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A Model Judicial Biography

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A MODEL JUDICIAL BIOGRAPHY

Gerald Gunther*

JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY. By Pnina Lahav. Berkeley: University of California Press. 1997. Pp. xvii, 314. \$29.95.

I have long been a fan of the *Michigan Law Review's* annual book review issue. I was therefore particularly delighted to read the Introduction to last year's issue, the twentieth anniversary of this ingenious and, I think, unique law review format. Michigan professor Carl Schneider wrote that opening piece.¹ Schneider brought excellent credentials to the writing of his witty and thoughtful essay: he was Editor-in-Chief of the *Law Review* twenty years ago, and thus present at the creation of the book review issue. His thoughtful *Introduction* states, accurately I believe, that the book review issue "is the best read issue of any law review in the country."² He recalls the initial goals of the format and offers persuasive suggestions for future ones. He points out that one of the purposes of the book review issue is to "serve the readers," stating: "[B]ecause there is now so much published, no one can read everything; and because much of it is not good, no one would want to. Book reviews, then, help their readers decide which books to buy, which to read, and which to study."³ I agree with his observation, as I especially do with his comment that "often a serious book goes unreviewed for several years because it was overlooked in the flood" of new books.⁴ The inattention to Pnina Lahav's⁵ biography of Simon Agranat in this country vividly illustrates Schneider's remark about books that have been overlooked.

The silence of American newspapers and periodicals has been stunning. *The New York Review of Books*, *The New York Times*, other major newspapers and magazines of general circulation — none have reviewed the book.⁶ Attention to the book in American

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1. Carl E. Schneider, *The Book Review Issue: An Owner's Guide*, 96 MICH. L. REV. 1363 (1998).

2. *Id.* at 1375.

3. *Id.* at 1368.

4. *Id.* at 1373.

5. Professor of Law, Boston University School of Law.

6. The only serious press evaluations of the book I have found are in foreign newspapers: e.g., enthusiastic reviews in Israel's English language daily, the *Jerusalem Post*, and one in

publications consists only of a favorable review by Sanford Levinson in the *History Book Club Review*⁷ and an extensive, enthusiastic evaluation by Laura Kalman, a knowledgeable and thoughtful biographer herself,⁸ in *Law and Social Inquiry*, the Journal of the American Bar Foundation.⁹ Kalman, who had written a blurb for *Judgment in Jerusalem* — a blurb beginning “[t]his is the best biography I have ever read” — superbly surveys the pitfalls that confront a biographer and evaluates Lahav’s achievement far more thoroughly than I can here. She ends her forty-five-page essay with the statement: “I wish my blurb had been more glowing.”¹⁰

I fully share Kalman’s enthusiasm. I, too, am convinced that Pnina Lahav has written a truly superb book. Her biography of Simon Agranat tells an enormously gripping story of one human being’s life and, at least as important (but rare), depicts her subject with continuous attention to the context of the rich history that affected him and that he affected. As a result, this is not only a portrait of an intriguing individual but also a sophisticated, nuanced depiction of the strains and divisions that have marked the history of Zionism, of Israel, and of Israeli law. Moreover, the book is a great read.

I suspect that most readers of this book review issue have never heard of Simon Agranat and are neither Zionists nor especially interested in the history of Israel. This review is an effort to persuade you not to let these considerations stand as obstacles to your decision to read this book. I speak from personal experience; I, too, had not heard of Agranat and was not steeped in Israeli history. My major field is American constitutional law, not comparative constitutional law. I am a Jew, a refugee from Nazi Germany in the late 1930s. The German Jewish culture of my youth left me no legacy that would turn me into a devoted Zionist. My acquaintance with Israel is less than a decade old — only two visits, one to attend a conference,¹¹ the other to give a lecture¹² — after years of travel to many other foreign countries. Yet I was overwhelmed by

German in the *Frankfurter Allgemeine*. See Allen E. Shapiro, *Jewish Justice in the Promised Land*, *JERUSALEM POST*, Dec. 4, 1997, at 9, and *FRANKFURTER ALLGEMEINE ZEITUNG*, Mar. 20, 1998, at 11.

7. See Sanford Levinson, *HISTORY BOOK CLUB REVIEW* (June 1998).

8. LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* (1990).

9. See Laura Kalman, *The Power of Biography*, 23 *L. & Soc. INQUIRY* 479 (1998).

10. *Id.* at 524.

11. International Conference, *The Nature and Legitimacy of Judicial Review*, The Hebrew University of Jerusalem, December, 1994.

12. Gerald Gunther, *The Art and Craft of Judging in the United States: Reflections of Judge Learned Hand’s Biographer* (Louis D. Brandeis Memorial Lecture, Israel Academy of Sciences and Humanities, Jerusalem) (Jan. 14, 1997).

Lahav's riveting book. My enthusiasm stems mainly from the fact that I am an aficionado of biographies, including but not limited to judicial biographies. In view of my very limited familiarity with Agranat and with Israel, I was stunned by my immediate absorption in Lahav's book.

This review, then, is an effort to bring to the attention of the readers of this year's book review issue a truly worthy and captivating book that richly illuminates many issues of considerable interest to American readers. This effort to shine a spotlight on an egregiously neglected book was spurred by a phone call from an editor on the *Michigan Law Review* asking me to review any or all of the biographies of American judges published recently. I replied that I was familiar with all the biographies, for I had read them in the course of serving as chair of the Supreme Court Historical Society's Committee on the Griswold Prize, an award for the best book relating to the Supreme Court.¹³ Reluctant to review books that I had already discussed at length with my committee colleagues, I suggested to the editor that I instead review the Agranat biography that I had just begun to read, for I was finding it to be the best I had encountered in a very long time. The editor, understandably, had never heard of Agranat or indeed the author; but, perhaps inspired by Carl Schneider's introductory essay last year, agreed to discuss it with his co-editors, who ultimately approved my suggestion.

I am writing this review because I remain convinced, after two readings, that *Judgment in Jerusalem* is indeed a remarkable achievement. My fervor is not diminished by another emotion that surfaced intermittently as I immersed myself in it. I had worked for many years on a biography of Learned Hand,¹⁴ in which I sought to interweave my subject's personal makeup, historical context, and public work, and to present my story in as readable a manner as I could. I am proud of my book, but I must acknowledge that Lahav's book, written with dazzling fluency and grace, nuance and thoughtfulness, is to me the model biography. And to fuel my envy some more, her book on Agranat is less than half the length of mine on Hand! This envy has also driven my interest in writing this essay: my Hand biography attracted a great deal of attention in the American media; I was truly disturbed that Lahav's book has been so widely ignored here and is hence unknown to most legal academics, to lawyers and students, and to fellow fans of biographies.¹⁵

13. Our committee recommended that the award go to Andrew Kaufman for his fine biography of Cardozo: ANDREW L. KAUFMAN, *CARDOZO* (1998).

14. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994) [hereinafter GUNTHER, *LEARNED HAND*].

15. I fear that I have taken so much space with these personal reflections that I may not be able to do justice to the attractions of this book. If my advocacy for this distinguished

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Why then do I find this book so outstanding? In my view, superb biographies are often the product of special connections between biographer and subject. Lahav and Agranat are an especially promising match. Her Prologue notes the irony "in the fact that Agranat and I have traded places. Born in America to Russian immigrant parents, he made his home in Israel. I was born in Tel Aviv to parents from Iran and Egypt and made my home in the United States" (p. xvii). Lahav has special reason to understand what it is to be an immigrant, as Agranat was; both became firmly rooted in two cultures, Israeli and American. Lahav has been a member of the Boston University law faculty for two decades. American constitutional law is her specialty, but her early immersion in Israeli life and culture and her continuing interest in Israeli events assure a surefooted depiction of the strands and strains in Israeli law and politics. Her rootedness in two countries could not alone guarantee a book as good as this one, to be sure. It must be her remarkable perceptiveness and her gifts for engagingly lucid and nuanced prose that were essential to fashioning a book of this admirable quality.

The central theme of Lahav's biography is, of course, the life of her subject, Simon Agranat. But in her skillful hands, that life becomes a revealing prism through which to portray and evaluate the history and culture of the country in which Agranat spent most of his life. His life, unlike that of any other Israeli Justice, began in the United States. Lahav's skillful portrayal of his American years introduces some of the themes that permeate the entire book. Born in Louisville in 1906, the young Agranat spent most of his first twenty-four years in Chicago. It was in Chicago that he developed two pervasive interests: Zionism and the American Progressive movement. To resolve any conflict between Agranat's Americanism and his Zionism, he followed the advice of Louis Brandeis: "To be better Americans we must become better Jews, and to be better Jews we must become better Zionists" (p. 18). In high school, he became Editor-in-Chief of a monthly Zionist magazine. When the American Zionist movement split between those who followed Louis Brandeis and those who followed Chaim Weizmann, Agranat's sympathies clearly lay with Brandeis, but he did not openly challenge his Zionist father's clear devotion to Weizmann. After a brief, failed migration in 1922 to Israel — then Palestine, a British Mandate — Agranat and his family returned to Chicago, where he attended the University of Chicago for his undergraduate and law degrees. His enthusiasm for the Progressive movement

biography leaves any reader in doubt, I strongly urge a reading of Kalman's persuasive evaluation, *supra* note 9.

was greater than ever. Robert M. LaFollette, Agranat's hero even in high school, gained his support in the 1924 presidential campaign, even though Agranat was not yet old enough to vote. After his admission to the Illinois Bar in 1930, Agranat left Chicago for New York to board a ship for Palestine — his parents had migrated there a few months earlier, and Simon followed them.

As I read Lahav's absorbing account of Agranat's American years, I thought — not for the last time — of similarities between Lahav's subject, Simon Agranat, and mine, Learned Hand. Agranat's private reservations about his father's strong support of Zionism à la Weizmann reminded me not only of Hand's struggle for youthful independence from his strong, rigid father but also of his reluctance to yield to family pressures that he go to law school rather than pursue graduate study in philosophy. An even more striking parallel is that Hand, three decades older than Agranat, was also an enthusiastic supporter of the Progressive movement. Indeed, no political cause stirred Hand as much in his life as Teddy Roosevelt's Bull Moose campaign of 1912, the campaign that pushed the Progressives into national prominence. Hand was already a judge by then, yet he felt so strongly about the cause that he served as an adviser to Roosevelt; and a year later, he permitted his name to be entered in the 1913 campaign for the Chief Judgeship of New York State's highest court in order to further Progressive ideals. The younger Agranat, by contrast, did not have occasion to become enchanted by the Progressives until the 1920s, when Robert LaFollette was the presidential candidate. Eastern Teddy Roosevelt Progressives such as Hand were not enthusiastic allies of the Party members from the West, for the Western faithful seemed too populist as well as too lacking in the rigor and hard-headedness that those in the East cherished. At a minimum, then, Agranat and Hand, in their affiliations with the Progressive movement, were lawyers whose values and goals extended well beyond material gains.

Agranat's move to Palestine meant that the young Illinois lawyer had to engage with a chaotic legal system: Ottoman law still provided a good part of the structure; British law slowly left its imprints; and law books, including reports of judicial decisions, were not yet readily available. But Agranat was determined to remain, and his perseverance succeeded: after ten years of private practice, he was named a magistrate in 1940. By the time the State of Israel was formed in 1948 and the new State's judicial posts had to be filled, the experienced Agranat was an attractive choice. Soon, he was appointed as Chief District Judge for Haifa; six months later, in January 1949, he became a Justice of the new nation's Supreme Court.

Agranat served as a Justice of the Israel Supreme Court until 1976; for the last eleven years of this tenure, he was the Chief Justice. His major opinions bear some resemblance to John Marshall's in the early days of American national history, for Agranat too was writing on a clean slate and his approach became a keystone in the development of Israeli law. Many of his rulings dealt with major issues in the growth of the state. I will not try to address most of them; Lahav's informative book and Kalman's extensive review do that job well.

* * *

Similarities in the judicial work of Agranat and Hand had particular resonance for me, in view of my recent work on the Hand biography. In her book, Lahav speaks of Agranat's "uncommonly long" opinions (p. 69), a trait with which Hand is not readily identified. But in explaining Agranat's almost obsessive efforts to tackle every issue in a case, she offers an explanation that applies equally to the modest, self-doubting Hand. She says: "Sensitive to the indeterminacy of legal doctrine, to the two sides of each coin, he needed to persuade himself that his result was justified. He felt compelled to expose the process of legal deliberation in order to feel at peace with the result" (p. 69). Moreover, the similarity to Hand emerges from the substance of Agranat's analysis in some of the cases.

Nowhere is this parallel clearer than in one of the most influential and well-known Agranat opinions, *Kol Ha-am v. Minister of the Interior*.¹⁶ The *Kol Ha-am* case involved the Interior Minister's temporary ban on the publication of two Communist newspapers. The Government's ban was based on a law enacted during the British Mandate period, in 1933, authorizing the Minister to suspend publication "if any matter appearing in a newspaper is, in [his] opinion . . . likely to endanger the public peace."¹⁷ The challenged articles were published in March 1953, at the height of the Cold War. The stimulus was a later discredited story in a leading Israeli newspaper that Israel's Ambassador to Washington, Abba Eban, had expressed his country's readiness to provide 200,000 Israeli troops in the event of a war between the United States and the Soviet Union. The criticism of this report by the Stalinist newspapers asserted, for example, that:

16. *Kol Ha-am v. Minister of Interior*, 1 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 90 (1953) (English translation of 7 P.D. 871) [hereinafter *Kol Ha-am*]. Lahav discusses the case at pp. 107-12 of her book; see also her earlier, fuller discussion in Pnina Lahav, *American Influence on Israel's Jurisprudence of Free Speech*, 9 HASTINGS CONST. L.Q. 21, 27-61 (1981).

17. *Kol Ha-am*, *supra* note 16, at 91-92 (quoting newspaper article originally printed in *KUL HA'AM*, 1953).

[T]he masses in Israel know that the Soviet Union is faithful to the policy of the brotherhood of peoples in peace. . . . If Abba Eban or anyone else wants to go and fight on the side of the American warmongers, let him go, but go alone. The masses want peace and national independence Let us increase our struggle against the anti-national policy of the Ben-Gurion government, which is speculating on the blood of Israel youth.¹⁸

Agranat's *Kol Ha-am* ruling held the Minister's ban illegal.

The episode that this story brought to mind was of course the setting of the *Masses* case, a very important case decided by then-District Judge Learned Hand in 1917,¹⁹ soon after the outbreak of World War I and the enactment of the Espionage Act of 1917. *The Masses*, a pacifist, strongly left-leaning magazine, admired those who refused to enlist in the American armed forces or who opposed the draft. New York City's Postmaster promptly issued an order banning *The Masses* from the mail,²⁰ and *The Masses* went to Hand's court to seek an injunction against the ban. In 1917, no major First Amendment case had ever been before the U.S. Supreme Court, so that Hand had some room to consider the issue without the confinements of precedents. Hand ruled against the Postmaster, thereby risking (and ultimately losing) his possible elevation to the U.S. Court of Appeals for the Second Circuit.²¹

The factual settings of the *Kol Ha-am* and *Masses* cases were obviously quite similar. In each situation, the Government sought to suppress publications that criticized its policies. In the United States, Congress has passed a law that, for the first time in more than a century, sought to inhibit speech critical of the government. Most of the public, caught up in patriotism and enthusiastic support for the ongoing war, no doubt supported the law. In Israel, a British Mandate ordinance, continued by the new State of Israel, provided the basis for the press ban. In neither country could the court ruling have pleased the general public. Yet the judges struck down the prohibitions.

Hand and Agranat were not crusading judges; indeed, they were typically opposed to interventions in policy disputes by overly activist judges. Moreover, Hand was by nature filled with self-doubt and skepticism not only about himself but about exercising

18. *Id.* at 93.

19. *Masses Publ. Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917) *revd.*, 245 F. 102 (2d Cir. 1917).

20. The Espionage Act declared "unmailable" publications made illegal by the Act. The New York Postmaster's ban was ordered by the Postmaster General. See Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 723 (1975); GUNTHER, *LEARNED HAND*, *supra* note 14, at 151-60.

21. A unanimous Court of Appeals promptly overturned Hand's ruling. See *Masses Publ. Co. v. Patten*, 246 F. 24 (2d Cir. 1917).

judicial review as well. He was an early opponent of *Lochner v. New York*²² and the Lochnerizing era to which it gave birth, and those abuses of judicial review made him averse to drastic rulings for the rest of his life.²³ True, Hand was sitting in a country where the courts' power to review the constitutionality of executive or legislative action had been clearly established more than a century earlier. Agranat, on the other hand, was adjudicating in a nation notoriously beset, then and now, by national security concerns. And Israel, unlike the United States, lacked then (and still lacks today) a written constitution. Israel's national legislature, the Knesset, is theoretically supreme, and Agranat had no ready basis to fashion an Israeli counterpart to *Marbury v. Madison*²⁴ out of the clay of parliamentary supremacy.

Yet both judges handed down rulings of lasting significance to freedom of expression and freedom of the press. To me, the most striking parallel between Agranat and Hand is the *way* they reached their decisions. Neither Agranat nor Hand purported to be handing down a constitutional decision. Instead, each ruling was based, on the face of it, on statutory interpretation, the far more traditional task of judges. Yet both Agranat and Hand, through their apparently modest rulings, contributed greatly to the constitutional development of their nations.

The analytical methodology of these two judges warrants fuller elaboration. Hand's *Masses* opinion clearly asserts at the outset that the constitutionality of the congressional legislation was *not* at issue in this case; only the reach of the statute, the law's "meaning," was involved.²⁵ Central to his statutory interpretation was his reliance on the premises of a democratic regime. Thus, he emphasized that, normally, disagreement with government policy falls "within that right to criticise either by temperate reasoning, or by immoderate and indecent invective, which is normally the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority."²⁶ Later in his opinion he stated that:

It would contradict the normal assumption of democratic government that the suppression of hostile criticism does not turn upon the justice of its substance or the decency and propriety of its temper. Assuming that the power to repress such opinion may rest in Congress in [war-time] . . . its exercise is so contrary to the use and wont of our people

22. 198 U.S. 45 (1905).

23. See, e.g., LEARNED HAND, *THE BILL OF RIGHTS 73-74* (1958).

24. 5 U.S. (1 Cranch) 137 (1803).

25. 244 F. at 538.

26. 244 F. at 539.

that only the clearest expression of such power justifies the conclusion that it was intended.²⁷

And so he found no such repressive intent here.

Hand did recognize that there was a limit to critical expressions. Advocating an incitement standard, he stated:

[T]o assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of agitation which in normal times is a safeguard of free government. . . . If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this [law] every political agitation which can be shown to be apt to create a seditious temper is illegal. I am confident that by such language Congress had no such revolutionary purpose in view.²⁸

Agranat reached a result very similar to Hand's in his *Kol Ha-am* opinion, through a route akin to Hand's.²⁹ Like Hand, he articulated the presuppositions of a democratic system and emphasized the importance of freedom of expression. But when Hand articulated "the normal assumption of democratic government,"³⁰ he could implicitly rely on the existence of a written constitution, with its explicit protection of freedom of speech in its First Amendment. Agranat had no such foothold. Instead, he, even more daringly and ingeniously, pointed instead to Israel's Declaration of Independence of 1948 and drew from it the values central to Israel as a democratic as well as Jewish state. Prior to Agranat's ruling, the Israeli Supreme Court had refused to use the Declaration as a legal source. Agranat insisted that, since the Declaration expressed "'the vision of the people and its faith,' we are bound to pay attention to the matters set forth in it, when we come to interpret [the] laws of the State."³¹ In short, *Kol Ha-am*, without openly challenging the supremacy of the legislature, did exactly what Hand had done in *Masses*: read into the *interpretation* of laws the basic presuppositions of a democratic deliberative society. Lahav views the case as a major, first step in making the Israeli judiciary the guardian of individual rights and characterizes this aspect of

27. 244 F. at 540.

28. 244 F. at 540.

29. Although Agranat was familiar with, and often drew upon, the work of American judges and scholars, *see generally* Lahav, *supra* note 16, and indeed sometimes quoted Hand, there is no evidence that he knew of the *Masses* case.

30. *Masses*, 244 F. at 540.

31. *Kol Ha-am*, *supra* note 16, at 105. The Declaration stated, *inter alia*, that the State of Israel "will be based on freedom, justice and peace" and "will guarantee freedom of religion, conscience, language, education and culture." Declaration of the Establishment of the State of Israel, 1 I.S.I. 3, 4 (1948).

Agranat's opinion as "a bold leap" that possessed "radical potential" (p. 111).

It is that strikingly parallel methodology of Agranat and Hand, that reliance on statutory interpretation imbued by a nation's basic norms, that caught my eye. But both *Kol Ha-am* and *Masses* had significant institutional and constitutional consequences as well. Agranat's "bold leap" has provided the basis for his successors' considerably greater activism: several of modern Israel's Supreme Court Justices have found the Declaration's emphasis that the nation is a *democratic* as well as a Jewish state a very useful springboard for judicial interventions that the aging Agranat probably would not have endorsed.³²

Hand, too, did not write his parallel *Masses* opinion as a constitutional one. Yet he clearly hoped — in a rare venture into novel constitutional interpretation — that his incitement test would become the constitutional standard. In the years immediately following the 1917 *Masses* ruling, he frequently tried to spread the message of *Masses*, even though the Second Circuit had promptly repudiated it. In letters to Justice Oliver Wendell Holmes, Jr., and Harvard scholar Zechariah Chafee, Jr., in particular, he persisted in advancing his approach. But in *Schenck v. United States*,³³ the Court adopted the clear and present danger standard, a standard Hand considered an inadequate protection of expression. A few months after *Schenck*, the Holmes dissent in *Abrams v. United States*³⁴ placed greater emphasis on the immediacy of the danger caused by speech and thus put greater bite into clear and present danger. Hand was still not satisfied, but the Supreme Court was not inclined to move to an incitement approach. By the early 1920's,

32. The modern Israeli Supreme Court has impressed me as perhaps the most activist in the world, even though (or perhaps because) it still operates without a complete written constitution. I first formed that impression in 1994, when I attended a conference which included Justices from the German, Canadian, American as well as Israeli Supreme Court. See *supra* note 11. My enhanced attention to the Israeli Supreme Court's work since this first visit to Israel has strengthened my impression. For example, the modern Court has "effectively abolish[ed]" standing requirements and "seriously erod[ed] the 'justiciability' (political question) doctrine." See Aeyal M. Gross, *The Politics of Rights in Israeli Constitutional Law*, in *ISRAEL STUDIES*, vol. 3, no. 2 (Pnina Lahav, Guest Editor, Fall 1998), 80, 85. Moreover, the Israeli Supreme Court has rendered rulings quite startling to American eyes — e.g., ordering the Speaker of the Knesset, Israel's parliament, not to remove a racist bill from the Knesset's agenda, H/C 742, *Kahana v. Speaker of the Knesset*, 39(4) P.D. 85 (1984), and ordering the Prime Minister to remove from his Cabinet a minister who had been indicted on criminal charges, H/C 3094, *Ha-tenua le-maan eichut ha-shilton v. Government of Israel*, 47(5) P.D. 426 (1993). For a recent defense of the Israeli Supreme Court's stance by its Chief Justice, see Aharon Barak, *The Role of the Supreme Court in a Democracy*, in *ISRAEL STUDIES*, *supra*, at 6; for a critical evaluation of the Court's directions, see Aeyal M. Gross, in *ISRAEL STUDIES*, *supra*, at 88-92 (on the role of Israel's Basic Laws of 1992 in enhancing the Israel Supreme Court's powers) and 97-101 (fearing the "Lochnerization" of Israeli constitutional law).

33. 249 U.S. 47 (1919).

34. See *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

Hand concluded that he had “not much hope that my own views as stated in the *Masses* case would ever be recognized as law.”³⁵

But Hand was wrong. Eight years after he died in 1961, the Supreme Court in *Brandenburg v. Ohio*³⁶ adopted Hand’s incitement emphasis as a central ingredient of a more speech-protective interpretation of the First Amendment.³⁷

* * *

Agranat’s greatest legacy to Israeli law was probably unintentional. Recent Chief Justices have led its Supreme Court in turning Israel’s Declaration of Independence into a tool legitimating the judicial crafting of a jurisprudence of rights. As Lahav notes, this modern resurrection of Agranat’s legacy of the 1950s has “pushed its frontiers beyond [his] wildest imagination” (p. 252). Lahav’s book thus provides sophisticated background for an understanding of such contemporary crises as the beleaguered state of the Supreme Court itself. Today’s Chief Justice, the brilliant Aharon Barak, has to operate under military guard and has been labeled “an enemy of the Jews.”³⁸ Even more recently, the religious leader of Israel’s ultra-Orthodox Shas Party denounced the Justices as “wicked . . . empty-headed and wanton evildoers” who are “unclean and desecrate the Sabbath.”³⁹ On February 14, 1999, some 250,000 ultra-Orthodox Jews participated in demonstrations that attacked the “tyranny” of the Supreme Court.⁴⁰ This controversy is in turn a reflection of the ongoing conflict between Orthodox Jews on the one hand and non-Orthodox and secular ones on the other. An observer might well suspect that the greatest threat to the survival of the State of Israel lies in conflicts *among* Jews rather than in

35. Letter from Learned Hand to Walter Nelles (April 20, 1923) (*quoted in* Gunther, *supra* note 20, at 750. Even earlier, Hand had written to Holmes that achieving Supreme Court adoption of the *Masses* approach seemed a hopeless venture: “I bid a long farewell to my little toy ship which set out quite bravely on the shortest voyage ever made.” Letter from Learned Hand to Oliver Wendell Holmes, Jr. (Mar. 1919) *quoted in* Gunther, *supra* note 20, at 739.

More than three decades after *Abrams*, Hand, in his Second Circuit opinion in *Dennis v. United States* 183 F.2d 201 (2d Cir. 1950), *affd.*, 341 U.S. 494 (1951), applied (and appeared to dilute) the clear and present danger test, largely because he felt bound by Supreme Court precedents endorsing the *Schenck-Abrams* standard. See GERALD GUNTHER, CONSTITUTIONAL LAW 1041 n.3 (12th ed. 1991). Even at the time of *Dennis*, however, he privately thought his *Masses* standard was preferable. GUNTHER, LEARNED HAND, *supra* note 14, at 604.

36. 395 U.S. 444 (1969).

37. See KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 53 n.1 (1999).

38. Joel Greenberg, *Major Israeli Writer Leads Protest on Orthodox Rally*, N.Y. TIMES, Jan. 18, 1999, at A13.

39. Rabbi Ovadia Yosef, *quoted in* Thomas L. Friedman, *Synagogue and State*, N.Y. TIMES, Feb. 23, 1999, at A23.

40. *See id.*

disputes between Israelis and Palestinians or other peoples of the Middle East.

* * *

This illustration of the contemporary value of Lahav's fascinating book comprises only a small part of its contents. Her biography touches on virtually every major theme affecting Israel's history, for Agranat's long tenure produced rulings involving all of them: the tensions between catastrophe Zionism and utopian Zionism (e.g., pp. 185-94); the impact of the Holocaust, especially confronted by Agranat in the *Kaszmer* (pp. 121-44) and *Eichmann* cases (pp. 145-62); the "Who Is a Jew?" controversy (pp. 196-220). The continuing interest of Americans in issues such as these — issues explored by Lahav with such rare skill — helps explain the extraordinary richness of this book.

This biography is truly a feast. Permit yourself to be nourished by it!