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Ely's Gifts

PATRICK O. GUDRIDGE*

We need to remember what we have not lost.

The writings of John Hart Ely are a distinctive and important contribution to the literature of American law. Their characteristic combination of informal authorial voice and intense, simultaneously original and authoritative analysis struck many of Ely's contemporaries, as well as readers and writers in the next generation, as a kind of ideal – proof that legal criticism, the genre within which they worked, might encompass not just good and important efforts, but artistry as well. This artistry, moreover, seemed to catch, to bring together within its own constructions, tensions emblematic of the time in which Ely wrote. Insistent, idiosyncratic personality and recognizable, regular structures are *both* evident, *both* somehow given pride of place.

Ely does not stand alone. The first inductee in the American legal literature hall of fame is, of course, Oliver Wendell Holmes. We still read *The Common Law* well over a century later. Individual sentences and phrases retain a freestanding brilliance. But there is also the larger irony: Holmes insists that legal formulas are only briefly useful, mostly accumulating irrelevance; or worse, impediments to the realization of the felt needs of the time. He insists on this even as he energetically identifies, and supplies with rich informing perspective, what he takes to be basic categories of legal thought.

There is also Alexander Bickel – Ely's teacher. *The Least Dangerous Branch* possesses its own distinctive tone, a kind of Miles Davis at Juilliard cool. It is, as well, the still compelling record of deep struggle: *Brown v. Board of Education* is right and good (Bickel is sure of this). Is it possible to conceive of terms in which *Brown* might be recognized within constitutional law without either diminishing *Brown* or wrecking constitutional law itself? Bickel's reimagination of constitutional law in institutional political terms – “the Supreme Court at the bar of politics” – is in part, for all the widespread implications, an attempt to reach what Bickel knows is the right answer to this quite specific question.

In much of his writing, however sharply complex its style and analysis, John Ely does not struggle much – nor, usually, does the work end in irony, even if it sometimes proceeds ironically. Ely elaborates

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emphatic conclusions. Why was he able to do this? I think that one answer, at least, is to be found in *The Chief*, the tribute to Earl Warren that Ely wrote in 1974. It is republished following these introductory paragraphs.

A tribute is in form personal writing. John Ely's own presence within his tribute – the reader's awareness that the tone and substance of the points to be made are peculiarly Ely's – is not surprising (as it is sometimes in his writing on seemingly impersonal legal topics). The reader is also prepared in advance, because this is a tribute, for the initial remarks about Warren the individual. The tribute, though, plainly changes tone, at first in occasional sentences, and then definitively part way through — characterizes Warren in overtly political terms, not in any immediate or partisan sense, rather within the language of the highest or deepest of American constitutional premises. The shift startles. Its effect is very much like that produced by John Milton's theologico-political turn in *Lycidas*: "But that two-handed engine at the door/ Stands ready to smite once, and smite no more." This time, though, the message is entirely positive. Its substance, it is easy to see, is the gist of *Democracy and Distrust*, Ely's great book, at the time of the Warren tribute still work for the future.

John Ely attributed to Earl Warren – gave him title to – Ely's own systematic vision, his own glimpse of deep constitutional order. Ely cannot mean for us to understand this exercise literally. It is, in one sense, his gift to Earl Warren – the system Warren's critics insisted he so conspicuously lacked. But it is, we may suspect, also Ely's acknowledgement of Warren's gift to him. The Supreme Court opinions that *Democracy and Distrust* so profoundly orders give the weight of history to that ordering, mark Ely's writing not as speculation, as theory, but as recognition – however much a new view, a new view (we are sure) of the world we already inhabit. The great work of John Ely (not just *Democracy and Distrust*) is an exchange of gifts – a potlatch of sorts, in this respect not only deeply moral, but in an important sense foundationally American.

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The following was published in Volume 88 of the Harvard Law Review (1974-75) upon the death of Chief Justice Earl Warren, for whom John Hart Ely had clerked. It is reprinted here, in full, with permission of the Harvard Law Review.

THE CHIEF

*John Hart Ely**

The image of Earl Warren often conveyed by the popular press was that of a glad-handing politician whose accomplishments resulted very largely from his winning personality. A sunny, even jolly, man: a sort of lovable uncle. Thus while he may not have been a great scholar, the theme seemed to run, he sure did have a "way with people" and that's what accounted for his success as Chief Justice. But somehow that just doesn't add up to greatness, and this was, unmistakably, a great man.

Don't get me wrong: the Chief went out of his way to show respect for everyone with whom he came in contact, regardless of station, and he was deeply sensitive to the feelings and insecurities of others. But no one who ever saw him pounce on a dissembling or callous lawyer would ever again think "loveable" quite the right word. No one who heard him on the phone with one of his colleagues — "No, Bill, we can't consider that. . . NO. It's all been decided. . ." — could imagine that this was a man who "led" by going along. No doubt the Court was more cohesive because he was Chief Justice, but that had little to do with charm in any cheap sense of the word. It had to do with the man's tireless devotion to his work, with his unusual ability, legal as well as administrative, and most of all with the unmistakable purity of his motives. Sure, he knew how to shake your hand, and even ten years after his appointment to the Court he instinctively waved back at people who waved at his car. But those were just the leftover reflexes of a prior life in politics: anyone who thought they were the way the Chief Justice did business would soon learn his mistake. He was a leader because he was a man with a mission, and because the mission was good.

If a law clerk's tribute is supposed to be full of anecdotes that demonstrate what a fascinating private character his boss was, then this tribute will be a disappointment. Oh, the Chief was a great sports fan — that's not made up — and a close and prescient student of the political process. But that's not so terribly interesting, and it was all secondary. There was simply too much important work to leave room for the cultivation of engaging eccentricities. I suppose it may be a little dull after all, but Earl Warren did not add up to a great deal more than the public record makes him — one of the greatest single forces for right the nation has ever known. The public man was the man, and that was a good deal more than the rest of us can even hope to be.

The public man was, always was, a democrat. The image often

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conveyed by the academics press of Chief Justice Warren and the Court he led was that of an unprecedented willingness — rightly or wrongly, depending on the commentator's biases — to superimpose the judiciary's value judgments on those arrived at by the political processes. There was some of this, to be sure, when liberty genuinely hung in the balance. But like any good lawyer, the Chief was preoccupied with questions of process — not simply of the criminal process which he so thoroughly understood, but more importantly of the democratic process as well. His concern lest those in power freeze others out of that process was most obvious in his voting rights opinions. But privately at any rate, he saw first amendment cases in much the same terms. He could expound on the values of self-expression, and the marketplace of ideas, as eloquently as the next man, but what the cases really involved for him were efforts on the part of the in's to make sure the out's stayed out. The racial discrimination and other equal protection cases were this too, if less obviously: the institution of representation, the Chief realized, will work only if the representative is made to understand that he cannot hurt the relatively powerless without at the same time hurting himself, or at least broad segments of the constituency on whose support he depends.

The Chief used to say that if *Reynolds v. Sims* had been decided before 1954, *Brown v. Board of Education* would have been unnecessary. The claim seems somewhat oversimplified, but it bespeaks a view of the judicial role that tells us much about the man and gives unity to much of his work. The Court's proper work, he was telling us, consisted not so much in second-guessing legislative value judgments as in tending the machinery of the democratic process to keep it from being captured, from becoming the self-serving organ of some privileged segment of society. A concern with process, seriously pursued, can lead in some quite "activist" directions.

The items that keep the Chief's death from being headline news remind us (as if we needed reminding) that those who love the Constitution have had much to mourn of late. But while we should weep for the absence in public life of men like Earl Warren, we need not weep for him. He lived the American Dream. Quite a number of men have done that, however. The Chief did something that the few will ever do: he did what he set out to do. And that was to make the American Dream more broadly accessible than it had ever been before.