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An era has ended with the passing of our late Chief Justice. To this man, who made us all proud to be lawyers, we dedicate this issue.

The Editors

Chief Justice Warren: The Enigma of Leadership

Abe Fortas†

The Chief Justice of the United States is inevitably the chairman of the judicial collegium. He is not always its leader. He calls the meeting to order; he arranges the agenda—within limits; he directs the work traffic—within limits; and he has certain procedural duties and procedural prerogatives, some of which significantly affect the Court's product. When the Chief Justice is in the majority, he assigns the writing of the opinion of the Court in particular cases. This is a function of great significance. If the Chief Justice assigns the writing of the opinion of the Court to Mr. Justice *A*, a statement of profound consequence may emerge. If he assigns it to Mr. Justice *B*, the opinion of the Court may be of limited consequence.

Apart from his special functions and administrative powers, the Chief Justice is in a position to be something more than an equal among equals. His position carries enormous prestige. This prestige not only affects the public, the bar and the bench generally, but it also makes it possible for the Chief Justice to influence the output of the Court, to a much greater degree than colleagues of equal or superior personal and professional calibre.

Of the 13 Chief Justices who served prior to Earl Warren, common

† Former Associate Justice, United States Supreme Court; Member, District of Columbia Bar.

consent, I think, would ascribe qualities of outstanding leadership to Marshall and Hughes. These were quite different types of men, men of vastly different gifts, men of substantially different backgrounds, and the leadership that each exercised manifested itself in very different ways.

Earl Warren, as a man and a Chief Justice, clearly belongs in this special category. He differed in background, temperament, interests and techniques from both Marshall and Hughes, but he was undeniably more than one among nine Justices. He was significantly responsible for the quality of the Court's output during his tenure. He amply deserved the title of Super-Chief which Mr. Justice Douglas bestowed upon him.

We know this; we feel it. But when we attempt to identify the ingredients—the particulars—of Warren's leadership, we find great difficulty.[1] He made no apparent effort to impress his views upon his brethren. He was no more emphatic than some of them in stating his conclusions. He did not attempt to persuade by one-to-one, off-the-record sessions. He did not convert his fellow Justices by the kind of penetrating, irresistible, jugular stroke which is so often the contribution of Mr. Justice Douglas. He did not press his brethren against a stone wall of logic and stern assurance in the manner that characterized the formidable Hugo Black. His effectiveness did not stem from the kind of calm and impressive scholarship that was the contribution of John Harlan.

By some process short of the occult, however, Warren was a great, powerful leader. Probably some of the great decisions of the Warren Court would have come even if the Chief Justice had added no more than his vote—and in some instances, even without his vote. But some of them would still lie unborn in the pregnant precepts of our Constitution if it had not been for Earl Warren; if it had not been for the quality that his personality brought to the Court and his colleagues—for his simple view that the imperatives of truth and justice and fairness could not, and should not, be avoided; and if it had not been for the standard that his courage and steadfastness set for his colleagues. To Warren, the Supreme Court was a temple dedicated to justice. He was its father-figure, and in such a setting his good and worthy colleagues were inspired and emboldened to seek and maintain the idealism of our Constitution and system of laws.

1. The nature, ingredients and emergence of leadership are currently the subject of fascinating scholarly and clinical investigation by psychiatrists, psychologists and social scientists. *See* W. BION, EXPERIENCES IN GROUPS AND OTHER PAPERS (1961); A. RICE, LEARNING FOR LEADERSHIP (1965); Rioch, *Followers and Leaders,* 34 PSYCHIATRY 258 (1971).

Throughout his term as Chief Justice, Warren had the benefit of a core of Justices whose basic constitutional commitments were congenial to his own. This core expanded and contracted as Justices died, retired, or resigned, and successors were qualified; and various of the Justices who were sturdy proponents of some of the views that Warren held, were unyielding opponents of other positions.[2]

If the Chief Justice's convictions had been contrary to those of the formidable majority with whom he served for most of his tenure, would the great decisions have emerged? In the five-four decisions, his vote was, of course, crucial, but no more so than that of any other Justice in the majority. In the cases where the majority was larger, would Warren's absence as Chief Justice have made a difference in the outcome? Would the great issues have been considered by the Court, or would the administrative powers of a hostile Chief Justice—or the climate that an unsympathetic Chief Justice might create—have relegated some of the crucial cases to the "Never-is-too-soon" box which the Court has available to it? If the cases had been considered by the Court, would the majority, *ex* Warren, nevertheless have persisted?

In all probability, some of the great decisions were foreordained, and it is arguable that they would have been handed down even in the absence of Warren. Some of the fundamentally significant decisions of the Warren Court, properly viewed, were the culminating—and perhaps inevitable—steps in an evolutionary process that had been underway for a long period of time, during the pre-Warren Courts. This is true of the decision which, in social terms, was the most revolutionary of all: *Brown v. Board of Education* (1954).[3] *Brown* and companion cases were before the Court when Warren assumed office. Their antecedents left little basis for choice as to how their issues must be decided. The six prior cases involving the "separate but equal" doctrine in public education were inexorable building blocks to *Brown:* steps progressively demonstrating that the "separate but equal" doctrine could not be defended; that it was, at best, shabby temporization; that it was neither workable in practice nor defensible as constitutional

2. During all of Warren's tenure, he had the immeasurable benefit of the work of Justices Black and Douglas. Mr. Justice Brennan joined the Court in the third term of the Warren Court (1956). This formidable trio was frequently joined by Tom Clark who served from the outset of Warren's term until his retirement in 1967. Clark was succeeded by Mr. Justice Thurgood Marshall, who, on crucial issues, shared the views of Warren, Black, Douglas, and Brennan. Arthur Goldberg and the author of this article together spanned the period from 1962 to 1969. Justices Stewart and Frankfurter, each from the different viewpoint of his own philosophy and constitutional conception, also shared from time to time in the elevation of constitutional principle which occurred under Chief Justice Warren.

3. 347 U.S. 483 (1954).

principle.[4] It was the rapid development of racial activism among blacks in the late 'forties and early 'fifties that brought the evolutionary trend to an inescapable climax.[5] Indeed, anything less than unanimity in *Brown* would have been surprising. Every Associate Justice who sat in *Brown* had joined in the Court's opinions, written by Chief Justice Vinson in 1950, in *Sweatt v. Painter*[6] and *McLaurin v. Oklahoma State Board of Regents.*[7] These opinions really sealed the fate of the "separate but equal" doctrine. After these decisions, *Brown* was inevitable.

Gideon v. Wainwright (1963),[8] decided by a unanimous Court, similarly, although not so clearly, seems to have been foreordained. *Betts v. Brady* (1942),[9] in which the Court declined to hold that the Fourteenth Amendment required appointment of counsel for an indigent defendant in a state felony proceeding, had been massively eroded. *Hamilton v. Alabama* (1961)[10] had held that if a defendant was accused of a capital offense, an absolute right to counsel existed. In a number of other cases, the Court had held that "special circumstances" existed which made *Betts* inapplicable and that the Fourteenth Amendment required the state to appoint counsel.[11] As Justice Harlan, concurring in *Gideon,* wryly pointed out, the Court had come to realize "that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial. In truth the *Betts* v. *Brady* rule is no longer a reality."[12]

The significant fact about *Gideon,* however, for purposes of appraisal of the Warren Court and its leadership, is not how it was decided, but that the Court reached into the barrel of petitions for certiorari and selected Gideon's handwritten petition for review. Unlike *Brown, Gideon* was not on the judicial agenda when Warren became Chief Justice. Gideon's case could easily have been avoided. It

4. Sweatt v. Painter, 339 U.S. 629 (1950). Chief Justice Vinson's opinion for a unanimous Court in *Sweatt* included this prophetic statement:

> With such a substantial and significant segment of society excluded [from the law school to which blacks were admitted], we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.

Id. at 634.

5. One of the important relevant aspects of this development was increasing recourse to the courts on behalf of blacks, under the able leadership of Thurgood Marshall and Spotswood Robinson III, acting for and with the NAACP.

6. 339 U.S. 629 (1950).

7. 339 U.S. 637 (1950).

8. 372 U.S. 335 (1963).

9. 316 U.S. 455 (1942).

10. 368 U.S. 52 (1961).

11. *See, e.g.,* Williams v. Kaiser, 323 U.S. 471 (1945); Hudson v. North Carolina, 363 U.S. 697 (1960); Chewning v. Cunningham, 368 U.S. 443 (1962).

12. 372 U.S. at 351. Only two of the Justices in *Betts v. Brady* were on the Court when *Gideon* was decided: Black and Douglas. Both had dissented in *Betts.*

is, indeed, this action—the selection of cases for review—that may be a more significant indicator of the vitality of the Court at a particular time than the decisions that it reaches; and the courage and initiative of the Warren Court in granting discretionary review and in choosing to confront difficult issues, are perhaps its most conspicuous characteristics.

In a somewhat similar category are the decisions of the Warren Court with respect to civil rights and freedom of the press. There was ample basis in precedent for such decisions as *Sweezy v. New Hampshire* (1957)[13] and *New York Times Co. v. Sullivan* (1964).[14] In cases of this type, I believe it may fairly be said that the Warren Court strengthened and broadened doctrine that had previously been established. In so stating, I do not minimize the importance of the Court's decisions, or the vision and steadfastness that those decisions required. The Court could easily have avoided extending the logic of its past decisions. It could easily have avoided the conversion of soft principle into hard doctrine. But it did not do so.

The special quality of the Warren Court particularly emerges in its decisions dealing with aspects of state law and procedure which had been substantially immune from the impact of basic federal constitutional principle. *Brown* and *Gideon,* of course, impinged upon state jurisdiction, but in respects which could hardly be said to partake of novelty. *Baker v. Carr* (1962)[15] and *Reynolds v. Sims* (1964),[16] however, were truly innovative. There was undeniably precedent for the Court's decisions but the question presented in *Baker* and *Reynolds,* it seems to me, was substantively and qualitatively different from those with which the precedents dealt.[17] In other words, there was ample room for choice: Without moving out of the path of prior decisions, Justices might easily have cast their vote against the one man, one vote rule. It would have been easy, within conventional judicial standards, for the Court to hold that a claim that state misapportionment was constitutionally offensive did not present a justiciable controversy under the Equal Protection Clause. To its credit, the Court did not do so. As Chief Justice Warren keenly realized, state abuse of the oligarchic weapon of apportionment had reached the point where it constituted a massive debasement of the fundamental rights of citizens.[18] The time

13. 354 U.S. 234 (1957).
14. 376 U.S. 254 (1964).
15. 369 U.S. 186 (1962).
16. 377 U.S. 533 (1964).
17. *E.g.,* United States v. Classic, 313 U.S. 299 (1941); United States v. Mosley, 238 U.S. 383 (1915); *Ex parte* Yarborough, 110 U.S. 651 (1884).
18. *See* Reynolds v. Sims, 337 U.S. 533, 556 n.30 (1964).

had come to insist upon state conformity with a fundamental principle of our Constitution—the right of every citizen to participate equally in the selection of his governors. The rights of blacks, a frequent object of disenfranchisement, were in process of full acknowledgement; and the awareness of individuality and of the individual integrity of the people of this Nation—particularly minorities and the poor—was a factor that increasingly demanded implementation of long-restricted constitutional principle.

Our Constitution and our Bill of Rights had been written idealistically in the broad terms of all of the people, but in fact, masses of people had been excluded from the benefit of significant provisions. The focus of the contribution of the Warren Court was its attack upon the restricted application of constitutional provision, largely, but not entirely, due to the failure of the states to implement constitutional commands, and to the subordination of federal constitutional principle to state jurisdiction.

Nowhere was this distortion by the states of fundamental constitutional principle more virulently in evidence than in the administration of criminal law. In 1961, the Warren Court decided *Mapp v. Ohio*,[19] by a vote of six to three, overruling *Wolf v. Colorado* (1949).[20] *Mapp* was the cornerstone of the Court's series of decisions applying constitutional principle to state criminal procedures. In my opinion, it ranks with *Brown* and *Reynolds* as a fundamental decision of the Warren Court. Justice Tom Clark, writing for the six-Justice majority of the Court, stressed that *Mapp* was not an instant product. Rather, he maintained, it was the Court's response to a problem with which it had temporized in previous decisions,[21] and which continued to be intractable: the problem of state convictions based upon evidence obtained in violation of fundamental constitutional right but nevertheless received in evidence. To Justice Clark, "time ha[d] set its face" against federal tolerance of state indulgence in arbitrary, unconstitutional police procedure. I do not quarrel with Justice Clark's argument that there was precedent which provided a basis for *Mapp*. Its doctrine was firmly established in federal cases,[22] but the extension of the rule to the states, despite the precedent of *Wolf*, was based upon constitutional principle rather than a steady progression of decisional law.

Subsequent to *Mapp*, the Warren Court handed down its contro-

19. 367 U.S. 643 (1961).
20. 338 U.S. 25 (1949).
21. *See, e.g.*, Irvine v. California, 347 U.S. 128 (1954).
22. *E.g.*, McNabb v. United States, 318 U.S. 332 (1943).

versial decisions in the field of criminal law enforcement. Perhaps the most abrasive was *Miranda v. Arizona* (1966),[23] a five-four decision which deserves neither the abuse nor the acclaim that it has received. It was a modest effort to assure that the right to counsel and the right to avoid self-incrimination should have a degree of reality. In my opinion, its significance is that someday, in a better world, it may be a predicate for a ruling that confessions obtained by the police or prosecutor, from a person in custody, are inadmissible if taken in the absence of counsel for the defendant.

Objective analysis is generally useful, but often essentially spurious. It is easy analytically to dissect the work of the Warren Court and Warren's significance to it and to arrive at misleading conclusions. The fact is that the Warren Court was both the product and a producer of a profound moral, ethical and constitutional revolution. It functioned in times when the demand for a full measure of human rights had become insistent. Our Constitution, our Bill of Rights, had promised that our government would accord that full measure. "Time had set its face" against an apartheid society, against a selective application of constitutional principle, against a half-a-loaf version of the noble generalities of our social compact. And it was the Warren Court that was the instrument and the motor of time's insistence.

Earl Warren, I think, was essential to the Court's response. I cannot prove this by quantitative or objective evidence. His contribution cannot be tallied. He provided an essence, an attitude, which set the tone and quality of the Court's work. In a sense, he was a simple man. His constant question was: Is this right or wrong? His answer was always firmly rooted in a profound sense of justice and human dignity, and in a simple and uncomplicated conception of the essential, noble meaning of our Constitution's precepts.

This simple approach provided a firm foundation for his colleagues' work. He was a constant reminder that the task of a judge is always to seek the truth—the essential constitutional and human values at stake. Because of his own quality, he was a constant reminder that neither fear nor the intricacies of the legal craft should divert Justices from this noble pursuit.

He was fearless; and his calm courage and steady course in face of vicious assault clarified and simplified for his like-minded colleagues the path to be pursued. In another sense, Warren provided for these colleagues, in the event that any of them might have been tempted to

23. 384 U.S. 436 (1966).

favor a less controversial career, a protective wall which rebuffed the assaults of the Court's critics and the seductions of compromise.

Along with these qualities, Warren was an immensely attractive, considerate and diplomatic leader. He was never divisive, impatient, short-tempered or abrasive. He created an atmosphere of comradeship, even within strongly felt and sometimes sharply stated disagreements. No one differed with him personally, even if sharply differing with his convictions and conclusions. It was this, along with Warren's qualities of courage and insistence upon simplicities of fairness and justice, that kept the Court on course, that averted fragmentation of its majority, and that makes reference to the "Warren Court" eminently appropriate.