Remarks by Honorable Frank M. Coffin
U. S. Circuit Judge, U. S. Court of Appeals
for the First Circuit
at the
Maine State Bar Association
Convention Dinner Meeting,
Samoset Hotel, Rockland, Me.,
August 24, 1966

The Bench and the Pit

Having been a judge for nine months and a day, I am in the position of other judicial juveniles who have addressed you in recent times, such as Judges Reid and Rubin. I have studied their well chosen remarks and would like to associate myself with the humility, gratitude, and earnestness which they displayed.

But my problems in addressing you dwarf theirs. For they at least had remained in the family of bench and bar while I return as an Enoch Arden, a prodigal, after years not, I hasten to add, of riotous living, but of wanderings in other fields and other lands.

One prospectus gained from my wanderings is that I do not take this particular community of lawyers and Judges for granted. I think there is something special about it. Chief Justice Kenison last year expressed his envy of the activity and spirit of this bar and its rapport with the legislative and executive branches. And when I read of Tom Weeks' challenge to Ben Berman to match the recent record of achievement of this Association, I realized how much the pace of serious concern and concrete activity in improving the processes of justice had accelerated.

I note, too, that the younger members of the bar are more vocal and influential. Perhaps this is because they are more prudent and skillful than I was. In 1949, when I had been a lawyer all of two years, I suggested that we try to adapt the Federal Rules of Civil Procedure to our circumstances, citing Judge Peters as a respectable authority. I even moved that a committee of five be appointed to look into the problem. This suggestion fell on the meeting with all the impact of a humming bird's feather. The motion was never seconded. President Currier Holman softened the flow by saying that he would like time in naming that committee. It was seven years before Justice Sullivan really stirred the Bar with his speech in 1956 and Israel Bernstein prodded the matter into open discussion. Only then did wheels begin to turn.

But, being both young and ignorant, I came back in 1951, speaking for the younger members, and pontificated about the far-ranging study of Chief Justice Vanderbilt and others, entitled Minimum Standards of Judicial Administration. Stomping blissfully where angels feared to tread, I proposed extension of the rule-making power, adoption of pre-trial conferences, discovery procedure, simplifying procedure, and reactivation of the Judicial Council. I was greeted with kindness and applause. And kindly President Oscar Dunbar said, "You watch him grow". In retrospect, I think he meant, "You watch him grow up".

In any event, this is not even ancient history. It is non-history. This Bench and Bar, aided by what Chief Justice Kenison described as the "quiet and persistent" leadership of Chief Justice Williamson, have moved imaginatively and responsibly with the times.

One thing has not changed. That is the unique fellowship of this fraternity. I say "unique"

advisedly. As long ago as pre-Revolutionary days, Maine lawyers, according to William Willis'[1] book on our early bar, had established a certain reputation. Hating blandly that "the social usages of that . . . period were unfavorable to the habits of lawyers", he describes their custom while on circuit to spend long nights over the favorite beverages of the day, flip and punch. Their own special parlor game was mock court. At one such court, Noah Emery of Kittery, the earliest resident lawyer in Maine, a cooper by training, was accused of calling the high sheriff, Leighton, a fool. The court, after hearing the circumstances, ordered Emery to pay a pipe of tobacco for the offense. With even-handed justice, it ordered the sheriff to pay a mug of flip for deserving the label. The author editorialized: "The equity of this admirable institution will be at once perceived in the exact justice that was measured out to both parties, the penalties always enuring to the benefit of the company, of which both accuser and accused were partakers."

John Adams, who rode circuit in Maine, and undoubtedly shared in these mock court sessions, thought that bar meetings also ought to be initiated in Boston to take measures against irregular practitioners. Adams reported in his diary that "Many of these meetings were the most delightful entertainments I ever enjoyed . . . the consequences were most happy; for the courts and the bar, instead of scenes of wrangling, chicanery, quibbling, and ill manners, were soon converted to order, decency, truth, and candor." He added that Benjamin Prat of Boston, as he left his brethren to take his seat as Chief Justice of New York, said, "Brethren, above all things, forsake not the assembling of yourselves together."

This deserves a footnote. For this was probably the last happy moment in Justice Prat's life. Samuel Eliot Morison tells us that although tenure for good behavior had been achieved for English judges by the Glorious Revolution, colonial judges held office only "during the king's pleasure". Easy-going royal governors had fallen into the practice of making appointments during good behavior. The British Board of Trade ordered a stop to this on the accession of George III. But the judges of New York refused to accept new commissions from the King except on a tenure of good behavior. The Board of Trade then ordered New York's Governor to appoint Prat of Boston to serve during the king's pleasure. The assembly countered by voting no salary. Poor Prat, doing all of the work of the supreme court without salary, soon died. This was one of the incidents which led to Article III, Section I of the Constitution incorporating the two principles of tenure for good behavior and prohibition against diminution of compensation. I am deeply indebted to Justice Prat and take satisfaction from the fact that the gregarious example of the Maine Bar, adapted in Massachusetts by John Adams, gave him his last pleasant memories.

That your capacity for the absurd has not diminished is established by the level of the anecdotes gracing the pages of the Maine Bar proceedings in recent years. Any concern I may have had over the possibility of angina setting in was banished when I read, in cold print, the contributions last year of Justice Tapley. His lead-off story was one of the most hirsute canines ever to issue from the mouth of an otherwise sane and wise judge. Reading that made me feel that nothing I do here could jeopardize my good behavior.

If any of you are wondering when I shall reach the theme of this talk, I should tell you that, contrary to modern practice, the title was in the nature of a dilatory plea. Sanford Fogg was going to press with his program and needed a title. In desperation I gave him "The Bench and the Pit". It sounded like as good a title as "The Cloister and the Hearth", or "The Web and the Rock", or "Beauty and the Beast". The only trouble is to remember what I possibly could have had in mind when I gave the title to Sanford.

---

[1] A History of the Law, the Courts, and the Lawyers of Maine, pub. by Bailey & Noyes, Portland, 1863, pp. 101-103.

As for the "Bench" part, I shall save my definitive statement for another thirty years, on the chance that I may learn something. What I do want to do is to evoke some long forgotten memories of Maine's contributions to the bench which I have the honor to occupy. With Scott Wilson's retirement in 1940, and the passing of a quarter of a century, we forget that until that time Maine was always represented on that court.

Maine was even given the honor of supplying the first circuit judge for this circuit long before there was a court. For in 1869 George Shepley, son of Senator, later Chief Justice Ether Shepley, whom Judge Hale recalled as "The foremost citizen of Maine", was named the first circuit judge of this circuit - to help lessen the load of the Supreme Court Justice assigned as Circuit Justice. He had had a distinguished military career as Military Commandant of New Orleans and later as Military Governor of Richmond. As a judge he excelled in patent law and is said to have been able to charge a jury in a patent ease in understandable terms. I cannot aspire to that accomplishment.

In 1892, two momentous events occurred. The system of courts of appeal for the various circuits was inaugurated. And this Bar Association was established. History is silent as to any cause-effect relationship. In that year Republican President Harrison named Democrat William LeBaron Putnam of Bath, Bowdoin, and Portland to the court, thus establishing a precedent which has never since been followed. The example of Judge Putnam is a burden-some one to follow, for he had a "collosal" drive to work, a uniquely systematic mind, and a high degree of business acumen. He did relent and take three days of vacation a year, which gave him a good chance to look over briefs. He served 25 years, until 1917, and accounted for almost 700 court opinions and 44 concurring or dissenting opinions. Of his ability to write with a large or small pen, New Hampshire Judge Aldrich made this awesome description:

> ". . . Judge Putnam's resource of pin-point subtleties, combined with the broader force of his mental sweep, might be illustrated by comparing his mental qualities with those of the physical forces of the ponderous denizen of the darkened forests of the far-away east, whose elements of strength and power are so delicately and wonderfully organized that it may pick up the most finely-fashioned pin with its clumsy trunk, and yet, when it sets for itself a substantial goal worthy of its onslaught, its dauntless and mighty onrush, under the weight of irresistible power, is impeded not at all by the entanglements of the jungle."

I doubt that I shall ever merit such a pachydermous comparison. On only one point I can parallel Judge Putnam. He in 1888 and I in 1960 each garnered the largest vote ever cast for a Democratic candidate for governor. As the Portland Sunday Express archly observed, with some satisfaction, this "fitly ended his career as a Democratic politician".

From 1917 to 1929 sat Charles F. Johnson of Waterville, Colby, and ultimately Bowdoin. He was a robust, hearty, generous man, a hard worker, and eloquent speaker. He began as a poor boy, teaching school and serving as a railway clerk. He was another unsuccessful Democratic candidate for governor in 1892 and 1894 but bounced back to win election by the Democratic legislature to the United States Senate where he played an important role in tariff legislation on the Finance Committee, A liberal estimate of his campaign costs was $200. On the court he served as the balance wheel between the conservative Bingham and the liberal Anderson. As he relinquished his duties in 1929, Judge Hale urged him not to resign but to retire so that he could continue to work as his energies permitted. Judge Magruder has told you his classic answer - that he had other plans: to play a little golf, drink a little rum, and have a little fun. I might be able to emulate this aspect of Judge Johnson's aptitudes, although my golf game could stand

improvement.

Finally, in Scott Wilson, who served from 1929 to 1940, Maine contributed its eminent Chief Justice. He too earned his way through school by teaching, played baseball at Bates (where he was the first student to receive a sweater), and went on to hold legal posts for Deering, Portland, Cumberland County, and the Attorney Generalship. When he was named Chief Justice, Justice Philbrook, referring to the preceding 70 years when no Portland man held that post, said that the ark of Chief Justice had at last found a Mt. Ararat in Cumberland County and a legal Noah in Scott Wilson. When he left the Supreme Judicial Court, the headlines proclaimed a "Serious Loss to the Judicial System of the Pine Tree State". My own appointment, happily, escaped that kind of complaint.

On our court, he moderated the not always warm fellowship that existed between his two colleagues and wrote law on baked beans, the Jones Act, the gold clause, social security, and the Agricultural Adjustment Act. On declaring the latter unconstitutional, he developed a nosebleed. Whether he also shed sweat and tears over the case, we do not know. But it does illustrate the hazards of being an appellate judge.

I should also mention District Judge Clarence Hale who, after his retirement, sat on cases before the Circuit Court each year for some 15 years.

So much for the "Bench" part of these remarks. In our court's three quarters of a century span, Maine has been represented for two thirds of that time. Up to the present, we can say that we have sent some of our best men - men who had enjoyed high reputations as advocates before they donned their robes. As we measure legal history, this tradition is a short one, but in quality a demanding one.

If any of you thought I was going to expose some secrets of the judicial trade, you will see that I have neatly finessed the subject. And for a good reason - sublime, virginal ignorance. In descending now into the pit, I have at least the credentials of fellow suffering. Indeed, I have gone from one pit to another like a mendicant friar over the past decade - from the halls of Congress to the corridors of the executive branch, and thence to the chancellories of diplomatic life. I have been interested in comparing these various pits as a person whose first love and lore was that of advocacy.

And on returning to this first love, this time to a position where I am the target rather than the weapon of advocacy, I have found myself observing advocates at work. My feeling of sympathy with lawyers in the pit of appellate advocacy is strong. Perhaps over time, it will dull. In any event, while my sensitivity to the triumphs and tragedies of lawyers on appeal is still fresh, while the iron of observation is still hot, I thought I would strike.

I have not only watched with interest the lawyers who have come before us. I have kept score. This may transgress good behavior for a judge - but at least it is proof that I was awake. The beauty of my statistics is that no one can check on them and that they are so vulnerable to attack on the basis of subjective judgment, inadequate sampling, and sloppy record-keeping that no one will take them seriously. Yet they mean something to me - until something better comes along.

In seven sessions of court, we heard some eighty appeals, involving 169 different counsel. I had three categories for performance: A, B, and C. An "A" argument was one which added to the enlightenment of the court, beyond that gained from a reading of the briefs, either because of the marshalling of facts or law, or both, or the incisive response to questions. A "B" argument was competent but could not be said to have added to the briefs. A "C" argument ranged from the inadequate to the hopelessly incompetent.

The overall ratings were: A - 23%; B - 58%; C - 19%. This is a pretty symmetrical bell-shaped curve and probably proves very little. But I also kept track of performance by age groups and whether the advocate was a government lawyer or from a large or small firm. These figures are more interesting.

As to performance by age groups, I found a significant difference. 32% of the younger lawyers were in the A category, compared to only 16% of the older ones - a 2 to 1 ratio. 15% of the younger lawyers were "C" or inadequate, compared to 21% of the older lawyers. Speculating as to the reasons for this difference, I would guess there are two explanations. One is that most law schools today place considerable stress on moot appellate court work. The second factor is that younger lawyers are probably willing and able to invest more time (necessarily evenings and week-ends) in preparing for an argument. And there is the sneaking possibility that the younger generation is brighter and better trained than we are.

A second conclusion from my figures is that government lawyers placed 25% of their number in both the top and the bottom category - higher than the general percentage in each case. The excellent government lawyers were most often young or middle-aged lawyers from a federal agency, less frequently from a state or city. The poorer ones were either the less fortunate products of political patronage or tired bureaucrats who approached argument with the fatalistic feeling that nothing they could say would prevent the court from reaching a wrong decision.

The lawyers from small firms and individual practitioners also placed slightly more of their number in the excellent and inadequate categories. There is no better advocate than a good lawyer who has had to try his case below and write his own brief. But there is no worse advocate than a mediocre lawyer who has no one to help him avoid serious error.

One of the most interesting conclusions has to do with the performance of the large big city law firms. (I did not include Portland as a big city.) They supplied one third of the lawyers appearing before us. They had the smallest proportion of poor advocates, 10%. But, contrary to what might be expected, they did not exceed the overall average in excellent arguments. Indeed, they fell a percentage point below. The really significant finding was that 68% of their number fell in the middle group, the competent but mediocre, compared with the overall average of 58%. I draw two conclusions from this. The first is that whatever clients get for their money from the large big city firms, they do not often get excellent appellate advocacy. The second is that while the elaborate specialization of a large office undoubtedly equips it to handle a complex and important office practice, effective appellate advocacy is the job of an individual who must immerse himself thoroughly in all aspects of the case, This observation ought to be of some comfort to all Maine lawyers - none of whom has the luxury of a battery of specialists.

The good advocates were distinguished by a complete command of the facts tempered by restraint in using no more than the court needed; by a command of the law both within and outside the briefs; by a relaxed flexibility which allowed them to respond directly to questions from the court coupled with an ability tactfully to return to the thread of their argument or, equally important, the grace to abandon that thread on seeing that other things bothered the court; by a sense of selectivity in the points orally argued and a consciousness of the passage of time; by a manner at once informal and respectful; and by a confidence resulting in both a commanding presence and an effective underplaying of key points.

The inadequacies ran the gamut. They included the failure to Shepardize a keystone case (which had, unfortunately, been overruled); a plea that counsel's failure to file timely briefs should not prejudice the client; a confession that cases had been wrongly cited in a brief because part of it had been farmed out to another lawyer; tedious repetition of evidence despite the court's

admonition that it was thoroughly familiar with the facts; doggedly attempting to address a dozen separate points; monotonous reading from briefs, cards, or written argument; failure to understand, respond to, or recover from questions asked by the court; slouching over the lectern, keeping hands in pockets, engaging in bombast or observing long minutes of silence in leafing through briefs or records; being over-patronizing in answering a question or, just because a judge has asked a question favoring his case, assuming that the court is on his side and unctuously saying, "Your Honor has stated this better than I could"; attempting to influence the court by scowls, smirks and shakings of the head while opposing counsel is speaking; demeaning the trial judge; running overtime; and claiming rebuttal time which was inevitably squandered on trivia.

Whether my statistics are accurate or not, this catalogue of errors is evidence that advocacy is not what it should be. Probably it never was. But this is no reason for such mediocrity to continue to dominate.

For the times demand advocates - and good ones. As the appellate load increases throughout the country, the contribution which good advocates can make to the clearing of dockets is enormous. The extent to which the writing of an opinion is expedited when good advocates are at work cannot be underestimated. On the other hand, when relevant but unrecognized facts have to be dredged out of a record; when additional authorities have to be sought; when, in short, the court must do work which counsel should have done, the processes of decision and opinion-writing are prolonged out of all proportion.

Good advocacy helps not only the courts but lawyers themselves. For the discipline and standards imposed by advocacy in the classic sense cannot fail to lend steel to the lawyer's work outside of the courtroom. A well organized, selective marshalling of facts, precedents, and reasoning is still a hallmark of an effective person.

While we speak of advocacy as a tool, we are concerned also with substance. For to the extent that lawyers lower their sights in the manner in which they argue their causes, to the extent that advocacy merges into homogenized persuasion, to that extent is it less likely that individuals, groups, and causes shall have their spokesmen when they need them or that their cases shall be presented as they should be. The causes in need of effective advocacy are not diminishing. The horizon is expanding. The question is whether the vision of the bar can keep pace with this horizon.

The priceless merit of the practice of law in our state is that a lawyer cannot entirely lose himself in a specialty. Even the successful office practitioner from time to time finds himself called upon by his conscience, a client, or the court itself to take on an important criminal case. Or he may be propelled into a hearing before a municipal body or a state legislative committee. He must be ready to go to court if his partner is ill or absent. It is this readiness to leave the cloister for the pit that has sustained the sinew of the Maine lawyer and made him more than a match for his big city colleague.

But there is no room for complacency. For the causes in need of effective advocacy are not diminishing. The increasing burden on our trial judges, both in court and in conference, can be effectively carried only if there are skilled counsel who know how to balance their duty to the court with that of their clients. There will be increasing occasion, both in the state courts and in the federal court under the Criminal Justice Act, to appoint counsel to represent indigent defendants. The rosters of lawyers competent and interested in such cases are even today, I am told, awkwardly small.

There is nothing about the times in which we live which makes good advocacy obsolete. I grant that much of the nation's law business is transacted in the offices of attorneys and

government agencies. But both traditional and novel demands for advocates exist in abundance.

At the appellate level, the increasing work load calls for good advocates. To the extent that the opinion writer does not have to dredge salient facts out of a long record or seek out authorities not cited in a brief, the processes of decision are immensely expedited.

As for the trial courts, loaded with both pre-trial conferences and trials, it is difficult to underestimate the contribution to docket-clearing of advocates who have developed the ability to distinguish and fulfill both their duty to the court and their duty to the client.

Particularly in the intricate field of criminal law there is a need for both good prosecutors and good defenders. There will be increasing occasion, both in the courts of this state and in the federal courts under the Criminal Justice Act for the appointment of counsel to represent indigent defendants. Even now, however, the rosters of lawyers competent and interested in such cases are awkwardly small.

[There is still another role for the bar of today. The increasing efforts, private and public, to give more effective legal representation to the poor of the nation across the wide poverty spectrum are adding a new dimension to advocacy. In retrospect this may prove to be as significant development.] *Editors' note: This prophetic paragraph was deleted from the speech as delivered.*

But there is still another area for good advocacy - new in degree and intensity of interest if not in kind: the making available of qualified counsel to the poor. The giving of legal service without adequate compensation has always been a part of the lawyer's professional credo. Today, throughout the land, the depth and breadth of this obligation is in the process of radical enlargement. The concept is becoming recognized, not without controversy, that legal service of reasonable quality is not a luxury commodity, to be purchased only by those who can afford it. The new boundaries reach beyond the defense of criminal cases and encompass domestic relations, landlord and tenant, the problems of consumers, juveniles, and people served by local, state, and federal welfare programs. The clientele embraces both individuals and groups. And the focus does not stop with problems which have reached the crisis of litigation; it is also on the practice of preventive law which ranges from education of the citizenry in legal rights and duties to improvement of the institutions, laws, and procedures dealing with the problems of the poor, to timely counseling before eviction, divorce, foreclosure, repossession, or litigation.

It may well be that we are on the initial stages of a development of the practice of the law fully as significant as the growth in the 'thirties and 'forties of administrative law.

What this should mean for the legal profession in Maine is not yet clear. Our problems are happily not identical with those of Los Angeles, Detroit, or Washington, D.C. Nor should our response be identical. But it would be unwise to assume that we have in Maine no need for legal service to those at the bottom of our economic ladder that should not be met. There are, for example, 18,000 people in Portland whose income, under national standards, places them in the category of the poor. Can we be so sure that all of these know when to seek legal advice that might be helpful to them in time for it to be helpful - and that they could get this advice if they sought it? And what about those scattered in the smaller and sometimes isolated communities?

Those who brought to your agenda this morning a specific organizational concept for discussion have performed a valuable service. It is not surprising that hard questions were asked. And it would be unusual if unanimity were quickly reached on all the issues, for this is no less than an attempt to adapt our society to grapple with a range of problems that in the past have all too often been swept under the rug.

As members of the Bench and Bar concern themselves with the problem, there are certain

negative guidelines which shall surely not be forgotten: The need to preserve a sense of professional obligation; the avoidance of duplicating services; the resistance to encroachment on traditional private practice.

It is equally important that the affirmative guidelines be taken as seriously. I put them as questions. How can we be sure that we know the legal needs of the poor? How can the bar, the Law School, and social agencies be persuaded to cooperate in meeting the legal needs of the poor? How can the specific responsibility of the bar and the general responsibility of the public best be balanced and meshed? How can competent, sensitive lawyers and staff be recruited and retained? And, as important as anything else, how can the poor themselves be reached - first, to know what the law should mean to them; second, to have confidence in the processes of the law, and, third, to play a role in developing, promoting, and administering any service?

Were I to say more, I would only display more ignorance. But it does seem to me that a new challenge has been laid before us - the bringing of the utensils of a government of laws to the service of people formerly considered beyond the pale of concern in a reasonably small, friendly, and informal state. We ought to be able to do this job well. By so doing we shall serve both the nation and this beloved state. And, as we approach next year's three quarter century mark for this Association, we shall find ourselves in the same spirit of self criticism and striving as that which motivated the founders. For we shall be engaged in the task of improving the administration of justice which is the basic hallmark of civilization itself.