
GERALD GUNTHER



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GERALD GUNTHER had one of the greatest careers in American constitutional law in the second half of the twentieth century. Many thousands of American lawyers first encountered the complexities of the Constitution in Gunther's widely adopted casebook, which carries the simple title *Constitutional Law* (at the time of his death, it was in its fourteenth edition, then co-authored with Kathleen Sullivan). The casebook places constitutional issues and Supreme Court decisions in a context that is historical and philosophical as well as legal. His scholarly standards were exacting and his overall approach to the law subtle and humanistic, learned, reflective, and skeptical. His casebook gives the reader Gerald Gunther's own sense that the law is a worthy subject matter, to be taken seriously.

On 21 April 1995, Professor Gunther read a paper before the American Philosophical Society, "Judge Learned Hand: The Choices and Satisfactions of a Biographer." Gunther had spent more than twenty years on his exhaustive biography of the most distinguished lower court judge in American history. The book was published, to wide acclaim, in 1994. In the paper he delivered at Philadelphia, Gunther stressed the qualities of Learned Hand: "disinterestedness, non-dogmatic evenhandedness, incessant skeptical probing." These were also Gunther's qualities.

One of Gunther's favorite passages from *Learned Hand* was the remarks the judge made upon receiving an honorary degree from Harvard: "I am thinking of what the scholar imposes upon himself; better, perhaps, of what he may fail to impose upon himself; of those abnegations which are the condition of his preserving the serenity in which alone he can work; I am thinking of an aloofness from burning issues, which is hard for generous and passionate natures, but without which they almost inevitably become advocates, agitators, crusaders, and propagandists. You may take Martin Luther or Erasmus for your model, but you cannot play both roles at once; you may not carry a sword beneath a scholar's gown, . . . Luther cannot be domesticated in a university."

Professor Gunther did not choose Martin Luther for his role model. Rather, availing myself of the metaphorical contrast employed by Judge Hand, I like to think of him as the "Erasmus" of American constitutional law. Erasmus was the greatest scholar of the northern Renaissance, and his primary commitment was to scholarship. Nevertheless, he remained not aloof, as Hand's comparison might suggest, when institutions he cared about, especially, in his case, the church, were abused by those in power.

Professor Gunther's primary commitment, likewise, was to scholarship, although he too did not stand aside when something went wrong

with the institutions about which he cared, most prominently the Constitution, but also the university.

Gerald Gunther was born in Usingen, a small town in Hesse, where his father was a butcher and his family had lived for centuries. He began school the year Hitler came to power, and was immediately singled out by a new Nazi classroom teacher as “Jew-pig” and separated from the other students so as “not to pollute” them. No doubt, once the Nazis went beyond racial slurs, they would have killed Gerald Gunther and his family had they remained in their hometown. When a few days before *Kristallnacht* 1938, the windows of the little Usingen synagogue were smashed, Gunther’s father finally agreed with his son’s urgent desire to leave Germany. Four hours after the incident at the synagogue, the family had departed for the United States.

Fifty years later, when Stanford University (where Gunther had been teaching since 1962) considered and adopted a student conduct rule that responded to use of racial slurs by some students and aimed at curbing “discriminatory harassment” by personal vilification, Gunther argued against the new disciplinary policy:

I am deeply troubled by current efforts—however well-intentioned—to place new limits on freedom of expression at this and other campuses. Such limits are not only incompatible with the mission and meaning of a university; they also send exactly the wrong message from academia to society as a whole. University campuses should exhibit greater, not less freedom of expression than prevails in society at large. . . .

The proper answer to bad speech is usually more and better speech—not new laws, litigation, and repression. . . .

I received my elementary education in a public school in a very small town in Nazi Germany. There I was subjected to vehement anti-Semitic remarks from my teacher, classmates and others. . . . I can assure you that they hurt. More generally, I lived in a country where ideological orthodoxy reigned and where the opportunity for dissent was severely limited.

The lesson I have drawn from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigot’s hateful ideas with all my power, yet at the same time challenging any community’s attempt to suppress hateful ideas by force of law.

Obviously, given my own experience, I do *not* quarrel with the claim that words *can* do harm.

The position Gunther took in this instance reflected the fact that he could never be swayed by momentary utilities to abandon basic constitutional commitments.

After Stuyvesant High School in Brooklyn, Gunther attended Brooklyn College (B.A.), Columbia University (M.A.), and Harvard Law School (J.D.), where he was an editor of the *Harvard Law Review*. He clerked for Judge Learned Hand and for Chief Justice Earl Warren, and, after one year at a New York City law firm, joined the faculty of the Columbia University School of Law in 1956. He (with a few other colleagues) left Columbia in 1962 to move to Stanford University, where he stayed for the remaining forty years of his life.

His honorary degrees and other honors are too many to list. I single out election to the American Academy of Arts and Sciences (1973), the American Law Institute (1974), and the American Philosophical Society (1981). His biography of Learned Hand was awarded the Erwin N. Griswold Triennial Prize of the Supreme Court Historical Society and the Triennial Award of the Order of the Coif (the legal honor society) as the best book relating to law published during the 1994–96 period and as “evidencing creative legal talent of the highest order.”

Gerald Gunther’s influence on American constitutional law is represented by several books and a large number of law review articles. His casebook is considered a “work of jurisprudence” and a reference work of the highest quality. It is very rare indeed for a casebook to make an independent contribution to scholarship. He has done so ever since he took over the seventh edition of what was then Dowling’s casebook. For the thirteenth edition, he invited Kathleen Sullivan to become his co-author. In a kind of “apostolic succession” the book that once was Dowling on constitutional law, then became Gunther (with Dowling), then Gunther, and, in 1997, Gunther (with Sullivan).

An article on the equal protection of the laws that appeared in the *Harvard Law Review* (1972) is the most widely cited legal article published over the last four decades and arguably recast the manner in which scholars think about the appropriate ways to consider claims of discrimination. In the article, Gunther advanced the claim that the so-called “strict scrutiny” to which the Supreme Court subjects “suspect classifications” (such as racial ones) was “strict in theory but fatal in fact,” thus suggesting that, when the Supreme Court employed it, governmental measures never survived. Few law professors have added a *bon mot* to our legal discourse. Gunther succeeded to the extent that many now use the formulation “strict in theory but fatal in fact” without remembering its source. It played a not insubstantial role in the Supreme Court consideration of the University of Michigan affirmative action cases last year when the court, as it were, decided to prove Gunther “wrong” by permitting some form of race- and ethnicity-based affirmative action in student selection.

Apart from being a scholar and humanist in his approach to constitutional law, Gunther was one of the country's great constitutional lawyers in the technical sense of the word. His professionalism remained undiminished until the very end. Gunther and I were co-editors of a series of landmark cases of the United States Supreme Court. Six weeks before his death, he sent me a five-page handwritten memo about the 2002 term in preparation for a meeting we had the following day in his office. We were still talking about the term, at his home, the last time I saw him on 19 July 2002—a few days before cancer took his life.

The communities to which he belonged gratefully acknowledge what Gerald Gunther did for the Constitution, for legal education, for scholarship, for universities, for his colleagues and students throughout the country, for his friends. We so much wish it all had lasted longer than seventy-five years, but—as Gerry himself said to some of us during his last weeks—its ominous beginnings notwithstanding, his was a life of consequence and richly satisfying.

Elected 1981

GERHARD CASPER
President Emeritus and Professor of Law
Stanford University

