

BOOK REVIEW**FRIENDLY FIRE**

HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA. BY DAVID M. DORSEN. CAMBRIDGE, MASS.: THE BELKNAP PRESS OF HARVARD UNIVERSITY PRESS, 2012. PP. 498. \$35.00

*Reviewed by Jonah J. Horwitz**

There are two questions one expects to be addressed, if not answered, in the biography of a great historical figure: 1) how did his life relate to his work and 2) how does his work stand up to the test of time. These are especially vexing questions for the biographer of a great judge. For the relationship, if any, between a judge's life and his work is a loaded subject, and the assessment of a judicial legacy carries with it all manner of perilous political and ideological assumptions. Nevertheless, the biographer must hazard answers, or there is little point in reading the book at all. Although David M. Dorsen has produced an impressive biography of Henry Friendly—prodigiously researched, skillfully written, and discerningly edited—it provides only sketchy and contradictory responses to these two fundamental questions. In the final analysis, therefore, the book is a noble failure, a victim of its own admirable ambitions.

As Dorsen astutely points out, Friendly's life is noteworthy largely because it was, compared to most of the other legendary jurists of his time, so ordinary. Friendly was born in 1903 into a middle-class German-Jewish family in Elmira, New York. His father, a cold, demanding man in much the mold that Friendly later filled in his own family, expected young Friendly to excel. And did he ever. Friendly was possessed of an intellect that can only be described, despite the overuse of the term, as genius. Perhaps even rarer, his brainpower was matched with a relentless work ethic and a profound intellectual curiosity. Harnessing these extraordinary gifts, Friendly rocketed through school, matriculating to Harvard at

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the age of sixteen, where he dazzled the faculty with his PhD-level work.

Friendly was drawn to history, but his parents were immigrants and wanted to see his financial security guaranteed. At their behest, Felix Frankfurter urged the young man to attend Harvard Law School, where Frankfurter was then teaching. A reluctant Friendly agreed and continued his superb academic career, earning a grade point average second only (and only arguably) to Louis Brandeis, with whom he promptly secured a clerkship at the Supreme Court.

Rejecting Harvard's entreaties to become a professor there, Friendly embarked on a long career in private practice. First at an established firm, and then at an offshoot founded by himself and several others, Friendly became a respected member of the New York bar. With forays into various areas, he specialized in handling administrative issues for large corporations, with a particular focus on representing Pan Am airlines in various regulatory matters. He then ascended to the federal bench, appointed to the U.S. Court of Appeals for the Second Circuit by President Eisenhower.

Now-Judge Friendly quickly established himself as one of the country's preeminent appellate judges, joining the ranks of Learned Hand, with whom he worked on the Second Circuit. While a judge, Friendly churned out seminal opinions in a wide array of areas, developing important doctrines, rejecting arcane theories, and everywhere honing and refining the law. His decisions became touchstones for the entire legal community, cited as authority by every court, including the highest, and lauded widely in the academy. Simultaneously, he somehow found the time to generate an immense amount of scholarship on an equally broad range of topics, and his articles became as influential as his opinions. In the waning stages of this legendarily productive career, his wife dead, his always-weak eyesight declining, and his mental acuity slipping, Friendly took his own life in 1986.

That, in rough outline, is the story of Henry Friendly, and it is a story Dorsen tells well. He has done a staggering amount of research, having apparently spoken with every human being Friendly had any substantial dealings with and having read apparently every scrap of paper he wrote on (and he wrote on many). Dorsen should also be congratulated for wearing his encyclopedic knowledge so lightly. Unlike too many biographers, he does not feel compelled to cram every piece of information he has gathered into his book. Rather, he carefully selects the best anecdotes for their illustrative power, and he relates them concisely but articulately. This is an especially valuable skill in the context of Friendly's personal life because that life is interesting not because of its color or excitement (as, say, with Oliver Wendell Holmes' and his Civil War

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stories), but because of its emotional paradoxes. For example, Friendly seems to have shown more emotion to a select few clerks and friends than he did to his own loving family. Dorsen captures the contradiction well without overdoing it, allowing his excerpts and quotations to do the work for him (he has an excellent eye for both).

The biography's understated eloquence is even more effective in the chapters concerning Friendly's career in private practice. It is here the intrepid biographer would feel most tempted to pile on gratuitous facts, and it is here where they would be most boring. How long can one sustain interest in the minutia of a hearing regarding flight routes before the Civil Aeronautics Board? Dorsen restrains himself. He captures the flavor of the work (which was, in fact, largely mundane), tells the few truly interesting stories, and moves on. Ever the modest biographer, he leaves the best descriptions to his interviewees, a method many of his peers could beneficially study.

The meat of the biography is, unsurprisingly, an account of Friendly's writings on the law. Dorsen does a fine job amassing, condensing, and summarizing this voluminous material. Friendly's pronouncements are neatly broken up into general areas of law, and then further divided within each chapter into sensible subsections. Dorsen has a deft touch with the law. He distils dense jurisprudential debates into straightforward but sophisticated overviews. With a few minor exceptions, he bridges the gap between the layman and the lawyer without sounding either pedantic or breezy. (One of those minor exceptions is a recurrent tendency to attribute the Second Circuit's actions on cases to Friendly alone, e.g., "Friendly affirmed" or "Friendly reversed," as though Friendly were acting as his own one-man panel.) Like his subject, he is particularly strong in summarizing the facts of cases, successfully reducing convoluted situations to their relevant essentials.

Stylistically, the author is a pleasant if unspectacular guide through Friendly's life. Dorsen writes simply but well, and his prose flows nicely. Though understated, the book contains the odd vivid phrase, used in commendable moderation, as when a district judge and former New York City Police Commissioner is characterized in passing as "a walrus of a man" (p. 243). He writes with particular feeling and sensitivity on the passing of Friendly's wife, and on her crucial role in his life generally. On a less positive note, Dorsen occasionally stumbles on the badly chosen word ("Friendly was undermining his *penchant* for stability") (p. 313 (emphasis added)), the awkward and grammatically dubious sentence ("Whether Friendly was sympathetic to Lopuch because of his race would be speculation") (p. 283), and the opaque formulation ("Incidents of slavery or involuntary servitude occasionally surface") (p. 208). He is

also prone to concluding paragraphs abruptly and incongruously. One ends with the following two sentences: “The Black Sox scandal shocked him. Friendly was disdainful about another of his mother’s sisters, telling an interviewer, ‘She led a rather useless existence [in her later years], so far as I could recall . . . I never liked her very much’” (p. 8 (alternation in original) (footnote omitted)). Such an inexplicable juxtaposition might work in a Joycean, stream-of-consciousness novel, but not a judicial biography. But to be fair Dorsen is, after all, a lawyer by training, so it is hard to fault him for the chance lapse into obfuscation or opacity. At any rate, the weak spots are the exception. For the most part, the prose does not disappoint.

In sum, *Greatest Judge of his Era* is a valuable book and an important contribution: it gathers, with discrimination, all of Friendly’s life and legal views into one place, a tremendous service to the legal community.

The praise above is advisedly effusive. But it stops here. As impressive an accomplishment as this book is, and as many strengths as it has, the lasting impression it leaves is one of frustration. To resort to a cliché, the biography raises many more questions than it answers, and not in a good way. These begin with the significance of Friendly’s life and its connection to his work. There are surely interesting things that could be said on the subject. Friendly was an emotionally stunted man, largely incapable of expressing the affection he seems to have genuinely felt for his loved ones. Yet he was able to express rather intense feelings in letters, which he produced, as with everything, in enormous quantity. And, most intriguingly, his judicial opinions are punctuated with visible sympathy for parties Friendly believed had been treated unfairly. Such sympathy even seems to have guided some of his votes on cases. What are we to make of this fascinating set of facts? Dorsen gives us not a clue. He provokes many such questions while providing no assistance to the reader curious for at least a few possible answers.

Now, lest this criticism be misunderstood as another “he should have written a different book” review, it must be admitted that no one needs another disquisition on how the contents of a judge’s lunch bag determine his decisions (though such a disquisition might be interesting in Friendly’s case, given that his lunch consisted of a glass of tomato juice, cottage cheese, a slice of pumpernickel, and jarred herring). Nor should Dorsen be faulted for staying away from that tired ground. But surely there is some productive inquiry to make into how Friendly’s background and inner life influenced his judicial output. He was a flesh-and-blood man, after all, not, much as he seemed at times, a robot, and his approach to cases could not have been totally insulated from his experiences in the world at

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large. The criticism is hardly unfair given that Dorsen has chosen to present not an account only of Friendly's life, nor a mere summary of his opinions, but *both*. Why discuss both aspects of Friendly if not to draw some connections, or at least to engage in some modest and educated speculation? Reading a biography like this is like reading two separate books, written by two separate authors, with two separate goals, and a chasm between the two projects. It is an especially noticeable omission given that Dorsen does not refrain from broaching the subject, but instead approaches it in a halting, undeveloped, and superficial way. For instance, out of the blue, the reader is informed that Friendly's jurisprudence on business law was formed by the understanding he obtained in private practice of "the workings of the mind of businessmen, at their best and at their worst" (p. 346). Of all of the fascinating things one could say about Friendly's life and its relationship to his work, this has got to be one of the lamest and least illuminating (not to mention the fact that it is totally unsupported as well).

Part of Dorsen's inability to link Friendly's life to his work stems from his inability to satisfyingly tell us what was distinctive or important about the work. If we get any explanation in this regard at all, it is in the form of remarkably platitudinous and unhelpful comments. In a typical formulation, Dorsen declares that "[j]ust as Friendly had no sympathy for misbehaving corporations, he had none for conniving investors who had no real cause for complaint" (p. 254). This is a bit like saying, "just as the judge did not care for bad people, he liked good people." Similarly, the chapter on intellectual property concludes with the proposition that "Friendly favored rectitude in business dealings" (p. 278). Of whom, exactly, could this not be said? All those judges writing opinions in favor of fraud and deceit? After reading Dorsen capably recount the nuances of Friendly's holdings in one of the most notoriously complex areas of law, to confront such a banal conclusion is immensely disappointing. One imagines John Madden as a legal commentator ("the lawyer who wins is the one who convinces the jury that he's right"). Analysis of this oversimplistic nature is beneath an author of Dorsen's caliber.

More troubling still is Dorsen's failure to critically evaluate Friendly's flaws as a judge. There is no question that Friendly deserves his status as an iconic jurist. He was brilliant, hardworking, well-intentioned, undogmatic, and non-ideological. The bench would be blessed to have more of his kind. But no one is perfect, and Friendly's imperfections were ample. He had little respect for binding precedent, continuously using the flimsiest of pretexts to evade the holdings of the Second Circuit and the Supreme Court when he disagreed with them. His loyalty to judicial modesty was sporadic and self-serving; he routinely decided issues that were

not presented by the controversy before the court (while lambasting other courts for doing the same). He sought to manipulate cases behind the scenes, using his connections to encourage attorneys to seek reversal of his own court. His opinions are speckled with intemperate and inappropriate language, deriding the intelligence of attorneys and colleagues. He declined to show deference to the lower courts whenever it suited his purpose.

To his credit, Dorsen does not shy away from the stories that substantiate this impressive array of shortcomings. On the contrary, he ably finds the quotes, often from Friendly's own pen, that most shockingly spell out his weaknesses. In fact, Friendly exercises a great deal more awareness of his failings in these pages, through his frequent apologies, than does Dorsen. Dorsen generally prefers to just ignore them, or worse, dresses them up in ludicrously charitable language. Friendly's scorn for precedent is invariably described as "creative," or, even more ridiculously, "bold." It certainly was that, much as Enron's accounting was "creative" and "bold" as well. More to the point, though, Friendly's cavalier attitude towards case law was also exceedingly unprofessional and showed questionable scruples. Far less forgivably, Dorsen comments that Friendly "did not vote contrary to the law" (p. 90) and then proceeds to recount the numerous times where he admittedly did just that: "Friendly took pleasure in [*Mitsui & Co. v. American Export Lines, Inc.*]¹ for another reason—he considered it a case study in 'how to overrule another panel decision without an *en banc*'" (p. 267). At the risk of stating the obvious, controlling precedent is law, and Friendly's disregard for it constituted rather lawless behavior for any judge to engage in, let alone one of the great judges of all time.

It would be one thing if Dorsen defended his view, expressed implicitly and explicitly throughout the book, that Friendly was right to ignore precedent, or if he conscientiously never expressed any position on the matter. He does neither. Instead, he employs the phraseology of a public relations consultant trying to distract the public from ethically suspect behavior with clever wordplay, lauding Friendly as "a master at *managing* precedent" (p. 323 (emphasis added)). Or insisting, in the book's final chapter, that Friendly was "*prepared* to embrace precedent" (p. 351 (emphasis added)), as though it were a choice presented to judges depending on their mood. A biographer serves little use if he accepts, so uncritically and with so little explanation, the correctness of his subject's conduct.

Other flaws are simply passed by without comment. Several, most prominently the insulting language to attorneys and judges in

1. 636 F.2d 807 (2nd Cir. 1981).

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Friendly's opinions, are chalked up to "unusual," "atypical," or "uncharacteristic" behavior. However unusual these stories were, there are enough of them here that they cannot simply be written off as irrelevant to Friendly's personality. No judge could write as caustically as Friendly did without it saying something about him. (The hypothesis that springs to mind is that he was so far above the advocates and his colleagues in intelligence, and so emotionally disconnected from the world, that he could not understand how anyone could miss what seemed obvious to his own supercharged mind.) Too honest for his own good, Dorsen's strenuous efforts to downplay Friendly's highly questionable actions sometimes awkwardly surface in the text: "Friendly's opinion was *unusual* for another reason. *Once again* he was voting to reverse the district court on grounds that the losing party had not argued there" (p. 275 (emphasis added) (footnote omitted)).

Dorsen may have taken the view that he would present only the facts, and leave it to others to provide the subjective criticisms. If he did take that view, though, he failed to carry through on it. For one thing, the biography is *not* devoid of subjective commentary on the quality and propriety of Friendly's career as a judge; it is simply devoid of *negative* commentary. The book is (rightly) replete with extravagant praise for the brilliance of Friendly's opinions. It is borderline duplicitous to ignore the flip side of the coin.

Aside from the rather glaring defects described above, Friendly's jurisprudence, as characterized by Dorsen, invites subtler, more substantive criticisms. Friendly's signature approach was to eschew bright-line rules in favor of multi-factor balancing tests. The obvious attack on such an approach is that a judge applying a test of this sort comes out with whatever outcome he desired in the first place. He says, "I've weighed factors A through D, I think A and B weigh toward guilt, but C and D weigh toward innocence, and they do so more strongly, so the defendant is innocent." If that is indeed how judges act (a plausible theory), then Friendly's approach undermines the very clarity and predictability it was designed to advance. In a similar vein, Dorsen attributes to Friendly a "purposive" (pp. 348-49) method of statutory interpretation, whereby he looked to legislative intent and policy as his guideposts in construing laws. Tellingly, Friendly seems to have used that approach to regularly subvert the plain language of the statute, while saying things like, "I cannot imagine that Congress would have it any other way." Of course, many would respond that the plain language is the best indicator of what a legislature wanted, and any other approach threatens to substitute judges' views (knowingly or unconsciously) for the will of the people, expressed through their elected representatives.

Dorsen does not touch these arguments, not even by putting

them in the mouths of the numerous commentators he could have quoted. As a result, we are left with a stunted portrait of Friendly's legacy as a judge. And, again, it is no defense to say that Dorsen set out to write an objective biography without taking on the difficult chore of assessing the soundness of Friendly's judicial philosophy. He takes that chore on with the title itself, where he bestows Friendly with the sobriquet, "greatest judge of his era." The biography is plainly designed to prove that claim. But it cannot be proved without an attempt to grapple with the other side, with the challenges to the title. Friendly, who reveled in lively debate, would have appreciated this point well. To call Friendly the greatest judge of his era is to make an argument, and, as any law student learns in his first year, a persuasive argument cannot be made in the absence of a counterargument.

The pernicious consequences of ignoring Friendly's flaws are most apparent, and most fatal to the book, in its concluding chapter on the judge's legacy. There, Dorsen makes sweeping claims as to his subject's judicial philosophy, referring to him as a "pragmatic moderate" (p. 348) and asserting that "[h]e used his enormous skills to fashion intelligent and sometimes creative readings to further the purposes of Congress and the needs of the country" (p. 348). These claims may be true, but Dorsen is in no position to voice them, having utterly neglected to make a serious case for the rightness of Friendly's decisions and methodology against the obvious objections. For all the reader knows, Friendly's "pragmatism" could just as easily have been a convenient vehicle for him to decide the outcome he liked best and then call it the most practical one. At the very least, Dorsen has given us no reason to believe otherwise. To put the point in a slightly different manner, there are very few judges who do not often say the things that Dorsen stresses as so central to Friendly's style as a judge: that his was the "practical" result, the one most aligned with legislative intent, the "fairest." In harping on such common rhetoric, Dorsen gives us a portrait with no real content, a judicial philosophy minus the philosophy.

An optimist might hope that a fuller account of Friendly, complete with counterarguments and a more serious, evenhanded depiction of his life and work, will come from someone else, someone who can build on Dorsen's work. Maybe it will. Even if it does, though, it will not make up for the inadequacy of this biography. We would benefit greatly from Dorsen's own candid views on these difficult questions. He is a thoughtful, intelligent writer steeped in Friendly's life and work. His opinions on the challenging questions posed by Friendly's story would enrich the public's understanding of an important figure. Judge Friendly made his name by engaging, rigorously, with tough questions. He deserves a biographer who will

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do the same.

Dorsen quotes a young Friendly remarking that “if Columbus waited many years for a critical account of his life, he ought now to be fully content” (p. 16). Hopefully, Friendly’s contentment will come soon.