A Remembrance

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The significant contributions of Justice Traynor to our jurisprudence will be delineated elsewhere by others far more qualified than I. I will attempt in this short paper to convey a little of what it was like to be a very junior associate of the justice some thirty years ago.

Since Justice Traynor always insisted that one establish the basis for an expression of opinion or a statement of fact, the stage should be set first. I had the good fortune to clerk for Justice Traynor from mid-1951 through mid-1953. Justice Traynor's opinions from this period can be found in volumes thirty-seven through forty-one of the California Reports, Second Series. Justice Traynor was in his prime and his reputation as a jurist and scholar were firmly established. My two-year tour of duty took place while Justice Traynor authored important opinions such as State Rubbish Collectors Association v. Siliznoff1 and De Burgh v. De Burgh.2 Ahead were many significant opinions and his years of leadership from 1964 to 1970 as Chief Justice of the California Supreme Court.

Justice Traynor's permanent assistant and colleague was Don Barrett, who had served the justice for many years as a senior research attorney. Don could anticipate Justice Traynor's views and could implement his thoughts and concepts on the basis of a few terse comments, in a manner totally mysterious to the novitiate. The justice and Don were assisted by a continuing procession of recently graduated law students, arriving as cocky, brash young men and women eager to enlighten the justice and the world with the brilliant insights implanted by their mentors at the law schools. Justice Traynor rapidly and kindly brought them to recognize their place in the great scheme of things, and thereafter they, with newly found humility, worked as junior colleagues with the justice in his pursuit of excellence.

By a stroke of good fortune I lived in Berkeley in the same part of the Bay Area as the justice and Don. The three of us commuted daily

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1. 38 Cal. 2d 330, 240 P.2d 282 (1952) (en banc) (tort of intentional infliction of emotional distress).

2. 39 Cal. 2d 858, 250 P.2d 598 (1952) (en banc) (elimination of recrimination as a ground for denial of divorce).
across the Bay Bridge to and from chambers in San Francisco. It was tacitly understood that either Don or I would always drive lest the justice, while musing over some fine point of law, overlook some worldly traffic problem. Traffic conditions were often bad; the trip was frequently slow; and in the relaxed condition of the outward and inward voyages, the justice would unburden himself concerning matters before the court. Thus, I was privy to the justice's thoughts and views to an extent not usually available to a law clerk who communicates with a judge only under office conditions.

While Justice Traynor never forgot that every lawsuit is of great importance to the parties and counsel, the unfortunate reality was that relatively few of the cases offered the opportunity for significant legal writing. Justice Traynor's eagle eye was sure to spot the candidates to join *Rylands v. Fletcher*\(^3\) and *Palsgraf v. Long Island Railroad Co.*\(^4\) in the annals of jurisprudence. As Don nimbly made our way down Ashby Avenue, we could hear Justice Traynor musing, "I was looking last night at the petition in such-and-such a case and I believe one night make a contribution." Don and I knew our cue and would politely inquire. The justice would then use this opportunity to think out loud and set forth his initial views and analysis of the case.

Justice Traynor had an uncanny ability to subject the most complex legal problem to a straightforward logical analysis leading his listener or reader to a foregone conclusion and leaving one wondering how the problem could have ever seemed so complex and insoluble. While the path from initial analysis in the commute car to a polished final opinion was long and weary, the initial analysis and solution rarely required major change.

If the court did accept a case of major importance and Justice Traynor were assigned the preparation of the opinion, the creative process began in earnest. The most important opinions were assigned to Don, with minor supporting roles for the transient law clerks. The other opinions were assigned to the juniors. Don needed only general guidelines; the juniors, including myself, received more detailed advice concerning the views of the justice. The analysis by the justice would conclude with the injunction to create a draft opinion along the lines discussed.

The first assignment left me with a blank yellow pad, an acute sense of panic, and a strong desire to see my mother. Eventually, however, such assignments resulted in a draft opinion for submission to the

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\(4\) 248 N.Y. 339, 162 N.E. 99 (1928).
One day Justice Traynor would be the strong advocate of his initial position and question the inability of his assistant to draft a meaningful exposition thereof. On another day Justice Traynor would have—or at least pretend to have—the strongest doubts of the merit of his initial position, marshal damning arguments against that position, and challenge his beleaguered assistant to endeavor to refute the cogent and persuasive arguments that he put forth. Since Justice Traynor was as skillful and adept in criticizing his initial position as he was in developing that position, it was no easy task to respond.

As the drafts were prepared and every point was explored, the opinion took a more complete form. This took place in the dark ages before word processing techniques made textual revision so easy, if not addictive, and the revisions and proofing were a weary task. Every new law clerk sooner or later blundered by saying in effect that the current draft was “good enough.” The response in kind but firm words by Justice Traynor would be that the opinion had to be absolutely correct and “good enough” did not count.

Critical passages were drafted entirely by Justice Traynor. The statement of facts, the procedural history of the case, and less important passages were initially drafted by the clerk. The justice then edited and revised the drafts, adding telling phrases and deleting sophistries and redundancies. The final product was truly that of the justice and often retained few traces of the initial draft so proudly submitted by the clerk.

Certain frailties of the law clerk species were evidently recurring, anticipated, and to be remedied at the first opportunity. Early in my tenure I submitted a draft of an opinion with a passage surmounting a most difficult point by blandly stating the desired conclusion and briskly moving to the next issue. The draft came back with the comment that “pole-vaulting” was impermissible. I was sent forthwith to the law library, not to return until the problem had been fairly faced and a draft prepared that squarely dealt with the argument. It was a relief later to discover that many other pole-vaulters had suffered the same fate. To this date I find myself noting in the margin of an advance sheet, “pole-vault.”

Another recurring clerical sin, particularly when the assignment was the preparation of the first draft of a dissenting opinion, was to take the opportunity to introduce into the draft some cutting comments respecting the faulty reasoning process of the benighted holders of the contrary view. All language of this nature would be lined out with a red pencil when the draft came back from chambers and there would
be a gentle comment during the return commute that personal attacks upon one holding an opposing view tellingly revealed one's inability otherwise to refute the argument.

Justice Traynor insisted upon clarity and simplicity of expression. The final versions of his opinions invariably met those criteria. He felt that a reader should immediately be able to understand the legal principles in the opinion and readily follow the substantiating arguments. The desire of the typical beginning law clerk to make a legal problem as complex and obtuse as possible was soon suppressed.

Justice Traynor reemphasized the importance of clear writing in his "take the little child by the hand" lecture, delivered early in each apprentice law clerk's tenure. After the justice had read a sufficiently obscure passage to provoke the lecture, the clerk was told that in order to teach a child, one took the child by the hand, one explained everything in simple and plain language, one took nothing for granted, and at the end the child knew the lesson. The humbled clerk was then told to take the reader by the hand—by rewriting the draft.

Justice Traynor insisted upon meticulous compliance with the rules of grammar and style. The drafts came back from chambers with split infinitives reunited, with improper use of the subjunctive tense corrected, and other sins of omission and commission rectified. I blush to this day with the realization that, through my ignorance, an otherwise not memorable opinion by the justice was published with a paragraph that began with a dangling participle. No doubt the justice's mind was on some other weighty matter when that misuse of the English language uncharacteristically got by him. One brief comment during a subsequent commute ride after the opinion was irrevocably published was sufficient to leave me resolved that, whatever further sins I might commit in this world, the creation of dangling participles would not be among them.

The California Supreme Court during this period had a number of outstanding members who had been together for a long time. The last change had been in 1945, when the most junior member, Justice Spence, had been appointed. The same seven justices were to remain together until the resignation of Justice Edmonds at the end of 1955.

On the whole, considering their strong individual personalities and the many occasions for disagreement in their long tenure together, the members of the court had great fondness and respect for one another. The author cannot recall even gossip revealing any personal animosities such as have been attributed to certain members of our highest
court in times past. However, certain little things did appear in opinions that seemed designed to tweak the ears of other members, to the great delight of the irreverent band of law clerks.

Several members of our court had had extensive experience as trial court judges. Justice Traynor had had a distinguished academic career before his appointment, but he had not been a trial judge. References from time to time would appear in opinions authored by the former trial judges indicating that the view being advocated would be obvious to one with such experience but regrettably incomprehensible to one whose life had been spent in an ivory tower. Similarly, I heard from clerical colleagues that certain of Justice Traynor's opinions extensively citing law reviews and treatises, and not citing opinions of his colleagues, were not read with unmitigated delight.

As in a long marriage, each member of the court had, or at least thought he had, a thorough and comprehensive perception of the likes, dislikes, prejudices, and peculiarities of every other member of the court. A very considerable amount of time was devoted during our daily commute, and no doubt in the conferences that other members of the court had with their staffs, to considering whether a particular line of argument would increase the chances of obtaining the critical votes needed for a majority opinion. One of the most delightful aspects of clerking for Justice Traynor was the opportunity to participate at least vicariously in the process of obtaining the assent of his colleagues to his views.

Proposed majority opinions were distributed to all members of the court after oral argument and conference. The assent of a member of the court to a proposed opinion was manifested by signing the opinion. The author of an opinion had some latitude in determining the order of circulation of an opinion for signature. I remember much musing by the justice during the commute ride as to whether a proposed opinion likely to draw opposition should go first to Justice A who would surely sign and not thereafter be seduced by fallacious arguments, or to Justice B who had a dubious facial expression during conference and should be won over early, or to Justice C whose signature would surely convince Justice D. The analysis was similar to the construction of the batting order by savants such as Gene Mauch or Casey Stengel. With hindsight I wonder if in fact the order of circulation actually made the slightest difference, but Justice Traynor loved the game. It was great fun.

If Justice Traynor came to a view after reading the briefs and

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7. See Judge Jerome Frank's oft-quoted remarks on the role of "bias" and "partiality" in judicial decisionmaking in *In re J.P. Linahan*, Inc., 138 F.2d 650, 651-52 (2d Cir. 1943).
hearing argument that was contrary to the member assigned, further strategic thinking was required. It was most important in such circumstances for Justice Traynor to make his views known before too many members of the court had endorsed the opposing, i.e., erroneous, view of the case. The usual practice was for the assigned member to circulate a tentative opinion prior to the oral argument and the ensuing conference where the case was discussed and the initial vote was taken.

Hence, the first step was to prepare for the conference in the hope that Justice Traynor could at that stage persuade a majority of his colleagues of the correctness of his views and be assigned the authorship of the opinion. Generally, opposition at conference achieved no more than a deferral of commitment until both the proposed opinion and the opposing opinion were available for review. The proposed opinion, of course, would usually be redrafted or modified by the author to take into consideration the views expressed at conference. The dissenting opinion would go through an accelerated drafting process in order to be ready for dissemination promptly after distribution of the proposed majority opinion.

Justice Traynor and his staff would then wait with bated breath to see whether undecided members of the court would be persuaded. On occasion the justice would ascertain from his own soundings that a particular point was troubling some member of the court. Intensive research and discussion would then follow in order for Justice Traynor to determine whether the dissenting opinion could be revised to resolve the problem without intellectual compromise.

There was great delight when an uncommitted member of the court was persuaded in a close case to see a matter from the true and enlightened viewpoint. And joy was unbounded in the commute car when a member of the court recanted, struck his name from the proposed opinion, and acceded to the correct view. It must be confessed that the elation was not in the least diminished by thought of the wrath of the colleague who had been unable to hold the vote.

If four votes could be captured, Justice Traynor and his staff would enjoy the ultimate triumph. The chief justice would request Justice Traynor to convert his proposed dissent into a majority opinion, while the displaced member and his staff had the disagreeable task of revising their proposed opinion into a dissent.

All too soon, the clerkship term expired and one met the succeeding novitiate. He was brash, cocky, and perhaps was prone to use dangling participles. When he asked for some parting advice, one told him that first one must take the little child by the hand. The poor fellow didn’t understand, but soon he would.