HENRY J. FRIENDLY: DESIGNED TO BE A GREAT FEDERAL JUDGE

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ABSTRACT

Who do you believe are great judges? Why do those judges make your list? Does Henry J. Friendly make your list as a great judge? He certainly makes mine. This Article challenges judges, attorneys, legal academics, and law students to explore the elementary question of what makes a great judge while asking whether Friendly was one. To aid that pursuit, this Article: (1) briefly lists the traits that make a great judge, (2) recounts Friendly's amazing academic and legal careers that equipped him with the necessary traits to be a great judge, (3) discusses Friendly's rise to the Second Circuit and his outsized presence on that court, and most importantly, (4) analyzes Friendly's historic and lasting contributions to the law. Because Friendly exemplified all of the traits of a great judge, I conclude that he was a great judge. I recommend that you, too, contemplate, study, and discover what made Friendly a great judge. In the process, you might become a better judge, attorney, legal academic, or law student. Friendly's impact on you would then only add to his monumental and lasting impact on the law itself.

TABLE OF CONTENTS

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I. INTRODUCTION

Henry J. Friendly was a great judge. He became a great judge by dedicating his life to the pursuit of acquiring and mastering the necessary traits that would enable him to make substantial impacts to the law. Friendly's stellar academic, legal, and judicial careers formed the tripod that supported his unlimited abilities to transform the law.[1] Even though Friendly never ascended to the Supreme Court, his 27 years of service on the U.S. Court of Appeals for the Second Circuit was legendary in its scope, contribution, and impact.[2] Three decades after his death, Friendly's transformative contributions to the law are still present today.

I am not alone in concluding that Friendly was a great judge. In early 2012, Chief Justice John Roberts, Associate Justices Anthony Kennedy, Stephen Breyer, Samuel Alito, and Sonia Sotomayor, superstar attorney Bob Bennett, and various federal judges attended an event in Justice Antonin Scalia's home.[3] What brought them together? Was it to feast upon

1. Michael Boudin, a former Friendly clerk and current federal judge on the U.S. Court of Appeals for the First Circuit, has a similar view of Friendly's stellar academic, legal, and judicial career. Judge Boudin explained, "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." Michael Boudin, *Judge Henry Friendly and the Craft of Judging*, 159 U. PA. L. REV. 1, 7 (2010). Expounding on Friendly's hyper-productive career, Judge Boudin explained,

> His later books and articles, almost all written while serving full-time as a busy 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.

Id. at 7–8; *see also id.* at 15 ("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.").

2. *See* Richard A. Posner, *Foreword* to DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA, at x (2012).

3. The Reliable Source, *A Truly Exclusive Washington Party: Antonin Scalia Hosts Justices to Toast New Henry Friendly Bio*, WASH. POST: BLOG (May 1, 2012), http://www.washingtonpost.com/blogs/reliable-source/post/a-truly-exclusive-

Justice Scalia's Italian cookies or Maureen Scalia's homemade hors d'oeuvres? Perhaps, because that fare was available, but the purpose of this gathering of the legal elite was to discuss the publication of *Henry Friendly: Greatest Judge of His Era*,[4] a biography written by David M. Dorsen.[5] At the event, Justice Scalia described Friendly as a man who was "top of the heap" and "one of the most admired court of appeals judges in the country."[6] Chief Justice Roberts, who clerked for Friendly in the 1979–1980 term, held little back in his effusive praise: "He was the best judge of his generation, he founded one of the great New York law firms, he was one of the leading academics of this generation, [and] he was general counsel for Pan Am. There [is] no figure today who's remotely comparable to that scope."[7] Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit gushed, "Friendly's photographic memory combined with his analytical power, energy, speed, and work ethic to make him the most powerful legal reasoner in American legal history" and the greatest federal judge of his time.[8] Judge Posner explained that Friendly built all of these qualities upon an "academic brilliance [tempered] with massive common sense."[9] Judge A. Raymond Randolph of the U.S. Court of Appeals for the D.C. Circuit, who clerked for Friendly in the 1969–1970 term,[10] concurs with his fellow federal judges on their assessments of Friendly: "Friendly was one of the greatest judges in our nation's history" and "was certainly one of the most brilliant."[11] Justice Felix Frankfurter once referred to Friendly as "the best judge now writing

washington-party-antonin-scalia-hosts-justices-to-toast-new-henry-friendly-bio/2012/04/30/gIQAR2vYsT_blog.html.

4. DORSEN, *supra* note 2. Dorsen's book served as my inspiration to analyze Friendly's lasting contributions to the law.

5. The Reliable Source, *supra* note 3.

6. *More Exclusive and More Cozy*, THE HOTLINE (May 1, 2012). Justice Scalia called Dorsen's book a "wonderful biography." I agree.

7. The Reliable Source, *supra* note 3. In May 2010, Judge Pierre Leval of the U.S. Court of Appeals for the Second Circuit presented Chief Justice Roberts with Friendly's judicial robe. DORSEN, *supra* note 2, at 357.

8. Posner, *Foreword* to DORSEN, *supra* note 2, at xiii. Paradoxical in its reciprocity, Friendly opined that Posner was the "best judge in the country." DORSEN, *supra* note 2, at 117.

9. Posner, *Foreword* to DORSEN, *supra* note 2, at xiii.

10. DORSEN, *supra* note 2, app. A at 363.

11. A. Raymond Randolph, *Before* Roe v. Wade*: Judge Friendly's Draft Abortion Opinion*, 29 HARV. J.L. & PUB. POL'Y 1035, 1035 (2006) [hereinafter Randolph, *Before* Roe v. Wade].

opinions on the American scene."[12]

Why do these judges regale Friendly as a great judge? The elementary question might be to ask—What are the traits of a great judge? Surely, the weighty question of what makes a great judge cannot simply boil down to whether one agrees with the judge's conclusions. Instead, there should be an objective standard that would lead people with varying viewpoints and worldviews to conclude that someone is a great judge. As you observe the quotes in the preceding paragraph, certain traits of greatness emerge. Building upon these foundational observations, I believe that the following traits readily emerge as markers of a great judge: impactful, thoughtful, cautious, restrained, clear, fair, intelligent, inquisitive, rational, pragmatic, well-read, critical, consistent, analytical, reasoned, curious, productive, independent, and detail-oriented. Undoubtedly, this list is incomplete. But at least these traits begin an analysis of what makes a great judge.

This Article encourages judges,[13] legal academics, attorneys, and law students to ask what makes a great judge and whether Friendly was one. To assist in that endeavor, this Article: (1) lists the traits of great judges,[14] (2) describes Friendly's amazing career that helped him acquire these traits,[15] (3) illustrates Friendly's outsized presence on the Second Circuit,[16] and most importantly, (4) analyzes Friendly's lasting judicial greatness.[17] In the end, because Friendly exemplified all of the traits of a great judge, I conclude that he was a great judge.[18]

II. TRAITS OF A GREAT JUDGE

To analyze whether Friendly was a great judge, it is prudent to frame that question analytically, albeit briefly. Who do you believe are great judges? What traits exemplify the judges on your list? Do only those judges who share the nuances of your worldview make your list?

In the polarizing political environment in which judges labor, outcome-

12. Paul Freund, In Memoriam, *in In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1709, 1720 (1986).

13. Tellingly, Dorsen dedicated his biography, in part, to "the Judges of the U.S. Courts of Appeals." DORSEN, *supra* note 2, at v.

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part IV.

17. *See infra* Part V.

18. *See infra* Part VI.

based conclusions undoubtedly seep into any analysis of whether someone is a great judge. You might ask whether a judge "gets it right." I am not convinced that what makes a great judge is based simply on whether he or she always "gets it right." Judges do not always "get it right." For instance, there are not many modern-day celebrations of Justice Oliver Wendell Holmes's decision in *Buck v. Bell*,[19] but Holmes is hailed as a great judge.[20] If one were simply to pick desired judicial outcomes and then list the authors of those opinions as great judges, then the discussion of great judges would inherently be driven by ideological bias. Conservatives would pick conservatives; liberals would pick liberals. We would pick people who think like we do; we would be left with what divides us. Ideological debate does not interest me here. Instead, I am interested in discovering whether people of different values and viewpoints can nevertheless identify objective traits—other than pure ideology—that great judges possess. What traits would unify people of varying values and viewpoints to conclude that Friendly was a great judge? Friendly himself and Judge Posner have both expressed their beliefs as to what makes a great judge.

Judge Posner listed the traits that made Friendly "the best federal appellate judge of the past half century": academic brilliance, common sense, analytical persuasion, strong memory, reasoned application, tireless energy, amazing speed and productivity, powerful legal reasoning, and a disciplined and striving work ethic.[21] Judicial ideology did not get top billing. Over two decades ago, Judge Posner explained that Judge Learned Hand was a great judge, and not because of his ideology.[22] Judge Posner readily acknowledged that "the criteria of judicial greatness are contested."[23] But he

19. Buck v. Bell, 274 U.S. 200, 207–08 (1927) (holding, shamefully and despicably, that the involuntary sterilization of a woman is constitutional because "[t]hree generations of imbeciles are enough").

20. Even though Justice Holmes and the Supreme Court revealed a bigoted, hateful, near-sighted, ignorant, and discriminatory worldview in *Buck v. Bell*, Justice Holmes continues to enjoy a special status among federal judges. *See, e.g.*, Cotton v. U.S. Parole Comm'n, 992 F.2d 270, 271 (10th Cir. 1993) (referencing "the great Oliver Wendell Holmes"); President Barack Obama, Remarks by the President at the American Veterans Disabled for Life Memorial Dedication (Oct. 5, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/10/05/remarks-president-american-veterans-disabled-life-memorial-dedication (quoting "the great Oliver Wendell Holmes").

21. Posner, *Foreword* to DORSEN, *supra* note 2, at xi, xiii.

22. Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511, 523 (1994) (book review).

23. *Id.*

refused to label a judge as great based on "the 'rightness' of his decisions," labeling that "too demanding."[24] Instead, Judge Posner maintained "the test of greatness for the substance of judicial decisions . . . should be . . . the contribution that the decisions make to the development of legal rules and principles rather than whether the decision is a 'classic' having the permanence and perfection of a work of art."[25] I wholeheartedly concur—to use judicial language—that a judge's contribution to the law is an essential trait of greatness.

Friendly also reduced to words the essential characteristics of a great judge:

> a strong and inquiring mind; . . . intense concentration and sharp analysis; education in philosophy . . . and in law . . . ; a knowledge, both wide and deep, of the world's great books . . . ; a gift of style or, more accurately, of styles, for his could vary as was appropriate from the simplest to the most sublime; a rare insight into the nature of his fellow men; and . . . a sense of humor, even—indeed especially—about himself.[26]

Friendly explained that because Judge Hand possessed these qualities, he was a great judge.[27] In addition to Judge Hand, who was "Friendly's favorite judge,"[28] Friendly deemed Justices Oliver Wendell Holmes,[29] Louis Brandeis,[30] Benjamin Cardozo, Harlan Fiske Stone, Felix Frankfurter,

24. *Id.*

25. *Id.*

26. DORSEN, *supra* note 2, at 124 (quoting HENRY J. FRIENDLY, *Judge Learned Hand* [hereinafter FRIENDLY, *Judge Learned Hand*], *in* BENCHMARKS 308, 316 (1967)). In a paper entitled *On Entering the Path of the Law*, Friendly expounded on what makes someone suitable to study and practice law, traits that inherently forge a path to the judiciary. *See* HENRY J. FRIENDLY, *On Entering the Path of the Law*, *in* BENCHMARKS, *supra*, at 22–33.

27. DORSEN, *supra* note 2, at 124; *see also* FRIENDLY, *Judge Learned Hand*, *supra* note 26, at 308–17 (explaining, in a speech, Friendly's admiration for Hand).

28. DORSEN, *supra* note 2, at 123.

29. *Id.* at 121–23; *see also* HENRY J. FRIENDLY, *Mr. Justice Holmes and the Common Law* (explaining, in a speech, Friendly's admiration for Holmes), *in* BENCHMARKS, *supra* note 26, at 285–90.

30. DORSEN, *supra* note 2, at 121–23; *see* HENRY J. FRIENDLY, *Mr. Justice Brandeis—The Quest for Reason* [hereinafter FRIENDLY, *Mr. Justice Brandeis*] (explaining, in a speech, Friendly's admiration for Brandeis), *in* BENCHMARKS, *supra* note 26, at 291–307.

Robert Jackson, Hugo Black, and Roger Traynor[31] as great judges.[32] With an eye toward greatness, Friendly anticipated that various federal circuit judges were or would become great judges, specifically commending Stephen Breyer of the First Circuit,[33] Richard Posner and Frank Easterbrook of the

31. Remarkably, Justice Traynor published 44 articles and 1 book while he was a state supreme court justice and 18 more articles after he retired from the bench at the age of 70. DORSEN, *supra* note 2, at 411 n.76.

32. *Id.* at 121–23 (explaining Friendly's belief that "when the history of American law in the first half of [the twentieth] century comes to be written, four judges . . . will tower above the rest—Holmes, Brandeis, Cardozo, and Learned Hand" (quoting FRIENDLY, *Judge Learned Hand*, *supra* note 26, at 309)).

33. Nominated to the Supreme Court by President Bill Clinton, Breyer became a Justice on August 3, 1994. Michael Kirkland, *Breyer Sworn in as Justice*, UPI (Aug. 3, 1994), http://www.upi.com/Archives/1994/08/03/Breyer-sworn-in-as-justice/2715775886400/.

Seventh Circuit, Richard Arnold of the Eighth Circuit,[34] and Robert Bork,[35]

34. When I clerked at the Eighth Circuit, I spent time with Richard Sheppard Arnold before his premature death (which kept him from his full potential—a seat on the Supreme Court). Friendly undoubtedly was correct in recognizing that Richard Arnold was a great judge. I dedicate the text of this footnote, even if somewhat misplaced and wholly inadequate to the task, to pay tribute to him as a great judge. In May 2009, editorialist Paul Greenberg described Richard Arnold's opinions this way:

> [Were his decisions] conservative or liberal? Such questions are not applicable in his case. For his law was neither of the right nor left. A fellow jurist named Antonin Scalia once noted that, among those who study such trends on the court, Richard Arnold was the liberals' favorite conservative and the conservatives' favorite liberal. Such was the quality of his law, which rose above labels.

Paul Greenberg, *The Lost Light*, TOWNHALL (May 11, 2009), http://www.townhall.com/columnists/paulgreenberg/2009/05/11/the-lost-light-n1140980. Greenberg explained why Richard Arnold's clarity of thought left little room for doubt: "One need not agree with Judge Arnold's decisions to understand how he reached them and why .... The clarity of the judge's prose mirrors that of his thought." Paul Greenberg, *Best Man Won't Be Our Next Justice*, POST & COURIER, Mar. 29, 1993, at 7A. As am I, Greenberg was in awe of Richard Arnold's ability to craft opinions: "There is something reverential in Richard Arnold's intellect that not even his tight, economical prose can disguise, and that resists all merely reflexive thought." *Id.* Greenberg similarly marveled at Richard Arnold's intellect, which "unties Gordian knots with a seeming effortlessness that sets him apart as a judge." *Id.* I concur, noting that Richard Arnold's opinions were elegant in their simplicity, with nothing important left out and nothing extraneous left in.

Richard Arnold was widely heralded as a great judge. Through the words of Justice Brennan and two federal circuit judges, the *Minnesota Law Review* paid tribute to Richard Arnold during his life. *A Tribute to Chief Judge Richard S. Arnold*, 78 MINN. L. REV. 1 (1993). After Richard Arnold's death, the *Arkansas Law Review* devoted 200 pages to pay tribute to his impact on the law; the luminaries paying tribute included Richard Arnold's brother and fellow judge on the Eighth Circuit, Morris Sheppard Arnold, former Senator and Governor Dale Bumpers, then-Senator Hillary Clinton, former President Clinton, Eighth Circuit Judge Theodore McMillian, and Justice Scalia. *Tribute to Judge Richard Sheppard Arnold*, 58 ARK. L. REV. 481 (2005).

No matter what standards determine who is a great judge, Richard Arnold makes the cut. He possessed all of the traits that made Friendly great. Additionally, Richard Arnold had a warm grace and a strong faith (perhaps not Friendly's strongest areas). The United States is a better place because of Richard Arnold's judicial service. I encourage you to explore further why Richard Arnold was a great judge. *See generally* POLLY J. PRICE, JUDGE RICHARD S. ARNOLD: A LEGACY OF JUSTICE ON THE FEDERAL BENCH (2009); Memorial Session in Honor of Richard Sheppard Arnold (Jan. 10, 2005), *in* 432 F.3d XXVII, XXVII–L (2006); Presentation of Portrait: Honorable Richard S. Arnold (June 28, 2002), *in* 315 F.3d XXIX, XXIX–XLIV (2003). Finally, if you wonder why I reference Richard Arnold as opposed to Judge Arnold, that is how I learned to

Ruth Ginsburg,[36] and Antonin Scalia[37] of the D.C. Circuit.[38]

Even though my Article focuses on Friendly's greatest trait—his lasting impact on the law—I nevertheless want you to know the traits that I believe great judges possess, which will equip you to look for these traits as I discuss Friendly. Again, my synthesized list of essential traits of great judges requires that the judge be impactful, thoughtful, cautious, restrained, clear, fair, intelligent, inquisitive, rational, pragmatic, well-read, critical, consistent, analytical, reasoned, curious, productive, independent, and detail-oriented. Would you add to or subtract from my list? When I apply my traits to Friendly, he soars above the field, leaving no doubt that he was a great judge.

III. FRIENDLY'S PREPARATION TO BE A GREAT JUDGE

From an early age, Friendly began acquiring and employing the necessary traits to become an outstanding thinker, writer, and, ultimately,

address him when I clerked at the Eighth Circuit. At that time, not only was Richard Arnold a member of the court, but so was his younger brother and my friend, Morris Arnold. Referring to Judge Arnold would simply beg the question, "Which one?"

35. Nominated to the Supreme Court by President Ronald Reagan in July 1987, Bork was rejected by the Senate in a 42–58 vote. Linda Greenhouse, *Bork's Nomination Is Rejected, 58-42; Reagan 'Saddened*,*'* N.Y. TIMES (Oct. 24, 1987), http://www.nytimes.com/1987/10/24/us/bork-s-nomination-is-rejected-58-42-reagan-saddened.html?pagewanted=all. Pasco Bowman, one of the judges for whom I clerked, was on the short list of candidates for this seat. *Id.* The seat ultimately went to Anthony Kennedy. Linda Greenhouse, *Reagan Nominates Anthony Kennedy to Supreme Court*, N.Y. TIMES (Nov. 12, 1987), http://www.nytimes.com/1987/11/12/us/reagan-nominates-anthony-kennedy-to-supreme-court.html?pagewanted=all.

36. Ruth Ginsburg was nominated to the Supreme Court by President Clinton and became a Justice on August 10, 1993. *Ruth Bader Ginsburg Sworn in as Supreme Court Justice*, N.Y. TIMES (Aug. 11, 1993), http://www.nytimes.com/1993/08/11/us/ruth-bader-ginsburg-sworn-in-as-supreme-court-justice.html. Though Friendly thought that Ginsburg was a fine judge, he apparently made the bigoted gesture of pulling a chair out for her at a dinner party, drawing her rebuke, "The time has long since passed when a man can tell a woman where to sit." DORSEN, *supra* note 2, at 118. I am not certain what Friendly's response would have been had Ginsburg pulled his chair out for him.

37. Nominated to the Supreme Court by President Reagan, Scalia became a Justice on September 26, 1986. Maira Garcia & Amisha Padnani, *Justice Antonin Scalia: His Life and Career*, N.Y. TIMES (Feb. 14, 2016), http://www.nytimes.com/interactive/2016/02/14/us/scalia-timeline-listy.html?_r=0. Justice Scalia died at the age of 79 on February 13, 2016. *Id.*

38. DORSEN, *supra* note 2, at 118 (reporting that "Friendly would single out for commendation younger circuit judges").

judge. Friendly rapidly developed academic talent. By age seven, he could read most any book,[39] and the more I learn about Friendly, the more I am convinced that he had read every book during his life. Friendly graduated first in his high school class, was editor in chief of the newspaper, and made the highest score on the New York State Regents examination.[40] His high school yearbook proclaimed his brilliance at the age of 16: "Henry's wisdom so overwhelms the rest of us that we can only sit amazed and speechless."[41] At age 16, Friendly enrolled in Harvard College, where he earned straight *A*s except for a *B* in physical training.[42] While at Harvard, Friendly produced serious academic papers on the Fall of Naples, the workings of the British monarchy in the 1840s, and church–state relations under William the Conqueror.[43] A senior-level European history professor mused that "in my whole teaching experience of some twenty years, [Friendly was] the best fitted for this work."[44] Graduating *summa cum laude*, Friendly was referred to as "the smartest at Harvard College."[45]

Friendly had two competing desires when he graduated from Harvard—pursue a Ph.D. in Medieval English History or attend Harvard Law School (HLS).[46] At the urging of then-Professor and later-Justice Felix Frankfurter, Friendly ultimately chose law over history.[47] Friendly quickly established himself as one of the top law students with a blindingly bright future. A law professor congratulated Friendly on one of his first-year exams with the following note: "[I have] never run across as beautiful [an exam] book as yours."[48] Predictably, Friendly became President of the *Harvard*

39. *Id.* at 6.
40. *Id.* at 10.
41. *Id.* at 11.
42. *Id.* at 12–13.
43. *Id.* at 15–17.
44. *Id.* at 17.
45. *Id.* at 13.
46. *Id.* at 20.
47. *Id.* Ponder how history would have recorded the accomplishments of Professor Friendly versus Judge Friendly. Life places forks in the road; we must choose our paths. The ripples of those choices impact the entire human condition. Interestingly, Friendly brought his Harvard training as a historian and love for that calling onto the bench. According to Michael Boudin, a former Friendly law clerk and current federal judge, "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." Boudin, *supra* note 1, at 5.
48. DORSEN, *supra* note 2, at 23 (alteration in original). Did your law school exams

Law Review, where he worked from 9:00 a.m. to nearly 11:00 p.m. daily, studying for classes on the weekends.[49] Friendly won the Marshall Prize for the best brief in HLS's moot court competition.[50] When his academic record came to a close, Friendly had earned the second highest grades in HLS history, just behind the record of Louis Brandeis.[51]

While Professor Frankfurter tried to entice Friendly to remain at HLS, Justice Brandeis persuaded Friendly to clerk for him on the Supreme Court.[52] On the first day of Friendly's clerkship during the October 1927 term, the *Christian Science Monitor* ran a front page story about Justice Brandeis and Friendly that hailed "[t]he two highest Harvard Law men to work together."[53] Friendly described his clerkship experience as "hero worship," proclaiming that Justice Brandeis knew "more law than almost the rest of the Court together."[54] As Friendly's clerkship ended, HLS and Justice Brandeis pressured him to become a law professor.[55] Friendly instead chose private practice, where he would remain for 31 years.[56]

Friendly began his private practice career at the prestigious law firm of Root, Clark, Buckner, Howland and Ballantine (Root Clark)[57] a year before

contain such notations?

49. *Id.* at 24–25.

50. *Id.* at 24.

51. *Id.* at 1. To put his academic performance in context, a score of 75 earned an *A* and 80 earned *summa cum laude* honors. *Id.* at 26. Friendly graduated from HLS with an average score of 86. *Id.*

52. *Id.*

53. *Id.* at 27 (quoting *Secretary of Justice Brandeis Nearly Ties His Harvard Rank*, CHRISTIAN SCI. MONITOR, Sept. 12, 1927, at 1).

54. *Id.* at 28–29. Foreshadowing the judicial traits that Friendly would acquire, Justice Brandeis displayed a solid work ethic, wrote all of his own opinions, was a master at organization, and mostly exercised judicial restraint. *Id.*; *see also* FRIENDLY, *Mr. Justice Brandeis*, *supra* note 30 (cataloging a number of Brandeis's qualities).

55. DORSEN, *supra* note 2, at 31.

56. *Id.* at 34. Money undoubtedly motivated Friendly to enter private practice. "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 . . . ." Boudin, *supra* note 1, at 8. Friendly had always lived comfortably and did not want to change that way of life. Friendly's father had left a large estate, and Friendly himself later left a $5,300,000 estate. DORSEN, *supra* note 2, at 44, 344.

57. DORSEN, *supra* note 2, at 31–32. Root Clark later became Dewey Ballantine, named after former governor and presidential candidate, Thomas E. Dewey, and the first solicitor of the Internal Revenue Service, Arthur A. Ballantine. *Id.* at 384 n.83.

the stock market crash of October 1929 and the onslaught of the Great Depression.[58] Shortly after joining the firm, Friendly was selected to perform legal work for a new company and new client, Pan American Airways (Pan Am).[59] This was the beginning of a very long and fruitful relationship between Friendly, Pan Am, and Pan Am's founder, Juan Trippe.[60] While at Root Clark, Friendly worked with John Marshall Harlan II, later a Justice on the Supreme Court, on a complex $550 million estate case.[61] Friendly also played central roles in a famous railroad case involving billions of dollars in bonds, the bankruptcy of Paramount Pictures, the creation of the Civil Aeronautics Board, and even performed legal work for Albert Einstein.[62]

In late 1945, Friendly left Root Clark to found Cleary, Gottlieb, Friendly & Cox.[63] Within five years, the fees per attorney averaged $2,760,000 in 2012 dollars.[64] Friendly continued his work for Pan Am, serving as Vice President and General Counsel.[65] In essence, Friendly held two full-time jobs from 1946 to 1959 and even had two offices in New York, one at his firm's 5 Wall Street address and another in Pan Am's offices in the Chrysler Building.[66] During this time, Friendly represented Pan Am and Trippe in their protracted battle against Trans World Airlines and Howard Hughes over transatlantic competition and contested routes in the regulated airline industry.[67]

Throughout Friendly's academic, clerkship, and private-practice

Dewey Ballantine later became Dewey and LeBoeuf. *Id.* at 1. In May 2012, the storied law firm of Dewey and LeBoeuf ended in monumental failure, collapsing under a wall of debt. James B. Stewart, *The Dubious Case of Dewey & LeBoeuf*, N.Y. TIMES (Sept. 10, 2015), http://www.nytimes.com/2015/09/11/business/the-dubious-case-of-dewey-leboeuf.html.

58. DORSEN, *supra* note 2, at 34, 36. Candid about his economic status, Friendly once said, "I personally felt no pain during the [Great] Depression." *Id.* at 36.

59. *Id.* at 34.

60. *Id.* at 34–36.

61. *Id.* at 38 (valuing the estate, at the time of Friendly's representation, at "$40 to $50 million (or about $550 million in today's dollars)").

62. *Id.* at 41–42, 45–46, 68.

63. *Id.* at 50–51.

64. *Id.* at 66.

65. *Id.* at 60.

66. *Id.*

67. *Id.* at 61. For an outstanding biography of Howard Hughes (and one of my favorite books), see DONALD L. BARLETT & JAMES B. STEELE, HOWARD HUGHES: HIS LIFE & MADNESS (reissue 2004).

experiences, one can readily recognize his powerful intellect, perfectionist organization, renowned efficiency, and tireless work ethic. For example, he often dictated briefs with pinpointed precision and a dazzling display of factual and legal support.[68] Friendly's nearly three decades in the law to that point had prepared him for the role that was designed for him: federal appellate judge. There was no doubt that Friendly possessed the traits of a great judge as he prepared to take the federal bench, a seat custom built for a man designed as he was.

IV. ON THE BENCH WITH THE TRAITS OF A GREAT JUDGE

Twenty-five years after graduating from HLS and nearing his 50th birthday, Friendly watched as Dwight Eisenhower was elected President of the United States, the first time a Republican had been elected in two decades.[69] Now was the time for Friendly, a Republican, to seek an appointment to the federal bench. Friendly was not interested in an appointment to the district court—only the appellate court.[70] Although he understood that political contacts played a major role in the nomination of federal judges, he hoped that merit would be the deciding factor to ensure a nomination.[71] Friendly's reputation for brilliance was undoubtedly an important trait as he sought a judicial appointment, a trait routinely displayed during his outstanding three-decade career as a practicing attorney, his stellar academic record at HLS, and his clerkship for Justice

68. DORSEN, *supra* note 2, at 70. While in private practice, Friendly argued, and lost, two cases before the Supreme Court. *Id.* at 72. His overall appellate record was 12 wins and 16 losses, proving that attorneys often cannot overcome the law and facts in a particular case. *Id.*

69. *Id.* at 71.

70. *Id.* at 72. Friendly actually visited a federal district court for a week as a spectator to see if he might be interested in a district judgeship as a stepping stone to a circuit judgeship. *Id.*

71. *Id.* at 71–72. Even though Friendly voted mostly Republican, he did not make many political contributions. *Id.* at 75. Friendly was, however, widely known as a brilliant attorney with a stellar academic and legal career. *Id.* at 72. And he did have helpful connections. For example, President Eisenhower's Attorney General was Herbert Brownell Jr. *Id.* at 71. When Friendly was the President of the *Harvard Law Review*, he got to know Brownell, who was editor in chief of the *Yale Law Journal*. *Id.* The two also worked together as the authors of the first *Bluebook*. *Id.* Even though *The Bluebook* is now the bane of—or reason for—a law review student's existence, Friendly worked on a blank slate to create a uniform guide to legal citation. *The Bluebook* is now in its 20th edition. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 20th ed. 2015).

Brandeis.

On March 10, 1959, President Eisenhower nominated Friendly to the U.S. Court of Appeals for the Second Circuit.[72] He was confirmed on September 9, 1959.[73] It can be common that when the President nominates an attorney in private practice to the federal bench, the attorney's clients look for other attorneys for the inevitable day when the attorney leaves practice for the bench and the client is left without an attorney.[74] Unfortunately, that process can prematurely impact the attorney's practice as clients flee before the attorney is confirmed as a federal judge.[75] This is the situation in which Friendly found himself.[76] As Friendly's clients began to seek other counsel, Friendly was left with little to do.[77] So Friendly did what would make him a great judge—he studied.[78] And he did not search out light beach reads. Instead, he prepared himself for his duties on the federal bench. Friendly devoured Hart and Wechsler's *The Federal Courts and the Federal System*.[79] In typical Friendly fashion, he described this work as "the most stimulating and exciting law book I had encountered since Wigmore's *Evidence*."[80] Friendly also studied the 1,500-page Hart and

72. DORSEN, *supra* note 2, at 75.

73. *Id.* at 77. Dorsen relays an interesting, behind-the-scenes political story about Friendly's nomination. Unhappy with the political progress on Friendly's nomination, Justice Frankfurter took the nomination into his own hands by asking Senate Majority Leader Lyndon Johnson for help. *Id.* Senator Johnson responded, "Felix, are you telling me that this Jewish boy should be on the Second Circuit? That's enough for me." *Id.* Senator Johnson immediately phoned Senator Thomas Dodd, the chairman of the committee overseeing the appointment. *Id.* When Senator Johnson was told that Senator Dodd was getting a haircut, Senator Johnson demanded to speak to Senator Dodd. *Id.* Seated in the barber chair, Senator Dodd took Senator Johnson's call and was told to set the hearing on Friendly's nomination. *Id.* Senator Dodd held the hearing on Friendly's nomination; two days later, the Senate confirmed Friendly to the Second Circuit. *Id.*

74. *See, e.g.*, Judy Harrison, *By the Time New Federal Judge from Maine Was Confirmed, He 'Had No Practice Left*,*'* BANGOR DAILY NEWS (May 24, 2013), http://bangordailynews.com/2013/05/24/news/portland/by-the-time-new-appellate-judge-from-maine-was-confirmed-he-had-no-practice-left/.

75. *See id.*

76. DORSEN, *supra* note 2, at 78.

77. *Id.*

78. *Id.*

79. *Id. See generally, e.g.*, HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953). The book was first published in 1953 and is now in its seventh edition.

80. DORSEN, *supra* note 2, at 78. *See generally, e.g.*, JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (1904).

Sacks's *The Legal Process: Basic Problems in the Making and Application of Law*,[81] admiralty law, Second Circuit case law, and decisions of great judges.[82]

On September 29, 1959, Friendly was sworn into the federal bench by his friend and colleague at Root Clark, Justice Harlan.[83] For the next 27 years, Friendly was a shining example of a great federal judge. One would be hard-pressed to name a handful of federal judges who delivered such staggering amounts of opinions and scholarship that made lasting contributions to the body of law. But being qualified to serve and actually serving as a federal judge are two different animals. The responsibilities that come with the oath can be daunting. After Friendly had assumed his position as a federal judge, and just weeks before his first sitting with a Second Circuit panel, he shared with Justice Frankfurter that he was "mighty scared."[84] Friendly also shared with Judge Hand that it was difficult to make up his mind about a case.[85] Judge Hand responded, "Damn it, Henry, make up your mind. That's what they're paying you to do!"[86]

To show that even top draft picks can make rookie mistakes, on his very first day on the bench, Friendly issued a decision in a case even though the court lacked jurisdiction, requiring him to vacate his opinion.[87] As every civil procedure student in the United States knows, every federal judge—from district judge to Supreme Court Justice—in every federal case must first ask whether the court has jurisdiction, even if the parties do not address the issue.[88] Trying to console Friendly in a letter, Justice Frankfurter wrote that it is "a healthy experience for a judge very early in his career to stub his

81. DORSEN, *supra* note 2, at 78–79. *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958).

82. DORSEN, *supra* note 2, at 80.

83. *Id.* at 85.

84. *Id.* at 82.

85. *Id.*

86. *Id.*

87. United States v. N.Y., New Haven & Hartford R.R. Co., 276 F.2d 525, 546–47 (2d Cir. 1960), *overruled in part by* Chappell & Co. v. Frankel, 367 F.2d 197, 200 (2d Cir. 1966) (en banc); *see also* DORSEN, *supra* note 2, at 82.

88. *See generally* U.S. CONST. art. III, § 2; 28 U.S.C. §§ 1330–1369, 1441–1452 (2012 & Supp. II 2014) (listing statutory requirements concerning district court jurisdiction and removal); FED. R. CIV. P. 12(b)(1), (h)(3); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173–76 (1803) (explaining that the Supreme Court enjoys jurisdiction only through a federal statute that is duly enacted consistent with the U.S. Constitution).

toe by reasonably enough relying on a solid assumption without subjecting it to critical examination."[89] Friendly forever heeded this sound advice.

Although Friendly had practiced appellate law and tried cases before various boards, he had not tried a jury case.[90] To shore up his understanding of the district court, Friendly sat by designation as a district judge several times during his first year as a judge.[91] While sitting in the district court in December 1960, Friendly confronted the case of *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*[92] As some first-year law students learn in their contracts course, Friendly was required in *Frigaliment Importing* to delve into the legal delicacy of "what is chicken?"[93] You might recall from your wondrous first year of law school, if your contracts casebook included *Frigaliment Importing*, that the case involved a plaintiff, who was also the buyer, who claimed his purchase contract for "chicken" meant "a young chicken, suitable for broiling and frying."[94] The defendant, who was the seller, on the other hand, claimed that "chicken" meant "any bird of that genus that meets contract specifications on weight and quality, including what it calls 'stewing chicken' and plaintiff pejoratively terms 'fowl.'"[95] Displaying concision and legal precision, thus meriting inclusion in 1L casebooks, Friendly held that the plaintiff did not prove his contract "used 'chicken' in the narrower sense."[96] Any law student would be wise to follow Friendly's example of how to conduct sound legal analysis.

As an appellate judge preparing for oral arguments, Friendly read every brief and appendix—he did not rely on clerks to prepare bench briefs.[97]

89. DORSEN, *supra* note 2, at 82.

90. *Id.* at 81.

91. *Id.* at 82. I believe that our judicial system improves every time a district judge sits by designation on an appellate court and a circuit judge sits by designation on a district court. When I clerked for Judge Riley of the Eighth Circuit, he sat by designation on district courts to resolve disputes either by trial or motion. Not only did the process make him a better appellate judge, it also provided valuable experience to his clerks, including me.

92. Frigaliment Imp. Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960).

93. *Id.* at 117; *see, e.g.*, E. ALLAN FARNSWORTH ET AL., CONTRACTS: CASES AND MATERIALS 574 (6th ed. 2001).

94. *Frigaliment Imp. Co.*, 190 F. Supp. at 117.

95. *Id.*

96. *Id.* at 118.

97. DORSEN, *supra* note 2, at 87; *see also* Boudin, *supra* note 1, at 6 ("Friendly's power of mind and memory gave him an unusual command of the record and the range

Immediately after oral arguments concluded, Friendly displayed dizzying diligence in producing his voting memorandums.[98] He circulated these memorandums to the other judges on the panel, who were normally at lunch when Friendly's memorandums arrived in chambers.[99] These were no ordinary voting memorandums from conference. Instead, these voting memorandums often arrived nearly in the form of final opinions.[100]

Friendly drafted nearly all of his opinions, rarely authorizing ghost-writing by his law clerks—a common practice among many judges.[101] He handwrote every opinion, usually in less than a day.[102] His longhand draft usually became his final opinion, perhaps with one edit.[103] Even though Friendly handwrote the first draft of his opinions, he wanted clerks to review his draft, scour it for errors, and provide written thoughts if they disagreed with anything.[104] He was willing to listen, but clerks had to be detailed and cogent in why Friendly was wrong and they were right.[105]

and interconnections of the issues posed.").

98. DORSEN, *supra* note 2, at 90–91.

99. *Id.* at 91.

100. *Id.*

101. *Id.* at 92; Boudin, *supra* note 1, at 12–13 ("That Friendly wrote his own opinions brought him very close to the case and helped him achieve [the proper] solutions. Given the growth in 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.").

102. DORSEN, *supra* note 2, at 92–93; *see also* Boudin, *supra* note 1, at 9 (recounting how Friendly "wrote his opinions in a burst of energy, drafting in longhand and normally editing the draft only once with his law clerk"). When reading Friendly's well-crafted opinions, one can recognize how stringently he focused on the facts. As I teach law students, the law is worthless without facts and facts are worthless without the law. They go together like a lock and key. The application of the law to the facts unlocks the proper legal conclusion. Friendly had a masterful appreciation of the importance of the facts. Friendly knew that if he got the facts right, the law would take care of itself in most cases.

103. DORSEN, *supra* note 2, at 93. If Friendly's ballpoint pen ran out of ink when he was writing an opinion, he would summon a clerk, holding the inkless pen in his left hand while continuing to write with a backup pen in his right hand. *Id.* Friendly had an odd way of summoning his staff. He used a buzzer system under which his secretary and each clerk had a different number of buzzes indicating that the judge wanted to see that person. *Id.* at 106. Another oddity was how Friendly's clerks were required to prepare the bench for his arrival: "Clerks drafted a map to show the placement of the parties' briefs and appendix . . . , a pad of lined paper, three sharpened No. 2 pencils with their points facing to the courtroom and their erasers lined up, two pens, the Federal Rules of Appellate Procedure, and so on." *Id.* at 108.

104. *Id.* at 104–05.

105. *Id.* at 105.

As a boss, Friendly was intimidating, brusk, impersonal, sarcastic, remote, impatient, and inconsiderate.[106] But when clerks performed at Friendly's expected level of competency, they enjoyed the challenge of a rigorous back-and-forth with a legendary judge.[107] Even though most of Friendly's clerks did not get to write opinions, help the judge make decisions, or have a personal relationship with the judge, most clerks were happy with their clerkship experience.[108] They had a front-row seat to witness a top-flight judge decide cases and craft masterful opinions. Most clerks realized that they had witnessed the traits of a great and historic federal judge.[109]

Even with handwriting all of his own opinions (without much help from law clerks), Friendly still outproduced his colleagues.[110] Friendly also routinely challenged his judicial colleagues to improve their written work. Upon receiving Friendly's suggested changes to a draft opinion, one newly appointed judge responded, "I feel a little like a young and somewhat over-eager pugilist who has been given a good lesson by a more experienced pro. Duly chastened for his pugnaciousness, with nose a little bloody and left eye slightly swollen, his genuine attitude is respect for the ability of the pro."[111]

Friendly spent nearly 27 years as a member of the Second Circuit.[112] Revealing his impact as a judge, other judges often referred to the Second Circuit as "Friendly's Court."[113] Friendly did not just make the Second Circuit a better court. His contributions reverberate through the entire body of U.S. law, and they can still be felt and seen today.

106. *See id.* at 103–13.
107. *See id.* at 105–06.
108. *Id.* at 103–04.
109. *Id.*
110. *Id.* at 93.
111. *Id.* at 97.
112. *Id.* at 355.
113. *Id.* at 116. Friendly was often discussed for a seat on the Supreme Court. *Id.* at 136. He apparently was a Republican token on both President John F. Kennedy's and President Lyndon Johnson's short lists for the seats that ultimately went to Byron White and Abe Fortas, respectively. *Id.* By the time Republican Richard Nixon assumed the presidency, Friendly had already reached the age of 65; no Justice had ever been appointed to the Supreme Court at that age. *Id.* Even though President Nixon openly discussed Friendly as a possible nominee for the seats that went to Warren Burger and Harry Blackmun, Friendly was never nominated. *Id.* at 136–37.

V. FRIENDLY'S LASTING JUDICIAL GREATNESS

The primary trait of a great judge is the ability to impact the law. Friendly undoubtedly made a lasting impact on the law.[114] Friendly's voice often helped guide the development of the law in those areas in which he lent his intellect and efforts.[115] This Part illustrates how Friendly's clear voice has made lasting contributions to the development of the law in many areas. If lasting impact is the key trait of greatness, then Friendly easily makes the cut.

A. *Initial Thoughts*

Friendly made lasting contributions to the law through his judicial and extrajudicial work. During his time with the Second Circuit, Friendly wrote 1,056 published opinions, including 890 for the court and 88 dissents.[116] Amazingly, he wrote his opinions "almost always in a day or less."[117] While producing a staggering amount of judicial work, he also concurrently produced a staggering amount of extrajudicial work. Before he joined the Second Circuit, Friendly had published 12 law review articles; after he joined the Second Circuit, Friendly published 4 books and 64 law review articles.[118] In addition to producing a mountain of opinions and law review articles, Friendly frequently gave important lectures on the law, actively served HLS in countless capacities, was active in bar associations at every level, served as a moot court judge at numerous law schools, and "was an inveterate letter

114. Using 200 of his book's 359 pages, Dorsen provides a masterful compendium of Friendly's substantive contributions to the rich tapestry of the law. *See* DORSEN, *supra* note 2, at vii–viii. Out of 25 chapters, Dorsen expends 15 chapters to detail Friendly's jurisprudential contributions to the First Amendment, Fifth Amendment, Fourteenth Amendment, habeas corpus, criminal procedure, criminal law, business law, intellectual property, labor relations law, administrative law, federal common law, federal jurisdiction, constitutional torts, railroad reorganization, and securities law. *See id.* Reading Dorsen's scholarly depiction of Friendly's body of work results in a wide-eyed gasp as one grasps Friendly's lasting impact on the law. U.S. legal history will be forever indebted to Dorsen for his work. This Article builds on Dorsen's analysis to further cement Friendly's monumental contributions to U.S. law and his irreducible reputation as a great judge.

115. Randolph, *Before* Roe v. Wade, *supra* note 11, at 1042–43 ("Over the years, Judge Friendly's opinions and writings have had a profound effect on many areas of federal law.").

116. DORSEN, *supra* note 2, at 2.

117. *Id.* at 3.

118. Dorsen's book takes four pages just to list Friendly's non-judicial publications. *Id.* app. B at 367–70.

writer."[119] He wrote letters to judges, law professors, attorneys, and politicians.[120] Friendly also continued his lifelong addiction to books. While serving as a federal judge and making extrajudicial contributions to the law, Friendly read every issue of the *Harvard Law Review*, devoured countless books, and read the then-2,400-page, two-volume *History of the Supreme Court of the United States*.[121]

As a law professor, I teach that sound legal analysis requires the clear and concise application of precise legal rules and principles to all relevant facts consistent with precedent and policy. Friendly's writings are models of sound legal analysis. Every law student, young attorney, and young academic (and perhaps "young" judge, too) would be greatly served by reading Friendly's opinions to better comprehend legal analysis.[122] Friendly's opinions vividly demonstrate how to develop and explain sound legal standards, how to fully explore the purposes behind the law, how to use precedent, and how to critically and clearly apply the law to all relevant facts to reach a reasoned legal conclusion.[123] As Judge Michael Boudin opined, "Friendly's legacy of incomparably fine decisions" will stand the test of time in their ability to educate generations of judges.[124] Perhaps there is no better authority to praise a legal writer than Justice Scalia, who described Friendly's writing as "always clear and lucid."[125]

Based on my analysis of Friendly's body of work, whether judicial opinions or nonjudicial scholarship, I draw a few conclusions that I will share

119. *Id.* at 101, 131–34.

120. *Id.* at 101.

121. *Id.* at 131. *See generally* 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 (1971); 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–15 (1981).

122. *See* Boudin, *supra* note 1, at 15 (explaining that Friendly's decision-making process is a lasting legacy that will continue to instruct).

123. *See id.* at 2 ("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."). Judge Boudin nicely explained the interplay that authorizes a federal judge like Friendly to reach the proper legal conclusion, "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 statutes and prior precedents, depended as much on an understanding of purpose and history." *Id.* at 4–5.

124. *Id.* at 15.

125. DORSEN, *supra* note 2, at 353.

in the next few paragraphs. I conclude that Friendly's decisions are always clear, mostly consistent, and inherently reasonable, even if one were compelled to disagree with the outcome.[126] It should be fair to say that Friendly attempted to interpret, understand, and apply the law as he believed the law compelled him to do, even if others viewed their roles, and the law's role, differently.[127] As a judge, he decided issues that came before him in actual cases.[128]

To me, Friendly had a textualist and purposivist legal philosophy, and attempted to interpret law as it was written and intended by the drafters of that law.[129] He filled in his textualist philosophy with context, understanding that all law is driven by a purpose. He sought to discover the purpose or essence of what the law was trying to accomplish. He had a resolute understanding that legal principles are not independent islands that we visit for resolution of disputes. Instead, they form the fabric of our society, and

126. Judge Boudin heaped praise on the clarity of Friendly's writing by calling his decisions "the gold standard in American appellate judging." Boudin, *supra* note 1, at 2. Before making this bold conclusion, Judge Boudin had a front-row seat to witness Judge Friendly perform his craft by serving as his law clerk in 1964 and 1965. *Biographical Directory of Federal Judges: Boudin, Michael*, FED. JUD. CTR., http://www.fjc.gov/servlet/nGetInfo?jid=218&cid=999&ctype=na&instate=na (last visited Mar. 9, 2017).

127. Judge Boudin explained that unlike some judges, Friendly "took precedent extremely seriously, albeit less as a command than as a presumption." Boudin, *supra* note 1, at 3. Judge Boudin further explained that Friendly's "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." *Id.* Indeed, Judge Boudin hypothesized that Friendly's "brain seems to have been built for this function." *Id.* I wholeheartedly agree with Judge Boudin's hypothesis. As the title to my Article illustrates, I believe that Friendly was designed to be a great federal judge.

128. If an issue that Friendly cared about did not come before him as a judge, he often spoke out extrajudicially. DORSEN, *supra* note 2, at 139. When asked why he would address a legal topic extrajudicially, Friendly replied, "It was because I got annoyed with something." *Id.* This practice is rarely seen today, as judges seemingly are culturally discouraged from speaking or writing except in their official roles. Bucking this common trend are a few notable exceptions, including Justice Breyer and Judge Posner, who routinely write or speak on far-ranging topics, and the late Justice Scalia, who also spoke and wrote about legal issues extrajudicially. *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION (2008); RICHARD A. POSNER, THE CRISIS OF CAPITALIST DEMOCRACY (2010); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Guttman ed., 1997).

129. Friendly's textualist philosophy made him suspicious of the use of legislative history to interpret a statute: "[L]egislative history is all too easy a refuge for the judge who is lazy or who is seeking justification for a predetermined result . . . ." DORSEN, *supra* note 2, at 410 n.73.

they are only as good as the purposes they serve.[130] He did not believe that his role was to determine what the law should be but rather what it is in all its pragmatic quandaries.[131] Although Friendly was deeply committed to individual rights and liberties, he did not race to find "new" rights. Friendly tried to understand the proper scope of the government's power and how individual liberty constrained that power.[132]

As I see it, Friendly practiced judicial restraint, but never in a political way.[133] Friendly was a judge; he was not a politician with a desire to push the law toward his political beliefs.[134] In my opinion, these are the types of judges in front of whom attorneys enjoy practicing. If you had a strong legal basis for your position, then Friendly was the judge you wanted on the bench to decide your case. If you wanted a judge who would make the law what you, he, or she thought it should be, rather than what it is, then you would have

130. *See* Boudin, *supra* note 1, at 4 (explaining that Friendly keenly understood "the importance of maintaining stable rules" and "the need for predictability and for protecting reliance").

131. *Id.* at 9 (explaining that Friendly's "sense of the practical infused [his] judicial persona"); *see also* Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 540 (2012) [hereinafter Posner, *The Rise and Fall of Judicial Self-Restraint*] (citing Daniel L. Breen, Henry J. Friendly and the Pragmatic Tradition in American Law: A Dissertation (2002) (unpublished Ph.D. dissertation, Boston College) (on file with the Harvard Law Library)) (characterizing Friendly as a legal pragmatist).

132. Judge Boudin delivered a poetic, but substantive, review of Friendly's judicial opinions:

> [R]eading 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.

Boudin, *supra* note 1, at 14 (emphasis omitted).

133. In my experience and generally speaking, the least experienced people are the least restrained, and the most experienced people are the most restrained. Obviously, there are exceptions.

134. Politics seemingly played no role in Friendly's judging. Chief Justice Roberts maintains that Friendly did not "adher[e] to a political ideology, [but] . . . to the rule of law." DORSEN, *supra* note 2, at 357; *cf.* John Paul Stevens, *Byron White—Hero and Scholar: Reflections About Punishment, Political Speech, and Public Liability*, 84 U. COLO. L. REV. 893, 907 (2013) (contending that Justice White was "such a great judge" because "he did not have an agenda that he sought to achieve through his decisions"; instead, "[h]e took the cases one at a time, deciding each on the basis of an impartial and intelligent study of the relevant facts and law").

faced a cold reception in Friendly.[135] These are the hallmarks of all great judges.

To illustrate Friendly's commitment to judicial restraint, he once decried to a retired Supreme Court Justice after the Court had expansively interpreted the Sixth Amendment, "Apparently the guiding principle now is 'Don't decide anything *but* constitutional grounds if such a ground exists.'"[136] Friendly's restrained and textualist approach is illustrated in his insistent focus on when "criminal prosecutions" began before Sixth Amendment rights attached.[137] The text and its purpose drive legal analysis, not some type of super-philosophical clairvoyance that magically produces judicial results that are best for society.

Perhaps this revulsion against judicially produced constitutional law prodded Friendly to criticize the exclusionary rule announced in *Mapp v. Ohio*.[138] Friendly contended that such an overbroad rule excluded far too much reliable evidence without any violation of an individual's fundamental rights.[139] For support, in *United States v. Dunnings*, Friendly gave this explanation:

> The exclusionary rule, as applied in Fourth Amendment cases, is a blunt instrument, conferring an altogether disproportionate reward not so much in the interest of the defendant as in that of society at large. If a choice must be made between a rule requiring a hearing on the truth of the affidavit in every case even though no ground for suspicion has been

135. FRIENDLY, BENCHMARKS, *supra* note 26, at viii (explaining "that the decider [of a case] should cerebrate rather than emote about what he is deciding; that he should endeavor to provide a principle that can be applied not simply to the parties before him but to all having similar problems; that he should tell what he is doing in language that can be understood rather than indulge in flights of rhetoric").

136. DORSEN, *supra* note 2, at 166 (quoting Letter from Henry J. Friendly to Justice Frankfurter (May 28, 1964)).

137. *See, e.g.*, United States v. Massimo, 432 F.2d 324, 327 (2d Cir. 1970) (Friendly, J., dissenting) (explaining that since the defendant's "'criminal prosecution' had begun, the Sixth Amendment entitled him to counsel at any 'critical stage'" (citations omitted)). *See generally* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

138. Mapp v. Ohio, 367 U.S. 643, 655 (1961) ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.").

139. DORSEN, *supra* note 2, at 181 (quoting HENRY J. FRIENDLY, *The Bill of Rights as a Code of Criminal Procedure* [hereinafter FRIENDLY, *The Bill of Rights as a Code of Criminal Procedure*], *in* BENCHMARKS, *supra* note 26, at 235, 262).

> suggested and another which takes care of the overwhelming bulk of the cases, the policies of the Fourth Amendment will be adequately served by the latter even though a rare false affidavit may occasionally slip by.[140]

Friendly was troubled by what he believed was judicial activism or excess by the Warren Court,[141] particularly in forcing major expansions to the protections contained in the Fourth, Fifth, and Sixth Amendments.[142] But overall, Friendly believed that as "the appointed defender of the Constitution," the Supreme Court "ha[d] performed that role gloriously well," at least "[o]n the whole."[143] He was nevertheless stressed by "the Warren Court's lack of analysis and [lack of judicial] restraint [that] ha[d] created a jerry-built structure . . . bound to collapse," a sort of "domino method of constitutional adjudication."[144] To counter that approach, Friendly believed that judicial "statesmanship" was needed "to preserve the good that the Warren Court did and prune out the excesses."[145]

Friendly inherently understood that the judiciary is structurally limited in its ability to make lasting policy choices.[146] He was naturally uncomfortable with trying to structure society's values judicially.[147] He often accorded deference to the institutional strengths of other organizations, constantly vigilant in trying to comprehend the limits of the institutional strengths of the federal judiciary.[148] He tended to deplore judicial activism

140. United States v. Dunnings, 425 F.2d 836, 840 (2d Cir. 1969).

141. *See, e.g.*, Posner, *The Rise and Fall of Judicial Self-Restraint*, *supra* note 131, at 552 (explaining that Friendly, "the greatest judge of the last half century and accused by no one of being an 'activist' in the pejorative sense of that abused term[,] . . . was a trenchant critic of the activist excesses of the Warren Court").

142. *See generally* A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249 (1968–1969) (discussing the expansionism and activism of the Warren Court in the "criminal law revolution").

143. DORSEN, *supra* note 2, at 165.

144. *Id.*

145. *Id.*

146. HENRY J. FRIENDLY, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't* [hereinafter FRIENDLY, *The Gap in Lawmaking*] ("Statute is a more powerful and flexible instrument . . . than any that a judge can wield." (quoting PATRICK DEVLIN, SAMPLES OF LAWMAKING 23 (1962))), *in* BENCHMARKS, *supra* note 26, at 41, 45–46.

147. *Id.* at 46.

148. *Id.*

while applauding judicial restraint.[149] He was cautious of the judicial expansion of the law beyond the Judicial Branch's institutional strengths.[150]

To combat unintended personal predilections from creeping into the law, Friendly sought precise legal rules and principles that could be clearly explained and consistently applied. Friendly recognized the natural tendency to expand judicial theories beyond their intended scope; often, unintended policy choices had been made.[151] For example, he deplored the federal government's overuse and expansion of conspiracy as a criminal theory, describing it "as 'that elastic, sprawling and pervasive offense,' whose development exemplifies . . . the 'tendency of a principle to expand itself to the limit of its logic'—and perhaps beyond."[152] This sentiment reflects Friendly's judicial temperament. He was constrained by law and reason; he was not liberated by judicial power, intelligence, or policy preferences. Friendly once admonished a clerk, the future-Judge Randolph no less, "You're here to give me your legal analysis, not your feelings."[153] Feelings might drive some judges; law and reason powered Friendly.

It was reason that forced Friendly to consider the proper role that inferior federal courts play in our federalist system.[154] He applied the law as best he could, showing judicial restraint and deference when the law required it, but using the power of judicial review actively when necessary to protect individual liberties.[155] He masterfully expanded and contracted

149. *See, e.g.*, sources cited *supra* notes 135–37 and accompanying text.

150. In a similar vein, Judge Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit explained, "Judges, like doctors, should first be mindful that they do no harm—that they do not make a bad situation worse." Jeffrey S. Sutton, Barnette*, Frankfurter, and Judicial Review*, 96 MARQ. L. REV. 133, 143 (2012). I believe that Friendly would have nodded in agreement.

151. FRIENDLY, BENCHMARKS, *supra* note 26, at viii (counseling a judge against employing "*ad hoc* decision-making" by prophesying that "the momentary pleasure of reaching a 'just' but unprincipled result in one case will not compensate for the agony of having to explain how he comes to a different conclusion in the next").

152. United States v. Borelli, 336 F.2d 376, 380 (2d Cir. 1964) (agreeing with and quoting Justice Jackson and Judge Cardozo).

153. DORSEN, *supra* note 2, at 243 (quoting A. Raymond Randolph, *Administrative Law and the Legacy of Henry J. Friendly*, 74 N.Y.U. L. REV. 1, 5 (1999) [hereinafter Randolph, *Administrative Law*]).

154. "The judicial power of the United States, shall be vested in one Supreme Court, and in such *inferior courts* as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1 (emphasis added).

155. *See* Boudin, *supra* note 1, at 4.

Supreme Court and circuit precedent in line with his judicial philosophy.[156] He had a keen sense—a judicial sense—of where the law had been, where it was intended to go, and how it was intended to apply. It is almost as if Friendly was part of a secret dance with the Supreme Court. As a judge on an inferior court, he would carry out his duties mainly by following the Supreme Court's lead when constrained by its precedent.[157] But at times, and

156. *See id.* ("Being himself a temperate reformer, Friendly was ready to alter and improve law where this was allowable."). Judge Boudin expounded on Friendly's ability to impact federal law,

> 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.

Id.

157. To illustrate this commitment, Friendly once explained, "I am no happier than [the other panel members] about [the holding in this case]. But our individual happiness or unhappiness is unimportant, and th[e] result is dictated by Supreme Court decisions." United States v. A Motion Picture Film Entitled "I Am Curious-Yellow," 404 F.2d 196, 202 (2d Cir. 1968) (Friendly, J., concurring). Justice Frankfurter, Friendly's HLS mentor, wrote similar sentiments in a controversial case involving a state's mandate that all students and faculty salute the U.S. flag. Dissenting from the Supreme Court's decision that compelling flag salutes violated the First Amendment, Justice Frankfurter wrote the following about judicial restraint:

> One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 646–47 (1943) (Frankfurter, J.,

consistent with past dances, he would take the lead and the Supreme Court would then follow. Indeed, the Supreme Court often affirmed his approach to and interpretation of the law.[158] With my initial thoughts out of the way, the remaining pages of this Part are dedicated to an analysis of Friendly's lasting impact on the law. Indeed, Friendly's impact on the law cements his legacy as a great judge.

B. *First Amendment*

Friendly made lasting contributions to the First Amendment when he became the first federal judge to recognize the need to extend the reach of the media's First Amendment protection against libel claims not only to public officials but also to public figures.[159] It is fascinating to recount how Friendly interpreted and enhanced Supreme Court precedent in a way that redounded on the Supreme Court's further development of First Amendment law.

In the landmark case of *New York Times Co. v. Sullivan*, the Supreme Court addressed "the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct."[160] Sullivan, the elected Commissioner of Public Affairs for the City of Montgomery, Alabama, brought a civil libel lawsuit in state court against a number of defendants, including the publisher of *The New York Times* newspaper, for an editorial implicitly criticizing Sullivan's record on race relations and civil rights.[161] An Alabama jury awarded Sullivan $500,000, the full request of his damages, and the Supreme Court of Alabama affirmed.[162] Reversing the Supreme Court of Alabama, the Supreme Court of the United States held:

dissenting). Friendly believed that his judicial duties constrained him to interpret and apply the law with full deference to the Supreme Court. As a scholar, however, he was free to delve into constitutional questions without constraint of precedent or his status as a judge on an inferior court.

158. *See, e.g.*, Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) (plurality opinion) (agreeing with Judge Friendly and applying the holding of *New York Times, Co. v. Sullivan* to public figures, not just public officials).

159. *See* Pauling v. News Syndicate Co., 335 F.2d 659, 671 (2d Cir. 1964); *see also* DORSEN, *supra* note 2, at 145. To be fair, Friendly did not decide the case on his own. Instead, he sat on a three-judge panel of the Second Circuit.

160. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256 (1964).

161. *Id.*

162. *Id.* (citing N.Y. Times Co. v. Sullivan, 144 So. 2d 25 (Ala. 1962), *rev'd*, 376 U.S. 254).

> [T]he rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a *public official* against critics of his official conduct.[163]

The Supreme Court began its analysis by identifying the long-settled "general proposition that freedom of expression upon public questions is secured by the First Amendment."[164] The Court recognized that free expression is a "constitutional safeguard . . . 'fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[165] The Court characterized this safeguard as "a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."[166] Thus, the Court cast the appeal "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on *government and public officials*."[167] Characterizing the editorial at issue in the case "as an expression of grievance and protest on one of the major public issues of our time," the Court foreshadowed its holding by explaining that it "would seem clearly to qualify for the constitutional protection."[168] The Court then framed the essential question as whether the editorial forfeited its constitutional protection "by the falsity of some of its factual statements and by its alleged defamation of [a *government official*]."[169]

The Supreme Court then issued a sweeping blanket of protection for First Amendment protections of free speech and free press when government officials are involved. To do this, the Court expressed fear that any rule of law that compelled critics of "official conduct to guarantee the truth of all [their] factual assertions" or face unlimited libel judgments would lead to self-censorship while limiting the vigor and variety of public

163. *Id.* at 264 (emphasis added).
164. *Id.* at 269.
165. *Id.* (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).
166. *Id.* (quoting Bridges v. California, 314 U.S. 252, 270 (1941)).
167. *Id.* at 270 (emphasis added) (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949); De Jonge v. Oregon, 299 U.S. 353, 365 (1937)).
168. *Id.* at 271.
169. *Id.*

debate.[170] Deeming this outcome inconsistent with the First Amendment, the Court adopted a "rule that prohibits a *public official* from recovering damages for a defamatory falsehood relating to his *official conduct* unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[171]

The Supreme Court decided *Sullivan* on March 9, 1964.[172] Nine days later, Friendly sat on a panel that heard the case of *Pauling v. News Syndicate Co.*[173] That case involved a libel claim by Dr. Linus Pauling, an anti-nuclear weapons pacifist who held no government position, against the publisher of the *New York Daily News* for an editorial that depicted Dr. Pauling as anti-American and pro-Communist.[174] Holding that the district court had properly submitted the libel case to the jury under the law that existed before *Sullivan*, Friendly analyzed the libel claim under that case's holding and rationale.[175] Friendly acknowledged the holding in *Sullivan* was limited to the principle that the First Amendment required states to recognize a "privilege for criticism of *official conduct*" that extended even to factual misstatements.[176] Even though Friendly recognized the strongest cases for such a privilege involve public officials, he found it "questionable whether in principle the decision can be so limited."[177]

Focusing on the rationale and purpose behind the holding in *Sullivan*, Friendly posited that if the actual malice test applied to the press's speech against a government or public official, then inevitably the principle should apply, by extension, to candidates for public office.[178] Using a flawless hypothetical, Friendly surmised that "if a newspaper cannot constitutionally be held for defamation when it states without malice, but cannot prove, that

170. *Id.* at 279.

171. *Id.* at 279–80 (emphasis added).

172. *Id.* at 254.

173. Pauling v. News Syndicate Co., 335 F.2d 659 (2d Cir. 1964).

174. *Id.* at 661–64. Dr. Pauling is "the only person who has won two undivided Nobel Prizes," which include "the Nobel Prize in Chemistry for 1954 and the [Nobel] Peace Prize for 1962." *Linus Pauling - Biographical*, NOBELPRIZE.ORG, http://www.nobelprize.org/nobel_prizes/peace/laureates/1962/pauling-bio.html#not_1 (last visited Mar. 9, 2017).

175. *Pauling*, 335 F.2d at 671.

176. *Id.* (emphasis added) (quoting *Sullivan*, 376 U.S. at 282).

177. *Id.*

178. *Id.*

an incumbent seeking reelection has accepted a bribe, it seems hard to justify holding it liable for further stating that the bribe was offered by his opponent."[179] Setting up the logical dominos to then watch them fall, Friendly argued, "Once that extension was made, the participant in public debate on an issue of grave public concern would be next in line."[180] Thus, if a newspaper had a First Amendment privilege against libel claims, for example, by "a member of the Atomic Energy Commission" or "a United States Senator" who speaks about nuclear weapons and communism, Friendly concluded, then so too would a newspaper enjoy such a privilege against a person who is not a public official but nevertheless speaks on public issues.[181] Friendly had taken the lead to expand the scope of First Amendment protection beyond government officials to public figures. The Supreme Court soon followed his lead.

Three years later, the Supreme Court asked in *Curtis Publishing Co. v. Butts* whether its *Sullivan* actual-malice rule would extend to "libel actions instituted by persons who are not public officials, but who are '*public figures*' and involved in issues in which the public has a justified and important interest."[182] The Court recognized that the issue had been addressed by a considerable number of federal and state courts who were sharply divided on "whether the [*Sullivan*] rule should apply only in actions brought by public officials or whether it has a longer reach."[183]

The public figure at the center of the case was Butts, "a well-known and respected figure" who served as the athletic director of the University of Georgia and had previously served as its head football coach.[184] Even though the University of Georgia was a state university, Butts was employed by a private corporation and not the State of Georgia; thus, he was not a government official.[185] *The Saturday Evening Post* published a story that claimed that Butts had conspired to fix a 1962 football game between the

179. *Id.*

180. *Id.*

181. *Id.* Friendly believed that this extension of the *New York Times* holding was consistent with the Supreme Court's underlying rationale and commitment to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* (quoting *Sullivan*, 376 U.S. at 270).

182. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 133–34 (1967) (emphasis added).

183. *Id.* at 134 (citations omitted).

184. *Id.* at 135–36.

185. *Id.* at 135.

University of Georgia and the University of Alabama.[186] Butts brought a libel action against the magazine publisher that sought $5 million in compensatory damages and $5 million in punitive damages.[187]

Taking the analytical path that Friendly had paved, the Supreme Court concluded that libel actions like Butts's are not controlled entirely by each state's libel laws but are instead limited by overriding constitutional safeguards.[188] Extending the reach of *Sullivan* in a way that Friendly had envisioned, the Court concluded "that a '*public figure*' who is not a public official" can recover for defamatory falsehoods by the press only upon a heightened showing of wrongdoing.[189] The Supreme Court has since further built its First Amendment jurisprudence on Friendly's public-figure foundation. Continuing down the path of expanding press protection for cases involving public figures, as prophesied by Friendly, the Supreme Court has extended the *Sullivan* standard beyond libel claims to claims of invasion of privacy and intentional infliction of emotional distress.[190]

186. *Id.* at 135–37 (describing the article entitled *The Story of a College Football Fix*).

187. *Id.* at 137.

188. *Id.* at 155.

189. *Id.* (emphasis added).

190. *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) ("We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This . . . reflects [the Court's] considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." (citation omitted)); Time, Inc. v. Hill, 385 U.S. 374, 387–88 (1967) ("We hold that the constitutional protections for speech and press preclude the application of [a right of privacy] statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."). For additional analysis of the case involving Jerry Falwell, Larry Flynt, and *Hustler* magazine, see Tory L. Lucas, *Preacher Man v. Porn King: A Legal, Cultural, and Moral Drama Starring Jerry Falwell, Larry Flynt and the First Amendment*, NEB. LAW., Aug. 2007, at 22. Friendly's contribution to this developing area of First Amendment jurisprudence continued over a decade later. In *Cianci v. New Times Publishing Co.*, Friendly recognized that the *Sullivan* standard was not limitless in its protection of First Amendment rights by allowing the press to hide behind opinion pieces about public figures. Cianci v. New Times Publ'g Co., 639 F.2d 54, 64 (2d Cir. 1980). Writing for the Second Circuit, Friendly predicted, "It would be destructive of the law of libel if a writer could escape liability for [written] accusations . . . simply by using, explicitly or implicitly, the words 'I think.'" *Id.* (footnote omitted). A decade later, the Supreme Court picked up on Friendly's assist, and cited him in the process, to conclude that there is no "wholesale defamation

C. *Fifth Amendment*

Friendly also significantly impacted Fifth Amendment jurisprudence. His contributions in this area illustrate his commitment to judicial restraint and his textualist approach to constitutional interpretation. Friendly particularly was troubled by the Supreme Court's departure from the Constitution's text in Fifth Amendment self-incrimination cases. Being crystal clear as usual, he opined that the famous *Miranda v. Arizona*[191] case went way "beyond the ordinary meaning of the [constitutional] language" without adequate justification.[192] Friendly even went so far as to advocate for a constitutional amendment to overcome part of *Miranda*'s Court-sponsored protections.[193]

In his biography of Friendly, Dorsen identified the starting point for Friendly's impact on the development of *Miranda* jurisprudence as Justice Sandra Day O'Connor's concurring opinion in *New York v. Quarles*.[194] After being accused of rape, the defendant in *Quarles* was apprehended, frisked, and handcuffed by police.[195] When the arresting officer noticed an empty holster on the defendant, the officer asked the defendant where the gun was located.[196] The defendant replied that "the gun is over there."[197] The officer then retrieved the gun, arrested the defendant, and read him his *Miranda* rights.[198] The issue in the case was whether the defendant's statement that was made before his *Miranda* rights were read to him and the gun that was found as a result of the statement were admissible at trial.[199] The New York trial and appellate courts suppressed the evidence based on *Miranda* violations.[200] Reversing, the Supreme Court held that both the statement and the gun were admissible.[201]

exemption for anything that might be labeled 'opinion.'" Milkovich v. Lorain Journal Co., 497 U.S. 1, 17–21 (1990) (citing *Cianci*, 639 F.2d at 61, 62 n.10).

191. Miranda v. Arizona, 384 U.S. 436 (1966).

192. Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 681 (1968).

193. *Id.* at 721–22.

194. *See* New York v. Quarles, 467 U.S. 649, 660–74 (1984) (O'Connor, J., concurring in part and dissenting in part); DORSEN, *supra* note 2, at 171–72.

195. *Quarles*, 467 U.S. at 651–52 (majority opinion).

196. *Id.* at 652.

197. *Id.*

198. *Id.*

199. *Id.* at 652–53.

200. *Id.*

201. *Id.* at 659–60.

Writing for the Supreme Court, Justice William H. Rehnquist resolved the case by carving out a "'public safety' exception" to *Miranda*, explaining that the *Miranda* rule need not "be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety."[202] Recognizing that when officers are motivated by concerns for the public safety, they should not be forced to make an untenable choice in the heat of the moment between reading *Miranda* rights before asking a safety-related question and risk losing any evidence discovered from a pre-*Miranda* statement.[203] Summing up its rationale, the Supreme Court explained "that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[204]

Writing separately, Justice O'Connor took exception with the Court's holding by explaining that it would only be appropriate if "the Court [were] writing from a clean slate."[205] Because *Miranda* was clearly established precedent, Justice O'Connor would have held that the defendant's statement was not admissible while the gun was.[206] Justice O'Connor maintained that the Court's newly created public safety exception unnecessarily blurred the clear lines that had been established and would only make *Miranda*'s requirements more difficult to apply.[207] Justice O'Connor would have extended the rationale of *Schmerber v. California* by taking a "bifurcated approach" that distinguishes between testimonial evidence—the defendant's statement—and nontestimonial evidence—the gun.[208]

In taking this separate analytical path, Justice O'Connor followed Friendly's lead. Quoting Friendly's work in *A Postscript on* Miranda, Justice O'Connor contended that "a strong analytical argument can be made for an intermediate rule" under which the police "cannot require the suspect to speak by punishment or force," but "the nontestimonial [evidence derived from] speech that is [itself] excludable for failure to comply with the *Miranda*

202. *Id.* at 656.
203. *Id.* at 657–58.
204. *Id.* at 657.
205. *Id.* at 660 (O'Connor, J., concurring in the judgment in part and dissenting in part).
206. *Id.*
207. *Id.* at 663.
208. *Id.* at 667–68 (quoting Schmerber v. California, 384 U.S. 757, 765 & n.9 (1966)).

code could still be used."[209] Justice O'Connor made this critical distinction because she recognized that some situations occur where "the societal cost of administering the *Miranda* warnings is very high indeed."[210] Justice O'Connor used Friendly's *The Bill of Rights as a Code of Criminal Procedure*[211] to explain a situation in which evidence acquired without a *Miranda* warning may be of high societal value.[212] Friendly had posited an example where requiring that a kidnapper receive a *Miranda* warning may be too costly to the public good in finding the victim.[213] Using Friendly's analysis as her guidepost, Justice O'Connor further drew the critical distinction between testimonial and nontestimonial evidence:

> Use of a suspect's answers "merely to find other evidence establishing his connection with the crime [simply] differs only by a shade from the permitted use for that purpose of his body or his blood." The values underlying the privilege may justify exclusion of an unwarned person's out-of-court statements, as perhaps they may justify exclusion of statements and derivative evidence compelled under the threat of contempt. But when the only evidence to be admitted is derivative evidence such as a gun—derived not from actual compulsion but from a statement taken in the absence of *Miranda* warnings—those values simply cannot require suppression, at least no more so than they would for other such nontestimonial evidence.[214]

When it came to the application of *Miranda*, Justice O'Connor recognized the need for balancing in the same way that Friendly did.

209. *Id.* at 668 (alterations in original) (quoting HENRY J. FRIENDLY, *A Postscript on* Miranda [hereinafter FRIENDLY, *A Postscript on* Miranda], *in* BENCHMARKS, *supra* note 26, at 266, 280).

210. *Id.*

211. FRIENDLY, *The Bill of Rights as a Code of Criminal Procedure*, *supra* note 139, at 235.

212. *Quarles*, 467 U.S. at 668 & n.3 (citing Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 949 (1965) [hereinafter Friendly, *The Bill of Rights*]).

213. Friendly, *The Bill of Rights*, *supra* note 212 ("Kidnapping raises the issue still more poignantly. If such a tragedy were to strike at the family of a writer who is enthused about extending the assistance of counsel clause to the station house, would he really believe the fundamental liberties of the suspect demanded the summoning of a lawyer; or at least a clear warning as to the right immediately to consult one, before the police began questioning in an effort to retrieve his child?").

214. *Quarles*, 467 U.S. at 671 (alteration in original) (quoting FRIENDLY, *A Postscript on* Miranda, *supra* note 209).

Friendly believed that the application of the fruit-of-the-poisonous-tree doctrine to *Miranda* cases was not required;[215] Justice O'Connor agreed.[216] Friendly helped persuade Justice O'Connor not to apply *Miranda* so rigidly that police could not carry out their duties to protect the public because of their preoccupation with defendants' *Miranda* rights. Striking a balance between effective law enforcement and the protection against invasions of the constitutional protection against self-incrimination, Friendly and Justice O'Connor believed that the fruits of an unwarned statement—but not the statement itself—should be admissible.[217]

One year after *Quarles*, the Supreme Court adopted what could be characterized as the Friendly–O'Connor framework when applying *Miranda* protection in light of the fruit-of-the-poisonous-tree doctrine. In *Oregon v. Elstad*, the Supreme Court reviewed a decision by an Oregon trial court that excluded an uncompelled confession that did not have the benefit of a *Miranda* warning.[218] The Oregon court had concluded that the "cat was sufficiently out of the bag to exert a coercive impact" such that a later confession was tainted fruit produced by a prior unwarned confession.[219] Writing for the U.S. Supreme Court and citing *Quarles*, Justice O'Connor flatly rejected the application of the fruit-of-the-poisonous-tree doctrine.[220] Even though the defendant's statement was obtained after a *Miranda* violation, the Court held that it was admissible because a *Miranda* warning was given before the second statement, relieving any taint from the first statement.[221] Building on her analysis from *Quarles*, which built on Friendly's foundational framework, Justice O'Connor explained that evidence obtained as a result of unwarned statements can be admissible.[222] Thus, the fruit-of-the-poisonous-tree doctrine does not apply to noncoercive *Miranda* violations.[223]

Friendly's Fifth Amendment contributions again were felt nearly 20

215. FRIENDLY, *A Postscript on* Miranda, *supra* note 209, at 279.
216. *Quarles*, 467 U.S. at 671 & n.4.
217. *See id.* at 671; FRIENDLY, *A Postscript on* Miranda, *supra* note 209, at 279, 280.
218. Oregon v. Elstad, 470 U.S. 298, 300–02 (1985).
219. *Id.* at 303 (quoting State v. Elstad, 658 P.2d 552, 555 (Or. Ct. App. 1983), *rev'd*, 470 U.S. 298).
220. *Id.* at 308.
221. *Id.* at 318.
222. *Id.*
223. *Id.*

years later in *United States v. Patane*.[224] In *Patane*, a police officer attempted to give the defendant his *Miranda* rights, but the defendant interrupted the officer to state that he was aware of his rights.[225] The officer then asked the defendant where his gun was located; the defendant eventually answered with the gun's location.[226] The officers found the gun, and the defendant was charged with unlawful possession of a firearm.[227] Because the arrest lacked probable cause, the trial court suppressed the gun.[228] Following *Elstad* and Friendly, the Supreme Court held that fruit obtained from noncoercive, unwarned testimony was admissible and not subject to the exclusionary rule.[229]

On the Fifth Amendment's protection against self-incrimination, Friendly wrote an opinion in *United States v. Beattie*,[230] which "presaged"[231] how the Supreme Court ultimately resolved the same issue. *Beattie* involved a defendant who, while being investigated by the Internal Revenue Service (IRS), requested that his accountant send his work product and analysis of the defendant's income tax records to the defendant.[232] The IRS subpoenaed these tax documents from the defendant.[233] Claiming a Fifth Amendment privilege against self-incrimination, the defendant refused to produce the documents.[234] After the district court enforced the subpoena to produce the tax records, Beattie appealed to the Second Circuit.[235]

Writing for the court, Friendly used his trademark laser focus to

224. *See* United States v. Patane, 542 U.S. 630, 643 (2004) (plurality opinion) (citing FRIENDLY, *A Postscript on* Miranda, *supra* note 209, at 280–81).

225. *Id.* at 635.

226. *Id.*

227. *Id.*

228. *Id.* The trial court "declined to rule on [defendant's] alternative argument that the gun should be suppressed as the fruit of an unwarned statement." *Id.* The appellate court reversed the trial court's basis for excluding the firearm, but nevertheless affirmed the suppression based on defendant's fruit-of-the-poisonous-tree argument. *Id.* at 635–36.

229. *Id.* at 643–44.

230. United States v. Beattie, 522 F.2d 267 (2d Cir. 1975), *vacated*, 425 U.S. 967 (1976) (mem.).

231. This apt language was used by Dorsen in his outstanding biography of Friendly. DORSEN, *supra* note 2, at 171.

232. *Beattie*, 522 F.2d at 267–68.

233. *Id.*

234. *Id.* at 268.

235. *Id.* at 267.

distinguish between a defendant's own records and someone else's records in the defendant's possession. As a basic starting point, Friendly recognized that the Self-Incrimination Clause of the Fifth Amendment protects a defendant from having to produce his own records, which would equate to nothing more than requiring a defendant to admit that the documents were genuine.[236] But that was not the scope of the issue. Instead, Friendly explained that "in order to bring a case of compelled production of papers within the [Fifth Amendment] privilege, the process must elicit not simply 'responses which are also communications' but communicative responses tending to incriminate."[237] Friendly held that unlike a requirement that a defendant produce his own records, requiring the defendant to produce his accountant's records "would not be admitting the genuineness, correctness or reliability" of the records, because the prosecution would necessarily still need to authenticate the documents through the accountant's testimony.[238] In other words, the defendant's simple act of producing the tax documents would not require that he testify that they were authentic, genuine, or accurate, or that they were even his documents.[239] Thus, no incriminating statements needed constitutional protection.[240] If the defendant's act of producing the records would have incriminated him, however, then Friendly would have applied the Fifth Amendment privilege against self-incrimination.[241]

Friendly did not end his analysis by explaining the nature of the Fifth Amendment's protection against incriminating statements. Friendly distinguished tax records that belonged to the defendant from tax records that belonged to his accountant, which the government could have subpoenaed from the accountant.[242] Honing in on the critical difference between producing one's own records and the records of another, Friendly explained that "there is no . . . invasion of a private inner sanctum when a taxpayer is asked to produce the work product of an independent contractor, possession of which he has obtained in an effort to forestall the compulsory production the Government could have had if the contractor had retained

236. *Id.* at 270.
237. *Id.* at 270–71.
238. *Id.*
239. *See id.*
240. *Id.* at 278–79.
241. *Id.*
242. *Id.* at 269.

them."[243] Based on Friendly's rationale, the Second Circuit held that "an accountant's workpapers representing his independent work product . . . do not come within the [Fifth Amendment] privilege simply because the taxpayer possesses them with the accountant's consent or even has acquired title to them."[244]

As has occurred throughout the years, Friendly started a train of thought that rolled down the tracks to, and through, the Supreme Court. In *Fisher v. United States*, the Supreme Court confronted the circuit-splitting question that Friendly had answered in *Beattie*.[245] Revealing yet again Friendly's impact on the law, the Supreme Court sided with Friendly by employing his rationale.[246] Like Friendly, the Supreme Court recognized that the Fifth Amendment focuses on incriminating statements.[247] Similar to Friendly's explanation that the Fifth Amendment extends to "communicative responses tending to incriminate,"[248] the Supreme Court likewise concluded, "It is also clear that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating."[249] The Court further elucidated Friendly's line of reasoning by explaining that compelling a taxpayer to produce documents from an accountant that are in the taxpayer's possession would not involve self-incrimination because it does not "ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought."[250] Precisely as Friendly explained in *Beattie*, the Supreme Court agreed that the taxpayer's production of the accountant's documents does not require authenticating and self-incriminating testimony from the defendant taxpayer; instead, by necessity and contrast, it required the authenticating testimony of the accountant.[251]

243. *Id.* at 279.

244. *Id.* at 278.

245. Fisher v. United States, 425 U.S. 391, 405 (1976). Indeed, the Court was called upon to resolve a split created by a decision of the Fifth Circuit and Friendly's *Beattie* decision from the Second Circuit. *Id.*

246. *See id.* Ultimately, the Supreme Court agreed with Friendly by citing the same case law and rationale to conclude that compelling the defendant to produce someone else's documents would not amount to "testimonial self-incrimination." *Id.* at 410–11.

247. *Id.* at 405.

248. *Beattie*, 522 F.2d at 270–71.

249. *Fisher*, 425 U.S. at 408.

250. *Id.* at 409.

251. *Id.* at 413.

The Supreme Court agreed with Friendly that the Fifth Amendment privilege did not attach to documents that did not belong to the defendant himself.[252] Summing up its rationale, the Supreme Court made the following observations:

> [The Framers of the U.S. Constitution] did not seek in [the Fifth] Amendment . . . to achieve a general protection of privacy but to deal with the more specific issue of compelled self-incrimination.
>
> We cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment. We adhere to the view that the Fifth Amendment protects against "compelled self-incrimination, not [the disclosure of] private information."[253]

A decade later, the Supreme Court extended its reasoning from *Fisher* to *United States v. Doe*, a case involving an owner of sole proprietorships who was subpoenaed for the records of those businesses.[254] Friendly had foreshadowed how these Fifth Amendment issues would play out when a defendant was asked to produce records belonging to another person.[255] Through his holding and rationale in *Beattie*, Friendly ultimately served as the architect that laid the foundation upon which the Supreme Court erected its Fifth Amendment jurisprudence on self-incrimination.

D. *Due Process*

Friendly's voice might have been the loudest and most heard when he explained the proper analytical framework for procedural due process. In an article—and not a judicial opinion, mind you—entitled *"Some Kind of*

252. *Id.* at 409.

> The accountant's workpapers are not the taxpayer's. They were not prepared by the taxpayer, and they contain no testimonial declarations by him . . . . The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing . . . .

Id. at 409–10.

253. *Id.* at 400–01 (last alteration in original) (quoting United States v. Nobles, 422 U.S. 225, 233 n.7 (1975)).

254. United States v. Doe, 465 U.S. 605, 606, 611–12 (1984).

255. United States v. Beattie, 522 F.2d 267, 279 (2d Cir. 1975), *vacated*, 425 U.S. 967 (1976) (mem.).

Hearing"[256] that addressed Fifth Amendment Due Process Clause rights, Friendly argued that due process inherently should be based on a balancing of all interests involved, a sort of sliding scale approach that provides greater constitutional protection the more serious the government action and private interests involved.[257] Friendly stated the appropriate test in this way:

> The required degree of procedural safeguards varies directly with the importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circumstances and inversely with the burden and any other adverse consequences of affording it.[258]

Essentially, Friendly was promulgating a policy within case law that balanced private and public interests—a benefits-versus-burdens analysis—when it came to due process requirements.[259]

In balancing the public and private interests involved, Friendly recommended courts use a sliding scale of the elements of a fair hearing such that as governmental action becomes more serious, procedural safeguards necessarily increase.[260] Along those lines, Friendly saw a need to examine whether, in light of existing procedural safeguards, a hearing would actually be profitable to the party appealing a decision.[261] Friendly found it misplaced that due process would require providing a minute benefit while imposing great cost and burden on an agency.[262] Pragmatically, this approach would result in the misappropriation of limited funds, i.e., funds misspent on valueless due process requirements could better be used to fund the agency's activities to support its beneficiaries.[263]

256. *"Some Kind of Hearing"* is an expansion of a lecture Friendly delivered on April 3, 1975, at the University of Pennsylvania Law School. Henry J. Friendly, *"Some Kind of Hearing*," 123 U. PA. L. REV. 1267, 1267 n.* (1975) [hereinafter Friendly, *Some Kind of Hearing*].

257. *Id.* at 1278. Even though Friendly recognized the importance of balancing tests, his opinions reveal that he was guided by fidelity to the law such that his balancing tests did not automatically tilt toward his policy preferences. One cannot see Friendly's finger on one side of the scale.

258. *Id.* (footnote omitted).

259. *See id.*

260. *Id.* at 1278–79.

261. *See id.* at 1281.

262. *See id.* at 1281 & n.79.

263. *Id.* at 1303–04. Perhaps this is an example of the concept that you should not rob Peter to pay Paul.

Friendly's article created the analytical framework that the Supreme Court ultimately adopted in *Mathews v. Eldridge*.[264] In *Mathews*, Eldridge sued the Social Security Administration for violating his due process rights by failing to give him a hearing before it cancelled his disability benefits.[265] To support his position that due process guaranteed a pre-deprivation hearing, Eldridge relied exclusively on *Goldberg v. Kelly*, which established the right to an evidentiary hearing before welfare benefits were terminated.[266] Rather than simply following *Goldberg*, however, the Supreme Court instead applied Friendly's analytical framework to create a three-factor test to determine whether due process required a pre-deprivation hearing.[267] The Court weighed the facts against the following three factors: (1) the private interest at stake or the degree of potential deprivation including length of potential wrongful deprivation;[268] (2) the risk of wrongful deprivation and "the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards";[269] and (3) the public or government interest or the "administrative burden and other societal costs" of requiring a hearing before every termination.[270]

Similar to Friendly's balancing in this area of benefits law, the Supreme Court viewed the cancellation of disability benefits as less serious than the discontinuation of welfare benefits because recipients of disability benefits often had access to other forms of income.[271] This balancing led to the view that the cancelation of disability benefits required less procedural due process than the cancelation of welfare benefits.[272] Again, Friendly's line of reasoning forged the Supreme Court's analytical path.

Friendly also explained that due process does not require that all

264. *See* Mathews v. Eldridge, 424 U.S. 319, 343 (1976).

265. *Id.* at 324–25.

266. *Id.* at 325 (citing Goldberg v. Kelly, 397 U.S. 254 (1970)).

267. *See id.* at 332–49.

268. *Id.* at 341 (quoting Fusari v. Steinberg, 419 U.S. 379, 389 (1975)).

269. *Id.* at 343.

270. *Id.* at 347.

271. *Id.* at 340–41 (citing and quoting Richardson v. Belcher, 404 U.S. 78, 85–87 (1971) (Douglas, J., dissenting)); Friendly, *Some Kind of Hearing*, *supra* note 256, at 1298 (explaining that "suspension of a payment that is the claimant's only hope for income is more serious than a suspension that permits resort to other sources of income, even to the welfare system").

272. *Mathews*, 424 U.S. at 343.

evidence be presented in a confrontational manner in an oral hearing but some evidence was susceptible to written submission.[273] After citing Friendly's discussion of this idea, the Supreme Court concluded that the submission of medical records for review by the state agency was susceptible to review without an oral hearing.[274] Because the "specter of questionable credibility and veracity [was] not present" in a review of the medical records, the Court saw little benefit to requiring the burden of an oral hearing.[275] Relying on Friendly's article for support, the Supreme Court summed up its balancing approach: "At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost."[276]

A comparison of Friendly's analytical framework on due process and the Supreme Court's decision creates the distinct feeling that Friendly essentially wrote the opinion in *Mathews* before the case was ever heard by the Supreme Court. How did he make such a pinpoint and, ultimately, lasting contribution to due process jurisprudence? By doing what a great judge does: he studied the case law, understood the competing interests, appreciated the judiciary's structural competencies, developed a clear-eyed understanding of how the law should govern a complex combination of facts, and created a clear test that would justly balance all of the competing interests consistent with the guiding principles contained in the Constitution. After conducting my own analysis of Friendly's contribution in this pivotal area of the law that is central to the U.S. legal system, i.e., the concept of due process, I am left with one overriding response—the Supreme Court was obligated to adopt the balancing test that Friendly had presented to them. There is no other way to administer justice equally and fairly to millions of people under infinitely complex programs. In terms of the proper allocation of limited resources, Friendly's views are impossible to discount. More pointedly perhaps, his views required attention and, ultimately, adoption.

Friendly's contributions to due process jurisprudence did not live and die with the landmark case of *Mathews v. Eldridge*. In *Wilkinson v. Austin*, the Supreme Court used the *Mathews* balancing test to determine whether the procedures used by Ohio to place prisoners in its maximum-security

273. Friendly, *Some Kind of Hearing*, *supra* note 256, at 1281 & n.79.

274. *Mathews*, 424 U.S. at 343 (citing Friendly, *Some Kind of Hearing*, *supra* note 256, at 1281).

275. *Id.* at 344–45 (quoting Richardson v. Perales, 402 U.S. 389, 407 (1971)).

276. *Id.* at 348 (citing Friendly, *Some Kind of Hearing*, *supra* note 256, at 1276, 1303).

prison comported with due process.[277] In concluding that Ohio had complied with its due process mandate, the Supreme Court analyzed the case under the three factors laid out in *Mathews* that followed Friendly's lead.[278] Strikingly, when looking at the first factor, which analyzed the private interest of the prisoners, the Supreme Court identified the difference between confining a free person and confining a prisoner.[279] This recognized distinction parallels Friendly's analysis that discontinuing disability benefits caused less concern than discontinuing welfare benefits.[280] Furthermore, when the Supreme Court examined the third factor of weighing the public versus private interests, it specifically considered the scarcity of resources when exploring the expanded costs of additional procedural safeguards.[281] This is an essential component of Friendly's (and, therefore, the Supreme Court's) analysis.[282] That is, Friendly did not operate in a Utopian vacuum in which there were unlimited resources available to guarantee rights. He pragmatically recognized, as did the Supreme Court, that because resources are finite and limited, there comes a point at which any potential benefit is outweighed by the cost in attaining it.[283] Ultimately in *Wilkinson*, the Supreme Court weighed all of the interests—the public's interest in controlling prisons and its operating costs, the existing procedural safeguards, and the diminished rights of prisoners versus other citizens—to determine that the state had complied with due process guarantees.[284] From the outset, Friendly helped form the *Mathews* balancing test, and his foundational thoughts still inform due process jurisprudence today.

Allow me to take one more paragraph to further illustrate Friendly's impact in creating the analytical framework that serves as the cornerstone for the Supreme Court's due process jurisprudence. Recently, in *Turner v. Rogers*, the Supreme Court applied the *Mathews* three-factor balancing test to decide whether due process was violated when a noncustodial parent was

277. Wilkinson v. Austin, 545 U.S. 209, 213, 225 (2005).

278. *Id.* at 225.

279. *Id.*

280. *See* Friendly, *Some Kind of Hearing*, *supra* note 256, at 1278 ("The required degree of procedural safeguards varies directly with the importance of the private interest affected . . . ."); *see also Mathews*, 424 U.S. at 341.

281. *Wilkinson*, 545 U.S. at 228.

282. Friendly, *Some Kind of Hearing*, *supra* note 256, at 1303–04; *see Mathews*, 424 U.S. at 348 (citing Friendly, *Some Kind of Hearing*, *supra* note 256, at 1276, 1303).

283. Friendly, *Some Kind of Hearing*, *supra* note 256, at 1303; *accord Mathews*, 424 U.S. at 348.

284. *Wilkinson*, 545 U.S. at 225–28.

not provided paid counsel at a contempt hearing on his overdue child support payments.[285] The Court recognized that the private-interest factor weighed heavily in the noncustodial parent's favor because freedom from bodily restraint is a core liberty interest protected by the Due Process Clause.[286] But that factor did not stand alone.[287] The Court still was required to weigh this important private interest against the other relevant interests involved.[288] In considering the strong public interest in ensuring that a noncustodial parent pay child support to the custodial parent, the overall fairness of the trial, and available "substitute procedural safeguards," the Court concluded that due process had been provided.[289] Recognizing that "[t]he custodial parent . . . may be relatively poor, unemployed, and unable to afford counsel," the Court determined the state providing counsel to noncustodial parents who are subject to contempt proceedings could create an asymmetry of representation and "make the proceedings less fair overall, increasing the risk of a decision that would erroneously deprive a family of the support it is entitled to receive."[290] Friendly's recognition that public and private interests must be balanced to resolve due process issues applied to yet another area of law: a civil contempt hearing.[291] The Supreme Court once more utilized Friendly's analytical framework of considering the nature of the governmental action, the importance of the private interest affected, and the public interest served.[292] Although not a perfect fit, *Turner* showcases that Friendly's general due process principles and overarching analytical framework continue to be utilized by the Supreme Court.

E. Bivens *Claims*

As already illustrated, Friendly made lasting contributions to the law through his judicial and extrajudicial work. Friendly's extrajudicial activity reached its pinnacle, at least arguably, in the famous case of Webster Bivens. In *Bivens v. 6 Unknown Named Agents of the Federal Bureau of Narcotics*, Bivens brought a civil suit against federal agents for violating his Fourth

285. Turner v. Rogers, 564 U.S. 431, 435 (2011).

286. *Id.* at 445 (first quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992); and then citing Addington v. Texas, 441 U.S. 418, 425 (1979)).

287. *Id.* at 446 (quoting *Mathews*, 424 U.S. at 335).

288. *Id.* (quoting *Mathews*, 424 U.S. at 335).

289. *Id.* at 446, 448 (quoting *Mathews*, 424 U.S. at 335).

290. *Id.*

291. *See id.* at 448.

292. *See id.*

Amendment right to be free from unreasonable search and seizure.[293] The federal district court dismissed the suit for lack of subject matter jurisdiction, holding that there is no civil remedy for violations of the Fourth Amendment by federal officials.[294] Bivens filed a motion for leave to appeal *in forma pauperis* to the Second Circuit,[295] and Friendly happened to be the judge who received the motion.[296] Friendly recognized the patent unfairness of denying a remedy to Bivens because he was subjected to unconstitutional conduct by federal officials.[297] Had he been subjected to the same conduct by state officials, he would have enjoyed a cause of action.[298] Unwilling to be hamstrung by his inability to decide this important federal issue, Friendly recruited one of his former law clerks, Stephen Grant, to represent Bivens pro bono on appeal.[299] Without Friendly on the panel that decided the case, the Second Circuit affirmed the district court, holding that Bivens had no cause of action.[300] Friendly's behind-the-scenes involvement was not finished. He encouraged Grant to pursue the matter to the Supreme Court, even advising Grant on how best to present the appeal.[301] At oral arguments before the Supreme Court, two former Friendly clerks squared off, with Grant representing Bivens and Assistant Solicitor General A. Raymond Randolph representing the government.[302] The Supreme Court followed Friendly's view that there was an implied cause of action for federal constitutional torts committed by federal officials.[303] Even though Friendly was an in absentia architect of the newly recognized constitutional tort, it is ironic that he later regretted the expanse of the theory recognized in

293. Bivens v. 6 Unknown Named Agents of the Fed. Bureau of Narcotics, 276 F. Supp. 12, 13 (E.D.N.Y. 1967), *aff'd*, 409 F.2d 718 (2d Cir. 1969), *rev'd*, 403 U.S. 388 (1971). The facts of *Bivens* reveal unconstitutional, despicable, and heart-wrenching police misconduct that would shock the conscience if left without a remedy.

294. *Id.* at 14–16.

295. *Id.* at 13.

296. DORSEN, *supra* note 2, at 183.

297. *Id.*

298. *Id.* (explaining the unfairness that "despite protections against the federal government provided to citizens by the Bill of Rights, a state prisoner had greater rights than a federal prisoner").

299. *Id.*

300. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 409 F.2d 718, 726 (2d Cir. 1969), *rev'd*, 403 U.S. 388 (1971).

301. DORSEN, *supra* note 2, at 184.

302. *Id.*

303. *See Bivens*, 403 U.S. at 389–92.

Bivens.[304]

I doubt that Friendly could have accurately predicted the expansiveness of this newly recognized federal common law constitutional tort. According to a Westlaw search conducted on March 12, 2017, there are 39,043 references to *Bivens*, with 21,300 cases citing *Bivens*.[305] Although this number speaks volumes to Friendly's massive impact on the development of federal law, the Supreme Court has seemingly joined Friendly by regretting how expansive and unwieldy such a federal common law tort has become. After expanding the constitutional tort for years, the Supreme Court began, at least as early as 1983, to search for ways to limit or contract the scope of *Bivens*.[306] Indeed, *Bivens* actions have gradually become judicially disfavored over the years, perhaps culminating with a huge blow in 2007 in *Wilkie v. Robbins*.[307]

In *Wilkie*, a landowner was harassed and bullied by federal officials from the Bureau of Land Management after the landowner refused to grant the government an easement across his land.[308] In response to the ridiculously overpowering behavior exhibited by the federal government to secure its desire for an easement, the landowner brought a *Bivens* common law claim that his rights under the Fifth Amendment's Due Process Clause had been violated by the federal officials.[309] Even though the Supreme Court was not keen on the government's conduct, it took aim at the differing competencies of the courts and Congress to remedy constitutional violations.[310] The Supreme Court ultimately recognized that the landowner had available to him an administrative process with judicial review that would vindicate his complaints.[311] The Court still asked whether the landowner nevertheless should enjoy an additional judicially created remedy

304. *See* Dale v. Bartels, 732 F.2d 278, 285 (2d Cir. 1984) (pleading implicitly that "the Supreme Court choose[] to place some limits on *Bivens* and its progeny").

305. Citing References for *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, WESTLAW, https://1.next.westlaw.com/Search/Home.html?transitionType=Defalut&contextData=(sc.Default)#sk=1.jQeZQq (search 403 U.S. 388; then select "Citing References").

306. *See* Bush v. Lucas, 462 U.S. 367, 374–78, 390 (1983) (declining to create or expand a judicial remedy where statutory remedies, albeit incomplete compared to requested judicial remedies, already existed).

307. Wilkie v. Robbins, 551 U.S. 537 (2007).

308. *Id.* at 541.

309. *Id.* at 547–48.

310. *See id.* at 561–62.

311. *Id.* at 553.

under *Bivens*, "weighing reasons for and against the creation of a new cause of action"[312] to "redress retaliation [by government officials] against those who resist Government impositions on their property rights."[313]

When confronted with a choice between a narrow process and remedy governed by Congress, and an unwieldy and constantly developing federal common law, the Supreme Court predicted that a judicially created cause of action for this landowner inevitably "would invite claims in every sphere of legitimate governmental action affecting property interests, from negotiating tax claim settlements to enforcing Occupational Safety and Health Administration regulations."[314] Using language that echoed Friendly's concerns,[315] the Supreme Court exasperated that "a general *Bivens* cure would be worse than the disease."[316] Deferring to Congress's competency with a restrained understanding of its own institutional abilities,[317] the Supreme Court put limits on the judicial expansion of *Bivens* claims to remedy constitutional violations:

> We think accordingly that any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation. "Congress is in a far better position than a court to evaluate the impact of a new species of litigation" against those who act on the public's behalf. And Congress can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees.[318]

Further expounding upon the differing competencies between Congress and the courts, the Supreme Court recognized that in developing the proper procedures and remedies for a cause of action, Congress could inform itself through the fact-finding process of holding congressional hearings—a luxury that courts do not enjoy.[319] At bottom and despite its implicit understanding that a landowner who was harassed by government officials might enjoy no effective remedy, the Supreme Court deflected the

312. *Id.* at 554 (citing Bush v. Lucas, 462 U.S. 367, 388 (1983)).
313. *Id.* at 561.
314. *Id.*
315. *See* Dale v. Bartels, 732 F.2d 278, 285 (2d Cir. 1984).
316. *Wilkie*, 551 U.S. at 561.
317. *See id.* at 562.
318. *Id.* (citation omitted) (quoting Bush v. Lucas, 462 U.S. 367, 389 (1983)).
319. *Id.* (quoting *Bush*, 462 U.S. at 389).

responsibility for creating constitutional causes of action to Congress.[320] I suspect that Friendly would smile upon the Supreme Court's newfound restraint exhibited in *Wilkie*.

F. *Habeas Corpus*

While on the topic of Friendly's extrajudicial activity that made lasting contributions to the development of the law,[321] Friendly had a profound effect on the law of federal habeas corpus. Consistent with his judicial philosophy, commitment to judicial restraint, and keen appreciation for the judiciary's inherent institutional shortcomings and limited resources, Friendly sought to define the appropriate contours of the federal bench's role in authorizing collateral attacks to criminal convictions. In his presentation of the 1970 Ernst Freund lecture at the University of Chicago, Friendly contended that a defendant seeking a writ of habeas corpus should be required to "make a colorable showing of innocence" for the court to

320. *See* Katrina Carmichael, Note, *The Unconstitutional Torture of an American by the U.S. Military: Is There a Remedy Under* Bivens*?*, 29 GA. ST. U. L. REV. 1093, 1098 (2013) (referring to *Wilkie* as "[t]he most decidedly damaging blow to *Bivens*").

321. In addition to his extrajudicial push in *Bivens*, it is unclear whether Friendly helped shape the debate over the First Amendment's restrictions on prior restraint in the famous *Pentagon Papers* case. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam). The Second Circuit heard appeals in the *Pentagon Papers* case nine days after the *New York Times* ran the first story about the Department of Defense's top secret papers about the Vietnam War and four days after the *Washington Post* ran its first story about the papers. DORSEN, *supra* note 2, at 151–53. Sitting en banc, the Second Circuit issued a decision the day after oral arguments. United States v. N.Y. Times Co., 444 F.2d 544, 544 (2d Cir. 1971) (en banc) (per curiam), *rev'd*, 403 U.S. 713. The Supreme Court heard the case on a Saturday three days after the Second Circuit issued its decision. *N.Y. Times Co.*, 403 U.S. at 713. Amid this rush of legal activity, Friendly handwrote a 21-page document with eight pages of footnotes that would have allowed the national government to restrain the press's ability to print the papers. DORSEN, *supra* note 2, at 158. In essence, Friendly deferred to national security experts, explaining that judges lacked institutional expertise on such issues. *Id.* at 158–59. Friendly expressed a strong commitment to judicial restraint in this case, even when judicial review probably required a more exacting critique of the government's claims against a backdrop of prior restraint. As far as Dorsen's research could tell, however, Friendly's "decision" was never circulated to the other members of the circuit as a voting memorandum, and it was never published as an opinion in the case. *Id.* Rampant speculation hypothesizes that Friendly had forwarded the document to his old friend, Justice Harlan, whose dissent tracked many of the points that Friendly had raised. *N.Y. Times, Co.*, 403 U.S. at 755–59 (Harlan, J., dissenting). There is no substantiation, however, that Justice Harlan ever saw the Friendly "decision," so it is impossible to claim that Friendly made a contribution to this area of the law. DORSEN, *supra* note 2, at 160–61.

review the habeas claim.[322] In so limiting federal habeas review, Friendly sought "to restore the [writ of habeas corpus] to its deservedly high estate and rescue it from the disrepute invited by current excesses."[323] Friendly's approach to habeas corpus tracked his overriding judicial philosophy displayed in his balancing analysis of procedural due process issues.[324] Friendly once again explained how absolutes were inconsistent with the judiciary's capabilities and ignored the pragmatic fact that the federal judiciary was not blessed with unlimited resources to scour every case for every error.[325] Instead, Friendly suggested that every habeas issue must weigh the societal interest against the individual's interest.[326] To illustrate that point, Friendly explained how constitutional rights would not be better protected with an active federal judiciary advertising and employing unlimited habeas review authority.[327] Friendly contended that if the federal bench used its limited resources to entertain all habeas claims, then the societal burden would be monumental and too heavy to bear, particularly when alleged violations did not even cast doubt on a defendant's guilt.[328] Friendly's judicial pragmatism counseled him that at some point, society's interest in punishing criminals would outweigh minor constitutional violations.[329] Instead of being a starry-eyed ideologue intoxicated by unlimited authority, Friendly was a pragmatic realist who understood that structural limitations should restrain the federal bench.

322. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970) [hereinafter Friendly, *Is Innocence Irrelevant?*].

323. *Id.* at 143.

324. *See supra* Part V.D.

325. Friendly, *Is Innocence Irrelevant?*, *supra* note 322, at 146–47, 148–49.

326. *See id.* at 149–50.

327. *See generally id.*

> My submission, therefore, is that innocence should not be irrelevant on collateral attack even though it may continue to be largely so on direct appeal. To such extent as we have gone beyond this, and it is an enormous extent, the system needs revision to prevent abuse by prisoners, a waste of the precious and limited resources available for the criminal process, and public disrespect for the judgments of criminal courts.

Id. at 172.

328. *Id.* at 157.

329. *Id.* Friendly argued that without a showing of colorable innocence, habeas corpus should not be granted based solely on a minor constitutional violation when it was fairly litigated at trial. *Id.*

Friendly's article first influenced the Supreme Court in *Stone v. Powell*.[330] In that case, the Supreme Court held that evidence obtained through an unconstitutional search that had been admitted at trial was not enough to grant a writ of habeas corpus.[331] Twice citing Friendly's speech, the Court tracked his arguments and reasoning.[332] Agreeing with Friendly that evidence obtained through an unlawful search can be as reliable as evidence obtained through a lawful search, the Court expounded on its reasoning:

> The costs of applying the exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.[333]

This reasoning followed Friendly's Chicago speech:

> "As the exclusionary rule is applied time after time, it seems that its deterrent efficacy at some stage reaches a point of diminishing returns, and beyond that point its continued application is a public nuisance." And "if there is one class of cases that I would hazard to say is very probably beyond the point of diminishing returns, it is the class of search and seizure claims raised collaterally."[334]

Friendly again employed his balancing test to recognize that society had a strong interest to not suppress unlawfully obtained evidence if it allowed the guilty to go free.[335] Friendly concluded that the misapplication of the exclusionary rule was not a sufficient enough wrong to authorize the grant of a writ of habeas corpus.[336] Agreeing with Friendly, the Supreme Court explained: "Resort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of

330. Stone v. Powell, 428 U.S. 465, 480 (1976).

331. *Id.* at 482.

332. *Id.* at 480 n.13, 491 n.31.

333. *Id.* at 489–90 (footnotes omitted).

334. Friendly, *Is Innocence Irrelevant?*, *supra* note 322, at 161 (footnote omitted) (quoting Anthony G. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 389, 390 (1964)).

335. *Id.*

336. *Id.* at 161–63.

liberty, results in serious intrusions on values important to our system of government."[337]

The Supreme Court later adopted Friendly's innocence requirement in *Kuhlmann v. Wilson* in cases involving successive habeas applications.[338] *Kuhlmann* asked whether a federal court should entertain successive applications for a writ of habeas corpus when each successive application is based on the same grounds that had been previously rejected.[339] The defendant asserted that the state had violated his Sixth Amendment right to counsel.[340] The defendant's first habeas petition had been rejected, but he was returning for a second time with the same argument based on a new ruling by the Supreme Court.[341] In a plurality opinion that addressed the wisdom of reviewing successive habeas petitions, Justice Lewis Powell agreed with Friendly that the proper habeas standard should incorporate an actual-innocence component because,

> the "ends of justice" require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence. This standard was proposed by Judge Friendly more than a decade ago as a prerequisite for federal habeas review generally. As Judge Friendly persuasively argued then, a requirement that the prisoner come forward with a colorable showing of innocence identifies those habeas petitioners who are justified in again seeking relief from their incarceration. We adopt this standard now to effectuate the clear intent of Congress that successive federal habeas review should be granted only in rare cases, but that it should be available when the ends of justice so require.[342]

Congress later took up the call to limit and restructure what seemed to be a flawed federal habeas corpus process by enacting the Antiterrorism and

337. *Stone*, 428 U.S. at 480 n.13 (citing Friendly, *Is Innocence Irrelevant?*, *supra* note 322).

338. Kuhlmann v. Wilson, 477 U.S. 436, 453–54 (1986) (plurality opinion).

339. *Id.* at 438 (majority opinion).

340. *Id.* at 439.

341. *Id.* at 441–42 (citing United States v. Henry, 447 U.S. 264 (1980)).

342. *Id.* at 454 (plurality opinion) (citation omitted) (citing Friendly, *Is Innocence Irrelevant?*, *supra* note 322, at 146–48). In *Herrera v. Collins*, the Supreme Court expounded on this reasoning by explaining that actual-innocence claims are not in themselves constitutional claims, but instead they serve as "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Herrera v. Collins, 506 U.S. 390, 404 (1993).

Effective Death Penalty Act (AEDPA).[343] Even though this expansive legislation does not completely track Friendly's proposed standard for habeas corpus, some scholars maintain that Friendly's impact on habeas corpus is substantial.[344] As an example, AEDPA creates certain procedural hurdles that habeas petitioners must overcome to secure a writ of habeas corpus.[345] Some scholars contend that such procedural safeguards further Friendly's goal of "restor[ing] the [writ of habeas corpus] to its deservedly high estate and rescue it from the disrepute invited by current excesses."[346] Although scholars and courts can continue to debate the contours of habeas jurisprudence, any placement of barriers—whether procedural or substantive—on habeas claims would necessarily incorporate Friendly's view that a federal court's grant of a writ of habeas corpus should be skeptically viewed as an extraordinary remedy that should be granted only in cases of colorable innocence.[347] Friendly's balancing framework can be seen yet again. Indeed, his overriding judicial philosophy that balances the interests of an individual defendant against the interests of the collective society in fighting crime is still part of the central debate about the expanse of habeas corpus jurisprudence.

G. *Abortion*

Friendly did not publish an opinion deciding a case involving abortion,

343. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101–108, 110 Stat. 1214, 1217–26 (codified as amended in scattered sections of 28 U.S.C.); *see, e.g.*, 141 CONG. REC. 14,680 (1995) (statement of Sen. Burns) ("I cannot agree with some of my colleagues who would suggest that habeas corpus reform should not be a part of this legislation.").

344. *See* Sara Rodriguez & Scott J. Atlas, *Habeas Corpus: The Dilemma of Actual Innocence*, LITIG., Winter 2008, at 35, 35 ("Federal habeas corpus procedures (and, often, state habeas procedures) closely reflect the views of . . . Judge Friendly."); *see also* Angela Ellis, Note, *"Is Innocence Irrelevant" to AEDPA's Statute of Limitations? Avoiding a Miscarriage of Justice in Federal Habeas Corpus*, 56 VILL. L. REV. 129, 141 n.68 (2011).

345. Rodriguez & Atlas, *supra* note 344, at 38–40 (summarizing key components of the AEDPA).

346. *Id.* at 35 (quoting Friendly, *Is Innocence Irrelevant?*, *supra* note 322, at 143).

347. The issue of the appropriate expanse of habeas corpus review is not going away. Recently, the Supreme Court issued a 5–4 decision announcing this holding: "We hold that actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . [or] expiration of the statute of limitations. We caution, however, that tenable actual-innocence gateway pleas are rare . . . ." McQuiggin v. Perkins, 133 S. Ct. 1924, 1928 (2013) (citations omitted).

but he might have influenced abortion jurisprudence if he had. And he almost did. In 1970, Friendly drafted an opinion in a case challenging the constitutionality of New York's strict anti-abortion statute.[348] Because New York amended its statute, the case was dismissed and Friendly's opinion was never published.[349] Friendly's clerk at the time, A. Raymond Randolph, who later became a federal circuit judge himself, published Friendly's draft abortion decision in 2006 after giving a lecture about it at the Federalist Society's National Lawyers Convention.[350] Although one could study Friendly's opinion to reveal his judicial thoughts on abortion issues, Randolph views the draft opinion as "a clear and brilliant message about the proper role of the federal judiciary," calling it "timeless" and "a classic in legal literature."[351] This observation is entirely consistent with why Friendly is a great judge. He sought to carry out his judicial responsibility to understand and apply the law, not to make it.

Even though Friendly may have held a personal predilection that public policy should authorize abortions in certain circumstances, Friendly believed that a judge's role is different from a legislator's or policymaker's role. To that end, Friendly explained that the constitutional right to privacy to protect the use of contraceptives discovered in *Griswold v. Connecticut*[352] could not be logically extended to limit the states from restricting abortions:

> A holding that the privacy of sexual intercourse is protected against governmental intrusion scarcely carries as a corollary that when this [sexual act] has resulted in conception, government may not forbid destruction of the fetus. The type of abortion the plaintiff[] particularly wish[es] to protect against governmental sanction is the antithesis of privacy. The woman consents to intervention in the uterus by a physician, with the usual retinue of assistants, nurses, and other paramedical personnel . . . .
>
> . . . .
>
> . . . While we are a long way from saying that such [Supreme Court]

348. Randolph, *Before* Roe v. Wade, *supra* note 11, at 1035, 1036 n.11; *see* Hall v. Lefkowitz, 305 F. Supp. 1030, 1031–32 (S.D.N.Y. 1969).

349. Randolph, *Before* Roe v. Wade, *supra* note 11, at 1037.

350. *Id.* at 1035 n.*.

351. *Id.* at 1035. Displaying Friendly's brilliance, Randolph detailed how Friendly handwrote the draft opinion "without the benefit of a law library" while on a cruise with his wife through the Panama Canal. *Id.* at 1037.

352. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

> decisions compel the legislature to extend to the fetus the same protection against destruction that it does after birth, it would be incongruous in their face for us to hold that a legislature went beyond constitutional bounds in protecting the fetus, as New York has done, save when its continued existence endangered the life of the mother.
>
> . . . .
>
> . . . [W]e simply cannot find in the vague contours of the Fourteenth Amendment anything to prohibit New York from doing what it has done here.[353]

Focusing on institutional competency, Friendly explained why the judiciary should not make abortion policy:

> We are not required to umpire th[is] dispute, which concerns what a legislature should do—not what it may do.
>
> . . . .
>
> . . . [T]he decision what to do about abortion is for the elected representatives of the people, not for three, or even nine, appointed judges.
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> . . . .
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> . . . The contest on this, as on other issues where there is determined opposition, must be fought out through the democratic process, not by utilizing the courts as a way of overcoming the opposition of what plaintiffs assume but we cannot know to be a minority and thus clearing the decks, thereby enable legislators to evade their proper responsibilities. Judicial assumption of any such role, however popular at the moment with many highminded people, would ultimately bring the courts into the deserved disfavor to which they came dangerously near in the 1920's and 1930's.[354]

Friendly did not shy away from the social policy behind abortion legislation, declaring that his personal beliefs—and not his oath to the Constitution—would authorize some access to abortion rights.[355] When

353. Randolph, *Before* Roe v. Wade, *supra* note 11, at 1057, 1059, 1061 (footnote omitted).

354. *Id.* at 1058–61.

355. *See* Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*,

searching for a principled ground upon which to base a judicial decision, however, he could not figure out "where . . . the courts get the power to decide this."[356] As Judge Randolph explained, Friendly's draft abortion opinion seemingly has not impacted abortion jurisprudence.[357] But the opinion does, once again, display Friendly's masterful ability to analyze legal issues from a judicially restrained viewpoint, rather than from a free-wheeling, policy-making position.[358]

H. *Federal Jurisdiction*

Friendly was an academic leader in federal jurisdiction.[359] Taking a contrarian position to the historical approach to federal jurisdiction, he advocated for the abolition of diversity jurisdiction and the expansion of federal question jurisdiction for two main reasons.[360] First, he wanted federal judges to focus on developing their expertise in interpreting and applying federal law.[361] Second, he quizzically asked how federal judges could competently decide state law issues without resorting to educated guesses.[362]

33 U. MIAMI L. REV. 21, 33–36 (1978).

356. *Id.* at 36.

357. Randolph, *Before* Roe v. Wade, *supra* note 11, at 1042–43.

358. Friendly never decided an affirmative action case, but he did make several observations about how the law in that area was developing. DORSEN, *supra* note 2, at 203. Friendly privately opined that his "gut reaction [was] that reverse discrimination is just as unconstitutional as the other kind." *Id.* at 203–04 (quoting Letter from Judge Henry J. Friendly to Benjamin Gooding (June 10, 1977)). He criticized affirmative action schemes that would authorize discrimination in favor of "applicants known by everyone to be inferior . . . [to] those better qualified." *Id.* at 204. Notwithstanding these generalized sentiments, Friendly nevertheless applauded Justice Lewis Powell's decision in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), that rejected quotas in affirmative action programs while protecting diversity goals. *See* DORSEN, *supra* note 2, at 204 (quoting Letter to Justice Powell (July 1, 1978), *in* JOHN C. JEFFRIES JR., JUSTICE LEWIS F. POWELL, JR., 498 (1994)). Friendly thanked Justice Powell "for the great service [he] ha[d] rendered the nation" and for his "moderation and statesmanship" that saved the nation from "another *Dred Scott* case." *Id.* (quoting Letter to Justice Powell (July 1, 1978), *in* JEFFRIES JR., *supra*, at 498).

359. *See generally* HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973); Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1973–1974) [hereinafter Friendly, *Averting the Flood*]; Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

360. *See, e.g.*, Friendly, *Averting the Flood*, *supra* note 359, at 640–46.

361. DORSEN, *supra* note 2, at 321.

362. Friendly undoubtedly disdained diversity jurisdiction for federal courts. *See* Feldman v. Allegheny Airlines, Inc., 524 F.2d 384, 390, 393 (2d Cir. 1975) (Friendly, J.,

Friendly has not won this battle, but his impact could still come to fruition.[363] Although the law has not—yet—followed Friendly's views on diversity or federal question jurisdiction, his academic and legal leadership led to the adoption of pendent party jurisdiction,[364] now commonly called supplemental jurisdiction.[365] Even when Friendly did not fully impact an entire field of law (like abolishing federal diversity jurisdiction), he still provided a grand assist (like with supplemental jurisdiction).[366]

I. *Training Attorneys, Legal Academics, and Future Judges*

Finally, and perhaps most dramatically, Friendly made a lasting and staggering impact on the law by training attorneys. These attorneys multiplied Friendly's impact on the law through their impact on the law. Focusing only on Friendly's 27-year judicial career, he employed 51 law clerks, many of whom became influential attorneys, academics, and

concurring dubitante) ("This case is another example of a federal court's being compelled by the Congressional grant of diversity jurisdiction to determine a novel and important question of state law on which state decisions do not shed even a glimmer of light.").

363. *See, e.g.*, FRIENDLY, *The Gap in Lawmaking*, *supra* note 146, at 44 (opining that federal judges should become experts in uniform federal law and boldly predicting that such a "unifying principle . . . is a young man with a future").

364. *See, e.g.*, Finley v. United States, 490 U.S. 545, 564–65 (1989) (Stevens, J., dissenting) (contending that the Supreme Court should follow Friendly's lead in recognizing pendent party jurisdiction: "Judge Henry Friendly considered this precise question in three separate opinions. Because he is universally recognized not only as one of our wisest judges, but also as one with special learning and expertise in matters of federal jurisdiction, a reference to each of those opinions is appropriate." (footnotes omitted)), *superseded by statute*, Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, § 310(a), 104 Stat. 5089, 5113–14 (codified at 28 U.S.C. § 1367 (2012), *as recognized in* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 558–59 (2005); Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627, 629 (2d Cir. 1971) (citing United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966)) (recognizing pendent party jurisdiction). *But see Finley*, 490 U.S. at 556 (majority) (rejecting pendent party jurisdiction).

365. 28 U.S.C. § 1367 (superseding *Finley* less than a year later and explicitly creating pendent party, now called supplemental, jurisdiction).

366. There are plenty of other areas of the law in which Friendly made notable impacts. As a few examples, Dorsen explained how Friendly "helped rationalize, modernize, and promote fairness in admiralty, antitrust, and bankruptcy laws and the law relating to punitive damages." DORSEN, *supra* note 2, at 249. Even though the list could go on and on, the one thing that drives Friendly home as a great judge is his acute sense of fairness and justice that lies in plain sight. This obvious trait can be found in Friendly's body of work.

judges.[367] Twenty-five of Friendly's clerks entered private practice, 21 clerked for a justice on the Supreme Court, 16 became law professors, and 7 became federal judges.[368] If your jaw did not drop while reading the last two sentences, reread them. Notably, three famous Friendly clerks—and three of his favorite clerks—are John G. Roberts Jr., the 17th Chief Justice of the United States, Michael Boudin of the U.S. Court of Appeals for the First Circuit, and A. Raymond Randolph Jr. of the U.S. Court of Appeals for the D.C. Circuit.[369]

VI. CONCLUSION

Friendly possessed the essential traits that undergird his reputation as a great judge. He was impactful, thoughtful, cautious, restrained, clear, fair, intelligent, inquisitive, rational, pragmatic, well-read, critical, analytical, reasoned, curious, productive, independent, and detail-oriented. He also sought to understand all viewpoints before making a decision. He was a judge. Even though Friendly's personal life may have been tragic and uninspiring,[370] his legal and judicial gifts were monumental. He spent his life

367. Twenty-seven clerks came from Harvard, seven from Yale, five from Chicago, and four each from Columbia and Pennsylvania. DORSEN, *supra* note 2, app. A at 361–66. Other clerks represented Stanford, Rutgers, Texas, and Michigan. *Id.*

368. *Id.*

369. *Id.* at 109. Friendly also rated Merrick Garland very high as a law clerk. *Id.* Garland clerked for Friendly in the 1977–1978 term, for Justice Brennan in the 1978–1979 term, and now serves as a judge on the U.S. Court of Appeals for the D.C. Circuit. *Biographical Directory of Federal Judges: Garland, Merrick B.*, FED. JUD. CTR., http://www.fjc.gov/servlet/nGetInfo?jid=820&cid=999&ctype=na&instate=na (last visited Mar. 19, 2017). President Obama nominated Judge Merrick Garland to fill Justice Scalia's vacant seat on the Supreme Court, but because his nomination did not move in the U.S. Senate, it expired at noon on January 3, 2017. *See* Doug G. Ware, *Nomination Expires for Obama Supreme Court Appointee Merrick Garland*, UPI (Jan. 3, 2017), http://www.upi.com/Top_News/US/2017/01/03/Nomination-expires-for-Obama-Supreme-Court-appointee-Merrick-Garland/4841483472115/.

370. Dorsen paints a picture of Friendly's personal life as mostly dark and painful. DORSEN, *supra* note 2, at 339–45. Friendly's children described him as having a dragging spirit, pessimistic, filled with intense sadness, gloomy, gruff, remote, generally unable to express feelings, indifferent, emotionally distant, and unable to connect on a human level. Friendly could write letters expressing love to his children, but he did not hold or kiss them or tell them that he loved them. Friendly's grandchildren recalled his "occasional brooding presence" in their lives. Even though Friendly struggled mightily with personal relationships and with being warm, hopeful, and loving, the light of his personal life undoubtedly was his wife, Sophie. BENCHMARKS, *supra* note 26, at v (dedicating his book "[t]o Sophie without whose good cheer and affection neither these

cultivating and mastering those gifts to their fullest potential, contributing mightily to the law.

To me, people are given raw talent and potential. To reach greatness, most people cultivate their talent and doggedly pursue their dreams over long periods of time to reach their highest potential. Friendly was designed with the key traits that made him a great judge; these traits built on themselves cumulatively over time. Firmly believing that all law serves a purpose, Friendly knew that his life's role was to discover those purposes so that he could clearly resolve legal disputes. Friendly spent his life preparing, which is precisely why he was prepared for each case and every issue. Friendly seemingly possessed and retained every experience, lesson, case, and principle he had ever learned. Even more amazing, he had the unique ability to recall this information at the precise time and in a useful framework to resolve legal disputes.

Generally, I believe that the law is what the judiciary is all about—not lawyers, judges, or personalities, even though these characters certainly

nor anything else would have been done"). Friendly was fortunate to find an outstanding wife in Sophie Pfaelzer Stern, the only child to a father who was later Chief Justice of the Supreme Court of Pennsylvania and a mother who came from a wealthy and socially prominent Philadelphia family. Sophie was everything that Friendly was not: she was healthy, he had poor health; she was young, he was old; she was vigorous, he was sedentary; she was optimistic, he was pessimistic; she was vibrant and warm, he was cold and dreary. Sophie loved life, was romantic, had lots of friends, loved raising children, and enjoyed talking with people; Friendly enjoyed none of those things. Tragically, in early 1985, Sophie was diagnosed with incurable colon cancer and died in less than three months. Friendly had wanted to die first; he was unprepared to care for himself. Sophie was his order; Friendly was now full of disorder. When the light of his life died, Friendly's world turned dark. Adrift without the unwavering support, structure, and love that Sophie provided, Friendly began to favor death over life. Even though his intellect and memory were strong, his body and emotions were weak, old, and frail. Depression now defined him. His ever-increasing complaints about aging, health, dependency, and loneliness rationalized his thoughts of ending his life. He became singularly focused on suicide. Although Friendly had the ability to conquer anything that required discipline, intellectual firepower, and a tireless work ethic, he was ill-equipped to find a purpose in his life outside of the law and Sophie. Accumulating the necessary pills and learning how to use them, Friendly killed himself one year after Sophie's funeral service. Friendly wrote many letters as he wound down his life. Even as he was entering death's door, he was in the middle of writing a note to his favored daughter when he drifted off into eternity. DORSEN, *supra* note 2, at 339–45. Please note that the content of this entire footnote was drawn from Dorsen's book at the pages cited. I chose not to provide citations for each sentence in order to capture, without interruption, the dramatic end to Friendly's life.

bring life and form to the law. Every judge, no matter his or her judicial philosophy, provides a critical voice in a vibrant and strong constitutional republic. But the law stands above the individual actors, rooted in our founding ideals and left in the hands of the living. At the end of the day, after every argument has been made, every voice heard, and every decision rendered, it is the law that is left standing—not the participants in the process. A great judge cares deeply about his or her oath of office and strives daily to be part of the strong and diverse judiciary that, along with other federal and state branches of government, ensures that the United States lives up to its constitutional promise to strive "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."[371] Friendly knew his purpose and the solemn role he played in the development of the law.

When I clerked at the U.S. Court of Appeals for the Eighth Circuit, I got to know the Arnold brothers—Richard Sheppard Arnold and Morris Sheppard Arnold[372]—who served on the court at the same time. During law clerk orientation, Richard Arnold said about his brother, "Morris is the best judge I know, because he is the judge I know best." Indeed, knowledge of a judge undoubtedly is the best way to test that judge for greatness. As my knowledge of Friendly increased, I gained a better appreciation for his amazing judicial traits and why he is routinely characterized as a great judge. And I am left with the firm conclusion that Friendly was a great judge.

Whether you are a judge, attorney, legal academic, or law student, I recommend that you too contemplate, study, and discover what made Friendly a great judge. In the process, I believe, you will become a better

371. U.S. CONST. pmbl.

372. In addition to enjoying the privilege to have known Richard Arnold, see *supra* text accompanying note 34, I also have enjoyed my time with Morris Arnold over the years. In 2014, I had the privilege to host him at Liberty University School of Law. He was a huge hit. During his visit, he stayed in Liberty's historic Carter Glass Mansion, toured Liberty's ever-expanding campus, spoke at a Federalist Society event, had a question-and-answer session with the students of the *Liberty University Law Review*, generously met with students and faculty at various meals, and guest lectured in my federal jurisdiction class. Having served as the first presiding judge of the U.S. Foreign Intelligence Surveillance Act Court of Review, his discussion of that court and the Foreign Intelligence Surveillance Act was simply outstanding. For more information about Morris Arnold's impactful visit, see Michael Varnell, *Law and Religion: A Legendary Former Federal Judge Visits Liberty University School of Law*, 2014 LIBERTY LEGAL J. 46, 46–48.

judge, attorney, legal academic, or law student. Friendly's impact on you would then only add to his monumental and lasting impact on the law.[373]

373. If you want to learn more about Friendly, there are abundant resources awaiting your curiosity. *See, e.g.*, Bruce A. Ackerman, In Memoriam, *in In Memoriam: Henry J. Friendly*, *supra* note 12, at 1709–13; Pierre N. Leval, Dedication, *Henry J. Friendly: In Memory of a Great Man*, 52 BROOK. L. REV. 571 (1986); Randolph, *Administrative Law*, *supra* note 153; Unveiling of the Bust of Honorable Henry J. Friendly (Mar. 27, 1989), *in* 887 F.2d XCI, XCI–CIV (1990); In Memoriam: Honorable Henry J. Friendly (June 9, 1986), *in* 805 F.2d LXXXI, LXXXI–CI (1987). Additionally, Harvard Law Library is the official custodian of the papers of Henry J. Friendly. *See* Edwin Moloy, *852: Rare – Henry J. Friendly Papers Now Open for Research*, ET SEQ.: HARV. L. SCH. LIBR. BLOG (June 26, 2009), http://etseq.law.harvard.edu/2009/06/henry_j_friendly_papers_now_open_for_research/.