

What the other Hand was doing

Several significant judicial biographies have appeared in the past few years, it would be interesting to speculate about the reasons for this. Perhaps as we continue to engage in what appears to be a national identity crisis the lives of judges, dedicated as they are to explicating the constitutional principles that hold the nation together, have a talismanic affect. It is therefore doubly interesting to find in these biographies of William Brennan and Learned Hand, that the judges themselves have such differing perspectives about the Constitution and its interpretation.

Justice Brennan and Judge Hand (though considered for years to be the "tenth justice," Hand was never elevated to the Supreme Court) are archetypal jurists for the two principal schools of legal thought. Those who advocate for "judicial restraint" are fond of quoting the late Judge Hand's statement that he would find it "irksome to be ruled by a bevy of Platonic Guardians." Alternatively, one would be hard-pressed to find a better example of Guardian-like behavior than the often counter-majoritarian decisions of Justice Brennan.

As the judges differ, so too do their biographers. Kim Eisler, though knowledgeable about legal issues (in 1986 he was appointed to manage the *Legal Times*), is a journalist best known for the book *Shark Tank: Greed, Politics, and the Collapse of Finely Kumble*. Gerald Gunther, on the other hand, is a law professor and author of a very popular textbook on constitutional law. One expects to get from Eisler a very readable popular account and he does not disappoint, A reader need bring little or no knowledge of the Supreme Court to Eisler's book and still gain some understanding of Brennan's influence on American life.

A JUSTICE FOR ALL

William J. Brennan, Jr., and the Decisions that Transformed America
Kim Isaac Eisler Simon and Schuster.
\$22. 303 pp.

LEARNED HAND

The Man and the Judge
Gerald Gunther, with a Foreword by Justice Lewis F. Powell, Jr.
Alfred A. Knopf. \$35. 818 pp.

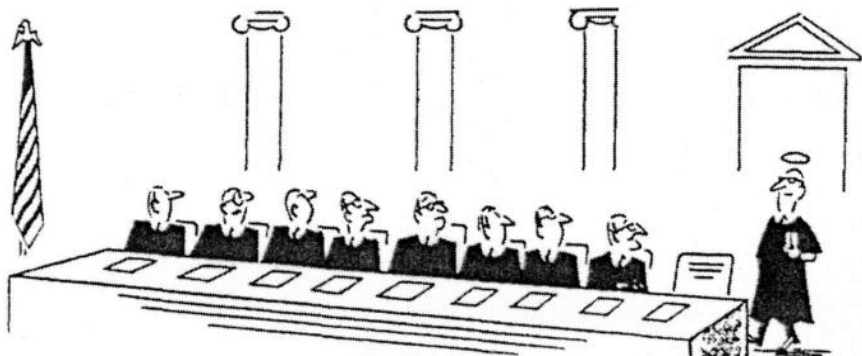
Paul A. Sracic

Unfortunately, this accessibility is sometimes purchased at the cost of analysis. For example, in discussing Justice Brennan's influence on Justice Blackmun's decision in *Roe v. Wade*, Eisler does not even begin to confront the intricate social and legal debates that surround the abortion case. Eisler notes the irony of a Catholic judge instigating a decision establishing abortion rights, yet provides little insight into how Brennan, a devout Catholic, reconciled his religious and legal beliefs. Is it enough to simply mention Brennan's oath of office, or to say that "the Constitution was his Bible"? Such statements reflect a fierce devotion to legal positivism, and hardly conform with Eisler's account of Brennan's fascination with Thomas Aquinas. Eisler

is a champion, not a critic. In this way, the biographer can be seen to mimic Brennan who "reached the decision first, then worked on the best reasoning that could 'capture the court.'" The extension of the legal doctrine of a "right to privacy" to euthanasia and other difficult questions is perhaps the unfortunate result of this method. In a curious way, Eisler's book is guilty of the same cart-before-the-horse approach. In both cases explanations are demanded that are not forthcoming.

In comparison, you come away from Gunther's book feeling as if you have actually met and discussed the issues of the day with the late judge. (Perhaps this is the result of Gunther's personal relationship with Hand. He served as Hand's law-clerk in the early 1950s). Gunther's portrait of Hand in some ways mirrors the judge's own sense of the importance of details. For example, Gunther reminds us that, in more than fifty years as a judge, Learned Hand found only two laws unconstitutional. Now, if Gunther's purpose was simply to applaud Hand's practice of "judicial restraint," there would have been little need to look closely at the question of why it was so important to Hand not to overturn legislation. Gunther, however, spends a good part of this lengthy work answering just this question.

Throughout his life, Hand was a skeptic-



"Ah, they've finally decided on someone..."

tic about all truths, legal or otherwise. Gunther explains. This made Hand extremely cautious, even timid, as he approached his personal affairs. As a judge, this skepticism manifested itself in a self-conscious reluctance to correct the constitutional interpretation of legislative majorities, even when he thought those interpretations lacked merit. He was a self-styled "skeptical liberal" whose modest faith in democracy was aptly put when he said that it was "not as bad as it seems." Yet this skeptical endorsement of democracy was more support than Hand was willing to give to the authority of any group of unelected judges—even (he might say especially) if he were included among them. Whereas Eisler cites with admiration a 1968 speech in which Brennan talks about the potency of the Fourteenth Amendment when used to remove inequities in society. Hand advocated for a constitutional amendment that would spell out exactly what the vague phrases of this amendment mean. In this way, he hoped to limit the discretion available to judges. Gunther underscores that it was Hand's skepticism about individual reason that made him reluctant to allow judges to exercise an absolute veto over the collective wisdom of the masses. Gunther connects Hand's skepticism with the teachings of his philosophy professors at Harvard. William James and George Santayana. These teachers clearly left their mark, encouraging Hand's already "emerging skepticism."

Perhaps one might be able to find the

source of Brennan's contrasting confidence in himself and in judicial absolutes within the teachings of Aquinas, his favorite philosopher. Eisler reports that Justice Brennan often spent nights reading the works of Saint Thomas. He adds that "just as Aquinas had written that knowledge arises from reason, it was reason and fairness, not precedent and law, that would dictate Brennan's jurisprudence." Brennan's self-proclaimed ambition while on the bench was "to provide human dignity to every man, woman, and child on the planet." Interestingly enough, Hand had his own noble aspirations. For example, in a speech that might well have been made by Brennan. Hand claimed that at times I can have the hope that in America time may at length mitigate our fierce individualism, may teach us the knowledge we so sorely lack that each of us must learn to realize himself more in our communal life whose formal expression is and as I believe will continue to be the law. Obviously, the difference between Brennan and Hand lies in their choice of means. Learned Hand did not feel that judges could mandate change. Note the "hope" he expresses that the people will reform themselves. Inheriting a family tradition of Jeffersonianism, Hand maintained a cautious faith in the democratic spirit, and a concomitant reluctance to allow judges to thwart popular decisions. Hand recognized the problem of a tyrannical majority, and was vigilant in protecting freedom of speech, a right that he felt was crucial to the maintenance of democracy

itself. Still, for Hand "the proper response to the flaws of democracy was to develop the habits essential to the survival of the democratic system."

As the title of Eisler's work indicates, Brennan's goals were more ambitious. While the justice's aspirations were admirable, the paradox remains that in the aftermath of the Brennan Court's (since, for Eisler, Brennan is the intellectual leader of the Warren, Burger, and Rehnquist Courts; decisions we became an increasingly violent, crime-ridden people. Although it is silly to hold Justice Brennan and the Supreme Court accountable for every negative (or positive) social "transformation," current conditions are still a legitimate standard to apply to the life and work of a justice whose jurisprudence is self-consciously guided by a desire to reshape society. And when one uses that standard, a striking contradiction between purpose and result would seem evident. Curiously, this problem is not mentioned or anticipated by Eisler.

Taken together, the decisions of these two legal craftsmen span most of the twentieth century. As the century draws to a close, the questions raised by these judges—the limits of democracy, and the role of the judiciary in policing these limits—remain. In the end, these books remind us of the complex nature of our democracy, and the corresponding need for us to lend ways to develop and sustain republican virtue.