

10-1980

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Recommended Citation

Richard Y. Funston, Earl Warren: The Judge Who Changed America. By Jack Harrison Pollack, 33 *Vanderbilt Law Review* 1265 (1980)
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol33/iss5/6>

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BOOK REVIEW

EARL WARREN: THE JUDGE WHO CHANGED AMERICA. By Jack Harrison Pollack. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1979. Pp. viii, 386. \$14.95.

*Reviewed by Richard Y. Funston**

"Now he belongs to the ages," Secretary of State William Seward reputedly said at the moment of Abraham Lincoln's passing. Were the scene to be repeated today, the Secretary would be forced to amend his pronouncement. "Now," the modern Seward would have to say, "he belongs to the journalists."

Earl Warren was a decent, personable, and humane man who had the good fortune to preside over the Supreme Court of the United States at a peculiarly propitious moment. That, surely, is enough to say for any man's lifetime, and someday the definitive biography of Warren will say it. In the meantime, it remains something of a mystery why aging liberals find it necessary to canonize the late Chief Justice. Nevertheless, journalist Jack Harrison Pollack's *Earl Warren: The Judge Who Changed America* is the latest addition to the Warren hagiography.¹ In it you meet Warren, the self-effacing, underpaid, young District Attorney; Warren, the legal scholar; Warren, the Supreme Court's "most influential member";² Warren, the ever-wise, ever-virtuous Chairman of the President's Commission on the Assassination of President John F. Kennedy; and Warren, the internationalist, who so opened the door to rapprochement with the People's Republic of China that the Nixon Administration's efforts were merely a formality.

In fairness, it must be said that Mr. Pollack tries to present a balanced picture, but his heart just is not in it. Thus, Pollack admits that some of Warren's actions before his appointment to the bench were less than noble, and that some of Warren's opinions for the Court were less than notable. At the same time, however, he adjures us to "restrain the temptation to over-moralize about some

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1. J. POLLACK, *EARL WARREN: THE JUDGE WHO CHANGED AMERICA* (1979).
2. *Id.* at 200.

of Warren's less noble actions."³ Pollack himself should have exercised such restraint when commenting on Warren's more noble actions. Unfortunately, he did not, and the biography makes its points by hyperbole, innuendo, and inaccuracy.

Indeed, the flavor of the book may be captured in one unforgettable sentence: "Everything that Warren wrote was obviously important; all his observations were balanced and fair; all his conclusions were unexceptionable."⁴ That some of America's most brilliant legal scholars did in fact take strong exception to Warren's writings⁵ is not noted.

Perhaps as a result of *The Brethren*,⁶ I, like many students of the Court, may have become hypersensitive to undocumented "revelations" about the Court. Nevertheless, apart from a postscriptive claim to have interviewed various people and a meager and simplistic bibliography, Pollack wholly fails to substantiate any of his statements, even when attribution (as in the case of a public speech) would be neither difficult nor violative of a confidence. Thus, Pollack freely asserts that Chief Justice Vinson left his opinion writing to his law clerks,⁷ that anti-Semitism was the cause of Justice Fortas' difficulties with the Senate,⁸ and that he knows how Chief Justice Warren voted in three different presidential elections.⁹ It is ironic, then, that Pollack severely criticizes President Eisenhower for his inability to document specifically the decisions that led to his disenchantment with Warren. "[I]n fact," Pollack writes, "he [Eisenhower] did not really know what decisions he was talking about."¹⁰

Quite frankly neither does Pollack know what decisions *he* is talking about. *Watkins v. United States*¹¹ and *Sweezy v. New Hampshire*¹² are hailed as "serving notice . . . that henceforth the

3. *Id.* at 95.

4. *Id.* at 310.

5. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); A. BICKEL, *THE MORALITY OF CONSENT* (1975); P. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* (1970); Kurland, *Earl Warren, The "Warren Court," and the Warren Myths*, 67 *MICH. L. REV.* 353 (1968).

6. B. WOODWARD & S. ARMSTRONG, *THE BROTHERS* (1979). A useful palliative to Woodward and Armstrong is to be found in Adler, *Book Review*, *N.Y. Times*, Dec. 16, 1979, pt. VII, at 1.

7. J. POLLACK, *supra* note 1, at 150.

8. *Id.* at 281.

9. *Id.* at 204, 287.

10. *Id.* at 262.

11. 354 U.S. 178 (1957).

12. 354 U.S. 234 (1957).

Court would be fearless in defending individual rights during . . . investigative procedures by *all* branches of government Despite pressure from the Eisenhower Administration and other quarters, the Warren Court never backtracked in its refusal to permit 'national security' . . . to be used as a pretext for infringing upon individual rights."¹³ *Barenblatt v. United States*¹⁴ is never mentioned. *Wesberry v. Sanders*¹⁵ (misspelled by Pollack as *Westberry*) is credited¹⁶ with extending the rule of *Reynolds v. Sims*,¹⁷ even though *Wesberry* was decided before *Reynolds*. The holding in *New York Times Co. v. Sullivan*¹⁸ is stated with almost ludicrous inaccuracy;¹⁹ but then, Pollack thinks that *Sullivan* was decided in 1954.²⁰

To continue to document Pollack's numerous errors regarding Warren Court decisionmaking, however, would incorrectly convey the impression that the book is primarily concerned with judicial interpretation during Warren's tenure. Actually, Pollack's subtitle is something of a misnomer. By a most generous count, only eighty-one of the volume's three hundred and eighty-six pages are devoted to judicial decisions. Much more attention is given to Warren's political career before he came to the bench. In fact, the book's chapters rather curiously correspond to presidential terms. One gets the impression that, for Pollack, the greatest thing about Warren is that he *almost* ran for President; and Pollack leaves no doubt as to the kind of President that Warren would have been:

He would have been a wise Mr. Honest, and not in the sanctimonious manner of Jimmy Carter. He had a broader, less partisan vision than Ford; he was more principled than Nixon; less devious and arrogant than Johnson; more experienced and mature than Kennedy; more of an activist than Eisenhower; less impulsive than Truman.²¹

Reading about Warren's rise from Assistant District Attorney to Vice Presidential nominee, one could come to a quite different conclusion. Warren was a vigorous prosecutor of communism and victimless crimes, who enthusiastically enforced the California anti-syndicalism statute and conducted a personal vendetta

13. J. POLLACK, *supra* note 1, at 188-89 (emphasis in original).

14. 360 U.S. 109 (1959).

15. 376 U.S. 1 (1964).

16. J. POLLACK, *supra* note 1, at 261.

17. 377 U.S. 533 (1964).

18. 376 U.S. 254 (1964).

19. J. POLLACK, *supra* note 1, at 261.

20. *Id.* at 346.

21. *Id.* at 11.

against certain gambling elements. With a good deal of political acumen and some cynicism, he refashioned the office of California Attorney General by constitutional amendment, doubling its salary, to suit himself before seeking the office. Warren was a member of the white supremacist Native Sons of the Golden West and an early advocate of Japanese-American internment during World War II. He sought and accepted the backing of the conservative publisher of the *Oakland Tribune*, Joseph Knowland, and then liquidated the debt by appointing Knowland's son, William, to the United States Senate. He often flowed with the tide, opportunistically changing position on issues as grave as war and peace and dutifully mouthing whatever happened to be the Republican Party line at any given time. Warren was, in short, a good electoral politician who tried to do his best under the circumstances as he saw them and, on more than one occasion, made a mistake.

When Pollack faces up to, rather than rationalizes, this behavior, his portrait of Warren is much more creditable.²² Unfortunately, he does not face the facts very often. Rather, the reader is asked to believe, for example, that a man who at age thirty-four was one of the youngest District Attorneys in the United States succeeded entirely on good luck and ability.²³ Supposedly there was no driving ambition, no will to succeed. Warren was just one of the boys.

Pollack endeavors to excuse Warren's past with two alternative theories. First, Pollack argues that Warren never really meant the "terrible" things he said back in the 1930s and 1940s. That does not do his case much good, though, since Warren then emerges as an intellectual mediocrity who just did what the party told him to do. Consequently, Pollack's second line of attack is to argue that Warren was later sorry for what he had said and done. This latter contention makes one wonder, however, whether Warren's interpretation of the Constitution proceeded from a subconscious desire to right the wrongs he had done in his earlier career.²⁴ Pollack, though, does not pursue the idea; he is interested in apotheosis, not analysis.

22. *E.g., id.* at 79.

23. *Id.* at 44-45.

24. In fact, Pollack suggests as much. J. POLLACK, *supra* note 1, at 56. Note also the observation that, under a Warren-initiated educational exchange program "several thousand young farmers from Japan have enjoyed a year's agricultural training in California thanks, perhaps, in large measure to the penitent conscience of the man who had sparked Japanese internment a decade earlier." *Id.* at 129.

As a result, Pollack's discussion of the Warren Commission is indeed strange. While Pollack is determined to find—or, at least, hint darkly at—a conspiracy in the assassination of President Kennedy, he is equally determined to absolve Warren of any responsibility for the commission's failure to discover that conspiracy. Yet, at the same time, he wants to prove that "Warren [was] the commission."²⁵ The two positions are self-contradictory. Either there was a conspiracy and the commissioners, including Warren, through malfeasance, misfeasance, or nonfeasance, failed to find it; or there was no conspiracy, and the commission's report, although flawed, is essentially correct. In either case, it strains credulity to believe that Warren (or anyone else) could have consistently dictated to men like John J. McCloy, Allen Dulles, and Richard Russell. As in his discussion of the Warren Court, Pollack exaggerates the centrality of Warren's role on the Commission.

Despite Pollack's assertions, Earl Warren was not the intellectual leader of the Court. If the Warren Court had such a leader, it was Hugo Black.²⁶ Pollack, however, sees Black, as an "all-out liberal"²⁷ who became "increasingly erratic."²⁸ Pollack clearly does not understand Justice Black, but then neither did Warren. For better or worse, Black's theory of judging was "comprehensive and internally consistent."²⁹ That theory, of course, was intended to constrain judicial activism.³⁰ In the hands of judges like Warren, however, uncommitted to Black's constitutional literalism and lacking his fidelity to history, it actually became an apology for judicial intervention on a broad scale.

In his later years, Black's principal intellectual adversary (and best friend) was Justice Harlan.³¹ It was Harlan who developed the concept of federalism, a concept Warren had difficulty comprehending,³² into a powerful critique of Warren Court decisionmak-

25. *Id.* at 233.

26. See G. DUNNE, *HUGO BLACK AND THE JUDICIAL REVOLUTION* (1977); G. WHITE, *THE AMERICAN JUDICIAL TRADITION* (1976); Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963); Snowiss, *The Legacy of Justice Black*, 1973 SUP. CT. REV. 187; Yarbrough, *Justices Black and Douglas: The Judicial Function and the Scope of Constitutional Liberties*, 1973 DUKE L.J. 441.

27. J. POLLACK, *supra* note 1, at 167.

28. *Id.* at 300.

29. G. WHITE, *supra* note 26, at 332.

30. *E.g.*, *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 515 (1969) (Black, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (Black, J., dissenting).

31. See generally D. SHAPIRO, *THE EVOLUTION OF A JUDICIAL PHILOSOPHY* (1969); Wilkinson, *Justice John M. Harlan and the Values of Federalism*, 57 VA. L. REV. 1185 (1971).

32. For example, compare Chief Justice Warren's opinions for the Court in *Reynolds*

ing. It was Harlan who carried on the tradition of Justice Holmes, and it was Harlan who demonstrated that judicial activism in the name of equality was not a necessary good. Yet Pollack mentions Harlan only a handful of times, almost invariably preceded by the adjective "conservative." The substance of Harlan's critique is never presented.³³ It is simply dismissed as "petulant."³⁴

Nevertheless, Harlan fares better than Justice Frankfurter, the Warren Court's most thoroughgoing spokesman for judicial restraint.³⁵ None of the other Justices "envisaged so limited a role for the Court as [did] Frankfurter, none maintained a jurisprudential stance in which procedural technicalities played such a dominant part, and none defined his position as a judge in so self-abnegated a fashion."³⁶ More than any other modern Justice, Frankfurter emphasized the element of choice in judicial interpretation and, on the bases of both democratic philosophy and institutional prudence, argued for a restrained exercise of that choice. As with Harlan, however, Pollack summarily derides this approach to the judicial function. It was, he writes, merely Frankfurter's "pet theme."³⁷

Perhaps the most consistent theme in Pollack's book is Warren's animosity towards and long-running feud with Richard Nixon.³⁸ Not surprisingly, Pollack builds up Warren at Nixon's expense. For Pollack, when Warren re-examined and changed his position on a particular issue, often quite suddenly, he exhibited

v. Sims, 377 U.S. 533 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966), with Justice Harlan's dissenting opinions in the same cases.

33. In fact, Pollack credits Warren with influencing Harlan's opinion in *Yates v. United States*, 354 U.S. 298 (1957). See J. POLLACK, *supra* note 1, at 189. The more likely influence was Judge Learned Hand. The intellectual origins of *Yates'* distinction between the advocacy of unlawful action as opposed to abstract doctrine can be traced directly to Hand's opinion in *Masses Pub. Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917). Hand, however, was a vigorous Warren critic, and Pollack mentions him only once, in a disparaging paragraph which lumps Judge Hand together with George Wallace and millionaire Texas cattlemen. J. POLLACK, *supra* note 1, at vii.

34. J. POLLACK, *supra* note 1, at 362.

35. See generally P. KURLAND, *MR. JUSTICE FRANKFURTER AND THE CONSTITUTION* (1971); W. MRNDELSON, *JUSTICES BLACK AND FRANKFURTER* (1961); W. MRNDELSON, *FELIX FRANKFURTER* (1964); Levinson, *The Democratic Faith of Felix Frankfurter*, 25 *STAN. L. REV.* 430 (1973). But see Grant, *Felix Frankfurter: A Dissenting Opinion*, 12 *U.C.L.A. L. REV.* 1013 (1965).

36. G. WHITE, *supra* note 26, at 359.

37. J. POLLACK, *supra* note 1, at 197.

38. Pollack, however, must necessarily treat Nixon with some ambivalence. After all, it was Nixon who, although for his own political purposes, was in large measure responsible for Warren's appointment to the Court. *Id.* at 6. Moreover, Pollack's liberal sympathies are congruent with Nixon's position as counsel in *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

statesmanlike flexibility;³⁹ when Nixon did the same, he was merely opportunistic. When Nixon in his memoirs quoted an (alleged) early Warren pronouncement, Pollack severely criticizes him for not documenting the statement.⁴⁰ Although Nixon succeeded in improving relations with the People's Republic of China, Pollack insists it was nothing more than the culmination of the efforts of others, including, of course, Warren.⁴¹

The nadir of this effort to discredit Nixon is reached in Pollack's discussion of the Kennedy assassination. A paragraph is inserted, at the expense of the narrative, informing the reader that two days before the assassination Nixon went to Dallas to attend a meeting of the board of directors of one of his law firm's clients, Pepsi Cola. While such is surely a legitimate reason, Pollack breathlessly informs us that this was the *only* time Nixon was in Dallas during 1963!⁴² When Senator Joe McCarthy engaged in this kind of character assassination by inference, Pollack presumably (and rightly) condemned it. It should equally be condemned now.

Whatever Nixon's involvement in Kennedy's death, however, Pollack leaves no doubt that Nixon was at least indirectly responsible for Warren's.⁴³ Pollack claims that the inner turmoil that Watergate caused Warren hastened his death. Watergate, of course, was attributable to the Nixon Administration, and not to modern America's institutions. Such a view is clearly shortsighted, for "[t]he sources of Watergate are [to be] found not in the paranoia of the King of San Clemente but in modern Americans' faith in the capacity of concentrated power to do good—quite in contrast with the Founders' knowledge of power's tendency to do evil The problem identified by Watergate lay not with the President but with the presidency,"⁴⁴ a presidency bloated with a power that the Warren Court countenanced and encouraged.⁴⁵

Given Pollack's rabidly anti-Nixon orientation, his treatment of the present Supreme Court is predictable. Whereas the Warren Court realized a constitutional revolution, the Burger Court is perpetrating a counterrevolution,⁴⁶ eroding the Warren Court's com-

39. *E.g.*, J. POLLACK, *supra* note 1, at 161-62.

40. *Id.* at 331.

41. *Id.* at 304.

42. *Id.* at 248.

43. *Id.* at 318.

44. Funsten, Book Review, 84 AM. HIST. REV. 283 (1979) (reviewing P. KURLAND, *WATERGATE AND THE CONSTITUTION* (1978)).

45. See R. FUNSTON, *A VITAL NATIONAL SEMINAR*, ch. 3 (1978).

46. J. POLLACK, *supra* note 1, at 363. There is a considerable body of scholarship that

mitment to desegregation,⁴⁷ threatening freedom of the press,⁴⁸ and perhaps reintroducing prayer in the public schools.⁴⁹ Moreover, Chief Justice Burger and Justice Blackmun vote together so often that "it would be cheaper to give Chief Justice Burger two votes and have only eight Justices."⁵⁰ Not unexpectedly, nowhere does Pollack mention that it was the Burger Court that approved busing as a desegregation remedy,⁵¹ applied the mandate of *Brown v. Board of Education*⁵² to northern school districts,⁵³ and sustained affirmative action programs;⁵⁴ that the Burger Court has been adamant in its refusal to countenance public aid to parochial primary and secondary schools;⁵⁵ that the Burger Court has granted the press virtual license to comment upon pending criminal trials⁵⁶ or that many of the press claims it has denied lacked either historical or legal foundation;⁵⁷ that the Burger Court has gone much further than the Warren Court toward recognizing a constitutional principle of sexual equality,⁵⁸ protecting private choice in matters of procreation,⁵⁹ and limiting the use of capital punishment;⁶⁰ or that, during Warren's last six terms on the Court, he and Justice Brennan voted together more consistently than

challenges this idea. See, e.g., R. FUNSTON, *CONSTITUTIONAL COUNTERREVOLUTION?* (1977); S. WASBY, *CONTINUITY AND CHANGE* (1976); Kalven, *Foreword: Even When a Nation Is at War*, 85 HARV. L. REV. 3 (1971); Kurland, *1971 Term: The Year of the Stewart-White Court*, 1972 SUP. CT. REV. 181; Mason, *The Burger Court in Historical Perspective*, 89 POL. SCI. Q. 27 (1974). Even those scholars who do adhere to the idea admit it must be seriously qualified in several respects. See, e.g., Dorsen, *The Court of Some Resort*, 1 CIV. LIB. REV. 82 (Winter-Spring 1974); Symposium—*The Burger Court: New Directions in Judicial Policy-Making*, 23 EMORY L.J. 643 (1974).

47. J. POLLACK, *supra* note 1, at 180, 340-41.

48. *Id.* at 346.

49. *Id.* at 342.

50. *Id.* at 300.

51. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

52. 347 U.S. 483 (1954).

53. *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973).

54. *United Steel Workers v. Weber*, 443 U.S. 193 (1979).

55. E.g., *Meek v. Pittinger*, 421 U.S. 349 (1975); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 411 U.S. 192 (1973).

56. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

57. See Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 SUP. CT. REV. 225.

58. E.g., *Califano v. Webster*, 430 U.S. 313 (1977); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). See generally Getman, *The Emerging Constitutional Principle of Sexual Equality*, 1972 SUP. CT. REV. 157.

59. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973).

60. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Furman v. Georgia*, 408 U.S. 238 (1972).

have Burger and Blackmun.⁶¹

On the other hand, it may be just as well that Pollack neglects to discuss these matters, because when he does discuss the specifics of Burger Court decisionmaking, he has trouble getting them right. For example, Pollack writes that, as a result of Burger Court decisions, "[t]oday, police are permitted to make warrantless arrests; to stop and frisk motorists at will . . ."⁶² As for the first charge, Pollack would apparently be surprised to learn that the Burger Court did not invent the warrantless arrest. The right of an officer, under certain circumstances, to make an arrest without a warrant is virtually as old as professional police forces.⁶³ As for the second charge, *United States v. Robinson*⁶⁴ and *Gustafson v. Florida*⁶⁵ did expand the scope of a search that may be conducted incident to a lawful arrest for a traffic violation.⁶⁶ Those decisions, however, do require a *lawful arrest*—i.e., probable cause—something the Warren Court itself did not require in *Terry v. Ohio*.⁶⁷ As a matter of fact, the Burger Court has unanimously taken a skeptical approach to the power of law enforcement to initiate an investigatory stop.⁶⁸

The best of Pollack's passages, however, is the following:

The "Nixon Four" voted as a bloc in fifty-four out of sixty-six cases heard by the Court during the 1972 spring term. Actually, no Warren Court decisions were overturned, but many were redefined in ways that limited their scope (former interpretations were now sometimes referred to as "harmless error"). Police powers, especially with respect to search and seizure, were broadened: *Harris vs New York*, for example, gave law enforcers the right to use a previous arrest for any [sic] crime as a warrant to search for evidence that an arrested person might have committed another, different, crime.⁶⁹

Several observations are warranted. First of all, neither I nor any

61. *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 345 (1971).

62. J. POLLACK, *supra* note 1, at 342.

63. See H. KERPER, INTRODUCTION TO THE CRIMINAL JUSTICE SYSTEM 248-49 (1972).

64. 414 U.S. 218 (1973).

65. 414 U.S. 260 (1973).

66. The point is not that the results reached in *Robinson* and *Gustafson* are desirable. That is certainly a debatable question. Compare LaFave, "Case-by-Case Adjudication" versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, with White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165. Before one can honestly and intelligently debate the desirability of a Supreme Court holding, however, it is necessary to know what the Court did hold and to state it accurately.

67. 392 U.S. 1 (1968).

68. *United States v. Ortiz*, 422 U.S. 891 (1975); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

69. J. POLLACK, *supra* note 1, at 307.

other student of the Court knows what the "Spring term" is. I assume that Pollack means the October Term, 1971. Regardless, *Harris v. New York*⁷⁰ was not decided in that term but in the previous one. Of course, Pollack may have some other cases in mind, since *Harris* does not hold anything like what Pollack says it does. Rather, *Harris* involved the admissibility of unlawfully obtained statements for purposes of impeaching a defendant's testimony at trial. Perhaps Pollack meant *United States v. Harris*.⁷¹ That, after all, was a fourth amendment case. That case, however, dealt with the issue of an informer's reliability as the basis for a probable cause affidavit and not with the use of a previous arrest. In any event, it too was not decided in the spring of 1972. As for Pollack's mangling of the harmless error rule, more than the few, brief pages of this review would be required to straighten that out.⁷² Nevertheless, the passage is something of a minor achievement, for it clearly manifests the disregard for detail that permeates the book.

In its insistence on oversimplification to the point of error, this biography is, in a kind of odd way, worthy of its subject. A typical Warren opinion begins with an impassioned statement that, taken in the context of the case, is usually pure dictum.⁷³ Sometimes it will introduce a quantum jump in American jurisprudence as nothing more than "an explication of basic rights that are enshrined in our Constitution."⁷⁴ Often it will reduce complexity to caricature,⁷⁵ so that difficult questions involving competing constitutional principles are presented as simple struggles between government and the individual.

Warren's confidence in his own rectitude had its consequences for his approach to the judicial function. As Holmes once wrote, "If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in

70. 401 U.S. 222 (1971).

71. 403 U.S. 573 (1971).

72. For a good introduction to the subject, see Note, *Harmless Constitutional Error*, 20 STAN. L. REV. 83 (1967).

73. *E.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Trop v. Dulles*, 356 U.S. 86 (1958); *Watkins v. United States*, 354 U.S. 178 (1957); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

74. *Miranda v. Arizona*, 384 U.S. 436, 442 (1966). Pollack writes that *Miranda's* "constitutional bases are sound." J. POLLACK, *supra* note 1, at 270. It may have initiated a desirable policy, but it is difficult to see the solidity of the legal foundations of a decision that claims to be based upon the fifth amendment yet cannot cite a single fifth amendment precedent to support itself.

75. *E.g.*, *McGowan v. Maryland*, 366 U.S. 420 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

law and sweep away all opposition.”⁷⁶ Warren never doubted his premises, and he enjoyed power. “Was his mind more executive than judicial?” Pollack asks.⁷⁷ The question must certainly be rhetorical. Warren was a man born to govern, not to judge; but if necessary, he would govern from the bench. Unlike, for example, Frankfurter, he was unable to separate his substantive evaluation of a given policy from his analysis of the question whether the enactment of that policy was within the constitutional powers of government. As Governor, he had exhibited impatience with the legislative process and its slow, compromising reconciliation of competing interests. As Chief Justice, he regarded it with contempt, gratuitously lecturing legislators on their duties—as he saw them.⁷⁸ Consistently underlying Warren’s performance on the Court is an ultimate faith in judicial paternalism. In *Brown*, in *Marchetti v. United States*,⁷⁹ in *Roth v. United States*,⁸⁰ or in *Miranda v. Arizona*,⁸¹ Warren’s commitment was to use judicial power to suppress behavior that he personally found obnoxious.

One of the fundamental questions in the history of the American republic has been the extent to which well-meaning judges should use their office to foster their own political, economic, or moral philosophies. An imperial Court, after all, is no more compatible with the principles of limited government than an imperial presidency. Both smack of an enlightened despotism that is no less despotic for being enlightened. Pollack, however, is unconcerned with the problem. He merely quotes from Warren’s last public address, a commencement speech at Morehouse College: “The great virtue of our government is that people can do something about it. They elect our representatives on all levels of government, our mayors, our legislators, our governors, and our President. When

76. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Pollack attempts to associate Warren with Holmes. J. POLLACK, *supra* note 1, at 263-64. Such an effort can only proceed from ignorance of Holmes’ jurisprudence. See G. WHITE, *supra* note 26, at ch. 8.

77. J. POLLACK, *supra* note 1, at 4.

78. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Watkins v. United States*, 354 U.S. 178 (1957). Political scientists have not generally been complimentary in their comments about the Warren Court’s handling of the legislative investigation cases, largely because it proceeded from an unrealistic conception of the legislative function. See, e.g., R. FUNSTON, *supra* note 29, at 102-08; M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT*, ch. 2 (1964).

79. 390 U.S. 39 (1968).

80. 354 U.S. 476 (1957).

81. 384 U.S. 436 (1966).

they have made a mistake, they can rectify it."⁸² But what about our federal judges? The electoral principle will not legitimate their efforts in social experimentation. They are unelected, life-tenured, unrepresentative in any immediate sense, and in a strict sense, irresponsible.

Moreover, judicial paternalism, whether to promote *laissez-faire* or equality, raises questions not only of legitimacy but, more practically, of institutional capacity.⁸³ Judges, even Supreme Court Justices, are inadequately trained in many areas of public policy. Their policymaking is piecemeal. Because courts are essentially passive bodies, they must wait for the cases to come to them, and the cases have a perverse way of not arising in logical order. The adversary system is not well-suited to providing judges with the kind of empirical data a good policymaker should have, and adjudication makes no provision for systematic policy review once a particular course of action is adopted.

None of this, however, is recognized in Pollack's book. According to Pollack, "the legacy of Earl Warren" is "Controversy, Contrast, Courage, Compassion and Conquest."⁸⁴ Conquest? Surely, that is an odd word to use with respect to a judicial legacy. Perhaps Pollack has in mind the "conquest" of history. Like many people, he believes that history ultimately will vindicate the Warren legacy,⁸⁵ but some contemporary developments cast doubt upon the staying power of the Warren legacy.⁸⁶ Recent data raise questions about the continued validity of the empirical bases of *Brown*.⁸⁷ The decline of support for public education proceeds from a strong, albeit inarticulate, opposition to the school's adoption of a social-corrective role at the expense of teaching—a role encouraged by Warren Court decisions. The taxpayers' revolt, however ill-considered, is an expression of dissatisfaction with paternalistic government, including judicial paternalism in the name of equality. Indeed, belying his confidence that history will vindicate Warren, Pollack expresses some skepticism about those very majorities that Warren hailed.⁸⁸

82. J. POLLACK, *supra* note 1, at 321.

83. See D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977).

84. J. POLLACK, *supra* note 1, at 337.

85. *Id.* at 338, 368. See, e.g., Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3 (1970).

86. See R. FUNSTON, *supra* note 46, at 319-25.

87. See, e.g., C. JENKS, *INEQUALITY* (1972); Armor, *The Evidence on Busing*, 28 PUB. INTEREST 90 (1972).

88. J. POLLACK, *supra* note 1, at 344.

Was Earl Warren "the judge who changed America?" Certainly, that claims too much for Warren. The Chief Justice is but the first among equals, and Warren, while perhaps a strong force for unity, was less than the Court's dominant intellect. No one, though, can gainsay that the Warren Court changed America. Whether those changes were wise or desirable are questions about which reasonable minds will differ. Pollack thinks that they were. Whether those changes will last, as Pollack also thinks, is more problematic. Whether the judicial process is an appropriate mechanism for the realization of social change in a republican form of government is a question that Pollack does not answer. He never asks it.

