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## ON EARL WARREN'S RETIREMENT: A REPLY TO PROFESSOR KURLAND

*Francis X. Beytagh, Jr.\**

ON that Monday in June of this year when Earl Warren removed his robe for the last time, a significant era in the history of the country, not just that of the Supreme Court, came to an end. It was in recognition of this (and somewhat in anticipation, as events turned out) that the *Michigan Law Review* published a symposium on the so-called "Warren Court" in its December 1968 issue.<sup>1</sup> Those articles were written by distinguished scholars and practitioners and are of consistently high quality. All but one of them dealt with important substantive matters considered and decided by the Court during Warren's tenure as Chief Justice. The remaining article, by Professor Philip B. Kurland, was more distinctly personal—and less than wholly laudatory—in its thrust. It is partly in response to that piece, and partly in simple tribute to a great public servant, that this Article is written.<sup>2</sup>

At the outset, I must confess a considerable bias in favor of Earl Warren, since I served as his senior law clerk during one of the Court's more notable recent terms—the 1963 Term. I saw him work under severe stress, for that was the period in which he served as both Chief Justice and head of the Warren Commission investigating the assassination of President Kennedy. I came to know and respect him as a jurist and as a man. I learned much from him—

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1. The term "Warren Court" originated during the early days of "massive resistance" to the Court's school desegregation decisions. For that reason, among others, the phrase was never one that carried much favor with either Warren or those who respected the Court and believed in the correctness of those decisions. The term has achieved latter-day acceptability, however, and is no longer used, at least exclusively, in a derisive sense. At least two recent studies of the Court, both of some renown, are so entitled. A. COX, *THE WARREN COURT* (1968); J. FRANK, *THE WARREN COURT* (1964).

2. In a unique sort of way, the University of Michigan Law School owes a special debt of gratitude to Chief Justice Warren. Six of its graduates have served him as law clerks, more than any other Justice, past or present, has taken from the school. This is particularly remarkable, I think, since Warren, a Californian throughout his entire life, had no previous contact with the school or with the State of Michigan. It reflects, at least in part, his deeply felt conviction that clerkships should not be the special preserve of a select few Eastern law schools. Warren, of course, graduated from the University of California Law School at Berkeley, and regularly took one of his law clerks from a West Coast school.

perhaps most by example—and will always remain indebted to him. But sentiment alone hardly prompts this piece, for whatever verdict historians finally render on the Warren Court and on Warren as a Chief Justice, he has undoubtedly been one of the most important public figures of our time. His long years of public service—over fifty in number—and his unflagging support of a number of worthy causes make him richly deserving of tribute by the legal profession and by the country on the occasion of his retirement. With that as a background, I turn to some of the points made by Professor Kurland.<sup>3</sup>

## I

Professor Kurland starts with a proposition with which it is difficult to disagree: that it is “too early to sanctify” Earl Warren.<sup>4</sup> Of course, it is too soon to pass definitive judgment on the merits of the Warren Court or of Warren as a Chief Justice. It is unfortunate, however, that Kurland did not follow his own advice. Instead, he feels that his assigned role in the symposium is that of “the devil’s advocate,” which he plays, according to precedent, by seeking to make out “a good case against the miracles that Warren is supposed to have performed, but not a good enough case to be convincing.”<sup>5</sup> He has at least accomplished the latter objective.

Anyone who seeks to evaluate the performance of an individual who has held the office of Chief Justice of the United States should initially be struck by the fact that there are so few men with whom to compare him. There have been thirty-seven Presidents and even more Vice-Presidents, but Earl Warren was only the fourteenth Chief Justice.<sup>6</sup> In this respect the position is a unique one among

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3. See Kurland, *Earl Warren, The “Warren Court,” and the Warren Myths*, 67 MICH. L. REV. 353 (1968). Nothing in my remarks about Kurland’s article is intended to reflect on his scholarship or achievements. He is, of course, an established teacher of constitutional law, has written extensively on a variety of constitutional law subjects, and has served as editor of the valuable SUPREME COURT REVIEW, an annual publication, since its inception in 1960.

4. Kurland, *supra* note 3, at 353.

5. *Id.*

6. Warren was consistently aware that he served as “Chief Justice of the United States” and not merely as “Chief Justice of the Supreme Court” [see 28 U.S.C. § 1 (1964)]—a proper reflection of the fact that he presided over a separate and constitutionally co-equal branch of the federal government. He was not, however, simply conscious of this fact; he acted upon it through his leadership of the Judicial Conference and his continued insistence on the attainment of the highest standards in the federal judicial system, as well as through his support for the Federal Judicial Center which now, at long last, is in operation. See Clark, *The New Federal Judicial Center*, 54 A.B.A.J. 743 (1968).

offices that are traceable to the beginnings of the federal system. This uniqueness, I suggest, has a special effect on any individual who serves as Chief Justice. He is distinctly one among few. Indeed, it is discernible at times that the other Justices, however cognizant they are of their own special roles, view the office of Chief Justice with some awe.

Since evaluation by comparison is so difficult, a careful look at the officeholder and his accomplishments is essential. Too often, Professor Kurland's assessment rests either upon the positing of inappropriate criteria or upon an overly simple application of correct standards. For instance at one point, Kurland poses an inapt either-or standard for assessing whether or not an individual has been a "great Chief Justice."<sup>7</sup> He states that Warren would qualify for the accolade if the test were whether or not he "presided over a Court that has written, rewritten, and repealed large segments of the law of the land . . .,"<sup>8</sup> but that he does not so qualify if "reliance is to be placed on Warren's individual contributions to American jurisprudence as revealed in his opinions . . ."<sup>9</sup> I submit that however brilliant and articulate an individual jurist may be, he is unlikely to be ranked as a "great Chief Justice" if the Court over which he presided was otherwise a pedestrian and undistinguished one. I also feel, although Kurland might dispute this, that a Court is unlikely to be significant and distinguished if the Chief Justice who presides over it is lacking in qualities of leadership, is ineffective as a judge, or is inarticulate in speaking for his Court. Because of the role the Chief Justice necessarily plays—although he casts only one vote—it would be very difficult for the eight other Justices to compensate for any substantial deficiencies in their senior.

Professor Kurland apparently feels that there is one characteristic which is central to any ranking of individual Justices: penetrating analysis of legal problems in studied and scholarly opinions. Even if one accepts this narrow and slanted approach, Warren does not fare badly, for the majority opinions which he wrote in many of the important cases decided during his time on the bench, from *Brown v. Board of Education*<sup>10</sup> through *Reynolds v. Sims*,<sup>11</sup> *South Carolina*

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7. Kurland, *supra* note 3, at 353.

8. *Id.*

9. *Id.*

10. 347 U.S. 483 (1954).

11. 377 U.S. 533 (1964).

*v. Katzenbach*,<sup>12</sup> and *Miranda v. Arizona*,<sup>13</sup> to the recent *Powell v. McCormack*,<sup>14</sup> are, viewed objectively, readable, quotable, and hardly lacking in persuasive force. Whatever one's view of the relative merits of the results reached in these cases, it can scarcely be maintained that Chief Justice Warren's opinions did not constitute, in Kurland's words, a substantial "individual contribution to constitutional jurisprudence."<sup>15</sup>

Qualities of leadership within the institution of the Supreme Court are more difficult to evaluate. I do not suggest that Earl Warren dominated the Court on which he sat. With strong-minded brethren such as Justices Black, Douglas, and Frankfurter, one simply could not adhere to such a view. Nevertheless, I do not agree with Professor Kurland's statement that "Warren has not formed the Court but rather . . . the Court has formed him."<sup>16</sup> On the contrary, I think it is clear that Warren's influence "extended beyond the power of the one vote that is conferred upon him as a member of the Court."<sup>17</sup>

In the first place, the influence of a Chief Justice's power to assign opinions is substantial, and Warren used this authority in various ways to shape the Court's approach to difficult problems. He sought to bring along recalcitrant or undecided Justices by giving them the majority opinions; he attempted to balance the opinion-writing load among his brethren while assigning at least several important opinions a term to the particular Justices who were interested in those cases; and he demonstrated a refined sense of judicial intuition by anticipating the sort of opinion a Justice might write before assigning a significant case to him. Citations are not readily available to support these propositions, but anyone who has followed the Warren Court closely can verify them. Moreover, the effect of a Chief Justice's role at conference in stating the cases to be discussed and voted upon by him and his brethren, while subtle, is considerable. Although not even the most trusted law clerk or secre-

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12. 383 U.S. 301 (1966).

13. 384 U.S. 436 (1966).

14. 37 U.S.L.W. 4549 (U.S. June 16, 1969). The *Powell* case—Warren's last major opinion—appears to be landmark in character. Like *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), it resolves a great deal about the relationship of the Court and another co-equal branch of the federal government while, at the same time, deciding very little in the actual case.

15. Kurland, *supra* note 3, at 356.

16. *Id.* at 354.

17. *Id.*

tary is allowed to invade the inner sanctum of the Court's Friday conferences, it is fair to assume that Warren's ability to get to the heart of a matter allowed him to use his authority to present cases to the Court in an influential way. Perhaps most important in this regard, however, is the strong moral force that Warren exerted during his years on the bench. Several of his former law clerks (or perhaps the same one) have been quoted to the effect that Warren is "a rare man, because he comes so close to representing the consensus of decent opinion,"<sup>18</sup> and that "much of his strength as Chief Justice lies in the fact that he reflects to a remarkable degree the prevailing concept of justice."<sup>19</sup> This combination of moral strength and liberal open-mindedness is an extraordinary one, and Warren's sense of morality—his instinct for the rightness of things—was surely not lost on those who sat on the bench and decided cases with him.

There is, of course, a much broader context in which the Court—and the Justices—exercise leadership. Here again, Professor Kurland's perspective is too limited. I submit that he poses the wrong question when he seeks to measure Warren as a Chief Justice by whether or not he can be regarded "as the intellectual or forensic superior of any of his brethren."<sup>20</sup> Whatever the validity of Kurland's assessment of these terms, surely his standard is subject to question. Of course, the Supreme Court is not an ordinary judicial body. It is not only "supreme" in a jurisdictional sense, but it also necessarily plays an important pedagogical role in our legal system. Thus, qualities of sheer brilliance of intellect and consummate skill in the techniques of opinion writing are important to the Court. But that hardly means that these qualities are essential in all nine Justices or in a Chief Justice, or that they are the *sine qua non* of an outstanding jurist. Despite Professor Cox's reminder that judicial "craftsmanship" gives decisions a "force of legitimacy" that they otherwise would lack,<sup>21</sup> the Court's basic function is to decide cases, and to decide as many of them as possible correctly. Its exercise of that function is most significant when it seeks to construe and to apply broad constitutional commands, such as those contained in the first, fifth, and fourteenth amendments, to specific factual situations so as to reflect underlying societal aspirations and goals of justice, fairness, and equality. The Warren Court sought to decide cases with

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18. NEWSWEEK, July 1, 1968, at 33.

19. J. WEAVER, WARREN: THE MAN, THE COURT, THE ERA 253 (1967).

20. Kurland, *supra* note 3, at 354.

21. A. COX, THE WARREN COURT 48 (1968).

this overriding consideration in mind, and Warren was at the forefront of that movement. He chose to take many of the most controversial opinions himself—*Brown*, *Reynolds*, *Miranda*, and *Powell*<sup>22</sup>—because he felt that it was his obligation to do so.<sup>23</sup> He never shirked the role of lightning rod for the institution over which he presided, a role the Court's opponents forced him to play. He gave no recognition to the sterile controversy over judicial activism versus passivism, nor did he speak out against his or the Court's critics, despite extreme provocation. What he did, and what the Warren Court generally did, was to decide the cases that came before it—difficult and complex as many of them were—in a way that seemed as just as possible in the individual circumstances. If that means that the Chief Justice and the Court were result-oriented, as many critics have charged, so be it. History may well record that they were right in so proceeding; similar charges were levelled at the Marshall

22. *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Powell v. McCormack*, 37 U.S.L.W. 4549 (U.S. June 16, 1969).

23. Among the "Warren myths" that Professor Kurland seeks to dispose of is that the Chief Justice was "a cohesive force, drawing together the disparate views of his brethren into a unified whole." Kurland, *supra* note 3, at 355. By comparing the Warren Court with the "Nine Old Men" who sat on the Court during the 1930's, he concludes that the facts are to the contrary and that the Warren Court "has been the most divided, if not the most divisive, in American history." His use of statistics in this regard has superficial appeal, but figures alone often fail to tell the entire story. The relevant question is not the one Kurland poses, but one that does not admit of an answer: would the Court during the past sixteen years have been even more divided without Warren's leadership, in light of the nature of the issues it has had to resolve, the strength of character and depth of feeling of its members, and the tenor of the times in which it has acted? Kurland's comparison with the New Deal Court is thus simply unconvincing, and does not provide a sound basis for concluding that Warren was not a conciliating force on his Court.

Particularly unpersuasive is his statement that "the presence of Warren on the Supreme Court and that tribunal's unanimity . . . [in the *Brown* opinion was nothing] more than coincidental." *Id.* at 356. On what is this statement based, and why is it "safe to say" that Justices Black and Frankfurter contributed at least as much as Warren to the unanimous result in *Brown*? To my knowledge, many factors contributed to that result, but certainly important among them was the new Chief Justice's strong conviction that such unanimity was of great institutional importance. He may later have come to regret the "all deliberate speed" standard enunciated during the next term [*Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955); *Calhoun v. Latimer*, 377 U.S. 263, 264-65 (1964); *Goss v. Board of Educ.*, 373 U.S. 683, 689 (1963); *Watson v. City of Memphis*, 373 U.S. 526, 530 (1963)]. *See also* Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 243 (1968)], but his role in shaping the Court's decision in *Brown* cannot be so readily disparaged. Perhaps the result was preordained and inevitable, but unanimity was not. Warren was the Chief Justice in his first term when the decision was finally rendered; unanimity was obtained, and it was he who wrote the opinion. Perhaps all this was coincidental, but that is hardly likely. In this regard, *see also* *Cooper v. Aaron*, 358 U.S. 1 (1958), in which a unanimous Court reaffirmed *Brown* in an opinion unusual in that it was specifically signed by all nine Justices.

Court, and history has long since rendered a favorable judgment on that body.<sup>24</sup>

Finally, there is an even more fundamental point to be made. If one forgets for a moment Professor Kurland's criteria for measuring the stature of justices and concentrates instead on the essential qualities that Earl Warren brought to the task of judging, it is difficult to conclude that he was anything less than a superb Justice. His most distinctive quality was a highly refined feeling for the facts which were critical to the decision in a given case. Central to this ability is, for want of a better phrase, a demonstrated instinct for the jugular—a characteristic which many esteemed lawyers and judges lack, and which, more often than not, sets the great apart from the good or average. Moreover, Warren had the ability to personalize and humanize a factual situation, a capacity not frequently found among men in high positions, and one particularly hard to maintain and apply in the austere surroundings of an appellate court. He had an abiding concern for the human situation with all its weaknesses and peculiarities, particularly for the disadvantaged and those who were discriminated against. Thus, he consistently exhibited more interest in deciding individual cases fairly than in developing a body of legal doctrine that Kurland and others would apparently view as entirely consistent and logical. A fear of a few intellectual loose ends, however, has never been the hallmark of a great jurist. Warren also had a sensitive appreciation for the practical significance of the important cases before the Court, a quality that enabled him to cut through rhetoric and dogma and to attain a perspective which others sometimes failed to reach.

Warren's overriding commitment to fairness was evidenced by his frequent questioning of counsel who sought to rely on a certain principle or doctrine without regard to the equities: "But is it fair to do it that way?" This notion of fairness is hardly foreign to our jurisprudence. Indeed, Warren would have been quite at home with the chancellors of old England. Of course, in many situations in the law it is better that a proposition be settled than that it be settled correctly. But that is not always so with respect to cases considered on the merits by the Supreme Court, particularly when constitutional issues are involved. Hasty overruling of constitutional decisions should, of course, be avoided as well. But in such cases, predictability

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24. If it becomes necessary to choose between style and substance, it seems obvious that the fair (or fairer) result should prevail.

of result is hardly a virtue in itself, and blind adherence to precedent, despite changed conditions, is of little value. Such a flexible approach may make things a bit more difficult for law professors and for others concerned with the practice and application of law. It is, however, the crux of enlightened judicial review—not ignoring precedent or history, but applying the words of the Constitution to new and different circumstances so as to reach a fair result in a particular case.

## II

Professor Kurland's references to Warren's earlier career, used to exemplify his theme that the Court formed Warren and not vice versa, have several telling answers. First, he plainly overstates the inconsistencies between Warren's past endeavors and his actions on the Court. It is an exaggeration to say that Warren "engaged in and endorsed the very prosecutorial practices" that the Court recently condemned, and that he engaged in "the kind of Red-baiting that characterized the McCarthy era" both while he was a district attorney and while he was the attorney general in California.<sup>25</sup> He did, as Attorney General of California, participate in the evacuation of Japanese-Americans from the West Coast, but only under the exigencies of the circumstances and to his lasting regret.<sup>26</sup> Also, while gov-

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25. Kurland, *supra* note 3, at 354. Kurland's references to passages in a single biography, J. WEAVER, WARREN: THE MAN, THE COURT, THE ERA (1967), do not on balance appear to support his statements. There are, however, perhaps understandably at this early date, few biographical works on Warren. An early book, written for the 1948 political campaign, is I. STONE, EARL WARREN, A GREAT AMERICAN STORY (1948). In the past several years, in addition to the Weaver book, two other biographical works have been published. L. HUSTON, PATHWAY TO JUDGMENT: A STUDY OF EARL WARREN (1966); L. KATCHER, EARL WARREN: A POLITICAL BIOGRAPHY (1967). Of course, a number of recent works on the Court have discussed Warren's role as Chief Justice. See, e.g., A. BICKEL, POLITICS AND THE WARREN COURT (1965); A. MASON, THE SUPREME COURT FROM TAFT TO WARREN (1968), and the books referred to in note 1, *supra*. See also, Lewis, *Earl Warren*, in THE WARREN COURT (R. Saylor, B. Boyer, & R. Gooding eds. 1969). Interestingly, the Mason book contains, in its preface, a quotation from a letter written by District Judge Wyzanski to the author, stating: "I have thought for some years that Chief Justice Warren will go down in history second only to Chief Justice Marshall. I am not referring to Chief Justice Warren's intellect, legal acumen, style, or personal ascendancy, . . . but to his capacity to make the judicial power a chief instrument for their realization." A. MASON, *supra*, at xii. Judge Wyzanski's standards for measuring greatness in jurists apparently are very different from Professor Kurland's. See text accompanying notes 7-10 *supra*.

26. Warren was, in any event, only the state attorney general, and the orders were military in origin. And, of course, he was not alone in sanctioning such dubious practices. See *Korematsu v. United States*, 323 U.S. 214 (1944), in which the Supreme Court, in an opinion written by Justice Black, upheld an exclusion order directed against persons of Japanese ancestry in designated military areas on the West Coast. See also *Hirabayashi v. United States*, 320 U.S. 81 (1943). In a recent television interview which was included in a ninety-minute documentary by National Educational Television,

error, he opposed the reapportionment of both houses of the California legislature on a population basis, as later mandated by *Reynolds v. Sims*.<sup>27</sup>

But in rendering such a harsh judgment of Earl Warren, Kurland apparently fails to recognize that men are capable of growth and crystallization of ideas with age and experience. Moreover, before his appointment to the bench, Warren had consistently been active in political life. In that role, he necessarily practiced the art of the possible. On the Court, however, with a lifetime appointment and freedom from the everyday concerns of practical politics and the inevitable compromises that it entails, Warren could at long last be his own man, responsible only to his oath and office, to the Constitution, and to his conscience. This, perhaps more than any other single factor, explains the apparent inconsistency between Warren the politician and Warren the Chief Justice. Thus, to the extent that Kurland is correct in stating that "Warren the Chief Justice has revealed a very different set of values than did Warren the district attorney, Warren the state attorney general, or Warren the governor,"<sup>28</sup> emphasis should be placed on the process of revelation and not on the differences. Indeed, it was logical that there would be significant interplay between Warren's personality and an institution with the history, tradition, and role of the Supreme Court; in fact, it would have been extremely unusual if the Court had had no effect on his views. It has left few, if any, who have come to it untouched.

### III

After concluding that Warren's greatness—a matter he earlier said should be left to future historians—must depend solely on "the erroneous identification of the Chief Justice with the institution over which he presides," Professor Kurland proceeds to take "a quick look at the work of the Court" on which Warren sat.<sup>29</sup> Rather than quarrel again with his implicit assertion that a jurist's stature is an either-or proposition<sup>30</sup> and his contention that the error made in identifying the man with the Court is a pervasive one, I shall turn to Kurland's cursory discussion of the Warren Court's performance,

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Chief Justice Warren's son stated that his father regarded the evacuation decision as a mistake even at the time it was being carried out.

27. 377 U.S. 533 (1964).

28. Kurland, *supra* note 3, at 354.

29. *Id.* at 356.

30. See text accompanying note 7 *supra*.

assuming *arguendo* that "history may well measure Warren's place by the work of the Court on which he served."<sup>31</sup>

Professor Kurland suggests that the acclaim for the Warren Court rests largely on five areas of its work.<sup>32</sup> With the first four, there can be no dispute: the school desegregation cases (although I would prefer to define the category more broadly as racial discrimination cases), the criminal procedure cases, the reapportionment cases, and the church-state cases. His final category—the obscenity cases—is somewhat narrow, for the Court's significant first amendment decisions have involved more than just obscenity;<sup>33</sup> but perhaps that is just a quibble.<sup>34</sup> In any event, Kurland puts the obscenity cases aside because "Warren was more likely to be found on the side of censorship than against it."<sup>35</sup> Indeed, Warren has been less liberal on the issue of obscenity than some of his brethren, but perhaps his views are dismissed a bit too brusquely. One of his continual concerns in this area has been with the impropriety of the Court's playing the role of super-censor. His suggestion as to how the Court might extricate itself from its present morass on the obscenity issue<sup>36</sup> may not be the best solution,<sup>37</sup> but it is entitled to more consideration than Kurland is inclined to give it.

Professor Kurland's substantive criticisms of the Warren Court's major accomplishments, while tentative and cryptic, seem rather

31. Kurland, *supra* note 3, at 356.

32. Kurland had, of course, earlier declared himself, in no uncertain terms, as something distinctly other than an aficionado of the Warren Court's work. See Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143 (1964).

33. *E.g.*, the free press cases, symbolized by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and the free speech and assembly cases, such as *Edwards v. South Carolina*, 372 U.S. 229 (1963).

34. It is easy to relegate to obscurity the Court's internal security and loyalty oath cases, probably because the McCarthy era and the vigorous investigative activities of the House Committee on Un-American Activities are long over. But it is well to remember that in the trying times of the early Warren Court, that body (and sometimes only a minority thereof) sought to uphold the constitutional rights of those labelled (and often libeled) as subversives. Cases such as *Watkins v. United States*, 354 U.S. 178 (1957), in which the Chief Justice wrote the majority opinion, led to wholly unfounded and thoroughly frivolous charges that Warren was a Communist or at least a Communist sympathizer. It is a sad commentary on a nation when a significant minority is sufficiently gullible to accept such charges, and is apparently incapable of understanding that the procedural rights and freedoms of association and expression that the Court was protecting in those cases are vitally important to a democratic society.

35. Kurland, *supra* note 3, at 357.

36. See, *e.g.*, *Interstate Circuit v. Dallas*, 390 U.S. 676, 704-08 (1968) (Justice Harlan, concurring); *Redrup v. New York*, 386 U.S. 767, 770-71 (1967).

37. See, *e.g.*, *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (dissenting opinion).

wide of the mark in many respects.<sup>38</sup> On the matter of reapportionment, his essential point is that "to the extent that voting power has been shifted, it has been shifted from the rural areas and, in some cases, the cities, to suburbia—a politically more reactionary constituency than even the farm groups."<sup>39</sup> That is a rather startling comment, for it seems to assume that the Court's objective in the reapportionment cases was to allocate additional voting power to certain areas which might be expected to vote in a particular way. It is clear, however, that the Court's purpose was simply to ensure that each citizen be entitled to cast an equally effective and properly weighted vote in electing his representatives, without regard to where he lives. That theme is repeated throughout the Chief Justice's opinion in *Reynolds v. Sims*, and has been the hallmark of the Court's approach in this area.<sup>40</sup> That the result reached in these cases

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38. Kurland's analysis of the Court's decisions in what he terms "the church-state cases" is limited to the comment that "[s]chool prayers and Bible-reading are uninhibited, despite the Court's decisions, except in those few places where a direct judicial mandate has been imposed or threatened." Kurland, *supra* note 3, at 357-58. No source is cited in support of this statement, although perhaps Kurland is substantially correct. In any event, the ultimate "success" of those decisions can hardly be measured by whether or not prayer and Bible-reading in public schools have been generally abolished within a few years after the decisions were rendered. Moreover, as Professor Paul Kauper's thorough and perceptive article points out, "the church-state cases" decided by the Warren Court include other important decisions in addition to *Engel v. Vitale*, 370 U.S. 421 (1962), and *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963). See P. Kauper, *The Warren Court: Religious Liberty and Church-State Relations*, 67 MICH. L. REV. 269 (1968).

39. Kurland, *supra* note 3, at 358. Kurland also notes that "the politicians rather than the people have controlled" much of the reapportionment that has taken place. *Id.* That may, of course, be legitimately viewed as presenting a number of potential problems, not the least of which is the political gerrymander. But the fact remains that "the politicians" have been required to operate within the equal-population framework that the Court has established, and the Court has not been reluctant to invalidate plans that, while approaching equality of population, include deviations that are not rationally explicable. *E.g.*, *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Wells v. Rockefeller*, 394 U.S. 547 (1969); *Kilgarlin v. Hill*, 386 U.S. 120 (1967); *Dudleston v. Grills*, 385 U.S. 455 (1967); *Swann v. Adams*, 385 U.S. 440 (1967). Moreover, as Dean McKay has noted, in a number of states, legislative reapportionment has been removed from the politicians' hands. McKay, *Reapportionment: Success Story of the Warren Court*, 67 MICH. L. REV. 233, 235-36 (1968). In any event, as the Court indicated in *Reynolds* itself, "legislative reapportionment is primarily a matter for legislative consideration and determination, and . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." 377 U.S. at 586.

40. This theme was recently reiterated in *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969), in which the Court stated that "[e]qual representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives." See also *Avery v. Midland County*, 390 U.S. 474, 478 (1968), holding the equal-population principle of *Reynolds v. Sims* applicable at the local governmental level.

might have political consequences scarcely means that the Court reached the result it did in order to achieve certain political ends. Moreover, the Court in *Reynolds* expressly noted that suburbs, and not cities, appeared to be the most disadvantaged areas under the existing malapportioned schemes, since population growth in those areas had been the greatest in recent years.<sup>41</sup>

In sum, Professor Kurland's criticism of the reapportionment decisions is certainly an odd one; it seems premised on the view that the holdings were motivated by partisan political considerations and did not work out quite the way the Court intended. This is unfair to the Court as an institution in that it questions the essential integrity of those decisions. If it is true that voting power has been shifted to "a politically more reactionary constituency"—and certainly that assumption is subject to doubt since people living in the burgeoning suburbs must have moved there from somewhere else—so be it. As a matter of fact, some conservative commentators who initially opposed the reapportionment decisions on ideological grounds have come to the conclusion that those decisions may be a significant weapon in restoring some balance in our federal system through a revivification of the state legislatures. Kurland himself is apparently resigned to the view that state legislatures are to remain "relatively unimportant instruments" of government.<sup>42</sup> While the jury is still out on that question, the signs are that legislatures elected under new apportionment plans, particularly where the previous schemes were grossly unfair, have been more vigorous and increasingly concerned with the unsolved problems of modern America. The simple and irrefutable fact is that the reapportionment decisions have permitted each citizen to have a substantially equal voice in electing his representatives. That is all they were intended to accomplish, and all they could properly have been intended to accomplish. It will be years before we know their ultimate effect.

As to the school desegregation decisions, Professor Kurland's complaint is that today "we have little more integration in the public school systems than we did when *Brown* was decided in 1954."<sup>43</sup> While his point is factually correct, it is hardly telling. What *Brown* found unlawful was the purposeful maintenance of separate school systems based on race. At least that much has been terminated. In-

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<sup>41</sup> 377 U.S. at 567, n.43.

<sup>42</sup> Kurland, *supra* note 3, at 358.

<sup>43</sup> *Id.* at 357.

deed, as Robert Carter laments,<sup>44</sup> the Court never set out to compel integration. Moreover, the fact that more Negroes are not attending integrated schools is not so much the fault of the Court itself as it is a variety of social factors, among which housing and employment patterns, coupled with the neighborhood school concept, predominate. There is surely a limit on the effectiveness of the judicial process. It was more than ten years after *Brown* before Congress first took action in this field, and it was not until the Kennedy and Johnson administrations that the executive sought effectively to enforce *Brown* through litigation. And, of course, the Court itself has continually sought to implement and extend *Brown*.<sup>45</sup>

But the over-all impact of *Brown* and its progeny cannot be measured simply in terms of the number of Negroes now attending integrated schools. The psychological effect of *Brown*, in presaging the demise of the separate-but-equal concept in fields other than education, has been great.<sup>46</sup> Meaning has finally been given to the Civil War amendments which purported to give the Negro equality—meaning which has permitted our black citizens a measure of pride and dignity. Congress has enacted implementing legislation, including, most significantly, civil rights laws in 1964, 1965, and 1968, which have dealt with problems of equality in access to public accommodations, in voting, and in housing.<sup>47</sup> Progress has been too slow for some and too fast for others; and the societal cost has been substantial. But the longer the delay, the more substantial that cost, in human as well as in economic terms. It is no disservice to the importance of education in our society to suggest that *Brown's* overriding significance was in triggering the present movement toward achieving racial equality in all aspects of American life.<sup>48</sup>

Professor Kurland's terse comment about the Court's decisions

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44. Carter, *supra* note 23, at 241-43.

45. *E.g.*, Griffin v. Prince Edward County Bd. of Educ., 377 U.S. 218 (1964); Bradley v. School Bd., 382 U.S. 103 (1965); Green v. County School Bd., 391 U.S. 430 (1968).

46. Carter, *supra* note 23, at 246-48.

47. *See also* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), in which the Court gave a significant boost to fair housing advocates through its broad reading of 42 U.S.C. § 1982 (1964) as prohibiting all discrimination, private as well as governmental, against Negroes in the sale or rental of property.

48. Another significant aspect of *Brown* is that in that case the Court began to utilize the equal protection clause as an important vehicle of constitutional decision-making. Indeed, one of the Warren Court's most significant achievements has been the discovery and elevation of that provision, once termed "the usual last resort of the constitutional arguments" by none other than Justice Holmes [*Buck v. Bell*, 274 U.S. 200, 207 (1927)], to a point of transcendent importance in achieving equality in a number of aspects of American life. As Justice Douglas noted in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966), "Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change."

in the field of criminal procedure borders on the scurrilous. He passes off more than a decade of decision-making in this difficult and controversial field with the remark that "[p]olice brutality seems not to be reduced, although a number of guilty defendants have been freed to attempt their escapades again."<sup>49</sup> Surely the Court's decisions in this area cannot be tested by the amount of police brutality or the level of crime in society.<sup>50</sup> Its purpose has not been solely to reduce objectionable police practices (although they have been reduced)<sup>51</sup> or to restrict the amount of crime (much less increase it, as some of the Court's detractors appear to think). Rather, the general aim has been to ensure fair and equal justice under law to all persons charged with crime, whether in a federal or a state court, without regard to their wealth or any other irrelevant consideration.<sup>52</sup> In short, the central objective has been to make the Bill of Rights meaningful for all citizens.<sup>53</sup> Court decisions do not create crime or make criminals, and they cannot stop crime until the underlying social problems are attacked. Indeed, the Warren Court's most lasting achievement may well be that it finally civilized our criminal jurisprudence by removing from it the vestiges of barbarism that still prevailed as recently as a generation ago and by stripping away some of the mystique that carried down through the common law from the Middle Ages. There is room for argument that the Court has carried logic too far in some of its decisions—particularly with respect to the fifth amendment.<sup>54</sup> But the Court, after all, is an intensely human institution faced with difficult and awesome issues to resolve. It certainly cannot be held to standards of computer perfection in decision-making. Even computers fail to work properly on occasion.<sup>55</sup>

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49. Kurland, *supra* note 3, at 358.

50. Many of the Court's important decisions in the area of criminal procedure have, of course, involved the extension of provisions of the Bill of Rights to the states through the fourteenth amendment, and not the development of new substantive standards.

51. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 93-94 (1967).

52. *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Mapp v. Ohio*, 367 U.S. 643 (1961), are perhaps the leading exemplars of the Court's decisions in this field. Can Kurland properly dismiss them as lightly as he does?

53. See Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 253 (1968).

54. On the other hand, it is evident that the Court has done some backing and filling in recent years in the field of criminal procedure. See, e.g., *Warden v. Hayden*, 387 U.S. 294 (1967); *Terry v. Ohio*, 392 U.S. 1 (1968). See also *Linkletter v. Walker*, 381 U.S. 618 (1965), and the progeny of decisions holding newly fashioned rules of criminal procedure nonretroactive in effect: e.g., *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Stovall v. Denno*, 388 U.S. 293 (1967); and *Desist v. United States*, 394 U.S. 244 (1969).

55. If anyone is in a good position to render judgment presently on the work of

## IV

In concluding his article, Professor Kurland grudgingly concedes that the Warren Court might amount to something after all. He recognizes that, if the Court's work is viewed from a broader perspective, it may appear to have been more successful than the picture he previously had painted. But even in concession his tone is cynical; he attributes to the Court the "spark[ing of] the Negro revolution that engulfs us at the moment," and disparagingly accuses it of causing "the egalitarian ethos that is becoming so dominant."<sup>56</sup> Moreover, he purports to question whether the Court has enhanced or diminished the rule of law in our society.<sup>57</sup> His earlier patronizing reference to the Warren Court's "good intentions" is consistent with his refusal to give the Court the benefit of any doubts on this score. He is correct in saying that history "has a nasty way of measuring greatness in terms of success rather than in terms of goodness."<sup>58</sup> But that point argues, I think, that Kurland should have heeded the admonition he provided both at the beginning and at the end of his piece—that it is simply too early to measure the greatness of either Warren or the Warren Court. Had Kurland adhered to this thesis, neither his nor this Article would have been written. He did not, however, practice the restraint which he preached. Thus, a response

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the Warren Court, Professor Archibald Cox, who, in his position as Solicitor General of the United States for over four years, argued numerous cases before that body, seems amply qualified. His recent book on the Court concludes with the following moving passage:

Only history will know whether the Warren Court has struck the balance right. For myself, I am confident that historians will write that the trend of decisions during the 1950's and 1960's was in keeping with the mainstream of American history—a bit progressive but also moderate, a bit humane but not sentimental, a bit idealistic but seldom doctrinaire, and in the long run essentially pragmatic—in short, in keeping with the true genius of our institutions.

But my view is deeply prejudiced. One who has sat in the Supreme Court almost daily awaiting oral argument or the delivery of opinions acquires both admiration and affection for the Court and for all the justices. The problems with which they deal are so difficult, the number and variety of cases are so overwhelming, the implications are so far-reaching that one sits humbled by the demands upon them. That the institution of constitutional adjudication works so well on the whole is testimony not only to the genius of the institution but to the wisdom and courage of the individual justices.

A. COX, *THE WARREN COURT* 133-34 (1968).

56. Kurland, *supra* note 3, at 357.

57. Professor Beane provided a rather eloquent answer to this query by suggesting that "[i]f the role of the representative branches is to give voice to—as well as shape and lead—public opinion, it may well be the proper function of the Supreme Court to voice the best aspirations of our people, to give reality to the ideals we profess in our Constitution and Declaration of Independence, and to provide justice for those who otherwise have difficulty claiming it." Beane, *The Warren Court and the Political Process*, 67 MICH. L. REV. 343, 351 (1968).

58. Kurland, *supra* note 3, at 357.

to his critical analysis of both Warren and the Court seemed to me to be appropriate.<sup>59</sup> There is a good deal more that can be said on both sides of most of these matters. It has been my purpose simply to attempt to respond to the points advanced by Professor Kurland. With that accomplished, I should like, if he would, to abide history's judgment on the man and the Court over which he presided.<sup>60</sup>

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59. Perhaps I have simply been too close to both of them; but perhaps Kurland has been a bit too far away.

60. In the final analysis, how history regards the Warren Court may in large measure depend on whether the Court in future years accepts and builds upon its work or, instead, moves in the direction of overturning or undercutting many of its important decisions. From my vantage point, at least, the latter prospect seems unlikely.