MEMOIRS IN A CLASSICAL STYLE

MICHAEL BOUDIN†

Paul Freund tells of Justice Brandeis, asked whether he was writing his memoirs, saying in reply: "I think you will find that my memoirs have already been written."¹ Reading once again Judge Friendly’s opinions in the September 1964 term, the force of this remark is brought home. For those opinions are Henry Friendly’s memoirs, as well as his legacy to future generations of judges and lawyers. In paying tribute to the Judge, it seems fitting to draw some lessons from that volume of opinions, and the entangled recollections that they stir.

The first hallmark of the opinions, and surely the most apparent, is the intensity of reasoning. It is characteristic of the opinions that the very process of deciding can be seen on the surface and is not buried in the result. Judge Friendly has referred to William James’s observation that “the completed decision wipes off memory’s slate most of the process of its attainment”;² but it would be difficult to find a judge who is more of an exception to this general rule of psychology. In Judge

Friendly's opinions, it is the process of exploration, the construction of analysis, that imprints itself on the mind of the reader. Thus, the opinion is not an attempt to justify an outcome; rather, the outcome is the natural epilogue to thinking the problem through.

The opinions display a willingness to face head on—indeed, to welcome—the difficulties of a case, the conflicting precedents and arguments, and the pressures of diverse values. One phrase frequently repeated is Judge Friendly's statement that he finds the case a harder one than his brethren. Such observations cap an unrelenting effort to reckon fully the force of the claims on both sides in order to reach the best result reason can attain. The study of these conflicting claims may not, of course, avoid the need for a leap of judgment or intuition at the end of the reasoning process; but Judge Friendly's leap is taken from a firm footing across a much narrowed gap.

This respect for reason is borne out in the style as well as the substance of the opinions. The level of rhetoric is markedly low and, though a mild sarcasm may enliven or a witty summary adorn a Friendly opinion, for the most part his writing is straightforward. There is an absence of prophetic utterance, of parades of unneeded scholarship, and of gilded ornaments of language. One is reminded of the description of the classical artist "as one for whom emotion is subordinate to intellect, colour to line, and atmosphere to structure."

A second hallmark, perhaps more surprising in a judge known for his extraordinary scholarship, is the acute and abiding attention to facts. This characteristic the Judge shares with Justice Brandeis, for whom he himself clerked over half a century ago. One wonders how much each man owed this attitude to many years of law practice, where, especially in litigation, one learns how much facts matter. In Judge Friendly's case it may also be worth recalling that the other path he almost followed was that of historian.

In his opinions, the Judge's concern for facts is primarily with those that emerge from the record below. Even in cases of limited importance, his summaries of fact are awesomely complete and handsomely organized. Assembling the evidence may look like a journeyman's task, but no one who has ever tried to draft a statement of facts in an appellate brief or to summarize them for an oral argument or

8 See, e.g., Escott v. Barchris Construction Corp., 340 F.2d 731, 735 (2d Cir. 1965) (concurring opinion); Fafnir Bearing Co. v. NLRB, 339 F.2d 801, 802 (2d Cir. 1964).


6 See, e.g., NLRB v. Kelly Bros. Nurseries, Inc., 341 F.2d 433 (2d Cir. 1965); ICC v. AAA Con Drivers Exch., Inc., 340 F.2d 820 (2d Cir. 1965).
trial court summation would be deceived by the seeming ease of Judge Friendly's handiwork.

He is no less deft in attending to facts that are never a part of an appellate record but cannot be disregarded if the opinion is to be rooted in the solid earth. One thinks of Judge Friendly invoking the realities of countervailing power when two large corporations deal with one another and his remarks in the same case on the changes of style over the years in the drafting of liability clauses. Along with Learned Hand, Judge Friendly is peerless in this delicate task of invoking the real world beyond the courtroom.

Yet a third hallmark, shared both with Brandeis and with Hand, is self-restraint. This is a paradox of sorts since no living judge is more capable than Judge Friendly of solving a legal problem in a way that commands admiration. Yet the opinions are replete with examples of his readiness to defer when, under the governing rules, another body has established the rule of decision. A Supreme Court pronouncement may be thought wrong, but it is obeyed and is never treated by Judge Friendly as an obstacle to be avoided. When the legislature's aim can be discerned and is constitutional, it is given effect no matter how wayward it may be. The same scrupulous care is taken in determining what a state court would do where, under the Erie doctrine or otherwise, state law governs the case at hand. When Henry Friendly says in an opinion that a precedent "instructs us," one knows that he truly means it.

Even when the way is clear for him to chart a new course or bring order to a tangle of older authorities, he often applies the checkrein of moderation. Of course, he shares the impulse of all great judges to refine and improve, and no one has done the job better; it has been widely remarked that there are now few areas of federal law left without a major Friendly opinion used by other judges as a beacon. Yet, in "tidying up behind," the precedents are not squeezed into a false symmetry, and, no less than Justice Brandeis and Judge Hand, Judge Friendly has always been conscious of not deciding too much for the future.

There is a fourth and final aspect of the opinions that deserves mention even in a list of virtues that does not claim to be complete.

---

6 See David Crystal, Inc. v. Cunard S.S. Co., 339 F.2d 295, 301 (2d Cir. 1964) (separate opinion); see also Delaney v. Towmotor Corp., 339 F.2d 4 (2d Cir. 1964).
7 See, e.g., United States v. Costello, 352 F.2d 848, 851 (2d Cir. 1965).
10 See T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964).
This hallmark is harder to derive from the bare language of the opinions, but it seems to me a clue to the success of Judge Friendly's work. That characteristic is the pleasure that the Judge takes in doing his job.

It is true that Judge Friendly has brought rare gifts to his office, including one of the finest minds of his generation and training under great masters of the law. His intellectual energy is immense and few scholars have written as much or as well in an entire career as he has, by way of avocation, in his years on the bench. His temperament, to his great advantage, sets him midway between the doubts that afflicted Learned Hand and the certainties with which Brandeis had to struggle. Even so, the raw effort embodied in Judge Friendly's opinions—hard won feats of research, synthesis and penetration—have required something even beyond great gifts and a sense of responsibility. That ingredient, I think, is the craftsman's intense satisfaction in his own craft and product.

Judge Friendly's enjoyment in his work, and in seeing the work well done, is merely reflected in the mirror of his opinions, and yet it was almost tangibly real for the Judge's clerks. A drought of interesting cases brought the gloom into the chambers; but nothing cheered the Judge up so much as a complex and perplexing legal problem, unless it was a term filled with many such cases. Reminiscing, another of his clerks recently recalled Judge Friendly's face lighting up with pleasure and his hand reaching swiftly for the bookshelf when the clerk cited to him an authority said to be in conflict with the tentative bent of the Judge's own thought. It was, I think, the happiness of a man who has found his perfect calling.

11 There cannot be many who have, as Judge Friendly did, studied under one Justice-to-be (Felix Frankfurter), clerked for another Justice (Louis Brandeis), and gone on to serve in law practice as apprentice to yet another Justice-to-be (John Harlan).

12 Perhaps this is what Learned Hand had in mind when he said obliquely that "[i]t is an honest craft, which gives good measure for its wages, and undertakes only those jobs which the members can do in proper workmanlike fashion, which of course means no more than that they must like them." Hand, Mr. Justice Holmes, 43 HARV. L. REV. 857, 860 (1930), reprinted in L. HAND, THE SPIRIT OF LIBERTY 57, 62 (1952).