

Symposium

The Duty To Defend

Barbara Allen Babcock[†]

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[†] Judge John Crown Professor of Law, Emerita, Stanford Law School. Thanks to the indefatigable staff of the Robert Crown Library and to Kateryna Rakowsky, a second-year law student, for help locating sources and documenting this piece.

INTRODUCTION

In the summer of 1962, John Ely and I were law clerks at Arnold, Fortas & Porter. This was a very hot ticket, and we were proud to win it because the firm was the model for doing good while doing well. The principals were major New Dealers, now corporate lawyers and Washington insiders, who also represented poor criminal defendants and the politically oppressed.¹

Notably, they had taken on the cause of accused communists, clients many lawyers turned away as the Cold War raged on. And Abe Fortas had been the lawyer for Monte Durham, the indigent defendant whose case established the modern insanity defense.² Firm members often told about the big business executive (and potential client) who asked Paul Porter whether the firm in fact represented the likes of communists and rapists. “That’s right, we do,” Porter responded. “What can we do for you?”³

That summer, the firm was engaged in the most significant pro bono case of all time—*Gideon v. Wainwright*, which would hold that there is a constitutional right to counsel in serious criminal cases.⁴ John Ely worked on the brief in *Gideon*, and the story became one of his favorites. It is the first entry in the criminal procedure section of his collected essays, *On Constitutional Ground*.⁵

In that section he also reprinted his only law review piece on a criminal subject, a blistering attack on a specific case, titled *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*.⁶ John accounted for the tone of *Anxious Observations* by

1. LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 152-90 (1990) (describing the firm, its personnel, and its cases); ANTHONY LEWIS, GIDEON’S TRUMPET 48-53 (1964) (describing Fortas and the law firm).

2. See *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954); KALMAN, *supra* note 1, at 178-80.

3. *Conference on the 30th Anniversary of the United States Supreme Court’s Decision in Gideon v. Wainwright: Gideon and the Public Service Role of Lawyers in Advancing Equal Justice*, 43 AM. U. L. REV. 1, 11 (1993) [hereinafter *Conference*] (internal quotation marks omitted) (remarks of Brooksley E. Born).

4. 372 U.S. 335 (1963); see also JOHN HART ELY, ON CONSTITUTIONAL GROUND 198 (1996).

5. ELY, *supra* note 4, at 198.

6. Alan M. Dershowitz & John Hart Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971). For purposes of this article, I am treating *Anxious Observations* like John did in *On Constitutional Ground*, acknowledging the coauthorship with Alan Dershowitz but describing the part of the article that concerned impeachment as John’s personal reaction and response, in light of his loss in *Martin*. ELY, *supra* note 4, at 211. Dershowitz personally confirmed to me that this was true at *The Yale Law Journal’s Symposium On Democratic Ground: New Perspectives on John Hart Ely*, on November 13, 2004.

saying it was his “‘last lick’ in reaction to a particularly bitter defeat I suffered in the Ninth Circuit” and citing the case of *Martin v. United States*.⁷

Why *particularly* bitter? I wondered after reading the case. Defeat is the daily bread of defenders—and on the surface there is nothing special about the *Martin* case. It was a routine charge of drugs found on the defendant at a border search. So I located John’s briefs in a remote government archive. In these pages, which no one had looked at for more than thirty years, I discovered the magnitude of the loss and how personally involved he was in the case.

Reading about John Ely and Billy Joe Martin led in turn to some reflections on the role and obligation of defense lawyers, particularly about the perils of putting the defendant on the stand. The subtexts are the interest and satisfaction (not to say the joy and passion) of the work. *Gideon* is the framing story, especially appropriate because John said that when he represented Martin, he was doing “my bit to help follow up on the promise that was made in *Gideon*.”⁸

My words are also a memorial to John Ely in one of his best moments. If they partake as well of personal manifesto, I think John would approve. As he once said himself, most tributes are also “about the tributor.”⁹

I. JOHN HART ELY AND CLARENCE EARL GIDEON

In his classic study of the case, Anthony Lewis wrote,

The case of *Gideon v. Wainwright* is in part a testament to a single human being. Against all the odds of inertia and ignorance and fear of state power, Clarence Earl Gideon insisted that he had a right to a lawyer and kept on insisting all the way to the Supreme Court of the United States.¹⁰

There for the first time in his entire life, the four-time loser got really lucky. The Court appointed Abe Fortas to follow up on the handwritten pro se petition that Gideon had filed. It did not take a weatherman to see which way the wind was blowing, as we used to sing at the time, when the Warren Court chose Fortas to be Gideon’s lawyer. They were preparing to overrule *Betts v. Brady*, the twenty-year-old precedent that required lawyers

7. ELY, *supra* note 4, at 211 (citing *Martin v. United States*, 400 F.2d 149 (9th Cir. 1968)).

8. *Id.* at 209.

9. *Id.* at 5 (reprinting Ely’s tribute to Earl Warren (“Like most tributes, this one is about the tributor as well as the tributee . . .”).

10. LEWIS, *supra* note 1, at 208.

in serious state criminal cases only when there were “special circumstances” justifying their appointment.¹¹

Gideon was not a slam-dunk case, however. The criminal justice system was still reeling from *Mapp v. Ohio*, which applied the Fourth Amendment and its exclusionary rule to the states.¹² All the arguments about federal interference with local procedure that *Mapp* had stirred up only one year earlier applied in spades to overruling *Betts*. A new rule would affect the practice in every courthouse in the country, from the smallest hamlet to the New York metropolis. In light of the situation, Fortas decided not only that he must win *Gideon*, but also that he needed “as much unanimity as possible” to make the new doctrine acceptable.¹³

Fortas acted as the general of a litigation force, designating a younger partner, Abe Krash, as field commander and John Ely as one of the troops on the ground.¹⁴ John spent his whole summer on the *Gideon* brief, producing a series of memoranda on subjects related to the right to counsel. In a wonderful passage, Lewis describes

the extraordinary process by which a large law firm digests a legal problem. Bright young men [sic: this was the early 1960s] break it down into tiny components and write treatises on every conceivable issue—they probe, imagine, cover every exit. Then, from this jumble of material, a skilled lawyer creates a legal work of art, choosing a coherent form for his argument and ruthlessly eliminating all that is extraneous to that form.¹⁵

Before returning to law school, John stopped writing memoranda and tried his hand at drafting the brief itself. “Krash and Fortas liked it, but they wanted something more finished and more pointed,” wrote Lewis, describing the remarkable preparation of the final product.¹⁶ While Krash crafted a second draft, “Fortas soaked himself in the right-to-counsel issue by sitting in the firm library for a week reading cases and commentary.”¹⁷ Then he holed up in a hotel room for two days, “blocking out the brief he wanted.”¹⁸ From these notes and hours more of consultation, Krash did a

11. The Court order granting the petition for certiorari said, “In addition to other questions presented by this case, counsel are requested to discuss the following in their briefs and oral argument: ‘Should this Court’s holding in *Betts v. Brady* be reconsidered?’” *Gideon v. Cochran*, 370 U.S. 908, 908 (1962) (mem.) (citation omitted).

12. 367 U.S. 643 (1961).

13. LEWIS, *supra* note 1, at 119.

14. Lewis discusses Ely’s role and quotes his memoranda at length. *Id.* at 122-27.

15. *Id.* at 120-21.

16. *Id.* at 133.

17. *Id.*

18. *Id.*

fresh and final brief and filed it in the Supreme Court. Altogether a stunning investment of time and high-level effort for a pro bono case.¹⁹

Though John was disappointed that little of his prose made it into the final product, he was gratified by a footnote (unprecedented and as prominent as a note can be) acknowledging the “valuable assistance of . . . John Hart Ely, a third-year student at the Yale Law School, New Haven, Connecticut.”²⁰ The client was the most pleased of all. From his Florida prison cell Gideon wrote this to Abe Fortas: “Everone [sic] and myself thinks it is a very wonderful and brilliant document. I do not know how you have enticed the general public to take such a interest in this cause. But I must say it makes me feel very good.”²¹

The decision in *Gideon v. Wainwright* came down in March 1963.²² Justice Black, who had dissented in *Betts v. Brady*, announced the opinion from the bench. From the lawyers’ perspective, the outcome was a total triumph. The Court was unanimous in holding that in all serious cases the states must provide counsel to those who could not afford it.²³ On the same day that it announced *Gideon*, the Court also provided counsel for criminal appeals²⁴ and eased the procedural path for habeas corpus petitioners.²⁵

The Yale Law School Class of 1963 was only weeks from graduation, and the revolution had officially begun. I had forgotten, until I started writing this piece, how dramatic it all seemed at the time, especially for me. From a tender age, I had planned to be a criminal defense lawyer, and now the United States Supreme Court was opening many paths to my goal. In a sense, for purposes of this story, I had been present at the creation.

In the summer of 1962, while John worked on *Gideon* with Abe Fortas, I worked on an administrative law case with Paul Porter. I, too, drafted an entire appellate submission, and mine was filed in the D.C. Circuit, verbatim as I wrote it. It was an appeal from the FCC’s denial of a TV license renewal, with a record thousands of pages long. Though Porter took me out to a fancy lunch to thank me for my efforts, they don’t lend themselves to a good story or even an instructive tale.

19. “Krash’s office diary shows that in the month from the printing of the record to the filing of the brief he spent an average of six hours every working day on the case of Clarence Earl Gideon.” *Id.*

20. *Id.* at 138 (internal quotation marks omitted).

21. *Id.* (internal quotation marks omitted).

22. *Id.* at 186-90.

23. *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963). Justices Douglas, Clark, and Harlan wrote separate concurring opinions.

24. *Douglas v. California*, 372 U.S. 353 (1963). Years earlier the Court had decided *Griffin v. Illinois*, 351 U.S. 12 (1956), which held that the state must provide an indigent prisoner a transcript and access to appellate procedure.

25. *Fay v. Noia*, 372 U.S. 391 (1963); see LEWIS, *supra* note 1, at 186.

Working on that case while following John's adventures on the *Gideon* brief did, however, reinforce my desire to do criminal defense. I practiced for almost a decade, ending as the first director of the Public Defender Service in the District of Columbia, a model agency designed to meet the demands of *Gideon* in the nation's capital. In 1972, I left to teach at Stanford, and in the 1980s John and I were together again, when he joined the faculty as dean of the law school.

As I knew John over forty-plus years, he was not the kind of intellectual who loved to discuss ideas or debate theories or even press a little doctrine. At least it was not his preferred mode. What John liked was telling stories: He often reminisced about "the best summer job ever,"²⁶ usually complaining about the inaccuracy of his portrayal in the movie *Gideon's Trumpet*. (He does come off as somewhat obsequious, which, for the record, John never was, not even a little.)

In his *Gideon* story, John reveled in the contrast between the grandeur of the principles involved and the pettiness of the case. Clarence Earl Gideon was twice tried for a two-bit burglary of a seedy poolroom where he regularly hung out.²⁷ Over the years, John embellished the tale with new adventures. Thus, in the early 1990s, he wrote to Lewis under the epitaph "*Sed sic transit gloria mundi*":

Last November, for reasons that are currently obscure, I found myself driving from Key West to New Orleans along the gulf coast, and consequently passed through Panama City. Assuming that the Bay Harbor Poolroom . . . must have been made a shrine of some sort, I naturally determined to check it out. Pilgrims there, I figured, would probably be anxious to have my autograph.²⁸

But no—John searched all day for this Sixth Amendment mecca only to end up with a picture of an abandoned building that may or may not have been Gideon's old stomping grounds. The photograph became part of John's story, however, for some time after the Panama City quest. He wanted to reprint it in *On Constitutional Ground*, but the editors apparently did not see the point.

I don't think John ever met Gideon, but he enjoyed telling about what a cranky old guy he was. "Gideon is something of a nut," wrote an ACLU lawyer at the time. "[H]is maniacal distrust and suspicion lead him to the

26. ELY, *supra* note 4, at 198.

27. I use "two-bit" here because the burglary involved only a little cash, some soft drinks, and a pint of booze. But because of his four prior convictions (for other small stuff), Gideon was originally sentenced to five years in prison. See LEWIS, *supra* note 1, at 65-78 (reproducing Gideon's autobiographical letter to Fortas).

28. ELY, *supra* note 4, at 207.

very borders of insanity. Upon the shoulders of such persons are our great rights carried.”²⁹ And his name was so perfect for a landmark case.

The case was well suited to its purposes in other ways too: no violence, no weapons, no personal confrontation, and—because Gideon was a white man—no issues of racial unfairness. As it came back for retrial with a lawyer thanks to the Supreme Court, we due process buffs held our collective breath. It would have been awful for Gideon to lose with legal help (and just imagine the ineffective-assistance-of-counsel claim).

Given the notoriety of the case, the judge agreed to appoint the local attorney of Gideon’s choice: Fred Turner.³⁰ The lawyer spent “three full days before trial interviewing witnesses and exploring the case.”³¹ He even went out in the backyard and picked pears with the mother of the star witness, to get impeachment material. At trial, Turner skillfully cross-examined, put his client on the stand, and pleaded for a not-guilty verdict. In less than an hour, the jury acquitted, freeing Clarence Earl Gideon after he had served two of the five years originally imposed.

The judge at the first trial had written, “In my opinion [Gideon] did as well as most lawyers could have done in handling his case.”³² But, as Lewis pointed out, “Gideon had not done as well as Fred Turner. He had none of Fred Turner’s training, or his talent, or his knowledge of the community. Nor could he prepare the case as Turner had, because he had been in prison before his trial.”³³ The difference in outcome from adding a lawyer made the retrial narrative deeply satisfying.

Especially so to John, whose prize memo of all that he had written that summer demonstrated what counsel could have done for Gideon. Using the trial transcript, John had shown where a lawyer would have made a motion, capitalized on an answer, objected to evidence, and corrected a misstatement of the law.³⁴ These were not things that a layman, even one

29. LEWIS, *supra* note 1, at 228 (internal quotation marks omitted). On retrial, Gideon rejected the services of the Miami civil liberties lawyers, suspecting that they would not do well with a Panama City jury.

30. *Id.* at 226.

31. *Id.* at 238.

32. *Id.* (internal quotation marks omitted).

33. *Id.*

34. *Id.*

34. “If such prejudice occurred in this trial,” he wrote, “it would seem that there is *no* trial in which counsel is unnecessary.” ELY, *supra* note 4, at 199. As John would later point out, this was clever because it enabled Fortas to argue that *Betts* should be overruled, while also placing Gideon’s “special circumstances” before the Court: a little outcome-insurance policy. *Id.* John included the following starred note after his memo excerpt in *On Constitutional Ground*:

This was an attempt to resolve an ethical dilemma. In appointing Fortas to represent Gideon, the Court had asked him to address himself to whether *Betts v. Brady* should be overruled. Obviously that was at least the Court’s tentative inclination and had to be our principal argument. However, we didn’t want to leave Gideon, who was after all our client, without the hedge that he should prevail even under *existing* law. By

who had experience as a defendant, could know to do for himself. As clever as John's memorandum was, however, he did not see the real prejudice to an uncounseled accused—the true difference a lawyer makes.

It was not mainly through the legal motions and technical objections that Fred Turner won for Clarence Gideon. Rather, it was in preparing the old ex-con to testify, showing him how to present himself, and lending Gideon his own credibility both in direct examination and in closing argument. In a few years, John would learn firsthand what it really means to an indigent accused to have a lawyer—and how hard it sometimes is to be that lawyer.

Now to the “bitter defeat” in *Martin*.

II. JOHN HART ELY AND BILLY JOE MARTIN

It's a familiar story to public defenders. The client meets a charismatic stranger—at a party, a club, his cousin's house. He never learns a real name: “‘Feet’ was all I ever heard.” “They called him ‘Big Man.’” Or “‘Jupiter.’” No address, no phone number, no first (or maybe last) name.

For reasons that are perhaps unknowable, certainly never fully explained, the stranger performs incredible acts of generosity toward the client. Feet handed a young man I represented the keys to a Cadillac and told him to take it for a spin. Big Man gave out cocaine like it was candy. And Jupiter took John Ely's client to Tijuana just so he could enjoy himself.³⁵

Billy Joe Martin did have fun at first—but after several shots of tequila, provided by Jupiter,

[s]omething happened, I know I woke up in my car, you know. When I woke up all the gifts that I had in the car was gone, and the money I had inside my shirt pocket was gone. I remember I was parked almost at the border. I could see the border.³⁶

After a fruitless search for Jupiter, Billy Joe started for home but was stopped at the San Ysidro port of entry. A search revealed four ounces of

structuring the argument in the way here suggested—that this is the case that proves that there are *always* “special circumstances”—I felt we could have it both ways. *Id.* at 199 n.*. John's lengthy memo became a short appendix to the Fortas brief. Abe Fortas folded John's argument into his larger one that the *Betts* rule had no real boundaries and actually involved greater federal and appellate interference with state criminal procedure than would a flat requirement of counsel in all serious cases.

35. *Martin v. United States*, 400 F.2d 149, 151 n.3 (9th Cir. 1968); *see also* Appellant's Brief at 4, *Martin* (No. 22586). *See generally* Appellant's Reply Brief, *Martin* (No. 22586); Appellee's Brief, *Martin* (No. 22586). The briefs from *Martin* are on file with the author.

36. *Martin*, 400 F.2d at 152 n.3 (internal quotation marks omitted).

heroin stuffed in his coat pocket. Billy Joe Martin was arrested and charged with smuggling narcotics.³⁷ John Hart Ely was assigned to represent him.

At the time, John had been a criminal defense lawyer for only a few months. After graduation in 1963, he was headed for a clerkship with Chief Justice Warren, the most coveted spot a man could have right out of law school. But his draft board refused a deferment, so John ended up in the Reserves for a year, as a military policeman.

“I put in for this because I knew I was going to be a criminal defense lawyer, at least for a while, and thus wanted to learn to ‘think like a cop,’” he later wrote.³⁸ He came out of the service in time to join the staff of the Warren Commission to investigate the Kennedy assassination. When Warren returned to the Court, John went with him to clerk in the 1964 Term. Then he spent a year in London on a Fulbright, and after that moved to San Diego to do criminal defense, preparatory to becoming a law professor.

John helped to found Defenders, Inc., one of the many projects set up around the country in the wake of *Gideon*.³⁹ Describing those days, John said he lost some trials, of course, but “[I]less than you might imagine, as San Diego had long been a city where guilty verdicts were essentially automatic. The sight of an appointed lawyer actually fighting for his client so shocked local juries that a number of them actually acquitted.”⁴⁰

Not in *Martin*, however, though John fought very hard indeed. To understand how it all played out, let us return to the border where, crossing from Mexico in March 1967, the hapless Billy Joe Martin declared two pictures, two cats, and a black hat. When searched, however, drugs wrapped in pink tissue were found in his coat pocket. Under interrogation, he told conflicting and improbable stories about how the packet came to be there.

37. Martin would be convicted of two counts, smuggling and concealing narcotics, under 21 U.S.C. § 174 (1964) (repealed 1970).

38. ELY, *supra* note 4, at 209.

39. “*Gideon* was like a wake-up call that set forces in motion on a dozen fronts.” *Conference*, *supra* note 3, at 5 (remarks of California Court of Appeal Justice Earl Johnson, Jr.). In the two years following *Gideon*, the Federal Criminal Justice Act was enacted, and the OEO Legal Services Program and the National Defender Project were created, as were “literally scores of public defender and organized offender programs in state courts around the country.” *Id.*; see also LISA J. MCINTYRE, *THE PUBLIC DEFENDER* 29 (1987) (“In 1951 a national survey counted only seven public defender organizations; by 1964 (a year after *Gideon*) the total had risen to 136”); Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2425, 2425-26 (1996) (discussing the “explosion in the number of defender offices across the country” after *Gideon*). See generally Barbara Allen Babcock, *Lefstein to the Defense*, 36 IND. L. REV. 13 (2003) (describing the founding of the Public Defender Service in Washington, D.C.).

40. ELY, *supra* note 4, at 431 n.8. John added, “Of course some other lawyers also fought as well, and our example increased the incidence of such behavior, and to this day—obviously thanks as much to our successors as to us founding fathers—at least the federal defender program in San Diego remains one of the models nationwide.” *Id.*

In none of these accounts, at least as recorded by the officer, did Billy Joe mention Jupiter.

Using the newly minted *Miranda v. Arizona*,⁴¹ John moved to suppress the statements that his client had made while in custody at the border.⁴² Recall the two-part *Miranda* holding: All custodial interrogation “contains inherently compelling pressures”; a sufficient warning and the opportunity to cease questioning can dispel the coercion.⁴³ John argued that though there had been warnings and even a signed waiver, the officers failed to advise Billy Joe of the essential fact that he could have a lawyer with him during the questioning. *Miranda* was barely two years old—and the lower courts were still reading the opinion for what it actually meant. The district judge granted the motion to suppress.⁴⁴

Though green as a trial lawyer, John was already deeply experienced as a reader of constitutional texts, so he was thinking ahead as the *Miranda* opinion implied lawyers should do. He moved next that the suppression order should also forbid the government’s use of the statements to impeach the defendant when he took the stand.⁴⁵ The judge agreed that certain portions of the statement could not be used for any purpose.

Sounding like a law professor already, John nailed down this part of the oral ruling:

Excuse me, your Honor, just for [the officer’s] guidance as much as anything when he does take the stand, there are several other matters in there that perhaps we ought to clear up. What I am particularly concerned about, amongst other things, is the fact that according to [the officer], he changed his story during the interview.⁴⁶

The court responded: “Well, I ruled that neither [story] can come in.”⁴⁷

41. 384 U.S. 436 (1966).

42. See Appellant’s Brief at 3, *Martin v. United States*, 400 F.2d 149 (9th Cir. 1968) (No. 22586) (recounting Martin’s statements).

43. *Miranda*, 384 U.S. at 467; *id.* at 533 (White, J., dissenting) (“[I]n the Court’s view in-custody interrogation is inherently coercive . . .”).

44. See *Martin*, 400 F.2d at 151. Such a ruling would be unlikely on similar facts today. When *Miranda* was new, however, the belief was widespread that it would effectively end the use of statements taken in uncounseled interrogations. The reasoning went like this: Any defendant who understood the warning would surely choose to have a lawyer present, and no lawyer would advise talking at such an early stage of the case. See, e.g., *Miranda*, 384 U.S. at 516 n.12 (Harlan, J., dissenting) (“[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.” (alteration in original) (internal quotation marks omitted)).

45. Appellant’s Brief at 3.

46. *Martin*, 400 F.2d at 151 n.2 (internal quotation marks omitted).

47. *Id.* (internal quotation marks omitted).

At the same time, the judge ruled that Martin would not be allowed to claim some high-minded purpose for his trip, but would have to admit that he went to a house of ill repute and got drunk. Again John clarified, "All right, if that's all that's going to come in, . . . I would have no further objection."⁴⁸ The trial proceeded.

Picture the prosecution's case in your mind's eye: the opening statement, the customs agent who did the search, the other officer who made the arrest, the chemist who ran the test that showed the white (or brownish) substance to be heroin. The defendant's statements, suppressed under *Miranda*, were hardly necessary to prove the government's case—especially because the most damning admission happened precustody. According to the customs officer, just as he started to search Martin's coat, the suspect exclaimed, "I bet I know what that is; somebody must have put that there."⁴⁹

What possible defense is there to such a case? Only the defendant's testimony: that he was the unsuspecting dupe of a man named Jupiter, that he did not know the package was in his coat pocket or did not know that it contained heroin (pink tissue paper, an unusual drug packaging, is some help here). Maybe John also tried to find Jupiter, or some objective evidence that he existed. But in the end, all they had for the "real villain" defense was Billy Joe on the stand, not only to deny his guilt but to tell about Jupiter.

In tandem with his Yale-trained lawyer, Martin told his tale well. He was a musician, and playing in L.A. clubs he met the freelance agent known only as Jupiter. On the promise of a good time, Martin drove Jupiter to Tijuana, where they spent some hours shopping, attended a house of ill fame (or ill repute), drank some tequila, and then everything went dark. Martin awoke in his car near the border.

While the appellate court would later find this story "bizarre and unusual,"⁵⁰ it must have sounded pretty good as it came from the witness stand, because the prosecutor felt the need to test the court's *Miranda* ruling. On cross-examination, he asked, "Did you tell the customs officials at the border about Jupiter?" To which the defendant replied, "Yes, I told them."⁵¹ "[V]ociferously" (his word),⁵² John objected, and he asked to approach the bench:

48. *Id.* (internal quotation marks omitted).

49. *Id.* at 150 (internal quotation marks omitted).

50. *Id.* at 151.

51. Appellee's Brief at 10, *Martin* (No. 22586) (internal quotation marks omitted).

52. Appellant's Reply Brief at 9, *Martin* (No. 22586).

Mr. Ely: That is the whole point. [The prosecutor] just sidestepped the order given. I think the whole point of keeping that out was to keep the jury from knowing that certain things were not said at the border.

The Court: Well, no harm has been done as yet. He said he did tell them about Mr. Jupiter.

Mr. Ely: Yes. Well, I would like the course of questioning to be discontinued immediately as to what he said at the border.

[The Prosecutor]: I wasn't going to go into it any further.

The Court: All right, no harm has been done.⁵³

The court was correct at this point—no harm had been done. The defendant had given his testimony that he was an unwitting drug mule. None of the contrary stories he told at the border under lengthy interrogation without proper warnings had been admitted, including, most importantly, his failure to mention Jupiter.

Imagine John's horror when, on rebuttal, the prosecutor called the interrogating officer to the stand, and proposed to ask him if Billy Joe mentioned Jupiter. On his feet, John again "vociferously" objected, and in a bristling exchange at the bench, he expostulated, "This is exactly the one thing I was trying to keep out, the failure to mention Jupiter, that is what the motion was all about."⁵⁴ But after further colloquy, the judge reconsidered his prior ruling and allowed the testimony for the purpose of impeachment only. In the unkindest cut, he called it "collateral."⁵⁵

So it was that these questions were asked and these answers given—the last testimony the *Martin* jury heard, at a time when the defense could not respond (though of course the jury did not know that court rules precluded response).

Q. Referring to the early morning hours of March 30th of this year did you have an opportunity to have a conversation with the defendant?

A. Yes, I did.

....

53. Appellee's Brief at 10-11 (internal quotation marks omitted).

54. Appellant's Brief at 5-6, *Martin* (No. 22586) (internal quotation marks omitted).

55. *Id.* at 6 (internal quotation marks omitted).

Q. During the course of this conversation did the defendant ever tell you anything about a man named Jupiter?

A. Not to my recollection.⁵⁶

There went any real chance of an acquittal. For one thing, it gave the prosecutor an unanswerable jury argument, and he pressed it hard. If you were innocent, you would tell about Jupiter. No one who had heard the name Jupiter would forget it.⁵⁷ Almost as crushing was the fact that the jury learned for the first time about this “conversation” at the border.⁵⁸ They had to wonder what else the defendant said, or did not say, and to suspect that worse was being kept from them—to feel, in short, that Billy Joe was the duper and they the projected dupes.

The jury convicted, the judge sentenced, and John Ely appealed the case. Everything up until now I’m sure happened pretty much as I have written it. On the next part I must speculate a little, though there is good evidence to support my interpretation. For what it’s worth, I’m as certain of this part as if I had sat next to John in that courtroom as I did in the classroom so many years ago.

A. *The Backstory of the Bitter Loss in Martin*

On a legal level John was personally involved because he had won the suppression prize by the exercise of his skill. He had shown the judge the true meaning of *Miranda*, had trounced the prosecutor, and even had a chance to win because the defendant looked so good on the stand. All this was snatched from him—at the very moment he was about to savor that ultimate triumph: the not-guilty verdict in a hopeless case.

Why did the judge change his mind and ruin John’s chances?

Precisely because he saw that John was on the verge of winning. Then why had he suppressed the statements in the first place? I suggest that he did it, to use a famous old metaphor, in order to “let the fox have his run” at the hunt, knowing that he will be torn to pieces in the end.⁵⁹ It increased the interest and fairness of the trial to let the defendant testify and give his best story, unfettered by what he had said at the border.

56. *Martin*, 400 F.2d at 152 (internal quotation marks omitted).

57. Appellant’s Brief at 6-7.

58. Remember that any references to the defendant’s statements while in custody were suppressed in the government’s case in chief. The judge’s original ruling would have allowed the prosecutor to impeach Billy Joe if he had denied being drunk and visiting a whorehouse. But he testified to both on direct examination, so there was no prior occasion for mention of the border interrogation.

59. See, e.g., 7 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 454 (Edinburgh, William Tait 1843).

To the prosecutor, the ruling felt like bias, which he bravely if inartfully professed in his brief:

The lower court, as do many trial courts, looked at the evidence of overwhelming guilt, and unilaterally decided to control the amount of evidence on the issue of guilt, regardless of its admissibility

. . . [The purpose is to] provide a defendant under such circumstances with whatever psy[c]hological benefits that might accrue from favorable rulings. It is more understandable in view of the certain conviction, and the absence of appeal by [the government].⁶⁰

Perhaps this was just prosecutorial paranoia, or perhaps he had a point. To evaluate his claim, consider the lot of the San Diego district court judges in those days before the widespread federalization of the criminal code. Their criminal diet was mostly drug smuggling. These were cold cases that turned on the motion to suppress, and that was usually a foregone conclusion because it was already well established that the Fourth Amendment had little bite at the border.⁶¹

The drug cases became routinized over the years—the same appointed lawyers or, for the more successful smugglers, retained counsel made the usual motions, and the customary plea bargains were offered after the motions were denied. The same old sentences followed. Judges found their intellectual stimulation in other parts of the docket. (The judge in John's case, a former Navy commander, particularly enjoyed his court's admiralty jurisdiction.)⁶²

Upon this scene came John Ely (and other post-*Gideon* defenders), making new motions, shaking up the old routines. San Diego then (and still, to a surprising degree) had a small-town feel to it. There was a lot of talk in legal circles about the new defenders—perhaps especially the brilliant Yale man who had clerked for the Chief Justice and served on the staff of the Warren Commission.

60. Appellee's Brief at 23-24, *Martin* (No. 22586).

61. In *On Constitutional Ground*, John describes his most signal victory in a border case: *Huguez v. United States*, 406 F.2d 366 (9th Cir. 1968), which established the need for a warrant to invade the person. ELY, *supra* note 4, at 210-11; see also *infra* note 144 and accompanying text. That victory failed to establish high standards for border searches and was presumably overruled by *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985), which involved lengthy detention and the administration of laxatives.

62. Judge Kunzel had written an article on admiralty law. Fred Kunzel, *The Seaman's Personal Injury Action and the Jury Trial*, 2 SAN DIEGO L. REV. 25 (1965).

At any rate, the judge decided to give the Billy Joe fox “room to run” by freeing him to tell his story on the witness stand. Not only were his statements at the border suppressed, but the judge also ruled that he could not be impeached with them if he took the stand, and for good measure, he forbade the use of Martin’s rape conviction because it did not go to his credibility. It was all good jurisprudential sport, precisely because there was no chance that the fox would escape—“no harm . . . done,” as the judge said in another context.⁶³

Until, I surmise, John Ely started taking it all too seriously. He treated the Jupiter defense respectfully—no small smiles or shrugs to dissociate himself from it. Rather than a ludicrous liar on the stand, Billy Joe came off as a luckless, marginal character, the kind who just might wander across the border unwittingly bearing drugs. My interpretation is based mainly on the poignant scene that transpired when the jury returned its verdict (after almost three hours of deliberation—a small victory in itself) and was excused.

At that point, or perhaps as they awaited the return of the verdict, John indicated he planned to appeal the impeachment point. The judge, according to the prosecutor, expressed “shock.”⁶⁴

The Court: If he is going to take this up on appeal—

Mr. Ely: It’s my idea.

The Court: I’m just saying this now, that I am certainly going to take that into consideration [in sentencing].⁶⁵

When John suggested “with all due respect” that would not be “proper,” the judge answered, “It may not be, but I am so firmly convinced in this case that there is no question about the defendant’s guilt.”⁶⁶ John then said, “I will tell you what I am going to appeal on,” and there followed a lengthy discussion of the legal issues.⁶⁷

Totally unmoved and perhaps irritated by Ely’s persistence, the judge concluded, presciently: “I do not think that . . . Miranda . . . can be used by the defendant as a shield where he elects to get on the witness stand and tell an outright lie.”⁶⁸ The “outright lie” that outraged the judge was not so

63. Appellee’s Brief at 11 (internal quotation marks omitted).

64. *Id.* at 24.

65. Appellant’s Brief at 8 (capitalization altered) (internal quotation marks omitted).

66. *Id.* (internal quotation marks omitted).

67. *Id.* (internal quotation marks omitted).

68. *Id.* (internal quotation marks omitted).

much the Jupiter story itself but that Billy Joe said he had told it to the customs officer.

Billy Joe Martin had turned the suppression shield fashioned to protect his right to testify into a sword to strengthen his defense. Here was the true rub for John Ely, I think, that soured his memories of the case. By implication (and not necessarily deliberately), the judge was attacking the lawyer's integrity when he held that the client could be impeached after all.

It was the lawyer who had suppressed the statements, the lawyer who had pressed for a ruling on their use for impeachment, the lawyer who had advised Billy Joe Martin on whether to take the stand, and the lawyer who had prepared him to tell about Jupiter. John Ely loaned his own credibility to Martin, assuming Jupiter's existence in his arguments, eliciting the story carefully, and aiding Billy Joe when he stumbled over a word or concept (what to call a warehouse in public, for instance). If Billy Joe Martin was committing perjury, John Ely was helping him do it.⁶⁹

During the colloquy over whether an appeal was justified, John made the point that Billy Joe's testimony was not a proven lie in any legal or technical sense. "In any event," he continued, "I don't think a man should be penalized because a man thinks they are appealable. I don't think that's a ground for making the sentence stiffer."⁷⁰

Now ominous, the judge responded, "All I want him to do is to tell the truth to the Probation Department."⁷¹ (That office would prepare the presentence report.) In the patois of criminal practice, he meant that Billy Joe should accept responsibility, admit that he had agreed to smuggle the drugs and that Jupiter was a figment. It was a no-win interview: If Billy Joe maintained the Jupiter story, the judge would be angry, but if he admitted lying on the stand, his appeal would be undercut. In the end, he refused to talk to the Probation Department, which went hard for him.⁷²

Billy Joe was sentenced to ten years on each count, to run concurrently: twice the minimum possible imprisonment.⁷³ The usual plea bargain,

69. In *Anxious Observations*, John discussed the lawyer's role in preparing witnesses: "Trial testimony is also prepared and elicited by an attorney who is bound not to countenance perjury in his witnesses (an obligation taken quite seriously by most lawyers)" Dershowitz & Ely, *supra* note 6, at 1222 n.95. The context for this remark was a comparison of the veracity of unwarned testimony in the police station with that given at trial. *Id.*

70. Appellant's Brief at 8 (internal quotation marks omitted).

71. *Id.* at 9 (internal quotation marks omitted).

72. See *Martin*, 400 F.2d at 153. There is no hint in the record of the conversation between John Ely and his client over whether to appeal in light of the sentencing judge's attitude. I suspect, however, that part of John's lifelong bitterness about the *Martin* loss came from regret over mistakenly thinking he could win just because he was right on the law. Dennis Curtis suggested this point to me at *The Yale Law Journal's* Symposium.

73. *Martin* was convicted under 21 U.S.C. § 174 (1964) (repealed 1970), which provided for a fine of \$20,000 and/or a sentence of five to twenty years for a first offense. Probation was not a

negotiable by any hack, would have been better than that. With regret and rage just below the surface, John appealed.

B. *The Appeal in Martin*

John's brief covered forty-six crisp pages on the application of *Miranda* to impeachment testimony and the reach of exclusionary rules in general. He cited almost a hundred impeccably apt cases, many with cogent quotations, as well as articles and treatises. Here, he wrote, was exactly the situation *Miranda* was meant to cover—the questioning of the isolated, unwarned, and uncounseled accused. Deterrence of this conduct, the goal of *Miranda*, would fail if the accused's statements could be used to impeach. John also claimed that the sentence was improperly harsher because he had indicated his intention to appeal.

In thirty poorly written pages with wide margins, the government cited three cases—one of which was *Miranda* itself. The brief said that the judge erred in finding a constitutional violation in the first place. So all John's high-flying hoopla over impeachment was beside the point. Plus the subtext—Martin was not a dupe but a very guilty dude.

Obviously irate, John referred in his reply brief to his opponent's "so-called" statement of facts and declared that one argument "defie[d] logic," another was "sophistry," and a third was "at best misleading."⁷⁴ The gloves were off, and the outcome of the bruising adversary exchange was a bad loss for John and Billy Joe. For openers, the Ninth Circuit gratuitously noted that the *Miranda* violation was not all that clear and, misreading the record, also claimed that John had failed to object to the question about Jupiter.⁷⁵

At any rate, the court held that *Miranda* applied only to statements, not to silence. "Nowhere is there any reference to excluding evidence that the defendant *did not* say something."⁷⁶ This was the very argument that John had said "defies logic."⁷⁷ As John saw it, the government was using the product of uncounseled questioning to convict—that was enough to implicate *Miranda*.⁷⁸ It was not, as he would say later, a case to be read for

possibility under the statute at the time. FED. DEFENDER'S PROGRAM OF SAN DIEGO, HANDBOOK ON CRIMINAL PROCEDURE IN THE UNITED STATES DISTRICT COURT 273 (1967).

74. Appellant's Reply Brief at 8, 10, 13, *Martin* (No. 22586).

75. *Martin*, 400 F.2d at 152.

76. *Id.* at 153; *see also* *Jenkins v. Anderson*, 447 U.S. 231 (1980) (holding that a defendant can be impeached with prearrest silence). *But cf.* *Doyle v. Ohio*, 426 U.S. 610 (1976) (holding that a defendant cannot be impeached with silence at the time of arrest and after receiving *Miranda* warnings).

77. Appellant's Reply Brief at 13.

78. Appellant's Brief at 12, 21, *Martin* (No. 22586).

“its precise facts,” but one that instead established “concrete constitutional guidelines for law enforcement agencies and courts to follow.”⁷⁹ Evidence obtained by violating the rules was “barred for all purposes.”⁸⁰

Martin came down in August 1968,⁸¹ a month after John Ely’s appointment to the Yale faculty. Even though he had left the defender’s life and was busily contemplating his tenure piece, John wrote a petition for certiorari on his own time. It was denied just as his first semester in the academy ended.⁸²

John and Billy Joe lost the case at trial, were denied relief on appeal, and failed in their attempt to win certiorari to the United States Supreme Court. John then turned to public opinion and posterity for vindication: He wrote an article about impeachment of a testifying defendant in *The Yale Law Journal*.⁸³

III. JOHN HART ELY AND VIVEN HARRIS: THE “LAST LICK”⁸⁴

One other thing directly related to our story happened in the momentous year of 1968: In November, Richard Nixon was elected President, having run on a platform blaming the Supreme Court for a breakdown in law and order. Soon enough, Nixon had his chance to replace Earl Warren with Warren Burger and Abe Fortas with Harry Blackmun (who, some younger folks may forget, started out as quite pro-prosecution). A prime target for the newly constituted Court was the 5-4 *Miranda* opinion, the one that was soft on criminals, handcuffed the police, and senselessly suppressed the best evidence.

The dismantling started with *Harris v. New York*, which held 5-4 that statements taken in violation of *Miranda* might be used to impeach the accused if he testifies.⁸⁵ John wrote that it was not surprising that Nixon’s appointees would “seek to reverse many of the holdings of that Court with something more than deliberate speed. The real disappointment is that men of the stuff of Justices Harlan, Stewart, and White would have joined this sort of opinion.”⁸⁶

79. Dershowitz & Ely, *supra* note 6, at 1210 (internal quotation marks omitted).

80. *Id.* (internal quotation marks omitted).

81. *Martin*, 400 F.2d 149.

82. *Martin v. United States*, 393 U.S. 987 (1968) (mem.) (denying certiorari).

83. Dershowitz & Ely, *supra* note 6.

84. ELY, *supra* note 4, at 211 (internal quotation marks omitted) (“[T]he following piece . . . was, at least so far as my contribution was concerned, a ‘last lick’ in reaction to a particularly bitter defeat I suffered in the Ninth Circuit.”).

85. 401 U.S. 222 (1971).

86. Dershowitz & Ely, *supra* note 6, at 1227 (footnote omitted).

Harris was the case that stirred *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*. Written with Alan Dershowitz, the article contains unusually strong language for academic discourse—sarcastically referring to one of the rationales as “half of a non sequitur,” for instance.⁸⁷ At another point it says, “[T]he majority, in crucial respects, flatly misstates both the record in the case before it and the state of the law at the time the decision was rendered”⁸⁸ In summary, John wrote, “each of the arguments set forth by the Court masks a total absence of analysis and provides no support for its result.”⁸⁹

What more devastating critique could there be of an appellate opinion? Try this: “[T]here is little room for disagreement about the desirability in Supreme Court adjudication of reasoned argument as opposed to arrogant *pronunciamento* or about the undesirability, indeed the intolerability, of what is, at best, gross negligence concerning the state of the record and the controlling precedents.”⁹⁰ Arrogant and intolerable: Wow.

Why was John Ely so angry? The case had some of the same human aspects as *Martin*. Viven Harris was a little guy in the great scheme of things—an addict, charged with selling small amounts of drugs to an undercover agent several times. He was arrested and questioned intensely;⁹¹ the disparity between the size of the sales and the law enforcement efforts indicates that Harris was a pawn in a move to get his drug dealer. Like Martin, he was not told that he could have a lawyer present while being interrogated, even though at one point he said he would like to talk to one.⁹²

A young legal aid attorney successfully suppressed the incriminating statements. Harris took the stand and denied the charges against him. On cross-examination, the prosecutor confronted him with the suppressed statements. In one of these, Harris had admitted to the police that he had bought “two five-dollar bags of heroin for Bermudez,” the undercover agent, and that he had “handed the narcotics to Bermudez who had given him twelve dollars and half of the heroin in one of the envelopes.”⁹³ On the stand, Harris explained to the jury that the glassine envelopes actually contained baking powder, which only looks like heroin.

He was convicted on the baking powder count, and the jury hung on the one where his testimony was not impeached. A divided New York Court of Appeals affirmed, and the Supreme Court granted certiorari on whether there was an impeachment exception to the use of unconstitutionally

87. *Id.* at 1224.

88. *Id.* at 1199.

89. *Id.*

90. *Id.*

91. *Id.* at 1200 n.13, 1204.

92. *Id.* at 1200.

93. *Id.* at 1200 n.13 (citing the New York County District Attorney’s brief).

obtained statements.⁹⁴ In a singularly short and dishonest opinion, the Court held that there was.

I won't go into detail because you can read John's article—which is still quite striking as a polemic on the dark political side of constitutional law. Basically, the Court significantly undermined the enforcement of *Miranda*, overruling its broad deterrent holding that statements taken in violation of the rules were barred for any use.⁹⁵ It also deliberately misread the record.

The Court asserted that there was “no claim that the statements made to the police were coerced or involuntary.”⁹⁶ In fact, Harris had complained of exactly that in all courts, including in the briefs and oral argument in the Supreme Court itself.⁹⁷ The Court passed off the case as involving at best a mere technical violation of the *Miranda* rules.

But what the Court did with the record, and what it did with *Miranda*, wrote John, “pales beside what it did with *Walder v. United States*.”⁹⁸ That case, like *Miranda* itself, “squarely faced the *Harris* issue and resolved it in favor of the defendant.”⁹⁹ Simply put, *Walder* held that unless the defendant made some sweeping claim like “I never used drugs in my life,” he could not be impeached with illegally seized evidence. Because Harris had made no such claim, the rule of *Walder* forbade the use of the statements against him.

Instead of “flimsily” distinguishing *Walder* as the Court had done with *Miranda*, it quite literally changed the meaning of the case “by dint of some skillful editing.”¹⁰⁰ Here is the form of *Harris*'s key quotation from *Walder*: “[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.”¹⁰¹

Note the bracket around the capital T, indicating that something has been omitted. The full quotation from *Walder* is this:

94. *Harris v. New York*, 401 U.S. 222, 222 (1971). More specifically, Chief Justice Burger wrote, “We granted the writ in this case to consider petitioner's claim that a statement made by him to police under circumstances rendering it inadmissible to establish the prosecution's case in chief under *Miranda v. Arizona* may not be used to impeach his credibility.” *Id.* (citation omitted).

95. “An important part of *Miranda* was squarely overruled in *Harris*; the Court does no service by pretending that it wasn't.” Dershowitz & Ely, *supra* note 6, at 1210.

96. *Harris*, 401 U.S. at 224.

97. Dershowitz & Ely, *supra* note 6, at 1201-04.

98. *Id.* at 1211 (citing *Walder v. United States*, 347 U.S. 62 (1954)).

99. *Id.*

100. *Id.*

101. *Harris*, 401 U.S. at 224 (alteration in original) (quoting *Walder v. United States*, 347 U.S. 62, 65 (1954)). John also quoted this language in *Anxious Observations*. Dershowitz & Ely, *supra* note 6, at 1211.

Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.¹⁰²

Rarely has an omission concealed so much.

Obviously, John Ely was still boiling mad about *Martin* when he wrote the *Yale Law Journal* article. And twenty-five years later, he was at least simmering when he reprinted a large swatch from this old article in his collected works with this note: "This comment was something of a 'gotcha': I am aware of no attempt to answer any of its (often deadly) criticisms. On the other hand *Harris* has not been overruled or even apparently questioned by the Court. Maybe I should have gone to divinity school after all."¹⁰³

At first blush, John's remark about there being "no response" seems uncharacteristically naive. What was he expecting the Court to do?—withdraw the opinion, reverse *Harris* in the next Term, apologize perhaps?¹⁰⁴ Nor was any conservative commentator likely to reply—no need to emphasize the bad reasoning in a case you have won.¹⁰⁵ Maybe John was just being sardonic about the fact that such devastating criticisms had so little effect on the doctrinal development. Or bemused by how little cited *Anxious Observations* has been in cases and scholarly writing compared to his other works.

The piece has continuing vitality, however, through its citation in casebooks and hornbooks.¹⁰⁶ I have found it peculiarly useful as a pedagogical tool. It's one thing for an old public defender like me to rage

102. *Walder v. United States*, 347 U.S. 62, 65 (1954).

103. ELY, *supra* note 4, at 228. In the most recent set of *Miranda* cases, many Justices cited *Harris* as a settled and respectable precedent. *E.g.*, *Missouri v. Seibert*, 124 S. Ct. 2601, 2609 n.2 (2004) (plurality opinion) (citing *Harris* in an opinion holding that a first questioning must be in deliberate violation of *Miranda* for a second questioning to be considered fruit of a poisonous tree).

104. At the Symposium, Alan Dershowitz related that Justice Blackmun had visited Harvard shortly after *Anxious Observations* was published and had told him and John how much he regretted the factual errors and shabby treatment of precedent in *Harris*. As Alan recalled the conversation, Justice Blackmun asked the two professors to let him know in the future of any other "bad" opinions like that one.

105. *But see* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (attacking *Roe* as unsoundly based on substantive due process).

106. *See, e.g.*, STEPHEN A. SALZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 718 n.14 (7th ed. 2000) ("Arguably, the Court strained, to the point of distorting the record, to use the case to cabin *Miranda*." (citing Dershowitz & Ely, *supra* note 6)).

against the tendency of the Court to undermine without overruling, to create elaborate doctrinal edifices, and then to lament and ridicule the complexity. Much more effective, I discovered, was to quote John Ely on the rape of the Warren-era precedents. The students were simply more receptive to the restrained, balanced, and fair author of *Democracy and Distrust*,¹⁰⁷ a text they had all studied in the first year of law school.

I found John-invocation similarly useful in teaching *Harris*'s effect on the defendant's right to testify. If only I had known about Billy Joe Martin, I could have cast the eminent and righteous Professor Ely in the role of the defense lawyer putting his client on the stand. Not only would this have enlivened the discussion, but John's experience also illustrates the burden *Harris* places on the defendant's right and on the lawyer's ability to defend him.

IV. TAKING THE STAND: NO "RIGHT TO COMMIT PERJURY"

The most influential lines in *Harris* are these: "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury."¹⁰⁸ John dispatched the lines in these words: "[T]he entire argument is a straw man. Of course a defendant has no 'right to commit perjury.' But this was hardly petitioner's argument. Neither does a defendant have the right to commit murder, and yet the Government may not prove that crime by means of an illegally obtained statement."¹⁰⁹

Despite John's demolition of the underlying idea, the "no right to commit perjury" line has taken on a precedential life of its own. For

107. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

108. *Harris v. New York*, 401 U.S. 222, 225 (1971). Only occasionally has the "no right to commit perjury" line failed to win the day. *See, e.g.*, *James v. Illinois*, 493 U.S. 307 (1990) (refusing to allow the only witness for the defense to be impeached with the defendant's illegally obtained statements); *New Jersey v. Portash*, 440 U.S. 450 (1979) (holding that compelled testimony given under a grant of immunity to a grand jury cannot be used to impeach the defendant in a later criminal trial).

109. Dershowitz & Ely, *supra* note 6, at 1222. The rest of the paragraph reads,

Nor, indeed, could it introduce such a statement as part of its case in chief in a perjury prosecution. Whether it should be permitted to use it to prove perjury in the context of a trial for a different crime is the question, and it is not answered by denying that there is a right that no one asserted.

Id. In the text and notes John also points out the difficulty of determining which statement is perjury and which the truth. *Id.* at 1222 n.95.

To the extent the "right to perjury" rhetoric is intended to conjure up the assumption that trial testimony is necessarily less credible than a statement given to the police without the safeguards of *Miranda*, it is of course subject to significant qualification. (In *Harris* itself, the District Attorney acknowledged that the defendant's pre-trial, station-house rendition of the events for which he was convicted had been a "false account"!)

Id. at 1222 (footnote omitted).

instance, it has justified impeaching the defendant with illegally obtained physical evidence¹¹⁰ and with prearrest silence.¹¹¹ It has also been used to enhance sentences under the Federal Guidelines¹¹² and to find effective assistance of counsel where the defense lawyer threatened the accused if he testified.¹¹³ And these are only the leading Supreme Court cases, which have in turn spawned a huge brood of lower court opinions along the same lines.

The slogan's expressive power depends on a certain image of the testifying accused. A cool and calculating defendant, caught red-handed, blandly denies the charges under oath. All the while the prosecutor has in hand the evidence to show that he is lying. Only some artificial rule prevents his revealing it. The guilty man is playing everyone in the system for the fools we are if we let him get away with it.

The trial judge had that very image of Billy Joe Martin. Remember his indignation that the defendant would “elect[] to get on the witness stand and tell an outright lie.”¹¹⁴ Not the basic Jupiter story, but the claimed mention of it to the customs officer, was the point where Billy Joe's testimony morphed from ordinary fabrication into perjury in the judge's view.

Why does perjury rile the fact-finder so much—why is it such a specially heinous and harmful crime? Because, as the old saying has it, perjury “pollutes the fountain of justice”;¹¹⁵ the damage is done to due process itself. Unlike the other statutes that cover criminal lying,¹¹⁶ perjury is an insult to the court—especially when, as in the *Martin* case, the judge has suppressed the evidence that would reveal the lie. The *Harris* line was really about that situation.

110. *United States v. Havens*, 446 U.S. 620 (1980); *see also* *United States v. Patane*, 124 S. Ct. 2620 (2004) (holding that physical evidence acquired through a defendant's un-Mirandized statement need not be suppressed).

111. *Jenkins v. Anderson*, 447 U.S. 231 (1980).

112. *United States v. Dunnigan*, 507 U.S. 87 (1993) (holding that the trial court properly enhanced the defendant's sentence, pursuant to section 3C1.1 of the Sentencing Guidelines Manual, after it determined she had committed perjury at her own trial); *see also* Barbara Allen Babcock, *Introduction: Taking the Stand*, 35 WM. & MARY L. REV. 1 (1993) (discussing the implications of *Dunnigan*).

113. *Nix v. Whiteside*, 475 U.S. 157 (1986) (holding that defense counsel's threats to report the defendant if he perjured himself do not constitute ineffective assistance of counsel).

114. Appellant's Brief at 8, *Martin v. United States*, 400 F.2d 149 (9th Cir. 1968) (No. 22586) (reprinting the colloquy between Ely and the trial judge).

115. *See, e.g., Chappel v. State*, 71 Ala. 322, 324 (1882) (“[Perjury] tends to contaminate the very fountains of justice; and hence, the solemn sanctions which legislation and immemorial usage have thrown around the giving of evidence, which is to shape the destiny of life, liberty and property.”).

116. *See, e.g., 18 U.S.C. § 1001* (2000) (prohibiting the making of false statements to government agents); *id.* § 1503 (prohibiting the obstruction of justice).

Yet the image of the slick confidence man, smirking behind his shield of legal technicalities, is far from the typical client I remember from my public defender days. Instead, I recall a young, uneducated African-American man, scared and shy, looking sullen and scary. Or I think of Sharon Dunnigan, a poor black mother, who testified that she did not take drugs to Cleveland, hoping that the jury might give her a break. Instead, she got extra time for lying on the stand—the Supreme Court’s short, unanimous opinion said she had no right to commit perjury.¹¹⁷ And then there is the voluble Billy Joe Martin, rambling on, apparently unaware of how bizarre his tale might seem.

For most people who take the stand to defend themselves, testifying is terrifying. They are unaccustomed to public speaking; to storytelling in formulaic phrases; to picking the whole truth from a traumatic, shattering, often violent set of memories; to the verbal sparring and logic traps of cross-examination. Often the decision about whether to testify turns ultimately on whether the defendant can withstand cross-examination, a judgment the lawyer can best make. Thus, though technically the decision about whether to testify is the defendant’s, involving waiver of a constitutional right or assertion of the privilege against self-incrimination, defense lawyers speak of putting their clients on the stand, acknowledging their own deep implication in it.

Aiding the accused in making the decision and in testifying and arguing for what he said is the heart of defense representation. To understand some of the vectors of the decision, imagine the interaction between John Ely and Billy Joe Martin over taking the stand to tell about Jupiter.¹¹⁸ A threshold question is whether John actually believed in Jupiter himself. Maybe he did—he was certainly not so case-hardened as to make that impossible. In fact, I can almost see John’s whimsical smile and hear him say, “Maybe a story like that could be true only one time in ten thousand. Why shouldn’t this be the time?”

It was also possible that Billy Joe did tell the customs officers about Jupiter and that they simply failed to record it. Certainly, the government could not make a perjury charge out of the discrepancy between what Billy Joe said, in effect, on cross-examination (“I told him about Jupiter”) and what the officer testified (“Not to my recollection”).¹¹⁹ Perjury is a difficult

117. See Babcock, *supra* note 112, at 3 n.9 (citing *Dunnigan*, 507 U.S. at 96).

118. In the most thorough of all trial manuals, still useful even though out of date, Anthony Amsterdam identifies almost a dozen major factors to consider in making the decision about taking the stand. Only one has to do directly with whether the client is truthful. 3 ANTHONY G. AMSTERDAM, *TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES* § 390 (5th ed. 1989).

119. See *supra* text accompanying note 56. In fact, testifying to a lack of memory, rather than to a factual proposition, is one way trained witnesses avoid committing perjury while creating an impression that they are being extra scrupulous. During the colloquy over whether an appeal was

charge to prove in any event; most statutes require at least the direct contradiction of a material sworn statement.

Even when a perjury prosecution is not technically feasible, however, most lawyers believe that they cannot ethically put the defendant on the stand to give testimony they both know is false.¹²⁰ The conventional defense view also holds that a lawyer “knows” only if the client has told him so categorically. Some would go further and say a defendant’s constitutional right to testify overrides the lawyer’s ethical duties, but based on an argument John made in *The Yale Law Journal* as well as on my understanding of his outlook, I don’t think he subscribed to this more radical approach.¹²¹

In pointing out the fatuity of the “no right to perjury” line, John argued that often it is impossible to tell which of two statements is true: the one given to the government during investigation or the one related at trial. In fact, he said the lawyer’s obligation “not to countenance perjury in his witnesses” actually makes the trial testimony more believable than the police statement given “without consultation with counsel.”¹²² He added that the obligation was “taken quite seriously by most lawyers.”¹²³

Once John satisfied himself that Billy Joe would not be committing perjury, the decision to put him on the stand was fairly clear-cut. Only Billy Joe could tell the Jupiter story, and without Jupiter there was no chance for

justified, John made the point that it was unclear whether Billy Joe’s testimony was an outright lie. Appellant’s Brief at 8-9.

120. MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102(A)(4) (1983) (“[A] lawyer shall not . . . [k]nowingly use perjured testimony or false evidence.”); *id.* DR 7-102(A)(6) (“[A] lawyer shall not . . . [p]articipate in the creation . . . of evidence when he knows or it is obvious that the evidence is false.”); MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(4) (1996) (“A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false.”).

121. I do not mean to engage here the rich ongoing discourse about whether the lawyer’s duty to the client includes putting him on the stand even though the lawyer believes he is lying. As far as I know, John Ely never got into this heated philosophical discussion. For an excellent overview, taking a strong position on the side of the client’s right to testify trumping all other concerns but citing and recognizing the entire literature, see MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* 159-95 (3d ed. 2004).

122. Dershowitz & Ely, *supra* note 6, at 1222 n.95. The passage concludes,

Most fundamentally, of course, the pre-trial statement will, by definition, have been given without the safeguards of *Miranda*, safeguards designed, at least in part, to ensure that the inherently coercive atmosphere of an in-custody police interrogation will not elicit an untrue statement. As the Court said in *Miranda*: the presence of counsel may help “to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.”

Id.

Although I never discussed it with him, I suspect that John took the same view I do toward a defendant’s right to testify: The trial is an occasion for the defendant to tell his best story, constrained only by the oath, cross-examination, and indisputable physical facts. “[E]ach trial, especially in view of the esoteric rules of criminal procedure and evidence, has its own ‘truth’—encapsulated, summarized, and concluded by the jury verdict.” Babcock, *supra* note 112, at 10.

123. Dershowitz & Ely, *supra* note 6, at 1222 n.95.

exoneration or mercy, because juries find it hard to acquit.¹²⁴ Certain commonsensical, widely held propositions come into play. Where there is smoke, there is fire; a deserving person would be diverted before trial. Moreover, innocent people do not remain silent when falsely accused. They shout their innocence from the rooftops, just as the jurors would do themselves.

Generally, juries need to hear from the defendant, and the moment when he takes the stand is the focal point of the trial. It is also high drama, requiring considerable aid from the lawyer in producing it. Preparing Billy Joe for his ordeal, John assured him that his prior conviction would not be mentioned and warned him not to open the door to cross-examination on the statements at the border. Specifically, Billy Joe should make no positive claims about his spotless character, his activities in Tijuana, his consistency in blaming Jupiter. I wasn't there when John prepared Billy Joe, but this was what any good lawyer would have done in light of the *Walder* rule.¹²⁵

Though the defendant's testimony is the focus of the trial, the argument that the lawyer will make of it is the true fulcrum of the defense. Even without a transcript, we can reconstruct John's closing—about the trip to Tijuana by the overly trusting and susceptible Billy Joe Martin and the sophisticated, worldly Jupiter. We can see John telling how the pink-tissue-wrapped present was slipped into the unconscious Billy Joe's jacket.

Surely John made the *pièce de résistance* of defense arguments: "You saw Mr. Martin, with his meager learning and limited background, faced with the skilled prosecutor's probing and pounding. He never deviated or faltered in denying his guilt, proclaiming his innocence." (Fleshed out, this argument alone can make it worth the defendant taking the stand, even if his testimony is weak in substance and halting in style.)

In sum, when the defendant takes the stand, the lawyer is also on the line, and when the defense fails, the lawyer feels it. As we have seen, John Ely was still smarting from the *Martin* defeat many years later. Though that case and *Anxious Observations* are the only substantial artifacts of John Ely's criminal defense career, the case serves to show him in every facet of the role: interview, motions to suppress, trial, sentencing, and appeal. Thinking about *Martin* also reveals something of John's philosophy of defending. A few words on that will bring us back to *Gideon* and John's tie to that landmark case.

124. As of 1993, "[f]elony conviction rates after trial [we]re around eighty percent, and in the high ninety percent range for all charged felonies." Babcock, *supra* note 112, at 12.

125. For discussion of the *Walder* rule, see *supra* text accompanying notes 98-102. Martin testified on direct examination about getting drunk and going to the house of ill repute, maybe blurring it out. John likely prepared him to so testify to avoid being impeached by those facts. See *supra* note 58.

V. "HOW CAN YOU DEFEND THOSE PEOPLE?"

When John tried the *Martin* case, he was working at Defenders, Inc. doing "my bit to help follow up on the promise that was made in *Gideon*."¹²⁶ That is one of the few times John mentioned his great summer job in print, despite its importance in his personal repertoire. He did speak at a thirtieth-anniversary celebration, however, giving a determinedly cheerful assessment of *Gideon*'s impact. "It has become mildly fashionable," he began, "to say that this is a case that hasn't panned out. I want to dissent from that," adding in Ely fashion, "somewhat."¹²⁷

He said that a lot of the criticism was based on the misperception that public defenders are not adequate lawyers, whereas they are really "pretty darn good."¹²⁸ Other Warren Court precedents may have fallen short of their purposes, John concluded.

But *Gideon*? I'm sorry, but I have a lot of trouble seeing this as one that has failed. It seems to me that it is one that has succeeded, and in particular I wanted to enter my dissent from the inference from the fact that public defenders may be handling more and more cases to the conclusion that the quality of representation is going down. I rather suspect it is proof that it is going up.¹²⁹

While John was saying things like this on the thirtieth anniversary, I was giving speeches on *Gideon* as a promise broken—how the Court had guaranteed a body with a law degree next to the defendant but had failed to breathe life into that body. How too many public defender offices start idealistically and then are overwhelmed by rising caseloads and receding funding, until no amount of dedication will suffice to do a good job in the routine cases.¹³⁰ Worst of all, how there are no truly routine cases anymore because of draconian sentencing statutes and practices that are now commonplace.

126. ELY, *supra* note 4, at 209.

127. *Conference*, *supra* note 3, at 29-30 (remarks of John Hart Ely).

128. *Id.* at 30.

129. *Id.* at 32-33.

130. I was not saying anything novel at the thirtieth anniversary, as shown by the remarks of the director of the D.C. Public Defender Service at the same conference with John. In fact, she was a bit testy with John, *see id.* at 44 (remarks of Angela Jordan Davis), for undermining her remarks in advance by reminding the audience that "she does have a budget that she has to defend and augment," *id.* at 30 (remarks of John Hart Ely). Today, the seriousness of the problem of lack of counsel is widely recognized. *See Note, Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2065 (2000) (providing citations and statistics describing the failed promise of counsel). According to most estimates, *id.*, about eighty percent of all criminal defendants are indigent and are represented by counsel appointed by the state, DEBORAH L. RHODE, ACCESS TO JUSTICE 122-33 (2004).

My speech indicted the profession for its failure to follow up on the obligations of *Gideon*, and the Supreme Court for its appalling disregard of obviously ineffective assistance of counsel, even in death penalty cases. How far we are from the dream of *Gideon* that every accused should be competently represented by a real lawyer. At base, though, my disagreement with John over *Gideon*'s influence was not very deep—it was the old half-empty/half-full distinction.

On the big issue—the importance of an adequate defense—we were always in accord. As *Gideon* moves into its forties, I think John would have applauded the high-level national committee formed to address the issue of the “many people . . . convicted and imprisoned each year without any legal representation or with an inadequate one.”¹³¹ The chair of the committee is Walter Mondale—who as Minnesota attorney general in 1963 generated an amicus signed by twenty-two of his brother AGs in support of *Gideon*.¹³²

Where we had a more serious disagreement was over the duty to defend in a philosophical sense. It was an argument that started in our student days, when many lawyers were turning away communists or even alleged communists. Not only did I find this despicable, but I maintained that no lawyer should refuse for reasons personal to himself to take any case because of the nature of the crime alleged.

The famous defense lawyer Edward Bennett Williams had in 1962 published *One Man's Freedom*, which dealt with that very issue.¹³³ He justified his representation of an accused spy in terms of

the right to counsel guaranteed by the Constitution and the role of the advocate in Anglo-Saxon jurisprudence. . . . [F]or the trial lawyer the unpopular cause is often a post of honor. Like other lawyers who try criminal cases, I have taken on many difficult cases for unpopular clients, not because of my own wishes, but because of the unwritten law that I might not refuse.¹³⁴

John disputed the unwritten law. He agreed that everyone deserved a defense, but he held that individual lawyers had no duties in that regard. Only if the lawyer was the last one on Earth was he obligated to take the client he disliked or disapproved of. In the manner of law students everywhere, we argued about this heatedly. I can actually remember

131. Henry Weinstein, *Many Denied Right to Counsel, Group Says*, L.A. TIMES, July 13, 2004, at A10 (internal quotation marks omitted) (describing the committee formed by the National Legal Aid and Defender Association and the Constitution Project to examine the issue of indigent defense).

132. LEWIS, *supra* note 1, at 145-47 (telling the story of the Mondale brief).

133. EDWARD BENNETT WILLIAMS, *ONE MAN'S FREEDOM* (1962).

134. *Id.* at 12-13.

walking along the winter streets by the campus post office, furious that John claimed he would not necessarily defend a dreadful criminal. Who did he think he was? Defense of the defenseless, the guilty, and even the indefensible was already my religion.

Now of course our basic argument did not apply directly to public defenders, because they don't choose their clients. But there is an analogous attitude that John and I also disputed. Basically, I believed that public defending was a sacred duty that requires a certain soul-set and selflessness that only a special class of people is capable of achieving: a mindset that values freedom over justice any day. In this vein, long after I had become an academic, I reviewed a book about public defending at my old office in the District of Columbia: "*How Can You Defend Those People?*": *The Making of a Criminal Lawyer*, by James Kunen.¹³⁵

While acknowledging the well-told stories, I took the author to task for betraying the inner circle of defenders, for speaking about his clients from an ironic distance, for staying only two-and-a-half years (not long enough to repay the training he received), and for using the job to get material for his book. John was first puzzled and then somewhat insulted by my approach, and he irritated me in turn by suggesting that I must have some secret grudge against James Kunen. None—other than his failure to meet my standard of single-minded devotion.

Today, two decades later, I wouldn't approach that review the same way but would instead welcome the time the author gave to the movement, his sympathetic portrayal of the work, his willingness to do it. In writing this piece about John's experience, I have realized that it is not only unnecessary to hold my belief system in order to defend, but that an attitudinal litmus test will stand in the way of ever realizing *Gideon's* promise. So let me conclude with a few words about John's approach to defending, in the hope that somewhere along the short continuum between him and me, lawyers and law students will find a model.

On the twentieth anniversary of *Gideon* I wrote a little piece called *Defending the Guilty*,¹³⁶ trying to answer once and for all the age-old question that dogs all criminal lawyers: How can you defend someone when you know he is guilty? Mainly, I set out to show, as John would say, "the inevitable futility of trying to answer the wrong question."¹³⁷ The real issue is, How can a freedom-loving people continue to convict, incarcerate, and even execute without adequate counsel?

It seems, however, almost impossible to reach the main issue without satisfying the age-old question. What is the philosophical stance that

135. Barbara A. Babcock, Book Review, 53 GEO. WASH. L. REV. 310 (1984).

136. Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1983).

137. ELY, *supra* note 107, at 71.

enables a lawyer to do the work—to put his own reputation on the line for someone like Billy Joe Martin, for instance? My idea was to provide a list of reasons for defending that would enable individuals to put together an answer for themselves and their public.

First was the garbage collector's reason (someone must do the dirty work). Next, the legalistic or the positivist's reason (guilt is a legal conclusion); the political activist's reason; the social worker's reason; the egotist's reason.¹³⁸ Using these categories, I think John's motivation was a combination of the social worker's and the egotist's reasons (incidentally, the same as my own).

The social worker's approach is concerned mainly with the benefit to the accused that flows simply from “[b]eing treated as a real person in our society (almost by definition, one who has a lawyer is a real person) and accorded the full panoply of rights and the measure of concern afforded by a lawyer.”¹³⁹ Compare to this formulation the answer John gave to people who asked him why he would spend his time defending the guilty:

[W]eren't your clients mainly the scum of the earth? It's true many of them were guilty of the crimes with which they were charged, though some weren't, but essentially all of them were people for whom nobody—surely no member of the establishment—had ever done anything nice. Even if I lost, as I confess I did sometimes, I think it did my clients some good to see me actually standing up and taking some shots for them.¹⁴⁰

Noblesse oblige is mixed into John's version, along with a touch of the egotist's reason, which goes like this: “Defending criminal cases is more interesting than the routine and repetitive work done by most lawyers, even those engaged in what passes for litigation in civil practice. The heated facts of crime provide voyeuristic excitement. Actual court appearances, even jury trials, come earlier and more often in one's career”¹⁴¹ In short, defending is absorbing and intense and—dare I say it?—enjoyable.

One thing that makes it interesting is the people you meet, usually from an entirely different world from your own. As I have proselytized among my students for many years, this is my main subtext. Try it; you will like it. No other type of practice produces such stories, I tell them, and the defender is virtually always the hero of the tale. That's why I call one justification “the egotist's reason.”

138. Babcock, *supra* note 136, at 177-79.

139. *Id.* at 178.

140. ELY, *supra* note 4, at 209-10 (endnote omitted).

141. Babcock, *supra* note 136, at 178.

At the thirtieth-anniversary celebration of *Gideon*, John told some of his defender stories. He recalled that sometimes defendants would ask for a “real lawyer” instead of John Ely. That never happened, he said, with clients in jail,

because they were able to talk to other prisoners and get an idea of who was good

I had one guy [out on bail] This guy was not so sure. He was thinking about dismissing me. He came to every case I tried, and he would sit in the front row to watch me. His case was coming up in a couple of months. He would sit there, and sit there, and usually at a break he would come up and offer to testify as an alibi witness¹⁴²

Beat, beat, beat . . . with John’s excellent timing, the concluding line of the story: “Don’t worry, I didn’t use him more than three or four times.”¹⁴³

Another of John’s stories was about a drug mule who was virtually raped at the border to recover the heroin secreted in his rectum. Oscar John Huguez was a “nice guy,” who sent John a Christmas card for years after he won his case on appeal.

[He] seemed to resemble most of my Mexican smuggling clients in that his crime appeared to have been born of serious economic necessity and was probably performed for a relatively modest fee paid by the actual entrepreneur, who undoubtedly never got even close to a prison. On the other hand Huguez could hardly have been unaware of the presence of the contraband.¹⁴⁴

Not only do defenders meet people they would never otherwise know, but they are often able to make a positive difference in the lives of their clients. Doing good by direct application of legal skills is pretty satisfying work for any lawyer. Now, perhaps you might say that Billy Joe Martin’s case, in which John Hart Ely was crushed and disappointed, and whose bitterness he carried for more than a quarter of a century, is hardly illustrative of the joys of defense. Yet there he was, as defenders daily are, on the cutting edge of constitutional doctrine in a real case where precious freedom was at stake. What could be better than that?

142. *Conference*, *supra* note 3, at 30-31 (remarks of John Hart Ely).

143. *Id.* at 31.

144. ELY, *supra* note 4, at 210 n.*; *see also* Huguez v. United States, 406 F.2d 366 (9th Cir. 1968).

The need has never been greater for lawyers willing to undertake the burden and share the joys of defense: to do “[their] bit to help follow up on the promise that was made in *Gideon*.”¹⁴⁵

If John Hart Ely could represent Billy Joe Martin, so can you.

145. ELY, *supra* note 4, at 209.