BOOK REVIEW

EARL WARREN—A PUBLIC LIFE, by G. Edward White. New York: Oxford University Press, 1982, pp. viii + 429. $25.00.

Introduction

After the death of a public figure, a certain time must pass before a detached assessment of his work is possible. In the case of Earl Warren, this "cooling off" period was especially necessary. Most Justices of the Court manage to slip quickly and comfortably into a dignified yet relatively obscure place in history after they have left active service. But Warren, long the focal point of significant controversy during his period of active service,[1] became in retirement a symbol for those unhappy with the more conservative judicial philosophy of the Justices who followed him onto the high bench.[2]

However, just as Warren's prominence required the postponement of a definitive scholarly assessment of his tenure as Chief Justice, other forces now make the time ripe for such a reflective analysis. Confronted with the contrasting judicial philosophies of the Warren Court and the Court over which his successor, Warren E. Burger, presided, legal scholars have, over the past few years, engaged in a widespread reexamination of the proper judicial role in constitutional adjudication.[3] At the same time, it is now apparent that scholars have paid far too little attention to the role of the modern Chief Justice in our constitutional order. With respect to each of these concerns, Professor White reintroduces into the discourse the intellectual and political presence of Earl Warren in a very special and useful way. The intimacy of the author's law clerk relationship with Warren,[4] while providing the author with a special perspective as to what made Warren "tick,"[5] is tempered by years of experience in the art of dispassionate scholarship.

1. For a rendition of those critics whom Chief Justice Warren took particularly seriously, see E. WARREN, THE MEMOIRS OF EARL WARREN 321-49 (1977) [hereinafter *Memoirs*].

2. *See, e.g.*, Mason, *The Burger Court in Historical Perspective*, 47 N.Y. ST. B.A.J. 87, 126 (1975); Simmons, *Earl Warren, The Warren Court and Civil Liberties*, 2 PEPPERDINE L. REV. 1, 6 (1974).

3. *See, e.g.*, J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

4. Professor White served as Chief Justice Warren's law clerk during October Term 1971, after Warren had retired from active service.

5. The word choice is Warren's. *See Memoirs*, *supra* note 1, at 8.

The result is a critical, yet respectful and understanding, approach to the "Old Chief," as he was affectionately known to the Court's staff during this reviewer's time[6] at the "Marble Palace."[7]

I. Warren's Intellectual Roots

The unifying theme of White's effort is to construct a deeper intellectual consistency from the apparently contradictory positions that Warren espoused at various times during his public life. At the beginning, White sets forth what he describes as the "pat explanation"[8] of Warren's public life. According to this theory, Warren is viewed as the quintessential "conservative, law and order politician who, through the vagaries of politics and accumulated political debts, was appointed Chief Justice of the United States."[9] Once on the Court, however, Warren reversed many of his previously held positions. Indeed, by the time of his active tenure, he was the perfect model of the judicial activist, and presided over a Court that, in terms of its substantive jurisprudence, was one of the most liberal in the nation's history.[10] To the adherents of this theory, asserts White, the basis of this metamorphosis remains a mystery. One suggested probability is that Warren fell under the influence of the experienced liberal Justices, such as Black and Douglas, who had sat at the Court's conference table for many years before his arrival.

White submits that his efforts to investigate Earl Warren have brought him to a different conclusion—one that he believes is relatively novel. For him, Warren's ideological roots were deeply imbedded in the progressivism of California[11] in the early part of the twentieth century. The progressives believed in the inherent perfectability of man and in the affirmative obligation of the civil state to help the individual achieve that perfection. Government must engage, they believed, in a constant effort to restore the fundamental moral principles that transcend immediate political issues and endure throughout the nation's history despite superficial societal change. As White notes, progressivism in its best form meant patriotism. In its worst form, it meant nativism, racism, and xenophobia.[12]

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6. The reviewer was Legal Officer of the Supreme Court during October Term 1972 and Special Assistant to the Chief Justice during the 1973-76 Terms.

7. *See* J. FRANK, MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE (1958).

8. G. E. WHITE, EARL WARREN: A PUBLIC LIFE 4 (1982).

9. *Id.* For an example of this theory, see J. POLLACK, EARL WARREN: THE JUDGE WHO CHANGED AMERICA (1979).

10. *See* G.E. WHITE, *supra* note 8, at 4.

11. For a description of California progressivism of that era, see G.E. WHITE, *supra* note 8, at 18-21, 328-32. *See also* White, *The Social Values of the Progressives*, 70 S. ATL. Q. 62 (1971).

12. *See* G.E. WHITE, *supra* note 8, at 329.

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White sees progressivism as the dominant force in Warren's early career. White believes that, in Warren's years as a prosecutor and later as Governor of California, the restoration of morality was a dominant theme, whether the issue was the rehabilitation of prison and mental health facilities, or the prosecution of gambling ships and confidence men. Once on the Court, Warren's belief in the basic perfectability of the individual was expressed as a concern for the rights of dissident minorities and an acceptance of the necessity of affirmative action by the government to protect disadvantaged persons.[13]

For White, Warren's opinion in *Brown v. Board of Education*[14] marked his emergence as a liberal theorist because in that case there was a consonance between his ethical impulses and his liberal policies. Similarly, in matters of economic regulation, it was not surprising to find Warren generally regarding the federal government as a beneficent and necessary force in carrying out economic policy, especially when the federal legislative judgment incorporated themes quite compatible with basic progressive tenets. Warren found no difficulty in viewing the antitrust laws as protection against economic privilege and the labor relations statutes as protecting the working man against such economic privilege and the resultant unequal bargaining power of employers.[15] White finds further support for his theory that the life source of Warren's jurisprudence was progressivism by noting that when traditional liberal positions were not easily harmonized with the ethical principles of progressivism, Warren followed the latter. Thus, White concludes that gamblers and panderers found little comfort from Warren's judicial pen.[16]

At times, White's broad brush treatment of Warren's judicial philosophy is exasperating; the reader's eye constantly awaits the next footnote for more concrete evidence of the dominance of "ethical principles" and for a more precise delineation of those principles. However, this "deficiency" is more attributable to Warren than to White. As the author notes, "Warren's ethical imperatives were undeniably vague"[17] and were rarely stated explicitly in the opinion text. Warren employed, albeit imperfectly, the orthodox analytical constructions of the day, even if the values in which he believed—fairness, decency, anticorporatism, individuality, and dignity[18]—were the unspoken bases of decision. White's discussion of the evolution of the opinion in *Boll-*

13. *See id.* at 332-49.

14. 347 U.S. 483 (1954). For a more detailed explanation of this case and Warren's role in the decision, see R. KLUGER, SIMPLE JUSTICE (1976).

15. *See* G.E. WHITE, supra note 8, at 279-302.

16. *See id.* at 250-62, 361-62.

17. *Id.* at 362.

18. *See id.* at 365.

ing v. Sharpe[19] illustrates the point well.[20] Warren's original draft of that opinion turned on a purported right to receive a public education; only in later drafts did he adopt the more conventional analysis that segregation was an "arbitrary deprivation of . . . liberty."[21] Although an ethical impulse had been the key element of the decision, it was not the basis for the post-decision explanation in the appellate opinion.

II. Warren and the Judicial Role

White asserts that Warren's progressive roots explain not only the Chief Justice's substantive views, but also his view on the proper judicial role in constitutional adjudication. Here White, while still painting with a broad brush, makes a strong case. He suggests that Warren's progressivism embodied a deep, pragmatic conviction that state legislatures were neither democratic nor representative of public opinion.[22] Because Warren viewed the Constitution as embodying clear ethical norms and imperatives that transcend the momentary legislative judgment, he had little difficulty in preferring those ethical norms to state legislative judgments. Those ethical norms also permitted him to avoid the inherent tension in a theory of government based on simultaneous support for affirmative government and for individual rights. Using his own ethical sensibilities, Warren was able, asserts White, to rank some constitutional rights higher than others.[23]

White does not simply state Warren's theory of judging. He also attempts—quite successfully—to place it in the context of the present debate over the proper judicial role in constitutional litigation. In one sense, he argues, Warren's active pursuit of fundamental ethical principles in the Constitution was a return "to a scrutinizing role for the courts that was of longer standing in American life"[24] than the standards of judicial restraint that were first articulated in plenary fashion by Justice Holmes in *Lochner v. New York*[25] and that reached the level of orthodoxy through the pen of Frankfurter. Yet the mere fact that parallels to Warren's activism can be found in the nineteenth century history of the Court hardly legitimates this approach. Rather, White suggests:

> "The fundamental issue raised by Warren's performance as a jurist is not, as has regularly been suggested, whether 'good' results reached by the Court are justifiable if the reasoning justifying them is 'bad'.

19. 347 U.S. 497 (1954).
20. *See* G.E. WHITE, *supra* note 8, at 226-29.
21. 347 U.S. at 500.
22. *See* G.E. WHITE, *supra* note 8, at 353.
23. *See id.* at 354-358.
24. *Id.* at 354.
25. 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

> The issue is whether ignoring the established jurisprudential canons of judicial performance constitutes 'bad' judicial reasoning."[26]

In response to this latter question, White states that the "content of Warren's 'natural law' was a set of ethical principles that Warren believed formed the foundation for constitutional adjudication."[27] White notes that a judge can rely on such a personal interpretation of the ethical norms embodied in the Constitution only when his ethical stance is shared by a great portion of the population. Indeed, White suggests that a good deal of Warren's success was due to "his remarkable ability to embody in his ethical judgments the ideals of other Americans"[28] at a time when the orthodox theory of judicial review was in a state of relative impotency. In short, Warren was the right judge at the right time.

White's description and analysis of Warren's judicial methodology emphasizes the necessity of the current judicial and scholarly reassessment of the judicial role. However, the author's measured, thoughtful approach should also counsel that such an inquiry ought not to reject out of hand Warren's fundamental marriage of law and ethics in constitutional adjudication. Simply because the Constitution ought not mean what one judge says it means does not compel the conclusion that effective constitutional interpretation must be dissociated from all ethical considerations. Rather, as Professor Cox has suggested, the Court's opinions, by reflecting "deeper lasting currents of human thought that give direction to the law,"[29] can "sometimes be the voice of the spirit, reminding us of our better selves."[30] In identifying those "deeper lasting currents of human thought," a judge cannot, of course, forget his life experience. He can, nonetheless, check his own impulses by measuring them against the accumulated experience and wisdom of those who have performed—and who are performing—the same delicate task of interpreting the fundamental document of our political order.

III. The Importance of Institutional Factors

It is difficult to quarrel with White's basic thesis that Warren's judicial philosophy was rooted in the progressivism of his earlier days. He makes a good case. It is important to recognize, however, that discovery of a Justice's intellectual roots does not explain his entire devel-

26. G.E. WHITE, *supra* note 8, at 236 (footnote omitted).
27. *Id.* at 358.
28. *Id.* at 355.
29. A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 111 (1976).
30. *Id.* at 117.

opment as a jurist. Indeed, what White describes as the "pat" answer,[31] or at least a variation of it, may still provide a further, and compatible, explanation for Warren's judicial views. Certainly, appointment to the Court and daily life within its semi-cloistered walls have a profound effect on everyone who, having been "struck by lightning," finds himself or herself there, especially on the basis of a lifetime appointment. As this reviewer noted elsewhere:

> The Court induces intellectual and moral growth at an exponential rate. With the exception of the Presidency, no position offers such a comprehensive view of American life. As Mr. Justice Douglas remarked: 'Across the screen each Term come the worries and concerns of the American people high and low presented in concrete, tangible form.' Working in that rarified atmosphere daily, confronted with the challenge of eight other sensitive intellects, has a profound effect on the person open to such a challenge.[32]

Indeed, we might question whether we have paid too little attention to these institutional forces in assessing the work of the Court and of each of the Justices. Personal background and philosophy are indeed important in describing and assessing a particular Justice's perspective; they are the essential "raw materials" for the development of a judicial philosophy. However, over the terms, in the isolation that the work of the Court imposes on its members, it is impossible not to grow intellectually and to synthesize into one's own perspective the insights of those who have walked a very different road to the same high place. It is, quite obviously, very difficult to document this phenomenon from the polished final work product of the Court. Nevertheless, it can be detected in the subtle changes in the "collegial chemistry" that appear to take place when one member of the Court is replaced with another. It can also be seen in the fact that, at least for some Justices, neither retirement nor death completely remove their influence from the conference room.[33]

Chief Justice Warren seemed to be particularly sensitive to these institutional forces. In his brief remarks upon retirement from the bench, he chose to emphasize two such characteristics: the Court's continuity and its collegiality. Addressing himself to the President, who had just delivered a short congratulatory message from counsel's podium,[34] the Chief Justice noted:

31. *See supra* text accompanying notes 8-10.

32. Ripple, *Review of J. Pollack, Earl Warren: The Judge Who Changed America*, 141 AMERICA 200 (1979) (quoting Tidewater Oil Co. v. United States, 409 U.S. 151, 175 (1972) (Douglas, J., dissenting)).

33. *See, e.g.*, No. 27 Orig., Tr. Oral Arg. at 38, Ohio v. Kentucky, 410 U.S. 641 (1973).

34. 395 U.S. vii, x (1969).

> I might point out to you, because you might not have looked into the matter, that it is a continuing body as evidenced by the fact that if any American at any time in the history of the Court—180 years—had come to this Court he would have found one of seven men on the Court, the last of whom, of course, is our senior Justice, Mr. Justice Black. Because at any time an American might come here he would find one of seven men on the Bench in itself shows how continuing this body is and how it is that the Court develops consistently the eternal principles of our Constitution in solving the problems of the day.
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> . . . .
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> We do not always agree. I hope the Court will never agree on all things. If it ever agrees on all things, I am sure that its virility will have been sapped because it is composed of nine independent men who have no one to be responsible to except their own consciences.
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> It is not likely ever, with human nature as it is, for nine men to agree always on the most important and controversial things of life. If it ever comes to pass, I would say that the Court will have lost its strength and will no longer be a real force in the affairs of our country. . . .
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> . . . In the last analysis, the fact we have often disagreed is not of great importance. The important thing is that every man will have given his best thought and consideration to the great problems that have confronted us.[35]

Warren's sensitivity to these institutional forces should not be surprising. From his vantage point in the Court's "center chair," the collegial aspects of judicial life were especially obvious. "The Chief" has a special responsibility to the Court as an institution and to its jurisprudence. He has the obligation to monitor comprehensively and to present to the conference the thousands of jurisdictional statements and writs of certiorari that seek a place on the Court's calendar. He must make the initial presentation of each argued case and is the first to give his views. While he thus has the opportunity to take the initiative by directing the Court's attention to those aspects of the case that he considers crucial, he must also endure the swift and sure modification of those views as the conversation proceeds down the conference table. His role in the assignment process provides him with an additional opportunity to experience, more directly than his colleagues, the impact of the collegial function's dialectic. While the assignment power is ultimately an opportunity for great influence in how the jurisprudence "writes out," it requires, first of all, a most precise understanding of the shades of difference in analysis, and even in tone, among the Justices. It requires the ability to harmonize views and to accommodate different emphases. In cases where there is significant indecision, "the Chief"

35. *Id.* at xi.

must take the initiative in mapping out the Court's further consideration of the case. Under these circumstances, there is a unique necessity to deal with the differences in doctrinal approach and, more importantly, with differing value systems.

In all of these roles, any Chief Justice is simultaneously leader and student. While he must ultimately produce a synthesis capable of commanding a majority of the Court, he must first appreciate different perspectives. In only the most obtuse of men would this process not lead to a broadening of personal intellectual perspective.

IV. Writing a Job Description for "The Chief"

Although White de-emphasizes the role of institutional factors in the "education" of a Justice,[36] his focus on personal intellectual development is important. Both the popular and the professional literature of recent times have stressed the "leadership" role of the Chief Justice in "massing the Court."[37] These writings have tended to de-emphasize the fact that a Chief Justice, like any other member of the Court, is primarily obligated to decide cases according to his own evolving view of the controlling constitutional policy concerns. As a counterpoint to this recent and pervasive misplacement of emphasis, White's concentration on Chief Justice Warren's intellectual and jurisprudential development rather than on his "leadership" and administrative roles is, in itself, most provocative and refreshing.[38]

36. It should be noted that Professor White's first-hand experience with Chief Justice Warren occurred after Warren's retirement. *See supra* note 4. At that point, Chief Justice Warren was no longer involved in the work of the Court, and White did not have an opportunity to see first-hand the role of these institutional factors.

37. *See, e.g.*, Danelski, *The Influence of the Chief Justice in the Decisional Process*, in COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 695 (Murphy & Prichett eds. 1979); Murphy, *Marshaling the Court: Leadership, Bargaining, and the Judicial Process*, 29 U. CHI. L. REV. 640 (1962).

38. White does not ignore the "leadership" role of the Chief Justice. First, in the chapter entitled "Reacting to Felix Frankfurter," White describes the difficulty Chief Justice Warren had in dealing with this particularly vexatious member of the Court. The idiosyncracies of Justice Frankfurter's behavior behind the red curtain of the Supreme Court have been well documented recently by such authors as H.N. Hirsch in his psychological study entitled THE ENIGMA OF FELIX FRANKFURTER (1981), and in Bruce Allen Murphy's work entitled THE BRANDEIS/FRANKFURTER CONNECTION (1982). They portray a Justice psychologically incapable of dealing with equals and, consequently, decidedly ineffectual. In describing Warren's reaction to Frankfurter, White permits us to see Frankfurter's disability from an entirely different perspective—that of the recipient. Chief Justice Warren had to deal with Frankfurter on two distinct levels; first, on a "Justice-to-Justice" level, and second, in the relationship of "the Chief" to an Associate Justice. As White indicates, these roles were not always compatible. Apparently, at times, Warren succumbed to the temptation to engage Frankfurter in the sort of personal adversarial role that one might expect between equals, but not between "the Chief" and an Associate Justice. Interestingly, White attributes

In earlier times, strong "leadership" of the Court from the center chair was perhaps a natural phenomenon. The Court's constitutional role was in its formative stages and each Chief Justice molded not only his own office, but the Court over which he presided. No doubt, today, "the Chief" continues to be more than simply "first among equals." His opportunity to take the initiative at conference and to make the assignment of the opinion enhances significantly his power of persuasion. As presiding officer, he sets the tone for both the Court's conferences and its open sessions on the bench. Today, however, the leadership of the Chief Justice with respect to the internal affairs of the Court is more rigidly circumscribed. The dynamics of small group interaction in a conference room of nine justices representing diverse populations all across the North American continent are distinctly different from the situation which confronted John Marshall in the Washington boarding house in which the Court conferred and lived together during a Term of Court. The Court, now a more mature institution of American government, is, as Chief Justice Warren himself pointed out,[39] essentially a collegial body, and the "leadership" potential of any single individual, including the incumbent of the center chair, is bound to be significantly constrained. As Justice Rehnquist has put it:

> The power to calm such naturally troubled waters is usually beyond the capacity of any mortal chief justice. He presides over a conference not of eight subordinates, whom he may direct or instruct, but of eight associates who, like him, have tenure during good behavior, and who are as independent as hogs on ice. He may at most persuade or cajole them.[40]

Moreover, at least in the eyes of the associates, "the Chief Justice is not entitled to a presumption that by virtue of his office he knows more law than the other members of the Court . . . ."[41]

White's emphasis on Warren's personal judicial philosophy rather than on his "leadership" of the Court should help immeasurably in restoring a balanced perspective to future assessments of the role of the Chief Justice in our constitutional order and of the performance of incumbents in that office. We need to examine critically whether, or at least to what extent, chief justices ought to be expected to provide "leadership" and "direction." Perhaps, in a time of growing ideological diversity, they ought to encourage, through their own self-restraint,

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the deterioration in their relationship to the growing doctrinal antagonisms between the two men. *See* G.E. WHITE, *supra* note 8, at 188.

In dealing with the *Brown* decision, White also notes that many of Warren's political skills were helpful in forging a unanimous decision. *See id.* at 159-72.

39. *See* 395 U.S. at x-xi.

40. Rehnquist, *Chief Justices I Never Knew*, 3 HASTINGS CONST. L.Q. 637 (1976).

41. *Clements v. Logan*, 454 U.S. 1304, 1308 (1981), (Rehnquist, J., in chambers).

the collegiality necessary to produce an institutional work product reflective of that diversity.

White's book provokes, albeit indirectly, another concern with respect to the position of Chief Justice that is worthy of further exploration. White's chapter on Warren's chairmanship of the Kennedy Assassination Commission[42] is far more critical of the Chief Justice's performance than are those chapters dealing with his judicial work. The author appears persuaded that the work of the recent committee of the House of Representatives[43] raises substantial questions as to the thoroughness of the "Warren Commission" report. Whatever the correctness of that conclusion, White's description of Warren's inability to involve himself directly in the "nuts and bolts" of the Commission's work[44] should make future chief justices far more wary of embarking on similar ventures. Indeed, White's chapter provokes the far broader question of whether saddling the Chief Justice with statutory responsibilities of a nonjudicial nature[45] places him at a distinct disadvantage in influencing the Court's jurisprudential direction. The Court's internal decisionmaking procedures are essentially competitive, and the process simply does not take into account that one participant must, because of other duties, regularly direct his attention elsewhere. Furthermore, there is a special intellectual and physical cost in shifting constantly between judicial and other, unrelated work.

Conclusion

Early in this book, Professor White acknowledges that his effort is not a definitive evaluation of Chief Justice Warren.[46] When he began, White states, he had in mind a work far less extensive than this one.[47] He has, however, made a significant contribution—one which will perform a very important role in future scholarly investigation in this area. It initiates key inquiries with respect to the enduring impact of Warren's tenure on the judicial function in constitutional adjudication and on the future of the office he held. It is written from the vantage point

42. *See* G.E. WHITE, *supra* note 8, at 191-213.

43. U.S. CONGRESS, HOUSE SELECT COMM. ON ASSASSINATIONS, FINAL REPORT OF THE SELECT COMMITTEE ON ASSASSINATIONS, 96th Cong., 1st Sess. 256 (1979).

44. *See* G.E. WHITE, *supra* note 8, at 193, 210-11.

45. In addition to his many responsibilities with respect to the administration of justice throughout the federal courts, the Chief Justice must perform many extra-judicial functions. He must advise the Librarian of Congress on the law library of the Library of Congress, 2 U.S.C. § 135 (1976); appoint members of the Commission on Executive, Legislative and Judicial Salaries, 2 U.S.C. § 352 (1976); serve as Chancellor of the Smithsonian Institute, 20 U.S.C. §§ 41-42 (1976); serve on the board of the Hirshhorn Museum, 20 U.S.C. § 76 cc (1976), and the National Gallery of Art, 20 U.S.C. § 72 (1976); and appoint a member of the National Historical Publications and Records Commission, 44 U.S.C. § 2501 (1976).

46. *See* G.E. WHITE, *supra* note 8, at 5.

47. *See id.*

of a scholar seeking to understand. Praise and criticism are used as tools to attain that end, and not as an end in themselves. Professor White has set a standard of inquiry that future scholars must strive to emulate.

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