Master of Judicial Wisdom

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A giant has left us.

Chief Justice Traynor was a towering intellect. He had inexhaustible energy. He was prodigiously productive. With Mrs. Traynor he shared a total dedication to public service. He was a warm and friendly person with broad and varied interests and a robust sense of humor.

He was always alert to detect cant, hypocrisy, or pettifogging. He had an innate sense that told him when a seemingly irrefragable legal argument was leading to an impossible result, and was therefore necessarily flawed; a conclusion he often telegraphed with the terse observation, "ain't law wonderful."

More than anything else, however, what made him one of the very great judges was his judicial wisdom. A scholar's knowledge of American institutions and deep understanding of the nature of the judicial process, both tempered with good common sense, gave him a mastery of the proper limits of judicial power—of the limited role even the best judge may properly play in a democratic society. Because his wisdom accurately defined that role for him, he could effectively play it to the hilt. One of the most important tasks of a state supreme court justice is to interpret and enforce the Constitution of the United States and of his own state. Justice Traynor of course wrote many outstanding opinions in this area. He fought valiantly to have the court make sense of the powers of administrative agencies to find facts; a battle not to be won until after he had left the court. He was constantly concerned with the meaning of the constitutional provision prohibiting reversal of a judgment for error unless the error resulted in a "miscarriage of jus-

† B.A. 1941, L.L.B. 1948, University of California, Berkeley. Mr. Barrett joined Justice Traynor's staff in 1948, and was senior attorney on his staff from 1949 until the justice's retirement in 1970. From 1964 to Mr. Barrett's retirement in 1981, he was principal attorney for the California Supreme Court.

1. See, e.g., Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946) (en bane) (absent clear and present danger, it is unconstitutional to discriminate on the basis of ideological persuasion in granting or denying access to school facilities for public meetings); Perez v. Sharp, 32 Cal. 2d 711, 198 P.2d 17 (1948) (en bane) (absent clear and present danger, prohibition of interracial marriage unconstitutional).


He was determined that rationally defensible legislation should not be invalidated under the vague provisions of the due process clause or the equal protection clause merely because the legislation appeared unwise. He was particularly intrigued by the quintessential constitutional jurisprudential issue of whether the legislature as well as the court has power temporarily to continue an unconstitutional rule by providing that an overruling constitutional decision should be prospective only. It has.

His interests, however, were not limited to constitutional questions of grand dimensions. He gave equal attention to constitutional questions of more mundane concern. Did additur, conditioning denial of a new trial on acceptance of increased damages, violate the right to jury trial? No. Did the California constitutional provision permitting comment on a defendant's failure to testify violate the United States Constitution? He thought not, but the United States Supreme Court disagreed. Did the principle of separation of powers preclude the legislature from conditioning the trial court's power to dismiss an allegation of a prior conviction on the prosecutor's consent? He thought not, but was subsequently overruled. It was enough that a constitutional issue, however minor it might appear, was fairly in controversy to call for its most meticulous consideration.

He gave equal consideration to questions of statutory interpretation. To him the question was never what did he wish the statute provided but always what did the statute mean. He recognized, of course, that in a so-called code state like California, many statutes, particularly many of those in the original codes, were little more than broad general statements of accepted common-law principles. As such they were not intended to freeze the orderly development of the common law. Moreover, even statutes that dealt with specific problems could sometimes be taken as appropriate models for the court to adopt in resolving similar questions that the legislature had not addressed.

In other words, although the legislature must be obeyed when it has validly spoken, it may also be looked to as a source of wisdom for the solution of problems it has not specifically addressed.

We come then to the more or less pure common-law function of a state supreme court justice. Here I think Justice Traynor was particularly preeminent. From serving on his staff from 1948 until he left the court in 1970, I had ample opportunity to see how he went about the task of deciding cases. It was a most instructive and rewarding experience.

It bears emphasis, of course, that even the most imaginative and innovative justice of the California Supreme Court spends little of his time writing significant opinions that clarify or modernize existing law or decide important new questions that arise in the ever changing social environment. He must spend a substantial part of his time deciding which cases the court should hear. Moreover, since a substantial part of the court's jurisdiction is deemed mandatory and since the court normally decides all issues in the cases it hears, judging involves a great deal of routinely applying settled law to the cases involved. Although that part of the job requires meticulous care and is often of paramount importance to the parties, it is not the stuff of which a court's or judge's reputation is apt to be made. It was a part of the job, however, that Justice Traynor never in the slightest degree slighted.

Still, it was no accident that so many significant cases came Justice Traynor's way. It resulted at least in part from the way he went about the task of judging. He approached each case with an entirely open mind. Any tentative views were subject to and often did change. No solution was acceptable until it could be satisfactorily and persuasively articulated in writing. He fully canvassed the apparently applicable law. If it appeared that there were anomalies, irregularities, or contradictions in the pattern of the law, he was not content to decide the case by merely fitting it into the pattern as unawkwardly as possible. He asked the question whether this was not an opportunity to resolve conflicts in the authorities or to restate the controlling principles or applicable rules to make the law a more rational whole. Justice Traynor was always alert to such opportunities, and there was seldom any dearth of them. Because of his concern that cases should be decided as rationally as possible, he necessarily felt compelled not to let those opportunities pass. In short, he decided so many significant cases because he knew or discovered that they were significant.

It bears emphasis that Justice Traynor's determination to perfect the law within the sphere properly alloted to a common-law judge in no way reflected disrespect for or disapproval of the doctrine of stare decisis. He had no wish to change the law just to change it or to rewrite
it as a legislative revisor might. He was particularly concerned that reasonable reliance on existing law not be disappointed. Such reliance, however, was that of people in ordering their affairs or conducting their businesses. It was not the reliance of lawyers in learning the niceties of the imperfections of existing law in order to become more effective litigators or advocates.

Thus, in seeking to make sense of the various aspects of the parol evidence rule, Justice Traynor was primarily concerned with protecting the reasonable expectations of the parties. Having delved deeply into the wisdom and knowledge of such outstanding scholars as Corbin, Wigmore, and Williston, having consulted the Restatement of Contracts and the Uniform Commercial Code, and having considered the results as well as the language of decided cases, he did away with the wills-o'-the-wisp of plain meaning and ambiguity and substituted instead rational principles for the interpretation of written instruments.\textsuperscript{12} Although such reform was jarring to those steeped in the ancient jargon, it probably did not affect the outcome of many contract disputes. Skillfully manipulated, the ancient jargon usually led to the correct result. But there was always the risk that it might not; a risk that was scarcely justified by a preference for familiar talk to straight talk.

I have mentioned Justice Traynor's consideration of and respect for legal scholarship. He was always delighted when he found that a problem with which he was wrestling had been explored and effectively analyzed in the legal literature. Such writings made his job of judging that much easier by giving him assurance that might otherwise be lacking that he was approaching the problem from the right direction. His reliance on the analyses of Professor Brainerd Currie to make sense of conflict of laws is an outstanding example.\textsuperscript{13} It is worth noting that after he became chief justice he asked for amici briefs in appropriate cases from legal scholars whose views in an area of their expertise might otherwise be unavailable.

Wholly consistent with his respect for stare decisis was Justice Traynor's willingness to innovate in procedural law. Here there was seldom any problem of injurious reliance on existing law, and if there were, the problem could easily be solved by making the ruling prospective.\textsuperscript{14} Thus, as a matter of common law, he opened the door to discov-


\textsuperscript{13} See, e.g., Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967) (en banc); Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961) (en banc).

\textsuperscript{14} See Phelan v. Superior Court, 35 Cal. 2d 363, 217 P.2d 951 (1950) (en banc) (Gibson, C.J.).
ery by defendants in criminal cases, and he later sought to afford the same right to the prosecution to the extent it was possible to do so consistently with the privilege against self-incrimination. Unfortunately, perhaps, the court subsequently concluded that the latter problem was one for the legislature to solve, if it could.

There is no end to what could be said about Justice Traynor's brilliance and craftsmanship. His tort decisions, however, demand special reference. Here he was not only concerned with keeping theories and analyses straight, but in recognizing the right time and case to bring sometimes halting and sporadic advances into the mainstream of tort law. Thus, he recognized when the doctrines of charitable and sovereign immunity had been so eroded that it was time to do away with them and, particularly in the case of sovereign immunity, to build a new law more in tune with reality.

Early in his tenure he recognized that res ipsa loquitur was a dubious solution to the problem of products liability and urged adoption of a rule of strict liability. For years even such eminent scholars as Dean Prosser considered his a voice crying in the wilderness, but by 1962 a unanimous court was ready to join him in announcing a rule of strict liability in tort for defective products. As his careful citations in that opinion make clear, however, he was not announcing a wrenching change in the law, but recognizing and articulating its majestic advance. The opinion is also noteworthy for its recognition of the interplay of the statutory law of sales with the common law of strict liability in tort. Thus, Justice Traynor recognized that the statutory definitions of warranties might be appropriate standards for determining whether a product was defective, whereas the statutory rules governing contractual relationships were inappropriate to limit the rights of an injured plaintiff who had no direct dealings with the defendant. Later he articulated the converse proposition that the statutory law of sales, not the law of torts, should govern liability for economic harms arising from breaches of warranty based on defective products.

I have tried to convey a little of the respect and reverence that

Justice Traynor inspired in those who worked with him and with whom he came in contact. He was a truly great judge and person. A giant has left us, but he has left a magnificent legacy.