My Judicial Key Ring

Remarks of
United States Senior Circuit Judge
Frank M. Coffin,
Recipient of The Morton A. Brody 2006
Award for Distinguished Judicial Service
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In being chosen to receive this award, I feel doubly privileged - to join in remembering Judge Brody and to be the first Mainer to be honored in his name. I admired him as a man and as a judge, and am grateful that he knew this in his lifetime. No judge I have known exceeded his practical wisdom, his compassion for the unfortunate, and, as anyone would agree, who saw his book-lined study at home - to which he would often repair after his long daily commute, his unfailing dedication to his work.

As it happens, this honor comes at a significant time in my life. While I shall retain my status as a senior judge, come next September I shall relinquish the chambers I have occupied for over forty years. So I thought this might be a good time to reflect a bit on my work as a federal appellate judge.

After almost twenty years divided among law practice, politics, and service in Congress and the executive branch, I joined the third branch of the government in 1965. I became the fourth Mainer to be appointed to the First Circuit Court of Appeals in its 73 years of existence. We were the smallest possible appellate court. Our entire membership was just three judges. Our clerk's office was tiny; we had no circuit executive, no staff attorneys and one law clerk.. Maine had one federal district judge, the highly respected Edward Gignoux. Now our court consists of six active judges-each with four law clerks- and four seniors, including fellow Mainers, Judges Lipez and Cyr. The Maine federal district court now has four excellent judges in Judges Carter, Hornby, Singal, and Woodcock. And, instead of typewriters and carbon paper, we all have computers, e-mail, fax machines, and copiers.

These four decades have seen tumultuous growth in the courts, in technology, in the mounting complexity of Supreme Court and other case law, and the ever flooding tide of federal statutes. I served first as a new judge, then as chief judge for a decade,, and finally as senior judge. Trying to distill from all this what I might say tonight has not been easy. I decided to take my cue from the recent months of travail surrounding the confirmation of our two new Supreme Court Justices. In those proceedings and the musings of pundits, the American people have had an intense course in the nature of the judicial profession.

The spotlight was supposedly on the nominees' judicial philosophy. But the Senators weren't really interested in judicial philosophy, in the sense of a coherent, systematic way of thinking about judging. Both opponents and defenders sought the nominees' views on such hot button issues as presidential power and abortion, deeply important issues but issues where political or religious beliefs harbored by citizens in general rather than judicial concepts were the defining forces.

There are, however, two practicing Justices who have come close to developing a systematic approach. The first is Justice Scalia whose philosophy is "originalism" or "textualism." His theme is that the Constitution should be interpreted according to the common meaning of the words at the time they were first used in it. When we depart from this, he

believes, we are in the shifting sands of subjective values. This concept, some critics point out, is not particularly helpful in dealing with such issues as campaign finance reform or offensive speech on the Internet in the 21st century.

A quite different approach is that of Justice Breyer, as set forth in his new book, "Active Liberty." He disclaims a philosophy but offers his theme that the Constitution seeks a balance between protection of individuals from governmental overreaching (modern liberty) and encouraging citizen participation in self-governance (active liberty with ancient roots). For example, he would find in the First Amendment not only the "modern liberty" protection of individual free speech but would stress also its "active liberty" encouragement of the exchange of information and ideas that stimulate greater participation in government. Hence the justification for campaign finance reform. His approach also stresses a focus on the consequences of any decision. This comes close to viewing the Constitution as a living thing. I discern some mild disagreement on the part of Justice Scalia, who said recently to a group in Puerto Rico, "[Y]ou would have to be an idiot to believe that."

Not being on the Olympian heights where Supreme Court Justices not only have more freedom and obligation to shape and occasionally reshape the law, I confess that I have fallen by the wayside in the search for the Holy Grail of a unified field, comprehensive judicial philosophy - what some scholars call "grand theory." I suspect that any such attempt is about as likely to succeed as trying to shoehorn an elephant's foot into a ballet slipper. My own view is eclectic - a word with a Greek root meaning to select. My job, as I see it, is to choose among sometimes contesting objectives and strike the right balance.

Let me illustrate. I consider myself attuned to values people call liberal, such as recognizing the primacy of the civil rights and civil liberties of individuals, and the necessary role of government in providing the framework for their realization and security, subject to unremitting vigilance to prevent unjustified governmental intrusion or arbitrary action. So a case comes along, where a hapless plaintiff has suffered from some excessive actions of a governmental body, but he has not tried to exhaust his available administrative remedies, or has not raised a key issue before the trial court, or he hasn't complied with court orders to disclose evidence or comply with critical case management deadlines. Here another principle kicks in - the need to maintain a level playing field by applying the same rules to rich and poor, to the powerful and the powerless - excepting only cases threatening extreme injustice. This has to trump any generalized preference I might otherwise have.

This doesn't mean that basic values of judges will play no part in decisions, but this coiled spring tension between contesting principles is still preferable to predictable battles between confirmed ideologues. Our hope for justice in this fallible world is that we have judges of open minds, ready to listen to reasoned argument, and possessed of a decent amount of intellectual humility.

With this disclaimer, I now select those principles and practices in my own work that have been my goals, not always realized. What emerges is not a single "key" or philosophy, but several keys on a key ring. They are four in number.

I begin with my basic credo – Transparent Analysis- the need for an analysis that reveals all the building blocks of decision. In my early years as judge and then chief judge, from 1965 to 1983, we were at the cutting edge of new constitutional doctrine, with added protections to civil liberties in the Fourth, Fifth, and Sixth Amendments and then the upsurge of civil rights, sparked by Brown v. Board of Education. The litigants who filed through our doors seeking relief from oppressive actions were tenants of public housing, welfare recipients, school teachers, public

employees, prisoners in solitary confinement, long-haired students. Through the seventies we issued a steady stream of opinions on appeals emerging from the Herculean efforts to desegregate the Boston school system.

Our greatest challenge was to do an effective job of balancing in cases where an individual was pitted against a governmental body and there was no governing precedent. The critical task then was, first, the identification of rights of the individual, their importance, and the likely frequency of their infringement. Then came the identification of the sometimes multiple interests of the government. And then came the critical task of balancing.

If this process was to be persuasive, it had to be honest. And to be and to appear to be honest, it had to be transparent or candid, which means that all relevant arguments, even the most difficult and hostile, had to be fully and fairly acknowledged. If an opinion can put its worst foot forward, fairly describe and distinguish the strongest case against it, and survive the exposure, it has passed the acid test.

The questions we face today generally do not concern newly asserted rights, but rather second or even third generation questions whether a governmental body or an employer has violated an accepted right. And the answer may be hidden under neutral-sounding questions whether a plaintiff's assertions fell so far short of making a real case that a jury trial was not required or whether, despite a judge's errors in conducting a trial, the evidence as a whole was so compelling that any errors were harmless. This is the substratum where subjective biases can tip the balance. Transparency may not eliminate the problem, but it will keep it to a minimum. It may not avoid controversy, but it focuses disagreement, avoids misunderstanding, elevates dialogue, and results in a better product of the court.

Considering the Alternative is my second key. As I come to the end of planning a draft opinion, I pause, look at what I am recommending, and ask the simple question: If, assuming the choice has not been predicted by precedent, we were to decide the opposite way, what would be the result? Or, if we did, could we, with a straight face, say that we were applying a neutral principle that would fit everyone in like circumstances? This is a way of considering, in line with Justice Breyer, the consequences. But it seems to me wise to consider policy views and probable results, not in isolation, but in comparison with the consequences of taking an opposite course. To me, this is a reality check. What usually happens is that, if our tentative decision has been tightly reasoned and fully informed, pondering the alternative gives us increased confidence in our judgment, even if it is a case of preferring the lesser of two evils.

The third key on my ring is incrementalism -a practice of narrowly confining the scope of most decisions to a principle governing the type of situation presented by the facts of the case, not a principle that would sweep the broader landscape. There is a bundle of reasons why incremental judicial law-changing decisions make sense. The first is, of course, that ordinarily there is no need to do more than is necessary to decide the case before us. Also, since we cannot see the future, it is wise to leave room for future development of the law, including room for escape valves. Then there is the obvious advantage in minimizing the likelihood of a dissent, a rehearing by the whole court, or even Supreme Court review. Finally, this kind of approach puts less of a strain on public acceptance of our legitimacy. We may not have introduced a grand design, but at least the humble addition of a brick or two will endure on the great cathedral of the law on which we have been privileged to work.

Affirmative Collegiality. I have reserved until last my favorite prescription for judges - a daily beaker of affirmative collegiality. As the complexity and volume of cases increase, this ingredient becomes more central. After all, our goal is to make as effective as humanly possible

the decision process of a group of strong-minded people, from diverse backgrounds, and often possessed of widely differing views, working closely together month after month on emotionally challenging, highly significant, and closely balanced issues.

The collegiality I seek is not just a veneer of formal politeness, civil discourse, or even occasional social times. It requires deliberate cultivation, free of dissimulation, manipulation, or lobbying. It restrains one's pride in authorship, values accommodation and compromise where possible without yielding one's deepest convictions, and seeks as much excellence in the court's final product as the combined strengths of its members permit. It even encompasses helping a colleague improve an opinion from which one strongly dissents.

I have written in my book, "On Appeal," that the Golden Rule of Collegiality is the appreciation of the different strengths of one's colleagues. A court is lucky to have a judge who shines in penetrating questions at oral argument. It also draws strength from one with a reservoir of practical common sense. Still another may show his strength best in helpful commentary on drafts of opinions. And another may have just the needed touch to help compose differences. There is even virtue in a gadfly ever on the watch against sweeping important issues under the rug. The solidly collegial court, I wrote, "is one in which each judge's qualities are valued, and each judge knows they are valued."

This collegiality infuses each panel of judges sitting on a case. Instead of pursuing one's own perception of problems with tunnel vision, collegial judges will also listen, not only to the lawyers before them, but to their colleague's concerns. Each is buoyed up by his sense of the openness, receptivity, and respect of his colleagues. In such a community, each rises to his highest potential.

These are the keys on my ring. But how am I viewed by our principal market, lawyers? I would never have the temerity to ask, but last year's "Almanac of the Federal Judiciary" sought the views of lawyers who had appeared in our court. These views turned up:

> Most lawyers interviewed said Coffin tends toward the liberal side. "He is fairly liberal - within the context of the First Circuit. . . ." "He is on the liberal side of moderate. . . ." "He used to be very liberal." "He tends to side with the government. He is conservative." "I can't tell what leanings he has - if any."

There you have me in a nutshell. I am obviously bipolar, or perhaps multi-polar. On balance, I am content to have such mixed reviews.

As this chapter of my life comes to a close, I reflect on what a passing show this has been. The expansive, even exhilarating years of the Warren era. Then a gradual lessening of pace in the Burger era, and more retrenchment in dealing with criminal defendants and the scope of the Commerce Clause, with greater deference to state sovereignty under Chief Justice Rehnquist. Now, with a new Chief and prospects of a new Court, we are in a state of suspended animation.

I shall miss the action, but I shall be a most interested observer. And a hopeful one. For I have utmost confidence in the judges of this country, state and federal, and the unique appellate system of justice that we have built over two centuries. I have been a very lucky person to have been part of it.