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Abstract

The Warren Court left for us an irresistible case study in legal change, particularly for the criminal justice field. This essay takes an institutional turn, looking more at the makers of criminal justice than at the end product. Who carried out the changes that the Warren Court began? How have other legal institutions, particularly state appellate courts and legislatures, responded to the environment of massive change that the Supreme Court created?

In the generations that followed the Warren Court era, state institutions embraced change. The Supreme Court's habit of constant tinkering with the machinery of criminal justice spread to the state level. This is one of the major institutional legacies of the Warren Court in criminal justice. The Warren Court was fire: turning a solid situation into a fluid one, creating movement, causing chemical reactions. Since 1969, other institutions have changed their habits to deal with this more fluid world of criminal justice.

The presence of these lively institutions at the state level is an ironic legacy for the Warren Court, since that Court is known as an enemy of federalism. But the long-term effects of Warren Court decisions in criminal justice left us with an unexpectedly vibrant federal system. State actors turned into reality many parts of the Warren Court's vision that the Court itself only defined in the abstract.

The Rehnquist Court, on the other hand, has become ice. State courts and legislatures have discovered their authority to interpret state constitutions to place their own brand of restrictions on government actors. In response to these innovations in state courts and legislatures, the Rehnquist Court's most famous and emblematic decisions today have the effect of ice. They slow down and freeze into place once ran more freely.

Thus, the Rehnquist Court also finds itself in an ironic position when it comes to federalism in criminal justice. Although the Justices often speak warmly of the benefits of variety in state criminal justice systems, sometimes their decisions snuff out variety in the states.

This icy effect does not flow from every Rehnquist Court opinion on criminal justice. Sometimes state courts continue to pursue a variety of approaches to a question, even after the Supreme Court speaks and throws its support behind one approach. This essay closes with a few observations about this puzzle: what features of the cases explain why some Rehnquist Court opinions, and not others, function like ice among the state courts?