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Thoughts about Roger Traynor and Learned Hand–A Qualifying Response to Professor Konefsky

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RESPONSE

THOUGHTS ABOUT ROGER TRAYNOR AND LEARNED HAND—A QUALIFYING RESPONSE TO PROFESSOR KONEFSKY

*James R. McCall**

In the preceding pages of this issue of the *University of Cincinnati Law Review*, Professor Fred Konefsky has given us a readable, well-researched, richly rewarding article on two of America's greatest jurists. He deserves congratulations on devoting himself to an in-depth study of a significant aspect of the work of these historic figures who have so much to offer contemporary American lawyers. This journal is also to be congratulated in appreciating the usefulness of first-rate American legal history to its readership. Why then, the need for a response, "qualifying" or otherwise?

The answer is that my area of disagreement with Professor Konefsky, although small, is important to what appears to be the beginning of a major undertaking in American legal scholarship—a reinvestigation of the dominant ideas and major personalities of American law at mid-century. Such a reinvestigation would provide scholars with a valuable background for evaluating contemporary legal issues and modes of thought.

The enterprise clearly appears to have begun. Without taking into account works published more than three years ago, the law lists make the case. Gerald Gunther published his biography of Learned Hand[1] in the same year that William Eldridge and Phillip Frickey published the Legal Process materials of Professors Henry Hart and Albert Sacks in a permanent, as opposed to the famous "tentative edition," format.[2] Laura Kalman's book on le-

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1. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (Alfred A. Knopf 1994).

2. HENRY M. HART, JR., & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Eldridge & Frickey eds., 1994).

gal liberalism, which was published last year,[3] begins with a prolonged visit to mid-century legal America. The remainder of the book essentially carries the reader forward to today while keeping a consistent historical awareness of the halcyon days of the Warren Court in the forefront of the narrative. Professor Andrew Kaufman's anticipated biography about Justice Cardozo, whose memory was fresh and whose influence was great at mid-century, is expected shortly, and I hope to add my contribution to this growing collection within the next few years.[4]

The reason for the interest in American law during the 1940s through the 1960s is easy to see. Those were great days for a lawyer to be alive, at least if he (there were very few female attorneys at that time) was interested in seeing fellow members of the bar make history. We are unlikely to see a figure in the law to match that of Chief Justice Earl Warren for some time, and we surely have not seen his like since he retired from the United States Supreme Court in 1969.[5] Big issues can make big historical figures if the figures have the right stuff to seize the issues and to affect the flow of the nation's life. Warren is a huge historical figure because he appears to have seized the huge issue of segregated race relations,[6] as well as a number of other large issues,[7] and to have changed the law and the nation's history. It was the period of Big Earl[8] and the titanic changes in the law with which

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3. LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (Yale Univ. Press 1996).

4. In the form of a biography of Justice Roger Traynor, tentatively titled *Roger Traynor of the California Supreme Court—Reform and a Vision of Justice.*

5. Warren retired in 1969. His final leading opinions were delivered in four cases decided on June 16, 1969: *Utah Public Service Commission v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969), *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969), *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), and *Powell v. McCormack*, 395 U.S. 486 (1969). Warren's last concurring opinion can be found in *Burgett v. Texas*, 389 U.S. 109 (1967), and his final dissent was given in *Frank v. United States*, 395 U.S. 147 (1969).

6. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Educ., 347 U.S. 483 (1954).

7. The treatment of persons accused of crimes (*Miranda v. Arizona*, 384 U.S. 436 (1966)), protection of freedom of the press (*New York Times v. Sullivan*, 376 U.S. 254 (1964)), and fully enfranchising voters in state elections (*Baker v. Carr*, 369 U.S. 186 (1962)) come to mind in an instant. Even if Earl Warren did not write all of the opinions of the Warren Court (and of the three listed, he wrote only *Miranda v. Arizona*), he might as well have done so. The impression of the time is the memory of today—all were the work of the Warren Court and that court would not have existed without its Chief Justice.

8. After his retirement Warren visited the University of California, San Diego. As Warren rose to speak, a number of students held up a large banner that read, "Right On, Big Earl!" The audience reacted with approval, and Warren grinned and began his speech. KALMAN, *supra* note 3, at 57.

he will always be associated. American lawyers cannot, and should not, forget the time when at least some of the nation's lawyers were honest to goodness heroes.[9]

Mid-century was also the time of other heroic figures in American law—to be sure, less heroic than Warren, but of large and memorable dimension nonetheless. Here we return to Professor Konefsky's fine article, because Roger Traynor and Learned Hand were two of the larger than life judges of the period. They seemed very important in the legal scheme of things in the 1950s, and they seem to have grown in stature as the decades have passed. Their opinions are still read by law students, their ideas about the proper role for American judges are still noted by law professors, and the professional persona of each is still vivid to the older practitioners who remember them.

Mid-century was not only a time of heroic legal figures, it was a time of large ideas about the proper role of courts. Although most of the debate on the issue took place in the pages of the law reviews, the Warren Court's opinions brought the topic of judicial activism into the public's vocabulary with such force that it remains there to this day.[10] The "impeach Earl Warren" placards were, in part, the public reaction to a judicial stance that drew intellectual support from legal realism, a jurisprudential theory that had been very important in the 1930s. In the law schools of the 1950s, the reigning jurisprudential concepts were known as process theory.[11] Although lawyers of the time were generally unfamiliar with the terms "reasoned elaboration" and "institutional settlement," many law students and most law professors were at least familiar with legal process theory by name. Very few well-known academics existed who criticized the Warren Court,[12] but

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9. In her book, Kalman notes that "the republican revival in the hands of some law professors attempts to recapture an improved version of the legal and political liberalism that characterized the law school world of the 1960s." *Id.* at 8.

10. There had been previous times in which a particular opinion of the Supreme Court had caused the public concern about the exercise of judicial review. With the exception of *Lochner v. New York*, 198 U.S. 45 (1905), the flurry of public attention upon the Court was short lived. The *Lochner* controversy was, in the public perception sense, resolved by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). During and after World War II, the memory of aggressive Court use of the power of judicial review faded in the public mind, or at least in the public mind as perceived by politicians—the performance of the Court disappeared as a political issue during the almost twenty year period prior to the decision of *Brown v. Board of Education*, 347 U.S. 483 (1954).

11. It is generally accepted that process theory had replaced legal realism as the dominant jurisprudence by 1950. *See* KALMAN, *supra* note 3, at 19-20, 27.

12. The present speculation is that the politically liberal faculties of the well established American law schools were generally loathe to say or write anything that would

those that did were closely associated with process theory.[13]

Traynor and Hand played very significant roles in establishing the propriety of process theory—serving, in varying degrees, as exemplars of the component ideas of process theory. It is in this connection that I think that Professor Konefsky's view of the two men may mislead the reader. The importance of the potential for reader confusion on this point depends upon how important it is for contemporary American law to have an accurate and thorough revisiting of the mid-century figures and jurisprudence.

"Getting it right" when revisiting the mid-century is very important only if that period offers valuable lessons for today's lawyers and judges. Such lessons are there to be learned in the minds of some. Judge Richard Posner recently called for a renewal of appreciation and study of the pragmatic perspective in judging,[14] which is tantamount to a request for re-examination and renewal of process theory.[15] Professor Mary Ann Glendon, in *A Nation Under Lawyers*, argues for a return to the "classical" model of the judiciary and a rejection of the concept of "romantic judging."[16] She points to Learned Hand as the foremost example of the classical judge and generally invokes the values of the process theory scholars in arguing for a return to a less activist judiciary. These commentators advocate a more disciplined form of judicial law making, and process theory was developed as a body of rules of self-discipline to cabin judicial power into boundaries approved by the electorate.

Turning to Professor Konefsky's article, the central points are clearly laid out. In *Baird v. Gimbel*,[17] Hand held that a subcontractor is free to revoke its offer in the form of a bid on a subcontract at any time before it is formally accepted by the general

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weaken the Warren Court in the eyes of the public or the legal profession because the faculties saw the success of racial integration as dependent upon public acceptance of *Brown v. Board of Education*. Any criticism of the Warren Court would, it was feared, lessen the respect and authority given to *Brown*. *See id.* at 35-37.

13. *See id.* at 34-35, 41-42; Henry Hart, *The Time Chart of the Justices*, 73 HARV. L. REV. 84, 98-100, 125 (1959); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32, 34-35 (1959).

14. *See* RICHARD A. POSNER, OVERCOMING LAW 387-405 (Harvard Univ. Press 1995); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 26-29, 454-69 (Harvard Univ. Press 1990).

15. The relationship between the pragmatic perspective and the legal process school is discussed in the text at notes 44-46, *infra*.

16. MARY ANN GLENDON, A NATION UNDER LAWYERS 127-29 (classical judge) and 117, 153-74 (romantic judging) (Farrar, Straus & Giroux 1994).

17. James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344 (2d Cir. 1933).

contractor. This type of binding acceptance will normally occur after the general contractor has obtained the bid award on the main contract.

The general contractor argued that the subcontractor's bid should be considered an irrevocable, or "firm," offer because the general contractor had relied upon it in calculating its bid for the main contract. Under formal contract doctrine, however, an offer is not irrevocable unless consideration has been given to the offeror for a promise not to revoke. Hand followed the doctrine and deemed the general contractor's reliance on the subcontract bid to be immaterial because reliance did not constitute consideration.[18] This was an accurate statement of the consideration concept when the case reached the Second Circuit in 1933, and Hand applied the concept in a formal and conclusive manner.

Traynor chose to change the consideration doctrine in *Drennan v. Star Paving*[19] in 1958. In his opinion, he used the type of legal analysis for which he was famous, which focused on the fact situation in the case and examined other sources as well as case precedent to find the best rule to apply to that fact situation.[20] Traynor concluded that the subcontractor should not be allowed to revoke his mistakenly low bid when the general contractor had used it to compile a successful bid on the main contract. *Drennan* made sense in the factual context of the case, and it has become the majority position on the issue of whether justified reliance can make a contract offer irrevocable.[21]

The nod clearly must go to Traynor's work on the issue. Hand took a strictly formalistic approach to the problem and only considered the doctrine generally applicable to facts of this type. Traynor, on the other hand, looked at the specific facts of the

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18. *See id.* at 346.

19. 51 Cal.2d 409 (1958).

20. Traynor noted that Restatement section 45 allowed reliance by the promisee to constitute the consideration to bind a promisor who makes a unilateral contract. *See id.* at 413. He then applied that principle to another Restatement concept that if consideration was given by the promisee for the promisor's agreement to hold a promise open, the promisor was bound to do so. Traynor held that the promisee's expected detrimental reliance on a promise could serve as consideration for holding the promise open. *See id.* at 414-15.

21. *See* RESTATEMENT (SECOND) OF CONTRACTS § 87(2). As mentioned by Professor Konefsky, there are dissenting views from the present consensus. *See* Alfred S. Konefsky, *Freedom and Interdependence in Twentieth Century Contract Law: Traynor and Hand and Promissory Estoppel*, 65 U. CIN. L. REV. 1169 (1997).

situation and determined that a more "rational"[22] resolution of the question should hold the subcontract bid to be irrevocable. By comparison, Hand appears to be dozing.

I agree with Professor Konefsky's conclusions about the *Baird* and *Drennan* opinions, and I particularly applaud his rich accounts of the underlying facts, the briefs, the oral arguments, and the lawyers involved in the cases. He also is thoroughly convincing on the point that Traynor had the *Baird* opinion and Hand's opaque "indifference" concept in the forefront of his mind in composing the *Drennan* opinion. Traynor, I am persuaded, was rejecting Hand's opinion in *Baird* and the judicial approach that Hand used to address the fact situation presented to him in that case.

However, I part company with Professor Konefsky on the implications he draws from the opinions regarding any essential disparity between the views of the judicial role held by Traynor and Hand. I see *Baird* as unrepresentative of Hand's general approach to judging. In part, this is because the development of common-law tort doctrine is outside the normal run of federal cases. Justice Scalia recently wrote on the sophistication of federal courts with tort doctrine:

> I would feel less uncomfortable about our plying these unknown waters if we were skilled navigators. But unlike state courts, we have little firsthand experience in the development of new common-law rules of tort and contract governing commercial transactions. Better to have followed some state-court pilots than to proceed on our own . . . .[23]

In fields in which Hand was comfortable and relatively free from directly controlling precedent, he was quite ready to adopt new rules for the purpose of serving the needs of society.[24] Attention to factual nuances and clear-eyed reckoning with the real world consequences of doctrine were also hallmarks of Hand's

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22. "Rational" to Traynor referred to legal doctrine that was adequately adjusted to present day realities. He first argued for more rational doctrine as a second year law student at Boalt Hall in 1926. Note, *Real Property: Landlord and Tenant: The Rule in Dumpor's Case*, 14 CAL. L. REV. 328, 333 (1926).

23. Saratoga Fishing Co. v. J. M. Martinac & Co., 1997 WL 284780, at **7-8 (U.S. 1997).

24. The classic illustration of this point is Hand's remarkable opinion holding a publisher protected by the First Amendment freedom of speech clause in *Masses Publishing Co. v. Patten*, 244 Fed. 535 (S.D.N.Y. 1917), *rev'd*, 246 Fed.2d 24 (2d Cir. 1917), discussed in note 32, *infra*. The facts of the case, the opinion and its probable effect on Hand's hopes for judicial advancement are discussed at *Gunther*, *supra* note 1, at 151-61.

body of work in federal law subjects.[25] The formalist mentality that Hand displayed in *Baird* did not produce the landmark opinions that he wrote in fields from antitrust to wage-and-hour regulation.[26] Viewed in proper context, *Baird* is more the aberration proving the rule than a representative Learned Hand opinion.

Professor Konefsky is completely accurate about Roger Traynor's concept of his office—ready, almost eager, to change existing precedent to make the law more rational.[27] Although Hand generally was more inclined to follow precedent than Traynor was,[28] the similarities between the basic jurisprudential views of the men are more important than any differences. Both judges were deeply majoritarian and pragmatic—perspectives that, in my opinion, make them worthy of study and emulation.

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25. *See* Repouille v. United States, 165 F.2d 152 (2d Cir. 1947) (holding that naturalization applicant's commission of a mercy killing, "even when the provocation was overwhelming," was inconsistent with a finding that the applicant possessed "good moral character").

26. The following note is merely suggestive of Hand's importance in developing federal statutory law. Hand's opinion for the court in *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945) provided, for the first time, a rational framework for discussion of the issue of illegal monopolization in antitrust law. A half century later, the opinion is still considered "the path breaking decision" (LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 95 (1977)), "familiar to almost every student of antitrust law" (PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 16 (1996)), "the landmark case" (EARL A. KINTNER, FEDERAL ANTITRUST LAW 369 (1980)), and "the starting point for modern monopolization law" (E. THOMAS HARRISON & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 209 (1994)). In copyright law, Hand's landmark opinions include: *Reiss v. National Quotation Bureau*, 276 Fed. 707 (S.D.N.Y. 1916), on the scope of the word "writings" in the federal statute; *Fred Fischer, Inc. v. Dillingham*, 298 Fed. 145 (S.D.N.Y. 1924), on the invalidity of a "good faith copying" defense; and *Sheldon v. Metro-Goldwyn Pictures*, 81 F.2d 49 (2d Cir. 1936), on the lack of relevance of "anticipation" in determining "originality." Hand's *Sheldon* opinion has been described as "craftsmanship at its best and is entitled to be ranked as a model of judicial style." George W. Pepper, *The Literary Style of Learned Hand*, 60 HARV. L. REV. 333, 341 (1947). In patent law, Hand eventually prevailed in his view that the issue of whether "invention" was involved in an innovation could only be determined by an examination of the factual context of the innovation. Dewey & Almy Chemical v. Walter Kidde & Co., 124 F.2d 986, 990 (2d Cir. 1942). Finally, Hand established the scope of federal wage regulation in *Fleming v. Arsenal Building Corp.*, 125 F.2d 278 (1941), *aff'd*, 315 U.S. 524 (1942), and *Bodella v. Borden Co.*, 145 F.2d 63 (1944), *aff'd*, 325 U.S. 685 (1945). These opinions are discussed, as well as Hand's thinking on statutory interpretation in *Gunther*, *supra* note 1, at 466-73.

27. Traynor viewed rationality as the primary internal characteristic of the judicial process and the justification for judicial lawmaking. *See* Roger Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. L. REV. 401, 401, 402 n.2 (1968).

28. Professor Konefsky is convincing on this point. See Konefsky, *supra* note 21, and the sources he cites for support, and GUNTHER, *supra* note 1, at 148-49, 298-300, 619-20.

Both judges believed so strongly in the principle of judicial deference to legislative policy choices that it would be accurate to say that it was an article of faith for both of them. Traynor addressed the point:

> [An appellate judge] who meditates law and social change ... is bound also to recognize that the task of law reform is that of the legislators, which is to say that it is primarily that of the people ... [and this is] squarely where it belongs in a democratic society that gives its people the education that qualifies them for responsibility.[29]

Early in his judicial career, Hand wrote that the proper standard for judicial review is "whether a fair man could believe that the law as enacted really served any genuine public interest. Between all reasonable differences of opinion, the legislature has the right to choose."[30] The two judges shared this majoritarian concept with the legal process school.[31]

Traynor believed in the preferred position concept that Justice Harlan Fiske Stone announced in *Carolene Products*,[32] which authorized judicial intervention to nullify legislation that curtailed free speech and the rights of "discreet and insular minorities." Although Hand stated his opposition to the preferred position concept, the positions he actually took on specific cases were not different from those taken by Traynor in opinions.

As Professor Konefsky points out, when Traynor wrote his first academic article as a sitting judge, he included a quotation from Hand's "Spirit of Liberty" address at the conclusion of the piece. Arguably, Traynor's comment on the quotation indicates his disapproval of Hand's view of the ineffectiveness of judges as the sole guardians of freedom of speech.[33] However, the important point is that when Hand was called upon to decide a censorship issue in the 1917 *Masses Publishing* case, he was forceful in the extreme in protecting the right of dissenters to voice their views.[34]

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29. Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L. FORUM 230, 239 (1956).

30. *See* GUNTHER, *supra* note 1, at 248.

31. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 670-72 (Eskridge & Frickey ed., 1994).

32. 304 U.S. 778, 783 n.4 (1938).

33. This is Professor Konefsky's view, which I find reasonable, but not compelling. *See* Konefsky, *supra* note 21, at 11-78. I think Traynor's statement simply indicates resigned agreement with Hand's position with a note of determination to keep trying in the face of daunting odds.

34. *See* Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917). In the opinion, Hand advocated a standard for permissible regulation of political speech that permitted

Traynor's free speech opinions, although advanced for their time,[35] were not as protective of free speech as Hand's *Masses Publishing* opinion, written thirty years earlier.

On the application of the Equal Protection Clause to protect racial minorities, readers of Gerald Gunther's recent biography about Hand are aware that Hand and Traynor were also of a similar mind. In *Perez v. Sharp*,[36] Traynor voided a segregation law six years before the Supreme Court first nullified a segregation statute in the famous *Brown* decision.[37] In a lecture given at Harvard Law School in 1958,[38] Hand criticized the *Brown* opinion as an example of inappropriate judicial legislation. However, Gunther's biography about Hand makes it plain that Hand was misled into holding a false belief about the meaning of the *Brown* decision.[39] Furthermore, the same source makes it clear that Hand would have approved of a broadly principled judicial opinion striking down all segregation laws—exactly the type of opinion Traynor wrote in *Perez*.[40]

Regardless of the extent of the difference between Hand and Traynor on preferred position rights, they were united on the issue of judicial deference to legislation in all other areas.[41] Both men strongly believed in the general principle of popular sovereignty. Hand, who was raised in patrician circumstances, was eloquent and without illusions on the point:

> We do more than count [votes]; we measure political forces by the aggressiveness and coherence of conflicting classes, and this, though it may be the despair of the reformers, I should like to put in a more respectful light. It may not be an ideal, [but] I shall argue that it is a tolerable system; that it can insure continuity and give room for slow change, since it allows

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prohibition only when the speaker actually incited illegal conduct. He was immediately reversed by the reviewing court. *See* Masses Publishing Co. v. Patten, 246 F.2d 24 (2d Cir. 1917). The United States Supreme Court did not adopt a standard this "speech protective" until *Brandenburg v. Ohio*, 395 U.S. 444 (1969). GUNTHER, *supra* note 1, at 603.

35. *See* Payroll Guar. Ass'n v. Board of Educ., 27 Cal.2d 197 (1945); Ellis v. Board of Educ., 27 Cal. 2d 322 (1945); Danskin v. San Diego Unified Sch. Dist., 28 Cal. 2d 536 (1946).

36. 32 Cal. 2d 711 (1948).

37. Brown v. Board of Educ., 347 U.S. 483 (1954).

38. *See* GUNTHER, *supra* note 1, at 658.

39. *See id.* at 666-72.

40. *See id.* at 667-69. In *Perez*, Traynor had held that a statute segregating a population by race denied freedom of association to every member of the population. On this theory, any segregation statute would be unconstitutional.

41. See quotations in text at notes 27-28, *supra*.

play to the actual, if unrecognized, organs of society.[42]

Traynor, the son of Irish immigrants whose boyhood in a Utah mining town was filled with hard manual labor, came by populist notions through his upbringing and life experience, as well as his training as a political scientist.[43]

With both men, the belief in popular sovereignty was supported by a personal philosophy that embraced the concept that individuals are quite fallible in their perceptions and ideas. Hand wanted the Cromwell quotation, "I beseech ye in the bowels of Christ, think that ye may be mistaken," engraved over the door of every courthouse in the land as a warning to judges who would exercise judicial power to arbitrarily make law according to their own policy judgments.[44] Traynor, as was his inclination, expressed the concept less colorfully:

> [A judge] knows well enough that one entrusted with decision, traditionally above base prejudices, must also rise above the vanity of stubborn preconceptions, sometimes euphemistically called the courage of one's convictions. He knows well enough that he must severely discount his own predilections, of however high grade he regards them, which is to say he must bring to his intellectual labors a cleansing doubt of his omniscience, indeed even of his perception . . . .[45]

An understanding of the fallible nature of man is one of the basic components of the pragmatic judicial perspective recommended by Judge Posner. This perspective requires an approach to judicial law-making with "the spirit of inquiry, challenge, fallibilism, open-mindedness, respect for fact, and acceptance of change."[46]

The pragmatic perspective accepts the idea that changes in doctrine must be made by judges, but also accepts the need for restraint on the exercise of that power and requires deference to legislative determinations. The dominant school of legal theory at mid-century appears to have been predicated on the same concerns that are reflected in the pragmatic perspective. It is beneficial that scholars appreciate the essential similarities between the thinking of two of the most illustrious judges claimed

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42. GUNTHER, *supra* note 1, at 433.

43. Traynor held a PhD in Political Science from the University of California at Berkeley. He received it in 1927, in the same graduation ceremony at which he received his law degree.

44. GLENDON, *supra* note 16, at 129.

45. Roger J. Traynor, *Reasoning in a Circle of Law*, 56 VA. L. REV. 739, 750-51 (1970).

46. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 465 (1990).

by the process scholars as exemplars of their concepts. Therefore, I register a qualification to the valid observation Professor Konefsky drew from the *Baird* and *Drennan* opinions. Looking at those opinions, it would appear that Hand and Traynor were very different in their approach to judging, but in truth they shared the same general perspective. Their names have bloomed in the dust because of the perspective they shared as well as their extraordinary individual abilities and careers.