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REMARKS ON JUSTICE HARLAN AS A JUDICIAL CONSERVATIVE*

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Justice Harlan was very much the judicial heir of Oliver Wendell Holmes and Learned Hand in terms of both respect for the legislature and what has now become popularly known as "judicial restraint." Emphasizing Justice Harlan's craftsmanship, Charles Fried's paper[1] reminds me of Hand's essay on the "Jobbists."[2] In this essay, Hand alluded to Holmes as the president of the "Society of Jobbists" to which he, Hand, had not yet been admitted.[3] That Society is a "guild" which

> all may join, though few can qualify. It is an honest craft, which gives good measure for its wages, and undertakes only those jobs which the members can do in proper workmanlike fashion. . . . It demands right quality, better than the market will pass. . . . The membership is not large . . . for it is not regarded with favor, or even with confidence, by those who live in chronic moral exaltation . . . who must always be fretting for some cure . . . . Its members have no program of regeneration; they are averse to propaganda; they do not organize; they do not agitate; they decline to worship any Sacred Cows. . . . When you meet a member, you are aware of a certain serenity that must come from being at home in this great and awful Universe, where man is so little and fate so relentless.[4]

From my point of view, we must all be concerned with the cabining that terms like "conservatism," "liberalism," "activism" and "restraint" have placed in our mind-sets. Rather than thinking in terms of right and wrong, black and white, we must view any judge's life work in the context of its time and the events shaping that time. As Justice Harlan viewed it, it was his role to point out the logical or philosophical or

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1. Charles Fried, *The Conservatism of Justice Harlan*, 36 N.Y.L. SCH. L. REV. 33 (1991).

2. *See* LEARNED HAND, *Mr. Justice Holmes*, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 57 (Irving Dillard ed., 3rd. ed. 1974).

3. *Id.* at 62.

4. *Id.* at 62-63.

historical inconsistencies that accompanied the Warren Court constitutional law revolution in the areas of due process, equal protection, and the criminal law generally.[5] For one, I do not judge other judges' work on the basis of whether they are right or wrong, or whether the conclusions they reach are consistent with my own views, but purely on the basis of whether they have done their job as well as they are able, as they see it, at their time and in their place. Measured by this standard, Justice Harlan can only be considered one of the greats.

I leave one final thought for your consideration. In a number of his decisions dissenting from the incorporation of the Bill of Rights and the creation of national standards, while emphasizing, much as Brandeis had before him,[6] that the states should be able to experiment, Justice Harlan expressed his fear of the *dilution* of national rights. As he said in *Malloy v. Hogan*,[7] "[t]he ultimate result [of incorporation] is compelled uniformity, which is inconsistent with the purpose of our federal system and which is achieved either by encroachment on the states' sovereign powers or by dilution in *federal* law enforcement of the specific protections found in the Bill of Rights."[8]

For those of us who are pretty much unreconstructed Warren Court—that is, Justice Brennan/Justice Marshall—followers, there is the bothersome, if not haunting, question whether, had the incorporation decisions gone another way, we would now see the watering down of federal protections on the federal level. An example of such watering down or dilution is in the area of the Fourth Amendment; on a federal level, it is weaker than it was before *Mapp*.[9] I know what my own answer to the question is, but I leave the thought for future contemplation.

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5. *See generally* Norman Dorsen, *The Second Mr. Justice Harlan: A Constitutional Conservative*, 44 N.Y.U. L. REV. 249 (1969) (discussing Justice Harlan's judicial philosophy and his frequent disagreement with the majority of the Warren Court).

6. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting).

7. 378 U.S. 1 (1964).

8. *Id.* at 16-17 (Harlan, J., dissenting) (emphasis added).

9. Mapp v. Ohio, 367 U.S. 643 (1961). Recent decisions lessening the scope of the protection afforded by the Fourth Amendment include Florida v. Bostick, 111 S. Ct. 2382 (1991); California v. Hodari D., 111 S. Ct. 1547 (1991); Florida v. Riley, 488 U.S. 445 (1989); Illinois v. Krull, 480 U.S. 340 (1987).