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THE PLATONIC GUARDIAN AND THE LAWYER'S JUDGE: CONTRASTING THE JUDICIAL PHILOSOPHIES OF EARL WARREN AND JOHN M. HARLAN

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* Judge, 55th District Court, Harris County, Texas; B.A., University of Texas, 1992; J.D., University of Houston, 1995. This Article arose from a paper that the Author wrote over a decade ago for Professor Craig Joyce's American Legal History seminar at the University of Houston Law Center. The Author expresses his appreciation to Professor Joyce for all he has done for the students of the Law Center and to the Houston Law Review for its many contributions to American legal scholarship.

> *There is a story that two of the greatest figures in our law, Justice Holmes and Learned Hand, had lunch together and afterward, as Holmes began to drive off in his carriage, Hand, in a sudden onset of enthusiasm, ran after him, crying, "Do justice, sir, do justice." Holmes stopped the carriage and reproved Hand: "That is not my job. It is my job to apply the law."*[1]

I. INTRODUCTION

Almost a quarter of a century has passed since Anthony Lewis announced, "We are all activists now."[2] Although Lewis spoke at that time of the Burger Court, many believe that comment still rings true today.[3] Action, however, has not always been the hallmark of the federal courts; indeed, the activism seen in the courts today began largely with the work of the Supreme Court under Chief Justice Earl Warren only a generation ago.[4] Nevertheless, despite the relatively recent rise of activist majorities on the High Court, many regard such activism as the historical norm and see calls for a restraintist retrenchment as a politically motivated affront to the obligations and legitimate powers of the judiciary.[5] Ironically, "this is the same light in which the decisions of the Warren period were regarded by orthodox lawyers then: as a political challenge to the rule of law embodied in the decisions of the previous period."[6]

In other words, an entire generation grew up with judicial activism as an unquestionable truth. To legally aware young

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1. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 6 (1990) (citation omitted). Whether the quote is accurate remains questionable, but other, more verifiable, quotations of Holmes provide the same flavor. *See* Michael Herz, *"Do Justice!": Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111, 111–12 (1996) (recounting three versions of the story); *see also* Michael J. Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 WM. & MARY BILL RTS. J. 585, 595 (2002) (quoting Holmes as proclaiming, "Of course I know and every other sensible man knows that the Sherman law is damned nonsense, but if my fellow citizens want to go to hell, I am here to help them").

2. Anthony Lewis, *Foreword* to THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T, at ix (Vincent Blasi ed., 1983).

3. *See, e.g.*, Adam Cohen, Editorial, *Psst . . . Justice Scalia . . . You Know, You're an Activist Judge, Too*, N.Y. TIMES, Apr. 19, 2005, at A20 (detailing some of Justice Scalia's activist inclinations for conservative causes).

4. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 428–29 (1990) (stating that the Warren era "set the tone for much legal debate" and that aggressive judicial activism in the 1960s and 1970s contributed largely to the erosion of the public's "faith in law's autonomy").

5. *Id.* at 429.

6. *Id.*

Americans, activism is a timeless reality, just like racially integrated schools and the right to an abortion.[7] But as with integration and abortion, a time existed when lawyers and judges fought bitterly over the constitutionality of judicial activism. Anthony Lewis claims that the fight is over and that the activists won.[8] Although some dispute the assertion that "[w]e are all activists now,"[9] this Article deals not with the fight between the activists and restraintists of today, but with the fight at its modern origin—between Chief Justice Earl Warren, the activist-winner, and Justice John M. Harlan, the restraintist-loser. In so doing, this Article will not bother to determine whether we are all activists now, but whether we should be. It concludes that Harlan's adherence to a philosophy of strict judicial restraint is more compatible with the rule of law.

II. DISPARATE BACKGROUNDS

Earl Warren was born in Los Angeles, California, on March 19, 1891.[10] His father, Matt Warren, anglicized from "Methias Varran," had come from Norway as an infant and grew up in Eagle Grove, Iowa.[11] Matt dropped out of school and worked as a farmhand and as a mechanic before he married a Swedish girl named Christine (Chrystal) Hernlund in Minneapolis in 1886.[12] They had a daughter, Ethel, in 1887, and the young family moved to California in 1889.[13] Following Earl's birth, the Warren family moved again, from Los Angeles to Bakersfield, where Matt worked in the railyards of the Southern Pacific.[14]

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7. *See* Lewis, *supra* note 2, at viii–ix (noting that despite the bitter legal disputes over *Plessy v. Ferguson* and *Roe v. Wade*, the results of those decisions are largely accepted by the public today); *see also* JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 517 (2006) (noting that much of the Warren Court's groundbreaking holdings are now publicly accepted, settled law; "[e]ven *Miranda*, the source of fury in its time, has embedded itself so firmly in the law that police have learned to live with it and conservatives are loath to disturb it").

8. Lewis, *supra* note 2, at ix ("[T]he great conflict between judicial 'restraint' and 'activism' is history now.").

9. *Id.*; *see also* Robert F. Nagel, *On Complaining About the Burger Court*, 84 COLUM. L. REV. 2068, 2070–71 (1984) (reviewing THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T, *supra* note 2) (arguing that although "[i]t is true that activism flourishes today," it does so only "amidst pervasive unease about the legitimacy of judicial power").

10. JOHN D. WEAVER, WARREN: THE MAN, THE COURT, THE ERA 19–20 (1967).

11. *Id.* at 19.

12. *Id.*

13. *Id.*

14. *Id.* at 21.

Shortly after Earl Warren's eighth birthday, on May 20, 1899, about 2,000 miles to the east, a son was born to Chicago lawyer John Maynard Harlan and his wife, Elizabeth.[15] His parents named him for his grandfather, Supreme Court Justice John Marshall Harlan.[16] Young Harlan's paternal ancestors emigrated from England in 1687.[17] His mother's forbearers, also from England's middle class, settled in Massachusetts in about 1640.[18]

Warren grew up in a little house across the street from the railyards where his father worked.[19] He worked as a "call boy" in the yards and attended public schools in the company town of Bakersfield.[20] Warren's work for the railroad exposed him to industrial accidents, crime, vice, "monopolistic power, political dominance, corruption in government, and their effect on the people of a community."[21] He said later that the lessons he learned in the yards "tend[ed] to shape [his] career throughout life."[22]

Meanwhile, Harlan "enjoyed a comfortable upper-class childhood," mingling with Chicago's elites and living in his family's elegant three-story home in one of the city's wealthier neighborhoods.[23] The family summered at their vacation home, "Braemead," on the St. Lawrence River in Quebec.[24] Harlan attended the exclusive Chicago Latin School until he was eight, when his parents sent him to preparatory schools in Ontario and, later, New York.[25] Like his father, Harlan attended Princeton University, where he was chairman of the *Daily Princetonian* and class president for three years.[26]

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15. TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 8–9 (1992).

16. Norman Dorsen, *The Second Mr. Justice Harlan: A Constitutional Conservative*, 44 N.Y.U. L. REV. 249, 250 (1969). Interestingly, while Harlan carried the distinguished name of his famous grandfather, Warren's parents failed to even give him a middle name. *See* WEAVER, *supra* note 10, at 20. "'Son,' Matt Warren explained when [Earl Warren] asked why he had no middle name, 'when you were born, we were too poor to enjoy any luxury of that kind.'" *Id.*

17. YARBROUGH, *supra* note 15, at 3.

18. *Id.* at 5.

19. G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 11 (1982).

20. *See* WEAVER, *supra* note 10, at 26 (noting that Warren attended Kern County High School); WHITE, *supra* note 19, at 11–13.

21. WHITE, *supra* note 19, at 12.

22. *Id.*

23. YARBROUGH, *supra* note 15, at 9.

24. *Id.* at 10.

25. *Id.* at 9–11.

26. *Id.* at 11–12. Young Charles Scribner, of the famous publishing family, and Harvey Firestone, Jr., worked on the *Daily Princetonian* with Harlan. *Id.* at 12. Adlai

Warren worked his way through Boalt Hall—the law school at the University of California at Berkeley.[27] He graduated "'in routine fashion' . . . not having distinguished himself by his academic performance."[28] He took a couple of positions in private practice before serving as an officer on the home front in World War I.[29] After the war, he worked for the California state legislature, as deputy city attorney in Oakland, and as a deputy prosecutor before getting elected District Attorney of Alameda County in 1926.[30] There, he met Nina Meyers in 1921; they married and had six children.[31]

From 1920 forward, Warren worked continuously as a public official: as a Deputy Alameda County District Attorney, as District Attorney of Alameda County for over a decade, as California Attorney General for four years, and as the only governor in California history to be elected three times.[32] The only time that an opponent defeated Warren in an election was when he ran as the Republican candidate for Vice President with Thomas E. Dewey in 1948.[33]

Harlan earned a Rhodes Scholarship in his last year at Princeton and three years later finished his stint at Oxford University's Balliol College with "a 'First' in jurisprudence, [and] seventh in a class of 120."[34] Upon his return to the states, Harlan secured a position as an associate in the esteemed Wall Street law firm of Root, Clark, Buckner & Howland.[35] In 1924, after

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Stevenson was also one of Harlan's close college friends. *Id.*

27. WHITE, *supra* note 19, at 15–16 (noting that the future Chief Justice's employment while attending Boalt Hall directly violated the law school's policy against outside employment for law students).

28. *Id.* at 21.

29. *Id.* at 21–23.

30. *Id.* at 23–25, 28.

31. *Id.* at 86.

32. Anthony Lewis, *Earl Warren*, *in* 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969: THEIR LIVES AND MAJOR OPINIONS 2721, 2727 (Leon Friedman & Fred L. Israel eds., 1969). In contrast to his devotion to civil liberties as Chief Justice, as governor Warren supported the wartime internment of Japanese Americans, even warning once that "if the Japs are released, no one will be able to tell a saboteur from any other Jap." PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT: THE MEN AND WOMEN WHOSE CASES AND DECISIONS HAVE SHAPED OUR CONSTITUTION 394 (1999). Warren's reputation in California still suffers so much because of his position on internment that "[n]o building bears his name." NEWTON, *supra*, note 7, at 518. In 2003, a bill was introduced in the California legislature "to install a pair of memorials along the walk that Warren used to take from the mansion to his office." *Id.* at 519. "But like previous proposals to honor Warren, it died. In this case, it was the legislature's Asian caucus that doomed the bill, retribution for Warren's advocacy of the internment." *Id.*

33. Lewis, *supra* note 32, at 2727.

34. YARBROUGH, *supra* note 15, at 13.

35. *Id.* at 13–15. Root Clark was the predecessor of the firm known today as Dewey

attending New York Law School, he was admitted to the bar.[36] He left the firm for two years to serve as an Assistant U.S. Attorney under his mentor, Emory Buckner, but returned in 1927.[37] He married Ethel Andrews in 1928, with whom he eventually had one daughter, and he later became a partner at Root Clark in 1931.[38]

Harlan eventually became the firm's leading trial partner, though he also served as head of the Operational Analysis Section of the Eighth Air Force in World War II and as Chief Counsel to the New York State Crime Commission.[39] President Eisenhower appointed Harlan to the United States Court of Appeals for the Second Circuit in 1954,[40] only a few months after he had appointed Warren Chief Justice of the Supreme Court.[41]

Ballantine L.L.P. Dewey Ballantine L.L.P.—Firm History, http://www.deweyballantine.com/about_firm_history_more.cfm (last visited Apr. 13, 2007).

36. YARBROUGH, *supra* note 15, at 15.

37. Dorsen, *supra* note 16, at 250.

38. *Id.*; Nathan Lewin, *John Marshall Harlan*, *in* THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–1993, at 441, 443 (Clare Cushman ed., 1993).

39. Dorsen, *supra* note 16, at 251.

40. *Id.* at 251–52.

> In retrospect the process of Harlan's appointment seems a relic. "I wanted a trial lawyer for the next Court appointment," noted Herbert Brownell, Eisenhower's Attorney General, "because the opinions under Vinson lacked utility to the bar. They were weak in applying high flowing principles to the lower courts and the bar that could be understood. I had long thought John should be on the Court. I told this to Ike and he agreed."

Roger K. Newman, *The Warren Court and American Politics: An Impressionistic Appreciation*, 18 CONST. COMMENT. 661, 666 n.23 (2001) (reviewing LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000)).

41. Lewis, *supra* note 32, at 2728. It is remarkable that Eisenhower appointed two men with such contrary judicial philosophies so closely in time. Incidentally, Eisenhower later famously called the Warren appointment "the biggest damn-fool mistake I ever made." William A. Wines, *Title VII Interpretation and Enforcement in the Reagan Years (1980–89): The Winding Road to the Civil Rights Act of 1991*, 77 MARQ. L. REV. 645, 651 (1994) (quoting BERNARD SCHWARTZ WITH STEPHAN LESHER, INSIDE THE WARREN COURT 92 (1983)). After Harlan, Eisenhower's next appointment to the Court was William Brennan. Eisenhower came to lament that choice almost as much as he did Warren. *See* John O. McGinnis, Editorial, *Coming to Order: How the Supreme Court Really Works*, WSJ.COM, Mar. 15, 2007, http://www.opinionjournal.com/forms/printThis.html?id=110009786 (noting that Eisenhower, referring to Warren and Brennan, "famously said of his presidency: 'I made two mistakes and both of them are sitting on the Supreme Court'"); *see also* JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 25–26 (2007) ("Eisenhower reportedly said his two worst mistakes as president both sat on the Supreme Court: William Brennan and Earl Warren, who became the ideological leaders of the most left-wing court in history."); IRONS, *supra* note 32, at 403 (repeating President Eisenhower's quote concerning Warren and Brennan). Ironically, Harlan's appointment was sandwiched between that of these two liberal icons. NEWTON, *supra* note 7, at 330 ("Ideologically conservative, as well as a dignified, patrician man, Harlan would prove much more to Eisenhower's liking . . . .").

Eisenhower appointed Harlan to the Supreme Court in 1954, but Harlan's appointment was not confirmed until 1955.[42]

III. JUXTAPOSED JUDICIAL PHILOSOPHIES

A. Representative Opinions

It may not be surprising that two men with such different backgrounds would develop into such an antithetical pair of jurists.[43] Harlan's jurisprudence was carefully reasoned and restraintist.[44] Warren's jurisprudence was egalitarian[45] and activist.[46] In a nation built upon the rule of law, Harlan's approach was, and is, more legitimate.[47] Yet, without the looseness of Warren's approach, many reforms of the 1950s and 1960s never would have occurred.[48]

1. Obscenity: The First Amendment. The labels perhaps most often placed on Warren and Harlan are, respectively, "liberal" and "conservative."[49] Yet, looking no deeper into the Bill

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42. Dorsen, *supra* note 16, at 252.

43. *See* IRONS, *supra* note 32, at 401 (noting that Harlan was "Warren's opposite in many ways" and that "Eisenhower did not pick Harlan as a counterweight to Warren, but he served that role until the Chief's retirement in 1969").

44. *See* Dorsen, *supra* note 16, at 250 (praising Justice Harlan's "consistent professional competence" and noting his restraint in an era of activist doctrinal innovations).

45. *See generally* Lewis, *supra* note 32, at 2726 (noting that Chief Justice Warren occasionally appeared to forego legal analysis to confront what he considered to be moral outrages). Lewis claims that Warren "bore considerable responsibility" for the judiciary's pushing aside of "stability, intellectuality, [and] craftsmanship" in its efforts to effect social change. *Id.* at 2723–24. "Earl Warren was the closest thing the United States has had to a Platonic Guardian, dispensing law from a throne without any sensed limits of power except what was seen as the good of society." *Id.* at 2726 (footnote omitted).

46. *Id.* at 2727 (stating that to Warren, "action was all"); *see also* NEWTON, *supra* note 7, at 517 (stating that Warren "has come to symbolize reckless, liberal judicial activism, against whose jurisprudence justices like Samuel Alito boast of having sharpened their skills").

47. *See* Philip B. Kurland, *Earl Warren: Master of the Revels*, 96 HARV. L. REV. 331, 337–39 (1982) (reviewing WHITE, *supra* note 19) (criticizing both Warren's ethicist approach to judicial decisions and the dismissal of legal reasoning that accompanied it). "Only the abandonment of the rule of law can make of Warren's example a guide to judicial behavior." *Id.* at 339.

48. Stephen M. Dane, *"Ordered Liberty" and Self-Restraint: The Judicial Philosophy of the Second Justice Harlan*, 51 U. CIN. L. REV. 545, 545–46 (1982) (crediting the "boldness and activism of the Warren Court" for the modern-day protection of individual liberties and equality); Lewis, *supra* note 32, at 2721–22 (stating that "the legal revolution could not have taken place without Earl Warren").

49. *See, e.g.*, WHITE, *supra* note 19, at 348 (describing Warren as possibly the only "liberal Chief Justice of the twentieth century"); G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 343 (1988) (describing Harlan as a conservative). *But see* Norman Dorsen, *John Marshall Harlan and the Warren Court*, *in* THE WARREN COURT IN

of Rights than the First Amendment, one quickly finds such broad characterizations imperfect, particularly in the area of obscenity.[50] Despite their divergent interpretations of the law in the obscenity area, the two Justices agreed that such cases were among the most difficult the courts faced.[51]

Warren's paternalistic view of decency motivated his approach to obscenity cases:

> Warren believed that human beings were inherently susceptible to temptations of the flesh and the spirit, but he also believed that such temptations were often destructive and should be suppressed or channeled. He conceded the inevitability of a public market for obscene literature; he also sought to regulate that market. His ideal solution to the problem of traffic in pornographic materials was to "eliminate the profit": If that were achieved, "the traffic in such shoddy merchandise [would] vanish."[52]

As a district attorney, Warren crusaded against indecency and degenerative moral forces.[53] Yet, as Chief Justice, "Warren was hampered . . . in his attack on pornography by the language of the Constitution."[54] Warren attempted to reconcile his moral mission to rid the nation of smut with the First Amendment's protection of free speech by recognizing a dichotomy between the content of the speech involved and the conduct of the material's distributors.[55]

HISTORICAL AND POLITICAL PERSPECTIVE 109, 109–10 (Mark Tushnet ed., 1993) (describing Harlan as "a moderate figure avoiding the extremes" rather than "an inveterate reactionary").

50. *See* Daniel A. Farber & John E. Nowak, *Justice Harlan and the First Amendment*, 2 CONST. COMMENT. 425, 434 (1985) ("In several obscenity cases, Harlan was strikingly more protective of civil liberties than Chief Justice Warren.").

51. WHITE, *supra* note 19, at 250; YARBROUGH, *supra* note 15, at 221.

52. WHITE, *supra* note 19, at 251 (quoting EARL WARREN, A REPUBLIC, IF YOU CAN KEEP IT 160 (1972)). Warren's visceral opposition to the evils of pornography and his intense determination to suppress it show both that his "expansive civil libertarianism" was not limitless and that he simply does not fit the model of a modern liberal. NEWTON, *supra* note 7, at 518.

> [L]ittle about him fit the strictures of a runaway liberal. His manner was too conservative, his rhetoric too restrained, his devotion to nineteenth-century values too sincere for Warren ever to be a liberal in the modern sense. He was a veteran, married his whole life to one woman, a father to six children, appalled by pornography, and deeply patriotic. He was a Grand Master of the Masons. He appreciated power and those who had it.

Id. Perhaps this explains why Eisenhower and so many others failed to foresee the leftward revolution he would initiate as Chief Justice.

53. WHITE, *supra* note 19, at 254.

54. *Id.* at 251.

55. *Id.* at 255–56.

Harlan's concern with the obscenity cases involved the relative authority of the federal government to that of the states—as did much of his jurisprudence.[56] Because he did not bear the moralist baggage the Chief Justice carried, Harlan focused on the truly analytical notions of obscenity law, such as the effect of federalism and the reach of the First Amendment, more closely than Warren.[57] In other words, "[t]he cosmopolitan Harlan was no prude."[58] The easily embarrassed Warren refused to view the pornographic films shown in the Court's basement conference room; instead, he sent a clerk or relied on the reports of other Justices.[59] Harlan, on the other hand, who "probably considered most obscenity controls silly," rarely missed a showing.[60]

Two individual cases, one near the beginning and one close to the end of the Warren era, serve to contrast the two Justices' divergent views on the regulation of obscenity. In *Roth v. United States*, the Court held that obscenity was not protected by the First Amendment because it completely lacked any redeeming social value.[61] Justice Brennan, writing for the Court, defined obscenity as "material which deals with sex in a manner appealing to prurient interest."[62]

Warren joined in the Court's definition of obscenity,[63] but he stressed separately that the Court condemned not the material but rather the conduct of its purveyors.[64] Warren insisted that pornographers "were plainly engaged in the commercial

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56. YARBROUGH, *supra* note 15, at 214–15.

57. *See, e.g.*, Roth v. United States, 354 U.S. 476, 496–507 (1957) (Harlan, J., concurring in part and dissenting in part) (demonstrating Justice Harlan's complex First Amendment analysis, utilizing constitutional law and federalism principles, while maintaining his focus on the law, not the conduct of the people involved).

58. YARBROUGH, *supra* note 15, at 214.

59. SCHWARTZ WITH LESHER, *supra* note 41, at 143.

60. YARBROUGH, *supra* note 15, at 214–15.

> Even in later years, after his eyesight had almost completely failed him, [Justice Harlan] still dutifully attended the showings, relying on the accounts of others for what he could no longer see. "Justice Stewart would sit next to Harlan and narrate," the journalist Nina Totenberg has written. "And about once every five minutes Harlan would exclaim in his proper way: 'By George, extraordinary!'"

Id. at 215. Although he did not narrate stag films for Harlan like Stewart did, Warren also tended to Harlan when his health failed him. NEWTON, *supra* note 7, at 348. "Warren developed a fondness and appreciation for Harlan, whose dignity impressed him . . . . When Harlan suffered from health problems . . . and he contemplated retirement[,] Warren persuaded him to stay and arranged for him to have an extra clerk to help with reading." *Id.*

61. *Roth*, 354 U.S. at 484–85.

62. *Id.* at 487.

63. *Id.* at 494–96 (Warren, C.J., concurring).

64. *Id.* at 495.

exploitation of the morbid and shameful craving for materials with prurient effect."[65] But Warren does not explain how he distinguishes between conduct and content.[66] For the defendants to be guilty of "commercial exploitation of . . . materials with prurient effect," the materials must actually be prurient.[67] The content of the speech, therefore, does matter, and the First Amendment must apply.[68]

Harlan avoided dichotomies between conduct and expression and instead focused on the proper role of the courts in the obscenity area. He dissented from *Roth* and concurred in its companion case, *Alberts v. California*.[69] *Roth* concerned a federal provision regulating obscenity and *Alberts* involved a state statute.[70] Harlan objected to the Court's "equation of federal and state power over obscene expression."[71] The police power of the states—the authority to regulate the safety and morality of the public—justified their regulation of obscene material.[72] Regardless of his own feelings about pornography, he recognized that it was not irrational for a state to conclude that lewd material could lead to sexual misconduct or an erosion of morality.[73] Harlan noted that, because the Court's "function in reviewing state judgment under the Fourteenth Amendment is a narrow one," rationality was all that was required of the states.[74]

Congress on the other hand, lacked any "substantive power over sexual morality" but had merely an "incidental" interest derived from its postal powers.[75] Congressional suppression would destroy the "prerogative of the States to differ on their ideas of morality"[76] and unduly hamper the experimentation that makes a federal system so valuable.[77]

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65. *Id.* at 495–96.

66. *See* WHITE, *supra* note 19, at 256–57 (describing how the dichotomy between conduct and expression is difficult to sustain based on analysis of the *Roth* and *Kingsley* cases).

67. *Roth*, 354 U.S. at 496 (Warren, C.J., concurring).

68. *See id.* at 495–96.

69. *Id.* at 496 (Harlan, J., concurring in part and dissenting in part).

70. *Id.* at 479–80 (majority opinion).

71. YARBROUGH, *supra* note 15, at 215.

72. *Roth*, 354 U.S. at 503–05 (Harlan, J., concurring in part and dissenting in part).

73. *See id.* at 506 (indicating that the States' prerogatives may differ with regard to standards of morality).

74. *Id.* at 501; *see also* Farber & Nowak, *supra* note 50, at 446 (reiterating the holding of *Roth*).

75. *Roth*, 354 U.S. at 504 (Harlan, J., concurring in part and dissenting in part).

76. *Id.* at 506.

77. *Id.* at 505.

Nearly a decade after *Roth*, the obscenity debate lingered. In *Ginzburg v. United States*,[78] Justice Brennan again wrote for the Court in a decision upholding a federal conviction for sending obscene material through the mail.[79] Although he assumed for argument that the material was not obscene,[80] Brennan nonetheless upheld the conviction because the "leer of the sensualist" consumed the material's advertising.[81] In particular, the Court found it offensive that the defendant attempted to obtain postmarks from Intercourse and Blue Ball, Pennsylvania, before finally having to settle for Middlesex, New Jersey.[82] The majority affirmed a five-year prison sentence for this "pandering."[83]

The "pandering" approach to obscenity can be traced directly to Warren's dissent in *Jacobellis v. Ohio*,[84] in which he repeated his position that the determination of obscenity depended upon "the use to which various materials are put—not just the words and pictures themselves."[85] Before *Ginzburg*, none of the other Justices had endorsed Warren's pandering scheme.[86] After *Ginzburg*, it became the law of the land.[87]

Dissenting in *Ginzburg*, Harlan condemned the Court's use of the pandering concept as "an astonishing piece of judicial improvisation" that cast "a dubious gloss over a straightforward 101-year-old statute."[88] Harlan did not object to the Court's failure to strike the statute down; he acknowledged that a state could constitutionally pass such a law and that even Congress might "possibly" have the same authority.[89] Rather, he refused to join in what he saw as the judicial creation of "a new statute," especially one that excluded "the sharply focused definitions and standards necessary in such a sensitive area."[90]

In the obscenity field, Warren worked to carve out the pandering of pornography from First Amendment protection in

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78. Ginzburg v. United States, 383 U.S. 463 (1966).
79. *Id.* at 464–65.
80. *Id.* at 465 n.4.
81. *Id.* at 468.
82. *Id.* at 467–68.
83. *Id.* at 464–67; *id.* at 497 (Stewart, J., dissenting).
84. Jacobellis v. Ohio, 378 U.S. 184 (1964).
85. *Id.* at 201 (Warren, C.J., dissenting).
86. WHITE, *supra* note 19, at 258.
87. *See* Farber & Nowak, *supra* note 50, at 447 (citing Splawn v. California, 431 U.S. 595, 602 (1977)).
88. *Ginzburg*, 383 U.S. at 494–95 (Harlan, J., dissenting).
89. *Id.* at 494.
90. *Id.*

an effort to protect individuals "from exposure to the debauched aspects of life" and to liberate them "from their own destructive tendencies."[91] Harlan, on the other hand, viewed the obscenity cases—as he did much of the Court's docket—as clashes between federal power and state power, between judicial activism and deference to the legislative will.[92] Always the federalist, Harlan preferred to leave the regulation of obscenity to the states.[93] "'[T]he preservation and assertion of state authority,'" he maintained, "'[held] the best promise for effective legal measures'" in this elusive and delicate area of the law.[94]

2. Criminal Procedure: The Fourth, Fifth, and Sixth Amendments. Though the labels of liberal and conservative attributed to Warren and Harlan did not fit so well in the obscenity context, they are accurate in the area of law enforcement. While "Harlan's opinions in *Miranda* and many other such cases reflected his regard for federalism and state autonomy,"[95] Warren took a "180-degree turn between his prosecutorial and his judicial days,"[96] and he was often accused of being "soft on crime."[97]

As in the obscenity cases, Warren looked upon the Court's criminal procedure docket as an opportunity to strengthen the nation's moral fiber.[98] He saw urban crime in the mid-twentieth century "as a protest against inequality and disadvantage in American life."[99] Warren hoped that the Court might "at least ensure that the process of criminal justice did not add to the degraded status of those participating in it."[100] To accomplish

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91. WHITE, *supra* note 19, at 262.

92. YARBROUGH, *supra* note 15, at 222; *see also* Alexander M. Bickel, *Pornography & The Courts*, COMMENTARY, Nov. 1968, at 97, 100 (reviewing CHARLES REMBAR, THE END OF OBSCENITY: THE TRIALS OF LADY CHATTERLEY, TROPIC OF CANCER, AND FANNY HILL (1968)) ("If all the judges manage to do is substitute, as they have in the obscenity cases, their subjective reaction for that of legislators, prosecutors, or even police, then they are not making constitutional law and are not performing the function that entitles them to supremacy. . . . [A]s Mr. Justice Harlan has suggested, there is good reason for taking the federal government out of the censorship business, and leaving it to the states.").

93. YARBROUGH, *supra* note 15, at 222.

94. *Id.* (second alteration in original) (quoting Letter from John M. Harlan, Justice, U.S. Supreme Court, to Jarvis Cromwell (June 23, 1971)).

95. *Id.* at 295.

96. Kurland, *supra* note 47, at 335.

97. WHITE, *supra* note 19, at 263.

98. *See id.* at 263–66 (describing Warren's intentions to correct the procedural ills and anachronisms that rendered the criminal justice system unfair and degrading).

99. *Id.* at 265.

100. *Id.*

this, Warren and his Court turned to the tenets of ethics and fairness that he found inherent in the Constitution.[101]

Harlan campaigned unabashedly against the Warren Court's swift expansion in the criminal procedure realm.[102] Despite the intensity of his efforts, however, Harlan "'had no fear of, or problem with protecting constitutional rights he considered fundamental from both state and federal violation.'"[103] Indeed, Louis Cohen, one of Harlan's former law clerks, stated that he "'would rather trust [his] liberty to [Harlan] than to Earl Warren, who, after all, sent Ralph Ginzburg to prison' for 'pandering.'"[104]

Harlan's fight with the majority over criminal procedure centered on his refusal to micromanage law-enforcement agencies from the bench.[105] Harlan's writings in this area once again demonstrated his high regard for federalism and state autonomy.[106]

Warren's greatest concern in his quest to repair the criminal justice system was the confession of incarcerated defendants,[107] and *Miranda v. Arizona*[108] was the culmination of the Warren Court's effort to reform the confession scheme.[109] In *Miranda*, the Court held that the Fifth Amendment requires that the right to counsel and protection against self-incrimination apply at the police-interrogation stage as well as at the adjudication stage of a state criminal prosecution.[110]

The Court combined "[f]our cases in which defendants had been questioned outside the presence of their attorneys . . . to form the factual base" for *Miranda*.[111] In all four cases, the defendants eventually confessed to the police and their admissions were used against them at their respective trials.[112]

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101. *Id.*

102. YARBROUGH, *supra* note 15, at 292.

103. *Id.* (quoting Interview with Louis Cohen, former clerk to John M. Harlan, Justice, U.S. Supreme Court, in Washington, D.C. (Feb. 4, 1990)).

104. *Id.*

105. *Id.*

106. *Id.* at 295.

107. WHITE, *supra* note 19, at 266.

108. Miranda v. Arizona, 384 U.S. 436 (1966).

109. Mark Tushnet, *The Warren Court as History: An Interpretation*, *in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE, *supra* note 49, at 1, 22.

110. *Miranda*, 384 U.S. at 467. Justice Harlan contended in dissent that the Court also silently relied on the Sixth Amendment's guarantee of the right to counsel. *Id.* at 513–14 (Harlan, J., dissenting).

111. WHITE, *supra* note 19, at 268.

112. *Miranda*, 384 U.S. at 445.

Warren wrote for the majority, delivering a three-part opinion.[113]

The first section of the opinion consists of a thirteen-page accumulation of police excesses under the then-prevailing rules concerning custodial interrogation.[114] The considerably shorter second section devotes half of its eight and one-half pages to a brief history of the privilege against self-incrimination.[115] As precedent, Warren cited three cases applying the Fifth Amendment against the states, as well as *Escobedo v. Illinois*, a Sixth Amendment decision.[116] The final thirty-two pages of the decision[117] "read[] more like the work of a legislative drafting committee than a judicial opinion."[118] In this section the court "transposed" the "Fifth Amendment's privilege against self-incrimination . . . into a set of precise guidelines for police conduct during the interrogation of suspects,"[119] including the famous warnings "with which every TV watcher is familiar":[120]

> [W]e hold that when an individual is taken into custody . . . and is subjected to questioning, the privilege

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113. *Id.* at 439–99; *see also* WHITE, *supra* note 19, at 269. The portion of the *Miranda* opinion can be summarized thusly:

> The first part developed the ethical basis of the decision, the second part attempted to ground the decision in orthodox constitutional doctrine, and the last part promulgated a code of police conduct. A striking feature of the opinion was its disproportionate attention to the first and third parts rather than to the second.

Id. Although Chief Justice Warren usually left most drafting to his clerks, this was not the case with *Miranda*.

> Warren rarely drafted in his own hand. After *Brown*, he had come to rely more heavily on his clerks, generally dictating to them his views of a case and the basis upon which he wanted the decision to rest. He then turned over the writing to them, and though he closely reviewed their work, he largely left drafting to them. *Miranda* was different. Warren wrote an extensive outline himself, drafting by hand in pencil on yellow legal tablets, just as he had in *Brown*.

NEWTON, *supra* note 7, at 465; *see also* BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT 589 (1983) (quoting Justice Abe Fortas, who acknowledged that the *Miranda* decision was "entirely" Warren's).

114. *Miranda*, 384 U.S. at 445–58, 467; *see also* WHITE, *supra* note 19, at 269 (summarizing Part I of the opinion).

115. *Miranda*, 384 U.S. at 458–66; *see also* WHITE, *supra* note 19, at 269.

116. *Miranda*, 384 U.S. at 461–65 (citing chronologically Bram v. United States, 168 U.S. 532 (1897); Wan v. United States, 266 U.S. 1 (1924); Malloy v. Hogan, 378 U.S. 1 (1964); Escobedo v. Illinois, 378 U.S. 478 (1964)); *see also* WHITE, *supra* note 19, at 269 (discussing the Court's reliance on these opinions).

117. *See generally Miranda*, 384 U.S. at 467–99 (outlining guidelines and safeguards to be implemented in interrogations).

118. BORK, *supra* note 1, at 94.

119. WHITE, *supra* note 49, at 363.

120. BORK, *supra* note 1, at 73.

> against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted . . . , the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to . . . an attorney, and that if he cannot afford an attorney one will be appointed for him . . . . [U]nless and until such warnings . . . are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.[121]

Warren's opinion in *Miranda*, like his thinking in the obscenity cases, shows that his jurisprudence ventures even further from the actual text of the Constitution than that of his fellow civil libertarians on the Court. In a single opinion, *Miranda* evinces the two approaches the Warren Court used to revamp constitutional law: "One . . . was the constitutional liberalism of Black, the other was the messianic paternalism of Warren."[122] To constitutional liberals like Justice Hugo Black, "[t]he most important function of the Court was to give the language of the Constitution meaning in the context of contemporary events."[123] *Miranda* did this, but it also exemplifies Warren's approach to judging.[124] As in the obscenity cases,

> Warren's mission in *Miranda* and elsewhere was to suppress behavior that he found obnoxious or repressive from his perspective of deep commitment to the freedoms inherent in American citizenship. The Constitution was one source of Warren's perspective, but there were others: his instincts about what was fair and just, his humanitarian premises, his outrage at brutal or immoral acts. In *Miranda* constitutional imperatives were a means of curtailing conduct he found deplorable, but the starting place for his thinking was the character of the conduct.[125]

Harlan's dissent in *Miranda* contained two broad criticisms: the decision's shaky constitutional foundation[126] and its disregard for the virtues of federalism.[127] In addressing the "poor

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121. *Miranda*, 384 U.S. at 478–79.

122. WHITE, *supra* note 49, at 365.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Miranda*, 384 U.S. at 504–14 (Harlan, J., dissenting) (questioning the Court's constitutional premises).

127. *Id.* at 514–24 (criticizing the Court's policy considerations).

constitutional law"[128] the Court created in *Miranda*, Harlan calls the majority's "asserted reliance on the Fifth Amendment" a judicial optical illusion, a "*trompe l'oeil*."[129] Warren's opinion, Harlan asserts, "fails to show that the Court's new rules are well supported, let alone compelled, by Fifth Amendment precedents."[130]

Harlan and his fellow dissenting Justices were not alone among constitutional scholars in their denunciation of Warren's *Miranda* analysis. Anthony Lewis asserts that "the Chief Justice's opinion did not summon up compelling reasons in logic or experience" and that "[a]t points the opinion would have to be called disingenuous."[131] Robert Steamer accuses Warren of "brush[ing] precedent and history aside in order to institute what he believed to be necessary reforms in protecting persons accused of a crime."[132]

Harlan was no more generous in his assessment of the *Miranda* Court's policy justifications: "Examined as an expression of public policy, the Court's new regime proves so dubious that there can be no due compensation for its weakness in constitutional law."[133] Harlan acknowledged that the provisions of the Constitution have "been stretched before to satisfy deep needs of society," but in this case, he argued, "the Court has not and cannot make the powerful showing that its new rules are plainly desirable in the context of our society, something which is surely demanded before those rules are engrafted onto the Constitution and imposed on every State and county in the land."[134] In criticizing the Court's flawed policy considerations, Harlan warns that *Miranda* may lead to an increase in the "social costs of crime,"[135] he chides the majority for

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128. *Id.* at 504.

129. *Id.* at 510.

130. *Id.*

131. Lewis, *supra* note 32, at 2741.

132. ROBERT J. STEAMER, CHIEF JUSTICE: LEADERSHIP AND THE SUPREME COURT 85 (1986).

133. *Miranda*, 384 U.S. at 514–15 (Harlan, J., dissenting).

134. *Id.* at 515.

135. *Id.* at 517. Harlan's frustration with this particular part of the majority opinion was especially evident during his oral recitation of his dissent.

> Harlan, by that time in his life nearly blind, flushed as he addressed his brethren and the audience. *Miranda* was handed down a year after the Watts riots had stunned the nation, and at a time when lawlessness was on the rise. The Court, Harlan warned in a quavering voice, was engaged in 'dangerous experimentation' in the face of a 'high crime rate that is a matter of growing concern.'

NEWTON, *supra* note 7, at 467.

an "exaggerated" portrayal of police interrogation tactics,[136] and he contests the Court's allusion to criminal practice in federal and foreign jurisdictions.[137]

Harlan's most gripping criticism, however, concerned the Court's impatience with the state legislative reform so important to a federal system.[138] "He was primarily concerned with the broad reach and detail of the Court's new rules and the degree to which they restricted the discretion of federal and state authorities, as well as the ability of such officials to make their own reforms in the criminal justice system."[139]

Indeed, in *Miranda*, Harlan commented upon the Court's "ironic untimeliness" in promulgating its new rules since at the time there was "in progress . . . a massive re-examination of criminal law enforcement procedures on a scale never before witnessed."[140] These reforms, Harlan argued, "would have the vast advantage of empirical data and comprehensive study, they would allow experimentation and use of solutions not open to the courts, and they would restore the initiative in criminal law reform to those forums where it truly belongs."[141]

Again, Anthony Lewis echoes Harlan's concerns in reference to *Miranda*:

> There was here no question of a moral vacuum that the Court had to fill, as in the racial area or in the persecution of persons with alleged Communist associations. Many groups in the community . . . were working actively to find solutions for the confession dilemma. There seemed no urgent reason for the Court to step in and cut off study and experimentation by declaring a constitutional absolute.[142]

Harlan believed that the Due Process Clause of the Fourteenth Amendment provided a "workable and effective means of dealing with confessions in a judicial manner."[143] Harlan appreciated this approach because it was "'judicial' in its

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136. *Miranda*, 384 U.S. at 517 (Harlan, J., dissenting).

137. *Id.* at 521–23. The Court compares American police interrogation law to that of England, India, Ceylon, and Scotland. *Id.* at 486–90 (majority opinion). The Court claims that because the United States' protection against self-incrimination is, unlike that of other countries, guaranteed in a constitution, this country should give at least as much protection as those nations. *Id.* at 489–90. Harlan replies that "[c]onsidering the liberties the Court has today taken with constitutional history and precedent, few will find this emphasis persuasive." *Id.* at 523 (Harlan, J., dissenting).

138. *See id.* at 524 (Harlan, J., dissenting).

139. YARBROUGH, *supra* note 15, at 296.

140. *Miranda*, 384 U.S. at 523 (Harlan, J., dissenting).

141. *Id.* at 524.

142. Lewis, *supra* note 32, at 2740–41.

143. *Miranda*, 384 U.S. at 506 (Harlan, J., dissenting).

treatment of one case at a time, flexible in its ability to respond to the endless mutations of fact presented, and ever more familiar to the lower courts."[144] In other words, unlike the activist tack that Warren took in *Miranda*, the Fourteenth Amendment analysis was restraintist.

Nevertheless, despite its constitutional flaws and perhaps ill-advised timing, Warren's *Miranda* decision may have been exactly what American criminal procedure needed:

> The *Miranda* case and its aftermath were undoubtedly motivated by a deep desire to purify the soiled standards of American criminal procedure, and history may show that they were effective. For many, that result would be an adequate answer to others' doubts about judges so openly playing a law-making role.[145]

3. Reapportionment: The Fourteenth Amendment. Like the all-or-nothing nature of *Miranda*'s exclusionary rule, "[e]qual protection is not a flexible standard: equality is required or it isn't."[146] In retirement, Warren said that in addition to the cases such as *Miranda*, which expanded the right to counsel in criminal cases, he was most proud of the decisions in the areas of desegregation and reapportionment.[147] Both of these areas involve the Equal Protection Clause of the Fourteenth Amendment.[148]

Of these two equal protection regimes, reapportionment, rather than desegregation, makes for the more interesting comparison of Warren's and Harlan's divergent philosophies. Indeed, the two Justices were in accord concerning desegregation. While Harlan had not yet joined the Court when it decided *Brown*, he participated in *Brown II*,[149] the unanimous order implementing the 1954 decision "with all deliberate speed."[150] Harlan refused, however, to join the Court in its judicial reapportionment of legislative bodies, as he believed that equal

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144. *Id.* at 508 (internal citation omitted).

145. Lewis, *supra* note 32, at 2741.

146. BORK, *supra* note 1, at 86.

147. STEAMER, *supra* note 132, at 82–83. In fact, when "asked which of his opinions he considered the most significant . . . [,] Warren surprised his questioner by naming *Reynolds v. Sims*," even though "[m]ost people would assume that *Brown* topped the list by far." IRONS, *supra* note 32, at 416.

148. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 568 (1964) (holding that the Equal Protection Clause mandates the "one person, one vote" rule for state legislative apportionment); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that the Equal Protection Clause prohibits the racial segregation of public schools).

149. Brown v. Bd. of Educ., 349 U.S. 294, 298–301 (1955).

150. *Id.* at 301.

protection's reach should be confined largely to its historic racial context.[151] The Warren Court's majority, on the other hand, "was instilling the equal protection clause with potent substance which it was never intended to possess. The Court, in effect, was rigidly imposing upon America its own particular . . . 'unrestrained egalitarianism.'"[152]

Despite the importance of the desegregation cases, the most far-reaching decisions of the Warren Court were arguably the reapportionment cases.[153] Those cases, more than the other undoubtedly important decisions of the period, "most plainly required Chief Justice Warren's support to be possible; it is hard to believe that they could have happened under another kind of Chief Justice, no matter who else was on the Court."[154] Warren's opinion for the Court in *Reynolds v. Sims*[155] stands as the most important in this area.[156] Likewise, Harlan's dissents in *Reynolds* and its reapportionment predecessor, *Baker v. Carr*,[157] represented his most vehement condemnations of the Warren Court's many egalitarian rulings.[158]

Reynolds concerned an equal protection suit by Alabamans challenging the apportionment of seats in the state legislature.[159]

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151. YARBROUGH, *supra* note 15, at 268.

152. Dane, *supra* note 48, at 560–61 (quoting Harper v. Va. Bd. of Elections, 383 U.S. 663, 686 (1966) (Harlan, J., dissenting)).

153. Lewis, *supra* note 32, at 2723.

154. *Id.*

155. Reynolds v. Sims, 377 U.S. 533 (1964).

156. Lewis, *supra* note 32, at 2745. ("There had been few cases in any court so significant to a nation's political system as *Reynolds v. Sims* . . . .").

157. Baker v. Carr, 369 U.S. 186 (1962). Harlan's opposition to the Court's stepping into the reapportionment fray began with *Baker v. Carr*. In a note he wrote to Justices Whittaker and Stewart while trying to pry them from the majority in *Baker*, Harlan eloquently described why he believed such cases called for restraint:

> I need hardly argue to you that the independence of the Court, and its aloofness from political vicissitudes, have always been the mainspring of its stability and vitality. Those attributes have been assured not alone by the constitutional and statutory safeguards which surround the Court, but also to a large extent, I believe, by the wise restraint which, by and large, has characterized the Court's handling of emotionally-charged popular causes. I believe that what we are being asked to do in this case threatens the preservation of these attributes.
>
> Let me be as concrete and frank as possible. Today, state reapportionment is being espoused by a Democratic administration; the next time it may be supported (or opposed) by a Republican administration. Can it be that it will be only the cynics who may say that the outcome of a particular case was influenced by the political backgrounds or ideologies of the then members of the Court?

NEWTON, *supra* note 7, at 390–91 (quoting Letter from John M. Harlan, Justice, U.S. Supreme Court, to Charles E. Whittaker, Justice, U.S. Supreme Court, and Potter Stewart, Justice, U.S. Supreme Court (Oct. 11, 1961)).

158. Dorsen, *supra* note 49, at 110.

159. *Reynolds*, 377 U.S. at 536–37.

The plaintiffs complained that Alabama denied them "equal suffrage in free and equal elections"[160] because geographic areas containing only about 25% of the state's population elected a majority of both representatives and senators in the state legislature.[161]

Warren's opinion in *Reynolds*, however, held that,

> as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.[162]

As a result, nearly all of the states would have to redistrict their legislatures.[163] Furthermore, the decision meant that when the population of a state voted through a popular referendum to apportion its legislature some way other than "one man, one vote," the action would be constitutionally invalid—a violation of "the essence of a democratic society."[164]

Critics accused the Chief Justice of both bringing the Court into a realm historically reserved for the legislative branch and ignoring precedent advising against the judicial determination of purely political questions.[165] More importantly, "Warren had based his purported usurpation of legislative prerogatives on an interpretation of the Constitution that was neither faithful to its literal text nor consistent with the context in which it had been framed."[166] This resulted from the approach taken by Warren to the questions before the Court:

> He did not ask whether the Constitution applied to the whole issue of apportionment, or if so what theories of representation ought to be considered. He began with the premise that the democratic norm was equal treatment of individual voters and then asked what departures from absolute population equality the Constitution would countenance.[167]

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160. *Id.* at 540 (internal quotation marks omitted).
161. *Id.* at 545.
162. *Id.* at 568.
163. Lewis, *supra* note 32, at 2745.
164. WHITE, *supra* note 19, at 238 (quoting *Reynolds*, 377 U.S. at 554–55).
165. *Id.* at 239.
166. *Id.*
167. Lewis, *supra* note 32, at 2745.

Harlan contended in dissent that "[t]he history of the adoption of the Fourteenth Amendment provides conclusive evidence that neither those who proposed nor those who ratified the Amendment believed that the Equal Protection Clause limited the power of the States to apportion their legislatures as they saw fit."[168] He added that the Court's failure "to consider any of these matters cannot be excused or explained by any concept of 'developing' constitutionalism. It is meaningless to speak of constitutional 'development' when both the language and history of the controlling provisions of the Constitution are wholly ignored."[169]

Harlan also accused the *Reynolds* Court of straying far "from the appropriate bounds of its authority."[170] "Generalities," Harlan contended, in his restraintist fashion, "cannot obscure the cold truth that cases of this type are not amenable to the development of judicial standards."[171] Harlan asserted that "[i]t is difficult to imagine a more intolerable and inappropriate interference by the judiciary with the independent legislatures of the States."[172]

Warren had considered in his opinion "the demand for representation of geographical areas and dismissed it with disarming simplicity: 'Legislators represent people, not acres or trees. Legislators are elected by voters, not farms or cities or economic interests.'"[173] Harlan responded:

> All this may be conceded. But it is surely equally obvious, and, in the context of elections, more meaningful to note that people are not ciphers and that legislators can represent their electors only by speaking for their interests—economic, social, political—many of which do reflect the place where the electors live. The Court does not establish, or indeed even attempt to make a case for the proposition that conflicting interests within a State can only be adjusted by disregarding them when voters are grouped for purposes of representation.[174]

Warren contradicted himself on this point. In a speech in Merced, California, in 1948, then-Governor Warren spoke successfully against reapportionment:

> "Many California counties are far more important in the life of the state than their population bears to the entire

168. *Reynolds*, 377 U.S. at 595 (Harlan, J., dissenting).
169. *Id.* at 591.
170. *Id.* at 615.
171. *Id.* at 621.
172. *Id.* at 615.
173. Lewis, *supra* note 32, at 2745 (quoting *Reynolds*, 377 U.S. at 562).
174. *Reynolds*, 377 U.S. at 623–24 (Harlan, J., dissenting).

> population of the state . . . . It is for this reason that I never have been in favor of restricting the representation in the senate to a strictly population basis."[175]

In *Reynolds*, Warren denied to legislatures across the country the option of considering such reasons in their own apportionment debates.[176]

> What is clear is that in 1948, California's voting rules worked to elect Warren, and since Warren saw himself as a good and progressive governor, he saw no reason to amend those rules. Reflecting on it later, Warren realized he was wrong, and made no attempt to justify himself. "It was," he recorded in his memoirs, "frankly a matter of political expediency."[177]

Harlan ended his dissent in *Reynolds* with an eloquent condemnation of judicial activism:

> Finally, these decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional "principle," and that this Court should "take the lead" in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements.[178]

Reynolds provided Harlan the perfect opportunity to expound upon his restraintist jurisprudential views. Anthony Lewis supposes that it also provides a clear picture of Warren's philosophy of judging:

> The issue of the Court's function could not be framed more starkly than it was in the Reapportionment Cases. On the one hand, the precedents ran uniformly against judicial intervention, and history suggested that the apportionment question bristled with political difficulties. On the other, it was a situation crying for reform in which the political branches were almost by definition unable to act; unless the Supreme Court intervened, corrosion of confidence in state government would continue unchecked. Seen in those terms, the issue for the Supreme Court was not a legal one

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175. WEAVER, *supra* note 10, at 245 (quoting then-Governor Warren).

176. *See Reynolds*, 377 U.S. at 623 (Harlan, J., dissenting) (stating that the *Reynolds* Court limited legislatures to population as the "controlling consideration" in districting).

177. NEWTON, *supra* note 7, at 388 (quoting EARL WARREN, THE MEMOIRS OF CHIEF JUSTICE EARL WARREN 310 (1977)).

178. *Reynolds*, 377 U.S. at 624–25 (Harlan, J., dissenting).

> in any ordinary sense of the term; it was an issue of statesmanship. That assuredly is the standard by which Earl Warren would want to be judged as Chief Justice of the United States.[179]

Harlan maintained, however, that not only is it the wrong standard, but that it is a dangerous one for a judge to measure himself against. In his *Miranda* dissent, Harlan lamented the ill effects the majority opinion would have on crime fighting.[180] But in *Reynolds*, he all but concedes the salutary social effect reapportionment will have, and still finds the Court's mandating it to be over-reaching:

> [N]o thinking person can fail to recognize that the aftermath of these cases, however desirable it may be thought in itself, will have been achieved at the cost of a radical alteration in the relationship between the States and the Federal Government, more particularly the Federal Judiciary. Only one who has an overbearing impatience with the federal system and its political processes will believe that that cost was not too high or was inevitable.[181]

There is little dispute that the one-man-one-vote result of the reapportionment cases was beneficent. And the fears about *Miranda* never came true.[182] But Harlan would certainly argue that the mere fact that the Court's pronouncements are socially desirable or, at worst, harmless, does not justify judges abrogating their obligation to tie their decisions to sound constitutional reasoning. Leaving Justices to determine when their activism is good for the country seems good and expeditious when the consequences are ultimately popular and praiseworthy.[183] But one needs only recall *Dred Scott*[184] and *Plessy v. Ferguson*[185] to realize how opening the door to such judicial arrogance potentially lets in the good with the bad.[186]

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179. Lewis, *supra* note 32, at 2746.

180. *See supra* note 135 and accompanying text.

181. *Reynolds*, 377 U.S. at 624 (Harlan, J., dissenting).

182. NEWTON, *supra* note 7, at 369–70.

183. *See* Bruce Ledewitz, *Justice Harlan's Law and Democracy*, 20 J.L. & POL. 373, 374 (2004) ("We worry more about judicial review when we think the courts are deciding badly, whether badly here means bad reasoning or bad consequences for society.").

184. Scott v. Sandford, 60 U.S. 393 (1856).

185. Plessy v. Ferguson, 163 U.S. 537 (1896).

186. *See, e.g.*, John Roberts, Chief Justice, U.S. Supreme Court, Keynote Address at the University of Texas's Tex Lezar Memorial Lecture (Mar. 7, 2007), *available at* http://www.utexas.edu/law/news/2007/030807_chief.html (follow "2007 Tex Lezar Memorial Lecture" hyperlink to view the speech) (featuring Chief Justice Roberts's citation of *Dred Scott* as an example of judicial arrogance during a recent speech in Dallas).

B. Philosophical Roots

1. Warren. The poverty Warren experienced in his childhood profoundly affected his jurisprudence.[187] Warren "identified with persons of low social and economic status, . . . remained indifferent to or suspicious of inherited wealth and social position," and practiced a "leveling" philosophy of government.[188] His egalitarian tendencies were also driven by his father's experience with the Southern Pacific, not to mention his own stint as a call boy for the railroad.[189]

Both the perceived evils of the Southern Pacific's influence on state and local politics and the poverty of his youth inspired Warren's entry into progressive politics in California.[190] In time, although he was a lifelong Republican, Warren's origin in Progressivism led him to endorse "the principle of affirmative, humanitarian governmental action."[191]

Anthony Lewis theorizes that "with hindsight, there was one unifying thread in his career—the commitment to action. Earl Warren was plainly a man born to act, not to muse, and very likely a man born to govern."[192] Thus, when he came to the Supreme Court, Warren applied to the problems of obscenity, police coercion,[193] and reapportionment "his own strict morality and innate humanitarianism. . . . The great issues that came before the Warren Court called, in one sense, for a judicial choice between action and inaction—between exercising power for reform or allowing things to go on as they were."[194] The urge to right society's wrongs, indeed, to govern, "did not depart Earl Warren when he put on a robe."[195]

2. Harlan. As with Warren, commentators see Harlan's social and economic status as a foundation of his judicial

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187. *See* WHITE, *supra* note 49, at 325.

188. *Id.*

189. *See supra* note 22 and accompanying text.

190. *See* WHITE, *supra* note 19, at 17–18 (describing Warren's exposure to Progressivism while attending the University of California at Berkeley as an undergraduate).

191. *Id.* at 126.

192. Lewis, *supra* note 32, at 2728–29.

193. Professor Yale Kamisar has noted that, as Warren spent twenty-two years in law enforcement before becoming governor of California, "[t]he seeds of the *Miranda v. Arizona* opinion may well have been Warren's own keen awareness of the opportunities for coercion and exploitation of confusion in the custodial interrogation setting." Yale Kamisar, *How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice*, 3 OHIO ST. J. CRIM. L. 11, 11 (2005).

194. Lewis, *supra* note 32, at 2729.

195. *Id.*

philosophy.[196] G. Edward White insists that "Harlan's social background was not the sole determinant of his judicial vision, but it may have made him less passionate about those inequities in American life whose very presence outraged some of his fellow Justices."[197] Because "Harlan could not be said to have experienced the stings of arbitrary injustice," White argues that when the Court embarked on an egalitarian crusade "[he] may have been less inclined to ignore analytical obstacles because his sympathies were enlisted less in the cause."[198]

It is unfair, however, to dismiss Harlan's stand against the activism of the Warren Court as predetermined by "a longstanding tradition of resistance to mass equality."[199] Even those most forceful in their silver-spoon accusations acknowledge the influence of Frankfurter, Holmes, and Brandeis in Harlan's jurisprudence.[200] Surely this reveals a more intellectual origin for Harlan's philosophy, perhaps acquired sitting at the knee of his grandfather or in his academic exploits at Princeton and Oxford.

One also cannot ignore the nearly three decades Harlan spent in private practice before coming to the bench.[201] "When

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196. *See* Dorsen, *supra* note 49, at 122 (describing Harlan's position as a "patrician traditionalist" as an explanation for his "principled manner" and "respect for process"); *see also* WHITE, *supra* note 49, at 342–43 (contrasting Harlan's elitist upbringing with the more modest roots of Warren and other more egalitarian Justices on the Warren Court).

197. WHITE, *supra* note 49, at 343.

198. *Id.*

199. *Id.*

200. *See id.* at 343–44 (describing how Harlan's jurisprudence combined Frankfurter's approach to the role of the judiciary with the federalism of Holmes and Brandeis). White also accuses Harlan of betraying Frankfurter's process jurisprudence by using it merely to advance his own set of social values. *See id.* at 345 (noting that Harlan admitted he was comfortable with the social implications of his resistance to judicially initiated reforms). To the contrary, Harlan was loyal to traditional process to the point of self-detriment:

> A striking aspect of Harlan's approach to *stare decisis* is that he would often follow precedent from which he had dissented when it was initially established. Equally striking is that Harlan followed this principle even as it carried him to dissent from the Court's failure to follow precedent with which Harlan disagreed.

Dorsen, *supra* note 49, at 118.

201. Dorsen, *supra* note 16, at 252 ("Responsible private practice and varied public service combined to prepare [Harlan] superbly for a seat on the nation's highest tribunal.").

> Harlan's "main concern, his lodestar," observed Norman Dorsen, who clerked for him, "was to keep things on an 'even keel.' He used that phrase many times. . . . The thing that people from Wall Street, from that world, care about most is national security. That's at the core of their senses. They don't want to rock the boat." Financial markets and corporate clients such as Harlan represented abhor uncertainty. Jurisprudentially, this translated into a deep respect for tradition and precedent. As Harlan wrote in his *Gideon v. Wainwright* concurrence, "I agree that *Betts v. Brady* should be overruled, but

Harlan took his seat in 1955, his experience at the bar was immediately reflected in both his working habits and his work product."[202] This is most evident in Harlan's opinions:

> These reveal, again and again, two manifestations of a disciplined background: first, a willingness to take great pains with the "little" case—the one that will never make the headlines; and, second, a desire to deal with problems comprehensively and to elucidate the reasons for his judgment, so as to leave lawyers and lower courts in no doubt about the meaning or scope of an opinion.[203]

Seen by the bar as a "lawyer's judge," Harlan's foundation in private practice is also evident in his staunch support of judicial restraint.[204] "[H]is fear that the judiciary [would] arrogate excessive authority in a system marked by a separation of governmental powers, and his concern lest the Congress, the legal profession, and the general public lose confidence in the judiciousness and self-restraint of the members of the Court" certainly influenced this aspect of his jurisprudence.[205]

Warren, by contrast, considered judicial restraint timid and cowardly.[206] He and the liberal Justices he led "were supremely confident in their ability to fashion a better world," and Harlan's calls for a more deliberate pace would not curtail them.[207] Criticism from other corners was equally fruitless, and it began even before most of the Warren Court's revolutionary work had begun. In 1958, Judge Learned Hand delivered the Oliver Wendell Holmes Lectures at Harvard. Judge Hand was eighty-seven at the time,

> and his lifetime of thought about the proper role of judges in a democratic society poured out in the lectures. There

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consider it entitled to a more respectful burial than it has been accorded. . . ."

Newman, *supra* note 40, at 666–67 (omissions in original) (quoting YARBROUGH, *supra* note 15, at 341 and Gideon v. Wainwright, 372 U.S. 335, 349 (1963)); *see also* J. Richard Broughton, *Unforgettable, Too: The (Juris)prudential Legacy of the Second Justice Harlan*, 10 SETON HALL CONST. L.J. 57, 58 (1999) (comparing Harlan to Edmund Burke "who resisted rapid change as a means of political reform, preferring instead the guidance of deliberation and established customs").

202. Dorsen, *supra* note 16, at 252.

203. *Id.* at 253.

204. *Id.* at 253–54; *see also* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 271 (1993) (describing Harlan as "plainly one of the best, if not the best, lawyer on the Court"); George C. Thomas III, *Through a Glass Darkly: Seeing the Real Warren Court Criminal Justice Legacy*, 3 OHIO ST. J. CRIM. L. 1, 8 (2005) (describing Harlan as having "the finest legal mind on the Warren Court, at least after Frankfurter retired").

205. Dorsen, *supra* note 16, at 254.

206. NEWTON, *supra* note 7, at 389–90.

207. POWE, *supra* note 40, at 214.

> was a tinge of bitterness in Hand's work, but there was eloquence, too . . . . While Hand in his lectures never mentioned Warren or his court by name, Hand's discomfort with Warren specifically and of activist judges generally was laced through the three discussions, particularly in the final day. "For myself," Hand told his standing-room-only audience near the conclusion of his talk, "it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs."[208]

IV. ANALYSIS

This Article intends to show that in a nation dependent upon the rule of law, John Harlan's approach to judging was, and is, superior to that of Earl Warren.[209] Warren's popular reputation, however, is difficult to overcome. He has been called "a man justifiably ranked with John Marshall as one of the greatest Chief Justices of the United States,"[210] and "[h]is personal dedication to the ideal of equal justice for all Americans and to the protection of individual liberties [has been] widely praised."[211]

Analysis of his reasoning in the obscenity cases, *Miranda* and *Reynolds*, however, reveals that Warren "was not a great legal scholar or judicial philosopher."[212] His habit of deciding cases "along the lines of justice, morals, and social welfare" has been called "the best and worst of judicial decisionmaking."[213] "It is the best because it centers on the ideal that a legal rule is a good rule to the extent that it establishes and maintains a social environment" that inspires and improves the quality of life.[214] "It

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208 NEWTON, *supra* note 7, at 364–65 (quoting LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES, 1958, at 73 (1958)); *see also* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 652–59 (1994) (discussing the 1958 Holmes Lectures and particularly noting that "Warren Court admirers could dismiss the most vocal critics of the Court as extremists; yet here was the nation's most highly regarded judge, renowned as the most articulate advocate of liberty, apparently joining the Court's enemies. . . . His stance was modesty; his philosophy, that of a skeptical democrat and experienced judge, doubting the court's competence to decide the problems of public policy").

209. *See supra* note 47 and accompanying text.

210. Ruggero J. Aldisert, *Super Chief: Earl Warren and His Supreme Court, A Judicial Biography; by Bernard Schwartz*, 72 CAL. L. REV. 275, 275 (1984) (book review).

211. CATHERINE A. BARNES, MEN OF THE SUPREME COURT: PROFILES OF THE JUSTICES 159 (1978).

212. *Id.*

213. Aldisert, *supra* note 210, at 278.

214. *Id.*

can be the worst," however, "when judges promulgate public policy through summary judicial pronouncements unaccompanied by reasons; when there is what Alexander M. Bickel described as 'unchanneled, undirected, unchartered discretion,' a kind of 'judgment proceeding from impulse, hunch, sentiment, predilection, inarticulable and unreasoned.'"[215]

Judge Richard Posner acknowledges White's perception that "Warren saw his craft as discovering ethical imperatives" and elevating to prominence in constitutional adjudication "one's sense of where justice lay and one's confidence in the certainty of finding it."[216] Nevertheless, Posner concludes, "Whatever this is, it is not judicial craftsmanship. To identify one's personal ethical preferences with natural law and natural law with constitutional law is to make constitutional adjudication a projection of the judge's will."[217] Such jurisprudence, Posner contends, is "parochial, lawless, and finally reckless."[218]

Some commentators insist that Warren should be judged not for his jurisprudence but for his "acute political sense,"[219] leadership, and administrative skill as a Chief Justice.[220] Yet, "judicial craftsmanship cannot be ignored in assessing a chief's

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215. *Id.* (quoting Alexander M. Bickel, *The Supreme Court 1960 Term—Forward: The Passive Virtues*, 75 HARV. L. REV. 40, 51 (1961)).

216. RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 214 (1985) (quoting WHITE, *supra* note 19, at 229–30).

217. *Id.* at 214–15. The inscription on Warren's tombstone, a passage from his book, *A Republic, If You Can Keep It*, illustrates both that he saw his calling as much more than jurisprudential and his determination to use his position to shape the world as he believed it should be:

> Where there is injustice, we should correct it; where there is poverty, we should eliminate it; where there is corruption, we should stamp it out; where there is violence we should punish it; where there is neglect, we should provide care; where there is war, we should restore peace; and wherever corrections are achieved we should add them permanently to our storehouse of treasures.

NEWTON, *supra* note 7, at 516–17 (quoting WARREN, *supra* note 52, at 6).

218. POSNER, *supra* note 216, at 215.

219. *See* STEAMER, *supra* note 132, at 87 (indicating the importance of acute political sense but recognizing the dangers of considering only this factor in assessing the Justice's effectiveness).

220. *See* Lewis, *supra* note 32, at 2723 (stating that even if Warren "was not a creative thinker," he certainly was "a great political leader"); Philip B. Kurland, *Earl Warren, the "Warren Court," and the Warren Myths*, 67 MICH. L. REV. 353, 353 (1969) (declaring that Warren "clearly qualifies for the accolade" of "a 'great Chief Justice'" if that term refers to a judge who presided over a particularly dynamic court); *see also* STEAMER, *supra* note 132, at 36 (stating that only Chief Justices Warren, John Marshall, and Charles Evans Hughes distinguished themselves as "great leader[s]"). Steamer argues that Warren, Marshall, and Hughes "were supremely fitted to the office [of Chief Justice]" and that "[t]he results of their service must accord them a place of honor among the finest practitioners of American statecraft." *Id.* at 89. Anthony Lewis maintains that "[n]o one could deny that he had courage." Lewis, *supra* note 32, at 2723.

effectiveness since judicial opinions, irrespective of their political implications, must be defensible as nonpolitical, objective reasoning that the public can accept even if disagreeing with the result."[221] Warren's lack of craftsmanship must be criticized even when assessing his role as Chief Justice, especially because he wrote the *Brown*, *Miranda*, and *Reynolds* opinions, possibly the three most important Warren Court opinions.[222]

Still, some claim that the lack of intellectuality in Warren's opinions is outweighed by the social good they achieved.[223]

> Harlan's focus, however, was not on who temporarily benefits . . . from the Court's current moves. Today's beneficiary might be tomorrow's victim. Once the federal judiciary, for whatever reason, usurps the prerogative of the states and Congress, it loses an appreciation of its own limitations. Power once acquired may be wielded in a way we will all regret.[224]

Perhaps Harlan himself said it best in *Harper v. Virginia State Board of Elections*,[225] a decision widely praised for abolishing the poll tax:

> The final demise of state poll taxes . . . is perhaps in itself not of great moment. But the fact that the *coup de grace* has been administered by this Court instead of being left to the affected States or to the federal political process should be a matter of continuing concern to all interested in maintaining the proper role of this tribunal under our scheme of government.[226]

"Warren's own concern for fairness over precedent or theory became legendary among Court watchers. He was reported to have frequently interrupted counsel during oral argument to ask if particular actions had been fair."[227] Harlan, on the other hand, firmly believed that "[t]he majesty of the law encompasses a great deal more than the mere doing of abstract 'justice' between

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221. STEAMER, *supra* note 132, at 87.

222. Miranda v. Arizona, 384 U.S. 436, 439 (1966); Reynolds v. Sims, 377 U.S. 533, 536 (1964); Brown v. Bd. of Educ., 349 U.S. 294, 298 (1955); Brown v. Bd. of Educ., 347 U.S. 483, 486, (1954); *see also* J. Harvie Wilkinson, III, *Justice John M. Harlan and the Values of Federalism*, 57 VA. L. REV. 1185, 1199 (1971).

223. *See* Dane, *supra* note 48, at 546 ("If not for the boldness and activism of the Warren Court, it could be argued, our nation today would be far behind in the protection of individual liberties and in the quest for political and social equality."); Lewis, *supra* note 32, at 2723–24 (stating that concerning the opinions of the Warren Court, "for the majority" of Americans "[t]he important thing was the just result").

224. Wilkinson, *supra* note 222, at 1221.

225. Harper v. Va. Bd. of Elections, 383 U.S. 663, 680 (1966) (Harlan, J., dissenting).

226. *Id.* at 680–81 (footnotes omitted).

227. BARNES, *supra* note 211, at 159.

litigants."[228] Harlan "represented something many yearn for in their judges—even when they know they may not like the conclusions the judge will likely reach."[229]

V. CONCLUSION

Both King Louis IX of France, also known as Saint Louis, and King Solomon of Israel were known for conferring judgments "regarded as eminently just and good."[230] Chief Justice Warren shared their vision of how justice should be done—taking inventory of all the circumstances and then wisely determining the "fair" result.[231] In the monarchies of medieval France and ancient Israel, such judicial methods were appropriate; Thomas Paine tells us that in those societies, "'the king is law.'"[232] In America, however, "'the law is king.'"[233]

At its purest, Earl Warren's judicial philosophy is incompatible with the rule of law.[234] John Harlan's approach, on the other hand, represents the epitome of the sound legal reasoning so necessary to a law-based society: respectful of both the "values deep in our legal tradition" and "the accumulated wisdom of past decisions."[235] As they wrestled with the judiciary's role in a representative democracy,[236] certainly the Founding Fathers envisioned a Harlan-type judge—deferential to the majority, yet cognizant enough to recognize when it exceeded its

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228. Dane, *supra* note 48, at 566 (quoting John M. Harlan, *The Place of the Harvard Law School in the Present Legal Scene*, HARV. L. SCH. BULL., July 1968, at 7).

229. Charles Fried, *The Conservatism of Justice Harlan*, 36 N.Y.L. SCH. L. REV. 33, 35 (1991).

230. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1175–76 (1989).

231. *See id.*; *see also* Roger J. Traynor, *Chief Justice Warren's Fair Question*, 58 GEO. L.J. 1, 5 (1969) (summarizing Justice Warren's concern: "Is it fair?").

232. Scalia, *supra* note 230, at 1176 (quoting Thomas Paine, *Common Sense*, *in* COMMON SENSE AND OTHER POLITICAL WRITINGS 3, 32 (Nelson F. Adkins ed., 1953)).

233. *Id.*

234. Kurland, *supra* note 47, at 339.

235. Louis R. Cohen, *A Biography of the Second Justice Harlan*, 91 MICH. L. REV. 1609, 1613 (1993) (reviewing YARBROUGH, *supra* note 15).

236. *See* Ledewitz, *supra* note 183, at 460 (noting that "American law is plagued by doubts about the proper relationship of law to democracy").

> Justice John Harlan was aware of this tension and considered it a central problem of American law that judges decide fundamental issues of governance without elections and without close democratic oversight. Justice Harlan resolved this problem for himself first by reference to certain lawyerly virtues: reasoned judgment, faithfulness to precedent, attention to tradition, and judicial restraint. Yet, he knew that these qualities were not guarantees of the proper use of judicial power in a democratic society.

Id.

constitutional limits. In this respect, Harlan was among the greatest Justices in our history.[237] Both he and the Founding Fathers shared a vision of the courts' proper place in a free society, a vision that Sir Thomas More, in Robert Bolt's play, *A Man for All Seasons*, eloquently and unknowingly identified in his admonition to the tribunal that condemned him to death: "The world must construe according to its wits. This Court must construe according to the law."[238]

237. Cohen, *supra* note 235, at 1613.

238. ROBERT BOLT, A MAN FOR ALL SEASONS 152 (1962).