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## REMARKS ON JUSTICE HARLAN AND THE BILL OF RIGHTS\*

JESSE H. CHOPER\*\*

The papers submitted by Professors Dorsen<sup>1</sup> and Van Alstyne<sup>2</sup> offer two remarkably similar appraisals of Justice Harlan, by two most acute commentators. I'd like to briefly review three areas of agreement and make some comments—somewhat analytical, but mainly anecdotal.

First, Justice Harlan was a judge of great integrity, principle, and professional commitment. I'd like to relate an anecdote about that. In 1965, I began a long friendship with one of Justice Harlan's early law clerks, Paul Bator. Paul was a visiting professor at Boalt Hall, and thought that I was some species of wild radical since I had clerked for Chief Justice Warren and now taught at Berkeley. I remember telling Paul soon after we met that I thought Justice Harlan was the finest legal craftsman ever—I underline the word ever—to sit on the Supreme Court. Paul appreciated that sentiment, but was less than fully convinced.

I pointed with great admiration to a case not mentioned in the presentations at this conference, *Douglas v. California*.<sup>3</sup> The question in that case was whether an indigent criminal defendant had the right to state appointment of counsel on the first appeal as of right after being convicted. The majority opinion for the Court, holding that there was such a constitutional right, was written by Justice Douglas. His rationale was based on a rough, loosely reasoned amalgam of due process and equal protection.

In his dissent, Justice Harlan separately addressed the Due Process Clause and the Equal Protection Clause, and powerfully dissected each one, point by point.<sup>4</sup> I agreed with the Court's result at the time and I agree with it now. I certainly did not dispute Justice Harlan's logic, which was impeccable, but rather disagreed with certain of his values—values beyond the text and history of the Constitution, but which (as even Justice Harlan recognized) are an inevitable part of constitutional interpretation.

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1. Norman Dorsen, *John Marshall Harlan, Civil Liberties, and the Warren Court*, 36 N.Y.L. SCH. L. REV. 81 (1991).

2. William W. Van Alstyne, *The Enduring Example of John Marshall Harlan: "Virtue As Practice" in the Supreme Court*, 36 N.Y.L. SCH. L. REV. 109 (1991).

3. 372 U.S. 353 (1963).

4. *See id.* at 360 (Harlan, J., dissenting).

He probably acknowledged this most clearly in a case referred to in a number of the other presentations, *Poe v. Ullman*.<sup>5</sup> I'll have a word to say about *Poe* later, but to conclude this first point, I wish fully to adopt what Bill Van Alstyne wrote in the draft of his article that I reviewed: "In my view, the virtue of Harlan is that he took his obligation to the Constitution seriously, whether or not one thinks he necessarily got matters right."

Interestingly, a half dozen years later, Paul Bator agreed with my assessment of his former boss. He did so only, I might add, when our mutual friend, Judge Henry Friendly, wrote in the *Harvard Law Review* that there had never been a Justice of the Supreme Court who so consistently had maintained as high a quality of performance or, despite differences in view, had enjoyed such nearly uniform respect from his colleagues on the lower federal and state courts.<sup>6</sup>

Second, all agree that Justice Harlan was not a passionate defender of individual rights. In his paper, Norman Dorsen quotes Justice Stewart as saying "I can assure you that a very interesting law review article could someday be written on 'The Liberal Opinions of Mr. Justice Harlan.'"<sup>7</sup> It would surely be a short article and, in the fashion of the day, would of course have relatively few footnotes. I don't mean that in a derogatory way. But Justice Harlan was, with few exceptions, a quite consistently conservative jurist. He was committed to the principle of judicial restraint, markedly more so and with much greater integrity than many other conservatively oriented Justices.

Let me refer to two-cases from the Term that I clerked, as evidence of both his conservative views and admirable qualities. The first was *Burton v. Wilmington Parking Authority*,<sup>8</sup> one of the earliest cases involving racial discrimination in privately owned places of public accommodation. As I recall it, there had not been a single racial discrimination case since the landmark decision in *Brown*<sup>9</sup> in 1954, in which the Court had been less than unanimous. But *Burton* was especially difficult. It was finally decided 5-4 against the act of racial discrimination. Justice Harlan dissented with a very short and careful opinion.<sup>10</sup>

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5. 367 U.S. 497 (1961).

6. See Henry J. Friendly, *Mr. Justice Harlan, As Seen by a Friend and Judge of an Inferior Court*, 85 HARV. L. REV. 369, 370 (1971).

7. Dorsen, *supra* note 1, at 93 (quoting John Marshall Harlan, 1899-1971, Memorial Address Delivered at a Special Meeting of the Association of the Bar of the City of New York by Mr. Justice Potter Stewart, Former Attorney General Herbert Brownell, and Professor Paul Bator (Apr. 5, 1972)).

8. 365 U.S. 715 (1961).

9. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

10. See *Burton*, 365 U.S. at 728 (Harlan, J., dissenting).

The second case was a more famous one, *Mapp v. Ohio*,<sup>11</sup> which applied the Fourth Amendment's exclusionary rule against the states. The issue had been raised only in an amicus brief, as I recall, and had never been argued. Although a question under the First Amendment was at the fore, a majority of the Court decided the case by overruling *Wolf v. Colorado*<sup>12</sup> and reversed the conviction. The opinion was written by Justice Clark.<sup>13</sup> At the conference the week after Justice Clark's opinion was circulated—which was the first time that Justices Frankfurter, Harlan, Whittaker, and Stewart learned of the rationale—Justice Frankfurter was absolutely livid. It was fairly late in the Term, and he said something like “You can't do this, you can't overrule *Wolf* this way, we must have it reargued. I can't possibly write the dissent between now and June.” He was very angry and forceful, I was told, and some of the Justices in the majority felt a bit squeamish about having sprung this on him. Justice Douglas, however, had no such reservations, and said something like “Felix, you've had that dissenting opinion written for years.” I was told that Justice Harlan calmed the situation by volunteering to undertake the task of writing the dissent, which he did, and it was a very forceful opinion.<sup>14</sup>

The third area that I'd like to discuss, and this will perhaps be a bit more analytic, is Justice Harlan's strong concern for federalism, a matter addressed in both of the papers upon which I have been asked to comment. Of particular relevance, given our topic of “Justice Harlan and the Bill of Rights,” was his fundamental-fairness/essence-of-ordered-liberty approach to the extent to which the Bill of Rights applies to the states.<sup>15</sup> This approach, ultimately rejected by the Court,<sup>16</sup> called for a fairly restricted constitutional protection against state action for such

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11. 367 U.S. 643 (1961).

12. 338 U.S. 25 (1949).

13. The liberal Justices got Clark's vote and he was assigned the opinion in an effort to keep him on board. Quite conservative himself, Justice Clark rarely found an unreasonable search and seizure, so the exclusionary rule likely made little difference to him. See Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1368 (1983).

14. See *Mapp*, 367 U.S. at 672 (Harlan, J., dissenting).

15. See, e.g., *Pointer v. Texas*, 380 U.S. 400, 408 (1965) (Harlan, J., concurring); *Mapp*, 367 U.S. at 678-86 (Harlan, J., dissenting).

16. See *Benton v. Maryland*, 395 U.S. 784, 793-96 (1968) (overruling *Palko v. Connecticut*, 302 U.S. 319 (1937)); see also *id.* at 808-09 (Harlan, J., dissenting) (opposing the overruling of *Palko* and arguing against incorporation).

individual rights as the right to a jury trial,<sup>17</sup> the prohibition against double jeopardy,<sup>18</sup> and the privilege against self-incrimination.<sup>19</sup>

On the other hand, whereas his commitment to federalism militated against his being very protective of individual rights, it also formed the basis for the relatively few areas in which he aggressively favored personal liberty. Examples include the fairly extensive protection that he gave obscenity under the First Amendment, as against the national government,<sup>20</sup> and his enforcement of the search and seizure provision of the Fourth Amendment.<sup>21</sup>

Indeed, even Justice Harlan's opinions in *Poe v. Ullman*<sup>22</sup> and *Griswold v. Connecticut*,<sup>23</sup> involving his discovery of the constitutional right of marital privacy, are grounded, albeit in a somewhat convoluted fashion, in his concern for federalism. Justice Harlan and Justice Black stood on opposite sides of the issue of the incorporation of the Bill of Rights. Justice Black would apply the Bill of Rights to the states in full, while Justice Harlan wished to exercise more discretion, more balancing.<sup>24</sup> They reversed their postures, however, on the marital privacy issue. Justice Black rejected such a right as an exercise of unfettered discretion and unprincipled value imposition,<sup>25</sup> while Justice Harlan's more open-ended approach led him to recognize the right.<sup>26</sup> I should add that difficult as it is to determine the constitutional basis for a right of privacy, it is even more difficult to figure out what influenced Justice Harlan to find it.

In conclusion, I did not know Justice Harlan personally very well at all. On the several occasions that I was with him, I found him to be a

17. See *Duncan v. Louisiana*, 391 U.S. 145, 171 (1968) (Harlan, J., dissenting).

18. See *Benton*, 395 U.S. at 801 (Harlan, J., dissenting).

19. See *Malloy v. Hogan*, 378 U.S. 1, 14 (1964) (Harlan, J., dissenting).

20. See, e.g., *Ginzburg v. United States*, 383 U.S. 463, 493 (1966) (Harlan, J., dissenting); *Manual Enters., Inc. v. Day*, 370 U.S. 478 (1962); *Roth v. United States*, 354 U.S. 476, 496 (1957) (Harlan, J., concurring in part and dissenting in part).

21. See, e.g., *United States v. Harris*, 403 U.S. 573, 586 (1971) (Harlan, J., dissenting); *Jones v. United States*, 357 U.S. 493 (1958); *Giordenello v. United States*, 357 U.S. 480 (1958).

22. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

23. 381 U.S. 479, 499 (1965) (Harlan, J., concurring).

24. See, for example, *Pointer v. Texas*, 380 U.S. 400, 408 (1965) (Harlan, J., concurring), where Harlan disagreed with Justice Black's holding that the right granted to the accused by the Sixth Amendment to confront a witness against him is a fundamental right essential to a fair trial and is made obligatory on the states by the Fourteenth Amendment.

25. See *Griswold*, 381 U.S. at 507 (Black, J., dissenting).

26. See *id.* at 499 (Harlan, J., concurring).

truly gentle man. But I do not know his professional product very well, and I am truly a great admirer. I am pleased and privileged to join on this occasion as one of the few outsiders in this tribute to Justice John Marshall Harlan.

