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Legislator Judges: The Warren Court and Justices' Use of State or International Policies in Criminal Procedure Cases

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The Warren Court went to great lengths to expand criminal defendants' rights, and in doing so it frequently relied on state majoritarian institutions' policies or international norms to accomplish its goals. The Court and justices were almost twice as likely to use state laws than international policies in their reasoning. The Court was also almost two-and-a-half times more likely to use state or international policies in its rationale when deciding in favor of the criminal defendant in relation to the state's interest.

by JOHN R. HERMANN

In *Trop v. Dulles* (1958), the U.S. Supreme Court decided that a native-born American's citizenship could not be revoked by a court-martial under the Eighth Amendment of the United States Constitution. To discern whether the court-martial was constitutional, the Court did not rely solely on the Constitution. Instead, the Court mused that, "The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[1] The Court used international laws to determine what the "evolving standards of decency" were: "The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime....The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Phillippines and Turkey, impose denationalization as a penalty for desertion."[2]

The Warren Court's use of state or international policies is not limited

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1. 356 U.S. 86, 101 (1958). While *the Trop* Court enunciated the words "evolving standards of decency," the Warren Court is just paraphrasing the Court in *Weems v. United States*, 217 U.S. 349 (1910), embracing the notion of a living Constitution.

2. *Id.* at 102-103.

to its Eighth Amendment jurisprudence.[3] The Warren Court also considered state or international policies in some of its most important criminal procedure cases. In *Mapp* v. *Ohio* (1961),[4] for example, the Supreme Court overturned *Wolf v. Colorado* (1949).[5] Both cases dealt with the Fourth Amendment's exclusionary rule, which holds that evidence obtained illegally by the police is inadmissible in a court of law. In overturning the *Wolf* decision that the exclusionary rule does not apply to the states, the *Mapp* Court reasoned that "while in 1949, prior to the *Wolf* case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have whole or partly adopted or adhered to the *Weeks* [exclusionary] rule."[6]

Additionally, in *Miranda v. Arizona* (1966),[7] the Court mandated that police notify suspects of their Fifth Amendment right from self-incrimination and Sixth Amendment right to counsel. A key part of the Court's reasoning in *Miranda* involved examining foreign countries' policies on the issue. In addition to exploring English common law, the Court found that "Scottish judicial decisions bar use in evidence of most confessions obtained through police interrogation."[8] The Court continued by stating that "in India [and Ceylon], confessions made to police not in the presence of a magistrate have been excluded."[9]

Clearly, the Warren Court relied on state or international laws in its decision making in these high-profile criminal procedure cases. Yet, the extent to which these same justices imported state or international standards into federal law in their path-breaking criminal jurisprudence remains unclear. This study seeks to answer two questions: First, how frequently did the Warren Court and justices rely on state or international laws when making decisions? And, second, was the Warren Court more likely to use state or international laws when ruling in favor of the individual over state interests?

The answers to these two questions are important because, while it is well chronicled that the Warren Court sided with the individual over the government in criminal procedure cases, little is known about how the Court justified its decisions. If the Court and individual justices were using state or even international laws, did they use them to gain support from the majoritarian branches of government, indicating the judiciary's inherent weakness in the American political system? Equally important, did the Court and justices use state or international laws in their reasoning based on the attitudinal or legal models of decision making? If so, then the Court and justices' use of state or international laws are simply post hoc reasoning and thus symbolic. The Court and justices may have needed to legitimize their preferred policy positions by citing state and international policies.

Legislator Judges and Their Legacy

Understanding the Warren Court and justices' use of state or international policies in their decisions is important for several reasons. First, the counter-majoritarian role that the Supreme Court can play in the American political system is one of the most prominent debates attracting Supreme Court scholars.[10] In *The Least Dangerous Branch*, Alexander Bickel explains "the root difficulty is that judicial review is a counter-majoritarian force in our system.... [W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of the representatives of the actual people of here and now; it exercises control, not in behalf of the prevailing majority, but against it."[11] If the Warren Court and justices considered state or international policies in their criminal procedure decisions, they may have reaffirmed the majority's wishes.

Several scholars have raised concerns that the justices of the Warren Court assumed policy-making powers that belong to the legislature and states, violating separation of powers and federalism, respectively.[12] Bernard Schwartz, for example, muses that "the Warren Court had to perform a transforming role, usually thought of as more appropriate to the legislator than the judge."[13] These same justices have also been accused of setting an independent moral agenda.[14] Again, if the Warren Court used a version of a majoritarian process (i.e., considering state/international laws) in a counter-majoritarian fashion (i.e., judicial review), it may have been affirming many of the electoral branch policies even when striking down laws as unconstitutional.

In addition, the Warren Court's criminal procedure decisions are worthy of analysis because they left an indelible imprint on virtually every citizen's rights. The Warren Court transformed the criminal justice system by favoring criminal

3. It is important to note that I am not implying that the Court is using the "evolving of standards of decency" doctrine here. This doctrine did not formally become precedent until *Gregg v. Georgia*, 428 U.S. 153 (1976). The "evolving standards of decency" doctrine, moreover, only applies to Eighth Amendment jurisprudence.

4. 367 U.S. 643 (1961).

5. 338 U.S. 25 (1949).

6. 367 U.S. 643, 651 (1961).

7. 384 U.S. 436 (1966).

8. *Id.* at 488.

9. *Id.* at 488-489.

10. Dahl, *Decision Making in a Democracy*, 16 J. PUB. L. 287 (1957); ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962); Jonathan D. Casper, *The Supreme Court & National Policy Making*, 70 A.P.S.R. 50 (1976); John B. Gates, *Partisan Realignment, Unconstitutional State Policy, and the United States Supreme Court*, 31 A.J.P.S. 259 (1987).

11. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16-17 (1962); but see, for example, Michael J. Klarman, *Rethinking The Civil Rights And Civil Liberties Revolution*, 82 VA. L. REV. 1 (1996); Barry Friedman, *The Birth of An Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

12. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT (1993); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

13. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 263 (1993).

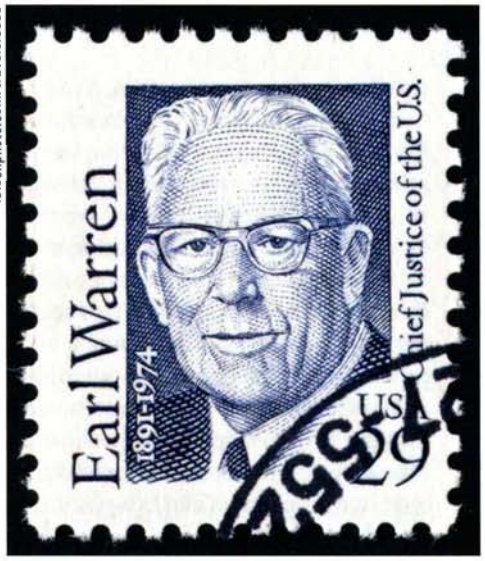
14. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); ROBERT BORK, THE TEMPTING OF AMERICA (1987); *but see* Corinna Barrett Lain, *Countermajoritarian Hero or Zero: Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361 (2004).

defendants' rights over the state's interests in fighting crime. Bernard Schwartz notes that the "[p]rotection of the rights of criminal defendants had become a primary concern of the Warren Court."[15] Moreover, the Warren Court ensured that several criminal procedure clauses in the Fourth, Fifth, Sixth, and Eighth Amendments that applied to the federal government also applied to the states. Some of the criminal procedure issues that were selectively applied to the states via the Fourteenth Amendment Due Process Clause during the Warren Court were: the Fourth Amendment's exclusionary rule in *Mapp v. Ohio* (1961),[16] the Sixth Amendment's right to counsel in *Gideon v. Wainwright* (1963),[17] the Fifth Amendment's right from self-incrimination in *Malloy v. Hogan* (1964),[18] the Sixth Amendment's right to confront a witness in *Pointer v. Texas* (1965),[19] the Fifth Amendment's right from self-incrimination, the Sixth Amendment's right to counsel in *Miranda v. Arizona* (1966),[20] the Sixth Amendment's right to a speedy trial in *Klopfer v. North Carolina* (1967),[21] the Sixth Amendment's right to a jury trial in *Duncan v. Louisiana* (1968),[22] and the Fifth Amendment's double jeopardy clause in *Benton v. Maryland* (1969).[23]

Finally, in *Trop* the Court appeared to start a controversy over the role of using state and international laws in criminal procedure cases. Almost 50 years later in *Roper v. Simmons* (2005), for example, the majority held that the death penalty could not be applied to juveniles under the Eighth Amendment. The Court held that a "majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment."[24] In terms of international law, the Court reasoned that "every country has ratified save the United States and Somalia...an express prohibition on capital punishment for crimes committed by juveniles under 18."[25] Some justices do not agree that international laws should be included as part of the Court's reasoning. In dissent in *Roper*, Associate Justice Antonin Scalia joined by Chief Justice William H. Rehnquist and Associate Justice Clarence Thomas harshly criticize the majority's decision by stating that "more fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."[26]

What We Already Know

Most of the literature involving the Court's use of state or international laws has focused on Eighth Amendment jurisprudence.[27] Additionally, legal scholars have devoted more attention to the Court's use of state



istockphoto.com/traveler1116

or international policies in its reasoning than political scientists.[28] There is a growing body of literature that is interested in how the Court applies state or international laws in other clauses of the Constitution in addition to the Eighth Amendment.[29] Steven Winter, for example, notes that the Court used the norms and mores of the states, municipalities, and police departments in its reasoning of when it is appropriate for peace officers to use deadly force in *Tennessee v. Garner* (1985).[30] Winter even suggests that the Court is a "popular oracle."[31] Similarly, Sheldon Bernard Lyke contends that the Court used the "evolving standards of decency" doctrine in its sodomy decision in *Lawrence v. Texas* (2003). Lyke provides evidence that "Lawrence can be read as part of the Court's Eighth Amendment evolving standards of decency jurisprudence."[32]

To date, Corina Barrett Lain has conducted the most comprehensive study of the Court's use of state laws in its reasoning in non-death penalty jurisprudence. Through rich description of individual cases, Lain demonstrates that the Court has considered state policies in its reasoning in many cases involving the Bill of Rights (including selective incorporation) and the Fourteenth Amendment Due Process and Equal Protection Clauses. Lain's central finding is that "the Supreme Court's explicitly majoritarian approach to Eighth Amendment protection is not all that different from what the Court does in other constitutional contexts. From due

15. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 281 (1993).
16. 367 U.S. 643.
17. 372 U.S. 355.
18. 378 U.S. 1.
19. 380 U.S. 400.
20. 384 U.S. 436.
21. 386 U.S. 213.
22. 391 U.S. 145.
23. 395 U.S. 784.
24. 543 U.S. 551, at 568.
25. *Id.* at 576.
26. *Id.* at 624.
27. William W. Berry, *Following the Yellow Brick Road of Evolving Standards of Decency: The Ironic Consequences of "Death-Is-Different Jurisprudence*, 28 PACE L. REV. 15 (2007); Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N. CAR. L. REV. 1089 (2006); Michael S. Moore, *Morality in Eighth Amendment Jurisprudence*, 31 HARV. J. PUB. L. & POL'Y 47 (2008); Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS J. 475 (2005); THOMAS WALKER, ELIGIBLE FOR EXECUTION: THE STORY OF THE DARYL ATKINS CASE (2009); *but see* Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365 (2009).
28. THOMAS WALKER, ELIGIBLE FOR EXECUTION: THE STORY OF THE DARYL ATKINS CASE (2009).
29. Steven L. Winter, *Tennessee v. Garner and the Democratic Practice of Judicial Review*, 14 NYU REV. L. & SOC. CHANGE 679 (1986); Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365 (2009); Sheldon Bernard Lyke, *Lawrence as an Eighth Amendment Case: Sodomy and the Evolving Standards of Decency*, 15 WM. & MARY J. WOMEN & L. 633 (2009).
30. Steven L. Winter, *Tennessee v. Garner and the Democratic Practice of Judicial Review*, 14 NYU REV. L. & SOC. CHANGE 679, 683-692 (1986).
31. *Id.* at 692.
32. Sheldon Bernard Lyke, *Lawrence as an Eighth Amendment Case: Sodomy and the Evolving Standardsof Decency*, 15 WM. & MARY J. WOMEN & L. 633, 635 (2009).

process to equal protection, from the First Amendment to the Fourth and Sixth, the Supreme Court routinely—and explicitly—determines constitutional protection based on whether a majoritarian of states agree with it."[33] To explain the prevalence of the Court's use of state laws in its reasoning, she suggests "the Court's state polling exercises are not so different from what the rest of us do when making difficult decisions: we look to others for guidance."[34] Lain concludes that "the Supreme Court [is] living up to its legacy as the 'least dangerous branch.'"[35]

While extant literature provides a theoretical and descriptive framework for the Court's use of state or international laws in its reasoning, the issue has never been empirically tested. This study seeks to empirically examine this phenomenon in the context of the Warren Court's criminal procedure cases.

Data and Methods

I started with the Supreme Court Database (hosted by Washington University, St. Louis) to find the universe of cases involving criminal procedure decided by the Supreme Court between *Trop v. Dulles, Secretary of State* (1958), and the conclusion of the Warren Court. I began with the *Trop* decision because it was here that the Court openly accepted the use of a living Constitution in justifying its decision, providing for the possibility of citing state or international laws in future decisions. Since *Trop* dealt with a criminal issue, I focused the analysis on criminal procedure cases during this era. Cases were selected that involved a criminal procedure issue and a constitutional issue when the Court issued a full opinion. For inclusion in this study, the Court and justices must expressly state that the case involves a Fourth, Fifth (excluding the Takings Clause), Sixth, and/or Eighth Amendment issue in the decision.[36] The study included cases examining both federal and state laws.[37] The total number of cases that met these criteria was 109.

The 109 criminal court opinions were read to determine if the cases included a discussion of state or international laws in its reasoning, including majority, concurring, and dissenting opinions. The Court's decisions that focused only on state or international laws of the distant past were excluded (e.g., colonial period, laws at the Constitutional Convention, or international policies during that era). Instead, the focus of this study is on justices' use of modern examples of or contemporaneous trends in state or international laws as part of their reasoning. At the state level, the analysis included city ordinances, state laws, and police actions that were squarely part of the constitutional issue. Excluded from analysis were state court decisions because the Supreme Court uses state court precedent frequently in its reasoning. At the international level, the study included decisions that analyzed international law as a part of the analysis, including court decisions. By examining any type of foreign law, the Warren Court and the individual justices were showing that they were interested in international norms and mores when crafting their decisions.

Three examples where the justices use state or international laws in their reasoning will clarify my coding methodology. First, in *Ferguson v. Georgia* (1961),[38] the Court considered the constitutionality of a state law in which a defense attorney was prohibited from asking a defendant to testify at his own trial under the Sixth Amendment's right to counsel. In overturning the law, the Court held that "the State of Georgia is the only State—indeed, apparently the only jurisdiction in the common-law world—to retain the common-law rule that a person charged with a criminal offense is incompetent to testify under oath in his own behalf at his trial."[39] The Court gave a myriad of examples of each state and the many nations that forbade this practice.

Second, Associate Justice Hugo Black's dissent in *Abbate v. United States* (1959)[40] considered international laws that involve the prohibition of the Fifth Amendment's double jeopardy clause. In his dissent, Black emphasized that "it has been recognized that most free countries have accepted a prior conviction elsewhere as a bar to a second trial in their jurisdiction."[41] Third, in *Duncan v. Louisiana* (1968),[42] the Court considered state laws when determining whether the Sixth Amendment's right to a jury trial should be applied to the states via the Fourteenth Amendment Due Process Clause. According to the Court, "indeed, there appear to be only two instances, aside from the Louisiana scheme, in which a State denies jury trial for a crime punishable by imprisonment for longer than six months."[43]

In terms of operationalizing the variables, I used the following coding scheme. If there is a presence of state or international law in the reasoning, the variable *using state or international* was coded 1; otherwise, the variable was coded 0. If the Court ruled in favor of the individual over the state, a variable was coded 1; otherwise, it was 0. The justices were excluded from the analysis due to their presence in too small a number of cases.

This study includes the Court and justices' discussion of state laws only, international laws only, and both.[44] The study also examines how frequently the Court decided to rule in favor of the individual over the state's position. To discern whether

33. Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. Rev. 365, 369 (2009).
34. *Id.* at 405.
35. *Id.* at 406.
36. Cases that involved only a Fourteenth Amendment Due Process Clause issue were excluded because some of the cases' definitions were nebulous in terms of defining the exact criminal procedure right in the Supreme Court database.
37. I use the word "law" in this analysis to include both legislative and police action. The Warren Court used both legislative acts and police actions in its decisions.
38. 365 U.S. 570.
39. *Id.* at 570.
40. 359 U.S. 187.
41. *Id.* at 203.
42. 391 U.S. 145.
43. *Id.* at 162.
44. This study recognizes that state and international laws are relatively different. This is why the study examines each individually. Nonetheless, both state and international laws serve similar purposes to the Court and individual justices in their reasoning. They both use norms and mores of different governments—whether at the state or international level.

TABLE 1. Frequency in Which the Warren Court and Individual Justices Use State or International Laws in Their Reasoning

Cases, Court, and Justices	Number of Cases (total N)	Percent
All Cases (state or international policies), including majority, concurring, and dissenting decisions	26 (109)	24%
All Cases (state policies only), including majority, concurring, and dissenting decisions	21 (109)	19%
All Cases (international policies only), including majority, concurring, and dissenting decisions	11 (109)	10%
Majority Decisions	20 (109)	18%
Concurring Opinions	7 (71)	10%
Dissenting Opinions	12 (87)	14%
Black	15 (108)	14%
Burton	1 (5)	20%
Brennan	19 (108)	18%
Clark	14 (72)	19%
Douglas	20 (109)	18%
Frankfurter	4 (22)	18%
Fortas	7 (47)	15%
Goldberg	2 (25)	8%
Harlan	15 (109)	14%
Marshall	5 (28)	18%
Stewart	17 (104)	16%
Warren	18 (107)	17%
White	10 (81)	12%
Whittaker	4 (23)	17%

there was a relationship between the Warren Court using state or international laws as part of its reasoning and ruling in favor of the individual, cross tabs and a one-tailed t-test was used. A t-test measures whether the means of two groups are statistically different from each other. It also discerns the likelihood the relationship between two variables occurred by chance.

Results

As evidenced in Table 1, the majority, concurring, and/or dissenting opinions mentioned state or international policies almost a quarter (24%) of the time in the 109 criminal procedure cases decided between *Trop* v. *Dulles* and the conclusion of the Warren Court. The justices were almost twice as likely to use state laws (19%) than international laws (10%) in their reasoning. The majority (18%) was more likely to use state and/or international policies in its reasoning in comparison to the concurring (10%) and dissenting opinions (14%).

Equally interesting, Table 1 also reveals that every justice that served during the time period and included in this study was willing to use state or international policies in his reasoning. In their opinions, not one justice expressed any opposition to the Court's use of state or international laws in its reasoning. The justices' discussion of state or international policies ranged between a low of eight percent (Associate Justice Arthur Goldberg) to a high of 20 percent (Associate Justice Harold Burton). With the exception of Associate Justice Goldberg (8%), every justice used state or international policies in at least 12 percent of the cases he authored or joined.

As Table 2 shows, the Court was almost two-and-a-half times more likely to use state or international laws to support its reasoning when they favored the individual over the state. The Court examined states or international policies in 17 of the 76 (22%) cases where it supported the individual. In stark contrast, the Court only discussed state or international policies in three of the 33 (9%) of the cases when it decided to side with the state's position.

Based on the frequencies, it is reasonable to conclude that the Court and justices were more comfortable justifying their decisions with state laws than international laws, perhaps because state policies have to conform with the United States Constitution. The relationship between the Court using state or international policies in its rationale and siding with the individual in criminal procedure cases was not likely to occur by chance. Using a one-tailed t-test, this study finds that there is only about an eight percent probability that this relationship took place because of chance. This finding is even more impressive given the low number of cases (109) under examination in this study.

While these data do not reveal with precision the reason why the Court is more inclined to use state or international policies when ruling in favor of the individual over the state, it is plausible to speculate that this propensity is related to the Court's lack of enforcement powers. This proposition is echoed in *Federalist 78* when Alexander Hamilton states that the Court "may have truly be said to have neither FORCE nor WILL but merely judgment....It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power, that it can never attack with success either of the other two; and that all possible is requisite to enable it to defend itself against their attacks."[45] Additionally,

45. ALEXANDER HAMILTON ET AL., THE FEDERALIST PAPERS 465-466 (1961).

it is likely that the justices strategically use state or international laws to justify their decisions in a post hoc way to aid in justifying their preferred policy preferences or in setting precedent. By using state or international policies when ruling in favor of the individual over the state interest, the Court frequently justifies its decisions to override the government by taking into consideration the policies of other elected branches and the norms of the international community.

TABLE 2. Relationship Between the Majority Opinion Using State and/or International Policies & Ruling for the Individual Over the State

Court	Rules in Favor of the State policy	Rules in Favor of the Individual	Total
Uses State/International Policies	3	17	20
Does Not Use State/International Policies	30	59	89
Total	33	76	109

t-test: 0.08 (one-tailed)

Conclusion

In the 109 criminal procedure cases decided between the Court's decision in *Trop v. Dulles* and the conclusion of the Warren Court, 24 percent of the majority, concurring, or dissenting opinions used state or international laws as part of their reasoning. Every justice used state or international policies in his reasoning at some point in the time period. The Court was almost two-and-a-half times more likely to use state or international policies in its rationale when deciding in favor of the criminal defendant against the state's interest.

While the Warren Court went to great lengths to expand criminal defendants' rights based upon its conception of "the American scheme of justice,"[46] it frequently relied on majoritarian institutions' policies or international norms to accomplish its goals. Such behavior indicates that the Warren Court was concerned with support of its decisions from other branches of government. More importantly, we can conclude that the Warren Court's criminal procedure decisions may not be as counter-majoritarian as once thought. This finding is confirmed by Lain's (2004)[47] case study of the Warren Court's criminal procedure decisions in *Mapp v. Ohio* (1961),[48] *Gideon v. Wainwright* (1963),[49] *Miranda v. Arizona* (1966),[50] *Katz v. United States* (1967),[51] and *Terry v. Ohio* (1968).[52] Lain concludes that "we see the Court as impervious to majoritarian pressures when, in fact, nothing could be further from the truth."[53] My findings support Lain's conclusions—at least in terms of the Court justifying its decisions based on majoritarian policies. As Dahl said so long ago, the Court tends to follow the election returns.[54]

Gerald N. Rosenberg contends that courts do not have the ability to bring about independent social change without broad extra-legal forces supporting its decisions.[55] As evidenced by my findings, the Warren Court appears to justify some of its criminal procedure decisions by trends in state laws, supporting the idea that extra-legal forces were already in the works.

Even though this study offers evidence that the Warren Court's decisions used state or international policies in their reasoning, we cannot assert with certainty that the Court's concern for majoritarian policies was the sole determinant of its reasoning. The justices likely relied on legal precedent and their own policy preferences when reaching these decisions. This study does demonstrate, however, that the justices clearly relied on state or international policies to justify a large swath of their criminal rights revolution. The Court recognized it needed another branch of government to enforce its position, and the use of state or international laws in its reasoning was a simple strategy to garner majoritarian decisions.

Given the limited scope of this study—the justices' use of state or international policies in the criminal procedure cases decided by the Warren Court—future research should focus on whether the Burger, Rehnquist, and/or Roberts Courts engage in similar behavior. In addition to criminal procedure cases, future research also is needed in other issue areas. For example, do the Supreme Court and its justices also use state or international policies in First Amendment, Equal Protection Clause, and privacy doctrine cases? In other words, we need to investigate if the use of majoritarian decisions is a common method of softening the rejection or invalidation of a state or federal law. ★

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46. 391 U.S. 145.
47. Corinna Barrett Lain, *Countermajoritarian Hero or Zero: Rethinking The Warren Court's Role In The Criminal Procedure Revolution*, 152 U. PA. L. REV. 365 (2004).
48. 367 U.S. 643.
49. 372 U.S. 355.
50. 384 U.S. 436.
51. 389 U.S. 347.
52. 392 U.S. 1.
53. Corinna Barrett Lain, *Countermajoritarian Hero or Zero: Rethinking The Warren Court's Role In The Criminal Procedure Revolution*, 152 U. PA. L. REV. 365, 452 (2004).
54. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J. PUB. L. 279 (1957).
55. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).