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Book Review

Self-Portrait of a Jurist—Without Warts

The Memoirs of Earl Warren. By Chief Justice Earl Warren. New York: Doubleday & Co., 1977. Pp. xii, 394. \$12.95.

Reviewed by Philip B. Kurland†

The canonization of Earl Warren proceeds apace. The true believers, mostly from academia and the media, repeatedly testify to the miracles worked by Warren as Chief Justice of the United States. All departures from the judgments and creeds of the Warren Court are regarded by them as heresies; all adverse criticisms are blasphemies.¹ And now we have Warren's own *apologia pro sua vita*, written, as the title page proudly proclaims, "by Chief Justice Earl Warren." But this volume deals primarily with Warren's work and life as, successively, Alameda County district attorney, Attorney General and Governor of California, and candidate for the vice-presidency in 1948 and for the presidential nomination in 1952. Little of it concerns his work on the Supreme Court, and what there is of that is mere posturing.

This is a dull book on an important subject. It is written turgidly, without grace or style. Its characters, including its main subject, are one-dimensional. It is a story told by an old man vainly looking back on a full and important public life, and aided by a very selective memory. Its only patent, and unintended, lesson is that which was recorded some time ago in *Ecclesiastes*:

I returned, and saw under the sun, that the race is not to the swift, nor the battle to the strong, neither yet bread to the wise, nor yet riches to men of understanding, nor yet favor to men of skill; but time and chance happeneth to them all.²

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1. See, e.g., L. LEVY, *AGAINST THE LAW* (1974). Not all academics are believers, however; some remain agnostic. See, e.g., A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* (1976); L. LUSKY, *BY WHAT RIGHT?* (1975). Some may even be considered the devil's advocates. See R. BERGER, *GOVERNMENT BY JUDICIARY* (1977); P. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* (1970).

2. *Ecclesiastes* 9:11.

The story is an oft-told tale. There is nothing of substance here that was not already more fully recorded in the sympathetic biographies of Katcher and Weaver.³ The unrevealing nature of the work should come as no surprise. We should have expected no more from a judicial biography:

The private life, the inner environment of a judge, his deeper motivations, usually become extraordinarily opaque, hidden from public gaze, after he ascends the bench. No judge has had a Boswell, and none has ever left behind him a detailed intimate diary like Pepys'. Sometimes, after his death, we can read a judge's private letters. But as Howarth said of Pepys' letters, with them, as distinguished from his diary, we are not "inside the man, looking through the window he made of himself on the world," we are only "peering through a curtained pane from without." We see not his "private face," only his "public face." As another writer observed, "behind the formal reserve of a high official a great deal more often goes on than most people suspect."⁴

There are some revelations, but again mostly unintended ones. For example, the atrocious nature of the writing would seem to afford evidence for the proposition that Warren did not write his own opinions, but depended upon the drafts of his law clerks.

There are other more obvious revelations. For one, Warren was not really well versed in the actions of the Court that preceded his own tenure. Thus, he writes:

After the decision [in *Cooper v. Aaron*, 358 U.S. 1 (1958)] was announced, Mr. Justice Frankfurter informed us that he had many friends in the Southern states, and that he intended to reach them by writing and circulating a concurring opinion of his own, to be officially filed at a later date. This caused quite a sensation on the Court, because it was our invariable practice not to announce the decision in any case until all of our views had been expressed. Nevertheless, he circulated such an opinion prior to the Court's announcement. Afterward, some of the Justices stated that they would never permit a Court opinion in the future to be made public until it was certain that the views of all were announced simultaneously.⁵

3. L. KATCHER, *EARL WARREN, A POLITICAL BIOGRAPHY* (1967); J. WEAVER, *WARREN: THE MAN, THE COURT, THE ERA* (1967).

4. Frank, *Some Reflections on Judge Learned Hand*, 24 U. CHI. L. REV. 666, 667 (1957) (footnotes omitted).

5. E. WARREN, *THE MEMOIRS OF EARL WARREN 298-99* (1977) [hereinafter cited by page number only]. Chief Justice Warren died before the publication of this volume, which includes certain notes added by its editors.

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Lest the chronology of these events not be clear from the words of the Chief Justice, the Court's opinion, signed individually by each of the Justices, including Frankfurter, appeared on September 29, 1958. Frankfurter's separate concurrence was filed on October 6, 1958.⁶ Whether this is a good or bad practice, whether a Chief Justice should ever be upstaged, are good questions. The practice is probably not a good one, largely because it reveals that judicial reasoning follows rather than precedes judicial judgment. But the condemned practice was not novel when Frankfurter indulged it in *Cooper v. Aaron*. In the *Rosenberg* case,⁷ which Warren erroneously refers to in this volume as a "treason" case,⁸ several of the same Justices filed their opinions after the announcement of judgment. In *Ex parte Quirin*,⁹ too, the judgment of the Court was announced, the petitioners were executed, and the Supreme Court, after some difficulty in composing a unanimous opinion, set out its reasons. On the other hand, Mr. Justice Rutledge should have been satisfied to postpone the filing of his dissent in *Yamashita*,¹⁰ rather than overworking himself to an early grave. When a Court insists on the announcement of a judgment forthwith, as in *Cooper* and *Quirin* and *Yamashita*,¹¹ there may be reason why minority if not majority opinions should be postponed. Why the Chief Justice took such umbrage at Frankfurter's behavior in *Cooper*, he never tells us, except to suggest that it was unique, which it wasn't.

Another revelation is that Warren did not understand some of the judicial doctrines that he rejected by instinct rather than by reason. Thus, he writes:

Neither do I agree with the so-called doctrine of "neutral principles." It, too, is a fantasy and is used more to avoid responsibilities than to meet them. As the defender of the Constitution, the Court cannot be neutral, whether it is judging litigation between individuals, between the government and an individual, or between branches of the government. The Court sits to decide cases, not to avoid decision, and while it must recognize the constitutional powers of the branches of Government involved, it must also decide every issue properly placed before it.¹²

Surely Warren accurately reflects here his antipathy to "neutral principles" and limited judicial jurisdiction. But to suggest that they

6. 358 U.S. 1, 20 (1958).

7. *Rosenberg v. United States*, 346 U.S. 273 (1953).

8. P. 302.

9. 317 U.S. 1 (1942).

10. *In re Yamashita*, 327 U.S. 1 (1946); see F. HARPER, JUSTICE RUTLEDGE AND THE BRIGHT CONSTELLATION 185-89 (1964).

11. See also *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

12. Pp. 332-33.

are the same is to reveal that he never meaningfully addressed either of them. The questions of restrictions on judicial power and of the impartial way in which a court is expected to apply the power that it rightfully asserts both may be contained in the notion of "judicial restraint," but not in that of "neutral principles."

Warren's memory of his most important opinion, *Brown v. Board of Education*,¹³ is clouded both by euphoria and nostalgia. Thus, he suggests that the cases decided under that name disposed of questions of both *de jure* and *de facto* segregation:

Seventeen of our states, by their own laws, had racially segregated public schools. A number of others had *de facto* segregation because of the rapid growth of ghettos which concentrated minority groups in the larger cities. The *Brown* case, when it came before the Supreme Court, challenged such discrimination in public schools as being unconstitutional.¹⁴

It was, of course, some years before the *de facto* cases came before the Court, and, if the Court's decisions remain less than clear on the subject, it is pellucid that *Brown* did not dispose of the *de facto* issues.

Memory also seems to be mixed with desire in his suggestion that there never was any "dissension within the Court in connection with the *Brown* case."¹⁵ Here, of course, Warren challenges the basis of his own claim to immortality, that he brought unanimity out of conflict in the *Brown* case. That the Court was in disarray—however clear the outcome of the decision might have been even before Warren's ascension—is too well documented to allow Warren's recollections to stand in the place of history.¹⁶

This foreshortened memory is evident in other places. Warren details at length a visit from an official of the Department of Justice, who called at the behest of Attorney General Mitchell to influence, as Warren states, the outcome of some pending wiretapping cases by revealing information not in the records of those cases about wiretapping of foreign embassies.¹⁷ As the story is told, the purpose and hoped-for effect of the visit are far from clear. But Warren does not mention at all a visit from Attorney General Mitchell himself, when he and President Nixon were seeking to secure the removal of Mr. Justice Fortas from the Court.¹⁸ Except for the fact that the Nixon

13. 347 U.S. 483 (1954).

14. P. 2.

15. P. 2; cf. p. 286 n.† (editorial note *contra*).

16. See, e.g., R. KLUGER, *SIMPLE JUSTICE* 582-616, 683-99 (1976).

17. Pp. 337-42.

18. The story is detailed in R. SHOGAN, *A QUESTION OF JUDGMENT* (1972).

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White House arranged to leak the story of the visit, we probably would not even have had Warren's public acknowledgment of it. What went on between Mitchell and Warren is still unknown. Whatever Warren might have told us appears to have gone to the grave with him. Mitchell and Nixon, whose piety at the "wrongdoing" of Fortas takes on a most peculiar hue in the light of Watergate, also seem to be leaving the story for their memoirs. Like Warren, however, they may not find their memoirs a congenial place to speak of this means of removing a Supreme Court Justice. For, as Warren writes, "the only [constitutional] way a Justice of the Supreme Court can be removed is by an impeachment resolution of the United States House of Representatives, followed by a trial in the Senate."¹⁹

The most interesting mystery of Warren's tenure as Chief Justice—which concerns his metamorphosis from an adept politician to a judicial statesman—remains unresolved by this autobiography because its existence is denied rather than confronted by the author. Warren's career, before his appointment to the Court, was almost a duplicate of Thomas E. Dewey's: a politician's use of prosecutorial and gubernatorial office as stepping stones to presidential office. It took a strange turn when he became the third governor in history to be appointed to the Court. (His predecessors were William Patterson in 1793 and Charles Evans Hughes in 1910.)

Warren denies that he changed:

It has been written that there was nothing in my background to presage my so-called "liberal" decisions on the Supreme Court. This notion has always been something of a mystery to me. Of course, I could well have some prejudice, as most of us do, in favor of my own consistency, but my actions have been exposed to the public constantly for more than half a century, and I feel that my views and actions in later years are but an outgrowth of the earlier ones.²⁰

It is not so much that these inconsistencies do not exist as that Warren prefers to ignore them. He downplays his role in the removal of the Japanese from California to concentration camps, not by explaining it, but only by apologizing for it:

I have since deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of freedom and the rights of citizens. When-

19. P. 304.

20. Pp. 4-5.

ever I thought of the innocent little children who were torn from home, school friends, and congenial surroundings, I was conscience-stricken.²¹

In the case of the rejection of Professor Max Radin for appointment to the California Supreme Court because of his activities on behalf of civil liberties, Warren totally ignored the event, but his editors mentioned it in a footnote:

Warren's disagreements with [Governor Culbert Olson] extended to other things as well. Among them was Olson's attempt to appoint a liberal University of California professor, Max Radin, to the California Supreme Court, which Warren successfully blocked as a member of the qualifications committee.²²

The book reveals, without being explicit, such things as prosecutorial searches without warrants,²³ attempts to prevent the exercise of the Fifth Amendment privilege, and violations of the secrecy of the grand jury.²⁴ But Warren explicitly recognizes that his early behavior would not meet the standards that he later helped impose on state prosecutors:

I would not recommend for today the vigorous cross-examination we gave to those prominent paving company people when they exercised their right against self-incrimination. That was more than forty years ago, when there were few guidelines for prosecutors and we were sure there was an industry-wide conspiracy to squelch by silence any attempts to root out widespread acts of corruption in city government.²⁵

Of his support for making it a crime to refuse to salute the flag, he says nothing.²⁶ But he explains his rejection of reapportionment for the California legislature in this way:

By the time I became governor, Los Angeles had about four million people, San Francisco about 800,000, Alameda (my county) about 750,000. Each of these three largest counties had but one senator each. On the other hand, a senator also represented some of the sparsely populated mountain counties with a three-county senatorial district of less than a hundred thousand people. Los

21. P. 149.

22. P. 159 n.7.

23. Pp. 74, 134-35.

24. Pp. 88-91.

25. Pp. 90-91.

26. The editors mention it in passing in the note on page 159.

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Angeles tried two or three times through the initiative process to increase its voting power in the Senate, but each time almost every county in the state voted against such proposals out of fear of being dominated by Los Angeles. The last attempt was made in 1948 when I was governor. The state was functioning well at the time, and I gave a statement to the press opposing the change. There was no constitutional issue raised, merely a question of fair representation for the larger counties. Because most of the large counties except Los Angeles were against the proposal, I joined with them in opposing it. It was frankly a matter of political expediency.²⁷

So, too, with his general position about the desirability of federalism and separation of powers:

It might be proper at this point to describe my concept of the relationships existing between various levels of government. My long experience in city and county government and four years as attorney general led me to the conclusion that, within reason, government should be kept as close as possible to the people. I therefore believed in a large degree of local autonomy. . . . In state government, I believed in the separation of powers and the autonomy of each of the three branches within its own domain, strengthened by mutual respect between them. I was opposed to any one of the three trying to impose its will on any other.²⁸

The list could be extended, but the point can be made without further itemization. It is not that Warren's views were right when he held political office and wrong when he was a jurist, but that his personal predilections before he joined the Court were different from—inconsistent with—those he expressed on the bench. Even if he could not himself see those differences, the record makes clear that they were there.

The vagaries of history always invite speculation. They do here, too. Richard III lost his kingdom for want of a horse. How different would the world look today if that much-maligned Richard²⁹ had prevailed, if the Tudors and Stuarts had never succeeded to the Crown of St. George? No Charles I? No Cromwell? No Glorious Revolution? No Hanovers? Suppose that, at the 1952 Republican convention, Warren had traded his political power for the vice-presidential

27. Pp. 309-10.

28. Pp. 169-70.

29. The tale is engrossingly told by Josephine Tey, in her mystery novel, *J. TEY, THE DAUGHTER OF TIME* (1952).

nomination instead of a place on the Court. No Nixon presidency? No Warren Court? No Watergate?

What then of the late Professor Bickel's keen analysis in his posthumously published *The Morality of Consent*, in which he suggested an analogy between recent presidential behavior and that of the Court under Warren? I offer this lengthy quotation from that slim but cogent volume for those of speculative and open mind willing to consider the possibility that both the Nixon White House and the Warren Court suffered the same Watergate syndrome:

[O]ur legal order cannot endure too rapid a pace of change in moral conceptions, and its fundamental premise is that its own stability is itself a high moral value, in most circumstances the highest. The legal order must be given time to absorb change, to accommodate it to itself as well as itself to it. If the pace is forced, there can be no law.

The assault upon the legal order by moral imperatives was not only or perhaps even most effectively an assault from the outside. As I have suggested, it came as well from within, in the Supreme Court headed for fifteen years by Earl Warren. . . . More than once, and in some of its most important actions, the Warren Court got over doctrinal difficulties or issues of the allocation of competences among various institutions by asking what it viewed as a decisive practical question: If the Court did not take a certain action which was *right* and *good*, would other institutions do so, given political realities? . . .

....

Here the connection with attitudes that at least contributed to Watergate is direct. It was utterly inevitable that such a populist fixation [as the Court revealed in the legislative apportionment and electoral franchise cases] should tend toward the concentration of power in that single institution which has the most immediate link to the largest constituency. Naturally the consequence was a Gaullist presidency, making war, making peace, spending, saving, being secret, being open, doing what is necessary, and needing no excuse for aggregating power to itself besides the excuse that it could do more effectively what other institutions, particularly Congress, did not do very rapidly or very well, or under particular political circumstances would not do at all. This was a leaf from the Warren Court's book, but the presidency could undertake to act anti-institutionally in this fashion with more justification because, unlike the Court, it could claim not only a constituency but the largest one.³⁰

30. A. BICKEL, *THE MORALITY OF CONSENT* 120-22 (1975).

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How would the author of these memoirs have responded to Bickel's proposition? Probably not at all. Large questions such as these were beyond Warren's ken—only for carping academics who thought that constitutional means were as important as constitutional ends.

The anonymous editors of these memoirs proudly announce that Warren's place in history is one in a triumvirate with John Marshall and Charles Evans Hughes. History may yet decide that the triumvirate that includes Warren contains not Marshall and Hughes, but rather his immediate predecessor and immediate successor: Fred M. Vinson and Warren E. Burger. For all three, it would seem, political power, including judicial power, was to be exercised for the advancement of what was "*right and good*" as their personal ideologies defined those less than rigid terms.