

# REASON AND IMAGINATION

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*The Selected  
Correspondence of  
Learned Hand*

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*Edited by*  
**Constance Jordan**  
PREFACE BY RONALD DWORKIN

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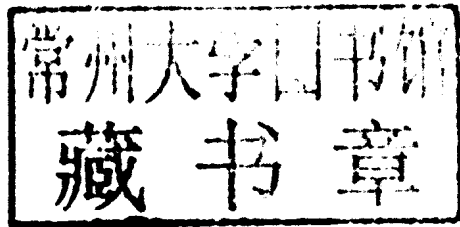
REASON AND IMAGINATION

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## EDITORIAL PRACTICE

The letters in this edition of Judge Learned Hand's correspondence are in holdings in various libraries, principally Special Collections at the Harvard Law Library (the Learned Hand Papers, the Oliver Wendell Holmes, Jr. Papers, the Zechariah Chafee, Jr. Papers, the Charles Wyzanski Papers), the Sterling Library at Yale (the Walter Lippmann Papers, the Henry Stimson Papers), and the Library of Congress (the Theodore Roosevelt Papers). Harvard's holdings, the most extensive, comprise sixty-five thousand items dating from 1892 to 1961, with a few family biographical items dating back to 1846. Hand's correspondence comes to approximately fifty thousand items and falls into three categories: letters to and from acquaintances on business and social matters, letters to close friends, and finally, letters to family members. They include single letters Hand wrote to an individual correspondent, and two or more letters on a particular subject exchanged between Hand and a second correspondent over a brief period of time; the latter I have linked together so that they form a sequence. With a given year, a sequence is represented by a number indicating the year in which the letters were exchanged, followed by its chronological place within that year as determined by the date of Hand's letter. Thus, his letter to Frankfurter, dated February 26, 1911, the second of the sequences in that year, is referenced as: 1911-2 To Frankfurter, February 26. Letters quoted from the Hand Papers are cited simply by Box and Folder numbers; those from the Chafee Papers and the Wyzanski Papers are cited as such with Box and Folder numbers; those from the Holmes Papers are cited as they are represented on microfilm. Letters quoted from the Lippmann Papers and the Stimson Papers are cited as from Sterling, with Box and Folder numbers; and letters from the Roosevelt Papers are cited as from LC, with Reel numbers. All other letters are cited as from particular libraries with full annotation.

Footnotes to each letter within a sequence clarify particular topics, including relevant books and articles; identify persons, events, and institutions mentioned in the letters; and provide cross-references to relevant letters within the correspondence. Footnotes on legal cases mentioned in the letters provide citations to judicial opinions, statutes, and law review articles; where appropriate, I have quoted passages from opinions and articles. I have translated words and sentences in French, Italian, German, and Latin as needed, and have left frequently referenced legal Latin phrases untranslated.

The letters themselves are in various formats. Letters in manuscript are represented in photocopies or microfilms of the original document and show a date of composition, usually reproduce the signature of the sender, and often but not always indicate provenance: because Hand wrote letters on official stationery at home, provenance is not in any case always certain. Letters in typescript (frequently in carbon copy) are represented in photocopies or microfilm of the original document that may or may not feature a letter-head indicating provenance. Letters that indicate no provenance I have left as they are.

Hand wrote longhand drafts for his secretary to type, signing the original typescript and leaving the unsigned carbon copy for his files (tp (typescript without signature)). This practice is exemplified in his 1920 letter to Zechariah Chafee, Jr. with its explanatory note from his secretary, Ms. Bergman, who in this case substitutes her signature for his. In some instances, he signs the carbon copy ( tp (typescript) with signature). These letters sometimes contain notes or emendations to the text in Hand's handwriting. For letters from him that are unsigned, I have supplied a signature in brackets, guessing how he would have signed them based on his familiarity with the correspondent, e.g., [L.H.] for letters such as to Justice Frankfurter, and [Learned Hand] for correspondence such as to President Roosevelt. Many of the correspondents with whom Hand was friendly addressed him as "B"; with very few exceptions, he signed all his letters to them "L.H."

Letters are also represented in typed transcriptions of their originals in manuscript, some copying the signature of the sender (tr/ms with signature (transcription of a manuscript with signature)), others without the signature of the sender (tr/ms (transcription of a manuscript without signature)). Other letters are represented in typed transcriptions of their originals in typescript, some copying the signature of the sender (tr/tp with signature (transcription of a typescript with signature)), others without the signature of the sender (tr/ms (transcription of a manuscript without signature)). As with letters in photocopies of carbon copies that are missing specific documentation, I have guessed how Hand would have signed these transcriptions. The character—manuscript, typescript, transcription—and location of every letter in a particular archive is indicated at its conclusion.

I have reproduced most letters in their entirety; however, I have cut portions of letters (indicated by bracketed ellipses) that comment on topics irrelevant to their principal subjects. I have silently corrected errors in spelling, punctuation, and typing. I have also omitted the address of the correspondent to whom Hand writes that occasionally appears at the conclusion of the letter. For guidance through this correspondence, I have followed the account of Hand's life in Gerald Gunther's biography, editing in full some of the letters he quotes in part and including many others he omits entirely.

I have included several appendices: biographies of individual persons mentioned in the correspondence or associated with events it describes; cases discussed in particular letters with the names and dates of the party to whom the letter is addressed; and a general bibliography.

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## PREFACE

Constance Jordan has done a great service to many disciplines through this collection of the often fascinating and brilliant letters of Judge Learned Hand. Even his casual letters are an important part of jurisprudence, constitutional theory, and the legal history of almost the whole of the twentieth century. She has recreated the remarkable and sadly lost culture of those learned, busy men and women who wrote each other essays of mixed philosophy and gossip in moments stolen from pressing careers.

But the main delight of the letters is in what they tell us about Hand himself. He is now almost unreflectively called the greatest of all American judges, the sculptor of the best of our legal doctrine, a master stylist whose judicial opinions are often poetry. We knew all that from the books that fill a lawyer's shelves. Jordan's collection tells us more. It shows us a relentlessly introspective, constantly self-doubting man of quite amazing erudition who quotes Hamlet with the easy familiarity of self-identification. He is angry with judges and philosophers who suppose themselves in touch with "absolutes"—universal moral truths. But his letters betray him as only a reluctant and part-time skeptic who wanted all his life to find his own ethical absolute—the truth, that is, about the right way to live.

He thought he had found this in a deep and near paradoxical idea: that living well means, as he put it, converting means to ends by taking what might be thought of as instrumental traits—like wisdom, courage, and industry—as freestanding virtues valued for their own sake quite independently of whatever else they might help to produce. That means judging a life by the way it is lived, as we judge a musical or athletic performance—not by what it has produced by way of an independent lasting achievement. It may seem odd that someone so dramatically successful in achievement should subordinate success to craft. But it may have been a comfort to a man approaching old age, conscious of the transient character of any kind of worldly success and with no conventional religious faith, to think that living with integrity is success enough to stand up to mortality. It may also be pertinent that Hand, as he repeatedly admits in these letters, was bitterly disappointed in not having had the one achievement he most wanted: his own seat on the Supreme Court. He said, toward the end, that that disappointment finally evaporated; perhaps his deeply thought-out ethical theory helped.

Legal scholars will undoubtedly find great interest in an altogether different matter: the fascinating correspondence between Hand and his close friend of many years, Supreme Court Justice Felix Frankfurter, about the Supreme Court and race. Hand and Frankfurter had both come passionately to disapprove of judges who used the Constitution to overrule democratic legislative decisions that contradicted their own moral convictions. Frankfurter nevertheless joined the Court's 1954 unanimous decision striking down laws that required schools to be segregated by race. Hand wrote him, charitably,



that he would probably have done the same in Frankfurter's place. The nation would have suffered from a divided opinion on this issue.

But Frankfurter wanted Hand's advice on another, even more delicate, matter: Frankfurter expected that in view of the segregation decision, another case would soon come before the Court testing whether the miscegenation laws of many states, which forbade interracial marriage, should also be overruled. Frankfurter thought not: that would be too great an assault on the conventional morality of large parts of the country. He wanted Hand to tell him that there would be no contradiction in his voting against racial segregation in schools, but not in marriage. Hand wrote a carefully worded reply. If one assumes that the school case was correctly decided, he said, then the marriage case would have to be decided the same way. Frankfurter, unhappy, tried to wriggle out of Hand's logic; reading his attempts in this collection is both amusing and sad. (In 1967, after Frankfurter's retirement, the Court unanimously struck down Virginia's statute making intermarriage a crime.)

In 1958, in his Holmes Lectures at his beloved Harvard Law School, Hand publicly stated his own opinion about race and the Constitution. He conceded that the 1954 segregation decision violated his lifelong convictions about judicial restraint and therefore acknowledged, glumly, that in his opinion the celebrated decision was wrong. Jordan reports in her introduction that this opinion was not popular. He knew it would not be. His integrity in nevertheless publishing it showed how well he lived, by his own measure of what that means.

Ronald Dworkin

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## ACKNOWLEDGMENTS

I have received most generous help over the years that I have worked on *Reason and Imagination*. I wish especially to thank the members of the staff of Special Collections at the Harvard Law Library: Leslie Schoenfeld, David Warrington, Margaret Peachy, Mary Person, and Edwin Moloy, Curator of Modern Manuscripts, who, from 2005 to 2010 answered my questions about letters in the Hand Papers, advised me on copyright matters, and gave me access to the collections I needed to see in order to complete this edition of Hand's correspondence. I am also grateful to Judith Schiff, William Massa, and Susan Gibbons for their assistance in locating letters in Manuscripts and Archives in Sterling Library at Yale and responding to my concerns about copyright; to Jennifer Brathovde and Patrick Kerwin at the Library of Congress for responding to my requests for information; and to Mary Robertson, Curator of Historical Manuscripts, and Sara Hodson, Curator of Modern Manuscripts at the Huntington Library, for their support and encouragement.

I wish also to thank Lisa Lucas, who did much of the basic research on the cases mentioned in the correspondence, and the many friends and family members who provided me with contacts throughout my work on this project and all kinds of Hand memorabilia, including letters, notes, and photographs: Patty Doar, Phyllis Seidel, Frances Morris, Susan Speers, Peter O'Malley, David and Lori Damrosch, and Jonathan Churchill with whom I spent many hours parsing Hand's prose and whose enthusiasm continues to inspire me. I deeply regret that he did not live to see this book in print. I am grateful to Judith Churchill for her support and introductions to persons Hand knew, including Ronald Dworkin, who kindly agreed to write the Preface to this volume, and to Barbara Gunther, who provided me with an initial contact at Oxford University Press. I wish also to thank my colleagues at Claremont Graduate University, Lori Anne Ferrell and Janet Brodie, who encouraged me to pursue this project at its earliest stages.

I have greatly benefited from the energetic efforts of my agents Ike Williams and Katherine Flynn of Kneerim and Williams, the interest of Jessica Picone in Learned Hand's correspondence, and the generous assistance of Michelle Lipinski, Gwen Colvin, Jennifer Gong, Ninell Silberberg, and Cassie Tuttle as this edition has gone through the publication process.

I wish further to thank the following persons and libraries for giving me permission to publish various letters I have included in this edition of Hand's correspondence: Susan Speers for letters from Augustus Hand; Mrs. Louisa Spenser for a letter from Grenville Clark; Alice Henkin for the wartime letters of Louis Henkin; Harvard Law Library for selected letters from the collections of Learned Hand, Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., Charles Wyzanski, and Bernard Berenson; Sterling Library at Yale University for selected letters from the collections of Henry Stimson and Walter Lippmann; the Seeley G. Mudd Manuscript Library at Princeton University for a letter from George F. Kennan; and the Harry Ransom Humanities Research Center at the



University of Texas at Austin for letters from Alfred A. Knopf. I also gratefully acknowledge copies of letters in the Library of Congress from Theodore Roosevelt, Harlan Fiske Stone, Felix Frankfurter, Harry S. Truman, and Warren Austin included in this edition of Hand's correspondence.

I have relied throughout this project on the support of friends and family, especially my sons Wilson, Andrew, and Geoffrey Kidde and my husband Edward Golub, who for five years has listened to me read aloud half a century of Hand's mail. My cousin Patty Doar has a special place in the history of this work, and it is to her that I dedicate it with affection and gratitude.

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## INTRODUCTION

*If any judge is to strike the imagination of his time, I think you should and increasingly do*

—Oliver Wendell Holmes to Learned Hand, March 10, 1931

A man well into middle age, notably successful in his life's work, Hand wondered if he should "try really to write." His question to his friend Philip Littell reflects a certain inquietude, a longing for closure, however particular: "the thought is not really buried until put into words." Once in words, a thought is no longer in the mind, to excite, frustrate, and perhaps even disturb. Hand's question is also understandable: his productions—opinions, articles, reviews—are firmly grounded in law and politics. Would another kind of writing be possible—history, philosophy? Years later, Bernard Berenson wrote Hand to remind him of what he might do: "I would urge you to write."<sup>1</sup>

In another sense, however, whether Hand should "try really to write" is a question answered by the sheer volume of his personal correspondence evident even at an early stage in his life—pages upon pages of letters to friends, notes to acquaintances, orders to businesses and public administrators, responses to queries and compliments from persons he knew and some he did not know. They testify that he did write; more important, as the correspondence published here shows, he was a master of English prose. It is not misguided to characterize his letters as literary. Many are brief essays on current events, often seen through the prism of their historical determinants, and on cultural affairs, often by comparison with those in England or in Europe more generally. They are addressed to the concerns and character of his correspondent, but rarely so limited in their scope or depth of reflection as not to entertain topics of general interest. Collectively, they punctuate those periods in which Hand chose to sequester himself from the business of work and the pleasures of society, and to gather his thoughts in order better to give an account of how he wished to be understood. For the most part, his letters depict him doing what he loved to do—talking (though on paper) to others. These conversations usually begin with a letter to Hand; its writer introduces a topic to which Hand will respond, often with digressions, objections, amplifications drawn from his own vision of life, distinct from yet also part of his view from the bench.

I have organized Hand's correspondence so that it falls into six parts: a Prologue containing letters that date from his graduation from Harvard Law School through his employment with Zabriskie, Burrill & Murray in New York City; four Parts, each comprising letters written successively during ten- to fifteen-year periods through the publication of *The Bill of Rights* in 1958; and finally, an Epilogue containing letters written in the last three years of his life. Accounts of events reflecting Hand's career on the bench are

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1. 1933-2 To Littell, February 12; 1952-1 To Hand from Berenson, January 23.

given perspective by observations on politics and ethics, often made to persons outside the legal field. Henry Stimson's letter congratulating Hand on his appointment to the United States District Court for the Southern District of New York introduces letters describing Hand's activities on behalf of Progressivism, his position on the freedom of speech associated with his decision in *Masses* and amplified in correspondence with Oliver Wendell Holmes, Jr., and his engagement with issues arising in the aftermath of World War I and the League of Nations; those letters make up Part I of the correspondence. Letters on the role of judges and the courts in declaring legislation unconstitutional, the politics and legislation of prohibition, the effects of the economic depression in the United States, and Hand's elevation to the United States Court of Appeals for the Second Circuit are topics addressed in Part II. The legislation of the New Deal, including the treatment of immigrants and the status of aliens, the rise of fascism and the outbreak World War II, the postwar period together with prospects for world government, and the rise of Communism in Eastern Europe are discussed in Part III. Hand's retirement from the Court of Appeals, Senator Joseph McCarthy's work for the House Committee on Un-American Activities, the Supreme Court's decisions on segregation, and Hand's Holmes lectures at the Harvard Law School and their publication are among the events reviewed Part IV. The Epilogue includes letters from the two persons whom Hand had signally regarded with respect and affection, Felix Frankfurter and Walter Lippmann, and also letters to and from Alfred A. Knopf concerning the publication of *The Spirit of Liberty*. Certain topics recur throughout the correspondence: freedom of speech, the interpretation of statutes especially in light of the procedure outlined in Edmund Plowden's report on *Eyston v. Studd* (1574), judicial review, natural law, and the philosophical notion of *mediocritas* or the moral mean.

Hand's correspondents hailed from many quarters. The largest group consisted of men of his own calling, the law; the rest had a place in some field of public life: journalism, government, and education. To each, and especially to those of long standing like Felix Frankfurter, Walter Lippmann, and Bernard Berenson, Hand cultivated a particular literary style, one clearly designed to engage his correspondent on subjects of mutual interest.

To Frankfurter, with whom letters on issues in the law were predominant, Hand was at once a dedicated exponent of the legal philosophy of James Bradley Thayer and an almost raucously witty critic of judicial activism, whether of the *Lochner* era or as exemplified by members of the Warren Court. Hand expected Frankfurter to address his complaints, and Frankfurter would do so, often responding with his own criticisms. Considered as a whole, their correspondence covers a period of just under fifty years and represents an acutely focused commentary on issues in American law, especially the interpretation of the First, Fifth, and Fourteenth Amendments.

Letters to and from Lippmann are of a different character. As a young successful journalist, Lippmann fascinated the judge, who, from the moment of their first acquaintance in 1914, admired the younger man's energy and self-confidence and cherished their friendship in part because it gave him a chance to experience a public character that he himself was neither permitted to reveal professionally nor, more important, able to summon personally. Their correspondence is wide-ranging and speculative, Lippmann suggesting daring measures and Hand supplying prudent counsel. It also radiates a

deeply felt affection, one for the other—at least until Lippmann's second marriage to Helen Byrne Armstrong in 1938. Hand's letters reveal that his subsequent distance from Lippmann followed his reluctance to meet Helen Byrne Armstrong's first husband and his own friend Hamilton Fish Armstrong. This break was eventually mended, but not entirely healed; their last letters, especially Lippmann's to Hand, show some of the old spirit, albeit in a muted way.

Of all Hand's correspondents, Berenson was perhaps least likely to have become intimate. A distinguished connoisseur of Italian Renaissance painting and long an expatriate living in Florence, Berenson exemplified virtues that Hand thought he himself lacked, particularly a temperament keen to enjoy the world's beauty and the knowledge to appreciate its representation in works of art. Suffering, by his own admission, from a rigid conception of art as a kind of engine of ethical uplift, a scripture mandating the moral life, Hand credits Berenson with allowing him actually to like looking at pictures. As they saw each other only on summer trips, and not at all during World War II, their correspondence is sporadic if also on occasion detailed and heartfelt. Hand's first letter to Berenson after the close of hostilities in Italy conveys his "utmost admiration" for Berenson's stoic conduct during his years of hiding from the Nazis in and around Florence.<sup>2</sup>

Three more correspondents figured prominently in Hand's life: Oliver Wendell Holmes, Jr., Theodore Roosevelt, and Herbert Croly, the founder and one of the editors of *The New Republic*. The Hand-Holmes correspondence shows the judge as touchingly reverential to the Justice, the Justice as condescendingly approving of the judge, and in all serves as a powerful illustration of how the audacious Civil War veteran had captured the attention and admiration of his colleagues by a jurisprudence mandating judicial restraint and promoting an Austinian vision of the law as expressing the power of the sovereign over the subject. This correspondence is continued almost in a deputized way in letters to and from Zechariah Chafee, Jr. of Harvard, who in his seminal work on the First Amendment, *Freedom of Speech* (1921), had applauded Hand's views in apparent distinction to those of Holmes, but finally followed the Justice rather than the judge. Hand's understanding of judicial review and the interpretation of statute, as conveyed in his letters to Frankfurter and Charles Wyzanski, extends well beyond what he took from Holmes, embracing, as it does, an appreciation of the imagination's role in the interpretation of the words of the law to the terms of the case to be decided.

Addressing issues relating to the Progressive movement, Hand's letters to Roosevelt reveal how deftly he tried to make Roosevelt embrace the social, economic, and political advantages that the nation could secure if only its citizens could be made to realize them in practice. Roosevelt's responses generally reflect his own political commitments and a self-confidence that Hand worried would be fatal to the cause. Hand communicated much of his dismay to Croly, whose book, *The Promise of American Life* (1910), had launched the Progressive program as a feature of American political thought. The sense of Hand's mostly anonymous contributions to *The New Republic* during this period is also registered in the Hand-Croly correspondence and provides rationales for judicial restraint, especially with respect to legislative reform of industry and the labor market.

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2. 1945-3 To Berenson, February 18.

The genre of the letter is ancient—one could instance Cicero's *Letters to Atticus*—and also modern. Letters from heads of state, the clergy, and persons in all walks of life inform the history of the west and continue to provide cogent evidence of political attitudes to the present day. The constitutive features of the genre remain the same, however: it serves to substitute a literary presence for an actual absence, and it contends with meanings communicated over time and through space, however brief and limited. Even letters received within days of being sent (as were most of Hand's to Frankfurter) need to be understood and interpreted in light of changes that have occurred in the interim;<sup>3</sup> they require historical contextualization. When Hand writes to Frankfurter that "while I look back on my nineteenth century kit of feelings and beliefs, it is not with any complacent satisfaction at the changed times I have lived into,"<sup>4</sup> he recognizes the burden of acknowledging the effects of these changes. Read right through, however, Hand's correspondence has a novelistic dimension. As letters follow in sequence, they can be seen to have created character. Accounts of business become elements of plot, to be tested in light of public and official discourse, and expressions of passion, aroused, thwarted or satisfied, gain the interest and power of words spoken in dramatic dialogue. The reader lives in the present they have fashioned after an imaginative reconstruction of the dynamics that produced the correspondence in the first place.<sup>5</sup>

The conditions in which Hand exchanged letters with his friends and acquaintances are exceptional by comparison to those in which we write today. They wrote and received letters of various lengths, some essays on a particular topic, some no more than casual notes. They expected to keep the letters they received and sent for later reference, and even to circulate the letters of others to their friends and acquaintances. Intimacies are thus made public, like those in a telephone conversation that is wiretapped and overheard by a third party unknown to the speakers. Some of Hand's correspondence openly defies conventions of privacy: a letter he sends or receives comments on and is sent together with a second letter from a third party whose consent has apparently not been sought. That party's communication is therefore effectively intercepted, read by someone to whom he had no intention of writing.<sup>6</sup> Its intention may be merely to inform; it may also convey criticism. Thus Hand comments to Lippmann on British politics by reference to two letters sent to Berenson's friend Nicky Mariano and now passed on to him: "I am enclosing a letter which Nicky got from an Englishman called Robert Trevelyan that B.B. thought you might like to see. Also a letter to the *Guardian* by Clifford Allen who according to B.B. must be the real author of the Trevelyan letter. You will see that both are a

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3. As Janet Gurkin Altman notes, a letter manifests a "temporal polyvalence": an act it describes is performed, then written down; it is dispatched, received, read and perhaps reread. *EPISTOLARITY: APPROACHES TO A FORM* 118 (1982).

4. 1950-2 To Frankfurter, January 20.

5. Robert M. Menuel and Christine L. Compson indicate such invention when they claim that from his correspondence with Holmes, "Frankfurter constructed another Holmes whose decisions invariably supported Frankfurter's reformist predilections." ROBERT M. MENUEL & CHRISTINE L. COMPSON, *HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934*, xxv (1996).

6. The practice is evidently ancient; see THOMAS E. JENKINS, *INTERCEPTED LETTERS: EPISTOLARITY AND NARRATIVE IN GREEK AND ROMAN LITERATURE* (2006).

defense of [Ramsay] MacDonald.”<sup>7</sup> And including in his letter to Hand a letter from Frankfurter—in which Frankfurter states that he is “flabbergasted” at Lippmann’s May 31 editorial in *The New York World* criticizing Holmes’s dissent in the case of Rozika Schwimmer, who was denied citizenship because she was an “uncompromising pacifist”—Lippmann invites Hand to disapprove of Frankfurter’s presumption: “Don’t you think it’s a bit trying?”<sup>8</sup> Agreeing in the matter of style but disagreeing in the matter of substance, Hand replies: “I think it is more than a bit trying, I think it is intolerable. Nobody has a right to address another, even an old friend, in that tone. It is quite likely that he [i.e., Frankfurter in supporting Holmes] is right. I am going to read the opinions with considerable care when they arrive, and I should rather guess that I shall come out that way.”<sup>9</sup> Such letters can also reveal reasons for an event well after its occasion. Having assumed that Frankfurter’s repudiation of Lippmann was linked to Lippmann’s divorce, Hand learns its darker cause long after the fact: Lippmann’s sympathy for Fascist attitudes toward Jews, announced in his columns in the *World* in the 1930s. In his letter to Hand, Frankfurter encloses the letter he wrote to Lippmann seven years earlier: “[W]hen, in your column for May 19, 1933, you described Hitler as ‘the authentic voice of a genuinely civilized people’ [...] something inside of me snapped,”<sup>10</sup> and also Lippmann’s response: “the manner in which you have torn phrases from their context and ignored the historical circumstances in which the article was written, is inexcusable [...] [I]nstead of trying to clear up the misunderstanding at the time, you have waited nearly four years to raise the question. It is now too late to raise it.”<sup>11</sup> For the most part, however, Hand’s letters to and from his friends and acquaintances are both frank and tempered; though Hand is occasionally vitriolic in his criticism of opinion he considers shallow or ignorant, he is ready to listen to it. His modesty is striking; he is hardly ever entirely certain of himself. In time, this modesty comes to include a tolerance for other, though not all, ways of being, and to support a celebration of the enjoyment life offers.

Throughout his correspondence, the figure of Learned Hand the man, a person of many moods and diverse interests, remains in view; it is not easy to pin down or characterize in simple terms. In an early letter to his cousin Augustus Hand, he characterizes himself, rather aptly I think, in the words of the Roman poet and emperor Hadrian as *anima vagula, blandula, qui errat in locis* (a sweet wandering spirit who moves from place to place), and invokes a character that is capricious, moody, and resists a fixed identity.<sup>12</sup> The figure is facetious and self-deprecatory, but it conveys an image of the writer nonetheless, and perhaps especially of the writer at work, stating, revising, restating, and never entirely confident that the resulting work would not need to be done again. Privileging the experience of doubt and delay over certainty and action, Hand’s letters promote the

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7. 1931-3 To Lippmann, September 16.

8. 1929-3 To Hand from Lippmann and note 97, June 6.

9. 1929-3 To Lippmann, June 7.

10. 1943-3 To Hand from Frankfurter, April 27; see therein To Lippmann from Frankfurter, November 28, 1936. (In this Introduction, ellipses in quoted correspondence and articles by Hand are mine.)

11. 1943-3 To Hand from Frankfurter, April 27; see therein To Frankfurter from Lippmann, December 17, 1936.

12. 1924-1 To Augustus Hand, July 27.

practice of tolerance and the classical virtue of *mediocritas*. Surprisingly, perhaps, they also celebrate the anti-utilitarian concept of means as ends: what is valuable is the practice of a virtue, not the goal it realizes. The point goes to Hand's own way of understanding history as the creation and destruction and recreation of successively realized ends, which, owing to their transience really do not qualify as ends. What remains, in history, are the examples of actions and attitudes that have comprised what is memorable in human experience. Hence his frequent reversion to the concept of the ad hoc, what is appropriate in a particular situation but cannot or should not be raised to an absolute or a universal.

Hand's world is thus both built and mobile, deliberately constructed and casually realized, the effect of individual labor that is done and redone over time. It depends on striving to reconcile oppositions that may appear to be irreconcilable; it reflects a sense that what we see as real is actually the outcome of constructions we give our raw experience. He approaches this world with some diffidence. Trying to understand Robert Millikan's physics, Hand writes to Simon Flexner: "Does it not suggest that we may ultimately come to the idea that what we understand by external reality is after all no more than the extremely elaborate patterns which we can impose upon the phenomenal world?"<sup>13</sup> "Is there nothing in our craving for something 'objective'?" Hand asks Wyzanski.<sup>14</sup> Evidently not. "Really this is my credo, so far as I can say to myself that I have any—in our search for 'external' laws of nature we are doing no more than trying to devise successively and progressively intricate conceptual patterns to enable us enough to foretell the course of the flux and deal with it to our purposes. Those patterns, formulas, schemes, call them what you will, are the measure and test of any 'externality' and probably exhaust whatever meaning that may have."<sup>15</sup> Thus he appreciates Berenson's claim that "Landscape," like other renderings of reality, whether objective or subjective, is essentially a "fabricated idea"—fabricated but utterly compelling in its capacity to deliver the experience of great beauty. Hand's account of visits to Berenson's Tuscan villa illustrates his "pleasure" in reading in the raw data of topography a wealth of emotion—desire as well as disappointment: in that countryside particularly "there is written the long history of man with all its tragedy of endless labor and its persistent belief that, in the words of William James, life on any terms, however straitened and painful, is to be accepted as better than non-existence. That and the matchless splendor of the mountains and the whole vast collections of centuries gathered up and open to all to see will never have their equal." And then too, it is a reminder of time's passage: "I regret more than I can say that although every opportunity was open to me, I waited till I was 50 before ever I broke in upon it. True, that first descent from Silva Plana (I wonder if I have remembered the right name) to Como was even then an unforgettable and is a never forgotten experience of what the World did have and what I never availed myself of."<sup>16</sup> Rendered repeatedly in different and sometimes satirical terms, Hand's notion of a constructed reality composed of self-imposed patterns that give meaning to phenomena becomes the basis of a self-knowledge always

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13. 1926-3 To Flexner, December 15.

14. 1945-8 To Wyzanski, December 16.

15. 1945-8 To Wyzanski, January 22, 1946.

16. 1955-3 To Hand from Berenson, August 8; 1952-7 To Berenson, August 5.



conditioned by humor. Returning from a European trip, Hand writes to Philip Littell that on setting out, he dreaded the “prospect of bustle and hotels and porters and the everlasting drip, drip of fees which one can never gauge properly”; he expected to be “jostled and harried and cheated, or [to] think I have been”; he knew that he would have “a haunting sense that I am missing much and am an ass to think about whether I am missing anything.” Once back home, however, a compensatory, indeed a beneficent, plenitude will fill this void: “I shall come back and say that I have had a good time and *it will be true*.”<sup>17</sup> True, that is, as a helpful fiction is true to its generous purpose; true, too, as any fiction that has disclosed its nature as fiction can be true to the reality that has given it voice and substance.

It is my hope that this edition of Hand’s correspondence will give further depth and color to the judge’s portrait already so brilliantly rendered in Gerald Gunther’s biography *Learned Hand: The Man and the Judge* (1994, 2011). Drawing on a host of documents that include correspondence, Gunther’s narrative history describes the causes and effects of the events that shaped Hand’s career. To treat Hand’s correspondence as a self-circumscribed collection of writing as I have done here is to undertake a different though complementary task, less invested in describing the causes and effects of events than in listening to assessments of such events, immediate, privileged, and personal as they inevitably were. And because this correspondence possesses a theatrical and arguably disputative quality, it resists conclusiveness; the questions the letters pose may be answered but often leave more to be asked. To bring to a narrative history evidence supplied by a correspondence is therefore to complicate it, leaving it open to the possibility of counterfactuals and in that way to make it a less perfect history.

Read as a single body of writing, Hand’s letters, punctuated as they are by those of his correspondents, convey a thematic ambiguity, shifting as they do between positions critical and rational on the one hand and others conciliatory and imaginative on the other. His first letter to his cousin Augustus Hand illustrates his reliance on reason as a means to prove a point. He approves abstractly two positions: the “individualism” endorsed by contemporary Democrats and expressed as the politics of “laissez-faire,” and the imperialism rendered as a global politics of “subject dependencies” and exemplified by colonies under the control of the United Kingdom. Yet his approval of “individualism” is qualified when considered in light of American experience: here *reasonable inquiry* reveals that “in a vast multitude of cases the State must and should regulate the conduct of individuals for their own welfare and modify the contractual relations which they assume towards one another.” Similarly, he rules out for the United States the possibility of acquiring “subject dependencies” such as the Philippines in light of the vast abuses and inequities already visited on the peoples over which this country had *de facto* control: “When one considers the plight of the poor Indian, who had at least a better chance of making his woes come home to us than the Filipino will have, and when one considers the Negro, I can’t see how he can have any very sanguine confidence in the beneficent effect of that glorious American liberty of which we talk so much.”<sup>18</sup> Argument of this kind appears

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17. 1929-7 To Littell, July 19.

18. 1898 To Augustus Hand, November 6.

throughout the correspondence; Hand objects, disagrees, demurs, and leaves it to his correspondent to appreciate his point of view.

By contrast, Hand's understanding of the imagination and the work it does is complex. Its most persistent and important reference is to the written word, principally in legal text but also as evidenced in literature generally. It is sketched initially in Hand's version of the English common lawyer Edmund Plowden's instructions on the interpretation of statute: "it is a good way when you peruse a statute, to suppose that the law-maker is present, and that you have asked him the question you want to know touching the equity; then you must give yourself such an answer *as you imagine he would have done, if he had been present*."<sup>19</sup> Contending with Plowden throughout the last half of his correspondence allows Hand to claim an essential role for the imagination in determining how words can find meaning in real situations, how the circumstances surrounding both the enactment of a law and its subsequent applications—necessarily tempered in historical terms, both those that shaped the character of its maker and that of its interpreter—determine the particular significance of the law that the judge is to apply. In "How Far is a Judge Free in Rendering a Decision," an address delivered on the Columbia Broadcasting System in 1933, Hand admits that the "intent" of those who make law is hard to discover: "Strictly speaking, it is impossible to know what they would have said about it [...] All they have done is to write down certain words which they mean to apply *generally* to situations of that kind. To apply these *literally* may either pervert what was plainly their general meaning, or leave undisposed of what there is every reason to suppose they meant to provide for. Thus it is not enough for the judge just to use a dictionary":<sup>20</sup> "he must have the historical capacity to reconstruct the whole setting which evoked the law; the contentions which it resolved; the objects which it sought; the events which led up to it. But all this is only the beginning, for he must possess *the far more exceptional power of divination which can peer into the purpose beyond its expression, and bring to fruition that which lay only in flower*."<sup>21</sup> Such imaginative projection need not—indeed must not—result in making law as a legislature does: while it may seem as if "a judge who is not 'literal' is 'legislating,' if he knows his business that is what he never does."<sup>22</sup> Imaginative projection is not a matter of "intruding one's own solution" on the case, however much this may be a temptation.<sup>23</sup> However difficult this may be in practice, "interpretation" must not become "enactment."<sup>24</sup>

Here, without becoming more explicit, Hand confronts the full force and dramatic effects of the "imagination" at work in interpretive reconstruction. The judicial work that takes place after a literal parsing of the words of the law, statute, or precedent, and before a decision as to how to apply these words to a situation more or less different than the one envisaged by the legislator or judge, is interpretive. The relevant question to ask of such

19. EDMUND PLOWDEN, COMMENTARIES OR REPORTS 467 (1779) (cited in 1951-1 To Frankfurter, January 15 (emphasis added)).

20. 1933-1 To Frankfurter, January 23, note 10 (emphasis added).

21. Thomas Walter Swan, in THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 217 (Irving Dilliard ed., 1960) (emphasis added) [hereinafter THE SPIRIT OF LIBERTY].

22. 1948-3 To Wyzanski, May 22.

23. 1952-5 To Wyzanski, April 13.

24. 1955-5 To Frankfurter, October 1.