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A Basic Concern for Process: Commentary on *Quo Vadis, Prospective Overruling*

by
JAMES R. MCCALL*

Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility,¹ has enjoyed a formidable subsequent citation history since it appeared in the *Hastings Law Journal* in 1977.² In part, the frequency with which *Quo Vadis* has been cited was the result of Traynor's reputation as Chief Justice of the California Supreme Court. At the time the article was published, Traynor was commonly praised by scholars and jurists in such terms as "our number one judge"³ and "the ablest judge of his generation in the United States."⁴ Notwithstanding such praise for his work as a judge, Traynor routinely defined himself as an academic. When he wrote *Quo Vadis*, Traynor was enjoying what was probably the ultimate professional pleasure of his life—a one year appointment to a professorship at Cambridge University.⁵

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1. Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 *HASTINGS L.J.* 533 (1977) [hereinafter *Quo Vadis*]. "Quo vadis" is Latin for "wither goest thou?" See JOHN R. STONE, *LATIN FOR THE ILLITERATI* 80 (1996). The author wishes to thank Ms. Linda Weir, Head of Public Services of the Hastings Law Library, for her help in developing this information.

2. *Quo Vadis* has been cited at least thirty one-times in reported judicial decisions by the courts of sixteen states, two federal Circuits, and, on one occasion, the U.S. Supreme Court. See *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 195 (1990). Computerized records show that *Quo Vadis* has been cited in thirty-four law review articles since 1983.

3. *Walter v. Schaefer, Chief Justice Traynor and the Judicial Process*, 53 *CAL. L. REV.* 11, 24 (1965).

4. Henry J. Friendly, *Ablest Judge of His Generation*, 71 *CAL. L. REV.* 1039, 1039 (1983).

5. See text at footnote 22, 24.

For many reasons, Traynor will be linked to Chief Justice Earl Warren in the annals of American legal history.⁶ The two Californians were historical contemporaries, and both were judges who successfully worked for dramatic liberal reform of the law.⁷

Warren's actions as California Attorney General produced the unintended consequence of Roger Traynor's appointment to the California Supreme Court in 1940.⁸ Because Warren had hired Traynor to work as a consultant in the California Attorney General's Office, Governor Olson thought that Warren could not publicly oppose Traynor if Olson nominated him for a state supreme court vacancy. Olson nominated Traynor, Warren supported the nomination, and Traynor was confirmed. He eventually served on the court for three decades. Warren became Governor by beating Olson in the 1942 election and was still serving in that office when he was appointed Chief Justice of the United States Supreme Court in 1953.

Traynor, a forty year old Boalt Hall law professor when nominated, was the first academic lawyer to be appointed to the California Supreme Court. More surprisingly, he also was the first graduate of Boalt Hall to be become a justice on that court.⁹ He quickly established a reputation for sophisticated reform of the common law and ground breaking Constitutional interpretation.¹⁰ In

6. See Bernard Schwartz, *The Judicial Ten: America's Greatest Judges*, 1979 S. ILL. U. L.J. 405, 438-39.

7. In addition, Traynor and Warren received their college and law school educations at the Berkeley campus of the University of California, lived in Alameda County, and had many friends and professional associates in common. The two men were friends, although the relationship was not close, and each genuinely admired the other's strengths. See Earl Warren, *Letter of Appreciation of Roger J. Traynor*, 53 CAL. L. REV. 5 (1967); Roger J. Traynor, *Chief Justice Warren's Fair Question*, 58 GEO L.J. 1 (1969).

8. Warren, a Republican, was elected California Attorney General in 1938. At the same election, Democrat Culbert Olson was elected Governor. Warren objected to Olson's original nominee for appointment to the California Supreme Court and eventually persuaded the committee that had to approve judicial nominations to reject the nominee. Olson then chose Traynor as a replacement nominee. See JOHN D. WEAVER, *WARREN: THE MAN, THE COURT, THE ERA* 71-73 (1967).

9. Since Traynor's appointment in 1940, the following Boalt Hall graduates have served on the California Supreme Court: Raymond E. Peters (1959-1973), Rose E. Bird (1977-1986), Frank E. Newman (1977-1982), Allen E. Broussard (1981-1991), Cruz Reynoso (1982-1986) and Kathryn M. Werdegar (1994-present).

10. Traynor's first major opinions reforming the common law were *Imperial Ice Co. v. Rossier*, 112 P.2d 631 (Cal. 1941), in which Traynor established the current limitations on the cause of action for inducing a contract, and *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n*, 112 P.2d 892 (Cal. 1942), in which Traynor expanded the concept of collateral

the field of Constitutional law Traynor wrote opinions setting out the present view of First Amendment protection for free speech in the "school board cases."¹¹ In *Perez v. Sharp*,¹² Traynor wrote an opinion striking down the California anti-miscegenation statute. *Perez* was the first judicial opinion to hold this type of statute unconstitutional.

Scholarly writing was a routine activity for a man who had made his way in the world as a gifted and industrious student and who had become a law professor soon after graduation from law school.¹³ Traynor published his first law review article while a student at Boalt Hall in 1926¹⁴ and published his last shortly before he retired from teaching at Hastings College of Law in 1980.¹⁵ During this fifty-four year period, he published ninety scholarly pieces.

During the first sixteen years of Traynor's service on the California Supreme Court, he published no extrajudicial writing. The first of his "judicial period" articles appeared in 1956.¹⁶ These articles were almost always first given as addresses at law schools and subsequently published in the school's law review.¹⁷ His topics usually related to his philosophy of judging, often with illustrations of important points from his published opinions.¹⁸ Traynor wrote forty-

estoppel to its modern dimensions.

11. See Payroll Guarantee Ass'n v. Board of Education of San Francisco Unified Sch. Dist., 163 P.2d 433 (Cal. 1945); Ellis v. Board of Education, 164 P.2d 1 (Cal. 1945); Danskin v. San Diego Unified Sch. Dist., 171 P.2d 885 (Cal. 1946).

12. 198 P.2d 17 (Cal. 1948).

13. Traynor worked as an associate in the newly formed office of Brobeck, Phleger and Harrison in San Francisco for a few months between his law school graduation in June 1927 and taking a position as an instructor at Boalt Hall the following January.

14. The article was a short student comment published during Traynor's second year as a law student at Boalt Hall. See Roger J. Traynor, Note, *Adverse Possession: Personal Property: Tacking and Payment of Taxes*, 14 CAL. L. REV. 218 (1926).

15. Roger J. Traynor, *Transatlantic Reflections on Leeways and Limits of Appellate Courts*, 1980 UTAH L. REV. 255.

16. See Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L. F. 230 [hereinafter Traynor, *Law and Social Change*].

17. E.g., *id.* (given at the dedication of the new University of Illinois Law Building); Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211 (1957) (given at a University of Chicago Law School Conference on Judicial Administration) [hereinafter Traynor, *Some Open Questions*]; Roger J. Traynor, *Unjustifiable Reliance*, 42 MINN. L. REV. 11 (1957) (given at a University of Minnesota Law School ceremony honoring Professor Henry Rottschaefer) [hereinafter Traynor, *Unjustifiable Reliance*].

18. Traynor's first three judicial period articles were on such topics of judicial theory as judges as lawmakers, see Traynor, *Law and Social Change*, *supra* note 16, the need for logically coherent opinions, see Traynor, *Some Open Questions*, *supra* note 17, and judicial fallibility, see Traynor, *Unjustifiable Reliance*, *supra* note 17. The first of only six judicial

two judicial period articles before his retirement from the court in January 1970. At the time of his death, in 1983, Traynor was the most prolific judicial writer of scholarly articles in American history.¹⁹ Other scholarly judges published books either before or during Traynor's career on the bench—most notably Benjamin Cardozo and Learned Hand, who published *The Growth of the Law*²⁰ and *The Spirit of Liberty*,²¹ respectively. However, judicial authorship of numerous law review articles was unknown prior to Traynor.

Upon retirement from the California Supreme Court, Traynor immediately returned to academic life as a law professor at Hastings. In the first two years of his resumed career Traynor published a book and eight articles.²² The article *Quo Vadis* is highly representative of the basic orientation of Traynor's scholarship during his years at Hastings—scornful of the formalist approach to law and proposing a sophisticated concept of judicial restraint based upon fundamental requirements of the judicial process.²³

Traynor wrote *Quo Vadis* while serving as the Arthur Goodhart Professor at Cambridge University for the academic year 1974-75.²⁴ The subject matter of the article reflected Traynor's teaching interests while on the Hastings faculty, criminal procedure and the judicial process.²⁵ He had become a criminal procedure expert while

period articles Traynor wrote on subjects of legal doctrine was *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657 (1959).

19. Traynor's rate of article publication has been surpassed by Judges Richard A. Posner and Frank H. Easterbrook, both sitting on the Seventh Circuit. Posner has published over seventy-five articles and several books during his tenure on the court, and Easterbrook has weighed-in with forty published law review articles since his appointment to the bench in 1985.

20. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* (1924).

21. LEARNED HAND, *THE SPIRIT OF LIBERTY* (1st ed. 1952).

22. Traynor eventually published *Quo Vadis* and twenty other articles during his ten years on the Hastings faculty.

23. E.g., in the last of his published articles, Traynor cautioned courts against succumbing to the pleas of "astute hawkers of alleged good causes" to act as "surrogate legislatures" in determining policy issues that are either too large for court action or beyond the scope of the dispute presented by the case. See Traynor, *Transatlantic Reflections*, *supra* note 15, at 281.

24. Traynor presented the article as an address at the University of Birmingham, England in the Spring of 1975.

25. Traynor taught a lecture course in criminal procedure and a seminar on the judicial process. He also taught a lecture course in conflict of laws at Hastings. Traynor had achieved a national reputation as a tax law teacher and scholar while on the Boalt Hall faculty in the 1930s. When he was appointed to the California Supreme Court in 1940 he had no specialized knowledge of any field of law other than state and federal taxation.

reforming California law in this area in the 1950s.²⁶ However, the intellectual core of the article was the product of his career-long interest in judicial theory and the practical commands and constraints of that theory.

Traynor planned and wrote *Quo Vadis* during the 1970s. At the time, scholars were having “a veritable field day”²⁷ with the Warren Court’s opinions on prospective overruling. The controversy, which lasted approximately fifteen years, arose because the U.S. Supreme Court issued many opinions during the 1960s overruling longstanding Constitutional precedents.

These overruling opinions produced “new law” and raised the question whether the new law would be applied under the traditional rule of full retroactive effect. Under that rule any new law established by appellate court opinions must be applied in reviewing any judgment on appeal. “Final judgments,” meaning judgments on which either appellate review had been exhausted or the time for further appellate review had expired, are no longer subject to such “direct review” in appellate proceedings. Thus, under the traditional rule, full retroactive effect meant that new law would be applied only on direct review of lower court proceedings.

The importance of the extent of retroactive application was heightened by a 1963 Supreme Court opinion that expanded the power of federal courts to exercise “collateral review” of the administration of criminal justice by state courts by issuing writs of habeas corpus.²⁸ In practical terms, the Court’s holding meant that federal courts could collaterally review state court judgments of conviction that had become final and invalidate those judgments when the procedures used by state law enforcement officials violated standards established by new law. If broad reaching new law was to be applied on collateral review as well as direct review, the potential number of reversals of past state convictions seemed a daunting prospect.

26. Traynor’s criminal procedure opinions for the California Supreme Court anticipated many of the Warren Court reforms of the 1960s. See *People v. Riser*, 305 P.2d 1 (Cal. 1956) (holding that the prosecution must furnish the accused with any evidence it possesses which could be useful for impeaching witnesses to the accused); *People v. Cahan*, 282 P.2d 905 (Cal. 1955) (adopting the exclusionary rule as an evidence law concept); *People v. Brown*, 290 P.2d 528 (Cal. 1955) (holding that the fruits of a search incident to a lawful arrest are admissible only if the search is reasonable).

27. Francis X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1558 (1975).

28. See *Fay v. Noia*, 372 U.S. 391, 399-414 (1963).

The Warren Court overhauled the law of criminal procedure in two famous opinions. In *Mapp v. Ohio*,²⁹ the Court held that the federal exclusionary rule was applicable to state court criminal trials under the Fourth Amendment.³⁰ In *Miranda v. Arizona*,³¹ the Court held that confessions obtained without the now familiar *Miranda* warnings were inadmissible.³² If the new law from *Mapp* and *Miranda* applied on collateral review of final state court judgments, the result would be the "wholesale release of the guilty."³³

In response to this problem, the Court held in *Linkletter v. Walker*³⁴ that the common law rule of full retroactive effect did not require that retroactive effect on collateral review be given to the new law announced in *Mapp*.³⁵ One year later, in *Johnson v. New Jersey*,³⁶ the Court went much further by essentially eliminating retroactive effect of the new law announced in *Miranda* on direct review of many judgments of conviction.³⁷ There, the Court decided that the *Miranda* holding would not be applied to convictions in which the trial had begun before the effective date of the *Miranda* decision.³⁸ Finally, in *Desist v. United States*,³⁹ the Court held that the new law it had established in *Katz v. United States*⁴⁰ would only apply to evidence procured by police officers after the effective date of the *Katz* opinion.⁴¹ Both *Johnson* and *Desist* made the effect of the opinions solely prospective by holding that the new law would only apply to future events.

In *Quo Vadis*, Traynor discussed the general subject of

29. 367 U.S. 643 (1961).

30. See *id.* at 654-55 (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949)).

31. 384 U.S. 436 (1966).

32. See *id.* at 444-45. The Court's holding in *Miranda* had been foreshadowed in *Escobedo v. Illinois*, 378 U.S. 478, 484-92 (1964).

33. *Linkletter v. Walker*, 381 U.S. 618, 637 (1965)

34. *Id.*

35. *Id.* at 639-40. *Linkletter* left open the possibility that retroactive application of new law affecting "the very integrity of the fact-finding process" on collateral review would be required. *Id.* at 639.

36. 384 U.S. 719 (1966).

37. See *id.* at 732-35.

38. See *id.*

39. 394 U.S. 244 (1969).

40. 389 U.S. 347 (1967). *Katz* held that the Fourth Amendment restriction on illegal seizure of speech could be applied in situations in which the police did not "physically intrude" into an enclosure to "seize" the speech through eavesdropping or recording. See *Katz*, 389 U.S. at 352-53. The opinion overruled *Olmstead v. United States*, 277 U.S. 438 (1928) and *Goldman v. United States*, 316 U.S. 129 (1942).

41. See *Desist*, 394 U.S. at 246-54.

prospective overruling at length and traced the history of the concept in civil as well as criminal law in the United States and England.⁴² However, the central point of the article was a strong disapproval of the concept of prospective overruling developed in *Johnson*, which Traynor described as “baffling except in terms of expediency.”⁴³ This rejection of *Johnson* was based upon Traynor’s view of the requirements of the American legal process.

Roger Traynor’s deep concern about the legal process was a common orientation for legal scholars of his generation, who generally subscribed to a judicial theory that gave process concerns highest priority. The “legal process” scholars, many of whom were Traynor’s personal friends, believed that the retroactive effect normally given to judicial precedent was an essential hallmark of the process of adjudication. Indeed, the retroactive effect of the judicial process served to distinguish it from the legislative process, which has an exclusively prospective effect. The fact that judicial overruling of a past precedent usually has a significant retroactive effect was viewed as a crucial restraining influence on the exercise of judicial power.⁴⁴

The first major point in *Quo Vadis* asserted that prospective overruling, when used on very rare occasions, is a legitimate judicial device to achieve justice when overruling an outdated doctrine.⁴⁵ Traynor’s second major thesis was that the U.S. Supreme Court had completely misconceived and mismanaged application of the concept

42. *Quo Vadis*, *supra* note 1, at 543-58.

43. *See id.*, at 558. The subsequent judicial opinions that have discussed *Quo Vadis*, as opposed to merely citing the article, have focused on Traynor’s condemnation of *Johnson*. *See Commonwealth v. Cain*, 369 A.2d 1234, 1263 (Pa. 1977) (dissenting opinion); *State v. Carpentieri*, 414 A.2d 966, 978 (N.J. 1980) (dissenting opinion); *Newman v. Emerson Radio Corp.*, 772 P.2d 1059, 1062-64 (Cal. 1989).

44. One of the most important publications of the legal process school stated:

Acceptance of the possibility of overruling prior decisions with no more than prospective effect relieves a court of one of the major practical restraints upon free changes of law Do we have a working theory of the judicial function which would be adequate to prevent judges for [sic] assuming political functions and to avoid a disintegrating chaos of doctrine if the propriety of prospective overruling were universally accepted?

HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, 606 (William N. Eskridge Jr. & Philip Frickey ed. 1994).

45. *Quo Vadis*, *supra* note 1, at 541-42. In this connection, Traynor believed that restricting retroactivity of new law to cases on direct review, as the Court had done in *Linkletter*, was a legitimate exercise of judicial power. *See Quo Vadis*, *supra* note 1, at 539. Traynor had actually anticipated the Court’s holding in *Linkletter* in his concurring opinion in *In re Harris*, 366 P.2d 305, 306 (Cal. 1961).

of prospective overruling in the *Johnson* opinion.⁴⁶ He wrote that "there is no wisdom" in the prospective overruling concept adopted in *Johnson* because it used an arbitrary cut-off date to give strictly prospective effect to *Miranda*.⁴⁷

Traynor's criticism of *Johnson* was almost identical to the views expressed by Justice John Marshall Harlan in his dissent in *Desist*.⁴⁸ Although it took two decades, the U.S. Supreme Court, in *Griffith v. Kentucky*,⁴⁹ eventually reversed the *Johnson* and *Desist* prospective overruling concept and fully adopted the Harlan-Traynor view requiring full retroactive application of new law to all cases in judgments that had not yet become final.⁵⁰

The U.S. Supreme Court did not cite *Quo Vadis* in *Griffith*. However, the California Supreme Court was guided by *Quo Vadis* and quoted extensively from it in resolving the prospective overruling issue in *Newman v. Emerson Radio Corporation*.⁵¹ In this 1989 opinion, the court adopted the teaching of *Quo Vadis* as supporting the view that full retroactive effect must be given to judicially developed new law in almost all instances. Roger Traynor, as a legal scholar and as a believer in the discipline of the legal process, would have been pleased had he lived to read the *Newman* opinion.

46. *Quo Vadis*, *supra* note 1, at 558-62.

47. The Court had made a very small exception to its holding that *Miranda* was to be given "exclusively prospective effect" in *Johnson*, 384 U.S. at 732-33. The Court allowed the appellants in *Miranda* and three companion cases to have the benefit of the new law of *Miranda*. 384 U.S. at 491-99. Traynor stated that this exception raised "a grave question of equal protection." *Quo Vadis*, *supra* note 1, at 559.

48. *Desist*, 394 U.S. at 258. (Harlan, M., dissenting). Harlan asserted that the Court's doctrines on retroactivity developed in *Johnson* and other cases "must be rethought" to avoid arbitrary results. *See id.* Like Traynor, Harlan advocated the consistent application of new law on direct review. *Id.* at 258-59. Traynor quoted Harlan's view on the issue in *Quo Vadis*. *See Quo Vadis*, *supra* note 1, at 559, (quoting Harlan's concurring opinion in *Mackey v. United States*, 401 U.S. 667, 679 (1971)).

49. 479 U.S. 314 (1987).

50. *See id.* at 320-28. The Court generally adopted Harlan's view in 1982. *See United States v. Johnson*, 457 U.S. 537, 562 (1982). In *Griffith*, the Court foreclosed any possible exceptions to the rule of full retroactive application to cases on direct review.

51. 772 P.2d 1059, 1062-66 (Cal. 1989).