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INTRODUCTION

ONE AMONG THE MANNE: CHANGING OUR COURSE

Ronald A. Cass[†]

We all want to make a difference. We want our lives to count for something, to change the world if only in a modest way. Of course, the older we get the more modest a change we are willing to accept as victory. As often observed, maturity consists in large part of the willingness to settle for ever-shrinking successes. Winning a case, being cited by the Supreme Court, perhaps by any court, having a book reviewed in the *New York Review of Books*—these are sufficient indicia of success for most lawyers and law scholars.

Not so for Henry Manne. He has made more of a difference at more margins than virtually any other professor of his generation.

I will not substantiate that declaration with comparisons. Instead, I will summarize some of the accomplishments of Henry's extraordinary—and yet on-going—career.

This will be done from high altitude, not only because I am on an airplane while writing this, but also because it looks at the broad landscape of Henry's accomplishments rather than at the details. As an academic administrator, I seldom am allowed prolonged contact with important matters so knowledge of details is a mere memory, and memory long since has begun to slip. That is a poor excuse for painting with so broad a brush (to switch metaphors) as I will here. Manne's considerable accomplishments, however, cannot readily be compassed, and a view of details will not capture how he has changed the course of legal scholarship and teaching, of judicial decision-making, of the law, and of so many lives. I seek here merely to impart the flavor of those changes.

In recounting what Henry Manne has done, I must speak of several Henry Mannes. There is Henry Manne the Scholar, Henry Manne the Entrepreneur, Henry Manne the Dean, and Henry Manne the Friend. All are important men. And all are one.

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HENRY I: MANNE THE SCHOLAR

Long ago in a land not too far away, Henry Manne discovered that basic economic analysis—standard microeconomic analysis, both as positive and as normative construct—could generate powerful insights for addressing legal problems.¹ Manne was not the first to make that discovery. Others had done so before. Some published articles or books using economic analysis, well or not so well. Some taught but were not published, Aaron Director most notably.²

Manne was one of the first legal scholars, however, to use economics to generate a new insight into a legal issue and to do so in a way that dramatically changed discourse about that issue. As a young professor at George Washington University, Henry wrote path-breaking articles in the *Harvard Business Review* and the *George Washington Law Review*, along with his better-known book, *Insider Trading and the Stock Market*.³ He argued that insider trading was not a practice by which corporate managers took advantage of their positions to the detriment of both their own stockholders and other traders. Instead, Manne said, insider trading was an efficient mechanism for compensating managers and for aligning stock markets with the best information about corporate prospects.

The book and articles contradicted virtually everything that was then being taught about corporations, manager-shareholder relationships, and the operation of securities markets. They laid the groundwork for a renaissance in corporate law and securities law scholarship, one that continues to this day. These writings' novelty and prescience explains their place on the list of most-cited law pieces.⁴

Moreover, Manne's early writings explicitly or implicitly embody a startling number of the themes that have animated the past thirty-five years of law and economics scholarship. Manne built on a rational expectations model. He saw stockholders and managers as parties to a principal-agent compact that runs in both directions, as later works by Fama and by Jensen and Meckling would explain fur-

¹ It may be misleading to associate Henry with standard microeconomic analysis, as his tendency has been toward the Austrian, process-oriented school of economic analysis rather than the more static analysis that has been dominant in the United States. For present purposes, however, this is a mere quibble.

² The most famous publication of Professor Director's thinking, describing "Director's Law," was written by George Stigler. See George J. Stigler, *Director's Law of Public Income Redistribution*, 13 J.L. & ECON. 1 (1970).

³ Henry G. Manne, *In Defense of Insider Trading*, HARV. BUS. REV., Nov.-Dec. 1966, at 113; Henry G. Manne, *Insider Trading and the Administrative Process*, 35 GEO. WASH. L. REV. 473 (1967); HENRY G. MANNE, *INSIDER TRADING AND THE STOCK MARKET* (1966).

⁴ A quick search of Westlaw's law review database indicates that the book alone has been cited 233 times; see also William J. Carney, *The Legacy of "The Market for Corporate Control" and the Origins of the Firm*, 50 CASE W. RES. L. REV. 215, 238-39, 243 (1999) (providing statistical compilations of citation to Manne's articles).

ther.⁵ Manne understood that information is costly to obtain and that each person has a point at which the cost of searching for additional information is greater than the expected benefit. He saw as well that traders in a market should not be expected to possess identical values or identical information—whether the market is a securities market or any other market—and that traders understood this point and adjusted their behavior to it. Manne accepted that price typically was an efficient mechanism to encapsulate information. And he knew that the best way to get information into the public domain quickly was to provide an incentive for those most likely to have it to act on it. All of these points have become the foundations on which substantial literatures have been built. And all were within Henry's grasp long before they were accepted orthodoxy even in the law and economics camp.

Manne marked out a path for scholarship that for more than a third of a century has given other scholars rich veins of ore to mine. He was viewed with suspicion and even hostility by those who saw his arguments as threats, a view that was most intense among those whose beliefs and scholarship ran in another direction and whose own intellectual capital did not allow them to engage Manne successfully. His embrace of economics suggested that those who would argue with him needed more than the rough analogical reasoning that characterized most legal analysis.

Manne did not, however, embrace a technical, mathematical economic analysis. He did not reach for points that could only be grasped after slogging through a minefield of equations. He did not want to elucidate possibilities that could become a basis for policy choices only in the unlikely event that certain data came into the domain of policy-makers in a reliable form. Manne sought a *useful* economic analysis, not a perfect or highly sophisticated economic analysis. Unlike the broader themes of Henry's writing, that preference has not generally pointed the way for later law and economics scholars, though the deficiency here is the academy's, not Manne's.

One final point about Henry Manne the Scholar. Until quite recently the typical tenured full professor of law was someone who viewed scholarship as something to be done only on rare occasions. A survey reviewing law review publication by tenured full professors over the period 1976-1981 discovered that zero and one were the

⁵ See, e.g., Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980) (arguing that the separation of security ownership and control is an efficient form of economic organization when viewing a large corporation as a set of contracts among factors of production); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & Econ. 301 (1983); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (defining the concept of agency costs and showing its relationship to the separation of ownership and control of large corporations).

dominant numbers of articles published over the entire period.⁶ Few professors continued an active life of scholarship after age 40. Manne again is different. He has continued to write and to think, to ask hard questions and to use insights from economics to answer them. Thus Manne will continue to contribute new things to us, even while his earliest works continue to teach.

HENRY II: MANNE THE ENTREPRENEUR

As remarkable as Henry Manne the Scholar is, it is Henry Manne the Entrepreneur who has made the largest, the most lasting, and the most unusual contributions.

Let me start with the unusual part. Law professors are not known for entrepreneurship. Take the simplest form of entrepreneurship, grantsmanship. Look down any university's list of grants applied for and grants received. See where the law faculty ranks. It may not be last, but it will be close.

To be sure, the poor showing reflects the disinclination of those who supply grant funding to support the work of lawyers and law professors. But the lack of grant-getting reflects as well the fact that most law professors have a lower than normal taste for risk-taking. Law faculty members receive research stipends from their own schools. For all practical purposes, law faculty members are paid to spend three months per year doing the research and writing they want without having to identify funding sources, write grant applications, visit prospective donors, or do any of the other work generally needed to secure support for research or related activity.

Henry Manne is the outstanding example to the contrary. He created a Law & Economics Center by doggedly pursuing contacts, tapping resources that had not previously been connected to law schools or law instruction, and selling his own vision of what legal reasoning, research and writing, and decision-making should be. The web of seminars and conferences that Manne spun around himself must be seen as the product of intense personal effort and ultimately the reward of personal loyalties; people willing to commit funds to an enterprise because Manne was at the center of it.

The Law & Economics Center plainly was Manne's baby. Many individuals contributed to its success at various times; many played key roles in its intellectual profile or its administration, in gaining new supporters or broadening its base of personnel, as students, teachers, or *confrères*. But to trace its migration is sufficient to un-

⁶ See Michael I. Swygert & Nathaniel E. Gozansky, *Senior Law Faculty Publication Study: Comparisons of Law School Productivity*, 35 J. LEGAL EDUC. 373, 381 (1985) (showing that 44.21 percent of senior law faculty members had zero publications and that 20.72 percent had only one publication).

derscore the personal character of this venture. Manne started the Center when he was at the University of Rochester and carried it with him to the University of Miami. When Manne decamped for Emory, he regenerated the Center and its programs, which moved with him to George Mason, where it lives today.

No other institution in the law school world can match what Manne's Law & Economics Center has done. I will not dwell on what the Center has done to encourage economists to look more seriously at legal issues. I am as certain that the Center has had an impact as I am ignorant of ways to illustrate this effect. The Center's more significant accomplishments, in my view, turn on its education of law professors and judges.

Thirty years ago, you could name the law professors who incorporated economic analysis in their teaching or writing in any serious way without having to use all of your fingers. The Law & Economics Center was instrumental in changing that. Its program of education in Economics for Law Professors—known at various times as “Pareto in the Pines” or “Pareto under the Palms”—has introduced hundreds of law professors to the way basic economic concepts can help illuminate analysis of legal issues. For some, the insights were novel and striking—even the concept of negatively sloped demand curves comes as a shock to many who reason by anecdote, and the implications of such propositions can be even more amazing. Some who attended Manne's “summer camp” got a good rest or a good tan, but most came away with more. Most found something in the economic analysis that changed the way they looked at a problem or a group of problems. And some found a way of looking at things that fundamentally changed their approach to teaching and writing.

The canard about the Center's session for law professors ran something like this:

A: Freely tradable, transferable property rights.

Q: Doesn't matter.

The joke makes a point. Before their time at Manne's summer camp, most of the folks who repeat that exchange thought the universal answer was “regulation” or “liability.”

Economic language has its drawbacks. At times, simple thoughts are couched in a peculiar argot and become peculiarly difficult for folks to comprehend. It's easier for most people to understand “wanting something less when you already have a lot of it” than it is to understand “declining marginal utility.”

Yet often enough framing ideas as economic concepts helps. Many economic commonplaces clarify our intuitions. A few show

that intuition can be wrong—ignoring sunk costs is analytically compelling, except to people who paid \$200 for theater tickets to a show they would not now choose to attend. As Professors Bill Breit and Ken Elzinga show with their sleuth, Henry Spearman, economic analysis can help solve real problems.⁷ And most economic analysis consists in figuring out the way group behavior changes with changed incentives or ways to line up costs and benefits to allow comparison, which is required at some level for every legal issue.

By and large, the summer camps for law professors have had a significant, positive impact on what is taught in law schools and written in law journals. I will not undertake to support that by regressing attendance at the camps with production of legal scholarships or by eliminating covariance with economic analysis introduced from other venues. This is one place where old-fashioned look-and-see causation analysis should suffice.

An equal or larger contribution has been made by the many conferences sponsored by the Center over the years, often in conjunction with the Liberty Fund or another foundation. These conferences have covered an enormous array of topics and have brought together scholars whose interactions often have advanced thinking about a given matter significantly. Bringing together people who share basic methodological predicates and asking them to address a given matter tends to reinforce commitment to their shared methodology and to sharpen the skills used in deploying it. For that reason, the conferences have played a significant role in bolstering the use of economic approaches in legal scholarship. The conference arrangement, of course, is not unique to the Center; it simply has done an uncommonly large number of them.

By far, however, the bigger impact of the Center almost certainly has been its impact on the judiciary. The programs for judges have exposed more than 500 federal judges to economic analysis. Many of the judges never had occasion before to consider some of the concepts introduced in the programs for judges. Some who had their first exposure to economic analysis of law in one of Henry's programs for judges have developed considerable sophistication in economic analysis.

Deciphering what moves judges is notoriously difficult, apart from the dominant influence of legal authority from legislation or

⁷ See, e.g., MARSHALL JEVONS, *A DEADLY INDIFFERENCE* (1995) (solving a fictional murder that took place in England in the mid-1960s over valuable mining certificates); MARSHALL JEVONS, *MURDER AT THE MARGIN* (1993) (solving two fictional murders that took place in the Virgin Islands over an old war grudge). Marshall Jevons, the combination of two famous nineteenth-century economists, is the nom de plume of two well-regarded twentieth-century economists, William Breit and Kenneth G. Elzinga. See *id.*

prior decisions.⁸ By and large, that influence so cabins judicial decision-making as to render any other input irrelevant.⁹ But there is enough play around the edges in enough federal cases that anything that alters judges' thinking about important legal issues can be important. The matters discussed in seminars for judges—what role incentives play in securing the benefits of inventive activity, how critical are property rights to liberty, does industry regulation generally help consumers or producers—certainly engage more than a few issues that come into courts.

Professional educators commonly opine that education has strong public good characteristics. These turn out to be remarkably difficult to document, even in a casual way. The same is true of economic education for judges. Neither the influence of the education on judicial decisions nor the effects of the decisions on public welfare are subject to ready proof.

Even so, no other venture outside the federal judiciary itself has done so much to instruct judges as the Law & Economics Center; none has held so many education programs for so many judges. The many businesses and foundations that funded the Center's operation were confident that it was improving the quality of judges' analysis of issues with obvious economic dimensions and hopeful that the programs for judges were providing some salutary effect on judicial decision-making more generally. Although it is possible that Henry was only the consummate salesman, my own surmise is that there is at least some truth to the assumptions that his instructions were efficacious.

HENRY III: MANNE THE DEAN

Henry's success with the Law & Economics Center helped the schools at which he located, but managing a school in its entirety is a different sort of challenge. He showed that he could do that, too. And, like the other Henrys, Henry Manne the Dean marched to the beat of his own drummer.

In 1985, George Mason University was looking for a dean to dramatically upgrade its law school. The university had taken over an unaccredited, proprietary operation that was little known outside of the Washington, D.C. area—and not very well known inside. One of the possible deans was Henry Manne, a possibility that both intrigued and frightened people associated with George Mason.

⁸ See, e.g., Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-making*, 75 B.U. L. REV. (1995) (examining what influences judges to make decisions and how much of judging is determined by individual preference rather than the formal framework of the law).

⁹ See, e.g., RONALD A. CASS, *THE RULE OF LAW IN AMERICA* (forthcoming, 2000).

The intriguing part should be obvious, and so should the frightening part. A law school is made up of several sets of folks with quite divergent interests. The groups are joined by the hope that the school's reputation will improve and its finances will improve, but each group hopes that the changes will make the school conform to their particular vision of the enterprise. A new dean brings the promise of change, but any change that clearly chooses a substantive vision of the school—one that consists of something more than "better" or "higher" or "richer"—surely will make constituencies that do not share that vision unhappy. Few people with strong substantive preferences get chosen to be dean, unless those preferences strongly conform to the dominant views of the choosers.

Henry conforms to Henry's views, and his alone. But the President and (enough) others at George Mason were sufficiently intent on ratcheting up the school's reputation quickly that they were willing to take a chance on someone who came with a strong scholarly reputation and a proven track record in attracting funding for education—even if he had strong views. So, in 1986 Manne became Dean of the George Mason University School of Law.

Manne served eleven years as Dean at George Mason, itself unusual in a land where, in any given year, one-fourth of the nation's law schools are looking for a new dean. Not surprising, what Henry did as dean was more unusual than the length of time for which he did it.

Manne came to George Mason with a well-formed blueprint for a law school. He envisioned a school at which economics and quantitative analysis played central roles, at which faculty members shared a commitment to a limited set of methodologies (perhaps a single methodology), at which scholarship was a serious requirement for faculty members, and at which students were not given free rein to roam across open fields of survey courses but instead were directed along tracks that provided greater specialization and more cumulative learning than the traditional law school education. It was a vision of an intellectual place, in keeping with the direction law schools long had been headed, but of a particular intellectual bent. In short, Henry envisioned a school that looked a great deal more like Henry, and less like most other folks, than any law school one could find.

It was not the vision of "better" or "higher"—except as those adjectives followed from the substance of what Manne wanted. It was not a vision that would be congenial to many of the then-current faculty at George Mason, and indeed very few of the faculty members who were in place when Manne arrived can be found at George Mason today. But it was a genuine, substantive vision that Manne believed in and that he did implement. That was no easy feat.

One of the lessons of “dean-ing” is the difficulty of doing what you want. Law schools—perhaps all schools—are driven by consensus. That is true to a degree in all bureaucracies, but especially so in schools. The fact that they are non-profit enterprises, and hence lack an ability to coalesce around a single, group maximand, is part of the explanation. It frustrates acceptance of hierarchical decision-making merely for its efficiency advantage. Part of the explanation is that there is no prospect for appeal to an attractive myth, such as the social contract—no one in a university setting can claim election by the group for which he asserts decisional authority. A law school dean pursuing a strong, substantive vision inevitably will have difficulty securing consensus. And Manne was no exception to this rule. But he forged ahead nonetheless. If lack of consensus was not a point of pride for Manne, it also was not a paralyzing force. Manne was confident that his was a good vision, and he pursued it with vigor.

Believing in free markets and in exit rights particularly, Manne saw the option for those whose own vision of a law school differed substantially as clear. And more than a few of those who differed understood the wisdom of that option. Manne did, to his credit, provide carrot-incentives to faculty members who were already on board as well as stick-incentives, offering reduced teaching loads and other assistance to any faculty member who would return to school for a Ph.D. in economics. At least one great success story came from that offer. But in the main, Manne secured his vision by replacing the faculty he inherited with a new and very different faculty, a faculty of accomplished scholars, of rising scholars, and of people with backgrounds in social science and promise of scholarly attainment. And he did this with alacrity. Within seven years, half of the faculty had changed¹⁰ and about two-thirds of the faculty then consisted of “lateral hires,” a rate double that of the group of schools at the higher ranks of the law school food chain; the group that would be thought most likely to rely on lateral hiring.¹¹

The results of Manne stamping the law school in his own image were striking. He established George Mason as a school that was unlike any other, and he attracted far better scholars and students than had been at the school before. Within a decade, the George Mason faculty ranked in the top thirty in scholarship according to the criteria used by Professors Ted Eisenberg and Martin Wells, both of Cornell, passing such well-regarded schools as the University of North Caro-

¹⁰ See AMERICAN ASSOCIATION OF LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS (1986-87 – 1993-94).

¹¹ See Theodore Eisenberg & Martin T. Wells, *Ranking and Explaining the Scholarly Impact of Law Schools*, 27 J. LEGAL STUD. 373, 405 (1998) (suggesting that higher-ranked law schools tend to make greater use of lateral hiring than other schools, but listing George Mason and George Washington along with Cornell, Stanford, and Yale as schools with especially high rates of lateral hiring).

lina and the University of Washington.¹² On the student side, it saw a significant improvement in LSAT scores—an increase of about ten percentage points in the students' performance relative to all test-takers¹³ and a rise in applications for admission from 1,101 in 1985 to 2,021 in 1996.¹⁴ Nationwide, applications rose sharply, then fell sharply over this same period, so that the beginning and end-points for all schools lie on a fairly flat line.¹⁵

At the end of the day, Manne's vision might seem a good one. Parts of it can be seen in other schools' programs, and most of the similarities come about after Manne's changes were implemented at George Mason. In a free market, different visions should be introduced and tested by the responses of others to them. The market has proven Manne's vision a success, but not necessarily one that could not stand improvement. The George Mason faculty and students of today—those who chose the product Manne designed—would, no doubt, left to their own devices, amend Manne's vision, and that will occur as his successors impose their preferences on his product.

The attractiveness of Manne's vision, however, is largely beside the point. What is especially commendable, in my view, is that Manne's commitment to the difficult tasks associated with "dean-ing" was a commitment to something he believed in, to a mode of education he thought better than the alternatives. As with his other endeavors, Manne was prompted to act by the prospect of making a change toward his vision of good. Following that vision, Manne has given the law school world a different sort of school, one that can be ac-

¹² See *id.*, at 388 (ranking George Mason thirtieth among law schools by scholarly impact). Although published beyond the ten-year time line referenced above, this article—which assessed scholarly impact as a function of the authors' citations in certain scholarly journals—is based on citations that overwhelmingly date from prior to 1996 and almost entirely on works published before that date.

¹³ See NATIONAL ASSOCIATION FOR LAW PLACEMENT, INC., 1986 EMPLOYER'S GUIDE TO LAW SCHOOLS 136 (1986) [hereinafter 1986 EMPLOYER'S GUIDE] (indicating a LSAT mean score of 35 in 1985); NATIONAL ASSOCIATION FOR LAW PLACEMENT, INC., 1997-1998 EMPLOYER'S GUIDE TO LAW SCHOOLS 129 (1997) [hereinafter 1997-1998 EMPLOYER'S GUIDE] (indicating a LSAT median score of 159 in 1996). According to the Law School Admission Council (LSAC), a mean score of 35 in 1985 would have been in the 71st percentile and a median score of 159 in 1996 would have been in the 80th percentile (The cited LSAC data is on file with the Pappas Law Library, Boston University School of Law).

¹⁴ See 1986 EMPLOYER'S GUIDE, *supra* note 13, at 136; 1997-1998 EMPLOYER'S GUIDE, *supra* note 13, at 129.

¹⁵ Data received from LSAC in a release entitled *Law Services History Information*, March 1997. According to the LSAC, the estimated total number of applications submitted to ABA approved law schools in each year from 1985 to 1996 was (rounded to the nearest 100): 1985, 254,800; 1986, 270,400; 1987, 319,700; 1988, 375,300; 1989, 414,600; 1990, 453,900; 1991, 458,300; 1992, 431,900; 1993, 422,200; 1994, 389,500; 1995, 342,000; and 1996, 308,900 (the LSAC data is on file with the Pappas Law Library, Boston University School of Law). During this period, George Mason saw an increase of 100 percent while the general law school world saw applications grow only by about one-fifth that proportion. See *id.*

cepted or rejected by each of us, but that would not have existed in the same way without Manne.¹⁶ Here, too, he has made a difference.

HENRY IV: MANNE THE FRIEND

Finally, I come to Henry the Friend. This is a Henry that is very much a part of all his successes.

Henry cares deeply about individuals. Like many folks, he has dislikes as well as likes. For those who are in the *like* camp, there is little Henry would not do. Henry is a great investor in friendships. He calls, he writes, he e-mails, he sends jokes (some good). He talks about whatever is on his mind, or yours, anything interesting or novel that has come his way, an article, a book, or a news story. He thinks of things that will be good for his friends, encourages their scholarship, includes them in projects, and sponsors them for memberships in various organizations. He works at keeping connected, far better than most of us on the other end of the e-mail.

His taste in friends is somewhat eclectic, crossing numerous boundaries. Many scholars a generation or so behind Henry have been the beneficiaries of his mentoring. Friends of all ages and stages have shared his enthusiasms, willingly or not. Henry's friends all know of his love of golf, of Memphis-pit barbecue, of art and music and literature. These are not matters of taste; they are passions because they are right, and they should be right for all Henry's friends. And even if you don't play golf or relish barbecue, you can't help but join in Henry's joy at least in some measure, so his embrace of life becomes part of the friendship.

The joy of friendship for Henry is inextricably intertwined with his career. People he has met along the way become friends and friends are mixed into all of Henry's professional ventures. He has not been loved—or even liked—by everyone. But his circle of friends is large and their mutual devotion deep.

I am fortunate to count myself within this circle. I give nothing away to admit that friendship with Henry colors my view of all four Henrys. This review has not been balanced—I have not attempted to find negatives to set against the positives—and I doubt I would be any good at it if I tried. If part of friendship is to see another's virtues as large and faults as mere trifles, I confess that this failing cannot help but prejudice my review. The prejudice, however, can only alter the shading of this picture; it cannot redraw the basic contours. Even

¹⁶ Henry also was a moving force behind the creation of an organization for law school deans that was separate from, and could serve as a counterweight to, the organizations that accredit law schools. The American Law Deans Association, which now has as members the deans of well over 100 of the 180 accredited American law schools, grew out of a meeting that was hosted by Henry at George Mason. As the co-conspirator in calling that initial meeting, and as the first president of the Association, I continue to blame Henry Manne!

viewed uncharitably, Henry has made an enormous difference to the law, to legal education, to several institutions, and to many lives. He has done in full measure what all of us aspire to do. And, even now, chapters of other Henrys may yet be written.