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THE WAYS OF A JUDGE AND ON APPEAL

The Honorable Kermit V. Lipez

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THE WAYS OF A JUDGE AND ON APPEAL*

*The Honorable Kermit V. Lipez***

I. INTRODUCTION

What do you do when your judicial hero, the author of two important books on appellate judging, was for many years your neighbor, friend, colleague, and mentor? You revel in your good fortune, and you share your admiration for his books.

In his extraordinary career, Judge Frank Coffin was an accomplished trial lawyer, the architect, along with his good friend, Senator Edmund S. Muskie, of the modern Democratic Party of Maine, a chairman of the state party, a two-term Congressman, an unsuccessful candidate for Governor, a deputy administrator of the Agency for International Development, and a member of the United States Court of Appeals for the First Circuit. That service in the legislative, executive, and judicial branches of our government reflects a breadth of experience that few people can match.

Judge Coffin's long involvement in the political world contributed significantly to a primary focus of his two books on appellate judging, *The Ways of a Judge*, published in 1980,¹ and *On Appeal*, published in 1994.² As a political organizer, a candidate for public office, a Congressman, and an administrator in a federal agency, Judge Coffin understood his accountability to constituents, legislative committees, and appointing authorities. Although his life tenure on the Court of Appeals made him immune to the vagaries of election or appointment, Judge Coffin retained a keen awareness of the need to legitimize his work—and the work of all judges—to the public at large.

Indeed, Judge Coffin recognized that federal judges had a particular need to explain themselves to a wary public. With its lifetime appointments and constitutionally conceived independence, the federal judiciary is an anti-majoritarian institution. That independence invites the familiar charge that the judges use their authority to impose their personal preferences on the public. Appellate judges are accused of writing decisions that, despite the trappings of precedent and logic, are nothing but a camouflage for instinct, bias, or hunch. They are criticized for creating law that undermines the politically accountable

* The author of these books, Judge Frank M. Coffin, was a member of the United States Court of Appeals for the First Circuit from 1965 until his death in December 2009, including eleven years as its Chief Judge. Although Judge Coffin had retired from daily judicial duties in 2006, he retained his status as a senior federal judge for the rest of his life.

** Judge, United States Court of Appeals for the First Circuit. I wish to thank my permanent law clerk, Barbara Riegelhaupt, for carefully editing this essay. Barbara was a law clerk for Judge Coffin for twenty-two years before she began working for me. Her tenure reflects her exceptional ability. To the extent that Barbara channels Judge Coffin on my behalf, that is a considerable plus.

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1. FRANK M. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* (1980).

2. FRANK M. COFFIN, *ON APPEAL: COURTS, LAWYERING, AND JUDGING* (1994).

institutions of our government. In short, the unaccountable judges are charged with acting in unaccountable ways.

Aware that such criticisms are abetted by the lack of transparency in an appellate judge's work,³ Judge Coffin undertook to remedy the problem as only a man of his gifts and experience could. By describing his own decisionmaking and work habits, he could demystify the decisionmaking process of federal appellate judges and, by so doing, legitimize it. This would be no small feat. It is not easy to be an observer of one's work, particularly when the essence of the work is something as evanescent as a decision. And there is always the possibility that the revelations about the ways of a judge might not be reassuring.

Whatever the validity of such difficulties and dangers, they did not deter Judge Coffin. He believed that the task of judging requires self-consciousness about the decisionmaking process—understanding how it unfolds and the factors that influence it—and the ability to explain why that process led to a particular outcome. He reports in *The Ways of a Judge* that throughout his first decade and a half on the bench he would make notes about the process of judging—observing stubborn problems, approaches that worked, and methods of craftsmanship—that would help him to examine and reflect on his own judging.⁴ Judge Coffin embraced the challenge of opening that introspective process, as much as possible, to the public.

It would be misleading, however, to suggest that Judge Coffin's two books on the appellate process are devoted solely to the elusive concept of judicial decisionmaking. Here again Judge Coffin's roots in the detail-rich world of the trial lawyer and the nuts and bolts of political organization and political campaigning are telling. He does not pursue his larger themes about the nature of judicial decisionmaking until he anchors his conclusions in the details of the appellate process and the work that takes place in a judge's chambers. In his first book, *The Ways of a Judge*, there are chapters on "The Appellate Idea in the United States," "The Elements of Deciding Appeals," "Place and Patterns of Work," "Preparing for Argument," and "A Term of Court." In *On Appeal*, there are chapters on "The State-Federal Court System: One Whole," "In Chambers," "Where Appeals Begin," "The Judges' Conference," and "Working with Law Clerks."

Written in a graceful, pleasing style, and carefully organized to lead the reader through the stages of the appellate process, these chapters, and others like them, describe in entertaining detail all aspects of the appellate process, both the public process that takes place in the courtroom and the process away from public view—the judges working together to reach a decision and the judge working with law clerks to craft an opinion explaining that decision. The answer to almost any

3. Judge Coffin crisply describes the problem: "The judges sit in a phalanx behind their elevated bench, listen to argument, ask a few questions, and, weeks or months later, issue an opinion. Exactly what goes on, if anything, between argument and decision is veiled in mystery." *THE WAYS OF A JUDGE*, *supra* note 1, at 4.

4. These ruminations were informal and spontaneous: "Whenever the spirit moved and time allowed—in an airplane, hotel room, or restaurant, even on the bench—I would scribble on tickets, menus, court docket lists, even baggage checks." *THE WAYS OF A JUDGE*, *supra* note 1, at 3. His object, he explains, was "to keep my ruminating self at enough distance from my operating self so that the former could observe the latter with some sense of perspective." *Id.*

question about the appellate process can be found in one of Judge Coffin's books.

For example, Judge Coffin tells us that the modern "brief" (which he observes is "usually anything but") "brazenly carries the name once reserved for a slip of paper listing a few cases."⁵ The English barrister would hand the slip to the judge on the bench, who might send the bailiff to retrieve a case noted on it.⁶ There are hundreds of such intriguing details in Judge Coffin's books, which add much to the pleasure of reading them.

However, those interesting details are merely the indispensable prelude to the larger subject of appellate decisionmaking that Judge Coffin addresses at the end of each of his books. The judicial process produces winners and losers. The appellate courts give content to civil liberties, confirm or vacate sizeable jury awards, resolve the inescapable ambiguities in statutes, establish rules of conduct for businesses, decide issues of crime and punishment, and occasionally declare statutes unconstitutional. The stakes in understanding appellate decisionmaking are high, for the parties going through the process and for the larger public who give such power to their judges. Judge Coffin wrote his books, in substantial part, to explain why that power has not been misplaced.

II. THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH

Despite the large ambition behind his writings on the appellate process, the title of Judge Coffin's first book bespeaks his personal modesty. He disclaims any intent to speak for anyone but himself.⁷ "This is a personal document. I do not claim to speak for all judges, all appellate judges, or even all federal appellate judges. I write only of my own work ways and thought ways, but I hope to reflect basic values widely held."⁸ His primary purpose is "to shed as much light as possible on the subject of judging" so that non-judges may understand judges and the appellate process,⁹ which ideally will lead to their respect for, and confidence in, the system.¹⁰

However, Judge Coffin is careful to circumscribe the expectations for his own inquiry. He acknowledges that the decisionmaking process will always be shrouded in some mystery: "[U]nless a judge were an extraordinary introvert and a psychiatrically trained one at that, he could not begin to describe with candor and completeness what goes on in a judicial mind in the deciding of a case."¹¹ He further observes that judges are not "jurisprudents"; they reach most decisions

5. THE WAYS OF A JUDGE, *supra* note 1, at 55 n.*.

6. *Id.*

7. Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit is one jurist who has taken a different approach. See RICHARD A. POSNER, HOW JUDGES THINK (2008).

8. THE WAYS OF A JUDGE, *supra* note 1, at 14.

9. *Id.* at 246.

10. Although Judge Coffin's insights are most pertinent to the experience of judges on the United States Court of Appeals, who enjoy the benefit of life tenure, his reflections on the processes of appellate decisionmaking and the importance of transparency have much to offer judges on other courts as well.

11. *Id.* at 195.

“without trying to tap the wellsprings of jurisprudential or moral philosophy.”¹² Between the inaccessible terrains of the psychoanalyst and the philosopher, there is the more accessible terrain of the self-aware craftsman, whose skills and values can be described and defended.

Judge Coffin operates largely in the craftsman’s middle terrain where most cases are decided. Despite the controversy generated by a few highly publicized cases, the vast majority of cases decided by appellate judges are not the “great” cases involving unsettled principles of constitutional law or issues of first impression. Instead, they are cases involving the application of settled principles to different facts and the familiar issues at the heart of appellate judging: Did the trial court’s dismissal of the case reflect a proper understanding of the law? Were the evidentiary objections and the objections to the jury instructions properly preserved? Were the erroneous evidentiary rulings harmless? Was there enough evidence to support the award of damages or the criminal conviction? Did the trial court properly apply the summary judgment standard? And on and on.

The familiarity of these issues does not mean that the cases that turn on them are easy or unimportant. To the contrary, these cases are always important to the parties and they can be important for the development of the law. Also, deciding these familiar issues can require exceedingly difficult judgments whose ostensible certainty conceals the uncertainty and shifting judgments that preceded them.

As Judge Coffin notes, the “decision” in many cases does not occur at the beginning of the process, and it is just as unlikely to happen only once during the judge’s work on a case. He describes the fluid nature of the decisionmaking process as the judge reads the briefs, discusses the case in chambers with law clerks, listens to argument, and confers with colleagues: “I see the process . . . as a series of shifting biases. It is much like tracing the source of a river, following various minor tributaries, which are found to rise in swamps, returning to the channel, which narrows as one goes upstream.”¹³ He identifies the “craft-related factors” that contribute to this narrowing and that, in the end, will decide most cases:

a case on point or clearly analogous, analysis of the evidence or a ruling by the trial court, a procedural or jurisdictional requirement, a compelling public policy, a close reading of legislative history, and considerations of institutional

12. *Id.* at 205.

13. *Id.* at 63. Judge Coffin’s more literal description of this exploration provides a window into what he describes as the appellate judge’s “state of prolonged indecisiveness” in hard cases:

One reads a good brief from the appellant; the position seems reasonable. But a good brief from appellee, bolstered perhaps by a trial judge’s opinion, seems incontrovertible. Discussion with the law clerks in chambers casts doubt on any tentative position. Any such doubt may be demolished by oral argument, only to give rise to a new bias, which in turn may be shaken by the postargument conference among the judges. As research and writing reveal new problems, the tentative disposition of the panel of judges may appear wrong. The opinion is written and circulated, producing reactions from the other judges, which again change the thrust, the rationale, or even the result. Only when the process has ended can one say that the decision has been made, after as many as seven turns in the road. The guarantee of a judge’s impartiality lies not in suspending judgment throughout the process but in recognizing that each successive judgment is tentative, fragile, and likely to be modified or set aside as a consequence of deepened insight.

Id.

appropriateness.¹⁴

In most cases, these factors will bring together judicial colleagues whose backgrounds and philosophies vary widely, leading to consensus on both the outcome and the approach.¹⁵

At the same time, however, Judge Coffin acknowledges that “[a]lthough the skills of the craft determine the outcome of most cases, the public and the press sense that in some of the most important cases there is more at work than professional judgment alone.”¹⁶ In these important cases, which often involve constitutional challenges to the exercise of government authority, “the public instinct is well if not accurately grounded, for a judge does inevitably have moral values and personal views about the causes and cures of our society’s ills.”¹⁷

Judges are fallible human beings who may be susceptible to “certain inflammatory stimuli,” such as hostility to a controversial public figure, a preference for a political party, a preexisting view of the strengths and weaknesses of the trial judge, or an attitude toward counsel affected by reputation. Such value judgments, more accurately described as prejudices, “can and should be identified, exposed to self-conscious analysis, and ruthlessly excised as far as humanly possible before decisions are made.”¹⁸ Otherwise, they have the potential to erode the craft skills that should control most decisions, and thereby justify the public skepticism about the fairness and impartiality of judges.

Another set of problematic values may also play a role in the decisionmaking process of judges. These values “derive[] from the social, economic, and political background of the judge.”¹⁹ One judge may have been a prosecutor, another a defense lawyer. Judges have different religious affiliations. Some judges have spent most of their professional lives in the corporate world, while others have used their legal skills on behalf of consumers or the indigent. It is pointless to deny that these experiences affect the mind-set of a judge. But Judge Coffin suggests that “[t]he difference between the good judge and the poor one is not that the former has been sterilized of all taint of his own experience but that he knows his enemy, himself, and is on guard.”²⁰

Finally, Judge Coffin describes a third set of values, which fall into the categories of Process and Substance. Acknowledging the essential “mystery” of the differing appeal of these values to different judges, “[t]he fact is that judges often differ in the weights they assign to certain values in the judicial process.”²¹ In reviewing the same case, one judge may emphasize the importance of finality and deference to the trial judge, while another may focus on the unfairness of the outcome. These inclinations may be the result of the differing social and economic backgrounds of the judges, or their different law practices, or even their differing views of the role of courts, but it would be difficult to characterize either

14. *Id.* at 197.

15. *Id.*

16. *Id.* at 199.

17. *Id.* at 201.

18. *Id.*

19. *Id.* at 202.

20. *Id.* at 202-03.

21. *Id.* at 203.

inclination as unworthy. As Judge Coffin puts it, each inclination “reflects a value with a positive weight.”²²

So where does this recognition of the tension between craft skills and values in some cases leave Judge Coffin in his quest to legitimize the work of the Third Branch? For a start, with no patience for those who see in this tension proof of the illegitimacy of the decisionmaking of federal appellate judges:

It is my thesis that the common view of the problem is distorted, and, because it is, the search for principles to harness judges is conducted in too strident a manner and with simplistic and absolutist expectations that are unrealistic.²³

These critics ignore the many restraints on the decisionmaking of appellate judges, which include

the need to convince a majority of any appellate court; the discipline of putting facts, reasoning, and conclusions in writing; the existence of well-recognized rules of the judging craft; the possibility of review by the Supreme Court; and criticism by the bar, law school faculties, and the academic journals. . . . [J]udges [also] are subjected to the most demanding ethical code in government.²⁴

As for those critics who insist that legitimacy depends on a judge’s adherence to “neutral principles” of law, or judicial restraint, or some overarching philosophy of judicial decisionmaking, their expectations are misguided. The reality is that “the counsel of restraint, like the counsel of adherence to neutral principles, either may not give clear direction [in particular cases] or, when it does give direction, is not a value-free approach to deciding cases.”²⁵

Although Judge Coffin acknowledges the contributions of successive or competing judicial philosophies (Sociological Jurisprudence, Legal Realism, Legal Process, the individual-oriented jurisprudence of John Rawls and Ronald Dworkin),²⁶ he remains skeptical of the sufficiency for the working judge of one overarching approach to judicial decisionmaking. Instead, he opts for pluralism:

I find merit in one school for a certain range of problems and merit in another for another range. Where the ranges seem to overlap in my mind, I have to choose between sets of principles or systems, well knowing that my very eclecticism clashes with the fundamental tenets of most of the competing systems.²⁷

This pluralism, in turn, leads Judge Coffin to a definition of judging that brings him back, in part, to the importance of craft:

Judging is most certainly not a matter of mystical revelation. Neither is it all logic or all science. Nor is it all a matter of institutional competence or a search for neutral principles. Finally, it is not the systematic application of a comprehensive theory of social utility or moral values.

Judging is a mixture of all of these, the formula for the wisest and most just

22. *Id.* at 203-04.

23. *Id.* at 216.

24. *Id.* at 218.

25. *Id.* at 220.

26. *Id.* at 231-41

27. *Id.* at 241.

mixture remaining as yet unrevealed. We know that the good judge diligently applies himself to the disciplines and skills of the craft. . . . We realize, too, that the judge, laboring in the vineyard of specific disputes, finds himself working out practical solutions and crafting tailored remedies that are calculated to recognize rights and at the same time respect the need for responsible governance and direction.²⁸

In light of this definition of judging, and its pluralistic nature, it seems fair to ask if Judge Coffin has met the challenge he posed for himself when he described the publication in 1880 of *The Common Law* by Oliver Wendell Holmes, Jr., as “the moment of truth.”²⁹ Given the revelation by Holmes that judges are not oracles who find and interpret “a mystical body of permanent truth,” but instead “reflect personal values in exercising the ‘sovereign prerogative of choice,’”³⁰ it follows, Judge Coffin writes, that “suitable principles for controlling and limiting the scope of such choices must be found. If not, this country would find itself in the anomalous position of having granted open-ended power to its least democratic element.”³¹

Superficially, pluralism seems an inadequate principle for controlling the open-ended power of federal judges. But Judge Coffin’s pluralism is the antithesis of the arbitrary decisionmaking that would make judicial power deeply problematic. The choice for Judge Coffin among competing answers in a particular case is the result of a disciplined, self-aware inquiry. He relies primarily on craft skills to narrow his choices. He exposes and excises prejudices masking as values. He acknowledges and assesses legitimate values for relevance and weight. Then he explains his choices by writing a carefully reasoned, fully stated opinion that imposes more discipline on the decisionmaking process. Writ large, this disciplined, self-aware, ultimately transparent process of deciding cases is itself an important controlling principle that serves in substantial measure to legitimize the open-ended power of federal judges.

Still, if this reliance on a craft-oriented process of judicial decisionmaking, infused by the selective application of competing judicial philosophies, seems anticlimactic for those who expected a more definitive answer to the secret of judging, Judge Coffin is unapologetic. There is simply not one “‘right approach’ for all judges.”³² Instead, there is only the continuing quest of judges to improve the quality of their work. To make his point, Judge Coffin wrote another book.

III. ON APPEAL: COURTS, LAWYERING, AND JUDGING

To some extent, as Judge Coffin acknowledges, he wrote *On Appeal* because of the challenge posed in a book review by a fellow judge and good friend. The reviewer commented that Judge Coffin had offered in *The Ways of a Judge* “‘no insight into the formula for judging, saying only that it remains ‘unrevealed.’”³³ He

28. *Id.* at 245.

29. *Id.* at 208.

30. *Id.*

31. *Id.*

32. *Id.* at 249.

33. ON APPEAL, *supra* note 2, at 231.

then added: “I would have welcomed some suggestion, however tentative, of Judge Coffin’s personal thoughts about how to decide [difficult] cases.”³⁴

Difficult cases can, of course, take many forms. There are cases involving statutory interpretation, where the language at issue is ambiguous (often because of a legislative compromise), the statutory scheme is intricate, and the legislative history is voluminous and inconclusive. There are civil rights and employment discrimination cases, disposed of by summary judgment rulings, where well-developed doctrines must be applied to massive records. There are lengthy criminal trials plagued by erroneous evidentiary rulings that raise the often elusive question of harmless error.

But these difficult cases, largely resolvable by the application of a judge’s craft skills (interpreting statutes, reading records), are not the difficult cases Judge Coffin’s friend has in mind. Instead, he is referring to the type of case identified by Judge Coffin himself at the end of *The Ways of a Judge*, where he wrote that the “most elusive mission [of all judges] is that of safeguarding individual rights in a majoritarian society with due regard to the legitimate interests of that society. The search for the approach most likely to accomplish this mission seems to be never-ending.”³⁵

The cases that present this elusive mission often involve the application of the great generalities of the Constitution, where the precedents of the Supreme Court are uncertain and the appellate judge’s craft skills do not provide the answers. Drawing on beliefs about the proper role of judges in our federal system, or lessons of history, or their own life experiences, or worries about undermining the authority of the police or the operations of government, or instincts of uncertain origin, some judges almost always decide these difficult cases in favor of the government. Other judges, drawing on similar sources but different concerns and instincts, decide more often in favor of the individual. Different values are in play in these cases, and it is disingenuous to claim otherwise.

But as Judge Coffin emphasizes in *The Ways of a Judge*, some values are legitimate (favoring finality in judicial proceedings over the fairness of an outcome) while others are unworthy prejudices (disliking a class of plaintiffs or their cause). Again, what matters in these difficult cases involving the government and individual rights is the judge’s self-awareness about the values affecting the decisionmaking, the legitimacy of those values, their interplay with the craft skills that are always important to the decisionmaking process, and the ability of the judge to write a careful, transparent decision that displays the craft skills at work, excises the unworthy values, and acknowledges the legitimate values that influenced the decision.

In the closing pages of *On Appeal*, Judge Coffin tries “to isolate and identify the cardinal beacons or values that I look to for direction in deciding constitutional cases posing a conflict between individual rights and state or societal interests, if and when I am not tightly confined by precedent.”³⁶ These four beacons are liberty

34. *Id.* (quoting Alvin B. Rubin, Book Reviews, 130 U. PA. L. REV. 220, 224 (1981)).

35. THE WAYS OF A JUDGE, *supra* note 1, at 249.

36. ON APPEAL, *supra* note 2, at 281.

(central to our constitutional arrangements),³⁷ equality (not mentioned in the Constitution “because it was as circumambient and pervasive . . . as the air”),³⁸ workability (which “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,”)³⁹ and community (an emergent but seldom recognized value in most adjudications).⁴⁰

Judge Coffin acknowledges that “[m]erely identifying one’s basic values does not go very far in illuminating how one would deal with hard cases of the type we are considering. My responsibility, therefore, is to try to bring some concreteness out of abstraction.”⁴¹ He does this, in part, by describing what he calls a “rights-sensitive balancing process,” which,

if it is conscientiously done, . . . not only will result in better decisions, more faithful to our constitutional mandates, but will elevate the dialogue among judges and increase the chances of understanding and consensus on the part of people generally.⁴²

Not surprisingly, this process relies heavily on the craft skills that are so important to the legitimacy of an appellate judge’s work. That is, the process requires a close, clear-eyed analysis of the details of the case in order to gauge accurately the competing interests at stake. The court must assess the “centrality and importance [of the individual right at stake], the extent to which it is likely to be infringed, and the frequency of infringement,”⁴³ as well as the effects on the government of recognizing the right. The adequacy of the record before the court in such cases is particularly important because, if the factual basis for a broad decision is lacking, “the decision may paint with far too broad a brush, with far-reaching damage.”⁴⁴ The court must also recognize the larger societal stakes in the protection of individual rights: “If a protectible individual right is at stake, society has a genuine interest in that right, as well as the individual; both interests must then be weighed against the countervailing institutional interest of society.”⁴⁵

Although Judge Coffin’s friend might not be reassured by the description of this balancing process at work in three decisions that Judge Coffin wrote, each of which was directly or implicitly overturned by a subsequent Supreme Court

37. *Id.*

38. *Id.* at 282.

39. *Id.* at 285.

40. *Id.* at 293. Elaborating on this last value, Judge Coffin explains it as:

[T]he self-interest a society has in preserving itself against the instability, insecurity, and disintegration threatened by the emergence, enlargement, and perpetuation of a very substantial underclass of uneducated, job-unqualified, welfare-dependent, unhealthy, despairing people living in dysfunctional families, all too susceptible to drugs and crime, with no sense of participation in, access to, or fealty toward that society.

Id. at 293-94.

41. *Id.* at 286.

42. *Id.*

43. *Id.* at 289.

44. *Id.* at 288.

45. *Id.* at 287.

decision,⁴⁶ he would probably acknowledge the usefulness of Judge Coffin's approach to these difficult cases. Balancing tests, so prevalent in Supreme Court jurisprudence, are an unavoidable response to two realities—the generality of the constitutional language protecting individual rights, and the plausible claim of the government that the specific recognition of those generalities in the case at hand is incompatible with important, perhaps even indispensable, government functions. If judges are to avoid ready deference to the claims of government administrators, thereby making themselves irrelevant, or quick hostility to those claims, thereby making themselves obstructionist, they must operate in that middle terrain described by Judge Coffin, where the judge's craft skills are so essential to the quality of the judge's work. Applying a Supreme Court balancing test in a difficult constitutional case is a craft skill. Incorporating Judge Coffin's "rights-sensitive balancing process" into that analysis is an important refinement of that skill.

To be sure, as the very name of the process suggests, it includes a tilt. It is called the "rights-sensitive balancing process," not the "government-sensitive balancing process." Judge Coffin warns repeatedly against a "policy of blanket deference to officialdom."⁴⁷ In the realm of equal protection analysis, he is skeptical about the defensibility of the minimum rationality standard:

[I]f an individual is adversely affected by legislation, more so than others, is it really faithful to our basic charter of rights to uphold the legislation if a court can hypothesize a possible rational basis or purpose of the legislation, even if such reasoning had played no part in its enactment?⁴⁸

He adds: "Perhaps the time will soon arrive when our higher expectations of the capacity of government to respect individual rights will declare the concept of

46. In the earliest of these decisions, *Drown v. Portsmouth School District*, 435 F.2d 1182 (1st Cir. 1970), a nontenured public-school teacher claimed that she was denied due process when the school district refused to renew her contract without giving any reasons for its decision. The panel concluded that "the benefits to the teacher of a statement of reasons for nonretention were so substantial and the inconvenience to the school board so slight that due process required it." ON APPEAL, *supra* note 2, at 290. The case was effectively overruled by *Board of Regents v. Roth*, 408 U.S. 564 (1972), in which the Supreme Court held that a nontenured college professor had no protectible liberty or property interest that required a statement of reasons for nonrenewal of the professor's contract.

In *Fano v. Meachum*, 520 F.2d 374 (1st Cir. 1975), *rev'd*, 427 U.S. 215 (1976), the First Circuit affirmed a ruling barring a proposed transfer of inmates from a medium-security institution to a maximum-security prison for reported misconduct because the transfer, without an opportunity to respond to the allegations, would violate due process. Judge Coffin explained that, in balancing the interests, the court considered that "the prison system itself had decided that it could live with the requirement [of a hearing] without difficulty." ON APPEAL, *supra* note 2, at 291. The Supreme Court held that the Due Process Clause did not require a transfer hearing. *Fano*, 427 U.S. at 229.

Ten years later, the First Circuit held in *Burbine v. Moran*, 753 F.2d 178 (1st Cir. 1985), *rev'd*, 475 U.S. 412 (1986), that a criminal suspect's right to counsel and privilege against self-incrimination had been violated when the police falsely told his attorney that they were "'through with him for the night,' did not tell the suspect of the call, and then proceeded to take three inculpatory statements." ON APPEAL, *supra* note 2, at 292. The Supreme Court held that "the Court of Appeals erred in finding that the Federal Constitution required the exclusion [from evidence at trial] of the three exculpatory statements." *Burbine*, 475 U.S. at 434.

47. ON APPEAL, *supra* note 2, at 284.

48. *Id.* at 285.

minimum rationality obsolete.”⁴⁹ And he describes “the Constitution—the original document, the Bill of Rights, the Civil War and other amendments—as a profoundly rights-oriented charter.”⁵⁰

In short, the tilt in Judge Coffin’s rights-sensitive balancing process is a tilt grounded in the Constitution itself. That tilt does not justify anything less than a rigorous analysis by judges of the details of the individual and governmental interests at stake when they clash. It does not mean that the balancing analysis will always fall one way. But the tilt does remind judges, and the larger public that Judge Coffin hoped to reach with his book, that a crucial premise of our constitutional system is a federal judiciary willing to resist legislative or executive action when it threatens core constitutional values involving individual rights. As Judge Coffin makes clear in *On Appeal*, a judiciary up to that task should be celebrated, not condemned.

IV. CONCLUSION

With typical modesty, Judge Coffin minimized the achievement of *On Appeal* with a comment that he would probably have applied to both of his books:

The most resistant task I have faced in writing this book has been to try to identify anything particularly individualistic and interesting about how I go about my work in deciding appeals. What I am about to say is all that I can confidently claim. And I know that it is neither terribly original nor illuminating. But it is all I can offer.⁵¹

Judge Coffin was far too modest. Although his accounts of his own decisionmaking process may not be original in the pure sense, they are illuminating for those of us who go from decision to decision with scant awareness of the patterns in our own decisionmaking. This lack of awareness does not mean that our decisions are wrong or unworthy of respect. Most of our decisions will reflect the craft skills which, as Judge Coffin pointed out, decide most cases. But for those exceptional cases in which craft skills only take us so far, and the pivot points of our decision become more elusive, Judge Coffin’s lucid exploration of his own decisionmaking reminds us that we can improve our work by thinking more systematically about it. Even if the values that we identify through such introspection still seem appropriate, or our location on Judge Coffin’s Procedure-Substance spectrum still seems about right, our increased self-awareness about our own thought processes should allow us to achieve the qualities in our written decisions that Judge Coffin so valued: openness and carefulness.⁵²

49. *Id.* at 285-86.

50. *Id.* at 281.

51. *Id.* at 262.

52. In defining these qualities, Judge Coffin incorporates his vision of appellate decisionmaking: By openness I mean laying on the table the opinion writer’s real reasons and thought processes, for without this there is little chance of meaningful dialogue or consensus. I realize that the ultimate work product of a court may, in order to gain a majority, be more opaque, but in the beginning there should be candor. By carefulness, I mean a self-conscious craftsmanship at every stage of the decision process, rejecting unspoken or facile assumptions and generalizations, and a fairness in stating issues, facts, and arguments.

Id. at 286.

Judge Coffin prized these qualities in judicial opinions because they advance the goal at the heart of his books—enhancing the legitimacy of an independent judiciary. Drawing on his years in politics and elective office, Judge Coffin understands that the public will value an independent judiciary for the same reason it values other governmental institutions—its belief that such an institution promotes and protects the public interest. To be sure, judges have a more difficult time explaining their role to the public because judges cannot equate the public interest with the majority. Instead, there are times when the majority must understand the societal stake in the protection of individual rights. Any attempt by judges to mask that reality is unwise. As Judge Coffin sees it, “a more perceptive view of the nature of appellate decision-making on the part of lay persons” will improve the quality of citizenship and will also “become[] a subtle yet powerful force for improving the quality of judges and their work.”⁵³

There are many in our society who will never be reconciled to the independence of the federal judiciary. There are politicians who will always inveigh against judicial activism and judicial legislators whenever they see a decision they do not like. But this inevitability does not mean that judges should cede the defense of their work to academics, members of the bar, or supportive politicians. Judges have their own responsibility to explain what they do, how they do it, and why their independent role matters.

For judges, the best defense of their role is the quality of the work that they do. For appellate judges, most of what we do is write opinions. Although the primary purpose of Judge Coffin’s books was to illuminate for the public a process they rarely see from the inside, his descriptions of his own approach to decisionmaking and opinion writing also instruct judges on pathways to improved performance. That objective and that lesson are complementary. If the public has a better understanding of what appellate judges do, how they do it, and why their independence matters, and if the judges write transparent, carefully composed opinions that reveal and explain the craft skills and values in play, they may persuade more members of an enlightened public that the legitimacy of the judiciary’s work does not depend on the popularity of its opinions.

That was certainly Judge Coffin’s faith in writing these two superb books. In lesser hands, that faith might seem fanciful. In Judge Coffin’s hands, that faith is irresistible.

53. THE WAYS OF A JUDGE, *supra* note 1, at 249.

