Book Reviews

Henry Friendly: The Judge, the Man, the Book

HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA. By David M. Dorsen. Cambridge, Massachusetts: Harvard University Press, 2012. 512 pages. $35.00.

Reviewed by Mary Coombs*

For those of us who neither live in the rarefied world of the famous nor are aficionados of self-published memoirs by the earnest and obscure, reading a biography of someone we knew personally is a rare event. David Dorsen's biography of Judge Friendly—in addition to being a surprisingly engrossing read for anyone[1]—was, for someone like me, both confirmatory and revealing.

The reason to remember Henry Friendly and write—or read—his biography is Friendly the Judge.[2] The subtitle calls him the "greatest judge of his era." With this assessment (if not with all his holdings), I can heartily agree.

While one often associates Friendly with a mastery of the law, he also had a concern for getting the facts right, which was somewhat unusual for an appellate judge.[3] He would pore through the record where the lawyers didn't cite to what seemed important to him. I believe that this focus on facts sometimes bridged his concern for reaching an outcome that seemed compatible with justice to the parties and his desire not to distort the law for future cases.[4]

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* I would like to thank Warren Stern, my co-clerk, and my research assistant, Andrea Solano. All remaining mistakes and misjudgments are my own.

1. To misquote ALICE IN WONDERLAND, it is a book with conversations but, unfortunately, no pictures. LEWIS CARROLL, ALICE'S ADVENTURE IN WONDERLAND 1 (Richard Kelly ed., Broadview P. 2d ed. 2011). To be honest, the audience is likely limited to lawyers, which is still enough for respectable sales. (In 2010 there were an estimated 728,200 lawyers in the United States. *Occupational Outlook Handbook*, BUREAU OF LABOR STATISTICS (Apr. 26, 2012), http://bls.gov/ooh/legal/lawyers.htm.)

2. DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA (2012).

3. This focus is perhaps less surprising when one considers his background as a lawyer for whom much of his practice was before administrative agencies and who was steeped in the forms of common law adjudication.

4. One example is Judge Friendly's finding parallels between the theology of Paul Tillich and the claims of Mr. Jakobson, a rather odd conscientious objector (CO), to find that Mr. Jakobson met the statutory standard for CO status. *Id.* at 245–47; United States v. Jakobson, 325 F.2d 409, 415–16 (2d Cir. 1963), *aff'd sub nom.* United States v. Seeger, 380 U.S. 163 (1965).

Dorsen provides an example of Friendly's fact consciousness in his discussion of the *Biaggi* case.[5] Friendly wrote an opinion that released the transcripts of a grand jury investigation only after he knew what the grand jury transcripts revealed; namely, confirming his suspicion that Biaggi was trying to manipulate the courts with his motion to release in part the transcripts of the grand jury that was investigating him.[6]

During my term, we had a case where a would-be author sought the release of the Bureau of Alcohol, Tobacco, and Firearms "raid manual" under the Freedom of Information Act.[7] Judge Friendly's concurring opinion found that the manual was protected by one of the exceptions in the statute and thus said that the plaintiff had no standing to question the constitutionality of the procedures set out therein.[8] Before he wrote that opinion, however, he had instructed me to review the manual and inform him if it did seem to authorize any unconstitutional actions by agents. I believe it mattered to him that, in my estimation, the manual did not.[9]

His working process not only produced masterful opinions with great rapidity, but it also was as good an intellectual training ground as any clerk could receive.[10] Immediately after the day's oral arguments, we were called *seriatim* to discuss the cases for which we were responsible—a discussion that began with him asking us what we thought.[11] If one could give an account of how the case should be decided that met with his approbation (if not his concurrence), one felt an extraordinary sense of achievement (or at least relief for not having stumbled).[12] And, as Dorsen notes, that discussion was immediately followed by the judge dictating his voting memo to his secretary.[13] These were inevitably the first memoranda distributed to the other judges and, one assumes, they guided the way the case would be analyzed.[14] Many judges rightly assumed that they should intellectually

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5. DORSEN, *supra* note 2, at 222–26; *In re* Biaggi, 478 F.2d 489, 494 (2d Cir. 1973) (Friendly, J., supplemental opinion) ("It [the majority opinion] rests on the exercise of a sound discretion under the special circumstances of this case.").

6. DORSEN, *supra* note 2, at 222–26.

7. Caplan v. Bureau of Alcohol, Tobacco & Firearms, 587 F.2d 544, 548–49 (2d Cir. 1978).

8. *Id.*

9. I do not know if I was assigned this case in part because I had been a mentee of Yale Kamisar. For a description of Yale Kamisar and his work, see *Yale Kamisar*, U. MICH. L. SCH., http://web.law.umich.edu/_facultybiopage/facultybiopagenew.asp?ID=201.

10. In addition to the interactions with the judge, one learned by watching the production of great legal analysis and by hearing his responses to bad legal work by lawyers and, less frequently, other judges. DORSEN, *supra* note 2, at 87–88.

11. A similar description of the judge's working methods can be found in Lawrence B. Pedowitz, *Judge Friendly: A Clerk's Perspective*, 1978 ANN. SURV. AM. L. xl, xli.

12. As Dorsen notes, Friendly could be quite cutting about poor performances by lawyers, other judges, or clerks. DORSEN, *supra* note 2, at 87–88, 95–97. As I have told colleagues, he did not suffer fools gladly, and from his intellectual perch, there appeared to be many fools.

13. *Id.* at 91.

14. *Id.* at 90–91.

dominate their clerks; I think Friendly made a similar assumption about most other judges.

The description of Friendly as "Greatest Judge of His Era," however, rests not merely on the judge's working method or on his focus with facts, but also on his contribution to jurisprudence.[15] The term brings to mind the iconic great judge of legal theory, Ronald Dworkin's Hercules, who can (as all judges ideally should) find the single best solution to hard cases—one that is consistent both with a defensible interpretation of existing law and with a coherent understanding of deep principle.[16] It also echoes Duncan Kennedy's counter image of the judge as half-consciously following his ideological predispositions in interpreting law in hard cases.[17]

Based on Dorsen's book and my impression, Friendly fits neither model.[18] About as well as any real judge, he sought (most of the time) to get "the law" right, consistent with both his sense of justice to the parties and a set of predilections that did not fit neatly into any simple liberalism or conservatism. His substantive political views were sometimes aligned with conservatism, particularly in his critical stance toward Warren Court constitutional criminal procedure law, which impeded law enforcement even where there was no plausible risk of convicting the innocent and no fundamental right, in his view, at stake.[19] But he also tended to favor

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15. That contribution is circumscribed by the facts that he served on a lower federal court and that I examine a period decades after he was active. His impact was larger than that position would suggest. Since 2000, Supreme Court Justices have cited to Friendly's judicial or other writings by name nineteen times (in Lexis Nexis, within the "Federal Court Cases, Combined" database, search the following: COURT(supreme) and "Judge Friendly" or "Friendly, J." or "Henry J. Friendly" or "Henry Friendly"). This is not simply an artifact of John Roberts being his former clerk; he has also been cited by Ginsburg, Stevens, Souter, Scalia, Kennedy, and Sotomayor. *E.g.*, Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 320 (2007) (Ginsburg, J.); Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 177–79 (2008) (Stevens, J.); Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004) (Souter, J.); Wal-Mart Stores v. Samara Bros., 529 U.S. 205, 210 (2000) (Scalia, J.); Brown v. Plata, 131 S. Ct. 1910, 1946 (2011) (Kennedy, J.); Blueford v. Arkansas, 132 S. Ct. 2044, 2057 (2012) (Sotomayor, J.).

16. *See*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 116–18 (1978) (theorizing that an ideal judge, such as the metaphorical Judge Hercules, would have complete knowledge of the law and sufficient time to decide all cases; in such circumstances, Judge Hercules could create the perfect rule for a particular case that justifies the law as a whole).

17. Duncan Kennedy, *Strategizing Strategic Behavior in Legal Interpretation*, 1996 UTAH L. REV. 785, 792–93.

18. Interestingly, Friendly himself does not discuss Kennedy in his writings but does briefly mention Dworkin. After noting the jurisprudential debate "generated by" Ronald Dworkin in *Hard Cases*, 88 HARV. L. REV. 1057 (1975), which discussed whether a judge may use policy or only principle in deciding cases where law seems indeterminate, Friendly concludes that "it is not clear to me how far apart, in any practically significant sense, the disputants really are." Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 24 n.14 (1978).

19. DORSEN, *supra* note 2, at 188, 214–15; *see also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970) (arguing that "with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence").

prosecutors or unsophisticated investors in cases involving the regulation of business.[20] He also placed more consistent emphasis than either Dworkin or Kennedy does on the role of the judge in (a) creating and maintaining a coherent and predictable body of law,[21] which he did not see as embodying a substantive preference for conservative and liberal policy choices,[22] and (b) leaving space for institutions to make policy choices (sometimes the government, sometimes private institutions being protected from government).[23] Finally, he was sometimes (though not always, as Dorsen notes)[24] more modest than Hercules. On occasion, after seeking to turn his first analysis (usually from his voting memorandum) into an opinion, he would be brought up short by the existing legal materials and conclude, "It won't write."[25] The winning party might not change, but the argument would be revised to be consistent with his best reading of the law he was interpreting. Perhaps somewhere in the world there is or will be a Hercules who can always find a "right" opinion on every topic consistent with her philosophical principles. In the meantime, we are unlikely to find a better judge than one like Friendly, who so often got it right, who wrote so fluently[26] and so well, and who recognized when it "wouldn't write."

Nonetheless, a biography and a memory must also consider Friendly the Man, particularly as it may help illuminate Friendly the Judge. The book does so, based on interviews with surviving family, a wide range of other judges, and famous folk who could shed light on various aspects of Friendly's life and character. Dorsen also interviewed every clerk Friendly had had. While each of us interacted with him intensely for only a year (and some of us almost not at all beyond that), that year was indeed intense. As the book demonstrates, there were common elements, but our experiences—

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20. DORSEN, *supra* note 2, at 249–53.

21. He similarly criticized administrative agencies, largely in terms appropriate to courts as well, for doing a poor job of "[providing] standards and reasoned analysis" for their conclusions. *Id.* at 295.

22. I think he would reject Kennedy's view that a preference for rules over standards is linked to a substantive "conservative" position. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1753 (1976) (connecting the conservative attack on judicial activism to a preference for judicial rulemaking and application of rules to judicial creation and enforcement of standards).

23. For more on Friendly's jurisprudence, see generally Michael Boudin, *Judge Henry Friendly and the Craft of Judging*, 159 U. PA. L. REV. 1 (2010) (surveying Judge Friendly's judicial decision-making process and noting Judge Friendly's understanding of the importance of predictability and the maintenance of stable rules).

24. At one point, Dorsen chastises Friendly for his "creative, if not cavalier, treatment of precedent." DORSEN, *supra* note 2, at 179.

25. *See id.* at 90–91, 150–51 (collecting examples of Friendly stating that he would change his ruling if one could find authority for the contrary position or expressing discomfort with a result he believed he could not avoid based on the law as it stood). Though he once said that "he could distinguish just about every decision," he sometimes felt more constrained by the body of statutory and decisional law. *Id.* at 89.

26. One stylistic quirk: he had a habit of the "not quite double negative" (like "not unreasonable"). A Westlaw search found twenty-eight Friendly opinions using that locution.

and our assessments of those experiences—varied. In thinking back and in light of the book, I think those differences are in part a result of changes in Judge Friendly over time, in part a result of differences among us, and in part a reflection of the meshing—or not—of our personalities with his.

By the time I clerked for the judge in 1978–1979, he was on the downward arc of a judicial career that lasted from 1959 through 1986. It was clear that the opportunity for a Supreme Court appointment had passed. As Dorsen notes, Friendly was at times "dispirited," if not necessarily clinically depressed.[27] He had difficult relationships with two of his three children.[28]

It may be that his depression was worsening—certainly we rarely saw him cheerful. His eyesight seemed to have gotten worse with time,[29] a disability especially salient for someone whose professional life was so bound up with reading and writing.[30] He seemed to flourish largely in the company of his wife Sophie, who had the warmth and natural social skills he lacked.[31] One feels acutely what a blow it must have been when she predeceased him.[32]

I was very much an atypical choice for a Friendly clerk. I was one of only two women clerks (two years after Ruth Wedgewood) and, as a Michigan graduate, one of only four clerks not from Harvard (more than half), other Ivy League schools, or Chicago.[33] I was also, unusually I believe, a second-life law student; I turned 33 during my clerkship year. Together these may have made for a poor fit for the judge's style in interacting with his clerks, apart from the more intellectual aspects of the court's work.

Friendly was a man of his time, formed in an era before feminism. He lived in a fairly sheltered world, growing up comfortably middle-class in a small city and living for much of his adult life in a luxurious apartment on Park Avenue in Manhattan.[34] Neither his mother nor his wife worked outside the home. In his world, he succeeded by merit and may have been less sensitive to how merit alone would not suffice for all.[35] The judge read

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27. *Id.* at 53.

28. *Id.* at 52–59.

29. *Id.* at 341.

30. He also relied extensively on his prodigious memory. This usually served him well, though clerks could be frustrated by his referring to some prior case that he thought relevant in a way of little use to a clerk with less than a year's tenure and before Westlaw and Lexis, such as "the case with the lawyer from X firm."

31. DORSEN, *supra* note 2, at 36–37, 55–56.

32. *Id.* at 339–40.

33. The other three "outreach" clerks are William Lake from Stanford, Martin Glenn from Rutgers, and William Bryson from the University of Texas. *Id.* at 361–66.

34. *Id.* at 6–10, 37.

35. Dorsen's book gives little sense of Judge Friendly's interactions with or understanding of the lives of racial minorities. His relationship with Judaism and WASP Anti-Semitism was complex, as shown by his somewhat inconsistent responses to Harvard President Lowell's proposal for a quota for Jewish students. *Id.* at 18. My sense is that the judge was also largely insensitive to

widely: law, history, and legal philosophy, but not apparently social sciences or current affairs.[36] His history reading, given his interests and the forms of history most common during his formative years, would have been intellectual and political, not social history.[37] Only one person on the long list of his regular correspondents was a woman.[38] Dorsen notes that when Friendly and others formed Cleary Gottlieb, two of its newly-hired nine associates were women.[39] This was unusual at the time and place.[40] We do not know how Friendly interacted with these women lawyers. I was unsurprised by the anecdote Dorsen recounts of Friendly's shock that Ruth Bader Ginsburg responded negatively when he pulled out a chair for her at a luncheon.[41] I suspect the shock was genuine surprise and dismay. My memory is that the clerks' dinners during his lifetime were held at the Century Association, his club. I doubt that the judge even really noticed that the Association had no women members.[42]

Similarly, I resented—more than many clerks—the "menial" tasks that were expected of us, such as ensuring that the bench was prepared precisely to his requirements for each sitting[43] and that he always had a working pen.[44] When buzzed in, you would enter, take the pen held out in his nonwriting hand, replace the innards with those from a government issue pen and return it to him, all without exchanging a word or glance. What was for him, as Dorsen suggests, a manifestation of routine and hierarchy,[45] felt to me like patriarchy as well.[46]

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class—that there were (and are) people who grow up in economic and family circumstances that do not dare even to dream of Harvard, though their native intelligence might have permitted them to thrive there.

36. *Id.* at 10–14, 54–55.

37. His senior paper at Harvard explored the relations of Church and State in England under William the Conqueror. *Id.* at 16–17.

38. *Id.* at 101.

39. *Id.* at 60.

40. *See* VIRGINIA G. DRACHMAN, SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY 255 (1998) (stating that in 1939, only 14.2% of lawyers in New York were women); David M. Margolick, *Wall Street's Sexist Wall*, NAT'L L.J., Aug. 4, 1980, at 60 (stating that in the 1940s, very few lucky women found positions at New York's most prestigious law firms and almost all found positions in trusts and estates law).

41. DORSEN, *supra* note 2, at 118.

42. He was hardly alone. Women were not admitted until 1989 and then only after a very contentious battle. *See* Felicia R. Lee, *121 Years of Men Only Ends at Club*, N.Y. TIMES, July 28, 1989, at B1, *available at* http://www.nytimes.com/1989/07/28/nyregion/121-years-of-men-only-ends-at-club.html?pagewanted=all&src=pm (describing the end of the long battle to end the male-only policy of the New York Athletic Club and recounting the Century Association's admission of women the previous year).

43. DORSEN, *supra* note 2, at 108.

44. *Id.* at 93.

45. *Id.* at 108.

46. This may be my projection. Other clerks may not have resented this part of the job. In any event, they were unlikely to attribute it to patriarchy.

I do not mean to suggest that the clerkship year was some unrelieved Dickensian misery. His work style meant there was little relaxed interaction between judge and clerk. But clerks and secretaries could often relax and enjoy the chambers on the other side of the judge's closed door. Furthermore, while the judge did not show much of a warm sense of humor with his clerks, he did have wit and cleverness.

Dorsen mentions two opinions that were pivotal in my decision to seek and take a clerkship with Judge Friendly (though he wrote nothing quite so clever the term I was there): *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*[47] and *Nolan v. Transocean Airlines*.[48] I, and at least one of Chief Judge Kaufman's clerks, saw a mix of wit and hostility in the way Judge Friendly, when he had arranged to ride home with Kaufman, would interrogate him during the ride on his views of recent advance sheets or slip opinions. As soon as the ride was arranged, Kaufman would reassign one of his clerks to prepare him for it. Dorsen's story of Kaufman's ignominious role in Friendly's Second Circuit nomination process[49] may go a long way in explaining this behavior, which we both thought showed more than just a desire to save money or make conversation on Friendly's part.[50]

Friendly the Man—like Friendly the Judge—was a complicated individual. And it may be that his personal history was more impressive than even those aspects that made my clerkship a legacy. We always want our heroes without feet of clay. We want those of great accomplishment to be great as people. Life doesn't always cooperate. To the extent that the judicial legacy would have been less had my clerkship been more pleasant, that is a trade I would not—at least in retrospect—have thought worth making.

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47. 190 F. Supp. 116, 117 (S.D.N.Y. 1960) ("The issue [in this case] is, what is chicken?"). *Frigaliment* was a contract case brought in diversity where the contract called for chickens and the plaintiff–buyer argued that this did not extend to stewing chickens. Friendly rightly used the standard tools of contract interpretation. As a cook and grocery shopper, I can say that stewing hens would be found in the "chicken" section of the meat and poultry case, but I would have been deeply unhappy if my husband had brought home a stewing hen when the grocery list included "chicken."

48. 276 F.2d 280, 281 (2d Cir. 1960) ("Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought."), *vacated and remanded*, 365 U.S. 293 (1961), *adhered to*, 290 F.2d 904 (2d Cir. 1961). Friendly concurred in my assessment (or vice-versa); he called this his "best opening paragraph." DORSEN, *supra* note 2, at 315.

49. DORSEN, *supra* note 2, at 74–75.

50. *Id.* at 120–21.