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Early in his judicial career, Judge Coffin proffered the concept of "workability" as one of the core factors in judging. *Justice and Workability*: *Un Essai*, his first published reflection on this idea, appeared in the *Suffolk University Law Review* in 1971. To frame the discussion, he started with a formal definition: "[T]he extent to which a rule protecting a right, enforcing a duty, or setting a standard of conduct—which is consistent with and in the interests of social justice—can be pronounced with reasonable expectation of effective observance without impairing the essential functioning of those to whom the rule applies."[1] This Article explores the ways in which the concept of workability became richer over time as the Judge limned out its relationship to the decisions of the First Circuit Court of Appeals and the United States Supreme Court, pitting individual rights against the imperatives of governmental institutions and the jurisprudence of the era.

I. FORMATIVE EXPERIENCES

As a backdrop, it bears reviewing briefly Judge Coffin's long apprenticeship in government service prior to his appointment to the First Circuit in 1965. His two-term stint in the 85th and 86th Congresses, from 1957 to 1961, was followed by a series of executive branch positions in the Kennedy and Johnson Administrations in the field of foreign aid, including service as Deputy Administrator of the United States Agency for International Development (AID) from 1961 to 1964, and as United States representative to the Development Assistance Committee of the Organization for Economic Cooperation and Development in 1964-1965. At AID in particular, he experienced firsthand the challenge and frustration of trying as a mid-level political appointee to merge and reform an executive branch agency and the disconcerting experience, after having served in Congress, of dealing from the outside with Congressional moguls.[2] When he took his seat on the Court of Appeals, he brought the experience and wisdom earned in Congress and the executive branch. In styling his extraordinary, three-volume autobiography *Life and Times in the Three Branches*, the Judge embraced this perspective on his life's work.

Less a part of the standard narrative, but explored in his autobiography, is his earlier experience in government at the local level. After clerking for two years for United States District Court Judge Robert Clifford in Maine after law school, he launched a solo law practice in Lewiston, Maine, and was quickly drawn into the

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1. Frank M. Coffin, *Justice and Workability*: *Un Essai*, 5 SUFFOLK U. L. REV. 567, 571 (1971).

2. 2 FRANK M. COFFIN, LIFE AND TIMES IN THE THREE BRANCHES 484-515 (2004) [hereinafter LIFE AND TIMES].

day-to-day work of local government, first as a member of Lewiston's underfunded Board of Education and its Pension and Planning Boards.[3] A year later, he became Lewiston's part-time Corporation Counsel.

In one sense, workability likely had its origins in these modest roles. Judge Coffin's duties exposed him first hand to the pressures of local self-government and its chronic shortage of time and resources. Night meetings of the city boards competed with law practice and family life.[4] As it turned out, many of the toughest cases the First Circuit faced during his tenure, and many of the most significant opinions the Judge wrote for the court, would concern the laws and practices of state and local government.

II. WORKABILITY IN ACTION

A sampling of Judge Coffin's opinions from the decade surrounding his *Suffolk University Law Review* piece illustrates a variety of contexts in which he found that workability had application across a range of local, state, and federal institutions. In each opinion, the Judge, writing for the court, took pains to view the case from the perspective of the implementing body. Empathetic to his core, Judge Coffin also believed deeply in transparency and dialogue. He brought to his every public endeavor the belief of a determined optimist that the participants could educate one another as they worked together towards a better future.

potentially causing administrators to become over-cautious in their initial hiring and to avoid the "time, expense, and often the personal discomfort of a full scale hearing"[10] by keeping teachers that should be let go. In a statement that surely took much of its meaning from his personal service on an overworked school board, Judge Coffin wrote that imposing an adjudicative hearing to flush out possible bad faith "would spawn a host of other problems not the least of which would be the erosion of the educational policy function of school boards."[11]

The Judge recognized that judicial sensitivity to the demands placed on an institution required reciprocity on the side of the institution. Workability sometimes foundered on the shoals of recalcitrance. In *Morgan v. Kerrigan*,[12] the Court of Appeals affirmed the district court's judgment that the Boston school board and other defendants had intentionally created or maintained racial discrimination in several respects.[13] It was clear that dialogue had failed in the face of official defiance. Judge Coffin's opinion for the court invoked Justice Frankfurter's concurrence in *Cooper v. Aaron*,[14] quoting its key passage: "'Only the constructive use of time will achieve what an advanced civilization demands and the Constitution confirms.' And the constructive use of time necessarily depends upon 'the fruitful exercise of the responsibility of those charged with political official power.'"[15]

B. Draft Boards

Controversies growing out of the Vietnam War also populated the court's docket in the late 1960s and early 1970s. While several cases dealt with wider public controversies,[16] most were appeals from convictions of young men for refusing to submit for induction into the military. Like school boards, Selective Service System draft boards were then, and still are, composed of local volunteers, and considerations of workability were featured prominently in Judge Coffin's opinions.

Typically, the appellants in the draft cases challenged the decisions of local draft boards to classify them as eligible to be drafted, and multiple opinions by Judge Coffin conveyed decisions reversing convictions or remanding cases for further proceedings. The opinions were careful to take into account the local, volunteer character of draft boards. Sounding a note that would persist through other cases, Judge Coffin wrote for the court in *Talmanson v. United States*,[17] that "[s]o long as we have a system entrusting the application of national policy to local

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10. *Id.* at 1186.

11. *Id.* at 1187. In *Drown II,* the court declined to interpose itself further after finding sufficient the school board's statement that the teacher's department had found her uncooperative in various respects. *Drown II*, 451 F.2d at 1109.

12. 509 F.2d 580 (1st Cir. 1974).

13. *Id.* at 588.

14. 358 U.S. 1 (1958).

15. *Morgan*, 509 F.2d at 598 (quoting *Cooper*, 358 U.S. at 25).

16. *See*, *e.g.*, *In re* Ellsberg, 446 F.2d 954 (1st Cir. 1971); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971); United States v. Doe, 460 F.2d 328 (1st Cir. 1972); United States v. Spock, 416 F.2d 165 (1st Cir. 1969).

17. 386 F.2d 811 (1st Cir. 1967).

units vested with discretion, there will be—as, indeed, it is intended that there be—variations in assessing area needs and availabilities."[18] When a draftee argued that an order issued by a clerk to implement a board decision deprived him of the right to have the board exercise its discretion, the court concluded in another opinion by Judge Coffin that "[t]o rule as a matter of law that every order to report must be the subject of board action seems to us a requirement unnecessarily burdensome on local boards and not demanded by the duty to treat registrants fairly."[19]

In *United States v. Baldridge*,[20] another registrant challenged a regulation that cut off new claims of deferment when a draft notice had been mailed. Unwilling to require endless process, the court, through Judge Coffin, declined to overturn the regulation, noting that "[b]ut for the regulation, a large percentage of those receiving induction notices might attempt to avoid induction by suddenly unearthing deferrable pursuits. The effect on the ability smoothly to supply the needs of the military for draftees could well be disastrous."[21] The case before it, though, presented unusual circumstances—the registrat had accepted an employment offer from the Peace Corps before the issuance of the draft notice—that the court felt merited relief and should be accommodated by the board.[22] "[T]he local boards would not be unduly burdened by the need to reopen the classifications of the few who are likely to be situated similarly to [the appellant]."[23]

C. Prison Officials

Challenges to the rules imposed by state prison officials raised analogous questions about the extent to which a judicial decision might impose processes that would hinder the ability of the officials to do their basic work, even though those officials are paid government employees rather than citizen volunteers. In *Nolan v. Fitzpatrick*,[24] the court faced a claim by a state prisoner that he had a constitutional right to send letters to the news media concerning conditions in Massachusetts' Walpole prison, where he was confined.[25] After careful analysis of the burden imposed on prison officials by their felt need to review prisoners' letters to the press and perhaps make a public response, the court concluded that the burden was modest and warranted.[26] Ever alert to the possibility of dialogue[27] with institutional

18. *Id.* at 812.

19. United States v. Powers, 413 F.2d 834, 841 (1st Cir. 1969). *See also* Frank M. Coffin, Chief Judge, U.S. Ct. of App. for the 1st Cir., Address at the Examiner Club: The Continuing Quest for Principle 33 (Nov. 5, 1973) (on file with Author) [hereinafter Address at the Examiner Club] ("[E]ven the best constituted lay draft board must be given some leeway. And if they were held to the punctilio of perfection, they would simply not be able to carry out their function.").

20. 454 F.2d 403 (1st Cir. 1972).

21. *Id.* at 406.

22. *Id.*

23. *Id.*

24. 451 F.2d 545 (1st Cir. 1971).

25. Id. at 546. *See also* Nolan v. Scafati, 430 F.2d 548, 550 (1st Cir. 1970) (allegation of refusal to forward a prisoner's letter to the Massachusetts Civil Liberties Union states a claim that prison disciplinary proceedings deprived him of access to the courts).

26. *Fitzpatrick*, 451 F.2d at 550.

defendants, Judge Coffin, writing for the court, added a postscript to highlight a "welcome constructive step": "Subsequent to argument in this case, we have been informed by counsel that defendants have voluntarily adopted new procedures permitting outgoing mail of prisoners to be sent without restriction as to addressees."[28]

Palmigiano v. Baxter[29] posed the question whether the prison system was required as a matter of due process to provide counsel to prisoners in disciplinary hearings.[30] For the court, Judge Coffin wrote:

> [W]e do not feel that prison disciplinary hearings necessarily require professionally trained counsel. The requirement of professionally trained counsel in all cases could amount to a significant expense for the government, both in supplying counsel for the accused and, because the hearing is likely to become more adversarial as a result, in prolonging the proceeding and making it necessary for the state to be represented by its own attorney.[31]

Fano v. Meachum[32] again addressed the due process rights of prisoners. Judge Coffin wrote that the Massachusetts prison system could not transfer a prisoner to a higher security prison based on informants' confidential statements.[33] The Judge took comfort in the fact that another prison in the same system had implemented a regulation barring the acceptance of informant statements without the presence of the accused.[34] Judge Coffin noted that "the prison system itself had decided that it could live with the requirement of a hearing without difficulty."[35]

D. The Police

A case that shuttled between the United States District Court in Massachusetts and the Court of Appeals illustrates the dynamic between general principles and practicality in the ongoing relationship of the federal courts with state and local government. *Castro v. Beecher*[36] led the First Circuit into the treacherous waters of de facto racial discrimination in the North. At the time, blacks constituted 16.3% of Boston's population but only 3.6% of its police force.[37] The case involved a challenge by black and Spanish-speaking plaintiffs to the hiring practices for policemen in Massachusetts, principally a civil service examination that screened out a disproportionate percentage of black and Hispanic candidates.[38]

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27. The Judge saw dialogue between the courts and other governmental institutions as a corollary to workability: "[W]hen judges succeed in involving the parties in working out institutional changes, more, much more is accomplished than settling the rights and liabilities of the parties to the dispute." Address at the Examiner Club, *supra* note 19, at 38.

28. *Fitzpatrick*, 451 F.2d at 551.

29. 487 F.2d 1280 (1st Cir. 1973).

30. *Id.* at 1290.

31. *Id.* at 1291.

32. 520 F.2d 374 (1st Cir. 1975).

33. *Id.* at 379-80.

34. *Id.* at 380.

35. FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 291 (1994).

36. 459 F.2d 725 (1st Cir. 1972).

37. *Id.* at 728.

38. *Id.*

The district court judge was the often prickly Charles E. Wyzanski, Jr.[39] Judge Wyzanski saw the record as establishing that the test unfairly discriminated not simply against the black and Spanish-speaking plaintiffs and the class they sought to represent, but more broadly against "minorities which did not share the prevailing white culture: that is . . . groups such as blacks, yellows, browns, American Indians, persons reared in lands where the preferred language is not English, and even whites from backwood areas."[40] After finding the test not to be related to qualifications needed to be a policeman, he ordered the Massachusetts Civil Service Commission to develop and use a new, job-related test, but provided no other relief.[41]

Writing for the Court of Appeals, Judge Coffin observed that Judge Wyzanski's characterization of the case as sweeping in the rights of everyone not in the mainstream "raises problems of riparian definition and proof which argue for the recognition of less comprehensive claims, at least those claims which have independent historical or decisional support."[42] There was no effective way for the courts to provide an effective remedy for the entire range of persons disadvantaged on Judge Wyzanski's sweeping principle. The Court of Appeals went on to fashion narrower relief, instructing the court below to create a priority pool of black and Spanish-surnamed applicants who failed the earlier test but pass a new non-discriminatory test and then to require the hiring of one applicant from the priority pool for ever(ppea3qalica.5(t)-(ru)(t)-5h8(r evree o)(t)-5h8(r ev)10.3o)-.6(e(t)-5i(t)-5ci)4.8((i)-7.(m)22.5.1(s)8( )-12.

III. WORKABILITY, PRINCIPLE, AND THE STANDARD OF HISTORY

As Judge Coffin's thinking continued to evolve, he recognized that "workability," as he had formulated the concept in his *Suffolk University Law Review* article, was more a self-imposed curb on personal predilection than a source of affirmative guidance for evaluating claims of constitutional or statutory rights.[47] Nor was that surprising, since the *Suffolk* article and much of his other writing was penned to defend the legitimacy of the work of unelected judges or, put another way, their accountability. He was at pains to show that the hands of judges are usually tied by precedent and, when not so tied, are limited in range by the requirements of craft,[48] leaving a judge little room for imposition of his own values except in unusual cases.[49]

But the Judge was not satisfied—his intellectual ambition required that he find a disciplined approach to those unusual cases. At least as early as 1972,[50] he began to imagine the book that would become *The Ways of a Judge: Reflections from the Federal Appellate Bench*, and set out to explore more deeply the current state of jurisprudence, hoping to find ideas that would help him think more systematically about the affirmative role of courts in government and society. This was at a time when the continuing influence of Warren Court decisions on the Supreme Court still empowered the lower courts to explore the meaning of constitutional rights in contemporary society. As Supreme Court doctrine evolved during his tenure to become more confining of the lower courts,[51] delicate balancing and workability began to play out less frequently in the Judge's opinions than in his speeches and extra-judicial writings. Despite the reduced scope allowed for application of his ideas to cases before his court, the Judge continued to take seriously the need for an intellectually consistent framework for judicial decision-making in cases not resolved by precedent or craft alone. In his words, "[t]he problem for a judge, and particularly for a Justice of the Supreme court of a nation or of a state, is to decide within his or her area of freedom in a principled manner."[52]

In *The Continuing Quest for Principle*, a paper the Judge presented to Boston's

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47. *Id.* at 25 ("There were two deficiencies in my attempt, my "essai." The first was my lack of any focus on principle . . . . I was looking only at considerations [restraining] courts—not at considerations pushing them. It was basically a negative formulation.").

48. The Judge later referred to these craft constraints as "principles to harness judges." FRANK M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 216 (1980).

49. In an insightful book review of *The Ways of a Judge* and *On Appeal*, Judge Lipez, Judge Coffin's successor once removed, emphasized the importance to Judge Coffin of legitimizing the role of the courts through discipline, self-awareness, and transparency. Kermit V. Lipez, 10 J. APP. PRAC. & PROCESS 371 (2009) (book review) (reprinted in this issue).

50. Memorandum from Frank M. Coffin, Judge, U.S. Ct. of App. for the 1st Cir., to the Author (May 21, 1972) (on file with Author).

51. In *On Appeal*, Judge Coffin wrote about several decisions of the Court of Appeals involving opinions he had written that the Supreme Court overruled or reversed. ON APPEAL, *supra* note 35, at 290-93. Other opinions reflected the new boundaries. For example, the First Circuit felt itself "compelled by the present state of the authorities" to caution the district court to "take into account rational positions advanced by the prison authorities." Nadeau v. Helgemoe, 561 F.2d 411, 420 (1st Cir. 1977).

52. Frank M. Coffin, *Book Review*, 56 B.U. L. REV. 1029, 1035 (1976) (reviewing ALEXANDER M. BICKEL, THE MORALITY OF CONSENT (1975)) [hereinafter *Book Review*].

august Examiner Club in 1973,[53] he surmised that jurisprudential principles might enable a judge to steer the judicial ship, giving it both a destination and a set of markers to assure accountability beyond craft.[54] What commanded most of his attention were the rights of individuals against governmental institutions at all levels, and it was mainly for cases involving those rights that he sought a principled basis for decision.[55]

In the Examiner Club paper, the Judge began a journey through what he called the "headlands" of American jurisprudence, a tour that culminated in *The Ways of a Judge*.[56] While full reviews of the paper and book are beyond the scope of this Article, brief stops at a few of the "headlands" will help chart his evolving course.

Among mid-20th century schools of jurisprudence, Judge Coffin looked closely at the "legal process school."[57] Notably, Professor Herbert Wechsler had called for the use of "neutral principles" as a benchmark to control judicial subjectivism. In Wechsler's formulation, "[a] principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."[58] On closer analysis, though, the Judge concluded that candidate neutral principles often conflict with one another.[59] Moreover, as *Castro v. Beecher* well illustrated, a neutral principle that is overbroad risks leaving a court unable to fashion a remedy commensurate with the rights it has identified. What steps could a court order to remedy the cultural and educational disadvantages of "whites from backwoods areas?" If no principle could be a basis for judicial decision making unless it could be applied to the full extent of its internal logic, then the courts would be unable to carry out their core function of making judgments among competing interests and values.

Other legal process scholars urged courts to avoid imposing their own values by showing extreme restraint in overturning the decisions of the other branches. While this approach largely obviated the need to balance individual rights against

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53. The paper was presented on November 5, 1973. The presence at the evening meeting of his law school professors Paul Freund and Milton Katz made the Judge "somewhat nervous," especially in that Professor Freund had read and commented on draft chapters of John Rawls' *A Theory of Justice*, one of the works the Judge intended to discuss that evening. Letter from Frank M. Coffin to the Author (Nov. 13, 1974) (on file with Author). The Judge would later serve as President of the Examiner Club.

54. Address at the Examiner Club, *supra* note 19, at 39-40.

55. For all his interest in the *Federalist Papers* and the separation of powers among the federal branches and the division between the federal and state governments, the Judge chose not to focus in his extra-judicial writing on the adjudication of issues under what he called the "great structural provisions" of the Constitution. *See* ON APPEAL, *supra* note 35, at 276. *But see* Frank M. Coffin, *The Federalist Number 86: On Relations Between the Judiciary and Congress*, *in* THE BROOKINGS INST., JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 21 (Robert A. Katzmann ed. 1988) [hereinafter *The Federalist*].

56. *See* THE WAYS OF A JUDGE, *supra* note 48, at 206-14, 231-49. As he often did in his writing, Judge Coffin made elegant use of nautical imagery, in the Author's view a delightful substitute for the tedium of sports and military imagery.

57. *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Cambridge Tentative ed. 1958).

58. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959) (quoted in Address at the Examiner Club, *supra* note 19, at 12).

59. In support of this point, Judge Coffin referred to Alexander Bickel's *The Least Dangerous Branch*: "[T]he question left unanswered is how may a court choose between competing principles, both adequately neutral and general." Address at the Examiner Club, *supra* note 19, at 12.

society's interests, in Judge Coffin's view it was itself value-laden. To make his point, the Judge parsed the Supreme Court's decision in *Fano v. Meachum*,[60] reversing *Fano v. Meachum* and holding that a prisoner has no right to due process before being transferred to a harsher prison:

> [I]t depends on one's starting point. If society's rights as reflected in state legislative and executive decisions are presumptively superior, the Court was restrained in declining to interfere with those decisions. But if one begins with the assumption of the presumptive priority of individual rights, a decision burdening the individual without any strong showing of governmental need could legitimately be said to be activist.[61]

To Judge Coffin, both "neutral principles" and "judicial restraint" seemed in practice to default to a passive approach that effectively downgraded individual rights by giving undue deference to only arguable governmental justifications for restricting those rights.

More congenial to the Judge's own thinking was Professor Ronald Dworkin's thesis that the great constitutional rights, notably including the rights of due process and equal protection, should be viewed as broad "concepts," not as botched attempts to state detailed "conceptions"[62] and therefore are properly interpreted in context over time. As Judge Coffin wrote, "[t]he emphasis on fairness, the entitlement of each person to equal respect, the view of the great clauses in the Bill of Rights as concepts, susceptible of adjustment in each era rather than as fixed, specific conceptions . . . spell a different, individual oriented jurisprudence."[63]

Another source of stimulus for Judge Coffin was the ambitious rethinking of the contractarian approach to moral philosophy put forth by Harvard philosophy professor John Rawls in *A Theory of Justice*.[64] Rawls argued, among other things, that persons in the "original position" (that is, in ignorance of their personal situations) would agree to a nearly absolute priority for individual liberty over other goals, such that "[e]ach person [would] have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."[65] The Judge explored the extent to which any of this thinking about the primacy of individual rights could be useful to a judge.[66] Although attracted to the moral content of this principle, and prepared to use the social contract as at least a metaphor,[67] the Judge was cognizant of his role. "[J]udges generally are confined to enforcing society's justice and that justice is often founded on notions different from our considered judgments in 'reflective equilibrium.'"[68] He also noted that in an imperfect world, an absolute priority for liberty could not be implemented through litigation "without bringing government to a halt."[69]

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60. 427 U.S. 215 (1976).
61. THE WAYS OF A JUDGE, *supra* note 48, at 220.
62. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134 (1977).
63. THE WAYS OF A JUDGE, *supra* note 48, at 240.
64. JOHN RAWLS, A THEORY OF JUSTICE (1971).
65. *Id.* at 550.
66. Address at the Examiner Club, *supra* note 19, at 30-33.
67. *Book Review*, *supra* note 52, at 1037.
68. Address at the Examiner Club, *supra* note 19, at 33.
69. THE WAYS OF A JUDGE, *supra* note 48, at 238.

Moving beyond "principle" alone, the Judge came to the view that the standard for assessing the rightness or wrongness of close decisions must be the ultimate verdict of history. For a judge deciding live cases, that standard demands both a deep understanding of how our society has evolved and an ability to see over the horizon.

A central reality to Judge Coffin, as he framed the role of individual rights in the late 20th century, was that institutions had come to dominate and regulate our lives. "We are now intensely urban . . . [and] rely more heavily on institutions."[70] "From childhood on, we become creatures of institutions—public school, universities, unions, professional associations, regulatory commissions, laws governing our occupations and our recreations. If we become ill, old, handicapped, or convicts, we live our lives in institutions."[71] Even local government rationing of mobile home parks puts one citizen's liberty at the mercy of another.[72] In a life increasingly bounded by institutions, the teaching of Judge Coffin's opinions and other writings was that personal freedoms must find some of their scope within those institutions.

Beyond a current assessment, the Judge wrote, a court must understand where our society is headed and how institutions and rights will function as our society and values continue to evolve:

> The judge must on the one hand be sensitive to the pace and direction of societal [evolution] . . . and on the other to his responsibility to stand for the principles of justice in that evolution. There is room at the margin for a moving edge of fairness—fairness checked by workability.[73]

He envisioned a wise decision as a point on a progression to a more just future.[74] "It is this nuance about sensing the future shape of value acceptance that . . . supports [a] view of the Court as a prophet of opinion with attendant responsibility to move in stages, stimulating colloquy, not in precipitate and premature formulations."[75]

The Judge's reflections on the many iterations of *Morgan v. Kerrigan*, the Boston schools case, and the controversial role of busing as a remedy for racial discrimination more generally are a case in point:

> My own feeling is that in its time busing played a vital role in helping end a century of racial discrimination by forcing communities to face up to the problem. It may have outlived its usefulness, but no one has suggested that another policy

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70. *Id.* at 221.

71. Address at the Examiner Club, *supra* note 19, at 16.

72. *See generally* Judge Coffin's opinion in *Lavoie v. Bigwood*, 457 F.2d 7 (1st Cir. 1972) (holding that the owner of the sole mobile home park in a town could not use the courts to evict a homeowner who was active in the tenants' association for complaining to public officials about management of the park).

73. Address at the Examiner Club, *supra* note 19, at 34 (referencing Jan Deutsch for the term "community agenda"). *See also* Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968).

74. Address at the Examiner Club, *supra* note 19, at 12-15. *See also* THE WAYS OF A JUDGE, *supra* note 48, at 213-14.

75. Address at the Examiner Club, *supra* note 19, at 14.

would have caused the nation to change course earlier.[76]

In a section of *On Appeal* entitled "The Looming Importance of Community," the Judge expressed his deep concern about the perpetuation of a substantial underclass of the poor people in America, a situation that called for "ways and means to enable the grievously displaced and disadvantaged to make reentry into the mainstream of society."[77] Though creating those ways and means was a job principally for legislatures, he saw a risk that legislatures would not take the initiative and foresaw a constructive role for courts in a dialogue.[78]

Having satisfied himself that he had mined the jurisprudence of his era until the lode petered out, the Judge declared his right and intention to insist on "pluralism" with respect to how a court should resolve cases not controlled by craft or precedent.[79] In the absence of a grand overarching theory, he took away an enhanced jurisprudential basis for an emphasis on liberty and equality, giving him enough "considerations pushing" the courts[80] to be a complement to workability.[81]

IV. LESSONS FOR JUDICIAL BALANCING

Emerging from his jurisprudential journey and at least partly as a result of it, the Judge reaffirmed his view that courts have an affirmative obligation to take rights very seriously. That conviction led him to question the Supreme Court's evolving approach to the balancing of interests between individual rights and government operations.

In *Judicial Balancing: The Protean Scales of Justice*,[82] the Judge took the Supreme Court to task for its sweeping decisions in the 1986 term. Basically, he charged that the balancing of individual rights against governmental interests was carried out at such a high level, and with such broad presumed facts, that government officials were bound to prevail: "[T]he broader the level of generality of the decision, the greater the compulsion to defer to officialdom."[83] He later called this pattern of outcomes the "level of generality" problem.[84]

This article, published in the *New York University Law Review*, analyzed in detail three cases decided by the Supreme Court in 1987—*Turner v. Safley*,[85] *Griffin v. Wisconsin*,[86] and *O'Connor v. Ortega*.[87] Of these, *Turner v. Safley* is of the most interest for present purposes, since it involved the applicability of constitutional rights in a prison, a setting with which Judge Coffin had dealt repeatedly and in a manner sensitive to both prisoners' rights and workability.

"The [Supreme] Court reasoned that subjecting all prison officials' judgments to strict scrutiny would 'seriously hamper their ability to anticipate security problems and adopt innovative solutions . . . and would thereby destroy the decision making process . . . .'"[88] In his view, though, the Supreme Court painted with too broad a brush: "*Safley* evidences very broad-scale rulemaking without any factual landscape showing the variety, frequency, and seriousness of problems raised by the assertion of the various constitutional rights of prisoners in far-flung and varied situations."[89]

The Judge went on to write that:

> In each of those [three Supreme Court] cases the major "balancing" was directed only to the question whether there should be some relaxation in the traditional standards of constitutional balancing, and not to the specific needs, interests, and limitations of the parties; that is, not to the "facts" of the case.[90]

The result was an almost casual acceptance of administrative excuses for curtailing individual rights. Judge Coffin noted:

> Deference, in the sense of a very substantial withdrawal of judicial review, to any officer of a government institution with power to inflict harm on an individual is a step that, in my opinion, should be taken only for the most clearly demonstrated, factually justified, and compelling reasons.[91]

Workability would have made it possible to take individual rights seriously without undue disruption of the core functioning of public bodies. Whereas Judge Coffin would have had the courts decide the trio of cases on narrow grounds, take a close look at the actual facts, and build workability into the balancing analysis and the remedy, the Court took workability off the table by more or less presuming the facts and ruling broadly.[92] "To me justice is something we approach better on a retail than a wholesale basis."[93] If a right does not have to be enforced woodenly and to the full range of its arguable generality, it is easier to contemplate recognizing it in the first place. The courts can take limited steps, see how effective or disruptive they are, and adapt.

V. WORKABILITY IN THE MIX

Over time, Judge Coffin refined the idea of workability, broadening its applicability from cases dealing with institutional regulations to cases dealing with actions of government institutions and racheting up the level of expectation for governmental institutions.[94] After two centuries, he wrote that the people "are entitled to reasonably properly run institutions which ought to be able to justify their actions."[95] Sweeping generalizations about interference with the work of

88. *Judicial Balancing*, *supra* note 82, at 36 (quoting *Safley*, 482 U.S. at 79).
89. *Id.*
90. *Id.* at 38.
91. *Id.* at 39.
92. *Id.* at 33.
93. *Id.* at 40.
94. *See* ON APPEAL, *supra* note 35, at 284.
95. *Id.* at 285.

government officials were unpersuasive: "[My deep] fear is that the centrality of liberty in our constitutional arrangements is today too often subordinated to administrative fiat and convenience."[96] He summarized by writing that workability "couples a sensitivity to individual rights with an equal sensitivity to administrative capability to carry out institutional missions while affording optimum respect for those rights."[97]

To workability, the Judge added a forward-looking aspect, which he called "incrementalism." Like workability itself, incrementalism was not a doctrine but an approach to hard cases that took into account workability, the lessons he had drawn from jurisprudence, and his conclusion that history will render the ultimate verdict. In a 2006 address styled "My Judicial Key Ring," the Judge explained that "[t]he third key on [my] ring is incrementalism—a practice of narrowly confining the scope of most decisions to a principle governing the type of situation presented by the facts of the case, not a principle that would sweep the broader landscape."[98] An excessive deference to government, in the mode of the Supreme Court decisions in *Turner v. Safley* and in *Meachum v. Fano*, leaves courts unable to serve as the guardians of core individual rights. On the other hand, as evidenced by the District Court's decision in *Castro v. Beecher*, an overbroad but rights sensitive principle in a novel case forces a court to choose between a remedy too weak to cure the violation and one commensurate with the violation but unworkably extensive and intrusive.[99]

Judge Coffin's legacy to all who cherish individual rights includes the core lesson, drawn from his life experience, that judicial legitimacy and judicial power to protect individual rights require a level of modesty and respect for the demands on other institutions of government that is neither dismissive nor blindly deferential. He taught us that to protect those rights in changing times, courts must have the wisdom and the courage to experiment, in the best common law tradition, with incremental solutions.

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96. *Id.* at 281.

97. *Id.* at 285.

98. Frank M. Coffin, Senior Judge, U.S. Ct. of App. for the 1st Cir., Remarks as the Recipient of the Morton A. Brody Award for Distinguished Judicial Service 8 (Mar. 19, 2006) (on file with Author).

99. "Issues of policy and issues of workability tend to merge." *The Federalist*, *supra* note 55, at 25.