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Another View of Justice Harlan—A Comment of Fried and Ackerman

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ANOTHER VIEW OF JUSTICE HARLAN—A COMMENT ON FRIED AND ACKERMAN*

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John Marshall Harlan was a distinguished jurist because he was truly distinctive. Complexity marked him as a judge, and that makes him far less readily reducible than most Justices to simple characterizations drawn from the liberal-conservative spectrum. Both of the papers upon which I have been called to comment[1] strike me as valuable and certainly stimulating; yet both seem to me to fail to capture the essence of the Justice. Let me try to offer a different vision of Harlan. In the time I have, I can best do so by illustrating some respects in which both Fried's and Ackerman's depictions offer portrayals of a judge who does not conform either to my memory or to the contemporary sense I get from my pleasures in teaching about and rereading his opinions.

Both papers depict Harlan as "conservative"—Fried to praise, Ackerman to criticize his approach to judging. I certainly agree that there was conservatism, in a sense, in Harlan, but only in a sense. When one looks at the details of the portraits these papers offer, one cannot help but notice flaws in omission, balance, and nuance. In focusing on some of these details, I will draw more on Fried's portrait than on Ackerman's. Even though I tend ultimately to agree more with Fried's general evaluation than with Ackerman's, I pick a bit more on Fried mainly because he provides a good deal of detail, while Ackerman characteristically inclines more to generalizations and abstractions—generalizations with which I hope to have time to disagree.

Let me turn to my bill of particulars, which suggests to me that there was a good deal more of what journalists would refer to as "liberal" in Harlan than either of the presenters credit him with. Thus, Fried tells us that there was ample skepticism in Harlan, with "no vast projects for overruling great chunks of the law."[2] He immediately goes on to say that Harlan "came to the Court in 1955, in time for the second phase of *Brown v. Board of Education.*"[3] And he soon suggests that Harlan's

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1. Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 5 (1991); Charles Fried, *The Conservatism of Justice Harlan*, 36 N.Y.L. SCH. L. REV. 33 (1991).

2. Fried, *supra* note 1, at 37.

3. *Id.*; *see* Brown v. Board of Educ. (II), 349 U.S. 294 (1955); *see also* Brown v.

conservatism was marked by his "willingness to accept a trajectory set in earlier cases."[4] I, of course, agree that Harlan was not on any mission to overrule hordes of precedents; but it is, I can assure you, wrong to imply that Harlan went along with *Brown II*, the implementation decision, simply or mainly because *Brown I* was already on the books. I clerked for Chief Justice Warren during the October 1954 Term, the Term during which Harlan came to Washington and in which *Brown II* was decided. *Brown II*, the "with all deliberate speed"[5] ruling, has been a favorite critical target for a later generation as not being sufficiently forceful. Yet, as the only law clerk in the Chief's chambers working on the opinion, I vividly recollect that the Justice pressing most insistently for added muscle in the decree was *not* one of the well-known liberals on the Court, but rather Harlan. More specifically, it was Harlan's voice and pen that was solely responsible for the toughest single sentence in *Brown II*, a sentence repeatedly relied on in later years, that read: "But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."[6] No reluctant follower of a "trajectory set in earlier cases" this!

Fried does acknowledge Harlan's contributions to individual liberties. One "aspect of the Justice's conservatism was his nice sense of civil liberties,"[7] as Fried so very temperately puts it. Cases such as *Cohen v. California*,[8] he says, show that Harlan "was willing not only to accept established precedent but also to embrace and extend it."[9] And Harlan's dissent in *Poe v. Ullman*[10] in 1961, Fried adds, "demonstrates a visceral commitment to the liberty of the individual."[11] I think Fried understates the case. True, *Poe*, in its recognition of the marital privacy ingredient of fundamental liberties, is a landmark of creative, sensitive expansion of basic liberties from traditionalist premises. But it is more than that: a large part of Harlan's dissent did not deal with the issue of substantive due process but was rather a brilliant, devastating demolition of the Frankfurter opinion that persuaded the Court to duck the contraception issue on grounds of justiciability.[12] Harlan not only cared about the

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Board of Educ. (I), 347 U.S. 483 (1954).

4. Fried, *supra* note 1, at 37.
5. *Brown II*, 349 U.S. at 301.
6. *Id.* at 300.
7. Fried, *supra* note 1, at 41.
8. 403 U.S. 15 (1971).
9. Fried, *supra* note 1, at 41.
10. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).
11. Fried, *supra* note 1, at 41.
12. *See Poe*, 367 U.S. at 524-39 (Harlan, J., dissenting).

underlying liberty, but also, and as strongly, about the manipulative use of jurisdictional concepts and the invocation of "passive virtues" to avoid confrontation with a substantial federal claim.[13] It is an opinion that in my view, especially in its jurisdictional parts, showed the principled master craftsman at his best.

I think Fried is far too grudging as well with respect to Harlan's free speech opinions. It could as readily be said of *Cohen v. California*[14] as Fried says of *Poe*, that it showed a "visceral commitment" to a constitutional value.[15] Harlan's opinion was clearly no mere embracing of established precedent, but a major addition. And *Cohen* was simply one of a group of cases from the late 1960s that shows Harlan's deepening appreciation of free expression values—cases either not cited or slighted by both Fried and Ackerman.[16] To me, the Harlan of the late 1960s provided the most coherent, compelling arguments for the protection of free expression on the Court, arguments that contrasted sharply with the often merely result-oriented opinions of many of his so-called "liberal" colleagues. Need I remind that the Harlan of *Cohen*, with his recognition of the emotive as well as cognitive value of offensive expression, was criticized by dissenters that included Hugo Black?[17] Or that the Harlan of *Street v. New York*,[18] protecting a flag-burner for reasons at least as powerful as those advanced in the more recent flag-burning decisions,[19] encountered sharp dissents from the likes of Earl Warren,[20] Hugo Black,[21] and Abe Fortas?[22] Or that it was Brennan's opinion that sent Ralph Ginzburg to jail,[23] in the face of a brilliant, I think unanswerable,

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13. *See* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

14. 403 U.S. 15 (1971).

15. *See supra* note 11 and accompanying text.

16. See especially Harlan's majority opinion in NAACP v. Alabama, 357 U.S. 449 (1958); *see also, e.g.*, Welsh v. United States, 398 U.S. 333, 344 (1970) (Harlan, J., concurring); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 455 (1968) (Harlan, J., dissenting); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 704 (1967) (Harlan, J., dissenting); Garner v. Louisiana, 368 U.S. 157, 185 (1961) (Harlan, J., concurring).

17. *See Cohen*, 403 U.S. at 27 (Blackmun, J., joined by Black, J., and Burger, C.J., dissenting).

18. 394 U.S. 576 (1969).

19. *See* United States v. Eichman, 110 S. Ct. 2404 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

20. *See Street*, 394 U.S. at 594 (Warren, C.J., dissenting).

21. *See id.* at 609 (Black, J., dissenting).

22. *See id.* at 615 (Fortas, J., dissenting).

23. *See* Ginzburg v. United States, 383 U.S. 463 (1966).

dissent by Harlan?[24] I have always thought it ironic, but not surprising, that the best part of the free speech legacy of the Warren Court, the part that has proved most lasting, came not from the pens of that Court's liberals but rather, repeatedly, from Justice Harlan.[25]

After his temperate appreciation of Harlan decisions, Fried contrasts some "harsh and . . . not particularly attractive opinions."[26] He suggests Harlan "worked too hard to sustain a conviction under the Smith Act in *Scales v. United States*."[27] I think that this comment is too dismissive of what Harlan achieved in *Scales*, *Yates*,[28] and *Noto*.[29] What Harlan did in this line of Smith Act cases was to take the fangs out of the legacy of *Dennis*[30] and to fashion a tremendously important expansion of protected political speech, an expansion constitutionalized soon after in *Brandenburg v. Ohio*.[31] I have analogized these Harlan contributions—contributions through the technique of statutory "reinterpretation"—to the approach taken by Learned Hand in the *Masses*[32] case during World War I, an approach Hand himself considered a constitutionally mandated one, and from which he never receded.[33]

I have drawn these corrective examples largely from Fried's paper because, as I have said, his is richer in specifics than Ackerman's. But to the extent Ackerman cites actual decisions—as he does with respect to the First Amendment in a long footnote[34]—he rather grudgingly concedes that *Cohen* showed a fine appreciation of First Amendment values, but implies that this was a rare exception. (In the draft that I reviewed, he added after *Cohen*: "Any others worthy of special note?" My suggestion is that there are indeed—many more—and that as a body of work,

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24. *See id.* at 493 (Harlan, J., dissenting).

25. See my comments on "First Amendment Balancing in the Harlan Manner" in Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001, 1005 (1972).

26. Fried, *supra* note 1, at 42.

27. *Id.*; *see* Scales v. United States, 367 U.S. 203 (1961) (upholding a conviction under the Smith Act, 18 U.S.C. § 2385 (1988), which criminalized "knowing membership" in any organization advocating the overthrow of the U.S. government by force or violence).

28. Yates v. United States, 356 U.S. 363 (1958).

29. Noto v. United States, 367 U.S. 290 (1961).

30. Dennis v. United States, 341 U.S. 494 (1951).

31. 395 U.S. 444 (1969).

32. Masses Pub. Co. v. Patten, 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

33. *See* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975).

34. *See* Ackerman, *supra* note 1, at 16 n.27.

Harlan's free speech opinions have left us a far more valuable, more lasting legacy than those of colleagues such as Warren, Goldberg, and Fortas.[35]).

Despite my sniping at Fried's examples, I must add that I find Fried's general portrait of Harlan more persuasive and attractive than Ackerman's. Fried, in my view, gives a more accurate sense of the judge I knew, to the extent that he emphasizes "humility"[36] and "an unwillingness to think he possessed all of the insight into the resolution of a problem,"[37] or that the Court as a whole did. So too with Fried's emphasis on "the old-fashioned name of craftsmanship,"[38] in the sense of "candor, care, being true to the facts, the record, and the precedents, and a modest respect for the other institutions that surround the Supreme Court."[39] I think I recognize the judge conveyed by that description, and I confess that I like that kind of judge. I may simply be suffering from the fact that I have just finished the manuscript of a biography of Learned Hand,[40] whose traits were similar, and who would talk of his aversion to those blessed with an excess of certitude. As he once put it: "For men who are not cock-sure about everything and especially for those who are not damn cock-sure about anything, the skies have a rather sinister appearance."[41] Hand personified in the best sense the modest, creative model of judging, as contrasted with the more interventionist, active models of Warren and Douglas. The comparison of Hand and Harlan is apt: though they were not intimate friends, they liked and admired each other, and they had much in common. Fried evidently likes that model of judging. Ackerman obviously does not.

Indeed, for Ackerman this Harlan Conference is mainly an occasion for once more reiterating and elaborating his models of contrasting modes of constitutional adjudication. For him, Harlan's methodology represents "common law constitutionalism," as contrasted with the "independent constitutionalism" of a Hugo Black or a William O. Douglas.[42] Ackerman's independent constitutionalist serves as the voice of the people acting "at rare moments of mobilized political consciousness" like the

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35. For a discussion of Harlan's free speech opinions "worthy of special note," see Gunther, *supra* note 25, at 1005-14.

36. Fried, *supra* note 1, at 39.

37. *Id.*

38. *Id.* at 51.

39. *Id.*

40. The biography, tentatively titled *Learned Hand: The Man and the Judge*, is now in the editing process and will be published by Alfred A. Knopf, Inc.

41. *Id.*

42. Ackerman, *supra* note 1, at 7-8 & n.7.

Founding and Reconstruction.[43] His independent constitutionalist draws from these great moments broad, abstract principles that form the core of the judge's constitutional function, in the face of the skepticism of the common law judge about the capacity of such abstractions to decide concrete cases. Ackerman favors this engagement in the construction of abstractions, and considers Harlan's methodology the antithesis of such ventures.[44] Predictably, Harlan is found wanting in such a comparison, so that Ackerman can suggest that his approach represents a "[v]oice from the twilight" rather than a "prophet of a new dawn."[45]

I, in turn, find the Ackerman approach wanting, as well as personally unappealing. One of my problems with it is its methodology: he defends the judge as promulgator of abstract principles in a largely abstract way of his own. That kind of argumentation has the merits of a bird's eye view, but a bird flying at so distant an orbit from this earth that the details inevitably blur. Thus, Ackerman's desire to present Harlan as an exemplar of his common law model requires placing Harlan on Ackerman's procrustean bed, with the predictable effect of giving us a rather maimed image.

Ackerman obviously prefers his alternative, independent constitutionalist model, and he insists that it is preferable because, for example, it is more consistent with "democracy," and because it is more likely to enhance "liberty."[46] I find both submissions somewhat unreal. For example, Ackerman's claim that the independent constitutionalist approach better grapples with the problem of the countermajoritarian difficulty of judicial review[47] seems odd to one who views skeptically the prospect of being "ruled by a bevy of Platonic Guardians."[48] I find even more risks to democracy in encouraging our judges to surmise abstract principles from Ackerman's varieties of historical roots than I do from judges given to the contextualized, disciplining judgments that Ackerman so deprecates. Moreover, in criticizing Harlan on liberty, Ackerman devotes a major segment of this effort to an unfavorable contrast of the Harlan and Douglas approaches in *Griswold*.[49] He chastises Harlan for being less willing than Douglas to engage in abstractions, and he praises Douglas for not emphasizing, as Harlan did, the traditional recognition of

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43. *Id.* at 29.

44. *See id.*

45. *Id.* at 32.

46. *See id.* at 11-26.

47. *See id.* at 11.

48. LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

49. *See* Ackerman, *supra* note 1, at 23-25; *see also* Griswold v. Connecticut, 381 U.S. 479 (1965).

the institution of marriage.[50] Yet he overlooks the last paragraph of Douglas's opinion, which waxes most eloquently about that very institution in order to protect "the sacred precincts of marital bedrooms."[51]

I take it that, for Ackerman, the judge who paints with the broadest available brush is the most admirable one. I am, to put it mildly, *dubitante* on that one. I am not surprised, however, that the portrait of Harlan that emerges from Ackerman's paper itself suggests the hand of an artist wielding his own very broad brush, rendering an image that to the initiated seems vaguely familiar yet hardly lifelike.

My brief corrective efforts on these two portraits may themselves suggest a third vision of Harlan. I can't think of a better tribute in remembering the Justice. All of us, with some justification, emphasize differing impressions of the Justice's productive and important sixteen years on the Bench. What all this suggests to me is that he was a judge who gave us a richness of product that will be worth remembering and debating long after many of his colleagues have entered the realm of historical obscurity. The Justice's work will remain essential to productive thinking about the role of our Court and its Justices.

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50. *See* Ackerman, *supra* note 1, at 24-25.

51. *Griswold*, 381 U.S. at 485.