THE NEGLECTED FIRST AMENDMENT JURISPRUDENCE OF THE SECOND JUSTICE HARLAN

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"Which member of the Warren Court announced that the First Amendment protects freedom of association?" If one posed that question to a hundred constitutional law experts, the responses would be overwhelmingly erroneous. Most of us would naturally assume the author of this novel but vital doctrine was Justice William J. Brennan, Jr., who probably did more to protect free expression than any other member of the High Court. Some experts might suggest Justice Hugo Black, the Court's "absolutist" who contributed so much to the shaping and application of First Amendment principles. Others would probably mention Justice William O. Douglas, who did more than his share of heavy lifting for free speech and press during his remarkable years on the Court.

Still others would guess the Chief Justice himself as the first proponent of associational freedom, since he gave far more than his name to the extraordinary period of protection for civil liberties. All those answers would be entirely plausible, but quite wrong. Curiously, the author of the opinion that recognized freedom of association as a protected liberty of expression[1] was Justice John Marshall Harlan, the normally conservative, erstwhile New York corporation lawyer, whose legacy is usually recognized in areas remote from free speech and press.

This reality of authorship becomes less puzzling when one adds a crucial element—that this doctrine first emerged during the 1957 Term, when Norman Dorsen served as a law clerk to Justice Harlan. That year at the Supreme Court marked the beginning of a remarkable legal career that would focus upon freedom of expression in myriad ways: teaching constitutional law at New York University for over four decades, presiding over the American Civil Liberties Union during fifteen years of singular influence upon First Amendment law, and guiding such other organizations as the Lawyers Committee for Human Rights and the Thomas Jefferson Center for the Protection of Free Expression.

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1. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

Thus the actual authorship of the judgment that gave constitutional protection to freedom of association turns out to be far less perplexing than it might at first appear. The presence of Norman Dorsen in Justice Harlan's chambers that Term supplied the crucial element. So productive a collaboration also invites a brief review of the origins of a constitutional doctrine that has proved remarkably important to the protection of freedom of expression.

When Alabama officials demanded that the National Association for the Advancement of Colored People surrender a complete list of its members as a condition of continued presence and activity within the state, the organization understandably demurred. NAACP lawyers insisted that such disclosure could not be compelled, as a matter of federal constitutional law, though no precise precedent could be invoked. The state moved to cite the organization for contempt, with heavy fines as the price of continued nondisclosure. The Alabama Supreme Court declined to grant any relief, but the U.S. Supreme Court agreed in the fall of 1957 to review the case. The case was argued in mid-January, and decided on the very last day of the 1957 Term.

Several procedural barriers complicated review of the merits of the NAACP's constitutional claim. Alabama's lawyers claimed the civil rights group had chosen the wrong path for redress within the state courts, and that the judgment in those courts rested, moreover, on an adequate state ground that would preclude federal court intervention. With what was for him uncharacteristic disdain for such dilatory claims, Justice Harlan moved through the procedural thicket with dispatch and certainty. He noted, among other failings, that the Alabama Supreme Court's procedural rulings could not be reconciled with "its past unambiguous holdings as to the scope of review available upon a writ of certiorari addressed to a contempt judgment."[2]

There was one further procedural issue that potentially shielded the central issue of substance. The Alabama lawyers had insisted that the NAACP, as an organization, lacked standing to assert the constitutional claims of its members, who as Justice Harlan observed, "are not of course parties to this litigation."[3] The standing issue was, in retrospect, more troubling than Justice Harlan felt he need acknowledge; the Court had indeed "generally insisted that parties rely only on constitutional rights which are personal to

2. *Id.* at 456.

3. *Id.* at 459.

themselves,"[4] thus normally precluding organizational or institutional presentation of First Amendment claims. Here, however, there was a compelling reason to recognize an exception to normal standing rules, enabling the Court to reach the merits: "[t]o require that [the expressive interest in nondisclosure of membership] be claimed by the members themselves would result in nullification of the right at the very moment of its assertion."[5] Thus the organization might, uniquely in this situation, present the First Amendment claims of its members. It had done so with much force and eloquence, though also with appreciation of the novelty of such claims.

The Court then proceeded to appraise those claims, and declared for the first time that freedom of speech does indeed encompass the right to associate for political purposes.[6] Having recognized such an interest, the Court then invoked it as the basis for rejecting Alabama's demand and freeing the NAACP of potential risk for contempt: "[T]he production order . . . must be regarded as entailing the likelihood of a substantial restraint upon the exercise by [NAACP] members of their right to freedom of association."[7]

The state had offered one further argument in extenuation—whatever reprisal might accompany or follow disclosure of an individual's membership in the NAACP would be inflicted by *private* rather than *governmental* actors—loss of employment, physical violence or intimidation, threats to family, and the like.[8] That distinction the Court conceded, but promptly rejected its claimed legal implications: "The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold."[9]

Finally, Alabama advanced several state interests that might normally justify a demand for surrender of membership lists. Any such interests, ruled the Court in light of the First Amendment implications, must be "'compelling.'"[10] The only potentially valid interest was to determine whether the NAACP "'was conducting

4. *Id.*

5. *Id.*

6. *See id.* at 460.

7. *Id.* at 462.

8. *See id.* at 463.

9. *Id.*

10. *Id.* (quoting Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring)).

intrastate business in violation of'"[11] the state's corporation laws. That claim simply did not avail, since for Justice Harlan the group's membership lists had no "substantial bearing"[12] on what the state needed or wished to know, in part because the organization had provided all the essential data, along with its pledge of full compliance with Alabama's rules for foreign entities operating within the state.[13] That substantially disposed of the case, governed as it was by a state's attempt to abridge "the right of [NAACP] members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment."[14]

We should now probe more deeply the source of that right. At the critical point in the opinion, laying the foundation for the ruling that followed, Justice Harlan wrote with beguiling certainty: "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in [earlier cases] were thought likely to produce upon the particular constitutional rights there involved."[15]

One should always be just a bit skeptical when a portentous Supreme Court ruling is introduced as "hardly novel." To the contrary, despite Justice Harlan's disarming disclaimer, this proposition was quite "novel." The cases he invoked by way of analogy differed in several important respects. For one, virtually all these precedents involved *individuals* who had pressed personal interests—witnesses demurring before legislative investigating committees,[16] lobbyists resisting registration and reporting requirements,[17] and media executives protesting governmental regulations or taxes.[18]

Moreover, the Court had not in many years reviewed a legal requirement comparable to Alabama's demand for surrender of membership lists. In fact, the only prior review of such a law had produced a totally different result; in the 1920s the Court had sustained New York's demand for membership lists of the Ku Klux Klan.[19] That precedent, said the *NAACP* Court three decades later,

11. *Id.* at 464.
12. *Id.*
13. *Id.* at 464-65.
14. *Id.* at 466.
15. *Id.* at 462.
16. United States v. Rumely, 345 U.S. 41, 42 (1953).
17. United States v. Harriss, 347 U.S. 612, 614-17 (1954).
18. Grosjean v. Am. Press Co., 297 U.S. 233, 240 (1936).
19. New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 77 (1928).

involved "markedly different considerations" reflecting "the particular character of the Klan's activities" of which "the Court itself took judicial notice."[20] Actually the process of distinguishing the earlier membership-disclosure case should have been a good deal more daunting, since the demand upon the Klan was potentially covered by the First Amendment, held a few years earlier to be binding on the states through the Fourteenth. Moreover, the earlier case had not relied solely on New York's special interest in unmasking the Klan, in contrast to other more apparently benign groups. Further, Alabama's demand for disclosure of the NAACP membership lists had not come out of the blue, but was an established condition for doing business and engaging in activity within the state.

Finally among the distinguishing factors, the very concept of "freedom of association" was "novel." Such a phrase could be found nowhere in the text of the First Amendment, nor was there clear precedent in the earlier free expression rulings that Justice Harlan cited with such confidence and conviction. By the late 1950s, there were a host of cases involving traditional free speech and free press claims.[21] Occasionally, as in *American Communications Association v. Douds*,[22] the First Amendment's explicit protection for freedom of assembly had been invoked to support something that vaguely anticipated freedom of association, but under conditions that would have brought little comfort to the NAACP and its members against Alabama's demand for full disclosure.[23]

Thus, the direct and unequivocal recognition of freedom of association in *NAACP v. Alabama* represented something quite novel, a highly significant expansion of First Amendment freedoms at a time that was especially crucial to the civil rights movement, but in time would prove invaluable to a host of other organizations, even eventually to the Ku Klux Klan.[24] In time, the scope of such freedom would be extended well beyond the context of political advocacy from which it emerged, but to which the Supreme Court's

20. 375 U.S. at 465.

21. *See, e.g.*, Smith v. California, 361 U.S. 147 (1959); Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of N.Y., 360 U.S. 684 (1959); Staub v. City of Baxley, 355 U.S. 313 (1958).

22. 339 U.S. 382 (1950).

23. *See id.* at 389.

24. *See Ex parte* Lowe, 887 S.W.2d 1 (Tex. 1994) (holding that the KKK cannot be compelled to produce membership list).

rationale could not logically be confined.[25] Much more could be said about the later evolution and the durability of associational freedom, now as fully accepted by most First Amendment scholars as those expressive rights that are specifically enumerated in the Bill of Rights. For our immediate purposes, however, it is enough to recall how freedom of association first came to be recognized as a protected interest, during that momentous Supreme Court Term when the normally cautious Justice Harlan had the counsel and guidance of Norman Dorsen. The rest, happily, is history.

There is a bit more to the neglected First Amendment jurisprudence of the second Justice Harlan. In the Term just before *NAACP v. Alabama*, the Court first addressed the intractable issue of obscenity in the *Roth* and *Alberts* cases.[26] Though he later came to a very different view, Justice Brennan authored a majority opinion that declared obscenity unprotected by the First Amendment because, by its very nature, it was material "utterly without redeeming social importance."[27] While Justice Harlan was not likely to reject that premise out of hand, he did express several prudent reservations about the approach the Court had taken in its first ruling on these troubling issues. In a long opinion that was both concurrence and dissent—joining his colleagues in upholding the state conviction while departing from them in the federal prosecution—Harlan raised several concerns that seem remarkably perceptive with the benefit of over four decades of experience.

First, Justice Harlan expressed grave doubt that the Court could meet its responsibility in this area by "paint[ing] with such a broad brush."[28] Leaving the crucial judgments to a jury under such imprecise guidelines seemed to him an abdication of appellate judicial responsibility.[29] Harlan warned that courts would be encouraged to rely on jury verdicts as a substitute for "facing up to the tough individual problems of constitutional judgment involved in every obscenity case."[30] He was, of course, absolutely right. Barely a decade had passed until the Court would find itself forced to review, de novo, the content of every obscenity charge that came before them. By the late 1960s, things got so bad that a majority

25. *See* Bruns v. Pomerleau, 319 F. Supp. 58 (D. Md. 1970) (holding that a nudist has the benefit of a constitutional right to associate with other nudists when his actions are in conformity with valid state statutes).

26. Roth v. United States, 354 U.S. 476 (1957).

27. *Id.* at 484.

28. *Id.* at 496.

29. *Id.* at 497-98.

30. *Id.* at 498.

opinion could report no more than that, on a given day, five Justices had found a particular film or book or magazine to be (or not to be) legally obscene, with virtually no guidance for the status of other sexually explicit material.[31]

Justice Harlan's second concern about the *Roth* approach was very different. It seemed to him that obscenity was mainly a matter for the states, and not for the federal government, and on that basis he dissented from the majority's affirmance of Roth's conviction in federal court.[32] "Not only is the federal interest in protecting the Nation against pornography attenuated," he warned, "but the dangers of federal censorship in this field are far greater than anything the States may do."[33] Indeed, assertion of a preemptive national control of literature and artistic material posed for him a genuine threat to the very nature of a federal system in which "States are free to experiment" in the setting of standards as well as other areas.[34]

Finally, Justice Harlan was deeply troubled about the untidy or disorderly character of the majority's approach to so sensitive an issue. He alone chided his colleagues because, "the Court has not been bothered by the fact that the two cases involve different statutes."[35] Moreover, he added that "the Court compounds confusion when it superimposes on these two statutory definitions a third, drawn from the American Law Institute's Model Penal Code . . . ."[36] In fact, the majority opinion contained no fewer than eight separate and significantly disparate definitions: two statutes, two trial-court elaborations of those statutes, the American Law Institute's Model Penal Code language, an entry from Webster's Unabridged Dictionary, and two phrases that seem to have been almost casually inserted in the opinion for explanatory or illustrative purposes.[37]

The point Justice Harlan was making here, and which he would later re-emphasize, was no less basic than a concern about due process. Obscenity law, he recognized, is unique in the difficulty that a potentially affected publisher or distributor faces in finding out what the law means, and what material it proscribes.[38] Indeed, one cannot truly know what is or is not "obscene" until a

31. *See* Redrup v. New York, 386 U.S. 767, 770-71 (1967).
32. 354 U.S. at 503.
33. *Id.* at 505.
34. *Id.* at 506.
35. *Id.* at 498.
36. *Id.* at 499.
37. *See id.* at 487, 489-91.
38. *Cf. id.* at 500-01.

jury returns, in a particular case, a verdict that reflects the jurors' understanding of "contemporary community standards"[39]—and which is of course binding on no other jury, even in the same community. The impossibility of shaping one's conduct to ascertainable standards has always marked obscenity law as very different from all other legal sanctions, and has led the courts of at least one state to chart a very different course in its regulation of such material.[40] Justice Harlan, alone among the members of the *Roth* Court, sensed the problem, and addressed it forthrightly at the start.

Justice Harlan was to restate several of these concerns, in *Ginzburg v. United States*,[41] where he again dissented from Justice Brennan's affirmance of a federal obscenity conviction. This was the case in which the notion of pandering entered the equation, providing a basis on which the distribution of marginal material might be criminalized because of the manner in which it was marketed and packaged, and the place from which it was postmarked.[42] This case revived Harlan's earlier expressed concern about the "attenuated" nature of the federal interest in this area. Even more troubling for him, however, was the risk that a conviction might now turn solely on the manner of dissemination—"a mere euphemism for allowing punishment of a person who mails otherwise constitutionally protected material just because a judge or a jury may not find him or his business agreeable."[43] He elaborated the due process and lack of notice concerns he had first expressed in *Roth*; "what I fear the Court has done," he added in *Ginzburg*, "is in effect to write a new statute, but without the sharply focused definitions and standards necessary in such a sensitive area."[44] While Justice Harlan would often join his more conservative colleagues in affirming obscenity convictions—and would dissent from Justice Brennan's unsuccessful effort to establish a "hard core" test for obscenity[45]—his occasional dissenting opinions reflect a remarkably thoughtful and perceptive appreciation of the special hazards of this area of the law.

One other of Justice Harlan's contributions to First Amendment jurisprudence surely deserves mention. In his final year of

39. *Id.* at 489.

40. State v. Henry, 732 P.2d 9, 17 (Or. 1987) (holding that "obscenity," however defined, retains the protection of the state constitution).

41. 383 U.S. 463 (1966).

42. *See id.* at 465.

43. *Id.* at 494.

44. *Id.*

45. *See Roth*, 354 U.S. at 503 (Harlan, J., dissenting).

service, the public use of profanity and vulgarity was ripe for the High Court's attention. *Cohen v. California*[46] provided the perfect vehicle, and to the surprise of most observers Justice Harlan turned out to be the perfect author of a remarkably protective free speech ruling. When an outspoken anti-war critic was arrested for displaying the phrase "fuck the draft" on a jacket he wore into the Los Angeles County Courthouse, Professor Melville Nimmer (theretofore known mainly as a copyright expert) took on the cause as an American Civil Liberties Union volunteer and presented a compelling free speech argument that eventually drew a solid majority for reversal.

In his surprisingly sensitive and good-humored opinion for a six-member majority, Justice Harlan recognized that many might see such a case as "too inconsequential to find its way into our books,"[47] but then set out to show just why it belonged there. Cohen's conviction rested solely on speech; there was no conduct, no fighting words, no obscenity or libel, and no valid claim that a captive audience had been subjected to offensive language.[48] What California had done, and what the First Amendment did not permit government to do, was "to excise, as 'offensive conduct,' one particular scurrilous epithet . . . ."[49] The risks of allowing such government authority were obvious to Justice Harlan; a state cannot ban the use of particular words "without . . . running a substantial risk of suppressing ideas in the process."[50] Words, he noted, "are often chosen as much for their emotive as their cognitive force."[51]

Moreover, "it is often true that one man's vulgarity is another's lyric."[52] Thus, added Justice Harlan, "it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."[53] As a person of exquisite taste—perhaps most unlikely of all the Justices ever to utter taboo or vulgar words—Harlan noted, in closing, "[t]hat the air may at times seem filled with verbal cacophony is, in this sense, not a sign of weakness but of strength"[54]

46. 403 U.S. 15 (1971).
47. *Id.* at 15.
48. *Id.* at 18-22.
49. *Id.* at 22.
50. *Id.* at 26.
51. *Id.*
52. *Id.* at 25.
53. *Id.*
54. *Id.*

and indicative of the Holmesian notion of a "marketplace of ideas."[55]

Curiously, the *Cohen* opinion drew dissents from Justices Black and Blackmun, who joined Chief Justice Burger in insisting that "Cohen's absurd and immature antic . . . was mainly conduct and little speech"[56] and that its minimally verbal component could be barred under the fighting words doctrine.[57] For the dissenters, "this Court's agonizing over First Amendment values seems misplaced and unnecessary."[58] This juxtaposition of contrasting views offered a special irony. That Justice Black, the lifelong First Amendment absolutist, should approach the close of his career as Cohen's adversary, while Justice Harlan left the Court as the champion of treating vulgarity and profanity as protected speech, defies classification if not logic.

Yet Justice Harlan's *Cohen* opinion was hardly unprecedented, as his much earlier concerns about obscenity and freedom of association surely anticipated. Along the way, there seems little doubt that Justice Harlan's understanding of free expression was significantly enhanced by his law clerk at the 1957 Term—just as the understanding of so many others of us has been enhanced by the teachings and writings and eloquent appeals of Norman Dorsen. In this sense we have all—Justice Harlan no less than the humblest of first-year students at the New York University School of Law—been the beneficiaries of his extraordinary insight and wisdom on First Amendment issues and principles.

Perhaps the finest of the many encomia that Professor Dorsen has recently received was the spontaneous salutation that President Bill Clinton added to his formal citation for the Eleanor Roosevelt Human Rights Award in December, 2000: "I've gotten to know him through our discussions of a political Third Way, but today we thank him for reminding us that in every age, respect for civil liberties is the American way. Thank you, Norman."

55. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

56. 403 U.S. at 27.

57. *See id.*

58. *Id.*