

Judicial Creativity and the Jurisprudence of Chief Justice Traynor

BY DONNA SCHUELE & SHOOHRAT ISAEV

Chief Justice Roger Traynor might have taken a bit of exception to the title of Ben Field's recently-published biography, *Activism in Pursuit of the Public Interest: The Jurisprudence of Chief Justice Roger J. Traynor*. As a law professor at Boalt Hall in the 1930s, Traynor was ever mindful of the charges that had been leveled at the anti-New Deal United States Supreme Court. Thus, with his appointment to the California Supreme Court in 1940, Traynor claimed to embrace not judicial "activism" but judicial "creativity." In doing so, Field asserts, Traynor launched a golden era for the Court, so that by the time he was elevated to Chief Justice in 1964 the state's highest court was reputed to be the most prestigious in the country.

While the stature of the Traynor Court is well known among jurists, lawyers and even law students, Field embarked on his biographical project believing that Traynor's career and contributions called out for more scholarly attention than they had previously received. He explains, "Justice Traynor is worth learning about not only because of the substantive reforms he initiated, but also because of his approach towards judging. He teaches us a great deal about judicial decision-making."

The publication of this book emerges out of a collaboration between UC Berkeley's Institute for Governmental Studies and the California Supreme Court Historical Society. As Dr. Harry Scheiber, a member of the Society's Board of Directors, explains in the Foreword, the Society has sought "to expand the scope of legal-history writing on California to embrace the interrelationships of law with society, with the processes of economic change, with politics and ideology and culture." *Activism in the Pursuit of the Public Interest* fulfills this goal admirably.

The model for Field's study is the classic text by Leonard Levy, *The Law of the Commonwealth and Chief Justice Shaw*. According to Field, Levy's work was "foundational" for his study. "I believe I asked better questions about the relationship between Traynor's innovative decisions and his political environment because of Levy."

In fact, Levy's and Field's volumes serve as interesting bookends for the history of the development of American law and jurisprudence. Levy focused on a pivotal Massachusetts state court judge in the early nineteenth century, Lemuel Shaw, to illustrate the development of common law doctrines, especially in the area of tort, at a time of increasing interdepend-



ence of the citizenry. In doing so, Levy showed us how Shaw's jurisprudential beliefs reflected his understanding of the need for the law to respond to that increasing interdependence.

Follow the movement of Americans westward and fast forward to the mid-twentieth century. Now it would be California and another influential state court judge, Roger Traynor, who would develop a jurisprudence to respond to modern forms of social and economic interdependence, where entrenched common law doctrines were proving inadequate to protect the rights of consumers and political minorities. And, like Lemuel Shaw, this chief justice would also achieve his reforms with a particular sensitivity to the larger environment in which his court operated.

In addition to judicial opinions, Field's biography relies on a variety of sources, including archives at Boalt Hall and Hastings College of the Law, casefiles housed at the State Archives, and the myriad publications that Traynor authored, first as a Ph.D. in political science, then as a law student and law professor, and later as a member of the Court.

Field also conducted interviews with colleagues of Traynor. These included Don Barrett, the senior staff attorney for the Court and a close friend of Traynor who, Field says, proved to be "an excellent source of information," and Herma Hill Kay, professor and former dean at Boalt Hall who served as Traynor's law clerk as a young lawyer. Regretting that so many of the people who worked with Traynor are now deceased, Field wishes that his study could have been informed by additional oral histories.

After recounting Traynor's early life and career, Field focuses on four different areas of case law development. With the anti-miscegenation case of *Perez v. Sharp*, 32 Cal.2d 711 (1948), Field transports us back to the world of race relations in the 1940s and the particularly complex racial and ethnic environment in California. In doing so, Field embeds Traynor's development of legal doctrine in the social setting of the times.

No controlling legal precedent supported Traynor's position that California's anti-miscegenation statute was unconstitutional. All courts, state and federal, that had considered the issue had upheld statutes against racial mixing. To overturn such a statute would certainly leave a court open to charges of judicial activism and encroachment on legislative prerogative.



Field's interview with Don Barrett reveals that he had advised Traynor to appeal to sweeping constitutional principles to defeat the statute. Traynor rejected that strategy. Instead, he employed a standard rational basis test but did so by relying on a variety of ostensibly neutral contemporary scientific and social scientific studies, especially Gunnar Myrdal's *An American Dilemma*.

In this way, Traynor avoided appearing activist but nevertheless reached a decision that carefully but creatively achieved justice. And he did so without setting off the sort of firestorm that one might have expected for the times. As Field demonstrates, notwithstanding the significant media attention focused on the case, the decision generated little public reaction and no more than subdued commentary from legal scholars.

Field's next chapters deal with Traynor's contributions to the development of law regarding divorce (*DeBergh v. DeBergh*, 39 Cal.2d 858 (1952)), police searches (*People v. Cahan*, 44 Cal.2d 434 (1955)), and products liability (*Escola v. Coca-Cola Bottling Co.*, 24 Cal.2d 453 (1944) and *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57 (1963)). As with his treatment of *Perez*, Field places each case in its social, political and/or economic context and demonstrates the ways in which Traynor moved the law away from sclerotic precedent and towards a position designed to accomplish broad justice without doing damage to the reputation of the California Supreme Court.

The Court's subsequent tumultuous history has not been lost on Field, especially when he undertakes to explain how Traynor and his form of activism avoided, in Field's words, the "self-inflicted wound" of the Bird Court. But, as Field ably demonstrates, Traynor accomplished much more than merely protecting the Court

Marshall F. McComb, Louis H. Burke, Mathew O. Tobriner, Roger J. Traynor, Stanley Mosk, Raymond L. Sullivan & Raymond E. Peters.

from charges of judicial activism. His understanding of the public interest recognized that judicial decision-making that remained loyal to outdated precedents undermined respect for the law and threatened democratic values far more than would judicial activism. Field astutely concludes that Traynor "attempted to replace the predictability of *stare decisis* with the predictability of coherent social policy." The result was an unprecedented period of prestige for the Golden State's highest court.

For anyone interested in the Traynor Court specifically or judicial process generally, *Activism in Pursuit of the Public Interest* is a must-read. Field's analysis is sharp and his writing clear. He provides just enough detail to place the cases in both social and legal context, allowing the reader to move quickly through the chapters. In the end, Field provides a historical context to today's politically charged but oh-so-routine cry of "judicial activism."

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