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Earl Warren: Law Enforcement Leads to Defendants' Rights

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Earl Warren
Law enforcement leads to defendants’ rights

The following is a condensed version of a talk Yale Kamisar, Clarence Darrow Distinguished University Professor Emeritus of Law at the University of Michigan, and now a member of the University of San Diego law faculty, gave last year at a two-day conference on "Earl Warren and the Warren Court: A Fifty Year Retrospect," held at the University of California (Berkeley).

A paper based on Kamisar’s talk, along with other papers that grew out of the conference on Warren, will be published by the Institute of Governmental Studies at UC Berkeley under the editorship of Harry N. Scheiber, director of the Earl Warren Legal Institute at UC-Berkeley. An article based on Kamisar’s talk will also appear in a forthcoming issue of the Ohio State Journal of Criminal Law, part of a symposium on “The Warren Court Criminal Justice Revolution: Reflections a Generation Later," edited by Professor George C. Thomas III of Rutgers University Law School (Newark).

By Yale Kamisar

Before becoming governor of California, Earl Warren spent 22 years in law enforcement: five as a deputy district attorney (1920-25), thirteen as head of the Alameda County district attorney’s office (1925-38); and four as state attorney general (1939-42). My thesis is that Warren’s many years in law enforcement significantly affected his work as Chief Justice of the United States. Among the cases I think support my thesis are the following:

• *Hoffa v. United States* (1966): This Supreme Court case affirmed the conviction of Jimmy Hoffa for trying to bribe members of a jury during the so-called Test Fleet case. The government had relied heavily on the testimony of an "informant," a union official named Edward Partin.

Chief Justice Warren was the lone dissenter. He pointed out that Partin had been languishing in jail, under indictment for such state and federal crimes as kidnapping, manslaughter, and embezzlement, when he contacted federal authorities and told them he would be willing to become an informer against Hoffa, who was about to be tried in the Test Fleet case. Warren noted, too, that in the years since Partin volunteered to be an informer against Hoffa, he had not been prosecuted for any of the serious crimes for which he had been jailed.

Warren argued that “the affront to the quality and fairness of federal law enforcement which this case presents” was sufficient for the Court to overturn Hoffa’s conviction in the exercise of its supervisory powers over federal criminal justice. No conviction should be allowed to stand, insisted Warren, when based heavily on the testimony of a person with Partin’s background and incentives to lie. “And that is exactly the quicksand upon which these convictions rest.”

In Warren’s very first case as a deputy district attorney he assisted a senior prosecutor in the trial of a union official for “criminal syndicalism.” Warren felt uneasy about the use of the three informers in the case; all three had unsavory backgrounds. Years later, Warren called the three informers “repulsive.” He thought that convictions based on the testimony of such persons were likely to result in miscarriages of justice.

• *Mapp v. Ohio* (1961): Dolly Mapp had been convicted of possessing obscene materials. At first, everybody thought the issue presented was not whether *Wolf v. Colorado* (1949) (the case that permitted state courts to admit illegally seized evidence) should be overruled, but whether the Ohio obscenity-possession law was unconstitutionally vague. The vote in conference was to overturn Miss Mapp’s conviction on First Amendment grounds.

After the conference, however, four justices (including Warren) changed their minds and decided to overrule *Wolf* if they could get a "fifth vote." The best bet was Justice Hugo Black. Warren was one of the justices who visited Black in his chambers and helped persuade him to come aboard.

Ironically, in 1942 then State Attorney General Warren and his staff had convinced the California Supreme Court to reaffirm its position that illegally seized evidence could be used in a criminal prosecution. However, shortly after he became Chief Justice of the United States, the California Supreme Court, in a famous case called *People v. Cahan* (1955), had overruled that precedent and adopted the exclusionary rule. By 1955, it had become apparent to Roger Traynor, author of the *Cahan* opinion, that "without fear of criminal punishment or other discipline," California police "casually regard illegal searches and seizures as nothing more than the performance of their ordinary duties for which the city employs and pays them."

As district attorney and state attorney general, Warren had kept in close touch with the California police. Warren must have known that Traynor’s criticism of the police was well-founded. Moreover, Warren knew Traynor personally and on the basis of his own dealings with Traynor, greatly respected him. (When Warren had been state attorney general, then-Professor Traynor had been brought into Warren’s office to organize a new tax division and to take charge of all tax litigation.)

If Justice Traynor’s scholarly, yet powerful, opinion in the *Cahan* case was not sufficient reason to vote for imposing the
exclusionary rule on the states as a matter of federal constitutional law, the kind of criticism the Cahan decision had been receiving from California law enforcement officials probably was. The critics had reacted to Cahan as if the guarantee against unreasonable search and seizure had just been written.

- **Gideon v. Wainwright** (1963): Warren had long been a strong proponent of an indigent defendant's right to appointed counsel. When the Alameda County Charter was written in 1927, it was District Attorney Warren who had insisted that it provide for a public defender. Because the newly appointed public defender had no investigators on his staff, whenever the defender thought one of his clients was innocent, Warren would share all the facts in his files with him. Warren felt so strongly about the right to counsel that he took an active role in founding the Bay Area Legal Aid Society in order to provide lawyers in civil cases for those who could not afford them.

Prior to Gideon, the rule that governed state criminal prosecutions was the Betts rule (named after the 1942 case) or the "special circumstances" rule. Under this rule, an indigent person charged with a serious non-capital case (even armed robbery or arson) was not entitled to the appointment of counsel under the federal constitution absent "special circumstances," e.g., he was illiterate or mentally disabled or the case was unusually complicated.

According to one of his biographers, Warren had instructed his clerks to look for a right-to-counsel case that would serve as a vehicle for abolishing the Betts' "special circumstances" rule. When the Court found the case — Clarence Gideon’s penciled in forma pauperis petition — Warren must have been sorely tempted to assign the case to himself. But Justice Black had written a powerful dissent 20 years earlier in Betts, the case Gideon was to overrule. So the Chief Justice let Black convert his old dissent into the opinion of the Court.

- **Miranda v. Arizona** (1966): In the course of throwing out a coerced confession in Spano v. New York (1959), Chief Justice Warren observed that "the abhorrence of the use of involuntary confessions" turns in part on "the deep-rooted feeling that the police must obey the law while enforcing the law." According to his former deputies, District Attorney Warren used to say exactly the same thing to them all the time. His long-time chief investigator recalled that his boss often told him: "Be fair to everyone, even if they are breaking the law. Intelligence and proper handling can get confessions quicker than force."

District Attorney Warren's office had one of the highest conviction rates in the state, yet none of the convictions he or his deputies obtained were ever reversed on appeal. Warren's deputy district attorneys were so hard-working and so determined to avoid any trickiness or unfairness in dealing with suspects or defendants that they earned a reputation around the courthouse as the "Boy Scouts."

J. Frank Coakley, a former Warren deputy district attorney, and Warren's successor as head of the Alameda County district attorney in office, has suggested that the seeds of Warren's Miranda opinion may have been his own understanding of the decisive imbalance between a prepared, indefatigable interrogator and an isolated suspect. Warren's own experience as a prosecutor and an interrogator may have made him keenly aware of the opportunities for coercion in the custodial setting.

As district attorney of Alameda County, the third largest county in the state, Warren was constantly trying to "professionalize" the police as well as his own deputies. After many unsuccessful attempts, he finally persuaded several California colleges to offer criminology courses and other police training programs. As Chief Justice, Warren was confident that professional police could satisfy the demanding standards the Supreme Court was requiring. Despite his critics' claims that he and his colleagues were "handcuffing the police," Warren viewed the Court's rulings, such as Miranda, as enlightening the police and encouraging them to work harder and to prepare their cases more thoroughly. As G. Edward White, one of Warren's biographers (and one of his former law clerks as well) put it, Warren believed that he and his colleagues were not hampering law enforcement but "enabling" it.

Yale Kamisar, the Clarence Darrow Distinguished University Professor of Law Emeritus at the Law School and a member of the San Diego University law faculty, is a nationally recognized authority on constitutional law and criminal procedure. A graduate of New York University and Columbia Law School, he has written extensively on criminal law, the administration of criminal justice, and the "politics of crime." He is author of Police Interrogation and Confessions: Essays in Law and Policy and co-author of Criminal Justice in Our Time, and The Supreme Court: Trends and Developments (five annual volumes). He wrote the chapter on constitutional criminal procedure for The Burger Court: The Counter-Revolution That Wasn't, The Burger Years, and The Warren Court: A Retrospective. He is also co-author of two widely used casebooks: Modern Criminal Procedure: Cases, Comments & Questions, all 10 editions, and Constitutional Law: Cases, Comments & Questions, all nine editions. In addition, he has written numerous articles on police interrogation and confessions; right to counsel; search and seizure; and euthanasia and assisted suicide, and is widely quoted on these subjects. Professor Kamisar taught at the University of Minnesota Law School from 1957-64 and joined the University of Michigan law faculty in 1965. He took emeritus status in 2004.