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Book Review (reviewing G. Edward White, Earl Warren: A Public Life (1982))

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EARL WARREN: MASTER OF THE REVELS

EARL WARREN: A PUBLIC LIFE. By G. Edward White.¹ New York: Oxford University Press. 1982. Pp. x, 429. \$25.00.

Reviewed by Philip B. Kurland²

"the master of the revels, if so, without disrespect, I may characterize the judge presiding on the bench." B. Cardozo, *Law and Literature* 150 (1931).

Although the biography of a judge ought to concern ideas rather than deeds, intellectual biography is a difficult literary form to manage well. Ideas are fleeting and difficult to capture, however well documented in legal opinions they may seem. And few judicial biographers successfully elucidate the ideological foundations of their subjects' actions. Instead, just as the judges they write about generally reason from ends to means, the biographers tend to explain ideas as an outgrowth of deeds rather than to explore how deeds derive from ideas.³

Intellectual biography proves less difficult when the subject is an intellectual. The typical Supreme Court Justice, however — even the incomparable John Marshall — is not an intellectual. He has not risen to the High Court because of reknown as a deep thinker. More often the appointment either rewards political activity in government or in bar association activities or follows from predictions, however faulty, of steadfastness to the appointing power's political notions of the judicial function. Perhaps for this reason, judicial biography is often political rather than intellectual.

Political biography inevitably invokes the partisanship of the author so that the subject becomes the protagonist — or

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³ One must look to the two volumes on Holmes by the late Mark DeWolfe Howe as the ideal, perhaps the unique example of great judicial biography. See M. HOWE, JUSTICE OLIVER WENDELL HOLMES, VOLUME 1, THE SHAPING YEARS 1841-1870 (1957); *id.*, VOLUME 2, THE PROVING YEARS 1870-1882 (1963). But then, Holmes left a legacy of records of his thinking and its development, particularly involving the period before his accession to the bench, the period covered by Howe's work. Holmes came to maturity in a community that highly valued intelligence and intellect. Certainly no judicial figure before or since has had a tutor like Ralph Waldo Emerson, a father with the wit and wisdom of the senior Holmes, or close friends of the mental caliber of William and Henry James or the Adams brothers. Certainly none has written as important a jurisprudential tome before donning his judicial robes. See O. HOLMES, THE COMMON LAW (M. Howe ed. 1963).

occasionally the villain — of the story that unfolds.⁴ The most attractive aspect of Professor G. Edward White's book is that the author does not conceal his partisanship. The book avowedly adopts the tone of a brief, an argument to salvage a reputation that the author believes to have been unfairly diminished in the decade since Warren's death. It is, moreover, to Professor White's credit that, unlike those who propose their judicial subjects for sainthood, he leaves no ground for the devil's advocate. He adheres with scrupulous fairness to the facts, however unpersuasive some biased readers may find his inferences. In addition, he writes with considerable literary skill. Clearly this book merits attention: it is honest and eminently readable. Whether it is also cogent may depend rather on the perspective of the reader than on that of the author.

To most legal academicians, the true believers in the Warren myth,⁵ the book will prove supererogative. Both before and after they read it, they will know that Warren is the greatest or second greatest judge in American history, depending on where they rank John Marshall. Whether the book will persuade those with no preconceptions or knowledge of the subject matter is difficult to say: given White's ratiocinations, the greatness of the late Chief Justice should clearly shine forth. As for those of us who never regarded Earl Warren or the Court over which he presided with adequate Christian charity,⁶ the book will not shake our belief in the stereotype that White seeks to destroy. White might have persuaded Warren's detractors of their error if he revealed new facts. He does not. Instead, he attempts to show that the stereotype depends on erroneous inferences.

The stereotype that White would dispel is, he admits, partly of Warren's own making:

He was, according to this opinion, a relatively simple man who happened to occupy a number of visible positions; a person of ordinary intellectual talents, of relatively bland disposition, and of limited horizons whose success, paradoxically,

⁴ There are of course exceptions, but they are few. David Cecil's biography of Melbourne is one. See D. CECIL, *MELBOURNE* (1954). But it was probably less difficult for a Cecil to regard political controversies coolly, and it is always easier for an author to be detached from an historical figure than from a contemporary one.

⁵ Examples include Yale Law Professor Fred Rodell and those who responded to a questionnaire about Warren that White cites (pp. 305-06).

⁶ See, e.g., P. KURLAND, *POLITICS, THE CONSTITUTION AND THE WARREN COURT* (1970); Kurland, *The Supreme Court, 1963 Term — Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143 (1964).

may be attributable to no more than the fact that he was "average."

Warren himself contributed to this stereotype. . . . His public speeches, throughout his career, tended to be ponderous and wooden; neither humor nor pithiness was his forte. Nor was his conversation vivid: He was neither a raconteur nor a wit, he did not enjoy pointed analysis or gossip. (Pp. 3-4).

For most of us, this description of Warren's public persona also characterizes Warren the man. White has omitted one important trait from his sketch, however — the pervasive sin of vanity. Warren was extraordinarily vain. He saw all who opposed or criticized him as, at best, guilty of *lèse majesté* and, at worst, tools of the devil. And to be sure, no signs of Warren's humility appear anywhere in this book. But then, no humble man has ever risen to the post of Chief Justice of the United States. A man of humility would find it difficult to flourish in that office.

Justice Frankfurter, who became Earl Warren's principal *bête noir*, has said: "The true face even of a public man is his private face. That can be seen only off stage, in the manner in which he pursues his tasks, day by day, when only those in close association see and hear and feel what he is doing."⁷ But, as the subtitle of the White volume reveals, the author does not attempt to uncover Warren's private "persona." Rather, he makes three particular arguments that, in good Supreme Court tradition, he summarizes at the beginning:

There are three assumptions . . . that this book seeks to challenge. The first is that Warren was a conservative California politician; I shall suggest that neither the term "conservative" nor the term "politician" accurately describes Warren's career as a California public official. The second is that Warren underwent a marked change in his attitudes once on the Supreme Court. I shall argue that his public life can be seen as of a piece and that the surface contradictions in his thought can be seen as manifestations of a deep commitment to a general set of principles that were consistent in themselves. The third is that Warren was not a legal technician and that his jurisprudential views were largely derivative. I shall contend that Warren was merely a different kind of legal technician, unorthodox rather than inept, and that his theory of judging, while uniquely his, was not without its own theoretical integrity. (P. 4).

Of the three arguments, the least interesting is White's challenge to Warren's reputation as a "conservative politician."

⁷ Frankfurter, *The Impact of Charles Evans Hughes*, in FELIX FRANKFURTER ON THE SUPREME COURT 465 (P. Kurland ed. 1970).

Neither the adjective⁸ nor the noun contributes much to behavioral definition. Theodore White has recently pointed out that, ever since Hiram Johnson led the Progressive revolution in California during the first half of the century, politics there have differed greatly from the Eastern variety.⁹ Thus, that Earl Warren was clearly not a "conservative" in comparison with his chief California opponents in his quest for the Presidency — Richard Nixon, Goodwin Knight, and William F. Knowland — may reflect more on the peculiarities of Warren's political environment than on his proper place on the national ideological spectrum.

White also fails to meet his burden of persuasion that Warren was not a politician. Warren managed to put together shifting blocks of constituencies, sometimes supported by political and private figures of dubious integrity, in order to have spent his entire pre-judicial career in appointed or elected office. Unlike his predecessor, Governor Olson, Warren was not an innovator in state government. Rather, like Thomas Dewey of New York, he sought to build a base for higher office in each of those that he occupied. And although his commitment to Dwight Eisenhower at the 1952 Republican Convention might have reflected a principled choice for middle-of-the-road over conservative Republicanism, it also became Warren's last hurrah as a candidate for public office, and he made the most of it.

Although both Warren and Eisenhower denied that any bargain was struck at the 1952 Republican Convention, few doubt that Warren exchanged the California delegation, whose vote cost him as well as Robert Taft the possibility of the Presidency, for the promise of the judicial chair that he came to occupy.¹⁰ Herbert Brownell, Eisenhower's Attorney General, reported that "Warren 'took the position . . . that he was

⁸ Ambrose Bierce defined a conservative as "[a] statesman who is enamored of existing evils, as distinguished from the Liberal, who wishes to replace them with others." A. BIERCE, *THE DEVIL'S DICTIONARY* (1906).

⁹ T. WHITE, *AMERICA IN SEARCH OF ITSELF: THE MAKING OF THE PRESIDENT, 1956-1980*, at 63-71 (1982).

¹⁰ *See, e.g.*, J. WEAVER, *WARREN* 183 (1967). Weaver claims:

When Warren's appointment to the Court was represented in the press as the payment of a political debt incurred at the Republican convention, Eisenhower was deeply offended. Like a pregnant spinster decrying the notion that sex might have had something to do with her condition, the General seemed to resent any carnal suggestion that politics had played a part in placing him in the White House.

Id.; cf. L. KATCHER, *EARL WARREN* 302-10 (1967) (attributing appointment more to Eisenhower's gratitude for Warren's campaign support in late 1952 and to Eisenhower's desire to appoint a moderate Western Republican than to a convention bargain for the California delegation).

ready to accept the Chief Justiceship, . . . that he did feel that he had a commitment for the next vacancy, and that this *was* the next vacancy” (p. 150).¹¹

It makes little difference to Warren’s reputation, however, whether White proves that Warren was neither a conservative nor a politician. Even if he were a liberal statesman committed to the needs of the people rather than to the advancement of his own career, few prosecutors, governors, or unsuccessful presidential candidates leave a mark on history. Warren is no exception. His legacy will depend on his actions as Chief Justice.

White’s second argument is equally irrelevant to Warren’s place in history. That Warren “underwent a marked change in his attitudes once on the Supreme Court” (p. 4) cannot detract from the credit due him for his work as a Chief Justice. White himself appears to acknowledge that different offices require different stances:

As a member of the University of California’s Board of Regents, Warren had consistently voted against the imposition of a loyalty oath on university faculty and staff, but as governor he had called a special session of the California legislature in September, 1950 to institute an oath for all state employees, knowing that this oath would be applied against University of California personnel. (P. 242).

Moreover, White cannot controvert the inconsistencies that pervade Warren’s career. Warren’s attitudes toward criminal procedure seemed to have taken a 180-degree turn between his prosecutorial and his judicial days. Suggesting that it takes a thief to catch a thief, some have noted that his early experience as a district attorney alerted Warren to the abuses of that office.¹² White offers a different explanation, which, however, is no more reassuring:

The professional criminal of the Prohibition era, Warren believed, knew what he was doing and took his chances; the average Warren Court criminal, he thought, might have turned to crime because of disadvantage or out of degradation.

¹¹ White concludes: “On balance, Brownell’s account of the conversation between himself and Warren seems authentic” (p. 151).

¹²

Lloyd Jester, who had worked for Warren in the Alameda County District Attorney’s Office, said that Warren’s protective attitude toward criminals as a judge was in direct response to his awareness of the coercive powers of an ambitious prosecutor. When Warren became Chief Justice, Jester claimed, “he just plain assumed that every other district attorney, every other prosecutor in this land of ours acted and was acting in the same manner in which he himself had acted in the past. . . . [H]e just turned turtle, ’cause he was going to correct all of these ills.” (P. 264).

One could even see "street crime" in the fifties and sixties as a protest against inequality and disadvantage in American life: a desperate plea to be able to participate fully in American society. Although the Court could do nothing about the deplorable conditions of urban America, it could at least ensure that the process of criminal justice did not add to the degraded status of those participating in it. (P. 265).

This statement, of course, does not claim that Warren's early and later positions were consistent, but rather explains why they were not. Nor can White reconcile inconsistent responses to the issue of reapportionment, vetoed by Governor Warren but extolled by Chief Justice Warren:

The *Brown* case and the changes that it brought about caused many people to believe that it was the most important case of my tenure on the Court. That appraisal may be correct, but I have never thought so. It seemed to me that accolade should go to the case of *Baker v. Carr* (1962), which was the progenitor of the "one man, one vote" rule.¹³

Warren's pervasive antiracism on the Court, from *Brown* onward, contrasts sharply with his role in the forced removal of Japanese from the West Coast in 1942. Here, White offers no apologies. "Warren was one of the individuals most responsible for bringing the relocation program into being. . . . [A]mong Warren's motives for excluding the Japanese from California was a provincial, xenophobic racism" (pp. 74-75). Indeed, White discounts the sincerity of Warren's published recantation. The only excuse implied is Warren's good company in the decision — President Roosevelt, Walter Lippmann, and the Justices of the Supreme Court majority that sustained the constitutionality of the relocation. (It is a bit disingenuous, though, to equate the Court's upholding of the Army regulations' constitutionality with Warren's political approval of their enactment.) In any event, White does not demonstrate any ideological continuity between the early Warren and the Chief Justice of the United States. This inconsistency, attorney Warren's excessively vigorous prosecution of the *Point Lobos* case, and his barbarous crusade against Professor Max Radin's appointment to the California Supreme Court (pp. 6, 34-35, 67-69, 73-77, 81, 103, 107, 126, 162, 267, 280, 319-20) simply figure as black spots on the escutcheon that mar the image of Warren that White would ask history to accept.

White suggests here, however, a different kind of consistency, which derives from the differences in the legal contexts

¹³ E. WARREN, THE MEMOIRS OF EARL WARREN 306 (1977).

of Warren's earlier and later judgments. The answers Warren proffered suited their occasion. As White would have it, then, constitutional protections are appropriately expanded to protect rapists, murderers, and muggers but should remain unavailable to bootleggers, rum runners, and organized corrupters of politicians. (Why drug peddlers should be in the former category and not the latter may not be so clear to some.) Perhaps Warren sought to protect the rugged individualist against corporate enterprise even in the administration of the criminal laws.

But why should it matter whether Warren as executive was consistent with Warren as judge? Surely differences in perspectives between the judicial function and the executive function are justified. Perhaps White fears that "psychohistorians" may rely on ideological inconsistencies to conjure theories of a "neurotic-narcissistic personality" derived from childhood insecurities and to conclude that Warren, finding he could not lead the side he had been on before his arrival in Washington, determined to lead the side he had earlier opposed.¹⁴ Or consistency might be thought essential to demonstrate Warren's leadership role on the Supreme Court. Otherwise one could suspect Warren of following rather than leading when he espoused positions taken on the Court by Justices Black, Douglas, Murphy, and Rutledge long before Warren's Supreme Court post was even a gleam in Eisenhower's eye. Accepting Emerson's observation, however, that a "foolish consistency is the hobgoblin of little minds, . . . [w]ith consistency a great soul has simply nothing to do,"¹⁵ one wonders why White strains to rebut allegations of Warren's inconsistency. After all, if this book asserts nothing else, it asserts that Warren's was a great soul.

This brings us to the third proposition that the book attempts to refute, "that Warren was not a legal technician and that his jurisprudential views were largely derivative." White proposes that "Warren was merely a different kind of legal technician, unorthodox rather than inept, and that his theory of judging, while uniquely his, was not without its own theoretical integrity" (p. 4). Here, indeed, we find ourselves in shallow waters filled with huge boulders. White informs us that Warren took his guidance to constitutional judgment neither from the text of the Constitution, nor from precedent, nor

¹⁴ See H. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981) (making a similar argument with respect to Frankfurter).

¹⁵ Emerson, *Self-Reliance*, in 2 *THE COMPLETE WORKS OF RALPH WALDO EMERSON* 57 (1903).

from legislation, nor even from reason. In sum, the book depicts Warren imagining himself a figure invoked by Learned Hand only in hyperbole — the Platonic Guardian.¹⁶

Lest I be accused of indulging in caricature, allow me to use White's own words in describing what he defines as Warren's "jurisprudence":

Warren thus equated judicial lawmaking with neither the dictates of reason, as embodied in established precedent or doctrine, nor the demands imposed by an institutional theory of the judge's role, nor the alleged "command" of the constitutional text, but rather with his own reconstruction of the ethical structure of the Constitution. No other influential judge on the Warren Court, or for that matter in the twentieth century, adopted such a view. Several leading judges, such as Holmes, Learned Hand, Frankfurter, and Harlan, were institutionalists; Black was a textual determinist; Benjamin Cardozo and Roger Traynor were creative disciples of reason. The only other Supreme Court justice who approached Warren's jurisprudential posture was Frank Murphy, who never achieved Warren's stature as a force on the Court or as a public figure. Indeed, the same posture that invoked ridicule in Murphy was the source of Warren's strength as a judge. (P. 359) (footnotes omitted).

White recognizes the problems created by what he dubs Warren's "ethicism":

Warren's definition of judging as an exercise in ethical choices raises two questions, each of which has received preliminary attention, and each of which is here sought to be answered. The first involves the juristic consequences of his stance: Did his approach produce a consistent and meaningful jurisprudence? The second concerns the worth of Warren's approach: Is it essential that it be held by a person of genuinely humane instincts? Anthony Lewis once said of Warren that he "was the closest thing the United States has had to a Platonic Guardian, dispensing law from a throne without any sensed limits of power except what was seen as the good of society. Fortunately he was a decent, humane, honorable,

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For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture. If you retort that a sheep in the flock may feel something like it; I reply, following Saint Francis, "My brother, the Sheep."

L. HAND, *THE BILL OF RIGHTS* 73-74 (1958).

democratic Guardian." Is Lewis right in suggesting that the posture of an ethicist is fatally dependent on the ethicist's own character? (P. 359) (footnote omitted).

White knows the answer. He has already informed us that "Warren's activist stance as a judge can be said to have originated in his visceral reactions to two experiences on the Court in the 1950s" (p. 187). The question whether a structure of constitutional jurisprudence can be erected on a foundation of human viscera seems to carry its own answer. Many a primitive society based its judgments on the examination of animal entrails. None left behind a "jurisprudence." Only the abandonment of the rule of law can make of Warren's example a guide to judicial behavior. And White acknowledges this point:

Thus when one compares Warren's approach with that of one, such as that of Hugo Black, which reached comparable results in countless cases, one finds a vulnerability in Warren's perspective that Black's avoids. . . .

. . . [W]hen Black is done, there is more than an aggregate of his ethical premises — there is a doctrinally consistent, if perhaps analytically flawed, body of constitutional jurisprudence. In contrast, when one divorces Warren's opinions from their ethical premises, they evaporate. No overreaching doctrinal unity binds them; they are individual examples of beliefs leading to judgments. One may applaud the results, embrace the premises, and admire the instincts of the man, but one can never divorce Earl Warren's opinions from Earl Warren and treat them as anonymous contributions to constitutional literature. (Pp. 366–67).

Perhaps even White gets carried away in praising or damning Warren's constitutional opinions. Apparently Warren himself sometimes recognized the need for legal reasoning. According to White, he also recognized his own inability to supply it. "Brennan was Warren's judicial technician. He was capable, in cases such as *Baker v. Carr*, or *New York Times v. Sullivan*, of supplying doctrinal rationales for decisions in which Warren strongly believed" (p. 185). To invoke again the voice of Warren's devil, Frankfurter: "Chief Justices of the United States are rarer than Presidents. A Chief Justice cannot escape history."¹⁷ My gut reaction to the White book is that the Warren Court may not "escape history," but that Warren may.

¹⁷ Frankfurter, *Chief Justice Stone*, in FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 7, at 442.