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On Appeal: Courts, Lawyering, and Judging

Richard L. O'Meara

BOOK REVIEW

ON APPEAL: COURTS, LAWYERING, AND JUDGING
by Frank M. Coffin
(New York: W. W. Norton & Company, 1994; pp. 373, $27.50)

*Reviewed by Richard L. O'Meara**

If one were to ask the members of the Maine legal community to define the term "judicial temperament," many would answer the question simply by referring to Frank Coffin.[1] Judge Coffin's newest book, *On Appeal: Courts, Lawyering, and Judging*, illustrates why the Judge has earned such overwhelming respect.[2] This highly personal work permits readers a glimpse "behind the scenes" at the judicial life of a man who has forged a highly successful career of public service marked by sensitive, fair, and well-reasoned decision-making and by good-humored, collegial relationships with all of his colleagues in the legal community and beyond.

It is no coincidence that *On Appeal* is the work product of a man who is renowned as a craftsman of both persuasive judicial opinions and lifelike sculpture and art. The Judge already has proved himself to be a master of design and execution, and the structure and grace of *On Appeal* serve to make it yet another example of his artistry. The book is organized into fifteen tight, subdivided chapters that follow a meticulously logical outline, a Coffin trademark. It makes its points emphatically, but with the gentle and refined style that has distinguished the Judge's opinions throughout his career on the bench. While its insights, drawn from the Judge's nearly three decades of experience on the federal appellate bench, are often brilliant, it is not surprising given the author that *On Appeal* is characterized by humility rather than ego.

On Appeal begins by tracing the roots of the American appellate tradition, comparing and contrasting it with the English and civil law traditions. It then moves briskly into a description of the American appellate system in a chapter that draws its subtitle, "One Whole,"[3] from Alexander Hamilton's integrated vision of the federal and state court systems in *The Federalist*, No. 82. This chapter is peppered with statistics to impress upon the reader the relative enormity of the state appellate court system when compared to its federal counterpart. It also highlights the promise of state constitu-

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* Director, Murray, Plumb & Murray, Portland, Maine; B.A., Dartmouth College, 1982; M.Sc., London School of Economics, 1983; J.D., University of Virginia, 1986; Law Clerk to the Honorable Frank M. Coffin.

1. Senior Circuit Judge, United States Court of Appeals for the First Circuit.
2. FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING (1994).
3. *Id.* at 43.

tional law in protecting individual liberties, an idea that has flourished in some states (although certainly not Maine) in recent years, as well as a series of institutional "shackles"—such as elected judges, underfunding, and diversity jurisdiction—that have worked to perpetuate the image of the state court system as a poor cousin of the federal system. Throughout the book, the Judge makes clear his desire to see "state court systems of excellence and independence"[4] flourish, despite these ever-present impediments.

From there, *On Appeal* becomes far more personal, affording a look into the Judge's chambers, into the *semble* of judges held after each day of oral argument, and even into the Judge's own decisional process. Having doubled his judicial experience since composing *The Ways of a Judge*[5] during his tenure as Chief Judge of the First Circuit Court of Appeals, the Judge appears more prepared than ever to share a wealth of "inside" information with his readers and even to grapple more deeply with the difficult question of how appellate cases should be decided.

The passages on life in the Judge's chambers open the door to give the reader a glimpse as to how at least one successful appellate judge handles the daunting workload imposed by his court. One highlight of this chapter, which does not lack for details (right down to the description of the nerf basketball hoop in the law clerks' workroom), is the Judge's portrait of the collaborative manner in which he works with his law clerks, "treating them as colleagues, something like junior partners in a small law firm."[6] While the Judge's heavy reliance on the talents of recent law school graduates may surprise the uninitiated reader, the training and development of his "clever" of clerks obviously rank among the Judge's proudest accomplishments.[7]

After a view of life in the chambers, *On Appeal* turns in its next chapters to describe the nuts and bolts of how cases travel the road to an appellate court and what happens once they arrive there. The highlights in these chapters include the Judge's advice on preserving the many different forms of error that may occur during trial. Also worth taking to heart is the Judge's "list of likes" in reviewing appellate briefs. This list places a premium on excellent organization derived from outlining, recognizing and handling those issues on which the writer is most vulnerable, and using "not one pejorative adjective or innuendo concerning one's opponent or the trial judge."[8]

The Judge also offers his views on what makes for a successful oral argument before the court. Describing the present day as the

4. *Id.* at 65.
5. FRANK M. COFFIN, THE WAYS OF A JUDGE (1980).
6. COFFIN, *supra* note 2, at 193.
7. *Id.* at 79.
8. *Id.* at 119-20.

"Age of Tungsten" (in contrast to the "Golden Age" of Daniel Webster), the Judge emphasizes that an oral advocate must be able to endure, without melting, the "heat" generated by the extremely limited presentation time allotted to each appeal and the pressure to respond instantly and appropriately to the searching questions of the judges.[9] The Judge's catalogue of critical questions that an advocate must be prepared to answer during oral argument provides an excellent checklist for preparation.

The heart of the book deals with how appeals are, or should be, decided. The Judge begins by describing the panel's post-argument conference as "a large stewpot sitting on a low flame, just enough to make it simmer, not boil, while various ingredients are gently added."[10] In relating the various approaches taken by the court to resolve appeals, the Judge canvasses a variety of case types routinely considered by the appellate court, from the frivolous "Rope of Sand" appeal to the true "Blockbuster" case that requires intense and time-consuming scrutiny from the court.[11] He then offers three chapters on "doing" judicial opinions that cover issues ranging from his preference for intensive pre-argument preparation meetings with law clerks, to his habit of immersing himself in the record of any case for which he must prepare the draft opinion, to the etiquette that surrounds the circulation and review of opinions among the chambers of the other judges on the panel. What may be striking to readers is the Judge's acknowledgment that the point of decision on an appeal may come very late in the process, sometimes well after the post-argument conference when the writing judge has her first opportunity to dig deeply into the record of the trial at issue. Equally interesting is the Judge's description of how he finally reaches his own "point of decision" after keeping an open mind for so long in the process.[12]

One of the recurring themes of *On Appeal* is its emphasis on the importance of collegiality. Nowhere is the need for collegiality more important than among appellate judges who, unlike almost any other group in our society, must work together intimately as true equals, often for the remainder of their professional lives, to accomplish a common goal. The Judge's thoughtful definition of collegiality among judicial colleagues is instructive:

> The deliberately cultivated attitude among judges of equal status and sometimes widely differing views
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> working in intimate, continuing, open, and noncompetitive relationship with each other,
>
> which manifests respect for the strengths of the others,

9. *Id.* at 129.
10. *Id.* at 168.
11. *Id.* at 176.
12. *Id.* at 185.

> restrains one's pride of authorship, while respecting one's own deepest convictions,
>
> values patience in understanding and compromise in non-essentials,
>
> and seeks as much excellence in the court's decision as the combined talents, experience, insight, and energy of the judges permit.[13]

The Judge, however, is careful not to restrict the importance of collegiality to his relationships with Article III colleagues as he considers the work of his law clerks "as being just as collegial as judges' work on a court."[14] The Judge's desire to preserve collegiality at all levels stems from his view that it is both "a guaranty of top judicial work . . . [and] a cherished source of joy in the life of an appellate judge."[15]

The Judge describes in some detail an array of non-collegial conduct to be avoided, including precipitate pronouncements on cases, delayed responses to requests from other chambers, corrosive language, lobbying, and overly done criticism. This catalogue should serve as a reminder to all of us in the legal community that collegiality does not just happen, but is achieved only as a result of active efforts. The Judge obviously takes pride in the collegiality and consensus-building traditions of his own court, observing that this has permitted him to restrict significantly his output of concurring and dissenting opinions (only twenty-one and twenty-seven, respectively, out of 2300 total opinions in his career[16]). The Judge further describes how he takes an active role in writing and editing his work product at all times with an aim toward preserving collegial relations with his colleagues. He even raises the topic under the rubric of "sensitivity" when discussing both his practice of writing opinions with due regard for how the language will be received by its various audiences, as well as the need for appellate judges to have a "high irritation threshold" when dealing with parties, the bar, and the trial bench.[17]

Other chapters, which are devoted to judging appeals, become even more introspective. They deal with personal reflections of how the Judge goes about doing the important work for which he was appointed to the court. Judge Coffin describes the process of deciding appeals not as a search for the right answer, but as a search for a "Grail of Legitimacy." He sees legitimacy at the appellate level as being comprised of three components: (1) explaining the "anomaly" of unelected judges in a democracy, (2) assuring accountability,

13. *Id.* at 215.
14. *Id.* at 175.
15. *Id.* at 228-29.
16. *Id.* at 225.
17. *Id.* at 268-70.

and (3) engaging in defensible decision-making.[18] Although the Judge mentions many branches of jurisprudence in discussing the forces that have shaped his own thinking and decision-making, he eschews allegiance to any one of them, deeming his own approach in deciding cases to be "unashamedly eclectic."[19]

To convey the significant differences between cases that cause appellate judges only routine stress and those that call for maximum intellectual effort, the Judge divides the universe of appeals to be decided into cases dealing with "familiar waters"[20] and those involving "uncharted depths."[21] In the former set of cases, he posits that the decision is constrained by multiple features of our appellate system, such as its adversarial nature, the need to rely on the decision and record made in the trial court, the requirements that appellate opinions be placed in writing and agreed upon by a majority of the court, and a multitude of doctrines that require the appellate court to defer to the trial court or agency (on factual findings), its own past decisions, or the Supreme Court or state court of last resort (on issues of law). He describes how even the routine cases sometimes activate his "justice nerve," but explains how the inevitable "gap between law and justice" often places "severe limits" upon what can be done by the court in the general run of appellate cases.[22] One interesting sidelight in this discussion of cases that float in "familiar waters" is the Judge's identification of a dangerous recent trend he perceives in the use of summary judgment to resolve such cases, which he describes as "a subtle tendency on the part of both trial and appellate courts to devote less and less energy and analytical thought to . . . identifying the favorable reasonable inferences" owed to the non-moving party.[23] He warns that the rush to judgment in cases where favorable inferences have been overlooked actually can result in a less efficient system because of the appellate court's need to review a large record and, often, remand the case for further proceedings.

A relatively smaller percentage of appellate cases occupy the Judge's narrow category of "uncharted depths," because their outcomes "are not *clearly* determined by preexisting principles, rules, or precedents."[24] In discussing these cases, *On Appeal* focuses its spotlight on those cases that pit the interests of society against the rights of individuals. The Judge, whose public service career in the three branches of our government has spanned the birth and rapid growth of such civil rights litigation, identifies the values he consults

18. *Id.* at 232.
19. *Id.* at 247.
20. *Id.* at 253.
21. *Id.* at 275.
22. *Id.* at 262-63.
23. *Id.* at 265.
24. *Id.* at 275.

in deciding such cases—his four "cardinal beacons"—as liberty, equality, workability, and community.[25] On the value of "workability," however, he cautions that "courts cannot be faithful to the constitutional primacy of individual rights if they embrace a policy of blanket deference to officialdom."[26]

With the voice of a cautious civil libertarian, the Judge calls for "some gradation in deference accorded to governmental institutions and their representatives,"[27] urges courts to show "a modicum of healthy skepticism of undocumented administrative justification," and observes that, "[o]ver time . . . more, rather than less, may be expected from government officials and institutions in their actions burdening individual rights."[28] He then explains that the "rights-sensitive balancing process" he uses to decide such hard cases is neither marked by mechanistic means, nor covered by a single jurisprudential umbrella. Rather, it is process-oriented to the extent that it requires the conscientious and candid revealing of the real reasons supporting the decision. The Judge describes this process as "a self-conscious craftsmanship at every stage of the decision process, rejecting unspoken or facile assumptions and generalizations, and a fairness in stating issues, facts, and arguments."[29] To illustrate the application of this process, the Judge recalls three of his more important civil rights opinions in which his decisions in favor of individual rights did not survive the scrutiny of the Supreme Court.[30]

On Appeal closes its discussion of deciding difficult cases with a brief look at a fourth emerging value to be added to the trio of liberty, equality, and workability. The Judge defines this new value of "community" as:

> [T]he self-interest a society has in preserving itself against the instability, insecurity, and disintegration threatened by the emergence, enlargement, and perpetuation of a very substantial underclass of uneducated, job-unqualified, welfare-dependent, unhealthy, despairing people living in dysfunctional families, all too susceptible to drugs and crime, with no sense of participation in, access to, or fealty toward that society.[31]

Although the Judge notes that "community" is "not yet a factor in federal or most state court adjudication,"[32] he briefly outlines the directions in which all three branches of our government will need to move if they are to respond appropriately to this "core value"[33]

25. *Id.* at 281.
26. *Id.* at 284.
27. *Id.*
28. *Id.* at 285.
29. *Id.* at 286.
30. *Id.* at 290-93.
31. *Id.* at 293-94.
32. *Id.* at 293.
33. *Id.* at 298.

and provide "ways and means to enable the grievously displaced and disadvantaged to make reentry into the mainstream of society."[34]

In a concluding chapter assaying the future, the Judge returns to Hamilton's concept of "One Whole" and offers some modest proposals for preserving what is right with the American federal and state appellate system, while improving what is wrong with it. These ideas focus on promoting a high quality of life for appellate judges so as to attract and retain candidates of unparalleled talent and ability and on enhancing communication between the federal and state systems, the various branches of government, and the public at large. *On Appeal* closes by posing, without answering, the "crucial question . . . whether the citizen majority and its least representative institution can work together to safeguard our unique and time-tested tradition."[35] If we are fortunate, this question will serve as the springboard for the Judge's next round of thinking and writing.

While canvassing a broad range of topics related to appellate jurisprudence, *On Appeal* succeeds at many levels and is sure to impress a variety of audiences with its thoughtful analysis. At its core, however, *On Appeal* is a deeply personal gift to the legal community, both in Maine and across the country, from one of its most celebrated members. For this gift, all of us should be most thankful.

34. *Id.* at 294.
35. *Id.* at 325.