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Case Study of a Justice: "Courageous" Plessy Dissenter John Marshall Harlan and his African-American "half brother," Robert James Harlan of Ohio

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Arthur Landever, (Copyright 2003). Talk on February 12, 2003 to the Cleveland-Marshall Law College Community (My thanks to Marie Rehmar, Schuyler Cook, and Denise Carpenter who helped me with this project).

Justice Harlan had been a slave-owner; he had opposed the Emancipation Proclamation; he had initially opposed the passage of the 13th Amendment and apparently the 14th.; As an Associate Justice, he remained a racist, taking pride in being a member of the white race. Nonetheless, he was the most committed civil rights justice until the period of the 1940s or 1950s. What explains his votes and opinions? Can we know? Does it matter whether we know or not?

I. The Cast of Characters

1. ("General" and Justice) John Marshall Harlan I (1833-1911)

Born in the slave state of Kentucky. Parents were James and Eliza Shannon Davenport Harlan. Graduated from Centre College, Danville, and studied law at Transylvania University, Lexington Kentucky. Lawyer. Married, in 1856, to Malvina Shanklin of the free state of Indiana. Malvina, in her Memoirs (p.25-26) recounts an episode in which her husband, "in his efforts to save the life of a young Negro girl [slave], the maid of one of his sisters, and the last of the children of the favourite 'Black Mammy' who had cared for him when he was an infant—met with an accident that nearly cost him his own life...[The young slave's clothes had caught fire]...My husband, catching her with one hand...held her fast and with the other hand, tore her clothes off as best he could. His father and mother both joined him in his efforts and were badly burned, though not so severely as he was.....[Her husband's] left hand...was seared to the bone and the right arm from the finger tips to the elbow was almost unrecognizable as belonging to a human body. " John's view of slavery on his farm seemed to reflect a combination of "racial hierarchy and devotion." (Id at 42).

As to Harlan's politics, he at one time or another, in a fifteen year period, kept switching party affiliation. With the Whig Party's demise, he joined the Know Nothing (anti-Catholic and anti-immigrant) Party. In

1864, he supported the Democratic candidate for President, General McClellan. He won the post of state attorney general on the Conservative Union Party ticket. Then he supported the new Union Democratic Party. Yarbrough, 62-63. Next, he switched to the Republican Party, running unsuccessfully, as candidate for Governor of Kentucky, in 1871 and 1875. Suspicions abounded as to what his real views were. "Kentuckian Speed S. Fry, once a political ally but now an enemy, wrote in a letter that was forwarded to the chair of the Senate Judiciary Committee (considering his nomination to the Court) that Harlan had been 'very bitter' about the Emancipation Proclamation and had declared in 1866 that 'he had no more conscientious scruples in buying and selling a Negro than he had in buying and selling a horse.'" (Przybyszeweski at 41). While running for governor on the Republican ticket he conceded that his views had not always been pro-freedman. "Let it be said that I am right rather than consistent.' 'It is true that I was at once time in my life opposed to conferring these privileges [of citizenship] upon 'blacks',' but I have lived long enough to feel and declare...that the most perfect despotism that ever existed on this earth was the institution of African slavery.'" (Ibid).

At the onset of the Civil War, he joined the Union army, serving as a Colonel, 10the Kentucky Infantry,1861-1863. (Although nominated to be Brigadier General, he declined the promotion, leaving the army in order to take over his father's farm after James Harlan's death). Thus John Marshall Harlan became owner of the dozen slaves on his father's land. He opposed the Emancipation Proclamation (although it did not affect him directly, since it only applied to states in rebellion, and therefore not Kentucky). Przybyszewski (37) Apparently he did not release his own slaves until passage of the 13th Amendment in 1865. He initially opposed the 13th Amendment as being a "flagrant violation of the right of self-government." (Id. at 41). As to the 14th Amendment, the Democratic Union Party, of which he was a member, condemned the underlying legislation which eventually would become the 14th Amendment, as "unwise and oppressive."(Yarbrough, 63). Indeed, as attorney general, he brought an indictment against a general of the Union army for violating the slave code of Kentucky (Id at 38). After his nomination to the Court, Harlan explained to suspicious Senators that in his campaign for governor on the Republican ticket, in 1871 and 1875, he had endorsed those amendments. (Przybyszewski, at 41).

"Although several factors pushed Harlan in the direction of the Republican Party, the most important was his revulsion to the racial violence orchestrated by the Democrats. People joked at the time that Kentucky had waited to secede until after the war was over. Throughout the late 1860s and early 1870s, bands of marauding whites...ran rampant over the Kentucky countryside, attacking whites and blacks alike...Despairing of getting help from either local or national authorities, about 30,000 blacks left the state from 1860 to 1870, a number far out of proportion to the border-state migrations. Could the boy who remembered his father's disgust at t he brutality of a white slave driver become a man willing to embrace the political company of men who murdered blacks in the dead of night?"(Id at 39).

Nominated by President Hayes to be an associate justice of the U.S. Supreme Court, he was confirmed by the U.S. Senate in 1877, but not without some concerns that he might be luck-warm in his commitments to the 13th, 14th, and 15th Amendments. **He served from 1877-1911.** For several years, he taught Constitutional Law at Columbian University (later George Washington University). He became a member of the Anti-Imperialist League. He stayed in contact with two African-Americans while sitting on the Court. As will be noted below, one was Robert James Harlan, a light-skinned African-American treated as a family member, who was raised on the Harlan farm, The Justice and Robert "remained friends and political allies throughout their lives" (Przybyszewski, 23). The other was Frederick Douglass, the noted orator and civil rights advocate.

As a justice, he was a formalist who believed that there were "set rules for the interpretation of the laws and that the Constitution enshrined certain individual rights that no government might violate." Przybyszewski (168). To him, the white race, the dominant one in America, had a Christian duty both of paternalism and of striving toward equal rights for all in America. His concern about the treatment of

African Americans was clear in his Court opinions and in his speeches. According to Harlan, "...the white man who has got self respect...is not much disturbed by the fact that the black man is bettering himself ...[I]f there is a black man who can get ahead of me, I will help him along, and rejoice. Pryzybyszewski, (69) "[Frederick Douglass] would have made a great Senator." Yarbrough, 80. At a dinner, a guest mocked John for dining with Frederick Douglass, to which John replied: "I not only do not apologize for what I did, but frankly say that I would rather eat dinner any day by the side of Douglas[sic] than to eat with the fellow across the way who sought to entrap me by a question which has nothing to do with the contest [about Grant's re-nomination for President]. Yarbrough, 90. (Note that the justice's grandson, John Marshall Harlan II, later served on the U.S. Supreme Court).

2. Malvina Harlan (1838-1916). His Wife

She was born and raised in the free state of Indiana. Not without some misgivings, her parents allowed her to marry John Marshall Harlan, whose parents held slaves and were from the slave state of Kentucky. She was married in 1856, and the marriage lasted for fifty five years. Malvina believed that slaves had an innate gift for music and were less sensitive to heat. Przybyszewski (22). She thought, as apparently did her father-in law, that slaves with "unusual ability" should have the opportunity to become free, the slave owner paying them some wages so that they might buy their freedom. (Ibid 23). She is said to have given her husband the inkwell owned by Chief Justice Roger Taney so that John might be inspired to pen his dissent in the Civil Rights cases. She was a good friend of Lucy Hayes, wife of President Hayes, the President who nominated Harlan to sit on the Supreme Court.. Malvina wrote her memoirs following John's death. Justice Ruth Bader Ginsburg persuaded a book publisher to have the memoirs published in 2001.

3. (Colonel) Robert James Harlan (1816-1897). His "Half-Brother"

A quite light-skinned African-American slave, described as 7/8ths white, he was born in 1816 in Mecklenburg county, Virginia. He was then brought to Kentucky and reared by James Harlan, a "benevolent" slave owner, on the latter's farm. Robert was taught to read and write by James' sons. Although a slave, he was treated as a member of James Harlan's family. He first became a barber and a grocer. Then, In 1858, he was permitted to go to California and proceeded to make a fortune in the California Gold Rush. He then left Kentucky for Ohio, investing his fortune in real estate in Cincinnati. In 1852, he married the daughter of the Governor of Virginia, John B. Floyd, who would later serve as a general in the Confederate Army. The governor's daughter, his wife Josephine, presumably was also an African-American. Robert built the first school in Cincinnati for African-American children; he was a delegate at large to the Republican National Convention that nominated General Grant for president; he raised a battalion of 400 African-Americans and was commissioned as a Colonel by President Hayes; elected to the Ohio legislature in 1886, he worked to obtain the repeal of the "black laws," especially that law prohibiting sexual race mixing. Until 2001, it was rumored that Robert was John's half-brother. DNA, in 2001, appeared to reject that hypothesis. Although Robert was about seventeen years older than John and may have had little relationship with John while John was growing up, a relationship developed later. Indeed, "Robert and John remained friends and political allies throughout their lives."(Przybyszewski 23). For example, "Robert interceded on behalf of a Harlan who had assaulted a black civil servant on 5 November 1871 and discussed Rutherford B. Hayes' disappointing race policy with John on 1 June 1877....)"(Przbyszewski 216)

4. James Harlan (1800-1863). Justice Harlan's Father

Father of John Marshall Harlan I. Lawyer, Congressman from Kentucky's 5th District. Secretary of State, State Attorney General. Close associate of Henry Clay, head of the Whig Party. (Note that Clay favored

gradual emancipation of slaves). Enamored of both Chief Justice John Marshall and Henry Clay, he named one son, Henry Clay Harlan and another, John Marshall Harlan. While considered a "benevolent slave owner, he neither freed his slaves (except for Robert Harlan and one other of about a dozen) nor prevented them from being traded away. He clearly rejected any notion that he was an abolitionist. One account of his kind of "benevolence" is the story that John's wife Malvina tells of her father-in law coming upon a "a group of chained slaves and a 'brutish' white slave driver whose 'badge of office was a long snake-like whip made of black leather, every blow from which drew blood.'...[A]ngrily shaking his long forefinger in the face of the 'slave driver,' James said '*You are a damned scoundrel. Good morning , sir.*'" (Przybyszewski, 25). Young John was with his father when the episode took place. Robert Harlan, the African-American slave who was treated as a member of the family, was taught to learn how to read by James' other sons and was allowed to come and go as he wished. Indeed, he went off to the California gold rush and made a fortune in gold.. Malvina tells the story of James' being badly burned in helping to put out the fire on the clothing of one of his slaves. Two of James' sons taught African-American Robert Harlan to read. While DNA rejected the hypothesis that Robert, in fact, was his son, perhaps neither James nor his son John, was sure who had fathered Robert.

5. Albion Tourgee (1838-1905) Plessy's Lawyer in Plessy v. Ferguson

Lawyer, author (A FOOL'S ERRAND). He saw service in the Union army. Political judge in North Carolina. Carpetbagger from New York.. Advocate for more vigorous enforcement of federal laws to protect blacks. He represented Homer Plessy before the lower courts and the U.S. Supreme Court in Plessy v. Ferguson. He described Plessy, as Robert James had been described, as 7/8ths white. Presumably Tourgee had heard of the rumor that Robert was the Justice's half-brother. Did Tourgee choose Creole Plessy as plaintiff in this test case a) to gain one justice's favor? b) because the justices would understand a challenge based upon a property right in being declared white? c) because were the justices to support the Plessy position, they might find themselves in the awkward and difficult position of being required to make a case by case examination of whether a particular person was white or black ? or d) a combination ?

6. Homer Adolph Plessy (1862-1925) Plaintiff in Plessy v. Ferguson

Born a free man in New Orleans, he and his family "passed" as white or at least as not being African-American. Creole, he had a great grandmother who was African-American. When the Louisiana segregation law was passed in 1890, a Citizens' Committee of New Orleans African Americans and Creoles planned a strategy to challenge it. In 1892, They hired white civil rights attorney Albion Tourgee to handle the case. Plessy was asked to be the violator and he agreed. He entered a "white" car, was arrested, booked and then released on bond. He came before Judge Ferguson, who ruled that the state had the constitutional authority to pass such legislation. Four years later the case was before the U.S. Supreme Court. After the Court rejected his position, he "passed into anonymity, becoming a collector of insurance premiums."

7. Abraham Lincoln, (1809-1865) 16th President. On the importance to the Union of the border (and slave) state of Kentucky: "[Lincoln]is supposed to have said that he would like to have God on his side but he *must* have Kentucky."(Przybyszewski, 34).The Emancipation Proclamation, freeing only slaves in states in rebellion, was not applicable to the border state of Kentucky, which had not left the Union. Harlan opposed it, nonetheless.

8. Thurgood Marshall, (1908-1993) the civil rights advocate in key cases decided by the U.S. Supreme Court, especially in Brown v. Board of Education. He was appointed to the Court in 1967. According to close associate and later federal judge, Constance Baker Motley: "...Marshall's favorite

quotation was, 'Our Constitution is color blind '...Marshall admired the courage of Harlan more than any Justice who has sat on the Supreme Court. Even Chief Justice Earl Warren's forthright and moving decision for the Court in *Brown* did not affect Marshall in the same way. Earl Warren was writing for a unanimous Supreme Court. Harlan was a solitary and lonely figure writing for posterity."(Yarbrough,229).

9. **Frederick Douglass,** (1817-1895)19th Century former slave and civil rights advocate who associated with Harlan. He also considered Harlan courageous. Justice Harlan, for his part, said that Douglass would have made a great Senator.

II. Why Thurgood Marshall would admire many of Justice Harlan's Positions in Civil Rights Cases.

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

A Louisiana state law required railroads engaged in intrastate (local) operation within the state to provide "separate but equal" train car facilities for blacks and whites, with some exceptions. Criminal penalties for violation were to be imposed, not only upon the railroad corporation but also upon members of the races refusing to sit in the rail car designated for them. In a test case, Homer Plessy, an African-American --claimed by his lawyer to be seven-eighths white, "the mixture of colored blood ...not discernible in him"--entered a car designated for whites, and refused to leave it. Thereupon he was arrested and brought before a judge. Plessy, through his counsel, Albion Tourgee, demurred to the charge, based upon constitutional grounds. The judge overruled Plessy's demurrer. Thereupon counsel sought a writ of prohibition to stop the judge from finding his client guilty, based upon the facts. He sought a review, on the constitutional question, in the state appellate court, and ultimately in the U.S. Supreme Court.

The U.S. Supreme Court affirmed the state reviewing court, upholding the law as within the state's broad police power to regulate social relations. To the majority, the law obviously was not a badge of servitude in violation of the 13th Amendment, nor did the law violate the 14th Amendment. The latter was intended to enforce "the absolute equality of the two races before the law," but it "could not have been intended to abolish distinctions based upon color, or to enforce social...equality" or "commingling of the two races upon terms unsatisfactory to either." "The law does not stamp[] the colored race with a badge of inferiority." "[T]he colored race chooses to put that construction upon it."

Justice Harlan, in dissent, declared that the "railroad is a public highway," the railroad corporation exercising "public functions." The 13th Amendment proscribes not only slavery but "any burdens or disabilities that constitute badges of slavery or servitude." The 14th Amendment "add[s] greatly" to that protection. The law, "under the guise of giving equal accommodation for whites and blacks, [was intended] to compel the latter to keep to themselves while traveling in railroad passenger coaches....The white race...I doubt not...will continue to be [the dominant race]...if it holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. **Our Constitution is color-blind** (emphasis added), and neither knows nor tolerates classes among citizens...[T]he judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case"[which held, in part, that the framers never intended for African-Americans, free or not, to be citizens].

[Note: Plessy is no longer good law. See Brown v. Board of Education, 347 U.S. 483 (1954)].

2. Civil Rights Cases, 109 U.S. 3 (1883)

The Civil Rights Act of 1875 prohibited race discrimination by private individuals in places of public accommodation , providing both criminal and civil penalties. The U.S. Supreme Court, on appeal, had before it several cases under the Act. Criminal actions had been brought in the federal courts of California, Missouri, New York, and Kansas. A civil action had been instituted in a Tennessee federal court,. The cases concerned discrimination as to denial of hotel accommodations, refusal to permit entry into a theater, and refusal to permit entry, passed upon race, into a rail car designated for persons of a different race.. Justice Bradley, for the Court, focused primarily upon the 14th Amendment's first section as well as precedent to construe it as limited to Congressional legislation corrective of discriminatory state action, not as blanket authority for the Congress to outlaw private discrimination directly. If Congress were to have such latter authority, "it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty and property? As to the 13th amendment, it 'would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business." "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the process of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man are to be protected in the ordinary modes by which other men's rights are protected..."

Justice Harlan, in dissent: "The substance and spirit of the recent amendments...have been sacrificed by a subtle and ingenious verbal criticism...[T]he court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted....[As to the 13th Amendment]That there are burdens and disabilities which constitute badges of slavery and servitude, and that the power to enforce by appropriate legislation [the amendment] may be exerted by legislation of a direct and primary character, for the eradication, not simply of the institution but of its badges and incidents, are propositions which ought to be deemed indisputable...[As to the 14th Amendment] The assumption that this amendment consists wholly of prohibitions upon State laws and State proceedings in hostility to its provisions, is unauthorized by its language...This court has always given a broad and liberal construction to the Constitution, so as to enable Congress, by legislation, to enforce rights secured by that instrument....[But even if the 14th Amendment permits only corrective legislation, the federal law here is indeed corrective, and not merely primary] In every material sense...[R]ailroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions to governmental regulation....It is scarcely just to say that the colored race has been the special favorite of the laws. The statute of 1875 , now adjudged to be unconstitutional, is for the benefit of citizens of every race and color...The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizen...Today it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time, it may be that some other race will fall under the ban of race discrimination."

[Note: The majority position as to the 14th Amendment is still good law. But segregation in places of public accommodation is now prohibited by the 1964 Civil Rights Law by virtue of a broad reading of Congressional power under the Commerce Clause. See Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 (1964). Congressional authority under the 13th Amendment has been interpreted broadly at least as to race discrimination in housing, Jones v. Alfred H. Mayer Co.,392 U.S. 409 (1968), and in private schools, Runyan v. McCrary, 427 U.S. 160)(1976)].

3. Berea College v. Commonwealth of Kentucky, 211 U.S. 45 (1908)

Berea College was a private college incorporated in Kentucky. The college engaged in racially integrated instruction in the state despite the fact that a state law forbade corporations chartered in the state, as well as persons and associations, from doing so. The state law also forbade teachers and students from participating in such instruction or learning. The corporation was tried and convicted of violation of the law and it appealed its conviction. The state appellate court affirmed, as did the U.S. Supreme Court. The latter did so on the theory that a state could regulate and control a corporation charted by the state. The majority severed the particular part, not reaching the constitutionality of other parts of the legislation.

Justice Harlan, in dissent, objected to considering and severing only a particular part since it was clear that the state legislature intended all the sections to be treated as a whole. He reached the broad question whether the statute, taking account of all its parts, was constitutional. He deemed it unconstitutional as an "arbitrary invasion of the rights of liberty and property guaranteed by the Fourteenth Amendment against hostile state action."

4. Dorr v. United States, 195 U.S., 138 (1904)

Dorr was tried and convicted in the U.S. Territory of the Philippines of criminal libel, having been denied a trial by jury. The U.S. Supreme Court upheld his conviction, rejecting his contention that he was entitled to a jury under Article III. Instead, the Court based its decision upon Article IV, authorizing Congress to regulate U.S. territories.

Justice Harlan, in dissent, declared that the "guaranties for the protection of life, liberty and property, as embodied in the Constitution, are the benefit of all, of whatever race or nativity, in the States composing the Union, or in any territory, however acquired, over the inhabitants of which the Government of the Untied States may exercise the powers conferred upon it by the Constitution."

5. Hawaii v. Mankichi, 190 U.S. 197 (1903)

The Supreme Court reviewed a treaty between the United States and the Hawaiian Islands. Although the treaty was not formally adopted by the Senate, its object was "accomplished by the passage of a [Congressional] Joint Resolution…" Hawaiian laws were to be valid if "not inconsistent with this treaty nor contrary to the Constitution of the United States." A particular Hawaiian statute was then passed by which an individual could be tried for a crime without grand jury indictment and could be convicted by a non-unanimous jury of nine of 12 jurors. Mankichi was convicted of manslaughter in Hawaii under such procedures. The district court held that under the treaty and joint resolution, the appellee was entitled to discharge. The U.S. Supreme Court reversed, holding that the rights violated were not fundamental, the procedures being suited to the territory of Hawaii.

Justice Harlan, dissented, emphasizing that the U.S. Constitution in all its parts "became the supreme law of Hawaii immediately upon acquisition by the United States of complete sovereignty over the Hawaiian Islands…" (Three other justices dissented).

6. Downes v. Bidwell, 182 U.S. 244 (1901)

Under the Constitution, Congress is authorized to impose duties upon imports but any such duties must be uniform throughout the United States. Duties were imposed upon goods coming to the mainland from the United States' territory of Puerto Rico. The Supreme Court held that for the purpose of the Article I tax clause, Puerto Rico was not part of the United States.

Harlan, in dissent, declared: "I reject altogether the theory that Congress, in its discretion, can exclude the Constitution from a domestic territory of the United States, acquired , and which could only have been acquired, in virtue of the Constitution. I cannot agree that it is a domestic territory of the United States for the purpose of preventing the application of the tariff act imposing duties upon imports from foreign countries, but not a part of the United States for the purpose of enforcing the constitutional requirement that all duties, imposts and excises imposed by the Congress 'shall be uniform through the United States.' How Puerto Rico can be a domestic territory of the United States, as distinctly held in DeLima v. Bidwell, and yet, as is now held, not embraced by the words 'throughout the United States' is more than I can understand. We heard much in argument about the 'expanding future of our country.' It was said that the United States is to become what is called a 'world power;' and that if this Government intends to keep abreast of the times and be equal to the great destiny that awaits the American people, it must be allowed to exert all the power that other nations are accustomed to exercise. My answer is this, that the fathers never intended that the authority and influence of this nation should be exerted otherwise than in accordance with the Constitution. [The amending process is available for change, if necessary]."

7. Bailey v. State of Alabama, 211 U.S. 452 (1908)

Under Alabama law, where an employee refused to perform agreed-upon services or to refund money gotten, a presumption of criminal intent arose. Bailey being detained before trial, sought a writ of habeas corpus, challenging the constitutionality of the law. The state reviewing court rejected Bailey's contention. (Note: The U.S. Attorney General filed a brief as amicus curiae, supporting Bailey's position). The U.S. Supreme Court affirmed the judgment denying the writ. The application for it was held to be premature, especially given the "meager facts" the High Court had before it at the stage before trial.

Justice Harlan, in dissent, noted that the state reviewing court had reached a decision on the merits, and therefore, the suit was not premature. Alabama had created a system of peonage in violation of the U.S. Constitution and federal law. He declared: "It is a curious condition of things if this court [the U.S. Supreme Court] must remain silent when the question comes before it regularly, whether the final judgment of the highest court of a State does not deprive the citizen of rights secured to him by the Supreme Law of the Land."

8. Clyatt v. United, 197 U.S. 207 (1905)

Under federal law, peonage is a federal crime. For conviction upon an indictment charging that an accused returned one to peonage, the Court held that the federal government must show evidence of (a) a prior condition of peonage and (b) that the accused returned an individual to that condition. The U.S. Supreme Court remanded for a new trial, there being insufficient evidence that (a) was met.

Justice Harlan concurred in so far as the Court upheld as constitutional, federal statutes criminalizing peonage. But he separated himself from the Court: "[T]here was evidence tending to make a case within the statute. ..[T]here was abundant testimony to show that the accused with another went from Georgia to Florida to arrest the two Negroes...and take them against their will back to Georgia to work out a debt...[I]t is going very far to hold in a case like this, disclosing barbarities of the worst kind against these Negroes, that the trial court erred in sending the case to the jury."

9. Baldwin v. Franks, 120 U.S. 678 (1887)

One provision of a federal law made criminal, conspiracies to injure or oppress any "citizen" in the free exercise of rights or privileges under the federal Constitution or federal laws. Other clauses in that law spoke in terms of protecting "persons" as well. A second law made it an offence against he United States to conspire to "prevent or hinder[]" state authorities from giving or securing all persons the equal

protection of the laws. Baldwin was held by a U.S. marshal on the charge of conspiring to deprive Chinese nationals of "equal protection of the laws and of equal privileges and immunities under the laws." The U.S. Supreme Court declared the first provision constitutional but applicable only to citizens. The second federal law was declared unconstitutional as going beyond merely limiting the power of the states to deny equal protection.

Justice Harlan, in dissent, construed the first statute, given its overall purpose and its language of "person " in subsequent sections, to extend its protections to aliens. As to the second law, the equal protection clause "does something more than prescribe the duty and limit the power of the states...[T]hat provision is equivalent to a declaration, in affirmative language, that every person within the jurisdiction of a state has a right to the equal protection of the laws...If the United States is powerless to secure the equal protection of the laws...until the state, by hostile legislation, or by the action of her judicial authorities, shall have denied such protection...it is difficult to understand why congress was invested with power, by appropriate legislation to enforce the provisions of the Fourteenth Amendment."

10. Hurtado v. People of California, 110 U.S. 516 (1884)

Under California law, a person could be held to trial provided that an information was filed against him, based upon a judicial finding of probable cause for guilt. There need not be a grand jury to perform that function. Hurtado was tried for murder in the first degree based upon such an information. A jury rendered a verdict of guilty. An appeal was taken from a judgment upon that verdict. The state supreme court affirmed, and the U.S. Supreme Court affirmed that judgment. Justice Matthews wrote the Court opinion, maintaining that due process of law was not as broad a conception as "law of the land." Presumably the framers of the 14th Amendment did not mean a notion broader than that in the similar language found in the 5th Amendment. Otherwise, the other provisions of the 5th Amendment would be superfluous.

Justice Harlan, in dissent, cited Murray's Lessees v. Hoboken, 18 How. 272 and other authorities for the proposition that due process meant "law of the land." To interpret due process here as not requiring grand jury indictment "would lead to results which are inconsistent with the vital principles of republican government." Harlan took note of other criminal procedure protections specified in the bill of rights—protection against double jeopardy, public trial, confrontation of witnesses, compulsory process, petty jury. "[I]t seems to me that too much stress is put upon the fact that the framers of the Constitution made express provision for the security for those rights which at common law were protected by the requirement of due process of law, and in addition, declared, generally, that no person shall 'be deprived of life, liberty or property without due process of law." The great state court justices Shaw and Kent are cited to emphasize that broad construction of due process.

See also Harlan's dissents in **Maxwell v. Dow, 176 U.S. 581 (1900)** (no grand jury indictment and jury of less than 12) and **Twining v. New Jersey, 211 U.S. 78 (1908)**(jury instructions commenting on failure to testify) . [Note: While the Court today considers almost all of the criminal protections of the Bill of Rights selectively incorporated into the 14th Amendment liberty clause as restrictions upon the states, the majority position in **Hurtado** still remains good law. Grand jury indictment is not a fundamental right in state proceedings. Nowak, Const. Law, 6th Ed., 2000 at Sec. 10.2 at 369.

11. Louisville, New Orleans and Texas Railway Co. v. Miss., 133 U.S. 587 (1890)

Under Mississippi law, it was a misdemeanor for a passenger railroad to fail to provide separate but equal facilities for African-Americans and whites. The defendant railroad was tried and convicted of violating the law. On appeal, the state supreme court construed the statute as applying only to commerce within the state. The railroad contended, however, that the law was an unconstitutional exercise of commerce among

the states. The U.S. Supreme Court rejected the railroad's position. The Court affirmed the state court's judgment which had upheld the law as regulating only local commerce. Justice Brewer, for the Court, distinguished **Hall v. DeCuir** as concerning a direct burden upon interstate commerce. (In Hall v. DeCuir, 95 U.S. 485 ((Oct. , 1877 Term)), a Louisiana law had sought to forbid racial segregation while the common carrier was within the state. The Court had then held such a law a direct burden on interstate commerce). Here, in contrast to Hall, the state court interpreted the state law as limited to local commerce only and the Court was bound by such a construction.

Justice Harlan dissented, finding no distinction between the Hall case and the case in Louisville. They both concerned interstate commerce. As the state law in Hall, forbidding racial segregation, was deemed a direct burden on interstate commerce and therefore void; likewise should the law, in Louisville, requiring segregation, be seen as a direct burden on interstate commerce and therefore void.

12. Elk v. Wilkins, 112 U.S. 94 (1884).

Elk, an American Indian born on an Indian reservation, severed his ties with the Indian tribe in question and established residence in Omaha, Nebraska. He sought to vote in a city election but the registrar rejected his application based upon a lack of citizenship. He then sued in federal court, claiming violation of his 14th and 15th Amendment rights. The U.S. Supreme Court affirmed the lower court's denial of his claim. The Court's theory was that he was not born a citizen and had not been naturalized.

Justice Harlan dissented (Justice Woods concurring in that dissent). "If he did not acquire national citizenship on abandoning his tribe and becoming, by residence in one of the States, subject to the complete jurisdiction of the United States, then the Fourteenth Amendment has wholly failed to accomplish , in respect of the Indian race, what, we think, was intended by it; and there is still in this country, a despised and rejected class of persons, with no nationality whatever; who, born in our territory, owing no allegiance to any foreign power, and subject, as residents of the States, to all the burdens of government, are yet not members of any political community nor entitled to any of the rights, privileges, or immunities of citizens of the United States."

13. Not surprisingly, Justice Harlan joined with the Court in the following: **Yick Wo v. Hopkins, 118 U.S. 56 (1886)** (There is a violation of equal protection where the law is systematically applied in a discriminatory way to deny Chinese nationals the opportunity to operate laundries in wooden buildings) **Strauder v. West Virginia, 100 U.S. 303 (Oct. 1879 Term)** (striking down a state law denying blacks eligibility to sit on juries), **Ex parte Virginia, 100 U.S. 339 (October 1879 term)**(Upholding a federal law which imposed criminal penalties upon a state judge denying blacks the right to sit on a jury).

III. But Would Justice Thurgood Marshall endorse these positions by Harlan?

1. Cumming v. Richmond County Bd. of Education [Of Georgia], 175 U.S. 528 (1899)

The local school board "temporarily" suspended, for "economic reasons," the operation of the public high school for the sixty African Americans in attendance there. Instead, it provided for the education of 300 African Americans of elementary school age. At the same time, the board maintained a high school for white girls and provided aid to a private school for white boys. In a class action, Cumming sought to enjoin public funding going to the high school for whites until there was funding for the black high school. The Supreme Court rejected the challenge.

Justice Harlan wrote the Court's opinion. The local board's action to suspend temporarily for economic reasons the funding for the high school designated for black students was within the county's sound discretion. Given the absence of bad faith, there was no violation of the 14th Amendment. The Board's "...decision was in the interest of the greater number of colored children." "[I]t was in the discretion of the Board to establish high schools...The action of the Board appears to us to be more a discrimination as to sex then it does as to race. ...[T]he Board ...has never established a high school for white boys...[The Court need not consider the constitutionality of race segregation in public schools because] [n]o such issue was made in the pleadings...[T]he education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

[Note: Today state enforced racial segregation in the public schools would violate equal protection. Brown v. Board of Education, 347 U.S. 483 (1954)].

2. Pace v. Alabama, 106 U.S. 583 (October, 1882 Term) An Alabama state law made criminal sexual relations among whites, or among blacks, outside of marriage. For the first offense, punishment was $100 and up to six months in jail. On the second conviction, the fine was not less than $300 and imprisonment for up to a year. In the case of interracial sexual relations or marriage, the first conviction would result in two to seven years in prison. Pace, an African-American and Cox, a white woman. were tried and convicted of violating the law, in having sexual relations with each other, and each was sentenced to two years in prison. Pace appealed his sentence, claiming that it violated his right to equal protection of the laws. The U.S. Supreme Court affirmed the state judgment upon the sentence. Justice Field spoke for all the Court members (including **Justice Harlan**). The theory of the Court was that there was no violation of equal protection if there was punishment for members of each class. Here the white person and the black person in the relationship were each subjected to the harsher sentence.

[Note: Pace was overruled by Loving v. Virginia, 388 U.S. 1 (1967)].

3. Justice Harlan, in his dissent, in dicta, in **Plessy v. Ferguson,** had drawn a distinction between African-American citizens and Chinese nationals: "There is a race so different from our own that we do not permit those belonging to it to become citizens...I allude to the Chinese race [yet] a Chinaman can ride in the same passenger coach with white citizens of the United States..." He thus joined with the Court in upholding federal laws excluding Chinese nationals from becoming citizens and restricting their entry and residence. See **Chinese Exclusion Case, 130 U.S. 581 (1889). Fong Ye Ting v. United States, 149 U.S. 698 (1893).** Indeed, he dissented when the Court majority upheld the citizenship of a Chinese child born in the United States. **United States v. Wong Kim Ark, 169 U.S. 649 (1897) (Harlan** dissenting:"[T]he Fourteenth Amendment...does [not] arbitrarily make citizens of children born in the United States of parents who, according to the will of their native government and of this Government, are and must remain aliens..."), But see **Baldwin v. Franks**, above **II (9)**.

IV. Justice Harlan's patterns of civil rights decision-making as a member of the Court

1. The justices are to interpret the 13th and 14th Amendments, in accordance with the framers' wishes. The framers' aim was to assure that the national government had the broad authority to protect the former slaves, as well as other races, against both violence and discrimination. It did not matter whether such conduct was the product of state action or of private action.

2. Those amendments do not reach social relations between the races. Therefore, state laws prohibiting, or punishing with harsher sentences, sexual relations between the races are constitutional (**Pace**). Presumably laws providing for racial segregation in the public schools are constitutional as well (**Cumming**). That proposition is not as clear, though, given the pleadings in **Cummings**.

3. The constitution created a republican form of government. Accordingly, where the national government has taken over foreign territory, the criminal procedure protections in the bill of rights trumps Congressional authority over territories under Article IV. Such protections thus extend to inhabitants of a territory.

4. The framers of the 14th Amendment intended to apply the criminal procedure protections in the bill of rights to state criminal proceedings, and it was the duty of the Court to carry out the framers' wishes.

5. Congress has authority (plenary? exclusive?) to determine what races should be permitted to enter the United States and be eligible for citizenship. The first sentence of the 14th Amendment, to the effect that all persons born in the United States are citizens, was not intended to apply to the children of Chinese nationals since the parents "must remain" aliens.

V. Hypotheses:

1. Early family environment is an important factor in determining one's values, and that in turn provides clues to help explain a justice's views on the Supreme Court.

2. A justice can be courageous although confronted neither with physical, economic nor societal rejection, but merely with discomfort in influential white social settings, and perhaps a "cold shoulder" by some Supreme Court colleagues.

3. In looking back at the antebellum period, one can legitimately and morally distinguish between a "benevolent" slave owner (perhaps an example is James Harlan) and a "despotic" slave owner.

4. Justice John Marshall Harlan I had close relationships with Robert Harlan and with Frederick Douglass, while John Marshall Harlan served on the Court. Such relationships influenced the Justice's attitudes and votes on the Supreme Court.

5. Justice Harlan was influenced in his attitudes about race by his wife's thinking, his wife having grown up in the free state of Indiana.

6. John Marshall Harlan's close relationship with "half brother" Robert Harlan, an African American said to be 7/8ths white, influenced the legal strategy of Albion Tourgee. The latter was counsel to Plessy in Plessy v. Ferguson.. Tourgee, likely aware of rumors about the possible blood relationship of the Justice and Robert, "chose" Homer Plessy, an African American also said to be 7/8ths white, as plaintiff, to challenge Louisiana racial segregation law.

7. Christian religious duty to uplift African Americans and to pursue egalitarianism, at least, toward African-Americans, explains Harlan's pattern of votes in civil rights cases.

8. The brutalities inflicted upon the former slaves between 1865 and 1877 moved Harlan to rethink his positions.

9. The best way to determine how a justice will vote is to assess his patterns on the Court in his beginning years there.

10. Presumably Justice Harlan influenced his students. Perhaps their views influenced him too.

11. Since one cannot isolate factors to test and observe, identifying factors or a range or mix of factors as explaining one's actions is quite difficult and perhaps impossible.

12. The changes in Harlan's positions are best explained by his different roles and goals: As a Republican politician in Kentucky, he sought to win votes from an electorate suspicious of Republican candidates; as a nominee to the Court, he sought to gain votes from a Republican dominated Senate suspicious of his commitments to the Post Civil War amendments; as a Court member, he was now sufficiently independent, saw himself as a judge, not a politician, and voted his conscience in interpreting the Constitution.

VI. Limits of my research design and sources.

1. Inability to isolate out factors to account for given human actions.
2. The problems with secondary sources.
3. The limits of particular sources.

VII. Bibliography

Secondary sources:

1.Beth, Loren P., JOHN MARSHALL HARLAN, THE LAST WHIG JUSTICE (1992).
2 Yarbrough, Tinsley E., JUDICIAL ENIGMA--THE FIRST JUSTICE HARLAN (1995)
3. Przybyszewski, Linda, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN (1999)
4. Harlan, Malvina Shanklin, SOME MEMORIES OF A LONG LIFE, 1854- 1911 (2001)
5. Dictionary of American Negro Biography (Logan and Winston ed.)
6.Cleveland Gazette May 1, 1886
7.African-American Experience in Ohio, 1850-1920;
8.Courier-Journal, Louisville, Ky. ,Sept. 3, 2001
9. Google.com, generally

Case Opinions:
Bailey v. State of Alabama, 211 U.S. 452 (1908) (Harlan, J. dissenting).
Baldwin v. Franks, 120 U.S. 678 (1887) (Harlan, J. dissenting).
Berea College v. Commonwealth of Kentucky, 211 U.S. 45 (1908) (Harlan, J. dissenting).
Brown v. Board of Education, 347 U.S. 483 (1954)
Chinese Exclusion Case, 130 U.S. 581 (1889) (Harlan voted with the majority)
Civil Rights Cases, 109 U.S. 3 (1883) (Harlan, J. dissenting)
Clyatt v. United States, 197U.S. 207 (1905) (Harlan, J. partial dissent)
Cumming v. Richmond County Bd. of Education (of Georgia), 175 U.S. 528 (1899) (Wrote Court opinion)
Dorr v. United States, 195 U.S. 195 U.S. 138 (1904) (Harlan, J. dissenting).
Downes v. Bidwell, 182 U.S. 244 (1901) (Harlan, J. dissenting)
Elk v. Wilkins, 112 U.S. 94 (1884) (Harlan, J. dissenting)
Fong Ye Ting v. United States, 149 U.S. 698 (1893) (Harlan voted with the majority)
Hall v. DeCuir, 95 U.S. 485 (Oct. 1877 Term)

Hawaii v. Mankichi, 190 U.S. 197 (1903) (Harlan, J. dissenting)
Hurtado v. People of California, 110 U.S. 516 (1884) (Harlan, J. dissenting)
Louisville, New Orleans and Texas Railway Co v. Miss., 133 U.S. 587 (1890) (Harlan, J. dissenting)
Loving v. Virginia, 388 U.S. 1 (967)
Maxwell v. Dow, 176 U.S. 581 (1908) (Harlan, J. dissenting)
O'Neil v. Vermont, 144 U.S. 323 (1892) (Harlan, J. dissenting).
Pace v. Alabama, 106 U.S. 583 (Oct., 1882 Term) (Harlan J. joins Court opinion).
Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J. dissenting)
Robertson v. Baldwin, 165 U.S. 275 (Harlan dissenting, the rights of seamen and the freedom of labor)
Strauder v. West Virginia, 100 U.S. 303 (October Term, 1879) (Harlan voted with the majority)
Twining v. New Jersey, 211 U.S. 78 (1908) (Harlan, J. dissenting)
Virginia, Ex parte, 100 U.S. 339 (Oct. 1879 Term) (Harlan voted with the majority)

.7United States v. Wong Kim Ark, 169 U.S. 649 (1898) (Harlan, J. dissenting)