JUSTICE WHITE AND LEGAL REALISM: AN ADDENDUM TO PROFESSOR STITH-CABRANES

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First of all, I compliment and thank Professor Stith-Cabranes for her masterful analysis of the criminal law jurisprudence of Justice White. As I told her after a first reading, the part that particularly resonated with me was her perception of the place of Yale Law School of Legal Realism in Justice White's jurisprudence. Yale Legal Realism was at its apogee during his law school years in 1939 through 1941. Having drunk from the same well at the same time, I offer an eyewitness's perspective.

What was Legal Realism? And what was it not? Professor Stith-Cabranes focuses on the strong revulsion against negative policy-making by the Supreme Court in the 1920's and 30's. Its infamous decision in *Lochner v. New York*[1] was the *bête noir*. In 1937, challenging what were euphemistically known as "The Nine Old Men,"[2] President Roosevelt came dangerously close to fatally politicizing the Supreme Court for all time. Professor Walter Hamilton wrote in the 1941 (fiftieth anniversary) Volume of the Yale Law Journal: "An institution had been saved, but the price of escape was by a narrow margin; an ominous go-and-sin-no-more was the price of salvation."[3] But there was more, much more, to Legal Realism as the Yale faculty presented it to its pre-war students of 1939 and 1940.

Those of you who have studied or practiced drawing know the concept of negative space: the definition of a figure or an object by focusing on the space outside of it.[4] The negative

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1. 198 U.S. 45 (1905).

2. *See* DREW PEARSON & ROBERTS S. ALLEN, THE NINE OLD MEN (1936).

3. Walton H. Hamilton & George D. Braden, *The Special Competence of the Supreme Court*, 50 YALE L.J. 1319, 1322 (1941).

4. *See* BETTY EDWARDS, DRAWING on THE ARTIST WITHIN: A GUIDE TO INNOVATION, INVENTION, IMAGINATION, AND CREATIVITY 152 (1986).

space which defined Yale Legal Realism was the Harvard Law School concept that the Rule of Law was the Law of Rules. Harvard Law School and the case method of teaching was the creation of its legendary Dean, Christopher Columbus Langdell; originally a Darwinian botanist. He classified decided cases as he classified plants. He treated this process as a science. Langdell, and his Harvard disciples, notably Professor Samuel Williston, believed that law, like any other science, could be summed up in a few principles or rules.

As a perceptive analyst has put it: "For such individuals, a judge did not make law when he rendered a judicial opinion. His decision did not reflect his own particular prejudices or the peculiar circumstances of the case; rather, he found the concepts, rules and principles that had been revealed in previous decisions and applied them."[5]

To the Yale Legal Realists, the Harvards were unreal. That may be where the Realists' philosophy, if I may call it that, got its name.

A typical 1939-1940 class in Professor MacDougal's Property I was an autopsy-like search for the *real* (as distinguished from the stated) reason for a particular decision. MacDougal would ask the first student to be called on to describe the cadaver lying on the gurney. He would then go around the room at random eliciting explanations, other than that stated in the court's opinion, or by the preceding reciter. He batted down each—until he would come to Byron White. MacDougal was from Mississippi with a deep rich voice and a lightning-quick mind. He, like White, was a Rhodes scholar. Frequently, MacDougal saved the best for last, and called on White. Most of us had read the cases for the day. White appeared to have read the cases, plus the footnotes, plus the cases and articles cited in the footnotes. His voice was no match for MacDougal. But his mind and preparation were as good or better. I obviously don't remember details. I do remember frequently recognizing that Mac had met his match.

The other memorable Legal Realist and really their spiritual leader at the time was Professor Arthur L. Corbin. Corbin's contracts class met in the large classroom near the Dean's office. I believe it was Room 120. He arranged students alphabetically, methodically calling on each to stand-up and state a

5. LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, 11 (1986).

case or answer a question. A student could reasonably predict when his time would come. Corbin was working on his treatise. To that end he collected cases reported in advance sheets. You computer gurus might not know that advance sheets were West Company's bi-weekly publications of decisions. These and Corbin's experience from four years of private practice in Cripple Creek, Colorado, were the grist for his mill for his treatise.

At the same time that Corbin was building his treatise, Professor Samuel Williston of Harvard was creating the Restatement of Contracts. Corbin's target for the day—almost every day—was Williston's romance with rules and the Restatement. To Corbin, the law of Contracts was a common law of precedents built around a few Acts of Parliament (such as the statute of frauds) and state statutes (such as Commercial Codes), gradually adjusted from time to time by courts, somewhat like a coral reef, case by case, following precedent, distinguishing some on the facts, and occasionally overruling others.

Late in life, in his direct way, Corbin summed it up succinctly:

Q: Do you [Corbin] believe that there is such a thing as a "legal principle"?

A: Certainly, I do. By this I don't mean something handed down from the *sky*. Instead I mean this: it is possible to group together a number of similar cases (decisions) on which to base a generalization that is usable, subject to change as new cases appear with varying facts.[6]

Corbin and MacDougal were the most persistent, but not the only, preachers of Legal Realism at Yale at the time. Professors Wesley Sturgis, Roscoe Steffen, Underhill Moore and Walton Hamilton were also vocal ministers. Criminal law was not in the forefront of their attention. But Legal Realism permeated it, nevertheless. In 1940, there was one professor offering courses in Criminal Law—George Dession, a former prosecutor and the author of a casebook on the subject. Dession politically correctly applied Legal Realism to criminal law: "Criminal sanctions should be so used as to contribute in a productive way to recognized over-all ends of government."[7]

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6. *Id.* at 235 n.12.

7. GEORGE H. DESSION, CRIMINAL LAW ADMINISTRATION AND PUBLIC ORDER v (1948). A search of Dession's casebook reveals only one case and a footnote and five pages of material which address the death penalty. The case is a teaser, re-

I don't know whether Byron took Dession's course or not. If he didn't, he went through law school without taking criminal law; Dession ran the only criminal law course. But I find Dession's adaptation of Legal Realism reflected in Justice White's rejection of the death penalty in *Furman v. Georgia*.[8] Justice White's concurrence in *Furman* focused on whether the death penalty as randomly imposed served "a major goal of the criminal law—to deter others."[9] The Legal Realist in him came out in his invocation of "common sense and experience."[10] They "tell . . . that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted."[11]

Professor Stith-Cabranes's analysis of the early career *Robinson*[12] dissent beautifully accounts for the anti-Lochner element of Justice White's criminal law jurisprudence. The discussion of *Furman* reflects clearly a Legal Realist concern for consequences. Two opinions written for a narrow majority by Justice Scalia shortly before Justice White's retirement dramatically illuminate his dissenting Realist views about the rule of rules, original intent, and other hyper-technicalities in the interpretation and application of the Constitution.

I mentioned earlier negative space for defining an object. Our definition of Justice White is amply supplied by counterposing the academic and judicial work of his colleague Antonin Scalia. In a famous 1989 essay, Justice Scalia occupied opposite Justice White the Langdell-Williston negative space more definitively, and, yes, more astonishingly than ever did the Harvard conceptualists. His title told it all: "The Rule of Law as a Law of Rules."[13]

The exchange between Justice White, near the end of his active service, and Justice Scalia in *Harmelin v. Michigan*[14]

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garding convicted murderer Willie Francis. He was electrocuted by Louisiana, but blew the fuse. A 5-4 Supreme Court ruled that the double jeopardy clause did not stand in the way of a second electrocution. *Id.* at 45-51.

8. 408 U.S. 238 (1972).
9. *Id.* at 312.
10. *Id.*
11. *Id.*
12. Robinson v. California, 370 U.S. 660, 685 (1962) (White, J., dissenting).
13. 56 U CHI. L. REV. 1125 (1989).
14. 501 U.S. 957 (1991).

once again echoed, for me at least, the testy exchanges between the Harvard conceptualists and the Yale Legal Realists. *Harmelin* tested a Michigan statute which mandated life imprisonment without parole for a non-violent first offender convicted of mere possession of 672 grams of cocaine. In a controlling plurality opinion, Justice Scalia directly overruled as "simply wrong" *Solem v. Helm*,[15] a nearly 10-year old decision that a "disproportionate" sentence violates the Eighth Amendment.[16]

Justice White vigorously dissented, despite the fact that he had concurred in *Solem*. Scalia cites the precise words of the Eighth Amendment: they forbid "*excessive* fines,"[17] thereby genuflecting to proportionality; no such word modifies "cruel and unusual punishment." Both Justices cite the same authority on English precedent to the 8th Amendment.[18] Scalia quotes a passage listing the barbaric punishments (e.g., "horrible tortures inflicted in the inquisition").[19] White quoted the same scholar for the proposition that the imprisonment of the same person "for an unreasonable length of time, is also contrary to the spirit of the Constitution."[20] In dissent, White played back Scalia's argument that if "plain-talking" Americans had meant to ban disproportionate punishments, they would have said so and that in 1789 no punishment imposed by the United States could be reviewed under the Eighth Amendment because there was no "usual" experience of the new nation to serve as a benchmark.[21] White, characteristically understating, called these contentions "weak."[22] He asked rhetorically: what about the criminal law regimes of the former colonies which became states? As to the consequences of the *Solem* case which the majority overrules, White, the Realist, laments its passing: "the *Solem* analysis has worked well in practice."[23]

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15. 463 U.S. 277 (1983).
16. *Harmelin*, 501 U.S. at 965.
17. U.S. CONST. amend. VIII (emphasis added).
18. *Compare Harmelin*, 501 U.S. at 981 (citing B. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 186 (1832)) *with Harmelin*, 501 U.S. at 1010 (White, J., dissenting (citing same)).
19. *Harmelin*, 501 U.S. at 981.
20. *Id.* at 1010 (White, J., dissenting).
21. *Id.*
22. *Id.*
23. *Id.* at 1015.

On the last day of the 1992 Term, and the last court day before his retirement, Justice White's dissent in *Dixon*[24] went head-to-head with Justice Scalia's opinion for another narrow majority. The Court ruled essentially that conviction for criminal contempt for domestic violence committed in violation of a stay-away order was not a jeopardy barring criminal prosecution for the same violence. Justice White fired back one last time at the Court's "overly technical interpretation" and "exclusive focus on the formal elements of the relevant crimes."[25] He blasted the *Dixon* opinion for reaching a "result [that] is as unjustifiable as it is pernicious," derived, he believed, "from a 'hypertechnical and archaic approach.'"[26]

Professor Stith-Cabranes's paper is the best, if not the first, to cut through the fog of his unpopular opinions in *Roe*,[27] *Hardwick*,[28] and *Miranda*[29] to reveal the reality of Justice White's 31-year application to criminal cases his principled, realistic concept of the Constitution grounded in its "majestic, open-ended"[30] clauses and adapted incrementally case by case to what Justice Holmes identified as the "felt necessities of the time."[31] With the perspective of time, scholars may well discover that Justice Story's 1833 tribute to Chief Justice John Marshall fits Justice White as well: "[A] mind accustomed to grapple with difficulties, capable of unfolding the most comprehensive truths with masculine simplicity, and severe logic, and prompt to dissipate the illusions of ingenious doubt, and subtle argument, and impassioned eloquence."[32]

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24. United States v. Dixon, 509 U.S. 688, 720 (1993) (White, J., concurring in part and dissenting in part).

25. *Id.* at 720, 731.

26. *Id.* at 738, 739 (quoting Ashe v. Swenson, 397 U.S. 436, 444 (1970)).

27. Roe v. Wade, 410 U.S. 179 (1973) (White, J., dissenting).

28. Bowers v. Hardwick, 478 U.S. 186 (1986).

29. Miranda v. Arizona, 384 U.S. 436, 526 (1966) (White, J., dissenting).

30. Byron R. White, *Tribute to the Honorable William J. Brennan, Jr.*, 100 YALE L.J. 1113, 1116 (1991).

31. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

32. JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (5th ed. 1905) (leaflet).