

## COMMENTARY

### A LAWYER'S DEATH

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Toward the beginning of Tolstoy's long story *The Death of Ivan Ilych*, one of Ivan's lawyer friends goes to the dead magistrate's home to express condolences. Looking upon Ivan's body as it lies in its coffin, the visitor seems to see in Ivan's face "a reproach and warning to the living." Discomforted, he treats the warning as "not applicable to him," and is delighted to see another of Ivan's lawyer friends, a "playful, well-groomed, and elegant figure" whose refreshing appearance suggests that he is "above all these happenings and would not surrender to any depressing influences."<sup>1</sup> Ivan's two friends whisper an agreement to meet for a bridge game later in the evening, their whispers sounding one of the story's repeating themes: how we back away from death, treating it as separate from life and unconnected to ourselves until it is upon us.

I recalled the great Tolstoy story when I read the recent issue of the *Harvard Law Review* containing seven short articles under the title *In Memoriam: Henry J. Friendly*.<sup>2</sup> Henry Friendly, who died in March 1986, was among the very greatest federal judges of this century, and at his death he was still actively engaged in the work of the United States Court of Appeals for the Second Circuit. The group of men who memorialized him — Bruce Ackerman, Wilfred Feinberg, Paul Freund, Erwin Griswold, Louis Loss, Richard Posner, and Todd Rakoff — includes some of the leading names in American law. Their essays generally did not focus on Judge Friendly's contributions to specific areas of law; rather, most were more personal. That is what makes one omission from these articles particularly striking: none of the seven alluded to the fact that Judge Friendly killed himself.

As someone who deeply admired this brilliant scholar-judge, I had been shaken by the newspaper reports of his suicide. After finishing the *Review's* memorial tribute, I felt an enormous gap: a large and important matter had been left out, and it seemed that perhaps something important was revealed by that omission. This is the subject of my reflections here. I do not at all mean to criticize any of the individuals who contributed to the *Review's* tribute, each of whom superbly captured important aspects of Judge Friendly's life and ca-

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<sup>1</sup> L. TOLSTOY, *The Death of Ivan Ilych*, in *THE DEATH OF IVAN ILYCH AND OTHER STORIES* 98-99 (Signet Classic ed. 1960).

<sup>2</sup> 99 HARV. L. REV. 1709 (1986).

reer. But I want to suggest why there might also have been a place in this memorial for some mention of the subject of suicide.

There are undoubtedly reasons to think that the subject should be avoided altogether. To mention the suicide might, for example, risk diminishing the rest of what is said, making the final act of an extremely large life seem like the preeminent one. In addition, some might avoid mentioning the subject because they believe that suicide offends a religious prohibition, or is against the law, or is at least an embarrassment — evidence of weakness, irrationality, or family failure, or a lurid twist of plot in an otherwise refined life of the mind. Etiquette, then, or a sense of human delicacy, might counsel silence.<sup>3</sup> Perhaps most obviously, it might be thought that the subject of suicide simply has no relevance to the occasion at hand — any more than a clinical account of a great person's fatal illness or accident.

But there are also reasons to think that the subject has a place in the public reflections about Judge Friendly. Presumptively, the manner of his death was continuous with his life — indeed, it was a part of his life. I do not say that suicide is heroic, but it is not by definition an embarrassment. It can be expressive of a deeply rational man. Judge Friendly was eighty-two years old, with a life of enormous achievement behind him. His wife of fifty-four years had died a year earlier, and he had become virtually blind. His life had been one of reason and mind — reading, thinking, and writing — realms of activity that he controlled. (He had always done his own work, former law clerk Bruce Ackerman reported.<sup>4</sup>) For such a man — terribly diminished by untransformable losses, and for whom life had always meant excellences on his own terms — suicide could become a rational choice. Planned weeks ahead, as I am told it was, Henry Friendly's death may well have been the product of the same deliberate, controlling, and reasoning self that guided the rest of his life, a product of some of the same attributes that yielded his achievements.

In any event, Henry Friendly chose it, as no other great judge or lawyer I know of has done. That action became part of his uniqueness. My point here is not to give a particular account of his suicide, for I am certainly not the one to do that. My point is only to suggest that the manner of his death may be relevant to a complete understanding of his life, including his professional life, and therefore may be relevant in memorializing him. There may in the end be good reasons to avoid the subject, as I have suggested above, but we must

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<sup>3</sup> Until recent years, newspaper obituaries generally avoided mentioning suicide as the cause of a person's death. Reflecting the more modern practice, however, the *New York Times* obituary called Judge Friendly's death "apparently a suicide," *N.Y. Times*, Mar. 12, 1986, at B6, col. 1; and a later news article about a memorial service for Judge Friendly stated that he had decided "to end his own life." *N.Y. Times*, June 10, 1986, at B4, col. 6.

<sup>4</sup> See Ackerman, *In Memoriam: Henry J. Friendly*, *supra* note 2, at 1709-11.

guard against another possibility: To back off from the awesome subject of suicide may be an evasion, a refusal to face death's link to life, an unwillingness to confront the full force of Henry Friendly's reasoning self. Through such avoidance, we may miss a fundamental element of Judge Friendly's humanity and also miss something relevant in understanding Judge Friendly's achievements — indeed, something relevant to all of us.

In penning even these words here, I acknowledge that I have felt some awkwardness and some uncertainty about the wisdom of my effort, for the subject seems so delicate. But I am also moved by two overriding beliefs: that law's terrain (and the lawyer's terrain) must be the realities of life, in all their tangled complexity; and, further, that we almost always pay a price when lawyers ignore the humanity of their subjects. This contributes to my sense that there should be a place for Judge Friendly's suicide in our public reflections, just as there is a place for the rest of what his life of the mind produced. If we do not yet have a language or mode for discussing these matters in the law reviews, we should try to develop one.

I have wondered, in fact, whether the gap in the *Law Review's* memorial reveals something distinctive about lawyers. Surely it does not reveal something *unique* to lawyers. People from every walk of life may have any or all of the reasons noted above for retreating from death's many forms, including suicide; Tolstoy's story surely has a universal impulse, even though Ivan Ilych and his friends are lawyers. Yet it is fair to ask whether we as lawyers may be more likely than many others to distance ourselves from death's emotional force. For lawyers, death becomes a professional subject: lawyers write wills, administer estates, discuss insurance implications, analyze "wrongful death" as a legal category. We formalize death as part of our professional lives, and we become accustomed to pushing aside death's more human dimensions. Indeed, this is true of most subjects that lawyers address. We have our own rather abstract language and doctrines for approaching human problems, and our professional training and culture encourage detachment as a frame of mind.

More fundamentally, lawyers divide life into the "professional" and the "personal." Activities, other people, one's self — all are divided. Only certain very limited subjects or ways of speaking are deemed appropriate for one's professional voice. I am not certain why the division occurs, but part of the explanation must be that lawyers practice being agents and not principals. Lawyers always remind each other and the general public that what a lawyer says in a client's name is not necessarily the lawyer's personal view; indeed, this can be seen as a corollary to the lawyer's ethical obligation to represent even the most unpopular clients and causes. Aspects of the lawyer's role that separate the "professional" from the "personal" can contribute to a submergence of the lawyer's self, a reticence about expressing

feeling in a professional setting, and a disregard of complex and nuanced realities that don't fit into neat legal categories — leading lawyers, and law itself, to become distant from the life that is their necessary subject. Such tendencies within our professional culture may be reinforced by the personalities of those typically drawn to it.

In this world where the “professional” and the “personal” are sharply split, we seldom see or explore relationships between the two spheres. Writing about Henry Friendly in the *Harvard Law Review* is clearly “professional” and is about “professional” matters. Even when a contributor explicitly describes his essay as “personal,” there is no mention of the inner life. It should therefore not surprise us if lawyers assume that suicide lacks relevant meaning in this professional setting. I cannot really answer the question whether we in the legal profession are more likely than others to evade or distance ourselves from the subject of death. But I am quite certain that such avoidance diminishes the humanity and the reality of our subjects, diminishes our public discourse, and ultimately diminishes ourselves. Evading death, we diminish life.