1980

Book Review

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Original Citation

Stephen W. Gard, Book Review, 48 George Washington Law Review 299 (1980)

JUSTICE HUGO BLACK AND THE FIRST AMENDMENT *edited by Everette E. Dennis, Donald M. Gillmor and David L. Grey. Ames, Iowa: The Iowa State University Press, 1978. 204 pp., $10.95.*

This book is another addition to the rapidly expanding literature on Hugo L. Black.[1] The judicial career of Justice Black has become a favorite topic of contemporary legal scholars. Appointed to the United States Supreme Court in 1937, Justice Black served on the Court for thirty-four years until his retirement and death in 1971. During that period, Black served with five of our fifteen Chief Justices, voted on over three thousand cases decided by the Court, and wrote almost one thousand opinions.[2] No other individual, with the possible exception of Chief Justice Marshall, has had a greater influence on American constitutional law.[3]

This collection of twelve essays, written primarily by communications law scholars, focuses on Justice Black's contribution to our modern understanding of the freedom of speech and press clause of the first amendment. The choice of this theme is obvious, but nevertheless sound. In no other area did Justice Black make a larger contribution to constitutional jurisprudence. Moreover, Justice Black believed that freedom of expression is central to the democratic form of self-government established by the Constitution:

> I view the guaranties of the First Amendment as the foundation upon which our governmental structure rests and without which it could not continue to endure as conceived and planned. Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body. In fact, this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is death.[4]

This collection accomplishes several important tasks. Some of the essays are addressed to particular areas of substantive first amendment concern on which Justice Black wrote major judicial opinions: obscenity,[5] libel,[6] privacy,[7] and contempt.[8] Each of these essays does

1. *See, e.g.*, H. BALL, THE VISION AND THE DREAM OF JUSTICE HUGO L. BLACK, AN EXAMINATION OF A JUDICIAL PHILOSOPHY (1975); H. BLACK, JR., MY FATHER: A REMEMBRANCE (1975); G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION (1977); V. HAMILTON, HUGO BLACK: THE ALABAMA YEARS (1972); D. MEADOR, MR. JUSTICE BLACK AND HIS BOOKS (1974).

2. Proceedings in the Supreme Court of the United States in Memory of Mr. Justice Black, 405 U.S. IX, XLVII (1972) (Statement of Solicitor General Griswold).

3. Kurland, *Hugo LaFayette Black: In Memoriam,* 20 J. PUB. L. 359, 362 (1971).

4. Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 301-02 (1941) (Black, J., dissenting).

5. Devol, *Black's View of Obscenity as Protected Speech and Press,* in JUSTICE HUGO BLACK AND THE FIRST AMENDMENT 94 (1978).

a commendable job of describing and critically evaluating the substantive doctrinal positions advocated by Justice Black during his lengthy tenure on the Court. Other essays magnificently capture the human and judicial spirit and energy of Justice Black.[9] Finally, using the central theme of Black's first amendment views as a perspective from which to evaluate his judicial philosophy, two essays address Black's methodology of constitutional adjudication.[10]

Although it is perhaps ungracious to criticize a book that succeeds as well as this book does at presenting further insight into the human and humanistic achievements of Justice Black, it is nevertheless troubling that a volume intended as a tribute to Black leaves the overall impression that Black generally reached laudable, liberal results, but lacked juristic ability. Although the essays almost uniformly reflect a favorable impression of Black's substantive contributions to freedom of expression, they are equally critical of his methodology of constitutional adjudication. This view is stated bluntly by Professor Snowiss, who attributes the Court's frequent adoption of results advocated by Justice Black to the "forcefulness, power, and single-minded clarity of purpose in his opinions, rather than . . . exceptional analytic ability or subtle treatment of the many complexities of constitutional adjudication."[11]

Professor Snowiss' criticism of Black's constitutional methodology is difficult to pigeonhole. Snowiss criticizes Black's reliance on the text of the Constitution,[12] but this criticism, which largely assumes an image of a judge mechanistically executing an objectively ascertainable intent of the framers embodied in the document, misses the mark. Although some of Black's rhetoric could be so read,[13] he never denied that the document was ambiguous and required judicial interpretation.

> Since *Marbury v. Madison* . . . was decided, the practice has been firmly established, for better or worse, that courts can strike down legislative enactments which violate the Constitution. This process, of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a constitutional provision, thereby affecting policy.[14]

Professor Snowiss reads Black's recognition that constitutional in-

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6. Grey, *Black on Libel: So Firm . . . In His Foundation*, in *id.* at 66.
7. Gillmor, *Black and the Problem of Privacy*, in *id.* at 81.
8. Petrick, *Black v. Contempt*, in *id.* at 108.
9. Dennis & Gillmor, *Hugo Black: " 'No Law' Means No Law,"* in *id.* at 3; Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962), *reprinted in* JUSTICE HUGO BLACK AND THE FIRST AMENDMENT, at 41; Medelman, *Do You Swear to Tell the Truth, the Whole Truth, and Nothing But the Truth, Justice Black? He Does*, ESQUIRE MAGAZINE, June 1968, *reprinted in* JUSTICE HUGO BLACK AND THE FIRST AMENDMENT, at 54.
10. Snowiss, *The Legacy of Justice Black*, 1973 SUP. CT. REV. 187, *reprinted in* JUSTICE HUGO BLACK AND THE FIRST AMENDMENT, at 11; Teeter & Smith, *Justice Black's "Absolutism": Notes on His Use of History to Support Free Expression*, in *id.* at 29.
11. Snowiss, *supra* note 10, at 27.
12. *Id.* at 17-19, 25-28.
13. *See* Cahn, *supra* note 9, at 44-45.
14. Adamson v. California, 332 U.S. 46, 90-91 (1947) (Black, J., dissenting), *quoted in* Snowiss, *supra* note 10, at 19.

terpretation necessitates judicial judgment as a declaration against interest and then leaps to the conclusion that, because "Professor Wechsler . . . made it impossible to deny that protection of individual rights is a problematic, value-laden task, rather than a largely legal or technical one,"[15] constitutional adjudication is a matter of statecraft rather than judicial interpretation of the fundamental charter of our nation. Unfortunately, Professor Snowiss' criticism derives from a serious misinterpretation of the thesis advanced by Professor Wechsler.[16] Wechsler never suggested that the principles of constitutional law should be neutral, only that the principles judicially derived from the Constitution be capable of neutral application.[17] One may not agree with the principles that Justice Black derived from the first amendment, but it is difficult to argue that he was unwilling to apply them neutrally and across-the-board.

Professor Snowiss also finds Black's methodology objectionable on the ground that it fails to protect human rights in a modern society.[18] Such criticism presupposes that the Supreme Court should not be bound by the Constitution but should engage instead in explicit judicial policymaking.[19] It was precisely such judicial policymaking that Justice Black believed inappropriate in a democracy, a position that he asserted most clearly in his dissenting opinion in *Griswold v. Connecticut.*[20] The verdict is still out on the wisdom of substantive due process protection for human rights, and before Black's position is too quickly rejected we should consider the sort of judicial doctrines such reasoning has produced in the past.[21]

Even Professor Snowiss' criticism of Black's first amendment philosophy is as much a criticism of the results he reached as it is a disagreement with his methodology. Thus, Snowiss decries Black's failure to distinguish between "good" and "bad" speech but herself wholly fails to distinguish between ideas that are "bad," in the sense of being unpopular, and the expression of ideas that may cause substantive harm to countervailing social interests.[22]

It is this very distinction, however, that is crucial to Justice Black's interpretation of the first amendment. In Black's view the first amendment absolutely barred the government from penalizing speech merely because the government disfavored the idea ex-

15. Snowiss, *supra* note 10, at 20.
16. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).
17. *Id.* at 10-20.
18. Snowiss, *supra* note 10, at 25-28.
19. *See id.* at 20-21, 25-28.
20. 381 U.S. 479, 507 (1965) (Black, J., dissenting).
21. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905); Plessy v. Ferguson, 163 U.S. 537 (1896); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).
22. *See* Snowiss, *supra* note 10, at 24-25.

pressed. Thus, in *Communist Party v. Subversive Activities Control Board*,[23] Black declared:

> I do not believe that it can be too often repeated that the freedoms of speech, press, petition, and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish. The first banning of an association because it advocates hated ideas . . . marks a fateful moment in the history of a free country.[24]

If Justice Black was correct that this is the fundamental principle embodied in the first amendment —and the Supreme Court traditionally has accepted this view[25]—then the hard question is the constitutionality of governmental regulations that explicitly discriminate on the basis of the idea expressed using the rationale, not that the government finds the idea itself distasteful, but that the expression of the idea causes some substantive harm that the government has a non-ideological interest in preventing or remedying. The law of libel is just such a governmental regulation of the content of expression and, of course, Justice Black advocated the extension of the absolute protection of the first amendment to encompass such content regulation.[26]

Professor Grey's essay concerning Justice Black's views on the law of libel does a commendable job of attempting to explore beyond the "absolutist" label that "tend[s] to oversimplify Black's position."[27] Professor Grey identifies three factors that were essential to Black's uncompromising view that the first amendment prohibits all libel actions. First, Justice Black, relying primarily on historical evidence, believed that the common law was seriously ideologically biased in that it permitted government officials to penalize distasteful expression under the guise of redressing substantive harm to individual reputations.[28] Second, Black believed that this danger of ideological persecution was aggravated by the vagueness of the Supreme Court's judicially fashioned legal doctrines, which he charged were creating a quagmire of uncertainty.[29] Finally, Justice Black doubted that anyone is seriously harmed by libelous statements or that whatever harm might be suffered could not be best remedied in the marketplace of free expression without governmental intervention.[30]

Rather than recognizing the elegance and sophistication of Black's argument for the abolition of the common law of libel, Professor Grey denigrates Black's view as "based more on his feelings and his per-

23. 367 U.S. 1 (1961).

24. *Id.* at 137 (Black, J., dissenting). *See also* Schacht v. United States, 398 U.S. 58 (1970).

25. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974); Healy v. James, 408 U.S. 169 (1972); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959).

26. *See* Grey, *supra* note 6. *See also* Cahn, *supra* note 9, at 48 (quoting Black: "I have no doubt myself that the provision [first amendment free speech clause] . . . intended that there should be no libel or defamation law in the United States . . . .").

27. Grey, *supra* note 6, at 69.

28. *See id.* at 70, 73.

29. *Id.* at 77, (quoting Curtis Publishing Co. v. Butts, 338 U.S. 130, 171 (1967) (Black, J., concurring and dissenting)).

30. *Id.* at 69, 71, 79.

sonal background than on evidence from possibly useful behavioral science literature . . . about the potential dangers to certain individuals from 'mere word.' "[31] The only potential harm that Professor Grey attributed to libelous statements, however, is that "[d]eep inside some people they may do real emotional damage."[32] This criticism of Black's position misconceives the very purpose of the law of libel, which is to remedy injuries to reputation, not injuries to the victim's psyche. Thus, damages for emotional distress are recoverable in defamation actions only parasitically.[33] The wisdom of the common law on this point is admirable. Analogously, the infliction of emotional distress by the use of verbal insults or epithets has not been deemed independently actionable for the simple reason that the grievance has been thought too trivial and petty for judicial cognizance.[34] Instead, the common law is in accord with the view of Justice Black and has adhered to the position that "a certain toughening of the mental hide is a better protection than the law could ever be."[35] Justice Black, of course, went further and denied that libelous statements cause reputational injury of a serious enough nature to warrant judicial penalization.[36] Whatever the merit of this view, at a minimum the party seeking to inhibit expressive activities should bear the burden of proof that the particular utterance caused serious reputational injury that could not be remedied by other, less drastic means.[37] If such proof was required, and the requirement stringently enforced, Justice Black's position would be adopted *de facto*.[38]

The portrait of a Justice plagued by a simplistic doctrinaire constitutional methodology is found again in the essay authored by Professors Teeter and Smith.[39] They charge that Black was a poor historical

31. *Id.* at 80.
32. *Id.*
33. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 761 (4th ed. 1971) ("[S]uch damages are insufficient in themselves to make the slander actionable, but once the cause of action is made out without them, they may be tacked on as 'parasitic' to it.") *But cf.* Time, Inc. v. Firestone, 424 U.S. 448, 460-61 (1976) (damages for emotional distress absent proof of injury to reputation are constitutionally permissible).
34. *See* W. PROSSER, *supra* note 33, at 54-55.
35. Magruder, *Mental and Emotional Disturbance in the Laws of Torts*, 49 HARV. L. REV. 1033, 1035 (1936).
36. *Cf.* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841-42 (1978) (injury to the official reputation of courts or judges is not a sufficient reason to repress expressive activity).
37. In Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-50 (1974), the Supreme Court ostensibly required that a libel plaintiff prove "actual injury" as a prerequisite to recovery, but it is clear, after Time, Inc. v. Firestone, 424 U.S. 448 (1976), that the Court's definition of "actual injury" is so broad as to work no change in the common law doctrine of presuming injury to reputation. *See* Ashdown, *Gertz and Firestone: A Study of Constitutional Policy-Making*, 61 MINN. L. REV. 645, 670 (1977); Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1251-52 (1976).
38. Thus, one noted practitioner has observed: "In my own trial experience in libel cases I can recall only one instance in which I was able to show special damages." L. ELDREDGE, THE LAW OF DEFAMATION 175 (1978).
39. Teeter & Smith, *supra* note 10.

scholar, pointing to his conclusion that the first amendment was designed to abolish the crime of seditious libel in America as the primary evidence of flawed scholarship.[40] The complaint of Professors Teeter and Smith is twofold. First, they argue that Black's use of history was marred by "an innocently optimistic view of the men who wrote the Constitution and those who presented the nation with its Bill of Rights."[41] Second, they contend that Black's historical conclusion was simply incorrect.[42]

Professors Teeter and Smith object to Black's historical methodology because of his habit of relying on the framers' liberal statements concerning freedom of expression to support his expansive interpretation of the first amendment, while refusing to use the founding fathers' repressive actions and statements as impeachment evidence. In the view of Professors Teeter and Smith:

> [Justice Black] saw the Founding Fathers as patriots of spotless principle who wrought a quite possibly divine document in the Constitution. Black's view of history ignored historians who saw the Founding Fathers as men subject to human frailties, including the distortions accompanying economic and political ambitions.[43]

As the authors of this essay recognize, history has many uses and interpretations, and historians inevitably are selective in the source material upon which they rely in reaching their conclusions.[44] I believe that pejoratively characterizing Black as naive and "guilty of . . . law-office history"[45] unfairly maligns Justice Black. Black, it should be remembered, was neither writing biographies of the individual framers nor judging their overall character or behavior. Rather, he was interested in discovering the meaning of the Constitution and the Bill of Rights. In such an endeavor the "human frailties" of individual framers are irrelevant to the proper interpretation of a document intended to incorporate the framers' hopes, dreams, and ideals for a new nation.[46]

If one is interested, as Justice Black was, in discovering the ideals of the founding fathers that were incorporated into the first amendment, one can find a great deal of historical evidence to support Black's conclusion that the first amendment was intended to abolish the crime of seditious libel in America. How else can one explain the fact that there were "evidently no more jury trials for seditious libel in the American Colonies"[47] after 1735, that the Alien and Sedition

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40. *Id.* at 35-39.
41. *Id.* at 36.
42. *Id.* at 38-39.
43. *Id.* at 36.
44. *See id.* at 31-32.
45. *Id.* at 31.
46. *See* Anastaplo, Book Review, 39 N.Y.U. L. REV. 735 (1964). Professors Teeter and Smith rely heavily on the fact that Thomas Jefferson approved of seditious libel prosecutions during his tenure as President as evidence that the founding fathers adhered to a a niggardly conception of freedom of speech and press. *See* Teeter & Smith, *supra* note 10, at 38. Jefferson's efforts to "cover up" his role in these prosecutions, however, is evidence that even he recognized that his conduct constituted a deviation from the principles embodied in the first amendment. *See* L. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 301-07 (1960).
47. Teeter & Smith, *supra* note 10, at 33.

Act of 1798 was widely condemned and largely responsible for the Federalist party's electoral defeat in the elections of 1800,[48] and that the popular revulsion against the crime of sedition was so great that no similar statute was enacted in America for approximately one hundred years? In light of recent historical research, Black's historical conclusions appear more meritorious than previously believed.[49]

Hugo L. Black was a great Supreme Court Justice. In many respects this book captures the wisdom and energy of Justice Black and contributes to our further understanding of his judicial philosophy. It is perhaps unrealistic to expect any book to match Black's greatness. Nevertheless, this book is seriously flawed to the extent that it fails to evaluate Black's methodology of constitutional adjudication in a sensitive and thoughtful manner. It is true, of course, that Justice Black was himself largely responsible for fostering the image which this book perpetuates through his self-deprecation as "a rather backward country fellow"[50] and his simple, straightforward writing style. Nevertheless, as good as this book is, I believe that Hugo L. Black deserved better.

*Stephen W. Gard**

48. *See* Kalven, *The New York Times Case: A Note on The Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191, 221 n.124.

49. *See generally* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC (1969).

50. Cahn, *supra* note 9, at 45.

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