The Jurisprudence of Innovation: Justice Roger Traynor and the Reordering of Search and Seizure Rules in California

Ben Field

INTRODUCTION

The idea of judicial creativity caused great anxiety among legal scholars and jurists during the first half of the twentieth century. Building on the judicial philosophy of Oliver Wendell Holmes, Legal Realism emerged in the 1930s as a school of jurisprudence devoted to exploring the uncertainty of judicial law making. Justice Roger Traynor's career on the California Supreme Court from 1940 to 1970 coincided with widespread controversy among the Realists and other contemporary legal scholars about the subjectivity and arbitrariness of judicial decisions. Justice Traynor agreed with the Realists on certain fundamental propositions about the nature of judging. He did not share their anxiety, however, over the absence of fixed legal principles, or their cynicism about the legitimacy of judge-made law. While the Realists brooded over the intellectual justification for the judicial process, Traynor forthrightly encouraged judicial innovation.

Traynor's innovative decisions in search and seizure cases reveal the underlying assumptions of his judicial philosophy. Traynor grounded his philosophy of judging on a pragmatic theory of justice. Legal decisions required the application of judicial experience to the facts, he contended, not the mechanical application of precedent. Like the Pragmatist philosophers, Traynor embraced an ideal of action.[1] Judges had a duty to weed out obsolete legal rules, which abounded in search and seizure law. Traynor also believed that judges had a responsibility to create new

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search and seizure rules in response to the changing realities of crime and punishment in California.

Traynor's method of judging involved a process of inquiry and social verification that closely paralleled the Pragmatists' concept of scientific method.[2] William James argued that

> [w]e must find a theory that will work and that means something extremely difficult; for our theory must mediate between all previous truths and certain new experiences. It must derange common sense and previous belief as little as possible, and it must lead to some sensible terminus or other that can be verified exactly.[3]

Like James, Traynor searched for workable rules. His process of judicial inquiry embodied the principle that law ought to resonate with the circumstances of life. Traynor saw his search and seizure decisions in the social context of crime and policing. He allowed his judicial experience and his knowledge of the law enforcement system to guide him toward practical responses in search and seizure cases. With each new search and seizure case, he tested the functionality of legal rules.

Legal Realists believed that judging, when stripped of its claim to the legitimacy of time honored rules, would succumb to the prejudices of judges. Realists feared the law would become unpredictable and inconsistent as a result; judicial rulings liberated from precedent would be unruly. Traynor provided an answer to the Realists' fears. He insisted that careful judicial innovation would be a vast improvement over the mechanical application of obsolete legal rules. He believed judges would not abuse their power to innovate because caution typified the bench. Traynor also discerned limits to judicial creativity.[4] He asserted that judging demanded a self-conscious effort to make rules that functioned as coherent bodies of law. Self-imposed consistency circumscribed the creative pragmatism of rule making in individual cases.

PEOPLE v. CAHAN

Before Traynor gave rational structure to it, search and seizure law in California was a disjointed body of law. The centerpiece of Traynor's search and seizure decisions was *People v. Cahan*.[5] Decided in 1955, *Cahan* created a judicial rule of evidence barring the admission at trial in California courts of evidence obtained in an illegal police search.[6] The

primary objective of *Cahan* was to deter law enforcement authorities from engaging in such searches.

Traynor's opinion in *Cahan* demonstrated his pragmatic approach to judging. Charles Cahan, a bookmaker, had been convicted on the basis of statements he had made in conversations covertly recorded by the police.[7] The police had broken into Cahan's house without a warrant and installed listening devices that enabled them to make the recordings.[8] These recordings formed the evidentiary basis for Cahan's conviction. After assessing the risk of freeing criminals by excluding illegally obtained evidence of their guilt, Traynor concluded that police often could obtain the necessary evidence without violating the Fourth Amendment. Although the trial briefs contained no empirical evidence of the frequency of illegal police searches, Traynor argued that, based on his own experience, they had become routine. Traynor reasoned that police probably did not exhaust their legal options when breaking the law was easier and carried no risk of punishment.[9] He refused to act, in effect, as an accessory after the fact to illegal searches. Therefore, he felt compelled to adopt the exclusionary rule, the only alternative to continued court complicity with lawless police activities.[10]

In the two years following *Cahan*, the California Supreme Court and lower courts decided over one hundred search and seizure cases.[11] Traynor led the way in converting the constitutional principle (embodied in the Fourth Amendment) into "workable rules."[12] His judicial creativity was fired not only by evidence that a rule had become outmoded, but by his drive to make coherent previously discordant legal rules. Traynor's opinions on search and seizure reflect his devotion to creating a rational scheme of rules based on consistent, practically obtainable objectives.

TRAYNOR'S INTELLECTUAL DEVELOPMENT

Traynor asserted that judges should descend to the everyday business of life to make decisions.[13] As Oliver Wendell Holmes explained, "The life of the law has not been logic: it has been experience."[14] Traynor's earliest intellectual development suggests a source of his willingness to engage in practical analysis of the everyday business of life. He grew up in Park City, Utah, surrounded by mountainous terrain he later analogized to the path of the judge.[15] Park City was a mining town, and Traynor fondly remembered its color and diversity as part of his earliest educa-

tion. "I should count it a loss," he later wrote, "if we were to become so self-consciously mannered as to shut the windows of the parlor and the study to the language of the street."[16] Life in Park City must have been difficult for Traynor's parents, Felix and Elizabeth (O'Hagan) Traynor, who had immigrated from Hilltown, County Down, in Northern Ireland.[17] His father was a miner in Nevada and Utah until occupational disease forced him to quit when Traynor was six.[18] Traynor helped his father with a drayage business until his father died several years later.[19] Traynor's experiences in Park City molded an intellect unfettered by convention, and he remained attentive to the "language of the street" throughout his career on the bench.

Traynor demonstrated an interest in practical policy questions early in his academic career. After receiving his bachelor's degree at UC Berkeley in 1923, Traynor stayed on as a graduate student in political science and law. The law school (Boalt Hall) used the case study method originated by Christopher Columbus Langdell, a proponent of the oracular theory of judging. However, in his writings as a graduate student, Traynor examined legal questions from a policy perspective rather than within the traditional (Langdellian) framework of doctrine and theory. Each of his five student comments in the *California Law Review* dealt with practical policy issues, not questions of legal principle.[20] Traynor's political science Ph.D. dissertation analyzed the process for amending the United States Constitution.[21] Interestingly, it did not presage his later support for legal reform. To the contrary, it criticized various contemporary reform proposals. The dissertation did, however, foreshadow Traynor's method of analysis as a judge. Citing colonial experiences with charter amendments and the subsequent history of federal constitutional amendments, Traynor concluded that the provisions for amending the Constitution reflected the policies best suited to the needs of republican government.[22] His dissertation approached its topic pragmatically, scrutinizing the history of constitutional amendments to determine whether the constitutional amendment process had adequately accommodated contemporary political conditions and served contemporary political needs. Traynor also critically examined the amendment process as a system of rules made coherent by their underlying policy objectives. He would later employ this pragmatic approach and systemic perspective throughout his career on the bench.

Traynor was known primarily as a tax expert when Governor Olson nominated him to the California Supreme Court in 1940. He had taught the first tax class at Boalt Hall in 1929.[23] He helped write California's tax code as counsel to the State Board of Equalization and served as deputy attorney general in the tax division.[24] His role in revamping the state's tax laws demanded a circumspect analytical approach which, like many of his later decisions as a judge, advanced a coherent system of rules. Although Traynor recused himself from tax cases while on the California Supreme Court, his experiences critiquing and reforming the tax code helped establish a systemic approach toward legal reform that would echo through his judicial decisions.

Once on the bench, Traynor came to view criminal law as an incoherent collection of archaic rules. The development of criminal law, he wrote in 1959, "has been warped by successive irrationalities that have matched the potions and bloodletting of medicine."[25] Early in his judicial career Traynor embraced the position on the Fourth Amendment set forth by Benjamin Cardozo that "the use of evidence obtained through a search and seizure (illegal under the Fourth Amendment) . . . does not violate due process of law for it does not affect the fairness or impartiality of the trial."[26] The defendant could attempt to recover criminal and civil penalties from the police for their illegal action, but the courts would nevertheless admit the illegally obtained evidence.[27] Traynor's view that search and seizure cases hinged on due process rights changed as he observed over the course of years the practical impediments to legal action against scofflaw police officers.

SOCIAL CHANGE AND LEGAL REFORM

Traynor's career on the California Supreme Court spanned 30 years of explosive social change in California. During his tenure on the bench, the population of California tripled.[28] The state industrialized rapidly and became increasingly urban.[29] With these changes came increased social problems. Federal Bureau of Investigations crime statistics showed a nationwide increase in crime beginning in the 1940s,[30] and the California Department of Justice substantiated this trend. From 1952 to 1962, reported felonies in California increased 110 percent;[31] felony arrests in California increased 70 percent, and the rate rose from 507 per 100,000 Californians to 578 per 100,000;[32] felony charges in California Superior

Court increased 240 percent;[33] and felony convictions increased by 150 percent.[34] The state's population, by comparison, increased 50 percent during 1952-62. Some critics of FBI crime statistics argued that the increased reporting of previously unreported crime created the illusion of a crime wave.[35] However, this phenomenon does not appear to have caused the rise indicated by crime statistics in California.[36]

Law enforcement had adapted to the rise in crime. A transition from an adjudicative to an administrative law enforcement system began in the late nineteenth century and accelerated during the twentieth century.[37] With the advent of professional police and prosecutors, the focal point of law enforcement shifted from the courts and jury rooms to the streets, station houses, and district attorneys' offices.[38] Professional police applied scientific techniques, such as fingerprinting and blood testing. Professional prosecutors replaced part-time and volunteer lawyers who were brought in to try criminal cases. Lawrence Friedman and Robert Percival have noted that in the old system, "a system run by amateurs, or lawyers who spent little bits of their time and energy, with no technology of detection or proof, a trial was perhaps as good a way as any to strain the guilty from the innocent."[39] The professionalization of law enforcement and the advent of police science demanded changes in the law of criminal procedure. Traynor's search and seizure decisions would demonstrate his concern over the practical effect of sophisticated police tactics on the privacy rights of individuals.

Traynor urged judges to consider realistically the changes in law enforcement and to modernize accordingly the rules of criminal procedure. One of the distinguishing features of Traynor's opinions is its resonance with the changing conditions of life in California. The judge's calling, he contended, was to resolve legal controversy and "restore litigants to normal living much as a hospital restores the ailing and the injured."[40] The law, like medical treatment, should be administered only in accordance with the most current information and accurate diagnosis.

Traynor's search and seizure opinions defy categorization as pro- or antilaw enforcement. While his opinion in *Cahan* creating the exclusionary rule reflected his concern about the rights of those accused of crimes,[41] Traynor also believed that "our police . . . have a heroic job to do," and he often commended police officers for their difficult and dangerous work.[42] In *The Self-Inflicted Wound*, Fred Graham argues that the U.S. Supreme Court's "criminal [rights] revolution" nearly destroyed

the U.S. Supreme Court's all important reputation as the conscience of society.[43] *Cahan* and other Traynor opinions, which the U.S. Supreme Court later followed, similarly provoked a strong, negative reaction from some Californians, and Traynor worried about attacks on the courts in response to *Cahan.*[44] He feared the court might become the scapegoat for rising crime.[45] However, public reaction to the court's search and seizure cases was proved to be mixed, and dramatic signs of public discontent with the court's positions on criminal procedure appeared only occasionally. The 1958 Los Angeles County Grand Jury took the unusual step, however, of issuing an extensive report condemning the *Cahan* and other decisions:

> This ridiculous overliberality of interpretation of our constitution reflects a dangerous softness of thinking and a weak and watery philosophy, on the part of these people whom we put into a position to make such important decisions.[46]

The Grand Jury called for the removal of four justices from office, but no credible campaign against the judges emerged.[47]

The liveliest debate over the court's actions took place on the pages of California newspapers. Some newspapers attacked the court as pro-criminal defendant. The *San Francisco Examiner* reported that *Cahan* was "a change that gave the criminal defendant the greatest break he had ever received."[48] In a six-article series on the court's search and seizure cases, the *Examiner* claimed that *Cahan* and the court's subsequent search and seizure rulings were universally condemned:

> The initial blast by the four justices was followed by twenty-three aftershocks in the succeeding ten months. Some of these struck the law enforcement officers with even more devastating effect than the grandaddy effusion of April 27, 1955 (*Cahan*). Before the last one subsided, criminal justice in California had acquired a distinctly new look. The supreme court had rewritten the rule book on the law of arrest and on many phases of criminal procedure—and the revisions were drastic.

The *Examiner* characterized the court's search and seizure decisions as a self-inflicted wound.

Other newspapers did not share the *Examiner's* view. The *San Francisco Chronicle* editorial board came out in favor of the decision:

> For half a century the Constitutions of the United States and of the State of California have not meant what they said in protect-

> ing "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures" by the police in California. They do now.[49]

The *Los Angeles Times* and the *Sacramento Bee* also supported the court.[50] To the extent that such newspaper commentary reflected public opinion, one must say that public opinion revealed a wide range of responses to the court's search and seizure decisions.

Some explicit support for the majority decision in *Cahan* came from the legal community. Several search and seizure cases attracted the attention of the American Civil Liberties Union. The ACLU did, at the very least, help bring the problem of illegal police searches to the attention of the California Supreme Court. In 1952, ACLU attorneys argued *Rochin v. California* before the U.S. Supreme Court.[51] This case, which the California Supreme Court had declined to review, involved evidence obtained in a warrantless search of Mr. Rochin's home and subsequent medical procedures that caused him to vomit two capsules containing morphine. The impact of the ACLU's efforts, however, appears to have been limited. The ACLU's Southern California Branch filed *amicus curiae* briefs in only 11 search and seizure cases from the time of Traynor's first search and seizure case in 1942 to *Mapp v. Ohio*, in which the U.S. Supreme Court required all states to adopt the exclusionary rule, if they had not already done so.[52] The same two ACLU lawyers filed each of the 11 briefs. Perhaps a lack of sufficient staff or *pro bono* volunteers prevented the ACLU from launching a comprehensive litigation strategy to challenge illegal police searches systematically in courts across the state.

There were some expressions of support from the bar for *Cahan* and the reform of search and seizure rules. The Criminal Courts Bar Association, a Los Angeles County organization dominated by defense attorneys, filed an *amicus* brief on the defendant's behalf in the *Cahan* case itself.[53] The majority opinion in *Cahan* also evoked some active support in northern California. The Marin County Bar Association also filed an *amicus* brief on the defendant's behalf. Moreover, the Marin County bar leadership agreed almost uniformly with the court's opinion.[54] In a vote of Marin bar committee members, 19 of 28 members favored a motion to file the *amicus* brief. The seven members opposed to the brief were from the district attorney's office.[55] Support for the court's decision in *Cahan* may have been similarly strong among lawyers

elsewhere in California, but few lawyers actually organized to bring illegal search cases before the state courts.

Law enforcement initially opposed the court's search and seizure decisions. Los Angeles Police Chief William Parker, for example, blamed *Cahan* for a 35.8 percent increase in the crime rate in Los Angeles during the first quarter of 1956.[56] The Oakland police chief claimed the decision "placed a stumbling block in the way of law enforcement officers."[57] James Don Keller, district attorney and county counsel of San Diego County spoke for the majority of prosecutors and police officers when he wrote:

> At a time when the State of California and practically every area of the State was experiencing a tragic increase in narcotic traffic, the *Cahan* decision was not far short of disastrous to State and local agencies charged with responsibility for enforcement of the narcotics laws. . . . In bookmaking operations, while street bookmaker or collector may be arrested, the principals in the operation transact their dealings by telephone and make few, if any personal contacts, thus surveillance is of no value.[58]

However, with time, the new rules announced by the California Supreme Court seemed less onerous. Edmund G. Brown, Sr., who opposed *Cahan* when he served as attorney general in 1955, later admitted that it improved police conduct.[59] The new rules gained acceptance as police departments gradually incorporated them into the police training programs.

Traynor worried about the perception that "due process rules are the source of all our woes."[60] He noted that no empirical studies proved a correlation between crime and court rules.[61] "[T]hose who equate due process rules with coddling of criminals have failed dismally," he wrote, "to explain why crime flourishes when there is no such so-called coddling."[62] Moreover, the court's search and seizure cases evidently did not impede convictions. Felony convictions in California kept pace with population growth during the fifties.[63] In 1962 Traynor stated that "there has been a substantial abatement of the fear that the [*Cahan*] rule would frustrate law enforcement. It has become increasingly clear that acceleration of crime in our state, as in others, cannot be explained by the simplistic reference to the presence or absence of the exclusionary rule."[64] During the fifties, Californians generally did not seem to blame the court's decisions favoring criminal defendants for the rise in crime.

If public fear of crime and the perception that the "liberalization" of criminal procedure fostered crime did not become a force for counter-reform in California, they did have that effect in Washington, D.C., during the late sixties. By 1968 racial animosity and urban riots had charged the national-level debate over the rights of criminal defendants. The U.S. Senate voted 51 to 31 in favor of an amendment to the Omnibus Crime Control and Safe Streets Act of 1968 designed to reverse *Miranda v. Arizona*.[65] Although the anti-Supreme Court provisions did not become law, they signified the strength of the reaction to the Court's criminal procedure reforms.

The California Supreme Court's criminal procedure decisions were handed down prior to the tumult of the sixties. The atmosphere surrounding these decisions and the objectives behind them differed significantly from those surrounding the U.S. Supreme Court decisions; consciousness of the disparate treatment of racial minorities by the criminal justice system and fear of racial violence did not animate controversies over the California court decisions in the fifties. Although the California court's "liberalizing" decisions before 1960 had some vocal critics—and a few dedicated supporters—political pressure external to the judiciary seems to have had little effect on the reform of criminal procedure in California. Nor did *Cahan* and its progeny become a "self-inflicted wound" to the California court's reputation.

SETTING THE STAGE FOR THE REFORM OF SEARCH AND SEIZURE RULES

During Traynor's first year on the California Supreme Court he gave a radio speech in which he recalled the words of the British statesman William Pitt regarding the evil of arbitrary search and seizure:

> The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter, but the King of England may not enter. All his force dares not cross the threshold of the ruined tenement.[66]

The Fourth Amendment of the U.S. Constitution embodied the principle that unreasonable and unwarranted searches violated fundamental rights. However, California's search and seizure rules often deviated from this principle in practice. There were two reasons for this deviation. First,

the Fourth Amendment contains ambiguous language regarding the requirements for a legal police search. The first clause prohibits unreasonable searches and seizures, and the second clause creates a warrant requirement for searches:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[67]

Of several interpretations of the Fourth Amendment that emerged, two were dominant, though often inconsistent. The Fourth Amendment has been interpreted to mean both that some warranted searches were illegal and that some unwarranted searches were legal.[68] As a result, the police executed the vast majority of searches without warrants. In 1968, there were about 30,000 reported major crimes in San Francisco, a city of 750,000 people, and the police obtained 20 search warrants during the year.[69] In Los Angeles the courts issued only 1,897 warrants from 1930, when the court began keeping track of warrants, to 1968.[70] In 1968 the courts of Los Angeles, a city of three million, issued 197 warrants, more than ever before.[71] The courts' search and seizure decisions had done little to encourage police to obtain warrants. As a result, law enforcement agencies had developed search policies with little judicial oversight or control.

The second reason for the deviation of California search and seizure rules from Fourth Amendment principles was that the federal judiciary had done little to rein in local law enforcement agencies. Federalism persisted in the law of criminal procedure. Until the 1949 case of *Wolf v. Colorado*, the Supreme Court did not compel the states to meet the requirements of the Fourth Amendment.[72] Even with *Wolf*, the Court did not require the exclusion of evidence illegally obtained by nonfederal police.[73] Frankfurter, speaking for the Court, stated that freedom from unreasonable searches and seizures was "implicit in the 'concept of ordered liberty' and as such is enforceable against the States through the Due Process Clause."[74] However, the Court declined to interfere with states' policies designed to deter illegal searches: "it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistent-

ly enforced, would be equally effective." The Court continued to rely on a due process analysis, but it had sent a message to the states that they should adopt the exclusionary rule or its equivalent.[75]

Traynor and his brethren received the Supreme Court's message, but they "clung to the fragile hope that the very brazenness of lawless police methods would bring on effective deterrents other than the exclusionary rule."[76] A succession of illegal search cases made it "abundantly clear that it was one thing to condone an occasional constable's blunder but another thing to condone deliberate and systematic routine invasions of the Fourth Amendment."[77] The Fourth Amendment created a right without a remedy. Finally, the cases of *Rochin v. California*[78] and *Irvine v. California*[79] convinced the California court that it could no longer participate in the "dirty business" of condoning illegal searches.[80]

The facts of *Rochin* were so disquieting that the U.S. Supreme Court reversed the defendant's conviction on the grounds that the police methods used violated the Due Process Clause of the Fourteenth Amendment. With "some information" that Mr. Rochin had narcotics, the police forced their way into his house, where they found Mr. and Mrs. Rochin in their bedroom.[81] When the police asked about two capsules by the side of the bed, Mr. Rochin put them in his mouth. The police tried to pry the capsules from Mr. Rochin, but ultimately took him to a hospital where a doctor caused the defendant to vomit the capsules by feeding him an emetic solution through a tube. Lab analysis proved that the capsules contained morphine. The California Supreme Court had denied without opinion Rochin's petition for a hearing. However, the case shocked Traynor and some of his colleagues, and they hoped the state attorney general's office would file criminal charges against the police officers responsible for the search.[82] The attorney general took no action.

Irvine provided a tougher test of the due process standard for convictions based on illegally obtained evidence. The police had entered Mr. Irvine's home without a warrant three times using a duplicate key, which they had made.[83] They installed a listening device in Mr. Irvine's hall, moved it to his bedroom, and finally moved it again to a bedroom closet. At trial police officers testified to incriminating conversations they heard through the listening devices, and Mr. Irvine was convicted of bookmaking and related offenses. Justice Jackson, writing for the Court, asserted that *Irvine* differed from *Rochin* because it did not involve

coercion.[84] The trespass on the defendant's property and the eavesdropping alone provided grounds for a reversal of the conviction.

Justice Jackson expressed doubts about the efficacy of the federal exclusionary rule as a deterrent to illegal searches by federal law enforcement officers.[85] However, his message to the state supreme courts was mixed. He argued that "to upset state convictions even before the states have had adequate opportunity to adopt or reject the [exclusionary] rule would be an unwarranted use of federal power."[86] "[S]tate courts may wish to reconsider their evidentiary rules," he claimed.[87] *Irvine* troubled Traynor, and he answered Jackson's ambiguous message with a series of decisions that reordered search and seizure rules in California.[88]

TRAYNOR'S PHILOSOPHY OF JUDICIAL ACTION

People v. Cahan marked the departure of the California courts from the due process analysis of search and seizure cases. It was a tough case for Traynor. Years after *Cahan* he reflected on the decision:

> Of all the two-faced problems in the law, there is none more tormenting than the admissibility of illegally obtained evidence. Whichever face one turns to the wall remains a haunting one because there is always that haunting fear that the court has impinged too far on one or the other of the two great interests involved: first, effective law enforcement, without which there can be no liberty; and second, security of one's privacy against arbitrary intrusion by the police.[89]

In *People v. Gonzales*, 13 years before *Cahan*, Traynor had rejected arguments for the exclusionary rule and upheld a conviction based on illegally obtained evidence.[90] Looking back on *Gonzales* Traynor later wrote, "In 1942 clear academic postulates were as yet unclouded by long judicial experience."[91] Traynor's experience observing police practices suggested that only the exclusionary rule would deter illegal police searches.

Cahan and its progeny tested Traynor's philosophy of judging. Traynor came to believe that "(t)here are . . . reasonable grounds for differences of opinion as to the means of enforcing the Fourth Amendment."[92] Logic alone could not resolve or reconcile these differences. However, Traynor had great confidence in the ability of judges to reach pragmatic solutions to even the most difficult problems.

> [L]egal problems need not take [the judge] by storm if he makes a little advance, uncloistered inquiry into what people most want out of their lives and how they wish to live with one another. It is from the stuff of their relationships with one another and with the state that the common law develops.[93]

Where precedent failed, as it had failed to stop police from conducting illegal searches, the judge had a duty to find a practical alternative. "Uncloistered inquiry" would provide the experience necessary to render pragmatic judgment.

G. Edward White provides a different explanation for Traynor's departures from precedent. In "Rationality and Intuition in the Process of Judging: Roger Traynor,"[94] White argues that where a case required a choice between competing legal principles Traynor relied on intuition.[95] Traynor's writings provide some support for this view:

> Once he [the judge] has marshalled the data pertinent to a controversy, he must articulate a solution that calls for a discriminating sense of which available principle, if any, should govern the case. His task is least complicated when he can choose from among several plausible alternative principles that readily fit the case without looking anachronistic. As the badlands get worse there are clearer indications of what form reclamation might take, though the need remains for judgment of the highest order—that combinations [sic] of analysis and intuition culminating in decisions that proves prophetic.[96]

Traynor did not, however, use the word "intuition" often in describing his decision-making process.[97] The word denotes an absence of rational thought and inference, which seems inconsistent with Traynor's approach to judging. Moreover, the word describes a mysterious mental process, and, as a result, sheds little light on Traynor's more difficult decisions.

Traynor immersed himself in the scholarly debate over the mysteries of judging. He knew and read the work of the Legal Realist scholars, such as Jerome Frank, Karl Llewellyn, and his colleague at Boalt Hall, Max Radin. He wrote an essay responding to Frank's influential argument in *Courts on Trial* regarding fact skepticism and rule skepticism.[98] He also cited Llewellyn's Realist classic *The Common Law Tradition* in several law review articles.[99] Judge Frank endorsed Traynor's nomination to the California Supreme Court, though Traynor was a political unknown at the time.[100] However, Traynor's closest

relationship was with Max Radin, who served as dean at Boalt Hall (the University of California, Berkeley, Law School) while Traynor was a professor there.

Governor Culbert Olson nominated Traynor to the Supreme Court when the State Qualifications Committee rejected Radin, the governor's previous nominee, because of his "radical tendencies."[101] Another Boalt man, then-Attorney General Earl Warren, was one of two members of the Qualifications Commission to vote against Radin.[102] Although Radin's chance to sit on the state Supreme Court faded after the ugly confirmation fight, Radin was not jealous of Traynor's success. To the contrary, when Governor Olson called Radin to ask his advice on a substitute nominee, Radin immediately recommended Traynor.[103]

Traynor and Realists such as Frank, Llewellyn, and Radin rejected the proposition that law was composed of fixed principles.[104] "It is commonly believed" Traynor wrote, "that the decisions of a day in court are reflex arcs of the wisdom of the ages, just as it is commonly believed that the ages have been wise."[105] According to this oracular theory of justice, espoused by nineteenth century theorists, such as Harvard Law School Dean Christopher Columbus Langdell, judges found immutable principles of law and applied them to the case at hand. Citing Radin's *The Theory of Judicial Decision*, Traynor wrote that immutable principles of law "may encase notions that have never been cleaned and pressed and might disintegrate if they were."[106] Traynor and the Realists accepted the idea of the judge as lawmaker.

The conviction that judges made the law undermined the traditional concept of the judge's role. If Oliver Wendell Holmes, the philosophical progenitor of Realism, was correct that law reflected "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men," then judicial decisions had to find a new jurisprudential justification.[107] Realist scholars cynically belittled the claims of judge-made law as a source of impartial justice. Judge Learned Hand contended, in criticsm, that the principles of Realist jurisprudence were: "that a judge should not regard the law; that this has never really been done in the past, and that to attempt to do it is an illusion."[108] According to the Realists, judicial decisions were not the product of logical deduction from broad principles, and judicial neutrality was impossible.

Traynor did not share the more extreme Realists' cynicism about the prospects for judge-made law. Unlike them, he believed that judicial objectivity was possible. He asserted that judges were "uniquely situated to articulate timely rules of reason . . . as independent and analytically objective as that of the legal scholars."[109] Their freedom from political influence, their detachment from adversarial interests, and their tradition of public service insulated them from bias.[110] Traynor maintained that judges could overcome their predispositions by bringing to bear in the cases before them a "cleansing doubt of his [the judge's] omniscience."[111] In addition, "[t]he disinterestedness of the creative decision is further assured by the judge's arduous articulation of the reasons that compel the formulation of an original solution and by the full disclosure in his opinion of all aspects of the problem and of the data pertinent to its solution."[112] The writing was the final test of judicial objectivity. Through a pragmatic process of verification by scholars and practitioners, each opinion could be purged of any remaining improper bias.

The Realists argued that judicial decisions were result-oriented in that judges reasoned backwards from results chosen on the basis of their subjective values.[113] They saw judicial rationality, expressed through the language of decisions, as a facade. Traynor rejected this theory of result-oriented judging:

> He [the judge] comes to realize how essential it is . . . that he be intellectually interested in a rational outcome . . . he can strive to deepen his inquiry and his reflection enough to arrive at last at a value judgment as to what the law ought to be and spell out why. In the course of doing so he channels his interest in a rational outcome into an interest in a particular result. In that limited sense he becomes result-oriented.[114]

Traynor maintained that reason brought "the good" to light and that the will could then follow the path illuminated by reason.[115] "The old proverb that when there's a will there's a way is reversed," he wrote, "The judge must first find the way and then summon the will."[116] For Traynor, the act of judging was not the rationalization of a preconceived result, but the willful pursuit of a rational result. Traynor's formulation of the process of judicial decision making mirrored the Pragmatic theory that a reasoned inquiry could yield functional truths, propositions that served some useful purpose.[117] Traynor agreed with William James and John Dewey that the process of reasoned inquiry had a value—the value

of yielding decisions that could improve life and society. Unlike the Legal Realists, Traynor thus embraced a philosophy of judging that emphasized reason and downplayed the subjective values of the judge.

Traynor's sanguine assessment of judicial objectivity and rationality supported his view that the judiciary could be held responsible for the health of the law. The judge's "quality control" function in the legal process demanded that as soon as a precedent became outdated, the judge should eliminate it.[118] Traynor never mourned the death of a precedent. A "bad precedent is doubly evil," he insisted, "because it has not only wrought hardship but threatens to continue wreaking it."[119] Traynor not only accepted the idea of the judge as lawmaker, he encouraged judges to take a creative part in shaping the law. "I believe," he wrote, "that the primary obligation of a judge, at once conservative and creative, is to keep the inevitable evolution of the law on a rational course."[120] The stability of the law, in Traynor's view, thus depended not on its permanence, but on its flexibility.

Traynor considered judges better equipped to reform the common law than were legislators. Judicial expertise and temperament, along with the relative permanence and detachment of judicial office, supplied the essential basis for an intelligent, critical evaluation of the law.[121] In response to the challenge, brought with unusual fervor by the prosecution in *Cahan*, that "legislators have a unique sensitivity to popular needs or what is sometimes called an ear to the ground," Traynor argued, "we certainly cannot afford now, if we ever could, to play law by ear."[122] Legislators were more susceptible than judges to the passions of the day. "Too often they legislate madly, confounding the confusions of one paragraph with several more to explain what the first paragraph is deemed to mean."[123] In areas of the common law, such as criminal procedure, bound to raise popular passions, only the judiciary could produce educated, well-articulated reform.

Traynor sought to ensure that judges would rise to their responsibilities as objective and rational lawmakers. He advocated specialized instruction for members of the bench, supporting the Conference of California Judges seminar program and advocating the establishment of the California College of Trial Judges.[124] He also helped design a merit plan for the selection of judges.[125] At the 1967 opening session of the College of Trial Judges, he proudly noted that, according to the Task Force Report on the Courts of the President's Commission on Law

Enforcement and Administration of Justice, California had among the most ambitious program for the education of judges.[126] Traynor believed that special training for judges would enable them to take a more detached and critical view of their cases.

According to Traynor, the health of the law depended on judicial willingness to innovate. "Judicial office has a way of deepening caution, not diminishing it," he wrote, "The danger is not that they will exceed their power, but that they will fall short of their obligation."[127] While Realist scholars doubted that judges could transcend their prejudices, Traynor not only believed they could, but asserted that the health of the law depended on it.

> In the interest of coherence as well as efficiency, it is for the courts to consign to oblivion what has proved over the years to be chaff. . . . There is no place in the living law for period pieces or parrot paragraphs or ill-conceived figments of what has passed as legal imagination.[128]

Traynor sought out and excised obsolete rules of criminal procedure. One such precedent was the "mere evidence rule" that prohibited police from seizing property they had no right to possess. The rule prescribed that if a person had a right to replevy property seized, the search had violated that person's property rights, and the search was illegal.[129] The U.S. Supreme Court adopted the rule, which traced its roots to the English common law,[130] in *Gouled v. United States.*[131] Under *Gouled*, only searches for stolen property, which a thief had no right to keep, contraband, the possession of which was illegal, and instrumentalities of the crime, which constituted a danger to the community, could be legally seized. *Gouled* prohibited the police from seizing "mere evidence" of a crime, such as incriminating records or a blood stained shirt. Traynor announced that if the "mere evidence rule" ever came before him, he would overrule it, and he did so in 1966 in *People v. Thayer.*[132] "The modern view," Traynor wrote, "is that the exclusionary rules exist to protect personal rights rather than property interests and that common-law property concepts are usually irrelevant."[133] The "mere evidence rule" had become obsolete, Traynor believed, and so he acted upon his precept that judges should expurgate law that had outlived its purpose.

Traynor also feared the alternative to innovative judicial law making. If judges failed to modernize the law, the law as an institution might crumble under the weight of changing social conditions:

> [T]here is increasing concern that an evolution of sorts in the law may no longer be good enough to match the revolutionary changes that science and the attendant revolution of rising expectations in the world are making on our lives.[134]

The transformation of the living law into an anachronism might even prepare the way for antidemocratic forces. Traynor's decisions on criminal procedure, in particular, exhibit the fear that if the judge "tends [the law] badly or merely passively, it can develop weaknesses or disorders or, worse still, frightening powers."[135] Traynor's search and seizure opinions demonstrate his preference for reform in response to the changing social conditions.

Traynor appreciated the importance of the principle behind the Fourth Amendment, but his search and seizure opinions highlighted the practical problem of redeeming Fourth Amendment rights. In 1941, Traynor asserted that the Fourth Amendment was "the guardian of our private lives . . . the law at its best—deep rooted in human experience, precise in language, clear in purpose."[136] Philosophical commitment to the Fourth Amendment did not, however, impel Traynor's decision in *Cahan*. In contrast to the U.S. Supreme Court's decision in *Mapp v. Ohio*, which deemed the exclusionary rule "an essential part of both the Fourth and the Fourteenth Amendments," Traynor justified the decision as the means to achieve the policy objective of deterring illegal police searches.[137] Consistent with this practical approach, Traynor believed that the exclusionary rule should not be retroactive.[138] Those already convicted or about to be convicted on the basis of illegally obtained evidence should not benefit from the court's decision to deter future illegal searches. "[T]he policy to deter illegal police activity," Traynor asserted, "is outweighed by the policy of finality of judgments."[139] Deterrence of illegal searches was the guiding policy objective of *Cahan*.[140] Past illegal searches could not be deterred. Therefore, Fourth Amendment rights should have a prospective remedy only. The principles underlying the Fourth Amendment did not require the invention of the exclusionary rule; the practical problem of deterring illegal police searches did.

Traynor was unable to carry a unanimous court in favor of his "judicially declared rule of evidence."[141] Three of Traynor's seven brethren dissented in *Cahan* although they agreed with Traynor on the illegality of the search.[142] The dissenters argued that the policy issues addressed in *Cahan* should have been left to the legislature.[143] Traynor,

on the other hand, saw the addressing of policy issues, such as the ones raised by *Cahan*, as the judge's highest calling.

THE COHERENCE OF PRAGMATIC REFORM

Cahan and its progeny suggest the parameters of Traynor's judicial pragmatism. Pragmatism in epistemology, ethics, and politics is "an open, free ranging quest for the most satisfactory solution to specific problems arising from concrete circumstances."[144] Traynor's brand of judicial pragmatism was constrained by his demand for intellectual coherence within the law and his insistence on the textual consistency of his judicial opinions. "He [the judge] must compose his own mind as he leaves antiquated compositions aside to create some fragments of legal order out of disordered masses of new data."[145] As Justice Raymond Sullivan, Traynor's colleague on the court, noted, Traynor had a "jurisprudential sense . . . [H]e looked at the entire scope of the law and saw how it all fitted. He could fit the day to day problems into his broad ideas and concepts."[146] Donald Barrett, senior staff attorney for the court from 1948 to 1981, concurred, contending that "Judge Traynor was particularly concerned with keeping the pattern of the law straight."[147] Thus, the objective of *Cahan* to deter illegal police searches influenced every significant search and seizure case that Traynor decided after 1955—whether it dealt with standing to have evidence excluded, consent to search, search incident to arrest, or other related issues.

In the years following *Cahan*, Traynor systematically revised rules of search and seizure, making them into a "reasonably orderly constellation."[148] "If we keep in mind that the *raison d'être* of the exclusionary rule is the deterrence of lawless law enforcement," Traynor wrote, "we can guard against confusion in the attendant rules we develop."[149] For instance, the deterrence rationale of the exclusionary rule demanded a thorough reworking of the rules of standing. Before Traynor's opinion in *People v. Martin*, in 1955, standing to sue depended on the defendant's property interest in the place searched.[150] If the defendant owned or had authority over the place searched, he or she had standing to object to an illegal search. If the defendant lacked the necessary property interest, evidence obtained in an illegal search could be used against him or her. The policy objective of deterring police illegality made standing irrelevant. Since the purpose of the exclusionary rule was not to punish

past illegal searches, but to deter future ones, "such [illegally obtained] evidence is inadmissible whether or not it was obtained in violation of the particular defendant's constitutional rights."[151]

The rationale of the exclusionary rule did not always benefit the criminal defendant. Mistakes by the police resulting in illegal searches did not automatically require the exclusion of evidence. In *People v. Gorg*, the owner of a home in which the defendant, Gorg, occupied a room consented to a police search of the room.[152] Traynor ruled that the marijuana found during the search was admissible at trial even though the owner legally lacked the authority to consent to the search. The police, Traynor averred, had acted reasonably and in good faith on the owner's consent. Therefore, the search, though illegal, did not implicate the deterrence rationale of *Cahan*, which sought to deter *knowing* violations of the Fourth Amendment's terms.[153]

In a 1955 opinion for the court, Traynor created a similar "good faith" exception to the knock notice rule (Penal Code section 844), which required police to announce their presence before entering a dwelling. The police had seen heroin users come and go from a Mr. Maddox's apartment many times during their month-long surveillance of the apartment. Joined by a cooperative heroin user, they approached the front door, and the heroin user knocked. When the police heard a voice inside yell, "Wait a minute," and then the sound of retreating feet, they kicked in the door, searched the apartment, and found heroin. Although the officers violated the knock notice rule, Traynor refused to allow the formal requirements of the law to stand in the way of the practical needs of law enforcement. The court waived the requirements of the knock notice statute because the officers had reasonably believed compliance with the statute would allow the suspect to escape or to destroy evidence: good faith noncompliance with the knock notice statute did not render inadmissible the evidence seized.[154] The searches did not undermine the *Cahan* rationale because the "officer's right to invade the defendant's privacy" arose from the exigency of the situation.[155]

The *Cahan* rationale also influenced the rules of arrest. Traynor realized that "[o]nce they [the police] have made an arrest and obtained the evidence their very success may serve as a retroactive makeweight for probable cause."[156] He also noted that there was no action for false arrest if the police found evidence of a crime in the search incident to the arrest. In other words, protections against illegal searches of a person

were only as good as the protections against arrest without probable cause. *People v. Brown* prevented the police from searching illegally arrested suspects without triggering the exclusionary rule.[157] The police watched Ms. Brown walk in front of their car carrying something clenched in her fist. They approached her from behind and grabbed her wrists. Then they identified themselves and asked her to open her hand, but she refused. So they opened her hand and took from her a small rubber container. Lab analysis showed the contents of the container to be heroin. Traynor reasoned that the police must have probable cause to arrest before arresting a suspect and conducting a search incident to the arrest. The police had lacked probable cause to arrest Brown, and therefore the search was unconstitutional. Citing *Cahan*, Traynor argued that to condone the search of Brown would "destroy the efficacy of the exclusionary rule."[158] Just as a search was not justified by the evidence it uncovered, an arrest could not be justified by the evidence uncovered in a search incident to arrest.

The rationale of *Cahan* thus protected the criminal defendant from searches incident to arrest predicated on illegal arrests. It justified, however, an exception to the exclusionary rule when the police arrested a suspect illegally but in good faith. In *People v. Chimmel*, police officer De Coma obtained an arrest warrant that turned out to be invalid.[159] De Coma and other officers arrested Chimmel at his home. They thoroughly searched his house and garage and found stolen coins. Despite the invalidity of the arrest warrant, the court (with Traynor concurring) decided not to invalidate the search incident to arrest.[160] "No evidence even intimates that De Coma procured the [arrest] warrant in bad faith or exploited the illegality of the warrant," Justice Tobriner wrote.[161] The California Supreme Court held that De Coma's good faith reliance on the magistrates' finding of probable cause saved the arrest and the search. Later, however, the U.S. Supreme Court overturned Chimmel's conviction.[162]

Traynor recognized that the exclusionary rule placed pressure on the police to justify searches by conflating reasonable cause to investigate and reasonable cause to arrest.[163] He sought to reduce "the risk of arrest without probable cause by giving the police clear authorization to stop persons for restrained questioning whenever there were circumstances sufficient to warrant it."[164] The courts had long upheld the police practice of temporarily detaining and questioning people without probable cause

to arrest them.[165] Traynor maintained an expansive view of reasonable cause to investigate. Two men sitting in a parked car on a "lover's lane" raised sufficient suspicion to justify a brief detention and search of their car.[166] The new requirements of the exclusionary rule raised questions about the extent of the protections against search and seizure. Traynor gave police the leeway necessary to investigate suspicious circumstances without triggering Fourth Amendment safeguards.

Traynor recognized that the policy objectives of the exclusionary rule conflicted with other policy objectives of criminal procedure. For instance, Traynor and his brethren sought to increase judicial control and oversight over law enforcement by encouraging the police to obtain search warrants. "[T]he police may have a shorter reach if they are armed with a warrant than if they are not," Traynor acknowledged, "Understandably, they may prefer to go unarmed."[167] Traynor loosened the requirements for obtaining warrants in order to encourage their use. However, he also accommodated the policy objectives of the exclusionary rule when, in *Priestly v. Superior Court* he held that a magistrate's determination of probable cause to issue a search warrant required the disclosure of the identities of anonymous informers. This ruling jibed with the exclusionary rule because it prevented police from conducting illegal searches and then acting as anonymous informants for subsequent legal searches. Thus, even where the competing policy objective of discouraging warrantless searches was at issue, Traynor demanded consistency with *Cahan*.

In sum, Traynor's conception of the law gave him a framework for judicial innovation. Many contemporary judges and legal scholars perceived an absence of fixed legal principles and therefore responded only cautiously to the call for legal reform. Traynor recognized a holistic quality of the law demonstrated by the functional relationship of legal rules. *Cahan* and its progeny were practical solutions to the problem of illegal police searches that functioned as part of a system of rules. Traynor pursued the policy objective of deterring illegal searches within the framework of Fourth Amendment principles. The historical development of search and seizure practices from these broad, ambiguous principles had created an experiential context for Traynor's innovations. The exclusionary rule altered search and seizure practices—from warrant requirements to standing—but Traynor carefully avoided judgments solely

based on overarching Fourth Amendment principles, relying in addition upon a policy rationale for constitutional innovation.

CONCLUSION

Traynor conceived of the law as a living entity whose health depended on its responsiveness to community needs. Judicial experience had alerted him to the societal pressures favoring the prosecution or the defense in search cases. On one hand, crime and the fear of crime were rapidly increasing. On the other, police procedures had become more sophisticated, more invasive, and more administrative. Traynor's consistency did not, however, stem from any particular predisposition to favor law enforcement in some cases and criminal defendants in others. Like the Pragmatist philosophers, Traynor believed that judgment was the process of bringing experience to bear on the facts.[168] His jurisprudence reflected, in this respect, the rationale expressed by John Dewey: "A moral law, like a law in physics, is not something to swear by and stick to at all hazards; it is a formula . . . [whose] soundness and pertinence are tested by what happens when it is acted upon."[169] In Traynor's years on the bench, he sought to identify and weed out dysfunctional rules. In *Cahan* he overruled his own decision, *Gonzales*,[170] having come to recognize that it had failed to prevent or punish illegal searches, and he created new rules to serve that function.

Traynor's judicial philosophy gave judges a vital creative role to play. His search and seizure decisions asserted judicial control over law enforcement procedures in response to police disregard of judicial admonitions against illegal searches. The health of the law required that law enforcement, which had become a professional, administrative operation, yield to judicial authority. Thus, Traynor's judicial philosophy promoted not only the health of the law but also the prestige of judges and the institutional self-interest of the court. The judge's responsibility for reforming the law corresponded with an elevation of the judge's authority.

Traynor's philosophy of judging justified an expansive role for judges. His own efforts to reform outmoded precedent ranged widely from criminal law to torts, contracts, and conflicts of law. Although these topics are beyond the scope of this article, it is important to note that Traynor's judicial philosophy impelled innovation in areas of the law

aside from criminal procedure. For example, Traynor's approach toward allocating the risks of defective products in *Escola v. Coca Cola Bottling Company* parallels his pragmatic assessment of police search tactics in *Cahan*.[171] Here too Traynor looked beyond the narrow confines of conventional adjudication and saw a role for judges as policymakers.

Traynor also recognized the impermanence of all judicial decisions, including his own. It was a stance that militated against broad statements of principle, but it also impelled him to respond to new demands placed on the law. The absence of an effective deterrent to illegal searches created one such demand. Traynor's response in the series of cases beginning with *Cahan* may obscure his appreciation of the transitory nature of his own decisions because of their innovativeness. However, it is significant that Traynor's tool for protecting Fourth Amendment rights was a judicial rule of evidence, not a broad statement of principle. Traynor's "workable rules" of search and seizure directly affected police procedure, but Traynor intended them to endure only so long as they remained truly "workable rules," while the overarching principles of the Fourth Amendment would remain indefinitely. The ideal judge, Traynor declared, "can write an opinion that gives promise of more than a three-year lease on life by accurately anticipating the near future."[172] Traynor's understanding of the evolving nature of the law fostered both boldness and humility.

NOTES

[1]For a discussion of the Pragmatic ideal of action see David Hollinger, "The Problem of Pragmatism in American History," *Journal of American History*, LXVII(1):105 (1980).

[2]For a discussion of the Pragmatic theory of scientific inquiry in the context of Oliver Wendell Holmes's jurisprudence see Morton White, *Social Thought in America: The Revolt Against Formalism* (Boston, 1957), 208.

[3]James quoted in Morton White, *Science and Sentiment in America: Philosophical Thought from Jonathan Edwards to John Dewey* (New York, 1972), 209.

[4]On Traynor's involvement in Realist debates see text at notes 96 *et seq.*

[5]*People v. Cahan*, 44 Cal.2d 434, 451 (1955). For discussion of the constitutional context of *Cahan*, see text below at notes 70-86.

[6]The exclusionary rule required the exclusion from trial of evidence obtained by the police in violation of the right to the "'security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment . . . and as such enforceable against the States through the Due Process Clause of the Fourteenth Amendment.' An essentially identical guarantee of personal privacy is set forth in article I, section 19 of the California Constitution." *Cahan* 44 Cal.2d 434, 438 (quoting *Palko v. Connecticut*, 302 U.S. 319, 324-25.)

[7]*Ibid.*, 436.

[8]*Ibid.*

[9]Traynor, "*Mapp v. Ohio* at Large in the Fifty States," *Duke Law Journal*, 319, 322 (1962).

[10]*Ibid.*, 445.

[11]Note, "Two Years with the Cahan Rule," *Stanford Law Review*, 9:515, 536 (1957).

[12]*People v. Cahan*, 44 Cal.2d at 451.

[13]Roger Traynor, "La Rude Vita, La Dolce Giustizia; or Hard Cases Make Good Law," *University of Chicago Law Review*, 29:223, 230 (1962).

[14]Oliver Wendell Holmes, *The Common Law* (1881), 5.

[15]Elizabeth Roth, "The Two Voices of Roger Traynor," *American Journal of Legal History*, 27(3):269, 288 (1963).

[16]Traynor, "Many Worlds Times You" (Address at the University of Utah Commencement), June 9, 1963. Copy in Roger J. Traynor Papers, Hastings College of the Law.

[17]J. Edward Johnson, *History of the Supreme Court Justices of California*, vol. 2, "Biography of Chief Justice Roger Traynor" (San Francisco, 1966).

[18]*Ibid.*

[19]*Ibid.*

[20]See Comment, "Adverse Possession: Personal Property: Tracking and Payment of Taxes," *California Law Review*, 14: 218 (1926); Comment, "Inheritance Taxation: Tax Payable at Domicile of Testator on Intangible Personalty in Another Jurisdiction," *California Law Review*, 14:225 (1926); Comment, "Taxation: Stock Issued by Reorganized Corporation as Income," *California Law Review*, 14:244 (1926); Comment, "Real Property: Landlord and Tenant: The Rule in Dumpor's Case," *California Law Review*, 14:328 (1926); and Comment, "Damages: Date at Which Rate of Exchange Should be Applied," *California Law Review*, 14:405 (1926).

[21]Traynor, "The Amending of the United States Constitution, An Historical and Legal Analysis" (Ph.D. Dissertation, University of California, Berkeley, 1927).

[22]*Ibid.*, 205.

[23]Based on my interview of Professor Jennings who was one of Traynor's students.

[24]Roth, "The Two Voices of Roger Traynor," 295. For biographical background on Traynor, see Amy Toro, "Roger J. Traynor: Legend in American Jurisprudence," reprinted in this *Yearbook*.

[25]Traynor, "Comment" on Justice Charles Breitel's "The Courts and Law making" in Monrad G. Paulsen, ed. *Legal Institutions Today and Tomorrow* (New York, 1959), 56.

[26]*Gonzales*, 20 Cal.2d 165, 169 (1942).

[27]*Ibid.*, 170-71.

[28]*Los Angeles Daily Journal*, September 11, 1978

[29]See *California Blue Book 1950*; *California Blue Book 1960*; and *California Blue Book 1970*.

[30]Fred Graham, *The Self-Inflicted Wound* (New York, 1970), 73.

[31]In 1952 there were 137,878 felonies reported. *Crime in California* (1952), 8. In 1962 there were 289,393 felonies reported. *Crime in California* (1952), 25.

[32]In 1952 there were 58,211 felony arrests. *Crime in California* (1952), 12. In 1962 there were 98,813 felony arrests. *Crime in California* (1952), 47.

[33]In 1952 there were 12,926 felony charges in Superior Court. *Crime in California* (1952), 38. In 1962 there were 43,851 felony charges in Superior Court. *Crime in California* (1952), 81.

[34]In 1952 10,923 defendants were convicted and sentenced for felonies. *Crime in California* (1952), 40. In 1962 27,084 defendants were convicted and sentenced for felonies. *Crime in California* (1962), 116.

[35]See, e.g., Robert Cipes, *The Crime War* (New York, 1968).

[36]The percentage of felonies reported that the police determined were unfounded after the arrest of a suspect or investigation rose very slightly through the fifties and early sixties. Unfounded felony reports constituted 3.4 percent

of all felonies reported in 1954 (*Crime in California* (1954), 26); 3.8 percent of all felonies reported in 1956 (*Crime in California* (1956), 31); 4.3 percent of all felonies reported in 1958 (*Crime in California* (1958), 29); 4.2 percent of all felonies reported in 1960 (*Crime in California* (1960), 31); 4.3 percent of all felonies reported in 1962 (*Crime in California* (1962), 25); and 4.4 percent of all felonies reported in 1964 (*Crime in California* (1964), 25). The virtually constant frequency of unfounded felony reports suggests that the pattern of reporting had not changed.

[37]Lawrence Friedman and Robert Percival, *The Roots of Justice: Crime and Punishment in Alameda County, California 1870-1910* (Chapel Hill, N.C., 1981), 193-94.

[38]*Ibid.*

[39]*Ibid.*

[40]Traynor, "Fact Skepticism and the Judicial Process," *University of Pennsylvania Law Review*, 106:635, 636 (1958).

[41]*Cahan*, 44 Cal.2d at 442.

[42]Traynor, "Lawbreakers, Courts, and Law-Abiders," *Missouri Law Review*, 31:181, 206 (1966).

[43]Graham, *The Self-Inflicted Wound*, 5.

[44]Traynor, "Givers and Takers of the Law," *Journal of Public Law*, 18(2):247, 251 (1969).

[45]*Ibid.*, 253.

[46]*Los Angeles Daily Journal*, December 23, 1958.

[47]*Ibid.*

[48]*San Francisco Examiner*, April 29, 1956.

[49]*San Francisco Chronicle*, April 29, 1955.

[50]See *Los Angeles Times*, May 1, 1955; and *Sacramento Bee*, May 7, 1955.

[51]*Rochin*, 342 U.S. 165.

[52]This figure is based on a WestLaw search using the search terms "amici" and search for the period from April 2, 1942 through June 19, 1961.

[53]See Criminal Brief No. 8173 and 8177 (Hastings Law Library).

[54]*Ibid.*

[55]*Ibid.*

[56]*San Francisco Chronicle*, April 6, 1956.

[57]*San Francisco Chronicle*, April 21, 1955 .

[58]Letter of November 21, 1956, from James Don Keller as quoted in: Note, "Two Years with the Cahan Rule," *Stanford Law Review*, 9:515, 538.

[59]"The over-all effects of the Cahan decision, particularly in view of the rules now worked out by the Supreme Court, have been excellent. A much greater education is called for on the part of all peace officers of California. As a result, I am confident they will be much better police officers. I think there

is more cooperation with the District Attorneys and this will make for better administration of criminal justice." Letter of Dec. 7, 1956, from Edmund G. Brown, attorney general of the state of California, on file with the *Stanford Law Review*.

[60]Traynor, "Lawbreakers, Courts, and Law-Abiders," *Missouri Law Review*, 31:181, 187 (1966).

[61]*Ibid.*, 204.

[62]*Ibid.*

[63]See Samuel Walker, *Taming the System: The Control of Discretion in Criminal Justice 1950-1990* (New York, 1993). Walker states, "The evidence is overwhelming that the exclusionary rule has no impact whatsoever on police handling of the 'high-fear' crimes of murder, rape, robbery and burglary." *Ibid.*, 45.

[64]Traynor, "*Mapp v. Ohio*," 319, 323.

[65]See Graham, *The Self-Inflicted Wound*, 12, 121; also see Victoria A. Saker, "Federalism, the Great Writ, and Extrajudicial Politics: The Conference of Chief Justices, 1949-1966," in *Federalism and the Judicial Mind: Essays on American Constitutional Law and Politics*, ed. Harry N. Scheiber (Berkeley, Calif., 1992).

[66]Traynor, "The Right of the People Against Unreasonable Search and Seizure," Radio Speech KLX, November 14, 1941 (Traynor Papers).

[67]U.S. Constitution, Amendment IV.

[68]See Richard Funston, "The Traynor Court and Criminal Defendants' Rights: A Case Study in Judicial Federalism" (Ph.D. Dissertation, University of California, Los Angeles, Political Science Department, 1970), 61-62.

[69]Graham, *The Self-Inflicted Wound*, 204.

[70]*Ibid.*

[71]*Ibid.*

[72]*Wolf v. Colorado*, 338 U.S. 25 (1949).

[73]*Ibid.* The U.S. Supreme Court mandated the exclusionary rule for federal law enforcement officers in 1914. In *Weeks v. United States*, federal law enforcement officials had entered the defendant's house without a warrant and seized papers, which became the basis of a mail fraud prosecution. The Court held that the evidence unfairly prejudiced the trial against the defendant. *Weeks v. United States*, 232 U.S. 383 (1914).

[74]*Wolf*, 27-28.

[75]See Note, "Two Years with the Cahan Rule."

[76]Traynor, "*Mapp v. Ohio*," 319, 324.

[77]Traynor, "*Mapp v. Ohio* Still at Large in the Fifty States" (Transcription of Speech by Traynor, Appellate Judge's Conference New York City, August 1964, Traynor Papers).

[78]*Rochin v. California*, 342 U.S. 165 (1952).

[79]*Irvine v. California*, 347 U.S. 128 (1953).

[80]Traynor, "*Mapp v. Ohio* Still at Large."

[81]*Rochin*, 342 U.S. at 166.

[82]Traynor, "Remarks of Justice Roger J. Traynor at the Conference of Chief Justices in San Francisco, August 1-4, 1962" (Traynor Papers).

[83]*Irvine*, 342 U.S. 165.

[84]*Ibid.*, 133.

[85]*Ibid.*, 135.

[86]*Ibid.*, 134.

[87]*Ibid.*

[88]Traynor, "*Mapp v. Ohio* Still at Large."

[89]*Ibid.*

[90]*People v. Gonzales*, 20 Cal.2d 165 (1942).

[91]Traynor, "*Mapp v. Ohio*," 319, 320.

[92]Traynor "*Mapp v. Ohio* Still at Large."

[93]Traynor, "Better Days in Court for a New Day's Problems," *Vanderbilt Law Review*, 17:109 (1963).

[94]G. Edward White, *The American Judicial Tradition* (New York, 1976), 292.

[95]*Ibid.*, 295.

[96]Traynor, "Badlands in an Appellate Judge's Realm of Reason," *Utah Law Review*, 7:157, 160-61 (1960).

[97]The above excerpt is the only use of the word "intuition" I have found.

[98]Traynor, "Fact Skepticism and the Judicial Process," *University of Pennsylvania Law Review*, 106:635 (1958).

[99]See Traynor "Badlands," and his "No Magic Words Could Do It Justice," *California Law Review*, 49:615 (1961).

[100]"Biography of Traynor."

[101]*Los Angeles Times*, August 8, 1940.

[102]*Bakersfield Californian*, August 3, 1940.

[103]Professor Stephan Riesenfeld, who happened to be in Radin's office when the Governor called, reported this conversation to me in an interview, September 29, 1993.

[104]See White, *The American Judicial Tradition*, chapters on Frank and Traynor.

[105]Traynor, "Better Days in Court," 109, 123.

[106]Traynor, "Badlands," 157, 161.

[107]Oliver Wendell Holmes, *The Common Law* (1881), 5.

[108]As quoted in White, *The American Judicial Tradition*, 268.

[109]Traynor, "Badlands," 157, 167.

[110]*Ibid.*

[111]Traynor, "La Rude Vita," 223, 234.

[112]Traynor, "Comment" on Breitel, 52.

[113]Karl Llewellyn, "Realism in Jurisprudence—the Next Step," *Columbia Law Review*, 30:431, 444 (1930); White, *The American Judicial Tradition*, 273.

[114]Traynor, "La Rude Vita," 223, 234.

[115]*Ibid.*, 235.

[116]*Ibid.*

[117]See Hollinger, "The Problem of Pragmatism," 97.

[118]*Ibid.*, 229.

[119]*Ibid.*, 231.

[120]Traynor, "The Limits of Judicial Creativity," *Iowa Law Review*, 63:1, 7 (1977).

[121]Traynor, "Stare Decisis Versus Social Change" (Dedication of New Law Building, Duke University, April 26-27, 1963, Traynor Papers).

[122]*Ibid.*

[123]Traynor, "The Limits," 1, 4.

[124]"Remarks of Chief Justice Roger Traynor," Opening Session, College of Trial Judges, August 20, 1967 (Traynor Papers, Hastings Law Library).

[125]Traynor, "Good Judges, Good Law" (a dedication of the Earl Warren Legal Center, Boalt Hall, January 2, 1968; Traynor Papers).

[126]*Ibid.* For discussion of judicial reform in the Traynor era, see Harry N. Scheiber, "Innovation, Resistance, and Change: A History of Judicial Reform and the California Courts, 1960-1990," *Southern California Law Review*, 66(5): 2050-2120 (1993).

[127]Traynor, "No Magic Words," 615, 620.

[128]Traynor, "Better Days in Court," 109, 122.

[129]Graham, *The Self-Inflicted Wound*, 213-214.

[130]Funston, "The Traynor Court and Criminal Defendants' Rights," 101.

[131]*Gouled v. U.S.*, 255 U.S. 298 (1921).

[132]Traynor, "*Mapp v. Ohio*," 330-331; *People v. Thayer*, 63 Cal.2d 635 (1965), *cert. denied*, 304 U.S. 908 (1966).

[133]*Ibid.*, 638.

[134]Traynor, "No Magic Words," 615, 623.

[135]Traynor, "Better Days in Court," 109, 123.

[136]Traynor, "The Right of the People Against Unreasonable Search and Seizure, Radio Speech KLX, November 14, 1941 (Traynor Papers).

[137]*Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

[138]*In re Lessard*, 62 Cal.2d 497 (1965).

[139]Traynor, "Remarks of Justice Roger J. Traynor at the Conference of Chief Justices in San Francisco, August 1-4, 1962" (Traynor Papers).

[140]Traynor, "*Mapp v. Ohio*," 319, 334.

[141]*Cahan*, 44 Cal.2d at 442.

[142]*Ibid.*, 453.

[143]*Ibid.*, 457.

[144]James T. Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought 1870-1920* (New York, 1986), 148.

[145]Traynor, "Better Days in Court," 109.

[146]Oral History Project: Justice Raymond L. Sullivan, Hastings Sixty Five Club, February 11, 1987, at 21 (Traynor Papers).

[147]Oral History Project: Donald P. Barrett Esq., Senior Attorney, Supreme Court of California 1948-1981, May 28, 1986, July 28, 1986, at 21 (Traynor Papers).

[148]Traynor, "*Mapp v. Ohio*," 319, 323.

[149]*Ibid.*, 319, 334.

[150]*People v. Martin*, 45 Cal.2d 755 (1955).

[151]*People v. Martin* 45 Cal.2d 755, 761 (1955).

[152]*People v. Gorg*, 45 Cal.2d 776, 780—81, 291 P.2d 469, 471-72 (1955).

[153]*People v. Gorg*, 45 Cal.2d 776, 780—81, (1955).

[154]*People v. Maddox* 46 Cal.2d 301, (1956); Also *People v. Moore*, 140 Cal.App.2d 657, (2d Dist. 1956).

[155]*Maddox* at 306.

[156]Traynor, "*Mapp v. Ohio*," 319, 333.

[157]*People v. Brown* 45 Cal.2d 640 (1955).

[158]*Ibid.* at 644.

[159]*People v. Chimmel*, 68 Cal.2d 436 (1968).

[160]*Ibid.*

[161]*Ibid.* at 444.

[162]The Court overturned Chimmel's conviction on the grounds that, even if the arrest was valid, the subsequent warrantless search of Chimmel's house violated the Fourth Amendment. The Court held that a search incident to arrest could not expand beyond the area in the arrestee's immediate control. *Chimmel v. California*, 395 U.S. 752 (1969).

[163]*People v. Mickelson*, 59 Cal.2d 448 (1963).

[164]Traynor, "*Mapp v. Ohio*," 319, 334.

[165]*Giske v. Sanders* 9 Cal.App 13 (1908).

[166]*People v. Martin*, 46 Cal.2d 106 (1956).

[167]Traynor, "*Mapp v. Ohio*," 319, 333.

[168]William James, "The Moral Philosopher and the Moral Life," *The Will to Believe*, 158, as quoted in Kloppenberg, *Uncertain Victory*, 137.

[169]John Dewey, *The Quest for Certainty*, (New York, 1929, 1960) 278 as quoted in *ibid.* at 135.

[170]*People v. Gonzales*, 20 Cal.2d 165 (1942).

[171]*Escola v. Coca Cola Bottling Company* 24 Cal.2d 453 (1944).
[172]Traynor, "No Magic Words," 615, 625.