

On Becoming a Great Judge: The Life of Henry J. Friendly

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

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In writing a biography of Henry Friendly, author David Dorsen has taken on an enormous challenge: the subtitle is “Greatest Judge of His Era”—a claim that few who knew Judge Friendly, or are familiar with his remarkable legal legacy, would dispute. Judge Friendly left an unparalleled body of written opinions from his twenty-five-year career on the bench and was a vigorous presence at the very highest level of his profession through prolific writings, energetic participation in groups such as the American Law Institute, and his many professional friends.¹ His opinions remain, even today, among the most cited in the federal jurisprudence;² for those who knew him, he was an incomparably towering influence. To summarize the life of this remarkable person, and to offer some explanation of how he developed his formidable skills and extraordinary impact, is no easy task. David Dorsen does a remarkable job. His biography is not only rewarding for those who knew Judge Friendly or are familiar with his work, but also provides a readable and accessible exploration of how one person arrived at such a remarkable level of excellence in his profession.

I was a law clerk for Judge Friendly during the 1972–1973 term of the United States Court of Appeals for the Second Circuit. As it was for every lawyer who had this extraordinary opportunity, the year was one of the most remarkable experiences of my professional life. Unusually for a judge who died more than twenty years ago, his law clerks still reunite every three years or so to share recollections about our year with the Judge and his impact on our own thoughts and careers. This is no group of underachievers—it includes a number of very prominent professors and judges, including the Chief Justice of the Supreme Court—yet the prevailing sentiment is universally one of awe, occasionally tinged with a sense of fear that Judge Friendly might somehow look over our shoulders and remind us of standards of excellence that all of us still strain to meet.

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1. DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 3, 131–33 (2012).

2. *Id.* at 353–55.

I approached the Dorsen biography with a particular question that has always fascinated me: how was it that the son of a small-town manufacturer in upstate New York became the titan of his profession?³ Is it possible to find an explanation, or even a description, of his path to brilliance? A few years before he died, Judge Friendly permitted me to spend several hours tape-recording his reminiscence from both before and during his judicial career. While those recordings were transcribed, I never succeeded in editing or publishing them, and thus was thrilled when David Dorsen took them over and skillfully used them in his biography.⁴ Complemented by the thorough research he has done and access to Judge Friendly's files, friends, and family, the biography offers some clues to Friendly's emergence as one of the principal legal voices of his generation.

The first clue may seem obvious: Henry Friendly was simply a brilliant intellect, endowed with extraordinary skills. David Dorsen describes, and all of Friendly's law clerks well remember, the Judge's ability to sit down at a table with a ballpoint pen and two pads—one for the text of his opinions, the other for the footnotes—and simply write them out in one draft, often in one sitting, citing precedent from memory and when necessary marching over to find the text of the decision he wanted to quote, from memory pulling exactly the right volume of the Federal Reporter from the shelf. This technical brilliance was not a late development. When he arrived at Harvard College in 1919 at age 16, he had a keen interest in mathematics and took the most advanced course in mathematics available to entering undergraduates.⁵ When the grades arrived, he had received the second-highest grade ever received by a student in the history of the course. To his chagrin, however, the holder of the highest grade—by a minuscule margin—was a classmate. That was enough for Henry Friendly: he abandoned any dreams of becoming a mathematician.⁶ I had heard this story before doing my oral history with the Judge, and after confirming its basic outlines I was about to move on when I casually asked who the other student had been. It turns out that the competitor had been Marshall Stone, son of future Chief Justice Harlan Fiske Stone, who went on to have a distinguished career as a Professor of Mathematics at Harvard, and is credited with discovering several noted theorems. To be even neck-and-neck with such a scholar would be beyond the competence of virtually any other student, but to Henry Friendly being anything other than the best was insufficient. He later majored in European history, and when the time came for him to defend his thesis in an oral exam, the number of professors and students who wanted to watch was so great that the event took place in the Sanders Theater at Harvard College.

3. *Id.* at 5–6, 8.

4. *Id.* at 371–72.

5. *Id.* at 14.

6. *See id.* (“He changed his mind [about taking additional math classes] when he compared his performance in one course [with his classmate] Stone’s.”).

Undoubtedly through his mother, Friendly early on developed a passion for learning and an intellectual curiosity of extraordinary scope. His mother was evidently a woman of intellect and energy.⁷ Nor was she lacking in ambition for her near-sighted and unathletic son: after he arrived at Harvard College, she wrote to Professor Felix Frankfurter, who was known to her through a family connection, and who quickly befriended this young prodigy and did his utmost to entice him into the study of law.⁸ The persuasion was not immediately successful: Friendly remained fascinated with (and deeply knowledgeable about) European history throughout his life, and upon graduation at the top of his class in 1923 was courted not only by Professor Frankfurter at the law school but by the leading professors in liberal arts to pursue a career in academics.⁹ After a year of studying abroad to consider his options, he entered the law school¹⁰—but only really made up his mind to commit to the practice of law after receiving his first round of grades. He went on to achieve an academic record at Harvard Law School that, according to many, ranks even today as the statistically highest performance of any student in the history of the School.¹¹

The key trait that emerges from the Dorsen biography is that once Friendly focused on the law, he made it the passion of his professional life with a sustained and unwavering focus. With energy, curiosity, voracious reading habits, and prodigious memory, he saw the law in all of its dimensions—not as a series of rules to be memorized, nor even as tools to achieve ends, but rather as a process that goes to the core of society and how it is supposed to work. To this passionate commitment he brought insights drawn from his remarkable knowledge of history, literature, and philosophy. A trivial anecdote brought home to me the breadth of his reading and the depth of his ability to recall: once when I was with him he noticed that I was carrying a book and, with characteristic inquisitiveness, asked me what it was. It turned out to be a long and quite dense history of Russia, which I was going to visit for the first time later that year. “Oh,” he said, “that seems familiar, I think I read it once.” But, he then went on, “I must have read a different book because the one I read was more than one volume.” I checked, and sure enough the book I was reading was a one-volume simplification of an exhaustive seven-volume history of Russia—which the Judge had not only read, but mastered: when he questioned me about my meager insights from the slimmed-down version, it was clear that his grasp of the subject many times exceeded mine, even though he had read the lengthy opus more than twenty years before.

7. *Id.* at 6–7.

8. *Id.* at 20–21.

9. *Id.* at 20.

10. *Id.*

11. *See id.* at 26 (outlining Friendly’s excellent academic performance at law school).

When he joined the bench in 1959, Friendly brought to the job prodigious academic skills, broad learning, and more than three decades of challenging practice—which included founding what is today one of New York’s major law firms, and serving as General Counsel for Pan American Airways at the apex of its success as the first truly international American airline.¹² But most importantly, he brought an uncanny ability not only to parse a legal issue, but to see it in its three-dimensional context, shorn of ideology or preconceived notions. Before joining the bench, for example, Friendly had had relatively little experience with criminal procedures—he had never been a prosecutor or a criminal defense lawyer.¹³ Yet to this day, his decisions in this area are beacons of thoughtfulness and common sense, as well as learning. Many thought of him as a pro-government “conservative,” in part based upon a superficial interpretation of one of his well-known articles entitled “Is Innocence Irrelevant?,” in which he questioned some aspects of federal review of state criminal convictions via habeas corpus.¹⁴ But in each criminal case before him, his interest was in understanding exactly what happened in the case in question, and whether the procedures met the standards of transparency, honesty, and excellence that society demands. During my clerkship year, he wrote opinions in at least two instances reversing convictions because he felt that the prosecutor or the trial judge had not acted appropriately—even though the innocence or guilt of the accused was not really in question.¹⁵ In each case, he delved into the facts in meticulous detail, and concluded that the process had not satisfied acceptable standards upon which he insisted.

Judge Friendly was an internationalist. His work with Pan Am and his law firm put him at the cutting edge of international business during and after World War II.¹⁶ He read widely in French, once publishing a review of a lengthy French-language legal treatise¹⁷ and, as a student, remarking to a startled professor that a text apparently written in early English was actually in Law French, which Friendly offered to translate.¹⁸ But his heart was in the common law, where his insights derived not only from American precedent but from his deep understanding of English precedent as well. In his

12. *Id.* at 60–61.

13. *Id.* at 81.

14. Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

15. See generally *United States v. Fernandez*, 480 F.2d 726 (2d Cir. 1973) (reversing a robbery conviction on the grounds that the trial judge’s questioning and discernible distrust of the defense’s expert witness was both improper and prejudicial); *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972) (reversing a conviction for the prosecutor’s improper use of hearsay before a grand jury).

16. DORSEN, *supra* note 1, at 61–68.

17. Henry J. Friendly, Book Review, 54 HARV. L. REV. 169 (1940) (reviewing JEAN VAN HOUTTE, *LA RESPONSABILITÉ CIVILE DANS LES TRANSPORTS AÉRIENS INTÉRIEURS ET INTERNATIONAUX* (1940)).

18. Michael Boudin, *Judge Henry Friendly and the Mirror of Constitutional Law*, 82 N.Y.U. L. REV. 975, 977 (2007).

legendary *Kinsman Transit* tort decision,¹⁹ where he explored and essentially recast the law of causation,²⁰ he delved into English precedent at some length and with noteworthy insight—even though the applicability of that law had not been argued by either party.²¹ While respectful of the separation of the powers and the legislative function, he earnestly believed that judges contributed to the making of the law, and did not just interpret it in the manner of his continental counterparts. When the Federal Rules of Evidence were discussed, and ultimately adopted, in the 1970s, they were the culmination of years of work;²² today they are a fundamental component of federal trial practice. But Judge Friendly was not a fan because he felt that codified rules could never match the nuances and contextual appropriateness of judge-made decisions, and would stultify the flexibility and evolution of the law of evidence. It did not appear to occur to him that many judges, lacking his erudition, memory, and objectivity—Judge Friendly read *Wigmore on Evidence*²³ so thoroughly that he virtually had it memorized—would be helped by having a handy, consistent code of common-sense rules.

What are we to make of this remarkable man, looking back more than 25 years after his death?

On the credenza behind the desk in his chambers, there was a black-and-white photograph of Justice Louis Brandeis, for whom Henry Friendly served as law clerk at the beginning of his legal career after graduating from law school in 1927.²⁴ On it the Justice had scrawled “To Henry Friendly, a born lawyer.” While prescient, these words may understate Judge Friendly’s achievement: he was “born” with prodigious skills, but he became a masterful lawyer and judge through hard work, passion, an open mind, a high degree of curiosity, and relentless focus—and, to my mind, with an unwavering, almost brutal insistence upon intellectual honesty. While we are unlikely to see his like again, David Dorsen’s biography reminds us of the standards of excellence on which Judge Friendly insisted and the importance they hold for his profession today.

19. *In re Kinsman Transit Co.*, 338 F.2d 708 (1964).

20. *Id.* at 719–26.

21. David M. Dorsen, *Judges Henry J. Friendly and Benjamin Cardozo: A Tale of Two Precedents*, 31 PACE L. REV. 599, 610 n.69 (2011).

22. Paul R. Rice & Neals-Erik William Delker, *Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 F.R.D. 678, 683 (2000).

23. JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (2d ed. 1923).

24. DORSEN, *supra* note 1, at 27.