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James R. McCall

UC Hastings College of the Law, mccallj@uchastings.edu

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Roger Traynor: Teacher, Jurist, and Friend

By JAMES R. MCCALL*

In May 1983, on a day bathed in the radiant, wind-tinged sunlight typical of late spring in the Bay Area, a memorial service was held in Berkeley, California, in honor of Roger J. Traynor, Professor Emeritus of Law, Hastings College of the Law, and former Chief Justice of the California Supreme Court. At the service, friends of Roger Traynor spoke movingly of the personal qualities of the man who was known to the legal profession as one of the great judges and legal reformers in the history of the common law. Little was said of his public life, vast accomplishments, or abundant honors. The only speaker to trace the Justice's career began by stating that he was originally a teacher. This choice of priority was indeed correct, for Roger Traynor was first and foremost a teacher in the most profound sense of the word.

Certainly his enjoyment of law school life was apparent to all who knew him during the years he taught at Hastings. He took delight in the faculty camaraderie, the classroom discussion, and conversations with students. An unusually gentle man in whom intelligence, common sense, and good humor were pervasive and irrepressible, he was at home in the informal setting of the faculty lounge and the dining commons, as well as in the more austere world of the library and the lecture hall.

He began his career in the 1920's as a teaching assistant in the Political Science Department at the University of California at Berkeley, thereafter was a law professor at Boalt Hall during the 1930's, and, following retirement from the Chief Justiceship of the California Supreme Court, spent the last ten years of his career as a distinguished member of the Hastings 65 Club. During his career as a professor and a member of the supreme court, Justice Traynor wrote over seventy-five law review articles on subjects as varied as the tax collection procedures of the Internal Revenue Service and the use of environmental facts in appellate jurisprudence. His scholarly writing would have

* Professor of Law, Hastings College of the Law.

been extraordinary for a career academic. Considering that he also wrote over 950 opinions during thirty years of service on the California Supreme Court, his scholarly contribution can be accurately described as monumental. When he retired from the court in 1970, Justice Traynor told the press that he was accepting a position on the faculty at Hastings, adding, "Once a law professor, always a law professor." The statement revealed much about the man.

In his articles and opinions he continuously offered valuable instruction, without a trace of pretension or pedantry, to all persons concerned with the law and the pursuit of justice in America. In restrained and lucid prose, he presented the case for a disciplined mid-twentieth century judicial activism appropriate for reforming American common law. His views eventually prevailed over the lethargic jurisprudence that was prevalent when his judicial career began. Justice Traynor argued for rationality, rigorous honesty, and understandable writing in judicial opinions. He taught these precepts by constant example.

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. Like all born teachers, he never ceased to be an ardent student of his subject, the law. Perhaps because of his classroom background, he also never failed to take the necessary pains to communicate even the most complex issues in an understandable manner, so that time-pressed attorneys as well as leisured law professors could always learn from a Traynor opinion. On a personal note, he possessed the humility of many fine scholars, and few people failed to be both surprised and charmed by his complete lack of self importance and by his genuine courtesy.

Roger Traynor was born on February 12, 1900, in Park City, Utah. His parents were immigrants from Ireland, and his father supported the family by operating a small drayage business. Traynor worked in the family business after school, on weekends, and during vacations throughout his boyhood and into college. The necessity and virtue of hard work, the egalitarian values of that Utah mining community, and a family emphasis on honesty and ethical behavior shaped the man and his adult thinking.

He enrolled as a freshman at the University of California at Berkeley in the fall of 1919. Although initially overwhelmed by the size and sophistication of what was then the largest university in the country, he was immediately at home in the intellectual world of the classroom. After a brilliant undergraduate career, he enrolled as a

graduate student in the Political Science Department, intending to obtain a doctor of philosophy degree and to pursue a teaching career. As part of his doctoral course work, he enrolled in a constitutional law course at Boalt Hall. The teacher was Thomas Reed Powell, a distinguished visiting professor, and Traynor was thoroughly intrigued by the rigor and depth of Professor Powell's analysis. As a result, Traynor decided to obtain a law degree. While continuing work on his doctoral thesis and supporting himself as a teaching fellow in the Political Science Department, Traynor enrolled at Boalt Hall. In what he later recalled as the busiest period of his life, Traynor proceeded to graduate at the top of his class at Boalt Hall, serve as editor-in-chief of the *California Law Review*, and complete his doctoral dissertation. He received his doctoral degree and his law degree at the same graduation ceremony in the spring of 1927.

Following a few months of law practice in San Francisco, Traynor accepted an appointment to teach law-related courses to undergraduates in the Political Science Department at Berkeley. On the strength of his teaching and his scholarly writing, he was offered an appointment as a law professor at Boalt Hall in 1930. For the next ten years, Professor Traynor taught courses in the new and burgeoning areas of state and federal taxation and published several articles on tax law.

Throughout the decade Traynor, while teaching at Boalt, served as consulting counsel to the California State Board of Equalization, for which he wrote briefs and drafted proposed state tax laws. In the fall of 1933 Professor Traynor took a one-year leave of absence from teaching to serve as the first director of the California Sales Tax. Traynor took a second leave of absence during 1938 and 1939 to act as a consultant to the United States Treasury Department, collaborating in the drafting of the regulations for the 1938 Revenue Act. Upon returning to Boalt Hall in 1939, Professor Traynor served as acting dean of the law school.

In the summer of 1940, Traynor was appointed as an associate justice of the Supreme Court of California. Ironically, he was Governor Culbert Olson's second choice for the appointment. Olson, the first democrat in the twentieth century to be elected Governor of California, had attempted to appoint another Boalt Hall professor, long identified with liberal causes, but the appointment was blocked by the Judicial Qualifications Commission. The Governor then turned to Roger Traynor, who lacked the partisan credentials but had been highly recommended by many of the Governor's advisors because of his academic career and his work as a government consultant.

Justice Traynor's appointment was an extraordinary event. The first alumnus of Boalt Hall to serve on the California Supreme Court, Traynor was also the first man appointed to the court directly from a law school faculty. At age 40, he was one of the youngest California Supreme Court justices ever appointed, and he was joining a court on which the average age of the other justices was 63.

For a short period he endured some good-natured kidding from his fellow justices about his youth, academic background, and reformist instincts. Once he began to write opinions, however, Justice Traynor's lucid writing, firm command of precedent, and open consideration of underlying policies won the respect of his colleagues. Within months Justice Traynor won the necessary majority vote for a decision he wrote overruling an outdated contracts doctrine. Many such overruling decisions followed during the next thirty years. These decisions, taken as a body of work, transformed the law of California and significantly changed American jurisprudence.

Justice Traynor's judicial philosophy was premised on the belief that judges should openly acknowledge their role, albeit limited, as lawmakers and should actively assume the responsibility for keeping decisional law as rational—internally and in relation to contemporary society—as possible. He had formed this view as early as his second year in law school, and he acted upon it from the first day of his appointment. The force, clarity, and logic of his opinions quickly gained the attention of members of the profession far beyond the borders of California. Because of the freshness of his approach and the distinctly readable quality of his prose, his decisions were soon selected by casebook editors and eventually were followed by judges in other states. For the last twenty-five years American law students have time and again come upon Traynor opinions in their casebooks. These opinions remain invaluable as vehicles for teaching and learning legal concepts. Written in understandable prose, they relentlessly analyze the most complex doctrinal tangles and propose constructive changes or reformulations. As noted in 1961 by Chief Justice Walter V. Schaefer of the Illinois Supreme Court, "there is no sounder currency in the courts across the country than a Traynor opinion."

Today, it may seem quite understandable that an intelligent American judge in 1940 would be dissatisfied with the contemporaneous judicial lethargy and a common law based upon hardened doctrine dating from the eighteenth century. However, to lead the reform required truly exceptional ability, industry, and courage. Justice Traynor possessed all three. In 1944 he wrote a concurring opinion, which he

alone signed, advancing the novel theory that a consumer injured by a defective product should be entitled to sue the manufacturer for damages. Long-standing precedent limited the consumer to recovery from persons with whom the consumer was in privity, usually the retailer who had sold the product. No less eminent a scholar than Roscoe Pound, Dean Emeritus of the Harvard Law School, writing in the *American Bar Association Journal* in 1946, described Traynor's concurring opinion as "authoritarian law." Pound later changed his mind about the theory of strict products liability, as did many others, but it was Justice Traynor who kept the argument alive for twenty years, through six lonely dissents and concurrences. In 1963 the California Supreme Court finally accepted his view, and it is now the law of the land. Like so many other legal concepts introduced by Justice Traynor, it is difficult to imagine that the law was ever otherwise.

In 1956 Justice Traynor began a remarkable program of writing for the legal journals on a wide range of topics. He wrote articles on the legal doctrine in several fields, including the two areas in which he felt that he had made his most significant contribution: conflict of laws and torts. He also wrote a number of articles addressing fundamental issues in appellate jurisprudence, such as the proper relationship between the court and the legislature, the use of statutes in decisions involving common law precedents, the proper approach to deciding a difficult case, and the need to keep the decisional law both logical and responsive to the needs of society. Significantly, the articles also included extended discussions of the restraints upon the power of judges to make law through decisions. Those restraints included the requirements of rational consistency and open explanation of the exact premises and deductions used in arriving at a decision, deference to legislative policy determinations, and the need for restraint where overruling precedent would either defeat significant and justified expectations of the public or would immediately require elaborate rules to replace the discarded precedent.

In 1964 Chief Justice Phil S. Gibson retired, and Traynor was appointed chief justice of the California Supreme Court by Governor Pat Brown. Traynor's exceptional ability and the esteem in which he was held by the legal community made him an obvious choice to lead the court. The former Governor recently said, "I don't think there was any abler jurist in the United States, and that includes the [United States] Supreme Court. I've never seen more approval of anything I did than when I appointed him."

Chief Justice Traynor retired from the California Supreme Court

in 1970 and became a member of the 65 Club at Hastings College of the Law, where he taught criminal procedure, conflict of laws, and judicial administration. In great demand as a visiting professor, Traynor taught at the Universities of Virginia and Utah and received the honor of appointment as the Arthur M. Goodheart Professor at Cambridge University, England, for the academic year 1974-1975. Professor Traynor also served as chairman of the National Press Council and of the American Bar Association committee responsible for drafting the Code of Judicial Conduct.

That Roger Traynor was legendary, even that *rara avis*, a prophet with honor in his own country, is not open to doubt. Upon his retirement from the California Supreme Court, the editors of the *Harvard Law Review*, in an issue dedicated to him, stated that Justice Traynor's work "inspired a dramatic renaissance of the common law." The *Harvard Law Review* was one of six law reviews that dedicated issues to him during his lifetime, and the statement expresses the consensus view of legal scholars on his importance in the history of American law. Because of his career, the doctrine of stare decisis lost the hold it previously had over the minds of appellate judges, and the standards he set for lucid, comprehensible language in appellate opinion writing have influenced judges for almost forty years. The number and variety of the different areas of law that he helped to rationalize through opinions that either overruled or clarified tangled doctrine is perhaps the most striking feature of his collected decisions. His effect upon the development of the common law was historic, and among twentieth century judges only Benjamin Cardozo, the great reformer of the New York Court of Appeals, comes to mind as an apt comparison.

Roger Traynor was gentle in aspect, unpretentious in manner, and given to quiet delight in the enjoyment of life's variety and humor. He could be forceful and straightforward in pressing a point, but he was capable of neither harshness nor discourtesy. By consistent and continuing example he taught humane values and the importance of intelligence, industry, integrity, consideration, and understanding. His passion for justice was fierce but always expressed in a quiet, thoughtful voice. That passion and that voice have significantly changed the law and the quality of justice in our nation. His work and his ideas will endure, as will the memory of this extraordinary teacher and friend.