

# Henry Friendly

GREATEST JUDGE OF HIS ERA



*Foreword by Judge Richard A. Posner*

DAVID M. DORSEN

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*For Kenna  
and  
the Judges of the U.S. Courts of Appeals*

## Foreword

*Judge Richard A. Posner*

I AM ON RECORD as having expressed skepticism about judicial biographies. In an article published some years ago I listed a variety of obstacles to successful judicial biography—such as that only lawyers and law professors were likely to be able or inclined to write judicial biographies but that nothing in their training equipped them to be biographers, that most judges live outwardly dull lives, that judges tend to be secretive about their work, and above all that as with other “intellectual workers” the connection between judges’ accomplishments, on the one hand, and their upbringing, personal characteristics, psychology, and experiences—the natural focus of a biography—on the other hand, were difficult to tease out.<sup>1</sup> “Whenever a writer, artist, musician, any mode of imagination is made the subject of a biography, his light may be extinguished. . . . Life is simply a shell, the kernel of which is creative work. There is no real nourishment in biography. The words fly up, the lives remain below.”<sup>2</sup> One wouldn’t, in short, learn much of interest about a judge from a biography of him, I thought, and I therefore suggested “alternative genres” to judicial biography, such as the critical study, instancing—self-servingly—my little book on Cardozo.<sup>3</sup>

I was not entirely negative. I mentioned several fine judicial biographies; others have been published since I wrote my article. But I questioned the value of the genre, and had I been asked whether Henry Friendly was a promising subject for a biography, I would have said no. He had not had

an exciting early life, like Oliver Wendell Holmes or Byron White; he was not a “character,” like Learned Hand, or an enigma, like Cardozo; he had not been involved in great political events, like Brandeis, Frankfurter, and Robert Jackson. He had practiced law in New York (mainly administrative law, his principal client being Pan American World Airways, now defunct) for thirty-one years after clerking for Brandeis; had been appointed to the Second Circuit in 1959; had served there for nearly twenty-seven years with great distinction while also writing highly influential law review articles (some collected into books); had died, aged eighty-two; and that was it. A quarter of a century after his death, his judicial and scholarly work continued to command attention, but was receiving it—his favorite law clerk, himself a scholarly federal court of appeals judge, Michael Boudin, had embarked on a series of lectures on Friendly’s achievements.<sup>4</sup> I would, in short, have thought a biography of Friendly an unpromising venture.

Was I wrong! For David Dorsen’s biography is immensely illuminating. In addition to the impressive narrative and analytical skills that he has brought to the project, he has by dint of energy and application overcome the problem of delay that has plagued judicial biography and, a related point, has been able to exploit the unprecedented amount of material available to him about Friendly. Timing is critical. Inordinate delay in completion has been a grave problem for judicial biography. Holmes’s scholarly biographer, Mark DeWolfe Howe, took so long that he died in medias res. (His successor, Grant Gilmore, abandoned the project because he hated Holmes.) The biographies of Hand and Cardozo took decades to complete, and by the time they were published everyone who had known those judges and so might have offered corrections of or supplements to the biographies was dead. A biography of Robert Jackson, who died more than a half century ago, was abandoned by successive designated biographers. William Brennan’s biographer developed writer’s block, which caused a twenty-five-year delay in the publication of the Brennan biography. It’s as if the genre of judicial biography were under a malediction.

Which is not to say that a judge’s biography should be begun the day he dies or while he lives, for if it is begun too soon, the biographer will lack perspective. Dorsen began his biography when Friendly had been dead for twenty years, and completed it in six. He interviewed every one of Friendly’s fifty-one law clerks (all but one in person rather than by phone), along with Friendly’s favorite secretary. He interviewed many of the lawyers who appeared before Friendly, and the judges, still living, who knew him. Friendly’s elder daughter, a psychologist, talked at length to Dorsen about her father, with candor and insight, as did other close relatives. Dorsen had access to all of Friendly’s case files—an enormous trove, which Friendly

had donated to Harvard—and to Friendly’s very extensive correspondence, and to two extensive oral histories. And Dorsen did what few judicial biographers have had the patience to do, and that was to read extensively in the briefs, and the tapes or transcripts of oral argument, in Friendly’s cases, and read newspaper commentary on the cases—even to interview a number of the litigants.

But the assemblage of these materials of unprecedented richness was only the beginning of Dorsen’s task. The materials had to be sifted and organized and analyzed; a narrative framework imposed; description of the life and of the work balanced; the relationship of background, family personality, education, and experience to Friendly’s judicial and extrajudicial work explored; and the work itself characterized and evaluated. Dorsen had to explain what made Judge Friendly tick and in what lay the distinctiveness and distinction of Friendly’s career.

He has done all that, and as a result we learn more about the American judiciary at its best than we can learn from any other biography—not only more, but an immense amount. I got to know Friendly quite well in the four and a half years during which our judicial careers (mine starting, his ending) overlapped. I not only find nothing in Dorsen’s description and assessment of Friendly with which I disagree; I have learned much about Friendly that I did not know. Some of what I’ve learned has already induced me to make certain changes in my judicial practice; it will, I predict, have a similar effect on other judges; and by revealing what the best federal appellate judge of the past half century was really like as a judge it will help lawyers to understand judges, and thereby serve their clients, better.

I don’t want to give the story of Henry Friendly away, in all its rich detail. But I do want to offer a few reflections that might otherwise escape the notice of some readers. A minor one perhaps is the remarkable ability of people, or at least of remarkable people, to rise above physical and mental ill health. Friendly suffered throughout his life from serious eye problems, yet he must have spent almost all his waking hours reading or writing (by hand). In addition, he suffered from depression—not quite “clinical depression,” because he was missing some of the symptoms (notably, difficulty concentrating!), but serious enough that today someone as afflicted as he was would probably seek treatment. Yet neither the eye problems nor the depression slowed him down. He was immensely hard working and productive, and one cannot imagine his having worked harder or faster than he did had he been in tip-top health, except that the combination of vision problems and depression did shorten his life. He killed himself at a time when his mental acuity was unimpaired but his eyesight was going, and his spirit had been crushed by the death the previous year of his wife, whose high spirits had

helped keep his depression in check. Because of depression he seems not to have obtained much pleasure from most of his work either as a practicing lawyer or as a judge, and while he knew that he was an outstanding judge he took only limited comfort from that realization because he considered judging a mere craft rather than an art or a science.

Another reflection that occurs to me, one supported by virtually every candid biography, is that people are not of a piece, or at least high achievers are not, or not often. There were five quite different Henry Friendly: Friendly *en famille*—cold, taciturn, remote, and awkward; Friendly among his peers, mentors, clients, colleagues—tactful, personable, friendly, effective; Friendly in his dealings with his law clerks and with many of the lawyers who appeared before him—curt, grumpy, intimidating; Friendly in his judicial opinions and academic writings—formal, erudite, almost Teutonic; and finally Friendly in his correspondence—graceful, warm, generous, light—Bizet to the Wagner of his judicial opinions.

And something that may surprise some readers of the biography: brilliant people sometimes have great difficulty making productive use of other people. I am not speaking of delegation; there is too much of that among modern judges. It would have been a great waste of Friendly's time to have worked from opinion drafts of his law clerks, as most judges do nowadays, rather than writing his opinions himself, from scratch, as he did. But his clerks were very bright and energetic and could have helped more with research and even with critique of his drafts than they were allowed to do. He wasn't immodest, and he welcomed the occasional challenge from a clerk. But he didn't create an atmosphere conducive to eliciting criticisms and suggestions, or establish work protocols that would have maximized the clerks' contribution to his judicial decisions. He was so quick, so knowledgeable (having a photographic memory helped), and so experienced that he must have thought he could do everything himself faster and better than a law clerk could do anything—which may have been very close to the truth. The rapidity with which he wrote long opinions in near-final form astonished the clerks; it astonishes me.

Timing, I said, is important to biography; it is also important to a career. Friendly would have been a great judge in any era, but his contribution to the law would have been less in quieter times. His service as a judge coincided with a turbulent period in the history of the federal judiciary. The hammer blows of the Warren Court reached their crescendo in his first decade on the Second Circuit and were followed by the fractious and erratic jurisprudence of the Burger Court, all against a background of soaring caseloads in the lower federal courts. Friendly's opinions and academic writings, in field after field, proposed revisions and clarifications of doctrine that time after time the Supreme Court gratefully adopted.



My final reflection is, to me at least (I'm a judge, after all), the most important, because it concerns Friendly's essential qualities as a judge, which I think tend to be misunderstood—though not by Dorsen. Friendly was only sixteen when he entered Harvard College, and his academic performance as an undergraduate and then as a law student was sensational—probably the best in Harvard Law School's history. (Brandeis had had higher grades, but the grading system had later been reset to a lower level.) Friendly's photographic memory combined with his analytical power, energy, speed, and work ethic to make him the most powerful legal reasoner in American legal history. And so one might suppose that he was a formalist judge par excellence, deploying text and precedent to produce decisions that satisfied the legal profession's longing for formal correctness and objective validity. But that was not the kind of judge he was. He tempered academic brilliance with massive common sense. He was less mercurial, more matter-of-fact, than any of the other great judges. (The contrast in this respect between him and Learned Hand is particularly marked.) He saw cases not as intellectual puzzles to be solved but as practical disputes to be resolved sensibly and humanely. He bent his powerful legal intelligence to the service of shaping legal doctrine to the enablement of sensible results in individual cases. The aim was to improve the law—American law is in constant need of improvement, in fact is a mess to a degree that only insiders can appreciate—without unduly perturbing the doctrinal and institutional framework that provides necessary stability and continuity. Like all creative judges, Friendly did not feel himself bound by the issues as framed by the lawyers, and at times, we learn from this book, was surprisingly casual about waived or forfeited arguments. He didn't just decide interesting cases; he made interesting cases. He thus was something of a judicial buccaneer—a role not to be recommended, however, to the average judge. There are leaders and followers in adjudication as in other activities, and it is of a consummate leader that David Dorsen has produced a consummate biography.

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## Introduction

HENRY FRIENDLY SUCCEEDED brilliantly at just about everything he did (athletics being an exception). Born in 1903 in Elmira, New York, he was the only child of a comfortably-off German-Jewish family. He went to public schools there before attending Harvard College and Law School; he graduated summa cum laude from both schools and was president of the *Harvard Law Review*. He had the highest numerical average at the law school since Louis Brandeis, Class of 1887.<sup>1</sup> He clerked for Brandeis in 1927–1928 and, turning down several offers to teach at Harvard Law School, became an associate, then a partner, at a Wall Street firm that is now Dewey & LeBoeuf (before 2007 it was Dewey Ballantine). In 1930 he married Sophie Pfaelzer Stern, the daughter of an esteemed Pennsylvania jurist and a prominent member of Philadelphia society. Their three children, one boy and two girls, all married and had children. In 1946 he helped form Cleary, Gottlieb, Friendly & Cox and also served as vice president and general counsel of Pan American Airways. He was appointed to the U.S. Court of Appeals for the Second Circuit in 1959. Under his patina of ordinariness was a complex person with an active inner life, not to mention a remarkable list of successes. In 1985 his wife succumbed to cancer; a year later, distraught over her death and burdened by concerns over his own health, he took his life.

Trials are mostly about facts, circumscribed to some extent by legal constraints, especially defining what a plaintiff must prove to prevail and

what evidence he may properly present to the trier of fact to prove his case. By the time a case reaches the U.S. Supreme Court, which only a minuscule percentage do, all the facts are drained from it and the issues are almost abstract questions of constitutional or statutory law. In between in the federal system are the U.S. courts of appeals for twelve geographically defined circuits and one specialized court, to which a losing party can appeal as of right and present any issues he claims should require reversal. Those proceedings examine rulings made at trial (or earlier) to determine whether they were sufficiently in accord with the law to warrant affirmance of the result below or, alternatively, were so flawed as to require outright reversal or a new trial. Matters of fact are not reviewed except to place the legal issues in context or, on occasion, to determine whether the trier of fact resolved them so clearly erroneously as to constitute legal error. As a result, an argument in a court of appeals may bear little resemblance to the dominant concerns and disputes at the trial.

Since circuit judges almost always sit on panels of three and are subject to Supreme Court review, their power is fragmented and, in most areas of the law, greatly circumscribed by precedent. The role of a judge on the courts of appeals, unlike that of federal trial judges and Supreme Court Justices, is neither well understood nor appreciated, even though in the overwhelming run of cases they have what is tantamount to the last word. Compared to Supreme Court Justices, the job of circuit judges is unglamorous, though in many respects more difficult. Their caseloads are heavier, and they have to deal with every issue the parties raise on appeal. They decide cases on a far vaster range of subjects. Moreover, the help they receive from the parties' lawyers is frequently minimal compared to the far more thorough and careful product provided to the Justices. The discussion that follows demonstrates the extent to which Friendly and other circuit judges were required to supply, or at least considerably amplify and refine, the parties' arguments.

One scholar has noted, "The general public is, I suspect, unlikely to care very much about a court's reasoning process . . . ; the public concern is with results."<sup>2</sup> Because there are thirteen courts of appeals and the subject matter of the cases they hear tends to be mundane, the decisions of circuit judges are rarely evident to the public. Consequently, *how* Friendly decided cases may be more informative than *what* he decided. The influence of a circuit judge on the development of federal law depends largely on whether other federal judges view his work as worth emulating. On that criterion, as well as others, Friendly demands attention. He was productive, writing 1,056 published opinions (890 for the court, 88 dissents, 74 concurring, and 4 in the district court, not inclusive of *per curiam* opinions of which

he was the author). This book portrays the life and work of an exceptional federal judge sitting on an important appellate court, the federal court that hears appeals from judgments of the U.S. district courts in New York, Connecticut, and Vermont.

Unusually, Friendly wrote virtually all his own opinions, and he did so almost always in a day or less. (Critics have had more time to analyze them.) He not only wrote opinions; he gave lectures and authored dozens of articles and shorter pieces printed in law reviews. Larry Kramer, a former law clerk and later the dean of Stanford Law School, describes as “amazing” Friendly’s ability, after years of private practice, when he wrote little, to compose seminal articles in a number of fields.<sup>3</sup> A list of Friendly’s law clerks appears in Appendix A, and a list of his nonjudicial writings is in Appendix B. Between his opinions and articles there was hardly an area of the law he did not influence.

I have organized Friendly’s life through his years in private practice chronologically, and I have organized most of my discussion of his judicial years by subject matter to facilitate an understanding of his talents in the context in which they showed themselves. In researching his pre-judicial years I have benefited from six oral histories he provided, all of which centered on that period. As far as I can tell, no portion of four of the oral histories has ever been published, and the other two have been cited only in law review articles and then in a limited fashion. I also have been the grateful recipient of many lengthy interviews by Friendly’s two daughters, Joan Friendly Goodman and Ellen Friendly Simon; his daughter-in-law, Irene Baer Friendly; and his son-in-law, Frank Goodman. I have also spoken to other members of his family.

For my discussion of Friendly’s judicial years, I have examined all his judicial opinions and the dozens of extrajudicial writings, listed in Appendix B. Made available to me by the Second Circuit and the Special and Historical Collections Division of the Harvard Law School Library were his private papers, consisting of thousands of internal court memoranda and pieces of correspondence. With the help of the U.S. Archives and the Association of the Bar of the City of New York, I was able to review the parties’ briefs filed in ninety-five cases in which Friendly wrote an opinion, and I listened to recordings of oral arguments (although many important ones are missing). I conducted more than 250 interviews, including those of fellow circuit judges, district judges whose work he reviewed, Supreme Court Justices, former colleagues from private practice, friends and acquaintances of his, all fifty-one of his law clerks (fifty in in-person interviews), three of his secretaries, knowledgeable academics, lawyers who appeared before him, and five parties in the cases in which he wrote opinions.

I met Judge Friendly before he was a judge. His daughter Joan, now ombudsman and professor of education at the University of Pennsylvania, was at Radcliffe when I was at Harvard College (both Class of '56), and she introduced me to her father. I saw him on a couple of social occasions. Joan married Professor Frank Goodman of the Pennsylvania Law School, a classmate of mine at Harvard Law School and a friend. Later, as an Assistant U.S. Attorney in the Southern District of New York (1964–1969), working in the same building as the U.S. Court of Appeals for the Second Circuit, I greeted the judge from time to time in the halls, argued several cases before him, and sat at counsel table several times while my colleagues argued before him. He was awesome on the bench and had a towering reputation, but at that time I knew only a small fraction of his accomplishments.

This biography is neither authorized nor underwritten by anyone, and I neither sought nor received exclusive rights to any material. Only after I had decided to write the book did I contact the Friendly family. I had seen Joan and Frank Goodman only a few times since 1959, and I had never met other members of the judge's family. Friendly's two surviving children, along with Frank Goodman and Irene Friendly, the widow of his son, David, offered information, discussion, disagreements, and arguments, all of which materially improved my book. I also interviewed Stephen Simon, the divorced spouse of Ellen Simon, and talked to ten of Friendly's eleven grandchildren. The children and their spouses wanted the work to portray Judge Friendly as faithfully as possible, and I have tried to do just that as my compliment to and respect for a remarkable judge.

## CHAPTER ONE

### Early Years

HENRY JACOB FRIENDLY'S ancestors were dairy farmers in Wittelschhofen, Bavaria, in southern Germany, who, when Bavaria passed a law in the eighteenth century that required everyone to take a last name, adopted the name Freundlich (which translates to "Friendly"). While the extent of their religious devotion is unknown, the first Freundlichs in the nineteenth century had two seats at the local synagogue: one male seat and one female.<sup>1</sup> Friendly's great-grandfather, Josef Myer Freundlich, was born in 1803, married Lena Rosenfeld, also of Bavaria, in 1829, and died in 1880. According to a contemporary account, their estate burned down in 1831, apparently as the result of an accident. When their neighbors did nothing to extinguish the fire, because, the Freundlichs believed, they were Jewish, the couple sold their home and moved to the center of the village. Nevertheless, Josef remained a farmer and livestock dealer and prospered.

In 1852, to avoid serving in the German army, Josef's son Heinrich, Friendly's grandfather, and his brothers emigrated to the United States, changing their name to Friendly. A naturalized Henry Friendly (who changed his name from Heinrich) married Lena Hesslein, also from Bavaria, in New York City in 1860, and moved to the town of Cuba in upstate New York, where his parents joined him a decade later. Starting as a peddler, he soon owned a dry-goods store and then a carriage factory.<sup>2</sup> He had two sons, the first of whom, Myer Henry, the father of the future judge, was born in Cuba in 1862.<sup>3</sup> To work for his uncle Samson Friendly in the



manufacturing and jobbing of shoes, Myer moved to Elmira, New York, at the age of eighteen.

At the turn of the century Elmira was a town of about forty thousand, as it is today. It was passionately Republican, from which there was no dissent within the Myer Friendly household. The family lived on the west side of town, which was primarily inhabited by Christians. The Jewish population, living mostly on the east side, was about four thousand. The German-Jewish community, of which the Friendly family was a prominent part, was quite small, with about a dozen families and few children. Grandfather Henry became active in civic affairs, serving as commissioner of parks and Jewish affairs and becoming president of a liberal temple, the Congregation B'nai Israel. A monograph on the first Jewish settlers in the area described him as “a man of stern and thrifty qualities” who was generous to Jewish congregations in the community. The same monograph credited him with innovative trimming of trees in one of the parks, a controversial move at the time, but one that experts from Cornell University validated. Another monograph, commemorating the centennial of B'nai Israel, referred to him as “generous” and “one of the leading men of Elmira in the late nineteenth century.”<sup>4</sup>

In 1897, at the age of thirty-five, Myer married Leah Hallo of Meshoppen, Pennsylvania, the youngest of four daughters, whose father was a shopkeeper.<sup>5</sup> Named for his two grandfathers, Henry Friendly and Jacob Hallo, Henry Jacob Friendly was born on July 3, 1903. His parents were then forty-one and thirty-three, old in those days for a first child. In the early years of their marriage Leah had not been happy, once leaving and moving in with her sister Mattie and her husband, Max Heimerdinger, who lived in Chicago. Myer persuaded Leah to return; Friendly later commented, “I take it that I was the result of that persuasion.” At three years, five months, precocious little Henry Jacob used the words “interrupt,” “impatient,” “depend,” “consider,” and “properly”; two months later he knew the letters of the alphabet; at four years and eight months he could point out on a map and spell the names of most foreign countries. At seven he could read almost any book written for adults.<sup>6</sup>

Although not a high school graduate, Leah was diligent and precise and had a superb memory, remembering not only what had happened but when it did. Later, she became an excellent bridge player. Seeking to improve herself, she joined and became the head of the local Shakespeare Club. She liked to read to her son when he was having eye trouble, which started at an early age. Leah poured all her attention on her son—“there was absolutely nothing she wouldn't have done for me,” he remembered. She was