

### THE HIGH COURT CHANGES COURSE

By David M. O'Brien

For more than two decades "crime control" has had a strong pull on public opinion and passions. From Richard M. Nixon's 1968 presidential campaign promises of returning "law and order" to the country, to George Bush's 1988 "Willie Horton" campaign commercials, Republicans have attacked the Supreme Court and sounded the alarm that any Democratic appointee to it would "handcuff the police" in the war against crime. Whether such appeals to "crime control" continue to pay off remains to be seen. That is because after nine successive justices named by Republican presidents, the Court is more deferential to law enforcement than at any other time in over thirty years. Moreover, crime rates are stabilizing, and there are now more people in prison, serving longer sentences, than ever before.

#### The Individual (as Defendant) v. The Society

The impact on electoral politics of the symbolism of "crime control" remains as much a legacy of the Warren Court (1953-1969) as the "due process revolution" it forged in constitutional law. In the turbulent 1960s, when crime and arrests were on the up-swing, a majority on the Warren Court went against the political current. The Court boldly crafted "bright line" rulings for safeguarding the rights of the accused and ensuring equal access to justice for the poor. *Mapp v. Ohio* (1961) extended the Fourth Amendment's exclusionary rule—barring the use at trial of evidence illegally obtained by the police—to the states. *Gideon v. Wainwright* (1963) required providing counsel for indigent defendants in criminal cases. *Miranda v. Arizona* (1966) laid down guidelines for police interrogations of criminal suspects. These cases were indeed a major turning point in constitutional law and politics. In its first eight years (from 1953 to 1960) the Warren Court mustered a liberal result in civil liberties cases on average 55% of the time. Between 1961 and 1969, though, 76% ran towards safeguarding the rights of the accused.

Richard Nixon had only moderate success in turning the Court around with his four appointees. To be sure, the "times were a changin'" and the Warren Court "era" ended. In 1969, for instance, the proportion of all decisions in civil liberties cases going in the liberal direction dropped over 25 points from the preceeding term, to just 55%. By 1972, the percentage had fallen further to 46%. Only once again during the remaining years of the Burger Court did it again rise above 50%. The Nixon/Burger Court (1969-1986) generally charted a conservative course in criminal law. But instead of overturning controversial decisions

like *Mapp* and *Miranda*, it retrenched upon and fine-tuned established doctrines. More often than not, the Court was fragmented and pulled in different directions by either its most conservative justice, William E. Rehnquist, or liberal justice William J. Brennan. Its legacy is that of "a transitional Court"—drifting between what the Warren Court had accomplished and what the Rehnquist Court was to achieve.

#### Reagan Remakes the Court

What makes the Rehnquist Court so different are Ronald Reagan's strategic appointments. While Nixon made "crime control" and judgeships politically symbolic, Reagan achieved what his predecessors only promised. With Reagan's appointees a critical mass on the bench moved Rehnquist's way. The ninth consecutive nominee of a Republican president, George Bush's appointee, David H. Souter, further reinforced the solid majority on the Reagan/Rehnquist Court.

With each new appointment since 1970, the Court has moved incrementally in more conservative directions across a broad range of criminal justice issues. A comparison of the Warren, Burger, and Rehnquist Courts' record on state and federal criminal cases underscores the change. The Warren Court increasingly favored individual defendants over the government, but the Burger and Rehnquist Courts have usually gone the other way:

	% decided for the gov't	no. of cases	no. of terms
Warren Court	36	527	16
Burger Court	65	552	16 1/2
Rehnquist Court	67	154	4

There has been a profound shift from one jurisprudential view of the criminal justice system to another. At bottom, the Warren Court's rulings reflected a thoroughgoing "due process" jurisprudence. The Bill of Rights was strictly and expansively enforced, because the overriding value of "due process" is fairness, not truth. Formal procedural rules, such as those laid down in *Mapp*, *Gideon*, and *Miranda*, were deemed constitutionally required in order to (1) ensure a "fair state/individual balance" within the adversary system, (2) maintain defendants' presumption of innocence until proved guilty, and (3) safeguard against convicting the innocent. Such procedural fairness came at the cost of occasionally letting the guilty go free because "the constable blundered." That was deemed the price of freedom. By contrast, underlying many of the Rehnquist Court rulings are the values identified with "crime control." A premium is placed on efficient and effective law enforcement. And as a practical matter within law-enforcement bureaucracies, individuals are routinely presumed guilty as they move through the crimi-

nal process. They aren't suspects or arrested unless police suspect them of criminal activities, and they aren't charged and arraigned unless the odds of obtaining their convictions are good. Consequently, from the perspective of crime control, overturning convictions on appeal because of technical errors made by police, prosecutors, or judges seems wrong-headed.

### **The Rehnquist Court Redraws Policy**

Following the crime control perspective, the Rehnquist Court has given law enforcement a freer hand at virtually every stage in the system. Indeed, despite the *quantitative* similarities between the Burger and Rehnquist Courts in the Table, there is a growing *qualitative* difference between the two: The Rehnquist Court is markedly more conservative. The recent five-to-four decision in *Riverside County v. McLaughlin* (1991) is illustrative. Writing for the majority, Justice Sandra Day O'Connor reinterpreted a 1975 Burger Court ruling which required those arrested without a warrant to be "promptly" given a hearing to establish the probable cause for their arrest. O'Connor ruled that states may jail individuals who are arrested without a warrant and hold them for up to 48 hours without holding such hearings. That went too far for even Justice Antonin Scalia, who rarely breaks with the conservative majority. He sharply criticized the majority for abandoning established Fourth Amendment principles.

Other rulings have given police more flexibility in stopping and searching individuals, their belongings, and cars without a warrant or, in some cases, even "probable cause." *California v. Acevedo* (1991), for instance, overturned several Burger Court holdings that police must usually obtain a warrant before searching containers found inside cars. Precedents upholding individuals' Fourth Amendment-protected privacy interests were dismissed as "imped[ing] effective law enforcement."

To be sure, even the Warren Court acknowledged that sometimes exceptions must be made in enforcing the "probable cause" and warrant requirements of the Fourth Amendment. Police were thus allowed to "stop-and-frisk" individuals whom they had a "reasonable suspicion" of being engaged in criminal activity. But the Rehnquist Court has gone much further in a sweeping opinion in *California v. Hodari* (1991), holding that police no longer need even a "reasonable suspicion." The facts in *Hodari* are important because they are replayed daily in inner cities. Hodari D., a teenager, was standing with several other youths around a car parked in a high-crime area of Oakland, California. They spotted an unmarked police car approaching and started running. With police in chase, Hodari D. tossed away one small rock of crack cocaine, which police recovered after they had tackled him to the ground. The majority found nothing wrong

with the search, seizure, and use of evidence obtained against him. However, dissenting justices John Paul Stevens and Thurgood Marshall charged the Court with inviting "unlawful displays of force that will frighten countless innocent citizens into surrendering whatever privacy rights they may still have."

When applying the Fourth Amendment, the Rehnquist Court generally tends to rest with the amorphous "reasonableness clause," rather than enforcing (as did the Warren and Burger Court) the amendment's stringent requirements for a "warrant" and "probable cause." The Court thus finds very few "unreasonable searches and seizures" and has upheld warrantless aerial police searches of homes and businesses, warrantless searches of public employees' offices by their supervisors, warrantless administrative searches of "heavily regulated" businesses, and mandatory drug and alcohol testing of public employees.

A majority of the justices are impatient with the opportunities afforded defendants to appeal their convictions, and the lengthy delays that result. The Rehnquist Court has thus closed some avenues of appeal, cut back on the assistance of counsel, and circumscribed federal judicial supervision of criminal appeals from state courts. In particular, after long criticizing obstacles to the imposition of capital punishment and to carrying out executions, the Chief Justice now commands a solid majority which has sharply curtailed opportunities for appealing death penalties, and cleared the way for expedited executions of death-row inmates. The Rehnquist Court has signaled that it will no longer abide "frivolous" petitions from indigents.

On other matters of criminal procedure, the Rehnquist Court demonstrates a clear aversion to "bright line" rules which impinge on law-enforcement interests. It is prone to look at the "totality of the circumstances" when addressing claims of coerced confessions and the denial of an accused's rights under the Fifth and Sixth Amendments. While the Court is not likely to overturn *Miranda*, it has allowed numerous exceptions to it in upholding the use of confessions obtained by undercover agents, through police trickery, in the absence of a defendant's attorney, and when police fail to warn suspects of their prescribed rights. The unmistakable message of the Rehnquist Court is that police and prosecutors may get much tougher in cracking down on those suspected of criminal activity.

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