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THE MEMOIRS OF EARL WARREN. By Earl Warren. Garden City, New York: Doubleday and Co. 1977. Pp. 394. $12.95.

Earl Warren: A Partial Dissent

L.A. POWE, JR. †

Earl Warren was a remarkable man. His political career lasted more than four decades and saw him moving from district attorney to state attorney general to governor to Chief Justice of the United States. It demonstrated not only continuous advancement, but a genuine capacity for growth. He was good in each job, better in the next. The Court over which he presided for sixteen years quickly became known as the Warren Court, and he symbolized its values well: a deep and unwavering commitment to bringing forth and maintaining an open representative democracy and, more fundamentally, to guaranteeing the judicial implementation of the four words chiseled above the entrance of the Supreme Court Building—"Equal Justice Under Law."

By the time Warren retired there was little rational dissent from the proposition that he was one of the greatest individuals ever to grace the Supreme Court.[1] That was eight years ago. Normally some re-evaluation of any significant figure takes place within the decade after he leaves public life. Since there was little room for Earl Warren to advance, one would have expected some questioning of the dimensions of his stature and accomplishments. Yet, with large thanks to his mean-spirited successor, Warren Burger, and the restocked Court, Earl Warren's reputation is even better today than it was when he retired.[2] This increase in respect is nothing short of unbelievable; but that is the type of man Earl Warren was.

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† Professor of Law, University of Texas; B.A. 1965, Yale University; J.D. 1968, University of Washington.

1. *See* Mersky & Blaustein, *Rating Supreme Court Justices*, 58 A.B.A.J. 1183, 1184 (1972).

2. A forthcoming study that surveyed law professors, historians and political scientists found Warren ranked as the fourth greatest Supreme Court Justice. He was also ranked fourth by the respondents in each of the separate disciplines. Fleming & Owens, The Great, Near-Great, and Not-So-Great: Rankings of the U.S. Supreme Court Justices (unpublished) (copy on file with author). I wish to thank the authors for allowing me to use their results prior to publication.

Now, three years after his death, *The Memoirs of Earl Warren* has been published.[3] The reader begins it with high expectations and a long list of questions. Was the typical perception of Earl Warren as hard working, honest, genial, uncomplicated, somewhat bland, devoted to his family and dedicated to the values that made America great an accurate one?[4] According to this view, Warren was the perfect embodiment of the concept of justice, going so far as to look exactly like a Chief Justice should look.[5] If this portrait is not correct, what additional dimensions must be added, which of these traits is misplaced? How did Warren survive so well politically? How did he face difficult decisions? What did he perceive to be the function of the Supreme Court?

Answers to these questions must wait for a critical biography of Warren, for they are not to be found in his memoirs. Indeed the memoirs are as disappointing a document as it would have been possible for Warren to produce. They lack balance and fail to face the difficult questions that faced Warren the politician. The memoirs add virtually no information to that which is available in other sources.[6] They lack any insight into Warren's public acts. Furthermore, the memoirs are surprisingly defensive and self-serving. Other men may have committed errors, but it was hard for Earl Warren to think of—or at least admit to—any of his own. The man whose place in history seems so secure wrote a ponderous, extended apology. These memoirs do their author no justice.

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The memoirs give extensive consideration to Warren's years as district attorney and attorney general. In fact the book is approaching its half-way point before his election as governor.[7] Why? Perhaps because these were good years for Warren and he remembers them as such. Upholding law and driving out corruption present inescapable issues of right and wrong. Warren's actions in these positions were clearly right both at the time and at the bar of history. Furthermore, most of the participants in these events are probably dead now. They are easier to deal with than those involved with Warren later in his career who are either alive or well remembered. Finally, Warren may have emphasized his first position because the latter years of

3. E. WARREN, THE MEMOIRS OF EARL WARREN (1977) [hereinafter cited as MEMOIRS].
4. This perception is well presented in J. WEAVER, WARREN (1967).
5. *See generally id.* at 7, 37, 347.
6. Weaver's biography is the most notable and informative of the sources. J. WEAVER, *supra* note 4.
7. MEMOIRS, *supra* note 3, at 165.

his career were contentious times. Warren desired to fight few personal battles in his memoirs. He had always preferred not to hurt people.[8] Thus, unlike most memoirs, Warren's are not especially anecdotal.

The book's longest chapter is entitled "Problems to Overcome,"[9] and that title sets the tone for Warren's view of his governorship. Although Warren devoted almost thirty percent of the memoirs to his eleven years in this position, these pages present little of interest from either a state or national perspective. His emphasis as governor was on two interrelated objectives. There would be open government with a nonpartisan approach to public service and it would bring with it a search for the best men (the term is used accurately),[10] regardless of party affiliation, and a desire to bring the necessary services to a state that was almost doubling in population.[11] With California's five million new residents[12] came an economic boom beyond anyone's hopes, and Warren benefited from the fact that governing is always easier during prosperity. Still, there is little doubt that any state would have felt blessed with Earl Warren as governor.

Nevertheless, it is as a Chief Justice that Warren will be remembered. First and foremost, he brought his commitment to racial equality to the Court.[13] Beyond that he reversed the Court's direction—as well as a stance he took while governor—on malapportioned legislatures.[14] During his tenure sharp prosecutorial practices, some not unknown to District Attorney Warren, were invalidated and the hysteria of McCarthyism eventually met a judicial check. The latter two areas, however, receive scant treatment in the memoirs.[15] Instead, Warren concentrates on the first two, contending that

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8. The editors quote Justice Douglas: "Even in private conversations he never leveled off at an antagonist or denounced him." *Id.* prologue at xii. There are some exceptions to Warren's general reluctance to lash out at others. *See* note 15 *infra*.

9. MEMOIRS, *supra* note 3, at 167-236.

10. In a 14 page index with two columns of small print the names of only 32 women appear. Of these, 8 were related to Warren, 15 were simply wives, mothers or daughters, and 3 were secretaries. The remaining 6 were Helen Gahagan Douglas, Queen Mother Elizabeth, Queen Elizabeth II, Constance Baker Motley, Bessie Ferguson (a victim in a murder case) and Mrs. Agnes Meyer, a person who hosted the Warrens and Adlai Stevenson on "some wonderful summer cruises . . . through the Greek islands and in other parts of the Mediterranean." *Id.* at 259.

11. *Id.* at 116-214.

12. *Id.* at 207.

13. *See* text accompanying notes 17-24 *infra*.

14. *See* text accompanying notes 39-47 *infra*.

15. The criminal procedure cases were quite properly set in the context of equal justice for the poor. MEMOIRS, *supra* note 3, at 316-17.

> [Miranda v. Arizona, 384 U.S. 436 (1966),] was of no assistance to hardened underworld types because they already know what their rights are and demand them. And so it is with all sophisticated criminals and affluent prisoners who had ready access to their lawyers. However, because so many people who are arrested are poor and illiterate, short-cut methods and often cruelties are perpetrated to obtain convictions.

they were the Court's most significant accomplishments. [16]

The discussion of the race cases is more extensive than the other material about the Court years.[17] Most of it, of necessity, deals with *Brown v. Board of Education*[18] and its aftermath. Yet, if one wants to learn about the Court's deliberations leading to the *Brown* decision, one should read some other book. Warren portrays the process as relatively easy. The Court experienced no "dissension," but rather a testing of arguments.[19] Unnamed Justices occasionally acted as "devil's advocates,"[20] helping the Court to move toward a unanimous position that could secure "enthusiastic" adherence.[21] With a modesty uncharacteristic of the memoirs as a whole, Warren downplays his own role. He does so, however, without adding to the roles of the others.[22] The credibility of such a picture is not great, because this was a momentous case in which reargument was necessary. Moreover, after the presentation of the Court's negotiations in Richard Kluger's *Simple Justice*,[23] this depiction is best ignored. Warren made a conscious choice not to take credit when it was richly deserved; unfortunately, by so doing he obscured the Court's decisionmaking process.

The *Brown* opinions were carefully negotiated compromises and as such contain many ambiguities. Unfortunately, Warren's memoirs do not clarify the legal or historical questions raised by *Brown* any further than his two opinions did.[24]

Id. Although Warren spends considerable space on McCarthyism and the Court's defense of the first amendment, *see, e.g., id.* at 318-19, one really learns little from it. In part the discussion demonstrates what many conservatives found offensive about the Warren Court. Another part is aimed at settling old scores. His memoirs are the only time Warren takes on the John Birch Society—in many ways too easy a mark. *Id.* at 303-06. Eisenhower also takes the brunt of a story. When he and Warren were aboard Air Force One in the 1960's heading to Winston Churchill's funeral, Eisenhower singled out the Communist cases—none of which he had read—as the area in which Brennan and Warren had disappointed him. Warren rather happily tells of narrowing Eisenhower's objection to a single case—Yates v. United States, 354 U.S. 298 (1957)—and then noting "with some satisfaction" that it was written by John Marshall Harlan, an Eisenhower appointee of whom the general thought well. MEMOIRS, *supra* at 5-6.

The memoirs also even a score with the American Bar Association. Warren states in detail the circumstances leading up to his resignation from the organization and strongly contends that he was sandbagged into attending an ABA meeting in London at which intense criticism of the Court surfaced. *Id.* at 321-31.

16. MEMOIRS, *supra* note 3, at 281-303, 306-10.

17. *Id.* at 281-303.

18. 347 U.S. 483 (1954).

19. MEMOIRS, *supra* note 3, at 2.

20. *Id.*

21. *Id.* at 4.

22. *Id.* at 2-4.

23. R. KLUGER, SIMPLE JUSTICE 678-99 (1976).

24. See the particularly arresting statement discussing Brown v. Board of Education, 349 U.S. 294 (1955) (implementation decision): "neither local law nor custom should be permitted to interfere with the establishment of an *integrated* school system . . . with 'all deliberate speed'—a phrase which has been much discussed by those who are of the opinion that

Momentous though *Brown* was, Warren always felt that the reapportionment cases were more significant. As one reads his memoirs this conclusion appears somewhat surprising because it conflicts with his views on the legislative process. Two years before he died Warren published a short primer on democratic government complete with exhortations and optimism,[25] but the reader of Warren's memoirs will see few similarities between the two books. Indeed, the reader of Warren's memoirs might well wonder about American democracy and especially about the most democratic of all branches of government, the legislature. Hugo Black's love for and faith in the legislative process is found nowhere in Earl Warren. Instead, one sees an attitude that varies from contempt for to distrust of the legislative process.[26]

The seeds of Warren's attitude developed early. Immediately after World War I, he says, he asked an old friend who had once been an assemblyman what he thought of Warren's job as clerk of the judiciary committee. Noting Warren's age the same way many adults note children's ages before telling them the "facts of life," the friend responded: "I guess it is all right. . . . You are probably old enough now to be disillusioned as to man-made law."[27] He was indeed old enough, and the disillusion would become strong. Warren follows the story by noting that he thought of "this advice or admonition, whichever was intended, hundreds of times as I observed the process of legislation, the tricks of the trade, the lobbying, and what seemed to be downright corruption by some."[28] Lobbyists and their ability to dominate the legislature were his primary concern.

> [Paid lobbyists] frequently operate in dark passageways, hotel rooms, and through entertainment of various kinds. Also, because their job is with legislators, they often try to convince them that the best way to get what they want is to disdain the governor and hold back his legislation until their bills are agreed to by him. Too often, the Legislature succumbs to such blandishments and clogs the machinery so that no important legislation is enacted until the closing hours of the term, and then only with the so-called "bugs" that creep into it unknown to the general public, or even to many of the legislators.[29]

Warren's complaint was thus two-fold. First, lobbyists dominate the legislature and second, legislators often do not know what they are doing.

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desegregation has not proceeded" swiftly enough. MEMOIRS, *supra* note 3, at 288 (emphasis added).

25. E. WARREN, A REPUBLIC, IF YOU CAN KEEP IT (1972).
26. *See* text accompanying notes 34-38 *infra*.
27. MEMOIRS, *supra* note 3, at 53.
28. *Id.*
29. *Id.* at 174.

Bills can be rushed through[30] or held back until the whole process is jammed with legislation;[31] in either case the underlying justifications for the legislation are unexplored. How different a process it was from that of either the executive or the judicial branches—especially from the judiciary, the branch in which "processes are more available to the public"[32] and dispassionate reflection "on the facts" leads to the final outcome.[33]

Warren's distaste for the legislature went beyond the theoretical. Warren, like all strong governors, was "often in trouble with the legislature."[34] As the legislators did not appreciate his wisdom sufficiently, he did not trust them. The legislature was hectic, uncontemplative and untrustworthy. Warren would not bargain with it[35] and he fought to keep his office separate from it.[36]

With Congress it was little different. Warren and the Court were constantly under attack for putting blacks into the schools, taking God out and coddling Communists and criminals. As he noted, "Many politicians made anti-Supreme Court sentiment a basis of their campaigns for election, and some with long careers in high office maintained their tenure by such an appeal."[37] The combination of political opposition to Warren—something he neither understood nor tolerated well—and lobbyist domination made the legislature a combination of two of Warren's strongest dislikes. It is no wonder that his two discussions of separation of powers emphasize the need to maintain the independence of his office.[38]

What is a wonder is that Warren consistently maintained that *Baker v. Carr*,[39] not *Brown v. Board of Education*, was his most significant decision. [40] It has frequently been noted that Warren's position on reapportionment was inconsistent with the one he took as Governor of California.[41] In the memoirs Warren dismisses this earlier stance as "frankly a matter of

30. *Id.* at 175.

31. [W]e were in the closing days of a regular session of our Legislature. As usual, much important legislation was floundering around in committees or conferences awaiting the rush in the closing days when vital changes can be made without drawing immediate public attention because of the confusion that attends adjournment.

Id. at 262.

32. *Id.* at 335.

33. *Id.* at 337.

34. *Id.* at 232.

35. *Id.* at 174. "When it comes to a trading game, the Legislature holds most of the cards, and with the aid of the lobbyists can use them devastatingly." *Id.* at 238.

36. *Id.* at 238.

37. *Id.* at 319.

38. *See id.* at 169-70, 341-42. "[T]he constitutional doctrine of separation of powers . . . was designed in large part to protect the independence of the judiciary . . . ." *Id.* at 341.

39. 369 U.S. 186 (1962).

40. MEMOIRS, *supra* note 3, at 306.

41. *Id.* at 309-10.

political expediency."[42] Given his views of the legislative process one would hardly have expected him to waste his political capital tinkering with the process of selecting legislators who would then yield to the various lobbyists. Why then strike out on such a course at the Court? Warren's explanation is straightforward enough. He cites the practical effects of malapportionment in Tennessee—Memphis was virtually disenfranchised and it was impossible to do away with minority rule without the minority's express consent.[43] He also cites some theoretical reasons for eliminating malapportionment, backing them up with Lincoln's Gettysburg Address[44] and a few less artful quotes from his own *Reynolds v. Sims*.[45] Finally, he notes that he was told by a Justice "from one of the more populous states" that he was informed by a lobbyist "that in order to stop any legislation disapproved by the lobbyist's clients, it was only necessary for him to control the votes of nine senators, and they could be from the least populous counties."[46] It is conceivable that Warren concluded, despite his lack of faith in the legislative process, that the easily influenced legislature he had known was not inevitable and that improvement might be possible. But improvement could be effected only by judicial implementation of the one type of change the legislatures themselves were least likely to implement.

In *Reynolds*, Warren wrote: "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."[47] Yet he believed just the opposite. *Reynolds* was the expression of his ideal for democracy. Maybe he felt that its implementation would reduce the ability of lobbyists to influence the legislative process. The memoirs do not make it clear, however, whether Warren thought the reapportionment cases had any real effects beyond simply changing patterns of representation. As a successful politician in a state noted for political fluidity he may well have assumed there would be such an effect; nothing in his makeup indicates that he would be willing to support a theoretical goal that had no practical consequences.

The biggest disappointment of the memoirs is that so much of significance in understanding the whole picture of Warren's career is omitted. Even some of the episodes included are virtually skimmed over.

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42. *Id.* at 310.
43. *Id.* at 307 (citing Baker v. Carr, 369 U.S. 186 (1962)).
44. *Id.* at 308.
45. 377 U.S. 533 (1964), *quoted in* MEMOIRS, *supra* note 3, at 308.
46. MEMOIRS, *supra* note 3, at 307. The possible justices would be Frankfurter (Massachusetts), although this seems incredibly unlikely, Brennan (New Jersey), Stewart (Ohio), Harlan (New York) and Clark (Texas). Assuming that the numerical reference was to a one-third margin of the state's senate, it does not fit the size of any of those states' senates at that time. The number given was close to one-third of the New Jersey Senate, however, and Brennan was the author of *Baker v. Carr*.
47. 377 U.S. at 562.

The two events of Warren's career as a state politician that probably bear the greatest relation to Warren's later career were the Japanese relocation[48] and the *S.S. Point Lobos* murder.[49] Both are mentioned for several pages. Yet neither account is satisfactory.

There is little doubt that Warren's stance on the Japanese relocation is the best remembered position he took as a state official. He, like President Roosevelt and Justices Black and Douglas (to mention those with the best liberal credentials), was on the wrong side of the most massive blight on civil liberties in American history. Of the four of them, only Warren admitted what everyone knows: they erred. In his memoirs he reiterates his regrets about the incident.[50] Given this position, which is commendable compared to that of other major figures involved, one might expect some discussion on the problems of responsibility during a crisis. Warren provides a watered-down version of this by stating that the incident demonstrates "the cruelty of war when fear, get-tough military psychology, propaganda, and racial antagonism combine with one's responsibility for public security to produce such acts."[51] This reads somewhat like a justification for his actions; that suspicion is confirmed both by what is present and what is absent in the account. Not once does Warren consider whether the tragic affair could have been avoided if any of the responsible leaders at either the local or national level had acted as leaders should. Furthermore, he tries to shift some of the blame to the Japanese-Americans themselves. Thus, he devotes equal space to his regret and to detailing the "faults" of the Japanese-Americans.[52] He notes that the younger ones[53] went to Japan for their educations and became "more Japanese by training, indoctrination, and ideology" than their parents.[54] He also notes that after the order thousands of Japanese-Americans renounced their loyalty to the United States.[55]

Although less well known than the Japanese relocation, the *S.S. Point Lobos* murder and its aftermath also shed light on Warren's subsequent actions. The case was his most famous prosecution. It concerned a murder

48. *See* MEMOIRS, *supra* note 3, at 148-49.
49. *See id.* at 113-17.
50. *Id.* at 148-49.
51. *Id.* Compare his 1943 statement: "If the Japs are released, no one will be able to tell a saboteur from any other Jap." 4 L. FRIEDMAN & F. ISRAEL, THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, THEIR LIVES AND MAJOR OPINIONS 2728 (1969).
52. MEMOIRS, *supra* note 3, at 148-49.
53. Warren never indicates how many younger Japanese-Americans fell into this category.
54. MEMOIRS, *supra* note 3, at 148.
55. *Id.* at 149.

that occurred when Harry Bridges' union had closed down the ports. Three defendants were union officials who allegedly hired the fourth defendant to beat the decedent "within an inch of his life."[56] All were convicted by a jury after a long trial.

Many people thought the defendants were innocent, despite the verdict. It is possible that some of the popular doubts had their genesis in the tactics of the prosecution. Warren's chief investigator broke into a hotel room, photographed a letter and then planted a microphone in the room to get better reception than his earlier attempt to eavesdrop with a stethoscope had achieved.[57] If these gross fourth amendment violations were not sufficient to raise doubts about the convictions' validity, there were also allegations that confessions were coerced both physically and psychologically.[58] Warren barely mentions these tactics and the controversy that surrounded them.[59]

Several years later Governor Culbert Olson pardoned the three union officials, believing that they had not been guilty. This was one reason Warren ran against Olson in the next gubernatorial election.[60] But, beyond noting Olson's pardon and its reason, Warren hardly discusses the criticism of his prosecution. Instead, he vigorously reprosecutes and again convicts the defendants in the memoirs.[61] Perhaps many people who sided with the labor movement in the labor-management controversy believed the defendants innocent for that reason; still, one would like to have heard Warren's explanation of the situation creating such popular doubts.

One of the *S.S. Point Lobos* prosecution's chief critics was liberal law professor Max Radin of Berkeley.[62] Several years later this brilliant teacher, fine scholar and advisor to governor Olson was nominated by Olson to serve on the state supreme court. His nomination met with a flurry of sharp criticism suggesting that his leftist leanings were too great.[63] Although past appointments to the state supreme court had been routinely approved by the Judicial Qualifications Commission,[64] not so with Radin. After a lengthy meeting of the three member commission in July 1940, attorney general and commission member Warren announced: "We have considered all the facts in connection with the nomination, including the report from the board of

56. J. WEAVER, *supra* note 4, at 85. A fifth defendant had fled the country. *Id.* at 84.
57. *Id.* at 85-86.
58. *Id.* at 87-89.
59. MEMOIRS, *supra* note 3, at 113-16.
60. *Id.* at 116.
61. *Id.* at 113-16.
62. J. WEAVER, *supra* note 4, at 74.
63. *Id.* at 71-73.
64. The Judicial Qualifications Commission consisted of California's Chief Justice, its senior Associate Justice and its attorney general. *Id.* at 71.

governors of the State Bar, and we have come to the conclusion that the nomination should not be confirmed."[65] One would like to know what factors led to the rejection of the nomination and how they related to Warren's views on freedom of expression, the standards of police and prosecutorial conduct and possibly even his strategy for political advancement. But Warren does not even mention Max Radin in his memoirs.

It is harder to take issue with Warren's omission of events that occurred during the Court years, for these might have been rectified had he lived longer. While the memoirs do take Warren through his retirement, they are basically incomplete after 1964.[66] He was able to discuss the effort of the Mitchell Justice Department to use an *ex parte* contact to overturn the decision in *Alderman v. United States*[67]—a case concerning a defendant's access to conversations illegally wiretapped by the government.[68] Yet no mention is made of Warren's meeting with John Mitchell just seven weeks later when Abe Fortas was being pressured to resign from the Court.[69] Indeed, the Fortas resignation is not mentioned at all, so there is no indication of the role Warren played in Fortas' decision.[70]

Warren's own retirement was equally interesting and receives as little treatment in the memoirs. His letter to President Johnson stated he would retire at Johnson's pleasure,[71] an expression Johnson quickly turned into "effective at such time as a successor is qualified."[72] This raised the intriguing constitutional question whether there was a vacancy that would allow the President to nominate and the Senate to confirm a new Chief Justice. It raised political questions as well. There would be little chance of candid answers to these questions even if Warren had lived longer because he was a private man, not given to explaining such controversial and inexplicable events. Nevertheless, an attempt at explanation would have been fascinating.

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65. *Id.* at 73.

66. MEMOIRS, *supra* note 3, at 373-77.

67. 394 U.S. 165 (1969).

68. MEMOIRS, *supra* note 3, at 337-42.

69. For a discussion of this meeting, see R. SHOGAN, A QUESTION OF JUDGMENT 248-49 (1972).

70. According to Shogan's account Warren took

> "a very strong position" that Fortas's arrangement with Wolfson "should not have happened." His feelings were intensified by the untimeliness of the disclosure—only a month preceding his retirement from the Court after sixteen years of service. He could not help but look upon the incident "as a blot on the image of the Warren Court."

Id. at 249.

71. Letter from Chief Justice Earl Warren to President Lyndon Johnson (June 13, 1968), *reproduced in* 9A R. MERSKY & M. JACOBSTEIN, THE SUPREME COURT OF THE UNITED STATES NOMINATIONS 1916-72, at 382 (1975).

72. Letter from President Lyndon Johnson to Chief Justice Earl Warren (June 26, 1968), *reproduced in* R. MERSKY & M. JACOBSTEIN, *supra* note 71, at 383.

Finally, the memoirs contain no discussion at all of Warren's philosophy of judging. His commitment to equality comes through easily, but there was more. He made the question, "But is it fair?" famous.[73] Implicit in this question was Warren's strong sense that fairness in procedure was essential in a free country. He fused his concern for equality, his demand for fairness and his own concept of decency into an operative philosophy. He made the Constitution represent the best of what he thought America stood for. His Court enforced a decency in police actions,[74] and, since the nation and states had a right "to maintain a decent society"[75] if they wished, actions directed toward this goal found a constitutional sanction. Decency is an elusive concept, but for Warren at least a decent society protected children from obscenity[76] and from situations in which they might be coerced into participating in religious activities.[77] With adults more leeway could be tolerated, but still society could legislate a family day of repose,[78] suppress flag burning[79] and crack down on commercial exploitation of sex[80] and gambling.[81] Warren's feelings on these subjects were *strongly* held.[82] His belief in a blend of morality and old fashioned patriotism as the basis of decent society was so strong that, absent serious government overreaching,[83] he was willing to participate in judicial vigilante justice against defendants who flagrantly violated *his* norms. [84] Again, it would have been useful if Warren

73. *See, e.g.*, Rodell, *It Is the Earl Warren Court*, N.Y. Times, Mar. 13, 1966, § 6 (Magazine), at 30.

74. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961).

75. Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting).

76. Ginsberg v. New York, 390 U.S. 629 (1968).

77. School Dist. v. Schempp, 374 U.S. 203 (1963) (Bible reading); Engel v. Vitale, 370 U.S. 421 (1962) (Regent's Prayer). Despite the Court's doctrinal disavowals of reliance on coercion, 374 U.S. at 223; 370 U.S. at 430, it seems that potential coercion was an obvious fact in the public school situation.

78. McGowan v. Maryland, 366 U.S 420 (1961).

79. Street v. New York, 394 U.S. 576, 605 (1969) (Warren, C.J., dissenting).

80. Ginzburg v. United States, 383 U.S. 463 (1966); Roth v. United States, 354 U.S. 476, 496 (1957) (Warren, C.J., concurring).

81. Marchetti v. United States, 390 U.S. 39, 77 (1968) (Warren, C.J., dissenting).

82. *Compare* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969), *with* Street v. New York, 394 U.S. 576 (1969); *compare* Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965), *with* Marchetti v. United States, 390 U.S. 39, 77 (1968) (Warren, C.J., dissenting); *compare* New York Times Co. v. Sullivan, 376 U.S. 254 (1964), *with* Roth v. United States, 354 U.S. 463, 494 (1957) (Warren, C.J., concurring); *compare* Cole v. Arkansas, 333 U.S. 196 (1948), *with* Ginzburg v. United States, 383 U.S. 463 (1966).

83. *See* Hoffa v. United States, 385 U.S. 293, 313 (1966) (Warren, C.J., dissenting).

84. Although Justice Brennan wrote the opinion affirming Ralph Ginzburg's conviction, Ginzburg v. United States, 383 U.S. 463 (1966), there seems little doubt that Warren was the driving force behind the creation of that ex post facto finding of guilt. In the case of David O'Brien, O'Brien v. United States, 391 U.S. 367 (1968), it is arguable that Warren's theory of the case was never applied to its facts, but this judicial technique is not sufficiently unusual to warrant singling out this exercise. The shocking aspect of *O'Brien* was that the Court's mandate reinstated the district court's conviction and did not remand the case to the court of appeals. *Id.* at 386. By so doing the Court stripped O'Brien of *any* appellate review of several non-frivolous

had discussed his philosophy of interpreting the Constitution. He was neither theorist nor scholar, but he obviously had views on the translation of intense beliefs into constitutional law. The memoirs, however, provide no enlightenment.

PIECING AND PLACING

Earl Warren was a very private man and his memoirs were unrevealing by choice. The image he intended to present was incomplete. In the process of its presentation, though, Warren brings forth a second, unappealing—and unintended—image: that of a man who was insecure, self-serving, unwilling to deal analytically with the tough decisions he had faced or with the living people who might fight his interpretations. There is so much self-centered discussion in the memoirs that his basic concern for people as individuals fails to appear. Although there were occasional Max Radin events in Warren's life,[85] they were not representative. One cannot read Weaver's biography[86] or the moving tributes to Warren in the *Harvard Law Review*[87] and fail to conclude that Warren loved people and identified with them. He translated this affection for people into an "ability to personalize and humanize a factual situation."[88] Thus, litigants were not abstractions demanding access to the federal courts or swarming hordes swelling the Court's in forma pauperis docket. Warren felt they were people with problems that should be solved fairly and justly by the courts. In this he lacked one quality Thomas Reed Powell ascribed to the legal mind: an ability to think of one of two inescapably interrelated things without thinking about the other.

Warren was no theoretician. He had no use for theories that ignored human beings. Doing nothing because some theory of federalism suggested inaction was the correct approach made no sense to him.[89] Great ideas that ignored both reality and people were not such great ideas. Warren said that,

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issues initially by-passed by the court of appeals in its disposition of the case. *See* O'Brien v. United States, 393 U.S. 900 (1968) (mem.) (petition for rehearing denied without opinion).

85. *See* text accompanying notes 62-65 *supra*. *See also* Kopkind, *Brennan v. Tigar*, 155 NEW REPUBLIC, Aug. 27, 1966, at 21 (suggesting Warren may have been involved in Justice Brennan's wholly unjustified firing of his liberal law clerk Michael Tigar before Tigar even began work).

86. J. WEAVER, *supra* note 4.

87. Black, *An Impression of the Late Chief Justice*, 88 HARV. L. REV. 7 (1974); Brennan, *Chief Justice Warren*, 88 HARV. L. REV. 1 (1974); Ely, *The Chief*, 88 HARV. L. REV. 11 (1974); Pollack, *The Legacy of Earl Warren*, 88 HARV. L. REV. 8 (1974).

88. Beytagh, *On Earl Warren's Retirement: A Reply to Professor Kurland*, 67 MICH. L. REV. 1477, 1483 (1969).

89. *See* Harrison v. NAACP, 360 U.S. 167, 179 (1960) (Warren, C.J., Douglas & Brennan, JJ., dissenting).

" 'No book or professor had a profound influence on me, not even in the law school. Companionship was the greatest thing I found at the University, and it still stands out in my mind today as more important than anything I learned in classes.' "[90] He wrote early in his term as Chief Justice, "Our system faces no theoretical dilemma but a single continuous problem: how to apply to everchanging conditions the neverchanging principles of freedom."[91] For him there would never be a theoretical dilemma because he would not let any theory prevent what he felt were wise actions. And he believed in action. As a governor it was vigorous executive action; as a Chief Justice the vigor moved over to the judiciary. Ted White captured this better than anyone: "The fact that initially he had no well-developed philosophy of judging was in his case of no consequence; he had instead a well-developed philosophy of governing."[92]

That Earl Warren had many great qualities, especially a concern for people and an ability to deal effectively and persuasively in small groups, seems undeniable. His pattern of growth, exhibited each time his responsibilities widened, seems unmatched in modern American history. And his contributions to the Court—marshalling the unanimity of *Brown* and writing the opinion, authoring *Reynolds, Miranda* and *Powell v. McCormack*,[93] providing leadership internally, and willingly taking the public abuse that was so often directed at the Court—are of a high order. But the order may not be high enough to justify the current view that he ranks at or near the top with the greatest Justices of all time. Indeed, it is not clear that he ranks with four of the Justices who sat on his Court: Black, Douglas, Frankfurter and Harlan.[94]

No list of the qualities constituting judicial greatness could satisfy everyone. In part, the Justices who have been classified as great were important to the Court both when they sat and after. They either wrote major opinions for the Court or, through separate opinions or force of intellect, pointed the Court to major new developments. They wrote about the fundamental issues facing American democracy, and the positions they took were important in defining approaches to the never ending problems of accommodating rights and liberties and powers. In many cases they added something extra to the Court. Often that something extra is why Chief Justices have fared better historically than Associate Justices. Finally, extraordinary

90. J. WEAVER, *supra* note 4, at 30.
91. *Id.* at 255.
92. G. WHITE, THE AMERICAN JUDICIAL TRADITION 337 (1976).
93. 395 U.S. 486 (1969). After considering implications of a presidential impeachment one wonders how sturdy *Powell*'s political questions analysis is.
94. To use alphabetical order only.

judicial craftsmanship has normally been exhibited by these Justices.[95] Using these criteria, one must strain to make a case for Warren's greatness. Beyond a handful of cases one does not think of Warren as the author of major opinions. And if his positions on fundamental issues are seen as contributing to his greatness, it should be noted that Douglas and Black had staked most of these positions out years earlier, and that Brennan took these positions as strongly as Warren.[96]

The case for Warren's greatness will not soon be made any better than it was made by Abe Fortas. The gist of Fortas' position was expressed in two marvelously conceived paragraphs:

> Objective analysis is generally useful, but often essentially spurious. It is easy analytically to dissect the work of the Warren Court and Warren's significance to it and to arrive at misleading conclusions. The fact is that the Warren Court was both the product and a producer of a profound moral, ethical and constitutional revolution. It functioned in times when the demand for a full measure of human rights had become insistent. Our Constitution, our Bill of Rights, had promised that our government would accord that full measure. "Time had set its face" against an apartheid society, against a selective application of constitutional principle, against a half-a-loaf version of the noble generalities of our social compact. And it was the Warren Court that was the instrument and the motor of time's insistence.
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> Earl Warren, I think, was essential to the Court's response. I cannot prove this by quantitative or objective evidence. His contribution cannot be tallied. He provided an essence, an attitude, which set the tone and quality of the Court's work. In a sense, he was a simple man. His constant question was: Is this right or wrong? His answer was always firmly rooted in a profound sense of justice and human dignity, and in a simple and uncomplicated conception of the essential, noble meaning of our Constitution's precepts.[97]

Part of the elusiveness of Warren's greatness comes from the problems of separating the man from the Court. This must be done before one can evaluate the man individually, yet what is so distinctive about Earl Warren is how perfectly he *symbolized* his Court. If symbolism arose simply

95. Craftmanship, however, fascinates law professors more than others and therefore does not seem as important as the other criteria.

96. *See* Blasi, *A Requiem for the Warren Court*, 48 TEX. L. REV. 608, 609 (1970) (Brennan was "clearly the Most Valuable Player of the era"). Blasi's conclusion that the most lasting contribution the Warren Court would have was the generation of lawyers it spawned has lost none of its force. *Id.* at 622-23.

97. Fortas, *Chief Justice Warren: The Enigma of Leadership*, 84 YALE L.J. 405, 411 (1975).

because Warren was the Chief Justice and voted with the majority in the significant cases, then it would be hard to justify any special claim to greatness. On the other hand, if he symbolized the Court because he was essential to its work and was a personification of its efforts, then a good case can be made that he was great because his Court was great. The truth probably lies somewhere between the two, although closer to the latter than the former. A fascinating aspect of an evaluation of Earl Warren is the desire to praise and the difficulty of supplying supporting data. Symbolism provides him with tremendous leverage in this process, but this is a leverage that is not necessary for the other giants of his era.

That Earl Warren has probably been overrated as a Justice does not make him a less important historical study. He is one of the major figures of modern American political life, a man who acted, occasionally erred, always learned and steadily grew. A well-written set of memoirs would have been a wonderful legacy to leave a public that grows more cynical about politicians, law students who see the efforts to bring justice to all slipping away term by term, and future biographers to whom the responsibility for piecing together a whole and complex man will fall. Unfortunately, Warren did not produce such a memoir. He could have helped us understand the tumultuous times through which we have lived. Because of the significance of the work Warren could have produced the disappointment in his failure to do so is all the greater.