

January 2011

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Daniel E. Wathen

Barbara Riegelhaupt

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Recommended Citation

Daniel E. Wathen & Barbara Riegelhaupt, *The Speeches of Frank M. Coffin: A Sideline to Judging*, 63 Me. L. Rev. 467 (2011).
Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol63/iss2/9>

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THE SPEECHES OF FRANK M. COFFIN: A SIDELINE TO JUDGING

The Honorable Daniel Wathen & Barbara Riegelhaupt

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THE SPEECHES OF FRANK M. COFFIN: A SIDELINE TO JUDGING

*The Honorable Daniel Wathen & Barbara Riegelhaupt**

I had really developed a sideline to judging, which was secular preaching. I called on readers and listeners to act. I was still, as always, an advocate.

Frank M. Coffin¹

I. INTRODUCTION

For many years in Maine, the foolproof way to signal the importance of an event or ensure the success of a conference in the legal world was to invite Frank Coffin to deliver the keynote address. If you already had a keynote speaker of national renown, you would invite Judge Coffin to introduce the speaker. His introductions were as highly anticipated as the speech that followed, and they were as likely to entertain and enlighten the audience. The Judge's death at the end of 2009 focused attention on his remarkable contributions to the State of Maine and the nation. Although he served in all three branches of the federal government, his nearly forty-one years of judicial service became his life's work. The appellate opinions he crafted will always be part of the public record. The books he authored will also endure. Indeed, his most recent tome, *On Appeal: Courts, Lawyering, and Judging* was republished in 2009 in China, translated into Mandarin.² The part of his professional life work that is most at risk of slipping "gently into that cold night" is his collection of speeches.³ Consistent with his practice of keeping virtually every piece of paper he ever touched, each speech is well documented. His personal effects include files containing copies of the remarks that he delivered during his years on the bench—often with research notes—along with the beginnings of a catalogue for "the speech project" that he did not have the chance to pursue. Although the Judge always spoke in public with informality and intimacy, with barely a glance at his script, each speech was meticulously researched and crafted. Many bear evidence of editing right up to the point of delivery. Each speech was custom-made, designed for the occasion, and there was little if any repetition. At some points in his judicial career, primarily after he stepped down from his position as Chief Judge in 1983, he delivered as many as two major addresses a month. The scholarship and craftsmanship involved in these speeches must not be lost.

* Daniel Wathen, a former Chief Justice of the Maine Supreme Judicial Court, is Of Counsel at Pierce Atwood. Barbara Riegelhaupt served as Judge Coffin's law clerk for twenty-two years and is now a career law clerk for Judge Kermit Lipez, Judge Coffin's colleague on the United States Court of Appeals for the First Circuit.

1. 3 FRANK M. COFFIN, LIFE AND TIMES IN THE THREE BRANCHES 208 (2010) [hereinafter MEMOIRS 3].

2. *Id.* at 218.

3. In his privately published *Memoirs*, Judge Coffin noted about his speeches that he had "invested so much time, thought, and often passion in putting pen, typewriter, or computer to paper that I do not want to see all these efforts 'go gently into that cold night.'" *Id.* at 207.

The Authors of this Article are engaged in a separate project to publish the full collection of law-related speeches delivered by Judge Coffin during his tenure on the bench. That collection in its entirety consists of more than 125 speeches,⁴ and it is a treasure trove of thoughts on the judiciary as an institution, the law, judging, the legal profession, legal education, and legal luminaries past and present. The speeches are also worthy of study purely as examples of communication, advocacy, speechcraft, composition, humor, and whimsy. Within the confines of this Article, the modest goal is to provide samples of the delights that await the lawyer, judge, public speaker or citizen who turns to the full collection for guidance and inspiration in pursuing the cause of justice or merely in crafting a memorable speech. Few will ever equal Judge Coffin's ability to shape words to serve a purpose and motivate action.

Although each speech was an original, themes did emerge over the course of the Judge's four decades of service in the judiciary. The meaning of a collegial court and the threats to collegiality were topics he explored extensively. Similarly, the need to educate the citizenry and the media, and to engage them in preserving our unique and time-tested legal traditions, was a theme that appeared repeatedly through the years. Also prominent in the files are his rich remarks about practicing law in the grand style, using the law as a tool for social progress. The collection of tributes that he offered in praise or introduction of his colleagues and other luminaries is also a rich mother lode. These tributes reflect his deep interest in the minute details of the lives of others and his ability to turn a small bit of information into a witty oratorical gem. One of his trademark styles was to present his remarks in the form of a fable or as a fictional historical account, often "reporting" previously overlooked dialogue among familiar figures in history. Although he claimed to have adopted creative writing as a necessary tool to keep the audience's attention, that approach merely augmented his otherwise extraordinary ability to captivate his listeners.

In this Article, we dip into the collection of Coffin speeches, offering a sampling of the genius reflected in the full set. In the sections that follow, we present examples of the Judge's efforts in each of the following realms: (1) increasing understanding of the Third Branch among citizens and the media; (2) practicing law in "the grand style"; (3) paying tribute to individuals; and (4) speechmaking through fable and historical fiction. One notable omission in our sample is the topic of collegiality, bypassed here because Judge Coffin's role in promoting mutually respectful judging is addressed elsewhere in this issue by one of his colleagues on the First Circuit.⁵

We are confident that this taste of Coffin speechcraft will bring back fond memories for those who had the opportunity to hear the words spoken by their creator, and we hope that those who never experienced that pleasure will

4. Judge Coffin reported that, in total, he had made more than 200 speeches during his judicial years. *Id.* The prepared talks unrelated to the law included remarks at memorial services and other events celebrating happier occasions, homilies at a dozen weddings (primarily for his law clerks), speeches at high school and college commencements, and observations at the reunions of his sixty-eight law clerks.

5. See Levin Campbell, *Coffin's Court: A Colleague's View*, in this issue of the *Maine Law Review*.

nonetheless find enjoyment and illumination in reading the words of a judge and an orator who had few equals.

II. INCREASING UNDERSTANDING OF THE THIRD BRANCH

The two speeches that follow are examples of Judge Coffin's efforts to educate the citizenry in the intricacies of our constitutional form of government and the role of the legal system. He argued that legal reform and modernization required the informed and committed involvement of the public, as well as members of the legal profession. Some might shrink from the task of educating the public, but the Judge was more than equal to the task. Rarely will so much legal learning be found in a luncheon speech to a service club on Law Day or in a sermon delivered in church on the subject of justice.

THE FOUNDING FATHERS AND THE COURTS

Portland Kiwanis Club
April 29, 1975

We have begun our bicentennial. With a deft touch of irony, Fate has ordained that this time of jubilation come on the heels of Watergate, our painful humiliations in Southeast Asia, and our demonstrated inability to maintain our society with prosperity and security for all. Perhaps because this is a time for humility it is also a time to draw strength and pride from our past.

It is in the spirit of trying to discover something of our history, both relevant to our times and not likely to be wholly familiar territory to you, that I speak on this Law Day occasion of how the Founding Fathers came to give us the Constitution and how they viewed the role of the third branch of the government they created. For in rediscovering our roots lies much of the understanding of our unique form of government and the secret of its durability.

The story starts at least a hundred years before Independence, for we owe much to our Founding Fathers' grandfathers. Their own initiation in law and the courts took place in the English tradition, in which the judges held a position unmatched in other European countries, not just because of their professional competence but also because royal grant and ancient usage had peppered every town, borough, manor, and county with courts in which ordinary people participated. The workings of law through the courts were part of an Englishman's life. In the colonies, the settlers in time drew away from the English pattern of three separate court systems—King's Bench, Chancery, and Exchequer—and invented the model of one system, divided into trial and appellate jurisdiction. Governor Andros, for whom our neighboring county of Androscoggin was named, was a leader in combining all three courts into one superior court. Moreover, the colonists insisted wherever they could on jury trials. Their jury trial syndrome was equaled only by their passion for appeals. The result was that court processes and organization were so familiar to so many colonists that one scholar has said that this familiarity and concern was as large an element in the struggle over the ratification of the Constitution as economics or ideology.

More important than their stress on centralized courts, jury trials, and right of

appeal was the growth of a distinctly American attitude regarding the function of judges, the expectation that on occasion judges should declare statutes void as being inconsistent with common law, or, as it later was expressed, the constitution. Bear in mind that in the English system whatever Parliament said was supreme. This was also the guiding principle in all of the civil law countries on the continent of Europe. How, then, did the idea of judicial review of the legislative and executive become part of the American set of values?

The story begins in the early 1600's when Edward Coke was practicing, reporting, and later pronouncing law. In several famous cases he had proclaimed the principle that even Parliament could not legislate against the deepest principles of common law. He was not speaking casually. There had been two strains developing in English law. The first was that lands acquired by the King other than by descent were to be treated as if gained by conquest and subject, not to the primary authority of Parliament, but "extra regnum," subject only to the King's will. The colonies, of course, were in this grouping. The second development was that the King, in cases where he had given a grant or patent to form a borough or a guild of merchants, would, beginning in the 1200's, send judges around for what was called the General Eyres. At first they inquired only to see if new laws were within the limitations of the grant. Soon a second principle emerged—to inquire if practices were obstructive of "common justice." "Common justice" meant common law and grew into the concept of due process of law. In 1596, an ordinance providing for imprisoning any inhabitant refusing to pay an assessment was held by a court to violate Magna Carta. In 1615, in the Case of the Tailors of Ipswich, a monopolistic ordinance secured from the King by the Merchant Tailors Company was declared to be against the common law. In other words, not even a royal patent could make good a void ordinance.

This was bold doctrine, but, in England, confined only to royal grants, a diminishing area. It so happened, however, that the doctrine applied directly to the King's royal provinces—his grants—which, by 1754, included nine colonies, all but the two proprietary colonies of Maryland and Delaware, and the two corporate colonies of Connecticut and Rhode Island. In the nine royal colonies the doctrine took root that the courts could provide a check against powers being exercised beyond the charter or in violation of the common law. So a footnote to the law of England became a cardinal principle in America.

The principle was first confined to private matters, such as the law providing for succession of estates, until the mid-1760's. Up to that time, the relationship of England and the colonies had been loose, allowing room for play in the joints. Walpole coined the phrase "salutary neglect" to describe the policy. Then, beginning in 1763, Parliament passed statute after statute aimed at the colonies—empowering the royal navy to collect customs on every ship, and allowing the citizen informer whose tip led to the arrest to choose the forum—with or without jury; the Sugar Act, increasing duties and red tape, and allowing an informer to send the case to trial at Halifax; the Stamp Act, with another informer's choice of forum; the Statute of Foreign Treasons to deal with rioters, the trial to be in England; the Dock Act; and the Administration of Justice Act—one of the Intolerable Acts, again with trial not in the neighborhood but in far off England.

The legal fights provoked by this legislation moved quickly onto constitutional

ground. The colonists, who were fond of quoting John Locke, patron saint of the Whigs, ironically found their sustenance in the Tory Bolingbroke, who believed in the fixity of the constitution and had written, *A Parliament Cannot Annul the Constitution*. Strange doctrine this, to Englishmen, but increasingly familiar to Americans. They were not only predisposed to a fixed constitution put in writing but were prepared to commit the power of enforcing conformity to that constitution to the judiciary.

What came next were Independence and a decade of living under the *Articles of Confederation*. The lessons learned during this period were capsuled in the experience we had trying to administer justice in Prize Appeals—cases where American privateers or our Continental Navy had captured foreign vessels and claims were submitted to our courts. General Washington first brought the problem to the attention of Congress. Not only was it inappropriate for courts in various colonies to judge cases involving continental vessels, but it was important that justice to other nations—some of whom we were interested in attracting to our cause—not be at the whim of a parochial jury. Congress attempted to establish a national court of appeal. But the experience was one of frustration, the memory of which was fresh when the Philadelphia Convention was convened. In many other ways, our period of flirtation with the *Articles of Confederation* was a nursery for the national conscience. Debts due British creditors, no matter how just, were resisted. Requisitions of funds by Congress were cavalierly avoided. Widespread absenteeism by representatives to Congress was the rule.

Finally, in 1786, things began to move again. A group of states, worried about trade and the economy, met at Annapolis. They asked Congress to call a convention. After a few months of being unable to form a quorum, Congress issued a call for a convention to revise the *Articles*, but, wittingly or not, inserted in the preamble the words which were to prove fateful—that the proposed convention was “the most probable means of establishing in these states a firm national government.” This broad preamble, by long established rules of construction going back to the early 1600’s, overrode the language that the Convention was to be for “the sole and express purpose of revising the *Articles of Confederation*.”

The Convention met on May 14 and got down to work on May 30, 1787. Three and one half months later it had completed the most remarkable and enduring large work of social organization ever struck off by any group of human beings. There are several things to note about this group. It was, even from our perspective, incredibly young. Franklin’s advanced age of 81 was required to raise the average age to 43. The key men were James Madison, 36, and Alexander Hamilton, only 30. John Adams, temporarily removed from the scene as an ambassador—but only physically—was 37. While two thirds of the 36 were forgettable men, a dozen were outstanding in the breadth of their vision and in their parliamentary ability.

They began. Though this may seem a technical point, it is worth noting that they were inspired to adopt a procedure whereby points relevant to any article could be reconsidered later. Certain issues were gnawed over, like a bone, again and again. But sometimes in the gnawing an issue which had seemed portentous suddenly dropped from sight. In any event, under this rule, they knew that no one vote would be crucial and final. This, I think, set the stage for true deliberation,

which allows room for second thoughts.

The major issue, underlying most of the debate, was the allocation of powers between states and the national government and within the national government. Our story, the birth of the judicial section, is a chapter in that tale, but an important one. Randolph of Virginia had submitted a “Virginia Plan,” which proved to be the model worked on by the Convention. The debate was strongest on such issues as the appointment, tenure, and salary of the federal judiciary. Significantly, there was little dispute with the idea that judges should hold office during good behavior. The memory of the King’s removal of stubborn judges was too fresh in the minds of the members. As to salary, Madison argued that it should be fixed, subject to neither decrease nor increase. Franklin, always a realist, pointed out that there was such a thing as inflation. The suggestion was made that judges’ salaries be tied to the purchasing power of so many bushels of wheat. In the end the Congress voted that judicial salaries could not be reduced.

The independence of the judiciary came to the fore again when the proposal was considered to involve the Supreme Court with the Executive in an advance screening and possible veto of Acts of Congress. This was finally turned down, probably because of the feeling that judges should pass on legislation only when actual controversies were presented to them and that the judiciary should be shielded from any temptation to engage in anything approaching political bargaining. While Randolph’s original proposal envisaged one or more supreme courts, the Congress quickly settled on one. More difficult was his proposal to allow Congress to establish other, inferior federal courts. During much of the Convention the hope was held by some that state courts could fulfill this function. But the memory of the Prize Appeals experience finally won out and Congress was not only permitted but encouraged to set up these courts. At one point the federal courts were given authority to decide anything which might forward the peace and harmony “of the nation.” Had this provision stayed in, I as a federal judge might be presiding over the domestic difficulties of your next-door neighbor.

As the Constitutional Convention came into its final week, some good and bad ideas came to the forefront. In the latter category was the proposal that the Chief Justice look over new legislation to see if it comported with good morals. This was, happily, rejected. Of much greater importance was the final wording of the Supremacy Clause, which, after proclaiming that the Constitution and laws pursuant to it, and treaties were to be the supreme law of “the several states,” singled out the judges to “be bound thereby.” This command pointed clearly at the role of the nation’s judges as the arbiters of constitutionality. Thus came to fruition what colonists had come to value in their century long relationship with their mother country. History has generally credited John Marshall with inventing the doctrine of judicial review of acts of Congress in *Marbury v. Madison*. From what we have seen it is closer to the truth to say that Marshall made explicit what was implicit in the Constitution and clear in the minds of the Founders.

Thus the Convention ended. This had been in the main a meeting on the high ground of rational debate. It also had been a meeting focused on structure: the delineation of powers given to the national government, and the checks and balances effective within that government. Individual rights and liberties were not discussed. This is understandable, for what was at issue was what powers were to

be given the national government; if nothing about religion, speech, the press, self-incrimination was given to that government, so the argument went, there was no reason to worry about their infringement.

Nevertheless, a strong liberty nerve throbbed. People remembered too well not only what had happened in Star Chamber trials in England but what had happened in the colonies under the infamous Writs of Assistance. This liberty nerve remained to be played on by the many who opposed creating a new nation. The ten months' debate on ratification was one of the most intensive exposures to all kinds of propaganda that any nation has been exposed to. The newspapers were the medium and the mode was largely vulgar. The various appeals, apart from the remarkable Federalist Papers, were bottomed on prejudice: religious, sectional, fear of a standing army, and distaste of an imagined aristocracy.

The various state conventions were not models of eloquence or rationality. Our own convention in Massachusetts was a fair example. We Mainers, comprising about two sevenths of the delegates, were disposed favorably toward the Constitution, feeling that perhaps in this direction lay the best hope for our own independence. History has not been kind to our delegates. One has been characterized by a fellow Mainer as "windy"; one had to have his speeches ghost written; and another was elected on a platform that if he were elected a delegate he would not attend. But history has been less kind to the two most prominent men in that convention. Sam Adams, who had been most critical of the new constitution, was converted to its support when his clique of Boston artisans and tradesmen—lobbied by Constitution proponents—came out in favor of it. John Hancock, a vain man, was swung over by the new convert, Sam Adams, and the illusory promise that he would be next in line for the Presidency after Washington. In other states newspapers carrying the latest news were misdirected, crucial letters of support were withheld, quorums were obtained by sending marshals to all the bars and key votes were lost by staying over-long at well planned alcoholic lunches. Chicanery was on occasion a willing man-servant to principle.

The outcome was not all that conclusive. The vote in Massachusetts was 187 for ratification, 168 against; in New Hampshire, 57-47; Virginia, 89-79; New York, 30-27. Rhode Island flatly turned it down. This was far from a groundswell. But it was enough. A nation came into being.

Its work was not over. The First Congress convened with general expectations that a bill of rights would be made part of the Constitution. Several states had even contemplated making this a condition of ratification. The hero in this hour was Madison. He had originally not thought a bill of rights necessary. But, methodical man that he was, he sifted through no fewer than 186 proposed amendments, found 80 substantive ones, cast out the least popular and practicable, and came up with a list of nineteen. With this mammoth job done the House and Senate finally agreed on the ten which joined our Constitution in 1791. To this we must add the Fourteenth Amendment, passed at the close of the Civil War, guaranteeing due process and equal protection of the law to all citizens.

What does all this add up to? It is a concept of government that starts from the proposition that the people are the ultimate arbiter. This was not a unique concept. Witness ancient Greece. But the Founding Fathers and the Americans they represented did not create a pure democracy. They had an abiding distrust of

government—that is to say “the people”—riding roughshod over individual rights. Hence the Bill of Rights. They developed their own home grown doctrine of separation of powers, making room for both state and nation. They carried their distrust not only to giving a president the power to veto an act of Congress and Congress the power to override a veto, but gave the House the power to initiate tax legislation and the Senate the power to approve Treaties and top appointments. All told, this added up to an intricate balancing act.

Moreover, they watered down a citizen’s franchise in several ways. While they created a House where representation reflected population, they created a Senate where a state, no matter how large or small, had two Senators. These Senators were not only picked by state legislators but, being elected for six year terms, were further removed from changes in popular will. And the Presidency was filled by the votes of state electors, the winner not necessarily being the person with the greatest popular vote. Finally, from the beginning they insisted on the appointment of judges who should have permanent tenure and be shielded from legislative or executive pressure.

What was created is a mixed government—one in which power is so diffused that no “person, faction, class, group, or segment of the population, no matter what its numbers, could ever gain control of all the parts of the multi-faceted government.” If one tried to chart our federal-state system, identifying sources of power, there would be so many vertical and horizontal lines criss-crossing the page that it would look like a cat’s cradle. While the Founding Fathers probably never expressed it this way, in constructing such a government they were rejecting Montesquieu’s teaching that the operating principle of a republic was virtue. For this was a government based on the recognition that man, unchecked, could and would be self seeking, in short, evil. It therefore sought to insure that bribery, chicanery, deals, greed, logrolling, and love of power, prestige and self would over the long haul not overcome the public good by reason of the built-in motives and mechanisms to watch over, to warn, to oppose, and to check.

Such a system had to be in writing. Indeed, insistence on a written constitution, unlike that of England, was evident from the start. For the Fathers knew that *Magna Carta* had been enacted by Parliament thirty-two times—which meant that it had fallen out of the constitution at least thirty-one times. But putting the system on paper did not mean that all boundaries were located with detailed precision. Power was only generally defined, allowing it to shift as time and circumstances should dictate. But, if commodious words like “interstate commerce,” “due process,” and “equal protection” were to have any meaning, and if definitions were not set forth in the Constitution, how were limits to be set? Here the Founding Fathers, with a century of history behind them, made another peculiarly American contribution. Revolutionists and believers in the sovereignty of the people as they were, they nevertheless pointed to their judges, the least democratic branch, to insure that in fact the Constitution should be the supreme law of the land. And, while the Founders did all they could to make the federal judiciary independent, it is still subject to a series of substantial checks. Attrition among old judges, the appointment of new judges by elected officials, appellate and Supreme Court review of decisions, legislative responses to judicial interpretation, academic commentary on judicial reasoning, and the impact of events on

sitting judges all can combine to work ponderous changes in the flow of judicial thought.

This system—a mixture of systems—has survived. It has proven workable, adaptable, and enduring through wars, civil and foreign, and revolutionary change, economic, technological, and social. The machinery seldom runs perfectly. The executive branch can be for a time dominated and exploited, or simply sluggish and unresponsive. The Congress can be paralyzed by its own establishment and complexity of the tasks it undertakes. The judiciary can be criticized for being too liberal and too conservative, too passive or too active. The federal government can be for a time too intrusive into the affairs of states, and states at times can be in defiance of federal laws. And every part of this machinery can stand better people, better methods, better ideas. But when all this is said, the American Revolution, because of what it produced, our Constitution, nourishes our pride in the past two centuries and our hope for those to come.

JUSTICE AS A COILED SPRING

A sermon delivered at Immanuel Baptist Church, Portland, Maine
January 22, 1978

To be asked to speak from this pulpit as part of the half century celebration of this church is, for a layman, an honor. And to be asked by one's own minister, particularly when that minister is Edward Nelson, is an honor one cannot refuse.

But to try to say something fresh or inspiring to you on the subject of "Justice" in a few minutes is a very ambitious undertaking. For just as love is the very heart of the Christian religion, so is justice the very core of western society.

The Bible did not readily suggest a theme. The Old Testament, of course, is strong for justice; but it deals with concepts of a just God and a just person. It says very little about how society should go about providing secular justice for all. It was natural for me to turn to the Book of Judges. This, however, is a rather bloody account of the Israelites from about 1120 B.C. to 1050 A.D., at a time when they had no king but were ruled for some 200 years by ten leaders who were called judges and rescued the people time and time again from marauding bands. The only judicial-type judge, interestingly enough, was a woman, Deborah. As the book relates, "It was her custom to sit beneath the Palm-tree of Deborah between Ramah and Bethel in the hill-country of Ephraim, and the Israelites went up to her for justice." (4:5). Not being in the business of rescuing from marauding bands and not having my own palm tree to sit under, I must look elsewhere.

In the New Testament, at least in a quick survey, I found only one instance where Jesus uses the word "justice"; it is when he is giving the lawyers and Pharisees a good dressing down and says, "Alas for you, lawyers and Pharisees, hypocrites! You pay tithes of mint and dill and cummin; but you have overlooked the weightier demands of the Law, justice, mercy, and good faith. It is these you should have practiced, without neglecting the others. Blind guides! You strain off a midge, yet gulp down a camel!" (23:23-4). So justice is a good, but we are not told what it is. As we shall later see, I draw more from some of his parables than when he talks in these very broad terms.

So the soundest and humblest approach for a theme in this house is for me as one parishioner to tell his fellow parishioners some things he thinks are important for them to know about his work. Recently, when we were in the company of a minister in another town, he asked me whether the people of my church supported me in my ministry. This was a new thought to me . . . that I had a ministry, that you should know about it, and that I should care for your understanding and support. Yet is it not part of our concept of ourselves and church that not merely Dr. Nelson and Ruth Morrison have a ministry to attend to, but all of us?

In my case there is another reason to tell you some things of my work. It is that this work cannot succeed without understanding, commitment, and even sacrifice on the part of citizens in general. When we speak of justice in the large, we are speaking of the way our society works in distributing to the able opportunities to learn, work, and live in comfort, and to those less able the opportunities, goods, and services which add up to security. And of course on you and your elected representatives and officials, city, state, and national, this kind of justice must depend. But you have a vital role even when we talk about the kind of justice that centers about the courts. Wholly apart from the funding and support you give the institutions of society, I have the profound conviction that in the long run the quality of the stewards of the justice system—police, prosecutors, wardens, judges—will respond to the strongly felt expectations of the people. On their discriminating and knowledgeable praise and censure do the development of better role models and public institutions depend. The recent use by the President, Senators, and Governors of committees to propose names of qualified judgeship candidates seems to me to reflect such expectations.

In the time we have today, I want to do three things: to sharpen your perceptions of the kinds of justice dispensed in the different levels of our court systems and the different qualities demanded from the judges of these courts; to observe how the area of freedom to decide changes as we go from trial to appellate courts; and, finally, to see how in that area of freedom is a tension which comes from the Constitution itself. If we achieve this much, it will be a big step beyond the assumptions of many people, that justice is merely a mechanical matching of a given set of facts to the right law or rule.

To begin with, Americans have a fuzzy idea of their courts and judges. People say to me, “I hope I don’t have to appear before you,” or, “Now I know where to go if I get a parking ticket.” These people have placed me at the wrong level in the wrong court system. All we need to know right now is that there are two systems, one for each state to deal with questions of state law, and one for the nation, to deal with questions of federal law. Each state has a district or municipal or “police” court through which those accused of speeding, assault, or petty thievery flow in a large, rapid, and never-ending stream. This in a real sense is the people’s court, where justice is defined for most people. Here is where we need judges who are compassionate, whose knowledge of human nature is deep, and who have an uncommon share of common sense. These qualities, more than mere learning in the law, are the relevant ones, for these judges come closest to Deborah sitting under her palm tree; their decisions, often made on a moment’s deliberation dozens of times a day, are at their best not rough but finely tailored justice fitting the individual like a hand-crafted suit.

The higher up the ladder of courts we climb, the more room is taken by the rules of law, and the less remains for a judge's personal sense of justice. There's an old story about Judge Learned Hand bidding farewell to Mr. Justice Holmes and saying, "Do justice." Holmes called him back and said, "That's not our job. Our job is to apply the law." While, like any other memorable quip, this is only partly true, the truth bears repeating for those who would judge judges fairly. A state or federal trial judge may throw out an indictment. He is labeled "soft on criminals." Or an elderly pedestrian is cruelly injured by an automobile and the judge does not let the case go to the jury. He (or she) is thought to be hard-hearted and defense minded. In both cases the judge, wishing he could punish the criminal defendant and reward the injured oldster, is acting as the law compels him to act.

Yet if the trial judge is often straitjacketed by the law, he still has more freedom in some important ways than the courts of appeals. He has a wide discretion to sentence convicted criminals, to make findings of fact, to stimulate compromises, and to frame remedies. These judges must have a wide knowledge of law sufficient to make fair decisions on the spot; they must be calming and dignified managers of a trial; and they must have a sense of the practical, an ability to handle people, patience, courage, and decisiveness.

The appellate courts in the two systems are the Supreme Court of each state and eleven federal courts of appeals, of which my court is one . . . and of course the United States Supreme Court, which reviews a very small number of both state and federal cases. We do not see the parties, juries, or witnesses. We miss out on the drama. By the time we get a case, all suspense is over. We deal only with the cold, printed record, and the lawyers' arguments in their written briefs. Although so called, they often run from seventy to one hundred pages long. Unlike the trial courts, appellate judges work in panels of three or more. And unlike decisions at trial, decisions on appeal are not made on the spot, but only slowly, over time, after briefs are read, arguments heard, the case discussed among the judges, the opinion researched and written by one judge in consultation with his law clerks, and, finally, the draft opinion circulated for reaction to the other judges. This incremental, collegial process of decision resulting in an opinion which must be put in writing is one of the best guarantees against arbitrariness which man has devised.

Now the appellate judge is quite a different animal from the trial judge. What he needs is the ability to suspend judgment as he ploughs through thick records, to work well with colleagues, to give and take suggestions, to listen, to take the long view, to see a decision in the light of where the law has been and where it is likely to go, and to express complex thoughts clearly through the written word. It also helps if he has a philosophical bent and can adapt to a cloistered life.

While I have said that appellate courts have less freedom in some ways than trial courts, they do have a freedom on occasion to make law. Indeed, in one sense, whenever an appellate court decides a case, it is making law even if it is deciding only that a portable cement mixer is a "motor vehicle" when it takes to the highway. Before the decision, one could argue either way, but not after. This kind of freedom to make law is as old as the English common law itself, more than half a millennium.

Nine-tenths of the cases decided by a state or federal appellate court, other than the Supreme Court, are of this kind. This is what scholars would call

interstitial or gap-filling law making, adding something the legislature would have added had it given thought to all possible applications of a law. The remarkable thing is that in this overwhelming majority of cases, even though good lawyers make a strong case for both sides, and trial judges may decide both ways, the appellate judges, despite different backgrounds in practice, experience, and politics, will, after their drawn-out, collegial process of decision making, agree. They will do so because, after they take into account the hard facts in the record, the applicable statute and its legislative history, the relevant case law, and logical reasoning, there is virtually no room for reasonable judges to disagree.

I refer not to such cases but to the true area of freedom, where it is possible for reasonable judges to disagree. This is small, if it exists at all, when the law is static and individual rights are narrowly defined and rigidly confined. Through the nineteenth century and the early part of this century, judges decided cases in the field of private law—contracts, torts, property—pretty much as did their ancestors on the bench. But look what has happened in the past forty years: the administrative agency and law development of the '30's and '40's; the school desegregation cases of the '50's; the civil liberties expansion of the '50's and '60's; the range of civil rights litigation of the '60's; and the sweep of over forty major federal statutes in the '70's thrusting the courts deeply into issues concerning the environment, energy, health, safety, information, consumer protection, and age and sex discrimination. This has been a justice revolution unequalled in our country or anywhere else at any time in history.

The result is that courts have found themselves deeply involved in public law issues, issues which, because new or undefined, permitted broad options of decision. Each new statute affecting welfare, housing, safety, or environment carries with it a hunting license for a decade before all open questions of interpretation are settled. The deeper source of freedom is found in the less precise clauses of the Constitution. "Due process" and "equal protection of the laws," in the Fifth and Fourteenth Amendments, are the principal examples. Under the spur of civil rights lawsuits based on these words, courts have for almost a decade found themselves called upon to monitor public institutions to see that they act fairly toward, and without discrimination among, individuals. Jails, hospitals, mental institutions, universities, school systems, welfare programs, housing projects . . . all these have felt the impact of court orders.

At this point people wake up and say, "Where do courts get the power to do this kind of thing? I thought we were a democracy. Yet these judges who aren't elected or responsible to anyone are running our schools, prisons, elections, and just about everything." With this question this generation must wrestle anew—as does every generation—with the basic constitution-building problem faced by the Founding Fathers as they sought to create a structure that would serve the values they held dear.

While their dominant goal was to create a government of, by, and for the people, they avoided the over simple device of providing for an absolute, Greek-style democracy. They wrought a representative democracy, with the Senate being considerably less democratic than the House, and the President through his veto being given the power to nullify legislation desired by a clear majority. And while laws are passed, taxes raised, and monies spent in accordance with the majoritarian

principle, the Constitution also, through its Bill of Rights, recognizes rights in individuals to speak, to assemble, to worship, to due process and equal protection. It is in effect saying, while we run ourselves by majority vote, there are some things that not even an overwhelming or unanimous majority can do. If Congress unanimously passed, and the President signed, a law barring Edward Nelson from this pulpit, no one would contend that this law would be worth the paper it was written on. More realistically, it is entirely conceivable that legislators of a state would balance their budget by drastically cutting appropriations for the state prison, necessitating housing two or three prisoners in each tiny bathroom-sized cell. In both cases, the single, non-elected, life-tenured judge would declare the action of the majority void, not because this is “democratic” but because ours is a democracy wedded to certain individual rights.

This is not a formula of repose. Nor is it a formula of simplicity as it would be if, like continental countries, we were willing to make the parliament supreme in everything. It is a formula calculated to create tension. This is why, in thinking about our Constitution, I do not see justice as accurately represented by such a static, inert symbol as a set of scales. I think the appropriate metaphor is a coiled spring whose tension limits the pressures of a majoritarian government on one side and the demands on behalf of individual rights on the other.

This dual purpose Constitution owes much to the ages. The idea of democracy comes from Periclean Greece. To Rome we owe the majestic idea of the rule of law. But somehow into the crucible was poured also the sense of worth of an individual that we find in the New Testament. The scriptural passage about the one lost sheep from the ninety-nine comes just before the parable, in Luke, of the prodigal son, a young man who many might say was not worth worrying about. Our law books are full of cases of such individuals; occasionally they prove worth worrying about, and in any event, we worry about them because tomorrow we might stand in their shoes.

It is now pretty well accepted by most Americans that in this kind of mixed government, it is entirely fitting, as Chief Justice John Marshall announced in *Marbury v. Madison*, that judges and not the majority determine when the majority has exceeded its powers or rightful exercise of its duties. But this still leaves plenty of tension. Some feel that the individual rights should be confined to precisely what they were understood to mean in 1789, when the Constitution was ratified, or in 1866, when the Fourteenth Amendment was passed.

This argument suggested our second scriptural passage, being reminiscent of the Pharisee’s chiding Jesus for allowing his disciples to pluck ears of corn in the cornfield on the Sabbath. Jesus, acting like a latter day Supreme Court Justice, hesitated not in telling his inquisitors, “If you had known what that text means, ‘I require mercy, not sacrifice’, you would not have condemned the innocent.”

If judges and particularly the Supreme Court could not similarly interpret for their times the meaning of old phrases, the Fourth Amendment, which bars unreasonable searches of one’s person, papers, or house, could not be interpreted as covering wiretapping, since the Founding Fathers could not have had in mind this kind of intrusion. Yet to the extent that a freedom to interpret is accorded to judges, there will be unanswerable questions as to the source and extent of their reading. There will be running debate over judges’ views of society, their weighting of

values of the individual as posed against those of society, their conclusion that individual rights were violated, and, particularly, their framing of a remedy if this involves not merely the abolition of the chain gang, or the third degree, but a long range plan for the restructuring of a prison or school system.

I see no simple way to avoid this kind of tension in a society which values both majority rule and individual rights. Appellate courts and the Supreme Court exist to check rash or irresponsible judges. But when judges seem intrusive, it is often only because lawmakers or executive officials have neglected or refused for too long a time to take action clearly indicated to reach constitutional standards. To the extent that citizens persuade their elected leaders to cure obvious problems, they lessen the likelihood of confrontation. While our government has been durable, I think it is also fragile. What I may mistake for fragility may be the resiliency and flexibility of the willow which withstands all winds. But I think it wise not to push even the willow to its limits.

When all is said and done, just as love is the ineffable mystery in our religious life, so the workings of justice remain something of a mystery in our secular life. But something all the more to cherish and nourish.

III. PRACTICING LAW IN THE “GRAND STYLE”

Throughout his career, Judge Coffin would speak formally and in casual conversation of practicing law in the “Grand Style.” When he entered Harvard Law School in the fall of 1940, he made the following entry in his journal: “I am to study law with the intention of using it as a tool for social progress.”⁶ Although he practiced law for less than a decade before he was called to pursue social progress in the legislative, executive and judicial branches of the federal government,⁷ he continued to hold forth a picture of legal practice that summonsed the legal profession to return to its roots. A glimpse of the history of the “Grand Style” and the beginnings of the present-day challenges are evident in a 1983 speech to the bar in his home county. In 1996, he refreshed his views and presented examples of the “Grand Style” of practice in a modern context to a then current crop of legal graduates. Together, these speeches sketch out the contours of the type of legal practice that he persistently advocated.

THE ANDROSCOGGIN BAR – PAST AND FUTURE

Address to the Bar of Androscoggin County, Martindale Country Club
May 23, 1983

Only one who has moved away from his home community can appreciate what place it holds in the expatriate’s heart. In my case all of my growing up was done

6. 1 FRANK M. COFFIN, *LIFE AND TIMES IN THE THREE BRANCHES* 127 (2004).

7. Judge Coffin began the practice of law in 1947 with small matters that he took on during his two-year clerkship with United States District Court Judge John D. Clifford (a dual role that no longer is permitted). See 2 FRANK M. COFFIN, *LIFE AND TIMES IN THE THREE BRANCHES* 240 (2010). He worked as a full-time solo practitioner in Lewiston from 1949 to mid-1952, when he began working three days a week at Verrill Dana in Portland. *Id.* at 268, 274. In the fall of 1956, he was elected to Congress. *Id.* at 378.

here, all of my undergraduate schooling, my baptism in the law, virtually all of my community service, and all of the building of my political life. In a sense, just like philosophers after Plato, every other place I have lived and worked has merely supplied the footnotes.

To this bar, which I joined thirty-six years ago this summer, I should make the confession of any returning long-absent native son: the Androscoggin Bar is forever as fixed in my mind as would be a group photograph taken at a particular time. In the center of the front row is pipe-smoking Supreme Court Justice Harry Manser who admitted me to your company. Next are Frank Linnell and Don Webber who, as elders at the bar although only in their early 40's, encouraged me to start my practice here, since there was a lack of young lawyers. On the other side of the Justice are the Cliffords, John D., Jr., who asked me to clerk for him, and taught me that so much more than scholarship went into the making of a lawyer and judge, and his brother Bill, whose massive bulk and bulldog face radiated the simple integrity of the man. Then the fabled Bermans, Ben the consummate trial lawyer and David the constant student—a combination very much like my grandfather, Frank A. Morey, and his more oratorical partner, Daniel J. McGillicuddy.

The analytical, tactical, and courtroom powers of these lawyers were first rate. I usually compare the best advocates who appear before my court rather unfavorably to the top products, of which there were more than a few, of the Androscoggin bar. All, without exception, were unfailingly generous in helping me avoid mistakes, even more appreciated, helping me correct mistakes, and helping me do better next time. But once in court one did not ask for favors. In my early days the moisture behind my ears rather rapidly disappeared after encounters with or against these titans and Foxy Frank Powers, the resourceful and durable John Marshall, the indefatigable John Platz. The model of wise, long headed counsellors was provided by such sages as W. B. Skelton and Peter Isaacson . . . and quintessential sense and good humor by such as Blackie Alpren and the apparently immortal Harold Redding. Free advice and help always were to be cheerfully obtained from our judges—municipal, probate, superior, supreme—from Adrian Cote, Fern Despins, and Harris Isaacson, to Don Webber. I must always put in a special niche my first office sharer, mentor, and support, one of our first and valiant women members of this bar, Marguerite L. O'Roak.

Some of those I've mentioned happily still survive and thrive. To a remarkable extent there is a second and even a third generation of many. Bermans, Cliffords, Delahantys, Cotes, Linnells, Webbers, Isaacsons, Skeltons, and Traftons continue to flourish. And there is a lively if dwindling coterie of my contemporaries in the second row of this photograph—Justices Dufresne and Delahanty, Scolnik and Scales, Eddie Beauchamp, Irving and Philip Isaacson, Bill Trafton, Irving Friedman, and such youngsters as Curtis Webber, Paul Cote, and Larry Raymond.

Others, both living and dead, I have not intentionally omitted but only because the constraints of time force me to draw only an impressionistic sketch. But that impression is of a bar of highly competent and dedicated professionals, respecting their colleagues and the court, superbly serving their clients, both rich and poor, giving much to their community, and in general having the time of their life—every

day.

This view of this bar in the late '40's and early '50's is undoubtedly a rose-colored one. But that's the way I want to leave it. The more important if perhaps less rose-colored task is to look ahead. I want to share some of my thinking with you about both judges and lawyers. At the end, if you don't think it an imposition, I'd like to solicit your help.

After seventeen and a half years of judging, I am, like most judges, concerned about our ability to do our work at the high quality level all are entitled to receive from courts and yet keep pace with the remorseless tide of litigation. In 1965, when I joined our court, our three judges disposed of 200 cases a year. Now, with four judges, our annual caseload is near 1200, more than a six-fold increase. So far we have not reduced our standards, which I regard as high, not because of any intrinsic superior ability on our part but because we are a small court, intimately know each other professionally, take time to discuss and compose differences if possible without sacrificing principle. We have, accordingly, much the lowest rate of dissents of all the federal appeals courts. We have written far more published opinions per judge than have the others. We also can point to much the lowest rate of reversals of all such courts. Between 1975 and 1980, reversals of First Circuit decisions by the Supreme Court were by far the lowest in the country: 29 percent of our cases which were reviewed were reversed, compared to 42 percent for our closest runners-up, and 75 to 80 percent for the most reversed.⁸

What chills me is the contemplation of an ever-increasing caseload. Not only does this in itself strain our energies which on the whole are operating at their maximum, but the rush to cope with this problem involves diluting the very deliberativeness of appellate review which justifies the system. Equally important, there looms the unpleasant possibility that judges will lose their pride and sense of creativity in reflection, research, and careful writing.

Beyond a certain point, the elimination or further restriction of oral argument and summarily deciding simple cases will begin to erode the quality of justice. Certain institutional changes, such as procedures for pre-appellate argument conferences to simplify issues and explore settlement and wider resort to mediation and other out of court dispute resolving methods have significant, if limited, promise. Other such changes carry with them their own costs, such as giving appellate courts the discretion not to accept certain appeals, transferring all diversity cases to state courts, and establishing more specialized courts.

Just beginning to be talked about are the taxing of costs and attorney's fees to the loser, as is done in England, and taxing costs and attorney's fees to counsel who bring an unwarranted appeal. Although these latter steps may seem harsh, they may make sense. If, as I think, and as Cardozo observed sixty years ago, three fourths of all appeals would be decided the same way no matter what the ideology, background, or judicial philosophy of judges, it ought to be possible for astute counsel and his or her colleagues to identify at least the most obvious of such cases. If so, it may not be unfair to subject the losing side of such cases to rather draconian sanctions.

Talking about such remedies brings us back to where we should be—you, the

8. Kathleen Sylvester, *Playing Circuit Roulette*, NAT'L L. J., May 9, 1983, at 1, 24-25.

bar. As we approach the end of the twentieth century, it is clear that many professions and occupations face the deepest currents of change. Education, medicine, industry, and both your and my sections of the legal profession. It seems to me that this active bar in this busy but not metropolitanized center of the state has something to contribute. But I am not sure that you are being observed, that your experience, expectations, aspirations, and apprehensions are being gathered for consideration.

My chief impression of the legal profession these days comes from reading various bar journals and such weeklies as *The National Law Journal*. Here I read such headlines as *Firms Turn to Selling Themselves*, *Battle for Clients is Heating Up*, *275 Lawyers and Growing*, *Building a National Law Practice Through Mergers*, *Hidden Costs in Buying a Computer*, *Compensation Packages for Firm Administrators*. An article entitled *Future of the Practice: Survival of the Fittest* discusses the profit squeeze, increased competition, and the impact of technology in making law practice capital intensive. It underscores the need for a marketing plan, systems and operators to “avoid burnout and encourage enthusiasm,” development of an “entrepreneurial attitude” (as opposed to an insistence on “quality of life”), fiscal management, and long range planning. Advertisements sing the praises of low cost legal software, legal data and litigation support systems, office automation, word processing magnetic media for wills and trust agreements, the lawyer’s microcomputer, not to mention a full page ad of Arabian and Paso Fino horses as investment opportunities for surplus funds.

The Annual Institute on Law Office Management lists as workshop leaders such new centers of power in a law firm as Managing Director, General Manager, Executive Director, Business Manager, Personnel Supervisor, Coordinator of Word Processing, Administrator, Director of Administration, Legal Administrator, Facilities Manager, Administrative Partner.

Reading about this world made me pause and look ahead a few years. Just under a month ago, I spoke to the alumni of Northeastern Law School on the occasion of the dedication of a fine new building facility, Cargill Hall, and asked them to accompany a descendant of Swift’s Lemuel Gulliver as he surveyed the state of the practice of law fifty years hence. I entitled this extravaganza *Gullible’s Travails*.

Young Gulliver, reared on Nantucket, has visited several of the smaller Boston firms such as Ropes, Dorr, and Hall, and Foley, Proctor, Ely, and Barlow. He now, in 2033, visits the largest. This is how he described his visit:

This was a multi-ethnic conglomerate formed by Antonio Brob, Jacob Ding, and Cuthbert Nag. It was called Brobdingnag, a Professional Corporation. I was given a tour of the firm by an assistant to a junior associate paralegal. It was only a 20 minute tour because that eats up the \$250 budgeted for such remote recruiting possibilities as me. But what I saw was impressive. Each floor of the 50 was arranged something like a department store, with clusters of cubicles surrounding their own computer complex and word processing center. Signs overhead said “Building Code Violations,” “Anti-Environmental Defense Unit,” “Litigation Stonewalling Strategy Coordination,” or “Tender Offers – Shark Repellent Division.” A pneumatic walkway whisked me to the Discovery Warehouse where hundreds of associates were working away at interrogatories. My guide was very

proud of the library. There were, of course, no books but it had a law dictionary and 500 carrels where operators were silently punching away, getting printouts of statutes, regulations, cases and treatises.

As I walked along a corridor, I saw a more senior associate sitting behind his desk. He looked friendly and I begged his pardon and asked him how he liked being with the firm. He pushed a button on his time clock, explaining that this conversation would be recorded under “pro bono,” and said that he was in his 7th year and hoped to be chosen next year as “junior apprentice tenured partner.” This would place him in the \$200,000 income bracket and in the 100 person leadership group in pension plans. I was about to ask him more, but his clock buzzed; he had used up his pro bono quota for the day.

On an impulse I took an elevator to the top floor, hoping I might see a real partner. I looked forward to seeing commodious quarters, elegantly decorated according to the tastes of the particular partner. Instead, I saw offices not much larger than those of the associates. More lavishly furnished, to be sure, but with identical prints of upended pheasants and pointing retrievers on every wall. An affable partner invited me into his cell. He had a window. I admired the view of the office building next door, where the prints on the walls were abstract. I expressed my respect for the austerity of his office. He grimaced a bit and said, “You should have seen what we used to have. But that was before our Business Management Group took over.”

I looked questioningly. He went on, “Yes, our corporation is managed by the Group. It has about 100 business executives. They are the ones who concentrate on our basic goal: to maximize income and minimize expenses. They plan our marketing campaigns, hustling strategies, and presentations to prospective clients; they identify areas of the law that we should be moving into and the likeliest clients to make up a strong future client base; they oversee our advertising and maintain liaison with our public relations firm; they keep alert to the opportunity of luring experts away from other firms; they monitor our time sheets, maintain and update our compensation system and participate in the yearly goal-setting sessions with each partner; they handle all the collective bargaining; they allocate office space and implement our “Standardized Cost-effective Office Layout Decor” . . . which we sometimes call by its acronym, “SCOLD.”

I asked him about the firm’s policy on billable hours. “We’re pretty easy-going around here,” he replied. “Our new associates are expected to put in 2000 billable hours a year. Of course, that means 1000 or so additional actual hours. Senior associates do 2500 and—he coughed deprecatingly—”any partner worthy of his salt substitute will rack up 3500 to 4000 billable hours.” I am slow but even I figured that this meant 70 to 80 hours a week, and so commented. The partner replied, “Well, I know, but sometimes you think of two things at once; a really good hour goes by quicker than others. You can often, if you’re good at it, compress two hours into one.” By this time I was a bit worried about his losing all this time—especially when I learned of his \$1000 hourly charge, the amount the firm needed to receive double his \$1,000,000 take-home. But he seemed relaxed enough.

I had one final question. I asked him what people did who could not afford to hire Brobdingnag. He mused, “People? We don’t really have people. Most of our clients are corporations, unions, funds, foundations. There are times when I wish we could take on some, well, ordinary people. But aside from our pro bono quota—we do our full share—we simply have to charge to pay the rent. All the firms I know are in the same boat.”

If anything is vulnerable about this fantasy, it is that it is likely to be realized in one decade rather than five. Indeed, I suspect some firms are approaching this condition today. But what about the bar outside Megalopolis? What about the practice of law in the middle and smaller sized communities of this country? What about you? I would very much like to know in general how you are doing, and whether you are enjoying practice, what kinds of law you are practicing, whether you think you can do a top quality job, and if so how are you able to do it, what kinds of law or cases you leave to someone else, whether you are a solo practitioner or practice with others, whether your costs and fees make it impossible or difficult for you to serve some people, whether you have time for some sort of community or public service. Most of all, I'd like to know what you think is ahead for the legal profession in this country during the next decades.

I have had distributed a sheet with these questions on it. I would be greatly obliged if, sometime during this week you take a breather of just two or three minutes and either jot down your response or put pen to paper and write whatever you want to on the subject. If you prefer anonymity in order to make some particularly cutting remark, fine; just mail your response in a blank envelope. What I shall do with what you send me is to use your data in talks I shall be giving on the future of the profession in Colorado, Washington state and elsewhere around the country. I would intend also sending in a summary to such groups as that of Professor Heymann at the Harvard Law School, which has embarked on a study of the future of the profession. I suspect that he is not inundated with inputs from lawyers such as you. The universe he is studying may not be the universe you inhabit.

* * * *

In conclusion I sense all of us share to an unusual degree the same basic values as to both living and working. I can remember talking with a senior partner of a large Boston firm which I had interviewed before leaving law school. I had to tell him as tactfully as I could that when Fred Lancaster of this bar offered to let me use his office and books if I would only help Marguerite pay the rent, this opportunity seemed more attractive than becoming an associate in his fine firm. He looked at me sadly, shook his head and said, "I'm sorry. I had thought you would become a better lawyer than that." Obviously I have never regretted that decision. And, I hope, neither have you. I can only wish you the same thrills and rewards of practice and warmth of fellowship bridging the generations that I knew and cherish.

COMMENCEMENT ADDRESS

Boston College Law School
May 26, 1996

One of the many sayings inherited from our unconventional ancestor, Henry David Thoreau, is this one: "I have lived thirty years on this planet, and I have yet to hear the first syllable of valuable or even earnest advice from my seniors." Now of course, this is nonsense. No one invested more of his life dispensing valuable and earnest advice than the recluse of Walden. Nevertheless, it is a suitably humbling thought for a Commencement speaker.

So I shall not give you the benefit of my accumulated wisdom, valuable though it would have been. Instead, I shall assume the role of a latter day Nostradamus and try to track the doings of this graduating class during the next few decades. This will be difficult because those decades haven't yet appeared. Moreover, if I am right, you are also cursed with a social conscience, which complicates matters. So bear with me.

Our story begins with Commencement, 2001. This was your fifth reunion and you were making a big time of it. After your own disastrous commencement experience in 1996, graduating classes had refrained from inviting judges to speak. The class of 2001 had invited the beloved and newly retired Dean Soifer, recently named chair of the United Nations tribunal to arbitrate all intellectual property disputes arising out of the Internet.

The former Dean, apparently emboldened by his new exalted position, launched a scathing indictment of the legal profession, which he described as "profoundly dysfunctional." The large firms, he charged, were succumbing to global giantism, ignoring human values, demanding the ultimate from their servitors, selling their super-sophisticated wares only to the very wealthy and the multinational corporation, more often than not paying only lip service to pro bono programs.

The lower half of the vast middle class, he continued, had been effectively priced out of the legal services market. They, as well as the indigent, increasingly flooded the courts as pro se litigants, finding the forms and procedures of even the simpler actions incomprehensible, and driving judges and clerks up the wall.

As for the poor, the Dean's indignation reached a high point as he recalled how, in the year you had graduated, the Congress had wreaked its most savage vengeance on the Legal Services Corporation, whose budget was a minuscule one to begin with. The next year, Congress abolished it, even though the objects of its spleen—class actions, advocacy with legislatures, representation of immigrants, and fee-generating cases—had all been declared out of bounds. This quarter century hallowed safety net for those who had fallen through safety nets was abolished without a murmur. Lawyers in general were in such bad odor that their voices were buried under the strident rhetoric of Congressmen who were quick to charge that only a pitifully small fraction of lawyers were doing pro bono. Their rationalization: if only the bar did its job, all would be served.

Pointing out the paradox of rising needs for legal services among the vast and increasing underclass and the withering away of openings for young lawyers, the Dean ended with a passionate cry for concern, commitment, and action.

Among those of your class who had come back for reunion, there were a dozen or so who were particularly close friends. Being deeply moved by the Dean's talk, and having nothing else to do, they convened in a nearby, familiar bistro, and talked.

All of them had spent the last five years in large law firms. They had to. Your average debt on graduation had been \$60,000. Over half of your class winding up in law firms joined either very large firms (over one hundred partners) or large ones (fifty to one hundred partners). So you had a common base. But not a consensus.

Arnold waxed lyrical about his firm, his cherished working relationships with his senior partners and his very bright associates, his joy in being on the cutting

edge of hi-tech law, the thrill of developing specialized knowledge that would give his firm a competitive advantage, the exciting plans for new branches in far off places, and, of course, the income level.

But Beth took him on. She pointed out that he was still single. Speaking for herself, she confessed to having been through an awful time. She confessed that, when pregnant with her first child, she could not fulfill the 2400 billable hour requirement that was expected. Her specialty was invaluable, but highly technical and narrow. She seldom saw a client or even many lawyers in her firm. And the option of part time work was a ticket to second class status. Partners felt that she did not share their commitment, that she would not be available on weekends, that her professional growth would lag, and, most important, that she couldn't do her share of "business development."

Another classmate, Caleb, joined in, protesting the amount of reports, meetings, and management overburden one had to participate in, the plethora of written proposals and "beauty contests" involved in seeking new clients, the increasing disloyalty of old clients egged on by their penny-pinching house counsel, and the disillusioning banality of litigation, which often turned into endless discovery charades. There was no real security, no guaranteed path to partnership, no deep firm loyalty. The rain maker was the paradigm and the firm was often just a series of franchises licensed to use the firm name.

As the hour grew late, the debate waxed hot and heavy. Finally, Diana, who had been silent, asked for the floor and said, "Some of us are very happy with what we're doing, but that doesn't mean that things can't improve. And others want out, to find other ways of practicing law. I have an idea. Isn't this the time, in view of the Dean's speech, to put principle to work? We've all been lucky. We've been paid well the past five years, enough to break the back of our debts. I suggest that we spend the next five years going our separate ways, doing what we can to bring our profession back to its senses, and bring the Dean back here five years from now to hear what we've done." And this is what they did.

* * *

Reunion, 2006. The graduating class looked exceedingly young to you and even the faculty didn't seem so elderly any more. Dean Soifer was sporting a salt and pepper beard. The group repaired to their bistro. Arnold and his big firm survivors, clearly the better dressed of the group, were eager to report.

"We've got a lot to tell you," he began. "A half dozen of us formed a sort of cabal. We got together about every month to talk about what we were doing in our various firms. Some of us are on the management committees. We've made progress in four areas. First, we're beginning to make a dent in the value system. Part time and flex time are becoming respected options, as are special counsel and permanent senior associates. Second, several of our firms are making progress toward more lasting relationships with our large clients, participating more in strategic decision making, in return for thinning out the numbers of associates assigned to their work.

"Thirdly, we've really improved quality time, time when we get together to discuss something other than the matter at hand. One of our firms sets aside 4:00 p.m. on Fridays for a quiet time to discuss books, week-end plans, Supreme Court decisions, war stories, and to hear the reflections of some of our retired elders.

Several have started to give sabbatical leaves. And, most important, we're taking a much harder line on pro bono. We've persuaded most of our seniors that pro bono is not only part of our obligation but adds to our quality of life and even makes for better lawyers. So our firms now have written pro bono policies, involve senior partners, give billable hour credit, provide training and supervision, lend associates and contribute funds to legal aid organizations. My firm even serves as a resource for Beth's group."

Beth could restrain herself no longer. "Just listen to this," she began. "We've invented a new way of delivering legal services. Ten of us got together, decided we wanted to practice good law in a small group, make an adequate living, be useful to others, and have time for life outside the law. So we fixed up some remarkable warehouse space, installed our computers, and hung out our collective shingle. Some of us job share; one is part time; and an old timer drops in several times a week. We all figured out what we would need and the time it would take to net this amount. Beyond this we seldom go, except that we all try to do three or four pro bono hours a week.

"We picked our specialties. Family, elder, and health law are all hot fields and blend together. Commercial law for small businesses, real estate, and environmental law also blend and help pay the rent. Then we have to have two or three of us able to litigate in any court. We've been lucky. Some of our smaller clients followed us when we left our big firms. Several discrimination and civil rights cases have given us healthy fees. And Arnold's firm has been a great source of help on some technical matters beyond our competence. We've even produced some alumni who have spun off to form their own similar group. We find that there's a great middle class out there willing to pay our charges, which don't reflect billable hours so much as results."

Beth's report gave rise to much discussion. Finally, however, Caleb chimed in, rather shamefacedly. He said, "Well, I can't say that I did anything earthshaking. I didn't begin to turn big firms around and I certainly didn't invent a new kind of law firm. I joined a firm of twenty-five lawyers in a fairly small city. Much of my own practice takes me into local district court. I found that this is where the action is for most people. Particularly for divorce, child support, custody, child abuse, domestic violence, and paternity cases—the family law explosion. And I saw that so many came in to court without lawyers without a ghost of an idea where to go, what forms to fill out, what procedures to follow. So the idea came to me that if only these folk had some human being to explain the procedures and walk them through the forms, they wouldn't have to wait hours to bother the judge, they wouldn't have to come back repeatedly, and they'd not leave, disgusted with the system. Who better to help them than knowledgeable legal secretaries and paralegals, who know more about this field than we do anyway? So that's what we've done. We've persuaded firms in the city to give their secretaries two mornings a month so they can hold regular office hours at district court. They have given hundreds of these litigants real access to court, to the immense relief of the judges."

* * *

By this time it was very late at night. The Dean had listened intently to all the discussion. He was visibly moved, obviously proud, his eyes shining. "What a

group,” he was thinking. But then he checked himself. This was no time for too much self-congratulation. This is what he said:

This is terrific. It is far more than I could have hoped. But what about the world beyond your offices—the fifth of our people at or near poverty level?

One basic fact you have established—your credentials. Now you can lobby your governors and state legislators, some of whom are your classmates. You can lobby your Congressmen and your Senators. You can testify—with the authority that comes from doing all you can to involve your fellow lawyers.

Soon, if not now, you can lead the biggest march on Washington since Martin Luther King told of his dream.

And you resolved to do just that. I can hardly wait to hear your report at your fifteenth reunion.

IV. TRIBUTES TO OTHERS

Judge Coffin was as much acclaimed for his wit and grace in introducing a keynote speaker as he was for delivering featured speeches themselves. Indeed, his opening acts were reason enough to attend a program or lecture, and more than one speaker noted the challenge of following him to the podium. Even these prefatory remarks were carefully researched and written, and they at times also were cast in his characteristic fictional style. The Judge had a recurring role as introducer for the annual Frank M. Coffin Lecture on Law and Public Service, sponsored by the University of Maine School of Law, and he routinely captivated his audiences with his well-chosen words. The last of those introductions, of Dean Kurt L. Schmoke of Howard Law School, took place in October 2009, a month before Judge Coffin’s final illness. As usual, his research had unearthed a gem to share, and his delight was palpable as he revealed to his audience the surprising link between Maine and Howard University. Those remarks are reproduced below, along with his Coffin Lecture introduction of Justice Ruth Bader Ginsburg and an introduction of Massachusetts Representative Barney Frank at a 1985 meeting of the Maine State Bar Association. Also included is an excerpt of Judge Coffin’s remarks at the unveiling of Justice Stephen Breyer’s portrait in the First Circuit.

INTRODUCTION OF DEAN KURT L. SCHMOKE

Seventeenth Frank M. Coffin Lecture on Law and Public Service
October 23, 2009

It is a single pleasure—indeed it is a double pleasure to welcome Dean Schmoke to this platform as our seventeenth Coffin Lecturer. He is a real, live, walking paradigm of a life devoted to law and public service.

As you have heard, a life beginning at some excellent institutions of learning, followed by entry into the “real world” of practice in law firms, and service at several levels of government—an exposure to White House policy making, the nitty gritty work of a state prosecutor, climaxed by a dozen years as the battle-tested Mayor of Baltimore. Finally, a return to academia as Dean of Howard Law School, a venerable institution known for its historical commitment to civil rights and fighting discrimination in all its forms. At present, Howard and the U. Maine

Law School have already exchanged professors, and Dean Schmoke and Dean Pitegoff are exploring the possibilities of widening their collaboration still more to benefit both schools and the legal profession.

If this happens, a second link will have to be forged. You will recall that I began these remarks by saying that it was a double pleasure to welcome Dean Schmoke. This is where my second pleasure comes in. Let me share my secret.

This past week has seen two notable anniversaries, one celebrated, the other only now to be mentioned. Last Saturday, the 24th of October, 2009, according to Google, Howard Law School celebrated its one hundred fortieth anniversary. Last Monday, October 26, 2009, was the one hundredth anniversary of the death of a Mainer born in Leeds, named Oliver Otis Howard. He attended both Monmouth Academy and North Yarmouth. He graduated from Bowdoin in 1850, went on to West Point, and later volunteered for the Union army in the Third Maine Regiment.

By the time of the first battle of Bull Run he was a Brigadier General. At Seven Pines he lost an arm, but survived to fight in many other battles, rising to the rank of Major General. At the end of the war, President Andrew Johnson appointed him head of the Freedman's Bureau to serve during the stormy days of Reconstruction. It was in this capacity that General Howard first became involved in the events that led to the creation of Howard Law School's parent, Howard University.

In late 1866, a series of meetings took place among religiously motivated people in Washington. In November of 1866 a meeting was held to explore ways to train freedmen for the ministry. In December, at another meeting a proposal was made that a teacher training institution be formed with the name, the Howard Theological Seminary. General Howard vetoed the idea. Though himself a stout member of a church, he was devoted to keeping any new educational establishment free from sectarianism. The concept of such an establishment soon changed. In January of 1867, Senator Wilson of Massachusetts, who had attended the December meeting, introduced a bill in Congress. Remarkably, the bill found itself on a very fast track and became law in early March.

The charter was for a university which had broadened its graduate offerings to include law, agriculture, and medicine. Its aim was simply "the education of youth in the liberal arts and sciences." No race or sex differentiation was made. The entering class of six students had their instruction at faculty homes. General Howard and another man had undertaken to guarantee payment for the land that had been acquired for the university. A Reverend Boynton served briefly as the university's first president, but in 1869 Howard accepted the position and held it for fifteen years. In addition to helping eliminate sectarianism, he constantly raised money year after year, and even endowed a chair in the law school. His home, the Oliver Otis Howard House, a three story brick building with Mansard roof and magisterial tower, still stands on Howard's campus. He even went so far as to write Queen Victoria, asking for funds. I would love to see her answer, but nothing has been unearthed.

There was one difficulty which might possibly go down hard with today's students. After all, Howard had been a general. In the interests of health, neatness, and discipline, students had to go to reveille, march to classes, salute, go to roll calls and inspections. Somehow, these practices disappeared after he left.

Now, Dean Schmoke, you can understand why we are doubly glad to have you here in Maine.

*INTRODUCTION OF THE HONORABLE RUTH BADER
GINSBURG*

Eighth Frank M. Coffin Lecture on Law and Public Service
November 22, 1999

In the year 1872, the United States Supreme Court considered a case from Illinois. One Myra Bradwell had made so bold as to apply for a license to practice law, having passed all examinations. The Illinois Supreme Court had turned her down, reasoning that the state legislature had recognized “the axiomatic truth” that God had charged only men “to make, apply, and execute the laws.” The Supreme Court deferred to that view, but Justice Bradley went further. He opined that not only the civil law over the centuries but “nature herself” decreed that “the natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.” Strangely, the Chief Justice, Salmon Chase, dissented but did not favor us with his reasoning.

Almost exactly one hundred years later, in 1971, Ruth Bader Ginsburg founded the American Civil Liberties Union’s Women’s Rights Project, and in 1972 became the first tenured female professor at Columbia Law School, where she taught a seminar in conjunction with the Project. She went on to argue in the Supreme Court six key gender rights cases in the following decade, winning six of them. She filed amicus briefs in fifteen other cases.

In 1985, Erwin Griswold, long time Dean of Harvard Law School and former Solicitor General, speaking on the occasion of the fiftieth anniversary of the Supreme Court building, singled out as leading public issue advocates before the Court Thurgood Marshall and Ruth Bader Ginsburg. It was highly appropriate, therefore, that, this past summer, Justice Ginsburg became the first woman to receive the Thurgood Marshall Award from the American Bar Association.

Such a record makes Justice Ginsburg one of the rare individuals to come to the Supreme Court not with just a solid record of professional achievement, but with a record that had, without more, earned a prominent place in the history of our times. Happily, her story goes on. Far be it for me to try to encapsulate her style and genius. One can get some idea of her formidable intellectual firepower from knowing that she co-wrote a text on Swedish Civil Procedure . . . in Swedish. There is also the judgment of the Justice’s daughter Jane that her cardinal objective is always “to keep sight of the individuals whose plight gives rise to the question of principle.” And we can rely on the Justice’s own appraisal, borrowing from the example of Thurgood Marshall and the words of Benjamin Cardozo: “Justice is not to be taken by storm. She is to be wooed by slow advances.”

Finally, I must reveal to you that the Justice has a secret weapon, illustrating the not-so-ancient truth that behind many a successful woman stands a sensitive and stalwart man. So tonight we pay tribute not only to the Justice but to an outstanding lawyer and ever supportive husband, Martin Ginsburg.

In this unfolding term of the Supreme Court, the Justices will face basic

questions about what has been called “a continuing revolution in the making”—the nature of our federalism, the reach of state sovereignty; they will also deal with First Amendment issues centering on campaign finance, religion in schools, speech on college campuses; and they will further examine the scope of habeas corpus relief.

How will our Justice approach these? Listen to her closing words in accepting the Thurgood Marshall Award:

In the next century, may the Constitution Thurgood Marshall celebrated continue to evolve. May the nation’s motto, *E Pluribus Unum*, of many, one, become not simply aspirational, but real. May we build and keep our communities places where we tolerate, even celebrate, our differences, while pulling together for the common good.

I can think of no theme that more faithfully captures the underlying spirit of this lecture series than the title of tonight’s lecture—*In Pursuit of the Public Good: Lawyers Who Care*—nor anyone more qualified by achievement, competence, and commitment to give it than Justice Ginsburg. To add a personal footnote, I am today celebrating the beginning of my thirty-fifth year as a United States Circuit Judge. I could not possibly have a happier excuse to celebrate than this occasion.

Justice Ginsburg, that you have made the effort to be with us tonight is a gift that all of us in Maine will ever cherish. I have the signal honor to present the Honorable Ruth Bader Ginsburg, Justice of the Supreme Court of the United States.

INTRODUCTION OF REPRESENTATIVE BARNEY FRANK

Maine State Bar Association, Portland, Maine

January 25, 1985

You won’t believe the time I have spent in trying to come up with a suitable introduction for our speaker. I have dug into my files and come up with phrases like “man of the people,” a “man for the times,” or one for the future, or the great but overused “man for all seasons.” The trouble was that if I seriously tried any of these customary gambits, I feared that both the speaker and I would disgrace ourselves laughing. Finally, I’m sorry to report, I gave it up as impossible.

Instead, I shall content myself with reading a passage from an unauthorized version of Plato’s *Republic*. This is a bit classier than the last time I spoke to you, when I pirated from Boccaccio’s *Decameron*. The following is a little known extract found in the charred remains of the great Alexandrian Library after the fanatical bishop Theophilus burned it to excise all pagan literature. This is a snatch of dialogue between Socrates and Glaucon.

Socrates has, you will recall, discerned that a state should reflect the compartmentalized talents of its citizens: those endowed with the golden quality of command shall be the guardians; those with the silver virtues of will and courage shall be the warriors or auxiliaries; and those with the humbler qualities of brass and iron shall be the tradesmen. Then he says in the fifth book: “Until philosophers are kings, or the kings and princes of this world have the spirit and power of philosophy . . . then only will this our State have a possibility of life and behold the light of day.”

Reflecting on this later, Glaucon comments, “Socrates, such a state would possess temperance, courage, wisdom, and justice. Surely this is the perfect Republic.”

Socrates: As you talk, Glaucon, do you sense something missing?

Glaucon: Socrates, how could there be? You’ve taken hundreds of pages to reach this point.

Socrates: There is never an end to tampering with the proper organization of society. No, Glaucon, what you describe is a very dull State. And once dullness infects a Commonwealth, citizens and guardians alike lose interest, and once interest goes, wisdom follows. What I have neglected to provide for is the spark of interest, of humor, of the outrageous, that is to say, the guaranty of humility, the key to wisdom.

Glaucon: How do you propose, then, that this spark, as you call it, be supplied?

Socrates: Let us begin by choosing a most unlikely prospect for a guardian, so that he shall always be aware of the irony. Let him at the start be pleasingly plump and comfortable, even sloppy, to look at. This will appeal to the brass and iron tradesmen class. Then let him demonstrate the warrior’s silver virtue of willpower by achieving a more slender if not elegant figure. Finally, let him have a passion for justice, common sense, a sense of the ridiculous, and the ability to speak quickly, succinctly, and memorably.

Glaucon: What kind of training would you prescribe for such a person?

Socrates: I would first have him plunge into the waters of governance by appealing for the support of a small cross section of the larger State. Let him represent a suburb of Athens near Piraeus on the Aegean, what we might call a Back Bay, where cluster the poor and rich, laborer and intellectual, African, Asian, and Greek, but all with their wits sharpened by all the bustle. Let him then try to serve their interests and those of the body politic in our local legislature on that hill that shines like either a Beacon or a dead mackerel, where the squalid and the admirable mix in equal parts.

Glaucon: I can see that this would supply what some of our vulgar friends would call “street smarts,” but how would he gain acceptance by the most elite of the guardians?

Socrates: Ah, Glaucon, you have made a good point. To answer it I would have him attend the most famous legal academy of the Sophists where he can match wits, imperfect syllogisms, and minute distinctions with the self styled brightest and best . . . and I would have him attain honors. And he would do this with his left hand while carrying on his legislative duties.

Glaucon: Would he now be ready for more responsibility?

Socrates: Not quite. I would subject him to the fire and brimstone of a campaign for higher office against an articulate member of the opposite sex, to sample the

fury of a woman scorned . . . a test sure to temper his steel, if it does not steal his temper.

Glaucon: After all this, does he live with laurels and contentment, and the approbation of all?

Socrates: No. He has one more test—to survive, be composed and useful when the values he prizes are imperfectly pursued and the values he opposes are deified by those more powerful than he.

Glaucon: Such a one as you describe is surely impossible to realize.

Socrates: Not completely. But there's room for only one in generations. You know what the Senate is trying to do to me. Well, like me, he's too good to last.

The Honorable Barney Frank.

*REMARKS AT THE UNVEILING OF THE PORTRAIT OF JUSTICE
STEPHEN G. BREYER*

United States Courthouse, Boston, Massachusetts
January 5, 1998

To say this is a happy occasion is to put it mildly. The felicitous custom of publicly hanging our senior members was reactivated by our institutional guardian, Judge Campbell. This is our sixth portrait, and it is not of one of our aging seniors but of the twentieth judge on our court, one of our aging juniors, who has gone on to bigger things.

This might not have happened had not our active judges realized that our wall could be made to accommodate another portrait, in fact was yearning for another portrait, and that we should strike while the Breyer was still hot. They found a willing and able accomplice, Gary Katzmann, and eventually the deed was done. We are all your debtors.

On Tuesday, December 9, 1980, at 1:30 p.m., I was lying languidly in bed with a head cold, when Judge Aldrich's secretary, Mary Sherman, called to tell me that Steve Breyer had just been confirmed by the Senate. Soon Steve called. We had a good talk, which was interrupted when Senator Kennedy, still his boss, was on the other phone.

This was a most unlikely happening. Ronald Reagan had been elected our next President. President Carter had submitted seventeen judicial nominations to the Senate. Among them was the belatedly submitted name of Stephen G. Breyer. None had a chance . . . except the Chief Counsel of the Senate Judiciary Committee who had played fair with the minority Republicans and had won the support of Senators Thurmond, Laxalt, and Hatch. Even with this support, a considerable obstacle race had ensued. But the Senate had finally done the right thing.

I wrote in my journal, "I could not be happier. Steve is so bright, likeable, not arrogant or dogmatic. Only forty-two, he is almost young enough to be my son, and will be serving the court, hopefully, for at least thirty years."

Only nine days later, Steve's induction into office took place. In retrospect, I

wonder if we worried that this was too good to be true, and that Senators would change their minds. We used Jay Skinner's courtroom, the one we are sitting in now. There were several incidents that will not find their way into the history books. Our clerk, Dana Gallup, who was to read the commission, wondered whether he should read the signature of Ted Kennedy, scrawled above that of Jimmy Carter. I assured him that this was, technically, but not in the real world, surplusage.

Then I administered the oath, misdescribing the position as "United States Court Circuit Judge." But nobody complained. Steve then donned a robe belonging to Lee Campbell, and came to the bench. Senator Kennedy, who had run for President earlier in the year, opined that he never had entertained any doubt about Steve's confirmation, since he had been assured by the same pundits who had predicted his own Democratic nomination for the Presidency. Dean Sacks of the Harvard Law School conveyed the idea that that institution was facing the crisis of its life in living without Steve, full time.

Well, he joined our court, making it a court of four judges. Now—joy, oh joy—we could have en bancs. He served with us for nearly fourteen years. I cannot hope in a few minutes to do a decent job of summarizing what he meant to our court. I shall content myself with saying something about Judge Breyer's style, his opinions, his persona, his intuitive feel of the nexus between the majesty of law and the use of space, and his intellectual legacy to us.

First, his style. He was a consensus searcher. He was always pained, initially, with the prospect that there might be disagreement. He would accept disagreement, but only after all avenues leading toward agreement had been pursued.

Aiding him in finding the seeds of consensus was a formidable equipment—an exhaustive preparation, a penetrating analysis enriched by imaginative analogies, a unique capacity for instant organizing and articulating the pros and cons of all issues, and a ceaseless curiosity and openness to new thoughts.

Second, his opinions. This is not the occasion to attempt a summary of his contributions to the law as a circuit judge. In administrative law, in antitrust law, and in the sensitive and discriminating use of legislative history, among other fields, his opinions were enduring both within and beyond our circuit. But whether an opinion was cutting edge or not, it always was refreshingly clear and readable. And it would have no footnotes. Finally, Judge and then Chief Judge Breyer went out of his way to write opinions in Puerto Rico diversity cases that were sensitive and faithful to the civil law as proclaimed by the Supreme Court of Puerto Rico, and the commentators it respected.

A third bequest of his time with us: his persona. Judge Breyer had a Promethean energy. This enabled him somehow to carry his load of cases, perform his administrative duties as Chief, break in the new Sentencing Commission, teach at Harvard Law School, keep current his and Richard Stewart's popular casebook on administrative law, give talks and seminars here and abroad, and write and deliver a deeply insightful and provocative Holmes Lecture on the concept of effective risk regulation. What made this prodigious productivity acceptable to the rest of us, was his constant sense of the ridiculous and his self-deprecating sense of humor, not to mention a humanizing absentmindedness and bumbling impracticality about such things as fixing boilers, opening oysters, and avoiding

collision while riding a bicycle.

A fourth legacy is one we have not yet begun to appreciate in the fullest sense—his consuming dedication to obtaining a new courthouse and making it both a living monument to the dignity of our justice-seeking profession and one which will be accessible to and cherished by the people for whom the pursuit of justice exists.

Finally, I believe his greatest intellectual legacy to us is his resilient and persistent faith that our institutions, given diligent attention, sensitive maintenance and occasional fine tuning, provide a remarkably workable framework for carrying out the aspirations and dictates of our Constitution.

Our story stops as of August 3, 1994, when Judge Breyer became Justice Breyer. We almost lost him a year earlier when the President, after an agonizing period, finally nominated Judge Ruth Bader Ginsburg. I wrote Steve that perhaps his most shining moment was when he so gracefully commented that Judge Ginsburg was “a good pick.” The rejoinder was vintage Breyer: “It wasn’t that difficult to say that Ruth was a good pick—occasionally, I can try to be objective!”

What makes today’s occasion a uniquely happy event is that we are celebrating a former member in mid-career. We have noted the hallmarks of his fourteen years as a member of a lower federal court, where all of us are ever mindful of the written and unwritten rules, practices, principles, and protocols that channel and constrain our judgments. Now he has begun his service on the High Court where occasionally he will face issues where time has made ancient good uncouth and new law must be wisely fashioned. Moreover, he will face some issues where the crying need is somehow to harmonize views that appear disparate, and others where the need is leadership in developing new views. And the trick will be to know which issues fit each need.

I stand in awe as I contemplate the challenges and opportunities to be faced by the Supreme Court during the first two decades of the next century and millennium. For Justice Breyer will be only eighty-two in 2020. When the time comes to hang his portrait in the Supreme Court, I look forward to hearing how splendidly all of this has worked out. Then I shall drop in on Bailey Aldrich in his chambers and we shall comment about how gracefully Steve has aged.

V. SPEAKING THROUGH FABLE AND FICTION

One of the most identifiable characteristics of Judge Coffin’s speechmaking was his regular resort to fantasy or fable—a device that played a “prominent” and increasing role through the years.⁹ He explained in his *Memoirs* his “belief that some things could be better discussed and dramatized, with less likelihood of boring my audience,” if presented creatively.¹⁰ The style began well before he became a judge. Judge Coffin recounts the time when he first went to Congress and spoke at the Jefferson-Jackson Day Dinner, claiming to have found a letter written by Thomas Jefferson. It was, he thought, “a perfect vehicle to carry my views about the needs and goals of the Democratic Party.”¹¹ He recalled being

9. MEMOIRS 3, *supra* note 1, at 209.

10. *Id.*

11. *Id.*

both “astonished and flattered” when an AP reporter contacted him the next day to find out where he could examine the letter. Those who knew him can see the familiar twinkle that must have been in his eye when he wrote the following words in his *Memoirs*: “Some might feel I sometimes invent too much.”¹²

The fable that marked the beginning of his more regular use of fiction was *Gullible’s Travails*, which was delivered at Northeastern University in 1983.¹³ Drawing on Jonathan Swift’s 1726 *Gulliver’s Travels*, the speech took a descendant of Gulliver—prospective lawyer “Gullible”—fifty years into the future to examine different ways to engage in the practice of law. Gullible happily discovered that he could choose a path that would allow him to become “a complete lawyer, practice a learned profession that helped real people, and enjoy doing it.”¹⁴

As with Gullible’s tale, the Judge occasionally modeled his remarks on a well known piece of literature, and he also used significant historical events for background context. He often “discovered” the wisdom of the present in the past. Particularly remarkable about this category of his oratory is that such presentations effectively required a second layer of work beyond the task of coherently presenting a topic of substance. Although Judge Coffin was familiar with a wide range of literature and history, the level of detail in his creative adaptations reflects close review of the original works or other research materials in preparation for writing. The Coffin collection of speechmaking fiction includes one based on Boccaccio’s *The Decameron*,¹⁵ one adapting a portion of the Book of Exodus,¹⁶

12. *Id.*

13. Judge Coffin quoted a portion of this speech when he spoke less than a month later to the Androscoggin County Bar. The Bar speech, including the *Gullible* excerpt, is reproduced in Part III above. The *Gullible* speech was later published in the Journal of Legal Education. Frank M. Coffin, *Gullible’s Travails: A Prospective Law Student Visits Brobdingnag, a Professional Corporation*, 34 J. LEGAL EDUC. 1 (1984).

14. MEMOIRS 3, *supra* note 1, at 209.

15. The speech, titled *In Search of Shangri-Law*, was presented in 1984 at a meeting of the Maine Bar devoted to exploring the future of the legal profession. In his *Memoirs*, Judge Coffin explains that the concern he wished to address, as in the *Gullible* speech a year earlier, was the quality of life for lawyers. He explained as follows his variation on *The Decameron*, in which a group of young people in Florence sought to escape the plague by moving to the country, where they entertained each other with stories: “[M]y stories were of ‘Megalawpolis’ and its snares. The final story, of course, was of a firm of trusting and dedicated folk practicing good law, with time for pro bono effort and community service, and living enjoyable lives.” *Id.* at 210.

16. He gave the “Biblical” talk in 1996 to new Ninth Circuit law clerks and their judges. He described the speech in his *Memoirs* as follows:

I took as my text that part of the Book of Exodus in the Old Testament in which Moses’s father-in-law, Jethro, advises him not to wear himself out trying to settle all disputes, but to choose capable men to help out, at least in the simple cases. They were to constitute a permanent court of officials presiding over tens, hundreds, and thousands of others. I then revealed that I had deciphered from a crumbling potsherd the following verse, describing the origin of law clerks—one of the “not only little known but nonexistent shards of history”:

And for the rulers of thousands and rulers of hundreds, that they may bear the burden, thou shalt select from the youth of the land those of pure hearts and luminous minds who shall be to the rulers as a spring of cold water to the parched traveler.

Id.

and an account of the recent discovery, near Pompeii, of a pottery urn that contained a letter from Pliny the Younger. In the letter, Pliny asked his father to petition the Emperor Vespasian “to restore dignity, modesty, honesty, and service to a degraded cadre of—to quote Aristophanes in ‘The Clouds’—‘double-dealing, lethal-tongued legal eagles.’”¹⁷ The last of those, titled *A Scroll from the Ashes*,¹⁸ was the commencement speech delivered to the University of Maine School of Law in 1990. It is reproduced below, followed by a fable titled *What It Means to be a Federal Appellate Judge* that was presented in 1993 at a luncheon for newly appointed circuit judges.

A SCROLL FROM THE ASHES

Commencement Address, University of Maine School of Law
May 12, 1990

I must begin with an apology. First, however, I congratulate this class of 1990, the families who did so much to make this day possible, and the faculty, who provided the finishing touches. I also pay a special tribute to Dean Wroth who, in his own wise, gentle, droll way, will leave a good school even better for his deanship. This, however, has taken only two sentences. And I have no commencement speech to give. A commencement speech is like the oversized, gas guzzling automobile; nothing good to be said of it, yet it continues to flourish. But I have yet to meet any lawyer who has the faintest memory of what was said at graduation.

So I hope you will excuse me from that labor. Instead, I want to share with you a recent intriguing archaeological discovery. I accompany this with the usual disclaimer appropriate to any such excursion into antiquity: fact is fact and fancy is fancy—and ever the twain shall meet. But I do want you to know that, as a writer of judicial opinions, I am meticulous in having my quotes cite checked.

The discovery of which I speak took place near one of the great treasure houses of all time, the modest city of Pompeii, Italy, where, because of the eruption of Mt. Vesuvius on August 24, 79 A.D., over 3700 dwellings and their contents were partially preserved for posterity. What now claims our attention is a ceramic urn containing a parchment scroll. It was actually unearthed not at Pompeii, but at Stabiae, four miles south of Pompeii on the shore of the Bay of Naples.

On the urn being opened, a note was revealed attached to the parchment document. It was from Caius Plinius Caecilius Secundus to Caius Plinius Secundus. In short other words it was from Pliny the Younger to his uncle, Pliny the Elder. Pliny the Elder was in all respects a formidable leading citizen of Rome. He was a lawyer, soldier, administrator under Emperor Vespasian, scholar, author of some thirty-seven books, and, to quote his nephew, the fortunate man “to whom the gods have granted [both] the power . . . to do something which is worth recording [and] to write what is worth reading . . .” His nephew attributed his many accomplishments to rising at 2:00 a.m. to begin his day of reading and

17. *Id.* at 210-11.

18. Later “historical” accounts such as this were known in Judge Coffin’s chambers as “scroll from the ashes” talks. *Id.* at 210.

writing and, while bathing, insisting on being read to.

It is well known that Pliny the Elder died at Stabiae, during the eruption of Vesuvius. He was then in charge of the western Roman fleet on the northern side of the Bay of Naples and sailed to Stabiae in the south in what proved to be a vain rescue attempt of friends who lived there. He was overcome by smoke and fumes and died at the foot of Vesuvius on the shore near his friend's villa. The urn was discovered under some ten feet of lava.

It seems that Pliny the Younger, a very considerable lawyer in his own right, had been involved in a consortium of young men among the growing class of lawyers. The oldest component was the *juris prudenti*, those wise in the law, the scholars. Then there were the *advocati*, those literally summoned to one's side, people who wrote speeches for their clients. Finally, the new class, the *causa dici*, the speakers of cases, who were actually allowed to speak for their clients. The consortium group was deeply worried about their common profession. The parchment was their report, which they hoped their esteemed Pliny the Elder would not only read but forward to Emperor Vespasian for action.

I now shall read a translation of their report on the Future of the Legal Profession in Rome, entitled: *Lex Romanorum: Whither Goest Thou?*

This Consortium of the Future of Roman Law hereby reports its findings and, through the good offices of Caius Plinius Secundus, commonly called "The Elder," submits them to His Imperial Excellency, Vespasian.

1. History teaches us that a learned and noble profession must be ever alert to evidences of its decline. How acutely aware are we of the swift descent of the rhetores of Greece, from the Olympian heights of Demosthenes to the fetid swamps of Aristophanes' typical lawyer as sketched in *The Clouds*: a "lawbook of legs, who can snoop like a beagle, a double-faced, lethal-tongued legal eagle." "[I]f you pay them well, they can teach you how to win your case—whether you're in the right or not."

2. We accordingly took great pride in the restoration of the profession of noble advocacy under Rome, particularly in these shining days of Your Excellency's reign. Our especial jewel is your own appointed state professor of rhetoric, occupying the first endowed law chair in history, Quintilian. He it was, in his *Education of the Advocate*, who advised, "When the advocate has exercised sufficient patience in listening to the client, he must then assume another character, and act the part of the adversary The client must be questioned sharply and pressed hard [Then] let him put himself in the place of the judge . . . and whatever arguments would move him most if he really had to give judgment . . . , let him suppose that those arguments will have most effect upon any judge Thus the result will seldom disappoint him; or, if it does, it will be the fault of the judge." After stressing the foundations of an irresistible sincerity of speech, namely, integrity of conduct and nobility of spirit, and the hard training of writing with care, he concluded, "I trust that no one among my readers would think of calculating its monetary value."

3. Alas, it has been easier to master Quintilian's skills than the spirit he would inculcate. The very peak of justifiable pride was expressed by the Gaul Marcus Afer, a distinguished leader of the bar. Tacitus, in his work, *The Status of Advocates*, quotes him as saying:

[The days on which I donned the robe of a senator or was elected tribune] have been in no greater degree red-letter days for me than those of which I enjoy the opportunity . . . of securing an acquittal in a criminal trial, or of pleading some case successfully before the centumviral court, or of undertaking the defense of some redoubtable freedman or imperial agent in the emperor's presence-chamber. Then it is that I feel I am rising above the level of a tribune, a praetor, or even a consul, and that I possess an asset which . . . cannot either be conferred by letters-patent or follow in the train of popular favor.

But even this pride, based on talent, hard work, and service for rich and poor alike in the interest of justice, takes such an advocate as Marcus to the edge of arrogance. Here, from his pinnacle of persuasive power, he boasts:

Can vast wealth or great power bring with it any satisfaction comparable to the sight of grave and reverend seniors, men with the whole world at their feet, freely owning that, though in circumstances of the utmost affluence, they lack the greatest gift of all? Just look, again, at the imposing retinue of clients that follow you when you leave your house! What a brave show you make out-of-doors! . . . Are there any whose names are dinned at an earlier age by parents into their children's ears? . . . What class of men enjoys greater prestige here in Rome?

4. After the Marcus Afers of the Bar, arrogance and the pursuit of money have taken center stage, pushing aside the original goal—the pursuit of Justice. No longer could those of modest means or no means at all hope to have access to competent lawyers, courts, and Justice itself. Your Consortium presents the following Catalogue of Degradation compiled from contemporary observers:

Item – Martial notes the frequent connection between high fees and buying verdicts in this couplet:

With a judge to pay off and a lawyer to pay, Settle the debt's my advice;
much cheaper that way.

Item – Tacitus is even stronger: “The most salable item in the public market is lawyers' crookedness.” And another: “Pretend you purposely murdered your mother; they'll promise their extensive special delvings in the law will get you off—if they think you have money.”

Item – Here is Juvenal's assessment: “It's the stylish clothes that sells the lawyer. No one would give even Cicero a case if he didn't wear a ring gleaming with an oversize diamond. The first thing a client looks for is whether you have behind you eight flunkies, ten hangers-on and a sedan-chair and, in front of you, a crowd of the well-dressed.”

Item – In a recent trial observed by one of us, Pliny the Younger, the tribune Nigrinus read a well-phrased statement complaining that “counsel sold their services, faked lawsuits for money, settled them by collusion, and made a boast of the large regular income to be made by robbery of their fellow citizens.”

Item – To curb such robbery, the praetor Nepos issued his well known edict banning the buying and selling of counsels' services but, after a case is

settled, allowing a client to give counsel a sum not exceeding 10,000 sesterces. Yet we have heard how easily this is evaded; all know of the lawyer in this very reign who amassed a fortune of 300,000,000 sesterces.

Item – Our colleague Pliny the Younger describes the state of the profession today:

Audiences follow who are no better than the speakers, being hired and bought for the occasion. They parley with the contractor, take the gifts offered on the floor of the court as openly as they would at a dinner party, and move on from case to case for the same sort of pay. The Greek name for them means “bravo-callers” and the Latin “dinner-clappers”; witty enough, but both names expose a scandal which increases daily That is all it costs you to have your eloquence acclaimed.

5. Both the top and the bottom of Roman society suffer from this sorry state of the profession. Those citizens presently served by lawyers—the wealthy, the well born, and the powerful—can no longer count on having their causes justly decided. They must settle for buying victory if they can afford the price. And, the practice of law now being just another commercial enterprise, those emerging from its top ranks to take positions as quaestors, praetors, tribunes, and magistrates cannot be expected to exemplify the qualities of integrity of conduct and nobility of spirit which Quintilian strove so hard to preserve.

6. But beyond the wealthy, the well born, and the powerful, there is a wider impact of far more ominous portent for Rome. Everything that we have documented shows that the day has long passed when the freedman, the artisan, the shopkeeper, the laborer in the field and vineyard would expect to have the services of an able advocate. All that the vast and growing poor—and even the once mighty middle class itself—can hope for is access to the few able attorneys who are willing to be derided for their embarrassing lack of financial success, as described by Juvenal:

Their honors take their seats and you, you undernourished champion, rise to speak your piece What fee does that voice of yours command? A measly chunk of pork, a pot of fish fry, the overage onions they issue as slave’s rations and five jugs of rotgut wine.

What irony that under Roman rule the most exquisite body of jurisprudence has developed that the world has ever seen. The Forum proudly displays our principal laws in tablets of enduring bronze. The Capitoline Hill library houses three thousand more bronze plates. Our *juris prudens*, our scholars, are preeminent in their learning and sage counsel. But gone are the days when the leading *jurisconsults* could be seen walking in the Forum ready to give needful advice to the meanest of their fellow citizens. We have the most elegant courts of justice, our spacious Basilicas, no fewer than twenty in Rome alone. But their doors are closed to the miserable peasant or freedman, except when he is hauled there, in chains, often on some trumped up charge, and promptly sent off to be fed to the lions in the weekly blood baths at the Coliseum.

You, our respected Vespasian, have given us a gentle and benign reign. Neither you nor we will live to taste the bitter fruit now growing on the shriveled, tainted tree of the lawyer's profession. But the day may well come when the Roman citizen will have lost all civic sense, all sense of sharing or participation in the polity of Rome, all access to its heralded system of justice, all sense of community, of pride, of fealty. Should that fell day arrive, Oh Emperor, it will have come in no small part because the future of that once noble profession was left too long untended.

* * *

At the end of this document, in shakily written script, were these words:

This comes too late. I fear we cannot escape. The wind blows against us. We cannot sail away. The fumes come closer. I can hardly breathe. I bury this in the hope that some day, somewhere, someone will read this . . . and act on it.

Signed, P –

Stabiae, August 24
the tenth year of Vespasian

*WHAT IT MEANS TO BE A FEDERAL APPELLATE JUDGE –
A FABLE*

Address to Luncheon for Newer Judges
National Workshop for Appellate Judges, Washington D.C.
February 8, 1993

In an introductory note, Judge Coffin explained that he was unable to lecture his peers with a straight face, and so read the accompanying fable that he claimed to have found in “an odd volume of anonymous writings which he purchased at a second hand book store.”

Alex's Quest

Once upon a time, a young middle-aged lawyer, called Alex (short for *Advocatus Lex*), was approached by a judicial selection committee and asked if he would be interested in candidacy for an appellate judgeship. Alex confessed that he had never thought about it and in fact knew very little about the job, what it requires, what it gives, the benefits and burdens, in short, what it means to be an appellate judge.

So, he set forth to find out. He first went to the fount of all knowledge, one of his old law professors. The professor was clearly unenthusiastic, saying, “Oh Alex, I'm really disappointed. I had such high hopes for you. I always thought you were bright enough to teach. But I suppose judging is useful, so long as you don't become bored with such pedestrian work.”

Shaken a bit, the pilgrim next consulted a community leader—an editor of an important publication. What could he say about being an appellate judge? Long pause, then, “Well. The only ones I know anything about are Holmes, Hand, and Cardozo. The reason I remember them is their pithy epigrams and elegant prose. I

don't know a thing about what they decided, but, man, could they write!"

Not feeling helped by this footnote to fame, Alex called on the local civil liberties activist. This worthy was quick to respond. "Appellate judge? Wonderful. Go for it. We have too few good ones. They are in a position, if only they have the will, to be a powerful force for good."

Sensing that this view might be one-sided, Alex dropped in on the crusty, long-time executive director of the local chamber of commerce. He also wasted no time and used almost the same words in responding. "Appellate judge? Wonderful. Go for it. We have too few good ones. They are in a position, if only they have the will, to bring to the law some sense of stability and coherence."

Alex, sensing some disparity in these views, next approached an average citizen. Alex could tell he was an average citizen because he was wearing a shirt with a blue collar and the cap of an always losing baseball team, and investing his hopes in his Little League try-out pitcher-son. This citizen at first had trouble in focusing on appellate judges as distinguished from judges in general. Only when Alex mentioned the Supreme Court as an example did he brighten up and say, "Oh yeah. I know who you mean. Those are the guys that let convicted criminals go scot free, hate school prayer, love abortion, and encourage flag burning."

Alex decided to leave before a crowd gathered. He thought to himself that maybe he could get more balanced views from professionals who themselves were participants in the justice system. First he talked with a friend who was a trial judge. On being told the object of Alex's quest, he frowned, then laughed as he said, "Appellate judges? Alex, my boy, those are the chaps who ride down from the hills after the battle is over and shoot the wounded. They make it an art to take months to say why what a trial judge has to decide in twenty seconds was clearly wrong."

Next on the list was the local prosecutor. His assessment: "The trouble with appellate judges is that they live in an ivory tower. They make the job of a police officer as complicated as a game of chess."

Later, from the Public Defender: "The trouble with appellate judges is that they live in an ivory tower. In case after case they overlook the most unconscionable police conduct and haul out that overworked escape hatch, 'harmless error.'"

Alex, in talking with other lawyers he knew, who had argued cases on appeal, learned from some that appellate judges wrote insufferably long and over complicated opinions but from others that they ducked their responsibility by writing short, unpublished opinions or made decisions without any reasoning at all.

Finally, Alex was interested in knowing what the other branches of government felt about appellate judges. A legislator friend fairly exploded as she fumed about the insensitivity of appellate opinions that made a mockery of legislative intent. She added, "The reason our statutes are getting longer and longer is that we have to make sure the judges do their job in keeping the executive agencies under control." Then a long-time civil servant told Alex that the big problem with appellate courts was that they were far too intrusive and tried to second guess agency decision making.

By this time, Alex felt like a Gallup pollster. He knew what others thought, but what some thought was exactly the opposite of what others thought. All,

however, had one thing in common: they were views from outside. He still had no idea of what appellate judging was like, where the frustration and pain were, or the joys and satisfactions. So he did what he should have done all along. He sought out the wisest appellate judge he knew—old Judge Sage.

When Alex entered Judge Sage's chambers, he saw the judge at the far end of an old fashioned stand-up desk . . . the quintessential image of another age. But as the judge turned to greet him, Alex saw that he had been writing, not with a quill pen, but with a lap top computer. "I like to do this standing up," said the judge. "It keeps my opinions reasonably short."

Alex explained his quest. Judge Sage thought a bit and said, "Well, first of all, you should examine yourself to see whether you'd be best and happiest as an appellate judge rather than a trial judge, because openings for that job are likely to occur also."

Alex nodded and asked, "Is there any difference between them in demands and satisfactions?" Judge Sage replied: "Oh yes, indeed. To begin, there is or should be no class distinction between trial and appellate judges. Indeed, if we had to have only one level of judges, we'd have to say that the trial judge is the more indispensable. But in truth both are indispensable. Secondly, a wise decision on this issue is largely a matter of one's tastes and talents. Some judges I have known have been superb both as a trial judge and as an appellate judge. But generally, the qualities that go to make a trial judge truly outstanding are quite different from those an excellent appellate judge must possess.

"A trial judge savors the individualism of his or her role and challenges. The judge alone is in charge of managing cases, governing the courtroom, running the trials, rendering decisions based on the reasoning that best appeals. The trial judge stands out and is judged as an individual—for alertness, quickness, soundness, knowledge of human nature, compassion, and courage. And of course the trial judge signs up for the agonizing chore of imposing sentence."

Judge Sage paused for a long moment, then said: "The calculus of demands and rewards for an appellate judge is more subtle. Individuality is of course prized. Thoroughness in preparation, brilliance in analysis, articulateness in questioning, elegance in writing are given their kudos. But the most meaningful accolade is to say of one that he believes an appellate task is well done when it is the product of a willing collegial consensus, that in arriving at consensus he has brought out the best in others, and has abided his own frustrations with tolerant good humor. For the quickness and decisiveness of a trial judge, the appellate judge must substitute patient reflection and the willingness to change one's mind. Instead of the more obvious courage required in making a decision that one knows will be unpopular with government, the media, and the public, the appellate judge's courage lies in being honest with the facts, faithful to principle, and persistent in pursuing an important issue to the point of exhaustion."

Judge Sage continued: "This is the burden of being one among several. The rewards for an appellate judge are considerable—if you have the peculiar tastes and talents required. To begin, there is the quiet quintette of appellate activities: reading, listening, discussing, thinking, and writing. If you think of these with pleasure, chances are you'll be happy on an appellate bench. Then, there is the richness of adding a dimension to your own family." Judge Sage sighed happily

and said: “I have had over seventy-five law clerks in my judicial life. They have not only kept me young in heart and on my mental toes but have become a permanent part of our extended family. The relation between a judge, particularly an appellate judge, and his clerks is one of the richest society has encouraged.

“Then there is the unique and complex relationship of an appellate judge with his colleagues. I’ve mentioned the burdens of collegiality. In these times particularly, it doesn’t always come naturally. It has to be deliberately cultivated by listening carefully, going out of one’s way to show one’s concern for another’s problems, suppressing one’s pride of authorship, yielding on non-essentials. But when judges become real colleagues, they enjoy one of the rarest of human boons—the ever ready advice and counsel of a peer who is as deeply interested as you in the integrity and excellence of your court—and is equally caring for you.”

Then Judge Sage stopped, faced Alex with a searching look, and said: “I doubt if I have said anything that has not been said many times by others. But there is one fact about appellate judging that, as I look at the world about us, seems more precious, more to be valued, than any other. The Greeks had, not a word, but a series of carefully chosen words for the good life: ‘The exercise of vital powers along lines of excellence in a life affording them scope.’ Indeed, we could add one other ingredient that goes the Greek formula one better: exercise of vital powers—lines of excellence—a life affording them scope—for the public good. Alex, you should copy these words and put them in a corner of your desk blotter or someplace where, when frustrations mount, you can read serenity back into your life.

“I say this is almost uniquely appropriate to the life and work of an appellate judge. When one looks at the pace and pressures of a legislator, particularly a U.S. Senator or Congressman, or those of a President, Governor, or high official in a department or agency, or those of a Chief Executive Officer or University President, one comes to appreciate the enviable opportunity of an appellate judge to work away at an important case long enough to reach the point where he feels he has ‘gotten it right.’ Who else, I ask you, Alex, has the luxury of having an important problem to solve, a problem which is manageable in the sense that there has to be an answer, the time and resources to put one’s best effort into the solution, and the assistance of colleagues as dedicated to finding the right solution as you are?”

Judge Sage paused and Alex got up to leave. But the old judge bade him stay a bit longer and continued: “Alex, I can see that being an appellate judge interests you. I have only one thing more to say. If by good fortune you are selected, be wary. In my forty years on the bench I have seen great changes, changes in the type of cases, an arithmetical increase in appellate judges, a geometrical increase in cases, a revolution in technology—as my stand-up desk and lap top computer testify. Despite these changes, I have felt able to give to important cases the same attention in depth that I always have.

“But, looking ahead, I am not so sure. It seems to me that, apart from being the best judge you can be, your other most solemn obligation is to try to preserve the essence of the work of appellate judges as I’ve tried to describe it to you. So these things I recommend to you:

“First, develop your judicial nose in order to distinguish the issues and cases which deserve your best attention from those where the rightness of decision does

not require elaborate writing.

“Second, teach your clerks the same sense of priority. Spend time at the beginning of their term in showing what you like and don’t like in substance and in style, then try to arrive at a relationship where your training and trust make detailed editing unnecessary. In other words, use your clerks to the best advantage.

“Third, maintain a watchful eye for what I call overburden—the taking on of obligations which, when all is said and done, are not worth the cost when measured by the time taken from the judging process. I know this may sound like heresy, but there comes a point where further involvement of time in chores of administration, in committee work and the preparation of reports, in meetings, conferences and workshops, exacts a toll in both a judge’s ability to keep on top of his essential job and his serenity in trying to do so. In short, my fear is that when judges try to achieve state of the art in everything, the judiciary will have lost its essence and become, instead, a technocracy, a very impressive one, but a technocracy.

“These, Alex, are what I call your internal protection devices. But, more than ever, what kind of judging is possible depends on people who are not judges—the lawmakers. In the substantive laws they enact and in their zeal for exercising oversight they have already changed the landscape. It is not my purpose to lament this, but only to say that as a new judge, you, unlike those of my generation, will have to find ways to develop a perceived community of interest with the legislative branch.

“And, finally, for the same reason and with the same aim of moving with the times while preserving the essence of appellate judging, your generation will be wise to consider yourself educators of and missionaries to the public. No longer, I fear, can we safely assume that people, their elected leaders, and the press automatically possess the understanding of the needs and limitations of the judiciary that is necessary if the vital essence of our work is to be preserved.”

With that, the old judge stood up. The interview was over. But not quite. His eyes brightened as he said, “But I used the word ‘wary’ not ‘worry.’ If you are appointed, be prepared to enjoy. It’s still the best job in the world.”

And he turned back to his stand-up desk. As Alex took his leave, he heard the old judge singing, slightly off key, “When the saints go marching in.” He could just make out the words, “I want to be one of their number.”

VI. EPILOGUE

In his daily journal entry for November 6, 2009, Judge Coffin reported that he had driven that day to the federal courthouse for the first time since he had fully retired in September 2006. He and his wife, Ruth, were at the courthouse to attend a presentation of a portrait of Judge John Clifford—the judge for whom new law graduate Frank Coffin had clerked six decades earlier. Judge Coffin had been asked to speak at the ceremony, and he reported in his journal that he had delivered “personal memories.” It was an intimate event, with many members of Judge Clifford’s extended family present, and Judge Coffin described it as “a warm time.” He also evidently saw the ceremony as the perfect occasion for closing the book on one aspect of his life’s work. His journal entry concludes with a simple statement: “Now no more pub. speaking.”

Without a doubt, that declaration would have come under pressure if Judge Coffin had not suffered an ultimately fatal aneurysm just two weeks later. He was right, though, that “more” was unnecessary. The Judge already had given us a rich legacy of speeches that will provide inspiration for generations to come.