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**Symposium: National Conference on Judicial Biography
"Contracted" Biographies and other Obstacles to "Truth"**

COMMENTARY

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Becoming a biographer is like joining a movement. We ¹ share common thrills -- the frisson of archival research, for instance -- as well as common oppressors. Chief among the latter are our colleagues, who not only disparage the task itself but think we take too long doing it.

I have developed a stock response to the questions -- usually well- intended: "How's the biography progressing?" "How long have you been working on it?" Or, "When is the book coming out?"

The answer is: "I do not recall."

It is hard to make a life comprehensible -- most of us do not manage as much for our own days. So, yes, we biographers do take a long time to straighten out the confusion, to make sense of our subject.

As a fellow biographer, I rejoice in the critical and popular success of my colleague's long-awaited biography of Learned Hand,² and I deeply desire a similar reception for all legal biographies. At the same time, I feel a certain jealousy toward a biographer who has, by contract, unlimited and exclusive access to thousands of documents. My subject, Clara Shortridge Foltz, did not make arrangements for the preservation of her papers, though she longed for a biographer, and felt sure that someday she would have one.³ Four days after her death in 1934, the only one of her children to survive her offered all her effects for public auction. Nothing was held back.

When I see the advertisement for the auction in the back pages of an old newspaper, it gives me the same chill I felt when I read: "Frances Hand outlived Learned Hand by

two years. After his death, she would often sit by the fireplace in their apartment, opening beribboned packages of letters from Learned, rereading them, and tossing occasional bundles into the fire." ⁴ To a biographer, the thousands of pages preserved fade in significance when compared to those that were lost. ⁵

Not even an authorized biographer has total access to the person. What the good biographer does have, though, is access through a single person to that individual's world. A special strength of Gunther's book -- one invulnerable to its "contracted" or "authorized" status -- is the light it casts on the cultural history of Learned Hand's time and how that history was reflected in the law. For example, we see Hand, especially as a district court judge, enforcing the Volstead Act, which he abhorred partly because it interfered with the right of the people to be let alone under the Fourth Amendment. Moreover, he disagreed with prohibition as a policy, though he gave up social drinking unless he could be assured that the libation came from a private stock purchased before passage of the act. ⁶

Though there have no doubt been contracts that have compromised the accuracy of a particular biographer's work, Learned Hand does not seem to me an example. Other impediments to truth are far more formidable. One of these is the treachery of memory -- even of the most well-meaning witnesses. People exaggerate their roles, seek to vindicate themselves, speak well of the recently dead, see what they expect. I am almost relieved that there is no one living who knew Clara Foltz well -- and only one who knows her well, me.

This brings me to the real obstacle to truth: the relation between biographer and subject. There is nothing quite like it. James Atlas has written of a mystical bond: "a collaboration between two sensibilities bent on defying the sentence of oblivion imposed on us all." ⁷ The biographer as hero, saving at least one life, is one version of the role. Others, less pleasing but no less prevalent, are biographer as voyeur and biographer as obsessive.

The infatuation of a biographer for his subject can distort interpretation. I love Clara Foltz, and find that "to her virtues I'm very kind" and "to her faults a little blind." ⁸ And of course my desire as a feminist to supply a historical model for today's women lawyers influences me as well. In fact, trying to put the "hag" back into hagiography is a major preoccupation.

Now add to the natural feeling of many biographers (and even those who turn against their subjects remain enthralled with them) the relationship of law clerk to judge, of Gunther to Hand. There is an additional obstacle to truth here: the element of reflected glory. If Learned Hand was more grind than genius, then so may be his biographer. If Clara Foltz was a better self-promoter than a lawyer, I am diminished along with my project.

Moreover, like most judicial biographers, most law clerks need to see the judge as a

very great figure. For an entire year of one's precious youth, this person and his opinion of you, and his opinions generally, are all there is. For some, the clerkship is the beginning of a life-long relationship of mentor and protege.

On one level, Gerry Gunther's book is the extended tribute of a law clerk to his judge (that is the way law clerks talk: "My judge thinks" typically starts a conversation). Reading the book made me think often and with great pleasure of the man I clerked for, the first federal judge to hire a woman law clerk (many years before 1963 when I served), and also the first to hire an African American. His name was Henry W. Edgerton, and his background was a lot like Learned Hand's.

Born in 1888 (sixteen years later than Hand), he came from a WASP patrician background, graduated from what he always called "The Harvard Law School," and in 1937 was appointed to the United States Court of Appeals for the District of Columbia, which became a great court during his tenure. The major disappointment of his professional life was in not moving "up the street," as he put it, to the United States Supreme Court.

Like Learned Hand also, Henry Edgerton was a superb judicial stylist, though his writing was less ornamented (and thus more pleasing to some). Unlike Learned Hand, though, Henry Edgerton did not think the spirit of liberty consisted mainly in being "not too sure that it is right."⁹ Dealing with many of the same issues Hand faced, Judge Edgerton found that liberty required the protection of the weak and the despised. In plain, concise language, he wrote about the civil rights of aliens and communists, the criminally accused, and other outcasts.¹⁰

One of the best examples of both his style and his outlook is in a case decided five years before *Brown v. Board of Education*.¹¹ Judge Edgerton dissented from a decision refusing to integrate the public schools of the District of Columbia.¹² He wrote that "[t]he education required for living in a . . . humane and democratic country and promoting its ideals, cannot be obtained on either side of a fence that separates a more privileged majority and a less privileged minority."¹³

And he concluded:

It is sometimes suggested that due process of law cannot require what law cannot enforce. No such suggestion is relevant here. When United States courts order integration of District of Columbia schools they will be integrated. It has been too long forgotten that the District of Columbia is not a provincial community but the cosmopolitan capital of a nation that professes democracy.¹⁴

Like the best judges today, Judge Edgerton read the briefs and cases himself and listened to his young clerks without ever delegating ultimate responsibility. I adored that old man who taught me to write and to think and who made me see what wins arguments. At the same time, I could list his faults, and describe the depressive, dark side of his nature, but I would not like to do it. I would not do it.

Gerry Gunther hopes he has told the story of "his" judge, "warts and all,"¹⁵ yet what we mostly see of the warts is how easily excised they are -- except, perhaps, when the skillful writer does not observe them himself. For instance, Learned Hand's huge network of friends and intellectual companions was entirely, as far as the book tells us, male, and that shows a personal limitation, maybe a blemish rather than a wart.¹⁶ It's true, of course, that law, especially at its elite levels, was a male enterprise until very recently, and that when women tried to change the scene, they were the constant casualties of discrimination. But many men were helpful to women lawyers and women activists and interested in their cause.¹⁷ Many, many more, including Hand's great hero, Oliver Wendell Holmes, enjoyed the intellectual companionship of women, shown by the fact that they included women friends among their correspondents on the issues of the day.¹⁸

Gunther purports to reveal a wart in Hand's tortured insecurity. Maybe Hand was a little worse than some others, but every great person I have ever known well suffered from similar self-doubt. There are, also, a few work- warts in the story: Hand's decision in the Dennis case¹⁹ -- remarked by most legal reviewers; and his ill-timed attacks on both *Brown v. Board of Education*²⁰ and the Warren Court.²¹ These are honestly described but not emphasized in Gunther's biography.

But what does it matter that there are, really, no grave failings intentionally revealed here? Why should mean secrets, and the ugliest moments of a person's life, be in a biography? One answer might be that it is a person's faults, as much as her virtues, that enrich her humanity; and join her with an immortal stream of lives. Walt Whitman, speaking to generations unborn in "Crossing Brooklyn Ferry," wrote:

It is not upon you alone the dark patches fall,
The dark threw its patches down upon me also,

. . . .

I too knotted the old knot of contrariety,
Blabb'd, blush'd, resented, lied, stole, grudg'd,
Had guile, anger, lust, hot wishes I dared not speak,

. . . .

Lived the same life with the rest, the same old laughing, gnawing, sleeping,

. . . .

The same old role, the role that is what we make it, as great as we like,
Or as small as we like, or both great and small.²²

Perhaps, though, faults and base actions like those on Whitman's list belong in the story only when they explain more than the subject's common humanity. Gary Gilmore's brother exploring authentic evil,²³ or Diane Middlebrook writing about the relationship between Anne Sexton's madness and her poetry are examples.²⁴ Yet when, as in a judicial biography, there is a body of work to explicate, character flaws and personality defects might have some independent explanatory power, to say nothing of making the book more interesting.

Implicitly, Gerry Gunther tells us this was not the case with Learned Hand. Does the failure to critique Hand's character spring from the book's contracted or authorized status? I think not; a better explanation is that Hand led a sort of authorized life.²⁵ He was a quintessential judge: careful and circumspect in his habits and personality. What is important about him, and what Gunther portrays so well, is that he was a man who found his calling. Gunther records how much Hand enjoyed his daily labor even through all the compulsiveness and uncertainty, how he did his own work long after many judges would have stopped reading briefs and started relying on their clerks' memoranda and even their clerks' prose.

The book is a celebration of a life in the law.²⁶ Though such a life can be, as Clara Foltz once said in a despairing moment, "hard, unpoetic and dull," it can also be thrilling and satisfying -- as shown by this book in which Learned Hand lives up to his magnificent name.

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¹. I, too, have joined the movement. See, e.g., Barbara A. Babcock, *Reconstructing the Person: The Case of Clara Shortridge Foltz*, in *Revealing Lives: Autobiography, Biography and Gender* (Susan G. Bell & Marilyn Yalom eds., 1990); Barbara A. Babcock, *Clara Shortridge Foltz: "First Woman,"* 30 *Ariz. L. Rev.* 673 (1988), reprinted with new introduction in 28 *Val. U. L. Rev.* 1231 (1994); Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 *U. Cin. L. Rev.* 1139 (1993); Barbara A. Babcock, *Clara Shortridge Foltz: Constitution-Maker*, 66 *Ind. L.J.* 849 (1991). These pieces provide a copious sample of the books, nineteenth-century newspapers, and personal papers I am using to reconstruct the life of Clara Foltz.

². Gerald Gunther, *Learned Hand: The Man and the Judge* (1994).

³. In an autobiographical column in her monthly magazine, the *New American Woman*, published from 1916-1918, Foltz wrote:
These brief and hastily recorded reminiscences are in no way pretended to be more than book-marks, so to speak. Sometime, it may be that from out the dozen or more scrap books that lumber my study an inquisitive biographer may write the history of the progress of the first woman admitted to practice law on the Pacific Coast. Modesty should hardly prevent me from suggesting that my name must necessarily "go over the top."
Clara S. Foltz, *The Struggles and Triumphs of a Woman Lawyer*, *New Am. Woman*, Mar. 1918, at 38, 38.

⁴. Gunther, *supra* note 2, at 679.

⁵. Or at least that is what I imagine. Gerry Gunther does not speculate on what the bundles (bundles!) might have contained, although the agonized tone of many of Learned's surviving letters to Frances suggest the nature of those she destroyed. For an example of that tone, see, e.g., Gunther, *supra* note 2, at 188 ("But you get precious little out of me, but worries and anxieties about how I was to get along in the world, and a sort of pseudo-obligation to make my mark.").

⁶. See *id.* at 305-06. Hand also hated the Volstead Act because of the endless run of cases it produced. *Id.* at 306. His complaints in this regard have a modern analogue among federal judges whose dockets are loaded down with drug cases.

⁷. James Atlas, *Choosing a Life*, N.Y. Times, Jan. 13, 1991, s7 (Book Review), at 1, 23 (musing on nature of biography). Atlas is at work on a biography of Saul Bellow.

⁸. This quote from Matthew Prior's "An English Padlock," was one Clara Foltz used for many occasions. Here is the quatrain:

Be to her Virtues very kind:

Be to her Faults a little blind:

Let all her Ways be unconfin'd:

And clap your PADLOCK -- on her mind.

Matthew Prior, *An English Padlock* (1707), reprinted in *The Literary Works of Matthew Prior* 227, 229 (H. Bunker Wright & Monroe K. Spears eds., 2d ed. 1971). She often changed its original gender and recommended it as the best way to get along with men.

⁹. Gunther, *supra* note 2, at 549 (quoting Learned Hand, *The Spirit of Liberty* (1944), in *The Spirit of Liberty: Papers and Addresses of Learned Hand* 189, 189-90 (Irving Dillard ed., 3d ed., enlarged 1960) (1952)). This was Hand's famous formulation, first made in a widely attended and extensively reported lecture on May 21, 1944. *Id.* at 190.

¹⁰. See generally *Freedom in the Balance: Opinions of Judge Henry W. Edgerton Relating to Civil Liberties* (Eleanor Bontecou ed., 1960) (collecting Judge Edgerton's opinions on civil liberties).

¹¹. 347 U.S. 483 (1954).

¹². *Carr v. Corning*, 182 F.2d 14, 22 (D.C. Cir. 1950) (Edgerton, J., dissenting).

¹³. *Id.* at 32.

¹⁴. *Id.* at 33.

¹⁵. Gunther, *supra* note 2, at xviii.

¹⁶. When this Commentary was given at the conference, Professor Gunther noted that Frances Hand, Learned Hand's wife, was a woman suffragist and that Learned Hand supported her interest. Nothing about this aspect of their lives appears in the book. As far as the book reveals, for all his interest in public affairs and politics, Hand showed no concern for the struggle of women for the vote and for the opportunity to share in civic life generally.

Along the same lines, I was less impressed with the analysis of Hand as an outsider (and thus assumedly with empathy for outsiders) when I read that he was on the admissions committee of an exclusive club, the Century Association of New York. See *id.* at 408. It was not until 1988, under legal compulsion, that this famous old institution admitted women. See Nadine Brozan, Century Club Tradition Nears Its End, *N.Y. Times*, Nov. 27, 1988, at A40 (reporting on first 20 women proposed for membership at Century Association); Sydney H. Schanberg, Keeping Women Out, *N.Y. Times*, Sept. 18, 1984, at A27 (commenting upon and criticizing exclusivity of men's clubs in New York City). Information on when Jews, other ethnic minorities, or African Americans were admitted to the Century Club does not come readily to hand, but I would assume that while the ban against them may not have been so complete as it was with women, neither were they excluded as a group so totally and for so long. But see Gunther, *supra* note 2, at 115-18 (describing Hand's efforts, early in his career, to obtain membership for Jewish friend in exclusive club in Albany).

¹⁷. Clara Foltz often spoke of all the male lawyers who had helped and advised her in her struggles to join the Bar and establish a practice. Clarence Darrow was close friends with Jane Addams and the other women at Hull House, see e.g., Kevin Tierney, Darrow: A Biography 83 (1979) (discussing Darrow's interest in Addams and happenings at Hull House); Louis Brandeis worked closely with, and promoted the career of, Florence Kelley, see, e.g., Allon Gal, Brandeis of Boston 144 (1980) (discussing Brandeis's work with Kelley and Josephine Goldmark defending nine-hour workday for Ohio women).

¹⁸. Among the women that Holmes regularly corresponded with on intellectual issues were Nina Gray, see G. Edward White, Justice Oliver Wendell Holmes: Law and the Inner Self 243, 245, 251, 301-02, 309-11, 319, 354, 376, 459-61 (1993), Clara Stevens, *id.* at 10, and Alice Stopford Green, see The Essential Holmes 3-4, 22-24, 50, 111-12, 115-16 (Richard A. Posner ed., 1992). Even his letters to Lady Castletown, with whom some posit a romantic involvement, contain many passages about what he was reading and thinking. See White, *supra*, at 231-52.

¹⁹. *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

²⁰. 347 U.S. 483 (1954).

²¹. See Gunther, *supra* note 2, at 664-72 (describing Hand's criticism of Warren Court and Brown).

²². Walt Whitman, *Crossing Brooklyn Ferry*, in *Leaves of Grass* 159, 162-63 (Harold W. Blodgett et al. eds., New York Univ. Press 1965) (1891-92).

²³. See Mikal Gilmore, *Shot in the Heart* (1994) (telling story of life of murderer Gary Gilmore and speculating on source of his violence).

²⁴. See Diane W. Middlebrook, *Anne Sexton: A Biography* (1991) (exploring connection between Anne Sexton's mental disorder and her artistic achievements).

²⁵. Though Gunther speaks of writing about the private man as well as the judge, he does " 'not go from the life to the work, but rather the other way round.' " J.M. Coetzee, *The Artist at High Tide*, N.Y. Rev. Books, Mar. 2, 1995, at 13, 16 (reviewing Joseph Frank, *Dostoevsky: The Miraculous Years, 1865-1871* (1995)) (quoting Joseph Frank, *Dostoevsky: The Seeds of Revolt, 1821-1849*, at xii (1976)). As the other papers in this issue demonstrate, the proper relationship between the judge's life and work was one of the central themes of the conference.

²⁶. One thought that sustains me in writing about the first woman lawyer on the Pacific coast is that life stories are a way to help people think about our profession. For example, among the most enthusiastic consumers of *Learned Hand* were the students in my first year class, who had read it before they came to law school. Another person who found every page absorbing was David Tatel, recently appointed a judge on the United States Court of Appeals for the District of Columbia.