Earl Warren, Ernesto Miranda, and Terrorism

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To the memory of my brother-in-law, Yossi Beinart (1956–2017), whose extraordinary intellect was only matched by his basic decency, goodness, and humanity.

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Preface

You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand the rights I have just read to you? With these rights in mind, do you wish to speak to me?

This book asks one question.

Were Earl Warren alive, would he apply the Miranda warning established in *Miranda v. Arizona* to suspected terrorists? The answer is "yes."

I believe, based on interviews I conducted with those close to Warren, it would be a resounding yes. The Miranda decision was *his* decision. I am convinced that the essence of the holding—protecting the rights of the interrogated suspect—was of crucial importance to Warren. While other Supreme Court decisions in the years Warren was Chief Justice (1953–1969) dramatically shaped America, there is something fundamentally profound in the Miranda holding that sets it apart.

The weight Warren attached to the Miranda was not "by chance"; it reflected, I believe, his understanding of the

consequences of police misconduct and governmental overreach. Both caused egregious harm to innocent individuals. Warren knew this firsthand: after all, he had served as District Attorney, Attorney General, and Governor. Perhaps no Chief Justice has come to this exalted position better steeped in, and more deeply versed, in how fragile individual liberties are in the face of government power.

Warren knew this firsthand because he had exercised power during the course of an extraordinary political career. The levers of power had been in his hands; his decisions impacted the lives of many. Sometimes, as we shall come to see, those decisions were unfair, unjustified, and wrong. Those decisions are, I believe, essential to understanding the importance he attached to *Miranda*.

The question we are posing addresses one of the most urgent matters America faces today: terrorism. This issue takes on greater meaning when terms, often ill-defined, are casually bandied about by politicians, thought leaders, and pundits. Terms and words have meaning, whether intended or not. Phrases, coming from the political right and left, serve to undermine, castigate, and possibly endanger individuals and groups.

The importance of the Miranda decision, and the rights it guaranteed, cannot be sufficiently emphasized. Its relevance is particularly acute when individual rights are at their most vulnerable. As these words are written in February 2017, there is justified concern regarding the rights of the vulnerable members of society: the very class Warren

sought to protect when the Court announced the *Miranda* decision on June 13, 1966.

When Warren was appointed to the Supreme Court by President Dwight Eisenhower in 1953, he was sixty-two years old. His world was dominated by white men. Warren's wife, Nina, was a traditional homemaker; Warren expected Nina to focus on their six children.[1] Earl Warren was ambitious, tough, self-effacing and modest, fully aware of his strengths and weaknesses. When appointed to the Supreme Court, he quickly realized that unlike some of his new colleagues, he was not a brilliant jurist. He was, however, a master politician who was able to sway, convince, and cajole. That quickly became apparent when shortly after becoming Chief Justice, Warren crafted a unanimous decision in *Brown v. Board of Education*.[2] Those skills came naturally to Warren; they enabled him to achieve unparalleled success as a politician in California before his appointment to the Supreme Court.

A chief justice is "first among equals"; while he cast only one vote, there is little doubt Earl Warren was, truly, the Chief Justice of the Warren Court. His impact, imprint, and influence are undeniable; the critical decisions discussed in this book reflect his influence. That is not to diminish or disrespect the abilities and contribution of some of his fellow Justices. It is, however, intended to convey that Warren

1. In his memoir, Warren refers to his wife in the formal, Mrs. Warren.
2. 347 U.S. 483, 74 S. Ct. 686 (1954).

powerfully used the position of Chief Justice. By all accounts, he was respectful, perhaps deferential, in the early years of his term, oftentimes relying on the counsel of Justice Hugo Black. However, over the course of time, once confident in and of his abilities, the Court truly became the Warren Court.

As explained in the pages ahead, I served for twenty years in the Israel Defense Forces, Judge Advocate General's Corps. Different postings provided me the opportunity to gain a deep appreciation for dilemmas inherent to interrogations and the complicated relationship between suspects and interrogators. Those experiences, primarily in the West Bank and Gaza Strip, are important to my understanding of the challenges and complexities when interrogators and suspects share the same space.

Physicality, tangible and intangible alike, is an essential component of the interrogation setting. For the uninitiated, a visit to a detention interrogation facility is invariably uncomfortable. The discomfort is physical: it is hot, loud, and unnerving. However, the discomfort extends beyond the physical. The reality of the setting is stark: the state, in accordance with relevant laws, is denying basic freedoms to those it suspects committed a crime.

There can be no mistaking the reality of the circumstances: the detained individual has been, or will be, interrogated by a professional interrogator. How the interrogation will be conducted is dependent on the interrogator. The detainee knows this. The interrogator knows that

the detainee knows this. In democracies, there are limits on the interrogator. How the interrogator interprets and implements these limits is a matter of professional judgment and discretion. Warren sought to establish clear limits and boundaries. That is the core of the *Miranda* decision.

A visitor to an interrogation facility instantly understands the anxiety permeating throughout. It is hard to miss. Protection of the vulnerable was uppermost in Warren's mind when he wrote *Miranda*. That is clear from both how the opinion is drafted and from Warren's subsequent comments. The question we will seek to answer is whether his concern for protecting the criminal suspect would apply to protecting the terrorist suspect. The pressure on an interrogator can be very intense. The public wants "justice," rights be damned.

Terrorism evokes visceral responses. It is somehow different from the traditional criminal law paradigm. Terrorists are not criminals. They are different. Their motivations are different. The randomness of their actions is profoundly distressing. Terrorists challenge society; they are perceived as undermining core values. Terrorists seek to destabilize our daily routine, norms, and mores.

However, given the Supreme Court's demonstrated reservation in overturning precedent—less than 250 such instances since 1789—it would seemingly require extraordinary circumstances to reverse *Miranda*. That is distinct from creating exceptions; in 1984, Chief Justice Rehnquist carved out a "public safety" exception to *Miranda* in *Quarles*

v. New York.[3] While the facts did not readily lend themselves to the holding, Rehniquist's discomfort with *Miranda* was clear. However, the hesitation to reverse was evident when Rehnquist, in *Dickerson v. US*,[4] balked at overturning *Miranda*. However, Rehniquist's upholding of *Miranda* should not be interpreted as an embrace of Warren's decision; rather, it reflects additional consideration extending beyond the jurisprudence of Warren's holding.

Exploring whether Warren would apply the *Miranda* warning to a suspect very different from Ernesto Miranda presupposes—at least theoretically—the following: all suspects are to be guaranteed rights, regardless of the crime suspected of committing. That is, suspect A, suspected of crime A is to be guaranteed the same rights as suspect B, suspected of committing crime B.

That basic assumption is applicable in the traditional criminal law paradigm; whether or not it applies to "other" acts, particularly those defined or understood to be terrorism, is a matter of public discussion. Spikes in terrorist attacks accentuate the controversy and sharpen the debate's tone. It fosters politicians seeking to score easy points with a scared electorate. Responsible and measured voices are quickly drowned out.

Nevertheless, what must not be underestimated, regardless of what brought the interrogator and interrogatee

3. 467 U.S. 649, 104 S. Ct. 2626 (1984).
4. 530 U.S. 428, 120 S. Ct. 2326 (2000).

together are realities of the interaction. Warren doubtlessly understood those realities. Of that, there is no doubt. That is, the call to protect society in the aftermath of a terrorist attack is not cost free. After all, the individual suspected of involvement in an act of terrorism is just that: an individual suspected of involvement. A suspect is innocent until found guilty in a court of law. The consequences of minimizing, mitigating, or denying Miranda rights to a suspected terrorism are profound. Perhaps that is an understatement. The consequences extend far beyond the suspected individual; there are societal ramifications whose significance cuts to the relationship between the individual and the state.

Where this plays out, where the tension is most acute, powerful, and compelling is in the interrogation setting.

First and foremost, the interrogator is in full control. That, more than anything else, defines the relationship. That fact is essential to understanding the *Miranda* decision. Warren knew this firsthand: he had been there and recognized the inherent complexity of the circumstances. More than anything else, Earl Warren knew—not instinctively, but actually knew—that the environment was inherently coercive.

Warren knew what I knew: the imbalance between the two actors is visceral. The relationship is profoundly asymmetrical. I know this because I have seen it. For that reason, then, *Miranda* and the rights it guarantees suspects are the majestic apex of American jurisprudence. As Warren made clear, protecting the suspect is vital for a democracy.

In exploring the relationship between terrorism and interrogations, I ask if rights guaranteed by the US Supreme Court to an individual suspected of committing a rape, as Ernesto Miranda did in 1963, extend to individuals suspected of committing an act of terrorism. The question is posed regarding acts of terrorism *committed in the United States only*. The actor need not be an American citizen, resident, or alien provided the attack was conducted in the United States.

The sole exception is if an American commits an act of terrorism outside the United States and is extradited to the United States and prosecuted in Federal District Court. Detainees held in Guantanamo Bay and other installations are not guaranteed Miranda protections and therefore fall beyond our scope.

Warren was not an intellectual but a Chief Justice who dramatically changed America. A casual review of the sixteen years he served in that position leaves no doubt of that. What is also clear was, and is, the hostility felt toward Warren and the Court by politicians and the public alike.

Case in point: one of the individuals I interviewed while writing this book has a highly negative view of the Miranda holding. In response to my question what would he say to Warren were the Chief Justice to join us in our conversation, the response was quick in coming: "I'd punch him in the nose." When I expressed my surprise at the intensity of the response, my interlocutor, a highly respected member

of a major city's senior law enforcement team, was succinct: "Warren caused great damage to America."

While I appreciate and respect clarity, I was initially taken aback. However, upon further reflection I came both to understand and appreciate the frankness: the former, because the decision was clearly intended to limit law enforcement's ability to interrogate; the latter, because it clearly "put on the table" the passion *Miranda* elicits. We will discuss this in the pages ahead.

To fully understand the significance and endless controversy of *Miranda,* it is necessary to engage in a historical review of that era. No Supreme Court decision can be studied in a historical vacuum; *Miranda*, perhaps more than any other decision, exemplifies that. The turbulence of the 1960s changed America. The sense of disquiet was exacerbated by a Supreme Court determined to expand individual liberties precisely at a time when traditional values and beliefs were loudly, and sometimes violently, challenged. The dissonance was obvious.

There is a certain irony that a mainstream conservative, who had his eye on the Republican presidential nomination in 1952, propelled America to a new era precisely at a time when white college students and urban African Americans said "enough" to the existing "order." As a former, leading member of the Students for a Democratic Society (SDS) told me over breakfast in New York City, the radical student movements of the 1960s must be understood in a

twofold manner: their perception of racial inequality and a resulting commitment to combat that.

As we shall come to see, combating took various forms and shapes ranging from the polemic to the violent. That is an important theme in examining Miranda because of the seeming incongruity of a Supreme Court minimizing state power at the very moment "burn baby burn" was on the lips of looters and rioters.

Warren wrote the Miranda decision at the height of domestic disorder and unrest. The halcyon days of the 1950s gave way to a very different America in the 1960s.

Todd Gitlin's book, "The Sixties: Years of Hope, Days of Rage"[5] brilliantly brings this to light. Gitlin who was SDS President captures the era's intensity, in particular an overwhelming desire to directly address society's ills. The "movement" was committed to changing the status quo, challenging the establishment and attacking institutionalized racism. While SDS was opposed to American involvement in the Vietnam War, Gitlin's book suggests that US foreign policy was not the group's primary focus. That is not to gainsay the War's importance; rather, it is to reinforce the primacy of domestic issues.

SDS was largely nonviolent; however, subsequent groups, black and white alike, committed acts of violence. At the very moment, the Supreme Court was extending the rights

5. Todd Gitlin, *The Sixties: Years of Hope, Days of Rage* (Bantam Books, 1987).

of suspects. Viewed in that context, the anger Warren evoked and passion Miranda elicited "make sense."

There are a number of different ways to bring the turbulence of the 1960s to light. However, before describing "how" it is necessary to explain "why." For a wide-range of circumstances, the 1960s were an extraordinary decade. As discussed in the pages ahead, the events came "fast and furious," sometimes literally spinning out of control, confounding participants and observers alike. National leaders were, more often than not, scrambling in their responses that were largely ineffective, reflecting uncertainty in the face of demonstrations, anger, and violence.

How to bring this to the reader presents important challenges to the writer: after much consideration, I chose to incorporate music from that era as a means to bring it alive.[6] I made this decision before reading Gitlin's book, which explores the importance of music in general and particular songs in specific.

I was struck that we both highlighted P.F. Sloan's "Eve of Destruction," sung by Barry McGwire.

Of that song, Gitlin writes:

> There had been no song remotely like this one in the decade-long history of rock music, although the

6. I am neither a musician nor a student of music. However, I love music. I run to music. I write to music. My music tastes are very limited: American rock, particularly of the 1960s-1980s, and Israeli musicians, particularly the iconic group Kaveret; the late Arik Einstein and Yehuda Poliker.

> objections of the Christian Anti-Communist Crusade suggest, that here, at long last, was the song fundamentalists had been anticipating through all their years of panic, the one that would confirm their dire prophecies about the dark, inexorable logic of "nigger music." Nothing could have been in starker contrast to the previous year, 1964, when the Number 1 hits had included the Shangri Las' "Leader of the Pack, the Beach Boys" "Deuce Coup" and "California Girls", the Supremes' "Baby Love," and the Beattles' "A Hard Day's Night—all bouncy." "Eve" was strident and bitter, its references bluntly topical—no precedent for that not even in Bob Dylan's allegorical "Blowin' in the Wind."[7]

Including music gives portions of this book a sense that it reads like a popular social and cultural history. That was not my intention when undertaking this project; however, during the course of research, it became clear that explaining the years Warren was Chief Justice required careful examination of the America of his times. Doing so made incorporating music essential; it is well-nigh impossible to discuss the 1960s without delving into the protest music of that tumultuous decade. Music played a unique role in expressing the mood of the 1960s. Instinct suggests that

7. Gitlin, *The Sixties: Years of Hope, Days of Rage*, 196.

Warren did not listen to the music of those confronting traditional society. However, it cannot be denied that Warren's decisions *also* challenged, and confronted, basic norms of American society. The *Miranda* holding is but one example.

The protest music of the 1960s was in sharp contrast to the silence that greeted the internment of innocent Japanese Americans in the aftermath of Pearl Harbor. Protest by victims or observers was nonexistent. Neighbors did not turn on neighbors. This was very different from the Holocaust when Gentile neighbors turned on their Jewish neighbors. Rather, the primary response was one of acquiescence. That characterized neighbors, media, and artists alike. This was decidedly not the case when America was literally in flames. The music of the 1960s brings this to life: it captured the pain and anger of individuals suffering injustice at the hands of government or concerned about the nature, values, and quality of society.

There is, then, a profound lack of symmetry between the public silence, including that of song writers and musicians, that largely met the decision to violate the rights of American citizens in 1943 and the loud and cacophonous noise of the 1960s.

Warren's Miranda was written during a time of social upheaval where editors commented daily, politicians argued openly, angry Americans took to the streets, and musicians expressed their concerns publicly. For that reason, I

decided to include lyrics from relevant songs in the text. The book's website includes YouTube links to the actual songs. I hope this brings the era alive.

The music I incorporated was the "protest music" of the era. Readers may disagree with how I defined that particular genre and what musicians I chose to include. That is legitimate. It is not intended to minimize the importance of groups not included in the pages ahead. However, I decided to differentiate between protest songs such as "Fortunate Son"[8] and iconic songs such as "White Rabbit."[9] That is not to suggest Credence Clearwater Revival[10] was more important or popular than Jefferson Airplane,[11] but rather to highlight how I perceive particular songs and their relevance to this book.

Examining distinct aspects of Warren's remarkable career, as politician and Supreme Court Chief Justice, is both a journey through American history and a look at contemporary America and the compelling challenges it faces. It is, I believe, essential to understanding the *Miranda* decision and its possible application—from Warren's perspective—to those endangering contemporary society through acts of terrorism.

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8. https://www.youtube.com/watch?v=LyzUIEW-Q5E.
9. https://www.youtube.com/watch?v=WANNqr-vcx0.
10. http://www.rollingstone.com/music/artists/creedence-clearwater-revival/biography.
11. http://www.rollingstone.com/music/artists/jefferson-airplane/biography.

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One phone call later, Steve and I agreed on a book deal, which was the beginning of a wonderful collaboration and terrific friendship. The book you are holding is a continuation of that relationship.

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Student engagement is one of the true pleasures of academia; Ms. Roosendaal represents its very finest tradition.

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