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JUSTICES AT HOME: THREE SUPREME COURT MEMOIRS

Laura Krugman Ray*

LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST. By *Sandra Day O'Connor* and *H. Alan Day*. New York: Random House. 2002. Pp. xiv, 318. \$24.95.

THE FORGOTTEN MEMOIR OF JOHN KNOX: A YEAR IN THE LIFE OF A SUPREME COURT CLERK IN FDR'S WASHINGTON. Edited by *Dennis J. Hutchinson* and *David J. Garrow*. Chicago: The University of Chicago Press. 2002. Pp. xxii, 288. \$32.50.

SOME MEMORIES OF A LONG LIFE, 1854-1911. By *Malvina Shanklin Harlan*. New York: The Modern Library. 2002. Pp. xxxiv, 228. \$22.95.

The Supreme Court, once an austere and remote institution, is increasingly the focus of popular attention. The Justices are profiled in the *New York Times Magazine*¹ and the *New Yorker*,² photographed with family members for mass-market books,³ and — on the evening the Court decided *Bush v. Gore*⁴ — televised leaving the courthouse parking garage. In the spring 2002 television season, two hour-long programs were set in the Supreme Court; both were briskly cancelled, but during their brief runs they featured Justices as heroic figures played by prominent actors.⁵ When a former law clerk recently

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1. See, e.g., Jeffrey Rosen, *A Majority of One*, N.Y. TIMES, June 3, 2001, § 6 (Magazine), at 32 (profiling Justice O'Connor); Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES, Oct. 5, 1997, § 6 (Magazine), at 60 (profiling Justice Ginsburg).

2. See, e.g., Nat Hentoff, *Profiles: The Constitutionalist*, NEW YORKER, Mar. 12, 1990, at 45 (profiling Justice Brennan); Jeffrey Rosen, *The Agonizer*, NEW YORKER, Nov. 11, 1996, at 82 (profiling Justice Kennedy).

3. See LISA TUCKER McELROY & COURTNEY O'CONNOR, *MEET MY GRANDMOTHER: SHE'S A SUPREME COURT JUSTICE* (1999). Justice Ginsburg posed with her daughter Jane and discussed their relationship for a book entitled *Mothers and Daughters*. CAROL SALINE & SHARON J. WOHLMUTH, *MOTHERS AND DAUGHTERS* 48-51 (1997).

4. 531 U.S. 98 (2000).

5. In *First Monday*, Joe Mantegna played an idealistic Supreme Court Justice, with James Garner as the wily Chief Justice. Matthew Gilbert, "*First Monday*" is *High Court Drama That's Low on Appeal*, BOSTON GLOBE, Jan. 15, 2002, at E1. The program was

published his account of internecine warfare on the Court during his clerkship year, it was boldly subtitled "The First Eyewitness Account of the Epic Struggles Inside the Supreme Court" and marketed as a rare look at the secret drama unfolding inside the Justices' marble palace.⁶

These various glimpses of the Supreme Court, some a good deal more distorted than others, share a common assumption: public curiosity about the men and women who sit on the Court. The commercial success of *The Brethren*⁷ almost a quarter century ago remains the strongest evidence of that curiosity, which Woodward and Armstrong fed with a series of anecdotes about the personal interactions of the Justices and their distaste for some of their colleagues. Legal scholars with a more professional curiosity have long understood that there are relatively few dramatic revelations occurring behind the scenes. As the Court files of several Justices now available to researchers reveal, much of the interaction among the Justices is conducted through memos rather than conversation, and the points of controversy are usually technical rather than personal. Serious studies of the Court and comprehensive biographies of its Justices consequently tend to offer little in the way of excitement for a general audience and usually fail as well to satisfy its basic curiosity. Despite the increased attention paid to the Court in recent years, the Justices remain largely indistinct — and indistinguishable — figures for most Americans.

Yet the public fascination with the Court continues. A clear sign of that fascination is the publication in the last year of three unusual books that in various ways promise some insight into the Court and its Justices, not just for scholars but for the general reader as well. All three are memoirs, but all three touch on the work of the Court in curiously oblique ways. One, written by a sitting Justice, describes her early life on an isolated ranch. A second, written by a law clerk, describes his year at the Court from the vantage of the Washington apartment where he worked. The third, written by a Justice's spouse, describes the household life that revolves around a usually absent Justice. None of the books makes any sustained effort to penetrate the world of the Court. Instead, each carefully constructs a peripheral

cancelled after four months. Tim Goodman, *CBS Makes Stronger Case for Letterman*, S.F. CHRON., May 16, 2002, at D1. Sally Field played another idealistic Justice in *The Court*, which was cancelled after only three episodes aired. Brian Lowry, *Yesterday, When Cable Seemed So Far Away*, L.A. TIMES, May 4, 2002, part 6, at 1; David Zurawik, *Storyline Recidivism Is Hardly Appealing Even with Sally Field*, BALT. SUN, Mar. 26, 2002, at 1E.

6. EDWARD LAZARUS, *CLOSED CHAMBERS* (1st ed. 1998). The paperback edition retreated from what proved to be a controversial aspect of the book, changing the subtitle to "The Rise, Fall, and Future of the Modern Supreme Court." EDWARD LAZARUS, *CLOSED CHAMBERS* (2d ed. 1999).

7. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN* (1979).

world, a domestic universe where nonlegal concerns dominate daily life. Yet each of these satellite worlds sheds some welcome light, however refracted, on the Court and its Justices.

I. A CHILDHOOD REMEMBERED: LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST

Justice O'Connor's⁸ memoir (coauthored with her brother) of her childhood on a remote cattle ranch on the Arizona-New Mexico border mentions her Court career only in passing. *Lazy B* focuses instead on the rigors and pleasures of growing up in a small, tightly knit community where everyone cooperates in the daily struggle to conduct a profitable business in an often-inhospitable climate. O'Connor devotes only two paragraphs to the subject of her Court appointment, but those paragraphs emphasize the distance between her past as "a ranch girl" (p. 299) and her new judicial post. Her swearing-in ceremony is "a moment suspended in time, bridging the life of the harsh desert terrain of the Lazy B and the fast-paced, sophisticated life in Washington, D.C." (p. 299). The remainder of the book offers the reader an indirect account of building that bridge from her unusual background to her pathbreaking role as the first woman on the Supreme Court.

Memoirs by Supreme Court Justices are rare; memoirs by sitting Supreme Court Justices are rarer still (though the report of Justice Thomas's recent sale of his memoirs may signal a change).⁹ And memoirs that focus on the author's early years rather than on her professional career are the rarest of all. When at the age of eighty-two Justice Black began to write an account of his life, he devoted only two chapters to his childhood before confiding that "[i]t is hard for me to remember when I did not want to be a lawyer."¹⁰ The rest of the unfinished work concentrates on that ambition as it details the progress of his legal career. Earl Warren allotted only one chapter of his memoir to his boyhood, and much of that consists of sociological and political observations about Bakersfield, California.¹¹ The only Justice before O'Connor to write at length about his childhood is William O. Douglas, who published an early memoir of growing up in

8. Associate Justice, United States Supreme Court.

9. The publisher Harper-Collins has reportedly agreed to pay Justice Thomas an advance of \$1.5 million for memoirs that will cover his life from his childhood in Pin Point, Georgia, through his professional career, ending with his swearing-in at the Supreme Court. David D. Kirkpatrick & Linda Greenhouse, *Memoir Deal Reported for Justice Thomas*, N.Y. TIMES, Jan. 10, 2003, at A20.

10. Hugo L. Black, *The Memoirs of Hugo L. Black*, in MR. JUSTICE AND MRS. BLACK: THE MEMOIRS OF HUGO L. BLACK AND ELIZABETH BLACK 15 (1986) [hereinafter MR. JUSTICE AND MRS. BLACK].

11. See EARL WARREN, THE MEMOIRS OF EARL WARREN 9-32 (1977).

the Pacific Northwest, *Of Men and Mountains*,¹² before refashioning some of the same material in the first volume of his autobiography, *Go East, Young Man*.¹³ *Of Men and Mountains* is the expression of a romantic sensibility; it recounts Douglas's engagement with nature in the Cascade Mountains, not simply as youthful adventure but as the potent source of his adult self.¹⁴ Although O'Connor, like Douglas, describes a childhood spent in direct contact with the natural world, she does not share his romantic perspective. In her memoir, the lessons learned from the severe landscape of the Lazy B are external rather than internal, moral rather than emotional, practical rather than intuitive.

O'Connor's memoir is framed in terms of these lessons learned, and the principal lesson of the Lazy B's expanse of high desert is the insignificance of the individual. The epigraph to the preface, quoted from Wallace Stegner, establishes this central theme: "[T]here is something about exposure to that big country that not only tells an individual how small he is, but steadily tells him *who* he is" (p. vii). It is, in O'Connor's words, "no country for sissies" (p. viii), and survival requires a set of unromantic qualities: "planning, patience, skill, and endurance" (p. 10). A profitable year for the ranch depends on two factors: water and a decent market for cattle, both beyond the control of even the most prudent and skilled rancher. Those who commit themselves to making a living in this unaccommodating landscape, as O'Connor's family did for over a century, need a stoic streak as well, the capacity to accept the prospect that their best efforts may prove insufficient to overcome the formidable natural and economic forces that govern their lives. This is not the training ground for bold, self-sufficient leaders, but rather for professionals interested in working within defined boundaries.

O'Connor's role model is her father, DA Day, a tough and disciplined patriarch who keeps his ranch afloat and out of debt against difficult odds. DA runs the Lazy B with autocratic assurance, imposing the same unyielding demands for diligence and competence on his ranch hands and his children. Although O'Connor describes him with unflinching affection and respect, her anecdotes at times have a less positive effect on the reader. When she volunteers to paint the screen door, her father supervises her work and offers advice on improving the job. At the end of the day he asks only whether she has put away her materials, and O'Connor seems satisfied with his limited response: "And that was all the thanks I received, but somehow I knew DA

12. WILLIAM O. DOUGLAS, *OF MEN AND MOUNTAINS* (1962).

13. WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS* (1974).

14. For an analysis of Douglas's autobiographical writings, see Laura Krugman Ray, *Autobiography and Opinion: The Romantic Jurisprudence of Justice William O. Douglas*, 60 U. PITT. L. REV. 707 (1999).

thought the job was done properly, and that was what counted” (p. 34). That insistence on doing it right takes on a chillier tone when O’Connor is late delivering lunch to her father and the ranch hands because of a flat tire. Although it takes impressive strength and ingenuity to change the tire herself, she receives no appreciation for her efforts: “I had expected a word of praise for changing the tire. But, to the contrary, I realized that only one thing was expected: an on-time lunch. No excuses accepted” (p. 243). These lessons from DA are reinforced by the lessons O’Connor learns from the cowboys who form part of the ranch community. From one she learns “the contentment of doing the best you can with what you have” (p. 59), from another “that there were no excuses, only results” (p. 65), from a third, the example of “honesty and high work standards” (p. 79). The common refrain is a high standard of performance, unsoftened by any allowance for human frailty.

That unyielding standard carries as well an undertone of emotional remoteness that borders on cruelty, and at times O’Connor labors to soften the impact of the stories she tells. She quotes from a letter written by her father to her mother shortly after her birth in which he admits that he “cannot say that I feel any great parental love for Sandra yet’ ” (p. 95), but two paragraphs later she announces that “[a]s the first child, I was always the darling of my daddy’s eye” (p. 96). When she brings her prospective husband to the ranch for the first time, DA subjects him to an initiation of sorts by forcing him to eat “mountain oysters” (p. 285) — testicles of a castrated calf cooked in the branding fire on a piece of baling wire. O’Connor’s observation is drier than usual — “Welcome to the Lazy B, I thought. There is nothing like a gracious introduction to ranch life” (p. 285) — but she moves on briskly to describe the visit as successful without speculating on her father’s possible ambivalence or hostility. The physical quality of ranch life discourages psychological analysis and sentimental response. People measure one another by their conduct, just as they rely on that conduct for their shared survival, and O’Connor’s account of family life follows the local custom by refusing to explore the hidden emotional lives of her characters.

Although O’Connor emphasizes the formative power of the Lazy B, in fact her separation from the ranch began in childhood. From her earliest years she attended school in El Paso, returning to the ranch for vacations, and she left for Stanford University at sixteen. Inhabiting two different worlds from a young age, she experienced the differences between the austere culture of ranch life and the softer contours of urban life. As a child she felt uncomfortable in the elegant homes of her El Paso school friends, a problem she solved by bringing those friends to the ranch for holiday visits. The Lazy B remained the center of her world, the touchstone of her value system. Returning to the ranch with her family from their home in Phoenix, she found it

“a never-changing anchor in a world of uncertainties” (p. 298), the territorial locus which defined her values:

The value system we learned was simple and unsophisticated and the product of necessity. What counted was competence and the ability to do whatever was required to maintain the ranch operation in good working order — the livestock, the equipment, the buildings, wells, fences, and vehicles. Verbal skills were less important than the ability to know and understand how things work in the physical world. Personal qualities of honesty, dependability, competence, and good humor were valued most. (p. 315)

The implicit contrast between ranch values and Washington values is striking. O'Connor as Justice now inhabits a rarefied world in which verbal and intellectual skills outrank the simpler virtues of physical competence and hard work, a world in which results are often less prized than the jurisprudential pathways that lead to them. How, then, has her childhood on the Lazy B prepared her for a legal career? What insight, in other words, does her memoir provide about Justice O'Connor?

It tells us, initially, that she is a westerner, at home in a setting that deflates the human tendency toward self-importance, which in turn explains why she is unlikely to indulge in the introspective reveries of Justice Kennedy or the sharp-tongued attacks of Justice Scalia. As a practical Justice more interested in outcomes than in legal theories, O'Connor is also unlikely to develop elaborate doctrinal initiatives, often choosing instead to provide the fifth vote for a result she favors together with a succinct concurring opinion. The streak of independence fostered by her upbringing has prepared her to take on the role of swing Justice, preferring to go her own way rather than to maintain durable ideological alliances. As DA's daughter she is a hard worker, a reliable colleague, and a dutiful citizen of the Court, a role illustrated as well by the exercise classes she leads for women staffers as by her professional activities. O'Connor the memoirist is not inclined to offer her reader moments of intimate self-revelation. What she offers instead is a straightforward account of the values and customs of the Lazy B, leaving to the reader the task of tracing the impact of those values on her professional self.

II. A JUSTICE OBSERVED: THE FORGOTTEN MEMOIR OF JOHN KNOX: A YEAR IN THE LIFE OF A SUPREME COURT LAW CLERK IN FDR'S WASHINGTON

If *Lazy B* is something of a tease, withholding from the reader the psychological revelations so common in the recent flood of autobiographical writing, *The Forgotten Memoir of John Knox* aims to give the reader a revelation of another sort, a keyhole look at the least likeable of Supreme Court Justices, James McReynolds. Knox worked

as law clerk (a position then called “secretary”) to McReynolds in the Court’s historic 1936 Term, when the conservative Justices opposed to New Deal legislation lost their majority control in what has been called the constitutional revolution of 1937.¹⁵ McReynolds was an unyielding member of the conservative bloc, but he was also an unpleasant person and a difficult employer. Both a racist and an anti-Semite, McReynolds was still using the term “darkies” publicly in the 1930s (p. 51) and regularly insulting his Jewish colleagues, Justices Brandeis and Cardozo, by, among other gestures, refusing to sit next to Brandeis for the Court’s official photograph (p. xix). Knox began his clerkship year exhilarated by his position, and he kept a diary intended to record the majesty of the Court from his insider’s perspective. Instead, the memoir based on that diary records a young man’s progressive disillusionment with the Justice he serves.

Knox was an early practitioner of a now familiar genre, the clerk’s account of a year spent with a Supreme Court Justice. These accounts are invariably appreciative recollections, often published on the occasion of a Justice’s retirement or death, and written with affectionate respect. Although not all clerkships are successful, unhappy clerks do not make a practice of exposing their complaints about their Justices to public scrutiny. Knox has not written a typical memoir in part because Knox was by no means a typical law clerk of his era. Unlike the young men handpicked by Felix Frankfurter from the top rank of Harvard Law School graduates to work for Justices Brandeis and Cardozo (p. 5), Knox was a student of ordinary ability who wangled his way into his job through his correspondence with Justice Van Devanter, an ally of McReynolds (pp. xv, 6-7). A celebrity hunter from a young age, Knox had earlier managed to extract an invitation to visit Justice Holmes (pp. 150-51) and was drawn to the Court with a groupie’s determination. Knox was also, however, unaware of McReynolds’s reputation for abrasiveness and for instant dismissal of a clerk who failed to meet his exacting demands. When McReynolds’s Court messenger, Harry Parker, warns him that he will be fired if McReynolds ever finds him absent from work, Knox assumes that Parker is “exaggerating just to see how I would react” (p. 13). Parker’s prediction eventually comes to pass, and Knox is fired thirteen days before the end of his clerkship year for the offense of studying for the bar exam while McReynolds is out of town (pp. 250-52). By that point, Knox has lost any semblance of respect for his Justice, and the memoir records in painful detail this downward trajectory.

Knox differed from the law clerk memoirists who followed him in another important respect. For over half a century, Justices and their clerks have worked together in chambers located in the Supreme

15. See generally WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 213-36 (1995).

Court building. When Knox went to Washington, the new Court building had recently opened, but only two Justices had chosen to abandon the practice of working at home for their new chambers. Asked by McReynolds whether he prefers to work at the Justice's apartment or at the courthouse, Knox opts for the apartment, a decision he immediately regrets but is unable to change. Instead of a year spent observing the other Justices and enjoying the fellowship of their clerks, Knox spends his time in the isolated world of the McReynolds apartment. His only companions are Parker, who serves as McReynolds's general factotum, and Mary Diggs, his maid. Parker and Diggs are black, and McReynolds cautions his clerk against becoming too familiar with them. Despite that warning, Knox comes to rely on Parker's advice in avoiding collisions with McReynolds; Parker manages his boss skillfully, though he remains subject to McReynolds's sometimes brutal demands — when McReynolds goes duckhunting, Parker goes along to retrieve ducks from the icy waters. Together, Parker, Diggs, and Knox form an alliance that helps them to withstand McReynolds's petty cruelties. When McReynolds refuses to allow Parker and Diggs to listen to a broadcast of Edward VIII's abdication speech on the apartment's radio, Knox ascribes it to "sheer unadulterated cussedness" (p. 153) and the pleasure of asserting power over those in his employ. They in turn assert a power of their own, using code names — McReynolds is "Pussywillow" — so that they can talk freely about their employer. Knox's finest moment comes when, invited to eat lunch in the kitchen with Parker and Diggs, he rejects the separate table they have set for him and insists on joining them for the meal.

Knox's moment of fellowship with Parker and Diggs stands in sharp contrast to his chilly relations with McReynolds who, not coincidentally, never invites his clerk to eat with him, even when requiring him to work late. Knox describes himself as first "attracted to the Justice and then repelled" (p. 69), impressed by McReynolds's immaculate dress and formal manners but increasingly dismayed by his aloof and impenetrable personality. Attempting to establish some connection, Knox asks McReynolds what advice he would give a young lawyer. After pondering the question overnight, the Justice offers three suggestions: make contacts, marry, and never wear a red tie (pp. 72-73). McReynolds's most serious offenses, however, go well beyond his cool demeanor and superficial responses. As a Justice he is more interested in making sure his clerk works for his pay than in assigning useful research tasks. Knox is thrilled when McReynolds, leaving town for the weekend, asks him to draft an opinion. On his return, McReynolds makes no mention of the draft, the product of long hours of hard work, except to deposit it gently in his wastebasket after observing to his clerk that "'[w]e will now start writing the opinion as it should be written!'" (p. 136). Knox records this act of

calculated cruelty as the final blow to his diminishing respect for his Justice: "I experienced a terrible sinking feeling in the pit of my stomach— as if something had just died that I had once very much believed in" (p. 136).

Although his clerkship covers one of the Court's most eventful terms, Knox offers the reader very little of the insider's perspective on President Roosevelt's Court-packing plan and the Court's sudden validation of New Deal legislation. The problem for Knox as author is that McReynolds remains virtually silent on these subjects, never confiding in his clerk or discussing with him the battles raging both inside and outside the Court. What Knox can offer is his picture of McReynolds, bitter and unyielding conservative though he is, as a reluctant and perfunctory opinion writer. McReynolds takes precisely twenty-five minutes to dictate the first draft of an opinion to Knox, who concludes, perhaps with the arrogance of youth, that "scores of members of the 1936 class at the Harvard Law School could have produced a better opinion" (p. 142). McReynolds's greatest test comes when he is assigned to write for the four dissenters in a crucial case, *NLRB v. Jones & Laughlin Steel Corp.*,¹⁶ where the Court has upheld the National Labor Relations Act. Knox presents him as "considerably disgruntled" (p. 189) by the prospect of the work ahead, and even with the assistance of his three colleagues the Justice moves "like a dinosaur" (p. 189) through the opinion, which takes weeks to complete and holds up the release of the long-awaited case. The most illuminating moment in the defeat of the conservatives comes not during the opinion-writing process but when Knox smells smoke and realizes that McReynolds is burning the hostile mail that comes to the apartment each day from angry citizens.

Knox's clerkship year also ends in ashes with his dismissal less than two weeks before the end of his tenure. Although he acknowledges his own misconduct, Knox is struck most forcefully by the Justice's demeanor in compelling him to choose between his position and the imminent bar exam. In place of anger there is only indifference: "McReynolds was as impersonal as if he were merely ordering a second cup of coffee for breakfast" (p. 252). The casual dismissal underscores the lack of any personal connection between the Justice and the clerk who has worked in his apartment for ten months. So, in a different way, does their final meeting, when Knox returns a year later to visit Parker and is persuaded to speak to the Justice. McReynolds greets him "as if he had never seen me before in all his life" (p. 261), with the formal politeness of a complete stranger. It is scarcely surprising that Knox declines to visit McReynolds in his last illness eight years later, assuming that his former employer would not

16. 301 U.S. 1 (1937).

welcome the intrusion and would prefer to die, as he did, alone. Throughout his memoir Knox has struggled to find a suitable metaphor for McReynolds, who is variously described as a matador preparing for battle (p. 93), a gloomy Caesar (p. 96), and a sphinx (p. 233). Finally, Knox settles on the simpler metaphor of a man behind a wall (p. 261), unable despite his occasional attempts to communicate with anyone. Knox gives up the effort to understand his time with his former employer and ends the account of their final meeting on a note of resigned bafflement: "How strange it all seemed!" (p. 261).

Knox's memoir, like O'Connor's, gives us an oblique perspective on a Supreme Court Justice. Where O'Connor leaves it to the reader to draw the lines of connection between her childhood and her professional self, Knox provides a shadowy portrait of McReynolds playing his judicial role. The bulk of the memoir and its principal interest, however, reside in its extraordinary personal portrait of McReynolds the man. Knox, the creator of that portrait, is admittedly not exactly a neutral observer. As the afterword by the editors Dennis J. Hutchinson¹⁷ and David J. Garrow¹⁸ makes clear, the clerkship turned out to be the pinnacle of a legal career that suffered a number of setbacks before ending ignominiously. Looking back on his Washington year, Knox remains understandably resentful of McReynolds's lack of sympathy with his clerk's predicament, however self-inflicted. Yet Knox doesn't write with anger or bitterness. He records McReynolds's occasional moments of good humor, including his unexpected warmth toward a young mother and her baby, and at times expresses admiration for the seventy-four-year-old Justice's vigor. Such moments add credibility to Knox's account of an otherwise cold and unappealing figure.

The question raised though never squarely addressed by the memoir is the relationship of McReynolds's personal qualities to his performance on the Court. Is Knox taking advantage of his vantage point in the Justice's apartment to expose the private weaknesses of a public figure who has treated him shabbily? Is this simply gossip of a higher sort or a legitimate stab at an informal biography? In other words, should students of the Court be interested in what Knox has to tell us? The answer to the last question is surely yes. Although the memoir may reveal as much about its author as about its subject, it nonetheless provides a rare account of the way a Justice managed his staff of law clerk and messenger as he performed his official duties from an outpost of the Court. The memoir also suggests links between

17. William Rainey Harper Professor in the College and senior lecturer in law, University of Chicago.

18. Presidential Distinguished Professor, Emory University School of Law.

McReynolds's personal qualities and his judicial attitudes. A rigid and isolated figure, he found it difficult to view the world from any perspective other than his own and equally difficult to relinquish absolute control of his circumstances. These traits translated to strong prejudices, a remarkable lack of consideration in dealing with his staff, and problems in coordinating his work with his colleagues, even his conservative allies, at a critical moment in the Court's history. More broadly, McReynolds was by temperament the least likely Justice to accept the new jurisprudential approach that two moderate members of the Court, Chief Justice Hughes and Justice Roberts, embraced emphatically in 1937. For McReynolds, Roberts's abrupt shift to accept the New Deal program of strong federal-regulatory authority was an inexplicable betrayal of immutable principles. The individual Knox describes — inflexible in his habits, more demanding of others than of himself, capable of extending sympathy only to those beyond his immediate sphere — was hardly the Justice to question his own jurisprudential attitude, even in the face of a national crisis.

III. A DISSENT COMPLETED: SOME MEMORIES OF A LONG LIFE, 1854-1911

Malvina Shanklin Harlan's memoir of her marriage to Justice John Marshall Harlan offers another personal perspective on a member of the Court, this time that of a loving and reverential wife. The title of Malvina Harlan's book suggests the extent of her absorption in her husband's life — the dates run from their formal introduction to her husband's death, though she survived him by five years. Yet the memoir rarely records the world of the Court, from which Malvina remains consistently aloof, or even mentions the substance of her husband's work. In this respect it is markedly different from a comparable work, the diaries of Hugo Black's second wife, Elizabeth Black, published fifteen years after the Justice's 1971 death.¹⁹ Elizabeth Black came to the Court as Black's secretary in 1956 and married the widowed Justice a year later. She retained strong ties to other Court employees, including Black's law clerks, and frequently attended oral argument. Since her husband often discussed with her the cases he was working on, at times even dictating opinions to her, Elizabeth records the substance of Black's views and his work habits with great specificity. In contrast, Malvina Harlan seems content to view her husband's professional life from a distance, accepting without question her separate Court world of customary Monday afternoon "at home" receptions held by the Justices' wives. Harlan appears in her memoirs as a playful family man, a pillar of his church, a much-honored public

19. Elizabeth Black, *From the Diaries of Elizabeth Black*, in MR. JUSTICE AND MRS. BLACK, *supra* note 10, at 87.

figure, but — with a single exception — not as a working member of the Court.

The first page of Malvina Harlan's memoir epitomizes her admiring but limited perspective. As a fifteen-year-old, she "peep[s] through a narrow crack of the almost closed window-shutters" (p. 1) of her Indiana home and sees an unfamiliar young man passing by. Sixty-one years later, "she can still see him as he looked that day — his magnificent figure, his head erect, his broad shoulders well thrown back — walking as if the whole world belonged to him" (p. 1). To Malvina, Harlan is both "A Prince of the Blood" (p. 2) and "Young Lochinvar" (p. 5), a romantic figure who marries her and transports her to his family home in Frankfort, Kentucky. That move from Indiana to Kentucky is also a move from a family with abolitionist leanings to a family of slaveowners, a journey that might have undermined Malvina's admiration for her new husband. The potential gap between them is, however, bridged by advice from her mother that Malvina embraces: " 'You love this man well enough to marry him. Remember, now, that *his* home is *YOUR* home; *his* people, *YOUR* people; *his* interests, [*YOUR*] interests — you must have *no other*' " (p. 9). From this point on, Malvina ceases to suggest any matters on which she disagrees with her husband. Her account of the Harlan household slaves is affectionate, if condescending, and she is at some pains to make clear their kind and generous treatment at the hands of her new family.

One of the most dramatic incidents of the memoir combines the themes of Harlan as romantic hero with the benign face of slavery. When one of the Harlan family's slaves falls asleep and sets her clothing on fire with a candle, Harlan, assisted by his parents, attempts to extinguish her clothes and suffers severe burns to his hands and arms. Malvina calls her husband "a hero in his suffering" (p. 24) as he waits for medical attention until the girl, who later dies, is treated first. Malvina finds the girl's funeral "most touching" (p. 25), though she presents it as an alien ritual with improvised prayers that would, on a less solemn occasion, "have been amusing to a white person" (p. 25). Harlan suffers convulsions as a result of his injuries, and when his doctor is too candid in telling the patient about his condition, Malvina reacts with fierce protectiveness, silencing the doctor and announcing that "[a]t the moment I could have torn him limb from limb" (p. 27). The episode demonstrates Malvina's complete absorption of her mother's advice; she has accepted the culture of slavery as part of her husband's world, just as she has become both his admirer and his protector.

Malvina continues to play these complementary roles throughout their married life in matters both trivial and serious. When Harlan surprises her with a fashionable bonnet that is unfortunately lined with an unflattering color, she discreetly changes the lining and allows her

husband to collect the praise for choosing so well. In retrospect Malvina is perfectly aware of her well-intended manipulation: "That was fifty years before Barrie wrote his *What Every Woman Knows*, but, young as I was, I knew enough of Men's amiable weaknesses to say nothing, and I let my young lawyer-milliner think that the bonnet was *all* his choice" (p. 34). On a more significant occasion at the start of the Civil War, when Harlan is torn between his duty to enlist in the Union army and his responsibility toward his wife and children, Malvina again finds a way to spare her husband any discomfort. Knowing that he would enlist except for his concern for his family, she eases his choice:

I knew what his spirit was, and that to feel himself a shirker in the hour of his country's need would make him most unhappy. Therefore, summoning all the courage I could muster, I said, "You must do as you would do if you had neither wife nor children. I could not stand between you and your duty to the country and be happy." (p. 58)

Both as romantic hero and as man of conscience, Harlan remains in need of protection from his own best instincts, and Malvina offers that protection at whatever cost to herself.

The same protective spirit informs the memoir's only episode that deals directly with Harlan's role on the Court. Harlan, a student of history, has acquired at the Court the inkstand used by Chief Justice Taney to write his opinion in the notorious *Dred Scott* case.²⁰ When Harlan describes the inkstand to a senator's wife who is related to Taney and she tells him that she would like to own it, Harlan's "chivalric" (p. 108) attitude prompts him to offer it as a gift. Knowing that her husband values the inkstand for its history, Malvina determines to prevent the gift by the simple expedient of hiding it and pretending ignorance when he searches for it. Several months later, she finds her husband "in a quagmire of logic, precedent, and law" (p. 110) as he struggles to write his solitary dissent in the *Civil Rights Cases*,²¹ where the rest of the Court had found that the Civil Rights Act of 1875 could not constitutionally prohibit discrimination in public accommodations. Malvina determines to help her husband by unearthing the inkstand, placing it squarely on his writing table, and telling him that "I have put a bit of inspiration on your study table" (p. 111). The inkstand serves its inspirational purpose, and "his pen fairly flew on that day" (p. 111) as Harlan completes the celebrated dissent after forgiving his wife for her well-meaning subterfuge. The passage that concludes the episode reveals what Malvina elsewhere suppresses, her clear understanding of her husband's legal views and his role on the Court:

20. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

21. 109 U.S. 3 (1883).

It was, I think, a bit of “poetic justice” that the small inkstand in which Taney’s pen had dipped when he wrote that famous (or rather infamous) sentence in which he said that “a black man had no rights which a white man was bound to respect,” should have furnished the ink for a decision in which the black man’s claim to equal civil rights was as powerfully and even passionately asserted as it was in my husband’s dissenting opinion in the famous “Civil Rights” case. (p. 114)

Thirty years after her first glimpse through the closed shutter, Malvina sees her husband not as romantic hero or even as successful public figure but as practicing jurist. Her account of his dissent combines his struggle to articulate his position, her role as helpmate, and, most importantly, his role as the only member of the Court to support the claim of black litigants for equal civil rights under the Fourteenth Amendment. It is surprising and disappointing that Malvina fails to mention her husband’s most celebrated opinion, his 1896 solitary dissent in *Plessy v. Ferguson*²² from the Court’s separate but equal doctrine, and to tell the reader whether the Taney inkstand provided inspiration for that case as well. Still, the anecdote she does provide is the resonant center of her memoirs, the one moment when the domestic and legal spheres come together in a fusion of personal behavior and professional performance.

That coincidence of the personal and the professional marks Malvina’s book as more than a valuable first-person account of social and domestic life in the upper ranks of late nineteenth-century Washington. Justice Ruth Bader Ginsburg, who was instrumental in uncovering the memoir and securing its publication, explains in her foreword that she was drawn to the work “as a chronicle of the times, as seen by a brave woman of the era” (p. viii). Certainly it does offer a rare look at what Ginsburg calls the “unpaid job” (p. xii) of a Justice’s wife, which for Malvina included both her “at home” Mondays (pp. xii-xiii) and a variety of social and ceremonial occasions to which she accompanied her husband. But the memoir also offers an even rarer glimpse of a marriage in which the issue of slavery, which might have become a point of friction between the spouses, becomes first a test of wifely commitment and finally the impetus for an extraordinary collaboration of husband and wife in the writing of one of the Court’s memorable dissents.

IV. CONCLUSION

These three memoirs, written from three oblique angles, shed their diverse lights on three notable Justices. As the trend toward monumental biographies of public figures attests, we have increasingly come to believe that such figures are best understood not simply

22. 163 U.S. 537 (1896).

through the record of their professional conduct but in the broader context of their private and public lives. This is more than “the personal touch” that Dorothy L. Sayers once denounced as “that beastly habit of the modern mind.”²³ It is a recognition that even Supreme Court Justices, working in the splendid isolation of their chambers within the circumscribed parameters of the appellate process, bring to their jurisprudence the personalities and experiences of their lives off the bench. O’Connor tacitly acknowledges this linkage by writing a memoir that, while carefully excluding her professional career, nonetheless reveals the character traits that help to explain her independent role on the Rehnquist Court. Knox’s detailed account of McReynolds’s behavior during a fateful Court term suggests that the Justice’s personal flaws and limitations are reflected in the narrow rigidity of his jurisprudence. Malvina Harlan’s affectionate memoir of her married life describes her separate domestic world and then, in a single episode, collapses the boundaries between the domestic and the professional to illuminate her husband’s struggles as dissenting Justice. All three memoirs offer valuable slices of social history, but, more importantly, they offer as well three unusual perspectives that help us to view Justices O’Connor, McReynolds, and Harlan as figures in the round.

The Supreme Court has long been an American icon, represented in the public imagination by its marble courthouse and its nine black-robed Justices. With television cameras barred from the courtroom, the Justices have remained distant figures, glimpsed on the platform at presidential inaugurations or in the audience at state of the union addresses but otherwise generally screened from the direct public gaze. When the Court is thrust into the limelight, as it was most recently after deciding *Bush v. Gore*,²⁴ observers have little context for understanding the men and women whose decisions so directly affect their lives. Meticulously researched biographies of the Justices are invaluable in connecting their subjects’ lives with their jurisprudence.²⁵ Memoirs, however, have a different part to play. Whether written by a Justice herself, a critical clerk, or a devoted spouse, these intensely personal works offer a sideways glance at the subject from a narrowly focused perspective. They may not reveal everything the curious reader wants to know, but they do help to move us a bit closer to those remote, robed figures and sharpen our perception of the personalities who shape our law.

23. RALPH E. HONE, *DOROTHY L. SAYERS: A LITERARY BIOGRAPHY* 60-61 (1979) (quoting Sayers (internal quotation marks omitted)).

24. 531 U.S. 98 (2000).

25. See, e.g., DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE* (1998); LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* (1990); ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* (2d ed. 1997).