The Warren Court, Criminal Procedure Reform, and Retributive Punishment

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Abstract

The Warren Court’s legacy in criminal justice is largely one of increasing constitutional regulation of criminal procedure rather than substantive criminal law or punishment. In this essay, Professor Brown argues that, more than three decades after Warren’s resignation, the effect of that effort to improve overall criminal justice is uncertain at best. In an example of unintended consequences, that reform effort bears indirect responsibility for shifting criminal justice toward its current, harshly punitive orientation. Perversely, the Warren Court’s criminal procedure decisions helped prompt a popular-political response that moved criminal justice from its long-standing commitment to rehabilitation toward the current focus on deterrence, incapacitation and retributivism through the mechanism of severe sentencing policies. Normative gains the criminal justice system saw through procedural advances such as right to counsel have been offset by policy shifts in substantive criminal law and punishment that the Warren Court left to the political branches.