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A Biography of the Second Justice Harlan

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JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT. By *Tinsley E. Yarbrough.* New York: Oxford University Press. 1992. Pp. xvi, 395. $29.95.

The radiance of a leading lawyer or judge often has a remarkably short half-life. A vivid personality and uncommon skill (or even unusual wisdom) in dealing with problems of his own time may quickly fade in importance and in memory after his death. Thus, Emory Buckner, an early mentor and senior partner of whom Justice John Marshall Harlan spoke almost in awe, is now all but forgotten.[1] Felix Frankfurter, a later Harlan friend and would-be mentor, was an immensely powerful presence to federal lawyers of the World War II generation; today's lawyers and judges, when they think of him, surely often wonder quite what all the fuss was about. I propose to consider whether Justice Harlan himself has a greater claim to immortality.

Very few lawyers or judges can have inspired as much affection among those who knew them as Justice Harlan did. A description by his law clerk Bruce Ackerman begins calmly enough, calling Justice Harlan a man of "great personal charm" who "reached out for human contact with all who crossed his path."[2] But then, remembering the Justice's fortitude in the face of near-blindness, Ackerman throws caution aside, suggesting that to understand Harlan's character one should "reread" Marcus Aurelius' *Meditations* and then *add* "a genuine concern with the personal destiny of each human being that had no analogue in classical stoicism."[3] The Justice inspired such hyperbole: I described him to his biographer, in less scholarly terms, as the man I would send to Mars to show the Martians what Earth-people could be like. A calmer judgment is that he was surely the Justice best liked by his colleagues on the Court — even in the years when he was most

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1. Justice Harlan's admiration for Buckner is reflected in his introduction to an interesting biography, MARTIN MAYER, EMORY BUCKNER (1968): "To vouchsafe that there have been countless instances when lawyers bearing the responsibility for ticklish decisions have first asked themselves, 'What would Buck have done?' is not to indulge in hyperbole." *Id.* at ix.

2. Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan,* 36 N.Y.L. SCH. L. REV. 5, 10 (1991).

3. *Id.* at 11.

often in disagreement with the majority and sharply critical of its reasoning.

Justice Harlan is not, however, an obvious candidate for immortality. His opinions have been widely admired for the clarity with which they lay out the facts, the legal issues, and the precedents, but his words rarely grab us by the lapels and shake us. He held strong views on many subjects, but there are few areas in which he shaped our substantive law or the substantive views of any now-vigorous faction. Nor has he yet become one of those judges with the good or bad luck to be described by others with exceptional vividness.[4]

Justice Harlan has also, I regret to say, not been entirely fortunate in his first full-length biographer. Tinsley E. Yarbrough[5] has labored mightily to collect, examine, set down, and note the sources for the available information about the Justice's life and career at the bar and bench, and his book will be a useful reference work. But Yarbrough did not know the Justice, and he neither captures the personality that a wide circle found so captivating nor helps the reader very much to understand why the Justice held the legal views he did.[6] Yarbrough is also not sufficiently comfortable with the great legal issues that confronted the Warren Court to discuss them in any depth or attempt any very interesting analysis of Harlan's views and role on the Court. Moreover, the book has some lapses of logic and English prose that make it slow reading.[7]

The very title of the book, while perhaps irresistibly tempting because the first Justice Harlan had been called "the great dissenter," is one our Justice Harlan would not have liked. He was proud of the fact that his grandfather had also served on the Court. He kept Harlan I's bench chair in his chambers and was amused when a visiting Japanese dignitary who was told about the chair said in jest, "I did not know that the post was hereditary." But he did not think of Harlan I as a

4. In this he contrasts with his grandfather, the first Justice John Marshall Harlan (Harlan I). Justice Holmes called Harlan I "the last of the tobacco-spitting judges," and Justice Brewer said he "goes to bed every night with one hand on the Constitution and the other on the Bible, and so sleeps the sweet sleep of justice and righteousness." *See* PAUL A. FREUND ET AL., CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS xxxix-xl (1977). Harlan I also, of course, dissented in Plessy v. Ferguson, 163 U.S. 537 (1896), saying "[o]ur Constitution is color-blind." 163 U.S. at 559. He thus earned the immortality accorded to those who utter a single truly magnificent sentence and, more importantly, those whose disagreement with their contemporaries is courageous and prophetic.

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6. Noting that an unknown wag once described Justice Harlan as "Frankfurter without mustard," Professor Jethro K. Lieberman wrote, "this biography is Harlan without relish." Jethro K. Lieberman, *Harlan Without Relish,* 36 N.Y.L. SCH. L. REV. 243 (1991) (book review).

7. The first sentence of the book is a good example: "Like that of most families, John Harlan's family history lacks the factual precision he was reputed to have admired." P. 3. What Justice Harlan admired was precision in reasoning and the use of language. He knew very well that real life (including the history of any family) is full of complexities and uncertainties, and I think he was more pleased than displeased by that fact.

role model, and he would have suggested gently that calling him, or any other Justice, "the great" anything was inappropriate.

Moreover, the picture the title may call to mind, of Justice Harlan standing firm in vain against the tide of the Warren Court, is not how the Justice pictured himself. To begin with, he was in full accord with his brethren on the issue that had divided Harlan I from *his* brethren: the unconstitutionality of racial segregation. Furthermore, many of Justice Harlan's important disagreements with the Court were not about substantive conclusions but about how to reason one's way to the result; he might almost as easily be called "the great concurrer."[8]

Justice Harlan also professed a feeling of deep obligation *not* to "stand fast" but to follow precedents set by majority decisions of the Court over his dissent.[9] And in some of his most important disagreements with the Court, he was clearly ahead of his brethren in willingness both to recognize substantive rights and to accord the courts a substantial and creative role in protecting them.[10]

Justice Harlan did not make his biographer's task easy. His roles as grandson, son, husband, and father were private matters for him, although the personal grace he brought to the last two roles was apparent to those who knew him late in life. He was a great success at Princeton, where he was president of his senior class and Chairman of the *Daily Princetonian,* and at Oxford, where he was a Rhodes Scholar and won a coveted "first" in jurisprudence, but he was not the sort of student whose unusual achievements or bizarre behavior give rise to university legends. His working life as a practicing lawyer involved some of the great issues of the day: he contributed to the efforts (all notably unsuccessful) to enforce Prohibition, to allow City College of New York to hire Betrand Russell, and to permit the DuPont Company to continue to own a substantial slice of General Motors; but he handled these matters in the way he thought served his client rather than his biographer. Politics and public life were not among his chief interests, and his career at the bar ended before many lawyers of his stature counseled the glamorous or notorious.

Justice Harlan also assumed that a Justice should rigidly avoid publicity — and should avoid even thinking about his own biography — while at work. He was not particularly ascetic in personal matters:

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8. *See, e.g.,* Gideon v. Wainwright, 372 U.S. 335, 349 (1963) (Harlan, J., concurring).

9. *E.g.,* Lucas v. Rhodes, 389 U.S. 212 (1967) (Harlan, J., dissenting).

10. *See* Garner v. Louisiana, 368 U.S. 157, 185 (1961) (Harlan, J., concurring in the judgment) (recognizing lunch counter sit-ins as protected speech); Poe v. Ullman, 367 U.S. 497, 522, 551 (1961) (Harlan, J., dissenting) (recognizing challenge to seldom-enforced birth control statute as justiciable and — importantly — recognizing "the right of privacy embraced in the 'liberty' of the Due Process Clause"); Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (Harlan, J., concurring in the judgment) (again recognizing the right of privacy and — importantly — insisting that the liberties protected by the Due Process Clause are not limited to those specifically enumerated in the Bill of Rights).

he liked to laugh, to drink bourbon on appropriate occasions, to joke with his clerks about the movies (most very tame by today's standards) that received special showings in the Court's basement back when obscenity was a factual question that the Justices could determine only by personal inspection. But he had a monkish view of a Justice's obligations to the Court and the cases before him: he did not vote, because he thought Justices should put even that participation in the political process aside; he did not attend State of the Union messages, because he did not think it appropriate either to applaud the President or to refrain while others were applauding; and he did not seek outside applause for his own work and would have considered it wrong to do so.

I have said that Justice Harlan's writing, properly admired by working lawyers and law students, rarely contains the sort of dramatic phrases that would have enlivened a biography. I think he deliberately avoided memorable phrases in his opinions, recognizing that the effort to construct them can detract from precision in analyzing the present case — and that they sometimes take on a life of their own that obstructs careful analysis in later cases.

Justice Harlan's approach to constitutional adjudication also failed to offer grand themes for a biographer. No formula told him the results in constitutional cases: he respected the text of the Constitution but did not believe that it alone answered many of the hard questions; he thought "original intent," a notion frequently invoked by more recent conservative judges, was an illusion. His approach, as many have noted, was that of the common law: he believed in carefully examining the facts of each case and deciding it on the basis of the most nearly applicable precedent. The constraints were respect for precedent and what he saw as a judge's duty to move slowly, with the focus always on the particular, rather than to jump to superficially attractive generalizations not required by the facts of the case.[11]

But in sharp and explicit contrast to his friend Justice Black (and to some of today's conservative judges), Justice Harlan was prepared to place trust in judges to *develop* the law, including the common law of the Constitution. He knew that constitutional law must necessarily grow and change, and he thought it not only proper but unavoidable

11. In some areas where Justice Harlan took notable positions of principle, time has simply passed him by. I think he was right that the doctrine of incorporation of the Bill of Rights into the Fourteenth Amendment was bad history and bad jurisprudence, *see* Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (Harlan, J., dissenting); *Griswold*, 381 U.S. 479, 499 (Harlan, J., concurring in the judgment), but Justices of all persuasions have since become accustomed to using the language of incorporation and treating federal and state cases on Bill-of-Rights subjects as interchangeable. He was also right that in Reynolds v. Sims, 377 U.S. 533 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966), the Court reached out for broad, simple, paper solutions to complex problems (political representation and involuntary confessions, respectively) that the Court was not equipped to solve; but the paper formulas have stuck, partly covering up the problems that remain.

that a Justice would bring to bear on that process his own views of the values enshrined in the Constitution and the country's traditions. He was prepared, for example, to conclude in *Katz v. United States*[12] that electronic eavesdropping violated a right of privacy implicit in the Fourth Amendment,[13] while Justice Black dissented on the ground that eavesdropping literally did not constitute either a "search" or a "seizure."[14] In his lonely dissent in *Poe*[15] and his later concurrence in *Griswold*,[16] Justice Harlan found a right of marital privacy implicit in the liberty guaranteed by the Fourteenth Amendment, while Justice Black condemned such a notion as judicial legislation.[17]

Here, indeed, is a theme for a biographer. Justice Harlan knew that a Justice's own experience must shape his reasoning about constitutional matters. His own career provided many examples, of which his contribution to the law of privacy is only the most obvious. I watched him think through the "stop-and-frisk" cases of the 1967 Term[18] when he asked me (but really himself) what it would be like to be stopped or frisked in various situations. He ultimately concurred in the Court's judgments, filing concurring opinions that stated more clearly than did the Court the relationship between the right to "stop" and the right to "frisk." His instinctive aversion to eavesdropping, his profound respect for the privacy of married persons in sexual matters, and his difficulty seeing that unmarried persons properly might have similar concerns, surely reflect the life he had led. I wish this biography had tried harder to explain how the Justice came to the views that he held in these and other areas.

Knowing that a Justice cannot finally read the Constitution with any eyes but his own, Justice Harlan thought it all the more important to stay close to the facts of the case, to proceed slowly and cautiously in developing constitutional doctrine, to seek values deep in our legal tradition, to respect the accumulated wisdom of past decisions, to challenge his own reasoning until it reached a point of high precision and persuasiveness, and to state his reasoning clearly for others to accept or reject. Another biographer might consider how well he succeeded in following these precepts. I think (although there is obviously room for debate) that he succeeded better than any other Justice of the post-War period, perhaps better than any other in our history, and that he is worthy of being remembered for that.

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12. 389 U.S. 347 (1967).
13. 389 U.S. at 360-61 (Harlan, J., concurring).
14. 389 U.S. at 364 (Black, J., dissenting).
15. Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).
16. 381 U.S. at 499 (Harlan, J., concurring in the judgment).
17. Griswold v. Connecticut, 381 U.S. at 511 (Black, J., dissenting).
18. Terry v. Ohio, 392 U.S. 1 (1968); Sibron v. New York, 392 U.S. 40 (1968).