

Patricia Wald

Remarks at ALI's 93rd Annual Meeting

It is a great honor indeed to be a recipient of the ALI's Henry Friendly Award, and especially gratifying to have such an honor formally bestowed by my longtime friend and colleague on the D.C. Circuit, Harry Edwards. Harry and I spent over 20 years of lively discourse on that court in the decades of the 80's and 90's as the court reconfigured itself several times over with 13 new judges, a reconstituting all hearty institutions including the ALI must do to survive. In that vein I note that when Ruth Ginsburg and I came aboard the Council in 1980, 36 years ago, we were the only women (Shirley Hufstедler having recently stepped down); now we have 23 active and nine emeriti women Council members and this prestigious award has been bestowed on two others: Justice Sandra Day O'Connor and Linda Greenhouse. Our wondrous ALI President is also a woman. No one can doubt that the ALI's welcoming of a more diversely gendered leadership has contributed mightily to its growth and ability to confront the burning legal issues of the last three decades.

One has only to look at the agenda of this Annual Meeting to validate that conclusion—criminal sentencing revision, sexual assaults, election law, foreign relations - and more. Oliver Wendell Holmes once said: "I think that as life is action and passion - it is required of a man (woman too) that he should share the passion and action of his time at peril of being judged not to have lived." That caution applies to institutions as well as individuals and it includes not just the ALI but the judiciary as well and for the next few minutes I will share a few thoughts with you about the challenges of a perennially changing world to our courts.

In that respect let me draw from my own six decades' experience first as a law clerk, later as an advocate and a judge. I should mention that in all of these roles I had only the briefest of personal contact with Judge Friendly. and I will confess I am pretty certain after perusing the list of his 70 high achieving clerks who went on to become Justices, judges, professors and statesmen and women (there were two women among the 70) that it is highly unlikely I would ever have met the entrance requirements let alone survived basic training for inclusion in that hi-flying group.

I did, however, have the good fortune to meet and occasionally talk briefly with Judge Friendly at ALI Council meetings in the early 80's so I can attest to his unparalleled intellect and pungent wit, conspicuous even in an arena he himself, according to his biographer, David Dorsen referred to as "an elite organization made up of professors, judges and private practitioners"... "the pace of whose meetings ... exacerbated him" so that he was not sure they were always "a good use of his time" (he might have changed his mind if he could have seen us plummeting through 100 page drafts in an hour or two during the past few days). However, his actions belied his words for he did indeed contribute mightily to several of the ALI's most important restatements dealing with federal and state court jurisdiction, conflict of laws, corporate responsibility, international jurisdiction and a pre-arraignment code. He was, as several of his clerks have attested, a strict taskmaster, something I had reason to discover as a brand new judge serving with Judge Friendly on a Harvard Law School moot court final along with Nate Jones, also at the time a 'baby judge" from the Sixth Circuit. The student advocate to his everlasting sorrow failed to pick up a jurisdictional ambiguity in the case which was of course noted instantaneously by Judge Friendly, the presiding judge—as a result the advocate never came close to making his main substantive arguments, and Nate and I never got to ask any questions at all. Judge Friendly later apologized for the takeover, but the student as well as Nate and I, probably learned more about the indispensability of comprehensive attention to detail - a hallmark of Judge Friendly's judicial approach, than any of us would have, had the argument followed more traditional lines. But that experience only cemented any doubt on my part that I could ever have been a successful Friendly clerk, despite my great admiration for his opinions as gems of craftsmanship, penned in most cases entirely by his own hand in less than an hour. He was indubitably a judge of all seasons, certainly the ones he worked in (1959- 1986) and an unchallenged paragon of judicial restraint, which over the years has apparently become one of, if not the, most coveted quality of judging.

A few years before Judge Friendly took the robes in 1959, however, I had also clerked (the only woman clerk) on the Second Circuit for Jerome Frank during what some judicial historians have called its "golden age" - its then six judges included the two Hands, Learned and his cousin Augustus, Tom Swan and Charles Clark, Jerome Frank and Harrie Chase. The judge I clerked for,

Jerry Frank, was from a different planet than Judge Friendly in style, in experience and in many respects in philosophical orientation toward the judicial role itself. Clerking for Jerry Frank has been compared to grabbing the tail of a comet and hanging on for dear life.

His interests outside the law were unbounded, ranging from psychiatry to the language of the Hopi Indians; his acquaintances and prolific writing correspondents (no Twitter or Email then) reached back into his service in the Roosevelt Administration and into all branches of academia, not just the law but it also included his old New Deal buddies, several of whom became the founding fathers of what are now major national law firms. A primary duty of a Frank clerk, in contrast to what I read or hear about Judge Friendly's clerks, was to try and keep discussions of the fascinating but not always directly relevant topics which consumed Judge Frank's attention within reasonable limits in the final drafts of his opinions. Unlike Judge Friendly, he did not write all first drafts himself; he did for the ones he cared most about, but even then he conducted lively back and forths over days and weeks with the clerk (judges had only one clerk then), which resulted more than once in his changing his mind or at least his approach to a desired result. More often, of course, this ongoing dialogue changed the clerk's mind.

Yet his judicial instincts for getting the case right - result as well as law-wise - in the end were finely tuned, even if not initially consummated in a brilliant first draft. In one case we wrestled for days or weeks over whether notice by publication in the back pages of a New York newspaper to a major corporation involving a significant governmental takeover was sufficient due process. Despite precedent which convinced his colleagues, and I'm sorry to say this law clerk, that it was, the judge dissented on fundamental due process grounds and a majority of the Supreme Court ultimately agreed with him. Judge Frank dissented far more frequently than the rest of the court, usually on the underdog side; he pushed for more rights for criminal defendants, including counsel, years before Gideon; he pushed against administrative agency intransigence toward disadvantaged supplicants; he railed against too rapid resort to summary judgment, when facts or their interpretation were ambiguous, a fight going on to this day; he questioned eyewitness testimony - validation of that skepticism has grown exponentially over the years - he pleaded with the Supreme Court to review the imposition of the death penalty in

the Rosenberg appeal. No one then or now would likely have accused him of judicial restraint or even incrementalism. But his best friend on the court was Learned Hand who agreed with him in a surprising number of cases and, in my view he was a very good judge, a fine role model for his clerks, and the federal judiciary benefitted greatly from his presence on it.

All of which leads me to a modest but worrisome conclusion: the judiciary today - state and federal - from the Supreme Court on down through the lower courts - is called upon continually to make and revise an ever expanding but in some fields still embryonic body of law. As a result, few would today challenge the proposition that the High Court has come (whether designedly or not) to play a central role in policymaking- on issues involving the most taxing social and economic, even technological, issues of an increasingly complex modern world. But before the High Court lays down the law of the land, lower court judges have to set the stage, make the findings, listen to the experts, analyze the arguments, set parameters for the advocates, rule on the credibility of the witnesses, analogize from old precedent to newly invented technology and newly discovered scientific truths. It is true of course that courts at all levels must continue to draw fine lines between the constitutional prerogatives of Congress and the Courts but too often Congress declines or defers legislating for political reasons and when it does act, it often falls short of dealing comprehensively with complex problems. Gaps and ambiguities are regularly left for the courts to fill in. When that happens, few who have served on an appellate or trial court would deny that a judge's prior life and experience and extrajudicial knowledge enter, implicitly, sometimes even explicitly, into the decisional process. This is most likely to happen in novel and controversial but important cases. But even in familiar disputes, it can play a background role: Judge Frank for instance used to refer to being caught up as a possible suspect in an early stage of the Leopold and Lowe case on the basis of his ownership of a pair of glasses similar to those found on the now notorious crime site; he told us this brief brush with the criminal justice system colored his later approach toward the treatment of suspects. In my own case, several summers working on a manufacturing assembly line gave me a special interest and hopefully a better insight into the dozens of NLRB cases that came before the D.C. circuit involving employer–employee relationships played out on the factory floor.

Our courts like our other major institutions have to move forward with the times and developments in virtually all areas of national life. To do so they need to draw on the diverse personalities and experiences of judges from different backgrounds with different experiences. Courts nowadays need not just the Friendly model of a good judge but the Frank model as well. We don't want nine Judge Friendlys or nine Judge Franks on our courts, but we do want some of both to provide a kind of microcosm of the outside world in which their decisions will operate.

We need diversity on our courts not just racial, gender (in all of its aspects), and ethnic diversity but diversity of experience, outlook and even temperament. My 20 years on the D.C. circuit serving with a total of 25 different judges validates that thesis. I think Harry would agree with me. Just as the ALI has moved in the past 30 years from Judge Friendly's characterization of it an "elite organization" to one actively searching for qualified members in all places, solo practitioners, young comers, corporate in-house counsel, government lawyers, criminal defense lawyers and public interest advocates, so the judiciary must as well capture the diversity of our nation's best legal leaders. That is why I do worry that in picking judges at all levels we have come to focus too singularly on a particular paradigm of experience (prosecutor or academic) or a particular educational background (Ivy League) or even a particular temperament or quality such as judicial restraint, a concept that seems to have morphed beyond an agreed upon standard of respect and appropriate deference for the prerogatives of the other two branches, into a kind of proxy for Solomnic splitting of the baby in all cases, striving always for the middle ground, the "good judge" perceived as one who votes for one side as many times as the other, prioritizes conciliation above merits in virtually all cases, and suppresses any and all expressions of outrage at long standing legal injustices, refusing to undo or even criticize outdated precedents which keep the law out of step with developments in other fields.

Having spent the last four years working on intelligence oversight, I have encountered a surprising number of these legal doctrines, originated in the technology of long ago, which defy the logic of modern-day research and technological innovation, yet remain firmly embedded in our legal precedent. To keep our judiciary relevant, we will always need the sensitive, albeit

sensible, questioners and the advocates of needed change among our judges, just as much as we need their opposites - the moderates and restrainers. Every new judge subtly changes the perception and the dynamics of a court and six or seven or nine “same as”es do not add up to a great judicial institution

In truth the parts of Judge Friendly’s jurisprudence and craft I admire most are those areas where he did strike out and, with caution but determination, formulate new criteria for decision making and new legal approaches to time old as well as brand new dilemmas. After studying his case record, his biographer opines Judge Friendly did not feel bound by the views or arguments of opposing counsel but carefully scrutinized the facts himself and rearranged them so as to arrive at what he felt was the most practical and commonsense solution to the underlying problem. But by that mode he laid down principles that did, in fact, change or expand the law—I cite his famous article “Some Kind of Hearing” which has become a canon in administrative due process. He did, it is true, eschew too simple or radical changes and he had no apparent agenda for sure, but he did keep his sites riveted to those changes that would make the law incrementally better - and there were plenty of those to attract him over his 27 years on the court. He believed, as well, courts should construe statutory language “in context” and in his chronicler’s words, he strove “to fulfill the legislators’ purposes along with the underlying needs of the nation.” He cited legislative history in 105 of his opinions. That is why I applaud his careful but influential forays into changing the law for the better.

I have been privileged to have a great run in my professional as well as my personal life, due in greatest part to a supportive husband and tolerant kids. I have worked in the government, in the executive branch and with Congress, on the courts, here and abroad, in legal services and public interest law, a short turn in private practice. In all of that, my judicial service - here and at the international court at The Hague - were the best part. That was largely because the courts were peopled by strong, but certainly not always moderate or even tightly restrained, intellects. It was the struggles and often the dissents that breathed life into decisions aimed at governing a heterogeneous world out there. An old friend and renowned district judge Charlie Wyzanski used to say “He who is only is not even” - that goes for a court as well. While we justly

honor the Henry Friendlys, we should welcome, as well, the restless and perennially dissatisfied judges, like my old boss straining to push the law forward. and to bring to judicial deliberations new experiences and viewpoints. In that spirit, I thank the ALI again for this remarkable and deeply appreciated honor.