

## BOOK REVIEW

MY FATHER: A REMEMBRANCE. By Hugo Black, Jr. New York: Random House, 1975. Pp.viii, 273. \$8.95

*Reviewed by Ronald K.L. Collins\**

*[W]e must believe that no image we can procure is more precious in heaven's eye than a father . . . ; when a man does [him] honor, there is joy in heaven. —Plato, *The Laws* 931e*

Any biographical account of a deceased father written by his son necessarily bears some taint of filial bias. There is a pious veneration likely to be at work in a son's parting remembrance of his namesake. Hugo Black, Jr.'s portrayal of his father is in many ways such a memoir. But it is more. It is also the story of a unique father-son relationship replete with accounts of the more trying aspects of being the son of a famous man. Says its author: "[W]hat I am trying to do is simply tell the story of a father and son moving toward each other."<sup>1</sup> Of course, the son's statement is also a tacit admission of the one-time distance between the two.

*My Father* is not likely to be appealing to the more serious students of Mr. Justice Black's life and philosophy. There are other works which provide more detail, accuracy and insight.<sup>2</sup> Some may even detect within the book a son's obsession to win a sort of posthumous independence from the firm hand of a famous father. Conversely, the author does recognize his other bias: "I am Justice Hugo Black's son, and, of course, I am prejudiced in his favor."<sup>3</sup>

What the book does offer is a reconstructed account of the little known

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\* B.A. University of California; J.D. Loyola University, School of Law.

THE FOLLOWING CITATION WILL BE USED IN THIS REVIEW:

HUGO BLACK, JR., *MY FATHER: A REMEMBRANCE* (1975) [hereinafter cited as *MY FATHER*].

1. *MY FATHER* vii.

2. See, e.g., G. DUNNE, *HUGO BLACK AND THE JUDICIAL REVOLUTION* (1977); V. HAMILTON, *HUGO BLACK: THE ALABAMA YEARS* (1972); Yarbrough, *Justice Black and Equal Protection*, 9 SW. U.L. REV. 899 (1977); Yarbrough, *Justice Black and His Critics on Speech-Plus and Symbolic Speech*, 52 TEX. L. REV. 257 (1974); Yarbrough, *Justice Black, the First Amendment, and the Burger Court*, 46 MISS. L.J. 203 (1975); Yarbrough, *Justice Black, the Fourteenth Amendment, and Incorporation*, 30 U. MIAMI L. REV. 231 (1976); Yarbrough, *Justices Black and Douglas: The Judicial Function and the Scope of Constitutional Liberties*, 1973 DUKE L.J. 441; Yarbrough, *Mr. Justice Black and Legal Positivism*, 57 VA. L. REV. 375 (1971). For a comprehensive examination of Black's reading interests see D. MEADOR, *MR. JUSTICE BLACK AND HIS BOOKS* (1974).

3. *MY FATHER* 104.

aspects of Hugo Black's private life couched in the vernacular of "Daddy," "Son" and "fella" conversations. Casting off the somber awesomeness of the judicial robe, the reader finds Hugo, Sr., vying for the hand of Josephine Foster (later to become his first wife) or swatting away a lively game of tennis during his twilight years on the Court. Even more interesting are the glimpses of some of Mr. Justice Black's private assessments of the people and events with which he came in contact. *My Father* is the life story of a man who probably would not have favored the public revelations made in this biography: it's "bad business," he might have responded.<sup>4</sup>

There is a home-spun flavor about this book: the reader is treated to a portfolio of a few family snapshots. The thirty-two chapters are short—averaging less than eight pages each—and unblemished by footnotes. A little over a quarter of *My Father* is reserved for an account of Justice Black's days on the Supreme Court. Most of the remainder of the book depicts the highlights of his life from boyhood in Clay County, Alabama, to the "September 26, 1971" notice that "the Justice ha[d] passed."<sup>5</sup> Sprinkled throughout this biography are morsels of Hugo Black's personal views on law, politics, economics, religion, women, race and books. Those attracted to armchair reading will find in *My Father* a memorable and moving account of the life of Hugo Black.

Despite the book's unscholarly and biased character, *My Father* does provide some useful insights into Justice Black's more personal philosophy. Accordingly, the book is a treasure trove of revealing biographical gems. For example, a reader familiar with Justice Black's position in several cases involving challenges to the conscription laws and Selective Service classifications<sup>6</sup> might be inclined to view the Justice as a war hawk. *My Father* reveals, however, that Black not only hated war in general, but supported neutrality in the first world war and later opposed both the Korean and Vietnam Wars.<sup>7</sup> Although this revelation was made public as early as 1968 by the Justice himself in a CBS television interview,<sup>8</sup> the full magnitude of Black's antiwar sentiments is better captured in the son's account.

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4. *Id.* vii-viii.

5. *Id.* 266. Mr. Justice Black died at 1 a.m. on September 25, 1971. N.Y. Times, Sept. 26, 1971, at 76, col. 1.

6. *Gillette v. United States*, 401 U.S. 437, 463 (1971) (Black, J., concurring) (majority held that the conscientious objector provision of the Military Selective Service Act requires that the applicant be opposed to participating in all wars, not just the Viet Nam War); *United States v. O'Brien*, 391 U.S. 367 (1968) (Justice Black joining with the majority) (upholding law prohibiting "knowing mutilation" of draft cards); *Falbo v. United States*, 320 U.S. 549 (1944) (no right to judicial review of Selective Service classification in a criminal prosecution for failure to report for service).

7. *MY FATHER* 32.

8. *Justice Black and the Bill of Rights*, 9 Sw. U.L. REV. 937 (1977) (interview of Justice Black by Eric Sevareid and Martin Agronsky, December 3, 1968).

Justice Black also held similarly surprising views in the area of economics. He was, says his son, a strong critic of big business and special interest groups: Black “assumed . . . that somewhere along the line, fraud was involved whenever money went from the government to private industry in the form of subsidies or contracts or whenever money came into corporations from the public in a stock or bond sale.”<sup>9</sup> This economic sentiment no doubt influenced Justice Black in his staunch support of stiff antitrust measures.<sup>10</sup> Occasionally, *My Father* suggests that Black was something of an economic radical. “There is just no reason why a production worker in a factory should get five thousand dollars a year when the president of the firm gets five hundred thousand dollars,” he would tell Hugo, Jr.<sup>11</sup> Sounding like an angered Marxist—which he never was—the Justice once retorted to young Hugo’s defense of big business: “The motto of the businessman is, Do unto others that ye shall not be undone yourself.”<sup>12</sup> Hugo Black’s populist economic spirit as portrayed in *My Father* is representative of some of the fundamental tenets of his political and constitutional philosophy.

Consistent with his economic views, Hugo Black believed that government should never be the preserve of the few<sup>13</sup> and should always have effective limits placed on its powers: “People have never proved themselves worthy of unlimited control over others . . . . No special group of men has ever had that kind of power without doing wrong to the people subject to it.”<sup>14</sup> It is not surprising, therefore, that his Jeffersonian spirit caused Black to distrust Richard Nixon: “That fella knows nothing about real law and order. He only knows about the kind of law and order it takes to protect and enlarge the property of special privilege.”<sup>15</sup>

Despite his views about the dangers of corrupt or unchecked government, Black did not subscribe to any theory of civil disobedience; rather, he felt that if there were bad laws, the people should simply elect “good men” to rewrite the laws.<sup>16</sup> As indicated in his opinions in *Adderley v. Florida*<sup>17</sup> and *Brown v. Louisiana*,<sup>18</sup> the Justice believed that civil disobedience was

9. MY FATHER 86. Compare Justice Black’s majority opinion in *United States v. Bethlehem Steel Corp.*, 315 U.S. 289 (1942) (exorbitant wartime corporate profits upheld).

10. See Kirkpatrick, *Justice Black and Antitrust*, 14 U.C.L.A.L. Rev. 475 (1967).

11. MY FATHER 146. Of course, Justice Black’s own earnings are not necessarily the best exemplar of this philosophy; in 1925 his income reached nearly \$80,000 annually. *Id.* 45.

12. *Id.* 144. See Durr, *Hugo L. Black: A Personal Appraisal*, 6 GA. L. REV. 1, 8 (1971).

13. See MY FATHER 141.

14. *Id.* 140-41.

15. *Id.* 244-45.

16. *Id.* 155.

17. 385 U.S. 39 (1966) (upholding trespass conviction of students demonstrating on the premises of a jail).

18. 383 U.S. 131, 151 (1966) (Black, J., dissenting) (majority overturning conviction for breach of the peace stemming from silent protest of library’s segregation policy).

but an invitation to anarchy. Society, he argued, depends upon people "automatically" obeying the law.<sup>19</sup> Neither his Jeffersonian spirit nor his absolutist view of the first amendment altered this belief. Black, however, was unwilling to denounce the wisdom of the Declaration of Independence, and he therefore distinguished civil disobedience from the right of the people to rebel against an oppressive government whenever it becomes destructive of the very ends which it was instituted to secure.<sup>20</sup> But even if an old regime were overthrown, Black would probably insist that steps be taken to institute a new government. That much, and nothing more, he might have argued, was what the Founders intended.

*My Father* portrays Hugo Black as a man of simple virtue. He was not a religious man in any conventional sense; the Socratic moral virtues better suited him. During the course of explaining a religious lesson to his son one evening, he said: "[T]he central core of all religions [is expressed in the maxim], 'Do unto others as you would have them do unto you.'" <sup>21</sup> That maxim was as much his religious creed as it was his political one. Not surprisingly, he saw the Bible not as a "profession of faith but, rather, [as] a book that had more lessons to give for a constructive life than any other work."<sup>22</sup> "Ethical conduct, his real religion, was of paramount importance to him."<sup>23</sup> Moreover, religion was an "intensely personal thing" for Black and was the product of sincere belief rather than compulsion. In the wake of his majority opinion in *Engel v. Vitale*,<sup>24</sup> striking down the mandatory recitation of an official state prayer in public schools, the Justice is reported as having said to his son: "Most of these people who are complaining, Son, are pure hypocrites who never pray anywhere but in public for the credit of it."<sup>25</sup> As *My Father* clearly demonstrates, the key word in Hugo Black's profession of faith was the word "virtue."

It is unfortunate that *My Father* so superficially attempts to come to grips with some aspects of the darker side of Hugo Black's life. For example, within a single paragraph the author attempts to offer both an explanation and apology for his father's conduct in the 1921 Edwin R. Stephenson trial. In that case counselor Hugo Black won an acquittal for his client, Edwin R. Stephenson, who was charged with murdering Father James F. Coyle allegedly because the latter had been the officiate at the wedding of Stephenson's daughter to Pedro Gussman, a dark, curly-haired,

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19. See MY FATHER 154-55.

20. See *id*; cf. *In re Anastaplo*, 366 U.S. 82, 97 (1962) (Black, J., dissenting) (majority rejected bar applicant's defense of the right of revolution as guaranteed by the Declaration of Independence). See also G. ANASTAPLO, THE CONSTITUTIONALIST 384-89 (1971).

21. MY FATHER 174.

22. *Id.* 173.

23. *Id.* 175.

24. 370 U.S. 421 (1962).

25. MY FATHER 176.

Puerto Rican Catholic.<sup>26</sup> The racially bigoted tone of the entire trial was enhanced when attorney Black had the courtroom shades drawn in order to emphasize—replete with comments—Gussman's dark skin to the jury. Contrary to what the author maintains, the record does *not* seem to show that Stephenson was in fact innocent. Failing on that score and by way of apology, the author more honestly notes, "he was not beyond exploiting an emotional feeling based on race if that helped his client."<sup>27</sup>

Another sore spot in Hugo Black's life was his involvement with the Ku Klux Klan. Much has been written on the subject,<sup>28</sup> upon which *My Father* casts little new light. Less than three pages are devoted to the Klan scandal, wherein the author asserts: "I think anyone can see how a young man in his particular circumstances at that particular time would be tempted to become a member: He needed it to be what he was—the best trial lawyer in the South."<sup>29</sup> Here the son but reaffirms what the father had explained late in his life: the entire Klan affiliation centered around Hugo Black's lawyerly ambitions.<sup>30</sup> On a more positive note, the son concludes: "I am certain that he never participated in or agreed with any of the Klan's violent, lawless methods of promoting their beliefs, and that the thought of even his minimal involvement must have caused him some pangs of conscience."<sup>31</sup> These statements, like countless others, while they may help to exonerate Black, do little to explain the full measure of his pre-Court conduct and sentiments—Black himself was very cautious in dealing with the matter and remained relatively reticent about it. Somewhere in the gulf between his 1925 Klan resignation letter which was signed in the cryptic "Yours I[n] T[he] S[acred] U[n]failing] B[ound]"<sup>32</sup> and his courageous opinions in cases like *Chambers v. Florida*<sup>33</sup> lies the answer.

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26. For two worthwhile accounts of this case see G. DUNNE, *supra* note 2, at 103-04, and V. HAMILTON, *supra* note 2, at 85-93.

27. MY FATHER 52.

28. See, e.g., G. DUNNE, *supra* note 2, at 71-75, 105-06, 109-24; V. HAMILTON, *supra* note 2, at 260-300; Berman, *The Persistent Race Issue*, in HUGO BLACK AND THE SUPREME COURT 75, 76-83 (S. Strickland ed. 1967); Hamilton, *Hugo Black and the K.K.K.*, 19 AMER. HERITAGE 60 (1968); Leuchtenburg, *A Klansman Joins the Court: The Appointment of Hugo L. Black*, 41 U. CHI. L. REV. 1 (1973).

29. MY FATHER 104.

30. In a 1967 interview with the *New York Times*, the Justice explained his Klan affiliation as follows: "You want to know the main reason I joined the Klan? I was trying a lot of cases against corporations, jury cases, and I found out that all the corporation lawyers were in the Klan. A lot of jurors were too, so I figured I'd better even-up." N.Y. Times, Sept. 26, 1971, at 76, cols. 5-6. Compare Lerner, Book Review, 173 NEW REPUBLIC 25 (Oct. 18, 1975); Lerner, *Hugo Black—A Personal History*, 145 NATION 367 (Oct. 8, 1937) (Mr. Lerner maintains that Black's reasons were political rather than courtroom related).

31. MY FATHER 104.

32. G. DUNNE, *supra* note 2, at 117.

33. 309 U.S. 227 (1940) (overturning a murder conviction based on confession obtained under racially discriminatory circumstances).

*My Father* also devotes a chapter to Hugo Black's less than admirable traditionalistic views regarding the role of women in life. The book points out that Hugo Black was anything but a "woman's libber, and his feelings on this subject were very intense."<sup>34</sup> Moreover, "[a]ccording to him, scholarship should never play too big of a role in a woman's life."<sup>35</sup> He apparently regarded professional or outgoing women as masculine in a way that made him feel uneasy.<sup>36</sup> Maybe these sentiments partially explain his decision to join the majority holding in *Goesaert v. Cleary*,<sup>37</sup> wherein a double standard for men and women was held not violative of the fourteenth amendment. In as much as the Justice made an honest and concerted effort to subordinate his personal "predilections" to broader legal principles, it is difficult to gauge the influence that his sentiments about women had on his judicial behavior.

In contrast to the author's willingness to discuss other controversial issues, *My Father* makes no mention of Mr. Justice Black's opinion in *Korematsu v. United States*.<sup>38</sup> This omission seems quite significant given the Justice's reaffirmation of *Korematsu* a few years prior to his death.<sup>39</sup> In the light of all else the son has told, it is certainly odd that this important issue should go unmentioned.

Hugo Black's 1937 appointment to the Supreme Court was not well received by many liberals and conservatives alike. Some, like Albert Jay Nock, writing for the *American Mercury*, believed that Black's appointment was "unconscionable" and even urged that he was "legally ineligible" for the position.<sup>40</sup> By contrast, when his career had nearly run its full course, even his critics admitted with confidence that he was "without doubt a figure of the first importance in the history of the Court."<sup>41</sup> *My Father*, while it offers an account that is likely to satisfy the intellectual curiosity of neither the critic nor the admirer, does, nonetheless, present a capsulized recital of Justice Black's years on the Court along with a basic

34. MY FATHER 128. Additionally, the author notes that Black "was even less of a gay liberationist." *Id.*

35. *Id.* 124. As for a woman's life role, "he believed that a real woman cultivated an appearance and personal ways calculated to attract and please men and serve as the hub of the family." *Id.* 123.

36. *Id.* 123.

37. 335 U.S. 464 (1948). It should be noted, however, that the *Goesaert* holding was probably consistent with Justice Black's understanding of the fourteenth amendment's equal protection clause. See Yarbrough, *Justice Black and Equal Protection*, *supra* note 2.

38. 323 U.S. 214 (1944) (upholding exercise of war powers to exclude all persons of Japanese ancestry from designated West Coast areas); see G. DUNNE, *supra* note 2, at 436.

39. See N.Y. Times, Sept. 26, 1971, at 76, col. 8.

40. Nock, *The State of the Union*, 42 AMER. MERCURY 229, 231, 233 (Oct. 1937). *But see* Rodell, *Justice Hugo Black*, 49 AMER. MERCURY 135, 143 (Aug. 1944) ("He has the sure touch of greatness in him").

41. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 85 (1962).

statement of the major tenets of his constitutional jurisprudence. Additionally, the biography accents the spirit of the Justice himself by disclosing a few of the personal highlights involving Black's relations with other members of the Court.

Painting with a broad brush, the author sketches out a philosophic profile of Mr. Justice Black's jurisprudence. It is noted that the Justice believed in "a living law based on the Constitution, a law that would possess elements of permanency."<sup>42</sup> Reminiscent of Black's dissent in *Adamson v. California*<sup>43</sup> are the assertions that "Hugo detested phrases such as 'natural law,' 'shock the judicial conscience' and 'balancing,'" <sup>44</sup> and that he believed that the authors of the fourteenth amendment intended that it incorporate the Bill of Rights.<sup>45</sup> Further, the first amendment absolutism of the Justice's 1961 dissent in *Konigsberg v. State Bar*<sup>46</sup> is linked to his belief that "First Amendment protections [are] *the* key protections for our democratic republic."<sup>47</sup>

The late Professor Alexander Bickel, long time philosophical supporter of Felix Frankfurter, has stated that Hugo Black viewed the Constitution as "a storehouse of principles."<sup>48</sup> Similarly, *My Father* credits Justice Black with saying, "This Court's got to have some enduring principles."<sup>49</sup> Black, like Frankfurter, was a strong advocate of judicial restraint. But for Justice Frankfurter that restraint was the product of a caution mandated by history and the changing circumstances of the times. For Justice Black, by comparison, such restraint flowed from the *written* Constitution itself whose only fluidity derived from the article V amendment process.<sup>50</sup> Their respective attempts to foster judicial restraint pitted the natural law philosophy against that of legal positivism.<sup>51</sup> These philosophical differences in turn buttressed

42. MY FATHER 182.

43. 332 U.S. 46, 68 (1947) (Black, J., dissenting) (majority holds that privilege against self-incrimination is not inherent in right to fair trial and therefore is not applicable to the states under the due process clause of the fourteenth amendment).

44. MY FATHER 183.

45. *Id.* 175.

46. 366 U.S. 36, 56 (1961) (Black, J., dissenting).

47. MY FATHER 186 (emphasis in original).

48. A. BICKEL, *THE MORALITY OF CONSENT* 8 (1975).

49. MY FATHER 243.

50. See *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (Black, J., dissenting); H. BLACK, *A CONSTITUTIONAL FAITH* 11, 18, 21 (1969). *But cf.* Reich, *Foreword: Mr. Justice Black As One Who Saw the Future*, 9 Sw. U.L. REV. 845 (1977); Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 735-36 (1963) (Mr. Reich, former law clerk of Black's, maintains that the Justice's legal philosophy was more dynamic and less static than Black urged).

51. A convincing argument has been advanced by Professor Yarbrough that Justice Black agreed with the central precepts of "legal positivism" (even though the Justice disclaimed any knowledge of the phrase's meaning). Yarbrough, *Mr. Justice Black and Legal Positivism*, 57 VA. L. REV. 375, 386 n.63 (1971). Notwithstanding Professor Yarbrough's fine analysis, one

the alleged personal differences between the two jurists. By the time Professor Wallace Mendelson's book<sup>52</sup> on the two Justices was published in 1961, the popular impression was that the pair were bitter enemies in all respects.

The popular impression took on added credibility with the posthumous publication of the Frankfurter diaries.<sup>53</sup> *My Father* indicates that Justice Black knew of Justice Frankfurter's "secret" entries and in response to his son's question as to what he was going to do to protect himself, replied:

Nothing, Son. Felix just gets mad when somebody stands in his way. The stuff is probably like a bunch of letters a fella writes to blow off steam but never mails. If it's more, it will backfire on Felix if he continues and preserves it for history. Making secret memoranda about court business for history reflects a lot more about the character of the author than it does information about the subjects. Felix is both a very smart man and a very good man. He will probably destroy the stuff before he dies.<sup>54</sup>

The Frankfurter diaries, however, were not destroyed and in them can be found some rather backbiting remarks directed against Hugo Black.<sup>55</sup> As for Justice Black's personal papers, as soon as he had entered Bethesda Naval Hospital in the summer of 1971 he requested of his son that all his papers be destroyed.<sup>56</sup> "According to him, publishing the notes of conversations between Justices inhibited the free exchange of ideas . . . . He also felt that reports by one Justice of another's conduct in the heat of a difference might unfairly and inaccurately reflect history."<sup>57</sup> One can only speculate,

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may reasonably question such an assertion given the Justice's profound respect for the philosophies of such thinkers as Plato, Cicero, Plutarch and Thomas Jefferson. Justice Black may have adopted "positivist" means in order to secure "natural law" ends. See, e.g., *In re Anastaplo*, 366 U.S. 82, 97 (1961) (Black, J., dissenting). If, however, he was a "legal positivist," he was so only to the extent that he believed there existed a "higher law" which the Founders incorporated into the American Constitution. See Frank, *Hugo L. Black: Free Speech and the Declaration of Independence*, 1977 U. ILL. L.F. 577.

52. W. MENDELSON, *JUSTICES BLACK AND FRANKFURTER, CONFLICT ON THE COURT* (1961). In a 1967 letter to his friend and former law clerk, Jerome A. Cooper, Justice Black says of the Mendelson study: "Everything he has yet written about Felix and me has indicated that it is his desire to carry on a nonexistent feud between us." *LETTERS OF MR. JUSTICE HUGO L. BLACK TO JEROME A. COOPER* (third letter dated Sept. 20, 1967) (1973).

53. *FROM THE DIARIES OF FELIX FRANKFURTER* (J. Lash ed. 1975).

54. *MY FATHER* 234-35.

55. See, e.g., *FROM THE DIARIES OF FELIX FRANKFURTER*, *supra* note 53, at 174-76, 182, 254. Regarding the Frankfurter notes, a 1973 newspaper article reported: "A number of valuable personal papers are missing from the Felix Frankfurter Collection at the Library of Congress—stolen, apparently, by a scholar who had been using them." *N.Y. Times*, Sept. 15, 1973, at 5, col. 4. It is believed that several of the stolen papers were notes recorded by Justice Frankfurter concerning Justice Black.

56. *MY FATHER* 250, 252.

57. *Id.* 250-51. For an interesting examination of this general topic, see Ulmer, *Bricolage and Assorted Thoughts on Working in the Papers of Supreme Court Justices*, 35 *J. POLITICS* 286 (1973).

however, as to whether Justice Black was being magnanimous toward Justice Frankfurter in not publishing his side of the story, or whether he had other reasons for destroying his personal papers.

Another example of differences between Justice Black and other justices erupting into public controversy involved the ongoing and heated clashes between Justices Black and Jackson.<sup>58</sup> However, the kind of personal strain which existed between Justices Black and Frankfurter apparently did not result from the set of circumstances which gave rise to the "Great Feud" between Justices Jackson and Black.<sup>59</sup> Following the heated controversy surrounding the "portal to portal" cases,<sup>60</sup> and after Jackson had returned from service at the Nuremberg trials,<sup>61</sup> a rumor had been circulated that Justice Black had told President Truman that he would resign if Justice Jackson were nominated to fill the seat vacated by then deceased Chief Justice Stone.<sup>62</sup> Responding to this rumor, the author states: "It was a plain lie. Daddy had said no such thing. We never knew who had been responsible for the misinformation that was passed to Justice Jackson. It is reported that Justice Frankfurter had told that it was Hugo who had made this threat."<sup>63</sup> Rather, it is suggested that Black had an innocent role in the Chief Justice controversy and that Jackson and Black ended their lives with mutual admiration for each other.<sup>64</sup>

Not surprisingly, the chapter devoted to Justice Black's acquaintance with Justice William O. Douglas is quite amicable in tone. Of his companions on the Court we are told that Black "had a special kinship with Justices Douglas, Frank Murphy, Wiley Rutledge, Earl Warren, William Brennan, Arthur Goldberg and Thurgood Marshall, Justices who believed that the underprivileged should be protected."<sup>65</sup> Most of them, he is reported to have said, "are usually going to do the right thing. Sometimes they're too gullible, but they always mean well. They're kind of like Marcus Aurelius.

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58. MY FATHER 189-91; E. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 235-77 (1958).

59. MY FATHER 190-91. A more exhaustive study of this matter is offered in G. DUNNE, *supra* note 2, at 233-49; J. FRANK, MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS 123-31 (1948); and E. GERHART, *supra* note 58, at 245-77.

60. MY FATHER 190-91; *see* *Jewell Ridge Coal Corp. v. UMW*, 325 U.S. 161, *reh. denied*, 325 U.S. 897 (1945) (holding that section 7 of the Fair Labor Standards Act requires that miners be compensated for time spent traveling underground). Besides the fact that Jackson and Black vehemently disagreed about the proper result, the controversy centered on a letter sent by Jackson to the press in which he implied that Black should have recused himself because the miners were represented by Black's former law partner. *See* J. Frank, *supra* note 59, at 125-31.

61. *See* E. GERHART, *supra* note 58, at 256-59.

62. *See id.* 258.

63. MY FATHER 191.

64. *Id.*

65. *Id.* 242-43.

While they're around, we'll generally get a just judgment. But," he added, "when they're gone and we get a McReynolds type, he's free to let go with his bad sense of right and wrong."<sup>66</sup> Justice Black's ties to the Warren Court and its philosophy were thus quite deep-rooted. Nevertheless, Black felt it imperative to hold his closest colleagues to that same constitutional restraint that he urged upon his adversaries.<sup>67</sup> True to that code, he retreated from the Warren majority, with no little trepidation, in such cases as *Shapiro v. Thompson*,<sup>68</sup> *Sniadach v. Family Finance Corporation*<sup>69</sup> and *Goldberg v. Kelly*.<sup>70</sup> By 1971, Justice Black found himself the lone dissenter in *Boddie v. Connecticut*.<sup>71</sup> Neither his compassion for the poor, nor his admiration for Justice Douglas altered his constitutional faith. Absent the direction of specific constitutional guarantees, the Court, he argued, was powerless to invoke its will over that of the legislature.<sup>72</sup>

Justice Harlan is reported to have said: "The biggest difference between your father on the one hand, and me and Justice Frankfurter on the other hand, is the basic assumption we make about judges. Your father believes that you have to keep judges tethered—you can't trust their consciences loose without some kind of bridle."<sup>73</sup> When it came to their constitutional jurisprudence, the conceptual gulf between these distant cousins was immense. As in the case of Frankfurter—whose thought set the pace for Harlan—debate over the most desirable application of the first and fourteenth amendments never ceased during the two Justices' terms on the Court. Referring to the due process clause of the fourteenth amendment, *My Father* reports Justice Black admonishing Justice Harlan, "The way you interpret that thing, John, . . . it's nothing in the world but a shoot-the-works clause."<sup>74</sup> Harlan's "fundamental fairness" approach led to inconsistent results and divided the Justices on whether to impose certain restraints on the states.<sup>75</sup> Much of this philosophical tension between Justices

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66. *Id.* 243.

67. *Id.* 243-44.

68. 394 U.S. 618 (1969) (striking down one-year residency requirement for receipt of welfare benefits). Though Justice Black did not author a separate dissent, he did concur in Chief Justice Warren's dissent.

69. 395 U.S. 337 (1969) (prejudgment garnishment procedure which affords no notice or prior hearing to debtor violates due process).

70. 397 U.S. 254 (1970) (due process requires that evidentiary hearing precede termination of welfare benefits).

71. 401 U.S. 371 (1971) (states may not deny access to divorce courts because of an inability to pay court fees).

72. *But see* Haigh, *Defining Due Process of Law: The Case of Mr. Justice Hugo L. Black*, 17 S.D.L. REV. 1, 24-25, 40 (1972) (Justice Black "found some guarantees in due process which are not found in the Bill of Rights. Such guarantees seem to grow out of custom." *Id.* 25).

73. MY FATHER 258.

74. *Id.* 259.

75. *Compare, e.g., In re Winship*, 397 U.S. 358, 377 (1970) (Black, J., dissenting), *with* *Duncan v. Louisiana*, 391 U.S. 145, 171 (1968) (Harlan, J., dissenting). In *Winship*, Justice

Black and Harlan also manifested itself in the first amendment context<sup>76</sup> and to the very end the two Justices remained split on these constitutional issues.

Unlike the somewhat tense relationship between Frankfurter and Black, the Justice's personal rapport with Justice Harlan was very cordial and friendly. The fervor and nobility of Harlan's friendship are depicted in *My Father's* account of the latter's decision to postpone his retirement in order to avoid detracting any attention that would otherwise accompany Justice Black's retirement.<sup>77</sup> This book portrays the relationship between the two Justices as an exemplary model of true gentlemanship, despite their philosophical differences.

Although *My Father* provides some new insights concerning Hugo Black, one of the book's shortcomings is that it tends to reinforce many common misconceptions and simplistic beliefs about the man and his thought. In addition, the strained tenor of several of the author's comments concerning his father weaken the overall credibility of the book. In short, future biographers and students of Justice Black are cautioned to proceed with care in drawing certain conclusions from *My Father*. Notwithstanding such a caveat, *My Father* can prove to be a valuable resource for those who can integrate some of the information therein contained with other more primary and reliable sources.

Perhaps more than anything else, *My Father* reaffirms the greatness of Hugo LaFayette Black and his thought. The continuing public interest in Mr. Justice Black bears testimony to the value of his legacy. In that respect, *My Father* affords us a sketch for a more exacting, and hence more elevating, future portrait.

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Harlan argued in his concurrence that fundamental fairness requires that a charge made in a state juvenile delinquency proceeding be proven beyond a reasonable doubt. However, in *Duncan*, Harlan disagreed with the majority's holding that the fourteenth amendment guarantees a right to a jury trial in any state criminal case which, if tried in a federal court, would require a jury trial.

76. See, e.g., *Baird v. State Bar*, 401 U.S. 1, 34 (1971) (Harlan, J., dissenting); *In re Anastaplo*, 366 U.S. 82, 97 (1961) (Black, J., dissenting); *Konigsberg v. State Bar*, 366 U.S. 36, 56 (1961) (Black, J., dissenting). For a worthwhile account of the differences between Justices Black and Harlan in the bar admission cases, see Dilliard, *Mr. Justice Black and In re Anastaplo*, 9 Sw. U.L. REV. 953 (1977); Kalven & Steffen, *The Bar Admission Cases: An Unfinished Debate Between Justice Harlan and Justice Black*, 21 LAW IN TRANSITION 155 (1961).

77. See MY FATHER 260-61. By the same token, Justice Black could say (probably of Justice Harlan) on the eve of his 85th birthday in 1971, " 'some of those whose philosophies are the most opposed to each other are probably as good friends as there are on the Court.' " St. Louis Dispatch, Feb. 26, 1971, at 4, col. 1.

