

A FRIEND'S PORTRAIT OF HENRY W. SAWYER, III

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Henry W. Sawyer, III and his wife, Grace, were great art lovers. Does not law, like art, seek to accommodate change within the framework of continuity to bring heresy and heritage into fruitful tension? As Alfred North Whitehead observed:

[A] society maintains its civilization by preserving its symbolic code while giving expression to forces that, repressed, could break a society asunder. And so the basic dilemmas of art and law are, in the end, not dissimilar, and in their resolution—the resolution of passion and pattern, of frenzy and form, of convention and revolt, of order and spontaneity—lies the clue to creativity that will endure.¹

It is daunting to write about Henry, particularly for the *Law Review* of Henry's law school—a school he revered, and to which he gave so much honor. His classmates, colleagues, and the judges before whom he appeared, received from Henry so much life, inspiration, introspection, direction, and fun, that to think of him no longer here brings tears to our eyes as when the last bars of Wagner's *Parsifal* fade into silence. Many at the Philadelphia bar could write of Henry with as much knowledge, relish, and relevance as I—in fact, even more.

I have, however, several significant regrets. The prime one, of course, is that Henry no longer is here in person. Young lawyers never again will be in his presence and never will share Henry's *élan* and intellectual verve. They will be deprived of his path of inspiration to affect the law in its highest function—to make this grand democracy under law work for all in a civilized fashion. Finally, I regret that thinking about Henry reveals a basic defect in the Constitution. His very presence calls into question a clause in article I, section 9—the one providing that “[n]o title of nobility shall be granted by the

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¹ PAUL A. FREUND, *ON LAW AND JUSTICE* i (1968).

United States.”² As Thomas Jefferson once wrote to John Adams: “For I agree with you that there is a natural aristocracy among men. The grounds of this are virtue and talents.”³ Some suggest that John Marshall, Alexander Hamilton, and James Madison would have added a third attribute of “natural aristocracy”—courage. They, unlike Jefferson, fought in the Revolutionary War, just as Henry fought for this country in World War II and the Korean War. In any event, perhaps during a more credulous time, Henry W. Sawyer, III would have been confirmed into this rare class of persons.

I truly enjoyed the time spent working through my thoughts about Henry. For it is an absolute, ultimate joy to relive time spent with Henry as a social friend, public figure, jazz expert, and ally or foe—be it in politics or litigation. I think of riding the Chestnut Hill Local, working through legal arguments to present to Thurgood Marshall and Lou Pollak⁴ for the *Brown v. Board of Education*⁵ brief. I picture the family man, surrounded by Grace and the children, being guests at each other’s homes, drinking, eating, and trying to make sense out of the political process, as well as the practice of law. I remember the strong disagreements—which we had many times—yet always keeping humor, respect, and friendship.

There is special affection for a human being who was—by any 1953 definition—a Philadelphia Swell or Philadelphia Brahmin, yet knew that the A Train winds up in Harlem on 125th Street and Seventh Avenue, and has the courage to enjoy with me the night life in that special part of New York. Or knows—as Henry did by experience—that life and spirit resonate below Pine Street in Philadelphia. Or that Temple University is not the only place in North Philadelphia to learn how high and wide the human spirit can soar aided by jazz, by courage, or by the inspirational preaching of a Leon Sullivan or a Bill Gray, Sr. on a Sunday morning. Or to slip off to a nightclub in Atlantic City when attending the Judicial Conference of the Third Circuit, and have me realize that someone knows and understands Lou Rawls much better than even Bill Hastie did.⁶

² U.S. CONST., art. I, § 9, cl. 8.

³ Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), available in USA: Letters of Thomas Jefferson, 1743-1826 (visited Nov. 1, 1999) <<http://grid.let.rug.nl/~usa/P/tj3/writings/brf/jefl23.htm>>

⁴ Federal Judge, United States District Court for the Eastern District of Pennsylvania; Dean of the University of Pennsylvania Law School (1975-78).

⁵ 347 U.S. 483 (1964).

⁶ William H. Hastie was a Judge for the United States Court of Appeals for the Third Circuit from 1950-71, and Chief Judge from 1968-71.

Henry's distinctive mark, or genre, is that of a great gentleman: lettered, urbane, charming, witty, affable, and caring. He was someone who dealt with friend and foe without condescension and always was approachable. A French expression—*escalator de mots*—refers to the brilliant reply you should have made to the raconteur at the cocktail party, but only thought of going down the stairway when leaving. Often in a social, political, or legal conversation, and especially in court, I envied the fact that Henry came up with the bright thought in the right canter or pace and the right words when I was still stumbling.

This portrait also reveals a young person who sought expression and meaning in a political party,⁷ the minority party in Philadelphia at the time, and clearly not the party of Philadelphia's Swells. He had the nerve to live in its distractions, indeed to take an active part in its activities. He leavened its coarseness, for example by insisting on an ordinance that required all new building projects to earmark one percent of its costs for art.⁸ Cities and counties across the country have adopted this Sawyer brain-child. As the United States Secretary of Transportation, I later adopted this policy for all projects financed in whole or part by that Department.

Legislation often is described as being like sausage—you don't want to see it being made. Can you imagine the taste or zest of the sausage when mixed by Jim Tate,⁹ Raymond Pace Alexander,¹⁰ and Henry Sawyer? History truly will suffer if the tales of the Philadelphia City Council from 1956-59 that Sawyer reveled in and retold over a Saturday beer at the Sawyer swimming pool are not among the records of Drinker Biddle & Reath.

Now for a moment let us put on the canvas, Henry in the profession he so dearly loved. A lawyer's life, like every other occupational life, has much drudgery—senseless bickering, stupid obstinacies, captious pettifogging—all disguising and obstructing the only sane purpose which can justify the whole endeavor. These, of course, take an inordinate part of the lawyer's time; they harass and befog the unhappy wretch and at times nearly drive him from the particular work-

⁷ I refer here to the Democratic Party.

⁸ See Shannon P. Duffy, *Drinker Litigator Henry Sawyer Dies at 80*, THE LEGAL INTELLIGENCER, Aug. 3, 1999, at 3 (documenting the mark that Sawyer left on the Philadelphia City Council).

⁹ President of Philadelphia City Council, and later Mayor of the City of Philadelphia.

¹⁰ A leading member of the Philadelphia Bar, and later a judge in the Common Pleas Court of Philadelphia.

place where the work must be done. But near the end, when the trial almost is complete or the appellate argument is to be called, the turmoil must stop and craftsmanship must take over. Then the resultant joy in creativity begins. And out of this murk, the pattern emerges. For the superb advocate, like Henry, it must be one's own pattern, and one's own expressions. In that atmosphere, at that crucial moment, Henry reveals himself the master, as that rare lawyer who not only *knows*, but, even more important, knows *why*, and, still more important, knows *how*. The gifted, attractive, remarkable, capacious-minded Henry, with all-seeing eyes, lays aside efficiency and dispatch, as he never is shy of recondite learning, always on point.

For example, in 1961, when he argued *Deutch v. United States*,¹¹ Henry knew how to work through the pitfalls. Just two years prior, the Court upheld a contempt of Congress citation in *Barenblatt v. United States*.¹² Moreover, *Watkins v. United States*¹³ essentially had spelled out the almost absolute power of Congress. So what did Henry do? First he skillfully briefed a far more sweeping constitutional question—should a witness be compelled to inform on a friend? Years before Americans expressed their uneasiness over the Lewinsky-Tripp matter, Henry instinctively had grasped the discomfort of such a requirement. Any Court, even in 1961, would wish to avoid answering that difficult question and would seek resolution in a less controversial legal harbor. But first Henry had to share the unfairness of his client's treatment by the court below. He made it crystal clear by suggesting that the person who had persuaded the defendant to stay in the Communist Party was an agent of the FBI, a fact not even mentioned in the D.C. Circuit opinion. Thereafter it became easier for the majority to determine that the Government had not shown the defendant's responses about his associates to be pertinent to the congressional inquiry.

Another Henry signature style as an advocate was that he often presented a Rhadamanthine detachment despite the fact that many lawyers think that detachment can subvert a practical advocate's zeal. In Greek mythology, after all, Rhadamanthus was a judge, not an advocate. Thus many think detachment to be more desirable in a judge

¹¹ 367 U.S. 456 (1961) (reversing a D.C. Circuit opinion that affirmed a contempt of Congress conviction for a congressional witness who, even though freely admitting all his own acts and meetings with reference to the Communist Party, refused to inform on others).

¹² 360 U.S. 109 (1959).

¹³ 354 U.S. 178 (1957).

or scholar than in a trial lawyer in the pit or at the bar of an appellate court. But in Freund's classic book,¹⁴ Justice Brandeis reminds us that good opinions are made when the Court and the advocate are in equal rhythm. In other words, as Jeremy Bentham said, "The Law is not made by judge alone, but by judge and company."¹⁵ Thus a splendid technique in the hands of a master like Henry is to show detachment—even though presenting the legal position quite sincerely, quite effectively, and quite clearly—in order to get one to go along with your contentious legal point. Henry often observed that a strong but subtle suggestion often is better than a hit on the head to make the key point in an argument very effectively. He recognized that the great appellate judge does not wish to be accused, as Daniel Webster often accused Chief Justice John Marshall, of just copying the advocate's brief.¹⁶

One cannot end this portrait without a dash about Henry's tremendous sense of humor. His "all-seeing eye" gave him the capacity to engage in and admire colleagues of sharply different philosophies—whether right or left, rich or poor, black, red or white, dumb or brilliant, Jew or Gentile—so long as they fairly engaged in discussions and maintained a sense of humor. On one occasion, his love and appreciation for the way that the Quakers managed the Germantown Friends School conflicted with the fact that Henry twice had been to war. Henry had heard the anger of enemy fire and thus realized that, unfortunately, tyrants often could not be subdued by the friendly thoughts of Quakers, their ability always to listen, never to think ill of a human being, and to seek unanimity in the Meeting House. As he left that one particular Quaker meeting, he said of an opponent (known for voluminous comment), "He never took his eye off the ball, for he never saw it." And when talking about Martin Dies, Parnell Thomas, or Joe McCarthy—three of witch-hunt fame—he often remarked, "Why must there be so many bastards born in wedlock?"

Henry had an undying appreciation for Drinker Biddle & Reath—the law firm that gave Henry the head, range, and support to do what he thought necessary in civil rights and civil liberties cases. Henry became an associate and a partner because of his brilliance as a lawyer and his ability to represent large industrial corporations in the bet-the-company cases, whether antitrust, securities, or patent matters. In a

¹⁴ PAUL FREUND, *ON UNDERSTANDING THE SUPREME COURT* (1950).

¹⁵ *Id.* at 78.

¹⁶ *See id.* at 79-80.

nationwide electrical antitrust suit, General Electric, the lead defendant, retained Henry as local counsel.¹⁷ Before long, Henry's impressive command of the law and facts of the case induced the defendant's General Counsel to appoint Henry as lead counsel, replacing a pillar of the D.C. trial bar and senior partner in a major D.C. firm. Earlier, Henry had cut his teeth in the *Viking Theatre* case,¹⁸ which introduced him to the feverish, competitive world of movie distribution where Louis Nizer was opposing lawyer. Henry also convinced Polish Communists that the American Courts' hallmark was fairness and justice. In the Polish Golf Cart case, where the United States was plaintiff, Henry achieved a complete victory for his Communist client.¹⁹

Henry—because of his performance as a corporate litigation lawyer—became a partner in record time, even though his career was interrupted after one year in law school by five years active duty as a U.S. Navy Commander in the Pacific in World War II. After starting in practice, he served one year in the Korean War, and two years in Europe connected with NATO. He also handled more civil liberties and civil rights cases than did most lawyers who practice exclusively in these fields. Three were victories in the Supreme Court,²⁰ but a computer search reveals over thirty-five cases in the lower courts. Many of Henry's causes were unpopular, and this occurred long before the "white-shoe"²¹ law firms felt such pro bono work fit within their strategy. In fact, many often felt their business, commercial, and governmental clients would disapprove. But Drinker was strikingly different. On the day in 1961 that Henry argued *Schempp*²²—challenging the Lord's Prayer recitation in public schools—Messrs. Drinker, Biddle and Van Dusen sat in the front row.

From the day Henry started practicing law—soon after his first year of law school, interrupted by five years in the Navy, and during his work on the *Law Review*—he always sought variety in everything. He believed in Goethe's famous passage to those of any family wealth:

¹⁷ *United States v. General Elec. Co.*, 209 F. Supp. 197 (E.D. Pa. 1962).

¹⁸ *Viking Theatre Corp. v. Paramount Film Distrib. Corp.*, 320 F.2d 285 (3d Cir. 1963).

¹⁹ *See Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978).

²⁰ *See Lemon v. Kurtzman*, 411 U.S. 192 (1971); *School Dist. of Abington Township v. Shempp*, 374 U.S. 203 (1963); *Deutch v. United States*, 364 U.S. 456 (1961).

²¹ This term has nothing to do with race, but what the less fortunate of us who did not go to Princeton or Virginia called those men who, in the style of 1938, wore white shoes when dressed properly.

²² *School Dist. of Abington Township v. Shempp*, 374 U.S. 203 (1963).

"You must labor to possess that which you have inherited."²³ Henry once expressed (during one of our Chestnut Hill Local rides) his recognition that routine is a kind of narcotic. It keeps the mind so occupied that one thinks very little about what really matters, thus losing the roar of the waves to the fullness of the sea. After all, such challenging adventures are not important for a lot of mankind. Emerson put it right when he said that "[m]ankind is as lazy as it dares to be."²⁴

But Henry always has been driven to reject what Anatole France suggests in *M. Bergerat*: "Je comprends, c'est mon faiblesse, il y a beaucoup de face de ne pas comprendre."²⁵ For Henry, it is always important to weigh the pros and cons, and always important to play a role in the great social and political issues of the day. Further, it always was important to Henry that that the court understand the business issues of the client, or see that the wrongful uses of governmental power—which bring out the worst in man—be retarded. Senator William Borah, and John Greenleaf Whittier, though a century apart, help supply the last splashes to this portrait of Henry, as Jackson Pollock, an artist so admired by Henry and Grace Sawyer, would do. Senator Borah said:

The safeguards of our liberty are not so much in danger from those who openly oppose them as from those who, professing to believe in them, are willing to ignore them for their purposes. . . . The latter undermine the very first principles of our government and are far the more dangerous.²⁶

And Whittier, about Charles Sumner, wrote:

"Forego thy dreams of lettered ease,
Put thou the scholar's promise by,
The rights of man are more than these."
He—heard, and answered: "Here am I!"²⁷

²³ JOHANN WOLFGANG VON GOETHE, *FAUST*, pt. 1, l. 682 (1886) ("Was du ererbst von deinen Vatern hast, Erwirb es, um es zu besitzen!").

²⁴ See, e.g., *Commonwealth v. Ferguson*, 552 A.2d 1075, 1079 (Pa. Super. Ct. 1988).

²⁵ Translated, the passage means, "I understand, it's my weakness; there is much face-saving in not understanding." GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 359 (1994).

²⁶ Nat Hentoff, *Alan Barth's Wisdom*, WASH. POST, Aug. 28, 1999, at A19.

²⁷ JOHN GREENLEAF WHITTIER, *Sumner*, in *THE COMPLETE POETICAL WORKS OF JOHN GREENLEAF WHITTIER* 208 (1895).

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