Introduction:

THE CALIFORNIA SUPREME COURT AND JUDICIAL LAWMAKING —

The Jurisprudence of the California Supreme Court

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This student symposium focuses on lawmaking by the California Supreme Court. One way to place these articles in context is to ask a fundamental question: Do judges make law? Are they lawmakers? Chief Justice Roberts in his confirmation hearings famously suggested they are not when he compared judges to umpires who call balls and strikes — but do not "legislate" the rules of baseball.[1]

A similar view was prevalent when Roger Traynor was appointed to the California Supreme Court in 1940. At that time legal formalism — the view that judges apply but do not make law, and that policy has no role in judicial decision making — was the norm in judicial decisions and mainstream legal thought.[2] Leaving aside whether this is an accurate description

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[1] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. On the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

[2] In 1939, the year before Traynor was appointed to the bench, for example, Warren Seavey, the leading torts scholar at Harvard Law School and Reporter for the *Restatement of Torts*, wrote approvingly of judges who recognized that their task was

of the historic (or current) role of courts in America (it is not), it was a view that Traynor challenged soon after taking the bench.

In the field of torts, formalism was linked to what might be called traditional tort theory and "the fundamental proposition . . . which link[ed] liability to fault."[3] In his famous 1944 concurring opinion in *Escola v. Coca Cola Bottling Co.*,[4] however, Traynor called on his Court not only to make new law, but to do so by adopting a strict liability rule in products liability cases — and to do this based on a policy that had recently been disdainfully dismissed by a leading torts scholar as "sentimental justice" unfit for a court of law.[5] Traynor wrote in *Escola* that a strict liability rule was justified in products cases in part because "the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."[6]

Nor did Traynor confine his view of judicial lawmaking to common law subjects such as torts. In 1948, for example, Traynor's opinion for the court in *Perez v. Sharp*[7] held California's anti-miscegenation statute unconstitutional (thus preceding the United States Supreme Court's similar holding by twenty years).[8] By 1956, Traynor wrote, it was

> widely, if not universally, accepted that there is no rational basis in any law for race discrimination, that it is an insidiously evil thing that deprives the community of the best of all its people as it deprives individuals and groups to give of their best.[9]

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to articulate "principles deduced from the cases[,] . . . to see the plan and pattern underlying the law and to make clear the paths which had been obscured by the undergrowth of illogical reasoning." *See* Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 Harv. L. Rev. 372, 375, 39 Colum. L. Rev. 20, 23, 48 Yale L.J. 390, 393 (1939) [hereinafter cited to Harv. L. Rev.]. In Seavey's view a judge's "opinions of policy" had no place in this process. *See id*. at 373.

3 Ezra Ripley Thayer, *Liability Without Fault*, 29 Harv. L. Rev. 801, 815 (1916); *see also* Seavey, *supra* note 2, at 375 (noting the policy of no liability for non-negligent conduct).

4 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

5 Seavey, *supra* note 2 at 373.

6 *Escola*, 150 P.2d at 441.

7 198 P.2d 17 (Cal. 1948).

8 *See* Loving v. Virginia, 388 U.S. 1 (1967).

9 Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. Ill. L. Forum 230, 237.

Judge Richard Posner has written of norms that exist within the community of judges. Most judges, in his view, "derive considerable intrinsic satisfaction from their work and want to be able to regard themselves and be regarded by others as good judges,"[10] And to be regarded "as a good judge requires conformity to the accepted norms of judging."[11]

In judging, as in art, however, "norms are contestable,"[12] and "[r]apid norm shifts are possible . . . , because the products of these activities cannot be evaluated objectively."[13] In law it is the innovative judges who "challenge the accepted standards of their art, . . . [and these] innovators have the greater influence on the evolution of their field."[14] Posner cites Holmes, Brandeis, Cardozo, and Hand as "examples of judges who succeeded by their example in altering the norms of opinion writing."[15] Justice Traynor could be added to this list. By his example and through his extrajudicial writings, Traynor also altered the norms of opinion writing and judicial decision making.

In a series of articles beginning in 1956, Traynor articulated the jurisprudential perspective that would guide his Court over the next decades. Stated simply, Traynor's view was that courts are lawmakers and policy does — and should — shape their lawmaking. Thus, Traynor wrote, "Courts have a creative job to do when they find that a rule has lost touch with reality and should be abandoned or reformulated to meet new conditions and new moral values."[16] If this perspective sounds familiar it is because of its similarity to Judge Richard Posner's legal pragmatism.[17]

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[10] Richard A. Posner, How Judges Think 62 (2008).

[11] *Id*. at 61.

[12] *Id*. at 63.

[13] *Id*. at 64.

[14] *Id*. at 12–13.

[15] *Id*. at 63.

[16] Traynor, *supra* note 9, at 232. This comes with the qualification that in constitutional matters judges should generally — but not always — defer to legislative judgments. *Id*. at 241.

[17] Judges, Posner writes, "are rulemakers as well as rule appliers." In a particular case, "[a]n appellate judge has to decide . . . whether to apply an old rule unmodified, modify and apply the old rule, or create and apply a new one." Richard A. Posner, The Problematics of Moral and Legal Theory 248–59 (1999). In this process the goal is to "mak[e] the choice that will produce the best results." *Id*. at 249.

This jurisprudential perspective also has a distinguished pedigree. As I have recently explained, early incarnations of this view can be found in the works of four giants in American law: Justice Oliver Wendell Holmes, Judge — later Justice — Benjamin Cardozo, and the Legal Realists Leon Green and Karl Llewellyn.[18]

Following Traynor's lead, the California Supreme Court became the most innovative[19] and influential[20] state supreme court in the nation — and continues to be so to this day. Four examples illustrate "Traynor-style" lawmaking by the California Supreme Court. The first, *Greenmen v. Yuba Power Products, Inc.*, is a 1963 decision in which Traynor, in an opinion for a unanimous Court, wrote his *Escola* strict liability proposal and policies into California Law.[21] Based on these policies, the California Supreme Court, with little hesitation, then quickly extended strict liability beyond manufacturers to include retailers,[22] wholesalers,[23] and lessors.[24] These rulings, which courts across the nation quickly followed, represented, according to Prosser, "the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts."[25]

The second and third examples also involve common law subjects — the tort doctrines of contributory (and comparative) negligence and assumption of risk. Each involves lawmaking that occurred after Traynor's

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[18] *See* Edmund Ursin, *Holmes, Cardozo, and the Legal Realists: Early Incarnations of Legal Pragmatism and Enterprise Liability,* 50 San Diego L. Rev. 537 (2013). *See also* Edmund Ursin, *How* Great *Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial lawmaking*, 57 Buff. L. Rev. 1267 (2009).

[19] *See* Grant Gilmore, The Death of Contract 91 (1974).

[20] Measured by decisions that have been "followed," as that term is employed by Shepard's Citations Service, "over the course of several decades, the California Supreme Court has been the most followed state high court, and that trend continues." Jake Dear & Edward W. Jessen, "*Followed Rates" and the Leading State Cases, 1940–2005*, 41 U.C. Davis L. Rev. 683, 683, 710 (2007). Five of the six *most* followed of the "most followed" decisions are tort decisions rendered since 1960. *See id*. at 708–09.

[21] *See* 377 P.2d 897, 900–01 (Cal. 1963).

[22] *See* Vandermark v. Ford Motor Co., 391 P. 2d 168, 171–72 (Cal. 1964).

[23] *See* Canifax v. Hercules Powder Co., 46 Cal. Rptr. 552, 557 (Ct. App. 1965).

[24] *See* Price v. Shell Oil Co., 466 P. 2d 722, 723, 726–27 (Cal. 1970).

[25] William L. Prosser, Handbook of the Law of Torts § 97, at 654 (4th ed. 1971).

retirement, in one case by the still-liberal California Supreme Court, in the other by a Court dominated by conservative justices.

The contributory negligence rule, which as late as the 1960s was the law in most states, deprived an injured plaintiff of recovery from a negligent defendant if the plaintiff also had been negligent. The harsh effect of this rule had long been apparent.[26] It throws the entire loss on an injured party, even though he was only slightly negligent, and relieves a negligent defendant of liability however much he may have contributed to the injury. In contrast, a rule of comparative negligence apportions damages according to the relative negligence of the two parties.

Nevertheless, courts had consistently refused to adopt the comparative negligence principle, despite the fact that few disinterested observers had defended contributory negligence on the merits. Why did courts refuse to institute this change? The answer is that the judiciary viewed this reform as beyond their competence, as inappropriate to their institutional role. In *Maki v. Frelk*,[27] decided in 1968, for example, the Illinois Supreme Court explained "that such a far-reaching change, if desirable, should be made by the legislature rather than by the court."[28]

In 1975, five years after Traynor's retirement, however, the California Supreme Court in *Li v. Yellow Cab Co. of California* abolished the doctrine of contributory negligence and adopted a system of pure comparative negligence.[29] After *Li*, plaintiff negligence no longer completely bars recovery in negligence suits; rather, damages are only "diminished in proportion to the amount of negligence attributable to the person recovering."[30]

Li also had a second ruling, this one involving the doctrine of assumption of risk. Under this doctrine a person who voluntarily encountered a specific known and appreciated risk (whether reasonably or unreasonably)

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[26] *See*, *e.g.*, 2 Fowler V. Harper & Fleming James, Jr., The Law of Torts 1193–1209, 1236–41 (1956).

[27] 239 N.E. 2d 445 (Ill. 1968).

[28] *Id.* at 447.

[29] 532 P.2d 1226 (Cal. 1975). *See* Edmund Ursin, *Judicial Creativity and Tort Law*, 49 Geo. Wash. L. Rev. 229, 253–59 (1981).

[30] *Li*, 532 P.2d at 1243.

could not recover when injured by a negligent defendant. *Li* held that the defense of assumption of risk was merged into the general scheme of assessment of liability in proportion to fault in instances in which the plaintiff unreasonably encountered a specific known risk created by a defendant's negligence.[31] Thus it appeared, oddly enough, that a non-negligent plaintiff might still be totally barred from recovery.

In its 1992 *Knight v. Jewett* decision,[32] however, the now-conservative Court, in a plurality opinion by then Justice Ronald George, rewrote the law, effectively abolishing the traditional defense of assumption of risk.[33] At the same time, however, the Court also created a policy-based new doctrine favorable to defendants who are participants in active sports. As now Chief Justice George later explained in an opinion for the majority of the Court, to "impose liability on a coparticipant for 'normal energetic conduct' while playing — even careless conduct — could chill vigorous participation in the sport" and could "alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity."[34] As "a matter of policy, it would not be appropriate to recognize a duty of care when to do so would require that an integral part of the sport be abandoned, or would discourage vigorous participation in sporting events."[35] Accordingly, the Court created a limited-duty rule: "[C]oparticipants breach a duty of care to each other only if they 'intentionally injure[] another player or engage[] in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.' "[36]

For our fourth example we return to constitutional law and another opinion by Chief Justice George for the majority of the Court. In the widely known *In re Marriage Cases,* the Court held that California's

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[31] *Id*. at 1240.

[32] 834 P. 2d 696 (Cal. 1992). The views expressed in George's plurality *Knight* opinion were subsequently embraced by a majority of the Court. *See* Kahn v. East Side Union High School District, 75 P. 3d 30, 38 (Cal. 2003) (George, C.J.).

[33] *Knight*, 834 P. 2d at 714 (Kennard, J., dissenting). To maintain continuity with its *Li* decision, however, the *Knight* Court retained the terminology of assumption of risk. *See* Edmund Ursin & John N. Carter, *Clarifying Duty: California's No-Duty for Sports Regime*, 45 San Diego L. Rev. 383 (2008).

[34] *Kahn,* 75 P.3d at 38.

[35] *Id*.

[36] *Id*. at 38–39 (quoting *Knight*, 834 P.2d at 711).

limitation of marriage to a union of a man and a woman violated the equal protection provision of the California Constitution.[37] Like Traynor's *Perez* decision, *In re Marriage Cases* was decided by a Court that split 4–3. Firmly grounding his opinion in *Perez*, George wrote, "The decision in *Perez,* although rendered by a deeply divided court, is a judicial opinion whose legitimacy and constitutional soundness are by now universally recognized."[38] Only time will tell if *In re Marriage Cases* will be similarly regarded, but the spate of federal district court and courts of appeals decisions[39] overturning bans on same-sex marriage — including California's Proposition 8 which had (temporarily as it turns out) reinstated a ban on same-sex marriage[40] — suggests that it might well be seen as equally prescient.

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[37] 183 P.3d 384 (Cal. 2008). The Court also — and importantly — held that the strict standard of judicial review was applicable because

> (1) the statutes in question properly must be understood as classifying or discriminating on the basis of sexual orientation, a characteristic that we conclude represents — like gender, race, and religion — a constitutionally suspect basis upon which to impose differential treatment, and (2) the differential treatment at issue impinges upon a same-sex couple's fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple. *Id.* at 401.

Based on this, the Court wrote that to uphold the differential treatment of opposite-sex and same-sex unions, the state had to establish "(1) that the state interest intended to be served by the differential treatment not only is a constitutionally legitimate interest, but is a *compelling* state interest, and (2) that the differential treatment not only is reasonably related to but is *necessary* to serve that compelling state interest." *Id.* Applying this standard, the Court

> conclude[d] that the purpose underlying differential treatment of opposite-sex and same-sex couples embodied in California's current marriage statutes — the interest in retaining the traditional and well-established definition of marriage — cannot properly be viewed as a *compelling* state interest for purposes of the equal protection clause, or as *necessary* to serve such an interest. *Id.*

[38] *Id*. at 399.

[39] *See, e.g.,* Baskin v. Bogan, Nos. 14-2386 to 14-2388, *and* Wolf v. Walker, No. 2526 (7th Cir. September 4, 2014) (Posner, J.) (holding Indiana and Wisconsin bans on same-sex marriage unconstitutional).

[40] After the California Supreme Court held that California's limitation of marriage to a union of a man and a woman violated the Equal Protection Clause of the California Constitution, California voters approved Proposition 8, a ballot initiative

So for the past seven decades the California Supreme Court — whatever its ideological makeup — has been a lawmaking Court with policy at the heart of its lawmaking. It has embraced the lawmaking role that Traynor articulated in a series of articles in the 1950s and 1960s when he wrote that "judicial responsibility connotes . . . the recurring formulation of new roles to supplement or displace the old [and the] choice of one policy over another."[41] Guided by this jurisprudential view, the Court became the most influential state supreme court in the nation.

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The three articles in this symposium focus on different aspects of the court's lawmaking. In the first article, Evan Youngstrom notes that for several decades the California Supreme Court has been the most influential state supreme court in the nation and asks why the Court has been so influential. He concludes that this influence can be attributed to the Court's rejection of legal formalism and its embrace of a policy-based lawmaking role. Then, after discussing examples of the Court's innovative decisions, he explains why this type of judicial lawmaking is appropriate for a state supreme court.

Next, Aaron Schu asks whether Traynor should be considered to be an "activist" judge. He notes the definition of an activist judge offered by Ben

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amending the California Constitution to define marriage as a union between a man and a woman. *See* Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (upholding Proposition 8). Same-sex couples then successfully challenged in Federal District Court the constitutionality of Proposition 8 under the Due Process and Equal Protection Clauses of the Federal Constitution. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal 2010).

California officials had refused to defend the law, but the initiative's official proponents were allowed to intervene to do so. On appeal, the Ninth Circuit affirmed the District Court's decision. *See* Perry v. Brown, 671 F.2d 1052, 1095) (9th Cir. 2012). In *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), the United States Supreme Court held that the initiative's proponents lacked standing, vacated the judgment of the Ninth Circuit, and remanded the case with instructions to dismiss the appeal. The District Court's 2010 holding went into effect in June 2013 when the District Court's previous stay was lifted.

[41] R.J. Traynor, *The Courts: Interweavers in the Reformation of Law*, 32 Sask. L. Rev. 201, 213 (1967).

Field, author of a book on Traynor,[42] as one who "explicitly departs from legal precedent in favor of his or her sense of justice or social values."[43] This would include a judge's decisions involving common law subjects or statutory interpretation; and, indeed, two of Field's principal chapters focus on just such Traynor opinions. In contrast, Judge Richard Posner defines an activist judge as one who "enlarg[es] judicial power at the expense of the power of other branches of government,"[44] as in holding legislative or executive action unconstitutional. Decisions in private law subjects, under this definition, would not be activist even if they departed from precedent. In examining Traynor's opinions Schu concludes that, under Posner's definition, Traynor, like Holmes, should be classified as a "mixed" activist/restrained judge, activist in some constitutional areas, but generally restrained.

Then, in the third article Marissa Marxen examines Chief Justice Traynor's approach to statutory interpretation. She begins by explaining different theoretical approaches put forth by academics and others, including "intentionalism," "purposivism," "textualism," and "dynamic interpretation." In light of these approaches, she examines notable Traynor opinions involving statutory interpretation. She concludes that Traynor employed a blend of purposivism and dynamic interpretation in these cases.

The articles in this symposium present three perspectives on the judicial lawmaking of the California Supreme Court, with two of them focusing specifically on the work of Chief Justice Roger Traynor, one of the great judges in American history.[45] Judge Posner has written that he is "struck by how unrealistic are the conceptions of the judge held by most people,

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[42] *See* Ben Field, Activism in Pursuit of the Public Interest: The Jurisprudence of Chief Justice Roger J. Traynor (2003).

[43] Aaron J. Schu, *Justice Traynor's "Activist" Jurisprudence: Field and Posner Revisited*, 9 Cal. Legal Hist. 423, 427 (2014), (citing Field, *supra* note 42, at 121).

[44] *Id.* at 431 (citing Richard A. Posner, How Judges Think 287 (2008).

[45] *See* Henry J. Friendly, Tribute, *Ablest Judge of His Generation*, 71 Cal. L. Rev. 1039, 1039 (1986). In addition to Traynor, Friendly at various times identified only Holmes, Brandeis, Cardozo, Hand, Harlan Fisk Stone, Frankfurter, Robert Jackson, Hugo Black, and Traynor as great. Traynor "was the only contemporary on Friendly's list." David M. Dorsen, Henry Friendly: Greatest Judge of his Era 122 (2012).

including practical lawyers and eminent law professors who have never been judges — and even some judges."[46] If the articles in this symposium have shed some light on judges and judicial lawmaking and suggested new areas for research,[47] they have done a valuable service.

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EDITOR'S NOTE:

Among the goals of the California Supreme Court Historical Society and its journal are to encourage the study of California legal history and give exposure to new research in the field. Publication of the following "Student Symposium" furthers both of these goals.

Professor Edmund Ursin, who offers a course each year in Judicial Lawmaking at the University of San Diego School of Law, graciously agreed to propose to his Spring 2014 students that they consider writing on California aspects of the topic, with the possibility that the most promising papers might be accepted by the journal. From those provided by Professor Ursin, I have selected the three that appear on the following pages as a student symposium on the California Supreme Court and judicial lawmaking.

— SELMA MOIDEL SMITH

[46] Posner, *supra* note 10, at 2.

[47] For example, in addition to the Traynor decisions involving statutory interpretation presented by Marxen, other Traynor decisions illustrate further aspects of Traynor's creative use of statutes. *See. e.g.*, Clinkscales v. Carver, 136 P.2d 777, 778 (Cal. 1943) (violation of criminal statute "does not create civil liability . . . . The significance of the statute in a civil suit for negligence lies in its formulation of a standard of conduct that the court [chooses to] adopt[] in the determination of such liability.").