Hastings Law Journal

Volume 35 | Issue 5 Article 4

1-1984

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One key to understanding Chief Justice Traynor's judicial eminence is that he was a scholar on the bench. But other judges have been or are scholars; indeed, some have had distinguished academic careers. What are the qualities that distinguished Chief Justice Traynor's opinions and gave him a national, indeed, an international, reputation? I will answer this question by examining the method and substance of Chief Justice Traynor's opinions in several areas of criminal law.

False Pretenses

In 1954 Chief Justice Traynor wrote the majority opinion in *People v. Ashley*,[1] a pathbreaking decision. Ashley was charged with having defrauded two elderly women. Although some of Ashley's misrepresentations were ordinary misrepresentations of existing facts, the principal issue concerned the defendant's promises that he would build a theater, give the women a first mortgage, and pay six percent interest—all of which he failed to do.[2] This case raised the novel question of whether a promise to do something in the future made with an

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The writer acknowledges, with thanks, the valuable assistance by Susan Sekler, a staff member of the *Hastings Law Journal*.

1. 42 Cal. 2d 246, 267 P.2d 271, *cert. denied*, 348 U.S. 900 (1954).
2. *Id.* at 253, 267 P.2d at 276.

intention not to do what was promised could be a misrepresentation of fact. Traynor, rejecting the majority rule, answered affirmatively.

The cornerstone of Chief Justice Traynor's method was thorough scholarship. In *Ashley* he first stated the facts of the case in detail, including the fact that at one point, when one of the women complained, the defendant drew a revolver from his drawer and threatened her. The Chief Justice then noted: "The jury could reasonably conclude that defendant . . . deliberately set out to acquire the life savings of his victims, one a woman nearing 70 and the other a woman of little education and rural background and both with little or no business experience."[3]

Turning to the legal analysis, Traynor first disposed of a preliminary issue. He distinguished larceny by trick from larceny by false pretenses, holding that the latter was committed because the woman intended to pass title to the money as well as possession.[4]

The Chief Justice then addressed the principal issue of misrepresentation. He began by using the historical method, noting first that "[t]he crime of obtaining money by false pretenses was unknown in the early common law."[5] He cited an English case, *Rex v. Goodhall*,[6] in which the judge set aside the conviction "because the pretense 'was merely a promise of future conduct.' "[7] Traynor found three problems with *Goodhall*. First, the decision was questionable even when it was decided, given an earlier English decision that was not cited in *Goodhall*. Second, the *Goodhall* decision confused larceny by false pretenses with the crime of "cheat." Finally, he contended that *Goodhall* was "contrary to the plain meaning of the statute"[8] under which it was decided,[9] and he referred to two English writers in support of his interpretation.[10]

The Chief Justice then turned to American case law, focusing on the leading Massachusetts case of *Commonwealth v. Drew*.[11] He concluded that in *Drew* the court had completely misinterpreted *Goodhall* and had used dicta from other questionable decisions to uphold a false

3. *Id.* at 267, 267 P.2d at 284. Traynor was born and grew up in a small town in Utah.
4. *Id.* at 258, 267 P.2d at 279.
5. *Id.* at 259, 267 P.2d at 279.
6. Rex v. Goodhall, Russ. & Ry. 461, 168 Eng. Rep. 898 (1821).
7. *Id.* at 463, 168 Eng. Rep. at 899.
8. *Ashley*, 42 Cal. 2d at 260, 267 P.2d at 280.
9. 30 Geo. 2, ch. 24, § 1 (1757).
10. J. ARCHBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES 183 (3d ed. 1828); H. ROSCOE, DIGEST OF THE LAW OF EVIDENCE IN CRIMINAL CASES 418 (2d Amer. ed. 1840).
11. 36 Mass. (19 Pick.) 179 (1837).

pretenses conviction.[12] The *Drew* case had wide influence because Wharton, in his criminal law treatise, had formulated a misleading but influential rule based on the case.[13] Traynor cited cases in several states where, by legislation or judicial decision, the old Wharton rule had been rejected. The precedents in California were conflicting. Although earlier decisions followed Wharton, in recent cases convictions for fraud had been based on promises made with the intention not to perform. According to Traynor, these decisions, like those following the majority rule, "were made with little explanation of the reason for the rule."[14]

Justice Schauer strongly opposed Traynor's position on this issue, writing a vigorous dissent in protest of the majority's "revolutionary holding."[15] Justice Schauer opposed a conviction that he thought was based only on the mental state of the defendant. He contended that the majority rule created a danger for honest businessmen who simply failed to pay their creditors.[16] He supported this contention by contrasting the majority's concept of fraud based solely on the subjective state of the defendant's mind with other crimes, *e.g.*, burglary, where there were objective facts, such as entry, to support a finding of *mens rea*. According to Justice Schauer, the new rule in *Ashley* could be applied to debtors who had engaged in a series of perfectly legal transactions. Finally, he argued that there was no need for a new rule because there were misrepresentations of existing facts upon which to base the defendant's conviction.

Chief Justice Traynor did not find such reasoning persuasive. Instead of attacking Justice Schauer's dissenting opinion directly, Justice Traynor refuted his argument by analyzing a decision of the District of Columbia Court of Appeals[17] that made the same points urged in the Schauer dissent.[18] First, Traynor noted, in many American states, including California, as well as in England, false promises could be the ground of a civil action for deceit.[19] Second, more than non-performance is required to prove the *mens rea* necessary for conviction. A businessman's mere failure to pay a debt is not sufficient to satisfy this requirement. Moreover, in a criminal case, proof of guilt must be be-

12. *Ashley*, 42 Cal. 2d at 260, 267 P.2d at 280.
13. F. WHARTON, AMERICAN CRIMINAL LAW 542 (1st ed. 1846).
14. *Ashley*, 42 Cal. 2d at 262, 267 P.2d at 281 (1954).
15. *Id.* at 274, 267 P.2d at 288.
16. *Id.* at 276-77, 267 P.2d at 290.
17. Chaplin v. United States, 157 F.2d 697 (D.C. Cir. 1946).
18. *Id.* at 698-99.
19. *Ashley*, 42 Cal. 2d at 263, 267 P.2d at 282.

yond a reasonable doubt. Finally, a specific intent must be proved in many crimes; the prosecution in a case of fraud must prove that the misrepresentation was made "knowingly and with intent to deceive."[20] He concluded that "the inclusion of false promises in [the crime of false pretenses] will not 'materially encumber' business affairs."[21] In support he cited an article reporting relevant inquiries to Better Business Bureaus in leading cities and their answers to the effect that no cases were known of convictions for "ordinary commercial default."[22] He then announced the policy that he advocated: "If false promises were not false pretenses, the legally sophisticated without fear of punishment, could perpetrate on the unwary fraudulent schemes . . . ."[23] This decision, among others,[24] demonstrates Justice Traynor's objectivity and rebuts the notion that in criminal cases he was always on the side of the defendant.

Justice Traynor was a master of the art of legal innovation. While he espoused the idea that judges have a creative function,[25] his trailblazing opinions were the product of painstaking analysis. His innovations were miles apart from those of judges (some of the United States Supreme Court) who simply imposed their ideology on their decisionmaking. Aside from the fairness of the *Ashley* decision, what distinguishes his opinions from those of others is the thoroughness of his probing and the rationality of his analysis. History, precedent, the reasons present or lacking in the earlier decisions, the underlying policies, counsel's arguments regarding the relevant statutes, and the trial—all

20. *Id.* at 264, 267 P.2d at 282.

21. *Id.* at 265, 267 P.2d at 283.

22. *Id.* at 265 n.6, 267 P.2d at 283 n.6.

23. *Id.* at 265, 267 P.2d at 283. Finally, Chief Justice Traynor discussed defendant's contentions regarding corroboration, sufficiency of the evidence, new evidence, and denial of motions by the trial court. *Id.* at 267-74, 267 P.2d at 285-88. The order denying the motion for a new trial was affirmed. *Id.* at 274, 267 P.2d at 288.

24. *See, e.g.*, People v. Thomas, 41 Cal. 2d 470, 261 P.2d 1 (1953). *See also infra* note 62 & accompanying text.

25. Justice Traynor nevertheless believed that the creative function of the judiciary was narrow in scope. He wrote that "a judge undertakes only piecework on request, and never works free of precautions. Even when he is called upon to put a statute under his magnifying glass, he stays close to his bases of the common law. He invariably looks for precedent as his starting point. He is constrained to arrive at a judgment in the context of ancestral judicial experience: the given judgments; or lacking these, the given dicta; or lacking these, the given clues. Even if his search of the past yields nothing, so that he confronts a truly unprecedented case, he still arrives at a judgment in the context of judicial reasoning with recognizable ties to the past. By that kinship, a judgment not only establishes the unprecedented case as a precedent for the future, but integrates it into the often rewoven but always durable network of common law." Traynor, *Transatlantic Reflections on the Limits of Judicial Creativity*, 1980 UTAH L. REV. 255, 262.

received carefully reasoned study. Chief Justice Traynor was as objective as it was possible to be in dealing with a socio-legal problem.

Felony Murder

A second area of substantive criminal law in which Chief Justice Traynor made an important contribution is that of felony-murder. In the 1965 case of *People v. Washington*,[26] the defendant had been charged with the murder of his accomplice in a robbery. During an attempted robbery of a gas station, one of the robbers pointed a revolver at the owner, who immediately shot and killed him. The owner then went to the door, saw the accomplice Washington running away, and shot and wounded him.[27] Washington appealed from the conviction of robbery and first degree felony-murder.

In his majority opinion, Chief Justice Traynor discussed the fact that the felony-murder rule had been abolished in England in 1957. He cited the criticism of the felony-murder rule by several scholars and pointed out that in Michigan,[28] Pennsylvania,[29] and New York[30] the felony-murder rule had been restricted to killing by the felon, thereby excluding killings by an intended victim or a policeman. He plainly agreed with the criticism that the traditional felony-murder rule "erodes the relation between criminal liability and moral culpability."[31] He forcefully argued that the killing in *Washington* was not in furtherance of the felony but was in resistance to the felony.[32] Washington's robbery conviction was upheld, but the murder conviction was reversed.

Chief Justice Traynor seems to have agreed with earlier cases which held that when the felon directly kills, he is liable for first degree murder under the felony murder rule even if he killed accidently.[33] Despite his reluctance to extend the felony-murder rule to include killing by the intended victim or a policeman,[34] he acknowledged that "defendants who initiate gun battles may also be found guilty of murder if

26. 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).
27. *Id.* at 779, 402 P.2d at 132, 44 Cal. Rptr. at 444.
28. People v. Austin, 370 Mich. 12, 120 N.W.2d 766 (1963).
29. Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958).
30. People v. Wood, 8 N.Y.2d 48, 167 N.E.2d 736, 201 N.Y.S.2d 328 (1960).
31. *Washington*, 62 Cal. 2d at 783, 402 P.2d at 134, 44 Cal. Rptr. at 446.
32. *Id.* at 781, 402 P.2d at 133, 44 Cal. Rptr. at 445.
33. *Id.*
34. "To invoke the felony-murder doctrine when the killing is not committed by the defendant or by his accomplice could lead to absurd results." *Id.* at 782, 402 P.2d at 134, 44 Cal. Rptr. at 446.

their victims resist and kill."[35]

Traynor believed, however, that if someone other than the felon fires the lethal shot in a gun battle initiated by the felon, it must first be proved that, in addition to the *mens rea* for the felony, the defendant had the *mens rea* for second-degree murder. Only then may the felony-murder rule be applied, and its effect is to increase the gravity of the offense to first-degree murder. This conclusion about Traynor's view can be reached by juxtaposing statements he made in two other opinions. In the earlier case of *People v. Thomas*,[36] Traynor had written that Penal Code section 189, which contains the felony-murder provision,[37] "does not state that a 'killing' perpetrated . . . is murder of the first degree. It speaks only of 'murder' that is so perpetrated."[38] In the post-*Washington* case of *People v. Gilbert*,[39] another felony-murder case, he said, "[w]hen murder is established under Penal Code sections 187 and 188 . . . section 189 [the felony murder provision] may properly be invoked to determine the degree of that murder."[40]

Traynor's qualified acceptance of the felony-murder rule where the felon does not directly kill was subordinate to his approval in *Washington* of the Michigan, Pennsylvania, and New York decisions limiting application of the felony-murder rule to direct killing by the felon and to his emphasis on the requirement that the killing be in furtherance of the felony.[41]

35. *Id.* Justice Burke, joined by Justice McComb, dissented on the ground that pointing a gun at the owner of the gas station was initiating a gun battle. *Id.* at 785, 402 P.2d at 136, 44 Cal. Rptr. at 448 (Burke, J., dissenting).

36. 41 Cal. 2d 470, 261 P.2d 1 (1953).

37. CAL. PENAL CODE § 189 (West 1970 & Supp. 1984).

38. *Thomas*, 41 Cal. 2d at 477, 261 P.2d at 5 (Traynor, J., concurring).

39. 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1966). In *Gilbert*, Chief Justice Traynor, writing the majority opinion, reversed the conviction for several reasons, among them the fact that the trial judge instructed the jury in terms of proximate cause. The Chief Justice stated that "[t]his instruction withdrew from the jury the crucial issue of whether the shooting of Weaver was in response to the shooting of Davis [his accomplice] or solely to prevent the robbery." *Id.* at 704, 408 P.2d at 373, 47 Cal. Rptr. at 917.

40. *Id.* at 705, 408 P.2d at 374, 47 Cal. Rptr. at 918.

41. In *Washington*, Chief Justice Traynor, drawing on relevant Pennsylvania cases, had written: "It is not enough that the killing was a risk reasonably to be foreseen and that the robbery might therefore be regarded as a proximate cause of the killing." 62 Cal. 2d at 781, 402 P.2d at 133, 44 Cal. Rptr. at 445. If the California Penal Code is revised and a felony-murder rule is retained, Justice Traynor's decisions, the Model Penal Code, and conflicting laws in Michigan, New York, and Pennsylvania will make it necessary to address certain questions. *See* Hall, *Theory and Reform of Criminal Law*, 29 HASTINGS L.J. 893, 912-13 (1978).

Diminished Capacity

Diminished capacity is another major area of criminal law that Chief Justice Traynor addressed, principally in *People v. Conley*.[42] The defendant had been convicted for killing a husband and wife while he was grossly intoxicated. The trial judge did not instruct the jury that diminished capacity could negate malice and thereby reduce the crime to manslaughter. The California Supreme Court, in an opinion written by Chief Justice Traynor, reversed the conviction and held that "evidence of diminished capacity, whether caused by intoxication, trauma or disease, can be used to show that a defendant did not have a specific mental state essential to an offense."[43] The court further held that "[a] person who intentionally kills may be incapable of harboring malice aforethought because of a mental disease, defect, or intoxication."[44]

Traynor's rationale in support of the diminished capacity rule contrasts sharply with current uncertainties emanating from Proposition 8 and Penal Code section 28. Penal Code section 25(a),[45] adopted pursuant to Proposition 8, abolished the defense of diminished capacity, but Penal Code section 25(c),[46] also part of Proposition 8, allows evidence of diminished capacity to be considered in the sentencing or other disposition of a case. Penal Code section 28(a) renders evidence of mental disease, defect, or disorder inadmissible to negate the *capacity* to form a specific intent and states that such evidence is admissible "solely on the issue whether or not the accused *actually formed* a required specific intent." [47] This treatment is tenable although debatable regarding mental disease or defect short of insanity, and perhaps regarding trauma, but it is highly questionable regarding intoxication. Since 1838 in England,[48] and somewhat later in this country,[49] gross intoxication has been used to disprove an alleged *mens rea* and thereby to reduce a criminal homicide to manslaughter in states where murder is not divided into degrees. In states where such a division is made, murder in the first degree is reduced to second-degree murder or to manslaughter. In the

42. 64 Cal. 2d 310, 411 P.2d 911, 42 Cal. Rptr. 815 (1966).

43. *Id.* at 316, 411 P.2d at 914, 49 Cal. Rptr. at 818. In crimes that do not include a lesser offense, the result is acquittal. *See, e.g.*, People v. Harris, 29 Cal. 678 (1866) (voting twice); People v. Blake, 65 Cal. 275, 4 P. 1 (1884) (forgery).

44. *Conley*, 64 Cal. 2d at 318, 411 P.2d at 916, 49 Cal. Rptr. at 820.

45. CAL. PENAL CODE § 25(a) (West Supp. 1984).

46. CAL. PENAL CODE § 25(c) (West Supp. 1984).

47. CAL. PENAL CODE § 28(a) (West Supp. 1984) (emphasis added).

48. Regina v. Cruse, 9 Car. & P. 541, 546, 173 Eng. Rep. 610, 612 (1838).

49. *See, e.g.*, Booker v. State, 156 Ind. 435, 60 N.E. 156 (1900); Keeton v. Commonwealth, 92 Ky. 522, 18 S.W. 359 (1892).

original English and early American opinions, the term "diminished capacity" was not used, but identical results were reached. Thus, to exclude evidence of gross intoxication from the trial of the issues would be an extreme, if not revolutionary, innovation.[50]

Without going into the complexities that the current law entails,[51] it can only be noted here that the major, indeed probably the sole, purpose of the traditional law in this country and in England allowing evidence of incapacity to be introduced was to determine whether the defendant had the required *mens rea*.[52] In many cases, reliance only on external facts cannot prove a required *mens rea*. For example, even if a person draws a gun and says, "I am going to kill you," and then follows through on his threat, he may not be guilty of first-degree murder. He may have been mistaken regarding relevant facts because of fear, emotional distress, brain damage, or gross intoxication and therefore may not have had the requisite *mens rea*. Except where the defendant's adult normality is assumed or admitted, it is hard to visualize a situation in which the required *mens rea* could be established without relying on evidence of the defendant's mental capacity. The admissibility of evidence of irrational acts must proceed from the premise that *mens rea* depends on mental capacity and the corollary that incapacity negates certain mental states required as elements of crimes.

Plainly, Proposition 8 and Penal Code section 28 were reactions to public clamor that might more rationally have been directed not against the law but against the juries who returned questionable verdicts. However, there is no escaping the principle behind Chief Justice Traynor's opinion in *Conley*, that in criminal law the moral culpability of the defendant is of basic importance. Hence, to find a grossly intoxicated person guilty of murder in the first degree challenges the deeply rooted principle of moral culpability.[53] Moreover, it is wishful thinking

50. In State v. Bouwman, 328 N.W.2d 703 (Minn. 1982), the court refused to admit evidence of diminished capacity relevant to mental disease short of insanity. But the court reaffirmed its adherence to the traditional rule that evidence of intoxication may be introduced in the trial of the issues for the purpose of reducing the gravity of the crime charged.

In California diminished capacity meant mental disease, trauma, or intoxication. Hence, the indiscriminate rejection of diminished capacity rejects evidence of intoxication in the trial of the principal issue.

51. Because of the centuries-old treatment of intoxication as a ground for lowering a charge of murder to manslaughter, and because intoxication was included in "diminished capacity" in California, there may be constitutional questions regarding the complete elimination of diminished capacity.

52. *See* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 107, 534, 537 (2d ed. 1960).

53. The importance of moral culpability in criminal law can be seen in the reaction of the House of Delegates of the American Bar Association to the demand for a "guilty but insane" verdict, generated by the public outcry in response to the Hinkley decision. *Insanity*

to imagine that this value is as well preserved by substituting a court's discretion in sentencing for prescription in law.

Other Contributions to Criminal Law

Chief Justice Traynor made other important contributions to criminal law. In *Perez v. Sharp*[54] he wrote the opinion that held the anti-miscegenation statute unconstitutional, anticipating the same ruling by the United States Supreme Court by sixteen years.[55] Additionally, in *People v. Hood*[56] he provided a much needed clarification of the distinction between "specific intent" and "general intent."[57]

Justice Traynor also made important contributions in the area of criminal procedure. In 1955, in *People v. Cahan*,[58] he wrote the opinion that adopted the exclusionary rule, not only reversing years of California precedent,[59] but also reversing his earlier position.[60] He expanded the criminal defendant's discovery rights in *People v. Riser*[61] and upheld the prosecution's right to discovery against criminal defendants in *Jones v. Superior Court*.[62] In *People v. Ibarra*,[63] although the defendant had the assistance of appointed counsel, Justice Traynor held that counsel's failure to investigate all defenses denied the defendant a fair trial.[64] Dissenting in *People v. Brown*,[65] Justice Traynor urged an expansion of the indigent's right to counsel, arguing that the right should

Test, 69 A.B.A.J. 426 (April 1983). The delegates recommended only the exclusion of the "irresistible impulse" defense as formulated by the Model Penal Code. *Id.* The delegates further recommended that in states allowing the irresistible impulse test, the burden of proof should be on the defendant. *Id.* Thus, the final American Bar Association recommendation regarding insanity closely approximated California law prior to *People v. Drew*, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978). For the writer's criticism of the irresistible impulse rule and its refined statement in the Model Penal Code, see J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 486-504 (2d ed. 1960)). Unfortunately, *Drew* adopted the "irresistible impulse" test. Those who drafted Proposition 8 and Penal Code section 28 are to be commended both for their decision to leave insanity within the trial of the issues and also for their rejection of the "irresistible impulse" test.

54. 32 Cal. 2d 711, 198 P.2d 17 (1948).

55. McLaughlin v. Florida, 379 U.S. 184 (1964).

56. 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969).

57. *Id.* at 456-58, 462 P.2d at 377-79, 82 Cal. Rptr. at 625-27.

58. 44 Cal. 2d 434, 282 P.2d 905 (1955).

59. Paulsen, *Criminal Law Administration: The Zero Hour Was Coming*, 53 CALIF. L. REV. 103, 104 (1965).

60. *See* People v. Gonzales, 20 Cal. 2d 165, 124 P.2d 44 (1942) (holding that states are not bound by the fourth amendment's prohibition of the use of illegally acquired evidence in criminal trials).

61. 47 Cal. 2d 566, 305 P.2d 1 (1956).

62. 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

63. 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963).

64. *Id.* at 464-65, 386 P.2d at 491, 34 Cal. Rptr. at 866.

extend to appeals of right by indigents convicted of felonies. Though not adopted by a majority of the California Supreme Court in *Brown*,[66] Justice Traynor's views were later approved by the United States Supreme Court in *Douglas v. California*.[67]

Tribute to Justice Roger Traynor

Justice Traynor's opinions and his reputation as one of the nation's greatest judges have elicited many expressions of appreciation. A small sample of the huge volume of praise is indicative of the esteem in which he was held. Erwin Griswold, former dean of the Harvard Law School, writing in 1965 about the great judges of the past, mentioned Mansfield in England; Sharswood, Ruffin, Cardozo, and Vanderbilt in the United States; and among the then-living judges, he included only Schaefer, Traynor, and Lord Denning.[68] More recently, Professor Bernard Schwartz of the New York University Law School included Traynor in his list of the ten greatest American judges, along with Marshall, Holmes, Cardozo, and other celebrated judges.[69]

Justice Schaefer wrote that Traynor "has been for many years our number one judge."[70] Professor Schwartz wrote that "Traynor's own contributions . . . can be compared only to those made by earlier masters of the judicial craft, such as Shaw or Cardozo."[71] "Traynor's opinions display perhaps a greater mastery of the judicial art than those of any state judge since Cardozo."[72] The late Professor Harry Kalven, a leading authority on tort law, had high praise for Traynor's opinions in that field,[73] and Professor Currie, a conflict of laws scholar, said that Traynor's opinion in *Bernhard v. Bank of America*[74] was "a classic of jurisprudence, an early attainment of his lifetime goal of substituting reason for unreason in the law."[75]

65. 55 Cal. 2d 64, 69, 357 P.2d 1072, 1075, 9 Cal. Rptr. 816, 819 (1960) (Traynor, J., concurring).

66. *See id.* at 65-69, 357 P.2d at 1072-75, 9 Cal. Rptr. at 816-819.

67. 372 U.S. 353, 355 (1962).

68. Griswold, *The Long View*, 51 A.B.A. J. 1017, 1018 (1965).

69. Schwartz, *The Judicial Ten: American's Greatest Judges*, 1979 So. ILL. U.L.J. 405, 407.

70. Schaefer, *Chief Justice Traynor and the Judicial Process*, 53 CALIF. L. REV. 11, 24 (1965).

71. Schwartz, *supra* note 67, at 440.

72. Schwartz, *supra* note 67, at 441.

73. Kalven, *Torts: The Quest for Appropriate Standards*, 53 CALIF. L. REV. 189 (1965).

74. 19 Cal. 2d 807, 122 P.2d 892 (1942).

75. Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25, 26 (1965). *See also* G. WHITE, THE AMERICAN JUDICIAL TRADITION 292-316 (1976).

Justice Traynor became a member of the Hastings Faculty in 1970, when I also came to Hastings. He taught criminal procedure and a seminar in judicial process; I taught substantive criminal law and jurisprudence. In 1973 Dean Anderson appointed a Criminal Law Survey Committee consisting of Justice Traynor, Professor Perkins, and myself, as the senior members, and four of the younger faculty members. The committee met once each week for five months, circulated a questionnaire among the students, and drafted a twenty-two page report. Traynor attended all of these meetings and made many helpful suggestions which received unanimous approval.

Before joining the Hastings faculty, I had, of course, read some of Justice Traynor's opinions, but my position on the Hastings faculty made it necessary to familiarize myself with California criminal law. I read many more of Traynor's decisions in the criminal law field and discovered that they were invariably of a high scholarly order. I learned that he had a Ph.D. in political science as well as the degree in law. He was, in short, a scholar on the bench with an educational background not equaled by many judges. When I told some of my colleagues my assessment of Traynor's opinions in criminal law, Larry Eldredge, who had succeeded Prosser in torts, said he found the same high level of decision in Traynor's opinions in tort cases; teachers of other fields of law joined in the chorus of praise.

Finally, if an old colleague of Justice Traynor may be allowed to add a personal note in which the entire Hastings faculty would certainly join, it is this: Roger Traynor was one of Nature's gentlemen. In his relations with students and colleagues, he was invariably kind, friendly, and warm. He lives in the hearts of those who were privileged to work with him.