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THE WARREN COURT, LEGALISM, AND DEMOCRACY:
Sketch for a Critique in a Style Learned from Morton Horwitz

William H. Simon

Morton Horwitz's Transformation *books developed a critical approach that elaborates the underlying premises of legal doctrine and compares them to suppressed or ignored alternative perspectives. However, Horwitz's* Warren Court *book is largely an appreciation of the Court's doctrine that accepts at face value its underlying premises and the judges' claim to vindicate democratic values. In this essay, I speculate on what a* Transformation-*style critique of the Warren Court might look like and suggest that the Court is vulnerable to criticisms analogous to those the* Transformation *books make of earlier doctrine. I suggest that book ignores an alternative perspective on social justice that emerged clearly after the Warren Court era but was conceptually available during it.*

Surely the most consistent theme in Morton Horwitz's work is the critical portrayal of the evasion of substantive justice in legal discourse. Time and again, Horwitz has explicated legal argument as a series of elaborately contrived detours away from questions of distributive fairness, equality, and solidarity that, to the professionally unencumbered mind, shriek for attention.

Horwitz's book on the Warren Court is an exception.[1] The book is largely a celebration of the Court's, and especially Justice Brennan's, achievements and an appreciation of the unfulfilled promise of their more ambitious pronouncements. Yet, Horwitz has elsewhere acknowledged that the Warren Court was not immune to the temptations of evasion he analyzed in the rest of his work or in particular to three intellectual vices he often associated with it – formalism, individualism, and proceduralism.[2] I refer to these vices collectively as "legalism".

Without disagreeing with Horwitz's portrayal of the positive dimension of the Warren Court, I want to discuss some elements of a Horwitzian critique of the Court. Such a critique would suggest that the doctrinal retreats and practical failings of the post-Warren Supreme Court were foreshadowed and enabled by the presence in the Warren Court's own cases of the vices of formalism, individualism, and proceduralism.

I focus on crude but probably uncontroversial stories about the development and practical application of three critical areas of Warren Court doctrine – race discrimination, criminal justice, and welfare rights. Each shows a trajectory of progressive promise and ultimate (but far from total) disappointment.

In each case, the disappointment is clear only after the nominal conclusion of the Warren Court in 1969. Thus, it is debatable whether it is fair or illuminating to associate the practical failings with the earlier doctrines. Perhaps the post-1969 developments occurred because of political re-alignment and, had the Court's personnel not changed, doctrine would have evolved to address effectively the problems that emerged. However, my intuition – for which I can offer only impressionistic support here – is that the problems that later emerged can be traced to legalist features of the early case law.[3]

The second element of a Horwitzian critique -- after the exposure of the vices of legalism -- is the elaboration of an alternative perspective on the issues in question that is suppressed in conventional narratives. Sometimes the alternative is an actual perspective that preceded the subject under scrutiny, such as the "just price" jurisprudence displaced by 19th century contract law. Sometimes it is a hypothetical possibility -- for example, subsidization of antebellum economic development through the tax rather than the tort system. The function of recovering the suppressed alternative is to emphasize the contingency of the trajectory under focus (things could have gone differently) and to sharpen our normative assessment of it (some features of the alternative are comparatively attractive).

I close by invoking as an alternative to the Warren Court program Horwitz celebrates the program implicit in the re-orientation in public policy that occurred in the U.S. and the European Union in the 1990s that is often called "new governance." Since it emerged clearly only after the Warren Court era, it is empirically a subsequent alternative. But

since there is no reason to think that the program was not conceptually available during the Warren Court era, it could also be treated as a hypothetical contemporaneous alternative. In any event, since the "new governance" program competes today with approaches associated with the Warren Court, the comparison is an important part of the assessment of the Warren Court's legacy.

The contrast between "new governance" and Warren Court implies broader issues about democracy. Horwitz showed that the Warren Court doctrine was animated by a Progressive conception of democracy. He portrays this vision as an attractive one, but he does not consider whether it has any plausible rivals within the Progressive tradition. I suggest that it does have a plausible rival.

I. Promise and Disappointment: Three Stories

A. Race Discrimination[4]

The Court launched its struggle against government racial discrimination in Brown v. Board of Education by declaring de jure segregated schools to violate constitutionally-mandated equal protection. It applied the doctrine to other public services and facilities and to electoral systems. After considerable delay, it encouraged judicial intervention against a variety of forms of official resistance and evasion. Congress complemented its activities with statutes prohibiting some forms of private discrimination, including in employment, higher education (where the institution received public funds), and housing.

These efforts contributed to the virtual eradication of open deliberate discrimination in the public sector and a more gradual reduction in the private sector. By the 1970s they had contributed to a significant number of meaningfully integrated school systems, and they had opened up new job and housing opportunities for relatively better-off African Americans. But the gains seemed to come slowly; at some point, they stalled, and in some areas – notably school desegregation – there was severe regression.

Doctrinally, the key question was how anti-discrimination norms would apply to racial disparities that were not provably the consequence of intentional discrimination by particular defendants. The early success of the civil rights movement shifted contest from “disparate treatment”

cases to "disparate impact" cases. In the latter, the only proof of discrimination was evidence that the challenged action had affected minorities worse than whites. The challenged measures often seemed highly likely or even certain to have been influenced by racism. On the other hand, racism may not have been the only or the predominant motivation. In principle, there were legitimate reasons for, say, using traditional jurisdictional lines to draw school districts or requiring a high school degree for a bus driving job. The fact that these actions foreseeably disadvantaged blacks disproportionately did not necessarily mean that they had been adopted for the purpose of creating the disadvantage or that the arguably legitimate reason was not of substantial weight. Since it would often be unfeasible to resolve such questions conclusively, a lot depended on where the burden of proof was placed. With the partial exception of statutory employment discrimination cases, the court ultimately placed it squarely on plaintiffs.

More generally, the Court declined to interpret constitutional equal protection as a broad prohibition on the state's implication in social structures of racial subordination, and instead interpreted narrowly as a kind of intentional tort. It often demanded that the plaintiff show an intentional injury caused by a specific act or practice of a particular defendant. This imposed often insuperable burdens of proof (where, for example, it was hard to isolate out the effects of discriminatory behavior from other negative influences on the plaintiff) and sometimes precluded effective relief (for example, in suburban school cases, interdistrict relief was forbidden even where it was the only effective relief if the culpability of all the districts could not be established).

B. Criminal Justice[5]

Elaborating the due process clause of the 14th amendment and "incorporating" the Fourth, Fifth and Sixth amendments, the court developed a series of doctrines designed to improve the fairness of the treatment of relatively powerless people in the criminal justice system. In particular, it prescribed constitutional restrictions mandating the provision of minimally effective defense to indigents and restricting coercive interrogation and search and seizure. It enforced the latter through the "exclusionary rule" precluding admission of evidence obtained in consequence of violation of the doctrines. It also developed

a complex series of doctrines that facilitated more or less routine federal court review of state court convictions.

The positive side of the Warren Court criminal justice story is that these decisions helped to change practices in ways that benefitted the people they were intended to benefit, and they contributed to a notable general increase in the professionalism of law enforcement. But the negative side is that, again, change was much less than intended. Legislatures were stringy in funding public defenders, and the post-1969 Court cut back on the earlier doctrines in ways that limited their practical effect.

Another part of the story involves the indirect undermining of defendants' protections. The Warren Court years were followed by a time of massive middle class anxiety about rising crime and loss of social control. Conservatives were successful in using crime control issues to mobilize voters. In office, they devoted major effort to trying to cut back the Warren Court doctrines, but their most successful project was to legislate dramatic increases in punishment. Prescribed punishments, which the Warren Court had left virtually unregulated by the Constitution, soared. This escalation in turn generated a great increase in prosecutorial discretion, which the Court had also left largely unregulated constitutionally. When threatened punishments go up, the minimum probability of acquittal that would lead a defendant to choose trial goes up as well. Even a small risk of a disastrous punishment will induce many defendants to accept a plea bargain.

In the associated bargaining process, Warren Court procedural claims are at best assets to be traded for reduced charges. They may have significant value to the defendant, and the fact that prosecutors must offer concessions for them may create some incentives that deter the abusive practices that give rise to these claims. Nevertheless, the fact that the potential sanctions are often higher than the prosecutor would want to impose means that she can trade down without great cost. Moreover, the procedural doctrines simply do not address the most basic sources of unfairness in the system – excessive punishment and unchecked prosecutorial discretion.

C. Welfare Administration[6]

In the pre-1960s welfare system, street-level bureaucrats exercised broad discretion, partly by design and partly as a consequence of lax supervision. They sometimes used this discretion to tailor assistance in ways that helped recipients; more often, they used it arbitrarily and abusively.

The Court's decision in Goldberg v. Kelly (1970) is often taken to establish constitutional rule-of-law values in welfare programs. It repudiated the "right-privilege" distinction in constitutional law, required pre-termination hearings with respect to public assistance, and specified the minimum requisites of such hearings. (As a narrow practical matter, the key holding was the requirement of hearings prior to termination; the Social Security Act had required hearings that would have satisfied the other aspects of the decision since 1935.)

Welfare programs responded to Goldberg by creating or strengthening corps of hearing officers independent of line administration. The officers typically had strong professional credentials, sometimes as lawyers. The quality of their performance in adjudicating recipient claims tended to be high. Civil legal aid programs, which expanded during this period, often made substantial efforts to provide representation to claimants in these hearings. The rate of decisions in favor of recipients in these hearings was substantial, and not only where the claimants were represented.

So far, so good. On the other hand, you cannot say, as you can with criminal justice, that the Court's decisions contributed to a general professionalization of practice in the welfare area. The effects of constitutional welfare jurisprudence were rigorously confined to the realm of adjudication, and while that realm functioned well, only a small fraction of cases ever reached it. With the major exception of the Social Security Disability programs, appeal rates from negative case actions remained very small. There is good reason to believe that a substantial fraction of unappealed decisions were erroneous.

Most recipients' fates were left to the realm of routine administration. This realm was dramatically transformed, but not to the benefit of recipients. In essence, administration was bureaucratized. Discretion was squeezed out of the frontline worker's job by detailed and inflexible rules, Tayloristic supervision, and the redesign of the job to exclude people with qualifications or aspirations as social workers. Recipients were subjected less to coercive intrusion into their private

lives and more to demands of paper-pushing and bureaucratic hoop-jumping. Negative decisions were less likely to result from recipients' private conduct and more likely to result from their failure to comply with documentation or verification requirements or to comply with the requirements of work or child support enforcement programs. In essence, bureaucratic burdens on recipients were dramatically increased, while both the capacity and the inclination of frontline workers to assist them were reduced.

Administrators tended to insist that the spheres of adjudication and line administration were mutually impervious. For example, they instructed frontline workers that they were to ignore hearing decisions in all cases other than the one in which it was handed down. An applicant or recipient unfairly treated by line administration had a good chance of getting relief if she could get her claim into the hearing process, but many claimants were unable to do so, often because of the very kind of misconduct the hearing process was supposed to protect against. The Supreme Court squarely rejected arguments that due process might impose requirements on line administrative practices in Schweiker v. Hansen (1981) – a little known case that is as important as Goldberg. Schweiker refused to recognize either as a matter of constitutional or federal common law an estoppel principle that would afford relief to a person who had been wrongly told by a line worker that she was ineligible for benefits and in consequence, when she did file later, was denied for failure to comply with timeliness requirements. Schweiker is not a Warren Court case. It was decided in 1981, and Justices Marshall and Brennan dissented. But the decision did not require overruling or distinguishing any Warren Court decision. Those decisions were focused on hearings, not line administration.

II. Critique

A. Formalism

Formalism is the privileging of semantics or abstract logic over purpose and context. The paradigmatic instance of modern constitutional formalism is the invocation in the Burger and Rehnquist eras of the Equal Protection Clause and Brown as authority against affirmative action. However, I do not see this move as facilitated by any

defect in the Warren Court decisions. Brown is explicitly about racial classifications that cause stigmatic harm and implicitly about the oppression of minority group members. Affirmative action is readily distinguishable, and the later anti-affirmative action cases seem a strong departure from Brown.[•]

I do not think we can say the same thing about the role of Warren Court doctrine in grade school desegregation efforts. The Warren Court education cases were ambiguous, and as things played out, they proved compatible with various kinds of formalism that influenced both the right and the left.

First, there was the formalism that defined discrimination solely in terms of consciously and actively invidious official conduct, and thus excluded conduct that passively accepted or unreflectively reproduced social structures that were the product of private racism or were generally perceived by both whites and blacks as implementing the subordination of blacks. This understanding leaves de facto and disparate-impact discrimination -- which for a long time has meant most discrimination -- unredressed. It also meant that the remedy for past de jure discrimination might consist of little more than a shift to facially neutral practices that in fact involve very little effective integration.

Second, there was the formalism that measured desegregation in terms of government efforts to achieve racial mixing without regard to their results. At some point, the combination of housing segregation

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[•] On the other hand, Califano v. Goldfarb (1977), a Brennan opinion with Marshall joining, strikes me as manifesting a formalism analogous to that of the anti-affirmative action opinions. The case held invalid a Social Security rule that provided greater benefits to the dependent spouses of male wage earners than to those of female wage earners. Unnoted in the decision is the fact that virtually its only practical effect was to provide a class of male government employees with a second set of publicly-financed retirement benefits. (Few men employed in the private sector could qualify for dependents' benefits even after the decision because of the rule that a person gets only the higher of his own Social Security benefits or the benefits he would be entitled to as a dependent. Government employees up to that time were not covered by Social Security; public pensions were designed to compensate for this exclusion.) The discrimination the court struck down was clearly intended to benefit women dependents and clearly did so. The court objected that it gave women wage-earners a lower return on their contributions, but it is debatable whether that was the most plausible perspective from which to view the program. See William H. Simon, "Rights and Redistribution in the Welfare System," 38 Stanford Law Review 1431, 1478-84 (1986).

(unredressable because ostensibly the product of private decisions) and the restriction on interdistrict remedies (forbidden unless invidious discrimination could be proved against all districts) made it very hard to achieve meaningful desegregation. Some lower federal courts insisted on integration even in situations where such efforts were counter-productive (by producing chaos and white flight), and in majority-minority districts they labored desperately to contrive intricate decrees that might attract white students from the suburbs. The Supreme Court eventually condemned such decrees as ineffective.

Third, there was the formalism that interpreted equality as satisfied by racial mixing and perhaps economically equal inputs without regard to the quality of educatiion. When civil rights groups began to split over the relative priority of what now appeared to be the at least partially competing goals of desegregation and educational adequacy in inner city schools, the NAACP Legal Defense and Education Fund justified its strong pro-integration stance on the ground that it was compelled by Warren Court precedent. Our responsibility is to vindicate "constitutional standards", its lawyers said, and those standards mandate integration "wholly without regard to educational consequences." [7]

Consider now a formalist theme in the criminal procedure sphere. Is the exclusionary rule entailed by the 4th and 5th amendments, or is it simply one acceptable means a state can use in mitigating unreasonable interrogation and search and seizure practices? The Warren Court decisions were generally interpreted sympathetically by liberals and harshly by conservatives as reflecting the first view. Conservatives have criticized the decisions along precisely the lines that Arthur Corbin criticized Samuel Williston's categorical embrace of expectation damages in contract law.[8] They pointed out that the substantive rights in question did not logically entail any particular remedy. They argued that the rule had a limited effect on police conduct. (For example, it only kicked in with investigations where charges were filed; it was widely nullified by perjury in some jurisdictions.) There are many other, perhaps more cost-effective, ways of protecting the relevant constitutional rights – for example, requiring taping of confessions -- that the court has never required. And like Corbin, the commentators pointed to an underground of cases that tacitly deviated from the doctrine in highly defensible ways (for example, permitting the use of tainted material for impeachment).

B. Individualism

"[O]ur legal system," Horwitz has written, "is overwhelmingly geared to a conception of redressing individual grievances, not of vindicating group rights or of correcting generalized patterns of injustice."[9]

In substantive discrimination law, we see this orientation in the tort approach that requires the plaintiff to show a specific injury to her and to trace it to specific consciously invidious conduct by the defendant. Such doctrines immunize a substantial measure of intentional discrimination from liability by making the burdens of proof too high. They limit the ability of group members to vindicate group interests. And they disclaim any affirmative duty on the part of government to remedy the effects of racial subordination that cannot be traced narrowly to past wrongful official conduct.

In criminal justice and welfare, the individualist orientation is reflected in the pre-occupation with "end-of-the-pipe" remediation through individual claims for past wrongful conduct in adjudicatory procedures. This orientation ignores or denies the "management side of due process".[10] It fails to vindicate potential claims that cannot be raised in the required form because the victim lacks the knowledge or resources to do so. It encourages officials to bifurcate their practice between a realm of "trouble cases" to which the prospect of judicial supervision requires them to devote special attention and the realm of routine administration where they do not anticipate having to account for their treatment of the disadvantaged.

Of course, these problems are mitigated by the practice of "structural injunction" that emerged from the convergence of class action and equity practice under and after the Warren Court. Many have noted that the development of these procedural doctrines has put pressure on the individualist premises of substantive doctrine. At the same time, however, substantive individualism constrains remedial practice. A representative plaintiff who can show individual standing and prove an officially condoned practice that violates a clear duty often gets structural relief. But standing burdens are sometimes preclusive, and where the complaint alleges not, deliberate violation of explicit duty, but

failure to proactively monitor to prevent violations or to take effective initiative to provide mandated benefits, systemic relief is often denied.

Here again, it is debatable how much these limitations are grounded in Warren Court doctrine. Much of the relevant authority is post-1969. Some have found a fairly radical innovation implicit in the Warren Court's equity practice in civil rights cases.[11] But the "implicit" qualification is important. Much of the case law is pre-occupied with technical matters. It's notable that when Abram Chayes conceptualized the "public law action", he relied hardly at all on Supreme Court cases (other than recent ones cutting back on remedial practice) and credited much of the innovation he discussed to lower court judges.[12]

C. Proceduralism

The most striking manifestation of Warren Court proceduralism is in criminal justice. The exclusionary rule was indifferent to substantive guilt or innocence. It was popularly believed to cause guilty people to go free, and while the belief tended to be exaggerated, it was not wrong. Most of the Warren Court precedents were undoubtedly directly useful disproportionately to guilty people.

At the same time, the Warren Court made comparatively little or no effort to subject to constitutional regulation: (1) the quantum of evidence necessary to support a conviction; (2) prosecutorial discretion; and (3) proportionately of punishment. There were clearly major systemic abuses that could have been addressed under each of these rubrics. The Court's failure to develop substantive doctrinal checks put more pressure on its procedural doctrines to remedy injustice in the state criminal process. The Court developed the habeas remedy into a tool of virtually routine review, but in principle the bases for review were mostly procedural. Thus, defense lawyers had to squeeze claims of injustice into procedural claims. (Two friends who volunteered to do habeas appeals in the 1980s for clients they thought were innocent told me very similar stories about oral arguments in which they sought to inspire the panels to pay more attention to their routine procedural claims by asserting that here was a case in which the claimants were probably innocent and were told testily on each occasion to refrain from detouring to "irrelevant" matters.) When Alan Dershowitz won a reversal of Claus

von Bulow's conviction on the ground that the evidence was insufficient to support it, he plausibly described his strategy as daring and risky.[13]

The cost in terms of political legitimacy of criminal justice proceduralism was enormous. Political demagoguery over crime control readily focused on federal court doctrine, not just because of the myth that it was freeing large numbers of criminals, but because of the tension between the Court's proceduralism and popular values of substantive justice. One measure of this cost is the extent to which reformers ultimately increased the political traction of their arguments when they re-framed their critique of the system around substantive justice values – or as they put it, "innocence." A major landmark was the death penalty moratorium declared in 2000 by the Republican governor of Illinois on the expressed basis that it appeared that a substantial number of prisoners on death row might be innocent. This move was clearly a departure from the Warren Court approach.

The Warren Court's approach to welfare was also proceduralist. Race and gender issues aside, its main concerns were hearing rights. Justice Brennan did apply the fleeting "irrebutable presumption" doctrine to the food stamp program in U.S. v. Murray (1972), but that seed bore little fruit. He and Justice Marshall dissented from the denial of the equal protection claim about AFDC classifications in Dandridge v. Williams (1970). Had the liberal justices prevailed, they would have produced more rigorous requirements for programmatic classifications. But even this would have been a far cry from a substantive requirement to satisfy "minimum needs," about which liberal lawyers theorized and which a few state courts found in state constitutions. Moreover, what was arguably the Supreme Court's most radical step toward substantive welfare rights was not in any sense a Warren Court decision. This was Justice Powell's opinion in Youngberg v. Romeo (1982), holding that treatment of a disabled child in state custody on a paternalistic rationale must be "based on a professional judgment." Although formulated in the relatively uncontroversial context of people in state custody, it had the potential to be applied more broadly, and in some respects it has been. It seems an important step in the "soft process" approach to welfare rights that has been developed especially in Canada and South Africa.[14]

III. Post-Warren Court Approaches and Democracy

Courts evade questions of substantive justice, not only because of ideological bias, but also because of theoretical limitations. In particular, they shrink from the formidable problem of line-drawing that substantive justice values seem to present. Even among those who agree in principle on such matters, there is nothing approaching consensus on how one determines "minimum needs" or fair punishment or reasonable group access to positions of privilege. Once such standards were articulated, experience would require their frequent revision and adjustment, and courts have neither the mandate nor the qualifications to undertake such tentative and exploratory norm-setting. Thus, it has seemed inevitable to many that the courts would shrink from direct engagement with substantive justice.

In fact, however, a distinctive approach that avoids these problems emerged in the 1990s in the United States and the European Union. In the U.S., it is exemplified in the area of race by the "new accountability movement" in education, including the No Child Left Behind Act, and by the proactive "benchmarking" practices in employment discrimination compliance; in the area of criminal justice, by the reforms inaugurated in the name of the "innocence movement" and by settlements in various police abuse cases; and in welfare, by "evidence-based" social work and innovative forms of supervision that were especially visible in some litigation-induced reforms in the child welfare area, and analogous developments in environmental and health and safety regulation..[15]

In the "experimentalist" approach, courts avoid the problems of line-drawing by refusing to draw them. Instead, they induce relevant stakeholders to draw them collaboratively in a more open, disciplined, and reflexive process than would otherwise occur. The stakeholders define the goals of the effort, including fairness aspirations; at the same time they define processes and measures for ongoing assessment of progress toward their goals, and for revising them in the light of experience. Some of the key elements of the approach are:

-- Judicially-defined "penalty defaults" that, instead of specifying what the defendants must do, prescribe what will happen if defendants fail to negotiate a resolution with the plaintiffs

-- Monitoring processes and indicators that prescribe how progress under the negotiated regime will be assessed

-- Proactive error detection processes that treat instances of noncompliance diagnostically as symptoms of systemic problems rather than as “trouble cases” to be resolved in isolation

-- Transparency requirements that open the regime to ongoing participation by the plaintiffs and to more general public scrutiny

-- Minimum performance standards based on observed actual performance among governmental actors in comparable situations

-- Duties to reconsider and revise goals and processes in the light of experience.

Many of the regimes that reflect the "new governance" view have been established by statute or regulation, but some have emerged from institutional reform litigation. Moreover, there is arguably an underlying conception of constitutional right implicit in all of them. At the most general level, the core right is an entitlement to have one's interests in some area of public responsibility or activity considered in a process that is responsive and accountable. "Responsive" implies respectful consideration of the relation of the claimant's interests to the relevant public purposes by qualified decisionmakers with at least minimal participation by the claimant. "Accountble" implies a reasoned explanation by the decisionmakers, review of decisions in ways that provide rich assessments of both individual cases and the system as a whole, and transparent procedures of systemic self-assessment and self-correction.

The prima facie case of a violation of this type of public law right is a showing of, first, the state's chronic failure to meet relevant standards of performance in the area, and second, immunity of the system to conventional forces of political correction. The remedy that follows from a finding of liability is not a judicially-imposed code, but a judicial order that the system negotiate and implement with the claimants and other stakeholders a reform program that is accountable.

Such efforts are linked to those of the Warren Court in their concern for the well-being of disadvantaged people; in their general aspiration to reduce racial subordination, police abuse, and oppression and incompetence in welfare provision; and in their grounding in an ambitious conception of democracy. But in many respects these developments seem to break with the Warren Court.

Considered as jurisprudential phenomena, new governance regimes seem less legalistic, or at least differently legalistic, than the Warren Court.

New governance regimes seen less prone to formalism in three respects. They tend to derive conduct standards, not analytically from text or consensus, but experimentally from observations of actual performance under experimental conditions. Moreover, they focus the attention of officials and stakeholders on governing purposes and appraise their performances in terms of their success in achieving those purposes. And their interpretations are explicitly provisional and contestable.

The new governance approach shares with the Warren Court an ethical individualism that values personal dignity and aspires to respect and accommodate "difference". But its institutional architecture seems less individualistic. It is less focused on resolution of individual claims. It sees fair process as requiring, not just fair claims resolution, but also audit processes that sample across the program even where beneficiaries have not complained. Moreover, it insists that findings of errors be treated, not only as grounds for individual relief, but as systems of potential systemic malfunctioning. .

The newer systems are explicitly proceduralist, but in different ways than the Warren Court. First, the Warren Court's proceduralism was focused largely on the legislative process and the process of individual adjudication. In effect, it tacitly accepted the traditional liberal separation of enactment and enforcement. Rules get made in the legislature and applied in adjudication. Adjudication is backward-looking in the sense that it measures compliance in terms of fidelity to previously announced rules. But in new governance, the key focus is on on-going processes of elaboration, assessment, and correction.[16] These processes are not strictly legislative. They do produce rules or interpretations of rules, but the rules are intended to be revised far more quickly and easily than conventional legislative and administrative rule-making processes contemplate. And while, they do sometimes focus on particular cases, they cases are treated diagnostically as evidence of systemic performance.

Moreover, the range of public action to which the new regimes apply their proceduralism is considerably different than that of the Warren Court. The new regimes treat procedurally both issues that the

Warren Court treated substantively and issues that the Warren Court treated as non-justiciable. The Warren Court struggled to derive substantive norms on such matters as the permissibility of racially exclusionary practices or the reasonableness of search-and-seizures. At the same time, it treated as non-justiciable or left unregulated such matters as the adequacy of education or welfare benefits or the proportionality of punishment and prosecutorial discretion. The new regimes address all these issues procedurally, inducing and enforcing requirements of participation, transparency, monitoring, and self-correction.

Some of these new regimes originate in legislative initiatives; some originate in court cases. All of the problems they address seem susceptible to judicial intervention designed to induce the types of procedures the new regimes involve. Such procedures might form the basis of a conception of constitutional welfare rights. Indeed, one way of interpreting the South African Constitutional Court's much-admired by quite vague cases on housing and medical care rights is as a step toward an experimentalist conception.

Finally, Horwitz has shown that Warren Court jurisprudence rests on a vision of democracy. It remains to ask how contested or contestable this conception is. Horwitz situates Warren Court democracy in the American Progressive tradition, broadly understood. Is it the only important conception of democracy (important either in the historical sense of influential or in the normative sense of worthy of respect) within that tradition? My view is that it has a rival, and that the rival is implicit in the new governance regimes.

The Warren Court conception of democracy is in the tradition of John Stuart Mill or Jurgen Habermas. Its rival is in the tradition of John Dewey. Both conceptions emphasize a robust civil society and a fair electoral process. However, they differ along two dimensions.

First, Mill and Habermas insist strongly on the separation of politics and administration. For them, the broadest form of popular political participation is the indirect kind that occurs through debate and agitation in the civil sphere; direct participation is limited to voting. They appear to identify more direct forms of participation with anarchy or clientalism. The distinction between politics and administration is foreign to Dewey. Dewey, however, never elaborated how popular participation in administration could occur in a disciplined, accountable

manner. The new governance regimes of the post-Warren Court years substantiate Dewey's abstract intuition with concrete examples of how this might be accomplished.[17]

A second axis of difference concerns the role of consensus. Warren Court jurisprudence is rooted in constitutional text and background social consensus. Like Mill and Habermas, it treats consensus as an end-point or at least a resting point. In contrast, Dewey urges that consensus be treated as a set of hypotheses that require testing. Indeed, the most central concern of Deweyan politics is the tendency of shared understandings that originally summarized experience to congeal in ways that blind people to new experience. A Deweyan democracy thus needs institutions that challenge and destabilize consensus. Again, the new regimes give concreteness to this idea.

IV. Conclusion

As matters of both history and progressive politics, it is a important to assess the extent to which the vices of legalism can be found in the Warren Court's jurisprudence and the extent to which these vices contributed to the failures of its doctrines. In this effort, the recent "new governance" regimes are a useful heuristic. They offer a contrast that brings out some distinctive features of the Warren Court's approach. And some may conclude that they illustrate an approach that transcends some of the limitations of Warren Court legalism.

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NOTES

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[1] The Warren Court and the Pursuit of Justice (1998).

[2] "The Jurisprudence of *Brown* and the Dilemmas of Liberalism," 14 Harvard Civil Rights-Civil Liberties Law Review 599 (1979); "Rights," 23 Harvard Civil Rights-Civil Liberties Law Review 393 (1988); see also "In What Sense Was the Warren Court Progressive?," 4 Widener Law Symposium Journal 95 (1999).

[3] Obviously, the pejorative use of the terms formalism, individualism, and proceduralism here, as in Horwitz's work, should not be taken to imply a denial of the value of form, individuality, or process, but rather the excessive or unreflective reliance on these concerns in ways that obscure or displace competing values.

[4] See, e.g., Alan Freeman, "Antidiscrimination Law from 1954 to 1989: Uncertainty, Contradiction, Rationalization, Denial," in The Politics of Law 285-310 (3d ed., David Kairys ed. 1998).

[5] See, e.g., William J. Stuntz, "The Political Constitution of Criminal Justice," 119 Harvard Law Review 780 (2006).

[6] See, e.g., William H. Simon, "Legality, Bureaucracy, and Class in the Welfare System," 92 Yale Law Journal 1198 (1983).

[7] Derrick A. Bell, Jr., "Serving Two Masters: Integration Ideals and Client Interests In School Desegregation Litigation," 85 Yale Law Journal 480 n.32 (1975) (quoting J. Harold Flannery). See also 492 n.64. Bell writes: "NAACP General Counsel Nathaniel R. Jones cites frequent statements by Chief Justice Earl Warren to support his organizations position that "the Brown decision was not an educational decision resting on educational considerations. " Id. at 480 n. 32.

[8] See Henry Monaghan, "Constitutional Common Law," 89 Harvard Law Review 1, 3-6 (1975).

[9] Jurisprudence of Brown, cited in note 2, at 610.

[10] Jerry Mashaw, "The Management Side of Due Process," 59 Cornell Law Review 772 (1974).

[11] Owen Fiss, The Civil Rights Injunction (1977).

[12] Abram Chayes, "The Role of the Judge in Public Law Litigation," 89 Harvard Law Review 1284 (1976).

[13] Alan Dershowitz, Reversal of Fortune (1985)

[14] See Mark Tushnet, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law ch.s 7-8 (2008).

[15] See, e.g., New Governance in the European Union and the United States (Grainne de Burca and Joanne Scott, ed.s, 2006); Susan Sturm, "Second-Generation Employment Discrimination," 101 Columbia Law Review 458 (2003);: Katherine Kruse, "Instituting Innocence Reform: Wisconsin's New Governance Experiment," 2006 Wisconsin Law Review 645; Kathleen Noonan, Charles F. Sabel, and William H. Simon, "Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform," Law & Social Inquiry. (forthcoming 2009).

[16] For an interesting example, see R.C. v. Walley, 2007 WL 118101 (M.D. Ala. 2007). The decision terminates a consent decree in a challenge to the state's system for abused and neglected children. The Court declines to measure compliance primarily in terms of substantive standards, but instead looks to the state's capacity to identify and rectify mistakes in a way that is transparent and responsive to stakeholder complaints.

[17] See also Leonardo Avritzer, Democracy and the Public Sphere in Latin America (2002), which includes a critique of Habermas on the point of the separation of politics and administration and gives extended examples from recent Latin American political practice.