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How the Supreme Court Delivers Fire and Ice to State Criminal Justice

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I. Introduction

The Warren Court left for us an irresistible case study in legal change, particularly for the criminal justice field. Over the years, many people have evaluated the *direction* of change that the Warren Court wrought in criminal justice. They have asked whether the Warren Court was truly prodefense or whether it carried an exaggerated reputation on this score. Previous accounts of the Warren Court also estimated the *amount* of change that the Court imposed on police, prosecutors, defense lawyers, and trial judges. These

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writers debated whether the Warren Court's landmark decisions were consistent with existing case law and whether the Court displayed a judicious willingness to compromise.[1]

I plan to use this same starting point – the amount of change the Warren Court created – but then strike out along a different path. So I begin with this unsurprising proposition: the Warren Court introduced more changes into the criminal justice system than did its predecessors. The Warren Court earned this reputation in its own time, and the image stuck.[2]

This Article then takes an institutional turn by examining the makers of criminal justice rather than 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? The questions look past the merits of any particular case that created flux. Instead, I ask more generally about an atmosphere in which major change became the norm.

In the generations that followed the Warren Court era, state institutions embraced change.[3] The Supreme Court's habit of constantly tinkering with the machinery of criminal justice spread to the state level. State courts and legislative bodies may not always like the changes, but they now anticipate and create change rather than react to it. This result is one of the major institutional legacies of the Warren Court in the criminal justice field. Thus, the Warren Court was fire: turning a solid situation into a fluid one, creating movement, and causing chemical reactions.[4] Since 1969, other institutions have changed their habits to deal with this more fluid world of criminal justice.[5]

The presence of these lively institutions at the state level is an ironic legacy for the Warren Court. The Warren Court is known as an enemy of federalism, and that reputation had some basis in the short run. In the criminal justice area, the thrust of the Court's landmark cases was to centralize, to push state systems toward a more uniform criminal process, a push that tracked the federal system. The Warren Court unified criminal justice by restricting the discretion of police officers operating in the field and of trial judges.[6] But the

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1. *See infra* notes 28-38 and accompanying text (discussing Warren Court's willingness to break with precedent).

2. *See infra* notes 15-27 and accompanying text (discussing critiques of Warren Court).

3. *See infra* Part III (discussing impact of Warren Court decisions on state courts and state legislatures).

4. *See infra* Part II (discussing changes that Warren Court decisions brought).

5. *See infra* Part III (discussing impact of Warren Court decisions on state courts, federal courts, and state legislatures).

6. *See infra* notes 15-19, 39-60 and accompanying text (discussing restraints on and

long term effects of the Warren Court's criminal justice decisions left an unexpectedly vibrant federal system. State actors at the higher levels of state government, particularly in the appellate courts and legislative bodies adapted quickly. They turned into reality many parts of the Warren Court's vision that the Court itself only defined in the abstract. What began as movement toward uniformity ended with a profusion of independent actors that continually anticipated and initiated change for themselves.[7]

The Rehnquist Court, on the other hand, is ice. State courts and legislatures now routinely interpret the federal constitution and anticipate ways that it might shift over time.[8] They also have discovered their authority to interpret state constitutions to place their own brand of restrictions on government actors.[9] Legislative bodies have learned to amend codes in ways that make the federal constitution irrelevant.[10] In response to these innovations in state courts and legislatures, the Rehnquist Court's most famous and emblematic decisions have the effect of ice: slowing down and freezing into place what once ran more freely.[11]

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, their decisions sometimes snuff out variety in the states.[12] 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 has spoken and thrown its support behind one approach.[13] I close this Article 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?[14]

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changes to state criminal justice systems that Warren Court decisions brought).

7. *See infra* Part III (discussing impact of Warren Court decisions on state courts and state legislatures).

8. *See infra* Part III (discussing impact of Warren Court decisions on state courts and state legislatures).

9. *See infra* Part III.A (discussing impact of Warren Court decisions on state court decisions).

10. *See infra* Part III.C (discussing impact of Warren Court decisions on state legislatures).

11. *See infra* Part IV (discussing chilling effect of Rehnquist Court decisions on state courts and legislatures).

12. *See infra* notes 99-120 and accompanying text (discussing Rehnquist Court criminal justice decisions and federalism).

13. *See infra* notes 121-33 and accompanying text (discussing *Moran v. Burbine*, 475 U.S. 412 (1986), and state court reactions to this decision).

14. *See infra* notes 134-35 and accompanying text (discussing possible reasons that

II. Warren Court Fire Creates a Fluid World

The story begins with a claim that should not astonish anyone: The rulings of the Warren Court in criminal justice were dramatic and unsettling. They forced immediate changes in practice, some of them expensive and difficult to achieve. The Court's opinions also strongly hinted that even larger changes in practice would occur in the near future. The cumulative effect of these cases altered the entire environment for state actors in the criminal process. They faced a fluid world in which every aspect of criminal justice was up for debate.

This judgment about the Warren Court gained broad endorsement from the start. Critics of the Court pointed out the disruption that the rulings caused and singled out the criminal procedure cases for special criticism.[15] Law enforcement officials and judges complained that the Warren Court, more than any other Supreme Court in memory, upset their routines and made it too difficult for them to investigate and prosecute crimes.[16] These complaints spoke both to the prodefense direction of change and to the amount of change that the Court was forcing on the states.[17] The new decisions "handcuffed the cops."[18] In the famous campaign rhetoric of Richard Nixon, the Warren Court placed too many limits on the "peace forces" and not enough on the "criminal forces."[19]

Some legal academics gave essentially the same judgment. Although academic critics of the Court placed more weight on the amount of change and complained less directly about the prodefense tilt of the Court, both elements

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explain why state courts may not adopt Supreme Court decisions).

15. *See* Alexander Holtzoff, *Shortcomings in the Administration of Criminal Law*, 17 HASTINGS L.J. 17, 28-37 (1965) (criticizing Court's tendencies to repeatedly reexamine guilty verdicts and to overturn convictions on technicalities); Fred E. Inbau, *Democratic Restraints Upon the Police*, 57 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 265, 266-67 (1966) (noting that Court's attempt to "police the police" is misguided and better left to legislatures).

16. *See, e.g.*, O.W. Wilson, *Crime, the Courts, and the Police*, 57 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 291, 293-96 (1966) (arguing that Court's emphasis on rights of individuals frustrates main functions of effective police work).

17. *See* Inbau, *supra* note 15, at 267 (describing effect of Court's rulings on states).

18. *More Criminals to Go Free? Effect of High Court's Ruling*, U.S. NEWS & WORLD REP., June 27, 1966, at 32 (stating reaction of Los Angeles Mayor Samuel Yorty to *Miranda v. Arizona*, 384 U.S. 436 (1967)); *see also* Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1055 (1998) (arguing that *Miranda* has led to lower crime clearance rates and less effective police questioning).

19. *See* Arlen J. Large, *"Law and Order" – Into the Fuzzy Swirl*, WALL ST. J., Oct. 22, 1968, at 20 (examining law and order focus of 1968 presidential election); *see also* DONALD GRIER STEPHENSON, JR., CAMPAIGNS AND THE COURT: THE U.S. SUPREME COURT IN PRESIDENTIAL ELECTIONS 179-82 (1999) (chronicling Richard Nixon's rhetoric against judicial activism).

of the popular critique were present. According to Philip Kurland, from the University of Chicago, the Warren Court started out as reasonable.[20] But beginning with its decision in *Mapp v. Ohio*,[21] the Court produced "wholesale revisions" of state criminal procedure.[22] After *Mapp*, the Court demonstrated each year that its "intoxication with its own power was not diminished."[23] The future looked grim for the institution: "Like Caesar, the Court was ambitious. Like Caesar, its ambitions have been only partially requited. Unlike Caesar, the Court has not yet been assassinated. But there are some senators with a lean and hungry look."[24]

Many in the legal academy offered more sympathetic evaluations of the Warren Court's work on the whole, but even the Court's friends conceded at the time that the criminal justice cases constituted a "revolution."[25] Archibald Cox, the Solicitor General during the Johnson and Kennedy administrations, believed that the Court's rulings reformed criminal justice "in the States where reform was most needed, within an unusually short span of time."[26] But he also conceded that the reforms came with serious institutional costs: they caused a "radical revision of the structure of government" and undermined "the ideal of law as something distinct from the arbitrary preferences of individuals."[27]

The Warren Court's willingness to break with precedent reflected its ambition in criminal justice cases. Jerold Israel, Yale Kamisar, Stephen

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20. PHILIP B. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 75 (1970) (noting that decisions before 1961 generally reviewed criminal procedures in established ways).

21. 367 U.S. 643 (1961).

22. KURLAND, *supra* note 20, at 75.

23. *Id.* at 78.

24. *Id.*; *see also* Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 539 (discussing Court's retreat from precedent and its arrogant lack of articulation for bases of its decisions); Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 930 (1965) (warning against Court moving too fast to determine detailed rules of criminal procedure).

25. *See* CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 29-34 (1993) (characterizing Warren Court dicta as revolutionary).

26. ARCHIBALD COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 88-89 (1968).

27. *Id.* at 89; *see also* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 54-58 (2d ed. 1978) (discussing major impact of applying some Warren Court decisions retroactively); JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 270 (1980) (discussing increased ambition in scope of Court's exercise of judicial review); LEONARD W. LEVY, AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE 25-36 (1974) (examining judicial review and constitutional interpretation process and concluding that it is "overwhelmingly a means of rationalizing preferred ends").

Saltzburg, and others have debated this subject thoroughly. They looked back on the Warren Court more than a decade after it ended and argued that the most famous criminal justice decisions of the era were only modest extensions of prior case law.[28] However, while the Warren Court's use of prior case law did appear routine and reasonable when compared to the work of the Burger Court, hindsight can obscure our view of the Warren Court's treatment of precedent. Those who discussed the use of precedent at the time noticed a major difference between the Warren Court and its predecessor, the Vinson Court. Francis Allen put it this way: "[S]tates are now confronted by a catalogue of constitutional restraints hardly contemplated as recently as a generation ago."[29]

This description fits most of the important Warren Court criminal justice cases, even such modest innovations as *Aguilar v. Texas*.[30] In *Aguilar*, the Court created a more specific standard for courts to use in evaluating whether evidence from an informant amounted to probable cause. Under the new standard, an affidavit supporting a search warrant based on hearsay evidence needed to demonstrate both the basis of the informant's knowledge and the informant's veracity and reliability.[31] This new standard did not contradict or abandon the old one, but it did shift authority over these questions away from the magistrate and into the appellate courts.[32] The two-pronged structure of

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28. *See* Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1383-84 (1977) (stating that *Miranda* warning requirement did not impose major administrative burden on police); Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 62, 63-68 (V. Blasi ed., 1983) ("[M]ore often than not[, the Warren Court's] criminal procedure decisions reflected a pattern of moderation and compromise."); Stephen Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 152-58 (1980) (arguing that Warren Court decisions generally were congruent with established doctrines).

29. Francis A. Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213, 215-16 (1959); *see also* COX, *supra* note 26, at 87-88 ("If one may measure 'activism' by the overruling of settled precedents and the establishment of new constitutional doctrines, the Warren Court has been extraordinarily 'activist' in the field of criminal procedure."); Jerold Israel, Gideon v. Wainwright: *The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 211-15 (discussing vast changes that Warren Court decisions had on state criminal procedure).

30. 378 U.S. 108 (1964); *see also* Spinelli v. United States, 393 U.S. 410, 417-19 (1969) (elaborating *Aguilar* standards), *overruled by* Illinois v. Gates, 462 U.S. 213 (1983).

31. *See* Aguilar v. Texas, 378 U.S. 108, 114 (1964) (identifying requirements of affidavit and search warrant), *overruled by* Illinois v. Gates, 462 U.S. 213 (1983).

32. *See* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.3(a) (3d ed. 1996) (criticizing rationales of *Gates*).

the new rule profoundly changed a test that, until then, had remained conspicuously unstructured.[33]

Other prominent cases showed even more clearly that the Warren Court placed less value on precedent than did its predecessors. Without any serious showing of changed circumstances, *Mapp v. Ohio* overruled a case that was less than fifteen years old.[34] *Miranda v. Arizona*[35] addressed the perennial problem of coerced confessions but relied in an unprecedented way on the Fifth Amendment for the solution rather than on the voluntariness standard under the Due Process Clause.[36] And the announcement in *United States v. Wade*[37] that attorneys had to attend identification procedures such as lineups in the police station[38] was truly a bolt from the blue. The Court had no substantial body of cases on this problem before *Wade*, and the Court's solution opened an entire new field for defense attorneys.

Another potential measure of change looks to the number of states obliged to change their criminal justice practices because of a Supreme Court opinion. Some of the Warren Court's most celebrated cases, such as *Gideon v. Wainwright*,[39] impacted a surprisingly small number of states. *Gideon* required the states to provide counsel in all serious criminal cases.[40] The law of about thirty-five states already embodied this requirement, and local

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33. *See* Howard Abrahams, Spinelli v. United States: *Search for Probable Cause*, 30 U. PITT. L. REV. 735, 742 (1969) (explaining how *Aguilar* required that affidavit from police to magistrate to secure search warrant based on informants must set forth "underlying circumstances" necessary for magistrate to determine validity of informants' claims and support that informant was "credible"); Henry S. Mather, *The Informer's Tip as Probable Cause for Search or Arrest*, 54 CORNELL L. REV. 958, 968 (1969) (noting that *Aguilar* requires two-pronged test for "reasonableness" evaluation). The Burger Court later moved back to a less structured method for weighing probable cause in this setting. *See* Illinois v. Gates, 462 U.S. 213, 238-39 (1983) (returning to "totality of the circumstances" test). A number of state courts maintained the former more highly structured approach under their state constitutions. *See* State v. Cordova, 784 P.2d 30, 33 (N.M. 1989) (noting that New Mexico rules independently govern probable cause determination).

34. Mapp v. Ohio, 367 U.S. 643, 655 (1961), *overruling* Wolf v. Colorado, 338 U.S. 25 (1949). *See* Francis A. Allen, *Federalism and the Fourth Amendment: A Requiem for* Wolf, 1961 SUP. CT. REV. 1, 1, 40 (noting that "the interest of *Mapp* . . . [cannot] be explained by any particular difficulty or subtlety in the immediate issues involved" and that *Mapp*'s exclusionary rule is based on "unsatisfactory" theories of police misconduct).

35. 384 U.S. 436 (1966).

36. Miranda v. Arizona, 384 U.S. 436, 436 (1966).

37. 388 U.S. 218 (1967).

38. United States v. Wade, 388 U.S. 218, 223-24 (1967).

39. 372 U.S. 335 (1963).

40. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

practice in most of the other states was consistent with the requirement even when the law did not address it.[41]

However, other Warren Court cases mandated major changes in a large number of cases. *Mapp v. Ohio* introduced into a majority of states the exclusionary rule remedy for illegal searches and seizures.[42] In *Boykin v. Alabama*,[43] the Court addressed the high volume, and therefore high stakes, world of guilty pleas.[44] It announced that many features of the federal rules governing the information that judges provided to defendants during a guilty plea hearing were thereafter constitutional requirements.[45] This announcement shifted practices in a large number of states.[46]

The full amount of change that the Warren Court created encompasses more than the reforms that it required immediately. People celebrated and vilified many of the Court's opinions not just for what they held but for what they hinted. They hinted at an unsettling absolutist quality. The Court's opinions foreshadowed a world in which the states would carry out their egalitarian ideals without compromise. Philip Kurland complained that for the Warren Court "every proposition had to be taken to its logical extreme."[47]

Examples of this absolutist flavor in the Court's rhetoric are plentiful.[48]

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41. *See* Israel, *supra* note 28, at 1338 n.76 (acknowledging dispute over *Gideon's* actual impact on changing practice in most states); Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 17-20, 67-74 (1962) (presenting study on number of states already providing *Gideon* protections). These accounts may understate the impact of *Gideon* because they do not distinguish between states that provided counsel on request and those that provided counsel as a matter of course.

42. *See* Allen, *supra* note 34, at 20 (noting sweeping effect of *Mapp*); Roger J. Traynor, Mapp v. Ohio *at Large in the Fifty States*, 1962 DUKE L.J. 319, 319 (noting that *Mapp* extended exclusionary rule to all states).

43. 395 U.S. 238 (1969).

44. Boykin v. Alabama, 395 U.S. 238, 242 (1969).

45. *Id.* at 243.

46. *See* KURLAND, *supra* note 20, at 81 (discussing how Warren Court imposed uniform practices for judges when deciding whether to accept guilty pleas).

47. *Id.* at xx. *But see* MELVIN I. UROFSKY, THE WARREN COURT: JUSTICES, RULINGS, AND LEGACY 236, 241 (2001) (arguing that Warren Court, despite some allegedly radical decisions, did not attempt to alter criminal justice).

48. *See, e.g.*, United States v. Wade, 388 U.S. 218, 235-36 (1967) (establishing right to counsel at post-charge lineups); Griffin v. California, 380 U.S. 609, 614 (1965) (noting rule against prosecutorial comment on defendant's refusal to testify at trial). The *Griffin* Court explained that: "[C]omment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Id.* at 614. The *Wade* Court explained its ruling as follows:

The Court in *Griffin v. Illinois*[49] made an extraordinary and appealing observation about poverty and criminal justice: "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color . . . . [The] ability to pay costs in advance bears no relationship to defendant's guilt or innocence."[50] Although the decision reached a narrow holding – states must provide trial transcripts to indigent defendants on appeal[51] – the implications of the Court's language were tremendous. Similarly, the language of *Gideon v. Wainwright* appealed to some powerful ideals about the value of defense counsel:

> This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.[52]

Again, the language recognized no boundaries. Lawyers are "necessities, not luxuries" for anyone "charged with a crime."[53]

These examples are not intended to say that the Warren Court always took the most extreme position available to it. Nor do they mean that the Court entirely ignored the competing considerations at stake in these cases.[54]

> The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness – "that's the man."

Wade, 388 U.S. at 235-36.

49. 351 U.S. 12 (1956).

50. Griffin v. Illinois, 351 U.S. 12, 17-18 (1956); *see also* Roberts v. LaVallee, 389 U.S. 40, 42 (1967) (granting indigent defendant entitlement to free preliminary hearing transcript when useful for preparing for trial); Douglas v. California, 372 U.S. 353, 358 (1963) (mandating appointment of free counsel on first appeal as of right).

51. *Griffin*, 351 U.S. at 19.

52. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

53. *Id.*

54. *See* Linkletter v. Walker, 381 U.S. 618, 637 (1965) (limiting retroactive effect of *Mapp*).

But the Court did explain its holdings by appealing to a set of high ideals, particularly the ideals of racial equality and equal access to justice despite economic differences among defendants.[55] These ideals suggested that criminal justice generally, and the state systems especially, had a long way to go.

As others have observed, the Warren Court's criminal justice decisions did not all run in the same direction. The Court did create some constitutional doctrine favoring law enforcement.[56] But the Warren Court cases that favored law enforcement also made the environment more fluid. Even when the Court ruled for the Government, its decisions were unsettling. For instance, *Terry v. Ohio*[57] introduced a completely new tier into Fourth Amendment analysis by allowing stops and frisks based on "reasonable suspicion," a level of evidence more than a mere "hunch" but less than traditional probable cause.[58] The Court spoke in *Terry* about the need to select search and seizure requirements only after balancing individual and government interests.[59] This new methodology created real uncertainty about when the new system of "reasonable suspicion" requirements might apply.[60]

In sum, the Warren Court cases created an atmosphere more favorable to legal control over criminal justice. The decisions accustomed law enforcement agencies to the need for change. The idea that the Constitution might force a shift in police practices or courtroom customs became familiar. And the experience with many Warren Court holdings demonstrated for many that change was manageable, because even the most unpopular decisions were not truly disruptive. But the Supreme Court was not the only agent of change in this new environment.

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55. *See* Yale Kamisar, *Has the Court Left the Attorney General Behind? – The Bazelon-Katzenbach Letters on Poverty, Equality, and the Administration of Criminal Justice*, 54 KY. L.J. 464, 469 (1966) (suggesting that Warren Court emphasized equal protection, fairness, and equality at cost of police efficiency); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256-60 (1968) (stating that Warren Court sought to equalize criminal process across racial and economic continuum).

56. *See* Schmerber v. California, 384 U.S. 757, 770-72 (1966) (authorizing blood samples without warrant); Allen, *supra* note 24, at 537-38 (noting decline in judicial activism at close of Warren Court); Israel, *supra* note 28, at 1347 (discussing argument that later Warren Court decisions shifted back toward mainstream consensus on proper police power).

57. 392 U.S. 1 (1968).

58. Terry v. Ohio, 392 U.S. 1, 27 (1968).

59. *Id.* at 21-22.

60. *See* Ronald J. Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L.F. 763, 765 (outlining how reasonableness standard changes with circumstances in each case); Ronald F. Wright, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127, 1127 (1984) (criticizing balancing method to determine permissibility of searches).

III. Habits of Change Spread to the States

As time passed and Earl Warren and his colleagues gave way to Warren Burger and three other appointees of President Nixon, many predicted that the Burger Court would roll back the prodefense rulings of the Warren Court.[61] But the Burger Court did not overrule many of its predecessor's rulings outright. Instead, the Burger Court departed from the trajectory of the Warren Court in two less obvious ways. First, the Burger Court reaffirmed many of the ideals expressed in earlier opinions, even while it refused to extend them to new settings. For instance, the Court in *Ross v. Moffitt*[62] refused to require the states to pay for defense counsel at every level of appeal but still endorsed the importance of attorneys during the first level of appeal to prepare claims for all appellate reviews.[63]

The Burger Court's second technique for changing the trajectory of the Warren Court cases was procedural. A major component of the Warren Court's agenda was to expand federal habeas corpus as a forum to enforce the new constitutional rules that the Court applied to the states.[64] Similarly, the

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61. *See* LEVY, *supra* note 27, at 60 (noting changing criminal justice jurisprudence under President Nixon's Court); Otis H. Stephens, Jr., *The Burger Court: New Dimensions in Criminal Justice*, 60 GEO. L.J. 249, 250-66 (1971) (examining changes in criminal procedures from Warren Court to Burger Court); Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 423-24 (1974) (stating that Burger Court wanted to restrict defendants' rights and repeal Warren Court changes).

62. 417 U.S. 600 (1974).

63. Ross v. Moffitt, 417 U.S. 600, 616 (1974). In some areas, particularly those involving search and seizure and identification procedures, the Burger and Rehnquist Courts did cut back more clearly on the substance of the Warren Court holdings. Even there, scholars say that the holdings contradict the "spirit" but not the "letter" of the earlier cases. *See* Craig M. Bradley & Joseph L. Hoffmann, *"Be Careful What You Ask For": The 2000 Presidential Election, the U.S. Supreme Court, and the Law of Criminal Procedure*, 76 IND. L.J. 889, 893 (2001) (noting that Court has not overruled most Warren Court decisions but has recently advocated police interests over defendants' interests); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2491-93 (1996) (arguing that Court restricted availability of remedies without directly overruling Warren Court decisions).

In other cases, the Burger Court expanded constitutional rights further than did the Warren Court. *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (requiring appointed counsel at trial for any defendant that may receive incarceration as sentence). Once again, the broad language of the Warren Court opinions makes it possible to argue that the Warren Court eventually would have gone even further. *See supra* notes 47-53 and accompanying text (discussing "absolutist flavor" of Warren Court decisions).

64. Fay v. Noia, 372 U.S. 391 (1963), *overruled by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992); Townsend v. Sain, 372 U.S. 293 (1963), *overruled by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992); *see* Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 794-97 (1970) (discussing defendants' broadened

Warren Court established more rigorous rules on "harmless error," a change that made it difficult for appellate courts to keep a conviction intact even in the face of legal error.[65]

The Burger Court changed the rules of habeas corpus to make it easier for federal courts to avoid the merits of constitutional challenges. This change was especially true for search and seizure claims, which federal courts could no longer consider in habeas corpus petitions.[66] But new habeas limitations also applied to all other constitutional claims, as the Burger Court reinterpreted the 1867 habeas statute.[67] The Court also expanded other procedural devices to allow federal courts to reduce the impact of the still vital constitutional requirements.[68]

As Carol Steiker pointed out, this state of affairs was lousy for the Court's public image.[69] The public noted the continued vitality of controversial decisions like *Miranda* and others that set limits on police conduct. Only more sophisticated readers of the Court's opinions realized that the federal courts were, in fact, overturning fewer state convictions because of the new procedural rules.[70]

But this continued endorsement of broad ideals, combined with narrowed access to federal courts, also energized state courts and legislatures. The Warren Court's vision of criminal justice remained largely intact, but the

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access to habeas corpus hearings); Robert M. Cover & T. Alex Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1041 (1977) (noting that Court used habeas corpus as primary vehicle to enforce new constitutional criminal procedure rights).

65. *See* Chapman v. California, 386 U.S. 18, 23 (1967) (holding that for federal constitutional error to be considered harmless it must be harmless beyond reasonable doubt).

66. Stone v. Powell, 428 U.S. 465, 494 (1976).

67. Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977); *see generally* Ronald F. Wright & Marc Miller, *In Your Court: State Judicial Federalism in Capital Cases*, 18 URB. LAW. 659, 666 (1986) (stating that traditional use of habeas corpus was to challenge jurisdiction only but that courts now use it to evaluate substantive issues).

68. For instance, the Court made it easier for the Government to establish that a suspect consented to an otherwise illegal search. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973) (using totality of circumstances test to determine whether consent was voluntary). The trend arguably began during the Warren Court itself. *See* Michael E. Tigar, *The Supreme Court, 1969 Term – Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 4-7 (1970) (lamenting that actual procedure in criminal justice system had not improved for defendants despite Court's lofty constitutional decisions).

69. *See* Steiker, *supra* note 63, at 2549 (citing studies showing public's vast confidence in law enforcement); *cf.* STEPHENSON, *supra* note 19, at 178 (noting that partial retroactivity of *Miranda* created additional public hostility to opinion).

70. *See* Steiker, *supra* note 63, at 2532-33 (claiming that members of law enforcement community have "more accurate and sophisticated understanding" of Court's rulings than does general public).

federal courts no longer developed and tended that vision. The state institutions filled the vacuum. They adapted the Warren Court ideals to their own purposes, both through state constitutional law and through their own distinctive readings of the federal constitution.

A. Results Versus Habits in Reading State Constitutions

In the realm of state constitutional law, this era saw the beginning of the "new judicial federalism." Justice William Brennan, perhaps out of impatience with his new colleagues who failed to continue the criminal justice reforms that the Warren Court began, encouraged state courts to take up the cause for themselves. He pointed out that state courts could impose requirements on state law enforcement through interpretations of their own state constitutions. These requirements might be more stringent than (or build on the "floor" of) the federal constitution.[71]

State judges embraced the idea, at least in theory. Many well-regarded judges wrote with enthusiasm about the possibilities for independent readings of their state constitutions and started to identify circumstances in which such interpretations were most likely or appropriate.[72] In selected areas, the state

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71. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498-502 (1977) (discussing how state courts have extended rights beyond what Supreme Court has mandated); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 535 (1986) (noting that state courts have held their constitutions as more protective of personal rights than federal protections). Earlier state courts had exercised this same power, but Justice Brennan called for a renewed and expanded use of the power.

72. *See* Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1143 (1985) (discussing trend of state courts interpreting state constitutions to determine defendants' rights); Joseph R. Grodin, *Some Reflections on State Constitutions*, 15 HASTINGS CONST. L.Q. 391, 399 (1988) (noting practice of state courts finding that government actions violate state constitutions); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 400 (1987) (questioning practice of state courts finding expanded protections under state constitutions); Hans A. Linde, *E Pluribus – Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 166 (1984) (analyzing judicial review by state courts); Frank G. Mahady, *Toward a Theory of State Constitutional Jurisprudence: A Judge's Thoughts*, 13 VT. L. REV. 145, 149 (1988) (stating that state court analysis of state constitutions should take place through proper state authority); Stanley Mosk, *State Constitutionalism After Warren: Avoiding the Potomac's Ebb and Flow*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 201, 203 (Bradley D. McGraw ed., 1985) (noting increased enforcement of state constitutions by state courts after Warren Court); Ellen A. Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583, 585-86 (1986) (analyzing resurgence of state court judicial review); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983) (advancing belief that state constitutions provide separate sources of fundamental rights); Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and*

courts also took action. They strayed from the positions that the United States Supreme Court announced and held that their state constitutions required something different, that is, something more than the federal constitution.

For instance, the Massachusetts Supreme Judicial Court in *Commonwealth v. Upton*[73] read the state constitution to require the specific analyses of probable cause found in the older *Aguilar-Spinelli* line of cases from the Warren Court days rather than the more generalized *Illinois v. Gates*[74] probable cause test that the Burger Court announced.[75] The majority of states nominally adopted the *Gates* standard, but many of those states interpreted the test in ways that still placed great weight on the specific *Aguilar-Spinelli* inquiries.[76] Even though these courts interpreted their own state constitutions, they drew inspiration from Warren Court precedents. In the probable cause cases, for instance, the Warren Court's broadest and most inspired language about the need for uniformity in probable cause determinations figured in the state court rulings.[77]

The Warren Court's dicta influenced the state courts even more than did its holdings. The Court outlined an attractive egalitarian vision of criminal justice,[78] and some state court judges accepted these ideals as their own. After the Warren Court inspired them, the Burger Court empowered them. State court activity in the arena of state constitutional law did not pick up momen-

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Democratic Accountability: Is There a Crocodile in the Bathtub?, 64 WASH. L. REV. 19, 46-47 (1989) (analyzing state judicial review).

73. 476 N.E.2d 548 (Mass. 1985).

74. *See* Illinois v. Gates, 462 U.S. 213, 230 (1983) (issuing "totality of the circumstances" test).

75. Commonwealth v. Upton, 476 N.E.2d 548, 556 (Mass. 1985); *see also* State v. Jones, 706 P.2d 317, 322 (Alaska 1985) (advocating *Aguilar-Spinelli* test over *Gates* test); People v. Campa, 686 P.2d 634, 641 (Cal. 1984) (same); State v. Kimbro, 496 A.2d 498, 501 (Conn. 1985) (same), *overruled by* State v. Barton, 594 A.2d 917 (Conn. 1991); People v. Griminger, 524 N.E.2d 409, 410 (N.Y. 1988) (same); State v. Jacumin, 778 S.W.2d 430, 431 (Tenn. 1989) (using *Aguilar-Spinelli* test); State v. Jackson, 688 P.2d 136, 139 (Wash. 1984) (same). *But cf.* Commonwealth v. Gray, 503 A.2d 921, 927 (Pa. 1985) (correlating *Gates* and Pennsylvania constitution).

76. *See* OR. REV. STAT. § 133.545(4) (2001) (requiring that search warrant application shall consist of proposed warrant plus one or more affidavits); State v. Reesman, 10 P.3d 83, 89 (Mont. 2000) (using *Gates* test moderated by *Aguilar-Spinelli* influences); State v. Utterback, 485 N.W.2d 760, 766 (Neb. 1992) (using *Gates* test), *overruled by* State v. Johnson, 589 N.W.2d 108 (Neb. 1999).

77. *See* State v. Jackson, 688 P.2d 136, 139-42 (Wash. 1984) (drawing on reasoning of *Aguilar* and *Spinelli* as basis for rejecting *Gates*).

78. *See* Jesse H. Choper, *On the Warren Court and Judicial Review*, 7 CATH. U. L. REV. 20, 34-36 (1967) (applauding rise in egalitarianism); Israel, *supra* note 29, at 245-48 (noting theme of fairness and equality for defendants in Warren Court decisions).

tum because of Burger Court decisions reversing the balance of power between the prosecution and the defense. Instead, the momentum came from the gap between ideals and reality. The Warren Court pointed to this gap and implied that it would close.[79] The Burger Court accepted the ideals, sometimes grudgingly, but made it clear that the federal courts would not close this gap in state criminal justice.[80] In such a setting, the interpretive power of state courts became more relevant and more widely understood than ever.

Scholars watching these developments debated whether the state courts were using their power often enough. Many complained that the state courts turned down many more invitations than they accepted. It was most common to find state courts affirming the limited holdings of the Burger Court rather than expanding the reach of state constitutions.[81] Some argued that it was not legitimate or even possible for state courts to sustain their own readings of common constitutional provisions.[82] But most argued in favor of an independent voice for state courts and wondered why the state courts did not reject United States Supreme Court positions more often.[83]

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79. *See supra* notes 49-55 and accompanying text (discussing high ideals embodied in Warren Court decisions).

80. *See supra* notes 62-70 and accompanying text (discussing Burger Court's change of trajectory from Warren Court).

81. BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE 158 (1991); *see* Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 320-21 (1986) (noting that state court opinions sometimes have adopted Burger Court decisions and sometimes have expanded rights through state constitutions); Craig F. Emmert & Carol Ann Traut, *State Supreme Courts, State Constitutions, and Judicial Policymaking*, 16 JUST. SYS. J. 37, 41-45 (1992) (analyzing state courts' behavior in judicial review cases); Paul W. Kahn, *State Constitutionalism and the Problem of Fairness*, 30 VAL. U. L. REV. 459, 465 (1996) (discussing how most state courts do not expand rights under state constitutions); Barry Latzer, *The Hidden Conservatism of the State Court "Revolution,"* 74 JUDICATURE 190, 193-95 (1991) (arguing that state courts are more likely to accept than reject decisions of Burger and Rehnquist Courts); Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 288-91 (1998) (explaining judicial review by state courts); G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1114-17 (1997) (noting tendency of state courts to rely on federal doctrines rather than state constitutions).

82. *See* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 780-84 (1992) (citing statistics showing infrequency of state courts to cite state constitutions); Earl M. Maltz, *False Prophet – Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 434-43 (1988) (arguing that examination of federalism is not appropriate in state constitutional analysis).

83. *See, e.g.*, A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 883 (1976) (noting restraint by some state courts); Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 393-94 (1998) (arguing for legitimacy of independent state interpretation even if state population

This impatience misses the point. Independent interpretation has an effect even without overwhelming numbers. On a huge range of criminal justice questions, at least some state courts disagree about the requirements properly imposed on law enforcement.[84] On a few issues, a strong minority or even a slight majority of state courts have chosen a direction different from the United States Supreme Court.[85] But the outcomes are less important than the constant presence of the arguments. It is now commonplace for litigants to remind a state appellate court that it has interpretive options.[86] Many constitutional doctrines are plausible and available to state courts; many applications of a single constitutional rule are possible.

The *mindset* that these cases embody is a profound and powerful change. The habits of independence now at work in state courts in the criminal justice arena mean more than what a few state constitutional rulings can reveal. Although the state courts might decline to pursue their own constitutional path

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does not share distinctive beliefs); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 360-62 (1984) (analyzing use and effect of state court decisions rejecting Supreme Court reasoning based on state constitutions).

84. *See, e.g.*, State v. Lopez, 896 P.2d 889, 903 (Haw. 1995) (holding that third-party consent must arise from actual rather than apparent authority); State v. Meyer, 893 P.2d 159, 165 (Haw. 1995) (noting that discovery must be inadvertent to justify seizure of item seen in plain view); Sitz v. Dept. of State Police, 506 N.W.2d 209, 219 (Mich. 1993) (holding that individualized suspicion is necessary for sobriety checkpoint); State v. Tucker, 642 A.2d 401, 408 (N.J. 1994) (suggesting that police must show individualized suspicion to justify armed chase of person on foot); State v. Johnson, 346 A.2d 66, 68 (N.J. 1975) (stating that consent validates search only if party consenting to search knows about right to refuse consent); People v. Diaz, 612 N.E.2d 298, 302 (N.Y. 1993) (rejecting "plain feel" exception to limits on *Terry* frisk); People v. Torres, 543 N.E.2d 61, 63 (N.Y. 1989) (refusing to permit automatic search of car interior for weapons upon suspicion that driver is armed); Commonwealth v. Lewis, 636 A.2d 619, 624 (Pa. 1994) (stating that match with criminal profile does not substitute for individual facts constituting reasonable suspicion).

85. *See* Roberts v. State, 881 P.2d 1, 6-7 (Nev. 1994) (citing strong minority of state courts that have interpreted state law to impose two different materiality standards when prosecutor fails to disclose exculpatory information and noting that standard depends on whether defense requested information).

86. Treatises such as LATZER, *supra* note 81, reflect the routine nature of these arguments that appeal to state constitutions. The routine quality of these arguments also becomes clear when one compares decisions from the 1980s or early 1990s – decisions in which state courts discussed their independent power to interpret their state constitutions – with more recent decisions that treat this authority as a given. *See* Commonwealth v. Labron, 690 A.2d 228, 228-29 (Pa. 1997) (upholding, on remand from United States Supreme Court, prior suppression ruling on independent state constitutional grounds); Commonwealth v. Edmunds, 586 A.2d 887, 894-95 (Pa. 1991) ("[W]e have stated with increasing frequency that it is both important and necessary that we undertake an independent analysis of the Pennsylvania Constitution.").

in a given case (or even in most cases), the option is always open, and the courts debate it often.

B. Habits Spread to Federal Law

These habits of independence spread back from state constitutional law into *federal* law. When state courts interpret the federal constitution, they have more tools and more inclination to reach their own independent interpretations. The state courts recognize, of course, that their decisions on federal law are subject to review in the United States Supreme Court. Thus, they must account for the Court's precedent on a given subject. But given the Supreme Court's limited capacity for review[87] and the current restrictions on federal habeas corpus,[88] state courts have now become the frequent interpreters of federal law. With very limited exceptions, state courts have the final word on the meaning of federal law in their own jurisdictions.

When measured by results, the state courts look like the lower federal courts when they interpret federal law. The two sets of courts grant relief on federal constitutional claims at roughly the same rates.[89] But the state courts are not merely carrying out mandates from the United States Supreme Court. As they exercise their interpretive authority over the federal constitution, state courts occupy a variety of positions. Indeed, on some issues they seem to produce a greater variety in federal constitutional doctrine than the lower federal courts produce.[90] They are adapting the ideals of Warren Court decisions to the realities of their own systems. The state courts are also addressing constitutional questions that may never arise in the federal system.[91]

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87. *See* Chief Justice William Rehnquist, 2001 YEAR-END REPORT ON THE FEDERAL JUDICIARY (Jan. 1, 2001) (giving statistics on Supreme Court's 2001 caseload), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html. The Rehnquist Court has reduced its typical output to less than one hundred cases per year, with fewer than a dozen criminal justice cases in the mix. *Id.*

88. *See supra* notes 66-70 and accompanying text (discussing limitations on habeas corpus that Burger Court put in place).

89. Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 251 (1983); *see* Craig M. Bradley, *Are State Courts Enforcing the Fourth Amendment? A Preliminary Study*, 77 GEO. L.J. 251, 264 (1988) (discussing statistics on states' enforcement of Fourth Amendment).

90. *See, e.g.*, State v. Maristany, 627 A.2d 1066, 1069 (N.J. 1993) (approving of third-party consent based on apparent authority despite significant clues that person did not have authority over property).

91. For example, some state laws on pretrial detention cover a broader range of crimes than the federal pretrial detention statute, and therefore present unique due process issues. *See*

C. State Legislatures

The state appellate courts are not the only state institutions to become more engaged in criminal justice since the days of the Warren Court. State legislatures have also filled the territory that the Supreme Court refused to occupy. Some trends in the legislature have occurred outside the field of criminal procedure in the field of substantive criminal law and in laws setting (and funding) punishments. As Darryl Brown and Bill Stuntz point out, the expanded reach of the substantive criminal law and the increased severity of punishment have countered many of the libertarian effects of Warren Court procedural rulings.[92] Although these statutes do not speak directly to procedure, they have powerful effects on the work of police, prosecutors, and sentencing judges.

But other state statutes speak more directly to the procedural questions that the Warren Court opened for debate. For instance, when it comes to providing counsel for indigent defendants, some states fund attorneys for broader groups of defendants and some fund counsel for narrower groups.[93] Legislatures have created systems for delivering counsel that produce strikingly different qualities of representation that range from flat fee contracts to statewide public defender services.[94]

State legislatures appear to be more active in criminal justice matters today than they were in 1969.[95] They have not involved themselves more deeply in criminal justice merely in reaction to the United States Supreme Court; other trends have reinforced active legislatures. For several genera-

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N.M. CONST. art. II, § 13 (setting out circumstances under which court may allow bail).

92. *See* Darryl K. Brown, *The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411, 1413 (2002) (discussing use of substantive criminal law to undercut criminal procedure protections); *see also* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519-20 (2001) (discussing shifting of lawmaking and adjudication from courts to prosecutors that results from criminal law's expansion).

93. *Compare* FLA. R. CRIM. P. 3.111 (requiring counsel for indigent defendants in felony cases and misdemeanor cases in which defendant potentially faces imprisonment) *with* VT. STAT. ANN. tit. 13, §§ 5201, 5231 (1998) (requiring counsel for needy persons in any case in which fine of more than $1000 or imprisonment is possible).

94. *See* N.C. INDIGENT DEF. STUDY COMM'N, REPORT AND RECOMMENDATIONS 4-10 (2000) (on file with author) (describing mixed system of public defenders and appointed counsel and arguing that central coordination of system will improve cost effectiveness and create standards to improve quality of representation).

95. One brief measure of legislative activity might involve the sheer number of statutes enacted. In its 2001 session, the North Carolina General Assembly passed at least twenty-eight new criminal justice enactments. *See* 2001 N.C. ADV. LEGIS. SERV. PAMPHLETS 1-8 (listing 2001 legislative enactments).

tions, rules have proliferated in criminal justice. Many institutions have shifted power away from field-level officials such as police officers on the beat or sentencing judges at the trial level.[96] These rules come from state legislatures, state and federal appellate courts, sentencing commissions, and police department management. The Warren Court's ideals and endorsement of change, together with the Burger Court's shortened reach, made it easier for them.

IV. The Rehnquist Court Ices State Variety

Into this institutional cacophony, enter the Rehnquist Court. In many contexts, the Justices have spoken warmly about the genius of federalism and the "laboratories" in the states.[97] Some of the Court's holdings have shifted power from the federal government to the state governments,[98] but in the realm of criminal justice, the Court has done little to encourage independent state institutions. Instead, the Rehnquist Court's decisions sometimes have the effect of ice. They chill growth and movement in the states.

I claim no insight into the intent of the Justices; I speak only about the effects of their decisions. Furthermore, I do not claim that all the criminal justice opinions of the Rehnquist Court have the effect of ice. Some do not. The fact that some Supreme Court decisions operate like ice in the state courts while others do not presents the puzzle that will occupy the remainder of this Article. Do any features of the issues allow us to predict when the state courts will follow the lead of the Supreme Court rather than moving in a different direction?

The first icy decision that we consider is *Whren v. United States*.[99] In that case, police officers suspected that the driver and a passenger in a car possessed drugs; a traffic violation gavè the officers a pretext to check out

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96. *See generally* SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950-1990, at 145-56 (1993) (discussing movement to control discretion in criminal justice); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1521-22 (1981) (recognizing shift away from discretionary power in criminal justice system).

97. *See, e.g.*, Chandler v. Miller, 520 U.S. 305, 324 (1997) (Rehnquist, C.J., dissenting) (quoting Justice Brandeis on virtues of states serving as laboratories for social experiments); Arizona v. Evans, 514 U.S. 1, 8 (1995) (same).

98. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 607-19 (2000) (striking down federal criminal statute as exceeding congressional authority under Commerce Clause and Fourteenth Amendment); Alden v. Maine, 527 U.S. 706, 730-60 (1999) (declaring that Congress generally cannot create private rights of action against state governments); United States v. Lopez, 514 U.S. 549, 567-68 (1995) (striking down federal criminal statute as exceeding congressional authority under Commerce Clause).

99. 517 U.S. 806 (1996).

their hunch, and the subsequent search uncovered drugs.[100] The defendants asked the court to exclude the evidence because the officers had no reasonable suspicion of drug activity and would not have stopped their vehicle in the absence of their hunch about drugs.[101] The defendants claimed that the Fourth Amendment barred such pretextual stops.[102]

Michael Whren was not the first criminal defendant to make this argument. Most of the earlier cases involved the use of traffic stops for drug enforcement purposes, but a few arose in other settings.[103] Before the Supreme Court ever spoke to the issue, the state courts and the lower federal courts came down on both sides of the pretextual stop question. The state cases were about equally divided;[104] the federal cases ran about two-to-one in

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100. Whren v. United States, 517 U.S. 806, 808-09 (1996).

101. *Id.* at 809.

102. *Id.* at 810.

103. *See* State v. Blair, 691 S.W.2d 259, 262-64 (Mo. 1985) (en banc) (barring use of evidence when police in murder investigation gathered such evidence from pretextual arrest based on outstanding warrant for traffic offense), *overruled by* State v. Mease, 842 S.W.2d 98 (Mo. 1992) (en banc); Horne v. Commonwealth, 339 S.E.2d 186, 190 (Va. 1986) ("[I]f the arrest is bona fide, the police can make preplanned coordinated use of the arrest to give them the opportunity to ask questions about matters for which probable cause to arrest does not exist.").

104. At least eleven states recognized some potential constitutional limits on pretextual stops. *See* Brown v. State, 580 P.2d 1174, 1176 (Alaska 1978) (stating that arrest or traffic stop "should not be used as a pretext for a search"); Mings v. State, 884 S.W.2d 596, 602 (Ark. 1994) (allowing pretextual stop for minor infraction if reasonable officer would have made stop in absence of improper motive); Kehoe v. State, 521 So. 2d 1094, 1096-97 (Fla. 1988) (same), *abrogation recognized by* State v. Corvin, 677 So. 2d 947 (Fla. Dist. Ct. App. 1996); Tate v. State, 440 S.E.2d 646, 650 (Ga. 1994) (same); People v. Guerrieri, 551 N.E.2d 767, 770 (Ill. App. Ct. 1990) (same), *abrogation recognized by* People v. Thompson, 670 N.E.2d 1129 (Ill. App. Ct. 1996); State v. Izzo, 623 A.2d 1277, 1280 (Me. 1993) (same); State v. Van Ackeren, 495 N.W.2d 630, 644 (Neb. 1993) ("An arrest may not be used as a pretext to search for evidence."); Alejandre v. State, 903 P.2d 794, 796-97 (Nev. 1995) (allowing pretextual stop for minor infraction if reasonable officer would have made stop in absence of improper motive), *overruled by* Gama v. State, 920 P.2d 1010 (Nev. 1996); People v. Owens, 623 N.Y.S.2d 719, 721 (N.Y. Sup. Ct. 1995) ("[P]olice officers may not use a traffic infraction as a 'mere pretext' to investigate the defendant on an unrelated matter."); Limonja v. Commonwealth, 383 S.E.2d 476, 480 (Va. Ct. App. 1989) (allowing pretextual stop for minor infraction if reasonable officer would have made stop in absence of improper motive); State v. Chapin, 879 P.2d 300, 304-05 (Wash. Ct. App. 1994) (same).

At least nine states before *Whren* refused to overturn a stop or arrest based on an alleged pretext, as long as the officer had some justification for the stop or arrest. *See Ex parte* Scarbrough, 621 So. 2d 1006, 1010 (Ala. 1993) (using pure objective test, allowing no room for examination of officer's subjective intent); State v. Swanson, 838 P.2d 1340, 1343-44 (Ariz. 1992) (same); People v. King, 36 Cal. Rptr. 2d 365, 369 (Cal. Ct. App. 1995) (same); State v. Bolosan, 890 P.2d 673, 681 (Haw. 1995) (holding "that an investigative stop can be justified

favor of the Government's position.[105] Some courts in the state cases based their decisions explicitly on the federal constitution, while others were ambiguous about their source.[106]

The *Whren* majority ruled that the Fourth Amendment does not prevent pretextual stops.[107] Among the many unfortunate features of this decision, one of the most important was the decision's influence on state courts as they interpreted their own state constitutions. While some state courts before *Whren* had accepted the claim in limited settings,[108] they now fell in line behind the Supreme Court. In rapid succession, state courts ruled that their respective state constitutions, like the federal constitution, did not bar pretextual stops.[109] Moreover, the state decisions took on the categorical

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based on an objectively reasonable suspicion of any offense, provided that the offense for which reasonable suspicion exists is related to the offense articulated by the officer involved"); State v. Law, 769 P.2d 1141, 1144-45 (Idaho Ct. App. 1989) (using pure objective test, allowing no room for examination of officer's subjective intent); People v. Haney, 480 N.W.2d 322, 324 (Mich. Ct. App. 1992) (same); State v. Carter, 600 P.2d 873, 875 (Or. 1979) (en banc) (same); Garcia v. State, 827 S.W.2d 937, 944 (Tex. Crim. App. 1992) (same); State v. Lopez, 873 P.2d 1127, 1132 (Utah 1994) (adopting pure objective test as to stop, but limiting pursuant investigation and detention to "reasonable scope").

105. For federal appellate cases rejecting the defendant's pretext arguments, see United States v. Scopo, 19 F.3d 777, 784 (2d Cir. 1994); United States v. Ferguson, 8 F.3d 385, 391 (6th Cir. 1993) (en banc); United States v. Hassan El, 5 F.3d 726, 730 (4th Cir. 1993); United State v. Cummins, 920 F.2d 498, 500-01 (8th Cir. 1990); United States v. Trigg, 878 F.2d 1037, 1041 (7th Cir. 1989); United States v. Causey, 834 F.2d 1179, 1184-85 (5th Cir. 1987) (en banc), which all adopted a pure objective test but allowed room for examination of an officer's subjective intent. For the smaller group of federal cases accepting the defendant's argument, see United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988), *overruled by* United States v. Botera-Ospina, 71 F.3d 783 (10th Cir. 1995) (en banc); United States v. Cannon, 29 F.3d 472, 476 (9th Cir. 1994); United States v. Smith, 799 F.2d 704, 708 (11th Cir. 1986), which all adopted a test allowing pretextual stops for minor infractions if a reasonable officer would have made the stop in the absence of an improper motive.

106. *See, e.g.*, Mings v. State, 884 S.W.2d 596, 602 (Ark. 1994) (relying on federal constitution); State v. Izzo, 623 A.2d 1277, 1280-81 (Me. 1993) (same); Alejandre v. State, 903 P.2d 794, 796-97 (Nev. 1995) (interpreting federal constitution); People v. Owens, 623 N.Y.S.2d 719, 724 (N.Y. Sup. Ct. 1995) (relying on both state law and federal constitution).

107. *See* Whren v. United States, 517 U.S. 806, 819 (1996) ("[W]e think that there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure.").

108. *See supra* note 104 (listing states that accepted such claims).

109. *See* Holland v. State, 696 So. 2d 757, 759 (Fla. 1997) (construing limits under state constitution as coterminous with Fourth Amendment protections in pretextual stop context); Mitchell v. State, 745 N.E.2d 775, 787 (Ind. 2001) (interpreting state constitution to allow pretextual stops based on minor infractions); Commonwealth v. Murdough, 704 N.E.2d 1184, 1186 (Mass. 1999) (construing limits under state constitution as coterminous with Fourth Amendment protections in pretextual stop context); State v. Farabee, 22 P.3d 175, 181 (Mont.

quality of Justice Scalia's opinion in *Whren*. According to these state courts, their state constitutions left no room to consider the subjective intent of an officer. What was once a roughly equal split among the state cases has become a rout. Today, only one state – Washington – clearly interprets its state constitution to place limits on pretextual stops.[110]

These courts replaced their tentative early approaches with the Supreme Court's confident pronouncements. They now declare unworkable any rule that considered the intent or typical behavior of police officers. Remarkably, some states in which fact-finders were *already* applying the "would have" test now declared that it was *impossible* for a fact-finder to determine what an officer "would have" done in the absence of an underlying motive to investigate a hunch. They replaced a minimalist approach that decided pretext claims based on context (traffic stops and otherwise) with a search for abstract principles in United States Supreme Court opinions.[111] The effect of the *Whren* decision was to freeze the flowering of a nuanced case law in the state courts. It shifted their attention from the reality in the field to the consistency of legal precedent.

2000) (interpreting state constitution to allow pretextual stops based on minor infractions); State v. Bartholomew, 602 N.W.2d 510, 514 (Neb. 1999) (same); Gama v. State, 920 P.2d 1010, 1012-13 (Nev. 1996) (construing limits under state constitution as coterminous with Fourth Amendment protections in pretextual stop context); State v. McBreairty, 697 A.2d 495, 496-97 (N.H. 1997) (construing limits under state constitution as coterminous with Fourth Amendment protections in pretextual stop context); People v. Robinson, 767 N.E.2d 638, 642 (N.Y. 2001) (interpreting state constitution to allow pretextual stops based on minor infractions); State v. McClendon, 517 S.E.2d 128, 132 (N.C. 1999) (same); State v. Bjerke, 697 A.2d 1069, 1073 (R.I. 1997) (refusing to extend protections of state constitution further than those of Fourth Amendment); *cf.* Caldwell v. State, 780 A.2d 1037, 1046 n.18 (Del. 2001) (declining to decide limits on initial traffic stop under state constitution); People v. Rucker, 689 N.E.2d 1203, 1207-08 (Ill. App. Ct. 1998) (following *Whren* without reference to state constitution); State v. Predka, 555 N.W.2d 202, 205-06 (Iowa 1996) (same); State v. Hardyway, 958 P.2d 618, 622 (Kan. 1998) (same); Wilson v. Commonwealth, 37 S.W.3d 745, 749 (Ky. 2001) (same); State v. Waters, 780 So. 2d 1053, 1056-57 (La. 2001) (same); State v. Bolduc, 722 A.2d 44, 45 (Me. 1998) (same); Wilkes v. State, 774 A.2d 420, 430-31 (Md. 2001) (same); State v. Battleson, 567 N.W.2d 69, 71 (Minn. Ct. App. 1997) (same); Guerrero v. State, 746 So. 2d 940, 943 (Miss. Ct. App. 1999) (same); State v. Dickey, 706 A.2d 180, 186 (N.J. 1998) (same); City of Fargo v. Sivertson, 571 N.W.2d 137, 141 (N.D. 1997) (same); State *ex rel.* Dep't of Pub. Safety v. 1985 Chevrolet Blazer, 994 P.2d 1183, 1186 (Okla. Civ. App. 1999) (same); State v. Nelson, 519 S.E.2d 786, 790 (S.C. 1999) (same); State v. Trudeau, 683 A.2d 725, 728 n.3 (Vt. 1996) (same).

110. *See* State v. Ladson, 979 P.2d 833, 842-43 (Wash. 1999) (en banc) (rejecting *Whren* rationale and stating that state constitution requires investigation into totality of circumstances, including subjective intent of officer and objective reasonableness of officer's actions).

111. *Cf.* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3-23 (1999) (discussing "decisional minimalism").

But the story of *Whren* does not stop in the state courts. While *Whren* convinced state courts to abandon their efforts to regulate pretextual stops, it had no such effect on state legislatures. Legislators debated traffic stops based on the race of a driver – the crime of "driving while black." They passed laws that required police departments to keep more data about traffic stops; many other departments issued their own policies on data collection.[112] This public debate has created a political consensus that pretextual stops motivated by suspicions based on a driver's race are illegitimate. People disagree about how often these traffic stops occur, but these stops have become hard to defend in principle. Thus, when the Supreme Court delivers ice to the state courts, it will not necessarily cool the debate in the state legislatures.

A second example of Rehnquist Court ice comes from the *Miranda* context. In *Davis v. United States*,[113] the Court addressed the question of how officers must react during interrogation when the suspect makes an ambiguous statement that may (or may not) indicate a desire to speak to counsel or to remain silent.[114] Other courts had developed three possible responses, and two of the three attracted serious support in state courts and in lower federal courts.

First, the interrogators might stop the questioning entirely if the suspect makes an ambiguous statement that could indicate an invocation of rights. This option had slender support.[115] The second possibility was clearly the most popular: officers faced with such an ambiguous statement must stop their questions about the crime until they ask "clarifying questions" to determine whether the suspect truly was invoking *Miranda* rights. At least seven of the federal circuits followed this position, along with at least twenty states.[116] A third option found support in fewer than half a dozen jurisdic-

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112. *See* David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the "New Federalism" in Constitutional Criminal Procedure*, 3 U. PA. J. CONST. L. 367, 386-90 (2001) (listing state legislatures that introduced or passed bills and police departments that adopted policies).

113. 512 U.S. 452 (1994).

114. *See* Davis v. United States, 512 U.S. 452, 454 (1994) (stating issue).

115. *See* Maglio v. Jago, 580 F.2d 202, 205 (6th Cir. 1978) (interpreting ambiguous statement as invocation of right to counsel and requiring questioning to stop); People v. Superior Court, 542 P.2d 1390, 1394-95 (Cal. 1975) (en banc) (same), *superseded by* CAL. CONST. art. I, § 28; State v. Furlough, 797 S.W.2d 631, 639 (Tenn. Crim. App. 1990) (same).

116. *See* United States v. March, 999 F.2d 456, 461-62 (10th Cir. 1993) (en banc) (requiring clarifying questions after accused makes ambiguous statement regarding desire for attorney in order for interrogation to continue); United States v. Mendoza-Cecelia, 963 F.2d 1467, 1472 (11th Cir. 1992) (same), *abrogation recognized by* Coleman v. Singletary, 30 F.3d 1420 (11th Cir. 1994); United States v. D'Antoni, 856 F.2d 975, 980-81 (7th Cir. 1988) (same);

tions: officers in this situation could proceed with questions about the crime, and the questions stopped only when the suspect "unambiguously" invoked a *Miranda* right.[117]

In the end, the Supreme Court chose the third option,[118] even though the Government argued only in favor of the intermediate "clarifying questions" approach.[119] And within a short time, the holding in *Davis* transformed the landscape in state courts. The "continued questioning" approach under the federal constitution became the most common approach followed by state courts.[120] Like *Whren*, *Davis* effectively wiped out variety in the state courts.

United States v. Gotay, 844 F.2d 971, 975 (2d Cir. 1988) (same), *abrogation recognized by* Diaz v. Senkowski, 76 F.3d 61 (2d Cir. 1996); United States v. Fouche, 776 F.2d 1398, 1405 (9th Cir. 1985) (same), *overruling on other grounds recognized by* Brooks v. Cook, No. 92-56232, 1994 WL 232272 (9th Cir. May 31, 1994); United States v. Porter, 776 F.2d 370, 370 (1st Cir. 1985) (same); Nash v. Estelle, 597 F.2d 513, 517 (5th Cir. 1979) (en banc) (same), *abrogation recognized by* Soffar v. Cockrell, 300 F.3d 588 (5th Cir. 2002); Hampel v. State, 706 P.2d 1173, 1180 (Alaska Ct. App. 1985) (same); State v. Staatz, 768 P.2d 143, 146 (Ariz. 1988) (en banc) (same); People v. Benjamin, 732 P.2d 1167, 1171 (Colo. 1987) (same); State v. Anderson, 553 A.2d 589, 592-93 (Conn. 1989) (same); Crawford v. State, 580 A.2d 571, 576-77 (Del. 1990) (same); Ruffin v. United States, 524 A.2d 685, 700-02 (D.C. 1987) (same); Martinez v. State, 564 So. 2d 1071, 1073-74 (Fla. 1990) (same); Hall v. State, 336 S.E.2d 812, 816-18 (Ga. 1985) (same), *implied overruling recognized by* Tucker v. State, 491 S.E.2d 420 (Ga. Ct. App. 1997); Carter v. State, 702 P.2d 826, 832 (Idaho 1985) (same); Sleek v. State, 499 N.E.2d 751, 754-55 (Ind. 1986) (same); People v. Giuchici, 324 N.W.2d 593, 595 (Mich. Ct. App. 1982) (per curiam) (same); State v. Pilcher, 472 N.W.2d 327, 332 (Minn. 1991) (same); Kuykendall v. State, 585 So. 2d 773, 777 (Miss. 1991) (same); Sechrest v. State, 705 P.2d 626, 630 (Nev. 1985) (same), *overruled by* Harte v. State, 13 P.3d 420 (Nev. 2000); State v. Gerald, 549 A.2d 792, 831-32 (N.J. 1988) (same), *superseded on other grounds by* N.J. CONST. Art. I, ¶ 12; Russell v. State, 727 S.W.2d 573, 575-77 (Tex. Crim. App. 1987) (en banc) (same), *abrogated by* Sate v. Panetti, 891 S.W.2d 281 (Tex. Ct. App. 1994); State v. Sampson, 808 P.2d 1100, 1108-10 (Utah Ct. App. 1990) (same), *abrogation on other grounds recognized by* State v. Hilfiker, 868 P.2d 826 (Utah Ct. App. 1994); State v. Robtoy, 653 P.2d 284, 290 (Wash. 1982) (same); State v. Clawson, 270 S.E.2d 659, 670 (W. Va. 1980) (same), *implied overruling on other grounds recognized by* State v. Leep, 569 S.E.2d 133 (W. Va. 2002); Cheatham v. State, 719 P.2d 612, 618-19 (Wyo. 1986) (same).

117. *See* Dean v. Commonwealth, 844 S.W.2d 417, 420 (Ky. 1992) (requiring clear statement in order to invoke right to counsel); People v. Krueger, 412 N.E.2d 537, 540 (Ill. 1980) (interpreting ambiguous statement as insufficient to invoke right to counsel); Eaton v. Commonwealth, 397 S.E.2d 385, 394 (Va. 1990) (requiring clear statement in order to invoke right to counsel).

118. *See Davis*, 512 U.S. at 459 (requiring unambiguous statement to invoke right to counsel and stop interrogation).

119. Brief for the United States at 29-30, Davis v. United States, 512 U.S. 452 (1994) (No. 92-1949).

120. *See, e.g.*, State v. Eastlack, 883 P.2d 999, 1007 (Ariz. 1994) (en banc) (applying *Davis* rule); State v. Owen, 696 So. 2d 715, 718-19 (Fla. 1997) (adopting *Davis* approach under state constitution); People v. Cohen, 640 N.Y.S.2d 921, 933 (N.Y. App. Div. 1996) (applying

Although the state courts still had the authority to read their own constitutions to create or apply any number of rules in this setting, the "continuing questioning" approach dominated the others.

The Rehnquist Court's criminal justice cases contain more than ice. Sometimes the Court resolves doubts about the legality of law enforcement practice, but the state courts remain scattered on whether to allow it. They do not unite behind the Supreme Court.

Take, for instance, *Moran v. Burbine*,[121] another case with close kinship to *Miranda*. In that case, the police took Brian Burbine into custody for a burglary but also suspected his involvement in a recent murder.[122] Burbine had a pre-existing relationship with a lawyer from the public defender's office, and his sister notified the office about Burbine's arrest.[123] An attorney from that office called the police station to declare that she represented Burbine, but the police officer told the attorney that no one would question Burbine that night.[124] However, detectives began an interrogation an hour later.[125] Detectives issued the standard *Miranda* warnings but never informed Burbine that his attorney had called and was available for consultation.[126] Burbine later admitted to the murder.[127] The Supreme Court ruled that this interrogation did not violate the privilege against self-incrimination[128] or the right to counsel.[129]

Davis rule), *order rev'd in part by* 687 N.E.2d 1313 (N.Y. 1997); Dowthitt v. State, 931 S.W.2d 244, 257 (Tex. Crim. App. 1996) (same); Midkiff v. Commonwealth, 462 S.E.2d 112, 115 (Va. 1995) (same); State v. Ross, 552 N.W.2d 428, 431-33 (Wis. Ct. App. 1996) (adopting *Davis* as part of Wisconsin jurisprudence).

Only a few states have rejected *Davis* as a matter of state constitutional law and continue to require clarifying questions instead. What was once the dominant position now commands less of a following. *See* State v. Hoey, 881 P.2d 504, 524 (Haw. 1994) (requiring clarifying questions under state constitution); State v. Chew, 695 A.2d 1301, 1318 (N.J. 1997) (continuing to require clarifying questions in spite of *Davis*); *cf.* State v. Farley, 452 S.E.2d 50, 59 n.12 (W. Va. 1994) (distinguishing *Davis* in case dealing with right to silence).

121. 475 U.S. 412 (1986).

122. Moran v. Burbine, 475 U.S. 412, 416 (1986).

123. *Id.*

124. *Id.* at 417.

125. *Id.*

126. *Id.* at 417-18.

127. *Id.* at 418.

128. *See id.* at 422 ("Events occurring outside the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right.").

129. *See id.* at 429 (stating that right to counsel under Sixth Amendment does not attach prior to initiation of adversarial judicial proceedings).

This decision did not impress the state courts.[130] Although some state courts endorsed the *Burbine* holding for purposes of their own state constitution,[131] the larger group rejected the decision.[132] The state opinions sounded scandalized – even a bit self-righteous – that the Supreme Court would tolerate such intentional maneuvering to prevent an attorney from contacting a client.[133] Why the difference between *Whren* and *Davis* on the one hand and *Burbine* on the other? Is it possible to predict which Supreme Court rulings will attract a following among state courts while others remain uninfluential?

Certainly some characteristics of the courts of a particular state might indicate whether they will pursue an independent reading of the law. Are the judges in the state appointed or elected? Have the state courts reached independent rulings on constitutional criminal procedure in the past? Has commentary by academics, journalists, or influential judges called attention to a tradition of independence in the state? Knowledge on any of these issues might

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130. The unenthusiastic response to *Burbine* in some state courts is particularly interesting because the Attorneys General of thirty states filed *amicus curiae* briefs in the case arguing for an affirmance of the conviction. *See* Brief Amici Curiae Submitted by the States of California, et al. at 25, Moran v. Burbine, 475 U.S. 412 (1986) (No. 84-1485) ("We ask that the First Circuit's . . . decision protecting foolish suspects from themselves, be rejected.").

131. *See* Ajabu v. State, 693 N.E.2d 921, 931 (Ind. 1998) (reaching same conclusion under both *Burbine* and Indiana Constitution); Lodowski v. State, 513 A.2d 299, 306-08 (Md. 1986) (adopting *Burbine* approach as in accordance with state constitution); State v. Stephenson, 878 S.W.2d 530, 547 (Tenn. 1994) (same), *overruling on other grounds recognized by* State v. Saylor, No. E-2001-00604-CCA-R3-CD, 2002 WL 1482721 (Tenn. Crim. App. July 11, 2002); State v. Earls, 805 P.2d 211, 216-19 (Wash. 1991) (en banc) (same); State v. Hanson, 401 N.W.2d 771, 778 (Wis. 1987) (same); *cf.* Mitchell v. State, 816 S.W.2d 566, 568 (Ark. 1991) (following *Burbine* with no mention of state constitution); State v. Drayton, 361 S.E.2d 329, 334-35 (S.C. 1987) (same).

132. *See* People v. Houston, 724 P.2d 1166, 1173-75 (Cal. 1986) (rejecting *Burbine* under state constitution), *superseded by* CAL. CONST. art. I, § 28; State v. Stoddard, 537 A.2d 446, 451-52 (Conn. 1988) (same); Bryan v. State, 571 A.2d 170, 176-77 (Del. 1990) (same); Haliburton v. State, 514 So. 2d 1088, 1090 (Fla. 1987) (same); People v. McCauley, 645 N.E.2d 923, 930 (Ill. 1994) (same); West v. Commonwealth, 887 S.W.2d 338, 342 (Ky. 1994) (upholding pre-*Burbine* criminal rule providing access to counsel); Commonwealth v. Mavredakis, 725 N.E.2d 169, 176-79 (Mass. 2000) (rejecting *Burbine* under state constitution); People v. Bender, 551 N.W.2d 71, 78-80 (Mich. 1996) (same); State v. Reed, 627 A.2d 630, 645 (N.J. 1993) ("Prior to [*Burbine*], a majority of states followed a rule similar to the one we enunciate today, without any apparent diminishment in the effectiveness of their law-enforcement agencies."); State v. Isom, 761 P.2d 524, 527 (Or. 1988) (en banc) (reaffirming pre-*Burbine* state law cases). For a decision on this issue before *Burbine*, see State v. Luck, 472 N.E.2d 1097 (Ohio 1984).

133. *See* State v. Reed, 627 A.2d 630, 647 (N.J. 1993) ("[P]olice and prosecutorial behavior, in denying defendant access to counsel, did not well serve the investigative function. Such conduct does not promote public esteem for the law, and it substantially increases the possibility that a suspect's confession will be involuntary. At a minimum, such conduct must not be encouraged by the courts.").

help one foresee how the courts in a particular state would react to an opinion from the Rehnquist Court.

However, a prediction could also turn on features of the legal issue at stake, features that do not require specialized knowledge about a specific state court. An issue-specific prediction would allow one to anticipate how the state courts as a whole might respond to a case and yet not be able to guess what the courts in any given state might do. Let us turn, then, to the types of issues that might leave state courts more inclined to fall in line after a pronouncement from the Supreme Court.

The cases that we have considered – *Whren*, *Davis*, and *Burbine* – all share some features. In each case, the Supreme Court entered an area teeming with different proposals and approaches. Some state courts had spoken to the subject, however tentatively. The Supreme Court chose one of the less restrictive options and left state courts with a wide range of legitimate choices. What was it about the issues in *Whren* and *Davis* that pushed the state courts as a group to abandon their earlier experimentation and to endorse the Supreme Court's approach?

One potential explanation – and alas, a cynical one – is volume. Not many cases involve an attorney pursuing a client around the police station and the client not knowing about the attorney's presence. On the other hand, plenty of pretextual stops and ambiguous assertions of *Miranda* rights reach the courts. Stronger procedural rights in the *Burbine* setting would not undercut many investigations. State courts might assert their independence only when it is not terribly costly, when the distinctive state requirements will only matter in a few cases.

But my sunny disposition will not allow me to end on this cynical note, so here are a few other possible explanations. Perhaps state courts refuse to follow a Supreme Court ruling that favors law enforcement when the new case contradicts local experience in the area. When local police or prosecutors have encountered a problem regularly enough to generate a sizeable body of appellate decisions in the state courts, those courts might have confidence in their own judgment about what is fair and workable. Perhaps this theory does not explain *Davis* very well: state courts with significant experience nevertheless followed the United States Supreme Court's change of direction. But it might help explain the outcomes in other areas, such as the reluctance of some state courts to follow the Supreme Court's new doctrine on informant information as a basis for probable cause.[134]

A third possible explanation relates to the second. Although appellate courts might not have much experience with the particular issue involved, they

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134. *See supra* notes 30-33, 73-77 and accompanying text (discussing line of cases from *Aguilar v. Texas* through *Illinois v. Gates* and state court reaction to change in probable cause standard).

might by tradition or by law have extensive authority over an entire class of issues. Examples might include regulation of the bar and discovery practices. Thus, the fact that *Burbine* involved the interaction between the police and a defense attorney – rather than a transaction between the police and the suspect only – might have emboldened some state courts to step in and regulate the practices. The same dynamic might explain state court reactions to certain United States Supreme Court decisions that tolerated discovery misconduct by police or prosecutors.[135]

Finally, state court reaction to the Supreme Court's criminal justice decisions might amount to a critique of the Court's legal craftsmanship. When the Supreme Court drastically changes the trajectory from its earlier work, state courts could become more likely to ignore the new decision and to continue on their own path. Perhaps this response comes from a sense of craftsmanship, a feeling that the abruptness of the Supreme Court's decision is not very lawyerly.

V. Conclusion

The Warren Court's federalism legacy is ironically strong. Its holdings, and even more so its rhetoric, put change and the control of police discretion on the agenda for many players in criminal justice. The Warren Court did not

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135. *See supra* note 85 (citing *Roberts v. State*, 881 P.2d 1 (Nev. 1994)). For instance, a strong minority of state courts have refused to follow the Supreme Court's holding in *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988), which held that a court can reverse a conviction based on the prosecution's failure to preserve evidence potentially useful to the defense only if the defendant shows that the Government acted in bad faith. *See Ex parte* Gingo, 605 So. 2d 1237, 1241 (Ala. 1992) (disallowing prosecution's use of tests based on destroyed samples even though no bad faith was present); Thorne v. Dep't of Pub. Safety, 774 P.2d 1326, 1330 n.9 (Alaska 1989) (construing state constitution as not requiring bad faith); State v. Morales, 657 A.2d 585, 591-92 (Conn. 1995) (adopting more flexible approach under state constitution); Lolly v. State, 611 A.2d 956, 960 (Del. 1992) (refusing to supplant more flexible test in favor of *Youngblood* test); State v. Matafeo, 787 P.2d 671, 673 (Haw. 1990) (acknowledging that evidence in some cases may be so important that defense need not show bad faith); Commonwealth v. Woodward, 694 N.E.2d 1277, 1291-93 (Mass. 1998) (applying balancing test that does not necessarily require bad faith); Sheriff v. Warner, 926 P.2d 775, 778 (Nev. 1996) (applying test in which bad faith is only one alternative that defendant may show to obtain relief); State v. Smagula, 578 A.2d 1215, 1217-18 (N.H. 1990) (departing from strict reading of *Youngblood*); State v. Riggs, 838 P.2d 975, 977-79 (N.M. 1992) (applying balancing test that does not necessarily require bad faith); Commonwealth v. Deans, 610 A.2d 32, 34-36 (Pa. 1992) (distinguishing *Youngblood* in case in which Government attempted to use same evidence that defendant could not use because state lost it); State v. Cheeseboro, 552 S.E.2d 300, 307 (S.C. 2001) (treating bad faith as only one alternative that defendant may show to obtain relief); State v. Ferguson, 2 S.W.3d 912, 917 (Tenn. 1999) (employing multifactor test that does not necessarily require bad faith); State v. Delisle, 648 A.2d 632, 643 (Vt. 1994) (same); State v. Osakalumi, 461 S.E.2d 504, 512 (W. Va. 1995) (same).

set out to strengthen state courts and legislatures, but these state and local rule makers gained the most when the Court placed limits on the discretionary actors further down the line, such as police officers and trial judges.

State courts could always read their own constitutions differently than the federal constitution. State judges and legislators could always interpret the federal constitution for themselves. They could always reach issues that the Supreme Court was unlikely to reach, or read federal provisions in subtly different ways than federal judges might. But until the Warren Court planted its ideas, state courts or legislatures did not even consider acting in this way.

In the short run, the Warren Court made itself the center of attention in criminal justice. But as events have unfolded, state courts and other state institutions have forced their way back to the center of the action. Those who monitor change in criminal justice will overlook much of the action if they attend only to the Supreme Court's opinions. Today, the reactions of state actors to the Rehnquist Court matter at least as much as what the Court actually says. This fervent self-determination at the state level is the unlikely institutional legacy of the Warren Court in criminal justice.

NOTES