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ON THE CRAFT AND PHILOSOPHY OF JUDGING

*James L. Oakes**

THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH. BY *Frank M. Coffin*. Boston: Houghton Mifflin Co. 1980. Pp. xiv, 273. \$10.95.

It takes someone like Frank Coffin, who has served in all three branches of government, to put the appellate process in its proper perspective. A former Congressman from Maine and a foreign aid administrator, a long-time United States Circuit Judge, and now Chief Judge of the First Circuit, he has written *The Ways of a Judge* to shed light on the subject of judging — particularly federal appellate judging — for nonjudges, laymen and lawyers alike, for law students, and for those in journalism or politics. The book's success in achieving its purpose makes it must reading for lawyers and law students. One can only hope that it is also read by others who, in an increasingly litigious world, should be concerned with how the courts of last resort for almost all federal and state cases operate, as well as with how the judges of those courts deliberate and decide everything from ordinary criminal and civil cases to the far-reaching public-interest, institutional, and social-reform cases at the cutting edge of today's urban, bureaucratized, and pluralistic society.

In summarizing the book, this Review will examine some of the similarities and differences between Chief Judge Coffin's and the reviewer's courts and between their respective approaches to the judicial process. The Review will conclude with a few comments on the philosophy of judging that Judge Coffin reveals in his somewhat solemn, northern New England eloquence.

The Ways of a Judge commences by recognizing the importance, even granting its invisibility to the public, of the appellate judge's role. Lacking the influence of the legislator or the executive branch's "levers of power" (p. 7), the appellate judge is "a media cipher" (p. 7), isolated by a code of ethics "more stringent than that imposed on or accepted by any other group of public servants" (p. 8), but with a

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life tenure that is at once the pillar of judicial independence¹ and the envy of Congress. Judge Coffin notes the judge's personal involvement, the vexing and stimulating "professional-plus-philosophic" (p. 9) challenge of the job, and the constraining but mind-opening discipline of judging. And he makes short shrift of the politicians' old saw that judges should not "make" law by referring to the gaps left in nearly every legislative enactment. In doing so, he is rather kind to the legislatures, particularly Congress. He attributes the gaps to their inability to "foresee every problem" (p. 10), rather than to compromises knowingly made to transfer to the courts some of the politically hot-issues of the moment.²

In the course of chapters on "The Appellate Idea in History" (pp. 16-31) and "The Appellate Idea in the United States" (pp. 32-50), Judge Coffin makes a point that is too readily overlooked by critics of the courts: Our present system, encompassing state and federal courts, "represents an achievement . . . that has no equal today or in ages past in terms of utility and breadth of review, accessibility to the populace, and structure of deliberation" (p. 31).

Only as one approaches the center of the book does one learn the "ways" of a judge. Before moving into the judge's chambers, the author outlines several of "The Elements of Deciding Appeals" (pp. 51-63), which distinguish appellate review from other types of decision-making. A primary constraint on judicial decision-making, of course, is its tradition of independence and objectivity. This tradition and other aspects of the appellate process substantially shape the judge's task. Appeals involve focused review of some decision made below, and appellate judges must rely on structured (written and oral) arguments by adversaries. Various constraints and convictions limit their freedom to decide but an area of challenge is always left open. The constraints include that of *writing* in the sense that drafting an opinion makes a judge think, something that I fear is all too often lost in a day of summary judgments, affirmances from the bench, "screening" by staff clerks and the like, all of which strain the quality of justice. Judge Coffin mentions also the constraint of "collegiality," or having to decide by panel, by committee so to speak, while nevertheless respecting the autonomy of each individual — an autonomy that may be preserved primarily by the buffers of time within which to decide³ and the distance between the scattered

1. I may say that it is an independence that nevertheless has its own threats. See Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681 (1979).

2. See Johnson, *The Alabama Punting Syndrome*, JUDGES' J., Spring 1979, at 4, 53-54.

3. *But see* notes 12-13 *infra* and accompanying text.

chambers of a judicial circuit.⁴ He concludes with the perceptive observation that decision-making occurs incrementally, and is “enhanced by prolonged indecisiveness” (p. 61). It constitutes, in effect, “a series of shifting biases” (p. 63), comparable to a series of turns in a road.

“Work Ways” is a lovely part of the book. It describes the “chambers community” (pp. 67-74), the relationship of staff and law clerks to judge, one which I suspect is different with each and every judge but one which — as Frank Coffin describes his own chambers — is very close to my own. Ideally, it results in a mutual learning and sharing experience with the buck ultimately stopping at the judge’s desk (or occasionally in his wastebasket). The ultimate determination is his to make, but with substantial input at various stages of argumentation by memoranda and by conversation, by editing and occasional drafting. Judge Coffin’s phrase, and I cannot improve upon it, is “creative collaboration” (p. 71). Every potential law clerk should read this chapter. Judge Coffin writes also of Bailey Aldrich’s “windowsill workload” — the unseen work including prose complaints, rehearing petitions, procedural applications, habeas petitions, and emergency requests (pp. 75-78) — and of the cycle of a judge’s work, monthly in the First and Second Circuits from September through June with some time free in August, or maybe a week in the dead of winter. The “cycle” Judge Coffin calls it (p. 78); a “pipeline” is my word for it. One must read the briefs, read the law clerks’ memos, hear the arguments, exchange memoranda, confer, write an opinion, ask one’s law clerks to edit it, obtain one’s colleagues’ suggestions or dissents, rewrite, rethink, and file it, consider the inevitable petition for rehearing, keep one’s sense of humor when someone asks for an *en banc* vote or the Supreme Court grants certiorari, and finally, study the long-delayed law review comments, often reeking of the lamp, but sometimes surgically penetrating. It is a “cycle,” a “pipeline,” truly to be cherished by anyone interested in intellectual challenge, with an inspirational sense of political-social-historical American values, aims, and aspirations, but also with a deep moderating sense of the constraints of logic, intellectual candor, practicality, and the evolutionary process of law.

“Preparing for Argument” (pp. 81-108) discusses more specifi-

4. The Seventh Circuit is the only one, so far as I know, in which all the judges live in and work at the same place. This may have some advantages in efficiency; it may even inspire collegiality. But I think it would tend to narrow one’s perspective to live and work constantly in one metropolitan area with its media and atmosphere. To me, there is a healthy regional mix of viewpoints that occurs when some of the judges come from other, sometimes distant places.

cally the clerk-judge relationship. Rather than use law clerk bench memos (which I find handy for postargument discussion and for writing interjudge voting memoranda) Judge Coffin prefers to discuss the cases back and forth, taking notes, after evening (some of us do it on weekends) brief reading. Going through the briefs can be the most tedious and discomfiting part of the judge's job; tedious if a case is frivolous, discomfiting if it does not admit of ready decision-making. Judge Coffin mentions the "sheer quantity" (p. 83) of material to be read, 2000 pages or so of briefs per one-week sitting,⁵ exclusive of appendices, records, transcripts, and the like. As I do, or have to, Judge Coffin in effect speed-reads the briefs, reading closely the simpler cases, getting a general grasp of the more complicated ones, knowing when and where further exploration is needed, and sensing the key case where a novel issue is present and "basic values may determine the outcome" (p. 84). And he mentions, enlighteningly for the nonjudge, perhaps, that the judge thinks of questions he can ask that "will make his colleagues think."⁶

In what some will find as the most interesting part of the book, Judge Coffin then discusses three typical cases — two with parties' and counsels' names changed, one with real names since its facts are well-known.⁷ He describes how each was handled by judge and staff, summarizes the argument, and relates the outcome. The first is a drug-smuggling case with a typical search and seizure question and several run-of-the-mill subsidiary issues (except for a definition of smuggling in an 1899 Supreme Court case),⁸ including the factual sufficiency of the evidence question. The second is a highly technical federal consumer protection case, with over-long briefs and a twelve-volume record. We call these kinds of cases "blockbusters," and give them a weight of ten on a calendar-weighting scale from one to ten that our calendar clerks use to even out weekly assignments. And the third, nonfictional case, ultimately reversed by the Supreme Court, was a prisoner's civil rights case involving procedural due process when transfers to maximum security institutions are made.

After describing the facts of each case, but before discussing the arguments, Judge Coffin lists a few general concerns that recur in cases regularly. The list includes (1) identifying threshold issues of

5. This number seems high to me on average, but perhaps the First Circuit hears more cases per sitting — Judge Coffin mentions thirty — and has fewer sittings per judge.

6. P. 84. This is not said deprecatingly of one's fellow judges by Judge Coffin or me; they are hopefully doing the same thing.

7. *Fano v. Meachum*, 520 F.2d 374 (1st Cir. 1975), *rev'd*, 427 U.S. 215 (1976).

8. *Keck v. United States*, 172 U.S. 434 (1899).

jurisdiction and procedure — including appellate jurisdiction, mootness, abstention, and standard of review; (2) understanding the facts, the arguments made, and the opinion below, which involves reading within a rationed time-frame, seminar-type discussion with the law clerks, and familiarizing oneself with applicable prior case law; (3) scenting weaknesses, “signs of rot” (p. 103) — ploys and critical omissions of fact, an issue overlooked, a leading case not referred to; (4) inquiring after the common sense of the situation and determining the underlying policy at stake; (5) determining the best approach to handling the case — narrowly or broadly, by memorandum or full-scale opinion; and (6) identifying the last-minute points that the law clerks should examine before argument. Judge Coffin candidly says that while he could spend a solid month preparing for thirty cases, he actually spends fifteen to twenty hours. I think that a fair estimate of my own time for an equivalent amount of work, but to do the work within that time does require an ability to speed-read coupled with a variety of legal experiences, a keen nose for separating substance from form, and a willingness to keep one’s mind totally open on a fair number of issues that need further, deeper exploration in a key five or six of the week’s cases.

Chapter Seven deals with “A Term of Court” (pp. 109-42), or more properly, what happens at oral argument. When the judge has really probed the facts and law, the argument can be a crucible, though more frequently it produces only “modest dividends” (p. 110). The interaction between court and counsel may even be of lesser importance than the interaction between judge and judge. The conference begins at argument.⁹ While the First Circuit confers at the end of each argument day, when the Second confers depends on the judges sitting and whether they exchange voting memoranda. Such an exchange was made in all cases in the days of the Learned Hand court, when the briefs were not read until after argument; indeed, the conference was usually held the Friday of the week *following* argument. Today, the Second Circuit often holds daily conferences because crowded dockets, judgeship vacancies, and the complicated schedules of the senior, visiting, and district judges who regularly and often sit on appeal leave us no other choice. According to Judge Coffin, the First Circuit confers — somewhat like a Quaker meeting — after recess and a possible double-check with the law clerks. Conference can change views, send thoughts “packing.”

Argument itself in the First Circuit for a given side of a case is

9. See note 6 *supra*.

twenty or thirty minutes, as it used to be in the Second. Now fifteen or even ten minutes is usual in our court, twenty the exception, and thirty only in the infrequent “blockbuster” case and often not then. The reader will surely enjoy, and I will not attempt to summarize, Judge Coffin’s summary of the arguments and discussion of the lawyers’ strategies, as well as a synopsis of the judges’ conference, in his three paradigm cases. I will, however, refer to his views of advocacy, which he likens to those of a fish on the art of fly-casting. These include, as keys, the lawyer’s ability to sense the level of detail and sophistication expected of him, which in turn depends on the extent to which the judge has explored the issues in the case before argument; a “controlled flexibility” (p. 131) allowing the lawyer to answer the judge’s questions — now, not later, I would add — while keeping his engine in gear; a sense of the policies with which the judge is concerned; a “disciplined earnestness” (p. 132) that conveys a sense of conviction without making every point a matter of life and death; and the inevitable “instinct for the jugular” (p. 133), which involves both going after the opponent’s weakness, and sensing one’s own and counteracting it.

Judge Coffin seeks to answer the “bottom-line” question almost inevitably asked by students: When does argument matter? The times when argument changes the views of the court are few, less than ten percent, perhaps closer to five, I would agree. But a good argument ensures that a good case will not be lost, just as a “submission” by the appellant helps to ensure an affirmance. And a good argument can help shape (p. 135) the ultimate approach of the court.

Judge Coffin’s views on the judges’ conference should be read by all judges. The *ad hominem* remarks, the not altogether judicial statements he uses as examples, will ring, I fear, on familiar ears. He enjoys as I do the constructive debate viewing all the possible dispositions and options, the fascinating “chemistry” that is involved, and the “simmering” exchange (p. 139). And he mentions the assignment of opinions, a matter with which law clerks seem to be much concerned. The First, like the Second Circuit, leaves it to the presiding judge to make the ultimate decision. But what presiding judge would not assign the workload equally, taking the toughest cases for himself (but not always), leaving the “glory” or some of it to others, giving the “seniors” and the “visitors” a break perhaps, leaving (or taking) the writing of a case when it is obvious that there is an even split to the “swing vote”? Dissatisfaction can arise, of course (Judge Coffin does not mention it), when the presiding judge either sloughs off the tougher, less glamorous cases or takes the “big” cases for him-

self. But human beings, are, after all, only human. So what is new under the sun?

"The Creation of Opinions" (pp. 143-70) is an apt chapter title. By now it should be obvious that opinions are made, not born, in a judge's mind. All of the input — briefs, law clerks, research, argument, conferences, outside reading,¹⁰ life experience, law comprehension — is mustered for a creation, an ultimate effort that is both physical and psychic, as Judge Coffin puts it so well. One does not write, one creates — the most satisfying part of the judge's job — but the creation is by no means solely of the artist. I am sure the process is not dissimilar to the remarks made about certain sixteenth, seventeenth, and eighteenth century artists — "from the school of," "attributed to." An opinion in Judge Coffin's chambers, as in mine, is not the sole creation of the judge. It has prewriting input, postdraft and post-circulation input, as well as, sometimes, a long-delayed review in the law reviews, which may be reflected in a later opinion on the same subject-matter. I confess to the same "feelings of chronic ineptitude and perennial uncertainty" (p. 144). To the judge who does not have them, I say, "BEWARE!" Such a judge is fooling only himself. This is not to say that the judge should let himself always be open to persuasion. There is a time — a time of decision, of casting the die — when one senses the hidden, inner "feel" of a case, the result that makes justice for the parties, keeps the "law" in tune with advancing times, constitutes a "creation," yes, but is, one hopes, based on precedent, reason, logic, philosophy, experience, common sense, ethics, history, social value. It is humbling for all of us lower court judges to know that such opinions are still subject to reversal. It keeps us not only honest, but when reversal occurs, also bemused, and serves as an ever-moderating factor to those who would unabashedly practice "judicial activism."¹¹

"The Workings of Collegiality" (pp. 171-92) describes, of course, the inner workings of an appellate court, its "institutional grouping" (p. 171), the relationship among the judges that Judge Coffin quite properly finds unique. Regardless of a circuit's size — the First Circuit is the smallest, the Second is of medium size — federal appellate

10. I believe it imperative that a judge keep abreast of the day's news: social, cultural and economic trends, scientific and environmental affairs, in addition to the general legal developments occurring in the Supreme Court, one's own court, and elsewhere. I would conservatively estimate that doing this involves 30-35 hours a week on top of the regular workload. And one still must read a little biography, history, philosophy on the subject of one's choice — my favorite light reading remains famous trials of the past, just as that of my former boss (Judge Harris B. Chase) was contemporary detective stories.

11. See generally Ginsburg, *Inviting Judicial Activism: A "Liberal" or "Conservative" Technique?*, 15 GA. L. REV. 539 (1981).

judges share intimacy, deep if selective knowledge of one another, conduct characterized for the most part by openness and forgiveness, having no favors asked or given in the judicial context (though frequently given in the personal one), criticism, response, and resolution. If there are lapses of civility, these are usually mended at the occasional get-togethers that take place at various intra-court functions, as when a colleague is feted, a senior has a significant birthday or the like. I agree with Judge Coffin that "anticipatory collegiality" (p. 181) — that based on foreknowledge of the other's sensibilities — is the most significant because it enables one to meet the other's arguments, use words or phrases that do not grate raw skin, and call attention to the areas that one knows will arouse the particular colleague's interest. "Responsive collegiality" (p. 183) he describes as the give-and-take that occurs after an opinion is circulated. The reactions that he mentions are most accurate: the phrasing of the answering memo, the need to submit not just criticism but substitute wording, concern for the feelings of the opinion writer, care to avoid "a posture of either haughty rejection or servile acceptance" (p. 184), and the ultimate attempt at quality.

Judge Coffin's "simultaneous collegiality" (p. 186), the emergency hearing, often involving matters of moment, really struck a chord with me: I remember the Kennecott-Curtiss-Wright proxy battle, whose appeal the late Murray Gurfein and I received at 5:30 P.M. the night before the 10:00 A.M. stockholder meeting (we worked out our decision about 9:40 A.M., staying the district judge's order denying Curtiss-Wright the right to vote);¹² the Norton-Simon tender offer for Avis expiring at 6:00 P.M., whose appeal I received at about 2:30 that afternoon and alone in the courthouse contacted my Vermont senior colleague, Sterry Waterman, just flown in and staying at the Yale Club (we heard the appeal at 4:00 or 4:30 P.M. and affirmed the denial of a preliminary injunction against the tender offer about forty-five minutes later).¹³ Of such decisions — a third judge was not immediately available in either case — is "simultaneous collegiality" made. It helps, I would add, if the colleague is as close a friend and skillful a judge as were, in my cases, both Murray and Sterry. "*Our* court" can hear cases of considerable import

12. The stay ultimately proved sound, since the judgment below was reversed by a unanimous panel. See *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195 (2d Cir. 1978).

13. No appeal was taken. The case is captioned in our court as *Miller v. Avis, Inc.*, 573 F.2d 1293 (2d Cir. 1977) (declining to stay the denial of a preliminary injunction sought by a dissident stockholders' group).

on a moment's notice *and* decide them. I have no regrets or compunctions about either decision.

Judge Coffin writes also of "collegial governance" (p. 188) — the oversight role of the Judicial Council,¹⁴ standing committees, procedures for hearing complaints about judges (established by the Congress over the wise objection of a few judges like my former Chief, Irving Kaufman),¹⁵ the Administrative Office, the Federal Judicial Center, the National Judicial Conference. These well-intended and extremely hard working organizations, alas, sometimes divert the minds of the judges, Frank Coffin points out, to "the performance of tasks bearing only a remote relationship to the judging process" (p. 191). Here I quote the judge directly because my thoughts almost exactly echo his:

My instinct for survival, admittedly far easier to apply in the smallest of the circuits, is to think small, to be skeptical of proposals that require added staff, meetings, or reports, to resist forming permanent committees, to suspend judgment on much of the sophisticated technology designed to spare us from our labors. I do not say that my mind is closed; only that I am increasingly concerned that the devices of technology and the systems of modern management which are invoked to solve the problems of quantity and expedition may divert our energies from the goal of the highest quality of justice. [P. 192.]

There is more to judging, surely, than mere bureaucratic management.

I do, however, take exception to his views on technology. I find word-processing and inter-office electronic/telephonic communication extremely valuable tools in dealing with the surge of business that we have in a day of breakdown in what used to be taken for granted — transportation, rail or air, postal service, and the like. The combination of "Ma Bell" and Lanier or Wang helps to make up for the demise of the New York Central, Northeast Airlines, Air New England, the deterioration of the Lexington Avenue I.R.T., and the rising price of gasoline. Recently, for example, at a "split sitting," one extending over a weekend, I dictated voting memoranda from New York to my secretary in Vermont, who put them on the word processor and telephonically transmitted them to a fellow judge's word processor back in New York. (I dare not claim that this substitutes for a real live secretary in New York or I would never be able to insist that my Vermont secretaries leave the state.)

The final fifty pages of Judge Coffin's book are devoted to

14. See 28 U.S.C.A. § 332(a)(1)(C) (Supp. 1981).

15. See note 1 *supra*.

“Thought Ways” (pp. 195-249), and sketch the outlines of the judge’s own judicial philosophy. Using Learned Hand’s phrase, he notes first that we judges are “jobbists” (p. 196), practitioners of a craft, with disciplines of the guild, and as such (on the appellate level at least) are able to decide many if not most of the cases presented to us with only those disciplines, including precedent, the “rules” of statutory construction, trial court discretion, and the like. He notes the different roles of the judge in a municipal or local court, who makes and communicates one-to-one judgments about people, and the judge at the trial level, who is simultaneously “administrator, manager, diplomat, psychiatrist, and public relations expert”¹⁶ and is under greater pressures from time to time.

But since by no means all cases are, or can be, decided with just the tools of the craft, the appellate judge is also an interpreter of values. Judge Coffin condemns the pigeonholing of judges that so often takes place in editorial columns, the halls of Congress, or, he could have added, in the mind of the public generally: “strict” or “loose” constructionist, “conservative” or “liberal,” favoring “restraint” or “activism” (p. 200). Quite correctly he observes that while labels may be appropriate to some judges on some issues some of the time, labels also more often end rather than encourage thought.

He goes on to note that judges, like everyone else, have moral values that generate immediate responses to certain stimuli, but suggests that identification and consequent excision of these values with self-conscious analysis is surely necessary. In this regard, he points to the salutary “disinfectant” (p. 202) of writing down reasons for a decision — a reminder that summary dispositions can sometimes conceal bias of the worst type. Of a second set of values, those deriving from the social, economic, and political background of the judge, Judge Coffin is equally wary — the former plaintiffs’ or defendants’ lawyer in a personal injury case, the regulator in an enforcement agency case, and the like. Knowing the enemy, oneself, and being on guard is enough, he says. The third set of values, which he calls neutral in content, he divides into the two camps of Process and Substance: One reasonable judge might resolve the inevitable conflict between the two one way, deferring, say, to an expert agency, while another judge might resolve it in the opposite way, substantively advancing the rights of a group of individuals hurt by the agency’s ac-

16. P. 198. Because the author touches so little on the work of nonappellate judges I rather wish that he had edited out this reference, though I do not disagree with its accuracy, only its generality.

tions. Judge Coffin concludes that these often unspoken values permit judges to reach most decisions without going into jurisprudential or moral philosophy (pp. 204-05).

But then in a chapter entitled "Loss of Innocence and the Quest for Legitimacy" (pp. 206-14) he reviews for the layman the schools of legal thought from natural law found "mystically" to contain permanent truths; through Holmes's and Thayer's teaching of deference to legislatures; to Pound's, Brandeis's and Frankfurter's sociological jurisprudence; thence after to Judge Jerome Frank and the psychologically oriented "Legal Realists"; and finally to the "Legal Process" School, which emphasizes institutional constraints. Felix Frankfurter, Learned Hand, Herbert Wechsler, and Alexander Bickel, with their "neutral principles" and "passive virtues," are the foremost exponents of this last school, which Judge Coffin calls the "dominant" school of American jurisprudence.¹⁷ He saves the contemporary "rights" thinking of Rawls and Dworkin for subsequent treatment under the rubric "moral philosophy."

In the penultimate chapter, "Time for Reappraisal" (pp. 215-30), he develops his own thesis that the various theories founded upon the presumption that judges are too undemocratic — too strident, simplistic, and absolutist.¹⁸ He reminds us, as I have done elsewhere,¹⁹ and as Eugene Rostow did so well²⁰ before any of us, that "judges are today subject to a relatively high degree of accountability, not notably less effective than that to which officials in the other branches are realistically subject" (p. 219). "Judicial restraint" is not, after all, free from value judgments, as the highly charged cases of the last two decades demonstrate.²¹ And three decades of change have resulted, he points out, in a citizenry more dependent on itself and bureaucratic institutions, in a shift of society's priorities toward liberty, privacy and fairness. We are now a "justice-oriented society" (p. 222) and as such we have seen enormous changes in the nature of litigation: class actions involving extrajudicial institutions; a civil rights revolution; enlargement of criminals' civil liberties.

17. P. 214. I question how "dominant" the "Legal Process" school is. The grounds of jurisprudential debate have largely shifted, it seems to me, to the battle between H.L.A. Hart's positivism on the one hand and the moral rights theories of Rawls and Dworkin on the other. See, e.g., *Jurisprudence Symposium*, 11 GA. L. REV. 969 (1977).

18. I agree. See Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U. L. REV. 911, 946-49 (1979) (James Madison Lecture).

19. *Id.*

20. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952). See C. BLACK, *THE PEOPLE AND THE COURT* (1960); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 142-44 (1977); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 1-7 to 1-9 (1978).

21. See Oakes, *supra* note 18, at 930-31.

This litigation, an engine of structural change with its broad-scale remedies, has now become the focus for much sophisticated debate. Judge Coffin foresees an increase in these trends as the population presses against limitations of resources, energy, and space, and as more and more people demand a justice-determined distribution of goods and resources.

Judge Coffin's final chapter is "A Judge Seeks His Bearings" (pp. 231-49). I believe he has found his, as much as any mere human being on a complicated sea can ever find them. He examines various clusters of closely related rights and discovers a wide disparity in their treatment. He finds both equal protection analysis and due process scrutiny chaotic. He uses his own *Fano v. Meachum*²² to illustrate this latter point: rights do not exist unless they are given or "recognized" by positive law. He would not merely abandon the field; he recognizes the tension in a democracy.²³ He looks to Rawls and Dworkin and seems to appreciate their rights analysis — particularly the latter's view of the due process and equal protection clauses as appeals to moral concepts (pp. 239-41), and his fusion of constitutional law and moral theory.

In the end, he quotes a passage from Philip Soper of which I am very fond and to which I, too, have referred recently with much admiration:²⁴

Legal doctrine cannot afford the luxury of becoming a professional's intellectual pastime. The relevance of moral philosophy to the development of norms for governing a society of ordinary people lies in a few broad generalizations: Utilitarianism, for example, emphasizes that we are part of a social whole; Kantianism reminds us, on the other hand, that we are not mere appendages of the social body. And the task of judges, to maintain the balance between these poles while the philosophers are still out, requires practical reasoning that does not yield easily to unified field theories. To look for more is to ignore the injunction of one of the first philosophers [Aristotle] to seek "precision in each class of things just as far as the nature of the subject admits."²⁵

This is Frank Coffin's as well as my own pluralism. It leads to a

22. 520 F.2d 374 (1st Cir. 1975), *rev'd.*, 427 U.S. 215 (1976).

23. I may have carried the "Tension" motif a little far in likening it to poems and a geodesic dome that "maintains its shape and stasis by a complex of forces pulling against each other." Oakes, *The Role of Courts in Government Today*, 14 AKRON L. REV. 175, 186 (1980) (Whittemore Lecture) (quoting J. JEROME, *THE POET AND THE POEM* (1974)). Judge Coffin speaks of a "coiled spring."

24. See Oakes, *Property Rights in Constitutional Analysis Today*, 56 U. WASH. L. REV. 583, 587 n.21 (1981). See also Oakes, *supra* note 18, at 924 n.81.

25. Soper, *On the Relevance of Philosophy to Law: Reflections on Ackerman's Private Property and the Constitution*, 79 COLUM. L. REV. 44, 64 (1979) (quoting ARISTOTLE, *NICOMACHEAN ETHICS* 1094b (W. Ross trans. 1925)).

belief in the measurable movement of dispute resolution out of the courts, in extra- or sub-judicial systems within institutions,²⁶ in the assumption that the people should become more self-disciplined — all under an umbrella of both utilitarianism and heightened sensitivity to individual rights. The “workability factor” must be taken into account.²⁷ Judges are now “inescapably” part of the social process, and must be aware of its crosscurrents and complexities as they work from day to day and case to case.

Judge Coffin’s final point is another reference to accountability, not in the narrow sense of the judge’s being answerable, much less being demeaned, but in the broader sense of deeper and informed public participation leading to higher standards and expectations with greater respect. A judge’s “most elusive mission” (p. 249) is “that of safeguarding individual rights in a majoritarian society with due regard to the legitimate interests of that society.” For that mission, though he would never say so, Frank Coffin’s book shows — even if one did not know the man — that he is eminently qualified.

26. A classic example in our own court recently was *New York State Assn. for Retarded Children v. Carey*, 596 F.2d 27 (2d Cir.) (upholding internal structural decision adding staff to review panel established to administer institution under consent judgment), *cert. denied*, 444 U.S. 836 (1979).

27. Judge Coffin has written another classic — this time a law review article — on “workability,” which I highly recommended. *Justice and Workability: Un Essai*, 5 SUFFOLK U. L. REV. 567, 571-74 (1971).