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## THE DECLINE AND FALL OF THE AMERICAN JUDICIAL OPINION, PART I: BACK TO THE FUTURE FROM THE ROBERTS COURT TO LEARNED HAND – CONTEXT AND CONGRUENCE

Jeffrey A. Van Detta\*

### I. INTRODUCTION

#### A. An Overture to the Reader

In September 2008, Adam Liptak of the *N.Y. Times*, in an article *American Exception: U.S. Court Now Guiding Fewer Nations*, sounded an alarm about the health of the American judiciary:

Judges around the world have long looked to the decisions of the United States Supreme Court for guidance, citing and often following them in hundreds of their own rulings since the Second World War.

*But now American legal influence is waning. Even as a debate continues in the court over whether its decisions should ever cite foreign law, a diminishing number of foreign courts seem to pay attention to the writings of American justices.*<sup>1</sup>

This is astonishing to many people. And it should be. The opinions of America's courts have long been viewed as exemplars for the world.<sup>2</sup> While American commercial and political influence has waxed and waned, the export of American legal ideas in the form of judicial opinions long seemed "recession-proof." How is it that this most durable of American exports has fallen on such hard times?

Usually, such problems do not admit of a single answer. There are a variety of forces contributing to the decline and fall of the American judicial opinion. Some might lay this at the door of reactionary political ideology; others, at the feet of an aggressive foreign policy on the world stage; and still others, at the gates of an

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1. Adam Liptak, *American Exception: U.S. Court Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 18, 2008, at A1, available at <http://www.nytimes.com> (emphasis supplied).

2. American judicial opinions once "were 'studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C.'" *Id.* Now, according to authorities as diverse as Chief Justice Aharon Barak of Israel and Justice Michael Kirby of Australia, "America is in danger . . . of becoming something of a legal backwater . . ." Michael Kirby, *Think Globally*, 4 GREEN BAG 2d 287, 291 (2001); see also Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002).

American judicial trend towards intentional isolation from the influence of legal developments in the courts and legal systems of other nations.

In addition to these forces, however, I think there is another. That force is epitomized by scenes such as the memorable one in December 2000 of CNN's Legal Reporter feverishly flipping back and forth through the Supreme Court's opinion in *Bush v. Gore*<sup>3</sup> as it literally rolled off the press, desperately trying to get the gist of an opinion that was not written for the benefit of its audience of readers in mind.<sup>4</sup>

Indeed, as any law student can attest, it is often difficult to discern the answers to two critical questions. First, for whom are appellate judges writing their opinions? Second, by what principles are their writings guided? Part of the difficulty may be the isolation and disconnection experienced by appellate judges from the people and from the trial courts where the people's causes are heard. It is potentially quite significant that on the present United States Supreme Court, not a single Justice has had any judicial service as a trial judge. This is certainly a far cry from the days of Justices like John Marshall or Joseph Story, who spent much of each year acting as federal district court judges while riding throughout their respective Circuits.

The lack of trial court service may well be a significant factor contributing to the emergent decline and fall of the American judicial opinion. To help us understand how trial court service may season the writing and thinking of Supreme Court Justices, we will turn to the classic example of the experienced trial judge who became one of the nation's storied federal appellate judges: Learned Hand.

## **B. An Overview of the Methodology to Permit Evaluation of the Roberts Court Opinions Through a Retrospective Evaluation of Learned Hand's Evolution as a Judicial Opinion Writer**

The subject of trial court experience and its effect on appellate opinion writing has been overlooked. Important questions about the role of trial court judges as opinion writers have not been explored, such as: What makes a judge a good *trial*

3. *Bush v. Gore*, 531 U.S. 98 (2000).

4. See Stuart Taylor, Jr., *The Supreme Court—and Others—Flub the Challenge*, THE ATLANTIC ONLINE, Dec. 20, 2000, <http://www.theatlantic.com/politics/nj/taylor2000-12-20.htm>. As Mr. Taylor observed:

A bitter, 5-4 ideological split. (Or was it 7-2? Or 5-2-2? Or 3 plus 2 to 2 plus 2?) Six separate opinions. A rushed, late-night release. A presidential contest ended by a clot of legalese so dense and Delphic that you had to read the key sentence at least three times to realize that five Justices had cut off all vote recounts once and for all . . . . This is the way the election ends—not with a vote, but with a citation.

...

Whatever we think of *Bush vs. Gore*, it is binding on Bush and Gore. A poorly written, weakly reasoned 5-4 decision is still the law of the land, at least for this case.

*Id.* See also Steve Carell, *Indecision 2000-Ruling Digest*, on *The Daily Show* (Comedy Central broadcast Dec. 12, 2000) ("Steve Carell analyzes the Supreme Court decision in *Bush v. Gore* [531 U.S. 98 (2000)] down to the [J]ustice's neural pathways."), available at <http://www.thedailyshow.com/video/index.jhtml?videoId=123563&title=indecision-2000-ruling-digest>.

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court writer? Should this be measured by the writing of the *appeals* court judges who review them? Does it even matter if trial court judges write well?

These are important questions, especially with the growth of our state and federal trial court systems in the United States and Canada. Yet, they've not been directly posed, nor adequately answered, even by law professors who use judicial opinions daily as the grist for milling the laity into lawyers.

To be motivated to pose these questions requires two qualities: first, an appreciation for the trial judge's task; and second, a particular sensibility toward the challenges facing trial judges, distinct from those borne by their appellate brethren. Trial judges face a difficult transition upon appointment. Usually drawn from the ranks of practicing litigators, newly appointed trial judges must learn to move from advocacy to decision, from marshalling and presenting evidence to fact-finding and synthesizing. At the same time, their trial court opinions must nevertheless persuade the reader that the evidence has been fairly evaluated, that the correct factual inferences have been drawn from the evidence, and that in the process of reasoning to legal conclusions, the correct law has been correctly applied to the factual inferences. In addition to the usual burdens of assuming a judgeship (such as new working environments, decreased compensation, cases arising in unfamiliar areas of the law, inherited case backlogs, and new administrative duties), trial judges face the daunting burden of writing judicial opinions, orders, and judgments—the written record by which their performance and legacy will be measured.

This burden facing new trial judges has been recognized and addressed by the Canadian Institute for the Administration of Justice (CIAJ). Over the July 4 holiday several years ago, I was privileged to be among the faculty invited by the CIAJ to teach at its annual Judgment Writing Seminar held at the Faculté du Droit, Université de Montréal.<sup>5</sup> Newly-appointed federal judges from throughout Canada attend this annual event to spend several days focusing on one of the key crafts of their new trade. Unlike their American counterparts, federal judges (denominated “Justices”) in the Canadian system: (1) enjoy a court of general, rather than limited, jurisdiction and (2) write many judgments (i.e., findings of fact and conclusions of law) because there is no constitutional right to trial by jury in civil cases under the Canadian system. The justices in my section hailed from the Canadian provinces of New Foundland, Ontario, and Manitoba. Each of the Justices in my section faced the same legal-writing problem: transitioning from written advocacy to judgment writing.

As I reviewed and commented on judgments written by the Justices in my section, it dawned on me that the typical emphasis of judicial writing seminars was misplaced here. That is because most judicial writing seminars hold up appellate opinions as the exemplars of “good judicial writing.” Thus, most of the faculty of this conference taught from the *appellate* opinions of American judges such as

5. CANADIAN JUDICIAL COUNCIL, ANNUAL REPORT 2001-02, at 7, available at <http://dsp-pwsc.gc.ca/Collection/JU10-2002E.pdf>; see TIMOTHY P. TERRELL & JEFFREY A. VAN DETTA, CIAJ-ICAJ 2001 JUDGMENT WRITING SEMINAR—MATERIALS ON JUDICIAL OPINION WRITING: BEYOND LOGIC TO COHERENCE AND STRENGTH (2001).

Cardozo (*Palsgraf*)<sup>6</sup> and Jackson (*Morissette*),<sup>7</sup> Canadian judges such as Chief Justice Brian Dickson,<sup>8</sup> and British judges such as Lord Denning.<sup>9</sup>

Appellate opinions, however, serve very different functions from the functions served by trial court judgments. Unlike the appellate opinion, the trial court judgment does not find the facts and evidence readily organized and the evidence logically sifted. The trial court opinion must create a coherent narrative from the raw source material—the evidence (witness testimony, depositions, exhibits, reports, demonstrative evidence) introduced at trial. The trial court is thus able to indulge less artistry (and sometimes license approaching manipulation<sup>10</sup>) in the order and emphasis of presentation than appellate courts enjoy. Accordingly, the way to teach effective writing to trial judges would appear to call for writing models other than appellate writing models.

6. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339 (1928).

7. *Morissette v. United States*, 342 U.S. 246 (1952).

8. EDWARD BERRY, WRITING REASONS: A HANDBOOK FOR JUDGES 75-84 (1998) (comparing and contrasting the judicial writing styles of, among others, Chief Justice Dickson, Lord Denning, and Judge Cardozo); LOUISE MAILHOT AND JAMES D. CARNWATH, DECISIONS, DECISIONS: A HANDBOOK FOR JUDICIAL WRITING 40-41 (1998) (contrasting Chief Justice Dickson's handling of a factual narrative, described as "immediately capturing] the interest of the reader," with that of the mid-level appellate court). See, e.g., Margaret H. Marshall, "Wise Parents Do Not Hesitate to Learn from Their Children": Interpreting State Constitutions in an Age of Global Jurisprudence, 79 N.Y.U. L. REV. 1633, 1649 n.86 (2004) (quoting from Chief Justice Dickson's constitutional law opinion in *Regina v. Keegstra*, [1990] 3 S.C.R. 697, 743 (Can.)); Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 424-27 (2003) (discussing Chief Justice Dickson's opinion in *Keegstra*); Claire L'Heureux-Dube, *It Takes a Vision: The Constitutionalization of Equality in Canada*, 14 YALE J.L. & FEMINISM 363, 363-64 (2002) (citing and quoting Chief Justice Dickson's opinions in *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 1243-44 and *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, para. 49); see also *Remembering Former Chief Justice Brian Dickson*, NEWS & VIEWS ON CIV. JUST. REFORM (CANADIAN F. ON CIV. JUST., Edmonton, AB, Can.), Winter 1998-1999, Issue 1, available at [http://www.cfcj-fcjc.org/issue\\_1/nl-reme.htm](http://www.cfcj-fcjc.org/issue_1/nl-reme.htm). That article noted that: [Justice] Dickson always strove to improve the form and quality of legal writing. In an interview with Justice Robert Sharpe he said:

"I think it is imperative that our judgments be understandable to people who have not had legal training. We are not writing simply for legal academics or other judges. The cases we deal with affect every man, woman, and child in the country. I also think from the point of view of judges of the other courts who are required to follow our judgments, sometimes reading them late at night preparing for a jury charge, it is very much easier for them to read something which is written in everyday language."

*Id.* Similarly, Dickson's predecessor, Chief Justice Bora Laskin, has also been looked to as a judicial role model in Canada. See, e.g., Mark C. Miller, *A Comparison of the Judicial Role in the United States and in Canada*, 22 SUFFOLK TRANSNAT'L L. REV. 1, 10 (1998).

9. MAILHOT & CARNWATH, *supra* note 8, at 105-06 (noting that his style "deff[ies] classification because of [its] individuality," although "not everyone can write like Lord Denning, nor should anyone try"). For a thorough, laudatory comparative look at the careers and judicial writing styles of Lord Denning and Benjamin Cardozo, see Brady Coleman, *Lord Denning and Justice Cardozo: The Judge As Poet-Philosopher*, 32 RUTGERS L.J. 485 (2001); see also Andrew Phang, Book Note, 16 J.L. & Relig. 719 (2001) (reviewing ALFRED THOMPSON DENNING, *THE INFLUENCE OF RELIGION ON LAW* (1997)). In his assessment, Coleman employs both a mixture of qualitative (e.g., the Flesch Reading Ease readability analysis of randomly selected judicial opinions) and subjective critical devices (examination of specific excerpts from judicial opinions). Coleman, *supra* note 9, at 489. I eschew both approaches here, in favor of one that tests the coherence and clarity of judicial writing against a system of principles derived from the lessons of cognitive, reader-oriented psychology.

10. See, e.g., RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 55-57 (1990) (discussing Cardozo's rhetorical manipulation of the record facts in *Palsgraf* to set up the discussion of duty on which, contrary to the trial and appeals courts, he sought to present as the pressure point of the case).

If appellate writing models are not the route, then what should we use? Pondering this question in Montreal inspired me to consider the *trial* court opinions of one of America's most revered appellate writers: Second Circuit Court of Appeals Judge B. Learned Hand. Law students are quite familiar with many of Judge Hand's famous appellate decisions: The *T.J. Hooper*<sup>11</sup> and *United States v. Carroll Towing Co.*<sup>12</sup> in Torts; *James Baird Co. v. Gimbel Bros.*<sup>13</sup> and *L. Albert & Son v. Armstrong Rubber Co.*<sup>14</sup> in Contracts; the *Alcoa*<sup>15</sup> case in Antitrust; and *Hutchinson v. Chase & Gilbert, Inc.*<sup>16</sup> in Civil Procedure.

In his study of the Second Circuit in Hand's era as appellate judge (1924-1961), Professor Schick observed how Hand had achieved a sparkling reputation as an appellate court judge, and offered several reasons to explain that achievement:

Hand's reputation is sure to be enhanced, in any future assessment, by his performance on the bench. By all accounts, he was an outstanding trial and appellate judge, yet it was while he was chief judge [of the appellate court] that he and his court achieved enduring fame. The Second Circuit, although burdened with the heaviest case load of any of the courts of appeals, was consistently the most efficient of these courts. Professor Freund was right in 1961 when he wrote, "Learned Hand was born to be a judge . . . [he was] a judge's judge, a lawyer's judge, a student's judge." He was a master craftsman and a brilliant writer whose opinions surely rank with those of Holmes and Cardozo as the best American legal prose of the century. His ability to write beautifully did not lead him to the quick production of glossy opinions that did not explore the full complexities of a case. To the contrary, he usually worked hard and long until he was satisfied with what he had written. It was not enough to base a decision on outdated formulas and on legal clichés; throughout his career he sought to adapt the law to the rapid changes in society and industry.<sup>17</sup>

But how does Hand stand up as a writer of *trial* court opinions? Is a great appellate writer also a great writer of findings of facts, conclusions of law, and judgments? By what standards would we judge Hand as a judicial writer, based on his legacy of published trial court opinions (which number over 1,000)? Would good trial-court writing skills produce better appellate opinions? Would giving more weight to trial-court experience in judicial selection processes improve the insight and quality of appellate opinions?

11. The *T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932).

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

13. *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933).

14. *L. Albert & Son v. Armstrong Rubber Co.*, 178 F.2d 182 (2d Cir. 1949).

15. *United States v. Aluminum Co. of America* 148 F.2d 416 (2d Cir. 1945).

16. *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139 (2d Cir. 1930).

17. MARVIN SCHICK, *LEARNED HAND'S COURT* 188-89 (1970) (quoting in part Paul A. Freund, *Learned Hand: A Tribute*, HARV. L. REC., Sept. 21, 1961, at 11).

To solve the riddle of the decline and fall of the American judicial opinion, I have written two articles – this is Part I of II<sup>18</sup>—and I start here not with an exegesis of the politics or opinions of the Roberts Court. Rather, in both articles I seek to go back to the future, by looking to Learned Hand’s trial court writing and what it can teach us, in order to evaluate the current state of American judicial writing. A critical component of this undertaking is the adoption of a methodology well suited for the analytic task. Thus, these articles undertake to answer each of those questions, using the principles and techniques of superior legal writing developed by Armstrong and Terrell in their seminal work: *THINKING LIKE A WRITER*.<sup>19</sup> Section II of this article explores the principles articulated by Terrell and Armstrong by which cognitive psychology permits us to maximize coherence, clarity, and reader efficiency. In Section III, we explore the somewhat different perspective that Hand brought to the trial court writing task when he secured a 1909 appointment to the Federal District Court. We bring to bear in Section IV the principles worked out in Section II through the lens of Hand’s own predilections sketched in Section III. This article deals with evaluating Hand’s District Court opinions from the perspective of the Context and Congruence Principles articulated in Armstrong and Terrell’s work. The second article – which will be published in Volume 13 of the Barry Law Review—evaluates Hand’s District Court opinions from the perspective of the Segmentation and Audience Principles.

In both articles, I undertake a rigorous structural analysis, based on the cognitive psychological principles underpinning all effective legal writing. That analysis surveys a selection from Judge Hand’s opinions during a discrete period – the 1916-1917 period – after he had nearly eight years of experience on the trial bench under his belt. Thus, both Part I and Part II provide an overall perspective on Hand as a trial judge writer, as contrasted with the more familiar Hand as an appellate writer. The lessons from Hand’s dichotomous career are distilled into recommendations for more effective preparation for all judges, including new federal trial judges as well as Supreme Court Justices. Such preparation is designed so that all judges may write effective opinions on a systematic and continuous basis, starting us on a path to restore the international influence of American judicial opinions. In addition, Part II examines how the addition of a new member to the Roberts Court with considerable trial bench, as well as appellate court, experience—Justice Sonia Sotomayor from the Learned Hand’s own Second Circuit—presents an opportunity

18. Part II appears in Volume 13 of this law review. Jeffrey A. Van Detta, *The Decline And Fall Of The American Judicial Opinion, Part II: Back To The Future From The Roberts Court To Learned Hand—Segmentation, Audience, And The Opportunity Of Justice Sotomayor*, 13 Barry L. Rev. (2010).

19. STEPHEN V. ARMSTRONG & TIMOTHY P. TERRELL, *THINKING LIKE A WRITER: A LAWYER’S GUIDE TO EFFECTIVE WRITING AND EDITING* (1992) [hereinafter ARMSTRONG & TERRELL 1st]; STEPHEN V. ARMSTRONG & TIMOTHY P. TERRELL, *THINKING LIKE A WRITER: A LAWYER’S GUIDE TO EFFECTIVE WRITING AND EDITING* (2d ed., Practising Law Institute 2003) [hereinafter ARMSTRONG & TERRELL 2d]. Noteworthy in this approach is the absence of doctrinal or political partisanship. Too many commentators confuse agreement and/or disagreement with substance as a judgment on quality of the author’s legal writing. See, e.g., PrawfsBlawg postings from November 2006, in which some participants appear to confuse their agreement or disagreement with particular opinions of Justice Robert H. Jackson as a proxy for his reputation as a judicial writer. Postings of various authors, [http://prawfsblawg.blogs.com/prawfsblawg/2006/11/chief\\_justice\\_r.html](http://prawfsblawg.blogs.com/prawfsblawg/2006/11/chief_justice_r.html) (Nov. 13, 2006, 23:20 EST to Nov. 17, 2006, 18:20 EST).

for the Roberts Court to make an introspective re-examination of its opinion writing with the lessons of Learned Hand's *oeuvre* in mind.

## II. "THINKING LIKE A WRITER": THE PRINCIPLES AND TECHNIQUES OF EFFECTIVE LEGAL PROSE—CONTEXT AND CONGRUENCE

In their seminal work, Professors Terrell and Armstrong draw a crucial analogy between legal thought and legal writing. Analogizing to the jurisprudential writings of Ronald Dworkin, Terrell and Armstrong note that just as legal principles are the overarching guides from which legal rules spring, so, too, are the "background principles" of effective legal writing that "establish the framework within which all [written] rules (and what we will call 'techniques') apply."<sup>20</sup> The principles of effective writing "speak to fundamental purposes" and guide legal writers in "assess[ing] the relative importance of specific rules (and techniques), to choose among them when they conflict, and to draw them together toward the single end of clear, persuasive prose."<sup>21</sup>

What are the background principles that are the overarching guides? They are the product of applied cognitive psychology—how human beings receive and process information of various kinds in various settings. Terrell and Armstrong were among the first to apply lessons of cognitive psychology and theory to create a new perspective on an area of legal studies (i.e., legal writing). The use of cognitive psychology in illuminating topics in the law is spreading.<sup>22</sup>

20. ARMSTRONG & TERRELL 1st, *supra* note 19, at 1-2 to 1-3 (citing RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1976)).

21. ARMSTRONG & TERRELL 1st, *supra* note 19, at 1-3. Having lived with both texts for a number of years, including as a senior lecturer for LAWriters, [www.lawriters.org](http://www.lawriters.org), Professor Terrell's platform for instructing judges and practicing lawyers on this conceptualization of effective legal writing, I borrow freely from both works, rather than treating either as *urtext*, and consider them as, together, providing the overall approach used in my analysis below.

22. Raffaele Caterina, *Comparative Law and the Cognitive Revolution*, 78 TUL. L. REV. 1501 (2004). Professor Caterina observes that:

[T]he development of cognitive science brings on stage human nature. Models of vision and object recognition, generation and comprehension of language, reasoning and other cognitive processes elaborated by cognitive science are universal models. The linking of the cognitive processes to deep mechanisms characteristic of our species brings with itself the reconstruction of human nature.

*Id.* at 1501; accord Adam J. Hirsch, *Cognitive Jurisprudence*, 76 S. CAL. L. REV. 1331 (2003); Alan M. Lerner, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us about Teaching Law Students to Make Ethical, Professionally Responsible, Choices*, 23 QUINNIAC L. REV. 643 (2004). A significant application of cognitive theory has delved into the heart of judicial decision-making itself:

Based on a connectionist cognitive architecture, coherence-based reasoning shows that the decision-making process progresses bidirectionally: premises and facts both determine conclusions and are affected by them in return. A natural result of this cognitive process is a skewing of the premises and facts toward inflated support for the chosen decision. . . . [This theory of cognition may be applied] to four important aspects of the trial. . . . [C]urrent doctrine in these areas is based on misconceptions about human cognition, which lead to systematic legal errors. By identifying the cognitive phenomena that lie at the root of these failings, the research makes it possible to devise interventions and introduce procedures that reduce the risk of trial error.



Terrell and Armstrong have distilled effective legal writing into four principles that apply at the level of the entire document (which they call macro-organization). First, the context principle: readers absorb information best if they understand its significance as soon as they receive it. Second, the congruence principle: the organization of the information should match the logic of the analysis. Third, the segmentation principle: readers absorb information best if it is presented to them in relatively short pieces that do not exhaust the reader's span of attention. Fourth, the audience principle: an effective writer not only applies these principles, but does so with an informed perspective from having determined the identities, knowledge bases, and needs of each audience of the document.

The subsections that follow explain the content, and consequences, of the context and congruence principles; the segmentation and audience principles will be taken up in the second article appearing in Volume 13 of this publication.

### A. The Context Principle

Among the sins committed by legal writers, cardinal is the tendency "[w]hen it comes time to communicate the information," to "dump . . . [it] on the page as quickly as they can."<sup>23</sup> That sin creates fundamental dissonance between reader and writer. "Because they have not yet been given the container that allows them to hold the information intellectually, [readers] end up drenched rather than enlightened."<sup>24</sup> Thus, according to Terrell and Armstrong, a writer's first task is to construct a container. The container is the reader's "understanding of" the information's significance—"its point, its importance, the logic that makes all its pieces cohere."<sup>25</sup> In this way, the container permits the reader to fit that information "together with other pieces of information to form a coherent pattern" as the reader "approach[es] new information by trying to fit it into a pattern."<sup>26</sup> This container enhances the reader's comprehension by providing "more explicit—and earlier—information about the structure of [the writer's information or] analysis."<sup>27</sup> Terrell and Armstrong emphasize that "[r]eaders absorb information best if they understand its significance as soon as they see it."<sup>28</sup> Thus, they advise, the writer must "give them a context or framework that helps" readers to "grasp the details' relevance" and importance—"before inundating them with details."<sup>29</sup> In addition, the context or framework containing the information should assist the reader in grasp-

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Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 511 (2004). Similarly, by identifying the cognitive phenomena that lie at the root of reader incomprehension, Terrell and Armstrong's work make it possible to devise interventions – the principles of effective writing – and to introduce procedures (the techniques for implementing the principles) that reduce reader incomprehension.

23. ARMSTRONG & TERRELL 2d, *supra* note 19, at 18.

24. *Id.*

25. *Id.*

26. ARMSTRONG & TERRELL 1st, *supra* note 19, at 3-2; see ARMSTRONG & TERRELL 2d, *supra* note 19, at 14, 16-18.

27. ARMSTRONG & TERRELL 1st, *supra* note 19, at 3-2.

28. ARMSTRONG & TERRELL 2d, *supra* note 19, at 16.

29. *Id.* (emphasis added).

ing “the organization that binds” the details together.<sup>30</sup> In a word, the key to Terrell and Armstrong’s cognitive (or reader-centric) approach to professional writing is “meta-information”—information about the information that is to be communicated through a writing.<sup>31</sup> The rationale of meta-information is straightforward: “for your reader to appreciate your substantive information, you must also provide . . . information that prepares your reader’s mind to absorb your substance.”<sup>32</sup> When the reader is given meta-information, s/he “has been made ‘smart’”: “Once we understand how the details matter, we are far more likely to focus on the important ones and remember them. We also realize what we can afford to forget.”<sup>33</sup>

As applied “to every level of a document,”<sup>34</sup> the context principle is implemented by techniques such as “giv[ing] intellectual shape in advance to a new block of information” and “link[ing] new information to previous information.”<sup>35</sup> More specifically, Terrell and Armstrong proffer three “techniques” to realize this principle.<sup>36</sup> First, the writer should provide a focus for any discussion—at the level of the entire document, the level of each section, and at the paragraph level. As Terrell and Armstrong observe, this focus—the context—is the glue that binds an otherwise unruly gaggle of thoughts and facts together:

Readers absorb information best when their minds can engage with it, think about it, and work on it, rather than just try to remember it. They can engage with it in several ways: by using it to answer a question or test a conclusion, for example, or simply by following a thread—a theme or a topic—through it. They can do none of this, however, unless . . . [the writer has] given them a focus for their thinking in the form of a question, conclusion, or topic.<sup>37</sup>

Thus, “[a]t every level” of the document, “the key is to tell readers what to look for, and to give them a guide for distinguishing between critical and background details.”<sup>38</sup>

Second, writers are admonished to “[m]ake the information’s structure explicit.”<sup>39</sup> What does this mean? Terrell and Armstrong explain that:

[i]f readers are to absorb and remember complex information, they have to be able to divide it into parts and understand how the parts connect. In other words, they have to see a structure. And they

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30. *Id.*

31. *Id.* at 37.

32. JEFFREY A. VAN DETTA & JOHN L. SALATTI, JUDICIAL OPINION WRITING: BEYOND LOGIC TO COHERENCE AND STRENGTH: A PRESENTATION TO THE STATE OF LOUISIANA DIVISION OF ADMINISTRATIVE LAW 8 (2001).

33. ARMSTRONG & TERRELL 1st, *supra* note 19, at 3-4.

34. *Id.* at 3-5.

35. *Id.*

36. ARMSTRONG & TERRELL 2d, *supra* note 19, at 20-28.

37. *Id.* at 20.

38. *Id.* at 22.

39. *Id.* at 16.

have to see it not gradually and retrospectively, but quickly and easily, from the start. Before they wade into the details, they want the comfort of knowing that a structure lies ahead, not chaos.<sup>40</sup>

Thus, “[l]ogic is not enough” for a written discussion “[t]o create an organization with [a high] degree of clarity.”<sup>41</sup> Rather, the organization has to be “evident at a glance” to the reader “from the start, and at each step along the way.”<sup>42</sup> The rationale for this approach is teaching of cognitive psychology about how a reader’s mind actually processes information—indeed, the writer is in fact “organizing a process: the flow of information through a reader’s mind.”<sup>43</sup> During that process, the reader tries to absorb what she has just read, “to figure out how new information connects with old, and to forecast where the analysis will go next”—and as a result, the reader “select[s] some things to remember and discard[s] the rest.”<sup>44</sup> Cognitive psychology teaches that this process “is not random”; “we generally remember best what fits together with other pieces of information to form a coherent pattern.”<sup>45</sup> This patterned recognition is ignored by writers who, like detective novelists, throw out clues that they do not tie together until far into the writing. “With good legal writing,” by contrast, Terrell and Armstrong observe that the reader “should never have trouble understanding how things fit together as the information flows past.”<sup>46</sup> Effectively, the writer should not delegate to the reader what might be called the mental heavy lifting; “[t]he harder” that the reader has to work “to make it fit, the less efficiently” s/he “read[s] and the greater the chance” s/he “will misinterpret or forget the details.”<sup>47</sup>

Segueing directly from the idea of patterned cognition, Terrell and Armstrong’s third corollary, or technique, emphasizes that writers should approach the reader *first* with *familiar* information “*before* moving to *unfamiliar, new* information.”<sup>48</sup> The reason for this “old-information-before-new-information” approach is that “reading is a complex intermingling of the information the writer provides with what the reader already knows,” and combines with the reader’s existing store

40. *Id.* at 23.

41. *Id.* at 37; see ARMSTRONG & TERRELL 1st, *supra* note 19, at 3-25 to 3-28.

42. ARMSTRONG & TERRELL 2d, *supra* note 19, at 46, 47; see ARMSTRONG & TERRELL 1st, *supra* note 19, at 3-25 to 3-28. As they pointed out in their First Edition, cognitive psychology shifts the focus from the writer, who often mis-conceptualizes the writing task because they view it from their own perspective:

To create a cognitively effective organization, you must understand what you are organizing. Despite appearances, it is not a five- or ten- or fifty-page memorandum or brief or opinion. In one crucial sense, those pages do not exist: Unless they are read by someone with a photographic memory, they will never be held as a whole in a reader’s mind. At any point, [the reader’s] memory will contain only a few sentences, if that, in relatively precise form. What has gone before will have been winnowed and compressed to fit into his memory, and what is to come is largely a mystery.

ARMSTRONG & TERRELL 1st, *supra* note 19, at 3-2.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 3-3.

47. *Id.* at 3-2.

48. ARMSTRONG & TERRELL 2d, *supra* note 19, at 16 (emphasis added).

of information (dubbed “meta-information”) to give meaning to the new information.<sup>49</sup> Meta-information comes in primarily two forms: (1) information that the reader may reasonably expect her audience to possess as they come to her writing (e.g., ranging from general concepts, such as the meaning of “case law,” or the methods by which courts interpret statutes, to particular rules, such as the rule against perpetuities) and (2) the information that the writer bestows upon the reader as they read (which constantly increases the stock of “old information” as the reader encounters each new sentence and each new paragraph).<sup>50</sup> Cognitively, this means that readers are gathering new information throughout the reading process, that combines with information they already know, to create an ever-growing store of old information. As readers move on to a new quantum of information (a section, paragraph, or sentence), it is “the ‘old’ information” that the writer just gave the reader in the preceding quantum that matters most to the reader, because the old information prepares the reader to immediately contextualize and comprehend the new information.<sup>51</sup> In practice, the reader’s cognitive process tends to work in this way:

When they see the new . . . [quantum of information], their first question is, “How does this connect with what I just read?” If they cannot see the connection immediately, they have to suspend the new information—put it in [mental] parentheses, in effect—until they can figure out how it fits.<sup>52</sup>

Of course, when the reader is called upon to suspend details in this way, the reader has to do the “mental heavy-lifting”—and this decreases efficiency and increases effort—both of which are the enemies of the writer who hopes to get her document read, instead of skimmed or merely set aside for later.<sup>53</sup>

## B. The Congruence Principle

The second of the background principles discerned by Terrell and Armstrong is founded on the essential congruence that must exist between two different yet interconnected types of organization: the organization of a legal document’s logic and the organization of the presentation by which that logic is explained to the writer’s audience.<sup>54</sup> Although this principle may seem self-evident—indeed, in-

49. *Id.* at 25; see ARMSTRONG & TERRELL 1st, *supra* note 19, at 3-6.

50. VAN DETTA, *supra* note 32, at 8; see ARMSTRONG & TERRELL 1st, *supra* note 19, 3-6 to 3-7.

51. ARMSTRONG & TERRELL 2d, *supra* note 19, at 26.

52. *Id.*

53. ARMSTRONG & TERRELL 1st, *supra* note 19, at 3-2. Why, it might be asked, would a sophisticated writer both undermine her task and “inflict this kind of torture on h[er] readers?” ARMSTRONG & TERRELL 2d, *supra* note 19, at 27. Chalk it up to our natural tendency as writes to “instinctively focus first on what is new” in a section, paragraph, or sentence, because it is “our reason for writing it”; only after getting that off our proverbial chests do many writers remember to “bother to give readers what they want first: a link to what went before.” *Id.* at 27.

54. ARMSTRONG & TERRELL 1st, *supra* note 19, at 3-7 to 3-8; ARMSTRONG & TERRELL 2d, *supra* note 19, at 16, 28, 79-85.

evitable—a dissonance between the logic of analysis and the logic of presentation often inheres in much of what is written by lawyers, judges, and — yes — sometimes even law professors.<sup>55</sup> How does this happen to highly trained professionals whose thinking and writing should be their stock-in-trade? Terrell and Armstrong see the difficulty in the temptation afforded by the default organizations that arise in the legal reasoning process itself:

The failure does not usually happen when the raw material is a mess, because then the writer has no choice but to think about its organization. The problems arise when the material already has a plausible organization, one that creates a superficial impression of coherence. In these situations, even good writers may fail to realize that [the] existing organization does not match the logical structure of their analysis.<sup>56</sup>

Thus the congruence principle counsels that a legal writer “should break free from any organization that does not arise directly from the actual logic of [the] analysis.”<sup>57</sup> Otherwise, the writer “will be asking [his or her] readers to retrace the path of [his or her] thinking—or of someone else’s thinking—rather than offering them a coherent discussion of [the] results” of the writer’s thinking.<sup>58</sup> Terrell and Armstrong articulate a number of techniques through which a writer can realize the congruence principle. Addressing the main point of the analysis, both explicitly and initially, gives the writer an opportunity to link the point to a “road map” summarizing the organization of the analysis.<sup>59</sup> The writer can then use the road map to further clarify the congruence of logic and exposition in two ways. First, explaining how the supporting points of the analysis relate to the main point establishes vertical coherence. *Vertical coherence* reflects the author’s reasoning both from the “top down” and from the “bottom up”—i.e., the main point implicates each of the sub-points, and each sub-point speaks directly to the main point, not to another sub-point.<sup>60</sup> Second, *horizontal coherence* results from the relationship among the sub-points themselves and is established through a combination of the logical relationship among the questions, propositions, or conclusions that underlie the analysis and the analytic procedure by which the writer approaches an issue.<sup>61</sup> In the realm of the analytic procedure, Terrell and Armstrong note the importance of imposing clarity through the division and sequencing of the sub-points, especially by consciously choosing the most effective organizing patterns to present them, making the pattern explicit, and using only one pattern at a time.<sup>62</sup>

55. ARMSTRONG & TERRELL 1st, *supra* note 19, at 3-7; ARMSTRONG & TERRELL 2d, *supra* note 19, at 28.

56. ARMSTRONG & TERRELL 1st, *supra* note 19, at 3-8.

57. *Id.*

58. ARMSTRONG & TERRELL 1st, *supra* note 19, at 3-8; ARMSTRONG & TERRELL 2d, *supra* note 19, at 97.

59. ARMSTRONG & TERRELL 1st, *supra* note 19, at 3-17 to 3-21; ARMSTRONG & TERRELL 2d, *supra* note 19, at 47, 62-63.

60. ARMSTRONG & TERRELL 1st, *supra* note 19, at 3-18 to 3-20.

61. *Id.*

62. ARMSTRONG & TERRELL 1st, *supra* note 19, at 3-22 to 3-28; ARMSTRONG & TERRELL 2d, *supra* note 19, at 16, 23-25.

### III. UNITED STATES DISTRICT JUDGE LEARNED HAND: HIS APPROACH TO THE TRIAL COURT WRITING TASK

When Learned Hand took his federal judgeship up in 1909, he had no prior judicial experience.<sup>63</sup> Thus, he came to the trial bench as many trial judges do—from the practice of law, from the “other side” of the bench. But Hand was not an experienced trial lawyer; he was no Clarence Darrow, Max Steuer, or Francis X. Wellman.<sup>64</sup> To the contrary, Hand seemed almost allergic to the hurly-burley of the trial courtroom. Hand’s most important biographer, Gerald Gunther, wrote that Hand was not a particularly adept courtroom lawyer. “Appellate work was indeed the most congenial to” Hand, “for it did not require a lawyer to make quick decisions on his feet and placed a premium instead on research, reflection, and writing.”<sup>65</sup> Gunther observed that Hand “got no greater satisfaction from his rare courtroom appearances” than he did dealing with clients, as his examples from around 1900 demonstrate.<sup>66</sup>

Professor Gunther describes as “typical” Hand’s agonizing “experience . . . to collect a debt in a small upstate town.”<sup>67</sup> Hand clearly went a bit overboard on his “thorough preparation[,]” and did not appreciate how a trial judge might react to

63. See, e.g., Stephen E. Hessler, *The Story of Benjamin Cardozo, Learned Hand & The Southern District of New York*, 47 N.Y.L. SCH. L. REV. 191 (2003).

64. FRANCIS X. WELLMAN, *THE ART OF CROSS-EXAMINATION* (1913). Wellman, through his book, and Darrow, through his legend, are much better known to 21<sup>st</sup> century readers than Steuer, who was the “great advocate to those who knew him and heard him and remember him,” for “[h]is great triumphs were in the court room,” such as his brilliant cross-examination of the State’s coached witness in the prosecution of the owners of the Triangle Shirtwaist Factory in the wake of the infamous, deadly fire. See William K. Coblenz, Book Review, 38 Calif. L. Rev. 971, 971 (1950) (review of Aron Steuer, *Max D. Steuer: Trial Lawyer* (1950)); Douglas Linder, *Famous Trials: The Triangle Shirtwaist Factory Trial* (1911), available at <http://www.law.umkc.edu/faculty/projects/ftrials/triangle/trianglefire.html> (last accessed March 10, 2008).

Indeed, Max Steuer was such an outstanding trial lawyer that, even in 1918, he “charged a flat fee of \$1,000 per day for trial.” Janeen Kerper, *Trial Advocacy Lessons From Latin America*, 74 TEMPLE L. REV. 91, 98 (2001). Seventy-five years ago, the major press of the day hailed Steuer as “the greatest trial lawyer of our time.” *Bona Fides*, TIME, Apr. 3, 1933, available at [www.time.com/time/printout/0,8816,753619,00.html](http://www.time.com/time/printout/0,8816,753619,00.html) (last accessed April 4, 2009); see Bruce A. Green, *Criminal Defense Lawyering At The Edge: A Look Back*, 36 HOFSTRA L. REV. 353, 371 (2007).

65. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 56 (1994). A faculty colleague who joined us from the bench remarked upon hearing of my article, “Didn’t Jerry Gunther already cover that?” In fact, Gunther had little to say about Hand’s work on the District Court, and not much more to say about any sort of serious examination of Hand’s judicial opinions. Perhaps Richard Posner, in his review of Gunther’s book, put it most perspicaciously:

Yet despite its excellence, the book has serious limitations. One is its ideological cast, which carries Gunther away from the true significance of Learned Hand’s career. Gunther, a constitutional scholar, wishes to make Hand a spokesman for self-restraint in constitutional adjudication. Although Hand wrote a few notable constitutional opinions and gave a series of lectures on constitutional interpretation, the vast bulk of his judicial career was devoted to statutory and common law cases rather than to constitutional ones. It is in those areas, not constitutional law, that he made an enduring mark on American law and earned the reputation of the greatest lower-court judge in American history. Yet they receive short shrift in Gunther’s long book as a result of their remoteness from the theme of judicial self-restraint that preoccupies him because of his extra-biographical interests and commitments.

Richard A. Posner, *Judicial Biography*, 70 N.Y.U. L. REV. 502, 518 (1995).

66. GUNTHER, *supra* note 65, at 58.

67. *Id.*

making a federal case out of an assumpsit action, especially at the end of a long day on the bench.<sup>68</sup> “[E]xceedingly impatient” is how attorney Hand described the trial judge’s reaction to his “careful presentation.”<sup>69</sup> Hand “quickly became flustered,” and later whined a bit: “the judge would not let me get my evidence in without hassling and rushing me. . . .”<sup>70</sup> Hand might have been more proactive in anticipating the trouble that he knew was lurking in the form of a directed verdict motion that the trial judge was likely to grant against his client based on the extant law. Instead of giving the judge the context up front—raising the issue before asking the judge to sit through the tedious recitation of evidence on a claim the judge clearly thought lacked legal merit from the get-go—Hand left in “his briefcase a recently decided case (so recent that it was ‘not even yet in the advance sheets’) to persuade the judge” not to throw out his client’s claim.<sup>71</sup> However, eschewing what Terrell and Armstrong would admonish—“context before details!”<sup>72</sup>—Hand waited until the inevitable directed verdict motion came *and* was granted, and only then tendered the new case to the judge—who, predictably as any mentally exhausted audience would—merely “glanced at the opinion perhaps half a minute” and held his ground.<sup>73</sup>

Did Hand learn anything from this experience? He wrote to his cousin that the trial judge “gave me rather a short and swift rope [and] beat me, at once.”<sup>74</sup> But he went on to misjudge the needs of his audience—judges and other adjudicators—in fact-finding settings. Gunther provides another illuminating example. Hand served as counsel to his law partner’s Citizen Association, a kind of watch-dog group that labored to expose dissipation of public funds. In that role, “Hand had to appear on behalf of the committee in administrative hearings[,]” which “were disappointingly like his frustrating exposures to trial courts.”<sup>75</sup> Gunther narrates one of these hearings in terms reminiscent of Hand’s problems in courtroom presentations:

When Learned appeared before the state comptroller to urge that payments for certain state printing expenses be disallowed, he did not prevail; more embarrassingly, a local newspaper commented critically on his excessively complicated arguments: “HAND EXPOUNDS—A BUSHEL OF FIGURES[,]” read the headline; the story noted, “Mr. Hand’s argument was bristling with technical verbiage of the printer’s art, and was exceedingly difficult for the layman to follow.”<sup>76</sup>

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68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 58–9.

72. ARMSTRONG & TERRELL 2d, *supra* note 19, at 20.

73. *Id.* at 59.

74. *Id.*

75. *Id.* at 65.

76. *Id.* (original emphasis).

What has this to do with Hand's work on the United States District Court bench? For one thing, it hardly presents an auspicious background for sitting as a trial judge. Hand, in these early experiences, gave evidence that he harbored tendencies towards being a "lawyer's lawyer"—a less than complimentary observation that indicates that an attorney is neither practical, service-oriented, nor attuned to his audience.<sup>77</sup> It speaks more of being a technician than a well-rounded advocate and representative of clients; less of being the omnivorous and omni-talented type typified by Justice Joseph Story, and more of being comfortable writing about "the law," hidden away in appellate chambers. Such characteristics would hardly augur well for being effective as the ringmaster of a courtroom managing business of a trial court.

Yet, Hand was obviously a more-polished and experienced lawyer when he joined the federal court in Manhattan in 1909, after President Taft tapped him for the nomination. Nearly ten years had passed since Hand's misadventures described above. What did Hand bring to the trial bench that he did not display as a trial lawyer? In asking this question, I mean to focus on his communication skills displayed in his copious written output on the district court bench, rather than his doctrinal views and evolution. Moreover, from the perspective of cognitive presentation, I intend to examine the oft-held view, presupposed in so much of what is dispensed as opinion-writing advice, that "[a] lawyer, judge, or law student who formed his or her entire opinion of Learned Hand's opinions based on" the "canonization" bestowed on him as an appellate judge "might expect each decision he wrote to be a masterpiece" and "each area of law he touched to be clarified."<sup>78</sup> Hand's opinions for the District Court provide a unique opportunity for us to examine whether fame and success as a writer of appellate-court opinions evidences equal achievement in writing as a trial judge. This inquiry allows us to see if the virtues of lauded appellate writing are readily applicable and translatable into the trial bench setting.

Terrell and Armstrong's cognitive principles of organization provide the framework for the examination. The scope of the examination will be during a

77. Not every lawyer who seems like a lawyer's lawyer necessarily had Hand's difficulties while practicing law. One would, for example, not immediately think that the bookish, 18th-century lexiconed Cardozo would be an effective courtroom lawyer. Yet, Cardozo was a different man in the courtroom. As in private practice with his own firm, Simpson & Cardozo, he defended a newspaper in a libel trial brought in 1910 by self-promoting former Western lawman (and then-sportswriter), Bat Masterson. See *Masterson v. Commercial Advertiser Ass'n*, 160 A.D. 890 (N.Y. App. Div. 1913). The trial transcript of Cardozo's effective trial work, particularly his cross-examination of Masterson—which undermined Masterson's libel case and helped to ensure that the newspaper won a remittitur from the appellate court—survives, and shows a finely-honed sense of lawyerly skill beyond what we have seen demonstrated by Hand. See, e.g., William H. Manz, *Benjamin Cardozo Meets Gunslinger Bat Masterson*, 76 N.Y. ST. B. ASS'N J. 10, 12, 14-16 (2004) (noting that Cardozo's task in defending the newspaper was made much more difficult without the "the benefit of *New York Times v. Sullivan*," and its requirement that public figures, like Masterson, prove that a newspaper acted with actual malice); Randy Barnett, *Ben Cardozo Meets Bat Masterson*, Jan. 21, 2007, THE VOLOKH CONSPIRACY, <http://volokh.com/posts/1169362299.shtml>. Significantly, the record of the case also demonstrates that Cardozo did not always speak a convoluted syntax ("the package when it fell exploded") studded with obsolete or obscure words (e.g., "constable," "punctilio"). Rather, he could—when he needed to—communicate in a vernacular understood by educated adults.

78. Kenneth L. Port, *Learned Hand's Trademark Jurisprudence: Legal Positivism and the Myth of the Prophet*, 27 PAC. L.J. 221, 222 (1996).



typical year in Hand's maturity as a United States District Court Judge—1916–1917—when Hand had served nearly eight of the fifteen years he would spend in the Southern District of New York before President Coolidge appointed him to the United States Court of Appeals for the Second Circuit in 1924.<sup>79</sup> The point of the examination will be to illustrate that there is more to effective judicial writing—and improving judicial writing skills—than being able to write, à la Cardozo, Denning, *et al.*, “big thoughts” about “the law.”

Before pulling up the gangplank and sailing into this discussion, I wish to acknowledge six differences between Judge Hand's time and our own that might be seen as having some relevance to the way in which we evaluate his opinions through sensibilities formed from considering modern cognitive psychology.

First, it appears that some, if not indeed many, of his District Court opinions may have been originally delivered as oral judgments from the bench. No work describing the practices of United States District Judges in the Southern District of New York between 1900 and 1925 has made its acquaintance with me.<sup>80</sup> However,

79. See GUNTHER, *supra* note 65, at 270–72.

80. It would appear that a comprehensive history of this important federal court is in order. The Southern District's official website has attached to it only a rather sketchy history of the court written in 1961. PAUL BURAK, HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (1962), available at <http://www1.nysd.uscourts.gov/operations/history.pdf>. Of Learned Hand's service, that sketch is even sketchier: “Of Learned Hand's decisions and judicial philosophy, . . . we can do little more than re-echo the accolades of praise that have poured forth for this great American jurist. When he died last summer, free men the world over lost an indomitable combatant for the cause of justice.” *Id.* at 12. Not only is this a quite an obvious ducking of a challenging—and inevitably controversial task—in providing a fair and balanced assessment of Hand's trial-court work, its encomium of Hand in terms of some amorphous notion of “justice” would, it appears, have made the old judge gag. See, e.g., Port, *supra* note 78, at 211, 211 n.1 (explaining that the following quotation from Oliver Wendell Holmes, Jr., most “accurately summarizes Hand's judicial perspective[.] ‘I hate justice, which means that I know that if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms.’”) (quoting Letter from Oliver Wendell Holmes, Jr. to John C. H. Wu (July 1, 1929), in THE MIND AND FAITH OF JUSTICE HOLMES 435, 435 (Max Lerner ed., Transaction Publishers, 2d 1988) (1943); Whitney North Seymour, *Tribute to the “Old Chief” of the Bench*, in 264 FED. REP. 2d 31, 33 (1959) (special court session to commemorate fifty years of judicial service by Hand).

What little we do know comes from a survey book written by Erwin Surrency when he served as Law Library Director at the University of Georgia. In sketching West Publishing's inauguration of the Federal Reporter series in 1880, Professor Surrency describes a late Victorian-age version of a multi-media process:

A reading of the preface to the first volume [of the Federal Reporter] as well as an examination of the reports indicates the status of opinion writings in the court. All written opinions were supplied by the clerks and stenographic reports of the oral opinions were supplied by the authorized stenographer. On occasion, attorneys were employed to report opinions delivered orally, and there are a number that are reported as such.

ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 70 (1990). This seems to describe the early years around 1880; how much changed between then and Learned Hand's time is unclear. See *id.* at 51–52. The major changes reported by Professor Surrency are that Federal Circuit court opinions were included when those courts were established in 1891, and that in 1924, the Federal Reporter “would be printed in two columns, which the publishers claimed would increase the size of each volume by one-third and reduce the number of volumes annually from nine to six . . .” *Id.* at 71. Professor Surrency does note, however, that other literature on the subject seems devoted to the personalities of particular private reporters of decisions, mostly for the U.S. Supreme Court, and often about their other activities. See, e.g., Gerald T. Dunne, *The Early Court Reporters*, SUP. CT. HIST. SOC'Y 1976 at 43 (1976), available at [http://www.supremecourthistory.org/publications/images/SCHS\\_publications-1976.pdf](http://www.supremecourthistory.org/publications/images/SCHS_publications-1976.pdf). Professor Surrency does tell us of at least one significant 19th century reporter who “standardized the spelling and rewrote the headnotes, statements of facts and performed other important chores such as checking citations and supplying titles where omitted by the judges.” SURRENCY, *supra* note 80, at 54.

Professor Gunther does mention that Hand's judicial budget included a small salary line for a court stenographer, who may well have recorded orally delivered judgments for later transcription.<sup>81</sup> Yet, Gunther also tells us that Hand disliked extemporaneous speaking very much, and apparently never spoke without having prepared a polished written text in advance, even as to short introductory remarks at gatherings.<sup>82</sup> This is consistent with his approach as a practicing lawyer, as we have seen.

Second, the editorial conventions of the time are also a bit unclear.<sup>83</sup> Many of Hand's opinions in the Federal Reporter open with a long factual statement set in smaller type. When the analysis portion of the opinion begins, the type is larger, and proceeded by "Learned Hand, District Judge (after stating the facts as above)." One might conclude that the court stenographer or reporter of decisions somehow prepared these statements, in the way that the Official Reporters for the United States Supreme Court prepare such synopses of opinions. However, the style of the fact statements, and the way that Hand refers to the facts stated in a familiar, informal manner as if it were organically part of his opinion, suggest that this is more of an editorial convention, designed to allow the reader to get to the West "headnoted," key-numbered points more quickly, and only to refer to the facts if desiring to probe that particular case more deeply.<sup>84</sup>

81. See GUNTHER, *supra* note 65, at 289-92. A stenographer should not be confused with the modern-day judicial law clerk, who is a law-school graduate. It is known that during the period of Hand's District Court service (1909-1924), the only courts in the federal system in which any judge used a professional, legally trained law clerk was the U.S. Supreme Court. See, e.g., J. Daniel Mahoney, *Law Clerks: For Better or Worse?*, 54 BROOK. L. REV. 321, 325-26 (1988).

82. GUNTHER, *supra* note 65 (discussion of why Hand wrote out the 500 word address he gave in 1944, that came to be called "The Spirit Of Liberty," and recounting his dislike for and dread of extemporaneous speaking).

83. There appears to be scant research on the subject, and what research exists is hampered by the fact that law reporting was (and remains) first and foremost a capitalistic business venture—no one is much concerned with archiving its history. The only systematic study available is ERWIN C. SURRENCY, *A HISTORY OF AMERICAN LAW PUBLISHING* (1990). Professor Surrency observed that:

In this new era of computers, it appears to be more 'efficient' to search a computer data bank than to have any personal knowledge of the books and their contents . . . . The knowledge of how to use law books has grown increasingly shallow. Because of this development, it has become all too easy to imagine that the law book of the present was the law book of a previous era; the judge writing the opinion in 1810 had the same objective as the judge preparing an opinion today. . . .

*Id.* at v (also decrying that "American legal literature deserves to be better known and appreciated to prevent another dark age when individuals are only aware of what has taken place during their lifetime and the small amount they heard from their parents."). Even the identities of the ingenious West editors who devised the key number system has been lost in the womb of time. *Id.* at v, 245.

84. See SURRENCY, *supra* note 80, at 52 (Professor Surrency notes the greater involvement of publishing house editors in the finalization of opinions as key numbers and headnotes were used to restate the law:

Headnotes were a feature of all reports of the Nineteenth Century, but integrating the key-number system with the headnotes made it possible to find other points of law more readily. Gradually, at what period it is not clear, the West Publishing Company took an increased responsibility for editing opinions by assuring the accuracy of citations and other facets of the opinion).

*Id.* at 52 (citing *THE MAKING OF A LAW BOOK*, 3 Docket 2693 (1926))

Third, there is a fairly significant difference between Hand's operation in District Court chambers and his operation in the Circuit. In the District Court, he generally did not enjoy the assistance of a judicial law clerk (although for three years, Professor Gunther tells us, Hand used his stenographer budget to hire recent Harvard Law School graduates as his "law secretaries," but abandoned that practice after 1918 because he was dissatisfied that he could only draw "middling" Harvard students with the salary he had to offer).<sup>85</sup> It was only in 1930 that Congress appropriated money for the regular hiring of judicial law clerks for Circuit Court judges at salaries that allowed the judges to compete for the best talent. Gunther describes how Hand used law clerks as a sounding board and as a (Hand hoped, at least) ruthlessly critical jury to give him suggestions on each of the numerous drafts of opinions he wrote.<sup>86</sup>

Fourth, technology itself may have some bearing, too. Although dictating equipment was available, and was used by other judges in preparing opinions, Hand, at least on the Appeals Court when Gunther knew him, wrote out every draft of every opinion in longhand, using canary legal-lined pads. All of the editing was done by him and his clerks directly on his long hand drafts (which could number, Gunther tells us, in the neighborhood of a dozen for some opinions), which, only after having been vetted and corrected many times, were given to a secretary for typing.<sup>87</sup>

Fifth, there is an implicit historical bias that arose in common law England as law established itself as an independent, secular, and professional calling. That implicit bias, germinated in common-law England, taught that that lawyerly writing generally, and judicial opinions particularly, should *not* be written for a broad audience. One might dub this attitude the *Anti-Audience Principle*. For example, the persistence of French (along with Latin and snippets of English) in England's courts for centuries after French "had become obsolete in ordinary life" is suggestive of the legal profession's "desire to monopolize the provision of legal services."<sup>88</sup> Much of our English legal heritage held that the audience should be a small class of attorneys. The English judges were fully complicit in this; indeed, the Sixteenth Century jurist, Sir Edward Coke, "suggested that legal materials were not published in English, 'lest the unlearned by bare reading without right understanding might suck out errors, and trusting in their conceit, might endamage themselves, and sometimes fall into destruction.'"<sup>89</sup> Thus, during the period of the movement that led King James to patronize the so-called King James Translation of the Old and New Testaments of the Bible—one of whose primary commands was "to deliver God's book unto God's people in a tongue which they under-

85. GUNTHER, *supra* note 65,

86. *Id.* at 288-91 (Three years earlier, according to Professor Gunther, Judges Hand and Swan, a former Dean of Yale Law School who succeeded "boy wonder" Robert Maynard Hutchins, pooled part of their own salaries together to hire a law clerk to work jointly for them). *Id.*

87. *Id.* at 288-91, 620-21.

88. PETER M. TIERSMA, *LEGAL LANGUAGE* 28 (University of Chicago Press 1999).

89. *Id.* at 28-29 (quoting 3 Co. Rep. xl (Butterworth 1826)).

stand”<sup>90</sup>—we have courts in 1631 writing pronouncements in a polyglot language of French-Latin-English such as —

*at Assizes at Salisbury in Summer 1631 fuit assault per prisoner la condempne pur felony, que puis son condemnation ject un Brickbat a le dit justice, que narrowly mist., Eet pur ceo immediately fuit Indictment drawn pur Noy envers le prisoner et son dexter manus amputee et fix al Gibbet . . .*<sup>91</sup>

How many persons in 1630s England, even among the educated, would find such prose easy going? Significantly, this came some twenty years *after* the memorable lines, that opened the King James Translation of The Book of Genesis, Chapter 1 “In the beginning, God created the heaven and the earth. And the earth was without form; and darkness was upon the face of the deep. And the Spirit of God moved across the face of the waters.”<sup>92</sup>

Such contrasts between those wielding the cutting-edge of the language,<sup>93</sup> and those embalming a language of the dead,<sup>94</sup> are striking. One cannot help but agree with Professor Mellinkoff’s suggestion, “[w]hat better way of preserving a professional monopoly than by locking up your trade secrets in the safe of an unknown tongue?”<sup>95</sup> While matters of syntax had improved considerably in Hand’s age, the

90. MILES SMITH, , THE HOLY BIBLE, CONTAINING THE OLD AND NEW TESTAMENTS, TRANSLATED OUT OF THE ORIGINAL TONGUES, AND WITH THE FORMER TRANSLATIONS DILIGENTLY COMPARED AND REVISED XV (Cambridge Press) (1768)

91. TIERSMA, *supra* note 88, at 33. (A translation of this mongrel paragraph follows:

At Assizes at Salisbury in Summer 1631, there was an assault by a prisoner there condemned for felony; who, following his condemnation, threw a brickbat at the said Justice, which narrowly missed. And for this, an indictment for injury was immediately drawn against the prisoner, and his right hand was cut off and fastened to the gibbet, on which he himself was immediately hanged in the presence of the Court)

See James Kirby, *Inaccessible Law*, THE LEGAL NEWS, January 16, 1886, at 18, *available at* <http://books.google.com/books> (Search for “The Legal News Vol. IX”). ; *see also* 6 EDWARD FOSS, THE JUDGES OF ENGLAND 361 (Longman, Brown, Green, Longmans, & Roberts) (1857), *available at* <http://books.google.com/books> (Search for “The Judges of England brickbat”).

92. *Genesis* 1:1, 1:2 (King James).

93. *See e.g.*, DAVID NORTON, A HISTORY OF THE ENGLISH BIBLE AS LITERATURE 73 (Cambridge University Press) (2000) (“Much of the quality of the KJV as English exists because the translators and their predecessors strove for something other than writing stylish English” and instead “search[ed] for clarity and the ideal of simple comprehensibility.”)

94. KIRBY, *supra* note 91, at 18 (noting of the reports of English judicial opinions in the early 17<sup>th</sup> century that “[t]hey are written in a language at the time of their composition dead” and thus to be functional were cobbled together from “French-English, . . . interlarded with Latin”).

95. DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 101 (Little, Brown and Company) (1963). (Such anachronistic parochialism persisted for 300 years after Parliament enacted a Statute of Pleading, which Professor Tiersma notes “condemn[ed] French as ‘much unknown in the said Realm’ and not[ed] that parties in a lawsuit ‘have no Knowledge nor Understanding of that which is said for them or against them by their Serjeants and other pleaders.’” Tiersma notes that the statute was utterly ignored and “[i]ronically...itself was in French”!) TIERSMA, *supra* note 88, at 28.

old, ingrained habits die hard, and the Anti-Audience Principle still appears to lurk in the judicial writing of the age.<sup>96</sup>

A sixth consideration might be summarized as “you are (as a writer) what you read (as a student).” Hand’s writing as a judge was obviously influenced by the examples of judicial writing during his critical formative years as a law student. The effect of legal education on a judge’s later work has not, to my investigation, revealed itself as a topic of discussion. Yet that topic is particularly appropriate in Hand’s case. Of appellate judges whose reputation as a judicial writer survives today, Hand is the earliest to be educated by the case method. Hand matriculated at Harvard Law School in 1893.<sup>97</sup> By that time, the case method, inaugurated by Dean Langdell in 1870, dominated the Harvard curriculum;<sup>98</sup> it had not yet much caught on at other law schools (for example, Columbia Law School, where Benjamin Cardozo in the 1890s was educated largely out of hornbooks, not casebooks).<sup>99</sup> The casebooks that Hand used can be found in a table in the President’s Annual Report of Harvard College.<sup>100</sup> The casebooks were a polyglot of legal eras and cultures stretching from medieval England to 19th century English and American decisions. Some have been preserved and posted on the Internet.<sup>101</sup> Many of the decisions selected were not written in a reader-friendly style; some of the decisions were no more than bare reports of dispositions, with only fragments of reasoning provided.<sup>102</sup> The casebooks themselves were intentionally made reader “unfriendly.” As Professor Gunther observed at a distance of a century from Hand’s

96. An example of this appears not only in Hand’s admiralty opinions, see *infra* notes 108, 183 & accompanying text, but also in his trial and appellate work. See *infra* section III.D.1.a (discussing Hand’s idiosyncratic use of the phrase *vade meum*: “It is fairer that the plaintiffs should go to Boston than that the defendant should come here. Certainly such a standard is no less vague than any that the courts have hitherto set up; one may look from one end of the decisions to the other and find no *vade mecum*.” *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 142 (2d Cir. 1930)).

97. Email from David Warrington, Head Special Collections, Harvard Law School Library, to Jeffery Van Detta Professor of Law, John Marshall Law School-Atlanta, Georgia (Oct. 24, 2007, 09:24:36 EST) (on file with the author).

98. GUNTHER, *supra* note 65, at 43.

99. See RICHARD POHLENBERG, *THE WORLD OF BENJAMIN CARDOZO: PERSONAL VALUES AND THE JUDICIAL PROCESS* 33-40 (Harvard University Press) (1997).

100. Harvard University Library, *Annual Reports Of The President And Treasurer Of Harvard College: 1893-1894*, at 122 (1895), available at <http://pds.lib.harvard.edu/pds/view/2574409?n=3087&s=4> (last visited October 27, 2007).

101. The first-year casebooks were four, and the editions used during Hand’s time, or later editions of the same works, are available in digitized format from Google Book Search (<http://books.google.com/>) as follows:

2 JAMES BARR AMES & JEREMIAH SMITH, *A SELECTION OF CASES ON THE LAW OF TORTS* (Harvard University Press) (1893), available at <http://books.google.com/books> (search for A Selection of Cases on the Law of Torts); JOHN CHIPMAN GRAY, *SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY* (John Waston ed., Cambridge Charles W. Sever and Compnay) (1891), available at <http://books.google.com/books> (search for Select Cases and other Authorities on the Law of Property); JAMES BARR AMES, *A SELECTION OF CASES ON PLEADINGS: WITH REFERENCES AND CITATIONS* (The Harvard Law Review Publishing Company) (1905) (a later edition of the same work assigned to Hand’s class), available at <http://books.google.com/books> (search for A Selection of Cases on Pleading: With Reference and Citations); JOSEPH HENRY BEALE, *A SELECTION OF CASES AND OTHER AUTHORITIES UPON CRIMINAL LAW* (Harvard University 3d ed.) (1915) (a later edition of the same work than the one assigned to Hand’s class), available at <http://books.google.com/books> (search for A Selection of Cases and Other Authorities Upon Criminal Law).

102. AMES & SMITH, *supra* note 101, at 384 (reproducing *Wells v. Howell*, 19 Johns. 385 (N.Y. Sup. Ct. 1822), a case on the subject of trespass of animals to land). Many years later, Hand’s opinions in *Fong On* and *In re Lampitoe* recall the terseness and opaqueness of decisions such as *Wells*.

study of these casebooks, “[m]ost of the readings were volumes of selected court rulings. In their purest form, these enormous casebooks contained no explanatory materials, no historical or theoretical background at all. Instead, the students were expected to deduce the organizing principles from the morass of decisions.”<sup>103</sup> A more reader “un-friendly” approach is hard to imagine, and Hand himself “thought it all ‘rather a silly way’ to proceed.”<sup>104</sup> It appears that the experience, however, inured him to the view that the reader must be self-sufficient, persistent—and as patient as Job; reminiscent of the “Le brickbat” case discussed above, Hand remembered, for example, “reading a fifteenth-century [case] on property. [He] hadn’t any idea what the words meant. You read it over and over, until sort of by osmosis, it would come in.” Yet he was too disciplined a student to be paralyzed by the chaos: he worked hard, he mastered the materials, and he soon found reward in the law school’s new approach.<sup>105</sup>

What reward Hand received from reading the cognitively disorganized writings of others is not spelled out. What is spelled out, however, and is significant, is that Hand worked hard; so why should not his readers do so? One can hardly expect much reader sympathy from a lawyer trained with such cognitively dissonant materials, which imposed all of the mental heavy lifting on the reader.

These are certainly considerations to bear in mind as we—in the word-processing, cut-and-paste, computer-driven 21<sup>st</sup> century—shine the bright spotlight of cognitive psychological principles on Hand’s district court writing. Nevertheless, while these differences give us perspective, they do not change the validity of the principles we bring to bear on his writing. They are dependent on superb communication skills—skills mastered by, among others, the Greeks in the age of scrolls—and not on the technology at hand to memorialize the communication. These differences also suggest that the greater time and the more support (e.g., more law clerks) enjoyed by judges at the appellate level makes their opinions apples to the oranges of district court writing, where the case load is heavier, time is more of the essence, and the support network is less “deep”—and depending on the court system, may be little more than the judge himself or herself.

### **A. Context before Details—How Hand’s Opinions would have Benefitted from a Non-Party Reader’s Perspective**

Like many busy lawyers and trial judges, Hand often seemed to be in a great rush to get down all of the details of a case, without giving the reader any advance notice of what (if any!) of those details might matter to the issue on which he ultimately disposed of the case. In an evocative metaphor that I have heard Professor Terrell use to describe the reader’s reaction to such avalanches of detail, it makes

103. GUNTHER, *supra* note 65, at 43.

104. *Id.*

105. *Id.* at 43–44. (While Professor Gunther did not apparently attempt to unearth the old casebook and deduce to which of the cases Hand was referring, one candidate in Gray’s book is a case entitled, simply, “Anonymous,” reported by “Dyer” from 1560, making it a 16<sup>th</sup>, rather than 15<sup>th</sup>, century case). See GRAY, *supra* note 101, at 350.

one feel as though ‘she’s being splashed in the face by repeated blasts from a squirt gun.

## 1. Document-Centered Cases

Nowhere does the “context-before-details” problem seem to be more acute in trial court writing than in those cases which depend on the construction of a contract – a charter agreement, an insurance contract, or a commercial deal. Hand had a tendency to open the opinion with either a full, lengthy quotation of the document verbatim, or a very detailed summary of most, if not all, of its provisions.

### a. Awash in Detail to the Gunwales: *The Themis*<sup>106</sup>

Typical of the welter of details with which he could confront readers is Hand’s May 1917 opinion, apparently after a bench trial, in *The Themis*.<sup>107</sup> The plaintiff had chartered a ship from the defendants. The defendants agreed to deliver the ship to the plaintiff under an agreement (“charter party”) that specified a range of dates; the defendants failed to do so, because, they contended, the ship wasn’t returned to them in time from another charter party, whose voyage with the ship was interrupted by an unexpected closing of the Panama Canal after landslides. Hand’s opinion begins with a detailed statement of pleadings, the reference to the landslides, and proceeds to quote large portions of numbered paragraphs from three different charters.<sup>108</sup> Hand tells us that these are “the important parts”<sup>109</sup> of the documents; but we aren’t told how or why these parts are important, or to what issue or issues in the case they are important. For example, the reader is first greeted with this less-than-illuminating provision:

[1] That the said owners agree to let and the charterers agree to hire the said steamship for the term of nine consecutive seasons (underscored words in writing) from the day of her delivery, she then being placed . . . at the disposal of the charterers at Wabana not before April 1st or later than 15th of May (or charterers to have option of canceling this charter), . . . to be employed in any safe trade between ports in B.N.A., United States, West Indies, Central America, Caribbean Sea, Gulf of Mexico, South America, Europe, Africa, Asia, Australia or New Zealand as charters or their agents shall direct.

106. *Gunwales* rhymes with *funnels* and is a sea-faring term, defined by Merriam-Webster’s editors as “the upper edge of a ship’s or boat’s side,” leading to the colloquial expression filled “to the gunwales” meaning “full as possible.” Merriam-Webster Online, <http://www.merriam-webster.com/dictionary/gunwales> (last visited July 23, 2007).

107. *The Themis*, 244 F. 545 (S.D.N.Y.1917).

108. *Id.* at 545–50.

109. *Id.*

In total, Hand treats his reader to eleven lengthy paragraphs quoted from three different agreements with three different parties. None of these quotations is introduced with any kind of container to suggest the structure of the factual recitation, or with any kind of indication of what, if any, of the extensively quoted language is relevant, let alone which of the three agreements is relevant and how. In fact, the relevance of anything is not revealed until the reader wades through not only the three agreements, but also lengthy interspersions of facts regarding the movement of the ship as well as “[m]uch proof . . . taken upon the trial respecting the conditions of the Panama Canal during September and October 1915,” including the whereabouts of the Canal’s director, General George Washington Goethels.<sup>110</sup>

Had Judge Hand chosen to make us “smarter” readers up front, we would have been told what he saves for well into the opinion: the basic arguments of the parties (plaintiff charterer, defendant owners, and defendant sub-charterer), and the issues he will decide in the case. The issues are actually much more straightforward than the discursive prolixity of the opinion seems to suggest.

There are two issues. First, did the contract put on the ship owner the risk of liability to the charterer if the sub-charterer did not return the ship on time? That issue focuses a specific promise in the first paragraph of the charter to the plaintiffs (the second of the three agreements Hand had extensively quoted). The language at issue was quite narrow—that the owner had committed to deliver the ship to the plaintiff “upon redelivery” by the sub-charterer. The defendant argued that the redelivery language meant it wasn’t obligated to deliver the ship to the charterer until the sub-charterer had returned it. The plaintiffs argued that the implication of the language was exactly the opposite—that the owner bore the risk of the sub-charterer’s tardiness in returning the ship.

Second, since a specific clause in the charter contract imposes liability on the owner for the sub-charterer’s lateness in returning the ship, “[t]he only question under such a charter party is whether the charterer has come within the exceptions.”<sup>111</sup> By the time the reader has arrived at this crossroads in the opinion, s/he has lost any referent back to “exceptions”—exceptions to what? What kind of exception? Toward the end of the factual narrative, Hand had, in the process of summarizing the parties’ arguments, mentioned that the sub-charterer (and presumably the owners) argued that “the default was excused by the exceptions both in the charter party between the owners and the” sub-charterer, and that sub-charterer and its own sub-charterer, “especially the exception of ‘accidents of canals.’”<sup>112</sup> Yet, by the time we again encounter “exceptions” in Hand’s analysis, that brief mention, couched as it is in the recitation of other arguments and at the end of a long factual statement, is lost on the reader. However, when Hand raises the exceptions, the ambitious or motivated reader (assuming that there would be one of sufficient degree beyond the immediate parties to the case), may go searching for the referent of

110. See Generally, DAVID MCCULLOUGH, *THE PATH BETWEEN THE SEAS: THE CREATION OF THE PANAMA CANAL, 1870-1914* (Simon and Schuster) (1978).

111. *The Themis*, 244 F. at 553.

112. *Id.* at 549–50.



“exceptions” throughout the opinion. If the reader returns numerous paragraphs earlier in the opinion, s/he will find a paragraph, amid all the others quoted, that speaks of:

The act of God, the kind's enemies, loss or damage from fire on board in hulk or craft, or on shore, arrest or restraint of princes, rulers and people, collisions, any act, neglect or default whatsoever of pilot, master, or crew in the management or navigation of the ship, and all and every danger and accident of the seas, canals, and rivers, and of navigation of whatever nature or kind always excepted.

Reading this paragraph doesn't make us smarter at all. It tends to make the eyes glaze over. Had Hand more prominently set up this argument in the introduction and factual narrative of the opinion, the reading and comprehension would flow in a unitary fashion. As it stands, the reader is forced to constantly go back and forth between the factual narrative, the brief introduction Hand provides for the opinion, and the substantive discussion, which is not any more readily keyed into the issues. How much wiser and attentive we would have been had Judge Hand chosen to open his opinion with an introduction along the following lines, that telegraph to the reader what to look for:

This is a case of a vessel owner (Wilhelmsen) chartering out a ship to various parties, present in this case, for specified portions of the year, with an obligation to return the ship in time for it to be turned over to the next charter party. The plaintiff (Gans Steamship Co.), a charterer, sued the defendant owner because the ship was not delivered on time. The owner started a process of impleader that brought in two sub-charter parties (Nova Scotia Steel & Coal, who then impleaded Barber & Company), whom it blamed for the delay. Gans' breach of contract claim presents two issues for our determination: First, did the contract put on Wilhelmsen (and by extension, Nova Scotia) the risk of liability to Gans if Nova Scotia (and by extension, Barber & Co.) did not return the ship on time? Second, is Wilhelmsen (and by extension, Nova Scotia) absolved by the exception in each charter party agreement for “all and every danger and accident of the seas, *canals*, and rivers,” since Barber & Co. was delayed in returning the ship to Nova Scotia (who would have returned it to Wilhelmsen for Gans' charter) after landslides had closed the Panama Canal, through which the ship had to pass en route for Barber & Co.?

In the absence of a contextual container such as this one, the extensive quoting from the contracts was unnecessary and, combined with the lengthy, detailed factual statement, is detrimental to the reader's understanding. Of course, Judge Hand, and many other trial judges, might respond that their duties do not arise to create cognitively elegant trial court opinions, but rather to make as thorough a set of factual findings as possible. Making factual findings is a critical function of the trial process, in order to justify the rulings, make their bases transparent to the parties, and create a record sufficient for appellate review, including possible remand to consider the facts under different legal rules, or to consider additional legal is-

sues, and to permit, when necessary, supervision of the enforcement of the court's order or the administration of judicial relief.<sup>113</sup> Yet, those responsibilities can be satisfied without sacrificing the cognitive effectiveness of the opinion. For example, the contractual excerpts with which Hand opened *The Themis* might better have been placed in an appendix at the end of the opinion.

## b. Writing for the People: *The Masses*

The case neighboring *The Themis* in Volume 244 of the Federal Report is another Learned Hand opinion, *The Masses*.<sup>114</sup> This case was much more like the appeals court cases he relished and on which he would come to build his judicial writing fame. It involved primarily legal issues—whether certain sections of a counter-cultural publication violated provisions of a federal law known as “The Espionage Act of 1917.”<sup>115</sup> When discussing issues of law, Judge Hand exhibited a much more reader-friendly approach. The case is not about factual events so much as interpreting the “natural tendencies” of certain parts of a magazine defending socialists and other political dissidents and criticizing the draft and entry of the United States into “the Great War.” In fact, Judge Hand observes near the outset that “[i]n this case there is no dispute of fact which the plaintiff can successfully challenge except the meaning of the words and pictures in the magazine.”<sup>116</sup>

Hand instinctively zeroes in on the context principle. He does not start us by slogging through, as he did in neighboring *Themis* opinion, lengthy quotations from the challenged publications that the Postmaster of New York City was refusing to allow in the mails; nor lengthy quotations from the Espionage Act; nor lengthy recitations of various positions and arguments of the parties. Instead, he effectively summarizes the visual portions (i.e., editorial cartoons) of the challenged magazine, and provides his first views of the kinds of inferences that those portions may permit.<sup>117</sup> The summary is more than enough to inform the reader of the content that has raised the issue under the Espionage Act.

Hand employs two additional, very cognitively helpful, reader-oriented techniques that avoid deluging the reader with unnecessary detail that the reader would be unlikely to retain. First, he relegates a full quotation of the relevant sections of the Espionage Act to a footnote.<sup>118</sup> In the text, he describes, in layman's terms, the three ways in which the postmaster argues that the Espionage Act requires him not

113. See, e.g., John J. Brunetti, *Searching for Methods of Trial Court Fact-Finding And Decision-Making*, 49 HASTINGS L.J. 1491, 1491-1495 (1998); John B. Nesbitt, *The Role of Trial Court Opinions In the Judicial Process*, 75 N.Y. ST. B. ASS'N J. 39, 39-42 (Sep. 2003),

114. This is actually the title of the publication, but the case is often referenced by it. See, e.g., GUNTHER, *supra* note 65, at 151. The proper citation of the case is *Masses Pub. Co. v. Patten*, 244 F. 535 (S.D.N.Y.1917).

115. The Espionage Act of 1917, ch. 60, 40 Stat 217, 219 (1917); See Geoffrey R. Stone, *Judge Learned Hand And The Espionage Act Of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335 (2003); William H. Manz, *A Firm Hand of Repression: United States v. O'Leary*, 79 N.Y. ST. B. ASS'N J. 10, 12-15, (Jan. 2007) (discussing Espionage Act and cases following *Masses*).

116. *Masses Pub. Co.*, 244 F. at 538.

117. *Id.* at 536-37.

118. *Id.* at 536 n.1.

to permit *The Masses* to be mailed.<sup>119</sup> Second, Hand uses a technique—a bit unusual at that time—of providing the full text of the challenged prose sections of *The Masses* as an addendum to the opinion, and advising the reader of this step up front in the opinion.<sup>120</sup> In effect, Hand is suggesting to the reader that the content of the cartoons represents the gist of all of the content at issue. Thus, a reader who wishes to satisfy his or her curiosity as to Hand's faithfulness in synopsisizing the text can check it out on his or her own—without unnecessarily interrupting the flow of Hand's opinion.

There are, however, a number of structural defects in the opinion that might have been improved. Hand transgresses one of the corollaries of the context principle—organizing the communication so that “old information” always precedes “new information” and that the connection of the “new” information to the “old” information already provided to the reader remains clear. In introducing his analysis, Hand basically says that he must first interpret the Espionage Act “and, next, the words and pictures” challenged by the United States Postmaster in *The Masses*.<sup>121</sup> Naturally, one would expect the next paragraph to open with a discussion of what kinds of activities that Hand reads the Espionage Act to prohibit. Instead, Hand interrupts the flow of the analysis with a lengthy discussion—an aside—as to why “no question arises touching the war powers of Congress.”<sup>122</sup> Hand's point is simply that the government relies only on the Espionage Act to enjoin publication of *The Masses*, not on the power that the federal Constitution ascribes to Congress to declare and make war.<sup>123</sup> The point might have been relegated to a footnote, but given the times (the country had entered World War I), it seems too important for that. Instead, Hand might have introduced the issue by using the old information-new information linkage to clarify why it was an issue. The introductory paragraph might have been rewritten as follows to accomplish that goal:

In this case there is no dispute of fact which the plaintiff can successfully challenge, except the meaning of the words and pictures in the magazine. As to these the query must be: What is the extreme latitude of the interpretation which must be placed upon them, and whether that extremity certainly falls outside any of the provisions of the act of June 15, 1917? Unless this be true, the decision of the postmaster must stand. To evaluate whether the decision of the postmaster will stand requires consideration of three separate questions. First, since the United States is in a state of war with Germany declared by Congress under its constitutional authority, should the postmaster's

119. *Id.* at 538–41.

120. *Id.* at 537 (advising the reader of the addendum), 543–545 (the addendum itself).

121. *Id.* at 538

122. *Id.*

123. *Id.*

power to ban mailings be increased in ambit due to the Constitutional doctrine of war powers? Second, if not, then how are the relevant provisions of the Espionage Act to be interpreted? Finally, are the words and pictures challenged by the postmaster within the Espionage Act's proscription?

Note that by providing a link between the old information—the Espionage Act under which the postmaster seeks to ban mailing of *The Masses*—and the new information, i.e., that the Congressional war powers might be argued to enlarge the scope of communications to be banned—Judge Hand also had an opportunity to conform the structure of the analysis to the logic that undergirds the opinion. This is an example of how the principles discussed in Section II build upon, and interrelate with, one another. The Congruence Principle stands for the proposition that the substance of a communication comes across most clearly and effectively if the organization of the material mirrors the logic of the substance. Here, part of Judge Hand's logic is to delimit the source of the postmaster's claimed authority to ban the mailing of *The Masses*. An integral element of that logic is the elimination of War Powers as a basis for that authority. Thus, in providing the context for discussing the law, Judge Hand would have achieved greater clarity and persuasiveness if he had made the reason for discussing War Powers clear by the structure of the argument itself, rather than by having somewhat misleadingly told the reader that he would “first, . . . interpret the law, and, next, the words and the pictures,” only then to interrupt that sequence with a disquisition on War Powers.

Weak writing, of course, is often characterized by the discordance produced by injecting new information (NI) without first linking it to old information (OI). However, writing can become monotonous, and thus almost equally ineffective, by a mechanical or slavish adherence to the OI/NI structure in ways that limit deftness of expression in communicating its intellectual content. Hand does not fall victim to this. Indeed, while *The Masses* offers one significant example in which Hand ignored the OI/NI approach, it also shows a general adherence to the OI/NI approach. In fact, in several passages, Hand displays a finely honed sense of using OI/NI sequencing with great skill and subtlety. We can follow his skillful use of this technique in the most important paragraph of *The Masses*, in which he characterizes the postmaster's principal argument, and then explains why he will not accept that argument:

[1] The [postmaster's] action was based . . . upon the doctrine that the general tenor and animus of the paper as a whole were subversive to authority and seditious in effect. [2] I cannot accept this test under the law as it stands at present. [3] The tradition [in unspoken contrast with “this test”] of English-speaking freedom has depended in no small part upon the merely procedural requirement that the state point with exactness to just that conduct which violates the law. [4] It is difficult and often impossible to meet the

charge that one's general ethos is treasonable; such a latitude for construction implies a personal latitude in administration which contradicts the *normal assumption* [of the tradition of exactness] that law shall be embodied in general propositions capable of some measure of definition. [5] The whole crux of this case turns indeed upon *this thesis* [of the tradition]. [6] I make no question of the power of Congress to establish a personal censorship of the press under the war power: that question, as I have already said, does not arise. [7] I am quite satisfied that it has not as yet chosen to create one, and with the greatest deference it does not seem to me that anything here challenged can be illegal under any other assumption.<sup>124</sup>

Hand's movement of the force of his ideas is significantly enhanced by his fairly masterly use of OI/NI sequencing. Hand avoids the mechanical movement from familiar to new ideas. He adopts a more flexible and elegant—yet nonetheless cognitively sound—style. Hand begins with a characterization of the Postmaster's legal position in sentences 1 and 2, and carefully selects his synonyms for describing it, calling it first a doctrine, then a test. But he rapidly moves to the points he wishes to emphasize by reducing the characterization of the Postmaster's argument to a single sentence, followed by short, sharp, contrasting declaration of his disagreement with the test in sentence two.

At this point, Hand deftly moves from what has now become to the reader the "old" information—this very broad power claimed by the Postmaster—to completely new information in sentence 3. He does not do this by merely linking from objects of previous sentences to subjects of new sentences, which is what we often see in the typically competent use of the OI/NI sequencing.<sup>125</sup> Noteworthy is the

124. *Masses Pub. Co.* 244 F. at 543. (sentence numbering and emphases added).

125. See, e.g., LANCELOT ANDREWES, *THE WORKS OF LANCELOT ANDREWES*, (Library of Anglo-Catholic Theology, J.H. Parker, Oxford 1841-1854) (Volumes 1-6) (the great Anglican bishop and leader among King James's Bible translators, Lancelot Andrewes, as scrupulously as any author in the English language observed the OI/NI sequencing in his copiously preserved sermons); T.S. ELIOT, *FOR LANCELOT ANDREWES: ESSAYS ON STYLE AND ORDER* (Doubleday, Doran and Co.) (1928). (A classic OI/NI example comes from Andrewes' 1609 Christmas Day Sermon:

Men may talk what they will, but sure there is no joy in the world to the joy of a man saved; no joy so great, no news so welcome, as to one ready to perish, in case of a lost man, to hear of one that will save him. In danger of perishing by sickness, to hear of one will make him well again; by sentence of the law, of one with a pardon to save his life; by enemies, of one that will rescue and set him in safety. Tell any of these, assure them but of a Savior, it is the best news he ever heard in his life.

Lancelot Andrewes, *A Sermon Preached Before The King's Majesty, At Whitehall, On Tuesday, The Twenty-Fifth of December, A.D. MDCX, Being Christmas Day* (Luke ii 10, 11), in 1 *Works*, ANDREWES, *supra* note 125, at 73.; MARIANNE DORMAN, *LANCELOT ANDREWES: A PERENNIAL PREACHER OF THE POST-REFORMATION ENGLISH CHURCH* 12-13 (Iceni Books) (2004) (discussing T.S. Eliot's observation of Andrewes' technique of "squeezing and squeezing [a] word until it yields a full juice of meaning which we never should have supposed any word to possess"). Eliot confirms Andrewes as a master of OI/NI technique when he observes that "[t]he most conspicuous qualities of [Andrewes'] style are three: ordinance, or arrangement and structure; precision in

way in which Hand avoids monotony by slavish “OI/NI” structure. Rather, he nuances and flavors the discussion in the third sentence, by introducing the new information in a contrasting sentence that itself sets it apart from, yet links it to, the old information. The old information is the Postmaster’s position about judging a work from its general tenor; the new information is tradition as it existed before the Espionage Act—i.e., the common-law rule demanding specificity of exactly that language claimed to be subversive.

Hand juxtaposes the entire third sentence against the first two—and thus effects a transition from OI to NI made entirely by positioning of the contrast. That contrast is of the Postmaster’s asserted “test” with “tradition”—very well rooted tradition that emanates from fundamental concepts of liberty. Having staked out the superior pedigree of his favored approach—the English-speaking people’s tradition of specifying unlawful conduct—Hand resumes with OI in sentence 4 again, that immediately becomes NI within the same sentence—equating, in the fourth sentence, the Postmaster’s “test” with a (misguided) attempt to make a judgment of a speaker’s “general ethos,” and connects that to further NI, the idea that this gives the government almost unchecked power to ban speech, and the conclusion that this breadth of discretion inherent in the postmaster’s test violates the “normal assumption” of the English-speaking people’s tradition of freedom.

In sentence 5, a short and contrasting sentence again, Hand links this OI to the NI to reinforce the key notion of the paragraph, that the entire case—indeed, the entire use of the Espionage Act—must be limited by the tradition, which he now calls “this thesis.” Further OI/NI transition is achieved in sentences 6 and 7, in which Hand moves from the tradition back to the Postmaster’s test, linking the growing accretion of OI about both the Postmaster’s test and the common-law tradition to the final NI that he is not ruling on Congress’s power to adopt such a test (“personal censorship”), but merely ruling that Congress has not done so yet *and* only *had* Congress done so would the tradition be inapplicable and *The Masses* be excludable from the United States’ mails.

### c. Take a Memo – Please! *Corn Products Refining*

One of the most amazing examples of the struggles confronting Hand in getting opinions down on paper versus applying the Context Principle comes in *United States v. Corn Products Refining*.<sup>126</sup> Corn Products Refining sued the United

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the use of words; and relevant intensity.” *Id.* at 12–13. Eliot then emphasizes the OI/NI skill that Andrewes brought to bear in his work:

But the structure is not merely an external scheme or framework: the internal structure is as close as the external. Andrewes develops an idea he has in his mind: every line tells and adds something. He does not expatiate, but moves forward: if he repeats, it is because the repetition has a real force of expression; if he accumulates, each new word or phrase represents a new development, a substantive addition to what he is saying. Hand’s writing, at least at the sentence and paragraph levels, exhibits the same qualities).

ELIOT, *supra* note 125, at 182.

126. *United States v. Corn Prod. Ref. Co.*, 234 F. 964 (S.D.N.Y. 1916).

States Justice Department to dissolve a very large glucose monopoly that had been formed by Standard Oil Company interests, which controlled an overwhelming share of the corn syrup and glucose production market, and “followed the methods of the Standard Oil Company” in that “every device that ingenuity could discover was employed to retain control of the industry.”<sup>127</sup> Hand’s decision in that case has become well known to anti-trust specialists.<sup>128</sup>

The case presents an archetypical dilemma for the trial judge. There is a strong impulse, rightfully felt, to capture the full factual palette when making a decision that relies on a holistic view of the evidence presented. This is particularly so where, as here, the case is a bench trial. Competing against this impulse for thoroughness is the need to organize the mass of facts in a way that is cognitively digestible. In this important—and complex—opinion, Hand clearly opts for the latter over the former. In fact, were it not for the West headnotes, it would be difficult for the reader to have any clear idea of what the kernel of the case really was. A full page and a half of small-font type precedes Hand’s opinion. This section largely recounts the various allegations of pleadings filed in the case. At the end of this section, there is a roadmap—one of the few explicit roadmap paragraphs in Hand’s District Court work. But the roadmap’s effectiveness sags under the weight of its own complexity. In a fairly densely worded paragraph, the patient and perspicacious reader will see that Hand has laid out a three-part roadmap for the opinions.

First, Hand tells us he intends to dump a great deal of factual information on us—with no guidance as to which of the facts will be critical to our understanding of the case:

127. See MERLE RAYMOND THOMPSON, TRUST DISSOLUTION 1, 261-66 (Richard G. Badger ed., The Gorham Press) (1919) (describing itself as “a study of the chief monopolistic combinations which the Government has or is now trying to dissolve under the terms of the trust laws”). *Corn Products* was a very significant component of a new, and aggressive, phase of anti-trust enforcement:

[T]he foremost policy question facing the Justice Department and its newly formed Anti-trust Division became how to treat firms that, through merger or internal growth, already had achieved monopoly or near-monopoly positions. The Department addressed this problem by undertaking a series of lawsuits seeking to undo large concentrations of economic power that had been assembled in the late nineteenth and early twentieth centuries. From 1906 through 1917, the Department initiated monopolization suits against Standard Oil, American Tobacco, Eastman Kodak, International Harvester, du Pont, U.S. Steel, United Shoe Machinery, American Can, Corn Products Refining, and railroads that dominated anthracite coal production in the northeastern United States. In all of these suits, the Department sought divestiture. Although the government occasionally failed to establish a Sherman Act violation, these cases usually resulted in a finding of liability and the entry of a decree for structural relief.

William E. Kovacic, *Failed Expectations: The Troubled Past And Uncertain Future Of The Sherman Act As A Tool For Deconcentration*, 74 IOWA L. REV. 1105, 1114-15 (2003) (footnotes omitted).

128. See, e.g., *Dimmitt Agri Industries, Inc. v. CPC Intern. Inc.*, 679 F.2d 516, 518 (5<sup>th</sup> Cir. 1982) (describing Hand’s decision as “an opinion long familiar to students of antitrust law”). (Interestingly, the successor entity to Corn Products Refining was the defendant in the Dimmitt case, leading Judge Gee to observe that, “[d]espite the passage of time (or perhaps because of it), the officers of Corn Products Refining, now CPC International Inc. . . . have not learned the perils of incriminating internal memoranda. Students of antitrust law may consequently be excused a feeling of de-jà vu upon reading the facts in this case.”) *Id.* at 519.

The following statement of facts is made for the most part in chronological order, stating separately the conditions of the starch and glucose industries until 1902, at which time they were first combined in the formation of the Corn Products Company. The starch industry before 1902 is taken up in three periods: (1) That prior to 1890, the date of the formation of the National Starch Manufacturing Company; (2) that from 1890 to 1900, the date of the formation of the National Starch Company; (3) the period from 1900 to 1902. The history of the glucose industry is considered in two periods: (1) That prior to 1897, the date of the formation of the Glucose Sugar Refining Company; (2) that from 1897 to 1902. The conditions of the joint industry are then considered in two periods, (1) that from 1902 to 1906, until the formation of Corn Products Refining Company; (2) that from 1906 until the formation of the testimony. In the consideration of the period from 1906 to the present time the various practices adopted by the Corn Products Refining Company are themselves considered in chronological order along with the development of the industry itself.<sup>129</sup>

If the reader has not despaired and turned to the end of the opinion to end-run all of this, the reader will see that Hand has gone to the other extreme in brevity, referring us implicitly back to the discouraging narrative of all of the pleadings as the structure for his analysis. “At the conclusion of this statement of facts the various allegations of the petition are taken up in the order stated in the petition, and formal findings of fact are made upon all of them.”<sup>130</sup> Hand concludes with merely the barest of references to what conclusions he’s reached, which give the reader no contextual hints to help him or her navigate the legions of facts he is about adduce—shades of “Hand expounding a bushel of figures.” “Finally, appears a discussion of the law deemed applicable and of the conclusions of law made by the court, together with such remedies as the facts and the law require.”<sup>131</sup> A blander summary is difficult to imagine.

Had Hand adhered to this roadmap, as challenging as it is to the reader, all would be relatively well. But Hand does something that is the writer’s Cardinal Sin—he makes a “contract,” so to speak, with his readers about the structure of the document, then proceeds to breach it without so much as a link of an eye.<sup>132</sup> For, rather than a neatly corresponding three-part structure, what follows are seventeen sections, designated by Roman numerals, not arranged in the triad structure he suggests, with the sub-points linked to the main points listed in his roadmap. The sixteen Roman-numeral sub-points appear as follows:

129. *Corn Prod. Ref. Co.*, 234 F. at 966.

130. *Id.*

131. *Id.*

132. See ARMSTRONG & TERRELL 1st, *supra* note 19, at 3-17 – 3-14; ARMSTRONG & TERRELL 2d, *supra* note 19, at 51-77 (explaining how roadmaps establish an implied contract between writer and reader that the writer breaches at peril of losing the reader).



- I. The Condition of the Starch Industry in 1890<sup>133</sup>
- II. The Starch Industry Between 1890 and 1900<sup>134</sup>
- III. The Glucose Industry In 1897<sup>135</sup>
- IV. The Glucose Industry Between 1897 and 1902<sup>136</sup>
- V. The Corn Products Company From 1902 to 1906<sup>137</sup>
- VI. Formation Of The Corn Products Refining Company In 1906<sup>138</sup>
  1. The Causes of the Combination<sup>139</sup>
  2. Condition of the Plants Taken Over In 1906<sup>140</sup>
- VII. Control Of The Glucose And Starch Trade By The Corn Products Refining Company<sup>141</sup>
- VIII. Efforts Of The Corn Products Refining Company To Maintain Their Original Monopoly Of The Industry<sup>142</sup>
  1. The Profit-Sharing Plan<sup>143</sup>
  2. The Transaction with the American Maize Products Company and Stein, Hirsh & Co.<sup>144</sup>
  3. The Defendants' Entry into the Candy Business<sup>145</sup>
    - (A) Manierre-Yoe<sup>146</sup>
    - (B) The Novelty Candy Company<sup>147</sup>

133. *Corn Prod. Ref. Co.*, 234 F. at 967.

134. *Id.* at 969.

135. *Id.*

136. *Id.* at 970.

137. *Id.* at 971.

138. *Id.* at 972.

139. *Corn Prod. Ref. Co.*, 234 F. at 973.

140. *Id.*

141. *Id.* at 974.

142. *Id.* at 977.

143. *Id.* at 979.

144. *Id.* at 980.

145. *Corn Prod. Ref. Co.*, 234 F. at 982.

146. *Id.*

147. *Id.* at 984.

IX. Unreasonable Prices And Manipulation Of Prices<sup>148</sup>1. The So-Called Low-Price Campaign Of 1910 And 1911<sup>149</sup>(A) Outline Of The Plan<sup>150</sup>(B) Execution Of The Plan<sup>151</sup>(C) Sales Below Cost<sup>152</sup>(D) Profits From Specialties<sup>153</sup>(E) The Judgment Of The Trade<sup>154</sup>2. Manipulation Of Prices<sup>155</sup>3. Discrimination In Prices<sup>156</sup>4. Price Manipulation of Grape Sugar<sup>157</sup>X. Efforts To Fix Prices And To Restrict Production<sup>158</sup>1. Starch Agreement Of 1906<sup>159</sup>2. The Suppression of Proposed Companies<sup>160</sup>(A) Federal Syrup Refining Company<sup>161</sup>(B) The Staley Manufacturing Company<sup>162</sup>

## XI. Freight Rates

1. East-Bound Glucose Route<sup>163</sup>


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148. *Id.* at 985.

149. *Id.*

150. *Id.*

151. *Id.* at 988.

152. *Corn Prod. Ref. Co.*, 234 F. at 989.

153. *Id.* at 990.

154. *Id.* at 991.

155. *Id.* at 992.

156. *Id.* at 994.

157. *Id.*

158. *Id.* at 995.

159. *Id.* at 995.

160. *Corn Prod. Ref. Co.*, 234 F. at 997.

161. *Id.*

162. *Id.* at 998.

163. *Id.*

2. Transits<sup>164</sup>3. Barrel And Tank Rate From Clinton To St. Louis<sup>165</sup>XII. The Syrup Trade<sup>166</sup>1. The Purpose of the Defendants to Control the Syrup Industry<sup>167</sup>2. The Execution of the Plan<sup>168</sup>XIII. Dismantling Of Plants<sup>169</sup>XIV. Findings Of The Articles Alleged In The Petition<sup>170</sup>

[In this Section, Hand makes a finding on specific, Roman-numeral allegations that the Government's complaint made against the Defendant, from I through VII.]

XV. The Law<sup>171</sup>XVI. The Remedies<sup>172</sup>XVII. [No title—Hand takes up a short discussion of whether several of the individual defendants, directors of Corn Products, should be subject to the injunction the Court is entering]<sup>173</sup>

The reader would have been assisted substantially had Hand provided more details in his roadmap effort in the introduction. For example, he might have cross-referenced the actual Roman-numeral organization of the opinion. As it stands, the introduction does not sufficiently correspond to the more detailed organization of the opinion. Had it done so, the introduction would have made readers smarter by arming us with enough meta-information to understand the details and place them in a larger analytic context.

For example, Hand might have stated:

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164. *Id.* 1001.

165. *Corn Prod. Ref. Co.*, 234 F. at 1002.

166. *Id.* at 1003.

167. *Id.* at 1004.

168. *Id.* at 1007.

169. *Id.* at 1008.

170. *Id.* at 1010.

171. *Id.* at 1011.

172. *Id.* at 1015.

173. *Id.* at 1018.

The opinion is organized into 17 subsections that fall within four major subjects: facts, findings, legal conclusions, and remedies.

First, the facts are organized both by specific topics raised within the petition, as well as by chronological development of this industry and the business of the defendants. The starch industry before 1902 is taken up in three periods: (1) That prior to 1890 (**Section I**), the date of the formation of the National Starch Manufacturing Company [*and here a world about the relevance of this entity might help*]; and (2) that from 1890 to 1902 (**Section II**), the date of the formation of the National Starch Company [*and here a world about the relevance of this entity might help*]; [the reference to “(3) the period from 1900 to 1902” should be deleted, because Hand does not make that the subject of a separate section or subsection].

The history of the glucose industry is considered in two periods: (1) That prior to 1897, the date of the formation of the Glucose Sugar Refining Company; (2) that from 1897 to 1902. The conditions of the joint industry are then considered in two periods, (1) that from 1902 to 1906, until the formation of Corn Products Refining Company; (2) that from 1906 until the formation of the testimony. In the consideration of the period from 1906 to the present time the various practices adopted by the Corn Products Refining Company are themselves considered in chronological order along with the development of the industry itself.

Second, Section \_\_\_\_ covers the various allegations of the petition are taken up in the order stated in the petition, and formal findings of fact are made upon all of them.

Third, Section \_\_\_\_ discusses the applicable law under the Sherman Act, and this law is applied in Section \_\_\_\_ in reaching the court’s conclusions of law.

Fourth, such remedies as the facts and the law require are discussed in Section \_\_\_\_.

This description would be even more valuable to the reader if Hand had followed it with a table of contents, which would allow the reader to quickly dial down into any particular discussion within the opinion.

Expanding the introduction might have strengthened the opinion in two significant ways. First, Hand saved the most important question in the case until the very end—

By far the most important question in the case is whether the remedies which the government shall have shall be limited to an injunction, or whether they should include a dissolution of the Corn Products Refining Company into four or five constituent parts.<sup>174</sup>

But why not set this out in the beginning of the case? Doing so would create a container that focuses the reader more clearly on just which facts will ultimately be the most important. Those are the facts that inform the court's decision on remedies. Unfortunately, Hand waited until over 50 pages into the opinion to let the readers in on this critical perspective.

Second, this case appears to be a mountain of evidence. Are there many conflicting testimonies? Are there but expert evaluations of the economics of the business that are in dispute? Or are the facts largely indisputable, so that remedy—not liability—is really the key issue? We do not learn this up front; it is deferred until much later, but it is information the reader would benefit from greatly at the outset. Not until Section VII of the opinion do we find that the evidence is largely undisputed and consists of the defendants' own admissions—recorded in meticulously kept and detailed memoranda!

How much more powerful this opinion would have been for readers outside of the circle of the parties had Hand moved up 13 pages the third paragraph of Section VIII:

In the following subheadings, the devices adopted by the defendants to continue the control are taken up seriatim, but at the outset it will be clearer to comment upon a certain part of the evidence which is unusual. Ordinarily the intent, which plays so large a part in the decisions of the court in cases of this sort, must be gathered alone from the conduct of the defendants themselves; but in this case, by an unusual chance, the evidence goes much further. The officers of the Corn Products Refining Company apparent-

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<sup>174</sup>. *Id.* at 1015.

ly had a custom of communicating with each other by typewritten, unsigned memoranda. Apparently it was often difficult for them to interview each other personally, and the affairs of the company were discussed between them by means of these memoranda with the utmost frankness. The documents were never intended to meet the eyes of anyone but the officers themselves, and were, as it were, cinematographic photographs of their purposes at the time when they were written. They have, therefore, the highest validity as evidence of intention, and, although in many instances Bedford attempted to contradict them, his contradiction only served to affect the general credibility of his testimony. In the face of these memoranda, which for some strange reason were preserved, there can be no question in my mind of the continuous and deliberate purpose of the Corn Products Refining Company, by every device which their ingenuity could discover, to maintain as completely as possible their original domination of the industry. That they recognized the impossibility of an absolute exclusion of other glucose and starch manufacturers is true enough, for they were minutely advised as to all conditions of the industry. But, while recognizing this inability, they in no wise conceded among themselves that their conduct could not have, and should not have, a depressing influence upon the growth of any competition. In considering the various devices adopted for that purpose, I shall paraphrase the memoranda in detail; but at the outset it is important to remember that permeating the whole of their conduct, certainly down to the year 1912, there runs the intent which I have mentioned, an intent the execution of which it is the precise purpose of the anti-trust act to foil.

This would have made it clear to the reader that this is a matter in which the business facts, although complex, inevitably point to Sherman Act liability; and the actions so clearly established provide the basis on which the court is imposing the extraordinary remedy of dissolution.

## 2. Testimonial-Centered Cases

Some of the most impressive judicial writing—trial and appellate—has come out of cases that present judges with a welter of facts—persons, places, events, and documents—that must be successfully organized as a first matter of business in an opinion, as the foundation for legal analysis and conclusions of law that follow.

Certainly, in the author's experience, the opinions by District Judge Leonard Sand

and Circuit Judge Amalya Kearse in the *City of Yonkers* desegregation cases of the 1980s<sup>175</sup> are paradigms of the challenges presented by cases in which testimony, often conflicting, from scores of witnesses, must be organized into a coherent narrative, if the reader is to be persuaded by the court's opinion. That need to persuade readers of the "rightness" of an opinion is particularly acute in cases involving judicial overhaul or oversight of public schools and other governmental entities to purge them of the present effects of past invidious discrimination.<sup>176</sup> Indeed, for example, Judge Sand's 223-page opinion is a compelling model of organization and clarity—which by all needs it must be, for the case was of incredible complexity and landmark importance. Judge Sand began the *Yonkers* opinion with a helpful and detailed table of contents, then provided an elegant, judicious, and moving introduction to the work that lay ahead—truly the "Mountains of Colorado" as Terrell and Armstrong would call it—that paved the way for the precipices to seem as "the plains of Kansas"<sup>177</sup>:

After nearly one hundred days of trial, during which eighty-four witnesses testified and thirty-eight depositions, as well as thousands of exhibits, were received in evidence, this Court is called upon to decide whether the City of Yonkers and the Yonkers Board of Education have intentionally created or maintained racial segregation in the City's housing and schools. Before embarking on that task, we pause to make clear why that is the issue, and why it falls upon this Court to resolve it.<sup>178</sup>

175. *U.S. v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1185 (2d Cir. 1987) ("The present litigation, unique in its conjoined attack on the actions of state and municipal officials with respect to segregation in both schools and housing, brings into question acts, omissions, policies, and practices of the City and the Board of Education over five decades."), *aff'd* 624 F.Supp. 1276 (S.D.N.Y. 1985).

176. See Jonathan L. Entin, *Learning From Yonkers: On Race, Class, Housing, And Courts*, 44 HOW. L.J. 375 (2001) (reviewing LISA BELKIN, *SHOW ME A HERO: A TALE OF MURDER, SUICIDE, RACE, AND REDEMPTION* (1999)).

177. *ARMSTRONG & TERRELL* 2d, *supra* note 19, at 3-4, 9.

178. *U.S. v. Yonkers Bd of Educ.*, 624 F.Supp. 1276, 1284-1285 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987). (In dealing specifically with the credibility issue, Judge Sand provided an excellent, dual-purpose peroration in the opinion, which served not only to orient the reader well, but also to assuage the potentially explosive effect that Judge Sand's extensive findings of discrimination might have, both with respect to the community at large and the politicians currently in office:

We set forth below, in detail commensurate with the voluminous and complex nature of the record, the findings of fact and conclusions of law which lead to our determination that the plaintiffs have sustained their burden of proving that Yonkers' housing and schools have been intentionally segregated by race. In performing this inquiry, we have examined the actions of many officials who we are certain were entirely well-meaning public servants acting in accordance with their perception of what was feasible in the political and socioeconomic circumstances of Yonkers and in the best interests of that community. In many instances, acts were taken by elected officials in response to strong constituent pressures and perceptions of political reality. Members of the Board of Education also acted under similar circumstances. We are not passing moral judgments with respect to the actions of those who steered the destiny of Yonkers; nor do we suggest that the implementation of measures contrary to the political climate of the times would have been an easy task. Our inquiry is whether, under applicable legal standards, actions taken by the City of Yonkers and the Board of Education, with respect to housing and public schools, were in whole or in part intentionally segregative. We find that they were, for the reasons set forth below.

Sand's writing is a monument to a cognitively sensitive communication of fact-finding to a broad audience of lawyers, politicians, news reporters, and the general public, where credibility counted and the sheer volume of evidence would be overwhelming to all but the most perceptive and cognitively aware of minds.<sup>179</sup> Dare we expect the same of Hand in his District Judge days?

Expecting a *Yonkers*-style opinion from Hand would be both unfair and unrealistic. It would be unfair, because the kinds of causes of action that lead to such complex factual findings were not routinely before the federal courts in those days, save for the *rara avis* of a complex antitrust case. It would also be unrealistic, for Hand did not have the benefit of a law clerk to concentrate on such a monumental task, as Judge Sand did some 70 years later with two law-school graduate clerks,<sup>180</sup> and even if he had enjoyed such assistance, Hand did not see fit to use law clerks as ghostwriters<sup>181</sup>—which, from the author's perspective of having served as a federal judge's clerk, may not be as much as a tribute or a compliment as the uninitiated into the operations of a busy federal judge's chambers might think.

Thus, the body of testimony-centered cases reported in Hand's district court are fewer—and shorter—than we would find today. In fact, to find useful exam-

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*Id.* at 1289. Considering how strong the public reaction turned out to be, it is disconcerting to think what might have happened if Judge Sand had not the cognitive presentation skills that set his opinions in the *Yonkers* cases apart from the average works of the federal district court). See, e.g., Dena Kleiman, *Man In The News: Leonard Burke Sand; Mild-Mannered U.S. Judge Under Attack*, N.Y. Times, Aug. 4, 1988, at B4, available at <http://query.nytimes.com/gst/fullpage.html?res=940DEFDA153BF937A3575BC0A96E948260> (describing how Sand "now finds himself under constant personal attack. Some residents of Yonkers have picketed his weekend home in Pound Ridge, N.Y. Other residents have lambasted him daily in the newspapers and on television."); James Feron, *Judge Tells Yonkers Crowd 'Chapter Is Closed' in Case*, N.Y. Times, June 17, 1988, at B2, available at <http://query.nytimes.com/gst/fullpage.html?res=940DE7D7113DF934A25755C0A96E948260> (describing scene in which "Judge Leonard B. Sand leaned forward and spoke carefully to the nearly 50 Yonkers residents he had agreed to meet in an unusual confrontation in Federal District Court in Manhattan"); Fernanda Santos, *Mixed Success In Yonkers*, N.Y. Times, May 28, 2006, available at <http://www.nytimes.com/2006/05/28/nyregion/28yonkers.html?pagewanted=3&ei=5070&en=0ba21f014bc36065&ex=1186027200>, (describing protests against court order on desegregating public housing "where an effigy of Judge Sand was burned").

179. Kleiman, *supra* note 178. (discussing Sand's reputation as a thoughtful judge and excellent writer).

180. See, e.g., Alan Vinegrad, Essay, *The Role Of The Prosecutor: Serving The Interests Of All The People*, 28 HOFSTRA L. REV. 895, 896 (describing how Vinegrad "spent the better part of" his "fifteen month clerkship" with Judge Sand "helping to draft what became Judge Sand's landmark, 665-page decision, which held the City of Yonkers and the Yonkers Board of Education liable for unlawfully segregating the city's public housing and public schools over the course of forty years"); J. Daniel Mahoney, *Law Clerks: For Better Or Worse?*, 54 BROOK L. REV. 321, 325-26 (1991) (noting that, "[i]n 1936, district court judges were allowed to use law clerks, although the number of district court clerks was strictly limited until 1948, and required a certification of need by the appropriate senior circuit judge until 1959," and that modernly, District Judge's chambers enjoy two law clerk positions). Judge Mahoney noted that "[a]t first, only thirty-five district court clerks were allowed for the entire country. Later acts limited the number to two and three district court clerks per circuit. These limits were terminated in 1948."). See also 28 U.S.C. § 752 (1988). Nor did Hand's court have the benefit of office computers, which were coming into use within the Circuit when the author clerked in 1987-88. The early world-processing technology was not always of benefit, as the author remembers how the system—which relied entirely on very delicate "floppy" disks since the Lanier computers in use did not seem to have document storage memory—seemed to loose bench memos during the final "save" late on Saturday evenings in chambers as we prepared for a week long argument calendar to begin on the following Monday.

181. "No clerk for [Learned] Hand ever wrote a single word, either in producing research memoranda or in drafting opinions. Instead, the Hand-law clerk relationship was one of extraordinary intellectual intimacy: it consisted entirely of face-to-face contacts, not any written work." Gerald Gunther, *Reflections on Judicial Administration in the Second Circuit, from the Perspective of Learned Hand's Days*, 60 BROOK. L. REV. 505, 510 (1994).



ples, we must go outside of our 1916-1917 time period. Looking outside of that time period, I have selected four cases. Viewed holistically, they give us some idea of the extent to which Hand's writing followed the Context Principle where cases turned on testimony of witnesses.

### a. *The Eugenia I. Diacakis*

In *The Eugenia I. Diacakis*,<sup>182</sup> Hand was presented with a case of ship's liability for damage to cargo. The shipper's onions were stored in four holds, and when they were unloaded at the port of destination, it became apparent that they were severely water-damaged and "that the loss . . . was substantially entire."<sup>183</sup> The shipper claimed that the ship was unseaworthy—that failure of the ship owner to maintain the ship in good repair allowed the moisture in that ruined the cargo of onions. The ship owner contended that the onions were damaged not by unseaworthiness, but rather, by the crew's effort to douse a fire in a hold en route by admitting sea water. If the latter were the case, the shipper's compensation from the ship owner would be limited to a measure of damages called "the general average."<sup>184</sup> There were no photographs, movies, or documents to tell this tale—there were only live witnesses testimonies, from which Hand was tasked, by a process of inference, logical deduction, and intuition, to determine the likely cause of the cargo damage.

Here, Hand displays a command of the Context Principle that is effective (though we should recall that this opinion was written with nearly seven years more experience under his belt than he had when he wrote most of the opinions examined in this article). After a better-than-average account of the pleadings and procedural posture of the case (which appears under Hand's own name, rather than as a peroration by the reporters), Hand creates a context for evaluating the extensive and varied testimony before him: "The case, therefore, raises the single question of fact as to what caused the damage in question."<sup>185</sup> Hand starts by stating an undisputed fact—"[i]t was conceded by all the witnesses who had a chance to observe the discharge that at that time nearly all the onions were either thoroughly wet or moist."<sup>186</sup>

182. 22 F.2d 461 (S.D.N.Y. 1923). (The modern reader may, at first, find it unusual that a district court case is to be found in the Federal Reporter Second Series, or "F.2d," which we today associate with court of appeals opinions. However, all lower-court federal opinions were reported together, in the First and Second Series of the Federal Reporter, until 1933, when West Publishing began reporting the opinions of the federal District Courts in a series called the Federal Supplement ("F. Supp.")). See *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 693, 697 n.3 (2d Cir. 1998); *SURRENCY*, *supra* note 80, at 70-72; COLUMBIA LAW REVIEW ET AL., *THE BLUE BOOK: A UNIFORM SYSTEM OF CITATION* 195 (Mary Miles Prince ed., The Harvard Law Review Association) (2006).

183. *The Eugenia I. Diacakis*, 22 F.2d at 461.

184. Hand, assuming apparently that the readers of this opinion would be admiralty cognoscenti; did not deign to explain that phrase—or any of the other seagoing or ship's terms with which the opinion is studded. For a discussion on "general average," see GRANT GILMORE & CHARLES L. BLACK, *THE LAW OF ADMIRALTY*, ch. 5 §§ 5-1 – 5-16, at 244-271 (2d ed. 1975).

185. *Diacakis*, 22 F.2d at 461.

186. *Id.*

Hand does not make the rookie lawyer mistake—or display the reader indifference of veteran lawyers<sup>187</sup>—of organizing his opinion in a dreary witness-by-witness summary of testimony, lacking context or coherence. To the contrary, Hand creates context as he moves the reader through the opinion; by organizing the discussion around a series of logically related, telescoping inquiries that incrementally focus the factual inquiry, and by discussing only those portions of witness testimony that are relevant to the question he identified:

1. Hand “start[s] with the assumption that a cargo of onions alone will not of itself sweat heavily.”<sup>188</sup> He notes that the witnesses whose testimony covered that point agreed “and none of them disputed it.”<sup>189</sup>
2. The amount of “sweat in the hold” was “very excessive,” as witnesses testified, and “must have come from other sources “besides evaporation of moisture naturally contained in the cargo itself.”<sup>190</sup>
3. Testimony about the cargo hatches being opened showed that “this was not very often, as the weather was severe and the seas heavy” and that early in the voyage, “the hatches steamed in clouds, showing that there was a continuous evaporation in the holds.”<sup>191</sup>
4. Hand next tackles the answer to that question, synthesizing testimony, logic, and his own intuition about events based on his experience, now approaching 15 years as a trial judge hearing admiralty cases:  
  
[a] the cargo in hold No. 2 was damaged by the necessity “to extinguish the fire” by flooding the hold, which allowed the onions to absorb sufficient moisture “that could be spread over all,” including the onions in hold No. 1, “for there was no bulkhead in the ‘tween decks between land 2, and for this purpose the whole forward part of the ship was but one compartment”—thus rendering immaterial conflicting testimony about whether sea water actually entered hold No. 1 directly.”<sup>192</sup>

187. See e.g., *Lucy v. Zehmer*, 196 Va. 493 (1954) (the Virginia Supreme Court’s painful witness-by-witness reprise of trial testimony in a case known to law students by its inclusion in virtually every modern contacts casebook).

188. *Diacakis*, 22 F.2d at 461.

189. *Id.* at 461–62.

190. *Id.*

191. *Id.* at 462.

192. *Id.*

[b] Hand still had to resolve the course of the damage to the onions in holds 3 and 4, those behind the hold in which the fires occurred, which Hand admitted “is much more difficult.”<sup>193</sup> Hand noted the “testimony of the master and crew that substantially no water entered those holds.”<sup>194</sup> Hand relied on a skillful weaving of testimony—and absence of testimony—from a number of witnesses about flooding spilling over into the engine room, which spilled through into holds No. 3 and 4 via what he deduced to be an open valve and an absence of pumps in those holds in a ship of that age. In reaching that finding through a clearly set out logical set of deductions, Hand noted the captain and crews testimony about engine room flooding when extinguishing the fire; expert testimony about the configuration of ships of this type, and the absence of testimony that the valve between the engine room and hold No. 3 was secured or that there were pumps in hold No. 4.

When Hand completes this series of questions and observations, so skillfully has he presented the testimony and his inferences that the reader can but concur that “the balance of probabilities...succeeded in showing that the [cargo] damage” was the result of having to flood hold No. 2 to douse the fire, which produced “the influx of sea water into all the holds,” setting up later “evaporation from all the soaked cases [of onions] at the bottom [of each hold] [that] would have filled the whole after compartments with moist vapor, which in turn would condense and drip upon all the cases.”<sup>195</sup> Thus, the shipper’s recovery was limited to an amount determined by the “general average out” formula.

Although I have been critical of a number of Hand’s district court opinions, including those written in admiralty jurisdiction, perusing the volumes of the Federal Reporter of this era reveals that Hand’s style, if not always his organization, was at the top of his generation. Yet, even some of those inferior as stylists nonetheless could recognize opportunities to raise reader cognition. For example, Judge Edmund Waddill, Jr., a contemporary of Judge Hand who served in the Eastern District of Virginia, was not, by all appearances as gifted a craftsman of prose as Hand.<sup>196</sup> Yet, in an admiralty case from 1917, Judge Waddill not only provided a narrative of the sea collision that generated the suit but also was sufficiently motivated by the audience principle to publish a diagram illustrating the evidence of the events of the collision upon which his findings were based.<sup>197</sup> Interestingly, Hand

193. *Id.*

194. *Id.*

195. *Id.* at 463.

196. Edmund Waddill, Jr-Wikipedia, the free encyclopedia, [http://en.wikipedia.org/wiki/Edmund\\_Waddill,\\_Jr](http://en.wikipedia.org/wiki/Edmund_Waddill,_Jr) (last visited Mar. 20, 2008) (Edmund Waddill, Jr. (1855-1931), was an accomplished Republican attorney in Richmond, Virginia, who served as a U.S. Attorney and Congressman, a U.S. District Judge (1908-1921) and a U.S. Circuit Judge (1921-1931)); see Peter G. Fish, *From Virginia Read; uster to United States Circuit Judge: The Ascent of Edmund Waddill, Jr.*, 30 AM. J. LEGAL HIST. 198-240 (1986).

197. *The Mina*, 241 F. 530, 533 (E.D. Va. 1917).

used to re-enact such sea collision cases in his chambers; as Gunther tells us, he would reproduce the events with maps, model ships, and compass on a table in chambers.<sup>198</sup> Yet, it did not seem to occur to Hand to provide similarly useful cognitive aids to the readers of his opinions, beyond the mere intervention of his prose accounts, which as we've seen with *The Diacakis*, require the meta-information of a sailor's knowledge.

## b. *The Oregon*

In *The Oregon*,<sup>199</sup> Hand opens the opinion with a statement that may reveal a great deal about his impatience with day-to-day trial work; unlike King Solomon's inspirational approach to ferreting out truth among contradicting witnesses (to the delight and amazement of the Queen of Sheba),<sup>200</sup> Hand, apparently wearied of such strife and envisioning no visiting royalty among the readers of his cases, began this opinion with the seemingly jaundiced observation, "This case presents the usual conflict of testimony."<sup>201</sup>

The subject is again admiralty, as it was with so many of his District Court opinions from this period, except in this case, the incident occurred not on the high seas, but rather, on the East River, nearby the iconic Brooklyn Bridge. Hand provides next to no context, either in his opinion or by way of a small-type factual prelude as often appeared to be the custom. Only if one pauses to read the solitary, terse headnote, "Collision," wherein the West edition says—"In a collision between a vessel and a ferryboat in a river, while angling in to their respective berths, held, that the vessel was at fault and the ferryboat was not."<sup>202</sup>—can one have any inkling what in the world Hand is talking about when he introduces the case not by stating the nature of the case, the issues to be decided, the general thrust of the parties' argument, or the areas in which testimony may be in conflict. Rather, Hand opens with his despair at another case with conflicting witnesses, "[w]ithout very much by which it may be corrected. Upon the whole the witnesses for the *Coe*..."<sup>203</sup>—but wait a moment, says the reader: What is the *Coe*? Who were its witnesses? On what issues was their testimony pertinent? Eschewing such details, Hand continues by purporting to offer us an assessment of that which *he knows*, but *we*, his readers, do *not*— "...impressed me more favorably than those for the *Oregon*."<sup>204</sup> Again, asks the reader: What is the *Oregon*? Why is there a legal conflict between "the *Coe*" and "the *Oregon*"? Who were the witnesses for the *Oregon*? On what issues was their testimony pertinent, and as to what material facts did that testimony conflict? Rather than explain these matters, or even provide a roadmap for the opinion's elucidation of these matters, Hand asserts his justification for his

198. GUNTHER, *supra* note 65, at 307-8.

199. *The Oregon*, 280 F. 235 (S.D.N.Y. 1918).

200. 1 *Kings* 3:16-3:28; 1 *Kings* 10:1-10:10, 10:13; FLAVIUS JOSEPHUS, *ANTIQUITIES OF THE JEWS*, book VIII, ch. 6:5 at 226, available at <http://www.earlyjewishwritings.com/text/josephus/ant8.html>.

201. *The Oregon*, 280 F. at 236.

202. *Id.* at 235.

203. *Id.* at 236.

204. *Id.*

methodology of deciding this case, where the evidence is almost exclusively testimonial, upon grounds other than resolving conflicts in testimony:

. . . yet the difference is not enough to justify a finding based on their relative credibility. As is common, I can come to a conclusion more certainly by a consideration of the probabilities than by an attempt to apportion the weight to be given the several oaths of those who appeared.<sup>205</sup>

Hand's opinion then meanders through the facts, interspersed with observations about the uncertainty he believes remains on the ship's position and actions, his assumptions about what ships usually do along the river (which appear rooted in his personal experiences and belief, rather than upon admissible evidence, such as expert testimony), and the inferences he draws from his assumptions. There is a smattering of references to the testimony, but it is largely generic, non-specific, and employed to buttress his intuitions—what he calls “a consideration of the probabilities”<sup>206</sup>—rather than the bases upon which to make factual findings.

It is questionable whether under the modern standard of Federal Rules of Civil Procedure, Rule 52(e), Hand's opinion states sufficient factual findings—at the very least, the appeals court would have to completely reorganize the information in his opinion around a clear statement of the issues as informed by the relevant law—which we do not learn until the fifth paragraph of the opinion, where he hints at the legal context needed to understand the significance of the facts! What facts, and available testimony are legally relevant—what are the “usual incidents of the respective duties of vessels upon crossing courses”? What is the (apparent) rule when a vessel's “course was patent to all,” such as “a ferry upon a known course to a notorious destination”? Which has “the right of way” even “if the courses” between the ferry, and another vessel trying to reach her own berth, “were crossing”?<sup>207</sup> The reader, and an appellate court, would have to labor on their own, as the author did here, to make both sense of, and the critical cognitive connections among, the clues scattered in Hand's almost Proustian, stream-of-consciousness opinion. The opinion merited more attention from Hand to make it accessible to circles of readers beyond the parties—ferry mishaps are not uncommon occurrences in a busy harbor with many navigational challenges, and ferry mishaps in New York City can be disastrous.<sup>208</sup> Hand's opinion here reads like a foreign correspondent's dispatches from a detached second-hand appellate vantage. Yet it is supposed to be creating the foundation for a trial-court decision. In effect, it is a

205. *Id.*

206. *Id.* Gunther shed considerable light on Hand's working approach. This information is critical to understanding why Hand felt no hesitation in expanding his analysis beyond explicit facts in the record. See GUNTHER, *supra* note 65, at 307–8. Of course, Hand does not share with the reader his *ex parte* sources, thus leaving the reader to wonder why this federal judge believes his “consideration of probabilities” is at all appropriate.

207. *Id.* at 237.

208. *E.g.*, *United States v. Carroll Towing Co.*, 159 F.2d 169, 174 (2d Cir. 1947); Janny Scott, *Investigation Begins into Crash that Killed 10*, N.Y. TIMES, Oct. 16, 2003, at A1.

trial opinion that reads like an appellate opinion and brings the wrong elements to each of the tasks at hand.

The opinion would have been far less internally dissonant and stronger analytically had Hand synthesized the facts and the evidence along clearly articulated levels of organization. For example, Hand might have explained the general rule of right of way, exceptions to the rule, and used the framework of the rule to then state, in logical order, the individual factual issues to be determined. The opinion might then have employed each factual issue to become a discrete subheading. Under each subheading, Hand might have summarized the relevant testimony; the specific ways in which the testimony conflicted; the extent to which resolving the conflict on credibility grounds still left the factual finding in doubt; the specific “probabilities” that were relevant to “a consideration” of the facts “to come to a conclusion”; and finally the evaluation of those probabilities and the specific conclusion reached on each discrete factual issue.<sup>209</sup> Proceeding through the factual findings in this way, Hand might have built the opinion on a solid foundation that guided the readers to the inevitability of the finding of fault he reached.

A far more effective judicial writer of facts in admiralty cases was Circuit Judge John R. Brown, whose clarity and literary flair, are contrasted with Hand’s in numerous collision cases. For example, in *Archer Daniels Midland Co. v. M/V Freeport*,<sup>210</sup> Brown displayed his mastery at macro-organization, factual synthesis, and effective use of footnotes to enhance understanding through skillful hierarchical sorting of information to maximize reader cognition:

On December 12, 1987, at approximately 11:35 P.M., at Mile 117 AHP on the Mississippi River, the upbound laden freighter M/V FREEPORT collided with the downbound tow of the tug M/V VICKI LYNNE. The FREEPORT subsequently came into allision with a dock owned by Archer Daniels Midland.[FN1]

FN1. Archer Daniels Midland is not involved with this appeal. The issue decided at the District Court and appealed here is who is actually responsible for the damage caused by the collision and subsequent allision.

The pilot of the FREEPORT and the captain of the VICKI LYNNE had agreed to a “port to port” passing. The FREEPORT would stay close to the east bank while the VICKI LYNNE would favor the west bank.

The FREEPORT had also made a passing agreement with another downbound tug, the M/V SCARLET GEM. They had agreed to a “starboard to starboard” passing. By the time of the accident, the

209. See *The Oregon*, 280 F. at 236.

210. *Archer Daniels Midland Co. v. M/V Freeport*, 909 F.2d 809 (5th Cir. 1990).

SCARLET GEM had already joined a barge fleet which was moored on the east bank of the river. The pilot of the FREEPORT was unaware that the SCARLET GEM was no longer travelling down the river.

As the VICKI LYNNE and the FREEPORT approached one another, the pilot of the FREEPORT became concerned that there would not be enough room to pass on the “port to port” passage. He called VICKI LYNNE to request a “starboard to starboard” passage. The VICKI LYNNE agreed.

The maneuver failed, and the FREEPORT struck the tow being pushed by the VICKI LYNNE. The FREEPORT continued across the river until it hit the docks and barge owned by Archer Daniels Midland on the west bank.

The District Court found that both the M/V FREEPORT and the M/V VICKI LYNNE were responsible for the collision and subsequent allision. [FN2] The Court apportioned the fault on a 50-50 basis between the two vessels.

FN2. The District Court found several contributing factors. On the part of the VICKI LYNNE, the judge found fault in: i) The grossly inadequate lighting of the tug; ii) inadequate powering for the flotilla size and configuration in tow of VICKI LYNNE; iii) inadequate equipment to permit accurate vessel placement in the river; and iv) excessive working hours on the part of the tug’s crew. On the part of FREEPORT, the judge found: i) the FREEPORT pilot’s confusion over which downbound vessel was the VICKI LYNNE; and ii) the inadequate use of radar and lookouts which exacerbated the pilot’s confusion.<sup>211</sup>

While it is true that Judge Brown was sitting in an appellate, rather than a trial capacity, and that one of the themes of this article is that the trial and appellate tasks are different in many respects, they are nonetheless similar in more general, fundamental aspects of cognitive communication. It is in this latter sense that Judge Brown’s well-known admiralty opinion-writing is specifically worthy of contrast to Hand’s own extensive corpus. Judge Brown was as technically competent in admiralty and marine casualty cases as Hand, but, to borrow a phrase of Hand’s, Brown took special pains to make his opinions always accessible to non-

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211. *Id.* at 809–10.

specialist readers, and to cut through the oft-encountered procedural thicket attending to such cases, so as to “reach the heart of the matter.”<sup>212</sup>

A contrast of routine maritime cases will serve to drive home the point. An example of Brown’s abilities comes from a routine cargo-loss case, *Hercules, Inc. v. Stephens Shipping Co., Inc.*:<sup>213</sup>

Escambia [FN1] sold approximately 4,350 telephone poles for delivery in Puerto Rico. As part of the contract, Escambia had to arrange transportation. On April 25, 1975, Escambia entered into a contract with Hercules described as a charter of the barge HERWOOD for transportation of the poles from Brunswick, Georgia to San Juan, Puerto Rico. Two days earlier, on April 23, 1975, Hercules amended a long-term contract with Detco for the towage of the barge HERWOOD. Acting for Escambia, Stevens loaded the poles aboard the barge. The barge and tug set sail. A noticeable list to port developed. Detco, acting with advice of its chosen naval experts, attempted to compensate by ballasting several tanks, but to no avail. After refueling and leaving Puerto Plata, Dominican Republic, the barge capsized on June 29, 1975, losing its cargo of poles and sustaining substantial damage to the hull. And thereby hangs this tale.

FN1. The cast of characters is: Escambia: Escambia Treating Co., the owner and shipper of the goods. Hercules: Hercules, Inc., the owner of the barge HERWOOD Detco: Detco Towing Co., Inc., owner and operator of the tug TRACY D Stevens: Stevens Shipping Co., Inc., the stevedore Aetna: Aetna Casualty and Surety Company, the cargo underwriter on the cargo of poles.

In the usual welter of complaints, cross-complaints, counterclaims and impleaders, two distinct claims are asserted. The first is the claim by Hercules for physical damage to the barge HERWOOD. The second is the claim of Aetna (Escambia’s subrogated cargo underwriter) for loss of the cargo of poles.

In the first claim, Hercules lashed out against all, naming Stevens the stevedore, Detco, the tug TRACY D, and Escambia the shipper. Escambia cross-claimed against Detco and the tug TRACY D and Stevens, seeking indemnity and asserting that, if it were held

212. Learned Hand, *The Deficiencies of Trials To Reach The Heart Of The Matter*, 3 Ass’n of the Bar of the City of New York [A.B.C.N.Y.] Lectures on Legal Topics 87 (1926). His nearly 300 published admiralty-collision cases demonstrates Brown’s great skill in organizing and presenting the facts. A list of Brown’s admiralty and maritime cases can be generated on Westlaw by the search “au (John/5 Brown) and (admiralty maritime collision)” in the “allfeds” database.

213. *Hercules, Inc. v. Stephens Shipping Co., Inc.*, 698 F.2d 726 (5th Cir. 1983) (en banc).



liable on Hercules' claim, then legal responsibility lay on the impleaded cross-defendants, Detco, the tug, and Stevens.<sup>214</sup>

Hand's opinion in another admiralty case, *The Kaupanger*,<sup>215</sup> however, stands in sharp relief to Judge Brown's clarity. Ironically, Hand opens the opinion with a discussion of "[t]he confusion in this case," to which his presentation of the opinion merely adds:

The confusion in this case arises, I think, from a failure to distinguish between the volume and the weight of the cargo. The ship was built to fill her holds and decks, 'all the reach of the vessel's holds, decks and usual places of loading and accommodation.' Her water ballast should have been enough to hold her stiff if she filled even her cattle deck with any homogeneous cargo which did not set her below her marks. If she was tender before she filled the cattle deck, so that added ballast was necessary, the charterer would be deprived of the space occupied by the added ballast, and could set off for it. If she was stiff when allowed her water ballast, there was no breach of warranty. Clearly, she was not to be held liable if she became tender when loaded with a deck cargo, and not given any added ballast. Were the obligation otherwise, a charterer might insist upon loading a deck cargo 20 feet high and filling the holds as well. The ship was not so designed, and the charterer had no reason to suppose that she was. Even if the weather deck be among 'the usual places of loading,' to which he is entitled, he is not entitled to use it without added ballast.

The *Kaupanger* was in fact not allowed her water ballast; her deep tank and the orlop and between decks were filled with coals, which are lighter than water and heavier than hay. This at the outset upset her designed stability. Besides, to lift her dead weight in hay a deck cargo was necessary, which required an additional adjustment. Obviously, therefore, there was need of added ballast in the bilges, if the *Kaupanger* was to be economically stowed, and this could have been arranged for only at Galveston, when she began to load, or even earlier.<sup>216</sup>

Yet, in contrasting the writing of Brown and Hand, it is only fair to point out that most of Brown's published admiralty and maritime collision cases show him at his best under optimal circumstances—i.e., where the dirty work of managing trial-level litigation, lawyers, parties, discovery, witnesses and other evidence at trial,

214. *Id.* at 727–28.

215. *The Kaupanger*, 241 F. 702 (S.D.N.Y. 1917).

216. *Id.* at 704.

and the reporting of a trial transcript, were already done. Judge Brown was appointed directly to the Fifth Circuit by President Eisenhower in 1955, and he did not often sit as a trial judge in the district court. One rare occasion in which he did, *Royal Interocean Lines v. Panama Canal Co.*,<sup>217</sup> shows a much more workman-like approach to trial judging, with somewhat less consideration of the cognitive needs of readers, than he displayed without these distractions. Yet, Judge Brown still displayed more attention to the cognitive principles espoused in this article than Hand often did. For example, Judge Brown provided a crisp, clean contextual container and roadmap at the beginning of the opinion:

This matter came on trial before the Court. All material facts are stipulated by the parties. The only question of law presented to the Court is whether, under the circumstances of this case certain sections of the Canal Zone Code operate to raise the doctrine of sovereign immunity to thereby bar recovery of certain damages by Plaintiff, the owner of the M/V STRAAT HONG KONG, against Defendant, the Panama Canal Company. The Court finds that it does not.<sup>218</sup>

Judge Brown made the reader smarter, and simplified the potentially complex issue of the Congressional grant of sovereign immunity to the Canal operation, by using the audience, context, congruence, and segmentation principles simultaneously. For example, his explanation of the parties' arguments and his evaluation of them are masterful strokes of distillation and synthesis. First, Judge Brown distilled the relevant facts—not a discursive, let-me-set-down-everything-as-I-heard-it approach:

On June 7, 1977 Plaintiff's vessel, STRAAT HONG KONG, came into the Panama Canal from its anchorage in the Pacific Basin and collided with the M/V ORIENTAL COMMANDER, which was just leaving the Canal, causing damage to both vessels. At the time of the collision, both vessels were being conned by Panama Canal pilots. Soon after the collision, ORIENTAL COMMANDER dropped off its pilot and proceeded on to sea, even though she was informed that if she wanted to take any action for recovery of damages against the Government or against the Panama Canal Company she would have to remain for investigation by the Board of Local Investigators. STRAAT HONG KONG made its transit and, unlike ORIENTAL COMMANDER, anchored and remained for the BLI investigation.

217. *Royal Interocean Lines v. Panama Canal Co.*, 514 F. Supp. 472 (D. Canal Zone 1981) (Brown, C.J., sitting by designation).

218. *Id.* at 473.

A BLI investigation of the collision was conducted at which both the pilot of STRAAT HONG KONG and the pilot of ORIENTAL COMMANDER testified. Save for the fact that crew members of ORIENTAL COMMANDER did not testify the circumstances of the collision were thoroughly investigated. As a result of the investigation it was determined that neither the vessels nor crews, of either STRAAT HONG KONG or ORIENTAL COMMANDER, were responsible in any particular for the collision. The sole cause of the collision was found to be the fault of the pilot of STRAAT HONG KONG for navigating the vessel into the Canal at an excessive speed.<sup>219</sup>

Next, Judge Brown used the distilled facts to synthesize the Canal's disorganized (and somewhat incoherent) arguments into a form that could be evaluated:

With respect to STRAAT HONG KONG's claim for the amount paid in settlement, the Canal Company seeks to don the armor of sovereign immunity. Immunity in this case, the Company contends, arises from C.Z.Code Tit. 2, s 297 . . .

Although the Court concedes some difficulty in grasping the true purport of the Canal Company's argument, it appears to run as follows: Because ORIENTAL COMMANDER refused to remain for the BLI investigation, it thereby failed to comply with s 297. Accordingly, pursuant to s 297, the Canal Company became absolved from any liability for damages which might be asserted in a subsequent direct action by ORIENTAL COMMANDER against the Canal Company. Furthermore, and of particular significance to the present controversy, the Canal Company thereby became absolved from any liability for damages which might be asserted in a subsequent "indirect" action by ORIENTAL COMMANDER here the action by STRAAT HONG KONG against the Canal Company to recover sums paid in settlement of the claim asserted by ORIENTAL COMMANDER against STRAAT HONG KONG.<sup>220</sup>

Having kept the reader fully informed, engaged, and focused, Brown built on his superior organization of the findings and conclusions to zero in on a synthesized and completely transparent legal analysis:

The upshot is that the Canal Company knows everything it would have known had ORIENTAL COMMANDER tarried in the zone for the BLI investigation. And of greatest significance the prob-

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219. *Id.*

220. *Id.* at 474.

lem is not one of allowing ORIENTAL COMMANDER to recover damages against the Canal Company. Rather it is a loss sustained or incurred by STRAAT HONG KONG directly as a result of the flagrant and sole fault of the Canal Company's agent, the pilot.

Under the circumstances of the present case, the Canal Company stands before the Court with its chest unprotected by the armor of sovereign immunity.<sup>221</sup>

Brown's trial judging approach, thus, is consistent with, if not quite as polished as, his appellate judging approach. The cognitive impact of his opinions, then, suggest to what Hand's district court opinions in admiralty might have aspired, had they been crafted with the same care and attention to the cognitive principles that clearly guided Judge Brown.<sup>222</sup> As one of his former law clerks observed of Judge Brown:

As his clerk, I learned that there were at least two kinds of judges: Those who could find the heart of a case—the pivotal issue on which it turned—and boldly decide the case on that issue, and those who sort of piled up the issues and found for the party with the larger stack on his or her side. Judge Brown was most definitely in the former category. He could find the critical issue in a highly complex case the way a compass points to true north. Of all the skills I learned from the Judge, I have found that one—finding the key to a case and having the confidence to use it—the most valuable.<sup>223</sup>

### c. *Primeau v. Granfield*

In contrast to *Eugenia Diacakis* and *The Oregon*, Hand in *Primeau v. Granfield*,<sup>224</sup> faced a stark contradiction in buyer and broker-seller testimonies about extensive transactions in stock and land in the Cripple Creek gold mining area of Colorado, spanning seven years.<sup>225</sup> The buyer petitioned the court in equity to command the broker-seller to make an accounting of these transactions.<sup>226</sup> Rather than simply recite the testimony of each man concerning each transaction, Hand began by a general assessment of the number, kind, and duration of the transactions.<sup>227</sup> Without going into detail on these, Hand simply observes that “the testi-

221. *Id.* at 476–77.

222. *See A Tribute To United States Circuit Judge John R. Brown*, 25 HOUS. J. INT'L L. 237-99 (2003).

223. *Id.* at 249 (The author recalls a similar point made by Second Circuit Judge Roger Miner, who exhorted his law clerks to slice through the verbiage of the record, the opinions below, and the attorneys' briefs to find “the pressure points” of a case).

224. *Primeau v. Granfield*, 180 F. 847 (S.D.N.Y. 1910).

225. *Id.* at 848.

226. *Id.*

227. *Id.*

mony was immensely voluminous, both oral and documentary, and there was an absolute conflict of testimony between the parties,” which Hand proposes to resolve using the “many contemporaneous documents,” primarily their business correspondence, “during large parts of the period in question.”<sup>228</sup> Hand also warns readers of what is to come: “I have been obliged to go into each of the transactions in detail to determine the relations of the parties, in view of the unsatisfactory character of the testimony of each, but there are preliminary matters that must be determined before the details properly came up.”<sup>229</sup> Here, Hand has clearly articulated the context principle; he knows this is a factually convoluted case, both because of the number of transactions (21) in contention, and the night-and-day testimonial conflicts, and he is making a far more premeditated effort here than usual to keep his audience cognitively connected.

Some cognitive dissonance does creep in; Hand moves from very helpful discussion of the background of the transactions to an assessment, generally of the sophistication, acumen, motivation, and credibility of the buyer and the seller-broker—giving as of one player the description worthy of Dickens that he “is a man of no education, extremely illiterate, but shrewd . . . and apparently of unbounded energy and little or no scrupulousness in the means by which he attains his purposes”—to the discussion of cognitive contextualization and preliminary matters.<sup>230</sup> Cognitively speaking, the witness assessments are introduced too early, interrupt the development of the focus on resolving preliminaries, and only *then* address the merits. However, Hand’s literary instincts come into play when his imagination is engaged by a case; and here, those literary instincts actually triumph over a purely logical structure dictated by the reasoning of the case. For by introducing us to the remarkable peculiarities of these men in judicial combat, Hand engages the reader’s imagination and causes us to believe that this is not just a run-of-the mill investment fraud case—or even if it is, the characters of the litigants are so paradigmatic as to make the case classic.

In tackling the preliminary matters, Hand’s organization is a model of both the context and the congruence principles at work in the hands of a skillful writer who is sufficiently engaged by his material to also be mindful of the readers’ needs. Hand tells us that, “[f]irst,” he has “disregarded altogether the alleged misrepresentations” by broker-seller “regarding the properties” since the buyer had sold them and thus cannot meet the “tender-back” restitutionary prerequisite of the rescission remedy.<sup>231</sup> Having removed thereby a substantial number of claims to consider, Hand dives directly into the second of the two preliminaries:

[Broker-seller’s] affirmative defenses are two: First, laches, which at most was no more than a delay of three years . . . and which I dismiss; and second, [the buyer’s] disqualification to come into a court of equity because of his own inequitable conduct. The latter

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228. *Id.*

229. *Id.* at 849.

230. *Id.* at 848–49.

231. *Granfield*, 180 F. at 849.

has some serious aspects, and . . . I should be obliged to allow the case to be reopened, if I thought that a *prima facie* case had been made out against the bill.”<sup>232</sup>

Hand further breaks down the broker-seller’s unclean hands—”[t]he grounds for this defense are three,” and he proceeds to list them and discuss them seriatim, according to the three-subpart structure he established—(1) buyer’s alleged alteration of letters he offered as evidence at trial; (2) buyer’s alleged withholding of relevant but unfavorable letters; and (3) buyer’s alleged “iniquitous dealings with his customers.”<sup>233</sup> Hand rejects the affirmative defenses, one by one, using, as appropriate, his own intuition, logical consequences, and inconsistencies with documents tendered at trial. Perhaps most interesting is the high style that evidences Hand at his most engaged as fact-finder, who, while ruling in buyer’s favor on broker-seller’s affirmative defenses, makes an assessment of the buyer that also goes to his jaundiced view of both parties:

In regard to the second defense, the suppression of documents, I should have thought nothing of it, but for Primeau’s silly explanations. That he should not produce many of the very numerous letters which passed between them is not only not surprising, but is to be expected. Granfield also failed to produce a great many letters. In the case of Primeau especially, having no fixed place of business, being a man of extremely slovenly business habits, I am rather surprised that he can produce as many as he does. However, his attempts to explain their disappearance are childish, and I do not believe them. These attempts do not by any means indicate that he suppressed the letters, but only that he supposed he must show some excuse other than the truth.<sup>234</sup>

Hand’s opinion, however, never delivers the discussion of the 21 challenged transactions in detail, despite twice stating that such an examination was to be a centerpiece of the opinion. Unlike Hand’s out-of-sequence character sketch of the principals, however, this is not the result of a novelistic artistry outweighing logical efficiency. The opinion’s course just seems to sputter out. For a second time, Hand declares delay before getting to the dirty details of the transactions; this time, not to consider procedural defenses, but rather, to streamline the ominously threatening and impending avalanche of transactional detail by deciding issues that cut across all the challenged transactions: “Before taking up the transactions in detail, it will be more convenient to consider some of the questions which recur in a number of instances.”<sup>235</sup> In fact, however, Hand does not deliver on this intention, ei-

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232. *Id.*

233. *Id.* at 849–50.

234. *Id.* at 850.

235. *Id.* at 853.

ther; he devotes the remaining pages of the opinion to the evaluation of just one recurring question:

The most important of these is [broker-seller's] contention that the letters which he wrote and which purport to show that he was offering properties of third persons, [buyer] understood to be mere decoys, designed to conceal from [buyer's] customers that they were both disposing of their own holdings. He even explains [buyer]'s own letters to him as written in the same vein, and that [buyer] used to show them to his customers before they were sent, as evidence of his own good faith. In the first place, I must premise any consideration of this explanation by saying that it must be well proved. When a man seeks to put so tortured an interpretation upon his own letters, and that too a most dishonest one, I shall, as judge of the facts, look very suspiciously on it, and expect of him that he make clear proof of it before I believe him.<sup>236</sup>

Without ever reaching the details of even a single transaction of the 21 to which he alludes in the beginning of the opinion, Hand leaps from his defense of "the truth of the letters"<sup>237</sup> to ordering the accounting remedy. The transition is worth reproducing, because its precipitousness in mental gear shifting strips, metaphorically speaking, the transmission of reasoned analysis to the reader:

I shall therefore treat these letters as genuine except in such cases as I indicate a contrary opinion.

The master will take and state the account in accordance with the foregoing directions, following the procedure laid down in Smith's Chancery Practice, vol. 2, p. 127 et seq., except that in place of taking out warrants from the clerk's office, the account will be filed with the master who will prescribe suitable times for each step.<sup>238</sup>

Is something missing? These two paragraphs follow sequentially, but not logically. Where does Hand discuss *any* "cases" in which he "indicate[s] a contrary opinion"<sup>239</sup> about the genuineness of the letters? Where do "the details properly come up" that Hand says "oblige[d]" him "to go into each of the transactions in detail"?<sup>240</sup> How, specifically, does Hand actually use the "many contemporaneous documents, consisting in the main of the" letters between the parties, "[t]o the solution of" the "absolute conflict" between the plaintiff's testimony and defendant's

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236. *Id.*

237. *Id.*

238. *Granfield*, 180 F. at 855.

239. *Id.*

240. *Id.* at 849.

testimony?<sup>241</sup> This, it appears, has occurred elsewhere—before, and independent of, the delivery of the opinion. Hand here is describing the results of his hearing of testimony, review of exhibits, and comparison between his trial notes.<sup>242</sup> Apparently, it was enough for him to exposit in detail his reasons for not recognizing the unclean hands affirmative defense—he felt no need to actually dive into “the details.” Yet then, why did Hand tell us that he was going to do that—not just once, but twice?

The answer lies in the larger macro-structure of Hand’s opinion, which appears seriously flawed. If Hand had attempted to outline the opinion in a concise introduction, the following sequential structure would have emerged from the 21 paragraphs of his opinion:

[1] Procedural posture, allegations of buyer’s bill in equity, averments of broker-seller’s answer;

[2] General statement of structure of the transactions at issue, the fact that the evidence contains conflicting testimony, the existence of documents against which to check testimony, and Hand’s general assessment of each party’s credibility;

[3] Hand’s disregard of buyer’s allegations of misrepresentation by the broker-seller;

[4] Broker-seller’s affirmative defenses in general;

[5-8] Hand’s general discussion of specific arguments pro and con on the affirmative defenses, including allegations that buyer had unclean hands;

\*[9] In the context of rejecting broker-seller’s arguments that about buyer’s unclean hands, Hand’s observation that broker-seller was clearly in an agency relationship with buyer that imposed a fiduciary duty on broker-seller to follow his principal’s instructions and to account for money that he “took as agent;”

[10] A digression on why clean hands doctrine may find a plaintiff barred even if “the iniquitous conduct” is not “directed against the defendant,” discussing an extended analogy to the application of clean hands in trademark cases;

241. *Id.* at 848.

242. One must assume Hand made trial notes upon which to base his rulings, for the transcription of stenographic notes of the reporter in those days would be both incredibly time consuming and expensive. No source of the author’s acquaintance informs whether any of Hand’s trial notes have been preserved. If they are lying fallow some place, they should be unearthed and mined for insights about cases such as this one, as Professor Oldham has done with the trial notes of Lord Mansfield. See JAMES OLDHAM, *ENGLISH COMMON LAW IN THE AGE OF LORD MANSFIELD* xi-xii (2004).



\*[11] A return to the agency issue discussed in paragraph 9, with the declaration that the existence—or not—of an agency relationship between buyer and broker-seller “goes to the very heart of the bill’s equity, because unless the fiduciary relationship existed between [buyer and broker-seller], [buyer] could not claim any interest in the funds which he paid to [broker-seller,] without rescinding the transaction.”<sup>243</sup>

[12] To support his agency view, Hand’s drawing of inferences from the testimony and correspondence that buyer retained the power to control the disposition of money he’d transmitted to broker-seller, because “it was the custom of [buyer] to change the destination of moneys after [broker-seller] had received them, which he could not have done if the moneys belonged to the sellers as soon as it was sent.”<sup>244</sup>

[13-19] Discussion of the “reliability” and genuineness of correspondence between buyer and broker-dealer.

[20-21] Declaration that the special master<sup>245</sup> will conduct the accounting, directions for the accounting, and the Judge’s decision not to decide a question of traceability of funds in one of the transactions without further evidence from the parties.

The asterisked paragraphs above—plaintiff paragraphs 9 and 11—are the heart of Hand’s analysis and, in fact, explain his precipitous leap from looking at the reliability of the correspondence to the decree of accounting. The agency issue should not have been buried in the middle of the opinion, and further misplaced in the discussion of the three arguments on the unclean hands affirmative defense. That may indeed, have been what led Hand to the realization that he reached; but when he reached that realization, he needed to abandon this organization, which (like an Oreo cookie) sandwiches the key argument—and finding—as a creamy filling between two dense cookies, and move the agency question to the position of pre-eminence. It is the dispositive argument—the entire basis for Hand’s decree—and the only credibility disputes that really matter for purpose of ordering the accounting are those that Hand resolves in favor of finding the agency relationship and the fiduciary relationship which attends to it.

#### **d. Strangers In A Strange Land: *United States v. Fong On* and *In re Lampitos***

Not all subjects interested Hand to the same degree. In immigration and naturalization cases, for example, Hand wrote his shortest and most cursory opinions.

243. *Granfield*, 180 F. at 852.

244. *Id.* at 853.

245. *See generally* FED. R. CIV. P. 53.

Two examples of this—*United States v. Fong On*<sup>246</sup> and *In re Lampitos*<sup>247</sup>—show a fairly consistent disregard for the Context Principle when faced with the plight of individuals trying to remain lawfully within the United States. That is not to say, however, that Hand showed an anti-immigrant bias; to the contrary, in both of these cases where the decision centered entirely on the credibility of the immigrant’s testimony, he found that individual’s testimony credible (though that helped the individual’s legal position in only one of the two cases); and in *Fong On*, he made what strikes us at a distance of 90 years, a fairly remarkable statement, for that time, of objectivity in the face of open racism by the United States government. What is equally remarkable, however, is that having spoken out so strongly, Hand did not think it worthy to set these opinions up in a manner calculated either to attract a reader’s attention or to provide the context of the proceedings to enhance the persuasiveness of Hand’s opinion to the reader. Rather, he wrote in a fashion that seems as clipped and non-contextualized as possible, as if to say that the plenary power resided in him to dispense justice in these matters, and the contextualization of the decision by later readers was of little moment.

The *Fong On* opinion, as with other opinions that we’ve examined, begins speaking without providing coherent context:

Section 3, Act May 5, 1892 . . . being valid . . . the sole question is whether Fong On has made out his case. The arrest, though made under section 6, certainly cannot stand under that section, because there is no reason to hold him as a laborer, and his age in any case prevents his coming within that provision. The question, therefore, is whether he and his witness should be believed.<sup>248</sup>

Talk about a stream of consciousness approach to opinion writing! What Act? On what ground was its “validity” challenged? On what ground was its “validity” upheld? What is “section 6”? From what statute? What does section 6 provide? What agreement did the government make under it? What does it provide as to “laborers”? How is a laborer defined? Why did the law allow the government to “hold” certain persons “as a laborer”? What does the undescribed “laborer” provision provide about “age,” and precisely how does age relate to that provision? All of these are questions that naturally, and instantly, occur to the disoriented reader as s/he begins reading Hand’s opinion – to only then, bereft of answers to those questions, abruptly learn that this is really a testimony-centered case, focused, for a yet-unexplained reason, on Fong On’s testimony and that of a generic witness.

While that last sentence provides somewhat of a mini-roadmap, he immediately departs from it, launching instead into the witness’s credibility without first establishing the subject of his testimony, its relevance, and the nature of the dispute concerning credibility:

246. *United States v. Fong On*, 240 F. 234 (S.D.N.Y. 1916).

247. *In re Lampitos*, 232 F. 382 (S.D.N.Y. 1916).

248. *Fong On*, 240 F. at 234.

Of corroboration there is not much, except his understanding of English and his ability to read and write it, in which he shows a facility which presupposes long residence in this country.<sup>249</sup>

Puzzlingly, however, his knowledge of English or his ability to write it does not turn out to be the question on which this witness's credibility turns out to be critical – rather, it is whether the witness (whom we eventually are told is Fong Loy) in fact saw Fong On in this country as an infant – and though Hand tells us naught, we might declare that Fong On's bid to remain in the United States is predicated on the claim that Fong On was born here.<sup>250</sup> In a nutshell, the problem created by the testimony was that Fong Loy testified that he saw baby Fong On in his father's arms 16 years before – when Fong On in fact was 10 years old and not an infant.<sup>251</sup>

Apparently – and we are not in fact told – the Immigration Commissioner agreed that their testimony was not worthy of any credence because, allegedly, of their ancestry and the strong temptation that the right to remain in America held out as a justification for departure from the “truth.”<sup>252</sup> Hand does not tell us in so many words, but out-of-cognitive order, he offers a snippet of a perspicacious moment for a man of his times and social privilege:

Except for this, the case would really be devoid of much question, if the defendant and his witness were not Chinamen. The temptation to claim citizenship is very great, no doubt, and absolute certainty I do not think the case admits of; but I must give some credence to the testimony of men who, so far as one can see, have the usual earmarks of veracity under the circumstances. If they were Italians, or Irish, or Germans, or Jews, no one would very seriously assert that I ought with justice to disregard their testimony, even where they had the burden of proof. I do not know, and surely I ought not to assume, that Chinamen are less likely to speak the truth than any one[sic] else. Until there is some authoritative requirement to the contrary, I ought not to have any preconceived notions about it.<sup>253</sup>

This is a fairly amazing paragraph of extemporaneous, externalized introspection from a Republican judicial appointee of comfortable circumstances during an age of which W.E.B. Dubois wrote in 1903, “the problem of the Twentieth Century is the problem of the color-line.”<sup>254</sup> It might have been the crown jewel of an opi-

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249. *Id.*

250. *Id.*

251. *Id.* at 234–35.

252. *Id.* at 235.

253. *Id.*

254. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK*, at i (Forethought) (1903); W.E.B. DUBOIS, *The Color-Line Belts the World*, in W.E.B. DUBOIS: A Reader 42, 43 (David Levering Lewis ed., 1995).

nion that would be lauded as the first twentieth-century reification of convictions of conscience sounded in the celebrated Harlan opinions in *Strauder v. West Virginia*,<sup>255</sup> *The Civil Rights Cases*,<sup>256</sup> and *Plessy v. Ferguson*.<sup>257</sup> Certainly, where agents of the Immigration Commissioner pull individuals from the streets of New York based on ethnic profiling and proposed to deport them on the horns of a dilemma—i.e., “you must prove that you have a right to remain here, but we aren’t going to credit your testimony or that of those who know you”—a major rectifying opinion from a federal court would be in order. But, if anything, Hand’s cognitive organization of the opinion – and its non-coherent opening—subordinates the critical, landmark observation he makes about assessing witness testimony and the government’s noxious implications of that share pernicious prescience with the Nuremberg laws<sup>258</sup> to obscurity within an opinion whose off-handedness makes the whole matter appear of little moment.<sup>259</sup>

By contrast, yet *in pari materia*, Hand’s one-paragraph opinion in *Lampitoe* is a horrifying return to the toxicity of mainstream views of race at the turn of the twentieth century. The reporter tells us the compelling facts: that Lampitoe is a United States Navy enlisted seaman already on his second enlistment. Serving the country for almost two decades before America replaced the Spanish as exploiters of the Philippines, Lampitoe sought to become a naturalized American citizen. Yet, again the color line was front and center: “he is in every way qualified for citizenship, unless his race prevents,”<sup>260</sup> wrote the reporter. It is here that Hand picks up the opinion in a case that is founded on Lampitoe’s testimony about his service to the country that he had adopted and by whom he sought to be adopted. As in *Fong On*, Hand, however, provides no context—legal or factual—but rather begins by positioning a flat denial of Lampitoe’s naturalization petition among the shoals of three federal court opinions, none of which he tarries to explain factually or legally, and none of which he explains why they should bind his decision on Lampitoe’s petition:

255. *Strauder v. West Virginia*, 100 U.S. 303 (1879).

256. *The Civil Rights Cases*, 109 U.S. 3 (1883).

257. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

258. See e.g., INGO MUELLER, *HITLER’S JUSTICE* 120-50 (1987).

259. See e.g., Jeffrey A. Van Detta, *Requiem For A Heavyweight: Costa As Countermonument To McDonnell Douglas—A Countermemory Reply To Instrumentalism*, 67 Alb. L. Rev. 965, 991-992 (2004) (Observing how, under similar circumstances, “the legal linguistics of property rights triumphed over the language of human rights” indeed Justice’s story’s *L’Amistad* opinion”). There may be more at work here, however, than a lapse of appreciation for the higher levels of cognitive presentation to which Hand could reach. Hand’s later years saw him develop a great discomfort for the role assumed by the judiciary in civil rights enforcement. Hand disagreed with the concept of judicial review embodied in *Brown v. Board of Education*, and criticized that decision vigorously. Ronald Dworkin, who clerked for Hand 1957-1958, recently recounted a spirited debate about this subject as Hand was preparing a lecture for Yale, which devolved into Hand exclaiming in exasperation, “F\_\_\_ you, Ronnie!” Adam Liptak, *The Transcendent Lawyer*, NYU LAW SCHOOL MAGAZINE 13, 17 (Autumn 2005). Had Hand’s proponents been successful in their efforts to persuade President Roosevelt to nominate Hand to the Supreme Court in 1941, one wonders whether we would have had *Brown* — and its correction of the egregious shortfall of Reconstruction in living up to its initial promise—at all.

260. *Lampitoe*, 232 F. at 382.

The case falls exactly within *In re Alverto*, 198 Fed. 688, and needs no other consideration. There may be doubt about such cases as *In re Camille* (C.C.) 6 Fed. 256, or *In re Knight*, 171 Fed. 299; but where the Malay blood predominates it would be a perversion of language to say that the descendant is a 'white person.' Certainly any white ancestor, no matter how remote, does not make all his descendants white.

Petition denied.<sup>261</sup>

Hand did not even do Lampitoe the courtesy of describing the testimony he would have given about his life, his inspiration to serve in the United States Navy, and the patriotism it engendered to inspire his desire to become a citizen of the country under whose banner he sailed and served; nor did he pause over the details of Lampitoe's testimony of how he worked to become "in every way qualified for citizenship."<sup>262</sup> Hand's opinion eliminates Lampitoe's qualities and patriotism entirely from the equation; they are not lauded, reaffirmed, or even acknowledged. Instead, Hand's dismissively terse, four-sentence opinion reduces Lampitoe to his ancestry. Even if the law under which Hand was bound handcuffed him, – and he does not even cite a single Act of Congress – Hand owed a duty to explain that law in a way that [1] mitigated the sting of the irrationally racist effects it had on Lampitoe and [2] informed the immigration bar of the day about the hurdles that lay

261. *Id.*

262. *Id.* There is a long history of discrimination against Filipinos, continuing a century later in our own day, despite a patriotism and affection for the United States that belies the colonial beginnings. *See, e.g.,* Marvine Howe, *Good Enough To Fight, But Not For Citizenship*, N.Y. TIMES, Feb. 8, 1993, <http://query.nytimes.com/gst/fullpage.html?res=9F0CE3D91438F93BA35751C0A965958260> (last visited Dec. 11, 2007). As Howe memorably described the situation in 1993, the problems faced by Lampitoe had not gone away four-score years later:

Although his eyes have grown dimmer, the slight, white-haired Filipino veteran vividly remembers taking an oath of allegiance to the United States of America, half a century ago in the mountains of Sara on Iloilo island in the Philippines.

The former second lieutenant, Uldarico D. Dum Dum, now 74 years old, proudly displays a pile of yellowed, dog-eared military records, from induction documents to benefits papers, showing that he served three years under the United States Armed Forces in the Far East.

Mr. Dum Dum was therefore shattered to learn that his petition for United States citizenship had been rejected because his name could not be found in the Department of the Army's records in St. Louis. It is a story of rejection that has become familiar to Filipino veterans who won permission to apply for citizenship under provisions of the 1990 Immigration Act and then found that their applications were rejected because the Army did not have records of their service.

*Id.* *See generally*, STANLEY KARNOW, *IN OUR IMAGE: AMERICA'S EMPIRE IN THE PHILIPPINES* (1989); THE AMERICAN COLONIAL STATE IN THE PHILIPPINES: GLOBAL PERSPECTIVES (JULIAN GO & ANNE L. FOSTER EDS., 2003); E. SAN JUAN, JR., *FROM EXILE TO DIASPORA: VERSIONS OF THE FILIPINO EXPERIENCE IN THE UNITED STATES* 25 (1998); Annette B. Almazan, *Looking At Diversity And Affirmative Action Through The Lens Of Pilipino/a American Students' Experience At UCLA And Berkeley*, 9 ASIAN PAC. AM. L.J. 44, 51-52, 81 & nn. 30-35 (2004) (describing the early relations between Filipinos and the U.S. and noting "the reality that Pilipino/a Americans would likely hold an even greater socioeconomic status if racist laws and attitudes had not been in place and if the legacy of this racism did not continue to replay itself particularly in education and employment.").

before America's recently acquired colonial populations in the Philippines, Puerto Rico, and Hawaii in their quest to share not only in the burdens, but also the benefits, of their participation in an American empire. In dispatching Lampitoe in so few words and with so little effort to rationalize the result, Hand's opinion short-changes all constituencies by treating the matter as "self-evident,"<sup>263</sup> in a case where racists ought to be shamed by the inexorable inflexibility of a law founded in invidious, irrational discrimination and by the blithe institutionalization of the racism that, under a patina of law, depersonalized and denigrated a member in active service of the United States Armed Forces.<sup>264</sup>

### 3. Roadmaps

As we observed in the previous section, Hand was more likely to provide meta-information to readers if the subject of the opinion particularly intrigued him. By all accounts, Hand certainly was engaged by the theatre<sup>265</sup>, and took an interest in the performing arts.<sup>266</sup> He even recorded a number of 19<sup>th</sup> century folk songs—which he narrated and sang himself—for the Library of Congress in 1942.<sup>267</sup> In

263. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights...").

264. See Van Dett, *supra* note 259, at 992 (noting the potential for advancing human rights in the face of formalistic, positive law by contrasting Justice Story's *L'Amistad* opinion, grounded in terms of "whether certain Spaniards owned certain Africans" with his earlier opinion on Circuit in *Las Jeune Eugenie* wherein "Story had explored the law's full potential for freedom." (citing R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 368 (1985))).

265. GUNTHER, *supra* note 65, at 424 (caption to photograph no. 5, describing Hand's predilection for performing songs from Gilbert & Sullivan operettas at family gatherings), 644 (describing Hand's delight in acting out stories that he performed extemporaneously).

266. Arts references occasionally found their way into Hand's opinions as an appellate judge—although not always employed in support of memorable rulings. An oft-overlooked example provides a clash between Hand's artistically-flavored dissent that became the jaundiced view of a Supreme Court majority, from which Justice Robert H. Jackson, at the first-rank of legal and judicial writers, dissented. See, e.g., Jan Crawford Greenberg, Interview With Chief Justice Roberts, ABC News Online 2007, <http://abcnews.go.com/Nightline/print?id=2661589> (last visited July 31, 2007) (in which Chief Justice Roberts expresses the wish that he "could write could write as well as Justice Jackson writes"). In *Mezei v. Shaughnessy*, Judge Learned Hand in his dissenting opinion fairly bluntly described the situation of excluded aliens to that of the "Flying Dutchman" – alluding not only to the legend but to Richard Wagner's opera of that name—condemned to sail the sea forever; and Hand saw no entitlement to relief for them just because of that unfortunate status, and saw no Constitutional problem with allowing the executive branch so to do without effective judicial review—"if that society chooses to flinch when its principles are put to the test, courts are not set up to give it derringdo." 195 F.2d 964, 971 (2d Cir. 1952) (dissent), *rev'd*, 345 U.S. 206 (1953). Hand's rather glib and hard-hearted view of executive power was called into "forceful" question by Justice Jackson's tour-de-force dissent; for even though Mezei lost 5-4 in the Supreme Court, Jackson wrote against the outcome espoused in Hand's dissent, concluding "[n]o one can make me believe that we are that far gone." Jackson's writing in this dissent is a model of cognitive organization in which the principles identified by Terrell and Armstrong are used to create, from the perspective of reader cognition, a far more compelling opinion than Hand's dissent or the Supreme Court's majority opinion. 345 U.S. at 228 (Jackson, J., dissenting).

267. Stephen Wade, "The Library of Congress Recordings of Judge Learned Hand," All Things Considered, October 5, 1999 (National Public Radio), text and audio file <http://www.npr.org/templates/story/story.php?storyId=1064953> (last visited August 22, 2007). Apparently, Hand was visiting Chief Justice Harlan Fiske Stone at the Supreme Court building, and telephoned the Library to enquire whether they were interested in having him contribute to their folk-song recording project. The Library was; and Hand's fulsome recordings of songs he learned as a child include even regional accents, such as the one he brings to a Scottish ballad.

those opinions, then, Hand seemed to take more care in cognitively engaging and informing his readers—i.e., in writing beyond the immediate audience of the parties and their counsel.

### a. Cut To The Chase! *Stodart v. Mutual Film Corp.*

*Stodart v. Mutual Film Corp.*,<sup>268</sup> an early copyright-in-screenplay case, is one of those performing arts cases that engaged Hand's imagination—cinema—though in 1917, when Hand wrote the opinion, film had not yet achieved its full recognition as an art form. Yet, it is obvious Hand was intrigued. In *Stodart*, Hand addressed a variety of inter-related issues in a copyright infringement case. He imposes cognitive organization and transition — noting the “first question . . . is whether this picture is an infringement of the plaintiff's copyright” in his play and stating that “three points of defense are raised” which he proceeds to discuss serially<sup>269</sup>—that leave the reader with the impression of an opinion that had been logically and carefully thought out before being committed to writing, and not the product of an *ex tempore* delivery from the bench.

Hand dives into the first question of whether the plaintiff has proven infringement with an elaborate description of the play and its characters. Hand features his own critical assessment of its artistic merit (which, while it may seem immaterial to this issue, becomes quite important in Hand's decision on damages later in the opinion, though Hand does not foreshadow this connection for the reader). Unlike so many other of Hand's district court opinions, *Stodart* does not open up with a small-font, lengthy summary of the facts by the reporter of decisions;<sup>270</sup> rather, Hand narrates both the plot of the play and of the allegedly infringing screenplay, and he pulls out all of the stops of his highest rhetorical style in doing so:

The scene of the play is the north woods of Maine, and one of its supposed merits consists in the fact that it contains an atmosphere based upon the woods and life in the woods. The plot I need not consider in great detail. It is trite and conventional in the extreme, and its only claim to originality is in the setting of the scenes, all of which are out of doors and in the supposed local color. There is a simple-hearted and poetic hero, a north woods guide, who wins the heart of a person described as a society girl, whatever that may be. The latter, who is the heroine, is at the time of the play engaged to a villain, a rich person from the city, who supports himself out of the income of filthy and squalid tenements which are outside of the law. He is a typical villain, of unqualified rascally character, who, observing the tenderness of his lady for the heroic and poetic guide, employs the usual needy tool, and with him plots to com-

268. *Stodart v. Mutual Film Corp.*, 249 F. 507 (S.D.N.Y. 1917), *aff'd mem.*, 249 F. 513 (2d Cir. 1918). See Frank R. Miller, *A Re-Examination Of Literary Piracy*, 54 U. NEWARK L. REV. 327, 341-342 (1941).

269. *Stodart*, 249 F. at 508-09.

270. See *supra* notes 246 -247, and accompanying text.

promise the lady and the hero in such a way as to make her suppose that the hero has intended her wrong. This he does by directing his tool, who is a half-breed Indian, to change a mark upon the trail upon which the lady and the hero are to start off on the morrow. The tool does as directed, the couple are lost in the woods, and a compromise is effected sufficient to disturb the susceptibilities of the respectable. The lady doubts her hero. An imbecile father at once assumes that the hero has attempted to seduce his daughter, and all looks black for the hero and bright for the villain, as romance requires. The hero, however, induces the tool to repent upon the latter's deathbed, and he betrays the schemes of the villain, who is utterly confounded, and the couple live happily forever after.<sup>271</sup>

One suspects that Hand's plot summary is more lively and entertaining than the play itself.<sup>272</sup> Although Hand has not told us, as he might, that he seeks to evaluate the author's claim by simply juxtaposing his own detailed summaries of the play plot and the film plot, he moves so quickly and forcefully through his narrative that his intention—and his conclusion—quickly become clear. Hand then recounts the screenplay, which in those days was called “[t]he moving picture play,” concluding from the start that it “is beyond question a direct copy from this plot almost in its entirety” and noting that “[t]here are some incidents in the play which are not in the film, and some incidents in the film which are not in the play; but they are trivial and do not concern the plot.”<sup>273</sup> After his detailed description of the two, which are laid out in parallel logical sequences, the reader is swept along to concurrence in Hand's terse conclusion that “[s]o far as infringement is concerned, the case needs no discussion.”<sup>274</sup>

As appeared to be his usual custom, Hand did not provide a roadmap to the entire range of issues in the opinion, which are five: three defenses raised by the alleged infringer; a fourth argument about establishing damages; and a fifth argument addressed to setting attorney's fees. In terms of the flow of the discussion from point-to-point, Hand's opinion boasts effective horizontal coherence,<sup>275</sup> pre-

271. *Stodart*, 249 F. at 508-09.

272. Hand's blunt artistic judgment appears vindicated. Locatable references to the author-plaintiff, Robert Stodart, are virtually nil. A Robert Stodart is mentioned as playwright for a 1915 film adapted from a play, *Up from the Depths*; and the unusual spelling of the name and the contemporaneous time frame suggests the same individual. <http://www.imdb.com/title/tt0146334/fullcredits#writers> (last visited Dec. 12, 2007). Stodart appears to have turned a book or story into a play, *Silent Era, Up from the Depths*, <http://www.silentera.com/PSFL/data/U/UpfromtheDepths1915.html> (last visited Dec. 12, 2007), which had been written by the noted humorist of the era, Charles Battell Loomis, who had died in 1911 and merited his own obituary in the September 24, 1911 N.Y. Times. *Charles B. Loomis, Humorist, is Dead*, N.Y. TIMES, Sept. 24, 1911, available at [http://query.nytimes.com/mem/archive-free/pdf?\\_r=1&res=9905E3DB163CE633A25757C2A96F9C946096D6CF&oref=slogin](http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9905E3DB163CE633A25757C2A96F9C946096D6CF&oref=slogin) (last visited Dec. 12, 2007).

273. *Stodart*, 249 F. at 509.

274. *Id.*

275. See Armstrong & Terrell 1<sup>st</sup>, *supra* note 19 at 3-17 – 3-19, Armstrong & Terrell 2d, *supra* note 19, at 176.



senting the issues in the unfolding of the logic from the plaintiff's prima facie case to the defendant's burden of proving affirmative defenses, arriving ultimately at the remedial issues of damages and attorney's fees. Vertical coherence, however, is less well-served,<sup>276</sup> and Hand's weakness in the Context Principle remains evident. Readers might have been made much "smarter" with a roadmap to the overall cognitive structure of the opinion, followed by road signs in the form of discrete sub-headings to separate—and at the same time, highlight—the pentagonal structure of the opinion. Such a set of headings might have looked like these:

1. Whether author has established that the photoplay "The Strength Of Charles Mackenzie" violated the author's copyright in the play "The Woodsman" based on plot similarities
2. Whether Mutual Film Corporation has met its burden to establish a defense to infringement of the author's copyright in the play
  - a. Whether the author's copyright in "The Woodsman" is invalid because the title is already in the public domain
  - b. Whether use of a generic title, such as "The Woodsman," already in the public domain invalidates the author's copyright in the plot of the work
  - c. Whether the author authorized his play broker to sell the play manuscript
- [1] Whether mere delivery of the manuscript to a broker acting as factor empowered him to sell the author's rights to it
- [2] Whether the author ratified the broker's actions by waiting two months to challenge his disposition of the play
3. To what damages is the author entitled based on Mutual Film's infringement of his copyright in the play
4. To what attorney's fees under the copyright act is the author's attorney entitled

Yet, even a roadmap of that nature would have been incomplete. The last word of Hand's opinion is not his last word on the case, although we would not glean this easily either from the reporter of opinions or by the author of this opinion himself. Appended to the original opinion is something Hand calls a Supplemental Opinion. It is not mentioned in the reporter's terse description of the case nor in

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<sup>276</sup>. *Id.*

Hand's opinion.<sup>277</sup> The Supplemental Opinion was generated, Hand explains, by "a re-argument of the cause" by the film company, pressing again its points on the implications of the broker's possession of Stodart's manuscript (point 2.c.1 in my proposed organizing headings above) and Stodart's leisureliness in challenging the broker's actions (point 2.c.2 in my proposed organizing headings). The reader, however, would have been better served had Hand integrated those matters in the original opinion; there surely was time to do this, because the supplemental opinion was issued only 14 days after issuance of the original opinion.<sup>278</sup> Cognitively speaking, it is organizationally incoherent to present the two opinions seriatim when they in fact cover the same ground, requiring the reader to go back and compare the original arguments made by counsel (with Hand's commentary on them) with the re-argument (and Hand's new commentary in the Supplemental Opinion). The Congruence Principle demands that the judicial writer, undertake the "mental heavy-lifting" of synthesizing the points rather than simply presenting arguments in the default organization of the chronology in which the court considered them.

The real significance of the Supplemental Opinion, however, is in Hand's second thoughts about the damages he awarded to Stodart for copyright infringement. In the original opinion, Hand complained that "[t]he parties wish me to fix the damages now and without taking any further testimony on the subject"; in doing so, Hand wrote in a thinking-out-loud manner: "So far as the value of the play goes, I should accept Mr. Stodart's own figure [contained in the letter to his broker where he instructed him to sell the rights to the play for not "less than \$500 cash down"], which is \$500, and that value I do fix."<sup>279</sup> Hand had also acceded to Stodart's request to "allow something more, because in fixing that value he supposed that he would get the publicity of his own name upon the advertisements of the play, which has had on the motion-picture screen a considerable vogue."<sup>280</sup> Hand sets forth what passes for his reasoning just as the thoughts coalesced in his head: "I cannot, of course, tell what the value of that publicity would be to the plaintiff; at best it must be in the nature of a guess, but as the parties wish me to fix it now, and without going into any further evidence touching the success of the play, I will fix it at \$400. . . ."<sup>281</sup> Yet, as an afterthought in the Supplemental Opinion, and apparently on the basis of no new evidence or argument (since Hand had already told us that the re-argument was based "wholly" upon the film company's

277. The caption of the case rather mentions the supplemental opinion in the date line, "June 15, 1917. Supplemental Opinion June 29, 1917." *Stodart*, 249 F. at 507. In addition, the West editor, at the end of the eight separate headnotes that precede the case, rather un-illuminatingly, sets down the centered words, "Supplemental Opinion," but nothing else. *Id.* at 507. This information might have been more helpful had the West editor set the title between headnotes number 5 and 6; for headnotes 6, 7, and 8 are actually of material in the Supplemental Opinion, not the original opinion, and thus to list all 8 headnotes without indicating that division is likely to both mislead and confuse the busy reader researching case law. See *Stodart*, 249 F. at 507, 511-512.

278. *Stodart*, 249 F. at 507.

279. *Id.* at 511; see *Id.* at 510 (where Hand describes Stodart's letter in his analysis of the "title" claim, point 2.c.1 in the organizational headings I proposed above for this opinion).

280. *Id.* at 511.

281. *Id.*

defenses to liability), Hand drops us in a location entirely outside of any roadmap or analytic structure established for either the original or Supplemental Opinions:

“I think, considering the very trifling character of the play, that I fixed the damages too high. Instead of \$900, I shall award \$500, with \$300 counsel fee, and an accounting, if the plaintiff desires.”<sup>282</sup>

Sycophants of Hand’s legend would no doubt celebrate the judge’s legal realism and forthrightness in correcting himself. Perhaps so. But, from an organizational perspective, the *Stodart* opinion is far from a paradigm of judicial writing. After having traversed six densely-printed pages in the Federal Reporter, the reader has been taken through much of the substantive arguments twice, and has seen the judge set damages once on what might strike us as insufficient (or even non-existent) evidence, and then again on what strikes us as whim. This is hardly the way an effective judicial writer needs to leave the reader at the most critical of the natural points of emphasis; instead of leaving the reader with a clear understanding of the issues and Hand’s resolution of them, Hand leaves the reader feeling as though he were controlled by the case rather than controlling it.

## **b. No Writ For You! *United States ex rel. Marshall v. Gordon***

Although Hand was a political animal and early in his life absorbed by politics,<sup>283</sup> he seemed much less engaged in educating the readers of his opinions about political context as compared with his interest in carefully elucidating the context for the opinions in the lively arts. One case in particular shows how terseness is not necessarily conciseness,<sup>284</sup> particularly when the brevity leaves the reader bewildered. Hand eschewed the context in a case of major political importance, — a heated contest of wills and use of official power between H. Snowden Marshall, then United States attorney of the Southern District of New York, and Congressman Frank Buchanan, whose conduct Marshall and a federal grand jury were investigating when a House Committee responded by issuing a contempt citation against Marshall and causing him to be incarcerated.<sup>285</sup> This has contemporary resonance with similar pressuring tactics employed by officers of the federal government against specific United States attorneys.<sup>286</sup>

282. *Id.* at 512.

283. See GUNTHER, *supra* note 65, at xvi.

284. See ARMSTRONG & TERRELL 1<sup>st</sup> *supra* note 19 at 3-2; See ARMSTRONG & TERRELL 2d *supra* note 19 at 191-92, 249-50 (discussing the difference between brevity and concision).

285. U.S. ex rel. Marshall v. Gordon, 235 F. 422 (S.D.N.Y. 1916), *rev’d*, 243 U.S. 521 (1917).

286. See, e.g., Amy Goldstein & Dan Eggen, *Renzi Aide Called U.S. Attorney to Ask About Probe*, WASHINGTON POST, Apr. 26, 2007, at A4 (“The incident means that [Arizona U.S. Attorney] Charlton was the third of eight U.S. attorneys forced to resign last year who had reported to Justice officials that Republican members of Congress or their staffs made inappropriate overtures to their offices about politically sensitive investigations they were supervising.”); David Johnston, *Inquiry Into Ouster of U.S. Attorneys Moves Toward Subpoenas at Justice Department*, N.Y. TIMES, Mar. 7, 2007, at <http://query.nytimes.com/gst/fullpage.html?res=9B06E6DE1231F93BA35750C0A9619C8B63&sec=&spn>.

Marshall filed a petition for writ of habeas corpus, which Hand heard. Hand, however, gives us no context, but instead, plunges us into a confusing discussion of two contempts simultaneously—one against a newspaper reporter, issued by the House subcommittee, and the other against Marshall, allegedly for his having publicized a letter to the Committee Chair denouncing the use of the contempt power against the reporter.<sup>287</sup> Hand's opinion treats the reader a bit like a 19th century parent might teach a child to swim—by throwing him or her into the sea of details, to sink or swim as the bewildered child is able. After the confusing, un-contextualized thicket of facts, Hand begins the legal discussion of the opinion in no clearer a manner:

It was early settled that a commitment by the House of Commons for a contempt and breach of privilege was not examinable by any court. *Reg. v. Paty*, 2 *Ld.Ray*. 1105; *Alexander Murray's Cases*, 1 Wils. 299; *Brass Crosby's Case*, 3 Wils. 188; *Rex v. Hobhouse*, 2 Chit.Rep. 207; *Burdett v. Abbott*, 14 East, 1; *Case of the Sheriff of Middlesex*, 11 Ad. & E. 273. These cases came up in two ways, either by action of trespass against the serjeant at arms, as *Burdett v. Abbott*, supra, or more generally by habeas corpus, either after judgment, as *Brass Crosby's Case*, or after arrest, as *Reg. v. Paty*, supra, *Alexander Murray's Case*, supra, and the *Case of the Sheriff of Middlesex*, supra. It was even unnecessary to state, so high did the Commons carry their prerogative, the grounds of the commitment. *Reg. v. Paty*, supra, page 1106, per Gould, J. Indeed, the contempt in that case was for precisely the same act which the House of Lords had declared to be legal in *Ashby v. White*, 2 *Ld.Raym*. 938. Perhaps the strongest assertion of the immunity of the Commons in their judgments for contempt is to be found.<sup>288</sup>

. . . and on and on the historical exegesis goes. The reader's reaction, to use the vernacular that I have written in the margins of legions of examination answers written by fledgling first-year law students, is a perplexed, "Huh?"

Hand forges ahead, dragging the bewildered reader through another three full, densely-written pages of legal archaeology; but the reader is no more well-informed, even when Hand finally pauses in the historical parade to draw a breath:

***The state of the law, so far as decided, therefore, seems to be only this:*** That the House of Representatives has not inherited the prerogative in matters of contempt of the House of Commons, and that its commitments are open to inquiry, at least to the extent of discovering whether the commitment was an incident to the exercise of some constitutional power. Nevertheless it has a limited

287. *Marshall*, 235 F. at 423–27.

288. *Id.* at 425–26.

power to commit, and in the exercise of that power it enjoys immunity from review by a court which necessarily has no appellate jurisdiction. The last statement is certainly the law, if any part of *Anderson v. Dunn*, supra, survives, which I think it does. ***The question in this case, therefore, is of first impression in spite of all the decisions which have been cited. It turns, I think, upon three considerations:*** First, whether the House was engaged upon a constitutional duty; second, whether in that duty it had any powers to punish for contempt; third, whether that power went beyond compulsion to produce testimony, and included the power to punish contumacious language directed against itself, and published while the matter was still under consideration.<sup>289</sup>

Perhaps this summary would have been helpful up front! Finally, in the twelfth of the generally lengthy paragraphs that follow the Reporter's lengthy account of Hand's factual statement, Hand has tantalized the reader with a morsel of context; it takes him another page to distill the context even further into a clear issue for his decision:

***The case at bar does not, however, concern the House's power to compel the production of evidence, but the power to protect itself against the pressure which may arise from insult, abuse, or clamor while deliberating upon the finding of articles of impeachment.*** It will not, I think, be questioned that at common law it was a contempt of court to assail the motives and conduct of a court, at least while the matter was pending and open. Such was early held to be the rule in federal courts. And such, indeed, has been held, even after Revised Statutes, Sec. 725, in *United States v. Toledo Newspaper Co.* (D.C.) 220 Fed. 458, provided the publication be calculated to obstruct the administration of justice. I should not doubt that if Revised Statutes, Sec. 725, does not apply a court has such a power. ***The question here is, therefore, whether the House while so engaged has the powers of a court.***<sup>290</sup>

If only Hand had provided that to the reader in the beginning.

Hand might even have opened the opinion with a crisp, clear statement of the issue, modeled on a wonderful sentence that he did not set down until the last page of the lengthy opinion: "While, therefore, as I have said, there is no actual decision upon the point raised, it seems to me that there is both reason and precedent for the position that the House, while deliberating upon articles of impeachment, has jurisdiction to determine whether a publication is a contumacious assault upon its free-

289. *Id.* at 429 (emphasis supplied) (citations omitted).

290. *Id.* at 430 (emphasis supplied) (citations omitted).

dom of action. If so, the warrant in the case at bar was within its jurisdiction.”<sup>291</sup> This would not only have provided the reader with mercifully needed context, but it would have at least warned the reader that Hand was going to be examining precedents that appear to go back to Magna Carta, but that they won’t resolve the issue.

Hand’s opinion would have been far more successful—and defensible, given its later resounding unanimous reversal by the Supreme Court—had it followed the Context Principle. The Context Principle would have demanded a container and a roadmap, one that lay out the dizzying array of proceedings in the “double-contempts” quite clearly, and one that explained the organization of the information that Hand relates.

An example of such a container for this very case appeared nearly 90 years later. Professor Craig Lerner wrote a summary of this case in a law review article. Had Hand opened his opinion with such a summary, the reader’s attentiveness, and comprehension, would have been increased exponentially:

Indicted members of Congress have generally refused to surrender their privileged status without a struggle. Indeed, several have made full use of the special powers they wield as the princes of our American realm. A striking example of such behavior culminated in the Supreme Court case, *Marshall v. Gordon*. When a New York grand jury was investigating a member of Congress for his activities in a labor organization, the member took to the floor of Congress and charged the . . . [United States] attorney [for the Southern District of New York], Snowden Marshall, with malfeasance. After the grand jury indicted the member, a House committee, at his prompting, initiated an investigation of Marshall and issued a barrage of subpoenas. A defiant Marshall published a letter in a New York newspaper alleging that the Congressional committee was interfering with the grand jury investigation. The House responded to the letter by holding Marshall in contempt and ordering the Sergeant at Arms to arrest him.<sup>292</sup>

The reader is encouraged to read this paragraph again, then re-read Hand’s opinion in light of the context provided by a container such as Professor Lerner’s. The enhancement of reader comprehension facilitated by opening with this meta-information is striking.

291. *Id.* at 432.

292. Craig S. Lerner, *Legislators As The “American Criminal Class”: Why Congress (Sometimes) Protects The Rights Of Defendants*, 2004 U. ILL. L. REV. 599, 624 (2004) (footnotes omitted). Lerner continues with information not yet available to Hand at the time his decision was written: “At this point, however, the Supreme Court intervened. Although acknowledging an ‘implied power to deal with contempt’ to punish those interfering with Congress in the performance of a legislative duty, the Court held that Marshall’s intemperate letter did not warrant such punishment.” *Id.*

## B. Organizing The Law And The Facts Instead Of Letting Them Organize You: The Congruence Principle In District Judge Hand's Opinions

One of the greatest challenges for any legal writer—law student, law scholar, lawyer, or judge—lies in organizing the material to match the logic of your analysis. Allowing the organization of the material to organize you (and therefore obscure your analysis and confuse readers) creates analytic dissonance between the organization of the writing versus the organization of the thinking. For a trial court judge, this is a particularly acute problem. The materials—the facts and law at issue in a case—are presented from many different angles. There is the plaintiff's, or the prosecution's, presentation; the presentation made by the defense; the presentation made by the order of availability of witnesses at trial; presentation perhaps scattered through numerous documents which were created in the hurley-burley of everyday life, not for the ease of someone months or years later in trying to piece together a coherent view of the past; and the problem of the law itself, both as presented in a partisan fashion by dueling advocates, as well as by the published case law, which follows the messy, meandering course of controversies as presented by actual litigants, rather than a logical, interconnected, and seamless Euclidean development. How did Hand's cognitive organizing abilities measure up in this area? By examining several representative examples of Hand's fact-finding in reported district court opinions, we endeavor to gain insight into possible answers.

### 1. Judge Hand's Discussions of The Law—"Who's In Charge Here?"

#### a. No Checks Accepted Without I.D.! *United States v. Chase National Bank*

*United States v. Chase Bank*<sup>293</sup> confronts a negotiable instruments question in the pre-UCC days. Hand wrote what was, in effect, a novella of negotiable instruments law. In this opinion, Hand's legal analysis had to span some 150 years since the iconic opinion of England's greatest common-law judge, William Murray, Lord Mansfield, in *Price v. Neal*.<sup>294</sup> The case of *Price v. Neal*, of course, is perhaps the most famous in all of the law of commercial paper and negotiable instruments, and

293. *United States v. Chase Bank*, 241 F. 535 (S.D.N.Y. 1917), *aff'd* 250 F. 105 (2d Cir. 1918), *aff'd*, 252 U.S. 485 (1920).

294. Among those who left their imprint on the reception of *Price v. Neal* was America's first great commercial law giant, Justice Joseph Story, who, in a decision presaging his efforts to "federalize" negotiable instrument law in diversity-jurisdiction cases in 1842's *Swift v. Tyson*, embraced *Price v. Neal*—"the case of *Neal v. Price* [sic] has never since been departed from; and . . . it has had the uniform support of the Court, and has been deemed a satisfactory authority"—in a case out of the Georgia courts in 1825:

Considering, then, as we do, that the doctrine is well established, that the acceptor is bound to know the handwriting of the drawer, and cannot defend himself from payment by a subsequent discovery of the forgery, we are of opinion, that the present case falls directly within the same principle. We think the defendants were bound to know their own notes, and having once accepted the notes in question as their own, they are concluded by their act of adoption, and cannot be permitted to set up the defence of forgery against the plaintiffs.

*Bank of U.S. v. Bank of Ga.*, 23 U.S. 333, 349-350, 355 (1825). Story's opinion is much more cogently presented, and in fact, is far easier to understand, than Hand's.

that accounts for its prominent treatment in the *Chase* opinion. In *Price*, Lord Mansfield had to decide whether a promissory note forged to completion by a thief who got payment on it could be enforced by the bank against the customer so as to force the customer to pay. Lord Mansfield decided no, the paying party (usually a bank) who pays on a customer's draft cannot recover from the customer if the customer's signature later turns out to be a forgery.<sup>295</sup> To those not specialists in the law of negotiable instruments, the area and its common-law evolution are murky and dense topics—the parties in the creation, negotiation, payment, and collection of a negotiable instrument have multiple monikers, and the roster of players in a negotiable instruments transaction is strewn with artificial and ever-confusing “er” and “ee” endings (i.e., “maker” and “drawer” and “issuer”; “payee”; indorser”; and “drawee”), each with its own specific set of rights and liabilities.<sup>296</sup>

Hand's opinion begins with promise that the Context Principle is guiding his writing. Unlike some of his other opinions, in this one, Hand telegraphs to the reader that the case will be about the law, and a very specific question within a very specific area of the law that has a very specific historical context. He excludes parties, facts, and particular disputes from his container for the legal discussion. Hand instead elects a direct, and fairly arresting, introduction to what will be a discussion of precedent, analogy, and underlying policy. In the opening para-

295. See Christopher M. Grengs & Edward S. Adams, *Contracting Around Finality: Transforming Price v. Neal From Dictate To Default*, 89 MINN. L. REV. 163, 167-174 (2004); Steven B. Dow & Nan S. Ellis, *The Payor Bank's Right to Recover Mistaken Payments: Survival of Common Law Restitution Under Proposed Revisions to Uniform Commercial Code Articles 3 and 4*, 65 IND. L.J. 779, 789 n.45 (1990); see also, e.g., Thomas L. Cooper, Note, *The Doctrine of Price v. Neal Under Articles Three and Four of the Uniform Commercial Code*, 23 U. PIT. L. REV. 198 (1961); Steven B. Dow, *The Doctrine Of Price v. Neal In English And American Forgery Law: A Comparative Analysis*, 6 TUL. J. INT'L & COMP. L. 113 (1998).

296. For my own Commercial Law students, I have developed the following analytic model to assist them in conceptualizing the relative statuses, rights and liabilities in reference to the modern UCC. This model deals with all of the parties who can be involved in the making and enforcement of a negotiable instrument—and what liabilities they take on by their involvement. I suggest a two-step methodology for dealing with the question of who owes who what on a check, promissory note, draft, and the like. Step one is to start with UCC § 3-301 and determine whether the person who is claiming that others are liable to him or her on an instrument is, in fact, a person entitled to enforce an instrument. Typically, the person that § 3-301 covers are holders, but others, too, may be entitled to enforce the instrument, even if they are not its owner or possess it wrongfully (i.e., a thief of bearer paper). If we have a § 3-301 person seeking enforcement, then we move to step two. Step two involves two steps itself. First, like so many other questions in the Code, we need to categorize each potentially liable party. There are six: [1] Issuer, defined in 3-105(c), [2] Drawer, defined in 3-103(a)(5), [3] Indorser, defined in 3-204(b) [using 3-204(a)'s definition of indorsement], [4] Acceptor, defined in 3-103(a)(1) [using 3-103(a)(4)'s definition of drawee], [5] Drawee, defined in 3-103(a)(4); and [6] Accommodation party, i.e., a surety, defined in 3-419. Once we have determined which label applies to categorize each potentially liable party, we can then dial through the Code to determine exactly for what, and to what extent, and when each is liable to pay an instrument. [1] For issuers, we look to § 3-412, Obligation of Issuer of Note or Cashier's Check; [2] For drawers, we look to 3-414, Obligation of Drawer; [3] For indorsers, we look to 3-415, Obligation of Indorser; [4] For acceptors, we look to 3-413, Obligation of Acceptor; [5] For Drawees, we look to 3-408, which has the curious title of Drawee Not Liable on Unaccepted Draft; [6] Accommodation party, i.e., a surety, defined in 3-419, Instruments Signed for Accommodation. Thus, each separate category carries with it a particular set of obligations (and rights). Overarching all of this is the basic principle of Article 3, expressed in § 3-401(a), that to be liable, any party must either have [1] signed the instrument or [2] caused or had an agent sign the instrument. Drawee liability is what is at issue in *Price v. Neal*, and that specific liability is addressed under the rubric of “payment by acceptance or mistake,” the subject of Section 3-418, which ensconces the rule of *Price v. Neal*. See UCC 3-418 Official Comment 1 (1990 revision); UCC 3-418 Official Comment 1 (pre-1990 revision) (“The section follows the rule of *Price v. Neal*, under which a drawee who accepts or pays an instrument on which the signature of the drawer is forged is bound on his acceptance and cannot recover back his payment.”) (citation omitted).



graph, he effectively engages the reader by explaining the significance of this case in terms of: [a] What has been decided as settled common-law in previous cases and [b] Where the issue in this case falls between those rulings:

No one disputes since *Price v. Neal*, 3 Burr. 1354, that a drawee may not recover money paid upon paper forged by the drawer; on the other hand, no one disputes that, if the bill be once lawfully signed and uttered, no innocent holder may collect the bill with a forged indorsement and retain the proceeds. The question at bar presents the case where the forger not only forges the putative drawer's name, but makes the bill payable to the drawer and then forges the indorsement as well.<sup>297</sup>

Thus, there are no disputed facts; this is an opinion solely about what the rule of law shall be in such cases. However, despite this seemingly auspicious beginning, the opinion does not live up to its promise. At this point, a roadmap to make explicit the structure of his discussion and the steps of the application of the law is sorely needed—but sadly lacking. Instead, like many a law-student examination answer, Hand's opinion dives into abstracted statements of the law, not readily connected to his analysis of the facts:

A bill made in the form of this check, even if valid, is incomplete, and not commercial paper at all, until it has been indorsed and delivered to some person other than the drawer. Until then it is in form only an order to pay to the maker, and no obligation can arise between the maker as maker and himself as payee. This, after some confusion, was decided in the case of notes, and is now unquestioned law. It is so obvious as not to justify expatiation; and the same reasoning applies to bills.<sup>298</sup>

After that, Hand turns immediately to applying this law to the facts, but does so in a curious way. He leaves the reader feeling as if he is seeing only half a dialogue—as if Judge Hand has had, or is engaged in, conversation with others, to whose offstage assertions or comments he is fashioning specifically his discussion of the law:

Therefore, until Howard indorsed Sumner's name, the check did not, even on its face, exist as a legal instrument, any more than an undelivered deed; its factum was in abeyance. When he did indorse it in blank and deliver it to the Vermont bank, it was an order to pay the sum to bearer. The drawer's name was forged, but the two added forgeries of the same name were of no more signific-

297. *Chase*, 241 F. at 535.

298. *Id.* at 536 (citations omitted).

ance than if the forger had signed Sumner's name three times as drawer. *The rule is, however, not confined to cases where the paper is payable to drawer or maker.*<sup>299</sup>

That last quoted sentence is particularly telling – first, it tells us that without a roadmap, and with a number of rules having been mentioned already, it is unclear, without several re-readings, as to what “the rule” refers. Second, and more significantly, it tells us that the organization of this discussion of the law is not planned by Judge Hand with a specific cognitive objective. To the contrary, Hand's discussion appears to be entirely dictated by others—by the (unseen to the reader) arguments presented by counsel for the United States and counsel for Chase National Bank during the Bank's motion for a directed verdict at trial on or about April 21, 1917.<sup>300</sup> The suspicion thus raised—of a judge not in control of his material, but rather, controlled by it—becomes manifest in other aspects of an episodic, hodge-podge opinion. That suspicion is confirmed by further attempting to dissect the content of the opinion<sup>301</sup>:

1. The discussion of the law is largely compressed into lengthy string citations from an assemblage of jurisdictions. No information is given about the specific facts or nuances of holdings in the cases cited. (This appears to have been standard practice at the time – a perusal of cases in volume 241 reveals this to be common practice—parentheticals seem practically unknown at the time, although some judges at least wrote paragraphs about key cases, block-quoting the relevant portions).<sup>302</sup> It appears that Judge Hand simply inserted citations to authorities from the lawyer's briefs.

2. Idiosyncratically, however, Judge Hand inserts truncated commentary on cases in a string citation, with no consideration of how it will fall upon the eyes of a reader who has not just read these cases or cited them to the court in argument. For example, at the end of a lengthy string citation, he appends the following out of

299. *Id.* (citations omitted) (emphasis supplied).

300. *Id.* Further proving the “reveal-the-relevance” as you go along approach, Hand begins the next sentence with a lengthy string of cases as the subject of the sentence, followed by the predicate and object: “Phillips v. Mercantile National Bank, 140 N.Y. 556, 35 N.E. 982, 23 L.R.A. 584, 37 Am.St.Rep. 596; Bartlett v. First National Bank, 247 Ill. 490, 93 N.E. 337; Snyder v. Corn Exchange National Bank, 221 Pa. 599, 70 Atl. 876, 128 Am.St.Rep. 780; Coggill v. American Exchange Bank, 1 N.Y. 113, 49 Am.Dec. 310; Trust Company v. Hamilton Bank, 127 App.Div. 515, 112 N.Y.Supp. 84. National Bank of Commerce v. United States, 224 Fed. 679, p. 681, 140 C.C.A. 219, *though at first blush it seems to be an exception, in fact went off on another point, and recognizes the general rule.*” 241 F. at 537 (emphasis supplied).

301. Those reading this article on Westlaw can use the following hyperlink to the case in a separate window, and read it along with the list of items from my dissection. *United States v. Chase National Bank*, 241 F. 535 (S.D.N.Y. 1917).

302. *See, e.g., Virginia-Carolina Peanut Picker, Inc. v. Benthall Mach. Co., Inc.*, 241 Fed. 89, 97-98 (4th Cir. 1916) (Judge Pritchard) (quoting from a variety of cases, including Justice Story on Circuit, to expand on the general rule of prior use of an invention as providing grounds for a federal court to invalidate a subsequent patent).

the blue: “*National Bank of Commerce v. United States*, 224 Fed 679, p. 681, . . . though at first blush it seems to be an exception, in fact went off on another point, and recognizes the general rule.”<sup>303</sup>

3. The opinion makes rough transitions among the legal rules and arguments to be considered; outlined it looks like this:

a. Rule of *Price v. Neal*

b. Rule regarding issuance of a negotiable instrument—that if the drawer draws to himself, it is not a negotiable instrument until cashed at a bank, and at that point, there is no recourse against the bank by the actual drawer for failing to detect the forgery, whether the forger forges just the drawer’s signature, or also an endorsement;

c. Exceptional case [*National Bank of Commerce*], which Hand dismisses, virtually, as dictum with no specifics;

d. A belated acknowledgement that “the decisions are not unanimous”<sup>304</sup> and that some disagree with the view he’s taken, followed by an assertion (without an offer of logical proof) that those decisions are not “better considered”.<sup>305</sup>

e. A turn to other cases that also disagree with Hand’s view, to which he cursorily observes that they “are not contrary in principle; they depend upon the fact that the drawee or maker has intended as payee a person other than the forger.”<sup>306</sup>

f. An awkwardly sudden digression into an 1891 English case, *Bank of England v. Vagliano*;<sup>307</sup>

g. A return to the rule of *Price v. Neal*, and Hand’s comments upon it: “*Price v. Neal*, supra, has been a source of much difference of opinion. Lord Mansfield’s principle that the loss should fall where it chances, while often commended, has not escaped question.”<sup>308</sup> Hand does not exactly explain when and where this questioning has occurred, but ruminates upon policy, then shifts abruptly back into his original point in the case before him: “[a]s

303. *Chase*, 241 F. at 537.

304. *Id.*

305. *Id.*

306. *Id.* Parentheticals used to describe more of the factual context that support his characterization of these cases would be of great help to the reader.

307. *Id.* (citation omitted).

308. *Id.* (citation omitted).

the bill was a forgery, and created no obligation, it could make not the slightest difference to the drawee what indorsements it bore, or whether or not they were genuine.”<sup>309</sup>

h. Counterargument of the “even-if” counterfactual variety, ruminating on why, even if the check itself had not been forged, the outcome would be the same;

i. A *third* reprise of *Price v. Neal*, where Hand, in effect, suggests that the entire foregoing citations and discussions probably are not even relevant, since the original issue he posed—“the case where the forger not only forges the putative drawer’s name, but makes the bill payable to the drawer and then forges the indorsement as well”—may already come within the rule of *Price v. Neal*, for “[i]ndeed, from the report in *Burrows* it seems likely that . . . Lee, the forger, forged the indorsements along with the bill itself.”<sup>310</sup>

What emerges from all of this—compressed into text-dense four pages of the Federal Reports? A less-than-commanding structure. Hand’s discussion of the law strikes one as modeled after a murder-mystery writer (and one of a lesser light than Agatha Christie), with many leads cast about, chewed on for a while, set aside while new leads appear—only to conclude with recourse to a major clue set down in the beginning, laying in plain sight the whole time, but whose significance was not appreciated until the very end.

Just how far Hand’s organization strays from the real point of the legal discussion is exemplified by his lengthy digression, noted in point [3.f] above, concerning the seemingly gratuitously mentioned *Bank of England* case.<sup>311</sup> Hand here achieves a trifecta of cognitive dissonance: [1] He does not tell us why we should be concerned at all with any British rulings, or how this quarter-century old one is worthy of discussion (violating the Context Principle); [2] He does not tell us where this case even fits into the structure of the legal discussion (as the Congruence Principle would counsel); and [3] He discusses facts and players of this case by name (which is confusing because it is their status vis-à-vis the negotiable instrument that is really important), makes reference to some obscure, apparently British statute (“section 28”)—and ultimately tells the reader that this has been a giant waste of the reader’s time, because “[t]he case in any event had nothing to do with that now at bar”! (disregarding the Audience Principle). The passage has to be read to be believed:

It is quite true that *Bank of England v. Vagliano*, (1891) App. Cas. 107, does not accord with these cases, and with deference it is

309. *Id.* at 538.

310. *Id.* at 536, 538.

311. Gratuitous in the sense that American judges at the time still felt that reference to contemporary British cases lent more cache to their opinions.

doubtful whether the judgments of Lord Bowen below and Lords Bramwell and Field above are not to be preferred, where the matter is still open. The effect of the decision was indeed to compel Vagliano to pay to the order of Glyka, the clerk, when he had agreed only to pay to the order of Petridi & Co. Moreover, the result of the decision has been hardly more than to add to section 28 a clause which had been supposed to be already a part of the common law. The case in any event has nothing to do with that now at bar.<sup>312</sup>

The kindest thing that can be said of such a legal discussion is that it is one organized around the judge setting down for his reader the exact thinking process s/he went through to reach the decision, including every pothole, rut, detour, and wrong-turn on the way. This style is seemingly embraced as a school of judging by the Seventh Circuit's Richard Posner, although it is described with a subtlety and sophistication that belies its cognitive dissonance:

Judge Posner identified two fundamental analytical styles as characterizing the bulk of judicial opinions: what he termed "pure" and "impure" approaches. By "pure" he meant traditional, doctrinal, generally unimaginative decisions that depended basically on the supposed neutrality and objectivity of the law for their legitimacy. Such opinions were often characterized, interestingly enough, by statements of the judge's conclusion at the beginning of the opinion rather than the end, an element of style that I earlier praised as promoting coherence and reflecting confidence. "*Impure*" decisions, in contrast, were more openly communicative about the writer's struggles through the relevant legal material, and much more willing to view theoretical perspectives on the law as part of that material.

*Judge Posner strongly preferred the latter, more discursive and dramatic style, linking it to the deeper jurisprudential category of "pragmatism."*<sup>313</sup>

However, this style works only if it is conscientiously reigned in—otherwise it can become a "discursive writing style that develops toward a conclusion rather than announcing it," and has been criticized by other judges as devolving toward "just 'storytelling' exercises seeking to create dramatic tension" when "[r]eal lives and fortunes are at stake."<sup>314</sup> In less capable hands or in very harried hands, the

312. *Chase*, 241 F. at 537 (emphasis supplied).

313. Timothy P. Terrell, *Organizing Clear Opinions: Beyond Logic To Coherence And Character*, 38 NO. 2 JUDGES' J. 4, 39-40 (Spring 1999) (footnote omitted) (emphasis supplied).

314. *Id.* at 40.

“discursive” style is quite problematic for the reader, as Professor Terrell has explained:

Judge Posner’s urge to be discursive in searching for the under-ground currents of the law strikes me as an approach that runs the danger of becoming self-indulgent unless it is carefully controlled. Judge Posner is not merely suggesting that judges show “their minds at work” on the page; instead, *he seems to be endorsing a style that unabashedly proclaims “this is my mind at work.”* It is a writing strategy that can slip easily and unconsciously into a professional egotism . . . .<sup>315</sup>

Unlike the very skillful way Richard Posner can use this approach, when he remains unquestionably in command of the material, it is clear that Judge Hand’s opinion here is the product of a harried judge, whose imagination is somewhat intrigued by the problem, but who is able to devote only a little time (while writing up the gist of an oral ruling from the bench on a directed verdict motion) to the time-consuming, but cognitively essential, task of imposing a more coherent organization on the law<sup>316</sup>—i.e., a structure that is useful to readers outside of the intimacy of the parties to the specific controversy before him.

### **b. Paging Dr. Zhivago! *Friede v. White Co.* And Russia on the Eve of Revolution**

The Czar had abdicated six months previously, and Lenin had arrived in Petrograd station just three months before,<sup>317</sup> a Russian entrepreneur brought suit against White Company for breaching what the entrepreneur claimed was an exclusive agency contract to make sales to the pre-Revolutionary Russian government in *Friede v. White Co.*<sup>318</sup> Hand thus was not faced with a suit involving expropriation

315. *Id.* at 41 (footnote omitted) (emphasis supplied). Professor Terrell elaborates that the discursive style is not emotionally driven, but rather driven by a thinking-out-loud approach that may be helpful to the writer (or speaker, as in the case of an oral ruling in court), but less than helpful to the reader (or listener): “I do not mean to suggest that Judge Posner is endorsing a personal, cathartic style of presentation. He specifically notes the dangers and illegitimacy of such an approach to judging. But one need not be emotional to be self-indulgent. One can certainly be carefully analytic and nevertheless revel in one’s own acuteness.” *Id.* at 40 n. 20 (citation omitted).

316. Terrell, *supra* note 313, at 5. Good thinking is not synonymous with effective communication of that thinking, as Professor Terrell emphasizes:

Many writers mistakenly assume that organization is synonymous simply with logic: a clear organization results from logical thinking, a confusing one from murky thinking. But getting ideas in the correct order is only a necessary condition for a clear organization, not a sufficient one. Clarity also depends upon *coherent* organization, which comes instead from strategies that are founded on cognitive psychology.

*Id.* at 38 NO. 2 JUDGES’ J. 4, 5 (Spring 1999).

317. See, e.g., a chronology of Russian history at [http://en.wikipedia.org/wiki/Timeline\\_of\\_russian\\_history](http://en.wikipedia.org/wiki/Timeline_of_russian_history) (last visited April 27, 2009).

318. *Friede v. White Co.*, 244 F. 272, 273-75 (S.D.N.Y. 1917) (truck sales to Russian government, example of pre-Erie/REA state procedures in federal court; Hand applies state procedures unquestioningly). Cf. Judge Augustus Hand’s trenchant 1930 pre-sageing of Erie in *Cole v. Penn. RR. Co.*, 43 F.2d 953 (2d Cir. 1930). This

by Lenin's government nor abdication by it of any contracts. Rather, the Russian distributor (later domiciled in New York), Sergey Friede, sued White Company for refusing to accept orders he placed for sales to the Imperial Russian Government in 1913 and 1914.<sup>319</sup> Sergey Friede contended that the contract he concluded with White Company,<sup>320</sup> making him its exclusive agent, "required [White] to fill all orders transmitted to it by [Friede] for trucks which the Russian government might order during the years 1913 and 1914."<sup>321</sup>

With only the reporter's truncated version of facts in the context of White Company's motion for judgment on the pleadings, Hand tantalizingly begins the opinion with the ironic statement, "[t]he case, although large in amount, is in narrow compass" because it turns on what rights flowed from White Company's agreement "that for a period of two years . . . all business with the Russian government shall be done through you."<sup>322</sup> (Hand does not tell us the monetary value of Friede's claims, but he does indicate that Friede alleges "that the Russian government was a large purchaser, ready to accept nearly 1,200 motor trucks in one order after [World War I] arose" in August 1914.<sup>323</sup>) Thus, analogous to the famed case of *Wood v. Lucy, Lady Duff-Gordon*,<sup>324</sup> the only issue for Hand on this motion is whether the exclusive agency contract gave Friede the implicit right to demand that White Company fill any order which he obtained from the Czar's government.<sup>325</sup>

The discussion of the exclusive agency issue on which Hand embarks is reminiscent of the "let me take you on a journey through the law by way of my thinking

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might be a subject on which Robert Jackson's familiar aphorism—"quote B.; but follow Gus"—would need to be emended: "quote Gus, and follow Gus."

319. *Friede*, 244 F. at 273.

320. A history of the White Motor Company, which was most well known for producing industrial trucks, from 1902 until its bankruptcy and acquisition by Volvo, may be found at [http://en.wikipedia.org/wiki/White\\_Motor\\_Company](http://en.wikipedia.org/wiki/White_Motor_Company) (last visited December 31, 2007).

321. 244 F. at 273. Friede's filing of this lawsuit made the New York Times. See *\$1,500,000 IN AUTO SUIT.; M.S. Friede Alleges Contract for Sales to Russia Was Broken*, N.Y. Times, Oct. 3, 1916, at 17, available at <http://query.nytimes.com/gst/abstract.html?res=9E04E2DA1630E733A05750C0A9669D946796D6CF> (last visited Jan. 1, 2008). Sergey Friede, however, figured in other business disputes involving joint ventures to sell goods and materials to the Imperial Russian Government that did not honor their contracts with him after the Russian Revolution, and those claims remained unresolved at his death in the U.S. in 1920, where it was reported he had resided since 1890; three generations of Friedes pursued claims against the Russian government until an award of nearly \$ 800,000 was made in 1956 pursuant to The International Claims Settlement Act of 1949. *Fried Claim* (United States, Foreign Claims Settlement Commission, Sept. 6, 1956), reprinted in 26 E. LAUTERPACHT, INTERNATIONAL LAW REPORTS (1958 II) 352-361 (1969), available online at [http://books.google.com/books?id=6\\_WbPwDNuQ8C&pg=PA353&lpg=PA353&dq=m+sergey+friede&source=web&ots=UJ\\_mivMkO&sig=IjUtlSOTAYyPwISadWcVdZHq4HU](http://books.google.com/books?id=6_WbPwDNuQ8C&pg=PA353&lpg=PA353&dq=m+sergey+friede&source=web&ots=UJ_mivMkO&sig=IjUtlSOTAYyPwISadWcVdZHq4HU) (last visited Jan. 1, 2008). Friede, an engineer by training, had long been active in American exports in Russia, making a trip in 1897 to open the market for sale of American machinery to the builders of the Trans-Siberian Railway. See *The Chinese Eastern Railway* in XX Albert Shaw, *The American Monthly Review of Reviews: An International Magazine* 600-602 (1899), available at [http://books.google.com/books?id=5NMC AAAAYAAJ&pg=PA601&lpg=PA601&dq=m+sergey+friede&source=web&ots=m9yBE6yQsw&sig=yGj84yWPrUum1QOI-cF0\\_Zm9gF4#PPA601,M1](http://books.google.com/books?id=5NMC AAAAYAAJ&pg=PA601&lpg=PA601&dq=m+sergey+friede&source=web&ots=m9yBE6yQsw&sig=yGj84yWPrUum1QOI-cF0_Zm9gF4#PPA601,M1) (last visited Jan 1, 2008).

322. *Friede*, 244 F. at 273.

323. *Id.*

324. *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917); for a revelation of the origin of the implied "reasonable efforts" clause on the part of the agent in an exclusive agency agreement, see [http://lawprofessors.typepad.com/contractsprof\\_blog/2005/12/today\\_in\\_histor\\_2.html](http://lawprofessors.typepad.com/contractsprof_blog/2005/12/today_in_histor_2.html) (last visited Jan. 1, 2008).

325. *Friede*, 244 F. at 273.

out loud” that we examined in *Chase National Bank, supra.*<sup>326</sup> Hand begins by posing a series of rhetorical questions, apparently to frame his analysis:

Does that mean “all sales which I shall conclude with the Russian government,” or “all orders which you shall transmit?” Does it give the plaintiff an indefinite option on the defendant’s production for two years regardless of the amount which he might require? The allegations themselves show that the Russian government was a large purchaser, ready to accept nearly 1,200 motor trucks in one order after the war arose.<sup>327</sup>

This kind of “in my head” opening would be fine, had Hand then laid out a roadmap for his approach to the analysis of the issue. However, Hand does no such thing. Instead, as we have observed elsewhere he was frequently wont to do,<sup>328</sup> Hand makes a rough transition to telling us about cases that do *not* apply “The case is quite different from one in which the seller authorizes a broker to sell a given piece of land or a limited amount of personal property. *Baker Transfer Co. v. Merchants’ Mfg. Co.*, 1 App.Div. 507, 37 N.Y.Supp. 276.”<sup>329</sup>

Where did this case come from, one wonders? Is it cited in a brief—perhaps for Sergey Friede, the plaintiff? Was it raised at oral argument on White Company’s motion for judgment on the pleadings? We have no context for this case, so Hand immediately makes the reader feel like an interloper; something unseen seems to be the driving force behind this opinion’s organization, but we know not what it is. Rather than explain or elaborate, Hand begins thinking out loud again; it is only the incisive force of his pragmatism and his intellect that save him from becoming entirely ruminative:

Such contracts commit the seller to engagements of known amount; they do not subject him to the possibility of indefinite and enormous orders, which he must fill regardless of his capacity and his other demands. It would be strange if the defendant here had not retained the right to determine how many trucks it could spare for the Russian market, or how far it wished to deal with the Russian government. Otherwise it would have been impossible in apportioning its production to know how far it might be committed by indefinite contracts procured through the plaintiff. It might find its other trade more profitable; it might find the Russian government a factious customer and a slow debtor. I cannot suppose that it intended to give the plaintiff that control over its business by any such vague language as was used. On the contrary, the purpose of

326. See notes 293-312 & accompanying text.

327. *Friede*, 244 F. at 273.

328. See notes 323-24 & accompanying text.

329. *Friede*, 244 F. at 273.



the two letters was no more than to give the plaintiff the right to the exercise of an honest business judgment.<sup>330</sup>

Hand then states that “[t]he cases bear out this construction”—yet he turns to an enigmatic one or two line discussion of each case, most of which seem to hold for agents in Friede’s position. Only at the end of this long paragraph (discussing four separate cases) does Hand inform the reader of what he’s really doing: “I mention these only to distinguish them. Whatever is the proper rule, they have nothing to do with the case at bar. . . .”<sup>331</sup> Nothing to do with the case at bar, indeed! The reader who’s been following the cases in hopes of a clarification of the law to support Hand’s intuitive ruminations feels betrayed, for the Context and Congruence Principles are turned on their head, and Hand’s organization does not reveal the organizing structure of his legal discussion. Indeed, one might ask whether the reader would be more cognitively receptive had Hand first explained the governing law using these cases—and made the reader aware that there are two lines of cases, the *Baker Transfer Company* case he’d just discussed, as well as these—sketched out the rules derived from each, and then proceeded to evaluate, in the best common-law tradition, which line of cases was more analogous to the issue presented.<sup>332</sup>

Yet Hand’s discussion of the precedent does not become more focused—instead, he provides a third case discussion—this time of another four cases—that he asserts are “[n]earer to this case.” Hand ends his opinion with what should have been its beginning; a valedictory statement that had it instead been salutatory, might have provided just what this opinion lacks—a coherent structure for discussion of an area of the law that needs to be clarified:

The rule established by these cases when the employer rejects specific orders is this: The principal is bound to accept all orders sent in by the agent which in the exercise of an honest business judgment he would accept if he were actuated only by genuine business motives. The agreement is commercial, and presupposes that both sides will continue in good faith to prosecute the venture in which they have engaged. Nevertheless the principal does not place the conduct of his business in the hands of his agent or agree in advance that every order which the agent sends in must be accepted, regardless of his own judgment as to what business it will be profitable for him to transact. If it were so, the principal would have abdicated the conduct of his own affairs. If, on the other hand, the principal does not honestly exercise that judgment, but is moved by a desire to exclude the agent, or by any personal motive other

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330. *Id.* at 273.

331. *Id.* at 274.

332. See, e.g., the opinions and argument of counsel in the Exchequer Chamber in *Byrne v. Boadle*, 159 Eng. Rep. 299 (Exch. 1863), the original *res ipsa loquitor* case in torts, and the skillful use of precedent by the barristers before the court.

than to prosecute his business with a sole eye to its success, he is responsible. This is what is meant by an “arbitrary” refusal of orders. This fact the agent must allege and prove, since prima facie the principal is presumed to be acting in accordance with the arrangement which gives him complete freedom as his judgment may dictate. As there is no such allegation in the complaint, it is bad as a pleading.<sup>333</sup>

This would have been a better container for the entire discussion. As a container, this paragraph would have provided the logical integrity needed for a more coherently organized and detailed discussion of the cases.

### c. Linking Congruence To Context: *Sands v. James Carruthers*

As the internally dissonant discussion of the law in *Friede v. White* demonstrated, the principles identified by Armstrong and Terrell do not ride each one as a lone ranger. Rather, they are fundamentally integrated and dovetailed by reader’s cognitive needs. A case in point showing the linkage of the congruence and context principles is *Sands v. James Carruthers & Co.*<sup>334</sup> In this case, a Belgian business assigned to an individual, Sands, its claim against a Canadian business, Carruthers.<sup>335</sup> Sands died, and his administrator brought the breach of contract suit against the Canadian business in a state court. The Canadian defendant removed the case to Hand’s federal court on the basis of diversity of citizenship subject matter jurisdiction, but Sands’ administrator filed a motion to remand the case on the grounds that diversity jurisdiction did not actually exist. The argument was two-fold: (1) that the deceased, and his administrator, were to be considered to have the citizenship of their assignor—i.e., to be citizens or subjects of Belgium and (2) that the diversity statute did not extend subject matter jurisdiction to state-law claims between two citizens of a foreign state.<sup>336</sup> The basic problem was whether the as-

333. *Friede*, 244 F. at 274. Hand gave Friede the option to “plea[d] over within 20 days.” *Id.* at 275. The case disappears from the Reporter, and from history, at this point, however.

334. *Sands v. James Carruthers & Co.*, 243 F. 636 (S.D.N.Y. 1917).

335. *Id.* at 636 (West Reporter’s summary).

336. *See id.* at 636. Today, the relevant statute is codified at 28 U.S.C. § 1332(a)(2) (2006) (“The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . (2) citizens of a State and citizens or subjects of a foreign state”). Today, the status of administrators is addressed in the same statute:

For the purposes of this section and section 1441 of this title--

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

*Id.* at 1332(c)(2); see David D. Siegel, *In Estate and Ward Cases, Representative Will Henceforth Have Represented Person’s Domicile*, Commentary to 28 U.S.C.A. § 1332 (West 2001) (1988 amendment). As Wright & Miller explain the assignment aspect of the problem:

The First Congress, in the Judiciary Act of 1789, sought to outlaw one obvious device for manufacturing federal diversity of citizenship jurisdiction when it otherwise would not exist. If a citizen of New Jersey has a claim against another citizen of New Jersey, he must

signment from the Belgian to the American would be considered collusive, so that the Belgian's citizenship would control and defeat diversity between the American estate and the Canadian defendant. Hand thought not, because, primarily, the controlling statute at the time he found to apply to assignees, but not to administrators who are asserting an assignment made to a deceased.<sup>337</sup>

Hand's actual opinion, however, doesn't provide either the context for this evaluation—nor is it organized along a disciplined line of his analysis concerning the scope of the anti-assignment statute for limiting removal or of the scope of those parties encompassed within the anti-assignment statute. Instead, after offering next to no context, Hand starts his opinion by discussing and distinguishing ancient precedents; he discusses the law with an ad hoc quality that lacks congruence with his reasoning:

It has been accepted law since *Chappedelaine v. Dechenaux*, 4 Cranch, 306, 2 L.Ed. 629, that the restriction in section 24, paragraph 1, does not cover the devolution by operation of the law of a chose in action from a testator to his executor; such officers are not 'assignees.' The point was somewhat summarily considered in *Chappedelaine v. Dechenaux*, supra, but it was deliberately passed on in *Childress v. Emory*, 8 Wheat. 642, 5 L.Ed. 705. On the other hand, the word 'assignment' is very literally considered, and an assignment by operation of law is held to be within the restriction, if the grantees are called 'assignees.' *Sere v. Pitot*, 6 Cranch, 332, 3 L.Ed. 240. In *Mayer v. Foulkrod*, Fed. Cas. No. 9,341 (1823), Justice Washington and Judge Peters held that the Circuit Court had jurisdiction in a case precisely like this, except that it was a legacy which was assigned. The assignee was a citizen of Maryland, and so were his executors. The defendant was a citizen of Maryland, and so were his appear whether or not the legatees were citizens of Pennsylvania, which must affirmatively have appeared if the fact was relevant. The jurisdiction of the Circuit Court was upheld; the court treating the case as precisely similar to *Chappedelaine v. Dechenaux*, supra. Now it should be said of *Mayer v. Foulkrod*, supra, that under the later decisions (*Ingersoll v. Coram*, 211 U.S.

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bring suit in state court. But if, for some reason, he prefers to sue in federal court, he might consider assigning his claim to a citizen of Pennsylvania, who then would invoke the diversity jurisdiction of a federal court and pay over the proceeds of the suit to the assignor. To prevent this possibility, it was provided in Section 11 of the Judiciary Act of 1789 that a federal court was to have no jurisdiction over a suit on a promissory note, or other chose in action, in favor of an assignee, unless the suit could have been prosecuted in federal court if no assignment had been made. With some changes in language, this "assignee clause," as it was known, remained a part of the law until 1948, when it was replaced by the general anti-collusion statute that is now found in Section 1359 of the Judicial Code.

14 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3639 (3d ed. 2008) (footnotes omitted).

337. *Sands*, 243 F. at 637.

335, 361, 29 Sup.Ct. 92, 53 L.Ed. 208, and *Brown v. Fletcher*, 235 U.S. 589, 35 Sup.Ct. 154, 59 L.Ed. 374), legacies are not treated as choses in action, but as property. However, the court raised no such point, and supposed that the decision was necessary under the facts.<sup>338</sup>

One almost gets the mental image of Hand delivering this opinion orally—with stacks of reporters and the parties' briefs sitting before him, Hand goes through the parties' citations and arguments seriatim, with little regard, even in a short opinion, for providing the context in which the issue arises in this litigation, and federal practice more generally, or for organizing the reasoning around the structure of his legal analysis. The opinion would have been strengthened substantially if it had been crafted with each principal in mind—and if it had recognized the synergies of coherence that emanate from implementing both principles, simultaneously, in the writing.

## 2. Judge Hand's Discussions Of The Facts—"Making The Record, Or Allowing The Record To Make You?"

Fact-finding is one of the most difficult tasks in the judicial job description. Offering instruction on how to find facts is beyond the purview of this article.<sup>339</sup> We address how to organize a statement of facts or a set of factual findings more effectively, using the cognitive principles we apply throughout this examination of Hand's trial opinions.

Judges are responsible for fact-finding, of course, in those cases where they function as the trier of fact —i.e., in which a jury is not used. Yet, even when judges are presiding over a trial by jury, in which the jurors are supposed to find the facts, the judges must be equally attentive to the facts themselves, for at least two critical reasons. First, it is likely that one of the parties will move for judgment as a matter of law (i.e., a "directed verdict") during the trial. In ruling on directed-verdict motions, the judge must decide whether a jury could find sufficient facts established by the evidence to rule in favor of the other (non-moving) party. Second, it is virtually inevitable that a party who loses a jury verdict will file a post-trial motion for judgment notwithstanding the verdict (or *j.n.o.v.*, as the motion was known by its Latin moniker). In that event, the judge must decide whether a reasonable jury could find facts from the evidence presented to reach the verdict that this jury actually reached.

Thus, a trial judge must be incredibly attentive and fully engaged (in this task, and several others—such as ruling on admissibility of evidence, administering the progress of the trial, dealing with other motions filed during the trial, and attending to the jury's convenience). For some judges, this is the glory of the trial-term job.

338. *Id.* at 636-637.

339. Jerome Frank's 1949 discussion in his book, *COURTS ON TRIAL*, still deserves close and careful study by all judges and arbitrators; his insights on the frailties and the failures of fact-finders to understand the psychology and limitations of the process are lively and valuable half a century later.

For other judges—and Hand appears to be among them—the fact-finding task is a necessary evil attendant to the idealized judicial task of expounding upon the law. In describing Hand’s attitude toward appellate judging versus trial judging, Professor Gunther observed that “[m]any of his daily chores as a district judge seemed ever more routine and dull” and that “[t]he workload of hearing motions and presiding over trials both short and long filled with conflicting testimony made for wearying steady pressure yet rarely provided outlets for his analytic skills.”<sup>340</sup> Hand really “enjoyed the opportunities to reflect upon the law” and when “the Second Circuit summoned him to hear appeals, . . . he found that the appellate work gave him some of his most enjoyable and rewarding days.”<sup>341</sup>

Hand himself showed his dislike for the fact-finding process.<sup>342</sup> In an address to the Association of the Bar of the City of New York in 1921, Hand provides a fairly existentialist view of the fact-finding at trial:

Let us at the outset disabuse ourselves of the notion that we are engaged in an impartial and disinterested inquiry into objective truth. . . . Our inquiry must stop as soon as the litigants are, or under the rules must be, satisfied on their differences. Our results have no general significance whatever[;] we merely reach a passing accommodation which may be altogether foreign to any permanent answer.<sup>343</sup>

Then, in a if-wishes-were-horses frame of mind, Hand went on to suggest that most of the facts should be found through the parties’ own pleadings:

The aggrieved party comes demanding that his opponent be forced to make redress; he appeals to the law which may be found laid down in general written rules. These rules attach consequences to specified conduct, and he need only show that the defendant’s conduct is of the kind there described. In the name of Heaven then, let him say once and for all that the defendant has done the things which everyone knows will subject him to the prescribed consequences. And for the defendant, let him too admit that he has done what the plaintiff says, or if he has not, let him deny it. Again, if he means not to deny anything, but has come facts which will excuse him, let him tell us those and we will see whether the plaintiff will admit or deny them. . . . If the parties will only do so simple a thing as this, all will become easy, but if not we shall be . . . throw[n] . . . into such interminable a welter of confusions,

340. GUNTHER, *supra* note 65, at 270.

341. *Id.* (observing that “[a] permanent seat on the Circuit Court of Appeals, he knew, would assure him of regular work on legal problems of interest and significance”).

342. *Id.* at 135, 137, 145.

343. Learned Hand, *The Deficiencies of Trials To Reach The Heart Of The Matter*, 3 Ass’n of the Bar of the City of New York [A.B.C.N.Y.] Lectures on Legal Topics 89, 90 (1921).

doubts and suspicious as never in all the course of thirty years we can unravel.<sup>344</sup>

How the pleading styles of the times affected Hand's view of trial fact-finding, and whether Hand would seriously have contended that parties should stipulate facts before trial, it is clear that he did not find the fact-finding process to be the most congruent to his own tastes.<sup>345</sup>

**a. *United States v. Nine Barrels of Butter (The Oleomargarine case)***

Learned Hand's opinion in *United States v. Nine Barrels of Butter*<sup>346</sup> appears to be as much notes for a finished opinion as a finished opinion itself. The opinion does little for the reader either in terms of the Context or the Congruence principles. After the single headnote that opens the opinion, the opinion provides about as much context as we are going to get; after telling us that this is an action "at law," the large-font first paragraph tells us that this is an "[a]ction by the United States for the condemnation and destruction of nine barrels of butter claimed by the New York Butter Packing company."<sup>347</sup> Nowhere (in the beginning or later in the opinion) is the actual law that governs the case cited. Nor are the facts that show how the United States became involved in the case stated. In a long paragraph of small type-face following the introduction, the reader is told only that, "[w]hen examined in New York, they disclosed the presence in substantial quantity" of contaminants and rancidness. Who examined, and who disclosed? We do not know. It appears that the government may have done the inspecting, since it appears to have initiated the lawsuit, under some statutory authority, to "condem[n]" and "destr[o]y" this shipment of butter. It also appears from the fact that New York Butter Packing is described as "the claimant," that a fair inference is that the government, having inspected the butter and found problems, has impounded it, and thus New York Butter packing has become a claimant attempting to regain possession of the butter and to avert its destruction.

However, the opinion does not tell the reader; instead, it moves into what appears to be a roadmap for the analysis. "The claimant depends for its defense upon two theories," one of which involves when title to the butter supposedly "passed"

344. *Id.* at 90-91. Hand complained that while "there have been . . . all sorts of efforts to do this easy thing and still the learned practitioner sits down with his fair shorthand writer beside him and dictates the chapter of his client's wrong with all the rhetoric of passion and efflorescence of literary imagination." If Hand was distraught over the pleading practices of the 1910s and 1920s, one wonders what he would think of the habit of modern, high-profile pleaders in "big" cases who plead even more prolix – such as the *162-page complaint* filed recently in a North Carolina federal court in a civil rights lawsuit by former Duke University lacrosse players against 15 municipal and individual defendants, a pleading submitted in a court system that has since 1938 required by express rule only "notice" pleading? Mike Nizza, *Students Sue Prosecutor And City In Duke Case*, N.Y. Times, Oct. 6, 2007 at A10, available at <http://www.nytimes.com/2007/10/06/us/06duke.html> (last visited March 14, 2008); see Fed. R. Civ. P. 8(a) & Official Form 11.

345. Hand, Lectures, *supra* note 343 at 94 ("I make no effort to disentangle from the junk pile presented to me those structural pieces which, had they been properly chosen and erected, would have made a fair building").

346. 241 F. 499 (S.D.N.Y. 1917)

347. *Nine Barrels of Butter*, 241 F. at 499 (West Reporter's summary).

to New York Butter Packing, the other a detailed argument that a “retreatment process,” called “ladling,” will remove “most of the impurities.”

The context is obscure. We are not told as to either theory the legal context for the arguments. What legal difference does it make whether title to the butter “passed” to New York Butter Packing Company “before the date of its delivery to the carrier”? Similarly, why, the reader might wonder, does it matter that New York Butter Packing Company is designated as the claimant? Does this mean that it has custody of the butter, and the government is trying to wrest it away? Or does it mean that the government impounded the butter, leaving the company to petition the court for its return?

Of equal unhelpfulness, the opinion that follows is not organized congruently with this roadmap. The analysis of the opinion itself, that part that appears to begin after the phrase “LEARNED HAND, District Judge (after stating the facts as above),” appears to be organized around the points of the claimant, rather than the theories that were just offered as a roadmap. The points—whether they come from a brief, from an oral argument, or from the judge’s imposition of his own order upon them—do not correspond to the two legal theories first offered as a roadmap. Indeed, the first point, while it may correspond to the “passage of title” theory, is completely obscure as Judge Hand makes it:

The first point of the claimant is met and answered by the case of *Hipolite Egg Co. v. United States*, 220 U.S. 45, 31 Sup.Ct. 364, 55 L.Ed. 364, and needs no other discussion. In that case the eggs had been shipped by Clark & Co. to themselves, and were in storage at the time in question. That case was stronger for the claimant than the case at bar.<sup>348</sup>

This has made the reader unwise, rather than wiser. If the first point is indeed about passage of title, how does this *Hipolite Egg Company* case illuminate it—and more importantly, what is the claimant’s argument that it is supposed to refute, how exactly does it refute it, and why does it matter?

The second point, however, seems to go off on a discussion of subject matter jurisdiction—apparently the claimant is arguing that this is not “an article of food,” which appears relevant to the coverage of the unidentified law—this point does not correspond to the early roadmap’s second theory of retreatment by ladling:

The second point is in fact also decided by the same case, which was almost precisely like this in that aspect. *Doubts may arise, where goods are shipped in interstate commerce, which may or may not be articles of food, as their ultimate destination may determine; but this case does not raise them. By no chance can this butter be called anything but an article of food; by no chance can I avoid the conclusion that it was filthy and decomposed in part. As*

348. *Id.* at 500.

*such it came within the terms of the statute*, even though it might be saved and reclaimed by being made clean and palatable. *Questions of that sort arise under section 10*, and under that alone. Under that section I have the power to destroy, sell, or redeliver to the owner under bond. The conditions of redelivery, therefore, become the important question in the case. I may deliver the goods to the owner, upon condition that they ‘ladle’ the butter, or that they otherwise treat it so as to secure the health of the community, in either case subject to a bond.<sup>349</sup>

Of what “statute” does the butter “come within the terms”? Of what terms is Hand speaking? To what does “section 10” refer? The reader is left to do his or her best to deduce the context and events from the circumstances.

Despite the two-theories roadmap, the reader is treated to cognitive dissonance as Hand’s opinion continues on to examine a total of four points. The third point appears to correspond to the second theory – the availability of the process of ladling and how that should affect the outcome (of whatever is really the claim before the court). Hand rejects the suggestion he should allow the butter to be retreated or ladled. Yet Hand springs on the reader here a wholly new point, whose origin (from claimant, from government, or *sua sponte* from the court) is unclear: “There is, however, another and much more radical method of cleansing such butter, known as ‘renovating.’”<sup>350</sup> After describing renovation in some detail, Hand concludes that he will fashion a decree to “allow this butter to be ‘renovated’” and “after” renovation, the government will examine it “and, if it will not pass it, to convince me that it is still filthy or decomposed and shall be destroyed.” Hand describes the process for moving the butter to renovation and inspection, and then raises a fifth point that New York Butter Packaging must post a \$2000 bond to secure its performance as directed by the Court’s order. This is followed by two more brief points—we can call those the sixth and seventh—about what should happen to the butter if an appeal is taken and about which party “will bear the costs under section 10.” We must credit Hand for being so attentive about advance trouble shooting of his order; judges would much better serve justice by taking such care. Yet, the writing of the opinion itself is much less admirable. We reach the end of the opinion, therefore, with a serious lack of congruence between what appeared to be a roadmap, and the opinion itself, and without an explanation of the governing (presumably, federal) statute or the details of the statutory standards for product coverage, product seizure, or imposition of costs.

This opinion also, thus, implicates the Audience Principle—the claimant’s lawyers, identified only as a New York City law firm with no individual attorneys identified, and H. Snowdon Marshall, whom we know from the opinion examined *supra*, in Section III A.3.B, was the United States Attorney for the Southern District of New York. No one else is privy to its contours, and if these offices are busy

349. *Id.*

350. *Id.* at 501.



and have others in it who get this order, they may well have as much trouble understanding it as did we. The order raises many more questions for the reader than it answers; yet it did not have to be this way. With a proper container, describing the governing law and how this transaction comes within it, followed by a roadmap that identifies the discrete arguments and then proceeds to discuss them according to the roadmap, this opinion might have been a model of clarity rather than a model of confusion.<sup>351</sup>

### ***b. Equitable Trust Co. v. Western Pac. Ry. Co.***

In *Equitable Trust Co. v. Western Pac. Ry. Co.*,<sup>352</sup> Hand faced a complex business dispute that appears to boil down to an anticipatory breach of contract. The opinion itself has so much recitative detail and so little cognitively helpful structure that it is rather difficult for the modern reader to deduce what it is about.

The organization of this opinion is notable for its large factual recitation—and a false roadmap. Hand purports to organize this opinion not around chronology, or another, non-chronological yet cognitively pertinent technique. The opening paragraph of the opinion is one of the least inviting in all of legal literature, and reminds us of just how lawyers got such a bad reputation for writing opaque legalese:

This cause comes up upon final hearing on a dependent bill in equity, ancillary to a bill of foreclosure which was itself ancillary to an original bill in foreclosure depending upon diverse citizenship. On the 2d day of March, 1915, the plaintiff filed the original bill of foreclosure in the District Court of the United States for the North-

351. Learned Hand's "boss," Chief Judge Mayer of the Southern District of New York, makes a fascinating contrast with Hand's approach to writing facts. Although academics have been dismissive of Mayer—in their eyes, who can even cast a shade before Hand's assumed brilliance? —Julius Mayer's writing of facts shows that, in an important respect, he had progressed beyond Hand's often-nineteenth century approach. See, e.g., *The San Guglielmo*, 241 F. 969 (S.D.N.Y. 1917) (Mayer, C.J.); *Baltimore & Ohio River Co. v. Western Union*, 241 F. 162 (S.D.N.Y. 1917) (Mayer, C.J.). Typical of those who have underestimated Mayer, Professor Gunther, purporting to describe Hand's views, lumps Mayer with Marton Manton, a judge of rather limited abilities who later became the first federal judge ever impeached (and imprisoned) for accepting bribes from litigants to influence his decision of cases:

At the outset, Hand was nearly as doubtful about Julius M. Mayer, a politically well connected Republican who, like Manton, came to the federal bench after Hand but was promoted ahead of him. But Mayer slowly rose in Hand's estimation; unlike Manton, he took his job seriously and could produce better-than-adequate opinions.

GUNTHER, *supra* note 65, at 144. Gunther neglects to mention that Mayer was the Attorney-General of New York and had argued *Lochner v. New York*, 198 U.S. 45 (1905), before the U.S. Supreme Court. But see Howard Gillman, *De-Lochnerizing Lochner*, 85 B.U. L. Rev. 859, 859 n.1 (2005) (contending that "New York's Attorney General was halfhearted in his defense of the state's maximum hours statute for bakery workers"). Judge Mayor even had the additional distinction of being denounced in 1917 in a New York City rally by Emma Goldman for his sentencing of two convicted anarchists, <http://sunsite.berkeley.edu/Goldman/Writings/Accounts/NYT61517.html> (last visited September 23, 2007), and wrote an early study of juvenile justice from his experience as a New York City juvenile court judge, a real-world posting that one could hardly imagine Hand having the stomach for. See Solomon J. Greene, *Vicious Streets: The Crisis Of The Industrial City And The Invention Of Juvenile Justice*, 15 YALE J.L. & HUMAN. 135, 149 (2003).

352. 244 F. 485 (S.D.N.Y. 1917)

ern District of California against the Western Pacific Company for the foreclosure of a mortgage hereinafter mentioned, and on the 27th day of May, 1915, the ancillary bill of foreclosure was filed in this district for foreclosure of the same mortgage upon assets located in this district. This bill, which was filed on the same day, was to secure an adjudication upon a contract entered into between the defendant in the original bill, the Western Pacific Railway Company, the Rio Grande & Western Railway Company, the Denver & Rio Grande Company, and the plaintiff's predecessor in title. It was superseded by the filing of an amended and supplemental bill verified on the 4th day of January, 1917, and filed January 6, 1917, on which the hearing was had, and to which alone reference need be made.<sup>353</sup>

While Hand may be motivated to preserve details of the case, he has done virtually nothing in such an uninspired opening to make the opinion readable—or inviting—even to the parties. So how is this opinion organized?

A multi-layered organizational technique appears to be Hand's approach, but the layers are dissonant and potentially confusing to the reader. First, he begins with a recounting of the very detailed procedural facts and a discussion of the many, confusing, and overlapping parties to the case.<sup>354</sup> After two pages of dense procedural facts, Hand notes that there was a bench trial and observes, "It will serve no purpose further to detail the pleadings in the cause, but directly to proceed to a statement of the facts, which were either documentary or stipulated."<sup>355</sup> It is at that point that Hand retells the story in painstaking, chronological detail—many names of entities, many dates, many actions—six full reporter pages of footnote-sized type.<sup>356</sup> The wonder of it all is that Hand is a sufficiently skilled writer to give this a patina of novelistic feeling—save but for the inescapable feeling that this novel is as memorable as if it were written about the painstaking stages of an accounting audit by a CPA! To make matters more complicated, he interrupts this welter of details with a lengthy combination of summaries and quotations from something called "Contract B" (goodness knows whether the designation has any significance in and of itself or whether there is a Contract A lurking about and what it provides for).<sup>357</sup> After expending several pages on Contract B, Hand moves to singing the tale of yet another cold and soulless document, which he abruptly introduces:

The mortgage of the Western Pacific Railway Company was of the usual kind, and need not be considered in detail, except as set forth

353. *Id.* at 486–87, (West Reporter's summary).

354. *Id.* at 486–88.

355. *Id.* at 488.

356. *See id.* at 488–94.

357. *Id.*

below. It contains many references to contract B, and was drawn with the same in mind.<sup>358</sup>

Hand is a bit more selective here, but we are not told why or how the selectivity is related to the issues that he will resolve once the long and arduous path to the promised land of the analysis has been trodden. In particular, it is interesting that Hand brings up matter-of-factly, and with no herald of its real significance, a clause, the “sinking fund provision,” which *thirteen* pages later (after the reader’s mind has been buried in a metaphorical avalanche) figures so prominently in the actual disposition of the case:

Article 8 of the mortgage, the sinking fund provision, required the Pacific Company to create a sinking fund by setting apart out of the net income derived by it from the premises \$50,000 a year, commencing with September 1, 1910, and thereafter until all said bonds, principal and interest, should be redeemed or paid.<sup>359</sup>

Hand gives us no context nor any clue as to how the presentation of all these documentary details might be congruent with the analysis he must undertake of the matter. Rather than provide that kind of coherent linkage, Hand instead introduces a third organizing device at the end of the ten-page factual-documentary recitation:

During the foreclosure proceedings the Western Pacific Railroad Company was represented by counsel selected by its officers. Its officers at the time had been chosen through the voting power of the New Denver Company, which then controlled five-sixths of the stock of the Western Pacific; they were in part the same as the officers of the New Denver Company. *One of the issues* in the case was whether the attitude of the New Denver Company throughout the foreclosure proceedings estopped it from complaining of the action of the trustee in that proceeding, and in so far as this matter is relevant to the issues in question it is treated in the opinion below. *It is not necessary at this place to set out any of the facts in detail.*<sup>360</sup>

After then stating that “[t]he positions of the defendant are as follows,” he proceeds to list, in detail, the defendant’s positions, enumerated I through IX.<sup>361</sup> The transition is a bit jarring—why is Hand singling out “one” of the issues for background at the end of the factual recitation—and why has he not mentioned what the other issues are? Why list these nine arguments in detail, but not evaluate them or explain the facts relating to them—since this is a factual recitation?

358. *Id.* at 490.

359. *Id.* at 492; compare *id.* at 507.

360. *Equitable Trust Co.*, 244 F. at 492.

361. *Id.* at 494.

The analysis in Hand's opinion fares no better organizationally. He does not provide a roadmap for the many issues he introduces and takes up, nor does he use any headings or subheadings to guide the reader through what, in total, is a 23-printed-page opinion. A good example of the distress felt by the reader encountering this opinion can be gauged through this opening paragraph of the analysis:

LEARNED HAND, District Judge (after stating the facts as above).

[1] This being a suit based upon the direct contractual obligations of the Denver Companies to the trustee and indeed having been already held to be such in *Re Equitable Trust Co.*, 231 Fed. 571, 145 C.C.A. 457, the first question is to inquire from the contract itself what provisions create any such obligations. Both parties agree that they are sections 4 (b) and 5 of article 2. The Denver Companies already in section 4 (a) had promised to purchase promissory notes of the Pacific Company equal in amount to the yearly deficiency of the Pacific Company's income to meet certain charges upon that income, among which were the installments of interest and the sinking fund. Clearly the provisions of section 4 (a), at least up to the proviso with which section 4 (a) closed, required the tender of the requisite notes before the condition of the obligation was performed. Moreover, section 4 (b), so far as it was couched in the same language as section 4 (a), while it did create an obligation direct to the trustee, required as performance only the same acts as were required by the promise to the Pacific Company, and any condition upon the one obligation must have been equally a condition upon the other. Some point is made touching the change in language between section 4 (a) and section 4 (b), the first being an out and out purchase, while the second is an undertaking to pay 'out of the purchase price.' Were there nothing more in the contract, I should hardly treat this difference in terms as indicating any purpose to compel the Denver Companies to pay to the trustee unconditionally. Without other language it seems to me that the promise to pay 'out of the purchase price' would be conditional upon the same tender as was the promise to the Pacific Company itself. The other language in the contract, however, removes any doubt about the purposes of the parties.<sup>362</sup>

A reader, however, would have to be a computer to retain any of this; and a mental gymnast to flip between the recitation and the opinion (which might have at least provided cross-references). The findings might have been numbered, and he might have added an introduction to permit a non-party reader to skip to the opi-

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362. *Id.* at 495.

nion. To provide a context for what follows, the opinion might also have opened with a summary of the key, relevant facts.<sup>363</sup>

Hand, at some level, felt the cognitive dissonance generated by both the case and his opinion. "So far as I am now aware," he writes in the opinion's last line, "the foregoing disposes of all the questions raised."<sup>364</sup>

Reading Hand's opinions in this case calls to mind the most revealing account of a reader's cognitive struggle to process poorly organized, reader-unfriendly prose that one will find in literature. Just who is the insightful author who has seen and articulated the unrequited challenge of the reader who must struggle with the author's selfish egocentrism of writing for himself rather than his audience? None other than J.K. Rowling, the creator of Harry Potter, Hogwarts, and the Ministry of Magic. She gives voice to the voiceless readers who have struggled for eons with dense, poorly organized professional writing, boldly opening *Harry Potter And The Half-Blood Prince* by describing the hopeless struggle of a harried and distracted reader—the Prime Minister of England—to digest a memo from a subordinate that seems as reader unfriendly as Judge Hand's opinion in *Equitable Trust Co. v. Western Pacific Railway*:

It was nearing midnight and the Prime Minister was sitting alone in his office, reading a long memo that was slipping through his brain without leaving the slightest trace of meaning behind. He was waiting for a call from the President of a far distant country, and between wondering when the wretched man would telephone, and trying to suppress unpleasant memories of what had been a very long, tiring, and difficult week, there was not much space in his head for anything else. The more he attempted to focus on the print on the page before him, the more clearly the Prime Minister could see the gloating face of one of his political opponents . . .

. . .

He turned over the second page of the memo, saw how much longer it went on, and gave it up as a bad job.<sup>365</sup>

Useful points of comparison in dealing with the organization of factual complexities are Judge Sand's and Judge Kearsce's opinions in the *Yonkers* cases, as

363. Headnotes inserted by the West Publishing Company become integral in deciphering an opinion such as this one by Hand—and reveal themselves to be reader's tools as well as research aids. See, e.g., Gil Grantmore, *The Headnote*, 5 GREEN BAG 2d 157 (2006). The headnote indicators throughout an opinion can provide an otherwise absent roadmap for the befuddled reader—exceeding the more mundane view of the functions of a headnote that legal research experts teach us. Compare Randy Foreman, *Digests, Headnotes, And Annotations: The Most Useful Research Tools*, 82 MICH. B.J. Oct. 2003 at 50. ("Headnotes are summaries of legal points of law that are found at the beginning of many published court opinions. West reporters contain them, and are indeed famous because of them. While headnotes are primarily editorial summaries, they also serve to classify cases by legal topic, thus providing users with an aid for finding subject matter.")

364. *Equitable Trust Co.*, 244 F. at 508.

365. J.K. ROWLING, *HARRY POTTER AND THE HALF-BLOOD PRINCE* 1-2 (2005).

noted above; and even more on point is how a master communicator—Justice Robert H. Jackson—dealt with a factual morass, such as the one presented to Hand here, and tamed it with astonishing effectiveness, in *Morissette v. United States*.<sup>366</sup>

The critical issue in *Morissette* was whether criminal intent is an essential element of the crime of knowing conversion of Government property in the sense of whether the defendant must be proven to have had knowledge of the facts that made the conversion wrongful, not merely that he “intentionally exercised dominion over the property.” When one looks at the petition for *certiorari* filed by *Morissette*’s counsel, one is amazed that the case was taken at all. Beginning inauspiciously with, in effect, that the petitioner was born on a rainy night in Michigan, it proceeds for some 19 pages to detail every fact dumped into the trial court record about his life. Justice Jackson, however, drained the factual swamp of this excess, and produced a thematically linked and extremely concise fact statement. It shows the power of organizing facts, for by the end of the fact statement, the reader already is persuaded of Jackson’s conclusion. The factual statement is reproduced below, with my commentary on the organizational techniques placed in brackets:

[*First, Placing A Little Case In A Big Context*:] This would have remained a profoundly insignificant case to all except its immediate parties had it not been so tried and submitted to the jury as to raise questions both fundamental and far-reaching in federal criminal law, for which reason we granted *certiorari*.<sup>367</sup>

[*Setting The Stage For Reversal—Level I, Showing The Insignificance Of What Was Filched From A Desolate Place*] On a large tract of uninhabited and untilled land in a wooded and sparsely populated area of Michigan, the Government established a practice bombing range over which the Air Force dropped simulated bombs at ground targets. These bombs consisted of a metal cylinder about forty inches long and eight inches across, filled with sand and enough black powder to cause a smoke puff by which the strike could be located. At various places about the range signs read ‘Danger-Keep Out-Bombing Range.’ Nevertheless, the range was known as good deer country and was extensively hunted.<sup>368</sup>

[*Further Setting The Stage For Reversal—Dialing Down To Level 2, Showing That The Government Didn’t Really Care About Its “Property”*] Spent bomb casings were cleared from the targets and thrown into piles ‘so that they will be out of the way.’ They were not sacked or piled in any order but were dumped in heaps, some

366. *Morissette v. United States*, 342 U.S. 246 (1952).

367. *Id.* at 247.

368. *Id.*

of which had been accumulating for four years or upwards, were exposed to the weather and rusting away.<sup>369</sup>

[*Now, Dialing Down To The Unassuming And Innocuous Activity Of Petitioner*] Morissette, in December of 1948, went hunting in this area but did not get a deer. He thought to meet expenses of the trip by salvaging some of these casings. He loaded three tons of them on his truck and took them to a nearby farm, where they were flattened by driving a tractor over them. After expending this labor and trucking them to market in Flint, he realized \$84.<sup>370</sup>

[*Turning To A Tactic Used By Cicero*<sup>371</sup> *For His Criminal Clients, Dialing Further Down To The Unassuming And Innocuous Nature Of Petitioner Himself*] Morissette, by occupation, is a fruit stand operator in summer and a trucker and scrap iron collector in winter. An honorably discharged veteran of World War II, he enjoys a good name among his neighbors and has had no blemish on his record more disreputable than a conviction for reckless driving.<sup>372</sup>

[*Bringing The Entire Factual Scenario Into Focus To Show Petitioner's Lack Of Guile, As Well As Of Any Intent Worthy Of Sanction—And The Inaneness Of The Way In Which Federal Law Was Applied To Secure His Conviction*] The loading, crushing and transporting of these casings were all in broad daylight, in full view of passers-by, without the slightest effort at concealment. When an investigation was started, Morissette voluntarily, promptly and candidly told the whole story to the authorities, saying that he had no intention of stealing but thought the property was abandoned, unwanted and considered of no value to the Government. He was indicted, however, on the charge that he 'did unlawfully, wilfully [sic] and knowingly steal and convert' property of the United States of the value of \$84, in violation of 18 U.S.C. § 641, 18 U.S.C.A. § 641, which provides that 'whoever embezzles, steals, purloins, or knowingly converts' government property is punishable by fine and imprisonment. Morissette was convicted and sentenced to imprisonment for two months or to pay a fine of \$200. The Court of Appeals affirmed, one judge dissenting.

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369. *Id.*

370. *Id.*

371. See Cicero, *In Defence Of Sextus Roscius*, in MURDER TRIALS, 25-30 (1975) (Penguin Classics) (Michael Grant, editor) (commenting on Cicero's use of special pleading in defending before Roman tribunals clients accused of capital crimes).

372. *Morissette*, 342 U.S. at 248.

Of course, one might argue, that is all fine and good for appellate writing, where there is a focused issue to which only a limited portion of the factual record is relevant; trial courts must write all the facts, to complete the record and to support the inferences drawn. However, Justice Jackson's brand of synthesis would be even more helpful to a trial judge writing in a factually complex case, as Hand was in *Equitable Trust*. It would organize the facts cognitively around themes related to issues, instead of adopting a default organization (a party's pleading) and then departing from that as well.

**c. Mining the Details Without Context, Stating The Facts Without Congruence: *Eustis Mining Co.***

In volume 239 of the Federal Reporter, we find a case of dizzying factual complexity, *Eustis Mining Co. v. Beer, Sandheimer & Co.*<sup>373</sup>

Learned Hand provided one of his more convoluted factual statements. The facts begin with a lengthy, verbatim recitation of a contract—with next to no context. Uninspiring, fully quoted correspondence follows; turning effective cognitive organization on its head, Hand delays until the final paragraph of facts to provide anything like a container, but it is about as effective as rushing with a glass to the site of a gallon of spilled milk:

To an understanding of the case it is necessary to say that the cinder in question is the end product of a process of burning the plaintiff's ore to extract from it the sulphur. Its amount, therefore, depends in the first instance upon the ore produced, and in the second upon the demand for ore by the sulphur burners. The demand for sulphuric acid was slack during the year 1914, and the first half of 1915; but the demand for munitions caused by the Great War greatly stimulated the business during the second half of the year 1915. The plaintiff tried to make the defendant take all the resulting cinders and thus the dispute arose. In February, 1914, the Virginia Smelting Company mentioned in the contract was substantially owned by the plaintiff, or those who controlled it, and had been let to Beer, Sandheimer & Co. at about the time of the contract itself. Beer, Sandheimer & Co. also controlled large copper ore deposits in the island of Cuba, known as the Cobre mine, and it was these ores which it proposed to use in conjunction with the cinder covered by its contract for the purpose of extracting the copper from the Cobre ore. Other facts are stated in the opinion.<sup>374</sup>

What an effective organizing tool the information in this paragraph might have been, had it only been the basis for an introduction to the facts—and the opinion

373. 239 F. 976 (S.D.N.Y. 1917).

374. *Id.* at 981. (West Reporter's summary).



itself—by first establishing the business context for the case (the cinder-business as a byproduct of ore production) and then establishing the history of the ore market's fluctuations both before and after the commencement of hostilities in "The War To End All Wars." Incredibly, though, not only does Hand save this seeming container for the end of the factual recitation; he then lets the reader in on his despairing little secret that these are not all the facts, nor even necessarily the particularly relevant facts, but rather that there are "[o]ther facts" that "are stated in the opinion"! To complicate comprehension further, Hand introduces a metaphysics of fact-finding that leaves the reader to wonder if what they're getting from him ever really meets the eye—that "every one knows that a judge disposes of much matter which he does not put into his opinion."<sup>375</sup>

Yet the legal issues were themselves quite straightforward. In a nutshell, they all flowed from defendant's efforts to escape its obligations under an output contract to purchase all of the cinder by-product produced in plaintiff's mining of pyrite ore.<sup>376</sup> The overarching issue is whether an unforeseen (and frankly, unforeseeable) increase in output by the plaintiff mining company excused the defendant smelting company from purchasing the entire, greatly increased output of cinders that was "far beyond the estimate."<sup>377</sup> Today, this kind of case would be referred to in legal shorthand as a §2-615 case,<sup>378</sup> the defense of impracticability. Although the Uniform Commercial Code had not yet come into existence, Hand might have oriented us immediately with this contextualizing concept.<sup>379</sup> He might then have explained that the defendant smelting company had two fallback arguments: (1) that the contract didn't mean what the writing says, for which it relied on parole evidence in a written proposal; and (2) that its promise to buy the output in any given year was conditioned on plaintiff mining company providing defendant with an estimate of output in advance, and that condition failed because plaintiff had so seriously underestimated the war-years demand. Had an organizational container such as this been built, Hand could have stated the facts succinctly and in congruence with the logic of his legal analysis. Unfortunately, Hand structured this opinion with neither the context nor congruence principles much in mind.

Even more distressing is that once one actually enters into the opinion, it is clear that only a few facts are really relevant at all. The issue Hand tackles here is whether contractual intent was to be understood subjectively (considering parole evidence) or limited to the language of the documents themselves that constitute the contract—what became called "the objective theory" of contracts. That was still an issue subject to debate in Hand's day, and given the importance of the debate, Hand's contribution to it, and the lynchpin position it played in the resolution of the case, all facts other than those absolutely necessary for the resolution of this

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375. *Id.*

376. *Id.* at 982. Today, output contracts are governed under the UCC's default rule in § 2-306.

377. *Id.* at 976 (West Reporter's summary).

378. UCC § 2-615 (setting forth UCC's impracticability defense).

379. The concept was in an important phase of development at the time Hand wrote this opinion. See, e.g., Randal Owings, *Output Contracts And The Unreasonably Disproportionate Clause Of § 2-306*, 59 MO. L. REV. 1051, 1055-56 & nn. 46-53 (1994).

issue are superfluous, and should not be placed in front of the reader as so many hedge rows to be vaulted. Indeed, Hand acknowledges the marginal role of the facts he'd set out, and emphasizes the law, evoking his memorable "bishops" metaphor—most famously stated in *Hotchkiss v. Nat'l. City Bank of New York*:<sup>380</sup>

This evidence is, I think, irrelevant to the issues, for a reason going to the very nature of a contractual obligation. It is quite true that we commonly speak of a contract as a question of intent, and for most purposes it is a convenient paraphrase, accurate enough, but, strictly speaking, untrue. It makes not the least difference whether a promisor actually intends that meaning which the law will impose upon his words. The whole House of Bishops might satisfy us that he had intended something else, and it would make not a particle of difference in his obligation. That obligation the law attaches to his act of using certain words, provided, of course, the actor be under no disability. The scope of those words will, in the absence of some convention to the contrary, be settled, it is true, by what the law supposes men would generally mean when they used them; but the promisor's conformity to type is not a factor in his obligation. Hence it follows that no declaration of the promisor as to his meaning when he used the words is of the slightest relevancy, however formally competent it may be as an admission. Indeed, if both parties severally declared that their meaning had been other than the natural meaning, and each declaration was similar, it would be irrelevant, saving some mutual agreement between them to that effect. When the court came to assign the meaning to their words, it would disregard such declarations, because they related only to their state of mind when the contract was made, and that has nothing to do with their obligations.<sup>381</sup>

It would have helped immensely to place the extrinsic evidence at issue in the proper factual context up front in the opinion, thereby setting up this discussion of the objective theory of contracts which is really at the heart of Hand's disposition of the case. In fact, the real nature of the problem is that the parties contracted for an unreasonably long-term obligation without building into their contract a methodology by which the contract could be adjusted in light of changes in external commercial and political reality. This is the key lesson of the case, but the weight of a cognitively ponderous and reader-unfriendly opinion buries it.<sup>382</sup>

380. 200 F. 287, 293 (S.D.N.Y. 1911) (observing that "[a] contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and present a known intent" and that the usual meaning of those words control even if "it were proved by twenty bishops that either party . . . intended something else than the usual meaning which the law imposes upon them").

381. *Eustis Mining Co.*, 239 F. at 984-985 (emphasis added).

382. The substantive issues raised here are recurrent ones. See, e.g., Eagan, *The Westinghouse Uranium Contracts: Commercial Impracticability and Related Matters*, 18 AM. BUS. L.J. 281 (1980).

#### IV. CONCLUDING THOUGHTS TO PART I

In this Part I of two articles, I have made a close and exacting examination of representative opinions written by Judge Learned Hand during the midst of his 15-year federal District Court tenure. The tools I have used for that examination are those which Terrell and Armstrong have adapted from cognitive psychology and tailored to the arts of legal writing and editing. Two of the four foundational principles articulated in their work were brought to bear in the examination: the context and the congruence principles. The results show a mixed bag – moments of strength and superior coherence intermixed with more stretches of a somewhat banal, work-a-day approach lacking in the merits of establishing context and achieving congruence. What bringing to bear the segmentation and the audience principles will reveal about Hand as a trial-court opinion writer is the subject of Part II, which appears in Volume 13 of the *Barry Law Review*. There, I will make holistic observations about Hand's trial-court writing, considering the complete picture painted from the perspective of all four foundational principles. I will also discuss how the recent confirmation of the first U.S. Supreme Court Justice in our lifetimes with extensive experience on the U.S. District Court creates a unique opportunity for the Supreme Court to apply the lessons from Learned Hand's strengths and opportunities in trial-court opinion writing to reclaim lost leadership among the world's high courts.

For now, I leave the reader with a number of philosophical, yet eminently practical, matters to mull over in preparation for our journey together in Part II.

What exactly is the role of a judicial opinion? Some might quarrel with my assumption that to be of the highest quality, judicial writing need speak beyond the parochial concerns of the lawyers for the parties to the case—that it must speak to a broad spectrum of readers both within and without the legal profession. Yet this notion has a more venerable pedigree than my preferences, or the points of Terrell and Armstrong. In fact, this expectation goes to the very formational period in American history when publishing any judicial opinion was the exception, not the norm—a time that few of us, educated in the firmly-rooted case-method of the latter 20th century law school, realize were not dominated by the minds of judges, but rather, by the arguments of advocates. Opinion writing and publication were 19<sup>th</sup> century developments, hard-fought and slowly adopted. As the sophistication of the legal consumer increased, the understanding arose that court decisions were written and reported in service of multiple audiences beyond a small circle of local lawyers. “[C]ase reporting,” Denis Duffey has written, “was understood to be directed not only at improving judicial administration and aiding litigants by making the law known, but also at controlling courts by making their decisions subject to public scrutiny.”<sup>383</sup> The writing and reporting of decisions and judgments, noted an early reviewer of Henry Wheaton's pioneering efforts in case reporting, makes their authors “[a]nswerable, not only to parties and the power of the state, but to the

383. Denis P. Duffey, Jr., *Genre And Authority: The Rise Of Case Reporting In The Early United States*, 74 CHI.-KENT L. REV. 263, 266 (1998-2000).

tribunals of judicial and professional opinion. They cannot sin in defiance of the opinion or other judges and the profession of the law . . . .<sup>384</sup>

District Judge Learned Hand hailed from a generation of trial-court writers in which courts moved away from merely rendering judgments to participating in a larger and more widely disseminated dialogue about the law – one serving multiple purposes and increasingly diverse bodies of readers at home and abroad. That this put pressure on even the most well-educated and literary of trial court judges is amply illustrated by Hand's struggles to master the facts and to apply the law contextually and congruently during a typical year of his trial work. His struggles with pad and pen in his Foley Square chambers—exertion buried in the sands of time by the weighty reputation of his own appellate opinions and the profession's undue emphasis on appellate decisions as models of judging—as well as our determination to look at Hand's trial-court opinions afresh open a new vista in American judicature that allows us to have the conversation undertaken both in this article and in my forthcoming Part II.

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384. *Id.* at 266 n.13 (citing Wheaton's Reports, Vol. iii, 8 N. Am. Rev. 62, 67 (1818) (reviewing 3 Henry Wheaton, Reports of Cases Argued and Adjudged in the Supreme Court of the United States (1818))).

