John Marshall Harlan: Neglected Advocate of Federalism

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ABOUT TEN YEARS AGO Chief Justice Earl Warren retired from the United States Supreme Court and during his tenure as Chief Justice, 1953-1969, extraordinary interpretations of crucial constitutional provisions took place. This was especially true in the area of procedural due process of law. It was during the Warren Court era that the application of virtually all of the procedural rights found in the Bill of Rights, *i.e.*, Amendments 4, 5, 6, 8, became binding on the states through the use of the due process of law clause of the Fourteenth Amendment.

During this period of historical constitutional reasoning, a majority of the Court subscribed to the necessity of creating a uniform system of criminal justice. That is, many times states were found wanting in their application of due process of law to criminal defendants. As a result, the Court ruled that not only the federal government should be restrained by the procedural clauses of the 4th, 5th, 6th, and 8th Amendments but the states as well. The due process of law clause of the Fourteenth Amendment was the constitutional tool employed and the process was labeled incorporation. Thus, majority opinions projected a deep commitment to equalization of procedural treatment of criminal defendants before both federal and state courts.

The justices who participated in these decisions advocated a doctrinal symmetry toward the administration of justice. That is, both state and federal courts were to follow the same due process rules. Such adherence would result in order, predictability, and consistency within the entire judicial system of the United States. As a result, the Court, especially from 1963-1969, was seen by the American legal community and public as playing an activist role in policy-making. Judicial activism embodies a self-assertive role for the Court, *i.e.*, the Court should fill any vacuum created by the absence of action by the other branches of government. This approach, when applied, created a high degree of visibility for the Court as an expansive policy-maker.

But throughout this period of incredible constitutional adjudication, a strong voice of protest cried out. That voice belonged to Associate Justice John Marshall Harlan who served on the Supreme Court from 1955 to 1971. Harlan believed in a limited policy-making role played by the Court.

This approach, known as judicial restraint, presupposed a high degree of legitimacy behind legislative action. That is, the Court should support positive legislative activity in the areas of social policy-making. But in exercising such powers, the judicial branch should not use its power to expand the meaning of constitutional principles. The concept of judicial restraint advocated a limited role for the judiciary.

As a practitioner of judicial restraint, Harlan is acknowledged by political and legal scholars to be one of the more prescient United States Supreme Court justices in this century.[1] His judicial reputation rested on his opinions, in which he was untiring in probing the short-term as well as the long-run impact of the Court's action. Yet Harlan's opinions have not been fully analyzed because of his close personal and professional association and philosophical agreement with Justice Frankfurter. Some legal scholars associate Harlan with Frankfurter and view the former as a mere continuation of the Frankfurter philosophy. In fact, Harlan has been characterized as "a Frankfurter without mustard." This is simply not true.[2] Harlan's opinions stand on their own merits and are an outstanding contribution to the evolution of American legal thought. In his sixteen years on the Court, he produced opinions which reflected an astute concern for the role of the judiciary as well as a clear awareness of the definitions and sources of governmental power.

As an Associate Justice, Harlan often admonished the Court for "reaching out" in order to decide a constitutional question which he opined should be resolved by the legislature. Harlan was concerned not only with the direction of the Court but the effect of that direction upon American federalism. The very essence of government—power—its definition and who will exercise it was examined in Harlan's opinions.

Harlan served during a period of the Court's history when a re-interpretation of criminal procedure emerged. Specific provisions in the Bill of Rights dealing with criminal procedure were deemed fundamental rights by a majority of the Court and made applicable to the states as well as to the national government. The original intention of these enumerated rights, in Harlan's view, was to restrain the actions of the national not the state governments. An earlier decision, *Palko v. Connecticut*,[3] served as Harlan's starting point. Justice Cardozo's opinion stated that one of the enumerated rights could be applied to the states only if the state procedure violated those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Throughout his tenure on the bench, Harlan adhered to this principle as a guiding force.

An analysis of Harlan's opinions in the area of due process of law imparts a clearer picture of the development of American political/legal theory from 1955-1971. Harlan's opinions raised concerns over three concepts of crucial importance to his definition of federalism and the constitutional power of the judiciary: 1) the future of federalism, that is, the importance of allowing the natural diversity within the states to perpetuate and the necessity for experimentation at the local level; 2) incorporation would have a tendency to "water down" the essential meaning of the provision found in the Bill of Rights and such "watering down" would not result in a uniform code of criminal justice; and 3) the role of the Supreme Court as the final arbiter of Constitutional questions. Thus, Harlan advanced a theory of judicial restraint in the area of criminal due process and supported the role of the states regarding the administration of justice. But he consistently viewed state action in terms of "fundamental fairness" or "reasonableness." The Court, in his view, may have supervisory powers over law enforcement practices in the federal courts but this judicial oversight did not always apply to state courts. The Supreme Court should advance with caution theories of procedural due process, lest the delicate balance between state and federal govern-

ments be tipped. But it is important to remember that Harlan was part of a minority during the activist Warren Court years.

Was Harlan's vision of a proper role for the judiciary in a federal system of government misguided in light of the expectations by the public in the 1960's? During this period, government at the national level was expected to play a positive role in equalizing economic and political positions of its citizens. Today, incorporation is an accepted constitutional doctrine. Upon viewing some of the decisions of the Warren Court, has our governmental structure suffered because blacks and women now sit on juries or because the police must give certain warnings to criminal defendants? Upon reflection, were Harlan's opinions merely musings about a role to be played by the Court that could never come to pass? In reality, isn't every Court, even the present Burger Court, an "activist Court?" Doesn't it become just a matter of defining one's terms and discovering whose ox is being gored?

It is the thesis of this article that as an articulate spokesman for judicial restraint, Harlan's opinions especially in the area of due process of law are an important legacy to all Americans. Even though he was part of a minority, his legal forebodings of the sixties anticipated the governmental power struggles and administrative frustrations of the seventies. During the middle and late seventies, the political scene witnessed a call for less federal involvement and more state control over the tax structure and policy administration. The glow of the sixties over expectations of what the federal government could accomplish faded with the economic and administrative realities of the seventies. And, in the area of criminal justice, incorporation has, in effect, watered down the meaning of some of the aspects of the Bill of Rights.[4]

In the development of American Constitutional law, knowledge of the concepts underlying the meaning of due process of law is crucial to an understanding of the evolution of American criminal justice. By examining the Court's reasoning in history-making decisions during this critical period and Harlan's reaction to it, the conflicting philosophies on the Court can be better understood and evaluated.

II

PROCEDURAL DUE PROCESS within the Constitution can be considered under several headings: unreasonable search and seizure, self-incrimination, double jeopardy, jury trial, right of counsel, and cruel and unusual punishment. It is important to note at the outset Harlan's consistent adherence to the concept of *stare decisis*. Although Harlan often disagreed with the majority regarding the initial incorporation of a particular amendment to the states, once the incorporation was a *fait accompli*, he supported the established procedure. And as a matter of course, he often chided the Court for not following its own dictates. In addition, his concurring opinions often reminded the Court of the wisdom of his previous dissent as well as the wording used in the majority opinion. This approach was especially true in relation to the incorporation decisions.

Unreasonable Search and Seizure

The most celebrated search and seizure decision was *Mapp v. Ohio*[5] which ruled that all evidence obtained by searches and seizures in violation of the Fourth Amendment was inadmissible in a criminal trial in a state court. A previous opinion, *Wolf v. Colorado*,[6] was overruled. The majority opinion, written by Justice Clark, stressed the need for a uniform approach to criminal justice in America. Harlan dissented and accused his judicial brethren of abusing judicial power by overruling *Wolf*. He further stated that *Mapp* was the wrong case by asserting:

> The preservation of a proper balance between state and federal responsibility in the administration of criminal justice

> demands patience on the part of those who might like to see things move faster among the states in this respect. Problems of criminal law enforcement vary widely from State to State...For us the question remains, as it has always been, one of state or another. In my view this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in 'coping' with their own peculiar problems in criminal law enforcement.[7]

Thus, Harlan registered in *Mapp* a theme which would remain constant in subsequent opinions: the states must be allowed to develop and implement their own system of criminal justice. The Court could alter that system only when a constitutional principle was violated. But the Court must also remember its own place through adherence to the limits placed on it by the Constitution. Harlan further underscored that belief in *Mapp* by stating: "In the present case, I think we exceed both, and that our voice becomes only a voice of power, not reason."[8] Harlan concluded that doctrinal symmetry was not a necessity.

In subsequent concurring opinions, Harlan spelled out his concerns and reminded the Court what its opinion held. Thus in *Katz*, which established the necessity of issuing a warrant in advance of electronic surveillance,[9] Harlan supported the Court's interpretation of when electronic surveillance could be allowed but then pointed out that all the questions raised by the Court's ruling were not yet answered; and in *Desist*[10] which further defined *Katz* he reminded the Court that it had left a way out for future cases when the circumstances might justify such action by law enforcement officials. And, finally in *Coolidge v. New Hampshire*,[11] Harlan underscored his concern for the quality of precedent created by the Court by asserting:

> First, the states have been put in a federal mold with respect to this aspect of criminal law enforcement, thus depriving the country of the opportunity to observe the effects of different procedures in similar settings... Second, in order to have some room for the states to cope with their own diverse problems, there has been generated a tendency to relax federal requirements under the Fourth Amendment, which now governs state procedures as well.[12]

Self-Incrimination

Incorporation of the Fifth Amendment's protection against self-incrimination came with *Malloy v. Hogan*[13] in 1964. Malloy had been found guilty of contempt for refusal to answer questions in a state inquiry. The U.S. Supreme Court ruled that the State procedure had violated the constitutional guarantee against self-incrimination. Harlan's powerful dissent called for a reasoned approach to the concept of due process and its administration within a federal system:

> I accept and agree with the proposition that continuing re-examination of the constitutional conception of Fourteenth Amendment 'due process' of law is required, and that development of the community's sense of justice may in time lead to expansion of the protection which due process affords... I do not understand, however, how this process of re-examination, which must refer always to the guiding standard of due process of law, including, of course, reference to the particular guarantees of the Bill of Rights, can be short-circuited by the simple device of incorporating into due process, without critical examination, the whole body of law which surrounds a specific prohibition directed against Federal Government... *The ultimate result is compelled uniformity, which is inconsistent with the purpose of our federal system and which is achieved either by encroachment on the states' sovereign powers or by dilution in federal law enforcement of the specific protections found in the Bill of Rights.*[14]

Harlan pointed out that the Court was

"simply wrong" in its use of precedent to justify its broad sweeping action.[15] He also asserted that the majority's reliance upon *Mapp* to support incorporation of the self-incrimination clause to the states was ill-advised. Nothing in the previous opinions intimated that the Fourth and Fifth Amendments went along together. Harlan criticized the Court's approach to the concept of due process evident in the *Malloy* decision:

> The Court's undiscriminating approach to the Due Process Clause carries serious implications for the sound working of our federal system in the field of criminal law... The powers and responsibilities of the state and federal governments are not congruent; under our Constitution, they are not intended to be. Why should it be thought, as on *a priori* matter, that limitations on the investigative power of the states are in all respects identical with limitations on the investigative power of the Federal Government?[16]

Two controversial decisions in the area of self-incrimination handed down during the Warren Court era were *Escobedo v. Illinois*,[17] and *Miranda v. Arizona*,[18] the first which held that an accused must be given certain warnings about the constitutional right of self-incrimination before the police began its interrogation and the second held that specific warnings must be given to the accused as well as having counsel present with him. Harlan registered a strong dissent in both rulings.

Harlan's dissent in *Miranda* cried out against the quality of constitutional law and potential harmful effects for criminal law enforcement inherent in the majority opinion. The Court was accused of being too "utopian" in its quest for circumstances which would guarantee a voluntary confession.[19] He stated that due process clauses were sufficient to cope with the problems inherent in self-incrimination cases:

> The Court's opinion in my view reveals no adequate basis for extending the Fifth Amendment's privilege against self-incrimination to the police station. Far more important, it fails to show that the Court's new rules are well supported, let alone compelled, by Fifth Amendment precedents. Instead, the new rules actually derive from quotation and analogy drawn from precedents under the Sixth Amendment, which should properly have no bearing on police interrogation.[20]

The precedents cited by the majority dealt with counsel at trial or appeal, not police interrogations. According to Harlan, a strong difference existed between the two situations and as a result, the cases cited were nonanalogous.

Harlan then dealt with the policy implications of the majority's ruling and concluded that the Court had exceeded its constitutional authority by venturing outside its jurisdictional boundaries to the detriment of American federalism. *Malloy*, *Escobedo*, and *Miranda* represented to Harlan a dangerous path on which the Court had chosen to travel. Such a path was filled with potholes which could jar the very foundations of American federalism. For Harlan, differences between state and federal procedures were not always resolved by applying a portion of the Bill of Rights to the states. Incorporation denied existing differences between the national and state governments and such differences served as the foundation of our system. To Harlan, the majority's approach was illogical. To the majority, Harlan's objections were out of step with the contemporary definitions of individual rights.

Double Jeopardy

The most important decision during the Warren Court era involving double jeopardy was handed down in 1969 in *Benton v. Maryland*,[21] which incorporated the double jeopardy provision to the states. Harlan's dissent accused the Court of "reaching out" in order to decide the case and cited previous decisions which resulted

in the march toward incorporation.[22] Once again, Harlan protested against "a Doctrine which so subtly, yet profoundly, is eroding many of the basics of our federal system."[23]

Harlan then presented the facts of *Benton* in light of due process standards inherent in *Palko v. Connecticut*, which *Benton* overruled. Benton had been indicted and tried simultaneously for burglary and larceny. He was acquitted of larceny but convicted of burglary. Benton appealed and the case was remanded because of a Maryland court's decision ruling that a provision of the Maryland Constitution required grand and petit jury members express a belief in God. Benton charged that the indictment was wrong and demanded a retrial. He was again tried and convicted of both offenses. Under the *Palko* doctrine, Harlan asserted that the retrial of the larceny charge could be thrown out. Benton had been acquitted of that charge; therefore, the State had no legitimate interest in retrying him. It did not take incorporation of double jeopardy via the due process clause to meet basic due process goals.[24]

Confrontation of Witnesses

The Sixth Amendment contains provisions essential to the concept of a fair trial. One of these, confrontations of witnesses by the accused, was declared a fundamental right in *Pointer v. Texas*.[25] Harlan concurred in the result but, as to be expected, registered complaints against the march toward incorporation:

> It is too often forgotten in these times that the American federal system is itself Constitutionally ordained, that it embodies values profoundly making for lasting liberties in this country, and that its legitimate requirements demand continuing solid recognition of the work of this Court. The 'incorporation' doctrines, whether full blown or selective, are both historically and constitutionally unsound and incompatible with the maintenance of our federal system on even course.[26]

Incorporation subjected state procedures to federal authority, just the opposite of the *Palko* philosophy.

Right to Counsel

Another aspect of the Sixth Amendment, the Right to Counsel, became a fundamental right during the Warren Court era. In *Gideon v. Wainwright*,[27] the Court overruled a previous precedent[28] and incorporated the right of counsel for an indigent defendant in noncapitol cases. Harlan concurred but tempered his enthusiasm by stating:

> When we hold a right or immunity, valid against the Federal Government, to be 'implicit in the concept of ordered liberty' and this valid against the states, I do not read our past decisions to suggest that by so holding, we automatically carry over an entire body of federal law and apply it in full sweep to the states. Any such concept would disregard the frequently wide disparity between the legitimate interests of the States and of the Federal Government, the divergent problems that they face, and the significantly different consequences of their actions.[29]

Right to Fair Trial

Still another crucial aspect inherent in the Sixth Amendment is the right to a fair trial. In *Duncan v. Louisiana*,[30] the Court ruled that a jury trial was guaranteed in state trials by the due process clause of the Fourteenth Amendment. Harlan dissented and stressed the lack of need for a uniform criminal code but emphasized the importance of the concept of "fundamental fairness."

Harlan took the Court to task regarding its treatment of the incorporation doctrine:

> Even if I could agree that the question before us is whether Sixth Amendment jury trial is totally 'in' or totally 'out,' I

can find in the Court's opinion no real reason for concluding that it should be 'in.' The basis for differentiation among clauses in the Bill of Rights cannot be that only some clauses in the Bill of Rights, or that only some are old and much praised, or that only some have played an important role in the development of federal law. These things are true of all. The Court says that some clauses are more 'fundamental' than others, but it turns out to be using this word in a sense that would have astonished Mr. Justice Cardozo and which, in addition, is of no help.[31]

Harlan may have seemed confused with what the Court meant by 'fundamental,' but the actual source of its meaning was clear to him; namely, that the concept of 'ordered liberty' was fundamental to a civilized society.

In response to Harlan's dissent, Black wrote a concurring opinion which pointed out flaws in Harlan's approach. Black asserted:

> Finally, I want to add that I am not bothered by the argument that applying the Bill of Rights to the states, 'according to the same standards that protect those personal rights against federal encroachment,' interferes with our concept of federalism in that it may prevent states from trying novel social and economic experiments. I have never believed that under the guise of federalism the states should be able to experiment with the protections afforded our citizens through the Bill of Rights.[32]

Harlan's dissent and Black's concurring opinion revealed the strength of conviction behind the divergent philosophies on the Warren Court. These two views expressed differing opinions regarding the power of judges and the definition of federalism when individual liberties were determined. Harlan believed in a limited role for the judiciary but an expansive role for the states. Black stated that the judiciary had an obligation to adhere to constitutional guidelines when the States veered from protecting individual liberties.

But, was Black (and seemingly the rest of the majority) right when he stated that subscription to *Palko* led to greater exercise of power by the judiciary? After all, under *Palko* the Court could define the 'concept of ordered liberty' on an incremental basis. Whereas, incorporation seemingly determined the definition of fundamental due process. In effect, was Black more of an advocate of judicial restraint than Harlan when Black spoke of federalism not being used to sanction unauthorized power to the states regarding the definition of individual freedoms? It would be the supreme irony if Black's statements were remembered as supporting judicial restraint and Harlan's admonitions to the Court were categorized as examples of judicial activism!

Inherent in Harlan's dissent was a concern about the effect incorporation would have upon the meaning of the Bill of Rights. Even by incorporating the Sixth Amendment provision to the states, all questions regarding its implementation were not answered. Harlan stated that the Court had not defined the "exact scope and content of the right."[33] Was a twelve-member jury and a unanimous decision also part of a fundamental right? In a subsequent decision, *Williams v. Florida*,[34] the Court held that a six-member jury satisfied the Sixth Amendment's standards regarding a jury trial. Harlan concurred with the *Williams* ruling but asserted:

> There is no need to travel again over terrain trod in earlier opinions in which I have endeavored to lay bare the historical and logical infirmities of this 'incorporationist' approach, On that score I am content to rest on what I said in dissent in *Duncan*, 391 U.S., at 171... The Fourteenth Amendment tempered this basic philosophy but did not unstitch the basic federalist pattern woven into our constitutional fabric. The structure of our Government still embodies a philosophy that presupposes

> the diversity that engendered the federalist system.[35]

Lest his fellow jurists forget previous warnings, Harlan strongly reminded the Court that:

> Flexibility for experimentation in the administration of justice should be returned to the States here and in other areas that now have been swept into the rigid mold of 'incorporation.' ...It is time, I submit, for this Court to face up to the reality implicit in today's holding and reconsider the 'incorporation' doctrine before its leveling tendencies further retard development in the field of criminal procedure by stifling flexibility in the States and by discarding the possibility of federal leadership by example.[36]

Harlan's plea for a new look at the results of incorporation has largely been ignored by his judicial brethren.[37]

Conclusion

John Marshall Harlan came to the United States Supreme Court in 1955 with impressive legal credentials. His formal legal education plus his prior legal experience made him extremely qualified for the highest court in the land. Legal scholars and court watchers alike expected solid contributions from him and they were not disappointed. Harlan's opinions during the sixteen years he served as an Associate Justice were models of sound, judicial reasoning. This is especially true in the area of due process of law. His opinions reflected well reasoned, thoroughly researched and logically developed legal analysis. During an era of constitutional emotionalism regarding the definition and expansion of fundamental rights, Harlan's opinions called for remedying previous wrongs through adherence to basic constitutional principles of federalism and through a limited role for the judiciary.

In adhering to doctrines of judicial restraint and constitutional federalism, Harlan advocated preserving the principles put forth by the founding fathers. His opinions dealing with the concept of incorporation questioned the scope and content of the constitutional provision applied to the states. He was concerned about the impact of incorporation upon the meaning of provisions found in the Bill of Rights. There would be a national standard, *i.e.*, the Bill of Rights, which applied to the national administration of justice. State procedural standards should be determined by concepts inherent in a definition of due process of law.

But Harlan's opinions reflected a minority viewpoint. The majority of the Court insisted upon establishing a uniform system of criminal justice. The Bill of Rights contained fundamental provisions which should be binding on both levels of government within our federal system. Which approach espoused by members of the Court was correct? Women now serve on juries and accused criminals must receive constitutional protections. These events have hardly brought down the pillars of government. Yet, some of the interpretations of decisions handed down by the Burger Court have redefined the role of jury and other constitutional provisions incorporated to the states.

Harlan and his judicial brethren participated in decisions which changed the course of American constitutional law. Each time a provision of the Bill of Rights was incorporated to the states, new questions were raised as well as old ones answered. Harlan's admonitions attempted to temper the fast pace of the Court's action by pointing out the need for sound, judicial reasoning. Although the Court did not heed Harlan's advice, his warnings of the sixties contain added meaning for the seventies and eighties. Today, when constitutional and political principles are being scrutinized by the American public, government officials and journalistic pundits alike, the opinions of John Marshall Harlan offer solace. Harlan's legacy to the evolution of American legal thought and the preservation of the federal system needs to be revealed and shared, not neglected.

[1]For a summary of selected Harlan decisions, see David L. Shapiro, ed. *The Evolution of a Judicial Philosophy: Selected Opinions and Papers of Justice John M. Harlan*. Cambridge: Harvard University Press, 1969; G. Edward White, in a chapter in his book, *The American Judicial Tradition*, New York: Oxford University Press, 1977 examined "The Mosaic of the Warren Court: Frankfurter, Black, Warren, and Harlan." The analysis, while concise, discussed only a few of Harlan's opinions. Harlan was the subject of a *Harvard Law Series* (J. Edward Lumbard, "John Harlan: In Public Service, 1925-1971," 85 *Harvard Law Review*, November, 1971, 372-375; Earl Warren, "Mr. Justice Harlan as seen by a Colleague," 85 *Harvard Law Review*, November, 1971, 369-371; and John E. F. Wood, "John M. Harlan as seen by a Colleague in the Practice of Law," 85 *Harvard Law Review*, November, 1971, 377-381.) These essays represented a variety of interpretations but did not focus on Harlan's style or thought processes. Harlan's overall contributions have been discussed in several law review articles. J. Harvie Wilkinson III, "Justice John M. Harlan and the Values of Federalism, 57 *Virginia Law Review*, October, 1971, 1185-1221; Charles Alan Wright, "Order and Predictability in the Law: A Tribute to John M. Harlan," 20 *Journal of Public Law*, 1071, 363-370; Norman Dorsen, "The Second Mr. Justice Harlan: A Constitutional Conservative," 46 *New York University Law Review* (April, 1969) 249-271; see also, Dorsen's chapter on Harlan in Friedman and Israel, eds., *The Justices of the United States*, New York, 1969. Harlan was also compared to another member of the Court, Dorsen, "Mr. Justice Black and Mr. Justice Harlan," 46 *New York University Law Review*, October, 1971, 649-652; Harlan's life was discussed in general terms in Nathan Lewin, "Justice Harlan: The Full Measure of the Man," 57 *ABA Journal*, June, 1972, 579-583. [2]Daniel Berman "The Case of Mr. Justice Frankfurter." 2 *New Jersey Bar Journal* (1958) reprinted in Joel P. Grossman and Richard S. Wells, *Constitutional Law and Judicial Policy Making* (J. Wiley, 1972), 151-153. Other famous historical kinships include Holmes-Brandeis, Marshall-Story. For a discussion of these influential judicial twosomes, see G. Edward White, *The American Judicial Tradition: Profiles of Leading Judges* (Oxford University Press, 1976), 7-63. [3]302 U.S. 319 (1937). [4]The diluting impact of incorporation on the meaning of double jeopardy can be seen in *Illinois v. Sommerville*, 410 U.S. 458 (1973); see also, Peter Westen and Richard Drubel, "Toward a General Theory of Double Jeopardy," *The Supreme Court Review*, The University of Chicago Press: Chicago, 1978. For further illustrations of the weakening of the right to jury trial, see *Williams v. Florida*, 399 U.S. 78 (1970) where a six-person jury was allowed in a noncapital case in deference to a Florida procedure. White's majority opinion held that "the twelve-man panel is not a necessary ingredient of 'trial by jury.'" In addition see, *Apodaca v. Oregon*, 406 U.S. 404 (1972) where the Court ruled that a unanimous jury was not a constitutional requirement in noncapitol cases. [5]367 U.S. 643 (1961). [6]338 U.S. 25 (1949). [7]*Mapp v. Ohio, Supra*, p. 680-681. In an early dissenting opinion, *Rea v. U.S.*, 350 U.S. 214 (1956), Harlan issues the parameters of permissible judicial action. [8]*Ibid.*, p. 686. [9]*Katz v. U.S.*, 389 U.S. 347 (1967). [10]*Desist v. U.S.*, 394 U.S. 244 (1969). [11]403 U.S. 443 (1971). [12]*Ibid.*, p. 490, 491. [13]378 U.S. 1 (1964). [14]*Ibid.*, p.15-17. Emphasis added. [15]*Ibid.*, p. 18. [16]*Ibid.*, p. 27. [17]378 U.S. 478 (1964). [18]384 U.S. 437 (1966). [19]*Ibid.*, p. 505. [20]*Ibid.*, p. 510. [21]395 U.S. 784 (1969). [22]*Ibid.*, p. 808. [23]*Ibid.*, p. 809. [24]*Ibid.*, p. 812-13. [25]380 U.S. 400 (1965). [26]*Ibid.*, p. 409. [27]372 U.S. 349 (1962). [28]*Betts v. Brady*, 316 U.S. 455 (1942). [29]*Gideon v. Wainwright, supra*, p. 352. [30]391 U.S. 145 (1968). [31]*Ibid.*, p. 183. [32]*Ibid.* [33]*Ibid.* [34]399 U.S. 78 (1970). [35]*Ibid.*, p. 133. [36]*Ibid.* [37]See *Apodaca v. Oregon*, 406 U.S. 404 (1972) which allowed a nonunanimous jury verdict in noncapitol cases.

William Alexander Percy, Walker Percy, and the Apocalypse

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IN 1924 WILLIAM Alexander Percy published his third volume of poetry, *Enzio's Kingdom and Other Poems*. The time for its writing had been snatched from a life that was otherwise given over to public demands. For Percy and his father, former Senator LeRoy Percy, were among those who had been occupied during the past several years in a furious battle to keep the Ku Klux Klan from establishing its control over Mississippi.[1]

Will Percy describes in his autobiography, *Lanterns on the Levee* (1941),[2] the onset of the Klan threat and the decision made by Greenville community leaders that LeRoy Percy should lead the defense, just as LeRoy's father had spoken for the town during Reconstruction times (*LL*, 274). Their community had not welcomed the original, postwar Klan, even though it had the Confederate cavalry tradition for cachet, and the new Klan was not about to be accepted. The Greenvilleans and others around the state were astonishingly successful in denying public acceptability to the Klan during those confused years, so that while the *New York Times* frequently detailed Klan activities in the South, and in the North (even on Long Island!), it remained silent about Mississippi.

Which is not to say that the Klan was totally frustrated in its Mississippi campaign. At first the citizens did rally to LeRoy Percy, who became a national anti-Klan leader. He spoke at rallies, some as far away as Chicago, and warned a national audience about "The Modern Ku Klux Klan" in the July, 1922, *Atlantic Monthly*. His opponents were learning, though, to use the money that they were accumulating through initiation and regalia fees and to use the advantages of secrecy and hierarchical organization. LeRoy Percy was forced to warn, in a letter to the *New York Times*, on June 18, 1924, that the Mississippi delegation to the upcoming national Democratic convention had been chosen by a Klan-dominated state convention. Some of the delegates might not be Klan members, he acknowledged, but because of the unit rule the Klan would control the delegation.

The enemy may have been thrown off the walls and driven through the skirts of Greenville, but the local victory was, to a man of Will Percy's temperament, destined to be lost in the general defeat. LeRoy himself might take comfort in a skirmish won—but Will was one to think always of the entire campaign. The son could eat his greens only if they had vinegar on them; commenting upon his father's success in winning a Senate seat, Will observes, "Nothing is so sad as defeat, except victory" (*LL*, 145). Everything is sad, therefore, because nothing is absolute.

Even during the grand moments of '22 and '23, then, when LeRoy was speaking, in Greenville, then elsewhere, Will would have seen his father not as one man among a group of equal size and density, striving toward some attainable goal, but as one fully realized man against a background of smaller, insubstantial figures, who were merely a part of "the sorrowful pageant of the race" (*LL*, 234).[3] During those most rhetorical days, LeRoy became linked in Will's mind with Frederick II of Sicily (1194-1250), the Sun King, the "Stupor