An Even Keel:
The Judicial Example of John Marshall Harlan

by Chris Kemp

Norman Dorsen, who clerked for John Marshall Harlan II, did not adopt the same judicial philosophy as the Justice he worked for. He did, however, develop a strong respect for his one-time mentor. The desire of Justice Harlan to provide balance in all things, "to keep things on an even keel," as Dorsen remembers him saying, well represents the judicial philosophy of Harlan.[1] Harlan came from a family of some political and legal prestige, and his upper class background, his commitment to federalism and the separation of powers, and his desire to hold to neutral principles on the Court shaped his judicial philosophy.

The Harlan family immigrated to colonial America to escape the persecution directed toward Quakers in England. Family members migrated westward, and Harlan's great-grandfather, James, became a prominent figure in Kentucky politics prior to the Civil War. He served in the state legislature and as the secretary of state and attorney general, and later, two terms as a member of Congress. His support of the Union cause led Lincoln to appoint James the United States Attorney for Kentucky.

James named one of his sons John Marshall Harlan, after the great Chief Justice. Like his father, John also became active in state politics, and was catapulted into the national political spotlight by helping Rutherford B. Hayes secure the Republican nomination for the presidency in 1876. Following the controversial resolution of the election, Harlan narrowly missed being appointed the administration's Attorney General, but later in 1877, he was appointed to the United States Supreme Court. His thirty-four year tenure remains one of the longest in court history, and his dissent in *Plessy v. Ferguson* remains one of the best-known dissents in the Court's history.

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[1] Norman Dorsen, "John Marshall Harlan and the Warren Court," in *The Warren Court in Political and Historical Perspective*, ed. Mark Tushnet, (Charlottesville: University Press of Virginia, 1995), 109.

During the Civil War, John Marshall Harlan the elder fought for the Union, although he maintained some Southern sympathies. As a member of the Court, he displayed a commitment to the Union; the application of the Thirteenth, Fourteenth, and Fifteenth Amendments to protect black citizens; and the goals of Reconstruction. As a result, he often played the role of dissenter on the conservative Court of the late-nineteenth century.

Harlan's son, John Maynard, was born in 1864 and received his collegiate education at Princeton, the University of Berlin, and what is now George Washington University. He established a successful law practice in Chicago, but was more attracted to the political world. After being elected alderman, John Maynard ran a competitive, but poorly financed, campaign for mayor. He was considered to be too much of a reformer to gain full Republican support, and the opposition Democratic Party had a strong machine establishment in the city. He failed to win the election and returned to his law practice, making a substantial income representing business interests in the Chicago area.

John Marshall Harlan II was born May 20, 1899, one of four children and the only son. Sickly as a child, Harlan was sent to preparatory school in Canada on the advice of a physician who said that a more rigorous climate could either "kill or cure" the boy.[2] After several years in Canada, Harlan was sent to an elite preparatory school in New York in order to develop American connections. In 1916 he enrolled in Princeton, and his strong academic work as an undergraduate led to his being named as a Rhodes scholar. Harlan went on to study law at Oxford's Balliol College, earning a first in jurisprudence and graduating seventh in a class of one hundred twenty.

Upon his return to America, Harlan landed a job at the Wall Street firm, Root, Clark, Buckner, and Harlan. He soon developed a close professional relationship with Emory Buckner, a senior partner at the firm and one of New York's premier trial lawyers. Unlike many other firms at the time, Root, Clark encouraged its attorneys to take advantage of public service opportunities. When Buckner was named United States attorney in New York, Harlan went along as an assistant, becoming part of a group of rising young attorneys known as Buckner's "Boy Scouts." Harlan's outstanding work led Buckner to describe Harlan as "Poise in Motion" and "Persistence Personified."[3]

Harlan spent much of his time trying to enforce New York's liquor laws. Enforcing Prohibition in New York proved difficult for multiple reasons. First, the sheer numbers of violations made prosecution virtually impossible. Each week

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[2] Tinsley Yarbrough, *John Marshall Harlan: Great Dissenter of the Warren Court*, (New York: Oxford University Press, 1992), 6.

[3] J. Edward Lumbard, "John Harlan: In Public Service 1925-1971," *Harvard Law Review* 85 (December 1971): 372.

police arrested thousands, mostly low-level employees like waiters, porters, bartenders and bellhops.[4] Rarely were the owners of the establishments or the distributors of the bootleg liquor charged.

Harlan's work in Prohibition did garner him public attention, due to the "Bathroom Venus" case.[5] A naked showgirl dipped into a tub filled with champagne at an evening party. Several men lowered glasses into the tub and drank the alcohol, violating Prohibition laws. The newspapers certainly filled their columns with the information surrounding the case. Later, Governor Al Smith asked Buckner to investigate the Queens sewer scandal. Again, Harlan assisted his mentor in uncovering bribes and kickbacks. When Justice Learned Hand, then a judge on the United States Court of Appeals for the Second Circuit in New York, read Harlan's brief for the case, he was immediately impressed. John Marshall Harlan was quickly developing a reputation as one of New York's premier attorneys.

Harlan left his career behind in 1942, however, to journey to England and serve in the Operations Analysis Section of the Eighth Bomber Command. By that time he was in his early forties, past the normal age of a soldier, but the army felt that lawyers would be essential for the project due to their expertise at mastering technical information and then communicating it to a general audience.[6] The main problem Harlan faced when assuming his role was that fewer than five percent of the bombs dropped during daylight bombing raids in Germany were falling within five hundred feet of their target. In order to understand the predicament better, Harlan actually accompanied a crew on a bombing mission, keeping his participation a secret from his team, so that they would not prevent him from going. For his work, Harlan received the Legion of Merit and the Croix de Guerre from France and Belgium.

Upon his return from the war, Harlan resumed where he had left off and continued to represent some of the most prominent cases in the New York area, including successfully defending Pierre du Pont in an anti-trust lawsuit. Compared to Earl Warren, his future fellow Supreme Court judge, Harlan had fairly little political experience, but in early 1954, a vacancy appeared on the Court of Appeals for the Second Circuit. Due, in part, to Harlan's longtime friendship with Herbert Brownell, Eisenhower's Attorney General, Harlan was nominated and confirmed. His one year on the court was noncontroversial. The most interesting case was *United States v. Flynn*, in which Harlan upheld the conviction of a dozen second-string members of the American Communist

[4] Yarbrough, *Harlan*, 17.
[5] Ibid., 39.
[6] Ibid., 58.

Party. Although Harlan deferred to the state government in upholding the convictions, a theme that would dominate his tenure on the Supreme Court, he quickly became upset with McCarthyism and would find ways to limit the influence of the Red Scare once on the high court.

In October 1954 Justice Robert H. Jackson died. Due to his judicial experience and the fact that Jackson had been the only New Yorker on the Court, Harlan seemed the perfect selection to fill the vacancy. Eisenhower had received some criticism for his nomination of Earl Warren and his limited judicial experience, but Harlan had a reputation for being a lawyer's lawyer, expert in his handling of all the details in a given case. Both as an attorney and during his brief tenure as a judge, his legal reputation was sterling. His New York residency would also maintain the geographic balance on the Court. In nominating him to the Court, Eisenhower said Harlan's qualifications were "the highest of any I could find."[7] The American Bar Association concurred and gave Harlan its highest recommendation, as well. In addition, Harlan was supported by such legal experts as Judge Learned Hand, Senator Estes Kefauver, and heavyweight champ Gene Tunney, whom Harlan had represented in an earnings protection case in New York.

With such credentials and support, Harlan seemed like a candidate for a quick confirmation. One conservative friend even wrote Harlan, saying he hoped the new Justice would be able to reign in the liberal leaning of Justice William Douglas.[8] The confirmation, however, would take four months. Several factors delayed the process. First, the Senate had to deal with the decision to censure Senator McCarthy. Second, a bloc of southern senators had decided to take this opportunity once again to make public their dissatisfaction with the Court's rulings regarding race, especially the *Brown* decision. Senator James Eastland (D-Mississippi) was even prepared to disclose Harlan's past affiliation with the Communist Party, until he realized the John Harlan he had information on was from Baltimore.[9] Third, Republican Senator William Langer of North Dakota threatened to hold up the nomination until someone from his state or a state that had yet to receive an appointment to the Court was selected. A fourth problem came from Harlan's experience as a Rhodes scholar. Some feared his time spent in Europe must have made him an internationalist. Despite some senatorial fears that his time at Oxford had made him a "one-worlder" who

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[7] Norman Dorsen, "John Marshall Harlan," in *The Justices of the United States Supreme Court, 1789-1969: Their Lives and Major Opinions* vol. IV, ed. Leon Friedman and Fred L. Israel, 2803-46 (New York: Chelsea House Review, 1969), 2805.

[8] Yarbrough, *Harlan*, 72.

[9] Ibid., 103.

would sell out American sovereignty to the United Nation's "world government," Harlan was confirmed by a 71-11 vote on March 16, 1955.[10]

One cannot read about Harlan for very long without seeing him described as a "patrician." Norman Dorsen pointed out the criticism that some might be tempted to conclude "that his frequent unwillingness to accept constitutional claims based on alleged equal treatment of poor persons is somehow related to his failure to understand or to sympathize with poorer members of society."[11] Mark Tushnet extended this criticism, calling Harlan's decision in *Poe v. Ullman* a "jurisprudence of country-club Republicanism.[12] One of the wives of a member of Harlan's Wall Street firm was on the board of Planned Parenthood in Connecticut, and this, according to Tushnet, must have influenced his opinion on the issue of the Connecticut birth control law that ultimately led to the *Griswold* decision concerning the right to marital privacy.

Whatever the influence of Harlan's wealthy background, there are other more clearly identifiable influences on his judicial philosophy. As soon as Harlan was nominated as justice, Felix Frankfurter was delighted at the addition of a member to his restrainist wing of the Court. In *NAACP v. Alabama* (in which the Court ultimately decided the state of Alabama could not force the NAACP to make public its membership roster), Frankfurter heavily lobbied Harlan to delete any First Amendment references in connection with the Fourteenth Amendment from his opinion, in order to avoid any hint of incorporation. Yet Harlan was his own man and felt free to disregard Frankfurter's recommendations, as he did in *Poe v. Ullman.* However, Harlan must have appreciated Frankfurter's guidance in constitutional areas in which his previous law practice had given him little experience. On balance, Harlan agreed with Frankfurter on eighty percent of the cases they heard together.[13]

Perhaps the two strongest guiding stars of Justice Harlan's philosophy were the concepts of federalism and separation of powers. He firmly believed that these were the best safeguards of individual liberty, more so than specific constitutional guarantees. Under the system of divided powers established by

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[10] Nathan Lewin, "John Marshall Harlan," in *The Supreme Court Justices: Illustrated Biographies, 1789-1995*, ed. Clare Cushman, 441-45 (Washington, D.C.: Congressional Quarterly, 1995), 443.

[11] Norman Dorsen, "The Second Mr. Justice Harlan: A Constitutional Conservative," *New York Law Review* 44 (April 1969): 253.

[12] Mark Tushnet, "Members of the Warren Court in Judicial Biography: Themes in Warren Court Biographies." *New York University Law Review*, 1995, http://web.lexis-nexis.com/scholastic, November 2, 2002.

[13] Lewin, "John Marshall Harlan," 444.

the framers, Harlan was willing to grant great authority to the states, as well as a strong role for the legislatures at both the state and national levels.

Harlan was not hesitant in invoking the "abstention" doctrine, which limited the reach of the judiciary's role in matters of judicial intervention, and he proved one of the strongest supporters of the "state action" concept, which stated the Constitution's civil liberties protections extended to state, but not private, activity.[14] He revered precedent, perhaps an influence of the common law tradition he became so familiar with during his stint at Oxford, and would adhere closely to previous decisions, even ones he had disagreed with, and perhaps even registered dissents on in the past. An excerpt from his opinion in *Avery v. Midland County*, a county-level reapportionment case, clearly illustrates his great respect for *stare decisis*.

> I continue to think that these adventures of the Court in the realm of political science are beyond its constitutional powers, for reasons set forth at length in my dissenting opinion in *Reynolds*.... However, now that the Court has decided otherwise, judicial self-discipline requires me to follow the political dogma now constitutionally embedded in consequence of that decision.[15]

The theoretical background for Justice Harlan's philosophy can be found in Herbert Wechsler's concept of neutral principles. According to Kent Greenwalt, who clerked for Harlan, "...no modern Justice had striven harder or more successfully than Justice Harlan to perform his responsibilities in the manner suggested by the model."[16] Wechsler attempted to resolve the inherent conflict of how the act of judicial review could be justified when they inherently involve choices of value. According to Wechsler:

> The answer ... inheres primarily in that they are -- or are obliged to be -- entirely principled. A principled decision is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.[17]

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[14] Yarbrough, *Harlan*, 158.

[15] *Avery v. Midland County*, 390 U.S. 474 (1968), http://www.findlaw.com, October 24, 2002.

[16] Kent Greenwalt, "The Enduring Significance of Neutral Principles," *Columbia Law Review* 78 (June 1978): 984.

[17] Ibid., 985.

Five general principles explain this concept further. First, a neutral ruling would be one in which a person would be willing to follow the decision in other situations to which it applies. Second, a ruling must possess some degree of generality, addressing the legal principle underlying the case and how related cases ought to be addressed. Third, judges must confine their rulings to principles that have legal relevance; just because an argument is moral does not mean a judge is free to adopt it. Fourth, a principled ruling must address all of the issues in a case, not a select few. Finally, that reasoning must be reflected in the opinion delivered by the court; a court would fail in giving no reasons or false reasons for its decision.[18]

Chief Justice Warren employed a different judicial approach, looking for evidence of fairness in each case. Warren's approach, which often left little room for deference to the legislative bodies, was not based on the reasonableness of neutral principles, but the rightness or morality of the outcome.[18]

With such a different judicial philosophy, it is not surprising that Justice Harlan earned the reputation for being the great dissenter of the Warren Court. Harlan's dissent in *Reynolds v. Sims*, a case concerning Alabama's apportionment of state senatorial districts, summarizes many of the flaws of those who moved away from legal process theory.[19]

> The failure of the Court to consider any of these matters [of intent, language, contemporary understanding, political practice, subsequent amendments, and constitutional decisions] cannot be excused or explained by any concept of "developing" constitutionalism. It is meaningless to speak of constitutional "development" when both the language and history of the controlling provisions of the Constitution are wholly ignored.[20]

Miranda v. Arizona was one of the most controversial Warren Court decisions. To understand the public outcry against the ruling, one must first understand the context in which it occurred. Decided in 1963 *Gideon v. Wainwright*, mandating that an accused, indigent criminal be provided an attorney for trial was perhaps the only popular criminal procedural decision during its own time that the Warren Court issued. The case revolved around the fundamental unfairness a defendant would face in the technical word of the

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[18] Ibid., 985-90.

[19] Norman Dorsen, "John Marshall Harlan," 121.

[20] *Reynolds v. Sims*, 377 US 533 (1964), http://www.findlaw.com, October 24, 2002.

courtroom without adequate representation. The decision, in effect, overturned *Betts v. Brady* (1942), and while Justice Harlan concurred with the decision, his respect for precedent could be seen in the opening lines of his opinion. "I agree that Betts v. Brady should be overruled, but consider it entitled to a more respectful burial than has been accorded."[21] Harlan went on to describe his rationale for supporting Gideon's appeal, while denying the theory that the case incorporated the Sixth Amendment's provision for counsel. *Gideon* raised little controversy because several states already complied with the standards the Supreme Court enunciated, and twenty-two state attorneys general had filed an *amicus* brief on behalf of the defendant.[22]

Once the Court ruled in *Gideon* that the Sixth Amendment applied to the states, they were forced to address the issue of right to counsel. Did the right only begin at trial or when custodial interrogation began?

In *Escobedo v. Illinois* the Court attempted to answer the question. Police had detained Danny Escobedo for questioning in a murder case. He demanded to see his lawyer, and his lawyer, then at the police station, demanded to see his client. The police refused both requests and falsely told Escobedo that he could go home if he implicated another man. They did not tell him that under Illinois law, if he implicated someone else, he also implicated himself.[23] The Court ruled in a controversial 5-4 decision that the right to counsel began when the criminal process shifted from an investigatory to an accusatory nature. Thus, when Escobedo was being questioned, his constitutional right to counsel was violated, and by extension, his right to avoid self-incrimination also was denied. His conviction was reversed and the case remanded to the state for reconsideration.

Justice Harlan began his brief dissent by stating, "...I think the rule announced today is most ill-conceived and that it seriously and unjustifiably fetters perfectly legitimate methods of criminal law enforcement."[24] His reaction showed more restraint than many others. The Los Angeles Chief of Police complained that the decision "handcuffed the police," and New York City Police Chief "Michael J. Murphy agreed, stating the Court's ruling was "akin to

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[21] *Gideon v. Wainwright*, 372 US 335 (1963), http://www.findlaw.com, October 24, 2002.

[22] Yale Kamisar, "The Warren Court and Criminal Justice," in *The Warren Court: A Retrospective*, ed. Bernard Schwartz (New York: Oxford University Press, 1996), 119.

[23] Powe, Lucas A. Jr., *The Warren Court and American Politics* (Cambridge, MA: The Belknap Press of Harvard University Press, 2000), 389.

[24] *Escobedo v. Illinois*, 378 U.S. 478 (1964), http://www.findlaw.com, October 24, 2002.

requiring one boxer to fight by the Marquis of Queensbury rules while permitting the other to butt, gouge, and bite."[25]

More and more Americans were beginning to wonder if the rising crime rate was attributable to what they viewed as permissive court decisions. Bumper stickers stating, "Support Your Local Police" began to appear next to the ones reading, "Impeach Earl Warren." At the 1964 Republican Convention, Eisenhower urged delegates:

> "...not to be guilty of maudlin sympathy for the criminal who, roaming the streets with switchblade knife and illegal firearms seeking a prey, suddenly becomes upon apprehension a poor, underprivileged person who courts upon the compassion of our society and the weakness of many courts to forgive his offense.[26]

According to historian John Morton Blum, "*Escobedo* raised the storm against the Court to gale force."[27]

It was in this hostile atmosphere that *Miranda* reached the Court. The facts of the case are fairly simple. Shortly after midnight on March 4, 1963, Ernesto Miranda accosted and seized an eighteen-year-old woman, forcing her into the back of his car. He bound her, drove to the desert east of Phoenix, and raped her. He then drove her back to her neighborhood and released her. Before departing he said, "Whether you tell your mother what has happened or not is none of my business, but pray for me."[28]

After finding Miranda by tracing a partial license plate number provided by the victim, police asked Miranda to accompany them to the police station for questioning. Miranda voluntarily complied. The victim was unable to identify Miranda from a lineup, so police continued questioning Miranda. He was not provided an attorney, nor did he ask for one. After two hours of interrogation, Miranda admitted his guilt and signed a statement of confession. Found guilty of kidnapping and rape, Miranda was sentenced to twenty to thirty years in prison.

The case was appealed to the Arizona Supreme Court, which upheld the conviction, ruling that Miranda's due process rights were not violated because he had not asked for an attorney. Miranda gained new representation from the

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[25] Powe, *Warren Court*, 391.

[26] Theodore H White, *The Making of the President, 1964* (New York: Atheneum, 1965), 241-42.

[27] John Morton Blum, *Years of Discord: American Politics and Society, 1961-1974* (New York: W.W. Norton, 1991), 210.

[28] Liva Baker, *Miranda: Crime, Law and Politics* (New York: Atheneum, 1983), 5.

American Civil Liberties Union, and the new attorneys filed a petition for a writ of certiorari asking the Supreme Court to hear the case and rule whether an attorney must be provided for an indigent facing police interrogation.

Again, the Court issued a 5-4 decision, with Justices Harlan, White, Clark, and Stewart dissenting. Later, Justice Fortas acknowledged that the majority opinion was "entirely" Warren's, and when Warren announced the decision he spent an hour reading it in the courtroom.[29] The Chief Justice established a four-point summary that would be spoken to individuals taken into custody to ensure the privilege against self-incrimination was not violated.

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.[30]

These precautions would not only preserve a Fifth Amendment protection, but Warren also believed they would prevent the "third degree" during police interrogations; ameliorate the disparity between rich and poor in obtaining counsel; and bring police tactics to the same professional level by relying more on strong investigative techniques and less on custodial confessions.

The dissents by Harlan and White were especially sharp. Again, Justice Harlan succinctly presented his view of the majority opinion in his first sentence. "I believe the decision of the Court represents poor constitutional law and entails harmful consequences for the country at large."[31] Harlan believed the warnings that would be issued to all suspects would not end the use of questionable police tactics. Those who had lied before about the practices used in questioning could continue to lie. Worse still, the Court, in Harlan's judgment, was departing from precedent and taking the police power away from the

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[29] Paul L Murphy, *The Constitution in Crisis Times, 1918-1969* (New York: Harper & Row, 1971), 381.

[30] *Miranda v. Arizona*, 384 U.S. 436 (1966), http://www.findlaw.com, September 23, 2002.

[31] Ibid.

states, where it had traditionally resided. Perhaps from his years assisting Buckner as a prosecutor, Harlan viewed police questioning as an essential and effective tool when properly used.

Earlier in *Gideon*, Harlan had supported the right of all defendants to have proper counsel at trial, but he denied that the right extended, based on historical precedent, to custodial questioning. While it was true, he said, that innocent people were sometimes detained and questioned, that was a part of our system of justice. "Society has always paid a stiff price for law and order, and peaceful interrogation is not one of the dark moments of the law."[32]

Justice Harlan also attacked the basis of the Chief Justice's decision: the concept of fairness. Miranda confessed after a relatively brief interrogation during daylight hours, with no violence or threat of violence present.

> They assured a conviction for a brutal and unsettling crime, for which the police had and quite possibly could obtain little evidence other than the victim's identifications, evidence which is frequently unreliable. There was, in sum, a legitimate purpose, no perceptible unfairness, and certainly little risk of injustice in the interrogation. Yet the resulting confessions, and the responsible course of police practice they represent, are to be sacrificed to the Court's own finespun conception of fairness which I seriously doubt is shared by many thinking citizens in this country.[33]

While the goal of the majority may have been to ensure that only voluntary confessions would be extracted in custodial questioning, Harlan believed the ruling went too far.

> "...the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim in short is toward "voluntariness" in a utopian sense, or to view it from a different angle, voluntariness with a vengeance."[34]

Justice White, in his dissent, was at least as equally harsh. He decried what he viewed as an unfair and dangerous hampering of law enforcement officials'

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[32] Ibid.
[33] Ibid.
[34] Ibid.

ability to do their jobs. In a sarcastic swipe at the majority, he claimed a desire to wash his hands of the decision.

> I have no desire whatsoever to share the responsibility for any such impact on the present criminal process. In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case.[35]

Again, public reaction to the decision was strong, even stronger than the reaction to *Escobedo*. One law enforcement official said, "I guess now we'll have to supply all squad cars with lawyers," while another complained that "criminal trials no longer be about a search for truth, but search for technical error."[36]

At hearings that summer, Truman Capote, the author of the recently-released best seller *In Cold Blood* testified the murderers of the Clutter family would have been released had the Miranda ruling been in effect. Comments like these paved the way for the Republicans and Nixon to run a "law and order" campaign in 1968. One of Nixon's favorite lines in a stock campaign speech took advantage of public fear of criminal activity. "In the past forty-five minutes, this is what happened in America. There has been one murder, two rapes, forty-five major crimes of violence, countless robberies and auto thefts."[37] George Wallace also campaigned on the same issue, telling crowds, "If you walk out of this hotel tonight and someone knocks you on the head, he'll be out of jail before you're out of the hospital, and on Monday Morning they'll try the policeman instead of the criminal."[38]

Despite widespread opposition to the ruling, hints of acceptance began to appear. Congress passed the Omnibus Crime Control Act, signed into law by the president, attempting to invalidate the *Miranda* decision, but law enforcement agencies ignored it for the most part, choosing to follow the more stringent guidelines set up in the Court's ruling.

This was not the only example of the nation's gradual acceptance of *Miranda.* Subsequent cases somewhat lessened the public's concern about the

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[35] Ibid.
[36] Powe, *Warren Court*, 399.
[37] Ibid., 410.
[38] Ibid., 410.

lack of police power. *Schmerber v. California,* decided one week after *Miranda*, held that a blood sample could be unwillingly taken from a suspect to help prove guilt or innocence in a crime. By the early 1970s most prominent law officials held the view that *Miranda* did not hamper law enforcement efforts. Most law enforcement officials found that closer attention to procedural safeguards did not hamper their police work.

Miranda has gained even more respectability in the past decade. At her confirmation hearings, Justice Ruth Bader Ginsburg defended the ruling, saying, "It is an assurance that the law is going to be administered even-handedly because, as I said, sophisticated defendants who have counsel ordinarily will know about their rights...."[39] There is no reason to think that Justice Harlan would have accepted this statement by Justice Ginsburg, as it seems to imply an equal protection rationale for supporting the case. Ironically, though, he most likely would uphold *Miranda* today, even as Chief Justice Rehnquist did for a unanimous court in *Dickerson v. United States.*

> We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.[40]

Miranda has apparently become an accepted volume in the canon of American jurisprudence.

After *Miranda* Harlan continued to serve with distinction on the Court, despite growing ailments and blindness. While he continued to view his judicial philosophy as one of moderation, he increasingly found himself presenting dissenting opinions in many Warren Court decisions. As Harlan's vision worsened, he increasingly relied on his clerks in preparing for cases and in writing decisions. The Court, as an accommodation for Harlan's failing eyesight, allowed him to have one extra clerk his last several years on the bench. He resigned from the Court in late 1971 and died before the year's end.

Ernesto Miranda was retried and again convicted. Due, in part, to his attempts at self-education while in prison he was released on parole almost one year after Justice Harlan died. Later, he was stopped for driving on the wrong side of the road, and a search of the car revealed a gun and illegal drugs,

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[39] Kamisar, "The Warren Court," 119.

[40] *Dickerson v. United States*, 530 U.S. 428 (2000), http://www.findlaw.com, October 24, 2002.

violations of his parole. He was sent back to jail, again paroled, and to supplement his income, sold autographed Miranda cards for $2.00. In 1976 after a bar fight over gambling, Ernesto Miranda was stabbed in the stomach and the upper chest. At the hospital he was pronounced dead on arrival. A suspect in the crime was detained by police, refused to talk, and was released. He has never been seen since.