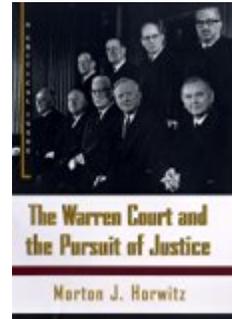


H-Net Reviews

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Morton J. Horwitz. *The Warren Court and the Pursuit of Justice*. New York: Hill & Wang, 1998. xii + 132 pp. \$18.00 (cloth), ISBN 978-0-8090-9664-0; \$13.00 (paper), ISBN 978-0-8090-1625-9.

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Raise High the Faded Banner

When Chief Justice Earl Warren stepped down from the United States Supreme Court in the fall of 1969, the vast majority of today's American undergraduates and law students had not yet been born. Since Warren's death, we have had two Chief Justices, each in different ways hostile to his legacy and his juridical methodology, and we have had dozens of historical and polemical attacks on him as a judge and an interpreter of the Constitution. Warren's three admiring biographers—G. Edward White, the late Bernard Schwartz, and Ed Cray [1]—have tried to stem the tide of denigration, but for the most part only *Brown v. Board of Education* is still generally hailed as an admirable landmark in American constitutional history—and not even *Brown* has been immune to doctrinal and jurisprudential criticism. Perhaps, as Arthur M. Schlesinger Jr., wrote in the first volume of his *The Age of Roosevelt*, twenty years is long enough to allow the passions first of idolatry and then of detraction to die down and a more constructive, nuanced interpretation to emerge. By all appearances, *The Warren Court and the Pursuit of Justice* aspires to present such an interpretation.

The book under review has significance in two differing ways. First, it presents itself as a concise, accessible history and interpretation of the Warren Court and its legacies—something greatly desired in resources for the rising generation of law students and college undergraduates already mentioned. Second, it is the latest book by Morton J. Horwitz, the Charles Warren Professor of History and Law at the Harvard Law School, probably the most renowned American legal historian of our time.

Reviewers of *The Warren Court and the Pursuit of Justice* will be tempted to assess it by reference to both contexts. It is necessary, however, to disentangle them. Therefore, this review focuses only on the first context; I leave it to others to assess this study in the context of Horwitz's evolving scholarship [2].

The Warren Court and the Pursuit of Justice is the latest installment in Hill and Wang's admirable "Critical Issue" series. Each volume in this series is about 150 pages in length (having no footnotes or endnotes but presenting terse bibliographies or bibliographic essays). Each book either opens a major historical problem to fresh assessment [3] or defines and explores a historical issue previously overlooked by historians [4].

In *The Warren Court and the Pursuit of Justice*, Horwitz carves out a daunting task: he proposes to assess the legacy of the most controversial Supreme Court of the twentieth century—perhaps of all American history—in just 115 pages of text. Inevitably he has faced the need to be selective. Still, this book is more a series of ruminations on the Warren Court, on the challenges it confronted and the challenges it met, and the history it made than a comprehensive distillation of the Warren Court's constitutional legacies.

Horwitz begins by establishing his cast of characters—introducing the Justices who composed the Warren Court. He devotes his second chapter to the two cases that made up *Brown v. Board of Education* (1954 and 1955); Horwitz argues that the *Brown* cases were "the themes of the Warren Court." Chapter Three consid-

ers the Warren Court's continuing engagement with the civil rights movement and the different kinds of cases that that movement spawned, including issues of First Amendment rights of free speech and press, civil disobedience and mass protest, and the Fourteenth Amendment's guarantee of equal protection of the laws. Chapter Four focuses on the Court's struggles with issues posed by McCarthyism and federal and state government campaigns against Communism. Chapter Five traces how the Warren Court wrestled with the task of reconciling constitutional law with evolving democratic theory in such issues as criminal procedure, reapportionment, and the "state[s] positive duty to provide its citizens with the conditions for individual self-development" (p. 89). Chapter Six, which focuses on "democratic culture," explores such thorny and contested areas as the law of obscenity, symbolic speech, and the right to privacy. Chapter Seven concludes the book.

Chapter One, "Constituting the Warren Court," emphasizes Horwitz's protagonists—the Warren Court Justices devoted to "the pursuit of justice"—over his antagonists—the conservative members of the Court. Earl Warren, Hugo L. Black, William O. Douglas, William J. Brennan, Jr., Arthur J. Goldberg, Abe Fortas, and Thurgood Marshall each receive lovingly detailed capsule biographies (pp. 5-12), whereas Horwitz disposes of Felix Frankfurter, John Marshall Harlan the younger, Potter Stewart, and Byron White in one brisk paragraph (pp. 13-14). This disproportion in biographical attention is notable in light of the book's appendix, which outlines the changes in personnel among the Justices between 1953 and 1969. We realize that the Justices whom Horwitz hails as the Warren Court dominated the Court for only two terms (1967-1968 and 1968-1969).

More important, Horwitz's approach denies the reader the chance to see how the Court and its internal arguments over the major issues of the Warren era evolved over time. The reader gets no opportunity to understand the give-and-take that necessarily resulted as Justices joined or left the Court, except as Horwitz mentions in passing such changes and interactions in his discussions of specific subjects. Moreover, Horwitz makes the interesting point that each of his protagonists can be understood as a social, educational, or political outsider, and a majority of outsiders on the Court may well explain the Warren Court's refusal to accept the settled condition of American life. However, the leading dissenter from the Warren Court's pursuit of justice, Felix Frankfurter, was—and saw himself as being—as much a social, religious, and ethnic outsider as any member of

the Warren Court's majority. (Though Horwitz perhaps sees Frankfurter as an insider due to his distinguished career as a law professor and New Dealer before he joined the Court in 1939, he nowhere explains his reasons.)

Horwitz's account of *Brown*, though a useful synthesis of much of the leading scholarship by such historians as Mark Tushnet and Richard Kluger, poses problems for the lay reader because we lose sight of the Court for pages at a time. Thus, his discussions of *Brown* and (in Chapter Three) of the civil rights movement feel as if they have been transplanted from a different book. To be sure, even the most activist Court is the prisoner of its docket, and it is as important to know how cases reached the Justices as how the Justices dealt with them. Even so, given the constraints of compression and series format that shaped the writing of this book, Horwitz's account of *Brown* and later cases generated by the civil rights movement seems unfocused and diffuse.

The most significant and astonishing omission from Horwitz's account of the Warren Court is any discussion of the Warren Court's church-state decisions. Such Establishment Clause cases as *Engel v. Vitale* (1962) and *Abington Township v. Schempp* (1963), which respectively struck down required school prayer and Bible reading in public schools, sparked vehement criticism of the Warren Court from citizens, politicians, and some legal scholars. Moreover, the Court's decision in *Sherbert v. Verner* (1963) is the root of all modern decisions construing the Free Exercise Clause. Perhaps Horwitz omitted this sphere of constitutional law because it was not truly original with the Warren Court, having its roots in earlier decisions of the Hughes, Stone, and Vinson Courts. The same could be said, however, of the areas of civil rights, equal protection, and criminal procedure, which Horwitz does stress. Further, early in his study (pp. 3-4), Horwitz himself concedes the risks of artificial periodization.

The final test of this book, however, is whether Horwitz has succeeded in his stated goal of showing that the Warren Court "managed to leave a lasting legacy of progressive interpretations of the Constitution, interpretations that even when subsequently overturned, continue to inspire future generations of judges, lawyers, and students (p. xii)." For decades, the Warren Court has endured vehement criticism from conservative and right-wing politicians and legal scholars. Such scholars as Raoul Berger, Earl M. Maltz, Christopher Wolfe, and the late Philip Kurland and Alexander M. Bickel all have assailed the Warren Court for its judicial activism, in particular its supposed eagerness to set aside precedent and

its alleged propensity to make law rather than to interpret law.

Horwitz offers a spirited, ardent defense of the Warren Court as a defender of democracy and revitalizing force for democratic values. He addresses this defense to a generation that has no direct experience of the history that Court made and that regards the Warren Court's decisions as one with *Marbury v. Madison* (1803). No longer is the Supreme Court the epicenter of American reform; no longer does it define the leading edge of progress in American life; no longer are the Justices engaged in the quest for justice that Horwitz identifies and celebrates as the central theme guiding the Warren Court. Indeed, when we recall his intended audience, Horwitz's book takes on coherence it otherwise lacks. Horwitz seeks not only to retell what a cynic might dub the bedtime stories of American legal liberalism [5]—he seeks to raise its faded banner anew. (This emphasis explains, among other things, the many passages of this book in which the Court disappears from view. In those pages, Horwitz establishes the contexts of a series of battles for justice, bringing the Court back in so that it can strike the appropriate blow for justice in the given issue or controversy.)

Unfortunately, Horwitz's vision of the Warren Court as a band of judicial worthies engaged in the pursuit of justice and the spreading of democracy throughout American life is too superficial and monochromatic. By presenting a version of the Warren Court's history skewed in favor of the pursuers of justice and slighting those whom he classifies outside that camp, Horwitz tells a less interesting, enlightening, and persuasive story than he could have presented. One reason why (at least for this battered adherent of legal liberalism) the Warren Court's achievements still have value and relevance is that the Court's leading decisions both emerged from and derived their legitimacy from a judicial process that exemplified open, robust disagreement and debate [6]. That process of judicial decision-making does not emerge from this book, and that omission saps the legitimacy and persuasiveness of the great cases that compose the Warren Court's legacy and of Horwitz's account of those cases.

Furthermore, disputes growing out of the relationships between substantive goals and procedural means persist in scholarly, political, and popular controversies over the role of the Supreme Court in American government. If anything, these controversies—over judicial activism versus judicial restraint, for example—have intensified the problematic nature of the Warren Court's place in the history of American constitutionalism. Again, un-

fortunately, these questions receive only fleeting treatment in *The Warren Court and the Pursuit of Justice* (p. 112). At bottom, Horwitz's failure to engage with and to recount the Warren Court's intellectual and jurisprudential processes and the controversies surrounding them are the Achilles' heels of this book.

I am grateful to Danielle J. Lewis, Greg Mark, I. Scott Messinger, Andrew Siegel, and Howard Venable for their advice and support.

Notes

[1]. G. Edward White, *Earl Warren: A Public Life* (New York: Oxford University Press, 1982); Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court* (New York: New York University Press, 1983); Ed Cray, *Chief Justice: A Biography of Earl Warren* (New York: Simon & Schuster, 1997).

[2]. Ever since the appearance of *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977), and its winning of the 1978 Bancroft Prize in American History, Morton J. Horwitz has been the legal historian best known to mainstream historians outside legal academia. Horwitz's 1977 volume, and its sequel, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), have been widely and respectfully cited. Indeed, *Transformation* is probably the best-known work of American legal history of its time. To be sure, many scholars have criticized Horwitz's findings and interpretations from a variety of perspectives. Nonetheless, Horwitz's work continues to be influential and inspiring to many legal historians.

Horwitz is now writing the volume in the Oliver Wendell Holmes, Jr., Devise History of the Supreme Court of the United States devoted to the Warren Court. It is not clear whether *The Warren Court and the Pursuit of Justice* is a preview or a byproduct of this larger project. We can say, however, that Horwitz is moving in his work from his previous focus on private law to a new emphasis on public, particularly constitutional, law. Ironically, following Horwitz's lead in *The Transformation of American Law, 1780-1860*, mainstream historians have taken more and more account of private law, and of jurisprudence as built on and dealing with private law. Horwitz, by contrast, is now heading back to public and constitutional law and to jurisprudence as engaged with those spheres of law.

[3]. E.g., Betty Wood, *The Origins of American Slavery*

(New York: Hill and Wang, 1997).

[4]. E.g., Richard White, *The Organic Machine* (New York: Hill and Wang, 1995).

[5]. See generally Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996).

[6]. To be sure, the Justices of the Warren Court car-

ried out this process within the boundaries of the American jurisprudential version of center/liberal political and cultural discourse. To us, a generation later, these bounds may seem constricted, but they were broad enough for vehement conflict within that perceived consensus.

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