

NADINE STROSSEN

Justice Harlan's Enduring Importance for Current Civil Liberties Issues, from Marriage Equality to Dragnet NSA Surveillance

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ABOUT THE AUTHOR: Nadine Strossen is the John Marshall Harlan II Professor of Law at New York Law School and the immediate past president of the American Civil Liberties Union, 1991–2008. This article is an adapted version of the speech she gave when being honored as the John Marshall Harlan II Professor of Law. She thanks her research assistants Jakub Brodowski, Anne Easton, Elizabeth Lanza, Michael McKeown, Rachel Searle, and Rick Shea for assistance with the footnotes. She would also like to thank Norman Dorsen and Amy Tenney for introducing her when the basis of this article was presented as a speech.

Professor Strossen adds:

I have been blessed to have an extraordinary mentor and teacher in Norman, and such an extraordinary mentee and student in Amy, who is now inspiring future generations of students as a mentor and teacher herself! I dedicate this article, given its discussion of Justice Harlan's pioneering work on constitutional rights for LGBT individuals, to the memory of those who were slain in Orlando on June 12, 2016. In particular, I would like to celebrate the lives of Juan Ramon Guerrero and Christopher Andrew Leinonen, dear friends of Rick Shea, who says they "would have loved to read" this article.

I. INTRODUCTION

I would be deeply honored to be appointed to any Chair, but I am especially thrilled to hold the Chair named after a Supreme Court Justice whom I have long held in the highest esteem, due to five interrelated aspects of his character and work. I have strived to emulate his character and work throughout my career—of course, never coming close to his achievements, but closer than I would have without his inspiring example. In this article, I describe the five especially admirable attributes of John Marshall Harlan.

II. FIVE ESPECIALLY ADMIRABLE ATTRIBUTES OF JUSTICE HARLAN

First, Harlan was ideologically independent, writing thoughtful, case-specific opinions that eschewed any rigid dogma. To quote a Columbia Law professor, Kent Greenawalt, who—along with Norman Dorsen—also clerked for Harlan: “No modern justice has striven harder or more successfully . . . to perform his responsibilities in [a neutral] manner.”¹ Accordingly, although Harlan has been called the Warren Court’s “leading conservative voice,”² he also wrote some of the most path-breaking liberal opinions that any Justice has ever authored.³ This is completely consistent with the neutral, non-partisan approach that the American Civil Liberties Union (ACLU) pursues and for which I also aim in my work. For example, as my students will attest, I drill them to be able to articulate all plausible perspectives on all issues we study. In that vein, I quote an e-mail from one of my students, who kindly thanked me for teaching “in a very balanced and fair manner.” She said, “[You opened] [m]y eyes . . . to things that I never knew possible. For example, before your class I never thought I would see eye-to-eye with Justice Scalia on any issue.”⁴ Maybe one can be too neutral! (Just kidding.)

A second admirable aspect of Harlan’s work flows from his neutral approach: He was unusually willing to rethink his views and to candidly admit that he had changed his mind.⁵ Norman Dorsen has written that this “trait [is] familiar to all of [Harlan’s] law clerks—his exceptional open-mindedness and willingness to listen to new arguments.”⁶ Harlan thus embodied a key element of “the spirit of liberty,” as defined by another great jurist who also served on the U.S. Court of Appeals for the Second

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1. BIOGRAPHICAL ENCYCLOPEDIA OF THE SUPREME COURT 251 (Melvin I. Urofsky ed., 2006) (alteration in original).
 2. Jethro K. Lieberman, *Harlan Without Relish*, 36 N.Y.L. SCH. L. REV. 243, 243 (1991) (book review).
 3. See *Loving v. Virginia*, 388 U.S. 1 (1967); *Engel v. Vitale*, 370 U.S. 421 (1962); *Cooper v. Aaron*, 358 U.S. 1 (1958).
 4. E-mail to author (on file with author), quoted in Nadine Strossen, *Tribute to Justice Antonin Scalia*, 62 N.Y.U. ANN. SURV. AM. L. 1, 2 (2006).
 5. See, e.g., *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) (revising the reasonable expectation of privacy formulation from his *Katz* concurrence).
 6. Norman Dorsen, *John Marshall Harlan, Civil Liberties, and the Warren Court*, 36 N.Y.L. SCH. L. REV. 81, 104 (1991).

Circuit: Learned Hand. In Hand's words: "The spirit of liberty is the spirit which is not too sure that it is right"⁷

As a civil libertarian, I have also been especially inspired by a third aspect of Justice Harlan's work: his landmark civil liberties opinions. To be sure, Harlan's overall record did not make him an ACLU all-star. To the contrary, he rejected many major civil liberties claims, including many on equal protection and criminal justice issues.⁸ On the other hand, he did write trailblazing opinions upholding certain constitutional freedoms, which have long been the focus of my own professional work: freedoms of speech⁹ and association;¹⁰ freedom to make our own choices about sexual intimacy, reproduction, and other private matters;¹¹ freedom from government-endorsed religion;¹² and freedom from government surveillance.¹³ These opinions involve disparate rights, protected under various constitutional provisions: several First Amendment clauses, which protect freedom of speech, assembly, and religion; the Fourth Amendment, which protects people from unjustified searches and seizures; and the due process clauses of the Fifth and Fourteenth Amendments. Nonetheless, despite their doctrinal and factual diversity, all these Harlan opinions are united by the same overarching theme that he consistently stressed in broadly construing all these constitutional provisions: that we should be free from government action that intrudes into our private individual sphere, where we can engage in our own chosen expression and relationships, both personal and political.¹⁴

The fourth special quality about Justice Harlan that I particularly respect is his legendary courtesy, even toward those with whom he strongly disagreed.¹⁵ In this sense, Harlan contrasted sharply with Justice Felix Frankfurter, who was his principal mentor on the Court.¹⁶ Frankfurter had a notoriously sharp tongue, not mincing

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7. Judge Learned Hand, *The Spirit of Liberty* (1944), in *OUR NATION'S ARCHIVE* 658 (Erik Bruun & Jay Crosby eds., 1999).
 8. See TINSLEY E. YARBROUGH, *JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT* 182–88 (1992).
 9. See, e.g., *Cohen v. California*, 403 U.S. 15 (1971).
 10. See *NAACP v. Alabama*, 377 U.S. 288 (1964); *Shelton v. Tucker*, 364 U.S. 479, 497–99 (1960) (Harlan, J., dissenting).
 11. See, e.g., *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting).
 12. See, e.g., *Walz v. Tax Comm'n*, 397 U.S. 664, 695 (1970) (Harlan, J., concurring in the judgment).
 13. See *United States v. White*, 401 U.S. 745, 779 (1971) (Harlan, J., dissenting); *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring).
 14. *Poe*, 367 U.S. at 554 (Harlan, J., dissenting).
 15. Chief Judge Henry J. Friendly, *Remarks at the Proceedings of the Bar and Officers of the Supreme Court of the United States in Memory of Justice John Marshall Harlan* (Oct. 24, 1972), in 6 *MEMORIALS OF THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES* 459, 475 (H. Kumar Percy Jayasuriya ed., 2009) (describing Justice Harlan's "unfailing courtesy").
 16. *Booknotes: Tinsley E. Yarbrough, John Marshall Harlan: The Great Dissenter of the Warren Court*, at 1:18 (C-SPAN television broadcast Apr. 26, 1992) (statement of Tinsley E. Yarbrough) ("[H]is principal mentor, was Felix Frankfurter.").

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words toward or about those with whom he disagreed. Given this difference between them, Harlan has been called “Frankfurter without mustard”!¹⁷

Harlan’s cordiality is especially salutary in today’s fractious political climate, with too many personal attacks on those with different views, which have infected too many recent Supreme Court opinions.¹⁸ I have tried to follow Justice Harlan’s fine example, and enjoy cordial and even friendly relationships with people with whom I strongly disagree and publicly debate. I quote just a sample from one such person whom I debated repeatedly, but who had to turn down the most recent invitation for another such exchange for lack of time:

Dear Nadine:

I really miss you at the helm of the ACLU, but it’s good . . . that you’re keeping your hand in the public-appearance game. You’re good at it. . . .

. . . As attractive as is the opportunity to share a stage with you again, I am going to say no [due to time constraints]. . . .

Let me know when you are in D. C. Warm regards.

Sincerely,

Nino¹⁹

Also inspired by Justice Harlan’s neutral approach toward ideas and individuals, I have enjoyed working with ideologically diverse organizations, including the American Constitution Society and the Federalist Society, both nationally and at New York Law School (NYLS).

This leads to the fifth way in which Justice Harlan serves as such a positive role model: his close and ongoing relationship with the recent law school graduates who served as his law clerks, including Norman Dorsen. Of all the wonderful professional experiences I have been so lucky to have, none has been more meaningful to me than working closely with students and continuing relationships with them beyond law school. Many of my former students and research assistants are among my most valued colleagues and friends.²⁰

III. JUSTICE HARLAN'S PATH-BREAKING CIVIL LIBERTIES RULINGS

The remainder of this article focuses on a few of Justice Harlan’s path-breaking civil liberties opinions in the areas previously noted. As I always stress to my Constitutional Law students, it is noteworthy that these pioneering rulings were authored by someone who was appointed by a Republican president and generally

17. YARBROUGH, *supra* note 8, at xii.

18. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626–31 (2015) (Scalia, J., dissenting); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting); *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting).

19. Yes, that was none other than Nino Scalia. This was just one of several gracious letters I received from him. He died in February, 2016. Letter from Justice Antonin Scalia to author (Mar. 6, 2015) (on file with the *New York Law School Law Review*).

20. I am so grateful to those who visited NYLS to hear me present the speech on which this article is based. By way of example, I cite the two who made the longest trips: Dan Parisi from London and Danielle Miklos from Rome.

considered a political and judicial conservative—a Republican Wall Street lawyer by background.²¹ Justice Hugo Black, a staunch Democrat, said that Harlan proved “that there is such a thing as a good Republican.”²²

Of course, strong judicial protection of constitutional rights and civil liberties is not, and should not be, the special province of any particular political outlook. Rather, the Constitution should be neutrally defended by all of us, just as it protects all of us. In fact, in quite a few of his opinions, Harlan took a stronger civil libertarian position than that espoused by even leading liberal activists on the Warren Court.²³ For example, in *Cohen v. California*, in which Harlan upheld the right to wear a jacket in a courthouse with the then extremely provocative words “Fuck the Draft,” he supported a more speech-protective position than the vaunted First Amendment absolutist, Hugo Black.²⁴ Likewise, in *Roth v. United States*, in which the Court first created the obscenity exception to the First Amendment, Harlan dissented, advocating a more speech-protective position than William Brennan, the archetypal liberal judicial activist, who wrote the majority opinion.²⁵

Moreover, while Harlan has not generally been viewed as a leader on civil rights issues, he in fact was in the vanguard on some key cases in that crucial arena too. In 1958, in *NAACP v. Alabama*, Harlan wrote the Court’s first opinion to expressly recognize and protect an implicit First Amendment freedom of group association to advance ideas in a case that was essential for the ability of the NAACP to pursue its civil rights work.²⁶ Furthermore, in the 1961 case *Garner v. Louisiana*, Harlan was the only Justice to sustain a First Amendment claim by civil rights demonstrators, who had been convicted for sitting-in at segregated lunch counters.²⁷ No other member of the Warren Court supported that ruling.²⁸

21. See YARBROUGH, *supra* note 8, at 339–41.

22. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 588 (2d ed. 1997).

23. See, e.g., *Cohen v. California*, 403 U.S. 15, 22–26 (1971).

24. Compare *id.* at 15–16, with *id.* at 27–28 (Black, J., dissenting).

25. 354 U.S. 476 (1957); see *id.* at 503–08 (Harlan, J., dissenting in part) (stating that the federal government lacks power to outlaw sexual expression because of thoughts that it might induce “sexually impure thoughts,” *id.* at 507, in contrast with illegal conduct, although Harlan did uphold states’ power to outlaw obscenity).

26. 357 U.S. 449 (1959).

27. 368 U.S. 157 (1961) (9–0 decision) (Warren, C.J., majority opinion); see *id.* at 185–207 (Harlan, J., concurring in the judgment) (characterizing the sit-in demonstrations as expressive conduct entitled to First Amendment protection).

28. See *id.* at 173–74 (majority opinion) (holding that the convictions violated the demonstrators’ due process rights because there was no evidence that their conduct foreseeably could have disturbed the peace); *id.* at 175–76 (Frankfurter, J., concurring in the judgment) (same); *id.* at 183–84 (Douglas, J., concurring) (maintaining that restaurants “are in the public domain,” *id.* at 183, and hence barred by the equal protection clause from engaging in “racial segregation,” *id.* at 184).

IV. *COHEN V. CALIFORNIA*: A MEMBER OF THE FIRST AMENDMENT PANTHEON

From among Harlan's rights-protective opinions, I have chosen to discuss the ones that have the most direct ongoing relevance for current controversies. First, I discuss his 1971 majority opinion in *Cohen v. California*. It is one of the most eloquent, enduring paeans to freedom of speech even for words and ideas that most people find deeply offensive. Therefore, it powerfully refutes the wrongheaded idea that alas is widely accepted in our society, including on our campuses: that, far from protecting speakers who are offending, officials should instead protect listeners who are offended.²⁹ I then discuss the specific examples of Harlan's rights-upholding opinions to which the title of my article refers: his opinions that provide crucial ammunition for upholding marriage equality and for striking down dragnet surveillance by the NSA.

Harlan's *Cohen* opinion ranks among the handful of opinions in the First Amendment pantheon. It persuasively makes several fundamental points in support of broadly enforcing the free speech guarantee, each of which would independently make it a memorable, quotable decision. In fact, the principles it enforced forty-six years ago have since then become so deeply woven into our law that they might well seem like truisms now. Therefore, I must underscore that these were novel ideas when Harlan laid them out. That conclusion is underscored by the fact that the lower courts had ruled the other way, rejecting the First Amendment arguments and upholding a criminal conviction and thirty-day prison sentence for Mr. Cohen.³⁰ Moreover, three Justices joined a harshly worded dissent, agreeing that Cohen deserved to spend a month in prison, and these three had overall pro-speech records.³¹ Indeed, as I already noted, one of them was a celebrated free speech absolutist: Hugo Black.³²

I next summarize the then-radical and now-cherished core principles that Harlan memorably staked out in *Cohen*. As I do so, consider how they relate to current free speech controversies, including whether certain racist or sexist epithets should be punishable as hate speech or harassment.³³ First, that we must defend freedom even—indeed, especially—for words and ideas that are deemed trivial at best, vile at worst.³⁴ Second, that free speech deserves defending even when it serves no instrumental purpose, and conveys no idea to anyone, because it has intrinsic value as an emotional outlet for the speaker.³⁵ Third, that we cannot suppress any word

29. *Cohen*, 403 U.S. at 21–22.

30. *Id.* at 22–26; *People v. Cohen*, 81 Cal. Rptr. 503, 509–10 (1969), *rev'd*, 403 U.S. 15.

31. *See Cohen*, 403 U.S. at 27–28 (Blackmun, J., dissenting, joined by Burger, C.J., and Black, J., and joined in part by White, J.).

32. *Id.*

33. *See* Eric Heinze, *Nineteen Arguments for Hate Speech Bans—and Against Them*, FREE SPEECH DEBATE (Mar. 31, 2014), <http://freespeechdebate.com/en/discuss/nineteen-arguments-for-hate-speech-bans-and-against-them>; *Students in Action: Debating Hate Speech*, ABA, http://www.americanbar.org/groups/public_education/initiatives_awards/students_in_action/debate_hate.html (last visited Apr. 6, 2017).

34. *See Cohen*, 403 U.S. at 24–25.

35. *Id.* at 26.

without also suppressing an idea, and that we may not suppress any idea.³⁶ Fourth, at least when we are outside the privacy of our own homes, we have no right to be shielded from offensive words and ideas, even when we are in places where we are required to be, and hence cannot necessarily quickly avoid the offensive speech; in other words, Harlan largely rejects the so-called “captive audience” rationale for curbing speech.³⁷ Fifth, that this robust freedom, even for offensive and upsetting speech, is ultimately as good for society as it is for the individual.³⁸

I will quote Harlan’s own eloquent words about that last point. He powerfully refutes the widespread view that society would be better off if we could just outlaw a few especially ugly epithets, and he does so despite acknowledging that such speech has serious downsides. First though, to help you fully appreciate the force of Harlan’s courageous defense of free speech in this passage, I must provide some historical context. I cannot stress enough that the particular words and ideas at issue were, at that time, widely considered dangerously offensive. Back then, the so-called “F-word” was analogous to the so-called “N-word” today: so taboo that polite people were loath to utter it for any purpose, even to criticize it, or even, as in the *Cohen* case, to defend the right to say it. For example, Justice Black’s law clerks said that even this staunch First Amendment absolutist was horrified at the possibility that his wife, Elizabeth, would be confronted with “that word” in a courthouse corridor.³⁹

At the oral argument, Chief Justice Warren Burger tried to impose a gag order on Cohen’s lawyer, Professor Mel Nimmer, who was arguing the case on behalf of the ACLU.⁴⁰ After announcing the case and calling Nimmer to the podium, Chief Justice Burger said: “Mr. Nimmer, . . . the Court is thoroughly familiar with the factual setting of this case and it will not be necessary for you . . . to dwell on the facts.”⁴¹ To which Nimmer replied: “At Mr. Chief Justice’s suggestion, I certainly will keep very brief the statement of facts. . . . [W]hat this young man did was to walk through a courthouse corridor . . . wearing a jacket upon which were inscribed the words ‘Fuck the Draft.’”⁴² As First Amendment expert Geoffrey Stone wrote: “At

36. *Id.*

37. *Id.* at 22.

38. *Id.* at 24–25.

39. Thomas G. Krattenmaker, *Looking Back at Cohen v. California: A 40-Year Retrospective from Inside the Court*, 20 WM. & MARY BILL RTS. J. 651, 655 (2012).

40. The ACLU played a leading role in almost all the cases discussed in this article.

41. Transcript of Oral Argument, *Cohen v. California*, 403 U.S. 15 (1971) (No. 299), reprinted in 70 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 828 (Philip B. Kurland & Gerhard Casper eds., 1975).

42. *Id.*; see also e-mail from Joel Gora, Professor of Law, Brooklyn Law Sch., to author (Oct. 6, 2015, 10:57 AM) (on file with the *New York Law School Law Review*) (“I [was] in the court room when the case was argued [W]hen Nimmer . . . described the words on the jacket, in quite a clearly audible and distinct manner, the Chief Justice’s face turned a bright crimson, almost matching the deep red curtains behind the bench . . .”).

that moment, I believe, Mel Nimmer won his case.”⁴³ Likewise, another commentator said: “If Nimmer had acquiesced to Burger’s word taboo, he would have conceded that there were places where *fuck* shouldn’t be said [including] the sanctified courthouse.”⁴⁴

In contrast with Professor Nimmer, Harlan and the other Justices never let “that word,” as they called it, pass their lips. Burger himself referred to the case as the “screw the draft” case.⁴⁵ Moreover, “[w]hen Harlan was to deliver the opinion in open court, Burger begged: ‘John, you’re not going to use “that” word in delivering the opinion, are you? It would be the end of the Court if you use it, John.’”⁴⁶ Indeed, Harlan delivered the opinion without saying, “fuck.” Even in guaranteeing the right to say it, the taboo against it was just too strong for him.⁴⁷

Again, I underscore this context—how deeply offensive the words at issue were considered at the time—so you can appreciate that Justice Harlan’s defense of the right to utter them would apply fully to whatever we now consider to be the most offensive words, which we also avoid saying even though we defend the right to say them. Therefore, to fully grasp his ruling and rationale, as you read it, have in mind whatever you consider the most ugly, unspeakable words today:

The constitutional right of free expression is powerful medicine in a society as diverse . . . as ours. It . . . put[s] the decision as to what views shall be voiced . . . into the hands of each of us, in the hope that . . . such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

. . . [T]he immediate consequence of this freedom may often appear to be only . . . discord, and . . . offensive utterance. These are, however, . . . necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a . . . distasteful abuse of a privilege, these fundamental societal values are truly implicated.⁴⁸

In this passage, Justice Harlan strongly protects individual dignity and choice. Notably, that is also a major theme that echoes through other opinions of his that protect other rights, including his influential *Poe v. Ullman* opinion, which in turn undergirded the historic 2015 same-sex marriage ruling, *Obergefell v. Hodges*.⁴⁹

43. Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 UCLA L. REV. 1, 2 (2008).

44. Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711, 1735 (2007) (emphasis added).

45. Susan J. Balter-Reitz, Cohen v. California, in *FREE SPEECH ON TRIAL: COMMUNICATION PERSPECTIVES ON LANDMARK SUPREME COURT DECISIONS* 160, 163 (Richard A. Parker ed., 2003).

46. CHRISTOPHER M. FAIRMAN, *FUCK: WORD TABOO AND PROTECTING OUR FIRST AMENDMENT LIBERTIES* 110 (2009).

47. Notice that I am not following in his footsteps in that regard!

48. *Cohen v. California*, 403 U.S. 15, 24–25 (1971) (citation omitted).

49. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

V. JUSTICE HARLAN'S CONTRIBUTIONS TO MARRIAGE EQUALITY

When I first read the Supreme Court's thrilling *Obergefell* decision, I was immediately struck by the fact that it repeatedly quoted Justice Harlan's landmark 1961 opinion in *Poe v. Ullman*.⁵⁰ This underscores the special status of that opinion; it is the earliest, most eloquent, and most enduring explanation of the Court's special responsibility to construe the term "liberty" in the due process clauses as encompassing protection from government intrusion into the private spheres of our lives. In other words, the opinion justifies the modern so-called "substantive due process" doctrine, which reads the due process clauses as protecting implied rights concerning sexual and other intimate matters.

Harlan's *Poe* opinion specifically concluded that Connecticut's statute outlawing contraception violated the Fourteenth Amendment due process clause.⁵¹ The majority of the Court had dismissed the constitutional challenge to the statute as non-justiciable, beyond the Court's review power.⁵² Therefore, it is noteworthy that it was the conservative Harlan who dissented on that point, concluding that the Court did indeed have the power—and, in fact, the duty—to reach the merits of the case.⁵³ Hence, he went on to address the merits, and in so doing wrote the opinion that was the Court's very first ever to uphold the implied right of sexual and reproductive freedom.⁵⁴

As I never tire of stressing to my Constitutional Law students, it was this respected conservative who blazed this progressive path, not one of the liberal judicial activists on the Court at the time. Harlan did this both by reaching out to rule on an issue that the other Justices ducked, and by laying out a rationale for upholding implied rights that has stood the test of time. This landmark opinion has often been quoted and built upon, as the Court has subsequently recognized a series of such implied rights,⁵⁵ including, most recently, the right to same-sex marriage.⁵⁶

To this day, we still have fierce ongoing debates about substantive due process, with the four *Obergefell* dissenters maintaining either that the due process clauses protect only procedural rights, or that they do not protect any substantive rights beyond those that society traditionally already recognizes.⁵⁷ The *Obergefell* dissenters' views underscore how dramatically different the current brand of judicial conservatism is from Harlan's. Justice Scalia bitterly denounced "the Court's claimed power to

50. *Id.* at 2598–99; *id.* at 2620 (Roberts, C.J., dissenting, joined by Scalia and Thomas, JJ.).

51. *Poe v. Ullman*, 367 U.S. 497, 539 (1961) (Harlan, J., dissenting).

52. *Id.* at 508–09 (majority opinion).

53. *Id.* at 539 (Harlan, J., dissenting).

54. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.27, at 917 (7th ed. 2004).

55. *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

56. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

57. *Id.* at 2515–16, 2518 (Roberts, C.J., dissenting); *id.* at 2627–28 (Scalia, J., dissenting); *id.* at 2631 (Thomas, J., dissenting); *id.* at 2640 (Alito, J., dissenting).

create 'liberties,'"⁵⁸ and he put that word "liberties" in quotation marks just in case we might not have understood that he did not think they really are such.

Likewise, Justice Clarence Thomas decried "the dangerous fiction of treating the Due Process Clause as a font of substantive rights,"⁵⁹ and further said that even if he assumed only for the sake of argument that the due process clauses did protect any substantive liberty, it would be limited to freedom from physical restraint.⁶⁰ Moreover, all four opinions, by all four *Obergefell* dissenters, excoriated the majority for engaging in judicial overreaching and undermining democracy by giving a broader substantive meaning to "liberty."⁶¹

Given the ongoing force of this perspective both on the Court and off, including among some current presidential candidates and their supporters, it is worth heeding Justice Harlan's thoughtful exposition in *Poe* of a different view: namely, that the Court has a duty to give substantive meaning to the concept of "liberty," and that it can do so in a way that is appropriately restrained, consistent with the limited judicial role in our system.

Harlan cited longstanding precedents and principles that repudiate the limited views the current dissenters defend.⁶² Instead, he offers an elastic, but not unbounded, concept:

Due process has not been reduced to any formula . . . [It] represent[s] the balance which our Nation, built upon postulates of respect for [individual] liberty . . . , has struck between that liberty and the demands of organized society. . . . [T]he supplying of content to this Constitutional concept has . . . not been [a process] where judges have felt free to roam where unguided speculation might take them. . . . [Rather, judges consider] the balance struck by this country, having regard to . . . the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from [this living tradition] could not long survive, while a decision which builds on [it] is likely to be sound. No formula could serve as a substitute . . . for judgment and restraint.

58. *Id.* at 2627 (Scalia, J., dissenting).

59. *Id.* at 2631 (Thomas, J., dissenting).

60. *Id.* at 2633.

61. *Id.* at 2611 (Roberts, C.J., dissenting) ("Under the Constitution, judges have power to say what the law is, not what it should be."); *id.* at 2614, 2617–18; *id.* at 2627–29 (Scalia, J., dissenting) ("The opinion in these cases is the furthest extension in fact . . . of the Court's claimed power to create 'liberties' that the Constitution and its Amendments neglect to mention. . . . This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government."); *id.* at 2631–32, 2637 (Thomas, J., dissenting) ("That a 'bare majority' of this Court is . . . wiping out with a stroke of the keyboard the results of the political process in over 30 States, based on a provision that guarantees only 'due process' is but further evidence of the danger of substantive due process. . . . The majority apparently disregards the political process as a protection of liberty." (citation omitted)); *id.* at 2640–41, 2642 (Alito, J., dissenting) ("The Justices in the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental. . . . Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage.").

62. *Poe v. Ullman*, 367 U.S. 497, 541–42 (1961) (Harlan, J., dissenting).

. . . [This “liberty”] includes a freedom from all substantial arbitrary impositions and purposeless restraints⁶³

Note Harlan’s repeated rejection of reducing the due process clauses to a “formula.”⁶⁴ That key point was also repeatedly stressed in the *Obergefell* decision.⁶⁵ Moreover, it is a general theme that animates many of Harlan’s opinions on various issues, consistent with his overarching rejection of any rigid orthodoxy. He steadfastly insisted that it is a judge’s responsibility to do nothing less than to judge each case and every issue.

Not only did Justice Harlan lay the cornerstone for *Obergefell*, but he also laid out compelling arguments for shielding marriage equality from the major challenge that it now faces: demands for religious exemptions or accommodations. These claims are being raised by everyone from local officials, who seek exemption from their duties to issue marriage licenses,⁶⁶ to providers of products and services, who assert the right to refuse to do business with same-sex couples.⁶⁷

Half a century ago, Justice Harlan rejected the claim that these sorts of exemptions were required as a matter of religious freedom. He also went further, arguing that these exemptions would violate the First Amendment’s non-establishment clause by conferring a special benefit on religion. For example, Harlan dissented in the 1963 case, *Sherbert v. Verner*, in which the majority construed the First Amendment’s free exercise clause as mandating an exemption from a neutral general law specifically when the law interfered with religious practices.⁶⁸ In a 1973 dissent in *Walz v. Tax Commission*, Harlan stressed that the First Amendment religion clauses mandate strict neutrality as between religion and non-religion, such that the government must not accord benefits that favor religion.⁶⁹ In this respect, Harlan took a more hard-line view of the establishment clause than the Court’s majority, which has enforced a so-called “benevolent neutrality,”⁷⁰ permitting government at least to voluntarily accommodate religion, and in some cases requiring government to do so. In contrast, Harlan consistently opposed any “religious gerrymanders.”⁷¹ Accordingly, he would strongly reject claims that religious objectors

63. *Id.* at 542–43.

64. *Id.* at 542.

65. *See Obergefell*, 135 S. Ct. at 2598, 2620.

66. Sarah Kaplan & James Higdon, *The Defiant Kim Davis, the Ky. Clerk Who Refuses to Issue Gay Marriage Licenses*, WASH. POST (Sept. 2, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/09/02/meet-kim-davis-the-ky-clerk-who-defying-the-supreme-court-refuses-to-issue-gay-marriage-licenses>.

67. Inae Oh, *Indiana Pizzeria Says It Will Not Cater Gay Weddings*, MOTHER JONES (Apr. 1, 2015, 10:23 AM), <http://www.motherjones.com/mojo/2015/04/indiana-pizzeria-gay-couples>.

68. 374 U.S. 398, 406 (1963); *id.* at 418 (Harlan, J., dissenting).

69. 397 U.S. 664, 699 (1970) (Harlan, J., concurring in the judgment).

70. *Id.* at 669, 676 (majority opinion).

71. *Id.* at 696 (Harlan, J., concurring in the judgment).

to same-sex marriage should be exempted from any general legal duty, including under anti-discrimination laws.

As if the above-described Harlan opinions are not significant enough in terms of LGBT⁷² rights, I note yet one more in that important genre. Justice Harlan actually wrote the very first signed Supreme Court opinion upholding a gay rights claim, in 1962.⁷³ This ruling is not nearly as well known as it deserves to be, even among constitutional law experts, because it is usually doctrinally pigeonholed under First Amendment obscenity.⁷⁴

Specifically, in *Manual Enterprises v. Day*, Harlan repudiated the post office's refusal to distribute so-called "physique magazines," which contained photos of partially nude male models, as well as political commentary, aimed at a gay audience.⁷⁵ Harlan rejected the post office's view, which both lower courts had upheld, that these magazines were obscene, and hence barred from distribution. This ruling made an essential contribution to the then-nascent gay rights movement. To quote our in-house NYLS expert, Art Leonard: "[F]olks who [study] the history of LGBT rights all celebrate this [decision]. It helped to lay the foundation of the modern gay rights movement, because it led to the development of a national gay press, which had been impossible under the Postal regulations."⁷⁶

To be sure, Harlan's opinion contains some disparaging language about homosexuality that reflected the then-prevailing societal views.⁷⁷ However, his opinion was still way ahead of his time in a couple significant respects. For example, he expressly equated straight and gay erotica, stating: "[T]hese portrayals of the male nude cannot fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates."⁷⁸ To quote a recent article by Rutgers Law Professor Carlos Ball: "[Harlan's] analogy between gay and straight erotica provided same-sex sexuality with a modicum of judicially approved legitimacy . . . that it had

72. LGBT is an acronym for "lesbian, gay, bisexual, transgender" that has been in use since the 1990s to replace "gay" as a collective reference to the LGBT community. 1 RACE AND RACISM IN THE UNITED STATES 690 (Charles A. Gallagher & Cameron D. Lippard eds., 2014).

73. While Harlan authored the first *signed* Supreme Court opinion in favor of gay rights, there had previously been an unsigned opinion upholding rights for LGBT individuals. *One, Inc. v. Olesen*, 241 F.2d 772, 776–77 (9th Cir. 1957) (holding that the material in "One," a periodical geared toward gay men, was obscene and "ha[d] a tendency to deprave or corrupt the morals of those whose minds are open to such influences"), *rev'd per curiam*, 355 U.S. 371 (1958).

74. See David G. Savage, *Supreme Court Faced Gay Rights Decision in 1958 Over 'Obscene' Magazine*, L.A. TIMES (Jan. 11, 2015, 5:30 AM), <http://www.latimes.com/nation/la-na-court-gay-magazine-20150111-story.html> (describing *One, Inc. v. Olesen* as "a little-noticed, one-line Supreme Court ruling in 1958 that didn't mention the word 'homosexuality' and was largely forgotten until recently," and as "a forgotten landmark" of the gay rights movement).

75. 370 U.S. 478 (1962).

76. E-mail from Arthur S. Leonard, Editor, LGBT Law Notes, N.Y. Law Sch., to author (Aug. 21, 2015, 7:06 AM) (on file with the *New York Law School Law Review*).

77. See *Manual Enters.*, 370 U.S. at 481.

78. *Id.* at 490.

never enjoyed before.”⁷⁹ Ball stated that this ruling was “*the first time that any court in the United States had ever suggested that there was an equivalence of sorts between heterosexuality and homosexuality.*”⁸⁰

Once again, the conservative Harlan was in the Court’s vanguard in this remarkable case, which was issued during the Dark Ages in terms of LGBT rights, seven years before Stonewall.⁸¹ None of the Court’s leading liberals joined his path-breaking opinion. Justices Black, William O. Douglas, Brennan, and Earl Warren also voted against the post office, but they did so only on narrow statutory grounds.⁸²

VI. JUSTICE HARLAN’S CONTRIBUTIONS TO FREEDOM FROM DRAGNET COMMUNICATIONS SURVEILLANCE

The next current hot topic about which Justice Harlan made amazingly prescient pronouncements is electronic surveillance of communications, including the NSA’s sweeping, controversial surveillance that Edward Snowden brought to light.⁸³ On this topic, one Harlan opinion is well known and routinely quoted in all the many ongoing discussions about whether mass communications surveillance violates the Fourth Amendment. In contrast, another Harlan opinion on point is not nearly as well known, which is too bad because it is a powerful indictment of the suspicionless surveillance programs that the government continues to engage in.

Harlan’s well-known opinion on point is his concurrence in *Katz v. United States* in 1967.⁸⁴ The majority opinion in *Katz* was itself a watershed, because it held that the Fourth Amendment does apply to electronic communications surveillance, thus overturning an important earlier ruling that had reached the opposite conclusion because it limited Fourth Amendment protection to physical trespasses.⁸⁵ *Katz* was a significant turning point; it recognized that “the Fourth Amendment protects people, not places.”⁸⁶ Noteworthy as the majority’s opinion was, even more influential has been Justice Harlan’s concurrence, in which he said that the Fourth Amendment extends to all government intrusions that invade a “reasonable expectation of privacy,” which he defined as “an actual (subjective) expectation of privacy . . . that society is prepared to

79. Carlos A. Ball, *Obscenity, Morality, and the First Amendment: The First LGBT Rights Cases Before the Supreme Court*, 28 COLUM. J. GENDER & L. 229, 293 (2015).

80. *Id.*

81. For more on the rebellion and its lasting impact, see News About Stonewall Rebellion, N.Y. TIMES, <http://www.nytimes.com/topic/subject/stonewall-rebellion> (last visited Apr. 6, 2017).

82. *Manual Enters.*, 370 U.S. at 495–519 (Brennan, J., concurring, joined by Douglas and Brennan, JJ., and Warren, C.J.); *id.* at 495 (Black, J., concurring in the judgment).

83. See *Edward Snowden: Leaks that Exposed US Spy Programme*, BBC News (Jan. 17, 2014), <http://www.bbc.com/news/world-us-canada-23123964>.

84. 389 U.S. 347, 360–62 (1967) (Harlan, J., concurring).

85. *Olmstead v. United States*, 277 U.S. 438 (1928), *overruled by Katz*, 389 U.S. 347, and *Berger v. New York*, 388 U.S. 41 (1967).

86. *Katz*, 389 U.S. at 351.

recognize as ‘reasonable.’”⁸⁷ Just one year after *Katz*, the Supreme Court majority adopted Harlan’s formulation as the touchstone for Fourth Amendment coverage.⁸⁸

Unfortunately, while that approach was a step forward for Fourth Amendment protection in *Katz* itself, as technology and society have evolved since then, the reasonable expectation of privacy test⁸⁹ has often had the opposite impact. As society has become inured to increasingly pervasive forms of mass surveillance, the definition of protected privacy in terms of societal expectations has led to a downward spiral; the more pervasive surveillance becomes, the narrower the reasonable expectation of privacy becomes, so that more and more forms of government surveillance will be deemed beyond Fourth Amendment protection.

This is exactly the argument that the U.S. government has been making and that too many courts have been accepting, including in defending mass NSA surveillance from Fourth Amendment challenges by the ACLU and other privacy advocates. The government argues that there is no reasonable expectation of privacy in our phone metadata, even though it reveals the most intimate details of our lives, because we should realize that this information is collected by our communications service providers and that these providers might well turn it over to the government.⁹⁰

In response, challengers to the surveillance have maintained that there should be a normative dimension to assessing whether the Fourth Amendment applies to the government intrusion at issue, not only a descriptive dimension. In other words, our Fourth Amendment rights should not be limited to privacy that is already respected in fact, but rather, it should encompass privacy that ought to be respected in principle.

That was precisely the point that none other than Justice Harlan himself stressed just four years after *Katz*, in his dissenting opinion in *United States v. White*. With his characteristic intellectual independence and rigor—including his consistent rejection of simplistic, formulaic approaches—Harlan rejected the mere formulaic invocation of the reasonable expectation of privacy concept, even though he himself had penned that phrase.⁹¹ He stressed that the *Katz* formulation “can, ultimately, lead to the substitution of words for analysis.”⁹² Instead, he said that judges must actually make judgments about whether the government intrusion at issue should be allowed, consistent with the communications privacy that we should enjoy. In language that is fully applicable to the NSA’s dragnet phone surveillance, he said that in deciding whether the Fourth Amendment applies,

87. *Id.* at 360–61 (Harlan, J., concurring).

88. *Mancusi v. DeForte*, 392 U.S. 364, 368–69 (1968) (applying the reasonable expectation of privacy test).

89. Pursuant to Harlan’s concurrence in *Katz*, the reasonable expectation of privacy test requires the demonstration of both that (1) the person has an “actual (subjective) expectation of privacy” and (2) “society is prepared to recognize [this expectation of privacy] as ‘reasonable.’” *Katz*, 389 U.S. at 361.

90. *Klayman v. Obama*, 957 F. Supp. 2d 1, 30–31 (D.D.C. 2013), *vacated*, 800 F.3d 559 (D.C. Cir. 2015).

91. *United States v. White*, 401 U.S. 745, 779–80, 786 (1971) (Harlan, J., dissenting).

92. *Id.* at 786.

[t]he analysis must . . . transcend the search for subjective expectations or . . . assumptions of risk. . . .

Since it is the task of the law to form and project, as well as mirror and reflect, we [judges] should not . . . merely recite the expectations and risks without examining the desirability of saddling them upon society. The critical question, therefore, is whether under our system of government . . . we should impose on our citizens the risks of the electronic listener . . . without at least the protection of a warrant requirement.⁹³

Harlan then examined this critical question, and concluded that these risks would exert an unacceptably chilling impact on our communications, a First Amendment concern that the ACLU and others have also stressed in our current challenges to NSA surveillance. To quote Harlan, “a rule of law that permits official monitoring of private discourse” may “well smother that spontaneity . . . that liberates daily life”; spontaneity that is “reflected in frivolous, impetuous, sacrilegious, and defiant discourse.”⁹⁴ In very strong language, which would condemn many ongoing communications surveillance programs, he concluded that “[warrantless] electronic monitoring . . . has no place in our society.”⁹⁵ Harlan elaborated that “the burden of guarding privacy in a free society should not be on its citizens; it is the Government that must justify its need to electronically eavesdrop.”⁹⁶

VII. CONCLUSION

In conclusion, I could wish nothing more for myself and my students—not to mention for our cherished country and Constitution—than that all of us members of the legal profession strive to follow in Justice Harlan’s footsteps by being courteous and respectful toward all people and neutral and open-minded toward all issues, and by doing our utmost to secure rights that have not yet received the protection they deserve. On that last point, I give the last word to Justice Harlan. I will quote a passage that not only nods toward the past, as we would expect from a conservative jurist, but that also ends on a forward-looking note, worthy of the most progressive jurist:

Each new claim to Constitutional protection must be considered against a background of Constitutional purposes [T]here is no “mechanical yardstick,” no “mechanical answer.” The decision of an apparently novel claim must [not only] take “its place in relation to what went before [but also cut] a channel for what is [yet] to come.”⁹⁷

93. *Id.*

94. *Id.* at 787–89.

95. *Id.* at 790.

96. *Id.* at 793.

97. *Poe v. Ullman*, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting) (quoting *Irvine v. California*, 347 U.S. 128, 147 (Frankfurter, J., dissenting)).

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