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TRIBUTES

JUDGE STERRY R. WATERMAN

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To think of Sterry Waterman the judge, one thinks perforce of Sterry Waterman the person. Of him it can truly be said, as the poet James Russell Lowell said of Louis Agassiz:

His magic was not far to seek,—
He was so human! Whether strong or weak
Far from his kind he neither sank nor soared,
But sate an equal guest at every board.
No beggar ever felt him condescend,
No prince presume; for still himself he bare,
At manhood's simple level, and where'er
He met a stranger, there he left a friend.

I have elsewhere¹ touched on Judge Waterman's life contributions—for which he received a national recognition that I doubt many Vermonters fully appreciated, largely due to his innate modesty but also due to the comparative anonymity in which work on an intermediate appellate court necessarily cloaks most of us. The exceptions to the rule, the unique Learned Hand, the infrequent Calvert Magruder, Skelly Wright, Irving Kaufman, David Bazelon, Henry Friendly, or Shirley Hufstedler—recognized as stellar by the judicial world at large though still not names familiar in every household—illustrate that most of the rest of us labor not in the halls of fame, but in the legal orchard (some would say thicket), where pruning, brush-burning, fruit-setting, and harvest are chores of the day, the enjoyment of the fruits themselves purely secondary.

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1. Vermont Bar Ass'n Newsletter, 6 (Feb. 1984).

Sterry Waterman's qualities of mind and character included, to say the least, integrity, loyalty, a spirit generous to fellow man while respecting of his privacy, independence of thought, and a respect for traditional values—family, church, community, school. These qualities made him at once a prototypical Vermonter and a colleague always to be respected. Added to these traits were a healthy gregariousness and sense of what used to be called noblesse oblige, a feeling of responsibility on the part of the gifted or the fortunate to give more time, effort, and dedication in the service of the public than the duties of citizenship alone demand. Vermonters generally, and the Vermont Law School in particular, have benefited immensely as a result of that sense of Sterry's. It can truthfully be said that without his leadership and reputation for excellence, just as without Dean Thomas Debevoise's endless efforts, the Law School would never have sprouted, let alone flowered. Judge Waterman foremost was responsible for the Vermont Bar's acceptance of and favorable inclination toward the Law School, a sine qua non to its birth, growth, and ultimate prosperity and prospects.

But to mention the Law School is to name only one of his extracurricular latter-day interests, important as the Law School is to the readers of this Law Review. No statement of the man, even alluding to his public services, is complete without reference to his judicial works which truly reflect his value system as well as his personality. His respect for traditional values demonstrates itself in attention to precedent. Yet he was fully aware that the law was capable of, indeed consisted of, growth in tune with changing times. When these conflicting principles met, as they did in *Flood v. Kuhn*,² the latest baseball antitrust case, he was perfectly capable of resolving the conflict:

We readily acknowledge that plaintiff is caught in a most frustrating predicament, a predicament which defendants have zealously seized upon with great perspicacity. On the one hand, the doctrine of stare decisis binds the plaintiff because of an initial holding that baseball is not "interstate commerce" within the Sherman Act, and, on the other hand, after there have been significant changes in the definition of "interstate commerce," he is now told that baseball is so uniquely interstate commerce that state regulation cannot apply. However, in our own defense, we do not consider our de-

2. 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

cision to be internally inconsistent. In disposing of the Sherman Act count in plaintiff's complaint, we are bound by Supreme Court decision, while in our disposition of the state and common law counts, we must of necessity decide this question of first impression by present Commerce Clause standards and not the standards applicable in 1922. Any apparent inconsistency results not from faulty logic, but from the vagaries of fate and this court's subordinate role to the Supreme Court.³

As for his approach to criminal law, it was as one would expect it to be. On the one hand, he was unwilling to hamstring the prosecution by mere procedural technicalities as in the case of a witness declining to answer grand jury interrogation based on electronic surveillance duly conducted under court order.⁴ Judge Waterman, nevertheless, was the first to recognize the importance of fundamental rights no matter how heinous the crime or reprehensible the criminal. In *United States v. Sperling*, he stated that the rule against double jeopardy, "has stood as a counterpoise on the side of the defendant against the state with its massive power and resources capable, if unchecked, of overwhelming the individual accused of crime."⁵ In this regard, while the Supreme Court has in the past few years cut back considerably on, if not directly overruled, *Fay v. Noia*,⁶ it was Judge Waterman who, joined by his great and good friend, the late Judge Joseph J. Smith of Connecticut, quite properly held that by virtue of a failure to appeal there had been no waiver of the "undeniable constitutional right of being tried without [the accused's] coerced confession in evidence,"⁷ and that the accused's failure to appeal his conviction in the state courts did not result in forfeiture of his right to federal habeas corpus in view of the significance of the federal right, its clear applicability to the case at hand, and the freedom of his codefendants convicted on the same basis.⁸

Judge Waterman was acutely aware of a principal legal pitfall, awaiting most law students, many lawyers, and even some judges—the tendency warned against by Holmes⁹ and by Car-

3. 443 F.2d at 268.

4. *In re Perisco*, 491 F.2d 1156 (2d Cir. 1974), cert. denied, 419 U.S. 924 (1974).

5. 560 F.2d 1050, 1056 (2d Cir. 1977).

6. 372 U.S. 391 (1963).

7. *United States ex rel. Noia v. Fay*, 300 F.2d 345, 350 (2d Cir. 1962).

8. *Id.* at 360-65.

9. Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 455 (1899).

dozo,¹⁰ among many others, to pigeonhole or label a fluid concept and thereby mechanically to reach a result, even while avoiding, evading, or even defying analysis. Judge Waterman quoted the legal realist, Walter Wheeler Cook, in *Power Authority of the State of New York v. Federal Power Commission*:

"The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against."¹¹

Thus could Judge Waterman distinguish between the "actual malice" of *New York Times, Inc. v. Sullivan*¹² in a significant, modern application, meaning knowledge that a statement was false or made with reckless disregard of its truth or falsity, and the more usual "malice" meaning ill will, bias, spite, or prejudice, creeping into any libel case where punitive damages are sought.¹³

Of course, no discussion of Judge Waterman's legal decisions, even one made cursory by space limitations, is complete without reference to his *SEC v. Texas Gulf Sulphur, Co.*¹⁴ There for an en banc court in an opinion which Judge Friendly referred to as "searching,"¹⁵ Judge Waterman laid down the parameters of securities law liability for corporate insiders possessed of material inside information and their "tippees":

Thus, anyone in possession of material inside information must either disclose it to the investing public, or, if he is disabled from disclosing it in order to protect a corporate confidence, or he chooses not to do so, must abstain from trading in or recommending the securities concerned while such inside information remains undisclosed. So, it is here no justification for insider activity that disclosure was forbidden by the legitimate corporate objective of acquiring options to purchase the land surrounding the exploration site; if the in-

10. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 586 (1937).

11. 339 F.2d 269, 275 (2d Cir. 1964) (quoting Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333, 337 (1933)).

12. 376 U.S. 254, 279-80 (1964).

13. See *Goldwater v. Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970). See also Oakes, *Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma*, 7 HOUSTON L. REV. 655, 688 n.155, 697 & n.4, 700-01 (1979).

14. 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969).

15. 401 F.2d at 864 (Friendly, J., concurring).

formation was, as the SEC contends, material, its possessors should have kept out of the market until disclosure was accomplished.¹⁶

Just as the banking and commercial world of today is governed by the Uniform Commercial Code, to which Sterry Waterman made a considerable, though largely unsung, contribution, so too is the corporate world guided as to what it can and cannot do with reference to inside information by his elucidation in *Texas Gulf Sulphur*.

In the end, however, Sterry Waterman will be remembered, as he would want to be remembered, not by his legal opinions. Considerable as they were, in quality as well as quantity, he would be the first to recognize that appellate judicial opinions are for the greater part but pebbles cast in a passing stream. Rather, he would want to be remembered, as he will be, by his dedication to and example for the profession as a whole—no one thought more highly of, or in turn was thought more highly of by, the organized bar, state, regional, and national. This respect became affection in the case of his law clerks in particular—three of whom became noted law school deans and others of whom have made important individual contributions to the law—and students of the law in general, from the first-year initiate to the mysteries of the law, to accomplished realist scholars, including such legal luminaries as Karl Llewellyn, Soia Mentschikoff, Kenneth Culp Davis, Norman Redlich, and Edward Levi, to name a few. I am honored to submit this tribute to an extraordinary Vermonter and leader of the legal profession whom to my everlasting good fortune, I best knew as a friend.

16. *Id.* at 848.

