

THE FORGOTTEN TRIAL OF WYATT EARP

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MURDER IN THE STREETS OF TOMBSTONE

It is early afternoon on a fateful day—October 26, 1881—in the frontier town of Tombstone, Arizona. Four heavily armed men have decided to take the law into their own hands. Gamblers and possibly thieves, a notorious gunslinger among them, they are determined to take vengeance for a series of trivial insults and imagined threats. Ignoring the orders of the county sheriff, they march grimly to an alley between a rooming house and a photographer's studio. There they catch sight of their intended victims—four unarmed men, two of whom they had already pistol-whipped that day, who are trying desperately to saddle their horses and ride out of town ahead of the trouble. It was not to be. With cool precision, the killers stride down the alley, guns ready, while horrified townsfolk watch from the nearby buildings. Barely pausing to shout an angry taunt—"The fight has commenced! Go to fighting or get away!"—they begin firing at their cornered prey. In less than half a minute it is over. Three men lie dead or dying from multiple gunshot wounds; only one has managed to escape. Arrogantly and unemotionally, the leader of the gang again brushes off the bewildered sheriff: "I won't be arrested, but I am here to answer what I have done. I am not going to leave town."

For most readers, the preceding narrative will seem both familiar and dissonant—almost, but not quite, a story that has been heard many times before. And well it should, because it is an account of the legendary "Gunfight at the O.K. Corral," though not told from the customary perspective of the cele-

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brated Earp Brothers. Rather, it is the losers' story, as it would have been related by partisans of the Clanton and McLaury brothers, three of whom were "hurled into eternity" by the bullets of the Earps and Doc Holliday. Of course, the losers' story is barely acknowledged today. Wyatt Earp is a hero, Doc Holliday an intriguing rogue, and the Clantons and McLaurys are identified, if at all, simply as generic bad guys. In gunfights as in war, the winners write the history.

Wyatt Earp, it turns out, won the historic gunfight in two different venues. As we all know, his first victory came in the dusty streets of Tombstone, Arizona. But he also won a second and equally important fight—at least as far as his legend is concerned—in a territorial courtroom. Wyatt Earp and his companions were prosecuted for murder in the weeks following the gunfight. The charges were ultimately dismissed by Judge Wells Spicer, but not before many days of testimony from eyewitnesses who swore that the Earps had gunned down unarmed men begging for their lives. The charges were taken so seriously that at one point Judge Spicer revoked bail for Wyatt and Doc, ordering them to jail on the prosecution's motion that "the proof so far was conclusive of murder."¹

Wyatt Earp would be remembered far differently today if he had been hanged as a murderer, rather than glorified as the definitive frontier marshal. So it is not hard to see that his myth depends as much on the outcome of the trial as it does on his survival of the shootout.² Trials, like gunfights, tend to have two sides. And as we shall see, the context can be nearly as important as the events themselves.

1. See CASEY TEFERTILLER, *WYATT EARP: THE LIFE BEHIND THE LEGEND* 136-37 (1997).

2. Even survival plus acquittal might not have been enough to secure his legend. The Earp persona was further magnified by his longevity. Not only did he live until 1929, but he also made his home in Los Angeles where he was able to spin his stories of the frontier days for writers and movie stars, Tom Mix among them. His story, which took him from Dodge City to Tombstone and eventually to Alaska, was made even more engaging by the presence of real-life characters with names like Doc Holliday, Big-Nose Kate, Curly Bill Brocius, Johnny Behind-the-Deuce, Old Man Clanton, Bat Masterson, Buckskin Frank and Johnny Ringo. No doubt, the existence of an extensive written record—newspaper reports of the gunfight and the transcript of Judge Spicer's hearing—also contributed to the long-term popular fascination with Earpiana.

TRIAL THEORY, THEN AND NOW

The best trial lawyers are storytellers. They take the raw and disjointed observations of witnesses and transform them into coherent and persuasive narratives. They develop compelling theories and artful themes, all the better to advance a client's cause. "Give me the facts," says the attorney, "and I will turn them into the best possible case."

But trial lawyers are not only storytellers. In addition, they are legal technicians, taking the raw observations of witnesses and organizing them into coherent, legally meaningful narratives. You can tell a terrific story and nonetheless lose your case—especially if you have failed to shape it in a way that will be convincing to the trier of fact. This is a lesson that has been learned time and again, often through bitter experience.

In the forgotten trial of Wyatt Earp, the prosecution seemed to hold a winning hand, but the defendants nonetheless walked free. That result was attributable not so much to the lack of evidence as it was to a failure in the quality of advocacy. This is not to say that the Earps were indeed guilty—that determination is irrevocably obscured by the passage of 120 years—but rather that a talented prosecutor, armed with a coherent theory and a persuasive story, could have won the case.

There are three structural devices that can add great power to the presentations of trial lawyers: theory, theme, and frame. A "theory of the case" provides the necessary bridge between the drama of the story and the requirements of the law. A winning case theory has internal logical force, explaining why the discrete facts, however interesting they may be, actually add up to "proof." Popular imagination notwithstanding, a trial is truly something more than a soap opera or a sporting match. Most of all, a trial is a contest of ideas, a process in which the law is applied to the facts. Unless that link is supplied by a comprehensive theory of the case, even the most rip-roaringly exciting story may come to nothing when the verdict is returned. This turned out to be the key deficiency in the Tombstone prosecution. Though witness after witness testified that the Earps shot the Clantons and McLaurys without provocation, the prosecutors were never able to explain *why* the lawmen would have descended to murder. In the absence of a motive, the Earps' claim of self-defense could not be effectively

refuted. In other words, the prosecution could not bridge the gap between description (the shooting) and proof (of murder).

Just as a case theory rests on logic, a trial theme appeals to moral force. Rather than explain why a particular verdict is dictated by the facts and the law, a theme shows why it *should* be entered, why it is the *right* thing to do. An effective theme allows the judge or jury to believe in the underlying righteousness of the verdict. The most compelling themes invoke shared values and civic virtues—honor, duty, friendship, commitment. Such themes can be forceful as rhetorical devices, though they have little if any independent legal weight. A trial theme underscores the theory of the case by showing why the desired verdict is both decent and good, as well as legally necessary. In *Tombstone*, the defense succeeded in developing a classic theme—“Law and Order.” The defendants claimed that they were protecting the town from marauding bandits, requiring stern measures to keep the peace. In contrast, the prosecution was not able successfully to articulate a competing set of values, attempting instead simply to let the facts speak for themselves. But, as they were to learn, facts do not speak for themselves at trial; they are always interpreted within the particular context of the case. This brings us to the concept of “story framing,” which is perhaps even more important than theory and theme.

The trial process has always attempted to recreate the past, but it is an imperfect process at best. Witnesses may testify about what they saw and did. Documents and physical objects may be placed in evidence. Experts may provide relevant opinions and conclusions. In the end, however, there is an insurmountable barrier. The factfinder—judge or juror—was not at the scene of the events. Not having been there, he or she cannot actually know what happened. Rather, the factfinder must ultimately deduce or suppose what happened, based not only on the evidence presented but also upon judgment, interpretation, common sense, and other insights. This is an inevitable feature of historical fact finding—the use of one’s experience and intuitions to deduce what *must have happened*.

The trial evidence allows a judge, as in the case of the *Tombstone* trial, to begin creating a mental image of the circumstances, people, locations, objects and transactions in question. That image, however, will necessarily be incomplete, since it is beyond human capacity to describe—or absorb—all of

the millions of discrete details that comprise every set of events. The missing details, and inferences drawn from them, will be filled in, however, by the judge's memory and imagination. If the gunfight occurred on a dusty street, the judge will imagine or recall a particular dusty street—filling in details consistent with that image.

That act of imagination or vision constitutes a story frame, the context in which the factfinder determines what *must have happened* in the incident described by the evidence. To use a contemporary example, recall that the prosecution in the O.J. Simpson case labored long and hard to create what might be called a "domestic violence" frame. At the very outset of the trial, prosecutors introduced evidence of Mr. Simpson's ill treatment of his wife, his past threats, and her fear of him. The purpose of this evidence was to support the conclusion that, given his jealousy, anger, and violent nature, he *must have been* the murderer. In contrast, the defense developed a counter-story, the "police prejudice" frame, intended to advance the theory that the officers *must have* contrived or mishandled the DNA and other evidence against Mr. Simpson.

Neither side had the benefit of direct evidence, which increased the importance of the competing frames. There were no eyewitnesses to the murder, nor was there any direct testimony that police officers had indeed monkeyed with the evidence. Instead, the jurors were asked to reach a conclusion based upon an accumulation of circumstances, in light of their own judgment and past experiences. As everyone knows, the "police prejudice" frame proved convincing and Mr. Simpson was acquitted.

The story frame may well be the trial lawyer's most powerful rhetorical tool because of its extraordinary effectiveness in the battle for the factfinder's imagination. Once a judge or juror begins to envision events in a certain context, new information will tend to be evaluated in that same context. A thought experiment makes this point more evident.

Imagine that the defendant in a criminal case is known to be a street gang member. An image immediately springs to mind. He slouches, he is rude, he is disrespectful of the law and susceptible to peer pressure. Even if jurors do not prejudge his guilt, they will probably regard him poorly—assuming that they know the answers to many questions about him. How does he dress? What sort of hours does he keep? How

much does he care about school? What does he do when he hangs out with his pals? How honest is he? Does he value the rights and property of others? The answers—or at least the suppositions—are pretty obvious if the defendant is a known “gang banger.” The jurors will tend to look at the case in a “street gang” sort of way.

But now suppose that the defendant belongs to a youth club or a neighborhood association. Suddenly, the image changes. He is more clean-cut, more responsible, more diligent in school, less aggressive toward strangers. His clothing, attitudes, and pastimes will all be imagined differently, simply because of the introductory description. The initial image dictates, or at least suggests, a variety of assumptions about the defendant’s attitude, conduct, and character. Jurors will begin with a different outlook if they approach the case from a “youth club” perspective.

These assumptions are not immutable. They can be overcome or dispelled. But a lawyer who can engage (and maintain) the factfinder’s imagination will obviously enjoy a significant advantage. That is the power of story framing.

The frame, or context, in the Tombstone trial turned out to be essential to the court’s decision. Defense counsel was able to draw upon a frame that characterized Tombstone as a town virtually under siege by lawless men such as the Clantons and McLaurys. With that as a backdrop, the actions of the Earps—no matter how aggressive or belligerent—would tend to be interpreted as necessary steps for the protection of civil society. Not having seen the showdown himself, Judge Spicer would never be able to know who actually drew his weapon first in the split second when the gunfight began. Instead, he could only decide what *must have happened* when Tombstone’s town marshal ordered the rowdy Cowboys to drop their guns. Did they submit as ordered or did one of them make a foolish, false—and ultimately fatal—move? The answer to that frame-dependent question would decide the entirety of the case—and there lies the fate of Wyatt Earp.

BOOMTOWN

The Earp brothers—Wyatt, Virgil, Morgan, and James—arrived in Tombstone in the fall of 1879. Although Wyatt and Virgil had already achieved considerable reputations as law-

men in Kansas, they came to Arizona not as peace officers but as fortune seekers.³ Their various investment plans enjoyed varying degrees of success, and they eventually found themselves once again employed in law enforcement.

Tombstone itself was every bit the frontier boom town portrayed in the Western movies. Sitting on a high plateau and surrounded by rugged mountains, the town was a scant thirty miles from the Mexican border, a fact that would assume some importance in the clashes that led to the famous gunfight. The economy of Tombstone was based primarily on mining the rich veins of silver found in the nearby hills.⁴ By the time the Earps arrived, capital was flowing into Tombstone from Boston, Philadelphia, Chicago, and New York.⁵ Along with the influx of capital came the businessmen's predictable desire for stability and order, another factor in the coming battle and its denouement.

The wealth of the silver mines also brought "development." Though the Earps spent only two years in Tombstone, they saw its population grow from 1200 to at least 6000, with some estimates placing the peak population at 10,000 or more.⁶ There were saloons, hotels, theaters, French restaurants, oyster bars, an opera house, a photographer's studio, even ice cream parlors and a "New York-style cigar shop."⁷

But the Easterners were not the only relative newcomers to the Arizona Territory. There were also the "Cowboys," a loose gang of "rootless ex-cowhands and saddle tramps [who] gravitated toward the small towns of southeastern Arizona, attracted to the climate and the relative lack of law enforcement on either side of the [Mexican] border."⁸ Most of the Cowboys,

3. Wyatt later told Stuart Lake, his biographer, that he had gone to Tombstone with "no thought of a peace officer's job." ALLEN BARRA, *INVENTING WYATT EARP: HIS LIFE AND MANY LEGENDS* 97 (1998). Indeed, the Earps brought with them a string of thirty thoroughbred horses, with which they intended to start a stage coach line, only to be frustrated when they discovered that Tombstone was already well-served by several firmly ensconced stage lines. *See id.* at 98.

4. *See generally* PAULA MITCHELL MARKS, *AND DIE IN THE WEST: THE STORY OF THE O.K. CORRAL GUNFIGHT* 24-25 (1989).

5. *See BARRA, supra* note 3, at 94.

6. *See id.*

7. *Id.* at 95.

8. *Id.* at 103. At the time, the word "cowboy" had not yet come into general use to refer to the men who drove cattle for a living—they were usually called cowhands, drovers, or stockmen. The term "Cowboy" was slightly derisive and eventually became nearly synonymous with cattle rustler. The Tombstone Cow-

including the Clantons and McLaurys, came from Texas; some were Confederate veterans. The Cowboys, it seems, had a penchant for conducting cattle-stealing raids into Mexico.⁹ Eventually, their rustling led to a virtual border war, much to the dismay of the mine owners and townsfolk, not to mention the federal authorities.

With so much money to be made and such a volatile and transient population, the civic life of Tombstone was unruly and divided. Although the factions tended to shift somewhat, it is fair to say that they broke down roughly along regional, economic, and political lines. On one side there were the town-dwelling, Republican, Eastern-oriented business interests. On the other side there were the Cowboys and their sympathizers.¹⁰ Mostly Southerners and Democrats, they lived on ranches and in the small satellite towns in the countryside surrounding Tombstone.¹¹ To rural Arizonians, cattle theft from Mexico was barely a crime,¹² and more than a few of the local ranchers were eager to acquire the stolen livestock at bargain prices.

In the fractious and disorganized politics that characterized the Arizona Territory, each side had its own claim to law enforcement: the Tombstone town marshal was generally elected by Republicans while the Cochise County sheriff was an office for the Democrats.¹³ In the struggle for legitimacy, however, the Easterners held the trump. The territorial marshal was a federal official appointed by Republican Governor John

boys themselves embraced the description, rather in defiance of conventional society. Adopting the approach of Allan Barra, I capitalize "Cowboy" to distinguish the disreputable louts from honest, hardworking ranch hands—the cowboys we have all come to know and admire. *See id.* at 104.

9. *See* TEFERTILLER, *supra* note 1, at 41.

10. *See id.* at 40.

As Tombstone grew into more of a town, a new breed of badmen in the Arizona backcountry grew into more of a problem. They started as a small collection of misfits, disenfranchised cowhands who drove the herds in from Texas . . . Gradually, the townsman took to referring to all the backcountry troublemakers as cowboys, distinct from the ranchmen who raised cattle.

Id.

11. Some of the towns had names like Pick-'Em-Up and Stink-'Em; others were more mundane, including Watervale, Richmond, and Austin City. *See* ALFORD E. TURNER, *THE O.K. CORRAL INQUEST* 175 (1981).

12. *See generally* BARRA, *supra* note 3.

13. *See generally* TEFERTILLER, *supra* note 1.

Fremont.¹⁴ (This, of course, riled the Cowboys, former Confederates who detested the encroachments of federal power.) There were even dueling newspapers in Tombstone. The *Epitaph* was Republican and pro-business, and consequently pro-Earp, while the *Nugget* tended to support the Democrats and the Cowboys.¹⁵

The Earps might not have had advance knowledge of Tombstone's various conflicts, but it was always clear which side they would be on. They were staunch Republicans. Virgil and James fought in the Union army; Wyatt attempted to enlist but was too young. Coming originally from Iowa, and most recently from Kansas, they were considered Easterners by Arizona standards (then as now). Most importantly, they stood for law and order. Virgil and Wyatt had served as peace officers in the railheads of Dodge City and Abilene where their primary task was keeping a tight rein on rowdy Texas trailhands, an experience that could not have endeared them to the ex-Texan Cowboys. The wild card of the Tombstone deck, in more ways than one, was John Henry "Doc" Holliday. A well-known gambler and gunslinger,¹⁶ notorious for carrying a nickel plated revolver, Doc Holliday was a native of Georgia and the son of a Confederate officer. Nonetheless, Doc allied himself with the Earp faction, by virtue of his long and close friendship with Wyatt.

By 1881, three of the Earp brothers had set aside most of their assorted business speculations in favor of full-time work as peace officers, which was the job they did best.¹⁷ Virgil, the oldest of the brothers, had secured a federal appointment as deputy territorial marshal for southeastern Arizona, and was also acting town marshal (sometimes called chief of police) for Tombstone. Wyatt and Morgan served as Virgil's special deputies. All three brothers occasionally rode shotgun for the stage lines in and out of Tombstone, and there is good reason to be-

14. See BARRA, *supra* note 3, at 127.

15. See MARKS, *supra* note 4, at 147. See also TEFERTILLER, *supra* note 1, at 68 (discussing the Republican *Epitaph*).

16. Holliday was also a dentist, having studied at a dental college in Philadelphia before heading west. See MARKS, *supra* note 4, at 35.

17. The sole exception was James, who tended bar in a saloon and was not involved in the defining gunfight.

lieve that Wyatt additionally worked as an undercover “detective” for the Wells Fargo Company.¹⁸

The Earps’ rival in law enforcement, and Wyatt’s rival in other ways as well (more on that later), was Sheriff John Behan of Cochise County—a Southerner, a Democrat, and a Cowboy sympathizer.¹⁹ Behan played a crucial role in both the gunfight and the trial. If things had turned out differently in either arena, we might hail him today as “brave, courageous, and bold.” As it is, he is barely remembered.

SOMEBODY ROBBED THE BENSON STAGE

This being a Western epic, the story would not be complete without a stagecoach robbery. And indeed, stage holdups were a constant problem for Tombstone, with each side often blaming the other for the crimes—though the accusations often seemed grounded as much in politics as in reality.²⁰ It was just such a robbery that set in motion the chain of events that would lead to the gunfight at the O.K. Corral.

On March 15, 1881, four outlaws attacked the Tombstone-Benson stage. Though the robbery was unsuccessful, leaving behind a Wells Fargo shipment of at least \$26,000, the bandits killed the driver, Bud Philpot, as well as one of the passengers.²¹ Two posses were formed as soon as the news of the murders reached Tombstone. One posse, under the leadership of Virgil Earp, included Wyatt and Morgan, Bat Masterson, Doc Holliday, and a Wells Fargo agent named Marshall Williams.²² The other was headed by none other than Sheriff Johnny Behan.

The Earp posse managed to track down and apprehend a man named Luther King. Luther confessed his involvement (though claiming he had only held the horses) and implicated three others still at large, all with known Cowboy associations: Harry Head, Billy Leonard, and Jim Crane. Behan soon ar-

18. See Wells Fargo’s History Pages (visited Oct. 3, 2000) <<http://www.wellsfargohistory.com/states/Ariz1.htm>>.

19. See BARRA, *supra* note 3, at 161–62. See also TEFERTILLER, *supra* note 1, at 111. Some researchers, however, question the extent of Behan’s actual association with the Cowboys. See MARKS, *supra* note 4, at 127–28.

20. See BARRA, *supra* note 3, at 141–46.

21. See *id.* at 139–40.

22. See *id.* at 140.

rived on the scene and argued in favor of releasing King, but the Earps insisted that he be arrested. Turning the prisoner over to Behan and a deputy, the Earp posse continued to hunt for Head, Leonard, and Crane.²³

Returning to Tombstone after several days of hard riding, the Earps learned that King had escaped from Behan's loosely guarded jail. More dismaying, they discovered rumors flying around town that they themselves might have been responsible for the robbery. At one point Behan actually arrested Doc Holliday for the crime, based on an affidavit extracted from Doc's girlfriend, Big-Nose Kate Elder, who seems to have been drunk at the time. The charge had to be dropped, however, when "Kate sobered up and recanted."²⁴

Even with Doc's release, rumors continued to spread about the murder of Bud Philpot, making the capture of Leonard, Head, and Crane a matter of both pride and honor (and maybe more) for the Earps and Holliday.²⁵ By the end of the summer, however, all three robbers were dead. In June, Leonard and Head were gunned down in an internecine Cowboy feud.²⁶ In August, Crane was killed in the Guadalupe Canyon Massacre by Mexican soldiers who crossed the border to apprehend cattle rustlers;²⁷ the other victims included Old Man Clanton, father of Billy and Ike.²⁸ There followed a series of retaliatory raids that inflamed the border. This cycle of cross border violence and reprisal sent "shock waves through the Governor's Office and all the way back to the White House."²⁹ There were calls for military intervention and for more vigorous law enforcement by the local federal marshals, meaning Virgil Earp and his deputized brothers.³⁰ This, of course, would only heighten tension between the Cowboys and the Earps.

23. *See id.* at 141-43.

24. *Id.* at 145. Wyatt posted a cash bond for Doc in the amount of \$5000.00.
See id.

25. *See* MARKS, *supra* note 4, at 151-52.

26. *See id.* at 152-53.

27. The Mexican Army was acting in reprisal for an earlier incident, usually called the Skeleton Canyon Massacre, in which as many as nineteen Mexican nationals had been murdered by a band of Cowboys, said to have included the McLaury brothers. *See* BARRA, *supra* note 3, at 154-56.

28. *See id.* at 148-49.

29. *Id.* at 156.

30. *Id.* at 156, 162-63.

In the midst of all of this, and before the massacre at Guadalupe Canyon, Wyatt Earp made a deal with Ike Clanton. Figuring that Ike might have information about Crane's whereabouts, Wyatt proposed to give Ike the hefty reward offered by Wells Fargo, if Ike would snitch on his sometimes-pal. The deal had to be kept secret, since Ike could hardly let it be known that he had agreed to inform on a fellow Cowboy. As for Wyatt, he was apparently willing to forego the reward money in exchange for an opportunity to arrest Crane. As Wyatt later explained, "I had an ambition to be sheriff of this county in the next election, and I thought it would be a great help to me with the people and businessmen if I could capture the man who killed Philpot."³¹ Of course, the bargain between the Cowboy and the lawman fell through when the Mexican army dispatched Crane at Guadalupe Canyon, but it nonetheless turned into a source of continuing friction between Wyatt and Ike, resulting in a deadly confrontation later that year.

In the following months, more stages were robbed,³² more outlaws escaped, and more tension built between the Earps and the Cowboys. The Earps attempted to enforce federal law and the Cowboys, with the apparent toleration if not outright support of Sheriff Behan, were having none of it. In one well-reported incident, Frank McLaury and several other Cowboys confronted Morgan Earp on Tombstone's main street. "I'm telling you Earps something," McLaury boasted, "you may have arrested Pete Spence and Frank Stilwell,³³ but don't get it into your heads that you can arrest me. If you ever lay hands on a McLaury, I'll kill you."³⁴ Similar threats were made to Virgil, who was acting town marshal at the time.³⁵ It was clear that a showdown was coming, and in the small hours of October 26, 1881, it began.

31. *Id.* at 159.

32. Including the robbery, on September 8, 1881, of the Sandy Bob stage from Tombstone to Bisbee, in which the prime suspect was Frank Stilwell—one of Johnny Behan's deputy sheriffs! *See id.* at 159–63.

33. Stilwell was Behan's deputy, arrested by Morgan Earp for robbing the Bisbee stage. *See id.* at 160.

34. *Id.* at 161.

35. *See id.*

PRELUDE TO A SHOWDOWN

Tombstone lived on a 24-hour schedule. The bars, theaters, gambling halls, and opium parlors all operated around the clock, as trail hands and miners were ever-anxious to sample the pleasures of the town. So it was not surprising when, nearing midnight on October 25, Ike Clanton and Tom McLaury rode into town with a wagon-load of beef (remember, they were rustlers) and immediately headed for their favorite gambling halls. At about 1:00 a.m. on October 26, Ike showed up at the Alhambra saloon for "lunch," where he ran into Doc Holliday. The two began a shouting match, instigated by a drunken Ike, who apparently suspected that Wyatt (and Doc) were going to expose his deal to betray Crane. As Ike continued to mouth threats, Doc taunted him to make good: "[You] son of a bitch of a Cowboy, go heel [arm] yourself."³⁶ Morgan Earp, also present in the Alhambra, told Clanton to leave.

Not long after, Ike confronted Wyatt in the street, telling him that they would soon have to go "man for man." According to Wyatt, he replied "Go home, Ike, you talk too much for a fighting man."³⁷

Then, in either a temporary gesture of conciliation or in a bizarre continuation of the feud by other means, nearly all of the principals repaired to the Occidental saloon to play poker. Johnny Behan, Ike Clanton, Tom McLaury, Doc Holliday, and Morgan, Virgil, and Wyatt Earp sat at the same table for nearly five hours; history did not record the name of the big winner.³⁸ Though the game was peaceful enough, Ike followed Virgil into the street once it was over, this time threatening Doc Holliday, "The damned son of a bitch has got to fight."³⁹

Virgil Earp went home to sleep, but Ike Clanton did not. Instead, he roamed the streets of Tombstone, openly carrying a gun and continuing to threaten the Earps and Holliday. At noon, he was standing in front of a saloon waving a Winchester rifle. Reports of Ike's aggressive behavior came to the Earps, who could not ignore such a flagrant breach of the peace and

36. *Id.* at 165. It was illegal to carry a gun in Tombstone, and it is most likely that both men were unarmed. *See id.* at 166.

37. *Id.* Wyatt later recalled, "I told him I would not fight no one if I could get away from it, because there was no money in it." MARKS, *supra* note 4, at 198.

38. *See* BARRA, *supra* note 3, at 167.

39. *Id.*

violation of the gun ordinance. They began to search for Ike, finding him on Allen Street. Virgil quickly grabbed the rifle from Ike's hand and just as quickly used his own revolver to club Clanton to the ground.⁴⁰

Bleeding from a scalp wound, Ike continued the verbal assault, "If I had seen you a second sooner, I'd have killed you."⁴¹

"You cattle thieving son-of-a-bitch," shouted Wyatt, "you've threatened my life enough, and you've got to fight."⁴²

"Fight is my racket," replied the still angry Cowboy, "and all I want is four feet of ground."⁴³

Wyatt openly challenged Ike Clanton, "You damned dirty cow thief, you have been threatening our lives, and I know it. I think I would be justified in shooting you down any place I should meet you. But if you are anxious to make a fight, I will go anywhere on earth to make a fight with you."⁴⁴

In an odd scene that could not be repeated today, the Earps brought the disarmed Cowboy before a magistrate, who fined Clanton on the spot (\$25 plus costs) and set him free. Virgil Earp even asked Clanton where he would like to pick up his confiscated guns.

On leaving the courthouse, Wyatt was confronted by Tom McLaury who continued Ike's threats. McLaury was not visibly armed, but Wyatt took no chances, pulling his pistol and striking the Cowboy across the head.⁴⁵

By this time, everyone in Tombstone knew that a fight was brewing. There were dozens of eyewitnesses to the following events, many of whom later gave accounts to the press and the court. People virtually lined the streets to see what was going on. And what they saw could not have been encouraging, since Ike and Tom, now joined by their brothers, Billy Clanton and Frank McLaury, proceeded to Spangenburg's gunshop. Virgil and Wyatt stood outside, watching the Cowboys load their

40. *See id.* at 169. In frontier slang, Virgil "buffaloed" him.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 169-70.

45. *See id.* at 170.

weapons.⁴⁶ Virgil wasted no time walking to the nearby Wells Fargo office to borrow a short barreled shotgun.⁴⁷

The Cowboys headed to the O.K. Corral, located at the end of Fremont Street.⁴⁸ They were overheard threatening to shoot the Earps on sight, a fact that was reported to Virgil by a bystander named H. F. Sills.⁴⁹ Eventually, the Cowboys moved to a vacant lot behind the corral, adjacent to Camillus Fly's photography studio.

Spotting John Behan, Virgil asked the county sheriff to help disarm the Cowboys. Behan refused to help the Earps, but did go to the corral to talk to the Clantons and McLaurys. Frank McLaury, however, refused Behan's request to give up his weapons, saying he would not be disarmed unless the Earps were as well.⁵⁰

Meanwhile, Virgil and Wyatt, standing near Hafford's Saloon at the corner of Fourth and Allen Streets, were joined by brother Morgan and Doc Holliday. Virgil handed the shotgun to Doc, and the four men began their famous shoulder-to-shoulder walk toward the corral. Behan tried to intervene, but the Earps strode past him. According to both Virgil and Wyatt, Behan falsely claimed to have disarmed the Cowboys—perhaps setting up the Earps for an ambush—though this is one of the many disputed facts that have never been fully resolved.⁵¹

Arriving at the lot, Virgil announced, "Boys, throw up your hands. I want your guns."⁵² Then, someone fired a shot and, in Ike Clanton's phrase, "the ball opened."⁵³ Within thirty seconds, the most famous gunfight in American history was over. But who started it, and why? And could it have been avoided even as the Earps faced down the Cowboys at that last, critical moment? It would take a trial to answer those questions, even though many events of the gunfight itself were more or less uncontroverted.

46. See *id.* at 171. Mr. Spangenburg, however, refused to sell a weapon to Ike Clanton, though that was probably unknown to the Earps at the time. See *id.* at 171-72; TURNER, *supra* note 11, at 114.

47. See BARRA, *supra* note 3, at 171.

48. See MARKS, *supra* note 4, at 210.

49. See BARRA, *supra* note 3, at 1-3.

50. See *id.* at 172.

51. See *id.* at 174.

52. See TURNER, *supra* note 11, at 193.

53. *Id.*

THIRTY SHOTS IN THIRTY SECONDS

Two pistol shots were fired almost simultaneously, followed by perhaps thirty more from both sides, as well as two blasts from the Wells Fargo shotgun.⁵⁴ Frank McLaury was killed on the spot, Tom McLaury and Billy Clanton were mortally wounded⁵⁵—all three men “Hurled into Eternity,” as the *Tombstone Epitaph* reported the following morning.⁵⁶ Virgil, Morgan, and Doc were also wounded, though not too seriously. Ike Clanton, the man who started it all, ran for cover and escaped unharmed.⁵⁷

54. See TEFERTILLER, *supra* note 1, at 122–23.

55. See *id.* at 124.

56. See BARRA, *supra* note 3, at 175.

57. The following morning, the *Tombstone Nugget* ran this account of the gunfight:

[W]hen within a few feet of them the marshal said to the Clantons and McLowrys: “Throw up your hands boys, I intend to disarm you.”

As he spoke Frank McLowry made a motion to draw his revolver, when Wyatt Earp pulled his and shot him, the ball striking on the right side of his abdomen. About the same time Doc Holliday shot Tom McLowry in the right side, using a short shotgun, such as is carried by Wells-Fargo & Co.’s messengers. In the meantime Billy Clanton had shot at Morgan Earp, the ball passing through the left shoulderblade across his back, just grazing the backbone and coming out at the shoulder, the ball remaining inside of his shirt. He fell to the ground but in an instant gathered himself, and raising in a sitting position fired at Frank McLowry as he crossed Fremont Street, and at the same instant Doc Holliday shot at him, both balls taking effect, either of which would have proved fatal, as one struck him in the right temple and the other in the left breast. As he started across the street, however, he pulled his gun down in Holliday saying, “I’ve got you now.” “Blaze away! You’re a daisy if you do,” replied Doc. This shot of McLowry’s passed through Holliday’s pocket, just grazing the skin.

While this was going on Billy Clanton had shot Virgil Earp in the right leg, the ball passing through the calf, inflicting a severe flesh wound. In turn he had been shot by Morgan Earp in the right side of the abdomen, and twice by Virgil Earp, once in the right wrist and once in the left breast. Soon after the shooting commenced Ike Clanton ran through the O.K. Corral, across Allen Street into Kellogg’s saloon, and thence into Toughnut Street, where he was arrested and taken to the county jail. The firing altogether didn’t occupy more than twenty-five seconds, during which time thirty shots were fired.

Id. at 184–85 (orthography original).

Wyatt, the only participant who was not hit, was soon confronted by Behan. "Wyatt, I am arresting you," he said. "For murder."⁵⁸

Wyatt Earp would have none of it. "I won't be arrested. You deceived me, Johnny, you told me they were not armed. I won't be arrested, but I am here to answer what I have done. I am not going to leave town."⁵⁹ Behan backed off, though not for long.

While most of Tombstone's citizenry supported the Earps, the Cowboy faction had its defenders as well.⁶⁰ The bodies of Tom, Frank, and Billy were displayed outside the local undertaker's establishment, propped up beneath a sign reading "Murdered in the Streets of Tombstone."⁶¹ Their funeral was attended by thousands of mourners, as the town band led the cortege to the graveyard on Boot Hill.⁶²

Within a few days of the gunfight it became clear that the Earps' chief accuser would be Sheriff John Behan. According to Behan, Billy Clanton had called out to the Earps, "Don't shoot me, I don't want to fight," and Tom McLaury had cried "I have got nothing," while opening his shirt to show that he was unarmed.⁶³ With some elaboration, this would become the anti-Earp story, as developed by the prosecution at the hearing before Judge Spicer (the pro-Earp story was told by the defendants themselves).

Who fired the first round? Did Frank McLaury shoot first, or at least draw his gun, prompting Wyatt to return fire in self-defense? Or was it an unprovoked Doc Holliday, wielding his notorious nickel plated revolver against men who had no desire to fight? That was the crucial issue confronting Tombstone as the inquiry into the gunfight proceeded. The rest of the details receded in significance compared to that one question: who drew first? As is so often the case, the presence of numerous eyewitnesses only added to the confusion, since their accounts were sharply at odds. The task of judgment fell to Justice of the Peace Wells Spicer. In order to determine what happened, he had to decide whom to believe.

58. See BARRA, *supra* note 3, at 178.

59. *Id.* at 178-79.

60. See TEFERTILLER, *supra* note 1, at 125-26.

61. BARRA, *supra* note 3, at 185.

62. See MARKS, *supra* note 4, at 255-56; TEFERTILLER, *supra* note 1, at 126.

63. BARRA, *supra* note 3, at 188.

THE PROSECUTION BEGINS

On October 31, 1881, Ike Clanton filed murder charges against all three Earp brothers and Doc Holliday, a coroner's inquest having heard from nine witnesses who swore that the Earps had provoked the fight.⁶⁴ The city council had already suspended Virgil as town marshal, pending the outcome of an investigation.⁶⁵ Wyatt and Doc were arraigned and bail was set at \$10,000 for each of the defendants, including Virgil and Morgan, whose wounds prevented them from appearing in court.⁶⁶ As was required by territorial law, the initial step in the proceeding was a preliminary hearing, which began immediately.⁶⁷ The sole legal question was whether the defendants would be held for trial in the district court.

The District Attorney at the time was Lyttleton Price. A Republican who might otherwise have been thought to support the Earp faction, he was obligated to lead the prosecution. Friends and supporters of the dead Cowboys raised \$10,000 so that several private lawyers could assist the prosecution, including Ben Goodrich, a native Texan and former Confederate officer.⁶⁸ On the third day of the hearing, another lawyer arrived from Texas—William McLaury, brother of Frank and Tom. Will McLaury was immediately made an associate prosecutor, a task he accepted with all the passion one would expect under the circumstances:

64. See TEFERTILLER, *supra* note 1, at 129.

65. See BARRA, *supra* note 3, at 193; TEFERTILLER, *supra* note 1, at 129.

66. See BARRA, *supra* note 3, at 194. The defendants had little difficulty raising the money for bond, both from their own resources and from funds contributed by supporters. See TEFERTILLER, *supra* note 1, at 130.

67. The longhand transcripts of both the inquest and the preliminary hearing survived until the 1930s when they came into the possession of a Works Projects Administration writer named Hal L. Hayhurst. Hayhurst produced an edited, typewritten version of the transcripts, that included much of the verbatim record along with his own summaries and editorial comments. The Hayhurst document was published in 1981 by Alford Turner, under the title *The O.K. Corral Inquest*. Turner himself critiques the Hayhurst document as incomplete and anti-Earp. See TURNER, *supra* note 11, at 16. Nonetheless, Turner's edition is acknowledged today as the best, most accessible version of the trial record. See MARKS, *supra* note 4, at 12. Unfortunately, the original transcript was destroyed along with Hayhurst's personal effects when the writer died. See BARRA, *supra* note 3, at 192.

68. See TEFERTILLER, *supra* note 1, at 130–31.

This thing has a tendency to arouse all the devil there is in me—it will not bring my brothers back to prosecute these men but I regard it as my duty to myself and family to see that these brutes do not go unwhipped of justice . . . I think I can hang them.⁶⁹

The Earps were represented by Tom Fitch, a native New Yorker⁷⁰ whose personal history was as colorful as might be expected of a criminal defense lawyer on the Arizona frontier. He had previously worked as a newspaper reporter and had served in the California legislature. He had also been elected to Congress from Nevada (where he had reportedly made friends with Mark Twain). After a stint in Utah as counsel for the Mormon Church, he moved to Tombstone in 1877, where he served in the territorial legislature. Doc Holliday was separately represented by another local attorney, T.J. Drum.⁷¹

The first prosecution witness was William Allen, a friend of the McLaurys, who testified that he had followed the Earps down Fremont Street and heard one of them call out, “You sons-of-bitches, you have been looking for a fight!”⁷² At the same time, “Tom McLaury threw his coat open and said, ‘I ain’t got no arms!’ . . . William Clanton said, ‘I do not want to fight’ and held his hands out in front of him.”⁷³

The prosecution theory became rapidly clear. As much as the Cowboys might have misbehaved and postured earlier that day, they brandished no guns and posed no actual threat. Instead, it was the Earps who stalked the Cowboys, determined to have it out with them, firing before the Clantons and McLaurys even had a chance to surrender. As to the critical question of the first shot, Allen believed that it came from Doc Holliday (“the smoke came from him”), and that the second shot also came from the Earp party.⁷⁴

That latter point was pivotal to the prosecution. Virgil Earp was well-respected in Tombstone, even by most of his political adversaries. Holding the position of both town and federal marshal, it would be hard to tar him—or by extension, his

69. *Id.* at 135.

70. *See* MARKS, *supra* note 4, at 260.

71. *See* TEFERTILLER, *supra* note 1, at 130.

72. *See* TURNER, *supra* note 11, at 56.

73. *Id.*

74. *See id.*

brothers—as a wanton killer. In contrast, Doc Holliday was widely regarded as a renegade, “the fastest, deadliest man with a gun” in Tombstone,⁷⁵ so it would be far easier to target him as the instigator of the crime.

Moreover, it does not appear that Doc was actually deputized when he joined Virgil Earp’s posse.⁷⁶ At the very least, it might be seen as criminally negligent for Virgil to bring the notoriously erratic Doc into what was already a tense situation. And of course, if Doc Holliday could be shown to have opened fire, that would explain the shots from the Cowboys that wounded Virgil and Morgan. So Doc Holliday—and his nickel plated gun—became the cornerstone of the prosecution’s case

Other damning witnesses followed, including Martha King, a Tombstone housewife who observed the Earp party on their way to the showdown. Before the fight ever started, she heard one of the Earps say, “Let them have it,” to which Doc Holliday replied, “All right.”⁷⁷

Sheriff John Behan testified over a period of several days, explaining that he had tried to stop the Earps, who shoved him aside. Proceeding to the scene of the fight, he heard Wyatt yell, “You sons-of-bitches, you have been looking for a fight,” and another of the Earps ordered the Cowboys to “Throw up your hands.”⁷⁸ Then the firing began.

I saw a nickel-plated pistol in particular [which] was pointed at one of the party. I think at Billy Clanton. My impression at the time was that Holliday had the nickel-plated pistol. I will not say for certain that Holliday had it. These pistols I speak of, were in the hands of the Earp party.

When the order was [given] to “Throw up your hands,” I heard Billy Clanton say, “Don’t shoot me, I don’t want to fight.” Tom McLaurry at the same time threw open his coat and said, “I have nothing” or “I am not armed,” or something like that. . . . My attention was directed to the nickel-

75. BARRA, *supra* note 3, at 197.

76. Most scholars believe that Doc, a trusted friend, was brought along to guard the rear, perhaps explaining why he had been given Virgil’s shotgun. See TEFERTILLER, *supra* note 1, at 147. At trial, Virgil explained that he had deputized his brothers, but of Holliday he would say only that, “I called on him on that day for assistance to help disarm the Clantons and McLaurys.” MARKS, *supra* note 4, at 285; TURNER, *supra* note 11, at 190.

77. MARKS, *supra* note 4, at 220, 264–65; TURNER, *supra* note 11, at 40, 66.

78. TURNER, *supra* note 11, at 138.

plated pistol for a couple of seconds. The nickel-plated pistol was the first to fire, and instantaneously a second shot—two shots right together simultaneously—these two shots couldn't have been from the same pistol—they were too near together. The nickel plated pistol was fired by the second man from the right, the third man from the right fired the second shot, if it can be called a second shot. Then the fight became general. . . . The first two shots were fired by the Earp party.⁷⁹

The sheriff damningly added that at least two of the Cowboys, Ike Clanton (who survived) and Tom McLaury (who did not), had been unarmed,⁸⁰ and that “there was as many as eight or ten shots before I saw arms in the hands of any of the McLaury or Clanton party.”⁸¹

Behan's testimony allows for two possibilities, one bad for the Earps and the other worse. The worst interpretation, of course, is that the town marshal called for the Cowboys to surrender, and then shot them down when they raised their hands as told. But if that was too harsh, the prosecution could fall back on the theory that Virgil, at least initially, might really have meant to disarm the Cowboys, but recklessly fell to shooting when he heard the report of the “drunken, dangerous dentist's”⁸² infamous weapon. Behan's repetition of “nickel-plated pistol” was obviously meant to drive home Doc Holliday's role, since everyone in Tombstone knew that only he used such a gun.⁸³

When Behan was tendered for cross-examination, the defense faced a difficult decision. His well-known antagonism toward the Earps would lend support to a claim of bias, but as sheriff of Cochise County he nonetheless brought a good deal of credibility to the stand. Could the defense afford to attack him head on, claiming that he had adjusted his story to convict the defendants? There was plenty of ammunition to that effect. For example, Behan had apparently given an interview to the

79. *Id.* at 138–39.

80. See TEFERTILLER, *supra* note 1, at 133; TURNER, *supra* note 11, at 139. On cross-examination, however, Behan was forced to concede that Tom McLaury might have had a concealed pistol; he remained certain that Ike Clanton had no weapon. See TURNER, *supra* note 11, at 147.

81. TURNER, *supra* note 11, at 139; MARKS, *supra* note 4, at 228.

82. See TEFERTILLER, *supra* note 1, at 132.

83. See BARRA, *supra* note 3, at 190.

Tombstone Nugget immediately after the gunfight, in which he informed the paper that “Frank McLowry [sic] made a motion to draw his revolver” just before the shooting began,⁸⁴ an observation conspicuously at odds with his “nickel-plated” testimony at trial. There was also the matter of Behan’s Cowboy associations and sympathies, including the fact that his deputy, Frank Stilwell, had twice been arrested by Virgil Earp for robbing the Bisbee stage.⁸⁵ At one point Behan had operated a Faro table at a local saloon—law enforcement and gambling not being regarded as mutually exclusive professions on the frontier. But Wyatt broke the bank at Behan’s table, putting him out of business and no doubt occasioning some resentment as well.⁸⁶

And there was one more plausible line of cross-examination, this one potentially explosive. Since the fall of 1880, Behan had been living with a woman named Josephine “Sadie” Marcus, a dancer and actress from San Francisco who had come to Tombstone with a traveling production of Gilbert & Sullivan’s *H.M.S. Pinafore*. The daughter of a middle-class German-Jewish family, Josephine was obviously adventurous and said to be stunningly beautiful. Bat Masterson described her as “the belle of the honky-tonks.”⁸⁷ By the time of the trial, however, it appears that Josephine’s affections had strayed in the direction of Wyatt Earp.

Wyatt himself was still living with a woman named Mattie Blaylock, often referred to as his second wife (and therefore called Mattie Earp) though there is no record of a marriage.⁸⁸ But it seems clear that Wyatt was seeing Josephine at the time.⁸⁹ According to the memoirs of Virgil’s wife, Allie:

84. *Id.* at 184.

85. *See supra* notes 32–33 and accompanying text; *see also* TEFERTILLER, *supra* note 1, at 103, 107.

86. *See* BARRA, *supra* note 3, at 129.

87. *Id.* at 113.

88. *See id.* at 101.

89. Josie remained living in a house once shared with Behan, but the sheriff moved out and Wyatt spent much of his time there. According to one researcher, “Wyatt was away one night when Behan appeared to demand that [Josie] get out or move the house, as the lot was in his name. Morgan Earp had thoughtfully shown up to protect her in Wyatt’s absence . . . and flattened the demanding Behan.” MARKS, *supra* note 4, at 160.

We all knew about it, and we knew Mattie did too. That's why we never said anything to her. We didn't have to. We could see her with her eyes all red from cryin', thinkin' of Wyatt's carryin'-on. I didn't have to peek out at night to see if the light was still burnin' at daylight when I got up.

Everything Wyatt did stuck the knife deeper into Mattie's heart. Polishin' his boots so he could prance into a fancy restaurant with Sadie. Cleanin' his guns to show off to Sadie. You never saw his hair combed so proper or his long, slim hands so beautiful clean and soft.⁹⁰

In the end, Wyatt succeeded in "stealing" Josephine from Johnny Behan.⁹¹ As much animosity as Behan might have felt toward the Earps because of their law enforcement and gambling conflicts, it would have paled in comparison to his romantic rivalry with Wyatt for the woman Bat Masterson called "the prettiest dame" in Tombstone.⁹²

Tom Fitch must have been tempted indeed to attack Behan on cross-examination. Could he make the sheriff contradict himself? Would Behan even be able to maintain composure if confronted with the story of Wyatt and Josephine? But that tactic also had its risks. Taking aim so directly at a prosecution witness might suggest weakness in the defense case. And bringing Josephine into the trial would surely breach Victorian decorum, not to mention the possibility that it might backfire by making Wyatt himself look like a two-timer.

At least in part, Fitch opted for a safer course that challenged Behan concerning the "nickel-plated" gun. Holliday was known to have carried a shotgun into the fight, so where did the revolver come from? Why would a man, with a shotgun in his hand, stop to pull out a pistol? And since the shotgun was unquestionably fired twice in the course of a thirty-second battle, how could Doc Holliday have started the fight with a

90. BARRA, *supra* note 3, at 234–35. Allen Barra doubts the full veracity of Allie Earp's memoirs, but does conclude that Josephine and Wyatt were involved with each other by the time of the trial. *See id.* at 233–36. At a minimum, "they must have talked and made some kind of pact to meet outside Arizona later." *Id.* at 235.

91. *See id.* at 101. *See also* TURNER, *supra* note 11, at 154. In fact, the two would live together for almost fifty years, until Wyatt's death in 1929, sharing adventures at "every mining camp and racetrack from Texas to Mexico to Alaska." BARRA, *supra* note 3, at 101.

92. *See* BARRA, *supra* note 3, at 113.

nickel-plated pistol? Behan had no good answer,⁹³ a deficit that has undermined the prosecution theory from that day to this.

But Fitch could not restrain himself entirely, and the cross-examination he conducted on bias was not nearly so effective. Did Behan meet with Billie Allen before trial to coordinate their testimony? "No," said the sheriff.⁹⁴ Had the witness contributed to the fund collected to pay the private prosecutors? "I have not contributed a cent, nor have I promised to."⁹⁵

Venturing into the rivalry between Behan and the Earps, the defense made only slightly more headway:

Were not you and Wyatt Earp applicants to General Fremont for the appointment of sheriff of Cochise County, and did not Wyatt Earp withdraw his application upon your promise to divide the profits of the office and did not you subsequently refuse to comply with your part of the contract?⁹⁶

Behan admitted the existence of the bargain, but claimed it fell apart because of Wyatt,⁹⁷ at one point adding cryptically, "something afterwards transpired that I did not take him into the office."⁹⁸ Whatever the reason for the failed arrangement—jealousy, perfidy, fortuity—it did not terribly undermine Behan's testimony about the gunfight.

In addition to Behan and Allen, two more witnesses testified that the Earp party, and Holliday in particular, fired the first shots and that the Clantons and McLaurys had raised their hands at Virgil's command before they were gunned down.⁹⁹ The evidence was sufficiently compelling that Judge Spicer revoked bail for Doc and Wyatt and remanded them to jail (because of their wounds, Morgan and Virgil were still con-

93. See TURNER, *supra* note 11, at 144–46; see also MARKS, *supra* note 4, at 263.

94. See MARKS, *supra* note 4, at 263.

95. TURNER, *supra* note 11, at 142; TEFERTILLER, *supra* note 1, at 133.

96. TURNER, *supra* note 11, at 142.

97. See TEFERTILLER, *supra* note 1, at 134.

98. TURNER, *supra* note 11, at 143. Perhaps that "something" concerned Wyatt's attentions to Josephine Marcus. Perhaps it had to do with local politics, or with a dispute over a stolen racehorse that involved Behan, Wyatt, and the Clantons. See BARRA, *supra* note 3, at 198–99.

99. The witnesses were Billy Claiborn and West Fuller, both to some extent associated with the Cowboys. See BARRA, *supra* note 3, at 178–90, 199–200; see also TURNER, *supra* note 11, at 71, 76–77.

fined to bed at the time).¹⁰⁰ In a bitter irony, they were taken into custody by Johnny Behan and remained in his charge for the next sixteen days.¹⁰¹ Recognizing the perils inherent in the situation, over a dozen Earp supporters stood guard in front of the jail, lest any Cowboy enthusiasts be tempted to take the law into their own hands.¹⁰²

The capstone of the prosecution case should have been the testimony of Ike Clanton, the only Cowboy who survived the gunfight. After giving his occupation as "stock raising and cattle dealer,"¹⁰³ he provided an account consistent with the other prosecution witnesses, a story filled with high drama and professions of personal courage. The Earps had bullied and intimidated the Clantons and McLaurys for nearly twenty-four hours before the battle, though Ike himself had "never threatened any of the Earps nor Holliday."¹⁰⁴ The fight itself was started by Doc and Morgan, quickly followed by a barrage from Virgil and Wyatt,¹⁰⁵ despite the unarmed Cowboys' efforts to surrender.¹⁰⁶ According to Ike, he heroically tried to take Wyatt out of the fight:

He shoved his pistol up against my belly and told me to throw up my hands. He said, "You son-of-a-bitch, you can have a fight!" I turned on my heel, taking Wyatt Earp's hand and pistol with my left hand and grabbed him around the shoulder with my right hand and held him for a few seconds. While I was holding him he shot. . . . I then went on across Allen Street As I jumped into the door of the photograph gallery, I heard some bullets pass my head.¹⁰⁷

100. See TEFERTILLER, *supra* note 1, at 136-37.

101. See BARRA, *supra* note 3, at 200; see also TEFERTILLER, *supra* note 1, at 136, 149.

102. See BARRA, *supra* note 3, at 200. Their fears were far from illusory. Prosecutor Will McLaury bragged at the time that he had "a large number of my Texas friends here who are ready and willing to stand by me and with Winchester if necessary." MARKS, *supra* note 4, at 283-84. And as history records, the Cowboys did indeed take matters into their own hands following the trial, maiming Virgil and murdering Morgan in separate ambushes. Wyatt took his own revenge in what has since come to be known as the "Vendetta Ride." See BARRA, *supra* note 3, at 231-85; TEFERTILLER, *supra* note 1, at 163-247.

103. TURNER, *supra* note 11, at 91.

104. TEFERTILLER, *supra* note 1, at 138; TURNER, *supra* note 11, at 99.

105. See TURNER, *supra* note 11, at 93.

106. See *id.* at 94.

107. *Id.* at 95-96.

At this point the prosecution case was strong on details and weak on motive. Five separate witnesses had testified that the Earps started the fight and that the Cowboys were either unarmed, had tried to surrender, or both. But something was lacking. It was unlikely that Judge Spicer would conclude that Virgil Earp was a cold-blooded killer who murdered the Cowboys for sport. After all, Virgil was a well-respected lawman, holding the positions of both town and federal marshal, with no record of extravagant force. It would be unconvincing to make him out simply as trigger-happy, especially since the most damning eyewitnesses were all known adversaries of the Earps. The case against the defendants would only be truly coherent if the prosecution could explain why the Earps would suddenly turn from peace officers into assassins.

The defense set out to underscore that deficit in the cross-examination of Ike Clanton. First, however, there would be a bit of impeachment, as Clanton was compelled to admit that, contrary to his direct examination, he had indeed threatened the Earps during the night before the gunfight.¹⁰⁸

Tom Fitch next went to work, asking Ike Clanton about the agreement to rat on Leonard, Head, and Crane, the Cowboy robbers of the Benson stage.¹⁰⁹ The defense theory was that Ike's overnight rampage against the Earps was motivated by the fear that he might be discovered as an informer. It was no surprise, therefore, that Clanton, while admitting an approach by Wyatt, denied making any such deal.¹¹⁰

Ike Clanton continued, claiming that Wyatt and Morgan had secretly confided in him that the Earps themselves, along with Leonard, Head, and Crane, had been responsible for the stage holdup and the murder of Bud Philpot.¹¹¹ He added that the Earps had "piped off" the money to Doc Holliday (whom Clanton later accused of being the man who actually shot Philpot).¹¹² Wyatt, fearful that Leonard, Head, or Crane might squeal, had offered Clanton \$6000 to help liquidate them. Ike,

108. Clanton admitted having said something to the effect of, "the Earp crowd had insulted [me] the night before when [I was] unarmed—I have fixed, or heeled myself now and they have got a fight on sight." TEFERTILLER, *supra* note 1, at 138; TURNER, *supra* note 11, at 102.

109. See TURNER, *supra* note 11, at 104–05.

110. See *id.* at 105–06.

111. See TEFERTILLER, *supra* note 1, at 139–41.

112. See *id.* at 141; TURNER, *supra* note 11, at 105–08.

however, told Wyatt, "I was not going to have anything to do with helping to kill Bill Leonard, Crane, and Harry Head."¹¹³

There was the missing motive. The Earps, having divulged their secret criminality to Ike Clanton, now had to eliminate him in order to avoid detection. Said Ike,

I found out by Wyatt Earp's conversation that he was offering money to kill men that were in the attempted stage robbery, his confederates, for fear that Leonard, Crane and Head would be captured and tell on him, and I knew that after Leonard and Head was killed that some of them would murder me for what they had told me.¹¹⁴

That would explain why the Earps, and especially Holliday, fired so quickly, refusing the offer of surrender by the Clantons and McLaurys. It would also explain Ike's earlier claim that Wyatt seemingly risked his life by firing at the unarmed, fleeing Ike Clanton, rather than at the other Cowboys who had drawn their guns and were returning fire.

This testimony posed a challenge for the defense, confronted with the demanding task of showing that the alleged confessions of Wyatt, Morgan and Doc had never occurred. It is always tough to prove a negative, and tougher still on cross-examination. Tom Fitch chose sarcasm as his weapon, hoping to make clear that Ike's story was not worthy of belief. "Did not Marshall Williams, the agent of the [Wells Fargo] Express company at Tombstone, state to you . . . that he was personally [involved] in the attempted stage robbery and the murder of Philpot?" "Did not James Earp, a brother of Virgil, Morgan, and Wyatt, also confess to you that he was [a] murderer and stage robber?"¹¹⁵

It wasn't great cross-examination, or even admissible,¹¹⁶ but it made the point. The validity of the prosecution now hung on the extraordinary story of Ike Clanton.

113. TURNER, *supra* note 11, at 116. Clanton initially testified that he would not help the Earps "capture" the robbers, but he quickly changed the word to "kill," a verb that was more consistent with the theory of lawmen gone bad. See TEFERTILLER, *supra* note 1, at 141.

114. TURNER, *supra* note 11, at 117.

115. *Id.* at 119. See BARRA, *supra* note 3, at 203; TEFERTILLER, *supra* note 1, at 142.

116. Judge Spicer sustained objections to both questions. See BARRA, *supra* note 3, at 203; TEFERTILLER, *supra* note 1, at 142; TURNER, *supra* note 11, at 119.

THE DEFENSE RESPONDS

Throughout the prosecution case, defense counsel made a series of tactical decisions. Behan was handled fairly gingerly on cross-examination, the subject of his pro-Cowboy partisanship barely being raised.¹¹⁷ In contrast, Ike Clanton was allowed to ramble on in an anti-Earp tirade, a move that was no doubt intended to give him enough rope to hang himself figuratively, rather than hang the Earps in reality. But perhaps the boldest strategy came into play when Wyatt himself took the stand as the first witness for the defense.

Rather than proceed in standard question and answer format, Wyatt took advantage of a territorial law that allowed a defendant in a preliminary hearing to give narrative testimony without facing cross-examination.¹¹⁸ In fact, Wyatt began reading from a lengthy prepared statement, which both surprised and outraged the prosecution. Perhaps the defendant can avoid cross-examination, they claimed, but he should not be allowed to write out his testimony in advance. Judge Spicer, however, ruled that "the statute was very broad [and that] the accused could make any statement he pleased whether previously prepared or not."¹¹⁹

Early in his narrative, Wyatt set the scene, describing the Clantons and McLaurys as dangerous criminals who contributed to the atmosphere of lawlessness surrounding Tombstone:

It was generally understood among officers and those who have information about criminals, that Ike Clanton was sort of chief among the cowboys; that the Clantons and McLaurys were cattle thieves and generally in the secret of the stage robbery, and that the Clanton and McLaury ranches were meeting places and places of shelter for the gang.¹²⁰

Then he brought up the matter of the Benson stage robbery and the murder of Bud Philpot, explaining the soured deal

117. See TURNER, *supra* note 11, at 148.

118. The statute is described in the court record as Section 133, page 22 of the laws of Arizona, approved February 12, 1881. See *id.* at 155; TEFERTILLER, *supra* note 1, at 142.

119. TEFERTILLER, *supra* note 1, at 142 (quoting the *Tombstone Nugget*).

120. TURNER, *supra* note 11, at 156.

with Ike Clanton and reinforcing the Cowboy's reasons for threatening the Earps just prior to the gunfight:

I had an ambition to be Sheriff of this County at the next election, and I thought it would be a great help to me with the people and businessmen if I could capture the men who killed Philpot. There were rewards offered of about \$1200 each for the capture of the robbers. . . . I thought this sum might tempt Ike Clanton and Frank McLaury to give away Leonard, Head, and Crane, so I went to Ike Clanton, Frank McLaury . . . when they came to town. I had an interview with them in the back yard of the Oriental Saloon. I told them what I wanted. I told them I wanted the glory of capturing Leonard, Head, and Crane and if I could do it, it would help me make the race for Sheriff at the next election. I told them if they would put me on the track of Leonard, Head, and Crane, and tell me where those men were hid, I would give them all the reward and would never let anyone know where I got the information.¹²¹

Wyatt proceeded to outline a long history of threats against the Earps by the Clantons and McLaurys, including many that had occurred in front of witnesses.¹²² He detailed the crimes of other Cowboys as well, as though to emphasize guilt by association:

"I knew all these men were desperate and dangerous men, that they were connected with outlaws, cattle thieves, robbers and murderers. . . . I heard of John Ringo shooting a man down in cold blood near Camp Thomas. I was satisfied that Frank and Tom McLaury killed and robbed Mexicans in Skeleton Canyon."¹²³

A prudent lawman could draw only one conclusion. "I naturally kept my eyes open and did not intend that any of the gang should get the drop on me if I could help it."¹²⁴

Wyatt was adamant that the Cowboys had initiated the confrontation, threatening Morgan, Doc, and Wyatt at various times, including an incident in the Oriental Saloon when Ike,

121. *Id.* at 156–57.

122. Wyatt named seven citizens who could testify to such threats. BARRA, *supra* note 3, at 205; TEFERTILLER, *supra* note 1 at 143.

123. TURNER, *supra* note 11, at 159.

124. *Id.* at 159.

wearing his six shooter, warned, "You must not think I won't be after you all in the morning."¹²⁵ Ike had been even more explicit to Ned Boyle, a bartender, who had reported to Wyatt that Ike had said, "As soon as those damned Earps make their appearance on the street today the ball will open, we are here to make a fight. We are looking for the sons-of-bitches!"¹²⁶

Next came the subject of Behan's betrayal of his fellow lawmen. Wyatt recounted that as the Earps marched down Fremont Street headed for the O.K. Corral, Behan called out, "I have disarmed them."¹²⁷ Wyatt continued, "When he said this, I took my pistol, which I had in my hand, under my coat, and put it in my overcoat pocket,"¹²⁸ thus making himself an easier target for the Cowboys who had not been disarmed at all.¹²⁹

Arriving at the lot behind the corral, "Frank McLaury and Billy Clanton's six shooters were in plain sight."¹³⁰ Virgil called to the Cowboys, "Throw up your hands, I have come to disarm you,"¹³¹ but instead, Billy Clanton and both McLaury brothers went for their guns:

I had my pistol in my overcoat pocket, where I put it when Behan told us he had disarmed the other parties. When I saw Billy Clanton and Frank McLaury draw their pistols, I drew my pistol. Billy Clanton leveled his pistol at me, but I did not aim at him. I knew that Frank McLaury had the reputation of being a good shot and a dangerous man, and I aimed at Frank McLaury. The first two shots which were fired were fired by Billy Clanton and myself, he shooting at me, and I shooting at Frank McLaury. I don't know which was fired first. We fired almost together. The fight then became general.¹³²

As to Ike Clanton's testimony, Wyatt's attitude was at first dismissive:

After about four shots were fired, Ike Clanton ran up and grabbed my left arm. I could see no weapon in his

125. *Id.* at 160.

126. *Id.*

127. *Id.* at 164.

128. *Id.*

129. TEFERTILLER, *supra* note 1, at 144.

130. TURNER, *supra* note 11, at 164.

131. *Id.* at 164.

132. *Id.*

hand, and thought at the time he had none, and so I said to him, 'the fight had commenced. Go to fighting or get away,' at the same time pushing him off with my left hand I never fired at Ike Clanton, even after the shooting commenced, because I thought he was unarmed.¹³³

Later, he became contemptuous: "The testimony of Isaac Clanton that I ever said to him that I had anything to do with any stage robbery . . . or any improper communication whatever with any criminal enterprise is a tissue of lies from beginning to end."¹³⁴

Wyatt added two statements that may provide a certain insight into the conduct of the trial. First, he addressed the legal justification for his actions:

I believed then, and believe now, from the acts I have stated and the threats I have related and the other threats communicated to me by other persons, as having been made by Tom McLaury, Frank McLaury and Ike Clanton, that these men last named had formed a conspiracy to murder my brothers, Morgan and Virgil, Doc Holliday and myself. I believe I would have been legally and morally justified in shooting any of them on sight, but I did not do so, nor attempt to do so. I sought no advantage when I went as deputy marshal, to help to disarm them and arrest them. I went as a part of my duty and under the direction of my brother, the marshal. I did not intend to fight unless it became necessary in self-defense and in the performance of official duty. When Billy Clanton and Frank McLaury drew their pistols, I knew it was a fight for life, and I drew in defense of my own life and the lives of my brothers and Doc Holliday.¹³⁵

Finally, Wyatt commented on the broken deal with Sheriff Behan, saying cryptically that Behan's sworn claims about the reasons "for not complying with his contract [were] false in every particular."¹³⁶

The story was powerfully told, but not without undertaking a certain risk. True, the narrative testimony insulated

133. *Id.* at 164–65.

134. *Id.* at 166; TEFERTILLER, *supra* note 1, at 145.

135. TEFERTILLER, *supra* note 1, at 144–45; TURNER, *supra* note 11, at 163–64.

136. TEFERTILLER, *supra* note 1, at 145; TURNER, *supra* note 11, at 166.

Wyatt from what might have been a withering cross-examination at the hands of Will McLaury, but only at the cost of suggesting that he might have something to hide. Furthermore, the decision to have Wyatt read his statement had its own drawbacks.¹³⁷ Would Judge Spicer believe that the words were actually Wyatt's? Surely, one can see counsel's guiding hand in some of the language. It seems almost impossible that the relatively unschooled Wyatt Earp would have been able to summarize so neatly the law of justifiable homicide:

I sought no advantage when I went, as deputy marshal, to help to disarm them and arrest them. I went as a part of my duty and under the directions of my brothers, the marshals. I did not intend to fight unless it became necessary in self-defense or in the rightful performance of official duty."¹³⁸

Might the judge also infer that the very details of the narrative had been composed (and therefore improved) by the attorneys?

We can only speculate about counsel's reason for adopting this maneuver, but it is made all the more enigmatic by the wide-open approach taken by the defense to the balance of the proceeding. Rather than limiting their evidence at the pre-

137. Indeed, it was a far more audacious act of lawyering than is initially apparent. The statute itself evidently dated to an earlier time when accused criminals were not allowed to testify under oath in their own defense. Strange as it may seem today, it was once the law in every state and territory that "interested parties," including defendants, were incompetent to take the stand. See generally Henry E. Smith, *The Modern Privilege: Its Nineteenth-Century Origins*, in *THE PRIVILEGE AGAINST SELF INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* 145 (R.H. Hemholz et al. eds., 1997) (explaining the relationship between defendants' incompetence and the privilege against self incrimination). To ease the harsh burden of this rule, a number of jurisdictions, apparently including Arizona, began to allow defendants to make unsworn statements that were not considered formal testimony and which, therefore, could not be subjected to cross-examination. FRANCIS WHARTON, *A TREATISE ON THE LAW OF EVIDENCE IN CRIMINAL ISSUES* §427 (8th ed. Philadelphia, Kay and Brother 1880) ("At common law, a defendant, at least in capital cases, is entitled to address the jury, at the conclusion of the case, giving his own story as to any relevant facts. In making this statement he is not subject to cross-examination."). Arizona, however, had abolished the defendants' incompetence in 1871. See *Ferguson v. Georgia*, 365 U.S. 570, 577 n.6 (1960) (listing the years in which each United States jurisdiction abolished the rule of "disqualification for interest"). Hence, Wyatt's lawyers were boldly invoking a statute which, though still in effect, had been substantively superseded for a decade. The ploy must have been transparent at the time, but the judge allowed it.

138. See TURNER, *supra* note 11 at 165.

liminary hearing, keeping their cards close to the vest, and saving their key witnesses for a possible trial, Fitch and Drum opted to present a full-fledged case. They called another eleven witnesses in addition to Wyatt, all of whom were readily tendered for further questioning by the prosecution.¹³⁹ Even Virgil Earp, so badly wounded that court had to convene at his bedside, was subjected to the rigors of cross-examination.¹⁴⁰ Why was the defense so much more protective of Wyatt than of Virgil? Were they worried that Wyatt would lose his temper under questioning from Will McLaury? Or were they afraid that he would be forced to make damaging admissions? Perhaps he knew something that his brother did not?

It was Wyatt who had the most pointed rivalry with Johnny Behan, including their failed agreement to split the proceeds of the job of Cochise County sheriff. What might the prosecution have discovered by inquiring into Wyatt's mysterious assertion that Behan's "reasons given by for not complying with his contract are false."¹⁴¹ Recall that Behan's own testimony on this point was equally obscure: "Something afterwards transpired that I did not take him into the office."¹⁴² Could this all have been an effort to shield the reputation of Josephine Marcus? Though the romantic triangle might well have been the best means to expose Behan's duplicity, defense counsel neither questioned Behan on the subject, nor did they put Wyatt in a position to be questioned about it himself. Was the lawman willing to hazard his own freedom—as well as that of his brothers and friend—in the name of gallantry?¹⁴³

139. They may also have been exposed to threats of murder, as Tombstone's tense atmosphere made it a very real possibility that Cowboy partisans might attempt to eliminate adverse witnesses. See TEFERTILLER, *supra* note 1, at 142.

140. See *id.* at 147. The defense refrained from calling either Doc Holliday or Morgan Earp, however, a provocative decision given the claims that either Doc or Morgan had fired the first shot. Doc, of course, was well-known for his volatile temper, which might have been reason enough to keep him off the stand. Morgan, the youngest Earp, was also thought to be less steady than his older brothers. MARKS, *supra* note 4, at 299.

141. See TEFERTILLER, *supra* note 1, at 145; TURNER, *supra* note 11, at 166.

142. See TURNER, *supra* note 11, at 143.

143. Literature and folklore extol the nobility of such a selfless gesture, as in the case of the "Long Black Veil":

Ten years ago/on a cold dark night/
Someone was killed/beneath the town hall light.
There were few at the scene/they all agreed/
That the man who ran/looked a lot like me.

And there is at least one more possibility. It was Wyatt who had first hand knowledge of the aborted arrangement with Ike Clanton for the betrayal of the Benson stage robbers. Perhaps there was more to that story than Wyatt was willing to tell. While it seems unlikely that Wyatt was actually involved in the murder of Bud Philpot, his connections to Leonard, Head, and Crane might have been closer than he cared to admit—at least while he was on trial for his life. Perhaps Wyatt's version of the ill-fated deal might have unraveled if probed too searchingly on the stand.

Wyatt Earp's prepared statement provided a coherent narrative of the defendants' theory, though his refusal to be cross-examined could not help but make it somewhat suspect. Given the explicit testimony of Behan and company, would Judge Spicer be willing to dismiss the charges based on an account that could not be tested in court? Surely the easier course of action would be to bind the defendants for trial, subjecting Wyatt, Virgil, Morgan and Doc to the uncertain mercies of an Arizona jury. To avoid that danger—and it was a danger, given the jury pool in Cochise County—defense counsel would have to provide witnesses who could demonstrate the indicators of credibility that Wyatt's testimony had eschewed.

After producing several witnesses to support or bolster the details of Wyatt's story, the defense heightened the trial's drama by calling Virgil Earp to the stand. Well, not exactly to the stand. The town and federal marshal was too severely in-

The judge said son/what is your alibi?

If you were somewhere else/you don't have to die.

I spoke not a word/although it meant my life.

I had been in the arms/of my best friend's wife.

See JOAN BAEZ, *LONG BLACK VEIL* (D. Dill, M. Wilkin), on *ONE DAY AT A TIME* (Vanguard Records 1970). There are numerous contemporary recordings of this folk song, each making the same point with slightly different lyrics, including thirteen separate renditions by Joan Baez. See, e.g., Nancy Lutzow, *The Joan Baez Web Pages - Discography* (visited Sep. 11, 2000) <<http://baez.woz.org/jbdiscSA.html#LBV>>.

A similar, though less tragic, instance is found in the play *Inherit the Wind*, by Jerome Lawrence and Robert Lee, in which the prosecution calls the defendant's girlfriend as a surprise witness. As defense counsel—obviously Clarence Darrow, but here called Henry Drummond—rises to launch into a devastating cross-examination, he is restrained by the defendant himself, who says, "Don't plague her. Let her go." The crusty lawyer pauses, sighs, and reluctantly replies, "No questions." The defendant prevails and the witness is excused without further questioning. JEROME LAWRENCE & ROBERT E. LEE, *INHERIT THE WIND* act II sc. 2 (1955).

jured to come to the courthouse, so Judge Spicer reconvened the hearing in Virgil's room at the Cosmopolitan Hotel.¹⁴⁴

Virgil affirmed Wyatt's testimony about Behan's treacherous claim to have disarmed the Cowboys, and explained his own unsuspecting response:

I had a walking stick in my left hand and my right hand was on my six-shooter in my waist pants, and when he said he had disarmed them, I shoved it clean around to my left hip and changed my walking stick to my right hand.¹⁴⁵

When he came in sight of the Cowboys, however, it was obvious to Virgil that they were well-armed. Billy Clanton and Frank McLaury had their hands on their six-shooters and Tom McLaury was reaching for a Winchester rifle on a horse. Virgil called out, "Boys, throw up your hands. I want your guns." At that point, "Frank McLaury and Billy Clanton drew their six-shooters and commenced to cock them, and [I] heard them go 'click-click.'"¹⁴⁶

Virgil still attempted to avoid a fight. "At that I said, throwing both hands up, with the cane in my right hand . . . 'Hold on, I don't want that.'"¹⁴⁷ But to no avail. Billy Clanton fired his pistol and Tom McLaury drew the rifle from its scabbard, using the horse as a shield. On cross-examination, Virgil agreed that Wyatt had also fired an initial shot, simultaneously with Billy Clanton.¹⁴⁸

Several more defense witnesses followed, upright citizens of Tombstone including two bartenders (an honorable and important profession in territorial Arizona), the town clerk, an army surgeon, and a hotelkeeper. Several testified that the Clantons and McLaurys had threatened violence against the Earps; others had seen the Cowboys, including the supposedly unarmed Tom McLaury, carrying guns just before the shootout.

For example, hotelkeeper Albert Bilicke testified that he had seen Tom McLaury at Everhardy's butcher shop shortly before the fight. "When he went into the butcher shop his right-hand pants pocket was flat and appeared as if nothing

144. TEFERTILLER, *supra* note 1, at 147.

145. *Id.* at 147; TURNER, *supra* note 11, at 193.

146. TEFERTILLER, *supra* note 1, at 147; TURNER, *supra* note 11, at 193.

147. TURNER, *supra* note 11, at 193.

148. See TEFERTILLER, *supra* note 1, at 147-48.

was in it. When he came out his pants pocket protruded, as if there was a revolver therein."¹⁴⁹ This evidence was not devastating, but the prosecutor (who should have known better) could not bring himself to leave it alone:

How did it happen that you watched him so closely the different places he went and the exact position of his right-hand pantaloons pocket when he went into the butcher shop and the exact form of a revolver in the same right-hand pocket when he came out?¹⁵⁰

Asked to explain his answer, Bilicke took full advantage of the prosecutor's classic mistake:

Every good citizen in this city was watching all those cowboys very closely on the day the affray occurred, and as [Tom] was walking down the street my attention was called to this McLaury by a friend, and so it happened that I watched him very closely.¹⁵¹

At a stroke, the defense theory crystallized. The Cowboys were a menace to the "good citizens" of Tombstone. They had to be watched and kept under control, meaning that Virgil Earp had only been doing his job.¹⁵² As will become evident, Judge Spicer was keenly attuned to such testimony.

Next to the Earps themselves, the most important defense witness was H. F. Sills, a railroad engineer from New Mexico who just happened to be visiting Tombstone on October 26. A complete stranger in town, he had no prior contact with either the Earps or the Cowboys.¹⁵³ Sills testified that shortly after arriving in Tombstone he passed by the O.K. Corral and overheard one of the Cowboys talk about killing "the whole party of the Earps" on sight.¹⁵⁴ Later, when the fight began, he saw

149. TURNER, *supra* note 11, at 211. Army surgeon J.B.W. Gardiner also testified to the same effect. *Id.* at 213.

150. *Id.* at 211.

151. *Id.* at 212.

152. The prosecutor's efforts at recovery did not fare much better. "Do you know every good citizen in Tombstone, or did you on that day?" he asked. The unfazed Bilicke replied, "I know not all of them, but a great many." *Id.* at 212.

153. See BARRA, *supra* note 3, at 208; TEFERTILLER, *supra* note 1, at 148; TURNER, *supra* note 11, at 188.

154. BARRA, *supra* note 3, at 208; TEFERTILLER, *supra* note 1, at 148; TURNER, *supra* note 11, at 182.

Virgil raise his cane and he believed that Wyatt and Billy Clanton had fired the first shots.¹⁵⁵

Sills' testimony was significant for two reasons. First, he was one of the few truly neutral witnesses at the hearing. Nearly everyone else was closely identified with one side or the other. And being neutral, it was particularly significant that Sills undercut the "nickel-plated pistol" theory by testifying that Wyatt and Billy Clanton fired first. By taking Doc Holliday out of the picture, he deprived the prosecution of its possible fallback position that the unstable gunslinger had impulsively fired as the Cowboys tried to surrender—which would make Virgil, at a minimum, criminally negligent for enlisting the erratic Holliday's assistance in the first place. But if it was Wyatt who shot first, Judge Spicer could only find for the prosecution if he concluded that the deputy sheriff was a deliberate murderer—a strikingly harder story to sell.¹⁵⁶ Of course, the prosecution would have no case at all if Billy Clanton or Frank McLaury could be conclusively shown to have fired the first shot. Even the staunchest Earp partisans were unwilling to go completely out on that limb. The best they could hope to establish was that Wyatt and one of the Cowboys fired almost simultaneously.

The prosecution cross-examined Sills relentlessly, hoping either to shake his story or to expose some hidden bias. Neither tactic worked.¹⁵⁷

The defense also called Addie Bourland, a dressmaker who lived across from Fly's photography studio, the scene of the gunfight.¹⁵⁸ Though Miss Bourland was not able to say who started the gunfight, she stated that she did not see the Cowboys with their hands in the air.¹⁵⁹ This testimony was obviously important to Judge Spicer, who took the extraordinary step of visiting her at her home during a break in the trial. Following that *ex parte* interrogation, Spicer recalled Miss

155. See TURNER, *supra* note 11, at 182.

156. Sills' testimony was significant for a third reason as well. Shortly after he left the stand, defense counsel argued that the prosecution evidence had become so weak that Wyatt and Doc should be restored to bail. Judge Spicer agreed, setting bond at \$20,000 each. The money was easily raised, and Doc and Wyatt remained free for the balance of the hearing. MARKS, *supra* note 4, at 288.

157. See TEFERTILLER, *supra* note 1, at 148; TURNER, *supra* note 11, at 182–85.

158. See TURNER, *supra* note 11, at 207.

159. See *id.* at 210.

Bourland to the stand, over the strenuous objections of the prosecution, and proceeded to question her himself.¹⁶⁰ Could she be more explicit about the beginning of the fight? "I didn't see anyone holding up their hands," she said. "They all seemed to be firing in general, on both sides. They were firing on both sides, at each other; I mean by this at the time the firing commenced."¹⁶¹

Then the prosecution, having been granted further cross-examination, blundered in a manner still all too familiar to contemporary trial lawyers, by asking one question too many. What had Miss Bourland told Judge Spicer during their private interview? "He asked me one or two questions in regard to seeing the difficulty, and if I saw any men hold their hands, whether I would have seen it, and I told him I thought I would have seen it."¹⁶²

Until that moment, it was possible that Miss Bourland had simply missed the Cowboys' gesture of surrender, in what was, after all, merely a thirty-second confrontation. It was the improvident cross-examination that allowed her to shore up her testimony by adding that "I would have seen it" if it had happened.

ARGUMENTS MADE . . . AND ARGUMENTS NEGLECTED

The defense rested, turning the case over to the prosecutors for rebuttal. Will McLaurry and Lyttleton Price now faced a decision of their own. An adverse decision at this point would terminate the proceeding, never allowing them to present further evidence to a jury. What could they do to reinvigorate their case, which had been badly damaged by the defense presentation? Should they recall Johnny Behan, allowing him to refute the charges in Wyatt's statement (and perhaps to expose Wyatt as an adulterer)? Could they locate additional witnesses who might impeach the reputations of Sills and Bourland? Was there more to be offered regarding the deal between Wyatt and Ike? And was there anything at all more to be said about Ike's claim that the Earps' attack was an effort to silence him concerning their participation in the Benson stage robbery?

160. See BARRA, *supra* note 3, at 209-10.

161. TEFERTILLER, *supra* note 1, at 151; TURNER, *supra* note 11, at 210.

162. TEFERTILLER, *supra* note 1, at 151.

Any testimony along those lines would have enhanced the prosecution theory, but it seems that there was no such information at hand. Instead, they called a single rebuttal witness, a butcher named Ernest Storm who had purchased the McLaurys' beef shortly before the gunfight. Mr. Storm offered the nearly irrelevant testimony that Tom McLaury did not appear to be armed when in Storm's shop at "about two or three o'clock in the afternoon."¹⁶³ Storm somewhat refuted Albert Bilicke's testimony that McLaury had emerged from the butcher shop with a pistol visible in his front pocket, but not with any great force. The balance of the defense case was untouched.

Many lawyers believe that it is essential to call at least one rebuttal witness, if only to make sure of having the crucial last word. Nonetheless, the prosecution here may actually have damaged itself by closing its case with a witness who had so little to say.

Looking back on the Tombstone murder trial, it is interesting to note the evidence that appears to have been omitted in the month-long hearing. From the defense side, relatively little was made of Sheriff Behan's connection to the Cowboys, including the arrest of his own deputy for robbing the Bisbee stage. In fact, the very idea of an organized outlaw faction was barely developed, save for an inaccurate reference to Ike Clanton as "sort of chief among the cowboys."¹⁶⁴ True, many defense witnesses testified that the Clantons and McLaurys themselves were dangerous habitual criminals, but the larger story of nearly open communal warfare stayed out of the record.¹⁶⁵

163. TEFERTILLER, *supra* note 1, at 151; *see also* TURNER, *supra* note 11, at 217.

164. TURNER, *supra* note 11, at 156. To the extent the Cowboys had an acknowledged leader, it was probably Curly Bill Brocius or John Ringo. *See* BARRA, *supra* note 3, at 205.

165. Tom Fitch, representing only the Earp brothers, also declined what might have seemed like an open invitation to blame everything on Doc Holliday (who had separate counsel). The prosecution witnesses repeatedly identified Doc as the first to open fire. If that were the case, and especially if the second round came from Billy Clanton or Frank McLaury, Wyatt and Virgil could have claimed that they drew their guns only after the shooting had commenced, not knowing whether the shots had come from Holliday or the Cowboys. Wyatt, however, testified that he fired the first shot, and Virgil agreed, thus protecting Holliday from taking sole blame. The most likely explanation for the Earps' testimony is that it was true—Wyatt fired first when he saw (or didn't see) Frank McLaury reach for his gun. Another possibility, however, is that Wyatt was covering up for Doc,

The prosecution, of course, was hardly eager to underscore the connection between the victims (not to mention its own key witnesses) and the epidemic of cattle theft, border raids, stage-coach robberies, and occasional murders that had plagued the growing community. On the other hand, the deep divisions in Tombstone society might have been used to strengthen their case as well. What else could explain the Earps' posited determination to gun down the unarmed Cowboys? Without more context, the prosecution was left arguing either the implausible theory that the entire gunfight was a plot to shut up Ike Clanton, or the less culpable theory that a jumpy Doc Holliday had started the battle, drawing the Earps in almost by misadventure.

THE COURT DECIDES

Judge Spicer delivered his decision on November 30, 1881, and it happened that the story frame made all the difference in the case. He was troubled by the inclusion of Wyatt and Doc in Virgil's posse, given the evidence of their history of bad blood with the Cowboys:

In view of these controversies between Wyatt Earp and Isaac Clanton and Thomas McLaury, and in further view of this quarrel the night before between Isaac Clanton and J.H. Holliday, I am of the opinion that the defendant, Virgil Earp, as chief of police, subsequently calling upon Wyatt Earp and J.H. Holliday to assist him in arresting and disarming the Clantons and McLaurys—committed an injudicious and censurable act¹⁶⁶

But it turned out that he was troubled more by the deeper background of the fight, and he did not confine himself to circumstances that had been introduced at trial:

[Y]et when we consider the conditions of affairs incident to a frontier country; the lawlessness and disregard for human life; the existence of a law-defying element in [our] midst;

whom he said had once saved his life in Dodge City. See TURNER, *supra* note 11, at 158. Or, as the anti-Earpists might claim, perhaps Doc was in a position to incriminate the Earps regarding either the shootout or the Benson stage robbery, in which case their favorable testimony might have been the price for his silence.

166. *Id.* at 219; see also BARRA, *supra* note 3, at 210.

the fear and feeling of insecurity that has existed; the supposed prevalence of bad, desperate, and reckless men who have been a terror to the country and kept away capital and enterprise; and consider the many threats that have been made against the Earps, I can attach no criminality to [Virgil's] unwise act. In fact, as the result plainly proves, he needed the assistance and support of staunch and true friends, upon whose courage, coolness and fidelity he could depend, in case of an emergency.¹⁶⁷

Remarking that there were “[w]itnesses of credibility”¹⁶⁸ on both sides, Spicer nonetheless rejected the argument that the Cowboys had been shot while trying to surrender: “Considering all the testimony together, I am of the opinion that the weight of evidence sustains and corroborates the testimony of Wyatt Earp, that their demand for surrender was met by William Clanton and Frank McLaurry drawing or making motions to draw their pistols.”¹⁶⁹

But this conclusion alone should not have been sufficient to free the defendants. The proceeding was simply a preliminary hearing, held only for the purpose of determining whether there was sufficient evidence to warrant a full trial. Ordinarily, the existence of “witnesses of credibility” would be enough to allow the prosecution to go forward, with the “weight of the evidence” being left for decision by the jury. In this case, however, there was an added element. The Earps claimed lawful justification for the shootings. That, as Judge Spicer determined, was a legal defense well within his jurisdiction to decide:

Was it for Virgil Earp as chief of police to abandon his clear duty as an officer because its performance was likely to be fraught with danger? Or was it not his duty that as such officer he owed to the peaceable and law-abiding citizens of the city, who looked to him to preserve peace and order, and their protection and security, to at once call to his aid sufficient assistance and persons to arrest and disarm these men?

167. TURNER, *supra* note 11, at 220; *see also* BARRA, *supra* note 3, at 210–11.

168. TURNER, *supra* note 11, at 221; *see also* BARRA, *supra* note 3, at 212.

169. TURNER *supra* note 11, at 223; *see also* TEFERTILLER, *supra* note 1, at 153–54.

There can be but one answer to these questions, and that answer is such as will divest the subsequent approach of the defendants toward the deceased of all presumption of malice or of illegality.

When, therefore, the defendants, regularly or specially appointed officers, marched down Fremont Street to the scene of the subsequent homicide, they were going where it was their right and duty to go; and they were doing what it was their right and duty to do; and they were armed, as it was their right and duty to be armed when approaching men whom they believed to be armed and contemplating resistance. . . .

To constitute the crime of murder there must be proven not only the killing, but also the felonious intent. . . . [I]n looking over this mass of testimony for evidence upon this point, I find that it is anything but clear.¹⁷⁰

Considering "the conditions of affairs incident to a frontier country,"¹⁷¹ Judge Spicer would require specific evidence of intent before he would order the lawmen to stand trial. But here the prosecution failed badly, offering only the allegations of Ike Clanton, which the Judge rejected in their entirety:

The testimony of Isaac Clanton, that this tragedy was the result of a scheme on the part of the Earps to assassinate him and thereby bury in oblivion the confessions the Earps had made to him about "piping" away the shipment of coin by Wells Fargo & Co. falls short of being a sound theory, [on] account of the great fact, most prominent in this matter, to-wit: that Isaac Clanton was not injured at all, and could have been killed first and easiest, if it was the object of the attack to kill him. He would have been first to fall, but, as it was, he was known or believed to be unarmed and was suffered and, as Wyatt Earp testified, told to go away, and was not harmed.¹⁷²

Which led inexorably to a single result:

In view of all the facts and circumstances of the case, considering the threats made, the character and positions of the parties, and the tragic results accomplished in manner

170. TURNER, *supra* note 11, at 221; *see also* TEFERTILLER, *supra* note 1, at 152-53.

171. TURNER, *supra* note 11, at 220.

172. *Id.* at 223; *see also* TEFERTILLER, *supra* note 1, at 154.

and form as they were, with all surrounding influences bearing upon the *res gestae* of the affair, I cannot resist the conclusion that the defendants were fully justified in committing these homicides—that it [was] a necessary act, done in the discharge of an official duty.¹⁷³

All charges against the Earps and Holliday were dismissed.¹⁷⁴

WHAT WENT WRONG?

With “witnesses of credibility” on both sides, the preliminary case against the Earps should have belonged to the prosecution. Their burden was relatively modest, requiring only the production of sufficient evidence to merit a complete trial. And in fact, at one point Judge Spicer virtually ruled that the prosecution had met its burden, when he revoked bail for Wyatt and Doc and remanded them to custody.

So what went wrong?

For one thing, the defense strategies all paid off. By producing a maximum series of favorable witnesses at the preliminary hearing, rather than reserving them for trial, the defense succeeded in creating a favorable frame for Judge Spicer’s evaluation of the facts of the case. The same approach underscored the “civic” nature of the Earps’ actions, since many of their witnesses were solid, town-dwelling citizens: an army surgeon,¹⁷⁵ various hotel- and saloonkeepers,¹⁷⁶ a dressmaker,¹⁷⁷ even an assistant district attorney,¹⁷⁸ a probate judge,¹⁷⁹ and

173. TURNER, *supra* note 11, at 224–25; *see also* TEFERTILLER, *supra* note 1, at 154–55.

174. *See* TURNER, *supra* note 11, at 226.

175. J.B.W. Gardner testified that he believed Tom McLaury to have been armed. *See* TEFERTILLER, *supra* note 1, at 149; *see also* TURNER, *supra* note 11, at 214.

176. There were several, including Julius Kelley, E.F. Boyle, and Albert Bilickie. *See* TURNER, *supra* note 11, at 203, 173, 211.

177. Addie Bourland, of course. *See id.* at 207.

178. The witness was Winfield Scott Williams, an assistant to the prosecutor Lyttleton Price. He was called to contradict certain statements of Sheriff Behan’s. *See* TEFERTILLER, *supra* note 1, at 149.

179. The witness, named John H. Lucas, had relatively little to say. *See* TURNER, *supra* note 11, at 214; *see also* TEFERTILLER, *supra* note 1, at 151.

the clerk of the board of supervisors.¹⁸⁰ Though some of the witnesses were clearly central to the defense, others seemed cumulative or even superfluous. It seems highly likely that the parade of notables was intended to influence the court in ways that were not strictly evidentiary.¹⁸¹

When it came to evidence, the defense also succeeded when it chose a "minimalist" approach. The narrative statement of Wyatt Earp apparently did not backfire. More importantly, the risky decision to take it fairly easy on Johnny Behan seems to have worked out as intended. In determining the significance of the evidence, Spicer stated that he gave "as much weight to the testimony of persons unacquainted with the deceased or the defendants, as to the testimony of persons who were companions or acquaintances, if not partisans of the deceased."¹⁸² By this he could only mean that he accepted the testimony of Sills and Bourland, rather than John Behan's. The further implication is that the judge was convinced that Sheriff Behan was a companion, perhaps even a partisan, of the slain Cowboys. The defense could have pounded away further at the connection, but in this case understatement appears to have worked well.

Though Judge Spicer was said to lean "toward the Republican law-and-order crowd,"¹⁸³ he was still willing enough to ship Wyatt Earp and Doc Holliday off to the cold and perilous comforts of John Behan's jail. In fact, the trial began with a defense challenge to Spicer's jurisdiction, claiming that as a justice of the peace he lacked authority to preside over the hearing.¹⁸⁴ Whatever his biases, they were not so pronounced that the Earps considered their exoneration a mere formality.

But as much as he might have aspired to objectivity, Spicer had to be aware of Behan's sympathies even in the absence of explicit courtroom proof. Living in Tombstone, he must have known about the lawlessness in the surrounding countryside,

180. Rezin Campbell testified to threats made to Morgan Earp by Ike Clanton. See TEFERTILLER, *supra* note 1, at 149; see also TURNER, *supra* note 11, at 204-05.

181. When Spicer reinstated Doc and Wyatt's bail, their bond was guaranteed by E.B. Gage and James Vizina, two of Tombstone's leading mine owners. See MARKS, *supra* note 4, at 288. The support of the defense by important business interests is not likely to have escaped Spicer's attention.

182. TURNER, *supra* note 11, at 222; see also BARRA, *supra* note 3, at 212-13.

183. TEFERTILLER, *supra* note 1, at 156.

184. See MARKS, *supra* note 4, at 262.

including the various stage robberies, raids into Mexico, and outright murders that had been attributed to the gang of Cowboys.¹⁸⁵ Indeed, as the murder hearing was about to begin, Tombstone Mayor John Clum was requesting federal troops to help safeguard the town against the potential outlaw threat.¹⁸⁶ It should have come as no surprise, therefore, when Spicer characterized the Clantons and McLaurys (and their friends) as “reckless men who have been a terror to the country and kept away capital and enterprise.”¹⁸⁷ The defense did not have to prove that the Cowboys meant trouble for Tombstone, it was in the juridical air.¹⁸⁸

It was the task of the prosecution to neutralize this judicial bias—possibly by distancing the victims from the Cowboy circle, conceivably by showing that the gang was more myth than reality. Perhaps that goal could not have been accomplished at all, but it certainly could not have been achieved through timid measures. The prosecution did attempt to establish that the Clantons and McLaurys had only been in a few “rows,”¹⁸⁹ but they never presented a sustained counter-narrative to the Earps’ story (and Spicer’s evident assumption)¹⁹⁰ of Tombstone-in-peril.

To persuade Judge Spicer to rule against the “regularly or specially appointed” peace officers, the factual assertions of partisan witnesses were bound to be insufficient. To win, the prosecution needed a compelling theory that explained not simply how but also *why* the Earps would murder the Cowboys.

185. For example, on the very day of the gunfight, General William Tecumseh Sherman had written to the United States Secretary of War requesting permission for the army to pursue American raiders into Mexico. Wrote Sherman, “[I]t is notorious that the civil authorities of Arizona on that extensive frontier are utterly powerless to prevent marauders from crossing over into Sonora and to punish them when they return for asylum with stolen booty.” MARKS, *supra* note 4, at 298.

186. *See id.* at 258.

187. TURNER, *supra* note 11, at 220.

188. Mayor John Clum, for example, saw the gunfight, and therefore the trial, strictly in terms of the good Earps against the dangerous Cowboys: “Was the police force of Tombstone to be bullied and cowed?” he asked rhetorically. MARKS, *supra* note 4, at 298.

189. *See* TURNER, *supra* note 11, at 150.

190. On cross-examination, Behan was asked about “the reputation of the Clantons and McLaurys in the section of the county in which they live and roam for turbulence?” TURNER, *supra* note 11, at 148. It made little matter that an objection was sustained. Judge Spicer clearly knew all about the “turbulence.” *Id.*

One such theory has since been offered by Earp researcher Paula Mitchell Marks. She suggests that the fight may have grown out of the Earps' efforts to ingratiate themselves with Tombstone's financial interests, either to enhance Wyatt's chance of being elected county sheriff or simply to remain in the good graces of the local mine owners and businessmen.¹⁹¹ In either case, points could be made by coming down hard on the Cowboys and impressing the locals with their "tough brand of police work."¹⁹²

So when Ike Clanton showed up in Tombstone on October 26, mouthing threats and displaying his weapons, the Earps responded with force, buffaloeing first Ike and then Tom McLauray. The Clantons and McLaurays, however, did not have the good sense to get immediately out of town. Instead, they gathered at the O.K. Corral, at least two (and possibly three) of them armed, in seeming defiance of Virgil Earp's lawful, though excessive, authority. The Earps and Holliday then marched over to the lot on Fremont Street, perhaps intending only to intimidate the Cowboys, perhaps intending to administer new beatings, but not with the settled purpose of committing murder. Unfortunately, things got out of hand; either the Cowboys did not respond quickly enough or the Earps and Holliday were too jumpy. Guns were drawn and shots were fired, the first shot coming from the volatile Doc Holliday. After that, the fight "became general" and the Cowboys' fate was sealed.

We can never know whether Marks's suppositions are historically true; they have been rejected by other researchers.¹⁹³ As advocacy, however, her proffered theory has the advantage of plausibility. To sustain a finding of probable cause, Judge Spicer would only have to believe that the Earps were over-aggressive and reckless, not that they were assassins. Consequently, Ike Clanton's wild charges would have been irrelevant to the case, making it far less likely that the prosecution would fall along with Ike's flimsy credibility. Of course, the great drawback to the theory is that it would only support a charge of manslaughter, not murder (at least against the Earps; a murder charge against Holliday might still have been a possibility).

191. See MARKS, *supra* note 4, at 298-99.

192. *Id.*

193. See, BARRA, *supra* note 3, at 214-15, 225-26; see also TEFERTILLER, *supra* note 1, at 87.

But a tempered case was exactly what the prosecution needed in the first place. The murder charge was almost certain to fail, given the Earps' badges and Judge Spicer's predisposition.¹⁹⁴

Why did the prosecution choose to "roll the dice," gambling that they would succeed in proving murder at the cost of abandoning the more promising manslaughter charge? Though documentary evidence is lacking, it seems a good bet that Will McLaury, aggrieved and vindictive over the killing of his two brothers, played a key role in pushing the prosecution to pursue its immoderate, and ultimately unsuccessful, approach. McLaury had a great emotional stake in proving that his brothers were innocent victims and the Earps vicious killers, leading him to accept uncritically Ike Clanton's fanciful claims.¹⁹⁵ The virtues of familial loyalty aside, the prosecution team clearly could have benefited from more detached associate counsel.

THEORIES OF THE CASE

For most of the last century, frontier historians have debated the fine points of the gunfight at the O.K. Corral. Hollywood, of course, has been firmly in the pro-Earp camp, at least since the 1950s when Burt Lancaster won "The Gunfight at the O.K. Corral," and Hugh O'Brien brought the role to television in "The Life and Legend of Wyatt Earp." Most recently, Kevin Costner and Kurt Russell have starred as Wyatt—a hero, of course—in separate feature films. Historians Allen Barra and Casey Tefertiller more or less concur with the general tenor, if not necessarily the documentary accuracy, of the Hollywood portrayal, concluding that the Cowboys started the fight and

194. Spicer said as much himself, noting that the prosecution claimed that the Earps:

[P]recipitated the triple homicide by a felonious intent then and there to kill and murder the deceased, and that they made use of their official characters as a pretext. I cannot believe this theory, and cannot resist the firm conviction that the Earps acted wisely, discretely and prudentially, to secure their own self-preservation.

TURNER, *supra* note 11, at 224.

195. Will McLaury went even further than Ike Clanton, apparently believing that his brothers were murdered because they "had got up facts intending to prosecute . . . Holliday, and the Earps, and Holliday had information of it." MARKS, *supra* note 4, at 265.

the Earps had to end it in order to carry out their duties as lawmen.¹⁹⁶ Other researchers, such as Paula Mitchell Marks, are decidedly more skeptical, suggesting that the Cowboys were mostly a nuisance and that the Earps gunned them down in an unnecessary show of force (and lied about it afterward).¹⁹⁷

While the weight of opinion seems to favor the Earps, a review of the lawyering at the preliminary hearing certainly allows the possibility that the revisionists may have a point. To be sure, the accounts of John Behan and Ike Clanton, if believed, could support a murder conviction, but their stories are made suspect by obvious (and not so obvious) bias and self-interest. And in any event, the testimony of the unquestionably impartial H. F. Sills would seem at least to create reasonable doubt no matter what Behan and Clanton had to say.¹⁹⁸ The murder story was just too intricate, requiring that every dispute be determined in favor of the prosecution in order to justify a decision adverse to the Earps. Thus, the most cogent account of the Earps' guilt would have to focus on a lesser crime such as manslaughter—not so as dramatic as outright murder, but still a serious felony.

In advocacy terms, the best cases are both “simple” and “easy to believe.” A simple story makes maximum use of undisputed facts, while relying as little as possible on evidence that is either hotly controverted or inherently unbelievable. In the same sense, a story cannot be easy to believe if it depends on implausible arguments or if it requires proof that the opposing witnesses have lied or falsified evidence. Trials can sometimes be won by stories that fail the tests of simplicity and ease, but it will be an uphill struggle indeed. The best and most effective trial theories are “able to encompass the entirety of the other side’s case and still result in . . . victory by sheer logical force.”¹⁹⁹

A simple story actually seeks to narrow the scope of disagreement between the parties by incorporating (and accommodating) as many of the other side’s facts as possible. No matter how vigorously presented, the murder case against the

196. See generally BARRA, *supra* note 3; TEFERTILLER, *supra* note 1.

197. See generally MARKS, *supra* note 4.

198. Given that the hearing convened less than a week following the gunfight, one wonders whether the prosecutors were even aware of Sills as they shaped their theory and presented their case.

199. STEVEN LUBET, MODERN TRIAL ADVOCACY 9 (2d ed. 1997).

Earps and Holliday could never be simple. It required the resolution of too many contradictory facts: Who made the first move? How serious were the Cowboys' threats? Did Sheriff Behan mislead the Earps? If the judge believed Virgil and Wyatt concerning any one of these questions, the prosecution would fail. At trial, that is the cost of complexity.

A manslaughter prosecution, however, would have had the simple virtue of making most of those questions irrelevant. Indeed, it could have accommodated nearly all of Wyatt's and Virgil's testimony concerning Ike's threats, the march down Fremont Street, and even the eventual moment of truth. Imagine how effective the prosecutor's final argument could have been pursuant to a manslaughter charge:

Wyatt and Virgil Earp claim that the Clantons and McLaurys reached for their guns, but sometimes you see what you want to see. After spending the previous night and morning brutalizing Ike Clanton and Tom McLaury, the Earps were ready for a showdown. They wanted to have it out with the Cowboys once and for all. So when Tom McLaury threw back his jacket to show that he was unarmed, the Earps and Holliday just couldn't wait to start shooting. Even a moment of calm hesitation would have shown that Tom had no weapon, but the defendants were all fired up. They didn't wait, they didn't think, they just started shooting. And that is manslaughter in this territory.

In a murder prosecution, any number of smaller questions might also have turned the case in favor of the defense, but they simply vanish in a manslaughter case. For example, one of the greatest weaknesses in the murder case was Johnny Behan's inability to explain how Doc Holliday could have fired—in the space of twenty-five seconds—both a shotgun and a nickel-plated pistol. But that anomaly has no bearing on the lesser charge, since the alternative—that Wyatt fired the first shot—can be made equally probative of manslaughter.

If the murder case was not simple, even less was it easy to believe, resting as it did on both implausible elements and the necessity of harsh judgments. Ike Clanton's outlandish story

may have been the death knell of the prosecution case.²⁰⁰ Of course, even fantastic tales may sometimes be true, but it was just too much to ask of Judge Spicer that he believe that Deputy Marshal Wyatt Earp would have helped rob the Benson stage *and* have confided the deed to the disreputable Ike.

In this case, it appears that the prosecution might have put the conclusory horse ahead of the theoretical cart (or perhaps stagecoach). If indeed the Earps were murderers (and Will McLaury certainly was not about to see it any other way), then there had to be a reason. And if there had to be a reason, then Ike's story was probably the best they could muster. A more fruitful approach, however, would have been to consider the plausibility of the alleged motives before deciding the nature of the offense to be charged. Such an analysis would have revealed that there was scant motive for murder, but that the underlying reasons for manslaughter might well be established.

The prosecution case was not easy to believe for yet another reason. It required the judge to conclude that Wyatt and Virgil lied on the stand. In contrast, a manslaughter theory could have accommodated virtually all of the Earps' testimony, perhaps even turning it against them. For example, Wyatt testified that Frank McLaury and Billy Clanton had their sixshooters in "plain sight" as the Earps approached the Cowboys. When Virgil called for them to hold up their hands, "Billy Clanton and Frank McLaury commenced to draw their pistols."²⁰¹ Wyatt continued, "I had my pistol in my overcoat pocket, where I put it when Behan told us he had disarmed the other parties. When I saw Billy Clanton and Frank McLaury draw their pistols, I drew my pistol."²⁰²

But Wyatt also testified that he succeeded in getting off the first shot, an impressive achievement given that he had to pull his weapon out of his overcoat pocket, while Frank and Billy already had theirs out and in plain sight. Could it be that Wyatt was a bit readier to begin firing than he admitted or re-

200. There has been much suggestion that Ike's farfetched story may have been drug induced. He requested and obtained a few days off in the middle of his testimony, in order to obtain medical attention for persistent headaches (due to the pistol whipping by Virgil Earp). At the time, administration of cocaine was the accepted remedy for headaches. See TEFERTILLER, *supra* note 1, at 138.

201 TURNER, *supra* note 11, at 220.

202 *Id.*

called? Or perhaps the Cowboys were not really reaching for their pistols after all, as evidenced by the fact that Wyatt apparently had plenty of time to pull his six-shooter out of his pocket after he saw them move their hands. In either case, there is a feasible implication that Wyatt acted recklessly, shooting without thinking. Importantly, Judge Spicer could have come to that conclusion without assuming that Wyatt lied on the witness stand.

HISTORY'S CLAIMS

Trial lawyers understand how difficult it is to recreate the past even a few months or years following the events themselves. After nearly 120 years, it seems impossible to determine with certainty exactly what happened in Tombstone that October afternoon. It is clear, however, that many contemporary observers—not limited to the Cowboy crowd—then believed that the Earps acted with unnecessary brutality. One newspaper, for example, reported in mid-hearing that “public sentiment, which was at first in [the Earps’ and Holliday’s] favor, has turned now since the evidence shows that it was the gratification of revenge on their part, rather than desire to vindicate law which led to the shooting.”²⁰³ Nonetheless, the prosecution badly overplayed its case, leading to Judge Spicer’s exoneration of the defendants. Today, the Earp brothers and Doc Holliday are lionized as the heroes of the O.K. Corral, the few dissenting revisionist voices being drowned out by the accolades of history.

203. MARKS, *supra* note 4, at 277.

