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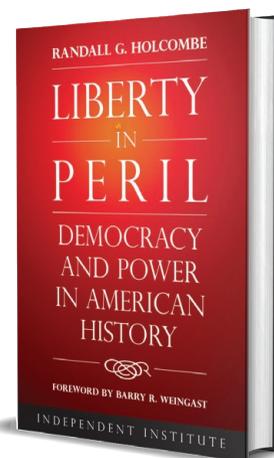
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Henry Manne

A Man to Remember

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RICHARD A. EPSTEIN

There is no end to the superlatives that can be heaped upon the late Henry G. Manne for an academic career that spanned more than sixty years, from the day that he graduated from the University of Chicago Law School in 1952 until his death at the age of eighty-six in January 2015. Henry Manne, the *American Spectator* informs us, “was law & economics” (Buckley 2015). That pithy description would have pleased Henry. He was not a man who tolerated nuances in argument. He was a man who loved hyperbole, especially when it was directed toward himself. Indeed, I think that it can be said that Henry was the embodiment of yet another maxim that speaks so well of his character: better to be attacked than ignored. The last thing that Henry wanted in life was to be passed by in silence. Right or wrong, it was good to be noticed. And if that attention could be gotten by strong academic arguments or by bold educational initiatives, so much the better.

Henry, of course, excelled in both directions. And in both he had the benefit of perfect timing. Henry was born in 1928, and he came of intellectual age during the mid-1950s. It is fair to say that the standard methods of legal analysis were ripe—not to be too delicate—for a hostile takeover. The dominant intellectual trope of that time was fealty to a “reasoned elaboration” of established principles within the well-defined confines of the legal system, which had made itself comfortable with the responsible implementation of the post-New Deal state.

If I had to pick one course from that period that reflected the impulse of the time, it would not be antitrust as taught by Aaron Director and Edward Levi. That

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The Independent Review, v. 20, n. 1, Summer 2015, ISSN 1086-1653, Copyright © 2015, pp. 127-131.

would have been a marginal enterprise of the sort that attracted Henry Manne, who may well have taken the course as a University of Chicago law student. But the main game in town at that time was the Henry M. Hart Jr. and Albert M. Sacks materials on legal process (Hart and Sacks 1994), which featured as its opening problem “The Case of the Spoiled Cantaloupes.” Hart was one of the giants of federal jurisdiction, and Sacks went on to be an embattled dean of Harvard Law School. The large intellectual movements of the day concentrated on the lawyer as a handmaiden to unwinding commercial transactions that, like the cantaloupes, had gone sour. The most speculative writing at the time, captured in the H. L. A. Hart–Lon Fuller debate on the relationship between natural and positive law, was the jurisprudential twin of the legal process materials. The law and economics of private markets and government agencies lay firmly in a future that came more rapidly than anyone at the time could have predicted.

And one of the movers of that shift was Henry Manne. The cautious intellectual incrementalism of the 1950s did not sit well with Henry, who prided himself on being a man who broke old conventions and established new ones. Given the tutelage of the late Armen Alchian, Henry quickly became one of the new apostles of the law and economics movement whose major mission in life was not only to upset established dogma but also to tackle the then-regnant modes of legal analysis. And Henry surely hit pay dirt on this issue with his major contributions of the 1960s, his *Journal of Political Economy* article “Mergers and the Market for Corporate Control” (Manne 1965) and his book *Insider Trading and the Stock Market* (Manne 1966), the first edition of which sells for a fancy premium, which is a wonderful tribute to its enduring value.

What is important about these two defining pieces of work is how they shattered settled conventions of the time. The New Deal wisdom did not think, if it thought about the question at all, that there was much reason for a market in corporate control when state regulation could shape corporate behavior in some optimal fashion. And Manne’s book on insider trading found uses for the practice, as a form of corporate compensation, that posed a major challenge to the smug conventional wisdom that the use of inside information was “unfair” in the market place and to the fact that no one asked why or how or indeed whether its use could be better regulated by charter provisions than by government fiat.

It can be said against Henry that substantively many of the stark positions he advocated fifty years ago have not stood the test of time. After all, a huge literature has grown up on both topics that has attacked the relentless purity of his positions. But to this criticism there are two powerful responses. First, Henry’s positions still have much life left in them, even if he is no longer around to defend them. It is not as though the Securities and Exchange Commission has covered itself in glory in the past decade. Second, and more importantly, virtually all arguments raised against Henry use Henry’s mode of analysis. They are never cast in the complacent, detached rhetoric of the 1950s. Rather, it is a case of fighting fire with fire. Use economic logic to expose, if you can, the economic flaws in Henry’s argument. Put otherwise, Henry swept the

boards on his primary passion, which was to show that the *methodology* of law and economics had no intellectual rival in dealing with these market and regulatory issues.

There is real intellectual toughness here. Throughout his life, Henry remained convinced that unless and until you put down some economic explanation based on a conception of producer or consumer welfare, you have no explanation at all. That one approach aligned him more closely with Ward Bowman and Robert Bork (both of whom had extensive Chicago connections before heading off to Yale in the 1960s, when I first met them), who took the parallel view that consumer welfare was the sole measure by which the desirability of the antitrust laws could be measured.

All three thinkers have a point. One other great law and economics thinker of the early 1960s was Guido Calabresi, whose famous formulation of the law of accidents was to minimize the sum of the costs of accidents, the cost of their prevention, and the administration of the system, within the overall constraint of justice. The richness of Calabresi's theory comes from the difficult trade-offs that are made whenever these three types of costs run in opposition to one another. Greater accuracy often comes at the cost of higher administrative costs. But what is striking about Calabresi's theory is that the constraint of justice in the end does not seem to do much work in the articulation of his views. Rather, it functions as a *deus ex machina* in most of the analysis. So Henry's great work of fifty years ago retains its urgency and salience today. The hedgehog with one big idea is remembered, whereas many of his contemporaneous foxes with little ideas are forgotten.

In thinking about Henry's life, however, it would be a mistake to think of him only as an academic thinker. He was much more than that. He was an entrepreneur, an evangelist, a builder of programs, a cheerleader, a heckler, and, as he himself always knew, something of a hustler. In everything, he was always larger than life. I came to know Henry by reputation shortly after I entered the teaching profession in 1968 at the University of Southern California, just when, as Henry's son Geoff Manne (one of my prize students, I am happy to say) relates, Henry decamped to the University of Rochester (G. Manne 2015), a strong university with conservative economic values, to implement the plan of starting a new law school devoted to the study of law and economic principles. As a product of a more conventional legal education, I remember asking myself exactly what this approach might entail. I got an early, if unintended, lesson in public-choice theory when Henry's pet project was blocked by some New York accreditation board that sought to protect the more traditional forms of legal education that Henry was determined to upend.

No legal barrier could long keep Henry down, and I can recall that many of my colleagues attended the first Economics Institute for Law Professors that Henry started in 1971. I did not have the sense or wisdom to attend, as my own commitment to law and economics as a methodology was far more cautious than it is today. But I do remember quite vividly the first time I met Henry, which was at a conference devoted to the question of gold clauses, held in November 1973 just at the time when the sale of gold was about to be again made legal in the United States.

The conference itself was quite memorable because many individuals there thought that the legalization of the sale of gold might revolutionize the economy in a way; as things turned out, it did not. I can still recall my own Latin-rich exchange with the late Gottfried Dietze (see Pelizzo 2006), the distinguished German political thinker who had witnessed during his youth in Germany the breakdown of the Weimar Republic. In dealing with the legalization of the gold market, Gottfried saw fit to invoke the Latin maxim “*Pacta sunt servanda*” (Contracts should be observed), to which I replied, incorrectly in retrospect, “*Rebus sic stantibus*” (Only if conditions have not changed).

But the star of the show was Henry the entrepreneur. As I recall, we could bring our spouses on this trip. Henry told us that the local Florida hotel (a flowery Florida Hilton, if memory holds) was prepared to give us a rate that was below the peak-season rate (even then hotels knew how to price discriminate) just one week before the peak rates went into effect. We naturally leaped at this golden opportunity, only to discover on our arrival that the off-season rate was actually a bit lower than the special discount rate that Henry had quoted for the occasion.

The word quickly spread of Henry’s coup, and the late Arthur Leff, a wonderful wag, remarked that he was eager to attend the next conference that Henry put together but would first have his lawyer review the agreement in advance as a matter of simple business necessity. But the bantering aside, the conference did much to contribute to the revival of the then-dormant Liberty Fund vision that combined strong property and contract right with limited government.

Henry, of course, did not stop with this one conference but remained a catalyst for the law and economics movement for many years thereafter, taking his program with him in hand from Miami to Emory to George Mason University, where it blossomed under his leadership and made the George Mason University Law School program into one of the most distinctive and distinguished in the nation, where it still serves as a much-needed corrective to the dominant progressive ethos of most American law schools. The combination of law and economics is a major discipline in other modern law schools, but I do not think that it was always presented to Henry’s liking. In his view, the student’s purpose was to show the power of markets to overcome key problems of information and coordination, not to run a set of exhaustive empirical studies to show that corporate boards would function better if they increased their number of independent directors by 5 percent. In his later years, Henry was at times reflective. Indeed, as I searched through my files for old Manne emails, I came across one that I think captures something of his mix of intellectual openness and unwavering commitment to the insights of his younger days. In relevant part, it reads, “So, in spite of the fact that the University of Chicago Law Review editors were clever enough to reject this offering (copy attached), you may find delights in it to which they were oblivious and which may make your day. I think it is one of the best things I have ever done (not least because I admit earlier errors and yet manage to come out with an even stronger case for insider trading). I shall be most eager to hear your reaction.”

The title of the article was “Insider Trading: Hayek, Virtual Markets, and the Dog That Did Not Bark.” There is a fine reflective tone in what Henry writes. I have lost all my Henry emails after that date, but I can recall that I was often on the receiving end of his broadsides about some economic aberration of the Obama administration. As was his wont, Henry was relentless in his criticism and usually on the mark. And, indeed, that is how I remember him: a man of great intellect, large ambitions, and expansive emotions—blended in proportions that we shall not see again.

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