

Essay

FRIENDLY, J., DISSENTING

MICHAEL BOUDIN†

American legal culture takes the dissent for granted as a natural companion to the majority decision of the court, but this is a parochial view. In early years, the British tradition was divided, with the Privy Council barring and the House of Lords permitting the publication of dissents;¹ even today, some Continental countries disallow them.² In the United States, Chief Justice Marshall did what he could to press for unanimous opinions.³ And years later, in 1924, a judicial-ethics canon of the American Bar Association decried dissents as tending to undermine faith in the courts.⁴

Yet dissents have a capacity to reveal the views of an individual judge in ways that panel decisions do not. Writing only for himself, the dissenting judge does not need to compromise with anyone, can employ a more personal voice, and can focus on issues of special importance to him. Judge Henry Friendly is reckoned one of the greatest federal judges to sit on the federal appellate bench in the twentieth century, with no circuit court peer other than Judge

Copyright © 2012 by Michael Boudin.

† Judge, U.S. Court of Appeals for the First Circuit. This Essay, in a slightly more condensed version, was delivered as the McCorkle Lecture at the University of Virginia School of Law in February 2011. Thanks are due to my then-law clerks, Jacob Heller, Joanna Huey, Matthew Guarnieri, and Jonathan Bressler, and to my friends Judge Pierre Leval, Judge Richard Posner, and Professor John Deutch, who each read an earlier draft of this Essay.

1. Michael Kirby, *Judicial Dissent—Common Law and Civil Law Traditions*, 123 L.Q. REV. 379, 385–86 (2007).

2. *Id.* at 382.

3. M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 311–24 (discussing Chief Justice Marshall's success in instituting the unanimous opinion); Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice*, 154 U. PA. L. REV. 1421, 1442–44 (2006) (explaining that Chief Justice Marshall “deliberately departed from the traditional mode of seriatim opinions” and that “[o]nce firmly established, the single majority opinion survived for the duration of the Marshall Court”).

4. CANONS OF JUDICIAL ETHICS Canon 19 (1924) (asserting that “[e]xcept in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort”).

Learned Hand. Judge Friendly wrote many dissents, almost all full-scale opinions done with his customary skill and learning.

During his nearly twenty-seven years on the bench—from September 1959 to March 1986—Judge Friendly wrote not only 800 or so published majority opinions for his own court but also 103 dissents and 88 opinions that were either concurrences or partial dissents.⁵ All of these separate opinions may be fairly treated as dissents to some degree. Even when an opinion began with the phrase “Friendly, J., concurring,” and even when Judge Friendly joined in the panel’s judgment, his rationale usually differed from the majority’s. A different rationale matters, of course, because it often points to a different result on somewhat different facts.

Thus, in substance, Judge Friendly took a position that diverged from the panel majority almost 200 times. This number may seem modest as a percentage of the 2800 or so panel decisions in which he participated during his career, but it is a significantly higher percentage than the ones generated by most of his colleagues.⁶ Because Judge Friendly’s separate opinions represent about 20 percent of his total opinions, they constitute a substantial body of work that invites a critique.

Let me start by recalling Judge Friendly’s remarkable background: his astounding A-double-plus average at Harvard Law School—more than one full grade level *above* the then-rarely conferred summa cum laude degree, which Judge Friendly also received—his clerkship with Justice Brandeis, his association with John Harlan—later the second Justice Harlan—at the Root Clark law firm in New York, his cofounding in 1946 of the Cleary Gottlieb law firm, and his service thereafter both as a founding partner at that firm and as a full-time vice president and general counsel of Pan American

5. No authoritative count of Judge Friendly’s opinions exists, and assigning exact numbers is complicated by the fact that although most of Judge Friendly’s opinions were written in Second Circuit cases, the judge also served occasionally on three-judge district courts as well as on the special rail-reorganization court established by Congress. The numbers set forth in the text of this Essay are derived from Westlaw searches that sought to identify Judge Friendly’s majority opinions, concurrences, and dissents as a circuit judge.

6. According to Westlaw’s classifications, *see infra* Appendix, Tables 1–2, the percentage of Judge Friendly’s cases in which he dissented—3.64 percent—was somewhat higher than for most others who sat as active judges while Judge Friendly was in active service; and his percentage of concurrences—3.11 percent—was appreciably higher than most others’. If one combines both of these percentages, one will see that Judge Friendly wrote separately in a higher percentage of cases than all but two judges in this group—Judges Walter Mansfield and Paul Hays.

World Airways.⁷ No legal audience needs to be reminded of Judge Friendly's heroic scholarship in books, articles, and book reviews, all written in his "spare" time.⁸

As for Judge Friendly's judicial career, the judge joined the Second Circuit in 1959, when the famous bench manned by the two Judge Hands—Learned and Augustus—as well as Judges Thomas Swan, Charles Clark, and Jerome Frank had almost completely disbanded. Judge Friendly did overlap with Judge Learned Hand, but only briefly. The Second Circuit in 1959 was beginning to grow, however, and over the course of his tenure, Judge Friendly had seventeen different colleagues. Many of his colleagues were very able figures, and the mention of two among them—Judges Ralph Winter and James Oakes—serves to underscore that Judge Friendly fell in the middle of the liberal-conservative spectrum, insofar as that spectrum can be adapted to describe judicial attitudes.

So it may be worth considering why Judge Friendly, a moderate figure and the acknowledged intellectual star of his court, failed so many times to win a second vote for his position. But something must first be said about other important matters: Judge Friendly's approach to legal issues, the style and substance of his dissents, and what observers can learn from those dissents about the judge's own priorities with respect to the issues most worth the trouble of a separate opinion. Finally, one should ask about his influence as a judge and a dissenter and about the role that dissents play in the judicial process.

All of Judge Friendly's opinions, whether for panels or for the judge himself, flowed from a common conception about judging. Given his education and his experience, Judge Friendly had no illusion that judicial decisions are the impersonal voice of the oracle

7. See THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 208–09 (Roger K. Newman ed., 2009) (providing biographical information about Judge Friendly's academic and professional accomplishments); Michael Boudin, *Judge Henry Friendly and the Craft of Judging*, 159 U. PA. L. REV. 1, 8 (2010) [hereinafter Boudin, *Craft of Judging*] ("What can be gleaned of [Judge Friendly's] work as general counsel of Pan American World Airways during its heyday confirms that business lawyering was at least part of his repertoire. In fact, he served as well as vice president of the company and as a member of its board of directors."); Michael Boudin, *Judge Henry Friendly and the Mirror of Constitutional Law*, 82 N.Y.U. L. REV. 975, 977–78 (2007) [hereinafter Boudin, *Mirror*] ("At Harvard Law School, . . . Friendly became a legend. . . . Friendly was president of the *Harvard Law Review* and ranked first in his class.")

8. Boudin, *Mirror*, *supra* note 7, at 976 n.2 (listing a sample of Judge Friendly's major works). A list on Westlaw of Judge Friendly's articles, book reviews, and lectures includes more than thirty entries and is by no means complete.

or that any given case yields only one permissible result, let alone only a single possible explanation for that result. Although such notions were the target of legal realists during Judge Friendly's early years, the judge's own views were probably closer to those of the so-called legal-process school than to those espoused by legal realism.⁹ Yet Judge Friendly did not fit neatly into any camp of legal philosophy or even find the subject of legal philosophy to be one of any special interest.

A common view of law, probably representing the way most judges in the twenty-first century think they do their job, is this: that judging is an endeavor by which certain accepted materials, such as statutes and decisions, will, when subjected to an accepted set of techniques—including textual study, inquiry into the underlying policy, and reasoning by analogy—point toward answers or, in closer cases, will at least inform and constrain choice. Under a more extreme “formalist” view—the view against which the realists reacted—judges think that rules determine everything, that a right answer necessarily exists for every legal problem, and that only bias or lack of competence can explain conflicts.

The legal-process school sharply differs from this formalist view in various ways—for example, by recognizing that case law has evolved in accordance with social needs and by giving special attention to institutional competence. Nevertheless, the legal-process school insists that “reasoned elaboration” of the grounds of decision remains crucial to providing justification, continuity, and guidance.¹⁰

9. Legal realism refers to a set of perspectives on judicial decisionmaking that stress the study of the results reached by judges and those judges' perceived underlying motivations, rather than the formal explanations provided in their opinions. Its best known exponents, who differed among themselves in their emphases and interests, thrived in the 1920s, '30s, and '40s. See generally G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972) (describing “the displacement of [sociological jurisprudence] by [realism] in the first three decades of the twentieth century”).

10. See William W. Fisher, III, *Legal Theory and Legal Education, 1920–2000*, in 3 CAMBRIDGE HISTORY OF LAW IN AMERICA: THE TWENTIETH CENTURY AND AFTER (1920–), at 34, 41 (Michael Grossberg & Christopher Tomlins eds., 2008) (“[Reasoned elaboration] encompassed at least three, related guidelines. . . . [First,] a judge must assume a posture of intellectual disinterestedness Second, . . . judges should consult with their colleagues before coming to conclusions. . . . Finally, judges must in their opinions explain their reasoning thoroughly, both to provide effective guidance to future litigants and to enable constructive criticism of their decisions.” (internal quotation marks omitted)); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 291 (1973) (noting that “legal scholars of the 1950's grew increasingly convinced of the

Perhaps this perspective has a special hold on those judges—like Judge Friendly—who are most gifted in deploying the materials and techniques by which an explanation is provided.

Let me explore, then, the character of Judge Friendly's dissents. All of Judge Friendly's opinions were formidable, but with respect to the dissents in particular, the word "devastating" comes swiftly to mind. The measured self-restraint of Judge Friendly's former partner, the second Justice Harlan—himself a regular dissenter on the Warren Court during the same era—was rarely visible in Judge Friendly's own dissents. Rather, in Judge Friendly's dissents, mildly biting comments about the majority decision were common.¹¹ Showing that those comments stung, sometimes an acute concurring judge in the majority—such as Judge Jon Newman—would be moved to respond for himself and to offer a further defense of the majority's position.¹²

When Judge Friendly dissented, tone was the least of the panel's problems. Judge Friendly's knowledge of common-law doctrine was bolstered by his own background as a prize-winning history student at Harvard College. Judge Friendly's deft handling of statutory construction was unmatched, and one of his major articles—nominally about his own mentor Justice Felix Frankfurter—was on

importance of judicial rationalization" and describing "Reasoned Elaboration" as a summary of "a new set of ideals and standards for judicial decision-making").

11. *See, e.g.,* Goodwin v. Oswald, 462 F.2d 1237, 1251 (2d Cir. 1972) (Friendly, J., dissenting) ("This case is a classic example of what I have called 'the domino method of constitutional adjudication . . . , wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation.'" (omission in original) (quoting Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 950 (1965))). Nor were counsel automatically exempt from a barb or two. *See, e.g., id.* at 1248 ("On this appeal we see The Legal Aid Society, a venerable organization long supported by private charity and more recently also by large public grants, assuming the role of solicitors for a prisoners' union.").

12. *E.g.,* Dickerson v. Fogg, 692 F.2d 238, 247 (2d Cir. 1982) (Newman, J., concurring) ("Judge Friendly's dissent contends that the circumstances under which [the victim] identified [the defendant] at the arraignment of [the defendant's] cousin were not sufficiently suggestive to warrant assessment of the reliability of the identification under the criteria set forth in [*Neil v. Biggers*, 409 U.S. 188 (1972)]. I share the dissent's concern that the police should not be obliged to act in a 'wholly unnatural fashion,' but I am satisfied that no such requirement has been imposed by the decision of this case." (citations omitted) (quoting *Dickerson*, 692 F.2d at 249 (Friendly, J., dissenting))); Hansen v. Harris, 619 F.2d 942, 958 (2d Cir. 1980) (Newman, J., concurring) ("Judge Friendly's vigorous dissenting opinion concludes that the case law has generally opposed estoppel of the Government, and that the substance-procedure distinction cannot be maintained in this context. My review of the authorities persuades me that estoppel of the Government enjoys considerable support and that the substance-procedure distinction makes the doctrine especially appropriate in the circumstances of this case.").

that very subject.¹³ More broadly, Judge Friendly's fertility of mind could furnish arguments in quality and number well beyond those offered by counsel.

Nor was anyone Judge Friendly's equal in the close parsing of case law. Consider this piece of vivisection in one dissent, directed at the precedents relied on by the panel majority. The case, *Mitchell v. Cuomo*,¹⁴ concerned a preliminary injunction granted by the district court to prevent the closing of a prison and the consequent transfer of its prisoners to another prison alleged to be already overcrowded.¹⁵ The district court had granted the injunction on the ground that an Eighth Amendment violation had been plausibly alleged, although not yet proven.¹⁶ In upholding the preliminary injunction, the panel majority invoked the support of a concurring opinion in the Supreme Court's *Rhodes v. Chapman*¹⁷ and a prior decision of the Second Circuit, *Lareau v. Manson*.¹⁸ Judge Friendly, however, read the majority opinion in *Rhodes* as warning federal judges to avoid intruding into state prison administration unless clear-cut violations of the Eighth Amendment were demonstrated and countered the majority's citations in this fashion:

We should look for guidance to the majority opinion in *Rhodes*, representing the views of six justices, rather than, as the [panel] majority here does, to the concurring opinion, which represents the views of only three, or to our own opinion in *Lareau v. Manson*, [a] portion of which relied on . . . [a Sixth Circuit decision] . . . that was reversed by the Supreme Court only a fortnight after *Lareau* was decided.¹⁹

Along with Judge Friendly's legal skill came an unusually thorough command of the record. The judge began one separate opinion on an ominous note: "Although the [panel] opinion's statement of facts is accurate as far as it goes, a somewhat fuller narrative is needed to place the matter in proper setting."²⁰ Typically,

13. Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in FELIX FRANKFURTER: THE JUDGE 30 (Wallace Mendelson ed., 1964).

14. *Mitchell v. Cuomo*, 748 F.2d 804 (2d Cir. 1984).

15. *Id.* at 805-06.

16. *Id.* at 806.

17. *Rhodes v. Chapman*, 452 U.S. 337 (1981).

18. *Lareau v. Manson*, 651 F.2d 96 (2d Cir. 1981).

19. *Mitchell*, 748 F.2d at 808-09 (Friendly, J., dissenting) (citation omitted).

20. *Pearlstein v. Scudder & German*, 429 F.2d 1136, 1145 (2d Cir. 1970) (Friendly, J., dissenting).

in such cases, Judge Friendly would move methodically on to mine the record for further facts, to draw inferences that the majority had overlooked, and to discredit witnesses whose testimony underpinned the panel's position.

One such instance was Friendly's dissent in a case called *Sea-Land Service, Inc. v. Aetna Insurance Co.*²¹ In that case, a ship that had gone aground was being towed free by another vessel.²² In the process, the tow line broke and the ship was thrown against the rocks and damaged.²³ Under admiralty law, a contribution by the cargo owner to the repair costs, otherwise borne by the ship's owner alone, would ordinarily have been required.²⁴ But the district judge had denied such a recovery by the ship's owner on the ground that the same damage would probably have resulted even without the failed tow.²⁵ On appeal, the panel majority did a fairly persuasive job of upholding the denial of contribution—persuasive, that is, until one reads Judge Friendly's dissent.²⁶

What Judge Friendly showed, moving from fact to law and back to fact again, was that the portions of the district court's findings on which the panel majority relied were more ambiguous than they initially appeared. The key findings—in Judge Friendly's words—had “the . . . elusive quality of seeming to say more than [they] really [did].”²⁷ And what Judge Friendly found, buried in those ambiguous findings, was a subtle confusion by the district judge about the correct legal standard to be applied. Judge Friendly's summing up, terse but elegant, went thusly:

In my view the difficulty here has arisen because of the district court's shift from the standard it enunciated at the end of the trial, . . . [specifically, whether the rescue effort involving the attempted tow increased the likelihood of the loss at issue,] to the concept . . . [that contribution] would not lie if it was ‘more likely than not that the . . . [loss would have occurred], regardless of whether the tow had been attempted.’ Since we all agree that the

21. *Sea-Land Serv., Inc. v. Aetna Ins. Co.*, 545 F.2d 1313 (2d Cir. 1976); *id.* at 1318–20 (Friendly, J., dissenting).

22. *Id.* at 1314–15 (majority opinion).

23. *Id.*

24. *Id.* at 1315.

25. *Id.* at 1316.

26. *Id.* at 1318–20 (Friendly, J., dissenting).

27. *Id.* at 1319.

former is the correct standard, I would reverse and remand for explicit findings in regard to it.²⁸

Unraveled, Judge Friendly's point was that the rescue effort—conceded to have been a legitimate effort to avoid much more severe damage—could have increased *in some measure* the risk of the lesser damage that resulted when the tow rope broke. Even if the same lesser damage would probably have occurred without the tow, any significant increase in the risk of such damage was traceable to the reasonable rescue effort undertaken on behalf of both the ship's owner and the cargo owner to avoid a feared greater damage. Given admiralty law's aim of encouraging such reasonable rescue efforts, a finding on remand of significant increased risk ought to be enough to require a contribution to cover the ensuing loss when the effort miscarried.

Although Judge Friendly's dissents always had such penetration, the occasions for the judge's separate opinions varied widely. Some involved major questions of law and policy on which a dissenting view, if held, had to be expressed. But, as further examples show, Judge Friendly also on occasion wrote separately when the issue was largely factual, when the result was right but the analysis wrong, or when a party was being unfairly treated. His lightning speed in both thought and expression made it comfortable for him to dissent whenever he disagreed, and he disagreed fairly often.

This was so in part because Judge Friendly saw in his mind's eye more dimensions of a case than do most judges. In addition to possessing great analytical skills and a memory stocked with doctrine, citations, and legal history, Judge Friendly—like a great chess player—could foresee the remote dangers of a holding or distinction proposed by the majority. Given all these capabilities, that he differed from other judges is no wonder. And, having arrived at a “better” answer, he did not hesitate to express it. Judge Friendly listened carefully, even to young law clerks, but he made up his mind quickly and decisively and had no false modesty.

Looking at four recurring themes in Judge Friendly's separate opinions, one can perhaps learn something more about the judge's priorities. These themes gave his dissents an energy that may have been more diffused even in a majority opinion by Judge Friendly himself that covered the same terrain. Put differently, when a judge is

28. *Id.* at 1320 (quoting *id.* at 1316 (majority opinion)).

writing a panel opinion covering the full range of issues presented, even strongly held preferences may appear to be just part of the landscape. Judge Friendly's dissents sometimes reveal emphases that are less obvious in his opinions for the court.

First, despite Judge Friendly's criticism of various ventures of the Warren Court into criminal-law reform—for example, its invention of new exclusionary rules and its drastic expansion of habeas corpus²⁹—an abiding concern with fairness permeated Judge Friendly's decisions in criminal cases: in his attention to the possible innocence of a defendant, in his insistence on government disclosure of exculpatory evidence and on the defendant's right to effective cross examination, and in his blunt censuring of his *own* court whenever it failed to give a party a fair chance to make out a case.³⁰

Regularly, Judge Friendly found flaws in convictions that did not trouble his other colleagues. Here is a typical example: In *United States v. Ross*,³¹ the defendant had been convicted in a federal district court on a single count of simple possession of *one-eightieth* of an

29. *E.g.*, Friendly, *supra* note 11, at 936 (“It is not obvious to me why determining which of the interests protected by the Bill of Rights against the nation shall also be protected against the states, or holding that the amendments mean something hardly suggested by their text, are permissible objective judgments To say as the Court recently did, ‘the Self-Incrimination Clause of the Fifth Amendment which we made applicable to the States by the Fourteenth,’ sounds pretty subjective to me.” (footnote omitted) (quoting *Griffin v. California*, 380 U.S. 609, 611 (1965))); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 145 (1970) (asserting that the Court's willingness to allow collateral attacks that are unsupported by proof of innocence would make “[t]he proverbial man from Mars . . . surely think we must consider our system of criminal justice terribly bad”).

30. *E.g.*, *United States v. Rush*, 666 F.2d 10, 13–16 (2d Cir. 1981) (Friendly, J., dissenting) (“In my view affirmance of this conviction [for conspiracy to import marijuana into the United States] is not a proper exercise of the power, conferred upon [this court] . . . , to ‘require such further proceedings to be had as may be just under the circumstances.’” (quoting 28 U.S.C. § 2106 (1976))); *United States v. Ciambrone*, 601 F.2d 616, 627–29 (2d Cir. 1979) (Friendly, J., dissenting) (arguing that the majority had failed to appreciate the necessity of “maintain[ing] . . . prosecutorial candor,” in light of the central role of the grand jury in securing basic liberties, and asserting that when a prosecutor fails to provide candid responses to a grand jury's questions, a “substantial possibility” that the grand jury would not have indicted had they been given the requested information “is all that is needed to warrant . . . quashing the indictment”); *United States v. Capanegro*, 576 F.2d 973, 983 (2d Cir. 1978) (Friendly, J., dissenting) (“The understandable desire that [the defendant] should not escape criminal punishment should not lead us to extend the statute beyond what Congress directed.”); *United States v. Frattini*, 501 F.2d 1234, 1238 (2d Cir. 1974) (Friendly, J., dissenting) (“[R]eversal of [the defendant's] conviction is necessary in justice not only to him but [also to his codefendant]. . . . This is the rare narcotics case where the defendants may be innocent. There must be a new trial . . .”).

31. *United States v. Ross*, 719 F.2d 615 (2d Cir. 1983).

ounce of cocaine—ordinary cocaine, not crack.³² The drug had been found in a search of the defendant's apartment conducted by agents of the Internal Revenue Service who were investigating tax offenses that had allegedly been committed by the defendant's restaurant business.³³ The majority of the appeals court panel, joined by Judge Friendly, remanded for a new trial on a misinstruction issue, but Judge Friendly dissented from the court's refusal to require a hearing on the defendant's selective-prosecution claim.³⁴

Judge Friendly's dissent described the dubious conduct of and threats by the prosecutors aimed at securing the defendant's aid in snaring his drug suppliers.³⁵ Full cooperation, the prosecutor had indicated, would lead to the dropping of all charges and the defendant's entry into the Federal Witness Protection Program; lack of cooperation, the defendant said he had been warned, would result in his being charged separately on each and every possible tax and drug count available.³⁶ This was too much for Judge Friendly, who, asking only for a hearing on the disputed factual allegations, wrote in part,

I recognize that the ability to offer leniency in return for cooperation is an indispensable tool of law enforcement. I also appreciate the undesirability of sanctioning a new defense unrelated to the merits that might require extensive pretrial proceedings. But I would want to think long and hard before deciding that selective prosecution, initiated by information [without the protection of a grand jury], for a trivial offense not generally prosecuted, following conduct such as [defendant] and his counsel allege, did not go beyond constitutional bounds³⁷

Second among the recurring themes was that of relative competency—of examiner versus agency, trier of fact versus reviewing court, and court versus legislature, executive branch, or commission. “I fear,” Judge Friendly wrote in one instance, “[that] this is another case . . . where appellate judges are whetting their

32. *Id.* at 616.

33. *Id.* at 617.

34. *Id.* at 622 (Friendly, J., dissenting).

35. *Id.*

36. *Id.* at 622–23.

37. *Id.* at 623. Judge Friendly added, “The majority’s phrases, ‘declined to aid’ and ‘failure to cooperate,’ are hardly adequate to describe the kind of assistance that would require participation in the Federal Witness Protection Program.” *Id.* (quoting *id.* at 620 (majority opinion)).

appetite for dealing with facts rather than leaving these to the district judge who saw and heard the witnesses.”³⁸ That measured modesty, reaching back to Professor James Bradley Thayer in one realm and to Justice Frankfurter in others, was common in Judge Friendly’s opinions, whether for the court or for the judge himself. Again and again, Judge Friendly’s position and posture recalled Goethe’s observation: “None proves a master but by limitation.”³⁹

Running through all that Judge Friendly wrote was yet another thread, one that owed something to his temperament and much to his years in law practice: attention to the practical. Whether assessing substantive law, an evidentiary error, or a remedy on remand, Judge Friendly thought that the judgment of courts should be anchored in real-world conditions and should aim at getting the world’s work done. If Justice Jackson was the patron saint of this church, then Judge Friendly was a devout disciple.

Consider as an example Judge Friendly’s dissent in *Hansen v. Harris*.⁴⁰ At the time that case was being decided, the Social Security regulations required a written application for benefits and allowed claims for periods preceding the written application to go back only one year.⁴¹ In *Hansen*, a divorced widow had applied for and received benefits for the future and for one year prior to her application, but she sought benefits also for earlier years that were seemingly precluded by the one-year limitation period.⁴² She argued that when she had inquired earlier about eligibility, the agency’s representative had misled her into not filing an application by saying that she was ineligible because she was divorced from her insured ex-husband. In fact, as she later discovered, her ex-husband’s death had made her eligible for mothers’ benefits notwithstanding the divorce.⁴³

38. *Chem. Transporter Inc. v. Reading Co.*, 426 F.2d 436, 439 (2d Cir. 1970) (Friendly, J., dissenting); *see also* *N.Y. Life Ins. Co. v. Conn. Dev. Auth.*, 700 F.2d 91, 97 (2d Cir. 1983) (Friendly, J., dissenting) (“Judge Carter was in a far better position than we are to determine whether [the defendant’s] counsel consented to an order requiring discontinuance of the New York action. He had the ‘feel of the case which no appellate printed transcript can impart.’” (quoting *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 216 (1947))).

39. JOHANN WOLFGANG VON GOETHE, *Nature and Art*, in *SELECTED POEMS* 165 (Christopher Middleton ed., Michael Hamburger trans., 1983).

40. *Hansen v. Harris*, 619 F.2d 942 (2d Cir. 1980), *rev’d sub nom.* *Schweiker v. Hansen*, 450 U.S. 785 (1981); *id.* at 949–58 (Friendly, J., dissenting).

41. *Id.* at 947 (majority opinion).

42. *Id.* at 944, 946.

43. *Id.* at 944.

The Second Circuit majority found no deliberate misrepresentation by the agent, as the widow had disclosed her divorce orally to the agent but had not revealed to the agent her ex-husband's death.⁴⁴ But the panel still held the agency estopped from denying benefits for the period seemingly excluded by the one-year limitation period.⁴⁵ The writing judge's theory was that an internal agency guideline had directed agents to advise applicants of the benefits of a written filing, even in doubtful situations, and that agents had been told not to discourage filings even when an applicant was likely ineligible.⁴⁶ The widow recounted her alleged conversation with the agent; the agent could not remember.⁴⁷ Writing in dissent from the result and from the opinion's author's reliance on the guidelines to overcome the regulation, Judge Friendly observed,

By dispensing with compliance with an admittedly valid regulation which requires a written application on the appropriate form for a wide variety of social security benefits, the majority opens the door of the federal fisc not simply to [the widow], whom we at least know to have visited the HEW office and said something, but to thousands who merely will make a detailed claim that they have done so and whom[, without a writing,] there is no effective means of rebutting. Millions of dollars will have to be expended simply to ascertain whether conditions of eligibility claimed in a subsequent written application existed at the time of the alleged oral one.⁴⁸

And, in the same case, Judge Friendly pointed to another practical anomaly in the panel's rationale:

Clearly it is in the public interest for an agency with over 80,000 employees, making more than 1,250,000 disability determinations alone a year, . . . to issue housekeeping instructions to its employees in the interest of uniform, fair and efficient administration. But it is perplexing why an agency that issues such instructions should be held to a higher legal standard of dealing with its clients than one that does not.⁴⁹

44. *Id.* at 947-49.

45. *Id.* at 948.

46. *Id.* at 947-48.

47. *Id.* at 944-45.

48. *Id.* at 949 (Friendly, J., dissenting) (citation omitted).

49. *Id.* at 956.

Not many such dissents bring immediate vindication, but in this case, the Supreme Court reversed the panel decision in a per curiam decision, saying, “We agree with the dissent.”⁵⁰

Judge Friendly identified strongly with the judicial enterprise. His intellect and interests cast him as a great scholar; his temperament and drive, as a success in law practice; and his imagination and literary flair, as a natural writer. But Judge Friendly’s *combination* of talents—each one possessed to an unusual degree—did not fit him perfectly into the pigeonhole of any of these vocations. Judging, to which he turned with relief after hard years in private practice, drew on all of his gifts. In return, he cared greatly about the court system and the quality and consequences of its product.

A fourth theme in Judge Friendly’s separate opinions was attention to further proceedings after the decision. Appellate judges, having spent their efforts deciding whether further proceedings are required in the case at hand, sometimes fail to consider carefully just what should happen in the lower court once a remand is agreed to be necessary. Yet in framing a remand, an appeals court enjoys unusual statutory discretion, and Judge Friendly was always attentive to this next stage.⁵¹ Again, this attention reflected not only his capacity for the practical but also his ability to see further down the road than other judges could see.

A good example is furnished by Judge Friendly’s dissent in *New York Life Insurance Co. v. Connecticut Development Authority*.⁵² In that case, an insurance company had brought an interpleader action to decide conflicting claims to the cash surrender value of a policy it had issued.⁵³ After two of the three potential claimants had disclaimed any interest, the cash surrender value had been awarded by consent to the third, who was the policyholder.⁵⁴ The district court had then enjoined all three claimants from bringing further proceedings against the insurer in other courts and had also precluded several related tort

50. *Schweiker v. Hansen*, 450 U.S. 785, 788 (1981).

51. 28 U.S.C. § 2106 (2006) (authorizing the appellate court to “direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances”).

52. *N.Y. Life Ins. Co. v. Conn. Dev. Auth.*, 700 F.2d 91 (2d Cir. 1983); *id.* at 97–98 (Friendly, J., dissenting); *see also* *Dickerson v. Fogg*, 692 F.2d 238, 249 (2d Cir. 1982) (Friendly, J., dissenting) (“The majority follows the district court in condemning [the arresting officers] for not conforming to a code of conduct which defies human nature.”).

53. *N.Y. Life Ins. Co.*, 700 F.2d at 92.

54. *Id.* at 93.

claims that had been brought by the policyholder against the insurer.⁵⁵ The district judge had understood the policyholder to consent to this resolution;⁵⁶ but, after obtaining his payment, the policyholder sought to preserve the tort claims and appealed when the district court refused to alter its injunction.⁵⁷

On appeal, the majority of the Second Circuit panel thought it unclear whether the consent extended to barring the separate tort claims and remanded for further proceedings.⁵⁸ Judge Friendly thought the district court had permissibly found consent and opposed the remand on the merits. He then continued, writing that even if the tort claims were to be reinstated, they were so clearly frivolous that the remand itself—intended to clarify whether consent had been given—would be a waste of time:

Beyond all this a remand is essentially futile. There was simply nothing to support [the policyholder's] contention that New York Life had acted in bad faith in instituting an interpleader action with knowledge that there were no adverse claims If Judge Carter [in the district court on remand] should alter his conclusion as to consent, which the majority wisely does not require, he would then be obliged to face this issue of New York Life's good faith and there can be no reasonable doubt what he would find.⁵⁹

Three of the four concerns emphasized in Judge Friendly's dissents—fairness, relative competence, and practical effects—are ones that some laymen, and even some judges, may view as extrinsic to the application of legal rules. But Judge Friendly, like any sensible judge, knew well how much open space exists in the law and recognized the role that other social values play in deciding cases. In truth, discerning the vector that is the composite of incommensurable values is one of the unspoken skills in judging. When a panel author saw matters more narrowly, a separate opinion from Judge Friendly was more likely.

In his dissents, Judge Friendly rarely showed satisfaction in seeing the light when other judges had not. If anything, his disagreements were flavored with frustration. Admittedly, as his law clerks learned, Judge Friendly's own rapidity of thought made him a

55. *Id.* at 94.

56. *Id.* at 93–94.

57. *Id.* at 95.

58. *Id.* at 96–97.

59. *Id.* at 98 (Friendly, J., dissenting).

shade impatient when his helpers could not keep up. But the sharper tone of his dissents had a different cause: that tone was the asperity of a master of the craft who sees the job being ill done, whether through an overbroad holding, a mishandling of the record or precedent, or an unjust outcome.

Craftsmanship is far more than adornment. Craft skills—naturally a centerpiece for the legal-process school—do guide judges to better reasoning and better outcomes even if they do not always dictate an answer. Whereas litigants and the public care more about the result than the explanation, the explanation is the part of the result that governs future cases. Conversely, the taint of a poorly crafted decision—especially one that is overbroad in its generalizations and detached from the circumstances of the case—impairs the court's reputation and threatens mischief in future cases. A balanced ticket of unhappy examples, more than a few from past Supreme Court decisions, would be easy to adduce.

If craft is so important and if Judge Friendly was so much its master, why then was he, in almost two hundred cases, unable to bring along his colleagues? Of course, he may have persuaded them often enough. Only a file-by-file review of more than 2800 case folders in the Harvard Law School collection—Judge Friendly's court papers that describe the decisions by the panels on which he served—would tell an observer how often the judge won over others in conference or in memoranda. One can persuade another judge to alter language or occasionally even a result and yet leave no trace of disagreement in the published opinion. And when Judge Friendly concurred separately rather than dissented, the pressure on other judges to adjust their positions would be less for judges primarily concerned with the outcome.

Still, on a three-judge panel, Judge Friendly needed to detach only *one* other judge from an unsound prospective opinion. Judge Friendly was not only a legal genius but also one with moderate views and, despite some sharpness in his separate opinions, a pleasant business-like manner with his colleagues—a trait common enough among those who have succeeded in law practice. True, great judges—like Justices Holmes, Brandeis, and the second Justice Harlan—may become regular dissenters in constitutional cases simply because they happen to be out of step with the recurring views of the then-prevailing majority. But most of the time, Judge Friendly's court was dealing with a menu of largely technical cases that were highly dependent on their facts rather than with great social issues.

Judge Friendly had to fail sometimes. His colleagues were confident men with leanings of their own, and Judge Amalya Kearse, the only woman on the court during Judge Friendly's tenure, was no less confident than her brethren. Judge Friendly might have found it doubly hard to reach a colleague in the panel majority who relied more heavily on gut instinct than on analysis or precedent—this mix varies considerably from judge to judge—or who had a strong allegiance to the panel opinion's author, or who lacked the energy to reexamine an initial vote. And Judge Friendly might have been in the “political” middle of the average panel but, on a particular panel, to the judicial right or left of the other two judges. This kind of imbalance can sometimes be checked by en bancs. But en bancs were relatively rare in the Second Circuit—Judge Learned Hand disapproved of them⁶⁰—so the panel usually had the last word.

As it happens, the political valence of the panel seems, from the statistics, to have had little part in occasioning Judge Friendly's dissents. Among those judges from whom Judge Friendly dissented most often were two liberals, two moderates, and a conservative;⁶¹ those from whom he dissented at a rate closer to his average were Judges Edward Lumbar, Sterry Waterman, and Paul Hays—another group spread across the spectrum. And Judge Friendly sat with both Judges Ralph Winter and Jon Newman—one conservative and the other comparatively liberal—and dissented from none of their opinions. Both judges were very smart and, whatever their predispositions, were unlikely to make the kinds of errors so provocative to Judge Friendly.

This brings me to the reasons for dissents and the balance of advantages between the panel majority and the outlier judge. The common aims of dissenters are familiar: to force changes in the majority opinion and, if possible, to alter the reasoning or result; to encourage en banc reconsideration or certiorari; to lay out an alternative approach and to warn uncommitted courts elsewhere of errors or dangers; to prompt legislative change; and to mark the

60. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 441–42 (2d ed. 2011) (stating that “[t]hroughout his life, Hand had nothing but scorn for the utility of en banc hearings” and noting that Judge Hand had once said that he “would ‘never vote to convene’ an en banc court”).

61. From judicial left to judicial right, these judges were Judges Thurgood Marshall and James Oakes, Judges Irving Kaufman and John Smith, and Judge George Pratt; Judge Richard Cardamone, from whose decisions Judge Friendly also dissented more often than average, is not easy to label in this fashion. *See infra* Appendix, Table 2.

precedent as a contested one. A dissent may have one or more of these aims, but it is inherently an appeal to others.

When a panel majority writes *ex cathedra*, its decision controls the outcome and determines the law, and no one else's consent or agreement is required. The dissent, by contrast, is openly advocating a position and encouraging the panel and others to alter or overturn the majority view. By criticizing the majority and advocating a different course, the dissenter may forfeit the useful appearance of judicial detachment. Instead of an air of Olympian detachment, the dissenter may appear more of an advocate, although this result is largely a matter of tone and can be controlled by the writer if he cares to do so. In fact, a willingness to acknowledge points on the other side often strengthens opinions, whether majority or dissent.

The dissenter, however, has advantages of his own: a fixed target in the majority opinion, the analytical scalpel, the deployment of precedent and record evidence ignored by the majority, and the forecast of malign consequences. Few have been better at playing offense than Judge Friendly, who, unlike Judge Learned Hand, had spent decades as a litigator and whose calm concealed a toughness honed in law practice. But Judge Friendly's individual criticisms never constituted the totality of his separate opinions. At the core of each separate opinion lay a proposal to follow a different path—a subtler reading of the precedents, an alternative assessment of the evidence, or a variant gloss on a statute.

Let me say something in closing about the influence of Judge Friendly's separate opinions. The dissents labeled as great by legal historians are almost entirely those of Supreme Court Justices, written in great cases, usually—although not always—turning upon provisions of the Constitution. Further, the dissents regarded as great are often deemed so in part because they were prophetic and ultimately prevailed in later cases. The roll-call is familiar—from Justice Curtis in *Dred Scott*,⁶² to the first Justice Harlan in *Plessy*,⁶³ to Justice Holmes in *Gitlow*⁶⁴ and *Lochner*,⁶⁵ to Justice Brandeis in *Olmstead*,⁶⁶ to Justice Jackson in *Korematsu*.⁶⁷

62. *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393 (1857); *id.* at 564–633 (Curtis, J., dissenting).

63. *Plessy v. Ferguson*, 163 U.S. 537 (1896); *id.* at 552–64 (Harlan, J., dissenting).

64. *Gitlow v. New York*, 268 U.S. 652 (1925); *id.* at 672–73 (Holmes, J., dissenting).

65. *Lochner v. New York*, 198 U.S. 45 (1905); *id.* at 74–76 (Holmes, J., dissenting).

66. *Olmstead v. United States*, 277 U.S. 438 (1928); *id.* at 471–88 (Brandeis, J., dissenting).

When it comes to dissents, Judge Friendly—an intermediate court judge with many mundane cases and no authority to write the final word on the Constitution—could hardly belong in this company. If he influenced the course of the law on important issues—and, arguably, he did affect both criminal procedure and federal common law, among other subjects—his articles may have mattered as much as his opinions, and his panel decisions, which carried the imprimatur of his court, had to have mattered more than his separate opinions.

Judge Friendly was widely cited by other judges both when he wrote for a panel and, perhaps not surprisingly as his reputation grew, when he wrote separately. By one count, his separate opinions—adding concurrences and dissents together—have been cited more often than those of Judge Learned Hand or of Judge Richard Posner.⁶⁸ But Judge Friendly's panel opinions, unlike his separate opinions, were controlling in his own circuit and, on that account, may also have carried extra weight in other circuits. Nevertheless, even his panel opinions were at the mercy of time and events.

Ultimately, Judge Friendly's most lasting influence as a judge is as a model for appellate judging—for opinions combining rigor, learning, mastery of the record and the law, insight, and balanced judgment. But Judge Friendly's *dissents* offer a narrower yet potent lesson—one that brings me back to the benefits of dissenting opinions. The lesson turns on the potential power of a unanimous panel, lacking a dissenter, not only to decide a case but also to control what the audience learns about the case, its underlying facts, and the arguments made by counsel.

One judge has observed that in a unanimous decision, “the victors in the case get to write its history.”⁶⁹ Against this danger, the dissent is, as Professor Henry Wigmore said of cross examination, an “engine . . . for the discovery of truth.”⁷⁰ For like cross examination, the dissent supplies for comparison, side by side with the official

67. *Korematsu v. United States*, 323 U.S. 214 (1944); *id.* at 242–48 (Jackson, J., dissenting).

68. A Westlaw search in February 2011 revealed that Judge Friendly's dissents have been cited 227 times and his concurrences 385 times. By contrast, Judge Richard Posner's concurrences have been cited 272 times, and his dissents 237 times; Judge Learned Hand's concurrences and dissents have been cited around sixty times each. Of course, numbers change over time, and any comparison necessarily ignores other obvious variables.

69. Robert G. Flanders, *The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable*, 4 ROGER WILLIAMS U. L. REV. 401, 402 (1999).

70. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 (James H. Chadbourn ed., rev. ed. 1974).

version given by the panel, both an adverse commentary and an alternative version of the matter. The majority has cast its lot with one side; the dissenter reminds the audience that the other side almost always has arguments of its own worth considering.

The phrase “learning from one’s mistakes” embodies an insight familiar to every child. Whereas Judge Friendly’s majority opinions taught the judicial virtues, his dissents warned against the common sins of appellate judging: distorting or ignoring precedent, misstating the record, being imprecise in thought and impractical in judgment, allowing unfair or unreasonable outcomes, and failing to respect the limits of the judicial role. Over and over, Judge Friendly’s separate opinions not only identified the substantive mistake in the panel’s reasoning but also identified the underlying sin or sins that had led to the error. And the sins were made vivid by Judge Friendly’s use of the panel opinion to illustrate them.

These are lessons indeed for judges, and no one needs them more. Overworked, holding positions of authority but largely insulated from outside criticism, and faced with perplexing problems that affect many lives, judges can fall easily into such sins. True, a quarrel does get settled, whether rightly or wrongly, and this finality is no small benefit. The principal obligation of courts is to *decide* so that the parties can get on with their lives. But judges are paid to get the result as right as human beings can manage, and lawyers know when judges have failed. This failure, not dissent, is what weakens confidence in the courts.

The high office of the dissent is to lean against and check a one-sided narrative or faulty analysis, to prompt a second look by the panel, and to warn other courts against perpetuating the panel’s mistake. In Professor Paul Freund’s enchanting phrase, the dissent is “the second blade of the shears, against which the cutting edge must work, serving to make a finer and truer line.”⁷¹ If Judge Friendly was prodigal in separate opinions, it is the law’s gain.

71. PAUL A. FREUND, ON LAW AND JUSTICE 55 (1968).

APPENDIX

Table 1. Judge Friendly's Rate of Dissenting and Concurring Compared to Contemporary Second Circuit Judges

Judge	On Panel	Dissenting Opinions	Percentage of Cases in Which the Judge Dissented	Concurring Opinions	Percentage of Cases in Which the Judge Concurred
Mansfield	1492	89	6.0	66	4.4
Moore	2614	146	5.6	69	2.6
Lumbard	4101	175	4.3	122	3.0
Oakes	4526	189	4.2	107	2.4
Friendly	2822	103	3.6	88	3.1
Timbers	1551	55	3.5	19	1.2
L. Hand	5638	177	3.1	87	1.5
Mulligan	890	28	3.1	16	1.8
Marshall	533	16	3.0	9	1.7
Kaufman	2340	53	2.3	52	2.2
Waterman	2523	53	2.1	78	3.1
Gurfein	567	8	1.4	10	1.8
Anderson	1159	15	1.3	17	1.5

Table 2. *Judge Friendly's Dissents from Other Judges*

Judge	Appointing President	Opinions with Judge Friendly on the Panel	Judge Friendly Dissents	Percentage of Dissents from This Judge
Curtin (DJ)	Johnson	2	2	100.0
Dooling (DJ)	Kennedy	2	1	50.0
Danaher (D.C. Cir.)	Eisenhower	4	2	50.0
Cardamone	Reagan	6	1	16.7
Medina	Truman	32	5	15.6
Pratt	Reagan	14	2	14.3
Marshall	Kennedy	35	5	14.3
Kaufman	Kennedy	82	11	13.4
Kearse	Carter	15	2	13.3
Mansfield	Nixon	40	5	12.5
Oakes	Nixon	50	6	12.0
Hand	Coolidge	9	1	11.1
Smith	Eisenhower	126	10	7.9
Van Graafeiland	Ford	13	1	7.7
Feinberg	Johnson	100	6	6.0
Anderson	Johnson	68	4	5.9
Mulligan	Nixon	36	2	5.6
Hays	Kennedy	108	6	5.6
Clark	Roosevelt	37	2	5.4
Moore	Eisenhower	137	7	5.1
Waterman	Eisenhower	131	6	4.6
Lumbard	Eisenhower	158	6	3.8
Meskill	Ford	40	1	2.5
Timbers	Nixon	41	1	2.4
Winter	Reagan	21	0	0.0
Swan	Coolidge	14	0	0.0
Pierce	Reagan	11	0	0.0
Newman	Carter	17	0	0.0
Gurfein	Nixon	26	0	0.0