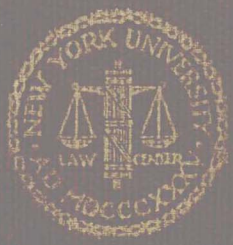

NEW YORK UNIVERSITY
LAW CENTER

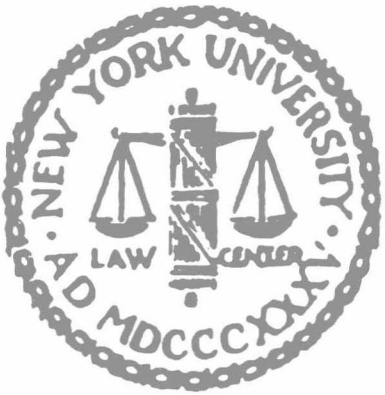
1978

ANNUAL SURVEY OF AMERICAN LAW

NEW YORK UNIVERSITY SCHOOL OF LAW
ARTHUR T. VANDERBILT HALL
Washington Square
New York City
Published by
Oceana Publications, Inc.
Dobbs Ferry, New York

L.C. Cat. Card No.: 46-30523
I.S.B.N. 0-379-12237-5

Printed in the United States of America



For what avail the plough or sail
Or land or life, if freedom fail?
EMERSON

Administrative Assistant ..... Mary W. Smith

Index ..... Margaret Aycock

Faculty Advisor ..... John P. Reid

This Volume of the Annual Survey of American Law

is respectfully dedicated to

THE HONORABLE HENRY J. FRIENDLY

DEDICATION

Happy it was for him, and for us, that just at the right time, neither too early nor too late, he was called to the bench.

With these words, written sixteen years ago, Judge Henry J. Friendly commended the fortuitous delivery of Oliver Wendell Holmes from the classrooms of Harvard to the Supreme Judicial Court of Massachusetts. Unlike Justice Holmes, Judge Friendly did not proceed immediately from Harvard to the bench. He was delayed, first by a year as law clerk to Justice Brandeis and then by thirty-one years as an attorney in New York. But despite the delay, Judge Friendly's tenure on the United States Court of Appeals for the Second Circuit began with such rightness of timing and has brought such happiness to himself and to others that his words are as descriptive of his own call to the bench in 1959 as of Justice Holmes's in 1882.

Law students, particularly those of the current generation, can best appreciate the timeliness of Judge Friendly's call to the bench. To his opinions and other writings—our primary means of knowing him—he brings not only a superior mind and an astounding breadth of scholarship, but also an intimacy, both personal and intellectual, with "those great men who, in the first decades of this century, remolded our law" (to use another of his phrases). This rare convergence of exceptional qualities in a judge has made him uniquely qualified to interpret, develop, and convey the jurisprudence of an earlier time. He is the undisputed custodian of the legal wisdom of the recent past, and the current generation of law students can be grateful that his call to the bench came early enough for him to have acquired that wisdom directly from those who brought it forth and late enough for him to pass it along as our contemporary.

Just how happy his call to the bench has made him, only Judge Friendly can truly know. But of the happiness his tenure there has brought us, we can be certain. It has presented us with the inspiring example of a judge who relishes every aspect of his task. It has released upon us an eloquence capable of describing Justice Brandeis, for example, as one of the "gifts made to America by 1848." It has delighted us with demonstrations of a mental agility capable of making, in one notable instance, the unlikely leap from the fortieth chapter of Magna Carta to the overabundance of motor vehicle litigations in the courts.

Judge Friendly's outstanding qualities, many of which are recounted in the tributes that follow, make him the judge to whom we readily and confidently turn to locate, in our own time, the ideal of the

American judicial tradition. As he begins his twentieth year of judicial service, the Editors of the 1978 *Annual Survey of American Law* take great pride in dedicating their volume to the Honorable Henry J. Friendly, Senior Judge of the United States Court of Appeals for the Second Circuit.

TRIBUTES

As practitioner, scholar, and jurist, Henry J. Friendly has been an influential participant in the growth of American law for fifty years. As Judge of the United States Court of Appeals for the Second Circuit for almost two decades and Chief Judge of that court, he followed the path of the Hands, Clark, and Swan, carrying on the remarkable tradition of that circuit. He has a deserved reputation as master of the craft of judging. Doing so he has lived up to his own rules which he prescribed for judges and administrators:

> that the decider should cerebrate rather than emote about what he is deciding; that he should endeavor to provide a principle that can be applied not simply to the parties before him but to all having similar problems; that he should tell what he is doing in language that can be understood rather than indulge in flights of rhetoric.[1]

This insistence upon the need to develop standards "sufficiently definite to permit decisions to be fairly predictable and the reasons for them to be understood,"[2] has influenced the growth of recent administrative law. Perhaps equally important is that he practices the philosophy that the best judicial writing style is no style—just clarity.

As a judge, Friendly has never lost sight of the precept that although a court may be inspired by the highest of motives, it may move too far too fast. He moves but does not "leap." He is well aware of the great advantages legislatures have over courts in making law by relying on the generality of human experience rather than on specific cases.

Less attention has been paid to Friendly's influence upon judicial administration. Like his predecessor, J. Edward Lumbard, and his successor, Irving R. Kaufman, Friendly presided ably over a very busy, outstanding, and diligent court. After serving as Chief of that court, he agreed to take on the unenviable task of presiding over the Railroad Reorganization Court. But perhaps his long run influence will rest to a large extent on his penetrating lectures, articles, and congressional testimony, which have concentrated attention upon the problems of the federal courts. Although very well aware of the "big needs" of the federal courts, Friendly, like Roscoe Pound, is also aware that "petty tinkering" is also necessary to keep the legal system in running order.

---

1. H. Friendly, Benchmarks at viii (1967) [hereinafter cited as Benchmarks].
2. H. Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards 5-6 (1962), reprinted in Benchmarks, supra note 1, at 90.

So, he has drawn attention to such problems as the "growing number of instances in which federal judges are being asked to pass on technological issues they cannot really understand."[3] He has called for a committee to be attached to the legislature to continually reexamine the state of laws, complaining about those cases where "the legislature has said enough to deprive the judges of power to make law . . . , but has given them guidance that is defective in one way or another, and then does nothing by way of remedy when the problem comes to light."[4]

Friendly has been a stalwart supporter of the battle for the abolition of diversity of citizenship jurisdiction in testimony before congressional committees and in lectures, stating that "Quite simply, diversity of citizenship jurisdiction is an idea whose time has gone" and "a luxury we can no longer afford."[5] He has exposed its absurdity with wit in his opinions:

> Our principal task . . . is to determine what the New York courts would think the California courts would think on an issue about which neither has thought.[6]

In his master work, *Federal Jurisdiction*,[7] Friendly emphasizes that "the inferior federal courts now have more work than they can properly do—including some work they are not institutionally fitted to do."[8] His thesis is that the general federal courts will best serve their country if their jurisdiction is limited to tasks which are appropriate to courts of general jurisdiction where federal judges can make a distinctive contribution.[9]

His was one of the strong voices disapproving the Supreme Court's "wholesale" revision of criminal procedure on a case by case basis rather than by rule-making. He was concerned about the expan-

---

3. Friendly, The Federal Courts, in American Law: The Third Century 206-07 (B. Schwartz ed. 1976).

4. Friendly, The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't, 63 Colum. L. Rev. 787, 792 (1963), reprinted in Benchmarks, supra note 1, at 47.

5. Diversity of Citizenship Jurisdiction/Magistrates Reform: Hearings on H.R. 761, H.R. 5546, and H.R. 7243 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. at 208, 199 (1977) (prepared and oral statements of Henry J. Friendly).

6. Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960), remanded, 365 U.S. 293 (1961).

7. H. Friendly, Federal Jurisdiction: A General View (1973) (published version of the James S. Carpentier Lectures).

8. Id. at 3-4.

9. Id. at 13-14.

sion of the exclusionary rule, warning that total exclusion seriously impedes the state "in the most basic of all tasks 'to provide for the security of the individual and his property,' "[10] and has suggested that the same authority that empowered the Court to "supplement the amendment by the exclusionary rule a hundred and twenty-five years after its adoption, likewise allows it to modify that rule as the 'lessons of experience' may teach."[11]

Writing in 1967 about criminal procedure, Friendly emphasized that "what haunts this whole subject is that so many say so much while knowing so little."[12] It is fortunate that Henry Friendly has experienced so much and has been willing to say so much—with wit at the appropriate time and with elegance—about so many subjects.

WARREN E. BURGER

Chief Justice
United States Supreme Court

---

10. Friendly, The Fifth Amendment: The Case for a Constitutional Change, 40 Pa. B.A.Q. 524, 526 (1969).

11. Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929, 952-53 (1965) (footnotes omitted), reprinted in Benchmarks, supra note 1, at 261.

12. H. Friendly, A Postscript on *Miranda*, in Benchmarks, supra note 1, at 278.

HENRY J. FRIENDLY—A COLLEAGUE'S APPRECIATION

I am pleased to salute a giant of American law, my friend and colleague, Henry J. Friendly. As in the case of Learned Hand, a man that we have both long idolized,[1] the fact that Henry has never sat on the Supreme Court must be counted as one of those inexplicable accidents of history that never could have occurred in an ideal world. That he has nevertheless affected the law profoundly and in diverse fields is all the more to his credit. His impact has derived not from the loftiness of his position but from the awesomeness of his intellect.

That, of course, would have been no surprise to those who knew Henry early, for even as a young man he walked with titans. He graduated *summa cum laude* from Harvard College and then duplicated the achievement at Harvard Law School, where he led his class and found time to serve as President of the Law Review. With such credentials it was inevitable that his friend and mentor, Felix Frankfurter, would select him as law clerk to Justice Louis Brandeis. But then Frankfurter suggested that first Henry take an extra year in Cambridge. When Emory Buckner, for whom Henry had worked the previous summer at the United States Attorney's Office, advised otherwise, the young law student became the subject of a heated controversy between the two older men. They agreed only on their premise, that Friendly was, as Frankfurter put it, "a very special case—a man of truly extraordinary talents."[2]

Henry took the advice of his former employer rather than of his professor, spending the year 1927-1928 in Washington with Justice Brandeis and developing a lifelong admiration for "Isaiah" and his faith in "the relentless, disinterested and critical study of facts."[3] His clerkship over, Henry Friendly joined Root, Clark, Buckner, Howland & Ballantine, where he worked closely with Buckner's top assistant, John M. Harlan. In 1946, he joined with George E. Cleary, Leo Gottlieb, and others in forming a firm that enjoys the highest regard of the New York bar. His manifest ability brought an appointment to the United States Court of Appeals for the Second Circuit in 1959. There he sits today, his tenure adorned by a term as Chief Judge in 1971-

---

1. See Friendly, Learned Hand: An Expression from the Second Circuit, 29 Brooklyn L. Rev. 6 (1962), reprinted in H. Friendly, Benchmarks 308 (1967) [hereinafter cited as Benchmarks].

2. Letter from Felix Frankfurter to Emory Buckner (Nov. 30, 1926), quoted in M. Mayer, Emory Buckner 150 (1968).

3. Friendly, Mr. Justice Brandeis: The Quest for Reason, 108 U. Pa. L. Rev. 985, 999 (1960), reprinted in Benchmarks, supra note 1, at 307.

1973 and, in service still continuing, as Presiding Judge of the Special Court organized under the Rail Reorganization Act of 1973.

And so Felix Frankfurter's wish that Henry would return to Harvard as a teacher has never been gratified. Nevertheless, I think it is fair to say that an entire generation of law students owes its legal education as much to Henry as to many tenured professors. It is, after all, only half true to say that he has never written a textbook. To be sure, his name has never appeared on the cover, but many casebooks feature his name prominently inside.[4] Only the fact that judicial opinions are in the public domain has prevented Henry from capitalizing financially on the wisdom he has generated from the bench. He has settled numerous important and troublesome questions of law, firmly planting torchlights on which posterity can rely for illumination. All his opinions partake, as do his classic lectures,[5] of his wonderful capacity for scholarship.

The primary function of Henry's clerks is to act as a sounding board for his analyses, and to keep him abreast with the latest currents in academic legal thinking. This is not surprising, for Henry is—without giving his dear Sophie any cause for jealousy—in love with the law. Like Learned Hand and the great law professors whom he so eloquently described,[6] Henry seeks no quarter from absolutes where ambiguity prevails. Whether the amount at issue be trivial or monumental is of no interest to him. An interesting question of law is what fires his intellectual passion. Even if it is on the periphery of an apparently unimportant case it is sure to draw from him meticulous attention.

It is for that reason, and because somewhere along the line a malicious rumor has arisen that he does not suffer fools lightly, that all who are involved in a case in which Friendly, J., is sitting—law clerks, advocates, and even his own colleagues—prepare with extraordinary care. Nothing, they know, will escape that piercing mind. The entire courtroom vibrates at its finest pitch when Henry Friendly is on the bench.

---

4. See, e.g., R. Jennings & H. Marsh, Securities Regulation (4th ed. 1977), which reprints all or part of no fewer than ten Friendly opinions, beginning at 98, 706, 880, 882, 892, 1215, 1224, 1358, 1383, & 1399. One opinion, Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281 (2d Cir. 1973), is reprinted in three parts, beginning at 892, 1018, and 1071.

5. E.g., Benchmarks, supra note 1 (collected lectures and articles); H. Friendly, Federal Jurisdiction: A General View (1973) (published version of the James S. Carpentier Lectures).

6. "In the universe of truth they lived by the sword; they asked no quarter of absolutes and they gave none." L. Hand, The Bill of Rights 77 (1958), quoted in Friendly, Hand, supra note 1, at 8; Benchmarks, supra note 1, at 310.

In open court, however, Henry rarely has an opportunity to give his full analysis of the case. To his colleagues, who are fortunate enough to hear it, it is a breathtaking experience, as he analyzes with lightning speed the primary, secondary, and even tertiary issues and the possible dispositions of each. It is akin to watching a master artist, in a matter of minutes, complete a sketch of a tree, with every detail correct down to the last twig.

Cold intellectual power is not the limit of Henry's gifts. He is also blessed in abundance with understanding and imagination. A steady and serious worker, he is no source of champagne anecdotes, but those close to him know that he is a true and loyal friend, with a firm character, a warm heart, and a generous spirit. He has shed an enduring glow not only on the law but on the lives of all who know him.

IRVING R. KAUFMAN

Chief Judge
United States Court of Appeals for the Second Circuit

HENRY J. FRIENDLY—A TRIBUTE TO A FELLOW JUDGE

Early in 1958 we five "active judges" on the Court of Appeals for the Second Circuit knew that Henry J. Friendly was under consideration for nomination to the vacant judgeship on our court; and we, together with our three active "senior judges," Judges Hand, Swan, and Medina, hoped that we might have him as a colleague. I personally had never met him but, of course, knew of his outstanding, his overwhelming, reputation as a scholar and as a successful practitioner. There is no need for me to enlarge upon that!

The months went by. The nomination was not immediately forthcoming, but our hopes remained high. At the 1958 American Law Institute meetings he was pointed out to me and thereafter, to my great delight, I became acquainted with him and Mrs. Friendly socially. However, it was not until October 1, 1959, when, by the somewhat earlier taking of senior status by Judge Hincks that year, we "actives" had become only four, that Henry finally joined us. The effect on us as individuals and the effect on the court as an institution was immediately dramatic. We had actually acquired as a colleague that most prestigious lawyer, that incredible Harvard Law School *summa cum*! It was hard to believe, but it was most welcome to believe.

The dramatic effect on the court I think I can best explain by referring to events of the first week that Henry sat with us. I was privileged to sit with him during that entire October 6, 1959, week and was privileged to concur with him in the first opinion he ever wrote for us, a per curiam written and filed on October 7, the day the appeal was argued, *Muryn v. New York Central Railroad*, 270 F.2d 645 (1959). It should go without saying, but I am saying it nevertheless, that I was mightily impressed, as indeed I expected to be, with his quick grasp of the issues in the cases we heard that first week. They were not all easy P.C. cases such as *Muryn* was. Indeed, Monday's first case later took the torturous *en banc* path, Henry first writing the majority panel opinion and then the three subsequent majority opinions filed during the *en banc* proceedings, *United States v. New York, N.H. & H.R.R.*, and another consolidated case, all reported in 276 F.2d at 525, 536 (1959) and 537, 553 (1960). And on Thursday Judge Hand, whose happiness over Henry's appointment was boundless, sat in with us on a couple of cases and wrote opinions in them, doing so, I think, just to show his delight and to welcome Henry. How privileged I was to be the third member

of such a panel and to sit on the same welcoming bench with the brilliant Old Chief and our brilliant newly-acquired colleague! The *en banc* case involved appellate jurisdictional problems, and a cursory examination of the opinions Henry wrote demonstrates lucidly how articulate Henry can be in explaining step by step the reasoning processes of which he is such a master.

We early learned from him that a cogent opinion could be fascinating reading and that important forensic results could be satisfactorily couched in exciting and provocative language without either turgid or rough-tongued phrasing. For example, later in that very first term he started off his opinion in *Nolan v. Transocean Air Lines*, 276 F.2d 280 (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." (See also, after remand, 365 U.S. 293 (1961), at 290 F.2d 904 (1961).)

This delightful gambit is, of course, a felicitous opening into his discussion of the time-bar issues confronting him in the case; but how effective it also is as a prologue for discussions in the areas of examination of the problems of diversity jurisdiction, of choice of law, of federal court jurisdiction and practice, of state-federal relations, you-name-it—areas where, after deep study, my eminent colleague has definite ideas and has written much.

Henry took for his chambers in the Court House a suite available on the floor where I had mine. There are but four suites on that floor. This arrangement has continued from 1959 to the present. We were "active judges" together for more than eleven years before I took senior status in November 1970. He, after serving two years (1971-1973) as Chief Judge of the Circuit, became a Senior Judge in April 1974. We each have retained our suites and each have carried on some judicial activity, he a great deal more than I; see, for example, his 1977 comprehensive opinion in an area of extraordinary difficulty and importance, *In re the Valuation Proceedings under Sections 303(c) and 306 of the Regional Rail Reorganization Act of 1973*, 445 F. Supp. 994 (1977), which I have reason to believe Henry considers to be one of his best opinions. Thus, for almost twenty years we have had not only a collegial relationship, but I like to think also a special familiarity arising from this neighborly association.

Contrary to the old trite banality that "familiarity breeds contempt," this familiarity has bred in me an admiration that has grown fuller and deeper year by year.

Of course, we have had many conferences about pending cases and judicial matters; but despite the fact that Henry must recognize that he is possessed of unusual talent he has always while conferring with me