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JUDGE HENRY FRIENDLY AND THE CRAFT OF JUDGING*

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How judges decide cases is a subject on which Henry Friendly sometimes touched in his writings. An example, published in this school's law journal, was his book review of Karl Llewellyn's great work on appellate judging;¹ but Friendly seemed mildly amused at Llewellyn's complex scheme and unique vocabulary. Anyway, Judge Friend-

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[†] Judge, U.S. Court of Appeals for the First Circuit. Appreciation is owed to my law clerks, Robert Allen, Dina Mishra, Kenneth Reinker, and Weili Shaw, and to my friends Judge Pierre Leval and Frederick Seidel, who read an earlier draft of this lecture.

¹ Henry J. Friendly, Book Review, 109 U. PA. L. REV. 1040 (1961) (reviewing KARL N. LLEWELLYN, *THE COMMON LAW TRADITION—DECIDING APPEALS* (1960)). On other occasions, Friendly touched on the subject, either in some detail, *see, e.g.*, Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21 (1978); Henry J. Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 YALE L.J. 218 (1961) [hereinafter Friendly, *Reactions of a Lawyer*], or in passing, in book reviews and tributes, *see, e.g.*, Henry J. Friendly, *Thoughts About Judging*, 79 MICH. L. REV. 634 (1981).

ly's own bent was toward history, not jurisprudence, and after three decades of arguing cases and advising clients, Friendly's craftsmanship was in his bones.

Yet interest in the subject of how judges decide cases continues to flourish. Recently, scholars have offered differing views on whether and to what extent federal circuit judges are, or should be, influenced by precedent, by statutory language, by the slant of the president who appointed them, by the political affiliation of their own colleagues, by the size of their circuits, by the presence or absence of dissents, by the practical consequences of their decisions, and by their own social goals and temperament.² Judge Friendly's own decisions, along with the work of a handful of other judges, are the gold standard in American appellate judging. So it is worth pondering what Friendly's body of court work can teach us about him and about the enterprise of deciding appeals.

Appellate judges have the peculiar burden of seeking to do three different things at the same time: first, to determine and respect "the law," this vast collection of constitutional provisions, statutes, precedents, canons, and other paraphernalia; second, to reform doctrine, if permissible and when appropriate, in light of new insights, experience, and social imperatives; and finally, to get the specific quarrel settled in a just and practical way. Naturally a potential exists for conflict among these aims—the difficulty of riding several horses at the same time—but let us defer that problem for the moment.

Along with other strengths, Friendly brought to the tasks of law finding, law improvement, and sound outcomes two qualities in which perhaps no American judge has surpassed him: a skill in wielding the legal tools and a quality of judgment honed by years of private law practice and service as general counsel to a great corporation. His education and professional background have been considered at

² See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005) (advocating a method of constitutional interpretation focused on promoting "active liberty"); RICHARD A. POSNER, *HOW JUDGES THINK* (2008) (examining various intellectual methods of judging); Jeffrey M. Chemerinsky & Jonathan L. Williams, Foreword, *Measuring Judges and Justice*, 58 DUKE L.J. 1173 (2009) (discussing the burgeoning field of legal empiricism); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178-79 (1989) (arguing that traditional common law case-by-case adjudication is difficult to square with a discretionary Supreme Court docket); Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. 1049, 1080-89 (2009) (discussing the differences between "trimmers" and "minimalists"); Edmund Ursin, *How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking*, 57 BUFF. L. REV. 1267, 1339-45 (2009) (reviewing Judge Friendly's views on social policymaking by judges).

length elsewhere.³ Here, taking as a surrogate a few examples from cases he decided during a single Second Circuit term, let us explore how he went about deciding cases and how his experience informed this exploration.

Common law judging is built on precedent—to Blackstone, precedent was the foundation principle and the crucial restraint that (in Blackstone’s words) kept “the scale of justice even and steady, and not liable to waver with every new judge’s opinion”;⁴ but many lawyers and scholars now doubt whether prior case law much constrains today’s judges. The causes of doubt are multiple: sharp doctrinal shifts by the Supreme Court throughout the twentieth century; realist legal philosophy and its offshoots; the preoccupation of modern courts with policy and consequences. For a law student in the 1960s, a vivid metaphor was Anthony Amsterdam’s likening of conflicting canons of construction to pool balls lodged on parallel racks, waiting to be chosen to support a desired result.⁵

Friendly, by contrast, took precedent extremely seriously, albeit less as a command than as a presumption. His decisions regularly sift through numerous earlier cases, distinguishing some on their facts or in light of what was argued, discerning trends, and explaining aberrant outcomes. His brain seems to have been built for this function. We then remember that he was schooled in the 1920s at Harvard by masters of the art of weighing and dissecting in a time when precedent got more consideration in classrooms and, at least formally, more respect in courts. Consider this sequence from Friendly’s concurrence in a decision:

The authorities on which the [panel majority] relies are not so strong as they might appear. It is indeed profitless to argue whether “dictum” or “holding” best characterizes Judge Frank’s statement in York that a spurious class action tolls the statute of limitations for later intervenors. What is clear is that the intervenors in question were not before the court and that the statement was initially framed without benefit of ar-

³ See, e.g., Michael Boudin, Madison Lecture, *Judge Henry Friendly and the Mirror of Constitutional Law*, 82 N.Y.U. L. REV. 975 (2007); see also *id.* at 975 n.1, 976 n.5 (citing sources that describe Friendly’s extensive judicial experience and his time at the firm now called Cleary Gottlieb Steen & Hamilton LLP). Judge Friendly recorded oral histories for both his family and the Columbia Oral History Project. A full-scale biography of Judge Friendly by David Dorsen is now underway.

⁴ 1 WILLIAM BLACKSTONE, COMMENTARIES *69. The full passage is quoted in William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5, 8 (1994), from which this excerpt is borrowed.

⁵ Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 67 (1960).

gument from counsel. While the question was raised on rehearing, the Court's attention at that time undoubtedly centered on the quite different problems that led Judge A. N. Hand to withdraw his concurrence and the Supreme Court later to reverse.⁶

What has just been quoted is only a portion of what Judge Friendly said about the dubious history and circumstances that qualified the authorities in question.

Part of this attention reflected for Friendly the importance of maintaining stable rules. As a former practicing lawyer and adviser to businessmen, he understood the need for predictability and for protecting reliance. But Friendly's immersion in precedent gave him something more subtle than the "discovery" of some legal rule to be discerned, applied, and perpetuated. Rather, it was an education in the rules and reasons past judges had given in handling like problems, a sense of facts that pushed decisions one way or the other, and the direction and limits of the dominant tendency. Whether this education led him to reaffirm, distinguish, or overturn a precedent is a different question. And, of course, he was not a slave to precedent. Being himself a temperate reformer, Friendly was ready to alter and improve law where this was allowable. He titled his tribute to Roger Traynor *Ablest Judge of His Generation*, and—here the second verb is telling—said that Traynor "illuminated and modernized every field of law that he touched."⁷ A judge of an intermediate federal court lacks the latitude of a state supreme court justice to alter common law; but Friendly, who helped advance the notion of federal common law in a narrower realm, was free to improve federal doctrine in a host of other fields and often did.

In Friendly's law school days, legislation took second place to case law; but in the New Deal, a torrent of statutes spilled out of Washington, and their interpretation has been a central part of federal judging ever since. The task is as demanding as common law judging—and not wholly different in its criteria. Some statutes—the antitrust laws, for example—are nearly blank canvas and invite nothing very different than common law elaboration; other, more detailed enactments confine more but also multiply problems of construction, often as to issues to which no legislative thought was ever directed. Friendly agreed that language mattered but found that language was rarely as rigid as it might appear at first glance and that interpretation, both of

⁶ *Escott v. Barchris Constr. Corp.*, 340 F.2d 731, 735 (2d Cir. 1965) (Friendly, J., concurring) (citations omitted).

⁷ Henry J. Friendly, *Ablest Judge of His Generation*, 71 CALIF. L. REV. 1039, 1040 (1983).

statutes and prior precedents, depended as much on an understanding of purpose and history.

Trained at Harvard College as a historian and always half in love with that calling, Friendly enjoyed identifying the real-world problem the statute sought to solve and unearthing the compromises made in the solution. And he not only could see the parts of the statute in relation to one another but, like an archaeologist, could correlate the present version to prior ones. In one case he gave a limited reading to a change in language, deeming a broader one at odds with the basic structure: borrowing from Justice Frankfurter, Friendly said that Congress “did not inadvertently add a colonial wing to a gothic cathedral.”⁸ In another, after an exhausting march through legislative history and real-world events, he concluded: “While this history would give no sufficient reason for cutting down the words that Congress used, it does afford ground for refusing to expand them.”⁹

More dramatic is a civil rights case in which protestors were charged in state court with disrupting traffic.¹⁰ Based on a Reconstruction Era statute, defendants claimed the right to remove to federal court *all* criminal prosecutions of civil rights demonstrators. Defendants did not contest the fairness of the state court—an express ground of removal under the statute—but relied on a different provision of the statute allowing removal of any proceeding brought “[f]or any act under color of authority derived from any law providing for equal rights,”¹¹ language so bland and broad as to give some linguistic warrant to their position; after all, might not the First and Fourteenth Amendments be just such laws?

However, a trail of statutory language and history led Friendly to conclude that “under color of authority,” even were the phrase applied to private actors (rather than those deputized to assist officers), required some law that not merely permits but “directs or encourages” the act being prosecuted.¹² One who blocked a subway entrance to advocate for equal civil rights was not, Friendly ruled, acting “under color of authority” in committing the trespass or obstruction.¹³ He did

⁸ *Falik v. United States*, 343 F.2d 38, 42 (2d Cir. 1965) (quoting *Interstate Commerce Comm’n v. J-T Transp. Co.*, 368 U.S. 81, 115 (1961) (Frankfurter, J., dissenting)).

⁹ *Willheim v. Murchison*, 342 F.2d 33, 41 (2d Cir. 1965).

¹⁰ *New York v. Galamison*, 342 F.2d 255 (2d Cir. 1965), *cert. denied*, 380 U.S. 977 (1965).
¹¹ 28 U.S.C. § 1443(2) (2006).

¹² *Galamison*, 342 F.2d at 264.

¹³ *See id.* at 265-66 (finding instead that the relevant constitutional provision was the First Amendment).

not dwell unduly on the fact that mass removal of state trespass cases to federal court would have paralyzed prosecutions.

Friendly's power of mind and memory gave him an unusual command of the record and the range and interconnections of the issues posed. In the classroom, attention centers on a single doctrine, such as consideration in the law of contract. By contrast, an appeal to a circuit court regularly presents not "a" legal problem but a welter—some substantive, some procedural, and some ignored or unknown to the parties. *Each* problem in turn may trail subordinate issues. For example, in dealing with a single claim of evidentiary error, a judge may need to consider not only the merits, but also whether an objection was raised, what proffer was made by the offering party, what grounds were given for and against the ruling, what standard of review applies, the relevance of the evidence, and whether the error was plain or harmless.

Figuring out what happened—often with little help from the briefs—is sometimes the hardest part of disposition; and hardly easier is arraying and organizing the potential issues on a mental map; indeed, deciding the issues thus arrayed is often the easiest part of the job for an experienced judge. Any lengthy decision by Friendly exhibits his ability to mine the briefs and record and construct the map. His organizing powers faced their greatest test, and their most remarkable success, in a series of decisions directed to the valuation of most of the major railroads in the eastern United States, an endeavor he himself described in an unduly modest tribute to his friend and colleague John Minor Wisdom.¹⁴

Another problem that appellate judges face is evaluating factual disputes—albeit at one remove from the witnesses. Consider what goes on when a judge asks whether the affidavits created a material issue of fact barring summary judgment, whether a trial judge's factual finding is clearly erroneous, or whether the jury could reasonably find the defendant guilty beyond a reasonable doubt. Friendly was not primarily a trial lawyer, but he had done some trial work, much administrative litigation, and frequent mustering and evaluating facts in briefing appeals.

A good example of how he used this experience is Friendly working out the opposing inferences in a dispute as to whether a company committed an unfair labor practice by firing a worker at least in part

¹⁴ See Henry J. Friendly, *From a Fellow Worker on the Railroads*, 60 TUL. L. REV. 244 (1985) (published posthumously).

because of his union activity.¹⁵ The Labor Board examiner had rejected the charge, noting that the worker had been fired only after his criminal record of violence became known; but a few fragments of evidence supported the unfair-practice charge, and the Board reversed and held the company liable.¹⁶

Friendly agreed that the question was the reasonableness of the Board's interpretation of the evidence—not Friendly's own view of the merits or that of the examiner.¹⁷ He also conceded that the union needed to show only that anti-union animus played some role in the discharge and that the Board was not obligated to defer to the examiner who heard the witnesses: the examiner, Friendly neatly explained, had the advantage in judging demeanor of witnesses, but the factual evaluation depended as well on inference drawing as easily done by the Board.¹⁸

Yet after applying his scalpel to the evidence, Friendly found that “of the four ‘facts and circumstances’ relied upon by the Board to show an anti-union motive in the discharge, all but the second reason, [management’s] knowledge of [the employee’s] union activity, are somewhat unsatisfactory; and the second alone is not enough.”¹⁹ Friendly's discussion of the evidence supporting his assessment is condensed but meticulous and is based on Friendly's own study and synthesis of the record. He wrote in part:

We have already indicated why the first circumstance—the history of improper anti-union activity—must be qualified by the later improvement. The Board's third point rests in part on an official warning to Rodeghiero not to engage in “union talks” but in fact the trial examiner did not decide whether the Benatoviches used these words or a far more innocuous command to stop “disturb[ing] the other people” in view of their complaints. For its fourth point, the Board said that Rodeghiero's ability as a butcher had not been questioned; but Hyman Benatovich testified that Rodeghiero was “the worst” butcher and “not a good worker.”²⁰

Friendly's legal knowledge and analytic skill would not surprise anyone familiar with his breathtaking academic record at Harvard Law School or its repeated efforts to lure him back to its faculty. His later books and articles, almost all written while serving full-time as a busy

¹⁵ *NLRB v. Park Edge Sheridan Meats, Inc.*, 341 F.2d 725 (2d Cir. 1965).

¹⁶ *Id.* at 727.

¹⁷ *Id.* at 728-29.

¹⁸ *Id.* at 728.

¹⁹ *Id.* at 728-29 (citation omitted).

²⁰ *Id.* at 729.

federal judge, would count as a respectable bibliography for an entire career of law teaching. But it was the marriage of these intellectual gifts with worldly experience that uniquely accounts for the character and quality of his decisions.

Perhaps it was a bent toward the practical, as well as material rewards to support a growing family, that led Friendly to join the Root, Clark firm instead of taking up Harvard's teaching offers; but surely it was decades of lawyering that gave him his vital experience in how the world worked—an experience not limited to courtrooms. One lawyer who knew Friendly thought of him primarily as “a business lawyer.”²¹ What can be gleaned of his work as general counsel of Pan American World Airways during its heyday confirms that business lawyering was at least part of his repertoire.²² In fact, he served as well as vice president of the company and as a member of its board of directors.

Evidence of what he took away from practice lies in numerous passages in his opinions—a perception of how the world works often serving as premise for some step of reasoning in the decision. For example, in the same Labor Board case earlier mentioned, the company sought to support its good faith in firing the employee based on his criminal record by saying that its lawyer so advised the firing. Here is Friendly's treatment of the point:

Having apparently learned a lesson from the prior proceeding, [the company's management] engaged an experienced labor attorney who endeavored to keep their conduct within what he considered the range permitted by law. We would not be misunderstood as saying that advice of counsel, even if precisely followed, is a defense to an unfair labor practice charge. But when a party that has erred in the past places itself in the hands of capable counsel who gives reasonable advice for the future, and there is a significant improvement in its conduct, it ought not be viewed as having such a propensity for sin that every episode is given the worst interpretation, or be condemned by indiscriminate repetition of the phrase that its conduct “must be assessed against the background of its earlier unfair labor practices.”²³

²¹ Interview with Leonard Joseph, Partner, Dewey Ballantine (Dec. 8, 1993). Dewey Ballantine was the successor to the Root, Clark firm at which Friendly worked from 1927 to 1946.

²² See generally MARYLIN BENDER & SELIG ALTSCHUL, *THE CHOSEN INSTRUMENT: PAN AM, JUAN TRIPPE, THE RISE AND FALL OF AN AMERICAN ENTREPRENEUR* (1982); ROBERT DALEY, *AN AMERICAN SAGA: JUAN TRIPPE AND HIS PAN AM EMPIRE* (1980).

²³ *Park Edge Sheridan Meats*, 341 F.2d at 727 (citing *Welch Scientific Co. v. NLRB*, 340 F.2d 199 (2d Cir. 1965)).

Friendly knew too that an appeal might well have a life after the judgment was handed down, and he was adept at taking this into account. One small example—an instance of his being a half step ahead of the Supreme Court in protecting defendants' rights and being overturned for his pains—shows how carefully he thought about the stage beyond the one before him. The occasion was a famous capital case that came before Friendly's panel on writ of habeas corpus.²⁴ The defendant—now sentenced to death—had been convicted of murdering a doctor in his home and badly wounding the doctor's wife. The critical fact was that after arraignment and a request for counsel, the defendant had been taken, without a lawyer, to the hospital, where he had been identified by the badly injured spouse, and this identification was introduced at trial.

This, Friendly held—without enthusiasm—violated the defendant's right to counsel as defined by Supreme Court decisions. Given much other evidence against the defendant, the retrial was almost bound to produce a new conviction, but the defendant now anticipated raising for the first time an insanity defense. At the end of his decision, Friendly added a footnote posing the question, but leaving it to parties to argue on retrial, whether under New York law the defendant would be entitled to raise an insanity defense not pressed in the first trial.²⁵

This sense of the practical infused Friendly's judicial persona. Learned Hand's leisurely and stimulating speculations about the concept of invention in patent law or the ideology of those who passed the Sherman Act have few counterparts in Friendly's decisions.²⁶ Just as Friendly had driven himself fiercely hard in law practice, so he wrote his opinions in a burst of energy, drafting in longhand and normally editing the draft only once with his law clerk after the latter's cite check. As the edited draft with paper-clipped inserts passed to Friendly's secretary for retyping and circulation to the panel, the law

²⁴ United States *ex rel.* Stovall v. Denno, No. 29208 (2d Cir. Mar. 31, 1965), *vacated*, 355 F.2d 731 (2d Cir. 1966) (en banc), *aff'd sub nom.*, Stovall v. Denno, 388 U.S. 293 (1967). The Supreme Court agreed with Friendly's legal position but declined to apply it retroactively. See Stovall v. Denno, 388 U.S. 293, 299-301 (1967).

²⁵ *Stovall*, No. 29208, slip op. at 1577 n.7. The Second Circuit panel's original opinion does not appear in the Federal Reporter because it was superseded by the en banc decision.

²⁶ See, e.g., *Harries v. Air King Prods. Co.*, 183 F.2d 158, 162 (2d Cir. 1950) (musing on the policy implications of available dispositions in a patent dispute); *United States v. Aluminium Co. of Am.*, 148 F.2d 416, 427-30 (2d Cir. 1945) (discussing the history of Sections 1 and 2 of the Sherman Act).

clerk watched him sweep the briefs into his outbox and turn immediately to the next case.

For most judges, the first draft of an opinion is discursive, but Friendly's power of mind produced sentences that were often compact in thought and compressed in expression and remained that way in the final opinion. When a law clerk proposed a fuller explanation of a pivotal ruling, Friendly replied that "Henry Hart will understand it." His oft-cited decision in *T. B. Harms Co. v. Eliscu*, clarifying the rules of federal jurisdiction over disputes about copyright ownership, is a dense study of precedent and variations in fact patterns; but it is just seven pages long in the Federal Reporter.²⁷ The concision lends Friendly's opinions energy and pace, even if the reader sometimes takes longer to understand a paragraph than Friendly took to conceive and write it.

Yet Friendly's opinions were far from dull. With his well-stocked mental library, he often decked out decisions with scholarly asides that entertain as well as educate. Addressing a statute of limitations issue, Friendly observed that it might seem clear to one "without the burden of legal knowledge" that the pertinent New York statute gave the plaintiff "three years within which to sue the Railroad in New York even though New Jersey would have dismissed her action unless brought within two";²⁸ but (he continued) "[t]he issue is not that simple"²⁹ and there followed this single sentence that might pose as a miniature treatise:

Story's famous principle that limitations are a procedural matter determined by the *lex fori*, see *Le Roy v. Crowninshield*, 15 Fed.Cas. 362 (No. 8,269) (C.C.Mass.1820); Commentaries on the Conflict of Laws § 576 (8 ed. Bigelow 1883), evoked opposition both from adherents of the *obligatio* theory, such as Mr. Justice Holmes, *Davis v. Mills*, 194 U.S. 451, 454, 24 S. Ct. 692, 48 L.Ed. 1067 (1904), and Professor Beale, 3 Conflict of Laws § 604.1 (1935), and from its foes, see Lorenzen, *The Statute of Limitations and the Conflict of Laws*, 28 Yale L.J. 492 (1919).³⁰

Perhaps the most difficult problem for a judge arises where a tension exists between "the law," as it has been laid down or as it is being reformed in the case as far as possible, and the intuited proper outcome of the case measured by broader criteria: not only a sense of the what "the law" would suggest absent some trammeling precedent or

²⁷ See 339 F.2d 823, 823-29 (2d Cir. 1964).

²⁸ *Clarke v. Pa. R.R. Co.*, 341 F.2d 430, 432 (2d Cir. 1965).

²⁹ *Id.*

³⁰ *Id.*

provision, but also current conceptions of fairness, public acceptability, the socially desirable outcome, and like considerations. Of course, the latter considerations may justify reshaping doctrine, but stubborn statutory language or binding case law may foreclose such a change.

The resulting conflict between “is” and “ought” creates, for a gifted judge, an opportunity to reconcile law with justice—or, put more prosaically, with a fair and reasonable outcome. Llewellyn recalls Taft, teaching a class at Yale Law School, recounting an exchange with Holmes as to whether it was “right or fair” to leave a fact out of consideration; and while Taft would not concede the fact to be legally relevant, Llewellyn thinks that the story “spell[ed] a man who *felt* the bearing of all the ‘background’ and ‘human’ and ‘situation’ factors.”³¹ Friendly had just such a gift for reconciliation.

A nice instance is a Friendly opinion reviewing an order of the now-defunct Interstate Commerce Commission (ICC).³² The respondent company, for a fee, did the matchmaking between anyone who wanted his car driven to some other city and a student or other traveler looking for free transportation and willing to serve as driver. At the time, the ICC had the statutory power to restrict the number of interstate motor carriers by granting or withholding a certificate or permit to perform such carriage.³³ The ICC said that this provision applied to the respondent company even though the company did not employ the driver and itself transported nothing, and the agency held that the company was operating illegally.³⁴ A district judge had set the ICC order aside on the ground that the company was not a carrier within the statute’s definition.³⁵

Friendly’s decision reinstated the ICC’s order but accommodated the command of the law with a desirable result. Friendly agreed, as the district judge had found, that the company was not itself a transporter of the cars but merely an intermediary. Nevertheless, he explained, the statute by its terms defined “common carrier” as one that “holds itself out to the general public to engage in” such carriage.³⁶

³¹ LLEWELLYN, *supra* note 1, at 1-22.

³² *Interstate Commerce Comm’n v. AAA Con Drivers Exch., Inc.*, 340 F.2d 820 (2d Cir. 1965).

³³ *See* Motor Carrier Act of 1935, Pub. L. No. 74-255, § 206(a), 49 Stat. 543, 551 (repealed 1995).

³⁴ *AAA Con Drivers Exch.*, 340 F.2d at 821.

³⁵ *See* *Interstate Commerce Comm’n v. AAA Con Drivers Exch., Inc.*, 234 F. Supp. 66, 74 (S.D.N.Y. 1964).

³⁶ *AAA Con Drivers Exch.*, 340 F.2d at 824 (quoting Motor Carrier Act § 203(a)).

The company's advertising described the transportation function without making clear that the drivers were not its own agents, thereby fitting the definition and effectively competing for business with carriers that did transport cars.³⁷ Friendly therefore ruled that the certificate was required.³⁸

Yet the power to restrict entry to the motor carrier business on economic grounds—as opposed to safety qualifications—never made sense; the requirement was repealed even before the ICC was abolished; and the respondent company was performing a useful function: just the kind of innovation that the decrepit ICC tended to suppress. Not long after the case just described, the ICC fought a losing battle against the use by railroads of supersized hopper cars that cut costs for shippers but competed with trucks for whom the ICC was concerned.³⁹ One could reasonably suppose that on remand in Friendly's case, the agency would make short work of the intruder and put an end to its operations.

But Friendly anticipated this outcome. Toward the end of the decision, Friendly observed that the requirement of a certificate did not bar the company's useful service, because it was free to seek one from the ICC.⁴⁰ Then, discerning what would happen when the company applied, Friendly appended a footnote to end the opinion—in its own way as neat as the mirror reflection in Van Eyck's famous wedding portrait hanging in London's National Gallery.⁴¹ What the footnote said—one can picture Friendly's sour smile—was this:

We are unable to share [the company's] fears that an application for a certificate is sure to be denied, presumably on the ground that its unlawful operations show it not to be "fit." The Commission has not regarded such operations as a bar if these were conducted in a not unreasonable belief as to their legality—a test rather clearly satisfied when they have passed muster in the reasoned view of a district judge. See, e.g., *Moyer Common Carrier Application*, 83 M.C.C. 83 (1960). Cf. *Bowman Transp., Inc. v. United States*, 211 F.Supp. 354 (N.D. Ala. 1962).⁴²

That Friendly wrote his own opinions brought him very close to the case and helped him achieve such solutions. Given the growth in

³⁷ *Id.* at 825.

³⁸ *Id.*

³⁹ See *Cincinnati, New Orleans & Tex. Pac. Ry. Co. v. United States*, 229 F. Supp. 572 (S.D. Ohio 1964), *vacated sub nom.*, *Arrow Transp. Co. v. Cincinnati, New Orleans & Texas Pac. Ry. Co.*, 379 U.S. 642 (1965).

⁴⁰ See *AAA Con Drivers Exch.*, 340 F.2d at 826.

⁴¹ Jan van Eyck, *The Arnolfini Portrait* (National Gallery, London 1434).

⁴² *AAA Con Drivers Exch.*, 340 F.2d at 826 n.2.

dockets, many judges on busy appellate courts can hardly do all or even most of their own drafting: inevitably, law clerks and staff attorneys often man the deck and sails while the judge holds the tiller. A circuit judge today may in a year vote on three or four hundred merits cases and write thirty to fifty full-scale opinions for publication while superintending many other shorter per curiams or brief judgments. A Supreme Court Justice, by contrast, votes on far fewer cases and writes only a dozen or fewer decisions for the Court.⁴³

One ought not be romantic about the earlier era when law clerks did not exist and judges perforce wrote their own opinions: many of the opinions were mediocre. This is so even if—such is the genius of the common law process—the judge usually managed a sensible outcome, however weak the opinion might be. Of the great early-twentieth-century treatise writers, Grant Gilmore wrote—only partly in jest—that they proceeded “by carefully distinguishing between the relatively few correct cases (many of them English) and the great piles of trash which filled the bound volumes of the reports.”⁴⁴

Yet many a complicated case is like a jigsaw puzzle with multiple solutions, often as to reasoning and sometimes as to outcome, none being inevitable. Courts can notice issues not raised, forgive waivers, remand for more development or explanation, and decide half-raised issues or defer them to a future case. The choices spread out like a maze of tracks in a great railroad terminal. As the forks appear, the seasoned judge who is close to the case is more likely than the clerk to understand the realistic options and select the best route to an outcome.

Further, law clerks may write well but—in speaking for another—they employ a safely formulaic mode usually learned in editing a law review. Judge-written opinions have a personal style that gives carrying power to the opinion. Still, it is not his personal style, but the wit and the embroidery of scholarship that matters most in Friendly’s decisions. Too often opinions, whether written by clerks or judges, amply identify relevant facts and governing principles, and reach a defensible result; but they may slide over the central analytical problem at the heart of the case.

For example, the opinion may state law and facts but fail to build the bridge that connects the principle to the result, explaining why

⁴³ See OFFICE OF JUDGES PROGRAMS, ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 24-27 tbl.B-1 (2009), available at <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/tables/B01Mar09.pdf> (comparing caseloads of federal courts).

⁴⁴ GRANT GILMORE, *THE AGES OF AMERICAN LAW* 70 (1977).

these facts fall within this rubric rather than another that invokes a different outcome. Or a choice of words used in a statute may be deemed decisive—even though the key terms could also be read differently, were the judge minded to do so, and why one reading is chosen rather than another is left unexplained. In Friendly's decisions, by contrast, the subject is illuminated as if by a great searchlight; usually one agrees—his archived case files contain notes from colleagues on the panel saying that they were originally inclined to differ but are now persuaded of his position; but *always* one learns.

Some may think all this is fairly to be expected from an appellate judge—even if done better by Friendly than almost all others. Quite the contrary. Other judges, including very fine ones, have done the job differently: Brandeis as a justice was an impassioned advocate; Black, a unique mixture of populist sentiment and (at least in his own mind) literal construction. Wisdom and Tuttle, heroic judges immersed in civil rights litigation, were sometimes part of the struggle and not above it. There are many models for judges and, in a collegial enterprise, a diverse bench has its benefits. Perhaps different times may call for different kinds of judges.

Still, reading over a term's worth of Henry Friendly opinions, one may come to believe that Friendly's *way* of judging has a timeless attraction: the predicate mastery of precedent and record; a care alike for doctrine and for equity and for social need; the reasoned and candid explanation of the result; and an awareness always of the comparative competencies and limits of judges. Llewellyn dedicated his book to judges in what he called "the Grand Tradition of the Common Law," mentioning Mansfield and Hand, among others.⁴⁵ Only shortly before the dedication, Friendly ascended to the bench, and he made this tradition his own.

By curious chance, Friendly's only long meditation on the craft of judging came early in his judicial career in the Storrs Lecture at Yale.⁴⁶ Following tributes by Friendly to past giants is a closing lament that, after Hand, neither the judges nor the work available to them is what it once was.⁴⁷ Construing the Fair Labor Standards Act, Friendly said, is not the same order of intellectual achievement as solving the prob-

⁴⁵ LLEWELLYN, *supra* note 1, at v.

⁴⁶ Friendly, *Reactions of a Lawyer*, *supra* note 1.

⁴⁷ *Id.* at 237-38.

lem of proximate cause in *Palsgraf*.⁴⁸ Consolation, he concluded, is to be sought in the worthy task of tidying up the law and repairing small “chinks and leaks” in the cabin of doctrine.⁴⁹

In his concern that the role of judges was narrowing, Friendly was a poor prophet: with the Warren Court, constitutional law’s domain expanded rapidly, and successor Justices have not been more timid in expanding judicial territory. To make law that Congress cannot change is no minor office, and the range of common law or statutory subjects now leashed by constitutional law, and so governed by judges, would have stunned nineteenth-century lawyers: family law and evidence and campaign expenditure and civil-service protection are merely examples. Neither is it small beer to interpret federal statutes in an era when they regulate nearly everything and are not often amended.

As to the caliber of judges, Judge Friendly’s decisions show that greatness did not end with Hand. Friendly’s opinions embody and reflect both his own remarkable gifts and the experience of a lifetime of intensely hard work—in class, in law office, and in board room. The issues Friendly decided have been or will be overtaken by events; the way he went about deciding them remains to instruct. Nathaniel Bowditch’s 1802 manual on navigation taught generations of mariners their craft.⁵⁰ *Gray’s Anatomy*, first published in 1858, is now in its fortieth British edition and still educating young doctors.⁵¹ Judge Friendly’s legacy of incomparably fine decisions can do as much for judges.

⁴⁸ *Id.* (discussing *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928)). Compare Justice Benjamin Kaplan’s mesmerizing variation on the foreseeability theme in *Or v. Edwards*, 818 N.E.2d 163 (Mass. App. Ct. 2004).

⁴⁹ Friendly, *Reactions of a Lawyer*, *supra* note 1, at 238 (quoting LLEWELLYN, *supra* note 1, at 37).

⁵⁰ NATHANIEL BOWDITCH, *AMERICAN PRACTICAL NAVIGATOR* (1802). The manual has been regularly revised thereafter and is available today in hard copy (the 2002 bicentennial edition), paperback, and (as one might expect) CD-ROM.

⁵¹ *GRAY’S ANATOMY* (Susan Standring ed., 40th ed. 2008).