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JUSTICE HARLAN AND THE BILL OF RIGHTS: A DICHOTOMY IN CONSTITUTIONAL ANALYSIS*

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In the jurisprudence of Justice Harlan, a citizen of the United States generally may rely on an expansive reading of the enumerated rights set out in the Bill of Rights for protection from the depredations of the federal government. The citizen of a state, however, generally may rely only on a rather subjective reading of the Due Process Clause of the Fourteenth Amendment as a restraint on arbitrary state action. The jurisprudence of Justice Harlan does not accommodate the incorporation of the Bill of Rights into the Fourteenth Amendment for application to the states.[1] What is not permitted to the national government, therefore, may be allowed to a state government. Acts of the national government may violate the rights or liberties of citizens of the United States, while the same acts, performed by a state government, may violate no rights or liberties of the citizens of the state. The dichotomy is contradictory, confusing, and, ultimately, irreconcilable.

When the Supreme Court upheld a conviction under a federal obscenity statute prohibiting the mailing of obscene materials, using an approved definition of obscenity, Harlan dissented.[2] In his opinion, the federal statute could not be constitutionally construed to reach more than hard-core pornography.[3] His dissent encompassed the notions that the interests protected by the obscenity statutes are primarily those of the states, that the federal interest in this area is attenuated, and that the dangers of federal censorship are greater than the dangers of state action of the same type.[4] Concurring in a decision upholding a state obscenity statute, however, Harlan considered the relevant inquiry to be whether the state so subverted the fundamental liberties implicit in the Due Process

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1. *See, e.g.*, Pointer v. Texas, 380 U.S. 400, 408 (1965) (Harlan, J., concurring) (rejecting the doctrine of incorporation).

2. *See* Roth v. United States, 354 U.S. 476, 496 (1957) (Harlan, J., concurring in part and dissenting in part).

3. *See id.* at 507.

4. *See id.* at 504-06.

Clause of the Fourteenth Amendment as to require invalidation of the state action.[5]

When the Supreme Court held that a city's prohibition on the exhibition of a motion picture deemed not suitable for young viewers was unwarranted under the provisions of a statute providing for the classification of motion pictures, Justice Harlan dissented.[6] He wrote:

> [N]o improvement in this chaotic state of affairs is likely to come until it is recognized that this whole problem is primarily one of state concern, and that the Constitution tolerates much wider authority and discretion in the States to control the dissemination of obscene materials than it does in the Federal Government.[7]

When it came to applying the brakes to the states, it seems that Justice Harlan would have us rely on his vision of good and evil. In the celebrated California case involving the conviction of a man who wore in a courthouse a jacket emblazoned with the initial letters of each word in the phrase "for unlawful carnal knowledge" juxtaposed with the words "the draft," Harlan gave us his vision of the limits on state regulation of speech.[8] He concluded that the state could not bar the obscenity under the provisions of a statute prohibiting disturbance of the peace by affirmative conduct.[9] Finding plainly untenable the state's argument that it could regulate the speech in question because it spawned the inherent likelihood of violence, Harlan explained that the existence of those "with such lawless and violent proclivities" is not a sufficient basis for allowing the state to bar people from "ventilat[ing] their dissident views."[10] He simply thought that the word in question could not be distinguished from any other offensive word, expressing himself in the oft-quoted phrase, "one man's vulgarity is another's lyric."[11] Robert Bork has objected to the moral relativism of the phrase, pointing out that "one man's larceny is another's just distribution of goods."[12] The comparison may not be an apt one, but it does point out the lack of a standard.

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5. *See id.* at 501. The state case, *Alberts v. California*, was decided in the same opinion as *Roth*.

6. *See* Interstate Circuit v. City of Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., dissenting).

7. *Id.* at 107-08.

8. *See* Cohen v. California, 403 U.S. 15 (1971).

9. *See id.* at 19-20.

10. *Id.* at 23.

11. *Id.* at 25.

12. ROBERT H. BORK, THE TEMPTING OF AMERICA 249 (1990).

Justice Harlan has been described as an aristocrat, one "of noble lineage," as well as "a patrician of the spirit."[13] I am not sure what is meant by those terms. I do know that much of Harlan's civil rights jurisprudence evinces a paternalistic approach to the problems of society. When the Connecticut anti-contraceptive statute first came before the Supreme Court and was dismissed for lack of a live controversy, Harlan dissented.[14] He confronted the merits of the claim and held the statute unconstitutional on due process grounds. In his opinion, the state statute violated substantive due process, which he characterized as "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."[15] When the Court finally confronted the merits of the state statute and held that criminalizing the use of contraceptives was unconstitutional on the basis of "zones of privacy," "emanations," and "penumbras,"[16] Harlan issued a separate concurring opinion.[17] Again looking directly to the Due Process Clause of the Fourteenth Amendment, Harlan found that the Connecticut statute "violate[d] basic values 'implicit in the concept of ordered liberty.'"[18] These are wonderful words, but difficult to characterize as law.

Harlan nevertheless supported the power of the states to deprive their citizens of a number of rights we now take for granted. He thought that there was a rational basis for a state poll tax as a voting qualification, observing that "the Equal Protection Clause . . . [does not] rigidly impose upon America an ideology of unrestrained egalitarianism."[19] He considered state legislative apportionments wholly free of constitutional limitations, except for the guaranty to each state of a republican form of government, a guaranty generally not applicable to apportionment.[20] He thought that the *Miranda* decision "represent[ed] poor constitutional law

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13. Nathan Lewin, *Justice Harlan: The Full Measure of the Man*, 58 A.B.A. J. 579, 583 (1972), *reprinted in* THE SUPREME COURT AND ITS JUSTICES 125, 135 (Jesse Choper ed., 1987).

14. *See* Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

15. *Id.* at 543 (citations omitted).

16. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

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

18. *Id.* at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

19. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 686 (1966) (Harlan, J., dissenting).

20. *See* Reynolds v. Sims, 377 U.S. 533, 591 (1964) (Harlan, J., dissenting).

and entail[ed] harmful consequences for the country at large."[21] He thought wrong the Court's holding that the Fourteenth Amendment makes the Fifth Amendment privilege against self-incrimination applicable to the states under federal standards, finding that the holding "carries extremely mischievous, if not dangerous, consequences for our federal system in the realm of criminal law enforcement."[22] He further found the Court's incorporation doctrine antithetical to the "purpose of our federal system" through a "compelled uniformity."[23]

When the Supreme Court, applying federal standards, granted the habeas petition of a person who had been convicted of contempt after invoking his self-incrimination privilege in a state gambling investigation, Harlan protested what he perceived as the Court's premise "that the Due Process Clause of the Fourteenth Amendment is a shorthand directive to this Court to pick and choose among the provisions of the first eight Amendments and apply those chosen, freighted with their entire accompanying body of federal doctrine, to law enforcement in the States."[24] In his view, the criminal justice systems of the states should be checked only by an interpretation of the Fourteenth Amendment's Due Process Clause that is informed by the "development of the community's sense of justice [which] may in time lead to expansion of the protection which due process affords."[25] That is just about as standardless as you can get!

Carrying out the same theme, Harlan, in a double jeopardy case, attacked the selective incorporation doctrine as unsupported "in history or reason" and decried the "eroding . . . of the basics of our federal system."[26] In a case dealing with a New York rule allowing the jury to determine both the truthfulness and voluntariness of a confession, he wrote that "'the states are free to allocate functions as between judge and jury as they see fit,'" and "[l]imitations on the States' exercise of their responsibility to prevent criminal conduct should be imposed only where it is demonstrable that their own adjustment of the competing interests infringes rights fundamental to decent society."[27] In a case involving a state's harmless error rule, his question was whether the rule was a reasonable one and whether it was "applied arbitrarily to evade the

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21. Miranda v. Arizona, 384 U.S. 436, 504 (1966) (Harlan, J., dissenting).

22. Malloy v. Hogan, 378 U.S. 1, 14-15 (1964) (Harlan, J., dissenting).

23. *Id.* at 16.

24. *Id.* at 15.

25. *Id.*

26. Benton v. Maryland, 395 U.S. 784, 808-09 (1969) (Harlan, J., dissenting).

27. Jackson v. Denno, 378 U.S. 368, 439 (1964) (Harlan, J., dissenting) (quoting Stein v. New York, 346 U.S. 156, 179 (1953)).

underlying constitutional mandate of fundamental fairness."[28] His dissent in that case was predicated on the belief that the majority had unnecessarily interfered with a state rule and that the Fourteenth Amendment does not "purport[] to give federal courts supervisory powers . . . over state courts."[29]

Harlan's expansive view of the Bill of Rights as applied to the federal government is manifested in a number of his decisions. He criticized the lack of a warrant in a case involving the search of an illegal distillery.[30] He required that an informant's information be shown to be reliable as a basis for a finding of probable cause in the issuance of a search warrant.[31] In another case, dissenting from the majority's view, he said that removing an automobile from the scene of an arrest and holding it for a search at the convenience of the police oversteps the applicable exception for warrantless searches of automobiles.[32] He favored giving appellants the retroactive benefit of favorable new rules on direct appeal.[33] These cases stand in sharp contrast to Harlan's view of the Bill of Rights as applied (or really as not applied) to the states.[34] The problem of the Harlan dichotomy, as I see it, lies in its failure to account for another Fourteenth Amendment provision that is just as important as the due process requirement: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[35]

Justice Harlan was appointed to the Supreme Court in 1955, the year that I was elected Managing Editor of the *New York Law School Law Review*, then known as the *New York Law Forum*. Our March 1955 issue was dedicated to Justice Harlan.[36] We reviewed his educational background, his career at the bar, his public service, his World War II service, and some of the decisions he wrote during his year as a Second

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28. Chapman v. California, 386 U.S. 18, 51 (1967) (Harlan, J., dissenting).

29. *Id.* at 47.

30. *See* Jones v. United States, 357 U.S. 493, 499-500 (1958).

31. *See* Spinelli v. United States, 393 U.S. 410, 418-19 (1969).

32. *See* Chambers v. Maroney, 399 U.S. 42, 62-63 (1970) (Harlan, J., dissenting).

33. *See* Williams v. United States, 401 U.S. 646, 680-81 (1971) (Harlan, J., dissenting).

34. *See generally* William H. Ledbetter, Jr., *Mr. Justice Harlan: Due Process and Civil Liberties*, 20 S.C. L. REV. 389 (1968) (examining Harlan's due process jurisprudence); Lewis I. Maddocks, *The Two Justices Harlan on Civil Rights and Liberties: A Study in Judicial Contrasts*, 68 KY. L.J. 301 (1979-80) (contrasting Harlan's views with those of his more activist grandfather in regard to constitutional restriction on state action).

35. U.S. CONST. amend. XIV, § 1.

36. *See John Marshall Harlan*, 1 N.Y. L.F. 1 (1955).

Circuit judge. We noted President Eisenhower's statement that Harlan's qualifications for the Supreme Court were the highest that he could find,[37] although we knew that Thomas E. Dewey and Herbert Brownell had passed on their favor with the President to a man who was their friend, colleague, and partner.[38] We observed in the conclusion of the dedication that Harlan's "lifetime of active practice is one asset in which the present Court is not particularly strong, since many of the Justices came to the Court from political or academic life."[39] In retrospect, I cannot help but wonder if it was that background—United States Attorney, downtown New York City law firm, cloistered youth, Princeton and Oxford—that contributed to the dichotomy of his jurisprudence. Perhaps we should not have been so critical of academics and politicians.

37. *See id.* at 10.

38. *See* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 259 (1985).

39. *John Marshall Harlan*, *supra* note 36, at 10.