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The Legacy of John Hart Ely: A Giant in the Classroom as Well

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A quick glance at the Ely biography — he was listed right after Oliver Wendell Holmes as one of the most cited legal scholars in history,¹ he was author of *the most cited* legal book² in recent history,³ he was a law clerk for Chief Justice Earl Warren⁴ and youngest member of the Warren Commission,⁵ he taught at Stanford Law School (where he was dean), as well as at the law schools of Miami, Harvard, and Yale,⁶ he even worked on the landmark *Gideon v. Wainwright*⁷ case when he was still in law school⁸ — is enough to confirm that John Hart Ely had the kind of killer résumé that meant any law school would gladly hire him whether he could actually teach or not.

While brilliant scholarship may not always coincide with outstanding teaching, with Professor Ely, the two seemed to nurture each other. Many of his students will attest that, far from making the study of law a dry and academic exercise, he turned it into a joyous and memorable intellectual experience. He had a marvelous sense of humor and a wry delivery that frequently took you by surprise, with the result that the classroom would often erupt in laughter. How could anyone forget Ely's revelation that the actor who portrayed him in the film version of *Gideon v. Wainwright* (selected for his resemblance to Ely) went on to a glorious career making nothing but porn films? Or his story about driving Chief Justice Warren home from work during Ely's clerking days. According to Ely, he and the Chief Justice got into a heated argument

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1. Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 424 (2000).

2. JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980), to cite it one more time, just for the fun of it.

3. Fred R. Shapiro, *The Most-Cited Legal Books Published Since 1978*, 29 J. LEGAL STUD. 397, 401 (2000).

4. Adam Liptak, *John Hart Ely, a Constitutional Scholar, Is Dead at 64*, N.Y. TIMES, Oct. 27, 2003, at A21.

5. *Id.*

6. *Id.*

7. 372 U.S. 335 (1963) (holding that states must provide counsel for indigent defendants in criminal cases).

8. Liptak, *supra* note 4, at A21.

about a case then before the Court, *Griswold v. Connecticut*.⁹ They agreed on the outcome but not on the rationale. When the argument reached the shouting stage, Warren insisted that Ely stop the car and let him out. Ely was in a quandary; it would have been inexcusable to let the Chief Justice of the United States get out and walk. Thinking quickly, he hit upon the solution of continuously driving around the block. That way, he could keep making right turns at red lights and didn't have to stop the car until he'd given the Chief Justice a chance to cool off.

Professor Ely didn't wear his fame on his sleeve. He humbly acknowledged when his lack of artistic skill resulted in a blackboard diagram of First Amendment principles that resembled a piece of Swiss cheese (not a bad metaphor, actually, when you think about it). But he made comments from time to time that showed he knew what a target he was for anyone who wrote on constitutional issues. In his class, we used the Stone casebook,¹⁰ one that frequently cited Ely's work in the case notes. In the course syllabus, Ely explained the rationale for his choice of textbook: "Whether overtly or covertly, the teacher's viewpoint obviously pervades every course: I use the Stone Seidman casebook largely to provide some balance. It is recurrently critical of my work, and directs you to numerous other criticisms. Every last one of them invalid."¹¹

There was an endearing sweetness about him that seemed to justify his description of himself as having a boyish charm and a heart as big as all outdoors. In spite of his iconic status, he was utterly approachable, more so than many a less famous professor, and he would greet my after-class questions with interest and patience. He always talked to me as if we were just a couple of colleagues with a common interest in constitutional law, not as if he was the expert and I was the neophyte. When we studied *Romer v. Evans*,¹² the case that struck down Colorado's anti-gay amendment, he never mentioned in class that he was one of five nationally recognized constitutional scholars who had written an *amicus curiae* brief¹³ for the Court supporting the overturning of the law on equal protection grounds. I found this out on my own and asked him

9. 381 U.S. 479 (1965) (holding that right to use contraceptives is constitutionally protected).

10. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* (4th ed. 2001).

11. John Hart Ely, Syllabus for Constitutional Law II, University of Miami School of Law, Spring 2002 (on file with author).

12. 517 U.S. 620 (1996).

13. Brief of Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, & Kathleen M. Sullivan, as *Amici Curiae* in Support of Respondents, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039), available at 1995 WL 862021.

where I could find the text of the brief.¹⁴ At the next class, he handed me a copy.

The last time I saw him was two weeks before he died. I went to visit him at his home. He was sitting up in bed, but he was so weak from the cancer that I could only stay a few minutes before he was too tired to continue the visit. Nevertheless, we had a nice talk, considering the situation. I gave him a copy of my recently published law review comment. He said he would try to read it. I told him that I was now teaching at the law school, a fact of which he hadn't been aware. I said he was one of my role models as a teacher. It was true. When I started thinking about how I would teach my class, Ely was one of the people I wanted to emulate. There are a few things about teaching you could pick up from an Ely class: (1) have a sense of humor, (2) challenge your students intellectually, but be ready to learn from them, (3) don't act like you're a big shot. It isn't just what he taught me about the Constitution that I'll remember; he also taught me that the simple joy of sharing knowledge with others is enhanced by a sense of humility, not a sense of self-importance. That's another part of the John Hart Ely legacy, in addition to his writings, that I hope will live on.

To his wife, Gisela Cardonne Ely, to his sons, John and Robert, and to all his family and friends, I offer my condolences. We've lost a great one.

14. As the preceding footnote reveals, it is now available on Westlaw.