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The Judicial Philosophy of Roger Traynor

by

JOHN W. POULOS*

I. Introduction

Roger Traynor served on the Supreme Court of California for nearly thirty years, from July 31, 1940, through January 31, 1970, first as an associate justice and then as Chief Justice.1 In those years he acquired an extraordinary reputation. Colleagues on the bench, in

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* Professor of Law, University of California, Davis. A.B. Stanford University, 1958; J.D. University of California, Hastings College of the Law, 1962. The research for this article started during the summer of 1991, while I was the inaugural Roger Traynor Summer Research Professor at Hastings College of the Law. The Roger Traynor Summer Research Professorship enabled me to undertake this project. The remainder of the research was carried out during the summers of 1992 and 1993 at Martin Luther King, Jr., Law School, University of California, Davis.

I would like to thank the Hastings faculty for providing me with valuable insights about Roger Traynor. I would also like to thank the librarians at Hastings for their invaluable assistance. My wife, Deborah Nichols Poulos, deserves special thanks for her support throughout the term of this project, and for reading and commenting on the manuscript.

1. Roger Traynor became the seventy-seventh associate justice of the California Supreme Court on August 13, 1940. He was appointed to the position by Governor Culbert Olson on July 31, 1940. 15 Cal. 2d iii n.4 (1940); 1975 OFFICE OF STATE PRINTING, STATE OF CALIFORNIA, CALIFORNIA BLUE BOOK 264-65 (1974) [hereinafter 1975 CALIFORNIA BLUE BOOK]; 2 J. EDWARD JOHNSON, HISTORY OF THE SUPREME COURT JUSTICES OF CALIFORNIA, 1900-1950, at 182-193 (1966). His tenure on the Court begins with the 16th volume of the second series of the Official California Supreme Court Reports.

Justice Traynor began his career as a teacher, initially in Berkeley’s Department of Political Science and later at Boalt Hall, where he spent ten years as a tax professor before he joined the Court. At the time of his appointment to the Court, he was Professor of Law and Acting Dean at Boalt Hall, the Law School at the University of California, Berkeley. Id. at 191.

both state and federal courts, refer to him as "one of the great contemporary figures of the law;"\(^2\) as "the ablest judge of his generation in the United States;"\(^3\) and as an "outstanding common law judge," whose reputation extends throughout the common law world.\(^4\) Law professors assess his work in equally complimentary terms: "Roger Traynor is a law professor's judge;"\(^5\) he is "one of the great judges and legal reformers in the history of the common law;"\(^6\) and his contributions "can be compared only to those made by earlier masters of the judicial craft, such as Shaw or Cardozo."\(^7\)

Lawyers\(^8\) and members of

For ease of expression, I generally refer to Roger Traynor as "Justice Traynor" throughout this article, even though he may have been Chief Justice of California at the time under discussion. There is, as yet, no published book-length biography of Roger Traynor. A brief biography appears in Johnson, supra, at 265. For an interesting short biographical article by one of his colleagues at Hastings College of the Law, see McCall, supra. Another brief autobiographical sketch appears in Roger J. Traynor, Many Worlds Times You, in The Traynor Reader 11-18 (Hastings Law Journal ed., 1987) (Baccalaureate Address at the University of Utah on June 9, 1963).

Chief Justice Traynor is also the subject of a series of audiotape interviews with a number of his friends, colleagues, and associates (including Donald P. Barrett, Research Attorney, Supreme Court of California (1948-1981), and Justice Raymond L. Sullivan). The interviews were conducted by Dorothy Mackay-Collins, the Curator/Archivist with primary responsibility for the Roger J. Traynor Memorial Room in the Law Library at the University of California, Hastings College of the Law. These interviews are part of an oral history project on Chief Justice Traynor conducted by Ms. Mackay-Collins. These oral history materials are on file in the Law Library's Roger J. Traynor Memorial Room.


6. McCall, supra note 1, at 741.


8. See, e.g., Donald P. Barrett, Master of Judicial Wisdom, 71 CAL. L. REV. 1060 (1983) (tribute by senior attorney who was on Justice Traynor's staff from 1949 until Traynor's retirement in 1970); Bill Blum, Toward A Radical Middle, Has A Great Court Become Mediocre?, 77 A.B.A. J., Jan. 1991, at 48, 49 (analysis by Los Angeles attorney of tempera-
the press\(^9\) offer similar appraisals.

Roger Traynor's exemplary reputation is based upon the nearly 900 opinions he wrote during his years on the bench,\(^{10}\) and upon his mastery of the judicial process. "The span of Traynor's creative contributions to the case law of California," Justice Tobriner commented, "is staggering."\(^{11}\) His opinions embrace every legal topic heard by the court from the start of the Second World War until after Astronaut Neil Armstrong stepped out of Apollo 11 onto the surface of the moon on July 20, 1969. He illuminated and modernized virtually every field of law he touched.\(^{12}\) Hundreds of pages of scholarly commentary analyze these opinions;\(^{13}\) and generations of law students have pondered them in casebooks on contracts, torts, criminal law, property, family law, and conflicts of law.


11. Tobriner, supra note 4, at 1770.


Nearly a quarter of a century has passed since Justice Traynor wrote his last opinion. It has been a decade since he died. This Article provides a new look at the judicial philosophy that produced this remarkable legacy. The Article focuses on Justice Traynor's judicial philosophy as found in twenty-four articles\(^\text{14}\) that he wrote between 1956 and 1980.\(^\text{15}\)

This Article begins with a brief review of the major developments in American legal process theory from the latter part of the last cen-

\(^\text{14}\) The articles are listed in Appendix A. Roger Traynor first began writing about the judicial process in the middle of his judicial career. The first article was published in the summer of 1956, after Justice Traynor had served on the California Supreme Court for sixteen years. Traynor was one of the invited speakers at the dedication of the new College of Law building at the University of Illinois on April 12-14, 1956. He spoke at a colloquium held on Friday, April 13, on the theme “Law and Society.” William W. Lewers, Foreword, Dedicatory Proceedings—The New Law Building, 1956 U. ILL. L.F. 163, 163. Justice Traynor's talk was published that summer in a symposium issue of the law review covering the dedication proceedings. Roger J. Traynor, Law and Social Change in a Democratic Society, 1956 U. ILL. L.F. 230 [hereinafter Traynor, Law and Social Change]. By that time, he was one of the most respected state court judges in the nation. It was because of this reputation that he was invited, along with Chief Justice Earl Warren, Justice Walter V. Schaefer, Judge Charles E. Wyzanski, Judge Herbert F. Goodrich, and others to participate in the ceremony. See Lewers, supra, at 163-64. The talk given by Justice Traynor at this ceremony became his first law review article on the legal process. His next legal process article, published the following year, was taken from an invited address given before the University of Chicago Law School's Conference on Judicial Administration on November 8, 1956. Roger J. Traynor, Some Open Questions On The Work Of State Appellate Courts, 24 U. CHI. L. REV. 211 (1957) [hereinafter Traynor, Some Open Questions]. In 1961, the Stanford Law Review published a symposium issue on Justice Traynor. In that issue, Chief Justice Walter V. Schaefer of the Supreme Court of Illinois (Justice Schaefer became Chief Justice after the University of Illinois ceremony dedicating the new law school building mentioned above) wrote: The legal profession is a busy one, and often recognition of the truly great among us is too long deferred. This symposium will embarrass Justice Traynor, but I think we need not be concerned with that. Whether he is willing to believe it or not, the fact is that he has been for many years the nation's number one state-court judge, and when the legal profession honors him, it honors itself. Schaefer, supra note 13, at 718.

Justice Traynor's last article was published in 1980. Roger J. Traynor, Transatlantic Reflections on Leeways and Limits of Appellate Courts, 1980 UTAH L. REV. 255 [hereinafter Traynor, Transatlantic Reflections]. With one exception, each of the twenty-four articles was first delivered as an invited lecture. The single exception is the short article he prepared for a history of the justices of the Supreme Court of California. Roger J. Traynor, The Supreme Court's Watch on the Law, in J. JOHNSON, supra note 1, at 207 [hereinafter Traynor, Watch On the Law].

\(^\text{15}\) As a general proposition, beyond the customary techniques of statutory construction and the manipulation of precedent, our conception of the well-written opinion precludes discussion and analysis of the process that produced the law governing the case. One can imagine that in past times, when judges adhered to Blackstone's view that judges find the law and do not make it, it would have been embarrassing and highly inconvenient to discuss the judge's method for finding the law. These traditions pass slowly. Custom-
tury to the Traynor years on the court. First, traditional views of the judicial process will be explored in Part II. Part III focuses on modern (meaning twentieth-century) judges’ movement away from those traditional views. All of these views, both traditional and modern, are the theories that provoked Roger Traynor to create his philosophy of the judicial process. Then, in Part IV, Justice Traynor’s judicial philosophy is explored in detail and examined for its relevance for our time. This portion of the Article focuses on Justice Traynor’s view of judging as a creative process, and the factors and limitations which drive the art of creative judging.

II. The Traditional Views of the Judicial Process

There is no single traditional view of the judiciary’s legitimate role in the legal process. There is, instead, a spectrum of views that vary according to the weight attributed to each component of the judicial role. Like multiple-factor balancing analysis so common to contemporary constitutional law, different results are reached when the components are weighted differently. However, the different conceptions of the judiciary’s role share some common ground. As we shall see, for example, Roger Traynor’s views are consonant in some respects with those espoused by Sir William Blackstone.

It is a foundational idea of our legal system that when people come before a court to resolve a dispute, it is the law, not the judge, that governs their affairs and their real world abstractions (such as government, partnerships, and corporations). This separation of the law from the person who enforces it is a common theme in varying views of the Anglo-American legal process. It is a major part of what
we mean by the "rule of law." In extreme manifestations of this idea, the judges apply or enforce the law solely as it was received from others.

In times long past the law was believed to be handed down by some source external to both the people and the judges: by God, nature, the king, kismet, or (in less benign situations) by force of arms. We need not trace the evolution of these ideas here, for it will suffice for our purpose to accept that the law applied by the judges was understood to come from a source external to the judge. The growth of other concepts, such as "legitimacy," "the people," and "democracy," limited the sources of law to a handful of choices.

The rise of the power and prestige of parliaments, insofar as they are founded on the democratic ideal of the power of the people to fashion their own destiny, ultimately established a fundamental principle of the Anglo-American legal system: Assuming away the modern complications created by American constitutionalism, statutory law is the supreme law of the land. It trumps the official acts, proclamations, and judgments of administrators and judges alike. It is the law judges must apply. According to this theory, the people, speaking through their democratically elected legislature, are the sources of the law applied by the courts. Thus, when judges apply statutory law, there is no debate about the sources of the law or its legitimacy, for this judicial action falls squarely within accepted democratic theory. But what is to be done when no legislative rule is available to resolve the dispute at hand? Judges, it was early agreed, must decide disputes properly submitted to them. Courts cannot turn litigants away to seek a legislative rule for application some later day. Decide the case they must! But how?

William Blackstone provides us with one of the most enduring and influential answers to the question. While acknowledging the primacy of statutory law in the English legal system, Sir William asserted that judges must also apply the *leges non scriptae*, the unwritten common law, as it is contained in judicial decisions and in the treatises of learned sages of the profession:

[The] . . . *leges non scriptae* . . . receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom. . . . [H]ow are these customs

17. 1 WILLIAM BLACKSTONE, COMMENTARIES *89 (St. George Tucker ed., 1803). The St. George Tucker edition of Blackstone's Commentaries is used in this Article because it is one of the most famous editions to be published in America. Tucker's notes in this edition (which are clearly identified) are an invaluable source of American legal history. 18. Id. at *63.
or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the ... living oracles, who ... are bound by an oath to decide according to the law of the land.... And indeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law.... For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case ... is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more clearly if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that is, it is not the established custom of the realm, as has been erroneously determined.19

"Where the common law and a statute, differ," Sir William finally observed, "the common law gives place to the statute."20

The supremacy of legislation did not develop in a vacuum. It grew in the same soil that nurtured the common law in England, and later in America. The common law was part of the environment in which legislative supremacy grew and prevailed. The ideas that produced democracy harmonized that institution with the common law, and created the supremacy of legislation to make both institutions, the common law and parliamentary democracy, consistent. Indeed, the common law would be integrated with democratic theory by insisting that it was based, like legislation, upon the will of the people and their values. The sources of the common law were thus later said to be the traditions of the people, their customs and practices, and community values. It is law based upon a common culture and its common values. But should there be a conflict between statutory law and common law, democratic theory made parliamentary law prevail.

These old conventions persisted, in one form or another and with varying vigor, into the nineteenth and twentieth centuries. Judges, we are told, apply the law. They do not make it. The law anciently was

19. Id. at *69-70.
20. Id. at *89.
“made” by the people from their traditions, customs, practices, and community values. The judge simply discovers that law and applies it in the case at hand. As cases are decided, a body of precedent, grounded in these sources, accumulates in the books. With the growth of precedent, a judge need not generally be concerned with “discovering” the law governing the case. The common law, embodied in precedent, can be applied with reason and the judge’s lawyering skills to resolve most of the legal issues coming before the court.

For the most part, the voyage of discovery begins and ends in the law library: The search becomes research. And in the exceptional situation, “where the former determination is most evidently contrary to reason” or “to . . . divine law,” precedent may be overruled. But this is done not on the ground that the law articulated in the precedent was incorrect or moribund, but on the theory that overruled precedent incorrectly evidenced the common law.

Novel cases, of course, present special problems: they cannot easily be resolved by precedent alone. However, by a combination of legal reasoning and other skills (such as, for example, the fine art of distinguishing cases on their facts), precedent usually can be forced to yield a rule for novel cases as well. When this is thought to be either impossible or inconvenient, the court can resort to the sources of the common law and “discover” an existing, but previously unrevealed, rule to match the occasion.

After the rise of legislation, classical common law theory reached maturity. All law is given to the courts by the people, either formally, as in legislation, or informally, as in the common law. Furthermore, the common law remains intact until it is altered by legislation. Once legislation conflicts with the common law, the courts are obliged to apply the statute as the law of the case. If the legislation is ambiguous, then the court is bound to interpret the statute in accordance with the legislative will. But in the absence of governing statutes, the common law prevails. Judges thus do not make law. With the use of logic and reason they find the law and apply it to the facts of the case. The judge is law finder and law applier, never law giver.

This process, Sir William would tell us, produced the common law of crimes, of contracts, property, torts, and the other common law subjects. It has been an essential part of American legal culture since the common law was brought to this country.

21. *Id.* at *69-70.
III. The Modern Rebellion

It is doubtful that many lawyers or judges in this century have fully embraced all aspects of the classical theory as articulated by Blackstone. Some portions of the theory lived longer than others. The most conservative version of the traditional view of the legal process is what we now pejoratively call "mechanical jurisprudence." Under this view, the facts of the case, not the law, are the primary focus of attention. This view apparently survived into this century primarily as a metaphor for the proper role of the judiciary in a democracy.22 Even today, it may accurately describe how some judges and some lawyers conceive of their daily work, especially in the lower courts and in some areas of practice. On the other hand, the fact that classical theory may accurately describe what is done in some settled areas of practice does not mean that it accurately depicts either the power of judges and lawyers in these situations, or the proper allocation of power in a contemporary democracy. At best, the classical theory expresses what is done, not what the judges properly may do. At worst, it is simply incorrect on all counts.

Additionally, it is doubtful that many judges or lawyers in this century actually believe that a case is overruled because it mistakenly interpreted the common law that is "out there." Rather, it is more likely they believe it was overruled because it no longer articulates acceptable policy.

Nevertheless, in some measure, classical theory has been the most influential conception of the judicial process in the common law world. It provides the core ideas against which modern conceptions of the legal process rebel. We now turn to the modern rebellion against classical theory, for these are the views that immediately influenced Roger Traynor's thinking about the judicial process.

A. Holmes

Near the end of the century, Oliver Wendell Holmes analyzed the common law in a series of lectures delivered at the Lowell Institute in Boston. In his first lecture, Holmes stated that his goal for these lectures was to present a general view of the Common Law. To accomplish the task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is

22. The phrase "mechanical jurisprudence" was given currency by Dean Pound's famous article of the same title. Roscoe Pound, Mechanical Jurisprudence, 8 COLUM. L. REV. 605 (1908).
not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.\textsuperscript{23}

The foregoing . . . well illustrates the paradox of form and substance in the development of law. In form its growth is logical. The official theory is that each new decision follows syllogistically from existing precedents. . . . On the other hand, in substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but not the less traceable to views of public policy in the last analysis.\textsuperscript{24}

Seventeen years later, Holmes was asked to deliver an address at the dedication of a new building at the Boston University School of Law. His address, \textit{The Path of the Law},\textsuperscript{25} further developed the themes discussed in the Lowell Lectures. It was in this address that he gave us his famous, though controversial, definition of law: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."\textsuperscript{26} Thinking it desirable "to point out and dispel a confusion between morality and law, which sometimes rises to the height of conscious theory,"\textsuperscript{27} Holmes offered the following explanation:

You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and

\textsuperscript{23} Oliver Wendell Holmes, Jr., \textit{The Common Law} 1 (1881). Holmes was asked to deliver a course of lectures at the Lowell Institute in Boston in 1880. He gave eleven lectures. They were subsequently published as \textit{The Common Law}. The quotation is from the first lecture.

\textsuperscript{24} Id. at 35-36.

\textsuperscript{25} Oliver Wendell Holmes, Jr., \textit{The Path of the Law}, 10 Harv. L. Rev. 457 (1897).

\textsuperscript{26} Id. at 461.

\textsuperscript{27} Id. at 459.
will want to keep out of jail if he can.\textsuperscript{28}

Holmes drew this distinction to enable one to learn and understand the law:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.\textsuperscript{29}

Holmes then returned to the "fallacy" that "the only force at work in the development of the law is logic."\textsuperscript{30}

The danger of which I speak is not the admission that the principles governing other phenomena also govern the law, but the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct. . . .\textsuperscript{31}

This mode of thinking is entirely natural. The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.\textsuperscript{32}

Near the end of his address, Holmes advised us on how to understand and mold the path of the law:

[\textit{F}ollow the existing body of dogma into its highest generalizations by the help of jurisprudence;\textsuperscript{33} next, . . . discover from history how it has come to be what it is;\textsuperscript{34} and, finally, so far as you can, . . . con-
The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules.

Id. at 469.

35. Id. at 476. The last phrase refers to a prior discussion of the use of the social sciences to determine the price paid for the policy adopted:

For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.

Id. at 469.

36. Id. at 470-71.
a source of the law.\textsuperscript{37} In 1908, using the invitation to give an address at the 75th anniversary of the Cincinnati Law School, and intending "to answer Holmes or at least to correct his position,"\textsuperscript{38} Dean Ames delivered a speech on the role of morality in the growth of the law. The address was subsequently published as the article, \textit{Law and Morals}.\textsuperscript{39} The lecture focused on the critical importance of the moral sense of the community as a source of judge made law. The supposed dispute on the role of morality in law between Justice Holmes and Dean Ames, who was one of the most prominent figures in legal education at the turn of the century, symbolizes much of what was to follow in the first half of the twentieth century with theories of the judicial process.

Before we turn to those developments, we should note that the characterization of Dean Ames' address as a response to Holmes' \textit{The Path of the Law} seems contrived. Unless Holmes changed his thinking after he delivered the Lowell Institute lectures (\textit{The Common Law}), he still believed that "the prevalent moral and political theories" were used as sources of the law at the time he delivered the Boston University speech.\textsuperscript{40} Holmes distinguished between law and morality for one purpose: to make clear that morality is neither a necessary nor a sufficient ingredient in the concept of law.\textsuperscript{41} If we focus on the judicial process, then according to Holmes, law is what

\textsuperscript{37} Throughout \textit{The Path of the Law}, Holmes distinguished between law and morality. He wrote:

I think it desirable, at once to point out and dispel a confusion between morality and law, which sometimes rises to the height of conscious theory . . . . When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law . . . . I do not say that there is not a wider point of view from which the distinction between law and morals becomes of secondary or no importance . . . [b]ut I do say that distinction is of the first importance for the object which we are here to consider—a right study and mastery of the law as a business with well understood limits . . . .

\textit{Id.} at 459. This was, of course, the point of his "bad man" theory. At a later point in his essay, Holmes wrote:

I hope that my illustrations have shown the danger, both to speculation and to practice, of confounding morality with law, and the trap which legal language lays for us on that side of our way. For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law.

\textit{Id.} at 464.

\textsuperscript{38} \textit{COMM. ON POST-ADMISSION LEGAL EDUC., ASS'N OF THE BAR OF THE CITY OF N.Y., JURISPRUDENCE IN ACTION} 4 (1953).


\textsuperscript{40} \textit{See supra} text accompanying note 23.

\textsuperscript{41} \textit{See supra} text accompanying notes 26-28.
the courts say it is and what one can predict the courts will continue to say is law in the future.\textsuperscript{42} Whatever aids in that prediction, including morality, is a source of the law. This hardly makes Holmes an amoral theorist, unless one believes that morality is an indispensable source of all law. Of course, some believed that was true. To them, Holmes was simply wrong. But more important to our inquiry, the Holmesian view of law thoroughly contradicts the traditional law-finding conception of the judicial process. But Holmes did not develop these ideas. That task was left to others.

The early twentieth century was one of the most dynamic periods in American legal history.\textsuperscript{43} The bar was professionalized, professional bar associations emerged, formal legal education became the norm for lawyers, and citizen pressure groups began to take interest in the law and legal institutions.\textsuperscript{44} Two additional developments would help redefine the nature of the judicial process. "What particularly marked the legal history of early twentieth-century United States," writes a legal historian about this period, "was a seemingly ubiquitous concern for finding, fashioning, and using new sources of information."\textsuperscript{45} Whatever we may think of this "penchant for information" as a paradigm for the early twentieth century American legal experience,\textsuperscript{46} it is demonstrably true that the quality and quantity of legal information was a primary concern throughout this era.\textsuperscript{47} This concern permeated the entire profession. The traditionalists, including Dean Ames and his colleagues at the Harvard Law School, solidified the casebook method of law study begun by Christopher Columbus Langdell at Harvard in 1870,\textsuperscript{48} wrote many of the multivolume treatises of the early twentieth century, and produced the bulk of the American Law Institute's Restatements of the law. Not to be outdone by their professors, the Harvard students founded the \textit{Harvard Law Review} in 1887.\textsuperscript{49} Like Langdell's casebook method, the law review

\begin{notes}
\textsuperscript{42} See supra text accompanying note 25.
\textsuperscript{43} \textit{JOHN W. JOHNSON, AMERICAN LEGAL CULTURE} 3 (1981). I have relied on Professor Johnson's book for guidance through the next few paragraphs of this article.
\textsuperscript{44} \textit{Id}.
\textsuperscript{45} \textit{Id}. at 4.
\textsuperscript{46} \textit{Id}.
\textsuperscript{47} \textit{Id}. at 29-69.
\textsuperscript{49} See \textit{2 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA} 440-41 (1908) (describing formation of the Review as a "potent factor in increasing the prosperity of the [Harvard Law] School").
\end{notes}
spread throughout American legal education in the early part of this century.

But the interest in information was not limited to creating new expository treatises and Restatements of the law. A few academics started taking Holmes seriously. They began looking beyond the traditional methods of legal analysis for new sources of information—to the world beyond the library. They sought to understand the purpose of this quest for new, nontraditional, legal information.

A revolt against abstract legal theory was evolving, and the new information was critical to the new theory. We now have the second theme for the first three or four decades of this century: this was also the era of revolt against abstract legal doctrine.

C. Dean Pound and Sociological Jurisprudence

Roscoe Pound was the great legal synthesizer of his day. Sampling the currents of contemporary thought, Dean Pound took four of the principal philosophical theories circulating at that time (the Holmesian view of law, the pragmatism of William James and John Dewey, Rudolf von Jhering's theory that law changes and develops as a result of competing social interests, and the European free-law movement) and welded them into a new, relatively complete theory of American law. It was called "sociological jurisprudence."

50. Thurman Arnold, a Yale law professor, was one of the most vocal critics of the restatement enterprise carried out for the most part at Harvard, and of the case method of study, which dominated Harvard at that time. Professor Arnold referred to Harvard Law School during this time as the "high church of abstract legal theology." T. ARNOLD, FAIR FIGHTS AND FOUL 58 (1951). Professor Arnold was one of the founding partners of Arnold, Fortas & Porter in Washington, D.C.

51. See generally ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982) (defining pragmatism's core as follows: "something is true if it proves to be useful in the appropriate human activity in the long run").

52. See generally RUDOLF VON JHERING, LAW AS A MEANS TO AN END (Isaac Husick trans., 1913) (discussing law as a force created by society, not the individual). Holmes' "bad man" analysis was suggested by von Jhering in this book, the second volume of which was published in Germany in 1883. Pound, who read German from the age of six, undoubtedly read von Jhering in German. See PAUL SAYRE, THE LIFE OF ROSCOE POUND 35 (1948) (quoting 1922 letter by Pound's mother in which she claimed to be teaching German to her son); D. WIGDOR, ROSCOE POUND: PHILOSOPHER OF LAW (1974).

53. This movement, also called sociological jurisprudence, developed a theory of law that is strikingly similar to Roscoe Pound's sociological jurisprudence. See, e.g., JAMES E. HERGET, AMERICAN JURISPRUDENCE, 1870-1970, at 163 (1990) ("[T]he free-law movement established a jurisprudential position that is almost equivalent to . . . the Poundian paradigm. . . .").

54. This title apparently was derived from Pound's article that used this phrase. See Roscoe Pound, The Need of a Sociological Jurisprudence, 19 GREEN BAY 607 (1907) (call-
tunately, Pound’s theory was spread throughout a number of articles. The following general description, taken from Professor Herget’s history of the jurisprudence of this era, extracts the essence of Pound’s sociological jurisprudence:

[The] study of law should move away from the analysis of appellate court opinions and toward the effectiveness of trial-court operations. The emphasis should be on the process of law in its social context; the study of abstract doctrine should be deemphasized. The main province of the inquiry should be the actual effects—the factual consequence—of legal doctrine, court decisions, and legislation. Courts and scholars alike should recognize that certainty in law is illusory and that legal precepts should be taken as flexible guides to decision-making so that justice can be achieved in individual cases. Purposes of the law, not sanctions, should be emphasized. [In addition] law must be treated instrumentally; it is always a means to an end. The pragmatic philosophy must be adapted to the legal enterprise.

[Finally], the processes of both adjudication and legislation are viewed as an activity of government officials in which various claims are made by groups or individuals upon the decision-making body. To have a chance of being accepted, these claims must be more than mere personal demands; they are asserted to be morally right, accepted by society, and generally applicable to some particular class or group of persons.

D. Cardozo and The Nature Of The Judicial Process

Pound’s theory of "sociological jurisprudence" was influential beyond academic circles. In the Storrs Lectures at Yale University in 1921, Benjamin N. Cardozo, then a judge on the New York Court of Appeals, gave the first sophisticated public discussion of the process of judicial law making. These lectures, entitled The Nature of the
Judicial Process,\(^59\) drew upon existing theories of the judicial process to explain how judges make law. Focusing on the role of precedent, Cardozo describes the typical approach to the judicial task:

The first thing [a judge] does is to compare the case before him with the precedents . . . . [I]n a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins. Almost invariably, his first step is to examine and compare them. If they are plain and to the point, there may be need of nothing more. Stare decisis is at least the everyday working rule of our law. I shall have something to say later about the propriety of relaxing the rule in exceptional conditions. But unless those conditions are present, the work of deciding cases in accordance with precedents that plainly fit them is a process similar in its nature to that of deciding cases in accordance with a statute. . . . It is when . . . there is no decisive precedent, that the serious business of the judge begins. He must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it for others.\(^60\)

For the typical cases, Cardozo provided this traditional method: employing logic (what he called "the method of philosophy"\(^61\)), he applied the obviously relevant rules of law to the facts of the case to reach his decision.\(^62\) There are, however, situations in which the tradi-

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\(^{59}\) *Benjamin N. Cardozo, The Nature of the Judicial Process* (1921).

\(^{60}\) *Id.* at 19-21. In his subsequent Yale lectures, Cardozo stated:

The problem stood before me in a new light when I had to cope with it as judge. I found that the creative element was greater than I had fancied; the forks in the road more frequent; the signposts less complete. . . . Some cases, of course, there are where one route and only one is possible. They are the cases where the law is fixed and settled. They make up in bulk what they lack in interest. Other cases present a genuine opportunity for choice . . . .

Cardozo, *supra* note 58, at 57-58.

\(^{61}\) "The directive force of a principle," wrote Cardozo, "may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy . . . ." Cardozo, *supra* note 59, at 30.

\(^{62}\) The obviously relevant rules of law may be based upon a constitution, a statute, or precedent:

There are times when the source is obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no farther. The correspondence ascertained, his duty is to obey. The constitution overrides a statute, but a statute, if consistent with the constitution, overrides the law of judges. In this sense, judge-made law is secondary and subordinate to the law that is made by legislators.

*Id.* at 14.

Cardozo recognized the creative element involved when a judge interprets a constitution or a statute, and when a judge fills in the "gaps which are found in every positive law in greater or less measure." "*Id.* at 15-16 (quoting Brutt, *Die Kunst der Recht-
tional logical method is not up to the task at hand. When this is so, as when there is no seemingly relevant precedent, the judge faces a creative task. Here,

the problem which confronts the judge is in reality a twofold one: he must first extract from the precedents the underlying principle, the *ratio deciden*di; he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die.

The first branch of the problem is the one which we are accustomed to address ourselves more consciously than to the other. Cases do not unfold their principles for the asking. Let us assume, however, that this task has been achieved. The problem remains to fix the bounds and the tendencies of development and growth, to set the directive force in motion along the right path at the parting of the ways.

For this second step, Cardozo identified four lanterns the judge might use to illuminate the way: (1) The method of philosophy; (2) the historical method (which lays bare the roots and soil from which precedent emerges); (3) the customs of the community; and

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92). This is done, according to Cardozo, "by the same processes and methods that have built up the customary law." *Id.* at 17.

I will dwell no further for the moment upon the significance of constitution and statute as sources of the law. The work of a judge in interpreting and developing them has indeed its problems and its difficulties, but they are problems and difficulties not different in kind or measure from those besetting him in other fields. *Id.* at 18.

93. "The common law," wrote Cardozo, "does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars." *Id.* at 22-23. He also thought that

Nine-tenths, perhaps more of the cases that come before a court are predetermined—predetermined in the sense that they are predestined—their fate preestablished by inevitable laws that follow them from birth to death. *Id.* at 60.

94. *Id.* at 23.

95. *Id.* at 28-30.

96. *Id.* at 30. "The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy." *Id.* Logic thus plays a major role in Cardozo’s theory of the judicial process.

97. "The directive force of principle may be exerted ... along the line of historical development; this I will call the method of evolution ..." *Id.* at 30-31. Cardozo believed that the method of history could both complement and confine the method of philosophy. It could complement because "often, the effect of history is to make the path of logic clear." *Id.* at 51. It could confine because the "tendency of a principle to expand itself to the limit of its logic may be counteracted by the tendency to confine itself within the limits of its history." *Id.* Reminiscent of Holmes’ use of history in the *Path of the Law*, Cardozo thought the principal value of this method is that "history, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future." *Id.* at 53. He
(4) the "method of sociology." 69

Cardozo believed the method of philosophy—the use of logic and analogy—was the wellspring of judge-made law. In this crucial second step, fixing the bounds and tendencies of development and growth, the method of philosophy "has the primacy that comes from natural and orderly and logical succession." 70 It is a by-product, Cardozo seems to say, of the rule of precedent:

Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts. A sentiment like in kind, though different in degree, is at the root of the tendency of precedent to extend itself along the lines of logical development. 71

In the absence of a better recipe, the method of philosophy molds the judgment. The methods of history, custom, and sociology provide rival paths, but theirs is the burden of overcoming the method of philosophy—the burden of enticing the judge to explore their way. How history 72 and custom 73 emit their siren's call and alter the destination used the law of property as his primary example of when the historical method was needed, for with property "there can be no progress without history." 74 At 54. Cardozo also mentions the importance of the method of history to understanding the distinction between larceny and embezzlement. 75 At 56.

68. Which Cardozo also called "the method of tradition." 76 At 31. Recognizing the variety of meanings given to "custom," Cardozo thought that in "these days, at all events, we look to custom, not so much for the creation of new rules, but for the tests and standards that are to determine how established rules shall be applied. When custom seeks to do more than this, there is a growing tendency in the law to leave development to legislation." 77 At 60. "General standards of right and duty are established. Custom must determine whether there has been adherence or departure." 78 At 62. Nevertheless, "the power is not lost because it is exercised with caution." 79 At 61. Cardozo used the "law merchant" as his primary example of the use of custom in the judicial process. 80 At 61-64.

69. Cardozo identified the method of sociology with "justice, morals and social welfare, the mores of the day...." 81 At 31. He distinguished "custom" from the method of sociology by noting that a "slight extension of custom identifies it with customary morality, the prevailing standard of right conduct, the mores of the time. This is the point of contact between the method of tradition and the method of sociology. They have their roots in the same soil." 82 At 63-64.

70. 83 At 31.

71. 84 At 34. See also id. at 48-49, 66-67.

72. Cardozo refers to the "historical method, or the method of evolution" as a source of judge-made law. See id. at 51. By "history" he means the events that made legal doctrine "what it is." 85 At 52.

The directive force of . . . precedent may be found either in the events that made it what it is, or in some principle which enables us to say of it that it is what it ought to be. Developments may involve either an investigation of origins or an effort of pure reason. . . . Some conceptions of law owe their existing form almost exclusively to history. They are not to be understood except as historical growths. In the development of such principles, history is likely to predominate over logic or pure reason. Other conceptions, though they have, of course, a history, have
of the case should be familiar enough to allow us to focus on their more elusive kin, the method of sociology.

As sources of judge-made law, the methods of history and custom primarily focus on things past as they presently appear. The method of sociology chiefly looks to the present and to the future. The future, as it is predicted to be, becomes a source of judge-made law. The methods of history and custom emphasize the rule applied. The method of sociology looks to the law's goals and assesses how they are—or how in the future they might be—achieved. Law is an instrumentality of public policy. The viability of past judge-made law

7 taken form and shape to a larger extent under the influence of reason or of comparative jurisprudence. . . . In the development of such principles logic is likely to predominate over history. . . . Sometimes the subject matter will lend itself as naturally to one method as to another [referring to the methods of history and of philosophy]. In such circumstances, considerations of custom or utility will often be present to regulate the choice. A residuum will be left where the personality of the judge, his taste, his training or his bent of mind, may prove the controlling factor. I do not mean that the directive force of history, even where its claims are most assertive, confines the law of the future to uninspired repetition of the law of the present and the past. I mean simply that the history, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future.

Id. at 52-53.

73. "If history and philosophy do not serve to fix the direction of a principle," Cardozo tells us, "custom may step in." Id. at 58. Although he acknowledged that "custom" is sometimes equated with the common law, as when we use the phrase "customary law," Cardozo is here concerned with a practice which is followed by people of a particular group or region as a source of the common law. Id. at 58-59.

Undoubtedly the creative energy of custom in the development of common law is less today than in was in bygone times. Even in bygone times, its energy was very likely exaggerated by Blackstone and his followers. . . . In these days, at all events, we look to custom, not so much for the creation of new rules, but for the tests and standards that are to determine how established rules shall be applied. When custom seeks to do more than this, there is a growing tendency in the law to leave development to legislation. Judges do not feel the same need of putting the imprimatur of law upon customs of recent growth, knocking for entrance into the legal system, and viewed askance because of some novel aspect of form or feature, as they would if legislatures were not in frequent session, capable of establishing a title that will be unimpeachable and unimpeachable. But the power is not lost because it is exercised with caution.

Id. at 59-61.

74. Cardozo uses the term "public policy" broadly. It encompasses the "good of the collective body." Id. at 72.

[It]s demands are often those of mere expediency or prudence. It may mean on the other hand the social gain that is wrought by adherence to the standards of right conduct, which find expression in the mores of the community. In such cases, its demands are those of religion or of ethics or of the social sense of justice, whether formulated in creed or system, or immanent in the common mind. One does not readily find a single term to cover these and kindred aims which
(precedent) thus is appraised by how its continued use furthers the public good. A new law proposed by the judge’s creative powers is evaluated by its predicted capacity “to attain the ends for which [it is] devised.” These assessments, which are pragmatic judgments, provide the fountainheads of judge-made law in the method of sociology. In making these assessments, judges are not “free to substitute their own ideas of reason and justice for those of the men and women whom they serve. Their standard must be an objective one.” The method of sociology is not limited to re-evaluating precedent and to creating new judge-made law to achieve some public goal.

The method of sociology (except, perhaps, for the method of philosophy) is “the arbiter between other methods, determining in the last analysis the choice of each, weighing their competing claims, setting bounds to their pretensions, balancing and moderating and harmonizing them all.”

Of all the interests the method of sociology brings to its calculus, one of the “most fundamental,” according to Cardozo, “is that the law shall be uniform and impartial . . . Therefore in the main,” he continued, “there shall be adherence to precedent.” Thus, despite the grand role he depicts for the method of sociology (re-evaluating precedent, creating new law, and mediating among the other methods), his final message is inherently conservative: precedent prevails, ex-

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shade off into one another by imperceptible gradations."

*Id.* Later Cardozo notes that the method of sociology frequently supplements the other methods. For example:

In some, however, the method of sociology works in harmony with the method of philosophy or of evolution or of tradition. Those, therefore, are the fields where logic and coherence and consistency must still be sought as ends. In others, it seems to displace the methods that compete with it. . . . In a sense it is true that we are applying the method of sociology when we pursue logic and coherence and consistency as the greater social values.

*Id.* at 75.

75. *Id.* at 73 (quoting Roscoe Pound, *Administrative Application of Legal Standards*, A.B.A. Proc. 441, 451 (1919)).

76. *Id.* at 102-03.

77. *Id.* at 88-89. Cardozo continues, “In such matters, the thing that counts is not what I believe to be right. It is what I may reasonably believe that some other man of normal intellect and conscience might reasonably look upon as right.” *Id.* at 89. Later he writes, “[A] judge, I think, would err if he were to impose upon the community as a rule of life his own idiosyncrasies of conduct or belief. . . . [H]e would be under a duty to conform to the accepted standards of the community, the *mores* of the time.” *Id.* at 108.

78. *Id.* at 98.

79. *Id.* at 112.
cept in unusual circumstances; the power of innovation of any judge is insignificant "when compared with the bulk and pressure of the rules that hedge him in on every side." Disagreeing with Holmes, Cardozo asserts that law is not simply the prediction of what a court will do, for the idea of law is not necessarily concerned with judicial behavior. Judges should overrule precedent and thus replace old doctrine with new law when the method of sociology counsels it, but that will be the rare occasion. Judges do not find the law, of course, they make it; but their creative power largely is confined to filling the gaps left by precedent and statutory law.

Of the cases that come before the court in which I sit, a majority, I think, could not, with semblance of reason, be decided in any way but one. The law and its application alike are plain. Such cases are predestined, so to speak, to affirmance without opinion. In another and considerable percentage, the rule of law is certain, and the application alone is doubtful . . . . Often these cases and others like them provoke difference of opinion among judges. Jurisprudence remains untouched, however, regardless of the outcome. Finally there remains a percentage, not large indeed, and yet not so small as to be negligible, where a decision one way or the other will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. These are the cases where the creative element in the judicial process finds its opportunity and power.

Because of the felicity of their expression, because they were the first comprehensive statement of the judicial process by a sitting judge, and because they took account of most of the contemporary theories, Cardozo's lectures remain to this day one of the few works that must be read to understand the judicial process as it emerged in the first half of this century. Yet many found flaws in much of what he said. Our principal concern here is with his central themes: the re-

80. Id. at 112, 149. The primacy of precedent is also supported by practical considerations: "[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." Id. at 149.
81. Id. at 136-37.
82. Id. at 124-30.
83. Id. at 133-35, 150 (recognizing that a judge has a duty to make law in the appropriate circumstances).
84. Id. at 124-25, 131.
85. Id. at 164-65.
86. Judge Posner writes, for example: Although the legal establishment canonized Cardozo during his lifetime and he is still widely considered not merely one of the greatest judges of all time but a judicial saint, there is a considerable, perhaps an increasing, undercurrent of dubi-
straining forces of precedent; and that the methods of philosophy, history and custom, with their essentially backward focus, should produce change slowly. On the infrequent occasion when new law must be made, or when change becomes necessary, Cardozo believed the method of sociology is the judge’s main guide. Thus, despite Cardozo’s enthusiastic embrace, the method of sociology would be infrequently employed. The law remained bound to abstract legal theory, to the law as it is written, and to the idea that legal doctrine largely is settled and certain.

E. Legal Realism

The chief academic criticism of Cardozo’s approach to the legal process (though seldom explicitly directed at his work) focused on Cardozo’s exception. Looking to Holmes and Pound rather than to Cardozo, the scholars known as the Realists adopted the sociologi-

ety. Today many legal thinkers believe that Cardozo has been greatly overrated—that his liberalism is fake, his judicial philosophy a bunch of platitudes, his famous writing style obese and archaic. More are unsure how he should be ranked, and indeed whether any judge can be evaluated on an objective scale of merit.


87. E.g., JEROME FRANK, LAW AND THE MODERN MIND 253-60 (1930); KARL N. LLEWELLYN, THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY ix (1930) (citing Holmes as having delivered one of the first wholesale presentations of the realistic viewpoint); KARL N. LLEWELLYN, SOME REALISM ABOUT REALISM—RESPONDING TO DEAN POUND, 44 HARV. L. REV. 1222, 1226-27 n.18 (1931) [hereinafter Llewellyn, SOME REALISM ABOUT REALISM]. The intellectual historian Morton White tells us that Holmes was the father of legal realism. MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 15-18, 59-75 (1949). Although the later realists claimed Holmes as their intellectual father, Professor Johnson reminds us that some of Holmes’ writings “were decidedly antirealist.” Johnson, supra note 43, at 125-26.

88. E.g., KARL N. LLEWELLYN, A REALISTIC JURISPRUDENCE—THE NEXT STEP, 30 COLUM. L. REV. 431, 435 n.3 (1930) (crediting Pound with early formulations of many precepts later becoming central to realism). “If Holmes was a questionable parent for realism,” Professor Johnson wrote, “Roscoe Pound . . . was a more likely source of the movement’s paternity.” Johnson, supra note 43, at 126. On the other hand, Professor Herget regards Legal Realism as an extension of what he calls the “Poundian Paradigm.” HERGET, supra note 53, at 170. A recent study points out that Pound’s writings were so varied, and in some cases contradictory, that the “sense in which Pound was a forerunner of the Realists is thus complex: His early essays they found inspirational; his later work was one of their principal targets.” AMERICAN LEGAL REALISM 7 (William W. Fisher et al. eds., 1993) [hereinafter AMERICAN LEGAL REALISM]. See generally ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982) (acknowledging Pound among the foremost American “pragmatic instrumentalists,” Summers’ term for Legal Realists); G. EDWARD WHITE, FROM SOCIOLOGICAL JURISPRUDENCE TO REALISM: JURISPRUDENCE AND SOCIAL CHANGE IN EARLY TWENTIETH-CENTURY AMERICA, 58 VA. L. REV. 999, 1004-05 (1972) (discussing how Pound’s principles of jurisprudence, once embraced by early Realists, were later attacked).
cal method as their general approach to the legal process.\textsuperscript{89} The Realist "Movement," which we are told was no movement at all,\textsuperscript{90} minimized the importance of abstract legal theory and rejected the notion that judges actually are bound by "paper rules." Professor Karl Llewellyn's inventory of the commonly held beliefs of the realist scholars provides an excellent summary of their thinking. The Realists' creed, according to Professor Llewellyn, was:\textsuperscript{91}

1. The conception of law in flux, of moving law, and of judicial creation of law.\textsuperscript{92}

2. The conception of law as a means to social ends and not as an end in itself; so that any part needs constantly to be examined for its purpose, and for its effect, and to be judged in the light of both and of their relation to each other.\textsuperscript{93}

3. The conception of society in flux, and in flux typically faster than the law, so that the probability is always given that any portion of law needs reexamination to determine how far it fits the society it purports to serve.\textsuperscript{94}

4. The temporary divorce of Is and Ought for purposes of study. . . . [N]o judgment of what Ought to be done in the future with respect to any part of law can be intelligently made without knowing objectively, as far as possible, what that part of law is now doing . . . . On the Ought side this means an insistence on informed evaluations instead of armchair speculations.\textsuperscript{95}

5. Distrust of traditional legal rules and concepts insofar as they purport to describe what either courts or people are actually doing. Hence the constant emphasis on rules as "generalized predictions of what courts will do."\textsuperscript{96}

6. [D]istrust of the theory that traditional prescriptive rule-formulations are the heavily operative factor in producing court decisions. This involves the tentative adoption of the theory of rationalization\textsuperscript{97} for the study of opinions.\textsuperscript{98}

\textsuperscript{89} The list of academics mentioned by Professor Karl Llewellyn (with the assistance of Jerome Frank) in his article Some Realism About Realism is typically used to identify the legal realists. Llewellyn, Some Realism About Realism, supra note 87, at 1226 n.18, 1233 n.34. The legal realist writing is listed in Appendix I of that article. Id. at 1257-59.

\textsuperscript{90} Id. at 1233-1234 (focusing on wide differences of opinion among the members of the "movement").

\textsuperscript{91} Rather than paraphrase these ideas, I prefer to use Professor Llewellyn's words for the major themes.

\textsuperscript{92} Llewellyn, Some Realism About Realism, supra note 87, at 1236.

\textsuperscript{93} Id.

\textsuperscript{94} Id.

\textsuperscript{95} Id. at 1236-37.

\textsuperscript{96} Id. at 1237.

\textsuperscript{97} Llewellyn explains the theory of rationalization of opinions as follows: An early and fruitful line of attack borrowed from psychology the concept of rationalization already mentioned. To recanvas the opinions, viewing them no
7. The belief in the worthwhileness of grouping cases and legal situations into narrower categories than has been the practice in the past. This is connected with the distrust of verbally simple rules—which so often cover dissimilar and non-simple fact situations. . . .

8. An insistence on evaluation of any part of law in terms of its effects, and an insistence on the worthwhileness of trying to find these effects.

9. Insistence on *sustained and programmatic attack* on the problems of law along any of these lines.

The major points of disagreement between Cardozo and the Realists concerned (1) the degree to which law is determinate or indeterminate, (2) the role of doctrine and precedent in the decision of cases, (3) the role of logic and reason in the judicial process, and (4) the nature of legal culture. Cardozo believed, for example, that existing precedent governs the majority of cases, the method of philosophy enables the judge to extract the appropriate rule from governing precedent; because of the binding effect of the extracted doctrine, the judgment in most cases is “predetermined.”

On the other hand, the Realists believed that because of the wide range of precedent available for use in most cases, and because most, if not all, precedent holds within its skin a variety of rules, judges have wide discretion in the decision of cases. A judge, for example, selects the precedents that “govern” the case from an array of existing law; then the judge extracts from the selected precedent the doctrine she will use in deciding the case at hand. Reason and logic, though indispensable as tools in the legal process, are neutral and can be used to longer as mirroring the process of deciding cases, but rather as trained lawyers’ arguments made by the judges (after the decision has been reached), intended to make the decision seem plausible, legally decent, legally right, to make it seem, indeed, legally inevitable—this was to open up new vision. It was assumed that the deductive logic of opinions need by no means be either a *description* of the process of decision, or an *explanation* of how the decision was reached. Indeed over-enthusiasm has at times assumed that the logic of the opinion *could* be neither; and similar over-enthusiasm, perceiving case after case in which the opinion is clearly almost valueless as an indication of how that case came to decision, has worked at times almost as if the opinion were equally valueless in predicting what a later court will do.

Id. at 1238-39.
98. *Id.* at 1237.
99. *Id.*
100. *Id.*
101. *Id.* at 1237-38.
102. “Of the cases that come before the court in which I sit, a majority, I think, could not, with semblance of reason, be decided in any way but one. The law and its application alike are plain, Such cases are predestined, so to speak, to affirmation without opinion.”

CARDozo, *supra* note 59, at 164.
reach or rationalize any decision. Thus, the Realist would argue, no legal decision is “predestined” unless the individual judge makes it so.

Of equal importance is the contrast between Cardozo and the Realists with respect to the more general legal culture. Cardozo believed that the judicial process should move slowly. “[A]dherence to precedent should be the rule and not the exception.”103 He also believed that the law as written, together with its paper goals and paper effects, were accurate statements of what judges do and the effect their judgments have on the real world. The Realists saw society in constant flux and insisted that law, even judge-made law, should keep pace of society’s movement. Furthermore, at the core of realism is the idea that the law-in-action functions quite differently from abstract law or law-as-it-is-written and pondered. Written law is a statement about how the law ought to function, whereas the law as it is actually practiced is the real law.104 Empiricism was thus a crucial part of the Realist credo. Real law is studied by empirical research. As with all scientific research, the Realists recognized that empirical research should not be predicated upon the values of the researcher.

103. *Id.* at 149.

104. This theme appears throughout much of the realist writing. For example, Professor Llewellyn wrote:

“Paper rules” are what have been treated, traditionally, as rules of law: the accepted doctrine of the time and place—what the books there say ‘the law’ is. The “real rules” and rights—“what the courts will do in a given case, and nothing more pretentious”—are then predictions. They are, I repeat, on the level of isness and not of oughtness; they seek earnestly to go no whit, in their suggestion, beyond the remedy actually available.

Llewellyn, *supra* note 88, at 448.

105. Llewellyn, *Some Realism About Realism, supra* note 87, at 1236. The professor continues:

Such divorce of Is and Ought is, of course, not conceived as permanent. To men who begin with a suspicion that change is needed, a permanent divorce would be impossible. The argument is simply that no judgment of what Ought to be done in the future with respect to any part of law can be intelligently made without knowing objectively, as far as possible, what that part of law is now doing. And realists believe that experience shows the intrusion of Ought-spectacles during the investigation of the facts to make it very difficult to see what is being done.”

*Id.* at 1236-37.
The Realists and Cardozo, however, were united in a number of beliefs: the insistence that judges make law; the importance of pragmatism in evaluating doctrine; and the reception of the method of sociology. Nevertheless, as we have seen, the differences between Cardozo's approach to the judicial process and the Realist conception of that endeavor were profound.

The Realists were academics and Cardozo was a judge. Some of the differences, perhaps, can be accounted for by this difference in their roles. Academics are told to research, analyze and evaluate the law and legal institutions; judges are told to decide cases as fairly and efficiently as the system permits. When Realist academics, such as Thurman Arnold, William Clark, William O. Douglas, and Jerome Frank, were appointed to the bench, they did not create an obvious Realist jurisprudence in the opinions they wrote. Neither did they write the Realist equivalent to Cardozo's *The Nature of the Judicial Process*.

Perhaps with a tinge of cynicism, it has been noted that in confirmation hearings, most judicial candidates profess adherence to the classical view of the legal process. Furthermore, "in private few contemporary American judges would describe their jobs in precisely the terms the Realists used." Nevertheless, it must be conceded that Legal Realism continues to influence American legal thought, including judicial thought, to this day.

Legal Realism's influence was produced by a relatively small number of legal scholars. Not all academic lawyers were caught in Realism's web. It is probably true that before World War II only a small minority of academics worked and wrote in the realist mode. Nevertheless, it is not easy to determine precisely which authors and which works should be included in an accounting of the Realist Movement. Professor Llewellyn's list of Realists, generated in 1931, contained only twenty names. Most were faculty members at Columbia, Yale, and the Johns Hopkins Institute of Law in Balti-


108. *See id.* at xiv-xv (citing several modern schools influenced by Realist thought).

109. *Id.* at xiii.

more. There were exceptions, of course. Roscoe Pound became Dean of the Harvard Law School in 1916, shortly after he issued his famous call for sociological jurisprudence. He remained at Harvard until he resigned in 1936. Dean Pound should be regarded as a Realist, at least before he and a number of the acknowledged Realists had their famous dispute over the value of legal rules and the place of moral values in the law. Even those who would deny that Pound was a Realist would concede that he is one of Legal Realism's forbearers. Except for Pound, Frankfurter, and perhaps a few others, the Harvard law faculty remained in the traditional conceptualist-formalist camp of legal thought. The Harvard faculty epitomized the thinking of most American legal academics and judges in this period. Another exception was Professor Max Radin at U.C. Berkeley's Boalt Hall. As we shall see, Professor Radin both symbolizes the decline of legal realism and brings us back to the purpose of our study, Roger Traynor's theory of the judicial process.

F. The Death of the Legal Realism Movement and the Rise of Reasoned Elaboration

With the decline in enthusiasm for empirical legal research, Realism, which had remained a comparatively small movement, began to ebb in the late 1930's. There were a number of reasons for turning away from empiricism. Much of the social science methodology employed by the Realists was unsophisticated and thus yielded little of value. Further, Realism was associated almost entirely with the
legal academy. Critics of Realism and traditional educators argued that empirical research took too much time and energy away from the practical training of lawyers.\textsuperscript{116} It also promised to consume too many of the sparse resources available to legal educators. Empirical research was relatively expensive, and the parsimonious financial climate during the decade following the great stock market crash made the funding of empirical research difficult.\textsuperscript{117} As would be expected from constant criticism, the lack of funding, and the all too frequent marginal results of doubtful utility, many of the true believers became disillusioned.\textsuperscript{118} Realism’s death seemed imminent.

But long before the Realism Movement reached the end of its natural life, it was killed by a series of deadly blows. Realism drew vitriolic criticism from its earliest days. Its pragmatism, its questioning of abstract ideology, and its insistence on value-neutral research made it vulnerable to the charge that Realism was morally and ethically relativistic.\textsuperscript{119} In addition, some Realists went beyond skepticism about the role of moral and ethical values in the legal process. They argued that absolute moral values had no place in the legal process.\textsuperscript{120} By 1935, totalitarianism in much of the world put Realism on the defensive.\textsuperscript{121} “American intellectuals,” Professor Johnson wrote, “recoiling in outrage at the Stalinist purges, the atrocities of Franco and Mussolini, and the naked ‘might-makes-right’ philosophy of Nazi Germany,
struck out at legal realism."\textsuperscript{122}

Reminiscent of the supposed disagreement between Holmes and Dean Ames over the role of morality in law and of the dispute that created the rift between Dean Pound and the Realists, the focus of the attack was on Realism's apparently relativistic approach to morals and ethics. America, as a civilization, professes to be dedicated to liberty, democracy, and freedom. These ideals are thought to be absolute moral values that distinguish America from totalitarian regimes throughout the world. In the words of Professor Edgar Bodenheimer, Realism was, by denying the existence of any necessary relationship between law and moral values, "prepar[ing] the intellectual ground for a tendency toward totalitarianism in [America]."\textsuperscript{123} Professor Bodenheimer's views were shared by others,\textsuperscript{124} including Professor Lon Fuller of the Harvard Law School\textsuperscript{125} and Dean Pound.\textsuperscript{126} In a less temperate vein, Professor Walter B. Kennedy of Fordham University Law School referred to Realism as a "goose-step philosophy."\textsuperscript{127} In summing up this criticism of Realism's relativistic approach, Edward Purcell wrote,

[Realism's] apparent ethical relativism seemed to mean that no Nazi barbarity could be justly branded as evil, while its identification of law with the actions of government officials gave even the most offensive Nazi edict the sanction of true law. Juxtaposing that logic to the actions of the totalitarian states, the critics painted realism in the most ominous and shocking colors.\textsuperscript{128}

The goal of these critical intellectuals was to justify American democracy against totalitarian claims on the one hand and to refute the perceived ethical relativism of Realism on the other hand. In the eyes

\textsuperscript{122} JOHNSON, supra note 43, at 155.
\textsuperscript{123} EDGAR BODENHEIMER, JURISPRUDENCE 316 (1940).
\textsuperscript{124} See, e.g., HERGET, supra note 53, at 190-93 (noting Professor Walter Kennedy, inter alia); PURCELL, supra note 118, at 161-72; WHITE, supra note 114, at 140.
\textsuperscript{125} LON L. FULLER, THE LAW IN QUEST OF ITSELF (1940); see also Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 HARV. L. REV. 630, 659 (1957) (criticizing Hart's theories as insufficiently condemnatory of Nazi ideology).
\textsuperscript{126} ROSCOE POUND, CONTEMPORARY JURISTIC THEORY (1940); Roscoe Pound, The Future of Lay, 47 YALE L.J. 2 (1937).
\textsuperscript{127} Walter B. Kennedy, My Philosophy of Law, in My Philosophy of Law: CREDOS OF SIXTEEN AMERICAN SCHOLARS 151-52 (1941). Professor Kennedy was one of the early critics of Realism. See, e.g., Walter B. Kennedy, Pragmatism as a Philosophy of Law, 9 MARQ. L. REV. 63 (1925) (cautioning against the abandonment of natural rights advocated by early Realists); Walter B. Kennedy, Principles or Facts?, 4 FORDHAM L. REV. 53 (1935) (rejecting behaviorist aspects of Realism as dehumanizing); Walter B. Kennedy, A Review of Legal Realism, 9 FORDHAM L. REV. 362 (1940) (postulating four fundamental defects in Realist thinking).
\textsuperscript{128} PURCELL, supra note 118, at 172.
of many, they achieved both goals. The most striking examples of success with the first goal are the Nuremberg and Tokyo war crimes trials following the end of World War II. Although Realism was not treated like Communism in the decade following the end of the war,\textsuperscript{129} in the eyes of at least a few legal academics the belief in Realism was nearly equated with treason.\textsuperscript{130} Given the times and this vociferous criticism, Realism eventually succumbed.

In 1940, Professor Karl Llewellyn, the leading Realist, recanted his statements that "the heart and core of jurisprudence" is something besides "right guidance;"\textsuperscript{131} and in his 1939 edition of \textit{Law And The Modern Mind}, Jerome Frank called natural law the "basis for modern civilization."\textsuperscript{132} Finally, in 1942, Professor Max Radin of Berkeley's Boalt Hall apologized for possibly creating the inference in his writings that "ideas like wrong and right, or any ideas, are worthless or meaningless."\textsuperscript{133} But as we shall see, Professor Radin's apology came too late.

What caused the demise of Realism? It is doubtful that the dispute over Realism's skepticism or ambivalence about moral propositions was sufficient to end the movement. But that was not the only objection to Realism born from the rise of totalitarian regimes in Europe and Asia. The central tenets of Realism, including the Realist teaching that judges make law and that law is indeterminate, apparently conflict with three fundamental ideals cherished by most Americans. First, the teaching that judges make law, but they are not bound by it, may appear inconsistent with the foundational belief upon which American democracy is built: The people select the rules by which they are governed. Second, these two teachings (that judges make, but are not bound by, law) can be seen as conflicting with the conception of the judiciary as reinforcing representative democracy, rather than undermining it. Third, by emphasizing judicial discretion in the making of law, and that judges are human, Legal Realism is easily seen as undermining popular faith in our system as a government of

\begin{itemize}
\item \textsuperscript{129} For example, Realists were not summoned before a Congressional committee and asked, "Are you now or have you ever been a Realist?"
\item \textsuperscript{130} See, e.g., Francis E. Lucey, \textit{Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society}, 30 \textit{Geo. L.J.} 493 (1942) (portraying Realism as a "might makes right" philosophy that could destroy democracy).
\item \textsuperscript{131} Karl N. Llewellyn, \textit{On Reading and Using the Newer Jurisprudence}, 40 \textit{Colum. L. Rev.} 581, 603 (1940).
\item \textsuperscript{132} Jerome Frank, \textit{Law and the Modern Mind} xvii, xx (1939); see also Jerome Frank, \textit{Fate and Freedom: A Philosophy for Free Americans} 295 (1945).
\item \textsuperscript{133} Max Radin, \textit{In Defense of an Unsystematic Science of Law}, 51 \textit{Yale L.J.} 1269, 1275 (1942).
\end{itemize}
laws, not of men. Viewed in this light, Legal Realism would support, not resist, the ascendance of totalitarianism in America.

With the recanting of Realism's ambivalence about moral propositions, with the decline of empirical legal research, and with the apparent conflict between Realism's basic tenets and popular conceptions of our democracy, Legal Realism suffered and died as an identifiable movement in American academic law. Nevertheless, Realism continued to influence American law in a variety of ways.

On June 6, 1940, William H. Waste, Chief Justice of California, died at his home in Berkeley, California. Four days later, Governor Culbert Olson nominated Justice Phil S. Gibson to be Chief Justice. This left a vacant seat on the bench of the California Supreme Court. Governor Olson nominated the Legal Realist, Professor Max Radin of Boalt Hall, to fill this vacancy.

Radin's nomination, though promptly endorsed by Justice Felix Frankfurter and by Thurman Arnold, generated immediate controversy. His outspoken Realist views, and his political liberalism, nurtured the charge that Professor Radin's "Americanism was open to challenge." Three weeks after receiving the nomination, the Judicial Qualifications Commission—consisting of Chief Justice Gibson, Presiding Justice Nourse of the District Court of Appeal, and Earl Warren, then Attorney General of California—by a vote of two to one, refused to confirm Radin.

In the midst of renewed controversy, Professor Radin asked Governor Olson to withdraw his name from further consideration. Radin's name was withdrawn and on August 1, 1940, Governor Olson nominated Professor Radin's colleague, Professor Roger Traynor, to the vacant seat on the California Supreme Court.

1. Reasoned Elaboration and Neutral Principles

Professor Traynor never joined the public debate over the compatibility of Realism with the American system of government, nor did he publicly speak about Realism's supposed potential for supporting totalitarian regimes. Professor Traynor's expertise was primarily in taxation and his scholarly writing did not directly address the de-

134. 2 Johnson, supra note 1, at 69.
135. Id. at 173.
137. Id. at 593 (describing Radin's refutation of these charges).
138. Id. at 592. Chief Justice Gibson voted in favor of confirmation. Id.
bate about Realism or Realist theory. Realism’s goal was “to define and discredit classical legal theory and practice and to offer in their place a more philosophically and politically enlightened jurisprudence.”

Professor Traynor’s scholarly writing had other goals. From 1940, when he was confirmed as an Associate Justice of the California Supreme Court, to 1956, Justice Traynor did not write about the judicial process in any extra-judicial publication. Between 1956 and his retirement from the Court in 1970, Justice Traynor published twenty-one articles on various aspects of the judicial process. He published three more while he was a Professor at Hastings College of the Law. These two dozen articles form the corpus of his off-bench writing about the judicial process. There is no book in the genre of Cardozo’s *The Nature Of The Judicial Process* that sums up his views on the judge’s role in American democracy. But before we turn to Traynor’s judicial philosophy, we must first briefly revisit the “moralist” reaction to Realism and the intellectual response to that criticism that has come to be known as “Reasoned Elaboration,” for these events influenced Roger Traynor’s theories about the judicial process.

As discussed above, there was an intellectual rebellion against Realism that focused, at first, on its perceived “moral relativism.” Realism was charged with being the intellectual harbinger of totalitarianism. The rebellion produced renewed interest in “the moral claims of settled law in a constitutional democracy.”

At approximately the same time, there was growing scholarly concern with the United States Supreme Court. “The Supreme Court,” Professor White wrote, “in invalidating certain New Deal legislative programs, wrote several opinions that gave to the Constitution various interpretations characterized by many commentators as inept or disingenuous.” Realism, as we have seen, was not as successful at suggesting how judges should decide cases as it was in its critique of classical theory and practice. If law is indeterminate, then how should

139. American Legal Realism, supra note 88, at xiii-iv.
140. See infra Appendix A. These twenty-one articles are listed as articles 1-21.
141. Id. These three articles are listed as articles 22-24.
142. See supra text accompanying notes 119-20.
143. See supra text accompanying notes 121-30.
judges decide cases? By applying their own values or conception of the public good? And how does this all square with democracy, the rule of law, and the proper role of courts in our system? Few of the Realists devoted any systematic effort to answering these questions.146

The few who offered answers, except perhaps for Professor Felix Cohen,147 had little to say that was either as comprehensive or as insightful as the Realist critique.148 The Supreme Court's allegedly inept or disingenuous handling of the New Deal programs and the rebellion against Realism and its failure to provide meaningful guidance on the judicial role stimulated a steady stream of scholarship aimed at distinguishing America from the totalitarian regimes of the Second World War, and at creating a model for decision-making in the Supreme Court of the United States.

This body of scholarship focused on the articulation of the reasoning process in appellate opinions. This process, it was argued, "highlighted the difference between a society, such as America, where law allegedly attempted to conform to public notions of reasonableness and fairness, and totalitarian regimes where law was synonymous with the fiat of officials."149 Articulation of the reasoning process in opinions also promised to produce institutional constraints on decision-making in the Supreme Court. These restraints are important, of course, for they are designed to perform the checking function classical theory attributes to law. But since the Realists persuasively argued that the checking function of law is mostly myth (as law is indeterminate), it is apparent that unless a judge's choice is constrained in meaningful ways, the rule of law means nothing more than rule by judges.

The scholarly discussion in the 1950's produced a model of the reasoning process for use in Supreme Court opinions: it is called "Reasoned Elaboration."150 Its tenets may be summarized as

146. AMERICAN LEGAL REALISM, supra note 88, at 170.
147. See FELIX C. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS: AN ESSAY ON THE FOUNDATIONS OF LEGAL CRITICISM (1933) (advocating juristic philosophy fusing scientific investigation with search for ultimate moral truth).
148. See AMERICAN LEGAL REALISM, supra note 88, at 165-67 (observing weakness of Realists in fashioning a program for judicial decision-making, and acknowledging that their focus on narrowing applicability of legal rules has become an important facet of jurisprudential reform).
149. White, supra note 145, at 285-86.
150. This is the name given to the model in 1958 by Professors Hart and Sacks in their famous casebook on the legal process: HENRY A. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 161 (tent. ed. 1958). Although the casebook was never published during the lifetimes of the authors, it
follows: 1. Judges must give reasons for their decisions;
2. These reasons must be set forth in a detailed and coherent manner;
3. They must exemplify "the maturing of collective thought;" and,
4. The Court must adequately demonstrate that its decisions, in the area of constitutional law, were vehicles for the expression of the ultimate social preferences of contemporary society.

The first and second of these prerequisites are not problematic. They need no discussion. It is the third element, initially articulated by Professor Hart, that is the hallmark of this theory. It is also the most difficult to understand. In essence, Professor Hart argued that given adequate time and reflection, the collective thinking of judges about particular cases could mature into something like "reason" as an objective concept. This "maturing of collective thought" is what supposedly frees the judiciary from the Realist criticism that judges' choices inevitably reflect their human bias. The fourth element infuses into the process the value preferences of contemporary American society. The binding together of elements three and four supposedly produces an objective "reasonable" solution to constitutional controversies that reflects the value preferences of the time. This "reasonable" solution could be reached, despite the judges' human biases, if they approach their task with intellectual detachment and disinterestedness, and if they take the time and make the effort openly to discuss their views of cases, heed the views of their fellow judges, and articulate as fully as possible the resulting consensus.

Putting aside the risk of oversimplification, Reasoned Elaboration boils down to the claim that there is a "common law" of the Con-
stitution that is objectively identifiable, and that reflects the contemporary value preferences of American society. Accordingly, the Court must adjudicate constitutional cases by applying constitutional common law (the product of the third and fourth tenets) in an opinion that articulates its reasoning (tenet 1) in a detailed and coherent manner (tenet 2). Such an opinion, of course, makes a contribution to "the maturing of collective thought" (tenet 3) and demonstrates that the opinion is a vehicle "for the expression of the ultimate social preferences of contemporary society" (tenet 4) for future use in the judicial process as it relates to constitutional law.

One of the last of the major contributions to Reasoned Elaboration theory was made by Professor Herbert Wechsler in his 1959 Holmes Lecture, Toward Neutral Principles of Constitutional Law. Professor Wechsler focused on the process of extracting principles from (what I have called) the constitutional common law that are legitimately usable to decide the case at hand. In other words, the goal of Professor Wechsler's inquiry was to articulate the process by which a judge could determine the ratio decidendi of the constitutional common law.

Constitutional law, like the common law, presents judges with choices among competing values and policies. Only decisions that are based "on grounds of adequate neutrality and generality" are "gen-

157. See id. at 15-17. The crucial point of constitutional decision-making, according to Professor Wechsler, is when the judge seeks to relate the case under consideration to past relevant cases and those which may come before the court in the future. This is the familiar process of extracting the relevant principle from precedent to use in the case at hand and in future cases. See id.
158. For other discussions of the process that should be used for common law precedent, see M. Eisenberg, The Nature of the Common Law 50-76 (1988); Joseph Raz, The Authority of Law 183-89 (1979) (asserting positivist argument that principles of law are derived from individual values rather than natural law); A.W.B. Simpson, The Ratio Decidendi of a Case and the Doctrine of Binding Precedent, in OXFORD ESSAYS IN JURISPRUDENCE 148 (A.G. Guest ed., 1961) (explaining the limiting force of binding precedent and its relation to morality); Arthur L. Goodhart, Determining the Ratio Decidendi of a Case, 40 YALE L.J. 161 (1930) (explaining the process of deduction); A.L. Goodhart, The Ratio Decidendi of a Case, 22 MOD. L. REV. 117 (1959) (asserting that the ratio decidendi of a case may be deduced by identifying facts recognized as material by the judge); A.W.B. Simpson, The Ratio Decidendi of a Case (pts. 1 & 2), 21 MOD. L. REV. 155 (1958), 22 MOD. L. REV. 453 (1959) (criticizing the methods advanced by Goodhart and others for identifying the ratio decidendi of a case); Julius Stone, The Ratio of the Ratio Decidendi, 22 MOD. L. REV. 597 (1959) (explaining that stare decisis and reasoned elaboration ensure adherence to lessons of the past while allowing for contemporary insight within judicial decision-making).
159. Wechsler, supra note 156, at 15.
uinely principled."\textsuperscript{160} To be of adequate generality, the principle must "transcend any immediate result that is involved."\textsuperscript{161} A principled choice between these "conflict[s] in human claims of high dimension"\textsuperscript{162} is a decision in which this ultimate conflict is perceived, articulated, and resolved in a manner that gives guidance for future similar disputes. A neutral choice means that the judge subordinates her personal predilections to the competing values presented in the case.\textsuperscript{163}

This appears to be a version of common law legal process theory clothed in constitutional apparel. Nevertheless, its application to constitutional law was an important contribution to the modern debate about constitutional theory.

One of Reasoned Elaboration's quests was for constitutional opinions that articulated, in a reasoned way, the general moral principles that bind Americans together. Although it thus addresses the "moral relativism" of the Realists and distinguishes America from the totalitarian regimes of the Second World War, it is less successful in meeting its second goal: an answer to the Realist argument that human bias has more to do with judicial decisions than does a concept of law, precedent or principle. "In the world of the Reasoned Elaborationists," Professor White explained, "judges neither found law in the old-fashioned sense nor made it in the sense of the Realists; they reasoned toward it and then articulated their reasoning processes."\textsuperscript{164}

The Realists, of course, rejected this conception of the judicial process as being little more than romantic nonsense. Thurman Arnold, for example, scoffed "that there is no such process as [the matur- ing of collective thought], and there never has been."\textsuperscript{165} And one can easily imagine how Jerome Frank would respond to the Reasoned Elaborationists' claim about objectivity and neutral principles: "Re-
ally?" Professor Wechsler's neutral principles, Llewellyn and Frank would probably answer, function in the same manner as a common

\textsuperscript{160} Id.
\textsuperscript{161} Id. at 19.
\textsuperscript{162} Id. at 34.
\textsuperscript{163} Conversely, an unprincipled decision is made when the conflict in values is not perceived, not articulated, or not resolved in a manner that guides future disputes. A non-neutral choice is one in which judges allow their personal values to affect the choice.
\textsuperscript{164} White, \textit{supra} note 145, at 289.
\textsuperscript{165} Thurman Arnold, \textit{Professor Hart's Theology}, 73 HARV. L. REV. 1298, 1312 (1960) (criticism of Hart, \textit{supra} note 152, by the unreconstructed Realist (Professor, Judge, Lawyer) Thurman Arnold, a founding partner of the law firm of Arnold, Fortas & Porter).
law principle. A concept’s function, not its label, is its important attribute. Judges create new constitutional law with the opinion, announcing their choice among competing values in precisely the same way judges make law in the common law system. This is so regardless of how carefully they articulate everything, how closely they reason everything, and how successfully they believe they have subordinated their personal values.\^166 As Professor Ely points out, the Neutral Principles theory “[does] not provide a source of substantive content.”\^167 Thus, judges are left to create the substance of the supposedly “neutral principles.”

2. Traynor on Reasoned Elaboration and “Neutral Principles”

We now turn to Roger Traynor. What did Justice Traynor think about Professor Wechsler’s “neutral principles”?\^168 They “sound pure and simple to a judge who confronts problems ridden with impurities and complications.”\^169 They sounded to him like “magic words.”\^170 But the elusiveness of the principles\^171 and their lack of substantive content were not his only reservations. As far as the common law process is concerned, Traynor was troubled by Professor Wechsler’s assumption (which was shared by Professor Hart in The Time Chart)\^172 that generalized principles that endure over time should be used to decide cases.\^173 Traynor agreed that courts have an obligation

\^166. However, Judge Frank would undoubtedly also argue that they could never be successful in actually subordinating their personal values.

\^167. JOHN H. ELY, DEMOCRACY AND DISTRUST 55 (1980).

\^168. Traynor’s only published discussion of Wechsler’s “neutral principles” is contained in his article No Magic Words Could Do It Justice, 49 CAL. L. REV. 615, 623-25 (1961) [hereinafter Traynor, No Magic Words].

\^169. Id. at 624.

\^170. Id.

\^171. Speaking of the highly generalized principles, Justice Traynor wrote:

There is no great quarrel with a solution that proceeds from realistic reasoning if it is reasonably clearly set forth. There can be serious quarrel, however, even with a decision that appears just on its face, if it floats in language so inadequate or ambiguous as to afford no clear insight into the nature of the competing interests, no clear vision of their relation to the contemporary environment, and hence no reliable clues for the determination of cases involving kindred competing interests in dissimilar fact contexts.


\^172. As we have seen, Professor Hart called for the use of “impersonal and durable principles” in constitutional adjudication. Hart, supra note 152, at 99.

\^173. Traynor, supra note 168, at 624-25.
to articulate their decisions in general terms. But in his view, judge-made law should be constantly reviewed for its contemporary utility. In a rapidly changing world, today’s principles may not survive tomorrow’s changes.

But there is a deeper disagreement here. Hart and Wechsler conceive of “durability” as a necessary attribute of the principles that should be used by the United States Supreme Court in constitutional decision-making. Because of their enduring quality, the principles Hart and Wechsler envisioned are meant to control future cases. Justice Traynor articulates principles and theories in his opinions to disclose how he reaches his decisions and why. These principles and theories, as we shall see, perform an explanatory function that breathes life into the institutional constraints that are fueled by the expectations of colleagues, the bar, the academy, and the general public. These explanations also provide relevant data for predicting what the court may do in a similar case in the future; but, according to Traynor, the principles they explain are always subject to review and revision as new situations may require. As we shall see, unless other considerations win the day, Traynor’s principles endure only so long as they serve the goals of the law. But Justice Traynor, unlike Hart and Wechsler, does not use principle and theory as a method of controlling the course of future litigation. “A judge is constrained not only to heed the relevant judicial past in arriving at a decision,” Justice

174. E.g., id. at 625, 627-28 (stating that judges sometimes devise guiding principles through independent research).

175. See, e.g., id. at 625-26 (arguing that judges “must achieve some acceleration in the death rate of antiquities”).


177. See infra text accompanying notes 281-91, 320-24.

178. The opinion may also serve to stimulate legislative action. See Roger J. Traynor, The Unguarded Affairs of the Semikempt Mistress, 113 U. PA. L. REV. 485, 498-99 (1965) [hereinafter Traynor, Unguarded Affairs].


"[T]here is a duty, case by case, to rework all language, ancient or recent, into newer, cleaner guidance, a Duty of On-going Judicial Review of Prior Judicial Decision." He rightly reminds us that “a court ought always to be slow in uncharted territory, and, in such territory, ought to be narrow, again and again, in any ground of decision . . . .” But he concludes, "once there is clearish light, a court should make effort to state an even broader line for guidance. And . . . so long as each such line is promptly and overtly checked up and checked on and at need rephrased on each subsequent occasion of new illumination, such informed questing after broader lines is of the essence of good appellate judging."
Traynor wrote in 1967, "but also to arrive at it within as straight and narrow a path as possible . . . . [T]he well-tempered decision knows how to take graceful leave of a dark landmark that is no longer on its mark, but takes care to refrain from all-purpose guidance for all that lies ahead." Thus, although Traynor agreed with the first and second tenets of Reasoned Elaboration, he did not believe that "neutral principles" or the third and fourth tenets (at least as proposed by Hart and Wechsler) were essential (or perhaps even of value) to the common law process. We will come back to this point after we have taken a closer look at the judicial philosophy of Roger Traynor.

IV. Roger Traynor on the Judicial Process

A. Introduction

As noted before, in nearly a quarter of a century Roger Traynor wrote two dozen articles on the legal process. This amounts, on the average, to one article each year for twenty-four years. Like the lectures given by Holmes and Cardozo, with one exception, the articles written while Roger Traynor was on the bench were initially delivered as invited lectures. This series of articles began in 1956 with his lecture, *Law and Social Change in a Democratic Society*, delivered on the occasion of the dedication of the new College of Law building at the University of Illinois. The last article was a lecture delivered at a colloquium on Methods of Law Reform held at the University of Warwick in 1980, while Traynor was a Professor at Hastings. Given his judicial duties, the number of opinions he wrote, and his articles on other topics, it is understandable that many of these articles plow much of the same ground. Sometimes most of the article is new, but on other occasions the new ideas are worked into previously published material so skillfully that it is revealed only after careful study. In others, the new material stands out so boldly that it cannot be missed. Unfortunately, Justice Traynor never consolidated his think-
ing into a book on the judicial process.

What follows is a statement of Roger Traynor's judicial philosophy gleaned from a study of these articles, together with an analysis of that philosophy cast in terms of contemporary legal process theory.

Traynor's judicial philosophy may be broken down into three mutually dependent themes: the creative role of judges; the sources of judge-made law; and the process by which the judge exercises the creative powers to mold the sources of the law into new doctrine. In addition, we will consider Justice Traynor's response to contemporary criticism of judicial law-making.

B. The Creative Role Of Judges

Although few lawyers, but many members of the general public, may still believe that judges do not make law, Roger Traynor, like Holmes, Cardozo, Pound and the Realists, repeatedly taught us that they do. He also shared the Realists' view that society is in rapid flux, and that the law "should keep pace with the times."184 And when legislation fails to solve a new problem, and that problem winds its way to court, the burden falls on the judges to "hammer out new rules" to govern the case at hand.185

The judge's lawmaking function is a central theme in Justice Traynor's view of the judicial process.186 Unless one is willing to argue that Holmes, Cardozo, Traynor, and a multitude of other judges misunderstand the nature of their work, the fact that judges create new law should now be firmly established in American law. One can, of course, debate whether judges ought to make law at a given time or whether judges should ever do so. But the fact that they do make law means that the contrary view either is myth187 or is based upon a dif-

186. The judge's lawmaking work is discussed from the first to the last of Justice Traynor's off-bench writing on the judicial process. See, e.g., Traynor, Law And Social Change, supra note 14, at 232 (discussing the judge's duty to "hammer out new rules"); Traynor, Transatlantic Reflections, supra note 14, at 259. In the latter article, Justice Traynor wrote, "Unlike Molière's bourgeois gentilhomme, who was astonished to learn that his customary language indeed makes prose, a modern judge is quite aware that his customary language indeed makes law." Id.
187. "Amid so much conflict, the fiction that a court does not make law is now about as hallowed as a decayed and fallen tree." Traynor, Transatlantic Reflections, supra note 14, at 258. Much earlier he wrote, "[l]ike many another myth, the myth that judges discovered rather than created law, surviving well into the twentieth century, engendered rituals that have outlived it." Traynor, The Well-Tempered Judicial Decision, supra note 180, at 290.

In another article, with his typical good humor, Traynor makes the same point (which appears throughout his writings on the judicial process) in words that could not be omitted
ferent conception of the judicial transaction.

Justice Traynor identified four settings in which judges make law. The least problematic is when the judge applies existing precedent to new facts. When a court, for example, "extends an old rule about some dobbin to a novel Pegasus," the resulting precedent is, in a limited sense, creative, for we now have judge-made law concerning a Pegasus when none existed before. Nevertheless, if one adheres to the classical Blackstonian view of the legal process, they will argue that the new precedent creates nothing more than a new application of an old rule. Whichever view one takes of this transaction (law-making or law-applying), all agree that this is the essence of our common law system; and that a judge generally should apply existing precedent to new facts in deciding cases.

Stare decisis signifies the basic characteristic of the judicial process that differentiates it from the legislative process. In the legislative process there is neither beginning nor end: It is an endless free-wheeling experiment, without institutional constraints, that may have rational origins and procedures and goals or that may lack them. In contrast a judge invariably takes precedent as his starting-point; he is constrained to arrive at a decision in the context of ancestral judicial experience . . . .

from this study:

I would not labor these observations were it not that they lead us to tangential light on our inquiry into the double standard of vigil. That double standard is fostered, perhaps inadvertently, by a dwindling but still highly vocal group who view with alarm any continuing development of the common law. In the mental graveyard of this set, the law is set forth in two kinds of tablets with no correlation between them. There are statutory tablets, of flexible material, cut to order in all sizes and shapes, from the skimpy to the outlandish. Legislators thus appear as normally creative, revising or liquidating their tablets as they see fit. In supposed antithesis are common-law stone tablets of mysterious origin that have always been where they are, complete with slots in which a judge deposits his question to receive in return the applicable rule of law, preferably no more than one. In this view, though judges resort to legerdeplume to create an illusion of kinship between burned-out coals of ancient sapience and the electric eels of unprecedented problems, they do not now nor did they ever create law. Before the judges the stone tablets were, presumably, concealed in the bushes.

Traynor, *Unguarded Affairs*, supra note 178, at 490.


189. Traynor, *The Well-Tempered Judicial Decision*, supra note 180, at 290. He further explains:

Unlike the legislator, whose lawmaking knows no bounds, the judge stays close to his house of the law in the bounds of stare decisis. He invariably takes precedent as his starting-point: he is constrained to arrive at a decision in the context of ancestral judicial experience; the given decisions, or lacking these, the given dicta, or lacking these, the given clues.

Traynor, *The Interweavers*, supra note 180, at 203.
Judges also make law when they interpret statutes. In the typical situation, judges use conventional techniques to interpret a statute they then apply to a new set of facts. This occurs, for example, when an apparently absolute phrase is interpreted as being subject to qualifications implicit in the context of the whole statute.\textsuperscript{190} Thus, in \textit{Church of the Holy Trinity v. United States}\textsuperscript{191} the Supreme Court held that a statute forbidding encouragement to aliens to migrate to this country to perform services of any kind does not apply to the employment of a clergyman by a church. This type of law-making is analogous to the law-making resulting from the application of precedent to new facts; it also is subject to the same difference in conception.\textsuperscript{192}

But judges also work creatively with statutes in a very different way. "Statutes, like precedents may be radioactive, their emanations expanding with the times."\textsuperscript{193} But "[w]e have been slow," Justice Traynor observed, in expanding the connotations of their own terms to keep pace with the incessant inventiveness of our economy. We forget that legislatures are neither omnipresent nor omniscient. Whatever their alertness to the times, the currency of their statutes begins to depreciate the moment they are enacted. Even if they were in perpetual session they could not possibly enact all the postscripts to yesterday's regulations that the events of each day would suggest. And if some machine could conceivably be devised to tabulate such postscripts they would be self-defeating, for their very numbers would defy intelligent application . . . .

. . . If in many fields it is impossible to prophesy forthcoming events and idle to tabulate actual ones, we must expect our statutory laws to become increasingly pliable to creative judicial elaboration.\textsuperscript{194}

In other words, the meaning of a statute, like the meaning of a constitutional provision, may change over time. This process of adapting statutes to entirely new situations, though the new facts could not possibly have been contemplated by the legislature, is properly a creative activity of judges. As an example of this creativity, Justice Traynor uses the California Supreme Court's interpretation of an 1872

\begin{enumerate}
\item \textsuperscript{191} 143 U.S. 457, 472 (1892).
\item \textsuperscript{192} See Traynor, \textit{No Magic Words}, supra note 168, at 616-17.
\item \textsuperscript{193} Traynor, \textit{Courts and Lawmaking}, supra note 190, at 59.
\item \textsuperscript{194} Id. at 60; see also Traynor, \textit{Better Days In Court}, supra note 171, at 23 (cautioning against passive judicial "fending" of statutes); Traynor, \textit{No Magic Words}, supra note 168, at 617-19 (stating that judges must engage in "judicial elaboration" when applying statutes to situations not anticipated by the drafters).
\end{enumerate}
statute authorizing service of process on foreign corporations doing business in the state. Rather than freeze the interpretation of the statute to the limits of jurisdiction recognized in 1872, the Court interprets the provision to keep up with the changing jurisdictional concepts of the Fourteenth Amendment’s Due Process Clause.  

Although this form of judicial creativity is seldom discussed, and perhaps more rarely practiced, it too probably would draw criticism from the traditional-classical point of view. If the new problem is not within the “legislative intent,” then the extension of the statute, so the argument would go, should be left to new legislation. Justice Traynor’s reply, we might suppose, would be to point out that there is a partnership of legislatures and courts in the law-making business; and while the legislature may be the senior partner, the junior partner exercises the partnership’s full authority until countermanded by the senior partner’s will. “The judiciary must,” Justice Traynor explained in 1961, “continue as a co-worker, not a minor competitor of the legislature in the development of the law.”

The third arena of judicial creativity lies in the void between precedent on the one side and statutory law on the other. A judge must decide cases properly submitted to the court. The common law tradition does not allow judges to abstain for lack of precedent or statute governing the case. In this situation, the judge must fill the void with judge-made law, for, as Justice Traynor stated, “[t]here is now wide agreement that a judge can and should participate creatively in the development of the common law.”  

A more modern devotee of the classical view would argue that the judge finds the law in the general principles upon which non-governing precedent is based. Most modern students of the judicial process would agree, as did Justice Traynor, that precedent is a source of judge-made law. If this is so, may the disagreement between the law-making and the law-finding camps be dismissed as a matter of

195. Traynor, Courts and Lawmaking, supra note 190, at 61.
196. Traynor, No Magic Words, supra note 168, at 616.
197. Traynor, Courts and Lawmaking, supra note 190, at 52.
198. Id.
199. See, e.g., supra text accompanying notes 17-21 and note 187.
semantics? Certainly Traynor, the Realists, Cardozo, Pound, and Holmes believed this was an issue of substance, rather than a difference in expression. Once one moves from the narrowest holding of a case, the level of generalization at which judges stop and extract the rule or principle they find relevant clearly is a question of choice. And which of the multitude of cases is to be subjected to this abstraction procedure? Precedents abound, but not all precedents are of equal value. This process thus is so full of freedom of choice, so full of judgment, that the realistic appraisal finds the judge making law from the elements common to all law. To borrow from the lexicon of the Realists, all precedent is indeterminate.

The analogy is to the weaver of rugs. Though two weavers may use identical yarn and the same technique, they will produce carpets of different quality and pattern depending upon their skill, their imagination, and the goal each has in mind. Each carpet is unique. The finding theory takes as its metaphor not the cottage industry of the courtroom and its handwoven creations, but the power looms of industry and the virtually identical products they make. These can be found on the shelves in the market places throughout the country. But new precedent is not ready-made, not virtually the same, and not found anywhere. It is produced by the judge’s labor from materials partially selected from a nearly boundless supply of precedent and fashioned into the end product by the creative skill of the judge.

The most controversial of the judge’s creative tasks, the last of the four realms of creativity, is the reformation of the common law—the replacement of existing precedent with new judge-made law. “Courts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values.”

None of us would disturb the law that is truly and rationally settled. A courtroom is not a reform school or a laboratory for smashing the atoms of that accumulated wisdom called precedent. If the precedent works reasonably well most of the time, we do not throw it away in a hard case for a rule that might henceforth work badly most of the time. Yet we should examine old rules regularly, as a good workman examines the machines to which he is assigned, to see first if they are properly put together, and then if they are in good working order.

If precedent is "ill-conceived, moribund, or obsolete," it is a candidate for reformation.\textsuperscript{202}

The controversy surrounding the overruling of precedent focuses on the doctrine of stare decisis: in a common law system, it is commonly said, courts are generally bound to follow precedent.\textsuperscript{203} The doctrine springs from such fundamental ideas as the equality of treatment of litigants,\textsuperscript{204} the need for stability and predictability in the law\textsuperscript{205} (which promotes certainty in the planning of one's affairs\textsuperscript{206} and protects the reliance interests of the parties\textsuperscript{207}), and judicial economy.\textsuperscript{208} It is also said to promote "the actual and perceived integrity of the judicial process."\textsuperscript{209} But the doctrine's discipline varies among common law jurisdictions. Stare decisis was so rigidly followed in England that the House of Lords considered itself bound by its own precedents until 1966.\textsuperscript{210} But generally it is not considered an inexorable command in the United States. "[R]ather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'\textsuperscript{211} Furthermore, the binding effect of the doctrine varies by subject matter\textsuperscript{212} and with the views of individual judges.\textsuperscript{213}

\textsuperscript{202}Roger J. Traynor, The Limits of Judicial Creativity, 63 IOWA L. REV. 1, 9 (1977) [hereinafter Traynor, Judicial Creativity].


\textsuperscript{204}E.g., Payne v. Tennessee, 501 U.S. 808, 827 (1991) (citing "evenhanded" development of legal principles as an important policy behind stare decisis).

\textsuperscript{205}Traynor, La Rude Vita, supra note 179, at 229 (stating that stare decisis engenders a "stability in the law that has value per se"); see Payne, 501 U.S. at 827.

\textsuperscript{206}Justice Brandeis once observed, "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." Burnet v. Coronado Oil & Gas Co., 285 U.S. 293, 406 (1932).

\textsuperscript{207}See Payne, 501 U.S. at 827-28.

\textsuperscript{208}Lewis F. Powell, Jr., Stare Decisis and Judicial Restraint, 1991 J. SUP. CT. HISt. 15-17 (stare decisis "makes [judges'] work easier").

\textsuperscript{209}Payne, 501 U.S. at 827; see Powell, supra note 208, at 15-17.

\textsuperscript{210}On July 26, 1966, the Lord Chancellor issued a declaration abolishing the rule adopted by the House of Lords in the nineteenth century that the House is bound by its own precedent. See Dennis Keenan, Smith and Keenan's English Law 133-34 (8th ed. 1986) (includes a reprint of the declaration).

\textsuperscript{211}Payne, 501 U.S. at 828.

\textsuperscript{212}"Considerations in favor of stare decisis are at their acme in involving property and contract rights, where reliance interests are involved . . . the opposite is true in cases . . . involving procedural and evidentiary rules." Id. at 828.

\textsuperscript{213}Compare, e.g., Orozco v. Texas, 394 U.S. 324, 327-27 (1969) (Harlan, J., concurring) (adhering strictly to precedent), with id. at 331 (Stewart, J., dissenting) (arguing that precedent should be abandoned in the face of unforeseen circumstances).
"[I]mitation of the past, until we have a clear reason for change," Holmes stated, "no more needs justification than appetite. It is a form of the inevitable to be accepted until we have a clear vision of what different things we want."\textsuperscript{214} Cardozo, on the other hand, apparently thought judges were fairly tightly bound by the doctrine.\textsuperscript{215} However, Traynor believed that precedent regularly should be reviewed with an eye toward judicial reformation of the common law, a view more in accordance with Holmes than Cardozo.\textsuperscript{216} Nevertheless, all three clearly understood that a judge exercises creative law-making powers when precedent is overruled in favor of new doctrine, and that judges rightfully exercise this power in our American democracy.

Precedent is overruled with some frequency in most American jurisdictions. The overruling of precedent seems so obvious an act of judicial creativity that one might argue that this finally proves that judges make, and do not find, law. But the traditional law-finding view explained the overruling phenomenon as an instance of judicial error in finding the law. In other words, the law was incorrectly found in the overruled case and it is now replaced by law correctly found. Few judges, or lawyers, one would hope, would offer this explanation today.

C. The Sources of Judge-Made Law

Cardozo’s judicial creativity was founded on the methods of philosophy, history and sociology, and on the customs of the community.\textsuperscript{217} Justice Traynor did not dwell on the sources of judge-made law. When they were mentioned, he did not use Cardozo’s terms and he usually spoke about them in conjunction with their use. Source and process were not clearly parsed. But insofar as he separately spoke of them, he identified the raw materials used to weave new law as precedent,\textsuperscript{218} the principles and rules found in relevant (but off-
point) statutes, the empirical facts of how the law actually functions, and, though less frequently mentioned, the past, contemporary and evolving values, customs and traditions of the people, and traditional legal materials. Even more infrequently, as though

739, 742 (1970) [hereinafter Traynor, Reasoning]; Traynor, Transatlantic Reflections, supra note 14, at 262 (citing “the given judgments; or lacking these, the given dicta; or lacking these, the given clues”); Traynor, The Well-Tempered Judicial Decision, supra note 180, at 290-91. Precedent is, of course, a form of history.

219. E.g., Traynor, Courts and Lawmaking, supra note 190, at 60-64; Traynor, No Magic Words, supra note 168, at 617-19; Roger J. Traynor, Statutes Revolving in Common-Law Orbits, 17 Cath. U. L. Rev. 401, 402 (1968) [hereinafter Traynor, Statutes] (same); Traynor, Transatlantic Reflections, supra note 14, at 259 (discussing the difficulties of integrating statutes with the common law).

220. E.g., Traynor, The Interweavers, supra note 180, at 212 (describing the use of policy and environmental data in judicial lawmaking); Traynor, Judicial Creativity, supra note 202, at 11-12 (same); Traynor, Reasoning, supra note 218, at 749-50 (same); Traynor, Some Open Questions, supra note 14, at 219 (same); Traynor, Transatlantic Reflections, supra note 14, at 279-81 (same); Traynor, Law And Social Change, supra note 14, at 234 (asserting that judges confronted with obsolete precedent are “free to weigh competing policies” in arriving at a solution).

221. E.g., Traynor, The Interweavers, supra note 180, at 212 (asserting that judges in their work gain sufficient expertise to decipher scientific studies and use them in the adjudicative process when appropriate); Traynor, Judicial Creativity, supra note 202, at 11-12 (acknowledging the value of occasional judicial inquiry into “legislative facts,” environmental data, and scholarly research as an aid to decision-making in uncharted areas); Traynor, Transatlantic Reflections, supra note 14, at 280 (same); Traynor, Reasoning, supra note 218, at 750 (asserting that judges in their work gain sufficient expertise to decipher scientific studies and use them in the adjudicative process when appropriate); Roger J. Traynor, What Domesday Books For Emerging Law?, 15 UCLA L. Rev. 1105, 1106-11 (1968) [hereinafter Traynor, Emerging Law] (endorsing the use of behavioral science in the fashioning of precedent).

222. E.g., Traynor, Badlands, supra note 218, at 160 (community standards are implicit in legislation); Traynor, Better Days in Court, supra note 171, at 109-10 (common law develops slowly in response to changing human values and desires); Traynor, Emerging Law, supra note 221, at 1107 (stressing that judges must understand the historical context of common-law rules in order to advance their evolution in an orderly manner); Traynor, The Interweavers, supra note 180, at 205 (community standards act as check on improvident judicial innovations); Traynor, Law and Social Change, supra note 14, at 232 (judges must sometimes reformulate the law to meet “new moral values”); Traynor, Unjustifiable Reliance, supra note 201, at 23-24 (same); Traynor, No Magic Words, supra note 168, at 625 (judges must heed “established folk patterns” in fashioning precedent); Traynor, The Well-Tempered Judicial Decision, supra note 180, at 291-92 (legal rules should lag slightly behind social mores, in order to ensure rules are reflective of the development of “seasoned community values”).

223. See Roger J. Traynor, To the Right Honorable Law Reviews, 10 UCLA L. Rev. 3, 5-8 (1962) [hereinafter Traynor, Honorable Law Reviews] (discussing the influence of law reviews on judicial opinion-writing). In addition, Donald P. Barrett tells us that “Justice Traynor followed the law reviews assiduously. Every issue that came to the court library was first sent to him before being shelved. He was very sensitive to areas where he knew the professors thought the California Supreme Court theories were cockeyed.” Transcript of Interview with Donald P. Barrett, Research Attorney, Supreme Court of California,
more out of caution than need, Justice Traynor reminds us that judges, who are "traditionally above base prejudices," must rise above their own preconceptions, predilections, and personal interests in deciding cases.224 "Our great creative judges," Traynor reminds us, "have been men of outstanding skill, adept at discounting their own predilections and careful to discount them with conscientious severity."225 The personal views of the judge thus are not legitimate sources of judge-made law.

How the raw materials of judicial lawmaking are brought together, sorted, and molded into new law by the judge concerns the art of creative judging. But it bears repeating here that Justice Traynor did not overtly distinguish the art of judging from the sources of judge-made law.226

D. The Art of Creative Judging

(1) Introduction

Now that we understand Roger Traynor’s firm belief that judges should make law, and that his theory of the judicial process draws no significant distinction between the sources of the law and the process the judge should use to make it, we return to the dispute over the legitimacy of judicial law-making that was raging at the time Professor Traynor was appointed to the bench.

Classical theory’s principal attraction is the ease with which it conforms to popular conceptions of democracy, the rule of law, and the proper role of courts in our democracy, and, accordingly, the facile way it dispenses with the troubling questions surrounding the Realists’ views, shared by Justice Traynor, that judges make law and they are not realistically constrained by precedent.

How did Justice Traynor respond to the anti-Realist criticism that the unrestrained judicial creation of law is a form of judicial tyranny

1948-1981, at 12 (May 28, 1986 and July 28, 1986) (by Dorothy Mackay-Collins, Curator/Archivist, Library, Hastings College of the Law; on file in the Roger J. Traynor Memorial Room); see McCall, supra note 1, at 742 ("As a justice, he elevated the importance of legal scholarship by initiating the practice of citing law review articles in California Supreme Court opinions. He consistently read the work of legal academics and incorporated it into his thinking.").

224. E.g., Traynor, Courts and Lawmaking, supra note 190, at 52; Traynor, Transatlantic Reflections, supra note 14, at 281.

225. Traynor, Courts and Lawmaking, supra note 190, at 52.

226. See, e.g., Traynor, Judicial Creativity, supra note 202, at 7-12; Traynor, No Magic Words, supra note 168, at 623-30; Traynor, Transatlantic Reflections, supra note 14, at 262-65.
antithetical to "our democracy"? As we have seen, he did not overtly embrace either the Reasoned Elaboration theory or Professor Wechsler's "neutral principles,"227 the two most prominent theories that responded to challenges to the creative role of Supreme Court justices in constitutional law at mid-century.228 As Reasoned Elaboration matured, it did not further develop its first and second tenets as constraints on judicial choice.229 The focus, instead, was on the third and fourth requirements: that the reasons given by the judge in the opinion must exemplify the "maturing of collective thought,"230 and that the court must adequately demonstrate that its decisions are vehicles for the expression of the ultimate social preferences of contemporary society (as illustrated by Professor Wechsler's "neutral principles" theory).231

As we have seen, Justice Traynor took a different path.232 He rejects Reasoned Elaboration's third and fourth tenets as being inconsistent with the creative role of judges in the common law process. Instead, he emphasizes the critical importance of Reasoned Elaboration's first and second tenets. These two tenets, which can be phrased as a single coherent-articulation-of-reasons principle, are not unique to Reasoned Elaboration theory. Although this coherent-articulation-of-reasons principle is not central to all contemporary legal process theories, it is embraced, or at least not rejected, by most, if not all, of them. Nevertheless, neither Holmes, nor Cardozo, nor the Realists constructed theories that restrained a judge's personal law-making choice based upon a coherent-articulation-of-reasons principle. Justice Traynor relies upon this principle as a major force that drives his judicial-limitation theory.

Though never the subject of a single article, Traynor's judicial-limitation theory can be extracted from an analysis of his lectures on the judicial process. Two types of forces apply whenever a judge considers the law he or she should use to decide a given issue. There are creative forces that urge the judge to create new law, and restraining forces that counsel the judge to apply existing doctrine. Any decision

227. See supra text accompanying notes 168-180.
228. See supra text accompanying notes 150-55.
229. These two tenets are, first, that judges must give reasons for their decisions and, second, these reasons must be set forth in a detailed and coherent manner. See supra note 151 and accompanying text.
230. Supra notes 152-54 and accompanying text.
231. Supra note 155 and accompanying text.
232. For a discussion of Justice Traynor's response to Reasoned Elaboration, see supra text accompanying notes 168-80.
the judge makes is the product of the relative strength of these opposing forces at the time the decision is made. The relative strength of the creative and restraining forces varies with a number of factors. Precedent prevails and the judge adheres to the common understanding of existing law when, for example, the forces of repose overpower what Holmes calls "the felt necessities of the time." On the other hand, when the creative forces overcome the restraining forces, the judge creates new law. This process applies in all of the situations described by Justice Traynor as calling for judicial law-making. In other words, the law a judge uses to resolve a given issue is thus the product of the creative and restraining forces as calculated by the judge at that given point in time.

Before we turn to the details of Justice Traynor's theory we must distinguish two types of criticism commonly aimed at judicial law-making. The first criticism focuses on the person of the judge deciding the given case and claims that it is inconsistent with "our democracy" to give law-making power to this individual. The second criticism looks not to the person of the judge, but to the office of the judge and


234. Frank was one of the primary proponents of the theory of rationalization of opinions. See Frank, supra note 132, at 159-71; Robert Jerome Glennon, The Iconoclast As Reformer 44-53 (1985); see also supra note 97 and accompanying text. The creative law-making forces do not work in one direction. The judge could, for example, overrule the existing precedent and return to precedent abandoned in the past.

235. The personal characteristics of the judge are the focus of this criticism. See, e.g., North v. Russell, 427 U.S. 328 (1976) (holding that non-lawyer judges may preside in criminal cases in which incarceration is a possible penalty under the due process clause of the fourteenth amendment, provided the defendant is given the opportunity to obtain a second trial, de novo, before a judge who is legally trained.) Issues concerning the personal qualifications of the judge typically arise in three settings: (1) proceedings to confirm a person nominated to a judicial office; (2) proceedings to disqualify a particular judge because of personal interest or bias with respect to the issues pending before the court; and (3) proceedings to remove a particular judge from office on grounds personal to the judge. The controversy over the nomination of Max Radin to the Supreme Court of California (see supra text accompanying notes 134-38) and Judge Bork to the United States Supreme Court (see, e.g., Robert H. Bork, The Tempting of America 267-355 (1990); Ronald D. Rotunda, The Confirmation Process for Supreme Court Justices in the Modern Era, 37 Emory L.J. 559, 581 (1988)) typify the raising of issues concerning the personal characteristics of a nominee to judicial office. The need for judges to be personally disinterested in the issues pending before them is an essential part of the Anglo-American judicial tradition and is not problematic. See, e.g., Henry J. Abraham, The Judicial Process 22 (1993). This issue frequently arises in proceedings to recuse a particular judge. The judicial retention election of 1986, in which Chief Justice Rose Bird and two Associate Justices were not retained on the California Supreme Court, illustrates the third way in which disputes over the personal characteristics of a judge arise. See, e.g., Joseph R. Grodin, In Pursuit Of Justice 162-86 (1989); John W. Poulos, Capital Punishment, the Legal Process, and the Emergence of the Lucas Court in California, 23 U.C. Davis L. Rev. 157, 208-20 (1990).
claims that it is inconsistent with "our democracy" to give law-making power to the judicial office. Classical theory avoids both criticisms by denying that judges make law. But once one recognizes that judges

236. "By the eighteenth century," Justice Traynor tells us, "doctrinaire preachments for the separation of powers had become influential enough to lend credibility to Blackstone's formidable voice of authority for the proposition that judges were confined to be finders of mystically pre-existing law within their own narrow domain. The temper of the times discouraged judicial initiative, and in response judges grew timid." Traynor, Statutes, supra note 219, at 404. Elsewhere, Justice Traynor noted that, "[l]ike many another myth, the myth that judges discovered rather than created law, surviving well into the twentieth century, engendered rituals that have outlived it." Traynor, The Well-Tempered Judicial Decision, supra note 180, at 290; accord Roger J. Traynor, Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility, 28 HASTINGS L.J. 533, 535 (1977) [hereinafter Traynor, Quo Vadis]. Later, writing in 1977, he observed that "there are even a few lawyers who still believe that it is for a judge to state, restate, occasionally expand, or even contort established precedents, but that he cannot properly create a new one." Traynor, Judicial Creativity, supra note 203, at 8; see infra note 297.

"The most ironic attacks against courts," Justice Traynor wrote in 1970, "are those that bemoan their lawmaking, ... as an encroachment upon the legislative function ... ." Roger J. Traynor, The Mind Counts, 20 CATH. U. L. REV. 259, 266 (1970) [hereinafter Traynor, The Mind Counts].

Most of the modern criticism of judicial lawmaking focuses on the judicial role in constitutional litigation. Commentary on the proper role of the courts in adjudicating constitutional issues in "our democracy" has been one of the dominant themes in the literature on constitutional law for several decades. Professor John Hart Ely tersely sums up the issue in the following excerpt from his book, Democracy and Distrust, supra note 167. In this selection, Professor Ely discusses the difficulty with assigning a creative role to courts in constitution litigation. The particular type of creative role he is discussing is "noninterpretivism"—the view that courts are not limited to enforcing norms that "are stated or clearly implicit in the written Constitution ... ." Id. at 1.

The second comparative attraction of an interpretivist approach, one that is more fundamental, derives from the obvious difficulties its opposite number [noninterpretivism] encounters in trying to reconcile itself with the underlying democratic theory of our government. It is true that the United States is not run town meeting style. ... But most of the important policy decisions are made by our elected representatives (or by people accountable to them). Judges, at least federal judges—while they obviously are not entirely oblivious to popular opinion—are not elected or reelected. "[N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic." Id. at 4 (quoting from Alexander Bickel, The Least Dangerous Branch 19 (1962)).

Although judicial lawmaking in areas other than constitutional law poses a different set of issues, it takes a measure of legal and political sophistication to appreciate those differences. One can anticipate that many who "bemoan ... [judicial] lawmaking, ... as an encroachment upon the legislative function" (Traynor, The Mind Counts, supra) do so on the ground that it violates "the underlying democratic theory of our government" (Ely, supra). Indeed, the ease with which judicial lawmaking is identified with an abuse of democratic theory may explain why judicial candidates usually profess adherence to the classical law-applying view of the judicial task in confirmation hearings. See supra note 106 and accompanying text.
do and should make law, both criticisms must be confronted. The problem is obvious: the duties of the judicial office are always performed by individual judges. Recognizing this fact, Justice Traynor states that a judge must be

painfully aware that a decision will not be saved from being arbitrary merely because he is disinterested. He 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 [sic] 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 . . . .

. . . . [H]e can strive to deepen his inquiry and his reflection enough to arrive at last at a value judgment as to what the law ought to be and to spell out why.237

Justice Traynor appears to be acknowledging that a judge's "cleansed" personal judgment is the key to acceptable judicial law-making. One cannot realistically distinguish the judge from the judicial office. But individual judges can be true to their office by employing their own "cleansed" values to find the vital balance between the creative and restraining forces urging and containing judicial creativity. This is sacrilege in classical theory. But it resonates with what Holmes tells us in *The Path Of The Law*,238 and with Realist theory as it is spun by Judge Hutcheson239 and Professors Llewellyn240 and Radin.241 The assertion that judges decide cases based upon personal judgment lies at the heart of much of the Realist criticism of classical theory.242 With the addition of his concept of "cleansing" personal judgment, this assertion is fundamental to Justice Traynor's theory as well. With this prerequisite in mind, we turn to the creative and restraining factors that are the elements of Justice Traynor's theory of the process by which judges permissibly make law.

Before we examine what I call the predominantly creative elements of Justice Traynor's theory, a word of caution is in order. For our analysis, the predominantly creative elements are pragmatism,

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238. See supra notes 23-32 and accompanying text.
240. See e.g., supra text accompanying notes 91-101.
242. Though a staunch Realist, such as Jerome Frank, would probably argue that "cleansing" is not possible. See supra note 234.
empiricism, intuition, the conception of the world as rapidly changing, and legal policy. A moment’s reflection suggests that many of these elements might support the status quo as readily as change. But we are here concerned with their principal tendency and that is to support judicial creativity. Why is this so?

If the status quo is the judge’s goal, existing law may be applied without resorting to any of these components of Justice Traynor’s theory. Stare decisis is sufficient to maintain the status quo. Each of these creative elements generally draws into question existing law. Pragmatism, for example, asks whether existing law produces its desired goal. When these elements are employed, judges are usually contemplating the exercise of their creative powers. If these elements are ignored, there is little ground to question existing law; and if existing law is not questioned, it will prevail. Once invoked, however, each of these elements may confirm that existing law is better than the proposed new rule. Nevertheless, these elements are considered primarily creative forces because they are necessary, though not sufficient, to move the judge’s creative power.

(2) The Predominantly Creative Forces

a. Pragmatism

Justice Traynor’s focus is not on the law as theology but on law as a tie that binds a people together, adjusts their relationships, and assists in achieving their goals. It is a pragmatic view of law. Undeniably, this Realist perspective of the judicial process is a fundamental component of Traynor’s philosophy of the judicial process. This does not suggest that he abjured theory, for he did not. Theory is spun to explain and unify, to make the law work; not as an end in itself. The law has its work, and it is the judge’s task to see that it is done fairly and efficiently. Holmes, Pound, Cardozo, and the Realists all agree with Traynor’s pragmatic view of the law and the judicial process, though there are undoubtedly differences in the enthusiasm with which they embrace it.

Justice Traynor’s explanation of how a judge should choose between alternative rules of apparent equal strength is particularly revealing:

243. Traynor, Better Days in Court, supra note 171, at 109. “It is from the stuff of [people’s] relationships with one another and with the state that the common law develops, ostensibly from the cases that formalize their quarrels, but under the surface and over the years, from the values that formalize their aspirations.” Id.

244. See supra text accompanying notes 93-100, and following note 105.
How can a judge then arrive at a decision one way or the other and yet avoid being arbitrary? If he has a high sense of judicial responsibility, he is loath to make an arbitrary choice even of acceptably rational alternatives, for he would thus abdicate the responsibility of judgment when it proved most difficult. He rejects coin-tossing, though it would make a great show of neutrality. Then what? . . .

He comes to realize how essential it is also that he be intellectually interested in a rational outcome. He cannot remain disoriented forever, his mind suspended between alternative passable solutions. Rather than to take the easy way out via one or the other, he can strive to deepen his inquiry and his reflection enough to arrive at last at a value judgment as to what the law ought to be and to spell out why. In the course of doing so he channels his interest in a rational outcome into an interest in a particular result. In that limited sense he becomes result-oriented, an honest term to describe the stubbornly rational search for the optimum decision. Would we have it otherwise? Would we give up the value judgment for an abdication of judicial responsibility, for the toss of the two-faced coin?245

The force of pragmatism appears throughout Justice Traynor’s writings on the judicial process.246

b. Empiricism

Empiricism is pragmatism’s chief tool. It is the method of choice for deciding what works. The common law has always contained an empirical element. It penetrates into the judicial process as the facts of the case at hand.247 But the empiricism that concerns us here is what we call the “legislative facts,” the facts that support the architecture of a given legal rule. “Why should judges not inquire,” Justice Traynor wrote,

the better to resolve a hard case, into what Kenneth Davis calls the “legislative facts” or what we might call the environmental data, as distinguished from selected litigated facts about the parties

246. E.g., Traynor, The Interweavers, supra note 180, at 203-04, 212-13; Traynor, Reasoning, supra note 218, at 750-51; Traynor, La Rude Vita, supra note 179, at 234-35; Traynor, Transatlantic Reflections, supra note 14, at 280-81.
247. Justice Traynor accepted the fact skepticism of the Realist Jerome Frank with this caveat:

The problem is that the facts are forever gone and no scientific method of inquiry can ever be devised to produce facsimiles that bring the past to life. The judicial process deals with probabilities, not facts, and we must therefore be on guard against making fact skepticism our main preoccupation. However skillfully, however sensitively we arrange a reproduction of the past, the arrangement is still that of the theater.

presented with partisan fortissimos and pianissimos? When hard
cases make good law, is it not usually because the judges had before
them the data requisite for informed judgment? Is it not just as
foolish in the judicial process as anywhere else to resolve problems
of enormous factual complexity without adequate data? The alter-
native is to assume the risk of dubious a priori assumptions. The
common law is replete with such assumptions.248

Brandeis (another ancestor of Realism),249 Cardozo,250 Pound,251 and
the Realists252 would enthusiastically agree.

Soundly based empirical studies directly relevant to law, how-
ever, are few and far between. The Realist experience with empiri-
cism, along with other factors such as its relatively high costs,
dampened enthusiasm for empirical legal research for several decades
after the Second World War. Although judges should take empirical
studies where they find them, well-grounded empirical research was
scarce during most of Justice Traynor's tenure on the bench. Never-
etheless, empiricism is one of the elements that generally supports legal
creativity in Traynor's theory of the judicial process.253

c. Intuition

The common law system does not give judges the luxury of wait-
ing for empirical data, for sound legislative facts, before deciding the
case with a new rule. What are judges to do? Are they bound to
flounder in "dubious a priori assumptions?"254 Traynor tells us to set
aside our predilections, our assumptions, and do the best we can.255
And what is that? In judges' "pragmatic search for solutions"256 they
must use "combinations of analysis and intuition" to arrive at a pro-

248. Traynor, Judicial Creativity, supra note 202, at 11-12; see also Traynor, Emerging
Law, supra note 221, at 1105 (suggesting that the law must quicken its pace to keep abreast
of new social developments); Traynor, No Magic Words, supra note 168, at 626-28 (discuss-
ing the "inadequacies of decision[s] . . . uninformed by adequate data"); Traynor, La Rude
Vita, supra note 179, at 235 (cases difficult to decide do not necessarily make bad law).
249. See JOHNSON, supra note 43, at 29-46 for an excellent discussion of Brandeis' con-
tribution to legal theory.
250. Cardozo's "method of sociology" included both pragmatism and empiricism. See,
e.g., CARDOZO, supra note 59, at 65-66.
251. See, e.g., THE CLEVELAND FOUNDATION, CRIMINAL JUSTICE IN CLEVELAND 579-
80 (Roscoe Pound & Felix Frankfurter eds., 1922) (discussing inherent unreliability of evi-
dence in criminal cases).
252. See, e.g., AMERICAN LEGAL REALISM, supra note 88, at 232-36 (discussing history
of law as a social science); HERGET, supra note 53, at 194-217 (same).
253. It is true, of course, that empiricism might support the status quo, but it remains as
an essential aspect of considering the creation of new law.
254. Traynor, Judicial Creativity, supra note 202, at 12.
255. HOLMES, supra note 23, and accompanying text.
In his ... responsibility of assuring the rational continuity of the law, a judge may now and again be compelled by reason to arrive at an innovative decision, in the honorable tradition of ancestral precedent-setters. Such a decision exemplifies judicial responsibility at its most challenging. The innovative decision is the most difficult for a judge to elucidate, for it usually concerns a controversy that has compelled him to evaluate conflicting interests in terms of a changing social or economic context. He is himself in the moving picture of that change, but must somehow view it dispassionately. That perspective he can achieve only by a long look at the past, in terms of the present, to evaluate whether once useful precedents are impained by obsolescence, or whether there are no useful precedents, and then by a long look at the present in terms of the future, to evaluate what the long-range prospects of currently visible change are.

Intuition substitutes for absent or incomplete empirical data in making the pragmatic assessment, and in creating new law. The judge uses intuition, in other words, to construct the "environmental assumptions," the world view, upon which the new rule is based.

d. Policy

Justice Traynor did not dwell on the use of policy in judicial law-making. But when he spoke of policy, he acknowledged that it may be a basic consideration in the law-making matrix:

It takes vision to recognize the junctures where markers can best help those who travel the long trails of the law. Such vision is essential in the occasional cases where a judge must choose between conflicting lines of precedent or, in an unprecedented case, between conflicting lines of policy. . . .

In such cases, we should not be misled by the half-truth that policy is a matter for the legislators alone to decide. The word "policy" has one connotation in the legislature and another in the court. Legislators can embark on any policy at will, whether wise or expedient or artful, without regard either for the continuity scripts of the law or for the coherence of their own ticker tapes. A judge, in con-

257. Traynor, Badlands, supra note 218, at 160; see also Traynor, Courts and Lawmaking, supra note 190, at 55-56 (discussing roles of judges and legislatures in fashioning new law); Traynor, Judicial Creativity, supra note 202, at 9 (innovative decisions call for the judge to “evaluate conflicting interests in terms of a changing social or economic context”); Traynor, La Rude Vita, supra note 179, at 223 (examining problems faced by a judge presiding over a complex case); White, supra note 7, at 294.
258. Traynor, Judicial Creativity, supra note 202, at 8-9 (emphasis added).
260. Id.
trast, cannot speak unless he is spoken to, and he must mind his musing when he does so. There is always an area not covered by legislation in which judges must revise old rules or create new ones, and in that process policy may be an appropriate and even a basic consideration.  

And in commenting on the judicial restructuring of conflict of laws, Justice Traynor stated that the "demolition of obsolete theories makes the judge's task harder, as he works his way out of the wreckage; but it leaves him free to weigh competing policies without preconceptions that purport to compel the decision, but in fact do not."  

Indeed, in his last article on the judicial process, Justice Traynor called this element "the essential, but narrow, leeway of judicial policy."  

Although policy is a basic consideration in Traynor's world of judicial law-making, he does not give it the central role it takes in some of the later theories produced by the Realist Movement. Policy is a critical element, for example, in the "realistic" theories produced by Professors Myres McDougal and Harold Laswell at Yale shortly after Traynor was appointed to the bench, now known as the Law, Science, and Policy movement.  

But for Roger Traynor, policy is only one of the many important components of judge-made law.

e. The Rapidly Changing World

Traynor, along with the Realists and Holmes, saw the world in rapid flux. This was not simply a world view, but an empirical truth: Roger Traynor sat on the California Supreme Court during one of the most dynamic periods in California's history. Because of the "ac-

262. Traynor, Judicial Creativity, supra note 202, at 11. The quotation continues as follows:

The briefs carry the first responsibility in stating the policy at stake and demonstrating its relevance; but if they fail or fall short in this task, no conscientious judge will set bounds to his inquiry. If he finds no significant clues in the law reports or statutes of his own or other jurisdictions, he will not close his eyes to a pertinent study merely because it was written by an economist or perhaps an anthropologist or an engineer.

Id.; see also Traynor, The Interweavers, supra note 180, at 212 (courts share role with legislature in determining policy); Traynor, Reasoning, supra note 218, at 749 (asserting that courts decide what is policy); Traynor, Transatlantic Reflections, supra note 14, at 280-81 (judges in hard cases must make judgments "as to what the law ought to be").


264. Traynor, Transatlantic Reflections, supra note 14, at 279.

265. The first comprehensive statement of their theories is found in Harold D. Laswell & Myres S. McDougal, Legal Education and Public Policy: Professional Training in the Public Interest, 52 Yale L.J. 203 (1943).


267. White, supra note 7, at 294-95.
elerating force of social and scientific change," Justice Traynor believed that lawyers and judges were bound to bring the law "up to a strength and creativeness equal to the times." The judge can no longer invoke with assurance the nearest quieting precedent. The nearest analogy may seem to him only impertinent. Tried and half-true formulas will not serve him, for all their show of stability. He must compose his own mind as he leaves antiquated compositions aside to create some fragments of legal order out of disordered masses of new data.

The judge must thus constantly review and update the common law. Judges must make new law for new situations, for "the felt necessities of the time."

Justice Traynor was so concerned with a realistic portrayal of the judicial process and with burying the law-finding myth that he repeatedly emphasized the judge's creative duties. Society was changing at a rapid rate and legislatures frequently did not manufacture the law necessary for the new disputes created by new relationships. Judges thus must fill these ever-present gaps at an escalating rate. This did not mean that legislatures slept while judges worked. In the modern world "legislatures have displaced courts as our major lawmakers." But legislatures do not make all the law needed to avoid or resolve the rapidly developing disputes. Ironically, with the ascending rate of new legislation, the creative role of judges escalates as well. Judges must exercise their creative powers over the new statutes—gaps in the statutory provisions must be filled, text must be interpreted, and statutes must be woven into the corpus of the law. When these tasks are added to the creative job of filling the void typically existing even in a stable society, between precedent on the one side and statutory law on the other, the judge is seemingly creating law at a speedy rate.

268. Traynor, Better Days In Court, supra note 171, at 109; see also Traynor, La Rude Vita, supra note 179, at 236 ("Things happen fast in our small world and we who tend the law must keep pace.").
269. Traynor, Better Days In Court, supra note 171, at 109.
270. HOLMES, supra note 23, at 1.
271. One of Justice Traynor's favorite articles on this topic, judging by the frequency with which he cited it, was Henry J. Friendly, The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't, 63 COLUM. L. REV. 787 (1963). Citations to this article may be found in Traynor, The Interweavers, supra note 180, at 214; Traynor, The Mind Counts, supra note 236, at 266; Traynor, Reasoning, supra note 218, at 751-52; Traynor, Statutes, supra note 219, at 427 n.92; Traynor, Unguarded Affairs, supra note 178, at 492 n.12; Traynor, The Well-Tempered Judicial Decision, supra note 180, at 292 n.12.
273. See supra text accompanying notes 190-96.
274. See supra text accompanying notes 197-99.
this must be added the job of constantly reviewing, repairing, and renewing the common law. With this addition, it would be facile, though incorrect, to assume that Justice Traynor counseled his brethren to make law at a break-neck pace. But, as we shall see, there are constraining forces that slow the pace of judicial creativity in Traynor's theory of the judicial process.

(3) The Predominantly Restraining Forces

Justice Traynor identified seven factors that restrain a judge's power to create new law: stare decisis, the common law tradition, what Traynor called "the tenet of lag," the retroactive effect of judicial decisions, deference to the legislature, internal institutional restraints, and external institutional restraints. These factors exercise their restraining powers in every case in which there is an issue of judge-made law. And in any given case, the restraining power of any one of these factors may be sufficient to overcome the creative forces and cause existing law to prevail. Furthermore, since all of these predominantly restraining forces are present in all cases in which judge-made law is challenged, the combined power of the restraining forces may seem overwhelming in nearly every case. So powerful are these restraining forces that Justice Traynor warns us that the "real danger to law is not that 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, with whom they consistently identify themselves save perhaps on the wearing of wigs." Even when the creative forces are strong enough to prevail, judge-made "law habitually moves in slow motion," for the predominantly restraining forces still exercise their constraining power. It is to these seven countervailing forces that we now turn.

a. Stare Decisis

The doctrine of stare decisis, as we have seen, expresses a series of concerns that counter creativity in the judicial process. "The serviceable consistency of stare decisis," Justice Traynor warns, "rightly discourages the displacement of precedent, absent overwhelming

275. See supra text accompanying notes 200-16.
276. Traynor, No Magic Words, supra note 168, at 621 (quoting Traynor, Some Open Questions, supra note 14, at 224); accord Traynor, Reasoning, supra note 218, at 744.
277. Traynor, Statutes, supra note 219, at 412.
278. See supra text accompanying notes 203-16.
countervailing considerations." Stare decisis "not only benefits the long-range evolution of the law, but also affords substantial protection against arbitrary judicial decision." The role of stare decisis in restraining judicial creativity is so well known that we may move on to a related constraint.

b. The Common Law Tradition

Though stare decisis plays a major role in the common law tradition, there are other equally important components to the culture in which American judges work. The judge "invariably takes precedent as his starting-point: he is constrained to arrive at a decision in the context of ancestral judicial experience." Even in a case of first impression, the judge "arrives at a decision in the context of judicial reasoning with recognizable ties to the past; by its kinship thereto it not only establishes the unprecedented case as a precedent for the future, but integrates it in the often rewoven but always unbroken line with the past."

Justice Traynor eloquently identified the impact of the common law tradition, apart from the rule of precedent, in his Murray Lecture, delivered on March 31, 1977, at the University of Iowa College of Law:

[B]y the time a case reaches an appellate court there are certainly two sides to the question, and at times maybe three or more. There is no way an appellate judge can find an easy answer to the hard question before him, no way he can spare his mind from thinking, no way he can abstain from writing an opinion in some measure original. At the same time he must remain the watchful keeper of the continuity scripts, entrusted to make the paragraph transitions from one case to another in the same area, to explain any amplification or updating of a familiar text, to justify in detail any departure therefrom, to elucidate the principles underlying the solution of a problem without true precedent. Ideally, he should be able to state his reasons plainly enough to enlighten counsel as to why they won or lost, and to allay the suspicions of any man in the street who regards knowledge of the law as no excuse for making it.

Moreover, in his preoccupation with any given script . . . the judge must visualize it in the context of others . . . .

279. Traynor, La Rude Vita, supra note 179, at 229.
281. Traynor, The Interweavers, supra note 180, at 203; see also Traynor, The Well-Tempered Judicial Decision, supra note 180, at 290.
282. Traynor, The Interweavers, supra note 180, at 203; see also Traynor, The Well-Tempered Judicial Decision, supra note 180, at 290.
283. Traynor, Judicial Creativity, supra note 202, at 1.
Given the hodgepodge appearance of cases, entirely dependent on the chance of who undertakes to litigate what, it is no easy task to ensure a continuity script that will not look like a crazy quilt. . . . Nothing stands against lunacy in the law but the reasoning judge.\textsuperscript{284}

The common law tradition also teaches judges to arrive at their decisions "within as straight and narrow a path as possible."\textsuperscript{285} Even when the judge does not hew to the past and thus takes "graceful leave of a dark landmark," the new rule must follow the path of the arrow, not the grapeshot from a blunderbuss.\textsuperscript{286} The common law is humble in its strength. It is confined by the record and focused on the issues. The opinion addresses the task at hand and nothing more.

Tradition also binds the judge to weave the rule, whether entirely or partly new, into the fabric of the law, giving it "the grace of coherent pattern as it evolves."\textsuperscript{287} Viewed in context, the common law is evolutionary, even when individual cases appear revolutionary. If the new rule cannot be integrated into the warp and woof of the law, tradition warns the judge to cast it aside as defective yarn. "Beware of false prophets," we are warned, "who come to you in sheep's clothing but inwardly are ravenous wolves."\textsuperscript{288} Revolutionary rules, as false prophets, as wolves, would consume the law, and the judges as well. The narrowness and precision of the rule and the fact that it flows from our accepted past affords a judge time to test and to extend, modify, or retreat as experience suggests.

Thus, although the elements of judicial creativity may urge the judge to make law at break-neck speed, Justice Traynor uses the metaphor of the tortoise to illustrate the proper pace of judicial creativity:\textsuperscript{289}

A decision that has not suffered untimely birth has a reduced risk of untimely death. Insofar as a court remains uncommitted to unduly wide implications of a decision, it gains time to inform itself further

\begin{itemize}
\item \textsuperscript{284} Id. at 5-6.
\item \textsuperscript{285} Traynor, \textit{The Well-Tempered Judicial Decision, supra} note 180, at 291. Similar statements frequently appear throughout his writing on the judicial process. \textit{See, e.g.}, Traynor, \textit{Quo Vadis, supra} note 236, at 537 (1977).
\item \textsuperscript{286} Traynor, \textit{The Well-Tempered Judicial Decision, supra} note 180, at 291.
\item \textsuperscript{287} Traynor, \textit{The Interweavers, supra} note 180, at 203.
\item \textsuperscript{288} \textit{Matthew} 7:15.
\item \textsuperscript{289} Justice Traynor said:
\begin{quote}
It has been known since the days of Aesop that the tortoise can overtake the zealous hare; La Fontaine has noted that it does so while carrying a burden. The frailty of the hare is that for all its zeal it tends to become distracted. The strength of the tortoise is its very burden; it is always in its house of the law.
\end{quote}
\end{itemize}
through succeeding cases. It is then better situated to retreat or advance with a minimum of shock to the evolutionary course of the law, and hence with a minimum of shock to those who act in reliance upon judicial decisions. The greatest judges of the common law have proceeded in this way, moving not by fits and starts, but at the pace of the tortoise that steadily makes advances though it carries the past on its back.\textsuperscript{290}

It is thus the burden of the judge to keep the pattern of the law straight, and to interweave the new with the old to make a seamless whole, with the pace of the tortoise.\textsuperscript{291}

c. The Tenet of Lag

Related to the pace of the tortoise is what Justice Traynor calls "the tenet of lag":\textsuperscript{292} "[T]he law must lag a respectful pace back of popular mores, not only to insure its own acceptance, but also to delay formalization of community values until they have become seasoned."\textsuperscript{293} In other words, the function of courts "is not to innovate changes but only to keep the law responsive to significant changes in the customs of the community."\textsuperscript{294} Once seasoned, however, and if the legislature fails to make appropriate provisions for them, "a judge may eventually find it incumbent upon him to articulate rules responsive to long prevalent values and customs."\textsuperscript{295} The tenet of lag is "deservedly respected," but it should not be used "to retreat from painstaking analysis within their already great constraints to safe and unsound repetitions of magic words from antiquated legal lore."\textsuperscript{296}

d. The Retroactive Effect of Judicial Decisions

Under classical law-finding theory, a decision "discovering" the common law relates back to the time the ancient custom first became binding on the community.\textsuperscript{297} This means that the common law was

\begin{itemize}
  \item \textsuperscript{290} Traynor, \textit{The Interweavers}, \textit{supra} note 180, at 203-04.
  \item \textsuperscript{291} Donald P. Barrett, a staff attorney at the California Supreme Court for thirty-three years, worked closely with Justice Traynor. He confirms that this is not simply academic talk. "Judge Traynor," Mr. Barrett reported, "was particularly concerned with keeping the pattern of the law straight." Transcript of Interview with Donald P. Barrett, \textit{supra} note 223, at 12.
  \item \textsuperscript{292} Traynor, \textit{The Interweavers}, \textit{supra} note 180, at 205.
  \item \textsuperscript{293} Traynor, \textit{Reasoning}, \textit{supra} note 218, at 744; see also Traynor, \textit{No Magic Words}, \textit{supra} note 168, at 621; Traynor, \textit{The Well-Tempered Judicial Decision}, \textit{supra} note 180, at 292.
  \item \textsuperscript{294} Traynor, \textit{The Well-Tempered Judicial Decision}, \textit{supra} note 168, at 292.
  \item \textsuperscript{295} \textit{Id.}
  \item \textsuperscript{296} Traynor, \textit{Reasoning}, \textit{supra} note 218, at 744.
  \item \textsuperscript{297} Speaking of the "ancient collection of unwritten maxims and customs, which is called the common law" (1 \textsc{Blackstone}, \textit{supra} note 17, at *17), Sir William Blackstone
\end{itemize}
existent, though not discovered by the courts, at the time the controversy occurred. This thinking generated a venerable rule of the common law: judicial decisions relate back to the time the dispute arose and thus govern the relationship between the parties, even though the governing rule is newly created by the court. This "makes a great deal of common sense," Justice Traynor asserted, "if taken with the essential grain of salt, that a judicial decision is not hopelessly backward." He also believed that courts appropriately give retroactive effect to their decisions that overrule previously governing precedent, provided there are exceptions for undue hardship the rule may impose. Indeed, it is commonly understood that the retroactive-application rule generally applies to all judicially created law regardless of whether it announces a pristine new rule, or replaces existing precedent, or functions in any of the additional ways we have seen in our

wrote:

[The maxims and customs, so collected, are of higher antiquity than memory or history can reach: nothing being more difficult than to ascertain the precise beginning and first spring of an ancient and long established custom. Whence it is, that in our law, the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority: and of this nature are the maxims and customs which compose the common law, or lex non scripta, of this kingdom.

Id. at *66 (footnotes omitted). When the judge "finds" the law and applies it in a given case, it is the ancient maxim and custom that is being enforced. See supra note 17 and accompanying text. As Justice Traynor notes, this is the common theoretical rationale for the doctrine that judicial decisions operate retroactively:

Judicial decisions normally operate retroactively. The mundane explanation is that a judicial decision, relating to events that have already occurred, naturally looks backward. It makes a great deal of common sense, if taken with the essential grain of salt, that a judicial decision is not hopelessly backward.

For all too many generations we justified such retroactivity by the prim lore descended to us through Blackstone that judges do no more than discover law that marvelously has always existed, awaiting only the judicial pen that would find the right words for it for all to heed. Once suitably bundled up it was automatically retroactive, given the premise that it had been there all along in the bushes at the bottom of the garden. The devotees of the discovery theory majestically dispelled the fractious problem of the overruled decision. The overruling decision simply displaced it all the way back in time, so that it never had a life it could call its own.

Traynor, The Well-Tempered Judicial Decision, supra note 180, at 289-90; accord Traynor, Quo Vadis, supra note 236, at 534-35.

298. 1 BLACKSTONE, supra note 17, at *66; Traynor, La Rude Vita, supra note 179, at 230-31; see also Traynor, Quo Vadis, supra note 286, at 535.


300. Traynor, Quo Vadis, supra note 236, at 535; Traynor, The Sweep Of New Rules, supra note 218, at 714.
examination of Justice Traynor's world of judicial creativity.\textsuperscript{301} The retroactive-application rule begins to restrain judicial creativity when it creates undue hardship for a party to the litigation:

A judge is mindful of the traditional antipathy toward retroactive law that springs from its recurring association with injustice and reckons with the possibility that a retroactive overruling could entail substantial hardship. He may nevertheless be impelled to make such an overruling if the hardships it would impose upon those who have relied upon the precedent appear not so great as the hardships that would inure to those who would remain saddled with a bad precedent under a prospective overruling only.\textsuperscript{302}

The special hardships may be sourced in either the justifiable reliance on previously settled doctrine or in the injustice created by the new rule's retroactive application.\textsuperscript{303} The idea that justifiable reliance may prevent the court from exercising its creativity, as when the hardships the new rule would impose are greater than the hardships that would accrue to those who would remain saddled with a bad precedent (to borrow from Justice Traynor's example), is grounded in several of the same policies supporting stare decisis.\textsuperscript{304} It is thus easy to imagine that many judges will refrain from exercising their creative powers when to do so would trammel the reliance interests of one of the parties to the litigation.

Much the same can be said when a new judicially created rule retroactively imposes criminal liability on the appellant. In this situation, even if there is no reliance interest at stake, most judges would conclude that the retroactive application of a rule "imposing or expanding criminal liability would be inherently unjust."\textsuperscript{305} Again, the harm imposed by the normal retroactive application of the newly created rule may restrain judicial creativity. In a world in which there are no exceptions to the traditional retroactivity rule, judges may well forego creating the new rule to protect either the reliance interests of

\textsuperscript{301} See supra text accompanying notes 188-216.

\textsuperscript{302} Traynor, Judicial Creativity, supra note 202, at 9-10; Traynor, La Rude Vita, supra note 179, at 231; Traynor, Transatlantic Reflections, supra note 14, at 264-70; Traynor, The Well-Tempered Judicial Decision, supra note 180, at 291-300.

\textsuperscript{303} E.g., Traynor, Quo Vadis, supra note 236, at 543 (reliance); id. at 549 (injustice created by retroactivity); Traynor, The Sweep of New Rules, supra note 218, at 715 (discussing both justifiable reliance and the injustice created by retroactivity); Traynor, The Well-Tempered Judicial Decision, supra note 180, at 293-96 (justifiable reliance); id. at 296 (injustice created by retroactivity).

\textsuperscript{304} Traynor, La Rude Vita, supra note 179, at 231.

\textsuperscript{305} Traynor, The Sweep of New Rules, supra note 218, at 716.
a party or to prevent an injustice.\textsuperscript{306}

Justice Traynor was so concerned with the constraints imposed upon judicial creativity in these situations that he supported a third alternative: rather than curb its creative powers when the retroactive effect of the new rule would unduly harm reliance or justice interests, the court should abandon the retroactivity rule for that case. In other words, the new rule should be made to operate purely prospectively.

This technique . . . enables a court to reform the law without upsetting the reasonable expectations of those who relied on the overruled precedent. Only occasional cases call for such a technique, but its rational use should foster public respect for courts. Although usually the technique involves the overruling of a precedent, it may be appropriate in exceptional situations to make new rules non-retroactive even when they have not been preceded by dissimilar rules.\textsuperscript{307}

The same technique applies, of course, when injustice would be created by the retroactively applying the new rule.\textsuperscript{308}

e. Deference to the Legislature

One of the first principles of classical theory is that law-making is exclusively a legislative function.\textsuperscript{309} If one embraces this theory in pure form, judges may never make law. “That is a matter for the legislature, not the courts,” we would be told in a courtroom controlled by classical doctrine. But one suspects that few judges educated after the Realist revolution would claim that judges find the law and never make it. There are, however, subtle emanations from classical theory that survive to this day. “Like many another myth,” Justice Traynor reminded us, “the myth that judges discovered rather than created law, surviving well into the twentieth century, engendered rituals that have outlived it.”\textsuperscript{310}

In disguised form, classical theory may be echoed in popular conceptions of “our democracy,” of the rule of law, and the proper role of courts in American society.\textsuperscript{311} As a Nation, we agree that law is prop-

\textsuperscript{306} Traynor, Transatlantic Reflections, supra note 14, at 265. In Justice Traynor’s estimation, in these circumstances “a judge in earlier years usually retreated from making a new rule that was clearly needed.” \textit{Id.}

\textsuperscript{307} \textit{Id.} at 266.

\textsuperscript{308} \textit{Id.} Thus, Justice Traynor tells us that the “problem of retroactive versus prospective application calls for the most sensitive balancing of competing claims to justice in the area of criminal law. \textit{Id.}

\textsuperscript{309} \textit{See, e.g.,} 1 BLACKSTONE, supra note 17, at *49; \textit{see supra} note 236 and accompanying text.

\textsuperscript{310} Traynor, The Well-Tempered Judicial Decision, supra note 180, at 290.

\textsuperscript{311} \textit{See supra} note 236 and accompanying text.
erly made by the legislative branch of government. In a one-view world, the principle of legislative law-making competence is transformed into a belief that the judicial branch of government is incompetent to make law. Thus, even today, one may encounter judges who refuse to create needed rules on the ground that it is beyond the competence of courts to do so, without ever mentioning or thinking about classical theory.

Justice Traynor, as we have seen, decisively rejected both classical theory and the notion courts lack competence to make law. He did not live in a one-view world. Although legislatures have displaced the courts as the major law-makers in our democracy, the judicial branch retains a portion of the law-making power that was once "the province mainly of courts." Today, the judicial and legislative branches are partners in the law-making enterprise. Each has its realm of relative law-making competence. There is a "symbiotic relationship," Justice Traynor wrote, "between the court and the legislature."

Their very dissimilarity fosters the vitality of each for the good of the common law. Lawmaking is too awesome a power to be concentrated in a single entity so exposed to external influences as the usual legislature or so insulated as the usual court.

Each is governed by its own institutional constraints. Thus the question judges should ask themselves is not whether they are making law, but whether it is appropriate for them to do so in the case at

312. Traynor, The Interweavers, supra note 180, at 202; Traynor, Reasoning, supra note 218, at 740-41.
313. Traynor, Reasoning, supra note 218, at 740.
314. The following quote illustrates Justice Traynor's views:

The judiciary must thus continue as a co-worker, not a minor competitor of the legislature in the development of the law. There has been too much idle dispute as to whether one or the other is the primary or ultimate or most social or most appropriately gowned source of law for the year. It is no longer realistic to picture the three, some would say four, branches of government as comparable to those of a hatrack, fixed and therefore incapable of movement, wooden and therefore incapable of development. The concept of each branch of government in its wooden place fails us as our thinking deepens. It persists only among those who also believe in pigeonholes for pigeons that theoretically stay put. In the past they have been wont to view with alarm as legislatures, which have the run of the realm for their lawmaking, recurrently sent forth statutes that reached deep into the common law. Now they are wont to view with alarm any judicial lawmaking, such as has gone on for centuries, as an encroachment on the legislative function.

Traynor, No Magic Words, supra note 168, at 616.
315. Traynor, Transatlantic Reflections, supra note 14, at 262.
316. Id.
hand. Part of the answer to this question is found in the institutional restraints we have already discussed and in those we will be discussing in a moment. Judges are free to make law only within the borders set by these constraints. But even if a judge remains within these borders, are there additional considerations that counsel judges to defer to legislative law-making rather than create an otherwise permissible rule?

Although honoring all of the institutional restraints on judicial creativity, judges must "remain much less than zealous reformers."317 There are some large scale social problems that are best left to a legislative solution. Judicial intrusion into the area may produce more problems than it solves. "A judge out of his judicial mind," Justice Traynor warned, may "fail to consider whether the decree or award that he relates to a particular grievance will invite wholesale litigation on a problem that could be rationally resolved only by comprehensive legislation."318

Even on that "rare occasion" in which the judge might legitimately intrude into one of these apparently intractable problems to goad a non-responsive legislature into comprehensive action,

he must first analyze exhaustively the claimed urgency of such action, particularly in the context of possibly equally strong competing claims, no one of which might be fulfilled without cost to the others. If this hurdle is cleared, he must still analyze whether legislators would otherwise remain delinquent . . . , despite the pleas of their constituents. The second hurdle cleared, he must finally analyze whether his own decision is one that the legislature can implement with justice to all and within the time prescribed.319

Thus, in Traynor's theory of the judicial process, though he insisted that courts are partners with the legislature in the law-making enterprise, there are rare occasions in which courts should hold their creative powers in abeyance to allow the legislature to enact comprehensive legislation taking into account the competing claims at stake. The general rule, however, is that within the constraints that we are now discussing, judges do and should respond to the forces of creativity and make new law.

f. Internal Institutional Restraints

In addition to the constraints imposed by the common law environment in which American judges work (the restraints associated with stare decisis, the common law tradition, the tenet of lag, the ret-

317. Traynor, Judicial Creativity, supra note 202, at 12.
roactivity of judicial decisions, and the rare situation in which comprehensive legislation is required), there are institutional constraints imposed by the litigation process itself. The nature of the judicial institution constrains judges' creative powers. Judges cannot reach out and make law even if it is required by season and circumstance. They have no roving commission to do good. Although society may burn for lack of law, judges, like Nero, may only watch and fiddle. Judges' powers are exercised only in response to properly presented claims: their lawmaking is dependent upon the injury of others and the initiative of lawyers. Judges' creativity thus is limited to cases brought before the court. Within those cases, judges are tethered by the record on appeal, by the issues and arguments presented by counsel, by obtaining the agreement of a majority of the judges' colleagues, and by the written-opinion requirement. Even when the injury is suffered, the claim is made, and the remedy is right, judges must persuade their colleagues to join in the creative act. Though the task of judging is solitary work, judge-made law is seldom woven by a single judge alone. The burden of convincing a majority of one's colleagues is a major impediment to judicial creativity by an appellate court judge. The decision and the resulting opinion thus bear "the marks of battle" in the tempering process generated by the collegial process of a multi-judge court. And there is always the possibility of a separate opinion, usually a dissent, that will display any weakness in the

320. Thus Justice Traynor wrote, "Many forces constrain review within extremely narrow limits. The most immediate constraint is the controversy itself that calls for decision; even the unprecedented controversy automatically precludes any ambitious excursion beyond its own context." Traynor, No Magic Words, supra note 168, at 620.

321. Traynor, Reasoning, supra note 218, at 742.

322. See Traynor, Some Open Questions, supra note 14, at 217 (describing the process by which a court moves from oral argument to issuing a decision). However, Justice Traynor believed it was permissible for the court to frame issues not raised by counsel as long as the court gives counsel the opportunity to submit additional briefs. Id. at 219.

323. Traynor, No Magic Words, supra note 168, at 621; Traynor, Reasoning, supra note 218, at 744.

324. Cf. Traynor, No Magic Words, supra note 168, at 621 (by implication); Traynor, Reasoning, supra note 218, at 743-744 (by implication).

325. Traynor explained:

Such a tempering process is that of a group, not that of a justice alone. One who takes part in it knows the marks of battle in the opinions that bear his name. He ceases to mourn the loss of a frugal phrase that contained his meaning exactly, and comes to accept the prolix replacement for its easier way with a hard idea. And he can sometimes rejoice that the questions of others cleared the mists from his own thinking.

Traynor, Some Open Questions, supra note 14, at 217.
As we shall see, reason is a central element in Roger Traynor's theory of the judicial process. His lectures dwell on the reasoning requirements for appellate opinions and for the orderly development of law. In 1967 he stated that a new rule announced in an opinion "must be supported by full disclosure . . . of all aspects of the problem and of the data pertinent to its solution." A decade later he reemphasized that the opinion must be reasoned "every inch of the way," including, of course, the reasons for the choice of one policy over another. The rigor of Justice Traynor's reasoning requirements for an opinion is disclosed by the following advice:

A judge must elucidate painstakingly a decision that involves the overruling of an earlier one. . . . If the discarded precedent was intrinsically unsound from the outset, he must undertake an exposition of the injustice . . . it engendered . . . . If the discarded decision has merely become obsolete, he must also specify how it fails to mesh with contemporary laws or with other judicial rules or statutes.

Although the Realists would question the efficacy of these requirements as constraints on judicial creativity, for any decision can be cast in the language of reason, Justice Traynor obviously believed they affect both the quality and the result of a court's decision. They constrain creativity to the realm of rationality. "Nothing stands against lunacy in the law," he reminds us, "but the reasoning judge. . . ."

And such requirements also counsel caution: "A reasoning judge's painstaking exploration of place and his sense of pace give reassurance that when he takes an occasional dramatic leap forward he is impelled to do so in the very interest of orderly progression." Finally, logic and reason are the tools that allow the other internal constraints to function. Without them, lawyers could not persuade judges and judges could not persuade colleagues to make or reject a proposed new rule. Justice Traynor's rules for reasoning opinions are thus rigorous forms of Reasoned Elaboration's coherent-articulation—

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326. Cf. id. at 218-19 (describing the implications that a dissenter should consider before recording an opinion).
327. See infra text accompanying notes 347-52.
328. Traynor, The Interweavers, supra note 180, at 205.
329. Traynor, Judicial Creativity, supra note 202, at 11.
330. Id. at 12.
331. Id. at 9.
332. Id. at 6.
333. Id.
Though reason and logic are thus essential parts of the judicial opinion and the process that produces it, the written-opinion requirement produces additional restraints. The process of grinding out the opinion focuses the judge's inquiry, affects the analysis, and influences the way the opinion is crafted. "The real test of a solution to a legal problem," Justice Traynor said, is "whether you [can] put it down convincingly in writing." And only by using plain English capable of being understood by children can the judge penetrate to the heart of the problem and resolve it convincingly. Traynor felt that opinions containing "repetitions of magic words from the legal lore" signal that the judge has retreated from the painstaking analysis required for the task of judging.

The final group of internal institutional restraints are limitations produced by the remedies available to the judge: specific decrees and awards of damages. These remedies restrict the judge's creative powers to the type of disputes traditionally resolved by courts. It is partly because of the limited remedies available to the court that Justice Traynor, for example, cautioned that judges should not be zealous reformers. "The larger a social problem before a court," he reminds us, "the greater is the risk of an unmanageable solution."

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334. See supra text accompanying notes 151-53.
335. Transcript of Interview with Donald P. Barrett, supra note 223, at 3.
336. Justice Traynor would occasionally admonish his law clerks to "'write it (referring to the clerk's draft of the opinion) so Joe or Mike could understand.' These were his two young children at the time." Id. at 21.
337. Traynor, The Interweavers, supra note 180, at 205. It is interesting to compare Justice Traynor's opinion-writing style with his off-bench writing style. Donald P. Barrett notes that Justice Traynor's style of writing an opinion was entirely different from the style he might use in writing a speech or a law review article. He would never put some of those titles in an opinion. He was very reluctant to have anything flip or humorous in an opinion. You didn't try to put anything like that in an opinion because it would get stricken out. Since he so thoroughly indoctrinated me in how an opinion should be written, I never had any success in trying to help to write any speeches. Sometimes I could get him some legal material he could use but as far as drafting them that was a totally different world.

Transcript of Interview with Donald P. Barrett, supra note 223, at 3; see also Roth, supra note 10, at 300-01.
339. Id.
g. External Institutional Restraints

The last group of constraints on judicial law-making is created by the anticipated scrutiny the opinion will receive once it is published.\(^3\)\(^4\) The opinion potentially must pass muster with the public, the press, the bar, and the academy.\(^3\)\(^4\) With his typical good humor, Justice Traynor noted, for example,

Scholars inspect the output of the appellate process as if it were dynamite, and they comment exhaustively on innocuous defects as well as on patent dangers. There are law journals enough to train searchlights upon the courts everywhere in the land, and they are quick to note the errant ways of appellate decision from the most righteous sentimentalism to the most wrongheaded standpattism.\(^3\)\(^4\)\(^2\)

And, in a similar vein, he observed that an opinion, if possible, should allay the suspicion of any man in the street who regards knowledge of the law as no excuse for making it. There is usually someone among them alert to note any misunderstanding of the problem, any error in reasoning, any irrelevance in data, any oversight of relevant data, any premature cartography beyond the problem at hand. Every opinion is thus subject to approval. It is understandable when a judge, faced with running such a gauntlet, marks time instead on the line of least resistance and lets bad enough alone.\(^3\)\(^4\)\(^3\)

\(^3\)\(^4\)\(^0\) An opinion should aim at convincing the losing party that justice is done despite her loss. But for our purpose here, other than the legal procedures such as a request for rehearing, scrutiny by the losing party is thought to ensure that some members of the bar (the lawyers for the losing party) and at least one member of the public (the losing party) will scrutinize the opinion.

\(^3\)\(^4\)\(^1\) Traynor, *The Interweavers, supra note 180,* at 205. "There is usually someone among them alert to note any misunderstanding of the problem, any error in reasoning, any irrelevance in data, any oversight of relevant data, any premature cartography beyond the problem at hand. Every opinion is thus subject to approval." *Id.; see also* Traynor, *Honorable Law Reviews, supra note 223,* at 8-10 (discussing the enthusiasm law reviews show in critiquing opinions).

\(^3\)\(^4\)\(^2\) Traynor, *Unguarded Affairs, supra note 178,* at 486. Justice Traynor's observation of the impact of scholarly comment on the judicial process, made in the same lecture, is worth noting:

There is no way of measuring the effect of constant law review critiques on the appellate process. Nevertheless, the increasing reference to them in opinions and briefs indicates that they are carrying increasing weight with judges and lawyers alike. It is no modern judge who still prides himself on some obscurely stated rapport with the reported authorities that in his mind render other learning expendable. It is no modern lawyer who still disdains the critiques, content to rest easy in hard cases with the undemonstrative Shepherds of the what-has-been, with all that has been indiscriminately stuffed into the overstuffed concept called authority. There is a pall on the once formidable Confrerie de Chevaliers Pontificaux in the practicing bar given to heeding and speaking no preachments other than what they have practiced.

*Id.* at 487; *see also* Traynor, *Honorable Law Reviews, supra note 224* (praising the proliferation of law reviews).

It is here that reason again performs a vital function: It provides the standard by which the opinion, and the judge who wrote it, may be evaluated by the reader. A court's power and influence, and the reputation of the judge crafting the opinion, depends upon the skill with which it is reasoned, for that is the universal measure of disinterested decision-making. "Sustained, impartial . . . criticism of [a court's] opinions would deter decisions made through excess or by fiat." On the other hand, a well-reasoned, well-tempered opinion "may serve to quicken public respect for the law as an instrument of justice."

The same may be said for its author. The accountability that flows from the publication of the opinion, though unmeasurable, is one of the important countervailing forces in Justice Traynor's philosophy of the judicial process.

Stare decisis, the common law tradition, the tenet of lag, the retroactive effect of judicial decisions, deference to the legislature, and internal and external institutional constraints are the forces of repose and the major constraints on judicial creativity. We now turn to the power that mediates between the forces of creativity and the forces of restraint.

(4) Reason and the Art of Creative Judging

Reason plays a central role in Justice Traynor's philosophy. It is the power that mediates between the creative and the restraining forces. Reminiscent of statements made by Coke and Blackstone, Justice Traynor calls reason "the soul of law," and he constantly refers to the "reasoning judge," to "the rational development of the

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344. White, supra note 145, at 291.
346. Traynor, Unguarded Affairs, supra note 178, at 487.
347. Donald P. Barrett, who worked closely with Justice Traynor from 1948 until Traynor retired, said:

I think Judge Traynor liked to believe that if you worked hard enough you could find the only right answer to every case. Now, I think he must have known sometimes he just had to make up his own mind. Sometimes there is no way you can say this is or that is the right answer, but certainly before he reached that point he wanted to be sure he had completely exhausted every available avenue.

Transcript of Interview with Donald P. Barrett, supra note 223, at 4.
348. Traynor, Judicial Creativity, supra note 202, at 7.
349. Id. at 6; Traynor, Reasoning, supra note 218, at 743.
law,"350 and to "judicial reasoning."351 "A government of laws," he writes, "suggests an ideal, a legal process as rational in all its ramifications as it has traditionally been in the courts."352

With reason as both the catalyst and the caldron, the judge assesses the mixture of forces presented in the case. The individual factors, the elements of creativity and constraint, push and pull against each other until an equilibrium is reached. This equilibrium is the judgment on the issue in dispute. All of the factors, of course, are not present in each case; and even when they are, a different result may be reached because of a change in their relative weights. Ideally, in Justice Traynor's world, each judge calculates the point of equilibrium on each issue in the case. The product of these individual calculations, produced by the same process of give and take, represents the final joint calculation—the judgment of the court.353

When the calculus favors restraint, the opinion is traditionally couched in terms of precedent and stare decisis. There is no change in doctrine. When the creative forces prevail, the law changes or new law is made. The calculus also dictates the direction of the change. When the creative forces are joined by powerful forces of repose, the law changes to what it was at some time in the past. When the creative forces strongly predominate, new law emerges. But, in Justice Traynor's view, it is never entirely new.354 The forces of repose are always present and influential. New judge-made law is thus always rooted in the common law.355 Like a new child, it owes its existence to its parental past and it carries the genetic code of its ancestors into the future. "Rational lawmaking," Justice Traynor explained,

involves far more than case by case response to such dramatic changes as have characterized our century . . . We should not forget that in deciding hard cases in new fields, a court is the one institution entrusted by peace-loving people to envisage a beneficent evolution of law for the long run. It must guard against the danger that evolution will take an ugly turn, back to an age of dim-eyed creatures grounded in dogma or off course to an age of bats in blind pursuit of panaceas.356

351. Traynor, The Interweavers, supra note 180, at 203; Traynor, Reasoning, supra note 218, at 742.
352. Traynor, Statutes, supra note 219, at 427.
353. See supra note 325 and accompanying text; see also Traynor, Judicial Creativity, supra note 202, at 6-7.
354. See, e.g., Traynor, Transatlantic Reflections, supra note 14, at 258-59.
355. Id.
356. Id. at 283.
Reason is thus the transmitter of the genetic code, the atomic force that binds the elements of law together. As Justice Traynor said:

[The judge] 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.357

This is not meant to suggest that Traynor's theory employs a grand multiple regression formula that produces the correct legal rule when all of the relevant factors are included and are assigned their proper weight. When judges make law, they exercise their own power of choice. But that choice is not arbitrary, not irrational, and not based upon the personal interests of the judge. It is the product of "professional skill,... legal reasoning and legal imagination,"358 after deep inquiry and "reflection enough to arrive at last at a value judgment as to what the law ought to be."359 In other words, judges exercise judicial, not personal, choice when they make new law.

V. Conclusion

We have followed the main currents in legal thought during Roger Traynor's formative years to give us a perspective on his judicial philosophy, and to provide a foundation for assessing its importance. We have seen the reaction of Holmes, Cardozo, Pound, and the Realists to classical doctrine and how their views influenced Traynor's judicial philosophy. Using their theories as raw material, Justice Traynor created an elaborate philosophy of the judicial process. Judges

357. Id. at 262.
358. Traynor, La Rude Vita, supra note 179, at 234-35. This idea was repeated verbatim in Traynor, The Interweavers, supra note 180, at 213.
359. Traynor, La Rude Vita, supra note 179, at 234. The quotation continues as follows: When at last he reaches a juncture where he feels bound to commit himself to one value judgment or another, the intellectual quest merges with a yearning for something more than the mere orderly disposition of problems, a yearning often approximately defined as a sense of justice and culminating in what Edmond Cahn calls The Moral Decision. . . . We should be aware of how difficult it is to come by. As Harry Jones sensitively observes, "just decision requires both an intellect that perceives the good and a will that resolutely perseveres in the good course intellectually perceived.”

Id. at 235.
make law, they do not find it. In doing so they exercise individual judicial choice. The law they make, like all law, is essentially indeterminate, and in a constant state of potential flux so that it may meet the felt necessities of the time. Furthermore, the courts in our common law system are partners with the legislatures in the law-making enterprise, though legislatures hold the trumping power. Finally, this partnership in the law-making enterprise is an essential element of our democracy. But Traynor's judicial philosophy goes well beyond the grand legacy left by countless judges of the common law, and by Holmes, Cardozo, Pound, and the Realists.

Holmes never shared with us his entire philosophy of the judicial process, and the Realists focused on demolishing classical theory and practice without articulating a positive theory of the judicial process. Pound ultimately joined the critics of Realism, and Cardozo never addressed the issues they raised. The Reasoned Elaborationists began developing a theory of institutional constraints that would address the Realist criticism that judges exercise personal choice when they make law, but they were diverted by the critics of Realism into focusing on the substantive principles that judges should use in constitutional adjudication.

Justice Traynor rejected Reasoned Elaboration's substantive principles. Instead, he created a complete judicial philosophy that was at once profoundly conservative and profoundly dynamic. The conservative elements, those elements that I have called the forces of repose, are juxtaposed against the dynamic elements, those elements I have called the creative forces. The judge's decision in any case represents the point of equilibrium reached by assessing the relative strength of these various counterbalancing forces as they appear in the case at hand. Because of the forces of repose, which include institutional restraints of awesome force, and the personal integrity of the judge, a judge's law-making choice is judicial, rather than personal, and fully compliant with the principles of our democracy. Traynor's reply to the Realist claim that a judge's law-making choice is inevitably personal is thus to distinguish between the judicial office, which is constrained by the forces of repose, and the judicial officer, who is personally restrained by self-conscious reason and integrity and by the environment in which the choice is made. Even if a judge puts personal integrity aside and seeks to exercise purely personal choice in making new law, the forces of repose make it nearly impossible to succeed. Judges must, for example, convert their personal choice into the rhetoric of the law and convince their colleagues to agree on a
decision that rationally explains the result in the terms of legal principles. Any purely personal judgment that survives the judicial process does not justify embracing the myth of classical law-finding theory, nor does it warrant abandoning our common law heritage.

"The real danger," Justice Traynor warned,
is not that 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, with whom they consistently identify themselves save perhaps on the wearing of wigs. They would command little attention were it not that they speak the appealing language of stability in justification of specious formulas.360

Justice Traynor's judicial philosophy currently stands as one of the most complete theories of the judicial process created in the latter half of this century. Traynor's philosophy effectively responds to the personal-choice dilemma, and embraces nearly all of Legal Realism's basic beliefs. Furthermore, it is more relevant to the judicial process of our time than the judicial philosophy of Benjamin Cardozo. Indeed, at a time when legislatures seem too compliant with the whim of the day, it is all the more important that our judges continue to weave the fabric of the law. It is critical that judges, lawyers, law students, and the lay public understand and agree upon the law-making role of judges in our democracy. There is no better place to begin than with the judicial philosophy of Roger Traynor.

360. Traynor, No Magic Words, supra note 168, at 621. The same quote appears, substantially unaltered, in Traynor, Reasoning, supra note 218, at 744. In an earlier portion of his article, No Magic Words Could Do It Justice, Traynor wrote:
As judges analyze issues that have been disputed every inch of the way, they learn to guard against premature judgment. Entrusted with decisions, bound to hurt one litigant or the other, they come to understand the court's responsibility in terms not of power but of obligation. The danger is not that they will exceed their power, but that they will fall short of their obligation.
Traynor, No Magic Words, supra note 168, at 620.
Appendix A

Justice Traynor's twenty-four articles on the judicial process, which are listed in the order in which they were published, are as follows:


23. Roger J. Traynor, *The Limits of Judicial Creativity*, 63 Iowa L. Rev. 1 (1977) (Murray Lecture at the University of Iowa College of
Law, March 31, 1977).