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"IT is not enough for the knight of romance," Justice Holmes once reminded us, "that you agree that his lady is a very nice girl—if you do not admit that she is the best that God ever made or will make, you must fight."[1] So, too, with the admirers of the Chief Justice and their "fair lady." For the moment, Earl Warren is enjoying the lavish praise that is not uncommonly ladled out when a man voluntarily decides to end a long and important government career. The contents of this issue of the *Michigan Law Review* may be taken as representative of the prevalent attitude, especially in the law school world, about the greatness of Chief Justice Warren.

Indeed, it was clear from the tone of the invitation to participate in this Symposium that the editors were requesting me to play a part in a sort of secular canonization of the great man, and that my role was to be that of the devil's advocate. As an amateur in canon history, I have been unable to discover an instance in which the devil's advocate has prevailed. I assume, therefore, that the function I am expected to fulfill is that of making out a good case against the miracles that Warren is supposed to have performed, but not a good enough case to be convincing. Thus, I must align myself neither with President Eisenhower's rumored reference to his appointment of Warren as the "biggest damfool mistake I ever made"[2] nor with President Johnson's assessment of Warren as "the greatest Chief Justice of them all."[3] My proposition here is rather that Warren is deserving neither of the simpering adulation of his admirers nor of the vitriolic abuse of his detractors. It is too early to sanctify him.

I should say early on, however, that if a "great Chief Justice" is one who has presided over a Court that has written, rewritten, and repealed large segments of the law of the land—constitutional as well as statutory and judicial—then Warren clearly qualifies for the accolade. If, on the other hand, reliance is to be placed on Warren's individual contributions to American jurisprudence as revealed in his opinions, it will be difficult indeed to justify such laurels.

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1. *Natural Law*, in COLLECTED LEGAL PAPERS 310 (1920).
2. J. WEAVER, WARREN: THE MAN, THE COURT, THE ERA 342-43 (1967).
3. *See* J. WEAVER, *supra* note 2, at 335-36.

The Warren myths, I submit, whether one finds them in the vast demonology or extensive hagiography devoted to the subject, are dependent upon identification of the Chief Justice with the institution over which he presides, an identification that has not been valid since the time of John Marshall, if it was valid then. A Chief Justice, despite the public image, has little authority that is not shared by his colleagues on the Court, except that which inheres in his personal capacities. Harlan Stone, for example, lent no more direction to the Court's actions as Chief Justice than he did as an Associate Justice.

The Chief Justice of the United States differs in function from an Associate Justice of the Supreme Court in that he is treated as the senior member of the Court no matter how short his tenure and, therefore, assigns the opinions when he is a member of the majority. And he presides at the conferences and during the presentations of oral arguments. It is certainly true that a strong Chief Justice can use these roles as devices for framing the issues to which the Court will address itself, but that function has as often been performed by an occupant of a side chair as by the possessor of the center chair.

There is no evidence that Warren's influence has extended beyond the power of the one vote that is conferred upon him as a member of the Court. Unlike Stone and Charles Evans Hughes before him, Warren can hardly be regarded as the intellectual or forensic superior of any of his brethren. Indeed, a far more accurate estimate is that Warren has not formed the Court but rather that the Court has formed him. Certainly Warren the Chief Justice has revealed a very different set of values than did Warren the district attorney, Warren the state attorney general, or Warren the governor.

As a district attorney and attorney general in California, he engaged in and endorsed the very prosecutorial practices that the "Warren Court" has so thoroughly condemned: extorting confessions, although allegedly not by physical violence; depriving indigents of counsel, although allegedly not at trial; bugging homes and offices and conducting illegal searches and seizures, although, it is said, the illegally secured evidence was not used at trial.[4] Nor, during this period, did he abstain from the kind of Red-baiting that characterized the McCarthy era.[5] As Governor of California he led the racist attack that resulted in the evacuation of the Japanese-Americans from the West Coast.[6] And, he successfully fought legislative re-

4. *Id.* at 76-94.
5. *Id.* at 62-75.
6. *Id.* at 105-14.

apportionment[7] that would have brought his state closer to the simplistic "one man—one vote" formula that he later thought should be imposed on all states, not merely as a desirable standard but rather as a constitutionally compelled one.[8] It is readily evident that the Supreme Court gave the new values to the Chief Justice; he certainly did not impose his standards upon the Court.

A second of the Warren myths is dependent on the proposition that his genial personality—and there is none who would deny him this—has been a cohesive force, drawing together the disparate views of his brethren into a unified whole. Unfortunately, the facts are to the contrary. Under Warren's presidency, the Court has been the most divided, if not the most divisive, in American history. A glance at a few statistics will make this point clear.

A comparison of the last five years of the Warren Court (excluding the 1967 term) with the last five-year period in the life of the equally embattled New Deal Court of the "Nine Old Men," which included such noteworthy dissenters as Justices Brandeis, Stone, and Cardozo, reveals the following:

"The Nine Old Men"				*"The Warren Court"*			
Term	Majority Opinions	Concurring Opinions	Dissenting Opinions	Term	Majority Opinions	Concurring Opinions	Dissenting Opinions
1932-33	168	1	17	1962-63	117	40	76
1933-34	158	4	18	1963-64	127	30	77
1934-35	156	1	14	1964-65	101	46	71
1935-36	146	3	20	1965-66	107	37	74
1936-37	149	1	17	1966-67	119	26	97
Totals	777	10	86		571	179	395
Average	155	2	17		114	36	79

If one looks only at the dissenting *votes*, the figures are these:

"The Nine Old Men"			*"The Warren Court"*		
Term	Dissenting Votes	Number of Cases	Term	Dissenting Votes	Number of Cases
1932-33	70	168	1962-63	234	117
1933-34	67	158	1963-64	320	127
1934-35	60	156	1964-65	173	101
1935-36	76	146	1965-66	168	107
1936-37	78	149	1966-67	322	119
Totals	351	777		1217	571
Average	70	155		243	114

7. *Id.* at 239-42.
8. Baker v. Carr, 369 U.S. 186 (1962).

This is not to suggest that there is anything wrong with a Court that chooses to express individual views by way of concurring and dissenting opinions and dissenting votes. It is offered only to indicate that the Chief Justice was perhaps not the great conciliating force that so many have suggested him to be.

This particular Warren myth, as indeed almost all of them, began with the unanimous opinion in the first of the school desegregation cases, *Brown v. Board of Education*.[9] The argument assumes that Warren is responsible, if not for the judgment in that case and its companions, at least for the unanimity with which the judgment was announced. It takes no occult powers to recognize that the *Brown* decision was the result of a careful, step-by-step process in which Warren participated only at the ultimate stage of authoring the *Brown* opinion—a step that would have been taken even with Fred Vinson still occupying the office of Chief Justice. Nor was the presence of Warren on the Supreme Court and that tribunal's unanimity any more than coincidental. It is safe to say that the façade of unanimity was due at least as much to the persuasive capacities of Hugo Black and Felix Frankfurter as to the benign presence of Earl Warren. (Perhaps, however, it may be said that Warren's visit to Justice Jackson while the latter was in the hospital with a heart attack was designed to prevent the filing of a separate opinion by Jackson.)

Warren's "greatness" depends, therefore, upon the erroneous identification of the Chief Justice with the institution over which he presides, as if a Chief Justice is responsible for the work of the Court as a President is held responsible for the actions of all his subordinates in the executive branch. That this is an erroneous concept of the Chief Justice's role should be clear. That it is the public concept, however, has only recently been underlined by the confirmation hearings and Senate debate on the nomination of Associate Justice Fortas to the Chief Justiceship.[10] And so, because the error is so pervasive, history may well measure Warren's place by the work of the Court on which he served rather than by his individual contributions to constitutional jurisprudence. Thus, a quick look at the work of the Court may be in order.

The acclaim for the Warren Court rests largely on five areas of its work: the school desegregation cases,[11] the criminal procedure

9. 347 U.S. 483 (1954).
10. *See, e.g.*, N.Y. Times, Oct. 4, 1968, § 2, at 53, col. 7.
11. *See* Carter, *The Warren Court and Desegreation*, 67 MICH. L. REV. 237 (1968).

cases,[12] the reapportionment cases,[13] the church-state cases,[14] and the obscenity cases.[15] I shall not touch upon the last because in that area Warren was more likely to be found on the side of censorship than against it.

I think that few but racial or religious bigots would reject the objectives of the Court in the school desegregation cases and the church-state cases. Objections to the reapportionment decisions may rest either on different philosophies of democracy than that of the Levellers,[16] or on notions of the impropriety and lack of wisdom in the Court's intervention in this political area.[17] And only a tyrant would object to the goals of due process that underlie the criminal procedure cases, however much legitimate exception may be taken to the Court's methods of securing these goals. In short, the Court's good intentions cannot be gainsaid. Indeed, if, as has been suggested, the road to hell is paved with good intentions, the Warren Court has been among the great roadbuilders of all time.

History, however, has a nasty way of measuring greatness in terms of success rather than in terms of goodness. Marshall, for example, is applauded because his Court contributed to the centralization of governmental power at a time when the centrifugal philosophy of Jeffersonian democracy might have destroyed the nation or kept it from coming into being. Roger Taney, on the other hand, has gone down in infamy, despite some noteworthy contributions to American constitutional jurisprudence, because he defended the institution of slavery in the *Dred Scott*[18] case when the forces of history proved to be on the other side—the side of the Union Army.

If we measure the Warren Court's efforts in terms of specifics, they do not augur well for history's halo. As of today, we have little more integration in the public school systems than we did when *Brown* was decided in 1954. (Congressional ratification and implementation of the Court's goals may change the tide, but not soon.) School prayers and Bible-reading are uninhibited, despite the

12. *See* Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249 (1968).

13. *See* MacKay, *Reapportionment: Success Story of the Warren Court*, 67 MICH. L. REV. 223 (1968).

14. *See* P. Kauper, *The Warren Court: Religious Liberty and Church-State Relations*, 67 MICH. L. REV. 269 (1968).

15. *See* Kalven, *"Uninhibited, Robust, and Wide-Open"—A Note on Free Speech and the Warren Court*, 67 MICH. L. REV. 289 (1968).

16. *See, e.g.*, Dirksen, *The Supreme Court and the People*, 66 MICH. L. REV. 837, 854 (1968).

17. *See, e.g., id.* at 839.

18. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

Court's decisions, except in those few places where a direct judicial mandate has been imposed or threatened. If we have achieved widespread reapportionment of state legislatures, it must be recognized that, for the most part, the politicians rather than the people have controlled such reapportionment. But worse, to the extent that voting power has been shifted, it has been shifted from the rural areas and, in some cases, the cities, to suburbia—a politically more reactionary constituency than even the farm groups. But the success of reapportionment is most likely to be discounted because the state legislatures have become relatively unimportant instruments in a country in which power is essentially divided between the national government and the cities. Police brutality seems not to be reduced, although a number of guilty defendants have been freed to attempt their escapades again.

On the other hand, if one views the Court's efforts from a broader perspective, looking at the woods rather than the trees, the Court may ultimately appear to be much more successful. Certainly the Court must be given credit for helping to spark the Negro revolution that engulfs us at the moment. Certainly, too, the Court has contributed to the egalitarian ethos that is becoming so dominant. But we do not yet know whether the Court's efforts have enhanced the rule of law in our society or have diminished it. And ultimately, I suspect, the verdict of history will depend upon the outcome of these three manifestations of the Court's business.

To restate my thesis then, it is too early to tell whether history is on the side of the Warren Court. If the Court has chosen the right side, and history credits it with contributing to that side's success, then history may use for Earl Warren the words Holmes once used for another jurist who, alas, has now been forgotten: "Great places make great men. The electric current of large affairs turns even common mould to diamond, and traditions of ancient honor impart something of their dignity to those who inherit them."[19] As of now, I submit, even these words would be extravagant and premature.

19. O. HOLMES, SPEECHES 54 (1913).