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Chief Justice Traynor and the Judicial Process

Walter V. Schaefer*

In our inertia we were standing by ghosts as well as living law, unjustifiably relying on the formula that all decisions are created equal and deserve equally to survive. So at long last we set an occasional ghost at rest in the past to which it belonged, in the belief that however much the wisdom of the ages deserves to survive, the foibles of the ages do not.†

When one appellate judge comments upon the judicial approach or technique of another his comment is ordinarily directed at the work of a member of his own court, and he uses the traditional medium, the dissenting opinion. That customary form of expression has advantages that transcend even the therapeutic value of the dissenting opinion to the dissenter. The terrain is familiar, the target is sharply defined, the permissible range of weapons is broad. It is a much more difficult undertaking for a judge to comment upon the work of a judge of another court. Both the legal terrain and the cast of characters are unknown except in a general way. And even a short experience in one conference room would warn against easy generalization about another.

Some judges make their principal contribution inside their own court. That an outsider might easily err in his appraisal of such a judge is clear enough from Chief Justice Hughes’ appraisal of the contribution of Mr. Justice Van Devanter, who wrote very few opinions.² The danger is a different one in the case of Chief Justice Roger J. Traynor who has written more than 590 majority opinions in his twenty-five years on the Supreme Court of California. And those opinions have been analyzed and dissected by outstanding specialists in a host of law review articles and notes. In his case the problem is not a dearth of material, but an over-abundance. All that an outside generalist can do is to offer some rather random, but hopefully relevant, observations about some aspects of his work.

Making allowance for the tendency of each generation to exaggerate its own problems and the significance of its own achievements, I have

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* Associate Justice, Supreme Court of Illinois.
² Address by Chief Justice Hughes at the Annual Meeting of the American Law Institute, May 1938, in *Proceedings in Memory of Mr. Justice Van Devanter*, 316 U.S. xi (1942). See Letter From Chief Justice Taft to the President of Yale University, December 1926, in *Pringle, The Life and Times of William Howard Taft* 97 (1939); Address by Chief Justice Stone at Memorial Service for Mr. Justice Van Devanter, 316 U.S. xiii (1942).
been unable to think of any other twenty-five-year span that has produced such important changes in so many areas of constitutional and common law. Nor do I know of any other judge whose work has been so significant in so many areas of the law. Chief Justice Marshall made a nation, and so stands apart. But of the others mentioned by Roscoe Pound as great American judges, I would venture that only Holmes, Cardozo, and Doe of New Hampshire could match Chief Justice Traynor, if the measure is taken in terms of breadth of interest and long range impact on the law.

I

THE EXCLUSIONARY RULE

Many trial judges have rendered judgments they would like to recall, and many judges of reviewing courts have written opinions that they would be happy to see excised from the reports. Still, it is a rare occurrence for a reviewing court judge to overrule one of his own opinions. The overruling of People v. Gonzales by People v. Cahan was unusual both for the bitterness of the immediate local response and for its nation-wide significance. More important here, its aftermath shows Chief Justice Traynor at work as judicial craftsman as well as advocate.

The issue was the admissibility, in a criminal prosecution, of the product of an illegal search. In 1922, the California court had rejected the federal exclusionary rule and adopted Wigmore’s view favoring the admissibility of the evidence. The problem was raised again in 1942 in People v. Gonzales, and the court adhered to its position. Chief Justice Traynor’s opinion pointed out that the fourth amendment to the Federal Constitution was not a limitation upon the states, and disposed of the coerced confession analogy on the ground that a coerced confession was excluded because of its potential unreliability, while there is ordinarily no doubt as to the reliability of the evidence resulting from an illegal search and seizure. Justices Carter and Schauer dissented.

The stream of cases involving illegal searches did not stop with People v. Gonzales; nor were there any indications of efforts to compel or induce the police to comply with the constitution. On the contrary,

2 POUND, INTERPRETATION OF LEGAL HISTORY 136-40 (1923).
5 Note, Two Years With the Cahan Rule, 9 Stan. L. Rev. 515, 538 (1957).
6 See People v. Mayen, 188 Cal. 237, 205 Pac. 435 (1922); 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940).
shocking instances of violation of constitutional rights continued.\(^7\) The suggestion of Mr. Justice Jackson that the record in *Irvine v. California* be sent to the Attorney General of the United States, with a view to federal prosecution of the California police officers under the Civil Rights Act, commanded only the support of Chief Justice Warren, and bore no fruit.\(^8\) In 1949, in *Wolf v. Colorado*,\(^9\) the Supreme Court had refused to apply the Federal exclusionary rule to the States. But in spite of the absence of Federal command, the States continued to move toward the exclusionary rule, by legislation as well as judicial action.\(^10\)

As Chief Justice Stone has pointed out, in a common law system judicial doctrines are themselves on trial as well as are the rights of litigants, and only those doctrines survive that meet the test of experience.\(^11\) When *People v. Cahan* came before the California court in 1955, strong pressures against the orthodox rule had accumulated. The intermediate California court of appeals, in affirming the *Irvine* conviction, had placed responsibility for that result squarely upon the Supreme Court of California.\(^12\) *Cahan* involved the same kind of aggravated police illegality that had been characterized by Mr. Justice Jackson as "incredible," "obnoxious," "a trespass and probably a burglary."\(^13\) It was against this background that Justice Traynor and Chief Justice Gibson reluctantly changed their position. "[W]e have concluded . . ." said Justice Traynor writing for the majority, "that evidence obtained in violation of the constitutional guaranties is inadmissible. . . . We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers."\(^14\)

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\(^8\) MOROAN, MAGUIRE & WEINSTEIN, CASES ON EVIDENCE 752 (4th ed. 1957).


\(^10\) Texas and North Carolina, by statute, have reversed their position and conformed to the federal rule. See N.C. GEN. STAT. §§ 15-27 (1953); Tex. CODE CRIM. PROC. art. 727a (1953). Maryland has provided for the exclusionary rule in misdemeanor cases. See Md. ANN. CODE art. 35, §§ 5, 5A (Flack 1951). Alabama has done the same in liquor cases. See Ala. Code 1940, Tit. 29, § 210 as amended in 1951. Rhode Island adopted the exclusionary rule by decision and by statute. See State v. Hillman, 84 R.I. 346, 125 A.2d 94 (1956); R.I. LAWS OF 1955, ch. 3590. See generally MORAN, MAGUIRE & WEINSTEIN, CASES ON EVIDENCE 745 (4th ed. 1957).


Spence, Shenk, and Edmonds dissented. Justice Traynor's opinion concluded with the observation that adoption of the exclusionary rule "opens the door to the development of workable rules governing searches and seizures and the issuance of warrants that will protect both the rights guaranteed by the constitutional provisions and the interest of society in the suppression of crime."\(^{16}\)

Six years later, in *Mapp v. Ohio,\(^{16}\)* the United States Supreme Court held that the exclusionary rule, applied in federal prosecutions since 1915, was applicable as well to state prosecutions. In the years that intervened between *Cahan* and *Mapp*, the California court decided forty-five search and seizure cases, with Chief Justice Traynor writing the opinion of the court in twenty-three. These cases presented most of the possible variations, and they produced what is, in my opinion, the most valuable body of search and seizure law that is available. In these decisions there is a realistic emphasis upon the need to appraise the conduct of the police officer in terms of the situation as it appeared from the data available to him, and a refusal to allow technical concepts of the law of trespass or of landlord and tenant to govern the reasonableness of a search. Standing to raise the issue is broadly stated, the burden of proof is fixed, and the problem of the anonymous informer is faced.\(^{17}\)

The opinion in *People v. Cahan* did not expressly consider whether or not the rule announced was to be applied retrospectively, but it has not been so applied.\(^{18}\) It seems clear that when *Mapp* was decided it was intended to be applied retroactively.\(^{19}\) The Supreme Court relied upon procedural barriers to minimize the possibility that cases long since decided might be reopened: "As is always the case, . . . state court procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected."\(^{20}\) But the customary procedural barriers thus relied upon were leveled by *Fay v. Noia,\(^{21}\)* decided in 1963, and federal habeas corpus

\(^{16}\) Id. at 451, 282 P.2d at 915.


\(^{19}\) "The short of the matter appears to be that in *Mapp* the Court fully expected its decision to be given retrospective application." Allen, *Federalism and the Fourth Amendment*, 1961 SUPREME COURT REVIEW 1, 43.


\(^{21}\) 372 U.S. 391 (1963). As the matter now stands, state courts must either abandon their
is now available to those prisoners whose pre-Mapp convictions rested upon evidence obtained by illegal search.

Chief Justice Traynor has been the leading advocate for prospective application of Mapp, but his argument has not been primarily based on the element of reliance upon the former rule that typifies the usual case of prospective overruling. Rather he has underscored heavily the purpose of the exclusionary rule as a deterrent to illegal police activity, and concluded that this purpose would in no way be served by reopening the cases of guilty defendants long since convicted. In In re Harris, Chief Justice Traynor’s concurring opinion stated his arguments against the retroactive application of Mapp. The case involved the sale of obscene books, and the majority of the court disposed of it summarily on the ground that evidence tending to prove contemporary community standards was erroneously excluded. There was a claim of illegal search, however, and Chief Justice Traynor’s concurring opinion was devoted to that issue. Technically, the entire forceful argument for the prospective application of Mapp was dictum—but it was conscious dictum.

Recently Professor Meador suggested that the entire discussion of the retroactivity of Mapp is illusory. This suggestion is based upon the premise that the issue in a federal habeas corpus proceeding centers upon “the legality of present detention.” On that premise Professor Meador says: “The situation is as though the warden appeared at the prisoner’s cell every morning bearing the illegally seized evidence in his hands, thereby using it to keep the prisoner in confinement for another day—today, tomorrow and tomorrow. . . . The petition is filed against the warden who at this very hour is confining the petitioner in the penitentiary. And in light of Mapp the warden will not be heard to say that he can keep a man in prison at this hour by unconstitutionally seized evidence.”

This facile approach does indeed eliminate any problem of retroactivity. It has a question begging quality, however, for if it should be decided that the overruling of Wolf by Mapp is to operate prospectively,
it would then be necessary to determine whether a conviction, based upon procedures that conformed with existing constitutional requirements when the case was tried, provides a constitutional justification for continued detention. The law is not a closed system but a process, and there is no more reason to assume today that the last word has been said in the development of Federal habeas corpus than there was to make the same assumption fifty years ago. Federal habeas corpus is an important instrument in the improvement of criminal justice. But it need not be a blunt instrument; it can be so fashioned that it will cut more sensitively as it cuts more deeply.

Finality of adjudication is a significant value that should yield only before an overriding demand that justice be done. As Chief Justice Traynor has pointed out, "To place at the disposition of the guilty an extraordinary remedy designed to insure the protection of the innocent would be to invite needless disruption in the administration of justice. There is a world of difference between a timely objection to evidence on the basis of the exclusionary rule and the uprooting of final judgments." The determination in Pickelsimer v. Wainwright that the right to counsel, recognized in Gideon v. Wainwright, is to be applied retroactively does not necessarily decide the retroactivity of Mapp, unless every shift in constitutional doctrine is to be accorded identical significance. In so far as the demands of justice are concerned, there is no kinship between retrospective application of the right to counsel, which bears heavily on every aspect of a criminal proceeding, and retrospective application of the exclusionary rule, which ordinarily does not bear at all upon guilt or innocence. Individual justices of the Supreme Court of the United States have from time to time advocated prospective application of new doctrines. The question of the retroactivity of Mapp is now before that court.

28 Traynor, supra note 22, at 341.
31 Griffin v. Illinois, 351 U.S. 12, 20 (1956) (Frankfurter, J. concurring). See Moser v. Darrow, 341 U.S. 267, 275-76 (1951) (Black, J. dissenting); Eskridge v. Washington State Bd. of Prison Terms, 357 U.S. 214, 216 (1958) (Harlan and Whittaker, J.J. dissenting); Pickelsimer v. Wainwright, 375 U.S. 2, 3 (Harlan, J. dissenting); Jackson v. Denno, 378 U.S. 368, 439 (Harlan, J., joined by Clark and Stewart, J.J., dissenting). In Simpson v. Union Oil Co., 377 U.S. 13, 24-25 (1963), which involved price maintenance, five justices concurred in the prevailing opinion which concluded: "We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today."
32 The Supreme Court has granted certiorari in cases that present the issue. United States ex rel. Angelet v. Fay, 333 F.2d 12 (2d Cir.), cert. granted, 33 U.S.L.W. 3142, No. 578 (1964); United States ex rel. Linkletter v. Walker, 323 F.2d 11 (5th Cir. 1963) cert. granted, 377 U.S. 930 (1964) (No. 1125, 1963 term; renumbered No. 95, 1964 term). A
While this is not the place for a full discussion of the advantages and disadvantages of prospective overruling, both the use of the technique by the California court and the interaction between court and legislature in that state are interesting. Whenever a common law court decides a matter of first impression, its action can be regarded as legislative in the sense that the court has made law. And whenever a court overrules one of its prior decisions it brings about a change in the law, and in this sense its action can be regarded as legislative. An overruling decision ordinarily operates retroactively; occurrences that took place while the legal doctrine announced in the overruled decision was in effect are nevertheless governed by the doctrine announced in the new decision. The legislative aspect of such an overruling decision does not ordinarily cause comment, however, perhaps because of residual remnants of the once dominant notion that a judicial decision does not make law but only declares what always has been the law. But a legislative change in the law ordinarily operates only prospectively; before it can be given retroactive effect it must hurdle judicial rules of construction against retroactivity, and it must surmount constitutional obstacles imposed by due process clauses, and prohibitions against ex post facto laws and laws impairing the obligations of contract.

Since Mr. Justice Cardozo’s opinion in the Sunburst Oil Company case, state courts have, with increasing frequency, coupled the overruling of an earlier decision with an announcement that the new rule will not be given retroactive effect. The primary purpose, of course, is to avoid frustration of justifiable reliance upon the old rule, and the technique has been employed in many areas of the law. Perhaps because the legislative quality of the decision that overrules prospectively is more readily apparent, perhaps for other reasons, an interesting series of legislative and judicial interactions has resulted.

petition for certiorari is pending in California v. Hurst, 325 F.2d 891 (9th Cir. 1963), petition for cert. filed, 32 U.S.L. Week 3323, No. 913 (1964).

Schaeffer, Precedent and Policy 13 (1956).


For example, in Spanel v. Mounds View School Dist., 264 Minn. 257, 118 N.W.2d


Muskopf v. Corning Hospital District,\(^{37}\) Justice Traynor writing for the majority, overturned what remained of the California doctrine of governmental immunity in tort; the court, however, did not make its ruling prospective. The legislature responded initially by re-enacting for two years "the doctrine of governmental immunity from tort liability . . . as a rule of decision in the courts of the State,"\(^{38}\) and subsequently by providing legislative specifications of liability and immunity.\(^{39}\) In the charitable and municipal immunity cases, the element of reliance that support a prospective overruling is found in the failure of the defendant to insure, or to investigate old claims that become enforceable only when immunity is overruled. It seems likely that Chief Justice Traynor does not feel that this type of reliance outweighs the claim of the injured plaintiff, for in discussing the availability of the technique of prospective overruling he has pointed out: "An overruling that is prospective only may appear particularly appropriate in such areas as contracts and property, where reliance is apt to count heavily."\(^{40}\)

Apart from situations involving "vested" rights, where prospective application of the overruling decision may be constitutionally required, the California court has used the technique primarily when the overruled decision concerned a matter of procedure.\(^{41}\) The Supreme Court of Missouri appears to have drawn the same distinction.\(^{42}\) Its justification is not readily apparent. Indeed, it might seem that if there is to be any such distinction, it should cut the other way; the purpose of prospective overruling is to avoid frustration of justified reliance, and reliance on substantive doctrines is at least as justifiable, and more important in planning transactions, than is reliance on procedural rules.\(^{43}\)

De Luz Homes, Inc. v. County of San Diego\(^{44}\) produced a rather unusual variation on the prospective overruling theme. An earlier decision\(^{45}\) had approved a method of appraising the value, for taxing purposes, of

795 (1962), the Minnesota court overruled the doctrine of municipal immunity from tort liability, but announced that the new rule would be applied after the adjournment of the next legislative session. And in In re Jeruzal's Estate, 130 N.W.2d 473 (Minn. 1964), the Minnesota court used the same technique in a case involving the validity of a totten trust.

\(^{39}\) CAL. GOV'T CODE § 815. Cobey discusses these enactments in The New California Governmental Tort Liability Statutes, 1 HARV. J. LEGIS. 16 (1964).
\(^{40}\) Traynor, La Rude Vita, La Dolce Giustizia; or Hard Cases Can Make Good Law, 29 U. CHI. L. REV. 223, 232 (1962).
\(^{42}\) E.g., Moore v. Ready Mixed Concrete Co., 329 S.W.2d 14, 24 (Mo. 1959).
\(^{44}\) 45 Cal. 2d 546, 290 P.2d 544 (1955).
\(^{45}\) Blinn Lumber Co. v. County of Los Angeles, 216 Cal. 471, 14 P.2d 512 (1932).
the possessory interests of lessees of tax exempt, government owned property that was highly favorable to the lessees. In *De Luz* the court, in an opinion by Justice Traynor, overruled that decision. The overruling was not made prospective. The result was that "lessees were therefore required to pay both rentals equivalent to rentals of private property and taxes to which lessees of private property are not subject because the full value of private property is taxed to the lessor." Thereafter the legislature adopted a statute which gave the ruling in the *De Luz* case prospective effect only, by limiting its application to leases created, extended or renewed after the *De Luz* case.

The constitutionality of this statute came before the California court in *Forster Shipbuilding Co. v. County of Los Angeles*. After discussing the theory underlying the doctrine of prospective overruling, Justice Traynor, writing for the court, said: "We have hitherto recognized that the California Constitution permits an appellate court to apply an overruling decision prospectively only, even though it thereby temporarily preserves and applies a mistaken interpretation of the Constitution. . . . Such temporary application of the rule of an overruled case may be prescribed by appropriate legislation as well as by judicial decision, for the Legislature is no less competent than the court to evaluate the hardships involved and decide whether considerations of fairness and public policy warrant the granting of relief."

More recently a very similar problem confronted the Supreme Court of Nebraska, and a different answer was given. The issue was the validity of a conditional sales agreement against a claim of usury. The Nebraska court held that the 1959 Nebraska Installment Sales Act was unconstitutional, and that a contract made in conformity with it violated the Nebraska Installment Loan Act and was subject to its penalties. The penalties for usury included loss of principal as well as loss of interest, and the decision caused considerable concern in financial circles. Thereafter, a special session of the legislature adopted emergency legislation providing that whenever a statute containing provisions for penalties or forfeitures "is judicially determined to be unconstitutional, such judicial determination shall be given prospective effect only, and agreements en-

47 CAL. REV. & TAX. CODE § 107.1.
48 54 Cal. 2d 450, 353 P.2d 736 (1960).
49 Id. at 459, 353 P.2d at 741.
51 See, e.g., Time, Nov. 8, 1963, p. 76. *Contrae*, Hare v. General Contract Purchase Corp., 220 Ark. 601, 249 S.W.2d 973 (1952) where, in a similar situation, the Arkansas court made its ruling prospective.
tered into in accordance with such statutes prior to the date of the partic-
ticular decision holding the applicable statute unconstitutional shall be
fully valid and enforceable . . . .”\textsuperscript{52} The Nebraska court held this
 provision invalid upon the ground that the power and duty of the judicial
branch of the government to determine the validity of the constitution-
ality of legislation “necessarily includes the authority to determine what
effect if any an unconstitutional statute shall have upon the rights of
parties which may have been affected by it.”\textsuperscript{53}

Presumably the court that overrules a prior decision without making
its overruling prospective has made a conscious determination that its
ruling is to be retrospective. If it has, its judicial determination is over-
ridden by the subsequent contrary legislative action. Perhaps one who
is skeptical may be permitted to dissent from Chief Justice Traynor’s
assumption of equivalent legislative and judicial competence to evaluate
hardships and to weigh considerations of fairness and public policy. What
Professor Peck said with reference to a somewhat similar assumption
seems relevant. “[I]t ignores the legislative realities. . . .[It assumes
that] the legislature is really an assembly of philosopher kings, gathered
to consider the problems of the republic and to settle matters dispassion-
ately, for the good of society. It does, in fact, comb through old deci-
sions of the court to see which, if any, are getting out of adjustment with
current values. Legislators will do this even though much of their time
and attention in the short and hectic legislative sessions is taken by
representatives of pressure groups and lobbies. Moreover, though most
of them have had no legal training, they are able to understand, evaluate,
and select for revision or repeal those judicially developed principles
that are no longer productive of justice. And they can do this even though
the rules and their various exceptions are stated, frequently without
indicia of doubt, in the complicated, technical jargon of a learned pro-
fession.”\textsuperscript{54}

III

DISSENTING OPINIONS

During his twenty-five years on the California court Chief Justice
Traynor has written 156 dissenting opinions.\textsuperscript{55} The bar generally does

\textsuperscript{52} NEB. LAWS, Spec. Sess. 1963, ch. 6, at 85.
\textsuperscript{53} Davis v. General Motors Acceptance Corp., 176 Neb. 865, 127 N.W.2d 907, 912
(1964).
\textsuperscript{54} Peck, The Role of the Courts and Legislatures in the Reform of Tort Law, 48 MINN.
\textsuperscript{55} The chronological distribution of these dissenting opinions over Chief Justice
Traynor’s twenty-five years of judging is interesting. There were no dissents in his first two
years on the court, and there were none in 1956, in 1963, or in 1964. The period of heaviest
dissent came in 1942, 1943, and 1944 when he wrote a total of 43 dissenting opinions.
not like dissenting opinions. So strongly has the current of opposition sometimes run that in Louisiana from 1891 to 1921 the State constitution forbade the publication of dissenting or concurring opinions, and in Pennsylvania a statute in effect from 1845 to 1871 prohibited the publication of minority opinions. Dissenting opinions are disliked by the bar because they are thought to lessen public confidence in the courts, to add unnecessarily to the volume of published opinions, and to unsettle the law by keeping open questions which should have been authoritatively determined.

Judges do not share that view. Chief Justice Hughes has said: “Unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time.” And in 1951 Justice Jackson wrote: “While I recognized the annoyance to the Bar of dissenting and concurring opinions, I think they are the lesser of evils. A court opinion which puts out a misleading impression of unanimity by avoiding, or confusing, an underlying difference is a false beacon to the profession. Far better that the division be forthrightly exposed so that the profession will know on what narrow grounds the case rests and can form some estimate of how changed facts may affect alignment in a subsequent case. The attitude of the Bar toward the dissenting opinion is unrealistic. Indeed, if it was sound it would reflect adversely upon the legal profession, for it is tacitly based upon the assumption that only one outcome is possible in every case. It sets up an illusory goal of certainty, for the absence of dissent does not always indicate the absence of doubt. Judges give dissenting opinions a much higher rating, because they are conscious of their own doubts, and so are tolerant of the opposing views of their colleagues. They know that many cases are decided not because the judge is convinced of the ultimate correctness of the result he reaches but because the case must be disposed of.

Chief Justice Traynor has himself described the circumstances under which a judge should dissent: “If a judge merely deems his own view

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56 Brash, Chief Justice O'Niell and the Louisiana Civil Code—The Influence of His Dissents, 19 Tul. L. Rev. 436, 440 (1945). Apparently, the constitutional prohibition against publication of dissenting opinions did not inhibit Chief Justice O'Niell, for it is said that he dissented as frequently while it was in effect as he did after its repeal.

57 Pa. Laws 374 (1845). Simpson, Dissenting Opinions, 71 U. Pa. L. Rev. 205, 208 indicates this did not completely deter the judges of that court from dissenting. One or more judges registered his disagreement in 395 cases, some of which were officially reported in contravention of the statute.

58 Hughes, The Supreme Court of the United States 67 (1928).

preferable, and the establishment of some rule counts more than the rule itself, he should at most record his dissent in two words or preferably keep his silence. If he is convinced that the majority has so misapplied settled law or so erroneously devised a new rule as to foster a malignant growth of the law, he should at least record his dissent. Should he decide to set forth his reasons, he should do so with painstaking care. Above all, he should keep his opinion impersonal. No conscientious judge will undertake a dissent without first asking himself the searching question whether it is likely to serve the law by extracting from the shadows the problems left unstated and the theories that should eventually control. Reference to the majority opinion should be kept at a minimum, unless it serves as a time-saving device to indicate the relevant defects and gaps that compel the rationale of the dissent.  

When the issue is recurrent, a dissenter must decide whether to repeat his dissent or acquiesce in the majority holding. On this matter Chief Justice Traynor's ideas have changed. In five successive dissenting opinions he expressed his disagreement with the California view that the jury should be instructed to weigh inferences and rebuttable presumptions against opposing testimony. Later he said: "Like many another judge, I have had to learn to give up dissenting while holding fast to a conviction. Thus I still believe, though still against the odds, in a dissent of several years ago against the California rule that presumptions are evidence and as such can be weighed. I no longer believe that it serves any useful purpose to reiterate that dissent. It rests with the professors and practicing lawyers to revive it in commentary if they see fit, or to hasten its oblivion by criticism, or to let it wither away if they choose in the stillness of indifference."  

The impact of a dissenting opinion is difficult to measure. There are of course instances where a dissent is dramatically vindicated, and Chief Justice Traynor has had his share of those. On at least three occasions his dissenting views subsequently prevailed in the Supreme Court of the United States, and in other instances his own court subsequently adopted

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61 In conversation Justice Traynor has described this feat as "weighing a bushel of feathers against next Thursday." The problem is discussed in Malone, Contrasting Images of Torts—the Judicial Personality of Justice Traynor, 13 Stan. L. Rev. 779, 789-94 (1961).
62 In such a situation Chief Justice Traynor now concurs. See, e.g., Breidert v. Southern Pac. Co., 61 A.C. 718, 723, 394 P.2d 719, 725, 39 Cal. Rptr. 903, 909 (1964): "Although I adhere to the views set forth in my dissenting opinion in Bacich v. Board of Control, 23 Cal. 2d 343, 366-380, 144 P.2d 818, that case is the law of this state until it is overruled. I therefore concur in the judgment herein under the compulsion of the Bacich case."
63 First Unitarian Church of Los Angeles v. County of Los Angeles, 48 Cal. 2d 419, 443, 311 P.2d 508, 522 (Traynor dissenting), rev'd, 357 U.S. 545 (1958); Garmon v. San
the views that he expressed in dissent. But the full effect of dissents is not to be traced only in dramatic vindications. A dissent may effect the expansion or contraction of a legal doctrine, at home or abroad, and it may produce a legislative rather than a judicial response. It speaks to the future, but it becomes at once a part of the existing body of the law.

CONCLUSION

Rufus Choate, stating his ideal of the "best" judge, said: "In the first place, he should be profoundly learned in all of the learning of the law, and he must know how to use that learning." Chief Justice Traynor fully meets that requirement. The hallmark of his work is an unremitting search for workable standards of adjudication—what Professor Malone has called his "passion for order." It appears in his extra-curricular writings as well as in his opinions. Karl Llewellyn said of him, "Let me say that I think my brother Traynor's major worry, the finding of a pattern to tell reversible from nonreversible error, is probably a full generation ahead of him and me."

The aftermath of Cahan is a demonstration of what a judge and a court can do by way of articulating standards in a difficult area. The same insistent search for meaningful rules explains Chief Justice Traynor's leadership in the field of conflicts. It accounts for his willingness always to challenge the maxim, the easy phrase, to see whether it leads

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65 Eliot, Tradition and Individual Talent, in SELECTED ESSAYS OF T. S. ELIOT 5 (New ed. 1950): "The existing order is complete before the new work arrives; for order to persist after the supervision of novelty, the whole existing order must be, if ever so slightly, altered; and so the relations, proportions, values of each work of art toward the whole are readjusted; and this is conformity between the old and the new."


67 Malone, supra note 61.

or misleads. So he looks behind the notion of mutuality in res judicata and a *Bernhard* case results.90 “Attractive nuisance” and “last clear chance” are useful doctrines, but when the phrase becomes a substitute for thought, they too, come under careful scrutiny and analysis.90

Not all judges who have served for long periods could be displayed as exhibits in favor of security of judicial tenure. All of us know judges who are time servers, with no zeal for the job. If there once was fire, it has long since burnt out. “[A]bove all,” said the perceptive Italian, Pierro Calamandrei, “the drama of the judge is habit which, insidious as a disease, wears him down and discourages him so that finally he feels that passing on a man’s life or his honor has become an ordinary act of administration.”91 Whether the antidote is described as concern, or commitment, or as Calamandrei put it, a kind of “religious exaltation,” it is indispensable to greatness in a judge. It is because Chief Justice Traynor has never let judging become habit, and has never lost his driving zest for the law, that he has been for many years our number one judge.

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91 *Eulogy of Judges* 72 (1946). Calamandrei continues: “The judge who becomes accustomed to rendering justice is like the priest who becomes accustomed to saying mass. Fortunate indeed is that country priest who, approaching the altar with senile step, feels the same sacred turbulation in his breast which he felt as a young priest at his first mass. And happy is that magistrate who even unto the day of his retirement experiences the same religious exaltation in rendering judgment which made him tremble fifty years before, when as a young praetor he handed down his first decision.”