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In Memoriam

HONORABLE ROGER J. TRAYNOR

Associate Justice of the Supreme Court of the State of California 1940-1964;
Chief Justice of the Supreme Court of the State of California 1964-1970.

The Supreme Court of California met in its courtroom, State Building, San Francisco, California, December 7, 1983.

Present: Chief Justice Bird, presiding, Associate Justices Mosk, Kaus, Broussard, Reynoso and Grodin, and Retired Associate Justices Burke, Sullivan and Richardson. Gill, Clerk; Williams and Rodgers, Bailiffs.

CHIEF JUSTICE BIRD: We meet this 7th day of December 1983 to pay tribute to the memory of Roger J. Traynor, who served with great distinction as an associate justice of the court from 1940 to 1964 and as Chief Justice from September 1, 1964 to February 1, 1970.

On behalf of the court, I wish to welcome Justice Traynor's son Michael here today. We also wish to welcome back to our court two of our colleagues—Justice Frank K. Richardson, who recently retired, and Justice Louis H. Burke, who has been sitting in the Superior Court of Marin County.

First, we will hear from Justice Stanley Mosk, who will speak on behalf of the court.

JUSTICE MOSK: Chief Justice, my colleagues, members of the bench and bar, friends of Roger Traynor:

Judge Henry J. Friendly of the Second Circuit put the theme of this occasion most succinctly: "For the thirty years of his service on the Supreme Court of California, from 1940 to 1970, Roger Traynor was the ablest judge of his generation in the United States." Friendly added that "the relentless logical march of some of his great opinions reminds one of Brandeis."

I would disagree only to the extent of equating Traynor opinions with no others. His were unique: they were cogent, irrefutable, and most importantly, just. And his opinions could, and can still, be readily comprehended; he never, even in his most trail-blazing productions, succumbed to the temptation to write a law review article in the guise of a judicial opinion.

A long time friend of Roger Traynor and of mine, Walter V. Schaefer, retired Chief Justice of Illinois, observed that Roger Traynor's work had two

fundamental characteristics. The first was precision of thought, which he described as a passion for order. The second was an abiding concern for the impact of a legal doctrine upon the men, women and children to whom it applied. His style, in achieving those two basics was one of modest mastery, an accurate sense of the relevance of legal doctrines upon real live human beings.

During the three decades Roger Traynor served the people of California on their Supreme Court, he was revealed as a brilliant legal innovator, one never apprehensive of being known as an activist—as that term is often opprobriously used. He was frequently years ahead of the United States Supreme Court and of other state courts, particularly in developing law designed to protect the individual whose home was invaded by authorities or whose health was impaired by harmful products. His prevailing concern was to make our system of justice responsive to the rights of the individual in an urban and mechanized society.

Justice Traynor did not shy away from judicial lawmaking, though he indulged in it only when necessary to chart the pattern of the law, never on an ad hoc basis. He often quoted Professor Davis' reminder that "the English common law was created, not found." Justice Traynor insisted that human beings are not as automatically programmed as machines, that "even the most carefully drafted and comprehensive statutes of one generation decline into the antiquated texts of the next, for they can never anticipate the boundless capacity of seemingly well-regulated persons for startling entanglements." Thus, he reasoned, "Barring those exceptional situations where the entrenched precedent has engendered so much reliance that its liquidation would do more harm than good, a court should be free to overrule such a precedent despite legislative inaction."

What impressed me particularly about Roger Traynor was his perpetual capacity for growth. Neither his feet nor his mind were set in concrete. As he once wrote, "However much the wisdom of the ages deserves to survive, the foibles of the ages do not." This was a characteristic of the ultimate judge—a willingness to be convinced. The justice who had written for a majority of the court in *People v. Gonzales* in 1942 that "The use of evidence obtained through an illegal search and seizure . . . does not violate due process of law for it does not affect the fairness or impartiality of the trial" became the justice who adapted the federal *Wolf v. Colorado* exclusionary rule to California, in the celebrated *Cahan* case in 1955, six years before the United States Supreme Court in *Mapp v. Ohio* declared that the federal exclusionary rule applied as well to state prosecutions.

In countless fields, Justice Traynor was preeminent. Among them is that esoteric cult of law professors and judges with an almost eerie fascination for conflicts of law. Roger Traynor was a charter member of that cult, along with David Cavers, Albert Ehrenzweig, Willis Reese, Brainerd Currie. Unfortunately few conflicts cases found their way to the Supreme Court during the

Traynor years, so to a large extent his expertise was unused. But his interest in the subject, manifested by law school lectures, never waned.

All of us learned much from Roger Traynor on the right of all persons to be treated as individuals, not as cogs in an industrial machine, or as mere statistical fractions of a racial or religious entity. In *Perez v. Sharp*, long before the United States Supreme Court did so, he struck down California's miscegenation ban as being a spurious reflection upon hypothetical racial disabilities. He wrote: "Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains." In protecting the institution of marriage, he also eliminated the defense of recrimination in divorce proceedings. In *DeBurgh*, he wrote that "[i]t is a degradation of marriage and a frustration of its purposes when the courts use it as a device for punishment."

It is in the field of torts that the Traynor impact was most celebrated. His concurring opinion in *Escola* has been recognized as a classic: "[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." The risk of injury, he wrote, can more readily be assumed by the manufacturer, than by the consumer, since the manufacturer can insure against the damage and distribute the cost among the public as an expense of doing business. In *Greenman* his views prevailed and thereafter the California Supreme Court remained in the forefront of the nation's judiciary in employing strict products liability.

By mentioning a few of the more than half-thousand Traynor opinions, I commit a slight upon countless other judicial gems. Fortunately for students of law, there have been significant reviews of his opinions, and the future will undoubtedly give birth to more. There is hardly a field of law in which his influence has not been felt. But his underlying philosophy of the law, and his inspirational impact, is more vividly revealed in the prolific supply of Traynor law review articles.

Roger Traynor would be the last person to declare that his work has been completed. Indeed, he once declared: "The law will never be built in a day, and with luck it will never be finished." No one can deny he built a sturdy foundation that will endure and continue in perpetuity to serve all who seek to construct a solid edifice of justice. He brought luster to this court. During and since the Traynor era we have been basking in the preeminence he earned for this institution.

CHIEF JUSTICE BIRD: Thank you, Justice Mosk. We are pleased to have with us today retired Associate Justice Louis H. Burke, who was a long-time colleague of Chief Justice Traynor.

JUSTICE BURKE: The Honorable Chief Justice, Associate Justices of the Court, family and friends of the deceased Roger Traynor and members of the Supreme Court staff and guests, the death of Chief Justice Roger J. Traynor of the California Supreme Court brought to a close an unparalleled career in the law. In fact, in the award of its gold medal in 1967 the American Bar Association acknowledged him to be one of the great judges in the United States history. His retirement in 1970 ended 30 years of dedicated service on the California Supreme Court, and it was my privilege to serve under him as an Associate Justice for his 6 years as Chief Justice.

Roger Traynor was not only a great jurist, but a most delightful colleague and associate. He had a dry sense of humor and an infectious and very hearty laugh. He loved good music and good food. Matt Tobriner and I would go to lunch with Roger several times a week and we were always amazed to see him enjoy a heavy noon meal of meat and potatoes while we dawdled with salad or sandwich. Roger was the son of a miner and had grown up in a mining town in Utah. He was accustomed to hard labor and for a time worked as a drayman hauling supplies behind a husky team of horses or mules. On rare occasions we would succeed in having him regale us with stories of his boyhood in the rugged mining country. His hearty appetite stayed with him, but to the wonder of his colleagues, he always remained trim and in top shape.

His life touched mine on several occasions with long periods of time intervening. We were both admitted to practice law in the same year 1927, Roger having graduated from the University of California, Phi Beta Kappa in 1923 and with his law degree and Ph.D in political science in 1927. After joining the law faculty at Boalt Hall in Berkeley, he offered a course in Taxation. As one of his distinguished students, later himself a professor of law at the university, Adrian A. Kragen, said of him, "Professor Traynor made his course (in Taxation) a rigorous and inspiring experience. The students learned not only the law, but obtained an understanding of the basis of and defects of the law, and what could and should be done to remedy them. Within a very few years Professor Traynor was regarded as one of the leading tax scholars in the country and he served both the United States Treasury Department and the California Board of Equalization and Franchise Tax Commissioner as a consultant. His work in California tax matters resulted in the Sales and Use Tax Acts (of which he was the principal author) and the Bank and Corporation Tax Act which have been the major sources of revenue for the state since their enactment. The so-called In Lieu Tax Act returned to local government tax bases the properties of public utilities, thus substantially broadening the tax base of those agencies, and shortly after this was done a court case resulted attacking the methods of assessment. Professor Traynor was retained to defend the assessments and, as General Counsel of the League of California Cities, it was my duty to render whatever assistance I could. I can remember vividly meeting with Roger while he prepared Mr. A. G. Mott, the head of the valuation division, for an expected rigorous cross-examination. It was Traynor's position that the mental processes

of the assessor could not be the subject of inquiry on matters of judgment. Professor Traynor was convinced that the extremely complex job of establishing values of each item of utility property, pole by pole and wire by wire, for the many overlapping taxing jurisdictions had been conscientiously and competently done and should be upheld. They were.

Some time in the late 1940's a barrio priest approached one of my then law partners, Dan Marshall, highly indignant because, as he explained, the county clerk had refused to issue a marriage license to "one of his barrio children." Admittedly, it was an interracial marriage proscribed by law, but the little foreign born priest could not understand why in this cradle of freedom people of mixed races were precluded from marrying. Dan took this case entirely on his own to the Supreme Court of California, and it was Justice Traynor who in 1948 wrote the opinion declaring unconstitutional the prohibitions against interracial marriages. (*Perez v. Sharp*, 32 Cal.2d 711.) Years later the United States Supreme Court followed suit.

After 10 years on the superior court bench and 3 years on the Court of Appeal, I was appointed to the Supreme Court and Justice Traynor had been named Chief Justice.

Early on in my service on the Court, the Chief Justice asked me into his chambers to review a dissent I was writing. In his calm and kindly manner, he counseled against some of the rhetoric and vituperation I had employed. He said there was no place in an opinion for such tactics and indulging in personalities only diminished the strength of the dissent and obscured its logic.

It was interesting to read of Mr. Peter Anderson's remembrance of Justice Traynor in the California Law Review of July 1983 which was dedicated to the justice. Mr. Anderson was his law clerk from 1951 to 1953 and said in commenting on the frailties of law clerks: "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 regarding the faulty reasoning process of the beknighted 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 (Anderson and Don Barrett were driving the justice across the Bay Bridge to San Francisco each day) that personal attacks upon one holding an opposing view tellingly revealed one's inability otherwise to refute the argument."

Mr. Anderson mentioned that it was tacitly understood that either Don Barrett or he would always do the driving in their daily commutes to and from San Francisco lest the justice, while musing over some fine point of law, overlook some worldly traffic problem.

His colleagues on the court had also noted that at times Roger, when preoccupied with weighty legal matters, resembled the mythical "absent-minded professor." The Court was sitting in Los Angeles on one occasion, and as the justices were awaiting the down elevator following a morning session listening to heavy oral argument, a stunning blond young lady joined the waiting group and greeted the Chief with a winning smile. Roger extended his hand and with his shy smile said, "How do you do? Haven't seen you for a long time." This brought a raucous laugh from the rest of us since the young lady was the court reporter who, seated directly below and in front of the bench, had stenotyped the morning's proceedings. Handsome as she was, I'm certain Roger was the only male in the courtroom who had failed to notice her.

Anderson stated "Early in my tenure I submitted a draft of an opinion with a passage surmounting a most difficult point, but blandly stating the desired conclusion and briskly moving on to the next issue. The draft came back with the comment that 'pole-vaulting' was impermissible—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.'"

Justice Traynor was a master craftsman with words and used them much as a skilled surgeon would use his instruments. He would automatically edit any legal writing placed before him for review; even his wife's grocery lists, it was said. I remember a session I had with him when painstakingly he struck out "while" in three places and substituted "although" in my draft of an opinion. I have never used the word "while" since without wondering whether it should have been "although."

Donald P. Barrett, who joined Justice Traynor's staff in 1943, was his senior attorney from 1949 until the justice's retirement in 1970. He continued to serve as principal attorney for the Court until his own retirement in 1981. He wrote of Justice Traynor in the law review to which I have previously referred, "He was always alert to detect cant, hypocrisy or pettifogging. He had 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 a fierce observation 'Ain't law wonderful.'"

It was a favorite comment of his, to be uttered time and time again during the Wednesday morning conferences of the justices when a faulty argument failed to support the asserted conclusion. The comment was always followed by his explosive, hearty laugh.

I learned of Justice Traynor's national reputation among leading judges and lawyers through contacts with them in committee affairs of such national agencies as the American Bar Association, the Institute of Judicial Administration, and the American Judicature Society. As Presiding Judge for four terms of the Los Angeles Superior Court, known as the largest trial court in the country, I

was called on to serve in a number of capacities with the Division of Judicial Administration of the American Bar Association, the Commission for the Revision of the Standards of Judicial Administration, the National Center for State Courts, and Mr. Justice Tom Clark's Joint Committee for the Effective Administration of Justice, which led to the formation of the National College of the Judiciary.

In these circles we frequently discussed Justice Traynor, and it became obvious that he was universally regarded as the ablest jurist in the entire country. Another name, highly revered among lawyers and judges, was that of Walter B. Schaefer of the Supreme Court of Illinois. Both judges had served on the faculty of the Appellate Judges Seminar in New York University Law School, where for a decade they met for two weeks each year with 20 or 25 judges in the top state courts and Federal Courts of Appeal. They likewise served on the Council of the American Law Institute and became close friends. It is highly significant, therefore, that Justice Schaefer said of him, "Even the most distinguished of our law professors are regarded as authorities in only one or possibly two areas of the law. Not so with Roger Traynor. His opinions and his scholarly writings ranged across the whole spectrum of the law. And he was not only at home in all fields of the law; he was an acknowledged leader in every field that he touched. There have been many scholarly analyses of his work—to me, (however it may be to others), his work seemed always to be marked by two characteristics. The first was precision of thought—what was described by Professor Wex Malone as 'a passion for order.' The second was a deep concern for the impact of a legal doctrine upon the lives of the men, women and children to whom it applied. In whatever field of law he wrote, his opinions showed that he had squarely faced the problems of the case, cut through the facts and tendered his solution. His style was one of modest mastery, stemming from a knowledge of the roots of the legal doctrines and a lively sense of the relevance of these doctrines to present conditions—That Roger Traynor was also a judge's judge is obvious from the frequent citation of his opinions, a Traynor opinion is always sound currency, always to be reckoned with." Justice Schaefer closed his comments, which appeared in the memorial law review issue to which I have referred, "More than twenty years have passed since 1961, when I first expressed my opinion that Roger Traynor had been for many years the nation's number one state court judge. Five years later I removed the state court qualification. Nothing has happened in the years since then to alter that opinion. 'The old order changeth, yielding place to new.' There were great judges before Roger Traynor and there will be great judges in the years ahead. But the standard that he set will remain an ideal for all judges."

Henry J. Friendly, Senior Judge, United States Court of Appeals for the 2d Circuit, said of Justice Traynor, "For the thirty years of his service on the Supreme Court of California, 1940 to 1970, Roger Traynor was the ablest judge of his generation in the United States. I say this without hesitation, qualification, limitation or fear of successful contradiction. Justices of the

United States Supreme Court, of course, were able to and did effect more dramatic or important changes in our institutions, notably by applying most of the Bill of Rights to the states and enforcing the equal protection clause of the Fourteenth Amendment so as to strike down segregation and malapportionment, but no other judge of his generation matched Traynor's combination of comprehensive scholarship, sense for the 'right' result, craftsmanship, and versatility. He illuminated and modernized every field of law that he touched, and, in the course of his long judicial service he touched almost all."

Chief Justice Warren E. Burger said of him "During his thirty years as a member of that Court and the last six as its Chief Justice, Justice Traynor was a prominent force in shaping that Court and its emergence as a leader among state courts.—He was instrumental in formulating the Code of Judicial Conduct adopted by the American Bar Association in 1972. Under Justice Traynor's guidance the original Canons of Judicial Ethics which had remained in place for some fifty years were replaced by a new Code, remarkable for its perceptiveness, clarity and brevity. While devoting himself to the refinement of the Standards of Judicial Ethics, Justice Traynor displayed a constant concern for effective judicial administration."

Although Justice Traynor was considered an innovator, he had a great respect for precedent. He believed that if changes were necessary to meet existing conditions in any field of law, such changes should take place on a step-by-step basis and over a period of years to preserve stability and to allow time for adjustment. Legal scholars studying his decisions can trace the evolution of his ideas through a series of opinions interspersed at times by as many as ten years, such was his concern for the careful development of the law.

For me, Roger Traynor down through the years filled the dual role of great jurist and inspiring and wonderful friend.

CHIEF JUSTICE BIRD: Thank you, Justice Burke. Mr. Robert Seligson of the State Bar of California will speak next.

MR. SELIGSON: Thank you your honor. May it please the court, members of the Traynor family and friends, it is a great honor to appear today as a member of and on behalf of the Bar of this State to pay tribute to the memory of one of the greatest judges of this or indeed any court, our beloved former Chief Justice, the Honorable Roger J. Traynor. If one were to search for the ideal appellate judge, I believe that the search might very well begin and end with Justice Traynor; for indeed he possessed all of the qualities of the perfect judge. Impartiality, integrity, humaneness, independence, collegiality, indefatigability, humility, scholarship, courage, the ability to write scintillating prose, a sense of tradition, a view to the future, a concern for the administration of justice—Roger Traynor possessed all of these qualities and more.

Upon graduation from Boalt Hall where he served as editor-in-chief of the California Law Review, Justice Traynor began his career in teaching and soon became a professor at his alma mater. He quickly developed, as Justice Burke has indicated, an expertise in tax law which led to his serving as a consultant to both the State Board of Equalization and the United States Treasury Department. In 1940 he was appointed Associate Justice of this court, and in 1964 he was elevated to the post of Chief Justice. On retirement in 1970, he returned to his first love, teaching, and he shared his enormous knowledge and wisdom with a new generation of students at Hastings College of the Law, University of Utah, University of Virginia, and Cambridge University.

Over the period of 30 years on this court, Justice Traynor authored some 900 opinions. The hallmark of a Traynor opinion was rationality and justice. He marshalled his authority with the dedication of the scholar. He explained the reasons for his rulings with the concern of the teacher. He respected and relied on existing precedent; but he also built on precedent with such excellence that the Harvard Law Review stated that "His three decades of service on the California Supreme Court inspired a dramatic renaissance of the common law." A good illustration of this, I believe, is his opinion in *Muskopf v. Corning Hospital District*, (1961) 55 Cal.2d 211 [11 Cal.Rptr. 89, 359 P.2d 457] which abolished the doctrine of sovereign immunity.

Justice Traynor wrote: "The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia. None of the reasons for its continuance can withstand analysis. No one defends total governmental immunity, in fact, it does not exist. It has become riddled with exceptions, both legislative and judicial, and the exceptions operate so illogically as to cause serious inequality."

And then, after setting forth the development of the law to prove his points, he concluded:

"Only the vestigial remains of such governmental immunity have survived; its requiem has long been foreshadowed. For years the process of erosion of governmental immunity has gone on unabated. The Legislature has contributed mightily to that erosion. The courts, by distinction and extension, have removed much of the force of the rule. Thus, in holding that the doctrine of governmental immunity for torts for which its agents are liable has no place in tort law, we make no startling break with the past, but merely take the final step that carries to its conclusion an established legislative and judicial trend."

Justice Traynor was also a great innovator and where existing rules were inadequate to do justice, he had the ability to set out in a new direction which soon became the established path as courts all over the country followed the teaching of the master. I doubt that there has ever been a state court decision

that could match the impact of Justice Traynor's opinion in *Greenman v. Yuba Power Products, Inc.*, (1962) 59 Cal.2d 57 [27 Cal.Rptr. 697, 377 P.2d 897] where he stated:

“A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. . . . The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”

How simple - how pure - how reasonable - how just. No wonder that this decision and so many other Traynor opinions have become landmarks.

Justice Traynor was a wise, gentle, and good man; and his opinions reflect that characteristic of conscience that called forth a better and more just society. Witness his decision in *Perez v. Sharp*, (1948) 32 Cal.2d 711 [198 P.2d 17] which Justice Mosk has mentioned today where Justice Traynor struck down a ban on interracial marriages, stating:

“The right to marry is as fundamental as the right to send one's child to a particular school or the right to have offspring. Legislation infringing such rights must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws.

“The effect of race prejudice upon any community is unquestionably detrimental both to the minority that is singled out for discrimination and to the dominant group that would perpetuate the prejudice. It is no answer to say that race tensions can be eradicated through the perpetuation by law of the prejudices that give rise to the tension.”

Professor Henry Kalven called Roger Traynor a “law professor's judge.” Judge Walter Schaefer, whom both Justice Mosk and Justice Burke have mentioned today, called Roger Traynor a “judge's judge.” As an appellate litigator, I would add that he was an advocate's judge. It was always a joy to appear before him. He was a kind man. He never asked an antagonistic question or made an effort to embarrass counsel. He was patient and willing to let you develop your point. He maintained an openness of mind to all who presented their causes to the court. His quiet, thoughtful questions went right to the heart of the matter and frequently he would summarize the point in such a cogent, logical way that counsel would invariably say, “That states it much better than I could, Your Honor.”

In sum, Roger Traynor was as Judge Henry Friendly has stated, the “ablest judge of his generation.” For 30 years he graced this court with superlative

dedication and consummate skill. He leaves behind a monument of opinions and other legal writings that advanced the progress of the law and brought greater justice to the people of California and, indeed, the entire nation. As scholar, teacher and judge, he set a standard for excellence which serves as an inspiration to us all. We shall always remember and revere this gracious and wise man who served us all so well.

Thank you.

CHIEF JUSTICE BIRD: Thank you, Mr. Seligson, and thanks to all of the speakers here today, especially Justice Burke, for joining us.

In accordance with our custom, it is ordered that this memorial be spread in full upon the minutes of the court and published in the Official Reports.