THE INFLUENCE OF JUSTICE TRAYNOR'S APPROACH TO STATUTORY INTERPRETATION ON MODERN AMERICAN LAW

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I. INTRODUCTION

With the recent "statutorification" of American law, a judge's approach to statutory interpretation has become increasingly important. Each judge's approach can determine the outcome of his or her decision, and many judges use differing approaches. Naturally, the approach adopted by an influential judge, like Chief Justice Roger Traynor, whose widely adopted opinions changed the course of law, has the potential to influence the law of the entire nation.

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She wishes to dedicate this paper to her father, Jeffrey L. Marxen, M.D., who died during her first year of law school and always supported her educational endeavors. Additionally, she wishes to thank Professor Michael B. Rappaport of the University of San Diego School of Law for making Legislation and Administrative Law interesting enough to inspire this paper.

II. THE IMPORTANCE OF STATUTORY INTERPRETATION

Statutory interpretation plays an important role in assuring the separation of powers essential to the proper functioning of our government. As James Madison opined, "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself."[1] The Founding Fathers obliged the government to control itself by creating a system of government based upon the separation of powers. Article I allows the legislature, consisting of the House of Representatives and the Senate, to make the law; article II vests the executive branch with the power to execute the laws; and article III empowers the judiciary to interpret and apply the laws created by the legislature.[2] Frequently, this interpretation involves interpreting the statutes and laws created by Congress.

Today, statutes, not common law, constitute the main source of modern American law.[3] As a result, the judiciary's interpretive role assumes great importance in "the 'hard cases' not clearly answered by the statutory language" because the court must apply and interpret the statutes enacted by Congress while simultaneously refraining from usurping the legislature's lawmaking power.[4] Thus, "any conflict between the legislative will and the judicial will must be resolved in favor of the former."[5] Accordingly, "statutory interpretation is not 'an opportunity for a judge to use words as empty vessels into which he can pour anything he will.' "[6] Rather, a judge must show deference to the legislature and its lawmaking power when interpreting statutes.

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[1] The Federalist No. 51 (1787) (James Madison).

[2] U.S. Const. Articles I–III.

[3] William N. Eskridge, Jr. & Philip R. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 669 (3rd ed. 2001).

[4] *Id.*

[5] *Id.* (citing Reed Dickerson, The Interpretation and Application of Statutes 8 (1975)).

[6] *Id.* (quoting Frankfurter, J.) (internal citation omitted).

III. THEORIES OF STATUTORY INTERPRETATION

"Three different theoretical approaches have dominated the history of American judicial practice. . . ."[7] Each approach rests upon "different versions of the role of the interpreter and the nature of our constitutional system."[8]

The first approach, *intentionalism*, mandates that the interpreter identify and then follow *the original intent* of the statute's drafters.[9] Intentionalists look first to statutory language but also "attempt to discern the legislature's intent by perusing all available sources, including, principally, legislative history."[10] Supporters of this approach, including Supreme Court Justice Stephen Breyer and former Supreme Court Chief Justice William Rehnquist, "argue that it supports the separation of powers expressed in the Constitution" because "[t]he legislative branch, not the judiciary, has the constitutional power to legislate," and "in order to avoid 'making law,' courts should strive to carry out the legislature's intent."[11] Thus, "[i]intentionalists view themselves as agents of the legislature that enacted the statute, who must avoid imposing their own preferences rather than furthering the choices of the legislature."[12] Some notable criticisms of intentionalism include arguments that "the intent of a legislative body cannot be ascertained from anything less than the language of the statute approved by that body"; "judges can manipulate legislative history to support their own interpretation"; "in any major piece of legislation, the legislative history is extensive, and there is something for everyone";[13] and finally, because the legislative history is neither approved by a legislature nor the executive, resort to legislative intent undermines the legislative process required by state and federal constitutions: "approval by the legislatures and presentment to the executive for approval or veto."[14]

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7 *Id.* at 670.

8 *Id.*

9 *Id.*

10 LINDA D. JELLUM & DAVID CHARLES HRICIK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES 97 (2006).

11 *Id.*

12 *Id.* at 97–98.

13 ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 36 (1997) ("As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends.").

14 JELLUM & HRICIK, *supra* note 10, at 98.

The second approach, *purposivism*, dictates that the interpreter choose "the interpretation that best carries out *the statute's purpose*."[15] Thus, this approach "focuses on the broad goals of a statute, on the problem the legislatures meant to address by passing the statute."[16] Purposivism differs from the other theories in that it "allows courts to seek meaning from the broadest number of sources to make a more informed decision."[17] Hence, "[i]t urges the court to consider *all* of the relevant evidence bearing on the meaning of the language at issue because the underlying premise is that the more such evidence the court considers, the more likely it is that the court will arrive at a proper conclusion regarding that meaning."

The third approach, *textualism*, requires the interpreter to follow *the "plain meaning"* of the statute's text.[18] As a result, "[t]extualists look to the text to find 'a sort of objectified' intent — the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."[19] This approach stems from a strict view of separation of powers, which believes that if the language of a statute is clear, courts must interpret the statute according to the language only, because "if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it."[20] Thus, in order to adhere to the separation of powers dictated by the Constitution, the judiciary must not look to the intent of the legislature but only the meaning of the law enacted.[21] Accordingly, this approach "examines the fewest sources" looking only "at the text at issue and also the language of other statutes" but neither the legislative history nor the purpose for the statute.[22] Textualists believe "that by holding Congress to its words, they ensure that only language actually enacted will be given the force of law and, further, that they will not engage in legislating, which is, they believe, the exclusive province of Congress."[23]

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15 Eskridge & Frickey, *supra* note 3, at 670.

16 Jellum & Hricik, *supra* note 10, at 99.

17 *Id.* at 100.

18 Eskridge & Frickey, *supra* note 3, at 670.

19 Jellum & Hricik, *supra* note 10, at 95.

20 Conroy v. Aniskoff, 507 U.S. 511, 528 (1993) (Scalia, J., concurring).

21 *Id.*

22 Jellum & Hricik, *supra* note 10, at 95.

23 *Id.*

Finally, a more recent approach, *dynamic interpretation*, advanced by William Eskridge, Jr., encourages courts to interpret statutes dynamically.[24] Eskridge notes that if judges interpret the Constitution in light of its text, historical background, subsequent interpretational history, related constitutional facts, and current social facts and the common law in light of the text of precedents, their historical context, subsequent history, related legal developments, and societal context, then why do most judges only consider the text and historical context of statutes?[25] Eskridge contends that statutes, like the Constitution and common law, should "be interpreted 'dynamically,' that is, in light of their present societal, political, and legal context."[26] The aforementioned three prevalent approaches to statutory interpretation "treat statutes as static texts," examining the intent of the legislature at the time the statute was enacted,[27] and therefore, assuming "that the legislature fixes the meaning of a statute on the date the statute is enacted."[28] Eskridge notes, however, that "[a]s society changes, adapts to the statute, and generates new variations of the problem which gave rise to the statute, the unanticipated gaps and ambiguities proliferate" and "the legal and constitutional context of the statute may change," so the intent of the legislature must adapt to the changes of the times.[29]

Generally, "state courts have been more likely to resolve issues of statutory interpretation by construing the apparent meaning of the statutory language — without *any* examination of the statute's purpose or legislative history," seemingly utilizing a textualist approach.[30] Beginning in the post–World War II era, however, California "often eschewed a plain meaning

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[24] William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987).

[25] *Id.* at 1479.

[26] *Id.*

[27] Intentionalists would ask how the legislature "would have intended the question to be answered had it thought about the issue when it passed the statute," while purposivists would ask which approach "furthers the purposes the legislature had in mind when it enacted the statute." *Id.*

[28] *Id.* at 1479–80.

[29] *Id.* at 1480–98.

[30] Eskridge & Frickey, *supra* note 3, at 741 (noting that some surmise this is due to "the dearth of legislative history materials available for state statutes and a more restrained methodology practiced by many state judges").

approach."[31] The California Supreme Court began its now prevalent habit of using "a contextual approach to interpret legislation broadly to promote liberal social policy and fairness."[32] However, this notwithstanding, "statements by ordinary legislators are rarely given much, if any, weight."[33]

IV. THE INFLUENCE OF JUSTICE TRAYNOR

In 1940, Traynor's appointment to the California Supreme Court occurred at a time when "the lawmaking role of courts was very much in dispute" due to the recent end of the *Lochner* era.[34] His appointment to the bench marked the turn of a new direction for the Court. By the late 1950s, Traynor had become so influential at the California Supreme Court that his views prevailed among the justices, leading the Court to become "the leading supreme court in the nation."[35]

In 1964, twenty-four years after his appointment as an associate justice, Traynor became chief justice of California. Traynor wrote over 900 opinions during his time on the bench, many of which became landmark decisions adopted by other states, influencing the course of the law.[36] In total, the California Supreme Court produced sixteen decisions followed at least three times by out-of-state courts during Traynor's tenure on the Court (although admittedly most of these decisions involve tort liability rather than statutory interpretation).[37]

Given how widely followed his decisions were, Traynor's method of statutory interpretation, which embodies his style of judicial lawmaking and invariably influenced those widely-followed decisions, created law.

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[31] *Id.* (citing People v. Hallner, 277 P.2d 393 (Cal. 1954); McKeag v. Board of Pension Comm'rs of Los Angeles, 132 P.2d 198 (Cal. 1942)).

[32] *Id.*

[33] *Id.* at 997 (citing Quelimane Co. v. Stewart Title Guar. Co., 960 P.2d 513 (Cal. 1998)).

[34] Edmund Ursin, *How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking*, 57 Buff. L. Rev. 1267, 1290 (2009).

[35] *Id.* at 1276 (citing Jake Dear & Edward W. Jessen, *"Followed Rates" and the Leading State Cases, 1940–2005*, 41 U.C. Davis L. Rev. 683, 683, 710 (2007) (noting that "five of the six *most* followed of the 'most followed' are tort decisions rendered since 1960")).

[36] John W. Poulous, *The Judicial Philosophy of Roger Traynor*, 46 Hastings L.J. 1643, 1645 (1995).

[37] Jake Dear & Edward W. Jessen, *supra* note 35, at 702.

Through the subsequent adoption of those decisions throughout the country, his method of statutory interpretation impacted the nation.

V. JUSTICE TRAYNOR'S VIEWS ON JUDICIAL DEFERENCE TO THE LEGISLATURE

As a highly influential judge authoring widely adopted opinions, Traynor's approach to statutory interpretation, which naturally influenced those opinions, is of great importance due to its ability to influence the law when referred to, approved of by, or adopted by other state courts throughout the country.

A. HISTORICAL CONTEXT OF VIEWS ON STATUTORY INTERPRETATION DURING AND FOLLOWING THE TRAYNOR ERA

Traynor's extrajudicial and judicial writings achieved prominence during the 1950s, when the legal process school, led by Henry Hart and Albert Sacks, displaced formalism and legal realism as the dominant modes of legal thought.[38] Throughout the late 1950s and 1960s, Hart and Sacks used their prominence to dominate and innovate in the field of statutory interpretation, beginning with their book *The Legal Process*, published in 1958.[39]

Hart and Sacks supported a purposivist approach to statutory interpretation.[40] They believed courts possessed the ability to correct mistakes in the text of a statute "when it is completely clear from the context that a mistake has been made," so long as they do not subvert "the legislative process and all other processes which depend on the integrity of the language."[41] Professor Hart "cautioned that law — particularly statutory law, which takes the form of general and prospective directives — is inherently incomplete."[42] Thus, in the absence of a clear directive addressing specific

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[38] Ursin, *supra* note 34, at 1300.

[39] Eskridge & Frickey, *supra* note 3, at 699.

[40] *Id.* at 699–700; *see also* Miranda McGowan, *Do As I Do, Not As I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 Miss. L.J. 129, 136 (2008) ("Henry M. Hart explains that law is 'a purposive activity, a continuous striving to solve the basic problems of social living.'").

[41] *Id.* at 704–05 (citing *The Legal Process* 1375 (1994 ed.)).

[42] McGowan, *supra* note 40, at 136.

problems, Hart and Sacks "believed that officials should fill gaps or resolve ambiguities through "reasoned elaboration."[43] For Hart and Sacks, reasoned elaboration meant elaborating "the arrangement [e.g., the statute, regulation, or precedent] in a way which is consistent with the other established applications of it and in a way that best serves the principles and policies it expresses," rather than construing a statute in light of one's own personal policy preferences.[44]

The purposivist approach of Hart and Sacks assumes that "[e]very statute must be conclusively presumed to be a purposive act."[45] Thus, courts must "[d]ecide what purpose ought to be attributed to a statute," and "interpret the words of the statute immediately in question so as to carry out the purpose as best it can."[46] Because Hart and Sacks' approach,[47] as compared to other purposivist approaches, was a text-based approach, they believed the "words of a statute guide and restrain interpretation in two ways."[48] First, the "text illuminates plausible statutory purposes."[49] Second, the statutory text "constrains the range of statutory interpretations."[50] Although Hart and Sacks advised referring to a wide range of materials

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[43] *Id.*

[44] *Id.* (citing Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 147 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994)) (internal quotations omitted).

[45] *Id.* at 137.

[46] Hart & Sacks, *supra* note 44, at 1374.

[47] Hart and Sacks' approach to statutory interpretation directs that, "[i]n interpreting a statute, a court should:

> 1. Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then
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> 2. Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either —
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> (a) a meaning they will not bear, or
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> (b) a meaning which would violate any established policy of clear statement."

See William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. Pitt. L. Rev. 691, 693–700 (1987) (citing Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1200 (tentative ed. 1958).

[48] McGowan, *supra* note 40, at 137.

[49] *Id.*

[50] *Id.*

to "illuminate a statute's context and purpose," they also cautioned that interpreters must keep in mind that the legislature is the primary policy-making body and depends on the courts "to effectuate its policies," thus, "contextual aids such as legislative history . . . help courts . . . shed light on the statute's 'general purpose.' "[51] Thus, Hart and Sacks, like Traynor, believed that the court and the legislature should be partners in lawmaking.[52]

Some scholars argue that Traynor's views more closely aligned themselves with those of Hart and Sacks' students and successors in the area of statutory interpretation, William Eskridge, Jr. and Philip Frickey. Eskridge and Frickey, however, wrote after Traynor's time, during the 1980s until Frickey's death in 2010 (although Eskridge continues to write on the matter). Eskridge and Frickey advanced the aforementioned dynamic theory of statutory interpretation, encouraging an interpretation of statutes which allows them to evolve in light of changed circumstances.[53] They argued that "statutory interpretation involves creative policymaking by judges and is not just the Court's figuring out the answer that was put 'in' the statute by the enacting legislature," but rather "is a dynamic process, and that the interpreter is inescapably situated historically."[54] This view is in accord with Traynor's belief that it is not only appropriate, but desirable, for courts to examine statutes critically. Thus, Hart and Sacks, like Traynor, recognized a lawmaking role for courts but also encouraged deference to the legislature, particularly in the realm of constitutional law.

B. TRAYNOR'S VIEWS ON STATUTORY INTERPRETATION

Regardless of whether one believes that judges should or should not consider policy, which may factor into *why* judicial lawmaking is good or bad, it is important to analyze *how* a judge who considers social policy relevant to judicial decision-making can constitutionally incorporate that policy

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[51] *Id.*

[52] *Id.* at 138.

[53] Eskridge & Frickey, *supra* note 3, at 707.

[54] William N. Eskridge, Jr., *Statutory Interpretation As Practical Reasoning*, 42 Stan. L. Rev. 321, 345 (1990) (citing Eskridge, *Supra* note 24, 1479 ("attacking the view that statutory interpretation is always a search for original legislative intent or purpose"); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 Va. L. Rev. 423 (1988) ("attacking the view that statutory interpretation must focus only on the statutory text")).

while making a decision where a relevant statute applies. Because Traynor believed that courts "must engage in 'judicial elaboration' when applying statutes to situations not anticipated by the drafters,"[55] many place Traynor within the dynamic interpretation approach to statutory interpretation.

Traynor believed courts must interpret statutes in accordance with legislative intent; however, in doing so, the role of the courts also includes making alterations to the statute in order to serve that legislative intent because the legislature lacks the ability to alter statutes to keep pace with the times. In some instances, this means a court's interpretation may differ from that which might logically stem from the plain text of the statute. Thus, this interpretation may qualify as "legislating from the bench" because a judge is "rewriting a statute" or writing something into the statute that was not written, voted on, and enacted into law by the legislature. However, most would agree that Traynor's decisions ultimately arrived at the right result. Further, to the extent that his decisions may include consideration of extratextual sources, he cannot be criticized for adopting the approach that best suits his needs, as his decisions interpreting statutes adopt a uniform approach, approving the consideration of as many sources as possible to arrive at the result in conformity with the legislature's intent.

Because it is impossible to foresee the future and "legislatures are neither omnipresent nor omniscient," Traynor urged courts to "expect our statutory laws to become increasingly pliable to creative judicial elaboration.' "[56] He believed courts should apply statutes as the legislature wanted them applied because the legislature was incapable of amending statutes quickly enough to keep up with the needs of society. This appears to comply with Hart and Sacks' approach of the time, urging courts to interpret statutes according to their purpose. Thus, Traynor advocated deference to the legislature; however, he felt it was up to the judiciary to interpret legislation in light of the needs of society, or as Justice Holmes would say, "the felt necessities of the time."[57] As a result, Traynor looked down on

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[55] Poulous, *supra* note 36, at 1686, n.194 (citing Traynor, *supra* note 47, at 617–19).

[56] Roger J. Traynor, *Comment on Courts and Lawmaking, Legal Institutions Today and Tomorrow*, LEGAL INSTITUTIONS TODAY AND TOMORROW 60 (Monrad G. Paulsen ed., 1959).

[57] *See* OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe Howe ed., 1963).

all canons of statutory interpretation that deflect attention from legislative purpose.[58] At the same time, many of Traynor's decisions utilize both grammatical and substantive canons of interpretation such as the doctrine of *in pari material* or the whole act rule.

Despite the fact that Traynor "spent the first decade of his legal career specializing in tax law," a statute-oriented area of the law centered around the Internal Revenue Code and "far removed from the common law style that became his primary legacy," his views on statutory interpretation have received scant attention.[59] Those that have given this subject attention, argue that "[a]lthough Traynor hinted at a seemingly dynamic approach to statutory interpretation, perhaps a natural outgrowth of his creative common law bent, his judicial opinions hew closer to the legal process theories of that era and reflect a decidedly pragmatic cast."[60]

In *Perez v. Sharp*,[61] Traynor authored the opinion overturning a state law prohibiting miscegenation, making the Supreme Court of California the first state supreme court to abolish such laws. In *Perez*, the petitioners, Andrea Perez, a white female, and Sylvester Davis, an African American, sought a writ of mandamus compelling the County Clerk of Los Angeles to issue them a certificate of registry and a license to marry under Cal. Civ. Code, § 69, which provided: "no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race."[62] Petitioners, members of the Roman Catholic Church, which "has no rule forbidding marriages between Negroes and Caucasians," contended that the statutes were unconstitutional on the grounds that they prohibited the free exercise of their religion and denied to them the right to participate fully in the sacraments of that religion."[63] At first glance, a strict textualist approach would appear to require a ruling upholding the prohibition.

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[58] *See e.g.*, Traynor, *supra* note 56.

[59] Lars Noah, *Divining Regulatory Intent: The Place for A "Legislative History" of Agency Rules*, 51 Hastings L.J. 255, 278 (2000).

[60] *Id*. at 278–79.

[61] 198 P.2d 17 (Cal. 1948).

[62] *Perez*, 198 P.2d at 17–18 (noting that the relevant statute, Civil Code, section 69, which implemented Civil Code, section 60, provided: "All marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void.").

[63] *Id*. at 18.

Traynor first looked to the language of the statute and held that "[s]ection 69 of the Civil Code and section 60 on which it is based are therefore too vague and uncertain to be upheld as a valid regulation of the right to marry," a fundamental right.[64] He concluded that "[e]nforcement of the statute would place upon the officials charged with its administration and upon the courts charged with reviewing the legality of such administration the task of determining the meaning of the statute."[65] Traynor viewed this as an impossible feat due to the failure of the Legislature to supply conceptions of race classification because "[i]f no judicial certainty can be settled upon as to the meaning of a statute, the courts are not at liberty to supply one."[66] In this respect, Traynor yielded to the lawmaking power of the Legislature by refusing to rewrite the statute. He also held that the statute violated "the equal protection of the laws clause of the United States Constitution by impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups."[67]

While not explicitly stating he was doing so, Traynor, who spoke out against canons of statutory interpretation in his extrajudicial writings, appears to rely on the substantive canon of statutory interpretation that courts must interpret statutes to advance federal values, including clear statement rules and the advancement of fundamental rights, such as marriage.[68] He also appears to utilize the canon of constitutional avoidance, "which requires courts to construe statutes so as to avoid ruling on potential constitutional questions."[69] However, he found no interpretation of the statute by which

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64 *Id.* at 29.

65 *Id.*

66 *Id.*

67 *Id.*

68 Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 940, (2013). While "[i]t is worth noting that clear statement rules have come under sustained attack as an improper exercise of judicial power or policymaking," others, such as Scalia, note that "[t]he presumption is based on an assumption of what Congress, in our federal system, would or should normally desire." *Id.* at 957, 1025, n.190 (2013).

69 *Should the Supreme Court Presume That Congress Acts Constitutionally? The Role of the Canon of Avoidance and Reliance on Early Legislative Practice in Constitutional Interpretation*, 116 Harv. L. Rev. 1798, 1799 (2003); *see also* Edward J. DeBartolo

infringement of the fundamental right of marriage could be avoided and no reasonable interpretation of the statute by which it could be construed as constitutional, and thus, had to strike down the statute.

Next, in order to support his conclusion that the statutes were unconstitutional, Traynor discussed previous amendments to the statutes.[70] He noted that, because states may validly regulate marriage, the fact that the law interfered with a religious right did not provide a per se invalidation under the First Amendment (observing that states could validly prevent the practice of bigamy, which is a part of some religions), so long as the law was "directed at a social evil and employs a reasonable means to prevent that evil."[71] However, if the law was both discriminatory *and* irrational, "it unconstitutionally restricts not only religious liberty but the liberty to marry as well."[72]

Traynor, in adherence to his legal pragmatism,[73] also considered policy in declaring the law unconstitutional. In terms of policy considerations

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Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). According to this canon, "when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction," and one of those interpretations is reasonable, "the canon functions as *a means* of *choosing between them*," requiring the court to choose the reasonable interpretation over the unreasonable interpretation, which may require reading a statute's text in light of its purpose. *See* Clark v. Martinez, 543 U.S. 371, 385 (2005); *see also* Almendarez-Torres v. United States, 523 U.S. 224, 237 (1998) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.").

70 *Perez*, 198 P.2d at 21–22.

71 *Id.* at 18.

72 *Id.* at 18.

73 *See* Ursin, *supra* note 34, at 1314–15 (discussing how "Traynor's combination of creativity and caution in the realm of statutory and constitutional interpretation resembles the views later articulated by" Judge Posner's pragmatic jurisprudence, which in turn stemmed from Justice Oliver Wendell Holmes, Jr., and counseled deference to the legislature, but allowed judges, when deciding issues of moral or political nature, to issue an opinion on a constitutional matter based upon that judge's intuitions of public policy); *see also* Linda E. Fisher, *Pragmatism Is As Pragmatism Does: Of Posner, Public Policy, and Empirical Reality*, 31 N.M. L. Rev. 455, 468 (2001) (discussing how a "pragmatist judge considers stability of the legal system, legal tradition, and deference to other branches of government to be important legal virtues," but will allow "the service of other social needs" to trump them, "according to notions of good policy"); *see also* Ursin, *supra* at 1315–16 ("Posner writes that an implication of his pragmatic jurisprudence is that 'courts will tend to treat the Constitution and the common law, and to a

and fairness, in the absence of an emergency, states may not "base a law impairing fundamental rights of individuals on general assumptions as to traits of racial groups."[74] Thus, Traynor concluded that "[a] state law prohibiting members of one race from marrying members of another race is not designed to meet a clear and present peril arising out of an emergency."[75] Further, because the right to marry is an individual right, not a right of a racial group, "[b]y restricting the individual's right to marry on the basis of race alone," the statutes at issue violated the Equal Protection Clause of the United States Constitution.[76]

Traynor also examined the history of the legislation at issue as well as the arguments in support thereof, looking at similar statutes (utilizing the doctrine of *in pari materia,* requiring similar statutes to be interpreted in light of each other).[77] One of the justifications for the statute was that the races should not intermix because of the physical inferiority of certain races, but Traynor cited "statistics showing that there is a higher percentage of certain diseases among Caucasians than among non-Caucasians," and that some diseases were even most prevalent among white persons.[78] While acknowledging that "[t]he Legislature is free to prohibit marriages that are socially dangerous because of the physical disabilities of the parties concerned,"[79] Traynor concluded that because the miscegenation statute condemned "certain races as unfit to marry with Caucasians on the premise of a hypothetical racial disability, regardless of the physical qualifications of the individuals concerned," no compelling justification could be shown to sustain the discrimination under the statute against the strong presumption against discrimination in the face of the Equal Protection Clause.[80] In essence, Traynor, relying on social science data, used a purposivist approach to examine the purpose of the statute at the

lesser extent bodies of statute law, as a kind of putty that can be used to fill embarrassing holes in the legal and political framework of society.'").

74 *Perez*, 198 P.2d at 20.

75 *Id.*

76 *Id.*

77 *Id.* at 21–22.

78 *Id.* at 23, nn.3–4.

79 *Id.* at 24 (citing Civ. Code §§ 79.01, 79.06).

80 *Id.*

time it was enacted and noted that the statute as enacted could not accomplish its stated purpose.

Traynor also found the statute too vague to be upheld. He argued, "Even if a state could restrict the right to marry upon the basis of race alone, sections 60 and 69 of the Civil Code are nevertheless invalid because they are too vague and uncertain to constitute a valid regulation."[81] When crafting a statute regulating a fundamental right, "[i]t is the duty of the lawmaking body in framing laws to express its intent in clear and plain language to the end that the people upon whom it is designed to operate may be able to understand the legislative will."[82] Citizens may not be deprived of liberty for the violation of an uncertain and ambiguous law.[83] "An act is void where its language appears on its face to have a meaning, but it is impossible to give it any precise or intelligible application in the circumstances under which it was intended to operate."[84] In the statute at issue, the Legislature referred to five races but failed to make provision for applying the statute to persons of mixed race, leading to a problem as to how to apply the statute to a person who had some, but not all, African-American ancestors.[85] If the statute were to apply to people of mixed race, how could the statute be applied?[86] Because the Legislature failed to define what makes one fall into a certain race, the application would lead to an absurd result by forcing the courts to determine whether a person falls into a certain race enumerated under the statute because of any trace of ancestry.[87]

Traynor again examined the Legislature's purpose in creating the statute, determining that "[t]he apparent purpose of the statute is to discourage the birth of children of mixed ancestry within this state."[88] He concluded, however, that the purpose could not be accomplished without considering

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81 *Id.* at 27.

82 *Id.*

83 *Id.* (citing, *inter alia*, United States v. Cohen Grocery Co., 255 U.S. 81, 89–92 (1921); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1931); Connally v. General Construction Co., 269 U.S. 385, 391 (1926)).

84 *Id.*

85 *Id.* at 28.

86 *Id.*

87 *Id.*

88 *Id.*

persons born of mixed ancestry.[89] If a statute regulating fundamental rights cannot be reasonably applied to accomplish its purpose, it is unconstitutional.[90] He then reasoned, "This court therefore cannot determine the constitutionality of the statute in question on the assumption that its provisions might, with sufficient definiteness, be applied to persons not of mixed ancestry."[91] If the classification of a person of mixed ancestry depends upon a given proportion of Mongolians or Malayans among his ancestors, how can this court, without clearly invading the province of the Legislature, determine what that decisive proportion is?[92] Thus, Traynor used the void for vagueness doctrine, which requires legislatures to enact reasonably clear guidelines, so that men of common intelligence are not "forced to guess at the meaning" of a criminal statute,[93] to conclude the statute failed to provide reasonable notice to men as to its enforcement, and was thus, unconstitutional and void.

Thus, in *Perez*, Traynor showed deference to the Legislature but, ultimately, struck down the statute at issue by using the void for vagueness doctrine; adopting a purposivist approach and looking to the purpose of the Legislature in enacting the statute, pointing out that the statute did not accomplish that purpose; and pointing out that the statute was unconstitutional. By not attacking the Legislature's purpose in enacting the statute and supporting his decision striking the statute down by showing the statue could not accomplish the Legislature's purpose, Traynor arrived at his result without infringing on the Legislature's lawmaking power. Further, it is noteworthy that Traynor struck down the law using these "neutral" approaches without relying only upon notions of morality and personal policy preferences, inasmuch as Traynor himself felt the anti-miscegenation laws were evil.[94] Most importantly, Traynor's *Perez*

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[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *See e.g.*, Smith v. Goguen, 415 U.S. 566, 575–73 (1974) ("The doctrine incorporates notions of fair notice or warning, [requiring] legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'").

[94] *See* Ursin, *supra* note 34, at 1315 ("Traynor's holding in *Perez v. Sharp* that California's anti-miscegenation legislation was unconstitutional reflected Traynor's view of

opinion received resounding approval, commended by many as being far ahead of its time (nineteen years, to be exact) and was even cited by the U.S. Supreme Court decision declaring anti-miscegenation statutes unconstitutional in *Loving v. Virginia* ("The first state court to recognize that miscegenation statutes violate the Equal Protection Clause was the Supreme Court of California").[95]

People v. Knowles[96] — disapproved on another ground in *People v. Beamon*,[97] and superseded by statute on another ground as stated in *People v. Tribble*,[98] — nevertheless demonstrates "[t]he fullest expression" of Traynor's views on the subject of statutory interpretation.[99] *Knowles* involved a statute criminalizing kidnapping. In holding that the statute allowed robbery to be punished under the statute, Traynor expressed his approval of relying on extrinsic aids when interpreting a statute.[100] He noted that courts may properly rely on "the history of the statute, the legislative debates, committee reports, statements to the voters on initiative and referendum measures," but that the primary source in determining the purpose of the Legislature must be the words of the statute.[101]

In *Knowles*, the defendant contended that for armed robbery, the crime of which he was convicted, Penal Code section 209 cannot be construed to apply to the crime of robbery because the statute "applies only to orthodox kidnapping for ransom or robbery, not to the detention of the victim during the commission of armed robbery."[102] Traynor rejected this interpretation by analyzing the language of the statute, history of the statute (including relevant amendments), plain meaning of words in the statute, intent of the Legislature, purpose of the statute, similar federal statutes, and other cases

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the 'insidiously evil thing' of racial discrimination and qualifies as an application of an 'outrage jurisprudence.'"); *see also* Ben Field, Activism in Pursuit of the Public Interest: The Jurisprudence of Chief Justice Roger J. Traynor 44 (2003) (pointing out that it was "paradoxical that Traynor used such a conventional method of analysis to reach such innovative results.").

[95] 388 U.S. 1, 7, n.5 (1967).

[96] 217 P.2d 1, 2–19 (Cal. 1950).

[97] 504 P.2d 905, 914, n.9 (Cal. 1973).

[98] 484 P.2d 589, 592 (Cal. 1971).

[99] Lars Noah, *supra* note 59, at 278–79.

[100] *Knowles*, 217 P.2d at 5–6 (Cal. 1950).

[101] *Id.*

[102] *Id.* at 2.

decided under the statute.[103] Traynor concluded that the defendant's "interpretation of section 209 finds no support in its language or legislative history; it could not be sanctioned without a pro tanto repeal by judicial fiat."[104]

First, Traynor analyzed the language of the statute, which he quoted as follows: "Every person who seizes, confines . . . or who holds or detains [any] individual . . . to commit extortion or robbery . . . is guilty of a felony."[105] Traynor noted that, first, even the defendant conceded that the ordinary interpretation of the language did not support his argument, and second, under the language of the statute, "one accused of armed robbery who has inflicted bodily harm on the victim, can be charged with a capital offense."[106] Although in his common law opinions, Traynor might have allowed considerations of policy and justice to lead to a different conclusion, in this statutorily controlled case, Traynor contended:

> Reasonable men may regard the statute as unduly harsh and therefore unwise; *if they do, they should address their doubts to the Legislature*. It is not for the courts to nullify a statute merely because it may be unwise. '*We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take this statute as we find it*.'[107]

Thus, Traynor shows substantial deference to the Legislature, by adhering to the statute and its purpose, despite the fact that he finds that the statute could be "unduly harsh."

In analyzing the text of the statute, Traynor examined the plain meaning of the words of the statute, finding the conduct at issue applicable to those words. In *Knowles*, the defendant and his accomplice restrained a person in his stockroom for fifteen to twenty minutes and inflicted bodily

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103 *Id*. at 2–9; *but see*, *id*. at 18 (Edmonds, J., dissenting, arguing that "the grammatical construction and language of the statute, the legislative history and development of section 209, and the legislative intent as derived from the history and circumstances surrounding the enactment of the 1933 amendment clearly show that one can commit robbery without also being guilty of kidnaping.").

104 *Id*. at 2.

105 *Id*. at 7 (bracketing by Traynor).

106 *Id*. at 3.

107 *Id*. at 3–4 (quoting Cardozo, J., in Anderson v. Wilson, 289 U.S. 20, 27 (1933)) (emphasis added).

harm on that person during the detention while the accomplice "rifled the cash register."[108] Traynor looked to the plain meaning of the words of section 209, remarking that, "Webster's New International Dictionary, Unabridged Edition (1943), defines 'seize' as 'To take possession of by force,' and 'confine' as 'To restrain within limits; to limit; . . . to shut up; imprison; to put or keep in restraint . . . to keep from going out.' "[109] Under the plain meaning of the words of section 209, the defendant's conduct of compelling the victim to enter a room at gunpoint and forcing him to remain in that room for fifteen to twenty minutes clearly fell within the scope of section 209.

Second, Traynor also used the history of the statute in arriving at his conclusion, noting its prior versions and the significance of amendments.[110] He pointed out that certain amendments demonstrated "a deliberate abandonment of the requirement of movement of the victim that characterized the offense of kidnapping proscribed by section 209 before the amendment . . . [that changed the offense] 'from one which required the asportation of the victim to one in which the act of seizing for ransom, reward or to commit extortion or robbery became a felony.' "[111] Thus, Traynor used the history of the statute to assure he furthered the Legislature's purpose.

Third, Traynor examined the intent of the Legislature in order to reject the defendant's contention that "the Legislature intended that the statute apply only to acts of seizure and confinement incident to a 'traditional act of kidnapping,' " meaning asportation of the victim. In rejecting this contention, he noted that, in amending the statute, the Legislature had broadened, rather than narrowed, the statute, so, it would be illogical to suggest that "conduct aptly described by the statute is not punishable" just because that conduct may have been excluded under the "traditional act of kidnapping."[112] In doing so, he pointed out that the Legislature unquestionably had "the power to define kidnapping broadly enough to include the offense here committed," and that "[s]ubject to the constitutional prohibition of cruel and unusual punishment, the Legislature may

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108 *Id*. at 4.

109 *Id*.

110 *Id*.

111 *Id*. (citing People v. Raucho, 8 Cal. App. 2d 655, 663).

112 *Id*.

define and punish offenses as it sees fit."[113] Even if their definition of an offense differs from the way other states define that offense or what has ordinarily been defined under that offense, courts cannot (and *should not*) question "the motives of a legislative body."[114] This statement in particular shows Traynor giving substantial deference to the Legislature. Traynor also noted, "The statutory definition of the proscribed offenses is not rendered uncertain or ambiguous because some of the prohibited acts are not ordinarily regarded as kidnapping."[115] Traynor elaborated on why the text should be interpreted according to its plain meaning:

> When the Legislature has made such acts punishable as kidnapping, this court should not impute to the statute a meaning not rationally supported by its wording. . . . "There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body." The will of the Legislature must be determined from the statutes; intentions cannot be ascribed to it at odds with the intentions articulated in the statutes. Section 209 clearly prohibits and punishes the offense committed by defendant; there is no basis for supposing that the Legislature did not mean what it said.[116]

In this analysis of the statute, Traynor exhibits substantial deference to the Legislature by deferring to the text of the statute and refusing to "inquire into the motives" of the Legislature. He displays a true purposivist approach in this opinion, looking to the intent of the Legislature at the time the statute was enacted, seemingly declining to alter the purpose of the statute to fit the present times even though he saw the statute as unduly harsh:

> An insistence upon judicial regard for the words of a statute does not imply that they are like words in a dictionary, to be read with no ranging of the mind. . . . Released, combined in phrases that imperfectly communicate the thoughts of one man to another, they challenge men to give them more than passive reading, to consider well

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113 *Id.*

114 *Id.* at 4–5.

115 *Id.* at 5.

116 *Id.* (quoting Cardozo, J, dissenting in United States v. Constantine, 296 U.S. 287, 298–99) (internal citations omitted).

> their context, to ponder what may be their consequences. Speculation cuts brush with the pertinent question: what purpose did the Legislature seek to express as it strung those words into a statute? The court turns first to the words themselves for the answer. It may also properly rely on extrinsic aids, the history of the statute, the legislative debates, committee reports, statements to the voters on initiative and referendum measures. Primarily, however, the words, in arrangement that superimposes the purpose of the Legislature upon their dictionary meaning, stand in immobilized sentry, reminders that whether their arrangement was wisdom or folly, it was wittingly undertaken and not to be disregarded.
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> "While courts are no longer confined to the language [of the statute], they are still confined by it. Violence must not be done to the words chosen by the legislature." A standard of conduct prescribed by a statute would hardly command acceptance if the statute were given an interpretation contrary to the interpretation ordinary men subject to the statute would give it. "After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. Certainly the court is not at liberty to seek hidden meanings not suggested by the statute or by the available extrinsic aids.[117]

Although Traynor might have felt at liberty to completely rewrite the law if the case were controlled by the common law, he recognized the importance of interpreting statutes according to their ordinary meaning because, if he were to interpret the statute in a manner counterintuitive to its ordinary meaning, then people could not rationally act in a manner that would avoid having their conduct fall under the statute, and the statute could lead to arbitrary enforcement. Thus, just as he did in *Perez*, Traynor

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[117] *Id.* at 5–6 (quoting, first, Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUMB. L. REV. 527, 543; and, second, Addison v. Holly Hill Fruit Products Co. 322 U.S. 607, 618) (internal citations omitted).

interprets the statute at issue in the way that best provides the public notice of what conduct should be avoided in order to prevent prosecution under the statute. While in *Perez*, this entailed striking the statute down entirely, here, it involves upholding the statute and interpreting it according to its plain meaning, and not, as the defendant requested, in a manner contrary to that ordinary meaning. Thus, Traynor found the defendant's interpretation of the statute resting "entirely upon speculation," void of support from the statutory language, contextual implications, and legislative history.[118]

Fourth, Traynor also looked to other statutes,[119] including the federal statute on kidnapping — known as the Lindbergh Law,[120] which served as a model for the California Legislature's revisions to section 209 — and cases interpreting that statute, including, *Gooch v. United* States,[121] noting that that statute did not limit its prohibition to what the defendant contended fell within "orthodox kidnapping for ransom."[122]

Fifth, Traynor looked to other cases decided under the statute, reasoning that the unequivocal language of the statute, as well as the cases decided under the statute, gave "no merit to defendant's contention that the Legislature did not intend to change the substantive nature of the existing crime."[123]

Traynor's *Knowles* opinion, although demonstrating "hints of endorsement for any number of approaches," pilots "a middle and pragmatic course between the extremes of textualism and dynamism, preferring a form of purposivism or what some have called modified intentionalism."[124] For the most part, however, the *Knowles* opinion is a rarity in that most of Traynor's statutory opinions "made no mention of extrinsic aids to construction, focusing only on the drafting history behind a particular provision — particularly tracing revisions of the text over time — to help understand legislative intent where the words did not provide a plain

118 *Id*. at 6.

119 By examining other statutes, Traynor again utilizes a canon of statutory interpretation: the doctrine of *in pari materia*.

120 18 U.S.C. § 1201.

121 297 U.S. 124, 126 (1936).

122 *Knowles*, 217 P.2d at 6.

123 *Id*.

124 Lars Noah, *supra* note 59, at 279–80.

enough meaning."[125] However, "[o]n one occasion, he did credit affidavits submitted by legislators involved in the drafting of a statute as a source of relevant guidance."[126] Thus, "[d]espite an announced willingness to consider pre-enactment materials, their infrequent citation confirms that practical limitations affected the interpretation of state statutes during this period more so than the theoretical disputes prominent today in the federal courts."[127] Further, *Knowles* became an important case because it was cited approvingly by nine different states for affirming various important principles of law, and Traynor's analysis was integral to arriving at those conclusions.[128]

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125 *Id.* at 280; *see also id.*, n.89 (citing *In re* Culver, 447 P.2d 633, 634–37 (Cal. 1968); Harvey v. Davis, 444 P.2d 705, 709 (Cal. 1968); California Motor Transp. Co. v. Public Utils. Comm'n, 379 P.2d 324, 326 (Cal. 1963); Burge v. City and County of San Francisco, 262 P.2d 6, 10–12 & n.7 (Cal. 1953); People v. Odle, 230 P.2d 345, 347–49 (Cal. 1951); *In re* Garcia's Estate, 210 P.2d 841, 842–43 (Cal. 1949); Loustalot v. Superior Court, 186 P.2d 673, 676–77 (Cal. 1947); *In re* Halcomb, 130 P.2d 384, 387–88 (Cal. 1942) (Traynor, J., dissenting)).

126 *Id.* at 280 (citing Silver v. Brown, 409 P.2d 689 (Cal. 1966); Friends of Mammoth v. Board of Supervisors, 502 P.2d 1049, 1055–56 (Cal. 1972) ("struggling to resolve conflicting post-enactment explanations of intent").

127 *Id.* at 280.

128 Morrisey v. State, 620 A.2d 207, 212 (Del. 1993) (distinguishing facts but approving of the holding allowing for the defendant to be charged with multiple offenses); State v. Hall, 86 Idaho 63, 76 (Idaho 1963) (approving of the holding, noting that "'[t]rue kidnapping' in the 'traditional' or 'conventional' sense, however, does not occur whenever there is incidental movement, however slight, of a murder victim."); People v. Wesley, 421 Mich. 375, 411–12 (Mich. 1984); State ex rel. Le Mieux v. District Court, 166 Mont. 115, 120 (Mont. 1975) ("We agree with the rationale of *Knowles*."); Jacobson v. State, 89 Nev. 197, 203 (Nev. 1973) (citing *Knowles* for the proposition that "[m]ovement of the victim is only one of several methods by which the statutory offense may be committed."); State v. Ginardi, 111 N.J. Super. 435, 440 (App.Div. 1970) (using *Knowles* to distinguish the factual circumstances in that case); State v. Clark, 80 N.M. 91, 94 (N.M. Ct. App. 1969) (citing Knowles approvingly: "If there is an unlawful restraining or confining, the length of time involved in such restraint or confinement is immaterial."); People ex rel. Eldard v. La Vallee, 15 A.D.2d 611, 612 (N.Y. App. Div. 3d Dep't 1961) (approving of *Knowles*: "It is the singleness of the act and not of the offense that is determinative."); State v. Walch, 346 Ore. 463, 470 (Or. 2009) (approving of the holding but distinguishing the applicable Oregon statute); State v. Innis 433 A.2d 646 (1981) ("California was not alone in supporting the view that the degree of asportation needed to commit a kidnapping offense could be minimal.").

Two years later, Traynor authored the opinion in *De Burgh v. De Burgh*.[129] As Traynor later wrote, he "analyzed [California's recrimination] statute that had been conventionally invoked as providing an absolute defense of recrimination and found that it gave the trial court discretion to grant or deny a divorce as the public interest indicated."[130] This holding, in turn, has been credited with laying the foundation for California's no-fault divorce legislation.

In *De Burgh*, a wife sought divorce from her husband on the grounds of extreme cruelty, but her husband cross-complained for divorce on the same ground. At the time, California only permitted divorce if the complaining party could prove one of the statutorily prescribed grounds of fault sufficient to justify a divorce. However, if the other party to the proceeding could prove the complaining party was also at fault, that party proved the defense of recrimination, and no divorce would be granted.[131] Traynor examined whether the case at issue warranted application of the doctrine of recrimination.[132] In determining the issue, as in *Knowles* and *Perez*, he examined the wording and legislative background of the applicable statues along with the history of the doctrine of recrimination and its objectives.[133]

First, Traynor again used the doctrine of *in pari materia* and examined other provisions on the same topic:

> [T]ogether, Sections 111 and 122 of the Civil Code provide: 'Divorces must be denied upon . . . a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce.' We are bound to consider the additional requirement that such a cause of divorce must be 'in bar' of the plaintiff's cause of divorce.[134]

He explained, "Had the Legislature meant to make every cause of divorce an absolute defense, it could easily have provided that: 'Divorces must be

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129 250 P.2d 598 (Cal. 1952).

130 Roger J. Traynor, *Law and Social Change in a Democratic Society*, U. Ill. L.F. 230, 232 (1956).

131 *See id.*

132 *De Burgh*, 250 P.2d. at 600.

133 *Id.*

134 *Id.*

denied upon . . . a showing by the defendant of any cause of divorce against the plaintiff.' "[135]

Second, Traynor also used the tool of reasoning by analogy to other areas of law, ultimately finding analogy to contract law inappropriate because marriage is much more than a contract and can only be terminated with the consent of the state.[136] Thus, in a divorce proceeding, while the court must consider the rights and wrongs of the parties as in contract litigation, it must also examine "the public interest in the institution of marriage."[137]

Third, Traynor examined the Legislature's purpose in enacting the statute, which he determined to be fostering the family unit. Traynor noted, "The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life," and "[s]ince the family is the core of our society, the law seeks to foster and preserve marriage."[138] However, Traynor also recognized that "when a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted."[139] He elaborated, "[P]ublic policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed."[140]

In abolishing the doctrine of recrimination, Traynor looked back to the origination of the doctrine, going as far back as the English ecclesiastical jurist, Lord Stowell.[141] He also examined past precedent regarding the doctrine, making a point of overruling certain precedent.[142] He distinguished the statute at issue concerning recrimination from the precedent interpreting the general doctrine of recrimination prior to the statute enacted by the California Legislature in 1872.[143] He also examined the precedents listed by

135 *Id.*

136 *Id.* at 601.

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.*.

142 *Id.* at 601–05 ("To the extent that the following cases support a mechanical application of the doctrine of recrimination, they are disapproved . . .").

143 *Id.* at 602.

the commissioners who drafted the Code, noting, "It is apparent from the decisions that were listed that the Legislature intended that divorce cases involving recrimination be governed by the same principles that apply generally throughout our jurisprudence."[144] He stressed that while the plaintiff's fault is always important in any case, such fault should not be "exalted above the public interest."[145] Defenses such as *in pari delicto* must still apply, but respect for the public interest must create an exception to the doctrine of unclean hands, from which the defense of recrimination stems.[146] Thus, "it is clear that the Legislature, in relying upon judicial principles of general application, intended that in divorce litigation the fault of the plaintiff should have no more significance than elsewhere in the law."[147] Thus, "with this purpose in mind it worded the statute to require that a cause of divorce shown by defendant must be 'in bar' of the plaintiff's cause of divorce" and "would have defeated its own purpose had it closed the avenues to divorce when the legitimate objects of matrimony have been destroyed."[148] Hence, Traynor's extensive analysis allowed him to conclude that, "a strict recrimination rule fails in its purpose of denying relief to the guilty," in uncontested divorce cases where neither spouse is "innocent."[149]

Next, Traynor looked to California cases decided since the enactment of the Code, social developments over the past several decades (such as the rising divorce rate and recognition of marriage failure as a social problem), divorce laws in other states (some of which required that the plaintiff's offense be of the same type as the defendant's offense or that the case involve equal guilt), and the work of leading scholars.[150] Traynor recounted how in 1948, a committee of experts of the American Bar Association strongly urged the elimination of the defense of recrimination,[151] but showed judicial restraint by noting that "[i]n view of the statutory provisions on the subject,

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[144] *Id.*

[145] *Id.*

[146] *Id.* at 602–03.

[147] *Id.* at 603.

[148] *Id.*

[149] *Id.*

[150] *Id.* at 603–05.

[151] *Id.* at 605 (citing Report of Legal Section of National Conference on Family Life 1, 3, 7 (1948); Zechariah Chafee, Jr., Some Problems of Equity 73 et seq. (1950).

we are not free to go so far."[152] Further, he also concluded that "the comparative guilt of the parties will be without significance in every case," but that

> some of the evils pointed out by the Bar Association Committee can be avoided within the framework of the existing statute if it is kept in mind that the doctrine of recrimination, like the doctrine of unclean hands of which it is a part, is neither puristic nor mechanical, but an equitable principle to be applied according to the circumstances of each case and with a proper respect for the paramount interests of the community at large.[153]

Ultimately, Traynor "concluded that section 122 of the Civil Code imposes upon the trial judge the duty to determine whether or not the fault of the plaintiff in a divorce action is to be regarded as 'in bar' of the plaintiff's cause of divorce based upon the fault of the defendant."[154] As applied to the case at hand, he held the evidence presented created ample support to conclude that the parties' misconduct should not bar a divorce based upon the aforementioned considerations because there had been "a total and irremedial breakdown of the marriage."[155] In a court's determination of when a cause of divorce shown against a plaintiff constitutes a bar to the suit for divorce, Traynor ruled that divorce courts, as courts of equity, are "clothed with a broad discretion to advance the requirements of justice in each particular case," but among things should consider "the prospects of reconciliation, the comparative fault of the plaintiff and the defendant, and the effect of the marital strife upon the parties, their children, and the community."[156]

In 1969, California became the first state to enact a no-fault divorce statute, which abolished all fault-based grounds for divorce and allowed for only two no-fault grounds, "irreconcilable differences" and "incurable insanity."[157] The *Report of the Governor's Commission on the Family*,

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[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.* at 605–06.

[156] *Id.* at 605–07.

[157] Former Civ. Code, § 4506, added by The Family Law Act, Stats. 1969, ch. 1608, § 8, eff. Jan. 1, 1970, repealed and reenacted as Fam. Code, § 2310 without substantive change, Stats. 1992, ch. 162, § 10, eff. Jan. 1, 1994.

proposing the law, even credited Chief Traynor's *DeBurgh* opinion as its inspiration for the law.[158] This action reflects legislative approval of the decision; however, many question if it would not have been appropriate for Traynor to defer to the Legislature in *DeBurgh* given that they were considering the issue at the time of the decision.

C. CONCLUSION

Many legal scholars describe Traynor as a judicial activist. Given his stance on the role of courts, Traynor would likely regard this as a compliment. However, although he may have taken an "activist" approach to his common law precedents, as the aforementioned opinions demonstrate, his opinions in cases controlled by relevant legislation demonstrate a mix of creativity and deference to the Legislature (without adopting a strict textualist approach), while still examining considerations of policy. Thus, many believe Traynor's opinions all arrive at the "right result." With his common law decisions, there is less tactical strategy in achieving this right result because courts are given far more discretion in the common law, of which they are the primary lawmakers. However, his opinions involving statutory construction warrant more applause given his ability to stress the importance of the text while not overemphasizing extratextual sources to the extent that he might be considered "legislating from the bench."

Traynor's methodical analysis in cases like *Perez* allowed him to reach innovative results, which although criticized by some at the time, could not be attacked on the grounds that he failed to show deference to the Legislature or was *Lochnerizing*.[159] Traynor, although believing antimiscegenation laws to be wrong, crafted a methodical analysis that could not be attacked on the grounds that he was basing the decision solely on his personal policy preferences.

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[158] Report of the Governor's Commission on the Family 91 (1966), Comment to § 028.

[159] *See* Lochner v. New York, 198 U.S. 45 (1906) (striking down a labor statute on the basis that it interfered with the freedom of contract); *but see id.* at 75–76 (Holmes, J., dissenting) ("liberty, in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.") (internal quotations omitted).

Further, *DeBurgh* might have come out differently had Traynor taken an approach to interpretation that scorned resort to extratextual sources. *DeBurgh,* in turn, laid the foundation for California to become the first state to adopt no-fault divorce legislation, a pioneering move that has been followed in every state in the nation.[160] Many recognize that Traynor and his innovative California Supreme Court, in becoming the first state high court to introduce no-fault divorce, were integral to this development in the law.

Traynor proved himself to be an unusually influential judge, and the policies of an influential judge are therefore important and influential as well. Traynor's approach, including elements of both purposivism and dynamic interpretation, still demonstrates a consistency that permeated his opinions. These opinions, as previously discussed, became widely adopted by other states — some adopted by the U.S. Supreme Court, while others led to nationwide changes in the law. Justice Traynor's judicial philosophy clearly impacted the law of the United States.

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[160] *Id.* 230, n.4 (citing Linda Elrod & Robert Spector, *A Review of the Year in Family Law*, 33 Fam. L.Q. 865, 911 (2000) ("Currently, all 50 states have enacted some form of no-fault divorce legislation, either based on the parties' separation for a specified period of time, or based upon the parties' incompatibility or irreconcilable differences.").