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REMARKS

CHIEF JUSTICE EARL WARREN: SUPER CHIEF IN ACTION*

Bernard Schwartz†

Years after his Presidency, John Adams said, "My gift of John Marshall to the people of the United States was the proudest act of my life. . . . I have given to my country a Judge, equal to a Hale, a Holt, or a Mansfield."¹

Contrariwise, when former President Dwight Eisenhower was asked by his biographer, Stephen E. Ambrose, "what was his biggest mistake, he replied heatedly, "The appointment of that S.O.B. Earl Warren."²

History has, however, disagreed with the Eisenhower estimate. Instead, the consensus is plainly with Vice-President Hubert H. Humphrey's assertion that, if President Eisenhower "had done nothing else other than appoint Warren Chief Justice, he would have earned a very important place in the history of the United States."³

During the 1953 Labor Day weekend when Chief Justice Fred M. Vinson

* Based on remarks delivered in a lecture to The Supreme Court Historical Society at the United States Supreme Court Chamber, Washington D.C., November 5, 1997. These remarks were also broadcast in their entirety by C-SPAN on December 20-21, 1997.

These are the last public remarks made by Professor Schwartz before his untimely death on December 23, 1997.

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1. 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 178 (1922).

2. Stephen E. Ambrose, *The Ike Age*, *THE NEW REPUBLIC*, May 9, 1981, at 26, 30. *See also* 2 STEPHEN E. AMBROSE, *EISENHOWER: THE PRESIDENT* 190 (1984) ("[I]n the sixties, Eisenhower frequently remarked that his biggest mistake was the appointment of that dumb son of a bitch Earl Warren."); ED CRAY, *CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN* 10 (1997) ("[T]he biggest damn fool thing I ever did.").

3. BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT-A JUDICIAL BIOGRAPHY* 627 (1983) [hereinafter cited as *SUPER CHIEF*].

died of a massive heart attack, Earl Warren stayed up late reading Beveridge's classic *Life of John Marshall*.⁴ When, a month later, President Eisenhower appointed Warren to succeed Vinson, no one expected the new Chief Justice to rank near Marshall himself in the judicial pantheon. Yet that is exactly what has happened. In his autobiography, Justice William O. Douglas concluded, "Warren clearly ranked with John Marshall and Charles Evans Hughes as our three greatest Chief Justices."⁵ Since Douglas wrote, Warren's stature has, if anything, grown. In a book earlier this year I stated, "Warren's leadership abilities and skill as a statesman enabled him to rank as second only to Marshall among our Chief Justices."⁶

The reality in this respect was encapsulated after Warren retired by Justice William J. Brennan, who began to call Warren the "Super Chief"—a title soon adopted by those growing increasingly nostalgic about the Warren years. "To those who served with him," Brennan wrote after Warren's death, "Earl Warren will always be the Super Chief."⁷

Warren himself was proud of his reputation in this respect. After he retired, he delivered a talk to hundreds of students in the basement lounge of Notre Dame Law School and was responding to questions. A member of the audience recently described what took place: "One of our classmates prefaced his question with the observation that 'Some say that you'll go down in history with Marshall as one of the two greatest Chief Justices. . . .' The Chief Justice smiled broadly and interrupted. 'Could you say that again—a little louder please? I'm having a little trouble hearing!'"⁸

I. LEADERSHIP NOT SCHOLARSHIP

Irving Stone, the novelist, who had become then-Governor Warren's friend, tells how he tried to introduce Warren to modern art. "What does this mean? Why hasn't this got a head?" the Governor asked when shown examples. Finally, Warren said, "Irving, I don't understand what this is all about. It is outside my training." Asked whether Warren got to know more about art as their friendship ripened, Stone laughed and said, "I think he left the subject alone."⁹

David Halberstam has written a tribute to Justice Brennan titled, *The Common Man as Uncommon Man*.¹⁰ The title can be applied equally to Earl Warren who was, in Anthony Lewis' phrase, "an ordinary man, a rather simple

4. See JOHN A. WEAVER, *WARREN: THE MAN, THE COURT, THE ERA* 190 (1967).

5. WILLIAM O. DOUGLAS, *THE COURT YEARS 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 240 (1980).

6. BERNARD SCHWARTZ, *A BOOK OF LEGAL LISTS* 8 (1997).

7. SUPER CHIEF, *supra* note 3, at vii.

8. Dennis Owens, *The Warren Court: A Retrospective*, 15 *APPELLATE PRAC. J.* 46, 47 (1997).

9. SUPER CHIEF, *supra* note 3, at 204.

10. See REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 22 (E. JOSHUA ROSENKRANZ and BERNARD SCHWARTZ eds., 1997).

man."¹¹ In most respects Warren could have been a character out of Sinclair Lewis. Justice Potter Stewart once told me, "Warren's great strength was his simple belief in the things we now laugh at: motherhood, marriage, family, flag, and the like." These, according to Stewart, were the "eternal, rather bromidic, platitudes in which he sincerely believed." They were the foundation of Warren's jurisprudence, as they were of his way of life. When we add to this Warren's bluff masculine bonhomie, his love of sports and the outdoors, and his lack of intellectual interests or pretensions, we end up with a typical representative of the Middle America of his day. Indeed, the most striking impression Warren gave "was what an old-fashioned American figure he [was]."¹² It is revealing that the Chief Justice's favorite poem was W.E. Henley's *Invictus*¹³—a poem that we now consider a prime example of trite Victorian sentimentalism.

After Warren had refused to head the commission investigating the Kennedy assassination, even though President Johnson said that he had "begged" him,¹⁴ the President got Warren to change his mind by appealing to Warren's patriotism: "Mr. Chief Justice, you were once in the army, weren't you? Well, as your Commander-in-Chief, I'm ordering you back into service."¹⁵ According to the just-published Johnson tapes, Warren then "started crying and he said, 'I won't turn you down. I'll just do whatever you say.'¹⁶ 'You know,' Warren later told his law clerk, 'When someone appeals to my patriotism that way, I don't know how I can say no.'¹⁷

Certainly, Warren was anything but a learned legal scholar. "I wish that I could speak to you in the words of a scholar," the Chief Justice once told an audience, "but it has not fallen to my lot to be a scholar in life."¹⁸

The work of a Chief Justice, however, differs greatly from that of other members of the Court as far as legal scholarship is concerned. While considering the appointment of a successor to Chief Justice Vinson, President Eisenhower asked a member of Governor Warren's staff whether Warren would really want to be on the Court after his years in high political office: "Wouldn't it be pretty rarefied for him?"¹⁹ "Yes," came back the answer, "I frankly think he'd be very likely to be bored to death [as an Associate Justice]."²⁰ But, the response went on: "My answer would be emphatically different if we were

11. THE SUPREME COURT UNDER EARL WARREN 152 (LEONARD W. LEVY ed., 1972).

12. *Id.* at 164.

13. The poem that ends, "I am the master of my fate; I am the captain of my soul." Anyone who has seen Rodin's famous bust of Henley realizes at once how out-of-date the character captured there seems today. See, e.g., RUTH BUTLER, RODIN: THE SHAPE OF GENIUS 166 (1993).

14. See TAKING CHARGE: THE JOHNSON WHITE HOUSE TAPES, 1963-1964 68 (Michael R. Beschloss ed., 1997).

15. SUPER CHIEF, *supra* note 3, at 496.

16. TAKING CHARGE: THE JOHNSON WHITE HOUSE TAPES, 1963-1964, *supra* note 14, at 72. There is no tape of the Johnson-Warren conversation in the Johnson Library. Apparently, even Lyndon Johnson realized that this was one conversation that should remain private.

17. SUPER CHIEF, *supra* note 3, at 496.

18. *See id.*

19. *Id.* at 4.

20. *Id.*

talking about the Chief Justiceship. He could run the place. . . ."²¹

The staff member's answer gets to the heart of the matter. The essential attribute of a Chief Justice is not scholarship but leadership. One who can "run the place" and induce the Justices to follow will effectively head the Court.

"Warren had learned as an executive in California to lead, to manage, to set a tone, and to get results."²² As such, he brought more authority to the Chief Justiceship than had been seen for years. The most important work of the Supreme Court, of course, occurs behind the scenes, particularly at the conferences where the Justices discuss and vote on cases. In an interview with me, Justice Abe Fortas summarized the Warren conference forte: "It was Warren's great gift that, in presenting the case and discussing the case, he proceeded immediately and very calmly and graciously to the ultimate values involved—the ultimate constitutional values, the ultimate human values."²³ In the face of such an approach, traditional legal arguments seemed inappropriate, almost pettifoggery. To quote Fortas again, "opposition based on the hemstitching and embroidery of the law appeared petty in terms of Warren's basic value approach."²⁴

All the Justices who served with him lay stress on Warren's ability to lead the conference. Justice Stewart well summarized the Warren role: "He was an instinctive leader whom you respected and . . . , as the presiding member of our conference, he was just ideal." When I asked Stewart about claims that Justice Hugo Black was the intellectual leader of the Court, he replied, "If Black was the intellectual leader. Warren was the *leader*."²⁵

Justice Black, it should be noted, always considered himself the catalyst for the Warren Court jurisprudence. In 1968, he delivered a lecture which the media interpreted as criticism of the Chief Justice. When Black told Warren that the press had distorted his statement, the Chief laughed and retorted, "Look, Hugo, you can't unring a bell."²⁶

A reading of the available conference notes of Justices on the Warren Court reveals that the Stewart estimate was accurate and that, after an initial period of feeling his way, the Chief Justice was as strong a leader as the Court has ever had. In almost all the important cases, Warren himself led the discussion toward the decision he favored. If any Court can properly be identified by the name of one of its members, his Court was emphatically the *Warren Court* and, without arrogance, he, as well as the country, knew it. In Anthony Lewis' words, the Warren Court's "legal revolution could not have taken place . . . without Chief Justice Warren."²⁷

A word should also be said on a widespread canard about Warren—that

21. *Id.*

22. G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 152 (1982).

23. SUPER CHIEF, *supra* note 3, at 87.

24. *Id.* at 87.

25. *Id.* at 31.

26. CRAY, *supra* note 2, at 473; SUPER CHIEF, *supra* note 3, at 629.

27. THE SUPREME COURT UNDER EARL WARREN, *supra* note 11, at 152.

Warren had no practical experience as a lawyer. "We made a mistake," Senator Joseph R. McCarthy once complained at a Senate hearing, "in confirming as Chief Justice a man who had no judicial experience and very little legal experience."²⁸ Alabama Governor George Wallace asserted that Warren did not "have enough brains to try a chicken thief in my home county!"²⁹ Such criticism, however, was misplaced. As his most recent biography puts it, Warren "was better prepared as a practicing attorney than many gave him credit for."³⁰ In terms of legal practice, Warren had more experience than any member of his Court. As District Attorney of Alameda County, he headed one of the largest law offices in California for thirteen years and then served as his state's highest legal officer for four more.³¹

Warren was the chief of the D.A.'s office in fact as well as name. According to the office's chief investigator, in "every major case in Alameda County Earl Warren associated himself in the trial."³² Warren personally appeared in court in many cases. In fact, he probably had more trial experience than most Justices. As Warren stated in his memoirs, "As district attorney, I had engaged in much litigation, both civil and criminal, and had argued a case in the United States Supreme Court."³³

The Chief Justice used to recall the time when District Attorney Warren argued before the highest Court, on January 7, 1932, in defense of Alameda County in a case brought against it by the Central Pacific Railway.³⁴ The argument happened to be the last heard by Justice Oliver Wendell Holmes. Later that day, after the sitting, Holmes casually announced, "I won't be down tomorrow" and he resigned a few days later.³⁵ Warren said his friends accused him of driving Holmes from the bench. They used to tease him, "[O]ne look at you and he said, 'I quit.'"³⁶

II. WARREN AND *BROWN I*

Chief Justice Warren's leadership of the conference and the Court is shown most spectacularly in the *Brown* segregation case.³⁷ I have already quoted Vice-President Hubert Humphrey's assertion that, if President Eisenhower had done nothing else other than appoint Warren, he would have earned an important place in our history. If Earl Warren had done nothing else other than lead the Court to its unanimous *Brown* decision, he too would have earned an im-

28. SUPER CHIEF, *supra* note 3, at 183.

29. CRAY, *supra* note 2, at 11.

30. *Id.* at 262.

31. See EARL WARREN, THE MEMOIRS OF EARL WARREN 176 (1977).

32. SUPER CHIEF, *supra* note 3, at 10.

33. WARREN, *supra* note 31, at 177.

34. See Central Pacific Ry. Co. v. Alameda County, 284 U.S. 463 (1932).

35. LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES 629 (1991).

36. SUPER CHIEF, *supra* note 3, at 335.

37. See *Brown v. Board of Education*, 347 U.S. 483 (1954).

portant place in our history.

We need not subscribe to Carlyle's hero theory to recognize that outstanding judges do make a great difference in the law.³⁸ It made a great difference that Earl Warren, rather than Fred M. Vinson, presided over the Court that handed down the *Brown* decision. *Brown* itself was the watershed constitutional case of this century. Justice Stanley Reed, who participated in *Brown*, told his law clerk that "if it was not the most important decision in the history of the Court, it was very close."³⁹ When *Brown* struck down school segregation, it signaled the beginning of effective enforcement of civil rights in American law.

In *Brown*, black plaintiffs challenged the constitutionality of segregated schools in four states and the District of Columbia. Before *Brown*, the Court had followed the rule laid down in *Plessy v. Ferguson*⁴⁰ that segregation was not unconstitutional, provided that there were "equal but separate accommodations for the white and colored races."⁴¹ The subsequent structure of racial discrimination was built on this "separate but equal" doctrine.

Brown first came before the Court when Chief Justice Vinson sat in its center chair. When the Justices discussed the case on December 13, 1952, Vinson stated that he was not ready to overrule *Plessy v. Ferguson*.⁴² A May 17, 1954 Memorandum for the File *In re Segregation Cases* by Justice Douglas states, "Vinson was of the opinion that the *Plessy* case was right and that segregation was constitutional."⁴³ With the Chief Justice in favor of upholding segregation,⁴⁴ the Vinson Court was far from ready to issue a ringing pronouncement of racial equality. Indeed, had Vinson presided over the Court that decided *Brown*, the result would have been a sharply-divided decision. According to the Douglas Memorandum for the File, "In the original conference there were only four who voted that segregation in the public schools was unconstitutional. Those four were Black, Burton, Minton and myself. . . . So as a result of the informal vote at the 1952 conference, . . . if the cases were to be then decided the vote would be five to four in favor of the constitutionality of segregation in the public schools."⁴⁵

Justice Felix Frankfurter's count was a bare majority the other way. In a May 20, 1954, letter to Justice Reed, three days after the unanimous *Brown* decision was announced, Frankfurter wrote, "I have no doubt that if the *Segregation* cases had reached decision last Term there would have been four dissenters—Vinson, Reed, Jackson and Clark—and certainly several opinions for

38. Cf. FELIX FRANKFURTER, *OF LAW AND MEN* 9 (1956).

39. BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 286 (1993).

40. 163 U.S. 537 (1896).

41. *Id.* at 551.

42. The conference statements in *Brown* and other cases are taken from notes taken by Justices who were present.

43. William O. Douglas, William O. Douglas Papers, Library of Congress.

44. Cf. MARK V. TUSHNET, *What Happened in Brown v. Board of Education*, 91 *COL. L. REV.* 1867, 1903-1904 (1991).

45. Douglas, *supra* note 43.

the majority view. That would have been catastrophic.”⁴⁶

The “catastrophe” was avoided when *Brown* was set for reargument in the next Court term, and, in the interim, Chief Justice Vinson suddenly died. “This is the first indication that I have ever had that there is a God,” Frankfurter caustically remarked to two former law clerks when he heard of Vinson’s death.⁴⁷ The Justice was confirmed in his comment when Earl Warren was appointed as Vinson’s successor. Under the new Chief Justice, the Court was able to issue its landmark ruling striking down segregation and to do so unanimously, without a single concurring or dissenting voice to detract from the decision.

Both the decision and the unanimity were attributable directly to Chief Justice Warren’s leadership. A few days before the *Brown* decision was announced, Justice Harold H. Burton wrote in his diary, “It looks like a unanimous opinion—a major accomplishment for [Warren’s] leadership.” And, just after the *Brown* opinion was read, Burton wrote to Warren, “To you goes the credit for the character of the opinions which produced the all important unanimity.”⁴⁸ Even a critic of my *Brown* interpretation—what he calls “the standard version”⁴⁹—agrees that that version “does capture most of Warren’s contribution to *Brown*” and that “in the end what mattered . . . was indeed Warren’s ability to accommodate the conflicting views of his colleagues.”⁵⁰

The new Chief Justice led the Court to its unanimous decision by first setting a completely different conference tone than his predecessor. According to a law clerk, Warren had come to believe that “*Plessy* was a disastrous opinion for the blacks.”⁵¹ With that belief, he began his first *Brown* conference on December 12, 1953, with a strong statement on the unconstitutionality of segregation:

I don’t see how in this day and age we can set any group apart from the rest and say that they are not entitled to exactly the same treatment as all others. To do so would be contrary to the Thirteenth, Fourteenth, and Fifteenth Amendments. They were intended to make the slaves equal with all others. Personally, I can’t see how today we can justify segregation based solely on race.⁵²

As far as *Plessy v. Ferguson* was concerned, said Warren, “the more I’ve read and heard and thought, the more I’ve come to conclude that the basis of segregation and ‘separate but equal’ rests upon a concept of the inherent inferiority of the colored race. I don’t see how *Plessy* and the cases following it can be sustained on any other theory. If we are to sustain segregation, we also must

46. SUPER CHIEF, *supra* note 3, at 72.

47. This statement was confirmed for me by one of the former clerks on a nonidentification basis. See *id.* at 72.

48. The sources of the Burton quotes and others not attributed in the *Brown* discussion are in SUPER CHIEF, Chapter 3.

49. Tushnet, *supra* note 44, at 1875.

50. *Id.* at 1878.

51. CRAY, *supra* note 2, at 279.

52. SUPER CHIEF, *supra* note 3, at 86.

do it upon that basis."⁵³ Warren then asserted that, "if the argument proved anything, it proved that that basis was not justified."⁵⁴

The Chief Justice's conference was a masterly illustration of the Warren method of leading the conference. It put the proponents of *Plessy* in the awkward position of appearing to subscribe to racist doctrine. Justice Reed, who spoke most strongly in favor of *Plessy*, felt compelled to assert that he was not making "the argument that the Negro is an inferior race. Of course there is no inferior race, though they may be handicapped by lack of opportunity."⁵⁵ Reed did not, however, suggest any other ground on which the Court might rely to justify segregation now.

When the conference was finished, it appeared that Chief Justice Warren had six firm votes for his view that segregation should be ruled invalid.⁵⁶ Two Justices, Robert H. Jackson and Tom C. Clark, indicated that they would vote the same way if an opinion could be written to satisfy them. Only Justice Reed still supported the *Plessy* doctrine.

The Chief Justice now devoted all his efforts to eliminate the danger of dissenting and concurring opinions. During the months that followed, he met constantly with his colleagues on the case, most often talking to them informally in their chambers. That was the way he had been able to accomplish things back in California. The result in *Brown* showed that he had not lost any of his persuasive powers in the Marble Palace. In particular, as Justice Reed's biographer puts it, Warren "engage[d] in a number of low-key but effective conversations regarding the cases with Reed."⁵⁷

Despite the Chief Justice's efforts, there are indications that Justice Reed persisted in voting to uphold segregation for months. He actually started to prepare a draft dissent.⁵⁸ By then, however, the Justice stood alone and Warren continued to work on him to change his vote, both at luncheon meetings and in private sessions. Then, the Chief Justice put it to Reed directly: "Stan, you're all by yourself in this now. You've got to decide whether it's really the best thing for the country."⁵⁹ As described by Reed's law clerk, who was present at the meeting, "Throughout the Chief Justice was quite low-key and very sensitive to the problems that the decision would present to the South. He empathized with Justice Reed's concern. But he was quite firm on the Court's need for unanimity on a matter of this sensitivity."⁶⁰

Ultimately, Justice Reed agreed to the unanimous decision. He still thought, as he wrote to Justice Frankfurter, that "there were many considerations that pointed to a dissent."⁶¹ But, he went on, "they did not add up to a

53. *Id.*

54. *Id.*

55. *Id.* at 87.

56. According to Justice Douglas, Warren had only five votes. Tushnet, *supra* note 43, at 1912.

57. JOHN D. FASSETT, *NEW DEAL JUSTICE: THE LIFE OF STANLEY REED OF KENTUCKY* 571 (1994).

58. *See id.* at 570 (portion of the Reed draft).

59. SUPER CHIEF, *supra* note 3, at 94.

60. *Id.*

61. *Id.* at 96.

balance against the Court's opinion. . . . [T]he factors looking toward a fair treatment for Negroes are more important than the weight of history."⁶²

At the conference that took the vote to strike down segregation, it was agreed that the opinion should be written by the Chief Justice. Toward the end of April, after he had secured Justice Reed's vote, Warren was ready to begin the drafting process. On April 20, Justice Burton wrote in his diary, "After lunch the Chief Justice and [I] took a walk around the Capitol then went to his chambers where he uttered his preliminary thoughts as to author segregation cases."⁶³ Soon thereafter Warren went to work on the *Brown* draft opinion.

Chief Justice Warren's normal practice was to leave the actual drafting of opinions to his law clerks. He would only outline the way he wanted the opinion drafted and would rarely go into particulars on the details involved in the case. That was for the clerk drafting the opinion, who was left with a great deal of discretion, particularly on the reasoning and research supporting the decision. It has been assumed that this procedure was also followed in the *Brown* drafting process. However, there is a draft opinion in Warren's papers in the Library of Congress which shows that it was the Chief Justice himself who wrote the *Brown* draft. Headed simply "Memorandum" and undated, it is in Warren's handwriting, in pencil on nine yellow legal-size pages.

Chief Justice Warren's *Brown* draft⁶⁴ was written in the typical Warren style: short, nontechnical, well within the grasp of the average reader; the language is direct and straightforward. The draft was based on the two things he later stressed to the clerk primarily responsible for helping on the *Brown* opinion: the opinion should be as brief as possible, and it was to be written in understandable English, avoiding legalisms. The Chief Justice told the clerk he wanted an opinion that could be understood by the layman.

The Warren draft contains the most famous passages in the *Brown* opinion. First, after referring to the decision facing the Court, the draft states, "In approaching it, we cannot turn the clock of education back to 1868, when the Amendment was adopted, or even to 1895 [sic] when *Plessy v. Ferguson* was decided."⁶⁵

The Warren draft also contains *Brown's* striking passage on the baneful effect of segregation on black children: "To separate them from others of similar age and qualification solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."⁶⁶

Concern with the impact of segregation on the "hearts and minds" of black

62. *Id.*

63. *Id.* at 96.

64. For the draft's text, see BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE WARREN COURT* 451 (1985). See also CRAY, *supra* note 2, at 284. CRAY is mistaken in saying that the draft only "outlined the general approach that Warren wanted the opinion to take." *Id.* The text shows that it was a first draft of the *Brown* opinion, containing most of its passages.

65. *SUPER CHIEF*, *supra* note 3, at 103.

66. *Id.* at 104.

children was typical of the Warren approach. In the case of segregation, this view had roots in Warren's contact with Edgar Patterson, his black driver while he was Governor of California. Patterson later recalled how he used to talk to the Governor about his early years. Warren would ask, "Tell me about how you felt when you were a little kid, going to school. And then I used to tell him about some of the things that happened in New Orleans, the way black kids felt."⁶⁷ Patterson thought that the *Brown* opinion "almost quoted the ideas that he and I used to talk about on feelings. . . . [T]hings that he picked up as he was asking questions about how the black man felt, how the black kid felt."⁶⁸ Just before Warren's death, Patterson visited him in Georgetown University Hospital and told him his *Brown* decision "seemed to be based on our discussion of my early school life in New Orleans."⁶⁹ Warren laughed and indicated that many other factors had entered into the decision.

In addition, the Warren draft stressed the changed role of education in the contemporary society, as contrasted with the situation when the Fourteenth Amendment was adopted ("No child can reasonably be expected to succeed in life today if he is deprived of the opportunity of an education"⁷⁰), and also posed the crucial question presented to the Court: "Does segregation of school children solely on the basis of color, even though the physical facilities may be equal, deprive the minority group of equal opportunities in the educational system?"⁷¹—as well as its answer: "We believe that it does."⁷²

The Warren memorandum transmitting the *Brown* draft to the Justices declared, "On the question of segregation in education, this should be the end of the line."⁷³ If that was true, it was mainly the Chief Justice's doing—more even than commentators on *Brown* have realized. The *Brown* draft shows that the Chief Justice was primarily responsible not only for the unanimous decision, but also for the opinion in the case. This was one case where the drafting was not delegated. The opinion delivered was essentially the opinion produced when Warren himself sat down and put pencil to paper.

The final *Brown* draft was circulated on May 13, 1954, in printed form. The next day, Saturday, May 15, was a conference day. At lunch, the Justices were entertained by Justice Burton, with a large salmon provided by Secretary of the Interior Douglas McKay. Just before, Burton wrote in his diary, the "conference finally approved Segregation opinions and instructions for delivery Monday—no previous notice being given to office staffs etc so as to avoid leaks. Most of us—including me—handed back the circulated print to C.J. to avoid possible leaks."⁷⁴

67. *Id.* at 97.

68. *Id.*

69. *Id.*

70. *Id.* at 103.

71. *Id.*

72. *Id.*

73. SCHWARTZ, *supra* note 64, at 450.

74. SUPER CHIEF, *supra* note 3, at 101.

When the *Brown* opinion was delivered, the Justices were well aware that they had participated in what Justice Frankfurter termed “a day that will live in glory.”⁷⁵ A few days earlier, in a note to Warren joining the opinion, Frankfurter wrote: “When—I no longer say ‘if’—you bring this cargo of unanimity safely to port it will be a memorable day no less in the history of the Nation than in that of the Court. You have, if I may say so, been wisely at the helm throughout this year’s journey of this litigation. *Finis coronat omnia.*”⁷⁶

III. *BROWN* ENFORCEMENT

There is an undated note, written on a Supreme Court memo pad in Justice Frankfurter’s handwriting, that reads, “It is not fair to say that the South has always denied Negroes ‘this constitutional right.’ It was NOT a constitutional right till May 17/54.”⁷⁷

The change in Justice Frankfurter’s posture on segregation was explained by him during a 1960 conference. “During the Conference,” states a January 25, 1960, handwritten note by Justice Douglas in his papers in the Library of Congress, “Frankfurter . . . said if the cases had been brought up [before *Brown*] he would have voted that segregation in the schools was constitutional because ‘public opinion had not then crystallized against it.’ He said the arrival of the Eisenhower Court heralded a change in public opinion on this subject and therefore enabled him to vote against segregation. Bill Brennan’s response was ‘God Almighty.’”⁷⁸

The May 17, 1954, *Brown* opinion declared the right against segregation, but it made no provision for enforcement of the new right. Instead, Chief Justice Warren’s opinion concluded by announcing that the Court was scheduling further argument on the question of appropriate relief. The situation was summarized in the *New York Times* account of the *Brown* decision: “when it returns in October for the 1954-1955 term [the Court] will hear rearguments then on the question of how and when the practice it outlawed today may finally be ended.”⁷⁹

The theme for the second *Brown* decision and opinion was set by Chief Justice Warren himself at the conference that met on Saturday, April 16, 1955, following the oral reargument on the terms of the decree earlier in the week. Warren’s presentation opening the conference stated the main lines of what became the Court’s enforcement decision. First, the Chief Justice rejected various proposals that had been discussed in the Court: appointment of a master to work out the terms of an enforcement decree, fixing of a date for completion of desegregation, requiring specific desegregation plans from defendant school

75. SCHWARTZ, *supra* note 64, at 460.

76. *Id.*

77. *Id.*

78. Douglas, *supra* note 43.

79. See ‘How’ and ‘When’ Remain as Issues, N.Y. TIMES, May 18, 1954, at 14.

districts, and imposing of procedural requirements—all of which were also rejected by the Court's decision. Then he emphasized that the Court should furnish guidance to the lower courts: "the opinion ought to give them some guidance. It would make it much easier and would be rather cruel to shift it back to them and let them flounder."⁸⁰ The guidance should be in an opinion listing the factors to be taken into account, rather than a formal decree.⁸¹ The opinion-not-decree approach had the advantage of greater flexibility. Flexibility in enforcement was also the keynote of the "ground rules" Chief Justice Warren suggested to guide the enforcement process.

Once again, the Warren presentation set the theme both for the conference and the decision. And once again the conference agreed that the unanimous opinion should be written by the Chief Justice. Warren stressed to his clerks that the opinion should be as short as possible and cover the main points he had made at the conference; that enforcement be flexible, under accepted equity principles; and that it take into account various factors to be briefly listed to serve as "ground rules" for the lower courts.⁸²

As was true in *Brown I*, the drafting of the *Brown II* opinion was by the Chief Justice himself. In May 1955, Warren once more put pencil to paper and produced a draft opinion. The original is again in pencil in the Chief Justice's handwriting on six yellow legal-size pages and headed "*Memo*."⁸³ As was true of Warren's *Brown I* draft, this *Brown II* draft is essentially similar to the final *Brown II* opinion and contains most of the latter's language.

The most noted change in Warren's *Brown II* opinion was made at Justice Frankfurter's urging. The Chief Justice had closed his original draft: "The judgments of the Courts of Appeal are accordingly reversed (except Delaware) and the causes are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit plaintiffs and those similarly situated in their respective school districts to the public school system on a non-discriminatory basis at the *earliest practicable date*."⁸⁴

In the final *Brown II* opinion, this was changed to: "The judgments below, except that in the Delaware case, are accordingly reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis *with all deliberate speed* the parties to these cases."⁸⁵

When the *Brown II* opinion declared that the lower courts were to ensure that blacks were admitted to schools on a nondiscriminatory basis "without undue delay," it led to learned controversy on the origins of the oxymoronic

80. SUPER CHIEF, *supra* note 3, at 117.

81. *See id.* at 118.

82. *See id.*

83. For its text, *see* Schwartz, *supra* note 64, at 463.

84. *Id.* at 465(emphasis added).

85. *Brown v. Board of Education*, 349 U.S. 294, 301 (1955).

phrase—itself so untypical of the normal Warren mode of expression. The phrase itself comes from Justice Oliver Wendell Holmes.⁸⁶ However, we remain uncertain where Holmes obtained the phrase. What is certain, nevertheless, is that Justice Frankfurter got it from Holmes and the *Brown II* opinion got it from Frankfurter. Commentators on *Brown II* have all assumed that this was the case; but they have had to support the assumption only by circumstantial evidence. However, two letters by Justice Frankfurter to the Chief Justice enable us to confirm definitely that the Justice was responsible for the “all deliberate speed” language.⁸⁷

These letters show that Chief Justice Warren had discussed the opinion with Justice Frankfurter even before his draft opinion was circulated and the Justice had then suggested the Holmes phrase. On May 24, 1955, Frankfurter wrote to Warren that he had read the draft “and I am ready to sign on the undotted line.”⁸⁸ But Frankfurter went on, “I still think that ‘with all deliberate speed’ . . . is preferable to ‘at the earliest practicable date.’”⁸⁹

Chief Justice Warren did not make the change in his circulated draft. So Justice Frankfurter sent him a May 27 letter repeating the suggestion:

I still strongly believe that ‘with all deliberate speed’ conveys more effectively the process of time for the effectuation of our decision. . . . I think it is highly desirable to educate public opinion—the parties themselves and the general public—to an understanding that we are at the beginning of a process of enforcement and not concluding it. In short, I think it is far better to habituate the public’s mind to the realization of this, as . . . the phrase ‘with all deliberate speed’ . . . [is] calculated to do.⁹⁰

Chief Justice Warren did, of course, finally accept the Frankfurter suggestion and the “all deliberate speed” phrase remains the most striking one in the *Brown II* opinion. More important was the two-edged nature of the phrase. It ensured flexibility by providing time for enforcement; but it also countenanced delay in vindicating constitutional rights. “All deliberate speed” may never have been intended to mean indefinite delay. Yet that is just what it did mean in much of the South.

Some of the Justices, including the Chief Justice, later indicated that it had been a mistake to qualify desegregation enforcement by the “all deliberate speed” language. Justice Hugo Black’s son quotes him as saying, “It tells the enemies of the decision that for the present the status quo will do and gives them time to contrive devices to stall off segregation.”⁹¹ This Black statement is inconsistent with what he said at the *Brown* enforcement conference. The Justice then had indicated that the Court should not try to settle the segregation issue too rapidly. If it attempted to do so, Black told the conference, its decree

86. *Virginia v. West Virginia*, 222 U.S. 17, 19 (1911).

87. SCHWARTZ, *supra* note 64, at 468.

88. *Id.* at 468.

89. *Id.*

90. *Id.*

91. *Id.* at 469.

"would be like Prohibition."⁹² Black, in fact, was the one Justice who predicted at the conference that the movement toward desegregation in the South would at best be only "glacial."⁹³

The Chief Justice, too, came to believe that it had been a mistake to accept the "all deliberate speed" language. In his later years Warren concluded that he had been sold a bill of goods when Justice Frankfurter induced him to use the phrase. It would have been better, he later said, to have ordered desegregation forthwith. By then, however, Justice Black's prediction of the "glacial" pace of desegregation had proved, if anything, over-optimistic. The Justices had, to be sure, not expected enthusiastic compliance by the South. But the extent of opposition was something that had not been foreseen. Looking back, Warren, at least, felt that much of the defiance of *Brown* could have been avoided if the South had not been led to believe that "deliberate speed" would countenance indefinite delay. When a comparable problem arose in 1964 in connection with enforcement of the "one person-one vote" principle in legislative apportionments,⁹⁴ the Chief Justice did not hesitate to urge immediate enforcement, regardless of the problems in individual states in adapting to the new rule.

Except in the *Brown* case, in fact, Chief Justice Warren never let the question of enforcement affect his decisions. He always felt that the Justices' duty was only to decide the cases before them as they thought the Constitution required. Warren's Court career was the living example of the old maxim: *Fiat justitia et ruant coeli* (Let justice be done though the heavens should fall).

But he did not expect the heavens to fall. Once, after the Court had ordered the release of an Army prisoner, one of his law clerks asked him how they were going to make the Army do that. The Chief Justice just laughed and said, "Don't worry about it. They will do it."⁹⁵ The clerk persisted and referred to the Andrew Jackson statement about John Marshall having to enforce his own decision.

"Look," Warren said in reply, "you don't have to worry. If they don't do this, they've destroyed the whole republic, and they aren't going to do that. So you don't even have to worry about whether they are going to do it or not—they're going to do it!"⁹⁶

IV. LEADERSHIP AND REAPPORTIONMENT

The 1964 case in which the one person-one vote principle was laid down was *Reynolds v. Sims*.⁹⁷ It arose out of challenges to the apportionment of the Alabama legislature. The apportionment issue had arisen two years earlier in

92. *Id.*

93. *Id.*

94. See *Reynolds v. Sims*, 377 U.S. 533 (1964).

95. SUPER CHIEF, *supra* note 3, at 759.

96. *Id.*

97. 377 U.S. 533 (1964).

Baker v. Carr,⁹⁸ which had decided that the Court had jurisdiction over cases challenging legislative apportionments, though they had until then been held to involve only “political questions” beyond judicial competence. Several of the Justices, including Chief Justice Warren, had also wanted to decide the merits in *Baker v. Carr* and apply a standard of equality of population to legislative apportionments. They were not, however, willing to apply it to more than one House.

The Chief Justice, in particular, was influenced by his experience in California, where only the Assembly was apportioned by population. Each California county was represented by one state senator, regardless of population. In his memoirs, Warren called this the “Federal System of Representation” because of its resemblance to that in the United States Constitution.⁹⁹ Warren believed that the system worked fairly and he thought the equal-population requirement should not extend to similar state senates.

The same belief was expressed during the conference discussions that followed the argument in November, 1963, of *Reynolds v. Sims*.¹⁰⁰ Led by the Chief Justice, most of the Justices quickly decided that the lower House apportionments, which were not based on equality of population, were invalid. But neither Warren nor the others were willing to apply the population standard to both Houses of the state legislature.

A direct result of Chief Justice Warren’s lead was that a majority of Justices changed their minds. The Chief Justice assigned the *Reynolds* opinion to himself at the November 22, 1963, conference—the conference at which the Justices received word of President John F. Kennedy’s assassination. As Warren started to work out his reasoning, he came to realize that his California experience should not be determinative. Instead, he concluded that the equal-population standard must apply to both Houses of a state legislature.

After the Chief Justice concluded that *Reynolds v. Sims* had to be decided by an equal-population standard applicable to both Houses, he remarked to the law clerk working on the case, “You know I gave a speech some years ago in California supporting our reapportionment system there.”¹⁰¹ He said it was based on the federal principle the Court was rejecting. “You know,” he went on, “I never really thought very much about it then. As a political matter it seemed to me to be a sensible arrangement. But now, as a constitutional matter, with the point of view of the responsibilities of a Justice, I kind of got to look at it differently.”¹⁰² The Chief Justice was not at all troubled by the fact that he had taken an entirely different position as Governor. “I was just wrong as Governor,” Warren later told another law clerk.¹⁰³

Even though the Warren *Reynolds v. Sims* opinion was more far-reaching

98. 369 U.S. 186 (1962).

99. WARREN, *supra* note 31, at 309.

100. 377 U.S. 533 (1964).

101. SUPER CHIEF, *supra* note 3, at 504.

102. *Id.*

103. *Id.*

than the conference discussion, it was quickly accepted by a majority. That result was due entirely to the Warren leadership. It was Warren alone who decided that the conference consensus was wrong and that the equal-population standard had to govern all state legislative apportionments. The Chief Justice also personally persuaded the Justices who joined his opinion that the federal analogy should not be followed. Had Warren not changed his mind and convinced the others that his new position was correct, the law on the subject would be entirely different. Because Chief Justice Warren led the Court to the *Reynolds* decision, Anthony Lewis could sum up the 1963 Term in the *New York Times* as "one of extraordinary importance for Court and country. Not since 1954 [when *Brown* was decided] . . . have any Term's decisions so deeply affected American institutions."¹⁰⁴

Chief Justice Warren never had doubts about the reapportionment decision. He maintained that, if the "one person, one vote" principal had been laid down years earlier, many of the nation's legal sores would never have festered. "If [the principle] had been in existence fifty years ago," he later insisted, "we would have saved ourselves acute racial troubles. Many of our problems would have been solved a long time ago if everyone had the right to vote, and his vote counted the same as everybody else's. Most of these problems could have been solved through the political process rather than through the courts. But as it was, the Court had to decide."¹⁰⁵ Indeed, John Hart Ely, a former Warren law clerk who is now a leading constitutional scholar, wrote in a book last year, "The Chief used to say that if *Reynolds v. Sims* had been decided before 1954, *Brown v. Board of Education* would have been unnecessary."¹⁰⁶

The Chief Justice was well aware that *Reynolds v. Sims* was the political death warrant for undetermined numbers of rural legislators, whose seats would now be reapportioned out of existence. Soon after the decision, Warren flew to his home state of California to hunt with some old friends. One of them was asked to invite the Chief Justice to go with some state senators on a trip to hunt quail. When Warren was asked if he wanted to drive down and join them, he looked incredulous. "All those senators?" he inquired in mock horror. "With guns?"¹⁰⁷

V. CRIMINAL LAW CASES

Justice Douglas tells us in his autobiography¹⁰⁸ that when Warren E. Burger succeeded Earl Warren as Chief Justice, he told the conference that the Court should overrule a number of Warren Court decisions—particularly those

104. Anthony Lewis, *Supreme Court Moves Again to Exert Its Powerful Influence*, N.Y. TIMES, June 21, 1964, at IV-3.

105. JACK HARRISON POLLACK, *EARL WARREN: THE JUDGE WHO CHANGED AMERICA* 209 (1979).

106. JOHN HART ELY, *ON CONSTITUTIONAL GROUND* 4 (1996).

107. *SUPER CHIEF*, *supra* note 3, at 508.

108. *See DOUGLAS*, *supra* note 5, at 231.

in the *Gideon* and *Miranda* cases.¹⁰⁹ These were the two most famous criminal-law cases decided by the Warren Court. They will be dealt with in reverse during the discussion of Chief Justice Warren's leadership in those decisions.

Writing in the *New York Times* in 1965, Anthony Lewis pointed out that the difficulty of the Court's work was insufficiently appreciated by either the Court's critics or its admirers. When the Court reversed a conviction, the decision was judged only in terms of the "poor downtrodden defendant" or the "vicious criminal threatening our peace."¹¹⁰

Yet the criminal cases that come to the Court can rarely be dealt with in light of the individual attitude toward the particular defendant. Lewis illustrated the point by referring to "a typical criminal case that comes before the Court these days. A suspect has been arrested and brought to a local police station; he asks to see a lawyer, and the police say no; after questioning by a relay of officers he confesses. Should the confession be admissible as evidence—or excluded because it resulted from the denial of counsel?"¹¹¹ The Sixth Amendment guarantees the right to counsel in "all criminal prosecutions." But, as Lewis noted, "the Constitution does not answer the critical question: When does the right to counsel begin?"¹¹²

Though Lewis published his article almost a year before *Miranda v. Arizona*,¹¹³ his illustrative case presented the very question posed in *Miranda*. The answer given made that case one of the most controversial in the Warren Court.

Miranda itself came to the Court as a result of the Chief Justice's initiative. He instructed his law clerks that year to be on the lookout for a case raising the *Miranda* issue, saying, "I think we are going to end up taking [such a] case this year."¹¹⁴ *Miranda* had been convicted of kidnapping and rape in Arizona. He had been arrested and taken to an interrogation room, where he was questioned without being advised that he had a right to have an attorney present. After two hours, the police secured a confession that was admitted into evidence over *Miranda's* objection. The state supreme court affirmed the conviction.

The Chief Justice's questions and comments during the *Miranda* argument foreshadowed the decision. One of the points for the Court to decide was when the proceeding "focused" on the defendant for purposes of his Fifth and Sixth Amendment rights—whether at the stage of police interrogation or only when an accusation was made. To Warren, the accusatory stage was reached with *Miranda's* arrest. "I didn't know," he commented during the argument, "that we could arrest people in this country for investigation. Wouldn't you say it was accusatory when a man was locked in jail?"¹¹⁵ The Chief Justice also indicat-

109. See *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Miranda v. Arizona*, 384 U.S. 436 (1966).

110. Lewis, *supra* note 104, at IV-3.

111. *Id.*

112. *Id.*

113. 384 U.S. 436 (1966).

114. CRAY, *supra* note 2, at 455.

115. SUPER CHIEF, *supra* note 3, at 589.

ed that Miranda's right to consult counsel was not affected by whether or not he could pay for a lawyer. "When does the right to counsel attach?" Warren asked, "Does inability to hire mean less generous treatment by the law?"¹¹⁶

Last of all, the Chief Justice stressed the failure to advise Miranda of his rights—a focal point of the *Miranda* opinion. When counsel argued that the test was one of voluntariness of the confession, Warren came back, "Wouldn't the best test be simply that the authorities must warn him?"¹¹⁷ Then the defendant could intelligently decide if he wanted to talk without counsel. "Do you agree," Warren asked, "that if a man says I would like to talk to a lawyer, the police should not interrogate?"¹¹⁸

Justice Fortas, who had been on the *Miranda* Court, told me that the *Miranda* decision "was entirely his"—i.e., Warren's.¹¹⁹ The Chief Justice's leadership led the Justices to their decisions in the case and the setting out of what the opinion called "concrete constitutional guidelines" for police interrogation.¹²⁰

At the *Miranda* conference, Chief Justice Warren left no doubt where he stood. As at the argument, the Chief Justice stressed that no warning had been given by the police. In such a case, the police must warn someone like Miranda of his right to silence, that anything he said could be used against him, that he could have a lawyer, and that he could have counsel appointed if he could not afford one.

The Chief Justice told the conference that such warnings were given by his staff when he was a district attorney. He placed particular emphasis upon the practice followed by the Federal Bureau of Investigation and explained how it worked. The "standard" F.B.I. warning covered the essential requirements Warren posited. The Chief Justice told the conference that the F.B.I.'s record of effective law enforcement showed that requiring similar warnings in all police interrogations would not impose too great a burden. Justice Brennan, who was present, said to me, "the statement that the F.B.I. did it . . . was a swing factor. I believe that was a tremendously important factor, perhaps the critical factor in the *Miranda* vote."¹²¹

The *Miranda* majority agreed on the Warren approach to the case after the Chief Justice explained his reasoning in his draft opinion.¹²² Above all, he persuaded the others to accept what amounted to a code of police procedure governing interrogation of suspects. Even the *New York Times* thought the Warren opinion went too far in this respect, saying that the listing of procedures was an "over-hasty trespass into the legislative area."¹²³ Chief Justice Warren

116. *Id.*

117. *Id.*

118. *Id.* at 589.

119. *Id.*

120. *Id.*

121. *Id.*

122. *See id.*

123. BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 109 (1996).

himself had no doubts in the matter and, relying on his years as a criminal prosecutor as well as the F.B.I. experience, persuaded a majority to agree to his far-reaching opinion. The opinion of the Court that the Chief Justice delivered in *Miranda* was essentially the same as the draft he had originally circulated.

In a memorandum at the time, Justice Brennan declared that the *Miranda* opinion “will be one of the most important opinions of our time.”¹²⁴ *Miranda* also turned out to be the most controversial of the Warren Court’s criminal-law decisions, and gave rise to anguished complaints from law-enforcement officers throughout the country. They denounced *Miranda* for putting, as Mayor Sam W. Yorty of Los Angeles said, “another set of handcuffs on the police department.”¹²⁵ *Miranda* was condemned on Capitol Hill and became a major issue in Richard M. Nixon’s Presidential campaign.

On the other hand, *Miranda*, as much as anything, exemplified Chief Justice Warren’s basic approach. Every so often in criminal cases, when counsel defending convictions would cite legal precedents, Warren would bend his bulk over the bench to ask, “Yes, yes—but were you fair?”¹²⁶ The fairness to which the Chief Justice referred was no jurisprudential abstraction. It related to such things as methods of arrest, questioning of suspects, police conduct, and the like—matters that Warren still understood as intimately as when he himself was doing the prosecuting years earlier as district attorney in Alameda County, California. The *Miranda* decision was the ultimate embodiment of the Warren fairness approach. *Miranda* also illustrates another aspect of the Warren leadership. The strong dissents there led Justice Brennan to draft a short concurrence which emphasized that the Court had not been as extreme “as the dissents suggest.”¹²⁷ Brennan showed his draft to the Chief Justice before circulating it. Warren expressed concern at the prospect of a separate opinion by a member of the majority. Though Brennan explained that the concurrence was being issued solely to emphasize the Court’s decision, the Chief Justice was not mollified. If he had a lodestar principle for important cases, it was that the opinion of the Court should speak with one voice. In the end, Warren persuaded Brennan neither to circulate nor issue the concurrence and only the Chief Justice’s opinion of the Court was issued for the *Miranda* majority.

During the *Miranda* argument, Chief Justice Warren stated that “this [case] is not much different from *Gideon*.”¹²⁸ He was referring to *Gideon v. Wainwright*¹²⁹—the Warren Court’s landmark 1963 case on the right to counsel. The book the next year by Anthony Lewis, *Gideon’s Trumpet*, and the movie based upon it have made Clarence Gideon and his case a part of American folklore. But few people realize that the *Gideon* decision resulted directly from Warren’s leadership. For years, Warren felt, as he said in a 1954 speech to the

124. SUPER CHIEF, *supra* note 3, at 593.

125. *Id.*

126. CRAY, *supra* note 2, at 317, 531; WEAVER, *supra* note 4, at 9.

127. SUPER CHIEF, *supra* note 3, at 592.

128. *Id.*

129. 372 U.S. 335 (1963).

American Bar Association, "that no man accused of a serious offense is capable of representing himself."¹³⁰ Not long before Gideon's petition was filed, the Chief Justice's law clerks had been instructed by one of the prior term's clerks, "Keep your eyes peeled for a right to counsel case. The Chief feels strongly that the Constitution requires a lawyer."¹³¹

Gideon had been convicted in a Florida court of breaking and entering a poolroom with intent to commit a crime—a felony under Florida law. The trial judge refused Gideon's request for counsel, and he had to conduct his own defense. The highest Florida court affirmed. Gideon then sent a petition to the Supreme Court for certiorari. The petition was laboriously scrawled in pencil in schoolboy-type printing. Gideon's papers arrived at the Court January 8, 1962—one of nine in forma pauperis petitions in that morning's mail.¹³²

Gideon's petition claimed that he had been denied due process because, "When at the time of the petitioners trial he asked the lower court for the aid of counsel, the court refused this aid. Petitioner told the court that this Court made decision to the effect that all citizens tried for a felony crime should have aid of counsel. The lower court ignored this plea."¹³³ At the trial, when the court had denied his request for appointed counsel, Gideon asserted, "The United States Supreme Court says I am entitled to be represented by counsel."¹³⁴

Gideon was, to be sure, wrong in his assertion. The leading case then was *Betts v. Brady*,¹³⁵ where the Court had held in 1942 that an indigent defendant did not have a due process right to appointed counsel in a noncapital case unless he could show that, under the special circumstances of his case, he could not obtain a "fair trial" without a lawyer. Gideon's petition did not claim any such "special circumstances" and, as Lewis put it in his book, the petition was not the type that evoked the rare comment in the Clerk's Office, where the petitions were sorted, "Here's one that I'll bet will be granted."¹³⁶ On the contrary, wrote Lewis, "In the Clerk's Office it had no ring of history to it."¹³⁷

But Lewis and other Court watchers were unaware of two crucial facts. One was that, as we saw, the Warren law clerks had been instructed to find in the mass of petitions just such a right-to-counsel case.¹³⁸ The second was that, in their discussions on *Carnley v. Cochran*,¹³⁹ a case then pending, the Justices had come close to overruling *Betts v. Brady*. However, before *Carnley* was decided, Justice Whittaker resigned and Justice Frankfurter became incapacitated by a stroke. This gave the Chief Justice, who was in favor of discarding the

130. Earl Warren, *The New Home of the Profession: The American Bar Center Dedication Address*, 40 A.B.A. J. 955, 956 (1954).

131. SUPER CHIEF, *supra* note 3, at 458.

132. *See id.*

133. *Id.*

134. ANTHONY LEWIS, GIDEON'S TRUMPET 7-8, 10 (1964).

135. 316 U.S. 455 (1942).

136. SUPER CHIEF, *supra* note 3, at 458.

137. LEWIS, *supra* note 132, at 7.

138. SUPER CHIEF, *supra* note 3, at 458.

139. 369 U.S. 506 (1962).

Betts v. Brady rule, the votes for a four-to-three decision overruling *Betts*. Warren decided, nevertheless, that it would be unwise to overrule an important precedent by a bare majority of only a seven-Justice Court. The case was assigned to Justice Brennan, who drafted an opinion of the Court reversing Carnley's conviction within the *Betts v. Brady* rule. It was after this that Chief Justice Warren told his clerks to look for a right-to-counsel case that would give the Court an opportunity to overrule *Betts v. Brady*.

Carnley and the Warren instructions made the *Gideon* case the proverbial needle in the *in forma pauperis* haystack. The Chief Justice's law clerks had the special duty of scrutinizing the I.F.P. applications and preparing a memorandum (then called a "flimsy," from the thin carbon copy sent to each Justice). When the Warren clerk who prepared the flimsy considered the case worthy of consideration, he attached the red envelope containing the original petition to his memo. This was done in *Gideon*'s case and served as a red flag that this was a right-to-counsel case that might serve as a vehicle for overruling *Betts v. Brady*.

At Chief Justice Warren's urging, the *Gideon* certiorari conference voted to grant the writ, with only Justice Clark for denial. Even the normally conservative Justice Harlan had written at the end of his clerk's certiorari memo, "YES, I think the time has come we should meet the *Betts* question head-on."¹⁴⁰ The order granting certiorari stated that counsel were requested to discuss the question, "[S]hould this Court's holding in *Betts v. Brady* . . . be reconsidered?"¹⁴¹

Gideon then sent another penciled petition: "I do desire the Court to appoint a competent attorney to represent me in this Court."¹⁴² At the last conference of the 1961 Term, Chief Justice Warren suggested that Abe Fortas, soon to be appointed to the Court himself, should be assigned to represent *Gideon*.¹⁴³ The Justices all concurred. The Court Clerk put in a call to Fortas, locating him in Dallas, and Fortas said he would be happy to serve.¹⁴⁴

"If an obscure convict named Clarence Earl *Gideon*," declared Attorney General Robert F. Kennedy in a speech after the Supreme Court decision, "had not sat down in his prison cell with a pencil and paper to write a letter to the Supreme Court . . . , the vast machinery of American law would have gone on functioning undisturbed. But *Gideon* *did* write that letter . . . and the whole course of American legal history has been changed."¹⁴⁵

Yet it was Chief Justice Warren more than anyone who was responsible for the *Gideon* decision. It was the Chief Justice who wanted his clerks to find a case like *Gideon*, led the Justices in granting certiorari in the case, and suggested that Fortas be assigned to argue it. Those were the crucial steps that made the *Gideon* decision inevitable. The rest was anticlimactic—though none but the Justices were privy to that reality.

140. SUPER CHIEF, *supra* note 3, at 459.

141. *Id.*

142. *Id.*

143. *See id.*

144. *See id.*

145. *Id.*

Gideon was argued on January 15, 1963. In his autobiography, Douglas called the Fortas argument the best he had heard.¹⁴⁶ But the Fortas eloquence was only the battering of an open door. The Justices, including Justices Clark and Harlan, who had not been willing to go that far the previous year in *Carnley*, had reached a consensus on overruling *Betts v. Brady*. Led by Chief Justice Warren, the January 18 conference quickly agreed that *Betts v. Brady's* time had come.

The conference voted unanimously to reverse *Gideon's* conviction and to overrule *Betts v. Brady*.¹⁴⁷ They followed Warren's suggestion to limit the opinion to the case at hand, without addressing the question of how far the new right to assigned counsel extended.¹⁴⁸ The Chief Justice assigned the opinion to Justice Black—a gesture particularly appreciated by the others because Black had delivered the dissent in *Betts v. Brady*.¹⁴⁹ When Justice Black wrote the opinion, he simply based it on his previous dissent, and he was able to circulate a draft within two weeks.¹⁵⁰ The decision was announced for a unanimous Court on March 18.¹⁵¹

To one interested in how an effective Chief Justice operates, the *Gideon* case is a good illustration of the Warren fairness in assigning opinions. He did not take the “big” cases for himself, except where, as in the *Brown* segregation case, he thought it was important that the Court speak through the Chief Justice, or, as in *Reynolds v. Sims* or *Miranda v. Arizona*, he wanted to bear the brunt of the expected criticism. The Justices all received their share of the important opinions, though he naturally gave more of them to those who were his supporters and would express themselves in the manner closest to his own views.

VI. WARREN AND COURT TV

Even an acute observer such as John Gunther listed Earl Warren's outstanding characteristics as “decency, stability, sincerity, and lack of genuine intellectual distinction. . . . [H]e will never set the world on fire or even make it smoke.”¹⁵² Warren may have projected a kindly, smiling public picture, whose outstanding characteristic was its blandness; the outer image, however, was deceiving. All of the Justices who served with him reject the blandness notion. Justice Byron White said to me, “[W]hen he made up his mind, it was like the sun went down. . . . He was very firm, very firm.”¹⁵³

One subject on which Warren had firm convictions was television in the courtroom. Because of the attention focused on that subject by the O.J. Simpson

146. *See id.*

147. *See id.* at 460.

148. *See id.*

149. *See id.*

150. *See id.*

151. *See id.*

152. DOUGLAS, *supra* note 5, at 187.

153. SUPER CHIEF, *supra* note 3, at 69.

trial, the Chief Justice's privately expressed view on court TV should be of great interest today.

There is no doubt about how Warren felt about television in the courtroom. It was Warren himself who led his Court to its 1965 decision in *Estes v. Texas*,¹⁵⁴ reversing a conviction because the trial had been televised. To Warren, TV had no legitimate place in a criminal trial. He declared in an unissued *Estes* draft that allowing the televising of criminal proceedings meant "allowing the courtroom to become a public spectacle and source of entertainment."¹⁵⁵

In the Warren papers there is a copy of the remarks the Chief Justice made to his law clerk about the *Estes* case, as taken down by the clerk.¹⁵⁶ "If televised trials are permitted," Warren told his clerk, "we turn back the clock and make everyone in the courtroom an actor before untold millions of people. . . . [W]e are asked again to make the determination of guilt or innocence a public spectacle and a source of entertainment for the idle and curious."¹⁵⁷

The Chief Justice recalled for his clerk how "[t]he American people were shocked and horrified when Premier Castro tried certain defendants in a stadium."¹⁵⁸ Warren warned his clerk:

[I]f our courts must be opened to the pervasive influence of the television camera in order to accommodate the wishes of the news media, it is but a short step to holding court in a municipal auditorium, to accommodate them even more. As public interest increases in a particular trial, perhaps it will be moved from the courtroom to the municipal auditorium and from the auditorium to the baseball stadium.¹⁵⁹

The presence of the television camera, the Chief Justice asserted in his remarks to his clerk, meant that all in the courtroom would act differently: "To the extent that television has such an inevitable impact, it deprives the courtroom of the dignity and objectivity that is so essential for determining the guilt or innocence of persons whose life and liberty hinge on the outcome of the trial."¹⁶⁰

Feeling the way he did about court TV, the comment Warren made to Fred W. Friendly about the matter is scarcely surprising. After Friendly had been appointed President of CBS News, he met the Chief Justice at a 1964 cocktail party. Warren wished Friendly well in his new job. In thanking the Chief Justice, Friendly said he hoped that he would still head CBS News when they had television cameras on the moon and on the floor of the Supreme Court. Warren responded with a smile, "Good luck! You will have more luck with the former than the latter."¹⁶¹

154. JOHN GUNTHER, *INSIDE U.S.A.* 18, 20 (1947).

155. 381 U.S. 532 (1965).

156. See *SUPER CHIEF*, *supra* note 3, at 547.

157. *Id.*

158. *Id.* at 164.

159. *Id.*

160. *Id.*

161. *Id.* at 543.

It is almost as if Warren foresaw the O.J. circus!

VII. MIRROR OF THE MAN

In a commemorative article on Chief Justice Warren's death in 1974, Justice Douglas wrote that, while Warren would be remembered most for the major cases such as the *Brown* school segregation case, "in many ways the lesser cases mirrored . . . the man."¹⁶² Warren the man, as well as the leader of the Court, was well shown in the 1967 case of *Brooks v. Florida*. Tyrone Brown, the law clerk who worked on the case said to me: "[The case] will never be significant . . . but I think, for me at least, it revealed volumes about the character of the man."¹⁶³

The *Brooks* case arose out of a food riot by blacks in a Florida prison. Brooks and the others involved were stripped naked and placed in bare punishment cells which the Supreme Court described as "the windowless sweatbox . . . a barren cage [fitted only] with a hole in one corner into which he and his cell mates could defecate."¹⁶⁴ For two weeks, they were kept in these cells on a daily diet of twelve ounces of thin soup and eight ounces of water.¹⁶⁵ Within minutes after Brooks was brought from the cell, he signed a confession. The confession was used to convict him of participating in the riot. The highest state court affirmed. Brooks filed an *in forma pauperis* petition for certiorari.

At the certiorari conference, the Justices voted eight-to-one not to take the case, with Chief Justice Warren dissenting.¹⁶⁶ The consensus was that it involved a matter of internal prison discipline in which the Court should not become involved. Warren was indignant at the decision to deny certiorari. He told Brown to work up a draft dissent. Brown prepared a number of drafts, but the Chief Justice kept saying that they were not strong enough.¹⁶⁷

At the 1994 University of Tulsa Conference on the Warren Court, Brown described what happened next:

So he called me to his office a third time. Rising from his chair, he said, 'Let's tell them what really happened. Tell them that the authorities placed these men in threes in tiny sweat boxes for two weeks, naked and on a starvation diet with just a hole in the floor to defecate in! Tell them that they brought these men out, still naked, and forced written confessions from them! Tell them that these confessions were used to convict these men of new crimes, that many years were added to the terms they already were serving. Tell them what really happened,' said the Chief, 'in plain language. Put it in those books,' said he, pointing to the bound volumes of *United States Reports* on the shelves in his office, 'and let

162. *Id.*

163. *Id.* at 719.

164. *Brooks v. Florida*, 389 U.S. 413, 414 (1967).

165. See SUPER CHIEF, *supra* note 3, at 719.

166. See *id.*

167. See *id.*

posterity decide who was right!' So, that was what we did.¹⁶⁸

Warren circulated an extremely sharp draft dissent on November 9, 1967, and, as Brown described it to me, "just kind of sat in his office and waited."¹⁶⁹

Soon thereafter, the Justices came in one by one and joined the dissent. By the next conference on the case, the Chief Justice had the votes of all, not only for the granting of certiorari, but for summary reversal. Warren had Brown draft a short per curiam to that effect, which was issued December 18, 1967.¹⁷⁰

Cases like *Brooks* and those discussed above demonstrate the Warren leadership in both the landmark and lesser cases. Well could Warren reply, when on his retirement a reporter asked him to describe the major frustration of his Court years, that he could not think of any. Breaking into a wide smile, the retired Chief Justice declared, "It has not been a frustrating experience."¹⁷¹

VIII. IN THE PANTHEON

To the end of his life, nevertheless, Warren regretted not having been able to make his mark in the White House. He always believed that his Presidential attempt had been frustrated by Richard M. Nixon's defection at the 1952 Republican Convention. Just after swearing in Nixon as President in 1968, Warren told a close Nixon adviser that he could not help feeling that, but for Nixon, he himself might have taken the Presidential oath in 1953.¹⁷²

It can, however, be said that Warren was actually able to accomplish more as Chief Justice than any occupant of the Oval Office since mid-century. Indeed, as Anthony Lewis tells us, the Warren Court "brought about more social change than . . . most Presidents."¹⁷³ One may say, with a Warren biography, "The only other figure in recent American history with whom Warren can be equated is Franklin Delano Roosevelt."¹⁷⁴ John Hart Ely summed it up last year:

while we should weep for the absence in public life of men like Earl Warren, we need not weep for him. He lived the American Dream. Quite a number of men have done that, however. The Chief did something that few will ever do: he did what he set out to do. And that was to make the American Dream more broadly accessible than it has ever been before.¹⁷⁵

Earlier this year, James J. Kilpatrick, the syndicated columnist, criticized my inclusion of Warren among the Supreme Court greats. "Is Earl Warren properly ranked among the 10 greatest?" Kilpatrick asked, "Warren wouldn't

168. THE WARREN COURT: A RETROSPECTIVE 280 (BERNARD SCHWARTZ ed. 1996).

169. SUPER CHIEF, *supra* note 3, at 720.

170. *See id.*

171. *Id.* at 766.

172. *See id.* at 723.

173. THE SUPREME COURT UNDER EARL WARREN, *supra* note 11, at 151.

174. LEO KATCHER, EARL WARREN: A POLITICAL BIOGRAPHY 473 (1967).

175. ELY, *supra* note 105, at 4.

make my own list of the greatest 25. The gentleman was a . . . politician from start to finish. He had the constitutional depth of a dishpan; he wrote tedious opinions[.]”¹⁷⁶

Perhaps Warren cannot be deemed a great juristic technician, noted for his mastery of the common law, but he never pretended to be a legal scholar. To him, the outcome of the case mattered more than the reasoning behind the decision. He took full responsibility for the former and delegated the latter, in large part, to his law clerks.

The result may have been a deficiency in judicial craftsmanship that subjected Warren to academic criticism, both during and after his tenure. Without a doubt, Warren does not rank with Holmes or Cardozo as a master of the opinion, but his opinions have a mark of their own. Warren would go over the drafts prepared by his clerks and make changes, usually adding or substituting straightforward language typical of his manner of presentation. As one of his law clerks told me, “He had a penchant for Anglo-Saxon words over Latin words and he didn’t like foreign phrases thrown in if there was a good American word that would do.”¹⁷⁷

As a consequence, the important Warren opinions have a simple power of their own; if they do not resound with the cathedral tones of Marshall, they speak with the moral decency of a modern Micah. Perhaps the *Brown* opinion did not articulate the juristic bases of its decision in as erudite a manner as it could have, but as the Chief Justice wrote in his memorandum transmitting the *Brown* draft, the opinion was “prepared on the theory that [it] should be short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory.”¹⁷⁸ The decision in *Brown* emerged from a typical Warren moral judgment, with which few today would disagree. The Warren opinion was so *right* in that judgment that one wonders whether additional learned labor in spelling out the obvious was really necessary.

When all is said and done, Warren’s place in the pantheon rests, not upon his opinions, but upon his Court’s decisions. If impact on the law is the hallmark of the outstanding judge, few occupants of the bench have been more outstanding than Chief Justice Warren. As Professor Ely wrote last year, “this was unmistakably, a great man.”¹⁷⁹

In the end, however, can we say that anyone truly knew the real Earl Warren? Outwardly, he was, as Ely describes him, a “sunny, even jolly man, a sort of lovable uncle,”¹⁸⁰ or, as a biographer put it, “with the enveloping friendliness of Smokey the Bear.”¹⁸¹ From the time he took his seat, Warren tried to meet everyone in the Supreme Court building. “I’m Earl Warren,” he would say, as he shook hands with everyone, including the guards and plumbers.

176. James Kilpatrick, *10 Best, 10 Worst*, TULSA WORLD, April 14, 1997, at A8.

177. SCHWARTZ, *supra* note 64, at 448.

178. SUPER CHIEF, *supra* note 3, at 97.

179. ELY, *supra* note 105, at 3.

180. *Id.*

181. WEAVER, *supra* note 4, at 7.

“When he says ‘good morning,’ he does it as if he hadn’t seen you for a year,” said one Justice.¹⁸²

Yet, as his most recent biography concludes, “For all his affability, Earl Warren remained a private man.”¹⁸³ The outward camaraderie masked a different inner person. “No one,” a friend of Warren once said, “really knows this man.” “All day long,” a member of Warren’s gubernatorial staff recalled, “we used to hear that booming voice, that belly laugh, that loud, ‘*How are you?*’ but sometimes in the evening when I worked late, I’d see him sitting in his office alone, his back to the door, his head bowed, and on that wall above him a sad, brooding picture of Lincoln. That’s the Earl Warren few of us ever saw and none of us ever knew.”¹⁸⁴

182. SUPER CHIEF, *supra* note 3, at 130.

183. CRAY, *supra* note 2, at 148.

184. SUPER CHIEF, *supra* note 3, at 132.

