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Harlan Without Relish

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BOOK REVIEW

HARLAN WITHOUT RELISH

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

*Reviewed by Jethro K. Lieberman**

Princetonian and Rhodes Scholar, lawyer's lawyer and judge's judge, John Marshall Harlan was a leading conservative voice of the Supreme Court during one of its most tumultuous and liberal periods. He was, in the words of an unnamed wag quoted by his biographer, Tinsley E. Yarbrough, "Frankfurter without mustard."[1] Unhappily for the reader seeking the man behind the steadiest dissenter to the great jurisprudential wave that was the Warren Court, this biography is Harlan without relish.

Grandson and namesake of the great dissenter who served on the Supreme Court from 1877 to 1911, the second John Marshall Harlan was born in 1899 in Chicago. His father, John Maynard Harlan, was a pugnacious lawyer and one-time reform candidate for Mayor and an independent-party candidate for governor of Illinois. At the age of eight, John Marshall Harlan was sent to boarding school in Toronto, where he developed the roots of an Anglophilia that would flower during his stay at Oxford and his tour of Army duty in England during World War II.[2]

At Princeton, from which he graduated in 1920, Harlan had a distinguished career: chairman of the *Daily Princetonian*, president of his class for three years, member of the Ivy Club, like his father before him. One of his close Princeton friends was classmate Adlai E. Stevenson, whose sister, Buffie, Harlan dated during those years. At Balliol College, Oxford, Harlan studied jurisprudence, graduating in three years with a "First"; he was seventh in his class of 120 students.[3]

In 1923, on returning from England, Harlan joined the prestigious New York City law firm of Root, Clark, Buckner, and Howland, after his brother-in-law introduced him to two of the senior partners, Elihu Root,

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1. TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT xii (1992).

2. *Id.* at 4-11, 13.

3. *Id.* at 11-13.

Jr., and Grenville Clark.[4] But the partner who would become "the greatest single [professional] influence in my life,"[5] as Harlan later wrote, was Emory R. Buckner, the firm's chief litigator and a lawyer who in his time was as well known as, say, Whitney North Seymour, Sr., was in the later generation or as Arthur L. Liman is in ours. It was Buckner who sent Harlan off to New York Law School, believing that Oxford did not equip a lawyer for admission to the bar. Tired of studies, Harlan at first resisted but then relented, completing the two-year course in one year of afternoon classes. It was, Harlan later said, "more of a 'filler-in' . . . than an integral part of my legal education."[6] At Root, Clark, Harlan came to know his junior colleague, Herbert Brownell, later President Eisenhower's Attorney General, who would recruit Harlan to the Second Circuit and ultimately the Supreme Court. Harlan also came to know Professor Felix Frankfurter, one of Buckner's close friends.[7]

Eighteen months after Harlan joined the firm, Buckner was named U.S. Attorney in Manhattan. He served two years in that position and took Harlan with him for the duration. A quarter of the work of the U.S. Attorney's office in those days was enforcement of the Volstead Act,[8] the federal law implementing Prohibition. Harlan became the head of the Prohibition Division. Buckner exhibited a moral fortitude seemingly unknown to us: sworn to enforce laws that he held foolish, he pledged to abstain from all drinking and instructed his staff to forego as well. Evidently a strict constructionist, Buckner "poured the contents of his ample cellar of bootleg wine and whiskey down the drain—much to the consternation of Harlan and other staffers, who suggested, to no avail, that he simply leave his cellar unlocked, permitting his valued stock to be 'stolen.'"[9] Buckner "even resigned all his club memberships, including his beloved Harvard Club, rather than risk being obliged to raid one of his own clubs."[10] Harlan evidently abided by Buckner's injunction while in federal service, though in 1930, three years after he left the U.S. Attorney's office (but before Repeal), he gave his sister Edith, at her request, a quart of scotch as a present when she graduated from Vassar. She and her friends polished off the bottle in time to disrupt the class

4. *Id.* at 13. By the 1940s, the firm was known as Root, Ballantine, Harlan, Bushby & Palmer; today it is known as Dewey Ballantine.

5. *Id.* at 15 (quoting Letter from John Marshall Harlan to David H. McAlpin (June 19, 1964)).

6. *Id.* at 15.

7. *Id.* at 15-16.

8. National Prohibition Act, ch. 85, 41 Stat. 305 (1919) (repealed 1933).

9. YARBROUGH, *supra* note 1, at 17.

10. *Id.* at 17.

dinner with drunken shrieks during the college president's speech. Ever after, according to Edith, Vassar conferred its degrees and put on its speeches before the class dinner.[11]

Enforcing Prohibition was as impossible as enforcing the drug laws today, and for much the same reason. Neither Congress nor the President was willing to commit the funds necessary to do so.[12] When Harlan came to the Prohibition Division, 2000 cases were pending. Every week, New York City police were turning over to federal courts about half of the week's 2000 arrests—"waiters, porters, bartenders, bellhops, and assorted other 'small fry.'"[13] It was a situation, Buckner declared, that would leave him 500 years behind at the end of his four-year term. To cope, Harlan's office initiated a "padlock policy,"[14] seeking injunctions rather than criminal prosecutions against the owners of establishments that served liquor. The policy quickly became controversial: no respecter of social class, Buckner decreed that even the toniest watering holes should be targets; moreover, many of the raids were warrantless. Indeed, in 14 cases, Harlan and his colleagues, with Buckner's own money, bought drinks to demonstrate that the nightclubs and cabarets they visited were serving liquor. In those days, the *Weeks* doctrine[15] prohibited federal courts from entertaining unlawfully seized evidence unless seized by state officials and handed on a "silver platter" to federal authorities.[16]

Harlan's most notorious case during that era was the "Bathtub Venus" case, in which theatrical producer Earl Carroll threw a huge party, induced a chorus girl to step naked into a bathtub full of champagne, and invited his guests to drink from the tub. The Bathtub Venus turned out to be a seventeen-year-old who was inveigled into starring in this after-hours show both by an ample amount of liquor and by a promise, later reneged on, of $1000 for her performance. Harlan presented the case to the jury, winning a perjury conviction, after meticulously collecting the evidence necessary to overcome the defense's attempts to portray the prosecution as a publicity stunt.[17]

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11. *Id.* at 17.

12. *See* LARRY ENGELMAN, INTEMPERANCE: THE LOST WAR AGAINST LIQUOR 149 (1979) (asserting that "[f]unding for enforcement was . . . both inadequate and inconspicuous"); DAVID E. KING, REPEALING NATIONAL PROHIBITION 30-31 (1979) (stating that during the Coolidge Administration few initiatives were taken to enforce prohibition and though "Congress steadily increased enforcement appropriations [it was] . . . never enough to accomplish the goal").

13. YARBROUGH, *supra* note 1, at 17-18.

14. *Id.* at 18.

15. *See* Weeks v. United States, 232 U.S. 383 (1914).

16. YARBROUGH, *supra* note 1, at 18-19.

17. *Id.* at 24-28.

But Buckner soon tired of this job, apparently stung by fierce political carping about his office's Prohibition policies and its prosecution of President Harding's Attorney General, Harry M. Daugherty, on fraud charges related to the Teapot Dome scandal. Harlan resigned with Buckner, and they rejoined Root, Clark, though two years later they would leave again briefly when Governor Al Smith appointed Buckner Special Assistant Attorney General to investigate corruption charges involving sewer contracts in Queens. Harlan became his chief assistant, and it was he who "ran the show,"[18] once again demonstrating his mastery of the process. He collected so much evidence and assembled it so logically that as Buckner offered each item into evidence at the trial, Harlan and his colleagues chalked it onto a thirty-foot chart standing in the courtroom for the jury to see. Maurice E. Connolly, Borough President of Queens since 1911, was convicted on several charges, and Harlan's brief, written after he had once again returned to Root, Clark, won the appeal.[19]

In 1931, John Marshall Harlan became a partner at Root, Clark, and for the next quarter century he would be the lawyer's lawyer, meticulously representing some of the major businesses in America. Occasionally he would play a central role in noncorporate cases that attracted headlines—for instance, the Wendel will litigation, involving an estate of perhaps $100 million, left in 1931 by an eccentric woman with no immediate family. Harlan and a team of twenty-five Root, Clark lawyers successfully fended off legal attacks by more than 2300 claimants over several years. Harlan also was the appellate lawyer who unsuccessfully sought to reverse a state judge's notorious ruling barring Bertrand Russell from teaching at City College in New York.[20]

In 1942, Harlan, then forty-three, joined the Army Air Force as a colonel at the invitation of Harvard Law School Professor W. Barton Leach, chief of the Operations Analysis Division, and went to England to head the Eighth Bomber Command's Operations Analysis Section. Harlan stayed in the war until December, 1944; France and Belgium awarded him the *Croix de Guerre*. And in 1951, Governor Thomas E. Dewey appointed Harlan chief counsel to a state commission investigating links between organized crime and state government in New York.[21]

But for the most part, and especially after World War II, his clients were major corporations, including American Telephone & Telegraph, International Telephone & Telegraph, Gillette, and members of the duPont

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18. *Id.* at 31.
19. *Id.* at 28-32.
20. *Id.* at 52-57.
21. *Id.* at 57-61, 74-79.

family and their business interests. Many of his cases wound up in the Supreme Court; he was no stranger to that body when he was appointed. Perhaps his most well-known corporate case was *Cohen v. Beneficial Industrial Loan Corp.*,[22] in which the Court, siding with Harlan's client, upheld state laws requiring plaintiffs with tiny financial interests in companies to post bonds before suing corporations in diversity cases. He was also an integral part of the General Motors-duPont antitrust litigation, centering on the government's charge that the companies were conspiring to restrain trade in automotive products. He won a dismissal of this mammoth case from the trial court and was bitterly disappointed when the Supreme Court, after he had become an Associate Justice, ultimately reversed.[23]

Although Harlan was never electorally involved in politics, he was well connected to the political establishment, particularly the Dewey wing of the Republican party, both from his public service and from his work as a leading member of the New York bar. When two vacancies opened on the Second Circuit Court of Appeals in June, 1953, the Eisenhower administration, through Attorney General Herbert Brownell, approached Harlan. Because he could not readily leave the duPont litigation, the paperwork for his appointment was slowed, and the announcement of his nomination was delayed until January, 1954. He was confirmed on February 9 but was to sit for less than a year. In October, 1954, Justice Robert H. Jackson suddenly died, and President Eisenhower sent Harlan's name to the Senate to replace him.[24]

There ensued a modest controversy—modest, at least, compared to the events to which the nation has been subjected in Supreme Court nominations in recent times.[25] Several southern senators were opposed to the nomination, despite Harlan's conservative reputation, because he was nominally a member of some international organizations and was, they felt, insufficiently attuned to the threat of international control of the United States. Said Senator Eastland: "'[T]he nominee would not agree to protect the sovereignty of the United States in the fight which now is being waged by powerful, organized pressure groups on the Atlantic seaboard to' subordinate the Constitution to the dictates of treaty

22. 337 U.S. 549 (1949).

23. YARBROUGH, *supra* note 1, at 62, 63, 65-68, 134; *see also* United States v. E.I. duPont de Nemours & Co., 126 F. Supp. 235 (N.D. Ill. 1954), *rev'd*, 353 U.S. 586 (1957).

24. YARBROUGH, *supra* note 1, at 74, 79-82, 86-87.

25. I write three weeks after the confirmation of Justice Clarence Thomas, in October, 1991.

arrangements."[26] These were the days of the Bricker Amendment,[27] which would have declared treaties subordinate to the Constitution and a version of which failed by one vote in the Senate the previous February.[28] In a statement that faintly echoes a similar declaration by Justice Thomas, who claimed that he had never discussed *Roe v. Wade* with anyone because he was so busy,[29] Harlan "pleaded ignorance of [the Amendment's] provisions, citing the press of his busy law practice."[30] Senator Eastland derided Harlan's profession of ignorance:

> Mr. President, here is an able lawyer, a man who represented the DuPonts in a great antitrust case, a man who was on the bench of the circuit court of appeals, a man who is highly educated, a graduate of Oxford University. He stated that he did not know what the Bricker Amendment was. . . . [P]ractically every schoolchild in the United States knew about the great fight which the senior senator from Ohio was making. It seems peculiar to me that that fact did not trickle down to this nominee, who is a great lawyer and an American of high intelligence.[31]

In the end, the Senate voted seventy-one to eleven to confirm Harlan, with fourteen not voting. On March 28, 1955, John Marshall Harlan became the eighty-ninth Justice to sit on the Supreme Court.[32]

Much of Harlan's jurisprudence, discussed at length in this biography, is discussed also elsewhere in this volume, and no purpose would be served for me to attempt to summarize it. Yarbrough's treatment is interesting and readable, but it is ultimately disappointing as a biography. Summing up Harlan's judicial philosophy, Yarbrough says that it

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26. YARBROUGH, *supra* note 1, at 109 (quoting 101 CONG. REC. 3011-36 (1955)).

27. S.J. Res. 1, 83d Cong., 1st Sess., 99 CONG. REC. 160-61 (1953).

28. The version that was narrowly defeated stated that "[a] provision of a treaty or other international agreement which conflicts with this Constitution shall not be of any force or effect." 100 CONG. REC. 853, 853 (1954). This version, known as the George Amendment, was defeated by a 60-31 vote, falling one vote short of the two-thirds majority required to pass a constitutional amendment. *See* DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP 180-81 (1988). The issue was finally put to rest when the Court, in Reid v. Covert, 354 U.S. 1 (1957), held that the Supremacy Clause does not permit the treaty-making power to override constitutional prohibitions. *See id.* at 16-18.

29. David Savage, *Democrats Skeptical on Thomas Testimony*, L.A. TIMES, Sept. 12, 1991, at A1.

30. YARBROUGH, *supra* note 1, at 109 (citing 101 CONG REC. 3011-36 (1955)).

31. *Id.*

32. *Id.* at 111, 113.

> included the belief that the political processes, federalism, and separation of powers were ultimately more valuable safeguards of freedom than specific guarantees to individual liberty, as well as the view that judicial constructions of such liberties should be conditioned by due regard for those important features of the American political and legal system. His philosophy was also characterized by a common law approach to judging which would emphasize precedent and flexible, evolving standards of constitutional interpretation; by recognition of the creative role judges play in the decision-making process and a belief that adherence to norms of judicial self-restraint was the proper way to constrain that creativity; by a preference for narrow constitutional constructions closely tied to the facts of individual cases and thus limited in their potential breadth; and by a commitment to constitutional interpretations based on "neutral" legal principles rather than on considerations of "justice" or social utility.[33]

But why Justice Harlan thought those thoughts, and how he developed that judicial philosophy—in short, what his life experiences were that led him to take the positions that he did—are questions that his biographer largely fails to discuss.

Why, for example, did Harlan become a lawyer in the first place? It is easy enough to speculate that with a grandfather on the Supreme Court and his father a well-known lawyer, any man would succumb. But that is conjecture. Yarbrough offers us nothing to account for Harlan's choice. We know little of Harlan's relationship with his father, except that John Maynard Harlan was remote from his children. We are told nothing of what Harlan studied at Princeton or why he chose to read jurisprudence at Oxford. Even in those days, presumably, a man could become something other than a lawyer. And having become a lawyer, why did he choose to practice on behalf of the clients he served? I do not insinuate that he made the wrong choices; I simply insist that a *biography* should account for whatever choices were made.

Moreover, though the purely biographical parts of this book are workmanlike, we are rarely treated to any explanations or insights into why Harlan thought as he did about his work or his life. Quoting Henry Friendly, Yarbrough suggests that Harlan was in it for the game: "Our pleasure came from the *gaudium certaminis*, the joy of battle, and from pride in a task well done. Today's young lawyers are missing something if they have lost this."[34] But from Harlan himself we have not a word,

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33. *Id.* at 153.

34. *Id.* at 51 (quoting Henry J. Friendly, *Mr. Justice Harlan, As Seen by a Friend and*

not even a hint. Nor do we learn much about the "inner" man. His daughter hints at one point that, like his own father, he was largely an absentee parent:

> He was a marvelous father when he was around. . . . But . . . he was a career man and lawyer all the time, and I guess I would have liked to see more of him when I was growing up. He worked all the time, and I think he found family life difficult. He left most of the day-to-day family matters to my mother.[35]

Not unusual perhaps, then or now, but Yarbrough hints from time to time at a cold streak in the man without ever exploring—or connecting to—Harlan's view that in the end, process is, if not all, much of life. On more than one occasion, Harlan had the opportunity to speak out on behalf of friends, including Adlai Stevenson when he was unfairly attacked for his role in the Alger Hiss case, but Harlan kept his silence.[36]

Here and there, Yarbrough suggests that Harlan was simply an old-fashioned gentleman, and an old-fashioned gentleman's ways can appear cold when they are only diffident or even chivalrous. Yarbrough quotes Henry Steiner, Harlan's clerk in 1958, on the Justice's "patrician's view" of many of the racial cases that came before the Court. Harlan, Steiner said, possessed

> a non-cynical, genuine, and deep belief in the fundamental goodness of the country [and the basic decency of its officials]. He was shrewd enough to know what was happening in Alabama and the rest of the South. But he was also an "all deliberate speed" person. He thought change should be accomplished in a "gentlemanly" fashion, with all possible respect for state laws, procedures, and institutions. He had this deep sense of [the need to] do as little violence to the traditional forms of federalism as possible.[37]

Why? Since this attitude apparently deeply affected and permeated Harlan's jurisprudence, it would be useful to understand how and why he acquired it. Was Harlan schooled in history? Did he think long and deeply about political institutions other than through the lens of the constitutional

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Judge of an Inferior Court, 85 HARV. L. REV. 382, 384 (1971)).

35. *Id.* at 62 (quoting Interview with Eve Harlan Dillingham in Redding, Conn. (May 27, 1989)).

36. *See id.* at 78-79.

37. *Id.* at 235 (quoting Interview with Henry Steiner in Cambridge, Mass. (Jan. 20, 1990)).

lawyer and judge? A believer in process and proceduralism at least ought to be asked whether he has ever considered the human costs of that proceduralism. Yarbrough does not put these questions. And yet, discussing Harlan's startling libertarian stance in the contraception cases,[38] Yarbrough quotes the Justice's clerk, Philip Heymann: "Justice Harlan had a patrician manner about him, and he was outraged at this interference with personal privacy. . . . He just couldn't imagine such a law."[39] Why does Harlan's patrician manner allow him to create a right of privacy from the open-ended text of the Due Process Clause and yet be clearly skeptical of the no less text-based equal protection claims of people whose interests state officials were likewise outrageously hampering or destroying? Yarbrough doesn't say.

Yarbrough does say that "Harlan's public and private stance in the 1961 sit-in cases had made it abundantly clear that the Justice by no means agreed with his grandfather that people had a Fourteenth Amendment right of access to restaurants and other places of public accommodation, regardless of race or color."[40] Again, why did he disagree? What led him to demur, this distinguished grandson of a passionate upholder of a view of the Constitution that has eventually come to be (at least largely) accepted? Did Harlan's philosophy ultimately stem from a deep-seated belief in personal privacy, so that government officials can do what they want unless they somehow invade a privacy interest? It is one thing to excuse Harlan from discussing his judicial philosophy at his confirmation hearings (a bizarre notion that lately permits us to grill a candidate about his sexual conduct but to resist being upset at his refusal to discuss what he thinks about the reasons for his being named to the Court), but it is entirely another thing for his biographer to be content to discuss his judicial philosophy by summarizing his opinions without undertaking to uncover what has led the man to this philosophy or even to ask whether Harlan ever entertained doubts about it.

Moreover, much of the stuff of a *judicial* biography—how Harlan interacted with members of the Court—is largely missing. Yarbrough does discuss Harlan's relationship with Black (warm, even while disagreeing with much of his constitutional approach to due process).[41] We are told that Frankfurter was Harlan's mentor, but we are given scarcely any evidence of the relationship, beyond the often obsequious, flattering notes for which the senior Justice was famous. But what Harlan thought of the

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38. *See* Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (Harlan, J., concurring); Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

39. YARBROUGH, *supra* note 1, at 312-13 (quoting Interview with Philip Heymann in Cambridge, Mass. (Feb. 8, 1990)).

40. *Id.* at 245.

41. *See id.* at 315.

two Chief Justices with whom he served—Warren and Burger—and how he dealt with them and with most other members of the Court is almost entirely missing, as is what "the brethren," as Yarbrough too often annoyingly refers to the Justices, thought of Harlan.

Only in a brief epilogue[42] does Yarbrough attempt to pick through Harlan's life to explain his public acts. On one page alone Yarbrough implicitly confesses his difficulty by using phrases (italicized below) that demonstrate the speculations in which he engages:

> Several elements in the Justice's background *appear to have been* reflected in, and to some extent helped to shape, his thinking in a variety of constitutional contexts. His prosecutorial experience *surely must have had* some appreciable impact. . . . Harlan's work [in government] *no doubt* helped to strengthen his regard for the role of the states in the federal system . . . . He was *probably* the author . . . of the memorandum . . . . Harlan's experience as Buckner's Prohibition chief *may well have* convinced him . . . of the wisdom of diverse state regulations in such sensitive areas. *No doubt*, it helped to nurture as well the sympathy for the special problems of law enforcement which was to be a common theme of his opinions. The death threats which he received during his work with the crime commission *may also have had* an impact on his thinking.
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> The Justice's World War II experiences . . . were also *of undoubted relevance.* The highly secret nature of his wartime activities *probably* contributed to the deference he was later to accord government in civil liberties cases with national security overtones. His suspicions of the Soviet Union . . . *seem undoubtedly* to have had an impact as well.[43]

Instead of connecting the life to the thought, Yarbrough gives his readers mini-histories of doctrinal development, snapshots of several topics that came before the Court. The discussion is largely ahistorical. That is to say, Yarbrough discusses the cases on loyalty and security, obscenity, segregation, and many others topic by topic, rather than relating them to each other historically. Moreover, Yarbrough rarely provides a context for any of the cases that came to the Court. Thus, chapter eight, "Incorporation and Beyond," has no framework—no road map to the cases, rules, and doctrines thrown at the reader, no explanation at the outset to guide any but the cognoscenti to what the discussion entails. In fact, not until three pages into the chapter does the reader even encounter

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42. *See id.* at 337-44.

43. *Id.* at 338 (emphasis added).

the word "incorporation."[44] Ultimately, this book boils down to a series of what might be termed "intellectual vignettes": Harlan took a strict view of this, a moderate view of that. But so what?

Harlan served on the Court from 1955 through the 1970-1971 Term, when he was forced by intractable illness to retire a month before his death. During those 16 years, many of them with cruelly failing eyesight, he wrote 613 opinions, "more than any other justice of his era."[45] Of the total, 168 were majority opinions of the Court, 149 were concurrences, and 296, nearly half, were dissents. From these figures and from Harlan's rate of dissent—62.6 dissents per term—during the period 1963 to 1967 ("the core period of Warren Court activism in civil liberties litigation"[46]), Yarbrough insists that Harlan is deserving, equally with his grandfather, "of the appellation 'great dissenter.'"[47]

The claim is unconvincing—or at least not proven. Harlan was a craftsman, a careful and prudent thinker, a probing and honest intellect, a writer of some power, a courageous man. Whether or not you agreed with him, you could not ignore him; his opinions demanded reading. It seems fair to say that they still do. But all that is not enough to make someone a great dissenter—though, in fairness, Yarbrough never defines the term.

It was Harlan's fate to be a conservative Justice in a liberal era. I do not doubt that were he a member of the Court today he would be its leader, resisting the new activism as much as the old. But to my mind, a great dissenter deserves the title because he sees clearly the errors and difficulties into which the majority's opinions will lead the country and because he articulates them in such a way that a later Court will finally pay him heed. In that sense, the first John Marshall Harlan was a great dissenter, as were Holmes and Brandeis a generation later, and as were Black and Douglas a generation after that. Theirs was the gift of prophecy, or prophetic persuasion.

It is not clear that Harlan's opinions were prophetic or that they have the staying power of the other great dissenters. Or, less sweepingly, it is amply clear that Yarbrough fails to make the case. Even if Harlan's metier was not prophecy, some of his dissents may yet come to be the law, as for example his dissent in *Fay v. Noia*,[48] the habeas corpus case which appears this past Term to have gathered majority assent.[49] But whether

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44. *Id.* at 273.

45. *Id.* at viii.

46. *Id.*

47. *Id.*

48. 372 U.S. 391, 448 (1963) (Harlan, J., dissenting).

49. *See* Coleman v. Thompson, 111 S. Ct. 2546 (1991) (holding that a procedural

his closely reasoned, stick-to-the-facts opinions can or will ultimately persuade a new Court to return to the views he espoused is at the moment very much an open question. It may be that it is simply too early to tell how lasting Harlan's achievement will be. But in restricting himself to tracing the trajectories of Harlan's thought, Yarbrough fails even to consider what Harlan's achievement was. We are left, finally, to glimpse Harlan through a veil, in the main through the words of his published opinions and some of his unpublished memos. That may be enough for the reader who wishes merely to know what Harlan said, but it is not sufficient for a biography of a man or of a judge and scholar. In the end, what is important is the legacy, and that remains for someone else to gather.

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default at the state level bars federal habeas review and citing Harlan's dissent in *Fay* throughout).