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Mister Chief Justice Traynor

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It has been the historic distinction of Chief Justice Roger J. Traynor to speak clearly on complex matters in a time of explosive growth and change and confusion. Since his appointment to the State Supreme Court in 1940, some 12,000,000 newcomers have turned up in California and gone about the business of making airplanes, chopping cotton, hustling real estate, setting styles, grinding out situation comedies, and looking for a place to park. There is no imaginable legal trouble that a Californian can't manage to get into. As a result, the state's highest court handles a wide and prickly range of litigation, from oil leases and water rights to pay-TV and topless pizza parlors.

In his first quarter-century on the bench, Traynor has delved into every corner of the law, sweeping away cobwebs, breaking through walls, letting in sunlight. He is not one to shed tears for the past when called upon to handle the last rites for an elderly precedent, nor is he likely to express fear for the future when giving obstetrical assistance at the birth of a healthy new judicial doctrine. "The law will never be built in a day," he has written, "and with luck it will never be finished."

A gentle dynamo with a quiet voice and a roaring laugh, the Chief Justice shoulders a staggering workload as a judge and as an administrator. While listening to oral arguments, conferring with his six associates and fretting over the wording of an opinion, he also has to keep the state's overtaxed judicial system working smoothly and efficiently. In an average week, as work slackens in one court and piles up in another, the Chief Justice must move more than 50 judges from bench to bench. It is a delicate maneuver, requiring considerable diplomatic skill. Traynor has proved quite adept at shifting them around.

Despite the pressure of his new office (he was elevated from associate to Chief Justice in the summer of 1964), Traynor still finds time to take in a concert, putter about the garden, reread Franny and Zooey, write for the law reviews, play with his six grandchildren, attend judicial conferences, and shoot the breeze with old friends from the bench, the bar and the law schools. In a group he is less likely to dominate a conversation than to enrich it with a pun or a paradox. Always, spoken or written, his words are judiciously chosen.

"He's a perfectionist," says one of his law clerks. "You put any piece of writing in front of him, even a shopping list, and he'll start editing it."

"I have not found a better test for the solution of a case than its articulation in writing," California's leading
which is thinking at its hardest," Traynor says.

In his judicial opinions, many of which have now become casebook classics, the Chief Justice manages to restrain the humor which bursts forth so naturally in his conversation and in his law review articles.

"Humor has no rightful place in an opinion," he says. "These are serious matters for the people involved. The cases belong to them, not to the judge. They should be told as plainly and forthrightly as possible how their case was decided. The litigant who loses is entitled to know why."

In one notable instance (People vs. Pierce), Traynor fell from grace, permitting himself the wayward pleasure of a pun. The case involved the common law concept of a man and wife as one person. Hence, according to an 1889 California precedent, when spouses conspire between themselves, they cannot be prosecuted for conspiracy. In laying this antiquated rule to rest, Traynor was unable to resist a playful comment on its absurdity.

"The fictional unity of husband and wife has been substantially vitiated by the overwhelming evidence that one plus one adds up to two, even in twogetherness," he wrote, and then stood guard over the printers, making sure the word was spelled as he had written it and printed without quotation marks.

"It is because Chief Justice Traynor has never let judging become habit, and has never lost his driving zest for the law, that he has been for many years our number one judge," writes Walter V. Schaefer, associate justice of the Illinois Supreme Court.

The Chief Justice dislikes the cumbersome circumlocutions of legalese. He uses the language with grace and dignity, always clear and logical, often eloquent and moving. He says. "I have never been substantially vitiated by the word was spelled as he had written it and printed without quotation marks.

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The Chief Justice dislikes the cumbersome circumlocutions of legalese. He uses the language with grace and dignity, always clear and logical, often eloquent and moving. He has even managed to give vitality and meaning to the least promising of literary forms—the baccalaureate address. When he returned to his native Utah to launch the state university's Class of '63, he sounded more like a homecoming poet than the distinguished jurist who had written California's sales tax law:

"A child growing up in the mountains of Utah in the early part of this century could readily come to envisage learning as a necessity of life, for his everyday lessons in the schoolroom served as indispensable companions across the wild country that he roamed on the longest possible route to and from school.

"There is no better way to begin one's learning than by wasting hours at a time exploring the Wasatch Range. As the wild maples turned color and the chokecherry trees took on the skeletal look of winter, one relearned each year that snow was knife-cold as well as beautiful. At the same time a child

would notice that the sagebrush and the scrub oaks changed little enough to give reassurance of the coming spring.

"Years later these vagabond observations would give familiar meaning to Heraclitus, who had been saying only yesterday or was it some centuries earlier, that everything is forever changing and permanence is but an illusion. Of course, whispered the child to the student he had now become. Anyone who ever lived in the Wasatch Mountains knew that by heart."

The Chief Justice was born in Park City, a Utah mining town, on Lincoln's birthday, 1900. His parents had left County Down, Ireland, to seek their fortune in the New World, where his father had worked in the mines, then gone into the drayage business. When the boy was 6 years old, just starting school, he tumbled headlong onto a barbed-wire fence, ripping open his right cheek. He still bears the scar, which he lightly dismisses as "the Heidelberg mark of the Wasatch Mountains."

"It was a land of bohunks and Micks and krauts and Cousin Jacks," he recalled in his baccalaureate address. "In these rude labels of identification that are part of our vivid speech there is nothing evil if they are free of vicious gloss, and I should count it a loss if we were to become so self-consciously mannered as to shut the windows of the parlor and the study to the language of the street.

"Such labels remain innocuous so long as we value diversity. When we do not, then with brutal swiftness they are used as stones by savages, while bystander sloths look on. A child in a mountain town of Utah would learn that lesson with horror as the villagers whose kindness he had known hurled stones through the windows of a kraut. We are at war, they screamed; and a child could not begin to know what bleakness in their own lives could have caused them to seize upon such a pretext to turn so savagely against a neighbor."

The sturdy, black-haired "Mick" from the Wasatch Mountains ("Traynor" springs from a Gaelic word meaning "strong man") managed to save $500 during the war and, in 1919, headed for the University of California, where he plunged into French and accounting, philosophy and history, logic and political science. In 1923 he was graduated with every available honor. He got his M.A. the following year, and in 1927 was awarded both a law degree and a Ph.D. in political science. All the while, when not rattling around some backcountry road in his $65 jalopy, he had been teaching 11 hours of political science, while he was winding up his third year in law school and also editing the California Law Review.

"He has a tremendous drive, a conscientious feeling that it is the duty of everyone to work toward a solution of social problems," says Donald Barrett, who has served as Traynor's chief research attorney ever since he got out of law school in 1948.

No government—local, state or federal—can tackle any social problem without money in its till. This practical consideration aroused Traynor's interest in his days as an undergraduate (he was reading Morley's biography of Gladstone) and helped steer him toward his specialty—taxation. In the Depression decade of the 30s, when he was teaching law at Berkeley, he began to be called more and more often to Sacramento. Wryly, he describes these uneasy confrontations of professor and politician:

"In the desperate year of 1933, when new sources of revenue had to be found, the most cynical legislators reluctantly took to listening even to a specialist in taxation encumbered with book-learning, perhaps in the belief that in desperate times what you know won't hurt you any more than what you don't know."

He not only drafted the Retail Sales Tax Act, passed by the legislature in 1933, but also served as its first administrator, setting up the system by which the state tapped the cash registers of some 200,000 retailers. Regarded as a model of fairness and efficiency, it was widely copied and caught the eye of New Deal fiscal experts. In 1937 he took a year's leave of absence from Boalt Hall to serve as tax counsel to the Treasury Department in Washington.

While the Traynors were in temporary exile from their beloved Berkeley, their friendly neighborhood prosecutor, Earl Warren, launched his first campaign for state office. He took over as attorney general in January, 1939, and, as he was to do later as governor, immediately began to staff the place with experts. Inevitably, he latched onto Professor Traynor, whom he asked to organize a tax division and to serve as part-time deputy attorney general, taking charge of tax cases in both the state and federal courts in California.

Still a full professor of law (he had made the grade at the astonishingly youthful age of 36), Traynor now found himself going to court to defend laws he had drafted, administered, and taught his students. At the same time he was moonlighting in Washington as a tax consultant to the Secretary of the Treasury. In the summer of 1940 the Governor of California telephoned one day to ask if he would be interested in an appointment to the state Supreme Court.

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**CHIEF JUSTICE Continued**

"It was a complete surprise," Traynor says.

It was also something of a historical accident. Governor Culbert Olson had first selected Professor Max Radin to fill the vacancy. Radin, a friend and colleague of Traynor's, was a brilliant teacher, a charming companion, and a prolific writer. He was also a liberal, outspoken Democrat. Right-wing patriots lost no time protesting his appointment. Traditionally the state's highest court had been reserved as a final resting place for political conservatism and legal mediocrity.

Radin's appointment, as required by law, was submitted to the Judicial Qualifications Commission, where it was rejected. Olson urged him to make a fight for his seat on the bench, but neither Radin nor his wife had the stomach for it, so the governor asked if he knew a law professor he could recommend for the job.

"Yes, of course," Radin said. "Roger Traynor."

The Boalt Hall scholar now presides over a tribunal caught in the trade winds of prejudice, poverty and political expediency. Demagogues have been quick to play the apprehensions of well-housed Caucasians against the violence of dispossessed Negroes. In declaring Proposition 14 unconstitutional, five members of the court overruled 4,526,000 registered voters who had gone to the polls to proclaim their right to dispose of their property in such a way as to discriminate against the racial or religious minority of their choice.

Proposition 14 ran afoul of the "equal protection" clause of the 14th Amendment, which the United States Supreme Court has interpreted as a barrier to any "significant" state involvement in discrimination. California voters had made the state a public partner in their private acts of prejudice. The court left the prejudice intact. It dissolved the partnership.

"It's a difficult matter to grasp," the Chief Justice remarked not long ago in a luncheon conversation, and then, by way of illustration, he pointed out that Californians might suddenly take a notion to start coining their own money, but no matter how large a majority such an attractive proposition commanded at the polls, it would have to be ruled out on constitutional grounds.

Traynor at times has reversed himself, notably in the controversial Cahan decision of 1955, which broke with state precedent and practice by forbidding the use in court of illegally obtained evidence. The ruling touched off anguished cries from lawmen who had grown accustomed to enforcing the law by casually violating it. In this instance, as was not uncommon, the crime committed by the police officers was more repugnant than the offense charged against the defendant.

After getting permission from headquarters to "bug" a local citizen suspected of bookmaking, Los Angeles police officers stole into the home of Charles H. Cahan, entering at night by means of a first-floor side window. They planted a microphone under a chest of drawers, then strung wires to a listening post in a nearby garage. Cahan was found guilty of making book on the basis of evidence obtained by law enforcement officers guilty of breaking and entering.

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It is morally incongruous for the state to flaunt constitutional rights and at the same time demand that its citizens obey the law," Traynor wrote in Cahan.

In 1942, when he was new to the bench and to police practices, he had gone along with a 20-year-old California precedent (People vs. Mayen) which permitted the use of illegally obtained evidence in state courts. As time went by, his misgivings began to grow. It was one thing to condone what Justice Cardozo had remodeled new ones, and in that process policy is terms with Cardozo's Amendment's protection the re? A bathtub on their son, who disappeared upstairs, then re-

CHIEF JUSTICE Continued

...ing the community, the United States Supreme Court applied the Fourth Amendment's protection against "unreasonable searches and seizures" to all state courts (Mapp vs. Ohio). In the five years since Mapp, the states have been ordered to provide counsel for the indigent (Gideon vs. Wainwright), to respect the Fifth Amendment's privilege against self-incrimination (Malloy vs. Hogan) and to honor a suspect's Sixth Amendment right to counsel even before an indictment has been handed down (Escobedo vs. Illinois).

"There is some poetic justice in compelling state courts to resolve in more than provincial terms the problem of policing the community without oppressiveness," the Chief Justice told members of the New York City bar last spring.

"If all state courts taken the initiative in that regard there would have been less need for the United States Supreme Court to become involved in policing the police. There might have been little need at all had state legislatures undertaken to formulate modern standards of police procedure, or had all police departments undertaken to raise their own standards."

In some pioneering instances, the California Supreme Court has staked out new judicial ground the United States Supreme Court has yet to occupy. In 1948, six years before the school segregation cases were resolved with a declaration that separate facilities were inherently unequal, Traynor spoke for the state court on the delicate matter of racial intermarriage, striking down California's anti-miscegenation law. The Warren Court still has not dealt directly with the outmoded laws of some 18

tious judges "might take off onward and upward, but that all too many of them have long since stopped dead in the tracks of their predecessors." As Traynor sees it: "The danger is not that they will exceed their power, but that they will fall short of their obligation."

Although the Chief Justice is one of the world's leading authorities on taxation, the family's Form 1040 is filled out by Mrs. Traynor, who in her husband's opinion "has far and away the most subtle mind I have ever encountered." She is not only at home in the field of accounting, but is also a graduate of Boalt Hall School of Law. In 1953, after the two oldest boys were grown and the youngest son had died, Mr. Traynor returned to the University of California, where she had been an honor student as an undergraduate, and signed on as a freshman in the law school.

The Traynors live simply and comfortably on a pleasant Berkeley street where front yards are likely to be cluttered with tricycles and skateboards. Their rambling, two-story house is alive with the artifacts of three generations. Fishing rods and teething rings live on easy terms with Cardozo and Carson McCullers, Dr. Seuss and Edith Piaf. One Saturday afternoon a wealthy lawyer and his wife dropped by with their son, who disappeared upstairs, then returned a few minutes later, visibly shaken.

"You've got to see the Traynors' bathroom," he told his parents. "You know what they've got up there? A bathtub on legs. Like in a museum." He just never got around to modernizing the bathroom," Mrs. Traynor says. "There's always been something more important to do."

In the Traynor scale of values, it is more important to plant a tree than to install a new tub, more important to keep up with their French than with their neighbors.

"Why does it have to be so ugly?" Mrs. Traynor often wonders as she looks up at the high-rise apartment building that has blotted out a hunk of sky above their small, exquisitely manicured garden. Then she shrugs off the intrusion. "We create our own environment," she said one afternoon last summer, shortly before she and her husband set out to leave for Manhattan, where he was to spend two weeks at New York University, participating in a seminar of Appellate Judges. "We'll be living in a tiny apartment, but somewhere we'll be able to find our quiet place, our tree, our piece of sky."

One night during the Berkeley troubles, when the Traynors were walking home, they rounded a corner and suddenly came upon a pack of angry rebels who obviously intended to force them off the sidewalk into the street. Roger and Madeleine Traynor do not back down in the face of force. The Chief Justice reached for his wife's hand and they calmly continued on their way. The demonstrators took the measure of this gentle pair, then fell back, clearing a path for them.

"The forces of darkness," Mrs. Traynor later wrote to a friend, "are always overpowering in aspect, always to be defied."

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