BOOK REVIEWS

THE CHIEF JUSTICE AND THE SCHOOL SEGREGATION CASES

The Public Papers of Chief Justice Earl Warren. Edited by Henry M. Christman. New York: Simon and Schuster, 1959. Pp. xi, 237. $4.50.

Henry M. Christman, whoever he may be,[1] has done the Chief Justice no great service in the publication of this collection of his speeches and opinions. For they reveal Warren's weaknesses rather than capitalize on his strength.[2] In the essays collected here we find no hint of the qualities of a Learned Hand, whose great literary talents are revealed as he deals with deep and subtle problems of the relationship of law and freedom;[3] nor of a Holmes, spirited and witty, challenging the very bases of our legal system;[4] nor of a Frankfurter probing the fundamentals of the role of the judiciary in a constitutional democracy and distilling the essence of men who have contributed to its effectiveness.[5] Warren's speeches reveal only the glittering generalities of the politician about the commonplace; nor should more have been expected of such ephemera as speeches welcoming various organizations to their California meeting places. The opinions reprinted here demonstrate what Professor Paul Freund has called "a tendency to make broad principles do service for specific problems that call for differentiation, a tendency toward over-broadness that is not an augury of enduring work and that misses the opportunity to use the litigation process for the refinement and adaptation of principle to meet the variety of concrete

[1] The publishers have revealed nothing about his identity.

[2] This judgment is not concurred in by the book reviewer for the New York Times. Herbert Mitgang, presumably after reading this volume, burst forth with this bit of hyperbole: "He is now in the distinguished company of such great dissenters in this century as Holmes, Brandeis, Cardozo and Stone." New York Times, July 8, 1959, p. 27, col. 4. See also Professor Cahn's review in The New York Times Book Review, July 12, 1959.

[3] See, *e.g.*, Hand, The Spirit of Liberty (Dilliard ed., 3d ed. 1959); Hand, The Bill of Rights (1959).

[4] See, *e.g.*, Holmes, The Common Law (1881); Holmes, Speeches (1891); Holmes, Collected Legal Papers (1920); Lerner, The Mind and Faith of Mr. Justice Holmes (1943).

[5] See, *e.g.*, Frankfurter & Landis, The Business of the Supreme Court (1928); Frankfurter, The Public and Its Government (1930); Frankfurter & Greene, The Labor Injunction (1930); Frankfurter, Mr. Justice Holmes and the Supreme Court (1938); Frankfurter, The Commerce Clause (1937); Frankfurter, Law and Politics (MacLeish and Prichard eds. 1939); Frankfurter, Of Law and Men (Elman ed. 1956); Konefsky, The Constitutional World of Mr. Justice Frankfurter (1949).

issues as they are presented in a lawsuit."[6] Nor is this view confined to those who make heavy demands for legal ability and workmanship in Supreme Court opinions. Even Professor Pritchett had this to say about two of the opinions reproduced in this volume:[7]

> Both in Watkins and Sweezy the Chief Justice managed to obfuscate the Court's comparatively narrow holding by stirring discourses on the virtues of privacy, the First Amendment and academic freedom, and the evils of thought control, enforced exposure of private affairs, and inquiries undertaken for the personal aggrandizement of the inquisitor. These preachments from such an authoritative pulpit are bound to be welcomed by libertarians who have heard precious little of this kind of talk from Washington in recent years, but they may cause one to forget that the Court has not yet reached the hard question as to what the First Amendment justifies a witness in refusing to reveal to a properly authorized congressional committee. In this area the Warren Court, reversing Theodore Roosevelt's advice, has perhaps spoken loudly to distract attention from the smallness of its stick.

Proof of the validity of such criticism may be found in the fact that later decisions of the Supreme Court have already rejected the extensive dicta contained in Warren's *Sweezy* and *Watkins* opinions.[8] Mr. Chief Justice Warren is a man of action, not a formulator of great legal doctrine, a man of good will whose conscience about the rights of individuals would do honor to most of those who now occupy legislative halls and executive mansions. History will find an important place for him, but because of his deeds rather than his words.

Indeed, his place in history as a Chief Justice has already been assured, partly by the accident of time which made him rather than Vinson the occupant of the central chair when the issues raised by the *School Segregation Cases*[9] could no longer be left undecided by the Court. Surely Earl Warren's name will be associated with *Brown v. Board of Education* and its progeny just as the name of Roger B. Taney is associated with the Court's most abominable error, the *Dred Scott* case.[10] Time has proved Taney wrong; it will vindicate Warren. But the Chief Justice has probably already suffered as much opprobrium for his role in effectuating desegregation as did Taney for his part in the attempt to perpetuate slavery. Of all the materials in this volume, only the Chief Justice's opinion for a unanimous Court in *Brown* is likely to be long-lived.

[6] Freund, *The Supreme Court Crisis*, 31 N.Y. STATE BAR BULL. 66, 78 (1959); *cf.* Griswold, *The Morrison Lecture*, 43 MASS. L.Q. 98, 110 (1958): "Perhaps it is his long experience as Governor which leads the Chief Justice to approach problems in some cases in terms of generalities and without sharp focus."

[7] PRITCHETT, THE POLITICAL OFFENDER AND THE WARREN COURT 65 (1958).

[8] *Compare* Barenblatt v. United States, 360 U.S. 109 (1959), *with* Watkins v. United States, 354 U.S. 178 (1957) (p. 150), *and* Uphaus v. Wyman, 360 U.S. 72 (1959), *with* Sweezy v. New Hampshire, 354 U.S. 234 (1957) (p. 175).

[9] Brown v. Board of Education, 347 U.S. 483 (1954) (p. 114); Bolling v. Sharpe, 347 U.S. 497 (1954) (p. 123); Brown v. Board of Education, 349 U.S. 294 (1955) (p. 125).

[10] Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

It is likely to be long-lived because of the fundamental nature of the issue which it resolved. It is likely to be long-lived, too, because of the ferment that it continues to cause. It is not strange that more than five years after the decision Southern demagogues and bigots continue to find fault with it. It is unfortunate, however, that so long after the decision it still forms the basis for unreasoned and unjustifiable criticism by lawyers and judges who should know better but who purport to see in the decision a unique departure from Constitutional principles and the judicial doctrine of *stare decisis*.

However novel the legal question presented to the Supreme Court in the *Brown* case, the social problem has been a recurrent one. For example, in 1922, President Lowell of Harvard had under consideration a proposal to exclude Jews from Harvard College. The Corporation ultimately rejected the proposal after being made to see the light by former President Eliot, then well into his tenth decade. Among those who wrote to Lowell about the subject was Judge Learned Hand, whose judgment and wisdom even the Southerners of typical ante bellum mentality cannot impugn. That letter said in part:[11]

> I cannot agree that a limitation based upon race will in the end work out any good purpose. If the Jew does not mix well with the Christian, it is no answer to segregate him. Most of the qualities which the Christian dislikes in him are, I believe, the direct result of that very policy in the past. Both Christian and Jew are here; they must in some way learn to live on tolerable terms, and disabilities have never proved tolerable. It seems hardly necessary to argue that they intensify on both sides the very feelings which they are designed to relieve on one. If after acquaintance the two races are irretrievably alien, which I believe unproven, we are, it is true, in a bad case, but even so not as bad as if we separate them on race lines. Along that path lie only bitterness and distraction.

The analogy is not a legal one but a social one.[12] The Constitution is directed to limitations on government action; private institutions and individuals may make their choice as they see fit so far as Constitutional command is concerned. It does point up the fact that although the question presented to the Court involved Negroes and whites, the problem can readily arise in terms of other races. Thus, the same question would be presented if a State should say that children of German ancestry shall be confined to one set of schools while children of non-German blood shall have access to all other schools. Those who say: "It can't happen here," should remember that the Supreme Court has been called upon at least once to strike down State legislation based on just such anti-German sentiment, when it held unconstitutional a State law which prohibited the teaching of foreign languages.[13]

[11] HAND, THE SPIRIT OF LIBERTY 21 (Dilliard ed., 2d ed. 1953).

[12] The relationship of these problems is underscored by the initial refusal of the West Side Tennis Club, in New York, to admit Ralph Bunche, United Nations Under Secretary for Special Political Affairs and Nobel Prize winner, to membership in July, 1959, because the club "accepted neither Negroes nor Jews for membership." N.Y. Times, July 9, 1959, p. 1, col. 4.

[13] Meyer v. Nebraska, 262 U.S. 390 (1923).

Because people tend to think of the great principles of our constitutional jurisprudence in abstract rather than real terms, it might be well to recall, too, that the cases which resulted in the *Brown* opinion involved real controversies between actual parties. And it was in the course of deciding four such flesh and blood contests that the Court, through Mr. Chief Justice Warren, rendered its famous and unanimous opinion. The cases involved State segregation laws in Kansas, South Carolina, Virginia, and Delaware. They bear the name of Oliver Brown, who was the father of an eight year old girl who had been prohibited from attending an elementary school within five blocks of her home in Topeka, because it was reserved for white students. Instead she was compelled to walk through railroad yards to take a bus to a Negro school twenty-one blocks away. Brown and the parents of other Negro children were responsible for these cases. They asked the courts to enjoin the States from maintaining this segregation. The United States District Court for Kansas refused relief because, it said, "the physical facilities, the curricula, courses of study, qualifications of and quality of teachers, as well as other educational facilities in the two sets of schools are comparable."[14] The federal court in South Carolina found that the Negro school facilities were grossly inferior to those available to the whites, but refused to grant the injunction when, on the order of the court, the State made appropriate efforts to equalize them in the county in question. So, too, with the federal court in Virginia. The Delaware courts, however, found that the inequality of school facilities required that the injunction issue.

The cases were first argued at length before the Court early in its 1952–53 Term. At the end of that Term, the Court set the cases down for re-argument in the 1953–54 Term and asked the counsel to prepare briefs in response to five questions. Earl Warren came to the Court at this point in the development of the desegregation cases. Early in the 1953 Term, the Court again heard oral argument. In addition, it received about 2,000 pages of written argument. On May 17, 1954, the Court handed down its unanimous opinion. But it did not frame its decree, which ultimately required the States to comply with its judgment "with all deliberate speed," until May 31, 1955. That the Court gave its fullest consideration to these cases cannot be gainsaid even by its most rabid critics. It concluded that laws, State or federal, requiring racial segregation in public schools were in violation of the Constitution.

To what extent Warren's "genius for bringing divergent factions together" brought about the unanimity in *Brown* v. *Board of Education* the public will never know. The individual and individualistic views of the nine men are aired behind closed doors in the Supreme Court conference room, and it is there that decisions and compromises are made. Earl Warren is warm and affable. He is a good administrator and a natural leader. He is popular with and respected by his colleagues. But did those factors alone produce unanimity?[15]

[14] 98 F. Supp. 797, 798 (D. Kan. 1951).

[15] Blaustein & Ferguson, Desegregation and the Law 28 (1957).

Whatever the factual answer to that question, in the minds of many, responsibility for the opinion and the unanimity of the court has been assigned to Warren. In the light of the subsequent and continued divisions of the Court, however, one may doubt the validity of this thesis.

What were the factors which properly affected the Court's judgment? First, of course, was the Fourteenth Amendment, one of the three Constitutional amendments enacted after the Civil War, primarily for the purpose of protecting the newly freed slaves from the tyrannies of their former masters. It is not surprising that the conquered South has never displayed any great affection for the Thirteenth, Fourteenth, and Fifteenth Amendments.

The pertinent section of the Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." If it is asked, as the Court did in one of the questions it put to counsel, whether the framers of the Fourteenth Amendment intended by the phrase "equal protection of the laws" to prevent the States from segregation in terms of race, two answers are offered. "The discussion and our own investigation," said Mr. Chief Justice Warren, "convince us that, although the sources cast some light, it is not enough to resolve the problem with which we are faced. At best they are inconclusive." A more forthright answer about the intent of the framers has been provided by Professor Bickel: "The obvious conclusion to which the evidence . . . easily leads is that section 1 of the Fourteenth Amendment . . . was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation."[16] "If," as Bickel says, "the Fourteenth Amendment were a statute, a court might very well hold . . . that it was foreclosed from applying it to segregation in the public schools."[17] But because it is a Constitutional provision, the second question asked by the Court had to be answered: Is the Court confined to the exact and immediate intent of the framers in interpreting provisions with such vague contours as "privileges and immunities," "due process of law," and "equal protection of the laws"? In short, is the Constitution a document of rigid and unchanging meaning or is it to be treated as a vital, living organism? It is the argument of Professor Bickel and the observation of Dean Leflar and Professor Davis of the Arkansas Law School that the framers of the Fourteenth Amendment knew and understood that, whatever its immediate effect, its appropriate interpretation would vary with the demands of the future and that the job of giving meaning to the words was assigned, in our system of government, to the Supreme Court.[18]

[16] Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955).

[17] *Id.* at 59.

[18] Leflar & Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377, 386 (1954).

This is the answer which Mr. Chief Justice Warren gave on behalf of the Court in the *Brown* case. It is the answer which the Court itself has long given to the question of the rigidity of meaning of the grand phrases in the Constitution. It may be put in the words of Mr. Justice Holmes:[19]

> when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

Or, in the language of Mr. Chief Justice Hughes, a judge whom the State of Georgia never sought to impeach:[20]

> If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the condition and outlook of their time, would have placed upon them, the statement contains its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"we must never forget that it is *a constitution* we are expounding—a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."

No serious student of the Court can deny that throughout its history it has interpreted the Constitution as a living and not a moribund document. Indeed, if a static meaning were to be given to the Constitution, the States' Righters might find, as Professor Crosskey has asserted,[21] that the appropriate function of the States in the American body politic approximates the function of the appendix in the human body: a source of trouble but otherwise a vestigial remainder.

In addition to the language of the Constitution, of course, the Court was called upon to consider the gloss which it had, through its decisions and opinions, put upon the Equal Protection Clause as it related to the Negroes it was framed to protect. The main pillar of the Southern argument is *Plessy* v. *Ferguson*.[22] Plessy, who numbered one Negro grandparent among his forebears, was arrested in Louisiana for refusing to ride in the colored coach of a railroad train. He brought an action to enjoin the enforcement of the Louisiana segregation law. The Supreme Court refused to interpret the Fourteenth Amendment as barring Louisiana from requiring separation of the races in transportation facilities. There are four points to be noted about this case. First, it did not involve educational facilities at all and the rationale proffered by Warren in *Brown*,

[19] Missouri v. Holland, 252 U.S. 416, 433 (1920).

[20] Home Building and Loan Ass'n v. Blaisdell, 290 U.S. 398, 442 (1934).

[21] CROSSKEY, POLITICS AND THE CONSTITUTION (1953).

[22] 163 U.S. 537 (1896).

that there cannot be separate but equal educational facilities, would not be inconsistent with the result in *Plessy*, though it would be inconsistent with the reading given *Plessy* by the lower courts. Second, although *Plessy* has been repeatedly cited as a basis for the "separate but equal" doctrine, the opinion will be searched in vain for any language suggesting that segregation is permissible under the Equal Protection Clause where equal facilities are provided. Third, Mr. Justice Harlan, the grandfather of the present Justice, dissenting, stated: "Our Constitution is color blind, and neither knows nor tolerates classes among citizens. . . . In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case."[23] Fourth, the vitality of the *Plessy* case was sapped almost a decade before the *School Segregation Cases*, when the Supreme Court held that State segregation laws imposed an invalid burden on interstate commerce.[24]

Three years after *Plessy* v. *Ferguson*, in 1899, the Court refused to close the white schools in Richmond County, Georgia, until a separate school was provided for Negroes. The question whether separate but equal schools violated the Constitution was not timely raised and the Court did not consider the question.[25] The issue was again avoided in the *Berea College* case in 1908.[26] In 1928 came the high water mark of the separate but equal doctrine and strangely enough it involved not a Negro but a Chinese, who was attacking not the separate but equal rule but the classification by Mississippi which prohibited her attendance at white schools and, therefore, compelled her attendance at a Negro school. The Supreme Court, which then included Holmes and Brandeis, speaking through Mr. Chief Justice Taft, approved the classification of the Chinese girl with Negroes rather than whites, and gave its blessing in dicta to lower court cases approving the separate but equal doctrine in education.[27] After this the tide of educational segregation as constitutionally approved behavior began to ebb.

In 1938, Lloyd Gaines, who had been denied admission to the University of Missouri Law School because of his color, brought his case before the Supreme Court. The State had offered to pay his way to any law school which would have him. But the Supreme Court said that this was not enough, that the State must afford him the opportunity to attend law school within the State where it gave that opportunity to others; and that the white law school, the only one which the State maintained, must be opened to him.[28] In this instance, the

[23] *Id.* at 559. But see his opinion in Cumming v. Board of Education, 175 U.S. 528 (1899).

[24] Morgan v. Virginia, 328 U.S. 373 (1946).

[25] Cumming v. Board of Education, 175 U.S. 528, 543 (1899).

[26] Berea College v. Kentucky, 211 U.S. 45 (1908).

[27] Gong Lum v. Rice, 275 U.S. 78, 85 (1927).

[28] Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); see also Sipuel v. Board of Regents, 332 U.S. 631 (1948).

Supreme Court reached a result which the Maryland courts had reached on their own some two years before.[29]

Herman Sweatt's case came to the Supreme Court in 1950. Texas had established a Negro law school in addition to its white law school. Sweatt, a Negro, applied for and was denied admission to the white school. But the Supreme Court granted him the relief he sought.[30] In effect, the Supreme Court held that there was no such thing as separate but equal law schools. On the same day, the Court decided *McLaurin* v. *Oklahoma State Regents*,[31] holding that the segregation within a graduate school at the University of Oklahoma, i.e., segregation by classroom seat, by library table, and by cafeteria section, was in violation of the Equal Protection Clause. The separate but equal doctrine as applied to education was nearly done to death on this day in June, 1950, when the *McLaurin* and *Sweatt* cases were decided. This is not to suggest that the court was ready to say in 1950 what it said in 1954, nor that the rationale in these cases provided a basis for the *Brown* decision. But long before *Brown* there were signs other than these school cases pointing to the early demise of that notion. The States, which had been barred from segregating by zoning since 1917,[32] despite the separate but equal argument, were held to be impotent to enforce racial restrictive covenants in 1948.[33] Protection to the Negroes in their voting rights—to the extent that such protection could be extended by a court—was afforded Negroes despite the subterfuges used by the States,[34] and the Fourteenth Amendment was held to mean that Negroes could not be excluded from jury service.[35] All these decisions preceded Warren's ascension to the Court.

These then were the legal factors which were involved in the opinion which Warren wrote for the Court, but they obviously were not the only relevant factors. In the interpretation of the Constitution, as in lesser matters, the Court, from its inception, has looked not only to the intent of the framers, to the lessons of history, to legal precedent and to logic; it has always weighed the potential consequences of its decisions. No one can catalogue these in the same fashion that one can list the legal authorities. Two are apparent, however.

The first was the fact that to millions of Americans, segregation had long been a cardinal principle in their way of life. In the words of President Truman's Committee on Civil Rights:[36]

[29] University of Maryland v. Murray, 169 Md. 478, 182 Atl. 590 (1936).

[30] Sweatt v. Painter, 339 U.S. 629 (1950). [31] 339 U.S. 637 (1950).

[32] Buchanan v. Warley, 245 U.S. 60 (1917).

[33] Shelley v. Kraemer, 334 U.S. 1 (1948); see also Hurd v. Hodge, 334 U.S. 24 (1948); Barrows v. Jackson, 346 U.S. 249 (1953).

[34] Smith v. Allwright, 321 U.S. 649 (1944).

[35] Norris v. Alabama, 294 U.S. 587 (1935); Smith v. Texas, 311 U.S. 128, 130 (1940); Cassell v. Texas, 339 U.S. 282 (1950).

[36] To Secure These Rights: The Report of the President's Committee on Civil Rights 79 (1947).

Legally enforced segregation has been followed throughout the South since the close of the Reconstruction era. In these States it is generally illegal for Negroes to attend the same schools as whites; attend theaters patronized by whites; visit parks where whites relax; eat, sleep or meet in hotels, restaurants or public halls frequented by whites. This is only a partial enumeration—legally imposed separation of races has become highly refined. In the eyes of the law, it is also an offense for whites to attend "Negro" schools, theaters and similar places. The result has been the familiar system of racial segregation in both public and private institutions which cuts across the daily lives of southern citizens from the cradle to the grave.

The Justices were not unaware of the profound changes in the Southern way of life that would be required by a desegregation decree. At least three of them had grown up and lived in the kind of community described in the quotation from the President's Civil Rights Commission: Hugo Black in Alabama, Stanley Reed in Kentucky, and Tom Clark in Texas. All of the Justices had lived, for greater or lesser periods, in the District of Columbia or its environs, which is not an untypical Southern community. It is hardly possible to believe that all eagerly sought after so fundamental a change. Evidence of the concern of the Court over this problem is revealed by the length and care of its deliberations and by the unusual form of its decree. The decree did not command immediate compliance, nor even compliance within a fixed period of time which was requested by the plaintiffs and by the Department of Justice. It required only compliance "with all deliberate speed," a novel form of decree so far as the Supreme Court is concerned.[37] The form was chosen to allow a gradual rather than a precipitous change. That the choice might have been a desirable one is attested by those jurisdictions which have, in good faith, utilized the grace period for working out plans for compliance. It has proved worse than useless, positively harmful, in those jurisdictions where the "razorback" or "cracker" influences have used the time to destroy the possibilities of a calm and peaceful transition.

The second of the non-technical factors was the recognition by the Court that the separate but equal doctrine had always resulted in separation but never in equality. Dean Leflar has demonstrated conclusively that there never has been, nor is there likely to be, any way to measure the equality of separate educational facilities.[38] In the only Supreme Court cases on the subject of segregation of

[37] "The critical terms of the decree are, of course, 'deliberate speed'—a phrase taken from English Chancery practice and not, as some litterateurs believed, from the refrain in Francis Thompson's 'Hound of Heaven': 'deliberate speed, majestic instancy.' If poetic terms are insisted on, the court preferred Thompson's refrain (or the first part of it) to Keats': 'Thou foster-child of silence and slow time.' " Freund, *Storm Over the American Supreme Court*, 21 MODERN L. REV. 345, 351 (1958).

For an earlier use of the phrase in the Supreme Court, see Frankfurter, J., dissenting in Sutton v. Lieb, 342 U.S. 402, 411 (1952): "I would remand the case to the Court of Appeals to be held by it until the plaintiff seeks with all deliberate speed a decision on the crucial question of the case in the Illinois courts."

[38] Leflar & Davis, *op. cit. supra* note 18.

educational facilities, either there had been no question as to the equality of the facilities, as in the case of the Chinese girl required by Mississippi to attend Negro schools, or, where the question had been presented, as in *Sweatt* and *McLaurin*, the Court had found that the facilities did not satisfy the demands of equality—not even when the segregation took place within the same school. Thus, there never had been any direct Supreme Court sanction of the notion that separate but equal educational facilities can actually exist.

To cut further toward reality, it must be recognized that the Court would have to assume the roles of two of the three monkeys, seeing and hearing no evil, in order to fail to recognize the want of good faith on the part of the States urging the retention of the separate but equal doctrine. From 1868 to 1954, this doctrine purportedly governed their actions. No person visiting the States of Georgia or Mississippi—the States which have produced the most vehement supporters of the separate but equal doctrine—prior to the *School Segregation Cases*, would have found any evidence of a good faith attempt to afford equal educational opportunities to their Negro citizens. Unless then the Court was to make a monkey of itself, it had to face the fact that the separate but equal doctrine was a mere excuse for the continued subordination of the Negro people, for a two-class system with the whites dominant; that the maintenance of an inferior educational system for Negroes would inhibit their capacity to secure the equality of status which the Fourteenth Amendment was designed to afford them.

Given the fact, then, that the function of segregation was a two-class system of citizenship, the Court had to decide whether the result which had been attained under the separate but equal flag was really consonant with the principles of democracy, freedom and equality which are both explicit and implicit in the language of the Constitution; whether it was consonant with the principles of morality which underlie our American jurisprudence; whether it was consonant with our role as leader in the Cold War fight of the free world against the spread of totalitarian doctrine. Chief Justice Warren, speaking for the Court, gave the only answer possible. As Professor Freund had said: "It is proving very hard indeed in some quarters to live physically with the Court's decisions; would it not have proved even harder to live intellectually and morally with a contrary decision?"[39]

The critics of Warren's opinion in these cases have shouted that it is a rejection of our principles of *stare decisis*. Two of the principal goals of our legal system are certainty and equality and the doctrine of *stare decisis* is essential to both. It contributes to certainty by giving a lawyer a reasonable basis for anticipating the rules that will be applied to his legal problem. It contributes to equality by requiring that the rules applied to one set of litigants will also be applied to a later set of litigants. It is a worthy and desirable principle, but like

[39] Freund, *op. cit. supra* note 6 at 67.

most basic principles of law is not inflexible. It has not reached the stage which was described by Jonathan Swift in *Gulliver's Travels:*[40]

It is a maxim among these men, that whatever has been done before may legally be done again; and therefore they take special care to record all the decisions formerly made, even those which have through ignorance or corruption contradicted the rule of common justice and the general reason of mankind. These under the name of precedents, they produce as authorities and thereby endeavor to justify the most iniquitous opinions. . . .

" 'There is no virtue in sinning against light or in persisting in palpable error, for nothing is settled until it is settled right.' "[41] Thus spake, not Zarathustra the god of light, but Senator Ervin when he was Mr. Justice Ervin of the Supreme Court of North Carolina. So, too, spoke James F. Byrnes, not when he was Governor of South Carolina or counsel to that State in the *School Segregation Cases*, but when he was a Justice of the Supreme Court of the United States. He was then called upon to write the opinion in a case in which the constitutionality of a California statute making it a crime to bring indigent persons into that State was at issue. He rejected earlier decisions which would have justified the California statute in this language:[42]

[w]e do not consider ourselves bound by the language referred to. *City of New York* v. *Miln* was decided in 1837. Whatever may have been the notion then prevailing, we do not think it will now be seriously contended that because a person is without employment and without funds he constitutes a "moral pestilence."

It must be appreciated that a rigid doctrine of stare decisis would be inconsistent with the notion of a dynamic, vital constitution. The appropriate principle was perhaps best stated in 1891 by a totally impartial but astute observer:[43]

[The Supreme Court] has not always followed its own former decisions. This is natural in a court whose errors cannot be cured by the intervention of the legislature. . . . as nothing less than a constitutional amendment can alter the law contained in the Federal Constitution, the Supreme Court must choose between the evil of unsettling the law by reversing, and the evil of perpetuating bad law by following, a former decision. It may reasonably, in extreme cases, deem the latter evil the greater.

History as well as reason will exonerate Warren of the charges levelled against him as the head of the Court which rendered the *School Segregation* opinions. The task was not an easy one. As one Justice of the Court has reported:[44]

[40] Quoted by Cloyd La Porte in DOUGLAS, STARE DECISIS 3 (1949).

[41] State v. Ballance, 229 N.C. 764, 767, 51 S.E. 2d 731, 733 (1949).

[42] Edwards v. California, 314 U.S. 160, 177 (1941).

[43] 1 BRYCE, THE AMERICAN COMMONWEALTH 266–67 (2d ed. rev. 1891).

[44] FRANKFURTER, *John Marshall and the Judicial Function*, in GOVERNMENT UNDER LAW 19–20 (Sutherland ed. 1956).

It may be that responsibility for decision dulls the capacity of discernment. The fact is that one sometimes envies the certitude of outsiders regarding the compulsions to be drawn from the vague and admonitory constitutional provisions. Only for those who do not have the responsibility for decision can it be easy to decide the grave and complex problems they raise especially in controversies that excite public interest.

Certainly Warren and his brethren displayed courage as well as wisdom in this opinion. They may take pride in the fact that it revealed a courage and wisdom which the Congress has never shown on this issue; a courage and wisdom which was lacking in a President who waited until more than five years after the decision to put the slightest force of the prestige of his office behind the result. Not until July 8, 1959, did President Eisenhower publicly—and somewhat timidly—suggest that segregation was "morally wrong."[45] History will vindicate Warren. It will treat him as a great judge, but for his actions like those in the *Brown* case, not for the contents of his speeches and opinions of the kind which fill most of this book.

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[45] At the President's press conference on July 8, 1959, the following colloquy took place: "William H. Lawrence of The New York Times—Mr. President, quite apart from the legalism of the situation. Mr. President, have you any opinion as to whether racial segregation is morally wrong? A.—Myself?

"*Q.*—Yes, sir. *A.*—Well, I suppose there are certain phases of segregation, you are talking about, I suppose, segregation by local laws—

"*Q.*—In public facilities. *A.*—In other words that interfere with the citizen's equality of opportunity in both the economic and the political fields.

"*Q.*—Yes, sir. *A.*—I think to that extent, that is morally wrong, yes." New York Times, July 9, 1959, p. 12, cols. 2 and 3.

It should be noted that the President displayed no less courage than other politicians. Governor Stevenson's campaign speeches, for example, will be searched without success for any more forthright position on this subject than the one quoted above.

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Why Men Confess. By O. John Rogge. New York: Thomas Nelson & Sons, 1959. Pp. 298. $5.00.

The incredible confessions of the Old Bolsheviks during the Moscow "show trials" of the 1930s prompted the world to ask how such confessions were induced. More recent confessions, not only in Russia but by repentant ex-Communists in this country and by American prisoners of war in Korea, have only underscored the puzzling problem.

O. John Rogge, a former Assistant United States Attorney General in charge of the criminal division, offers his explanation in this short and readable book. The answer, he says, is not force, which was used by the Russians only for a year or so (1937–38) and not at all by the Chinese Communists. Rogge instead