Choosing Heroes Carefully

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"You don’t need many heroes if you choose carefully," said John Hart Ely about Earl Warren. That is why—as a scholar, as a teacher, as a spirit—John became one of mine.

I first “chose” him nearly thirty years ago when I was a first-year student at Harvard Law School. It was mid-December and I was struggling to understand the doctrine of Erie R.R. Co. v. Tompkins, and how it applied to a case called Hanna v. Plumer. After looking at a few turgid hornbooks, and wondering why on earth I was in law school, I ran across an article in the Harvard Law Review called The Irrepressible Myth of Erie. “The ones I feel sorry for,” John coolly told me, “are the people who paid $150 for the cassette tapes explaining the Federal Rules of Evidence.” And with those words I was hooked.

John was the first legal scholar who really spoke to me. I started reading John Ely like some people read John Grisham. In short order, I had devoured his Yale Law Journal pieces on Roe v. Wade and Legislative and Administrative Motivation in Constitutional Law. I read his classics on flag desecration, the Bill of Attainder Clause, and reverse discrimination. As a

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2. 304 U.S. 64 (1938).
5. Id. at 693.
second-year student, I stayed up all night chuckling over Democracy and Distrust. I woke to realize that perhaps I had glimpsed for the first time what constitutional law and legal scholarship were really about.

Those of you who have read Tom Wolfe’s The Right Stuff know that “[a]nyone who travels much on airlines in the United States soon gets to know the voice of the airline pilot . . . coming over the intercom . . . with a particular drawl, a particular folksiness” that evokes the voice of Chuck Yeager, the greatest fighter pilot of all time. Well, anyone who reads law likewise hears in nearly every author the voice of John Hart Ely, the greatest pure legal writer of our time, the man who set the cadence for two generations of legal scholars.

As I read John’s articles, I naturally became more curious about John the man. I soon learned that John was not just an ivory-tower academic; he also enjoyed one of the greatest lawyerly careers of our time: from his days as a law student researching Abe Fortas’s brief in Gideon v. Wainwright, to his service as a law clerk to Chief Justice Warren working on Griswold v. Connecticut, to his time as member of the Warren Commission staff, to his years as a San Diego public defender and general counsel of the Department of Transportation, where he argued and won landing rights for the Concorde, an airplane that, fittingly, stopped flying the very week that John died.

When you get to know someone so well from afar, it’s pretty intimidating to get an actual letter from your hero. And so I was stunned, as a young law professor in 1989, to get a note in that beautiful, angular handwriting. The note said that the great John Hart Ely had enjoyed an article of mine, and that maybe we should talk sometime. Excited, I called his office and heard this message: “Call Me Voice-mail! This is John. Ely. But you knew that. I’m not here. But you knew that too. Or maybe I’m avoiding you. BEEP.” You know, no one did voicemail like John.

When I finally reached him, we talked about his book, War and Responsibility, a remarkable exposé of the lessons of the war in Indochina. Written after he finished his term as Dean of Stanford Law School, that haunting book reminds me—helpfully now—that there can still be scholarship after deanship.

Soon we were working together on a law professors’ amicus brief challenging the constitutionality of the first Gulf War. Calling in from various hotels in Eastern Europe, John left me voicemails that were so funny they made

me howl. For example: "Here I am in Prague, the Czech Republic. Like Diogenes, I am searching for an honest man. I just ate a fifty-dollar breakfast at the Hilton, so I don't think I'll find one here. Maybe he's in Warsaw."

And so I had the lucky chance so many people never get: to actually become friends with my boyhood hero. When we finally met in person, during his year visiting at Yale, we got to be friends surprisingly fast.

It was pretty easy, really. I knew everything about John, and so did he, so we had a lot to talk about. We went to minor league baseball games. We laughed about everything. And we talked about movie trivia, lots of it. John loved movies so much, he used to ask his own questions and then answer them. I once overheard this Ely monologue: "So what is the best fight scene on a gondola? Probably The Eiger Sanction." "And what, may I ask, is the best movie fight scene on a train? From Russia with Love. Definitely. From Russia with Love."

Once he moved to Miami, my family went to visit. Together we all saw the Asian elephants at the Miami Zoo and we toured the Parrot Jungle. When asked why he moved to Miami, John answered like Bogart in Casablanca: "I came for the scuba diving," he would say, although in fact, he rarely ever dove. The truth is that he stayed because of his Miami friends, especially Gisela, whom he met and married, who loved him last, and who cared for him until the very end.

After John got sick, our talks got more serious. Behind his cool exterior, I saw his vulnerability, his intense loyalty, his touching patriotism. I saw the irony that this Yankee WASP had a deep empathy for ethnic underdogs; it was not for nothing that he wrote so passionately about judicial protection of discrete and insular minorities. "Why do you always use your middle name?" I once asked him. "Because if I called myself 'John E. Lee,' everyone would think I was Asian, like you," he shot back.

Even while undergoing the most painful cancer treatments, John never lost his edge. On the day he received his honorary degree from Yale, which called him the greatest constitutional scholar of our time, he was in excruciating pain. After the ceremony, a number of my colleagues came to my house to visit John. Before long, each was telling John what they had written about him in their letters recommending him for the honorary degree. "In my letter," said one, "I wrote this." "In mine, I wrote this." His eyes tight with pain, John gave me that look. "You should have seen my letter," he whispered.

During our last few visits, John told me he was glad I was becoming Dean of Yale Law School. For Yale was where he had first studied and taught, and where he first fell in love with the law. Yale was the school that shaped him the most and that he loved the most. Standing under a tree at my home, he told me, "You know what? I like New Haven. My best friends are here. Why did I ever leave?"

Because, I thought to myself, you were restless. Because you were a maverick. Because you were fiercely independent. And maybe, just maybe, John, because you did not realize how much we loved you.
When Denny Curtis, Bob Gordon, and I went down to Miami for John's funeral, we found him lying in his coffin, wearing a Yale Law School necktie. At his fortieth law school reunion, held just a few days later, all his Yale classmates could talk about was John. One classmate recalled a moment during the very first week of law school, when a professor had asked him a hair-splitting question. John answered, "I'm sorry, sir. I don't play word games."

That was the John Ely I knew. The honest scholar. The committed activist. The passionate friend. No wonder that John never found his honest man in Prague. The truth is that the honest man that Diogenes searched for with his lamp was John Ely himself.

So in the end, the ones I feel sorry for are those people who never got to meet John in person. But just think, even as I speak, there is a college kid or law student somewhere who is opening up Democracy and Distrust for the very first time. And for that student, John Hart Ely is not just a memory. He is just as alive, just as cool—just as full of the right stuff—as he was for me, so many years ago and always.