1-1-1996

The Judicial Process and Substantive Criminal Law: The Legacy of Roger Traynor

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Recommended Citation
I. INTRODUCTION

Few issues are more debatable, though less debated, than the proper role of the judiciary in making substantive criminal law. Though heated discussions are easily found on the judiciary’s role in creating law of other types, it is generally assumed that judges legitimately play no significant role in creating substantive criminal law. This lack of debate is founded upon a generally accepted view of the legal process as it applies to the substantive criminal law. With rare exceptions, we are told, there are no common-law crimes in America. Crimes are created by legislative acts. The common-law substantive process, the method by which the English courts recognized and defined new offenses, generally was abandoned in America before the turn of the century. Legislative bodies now create the substantive crimes and the courts apply them. Courts are assumed to have no substantial creative role in making substantive criminal law. What little substantive law they create flows from applying statutory law to new facts, from the inevitable process of interpreting statutory law, or from filling in the small gaps left by inadvertent legislative omission in certain limited circumstances.

This simple statement of the traditional view raises the suspicion that it does not accurately reflect what courts do, or what they should be doing, in a mature system of substantive criminal law. We sense that the common-law process has not, and perhaps should not, be relegated to a minor role in creating new substantive criminal law.

By nearly universal acclamation, Roger Traynor was one of the great masters of the judicial process in the twentieth century. For thirty years he sat on the California Supreme Court, first as an associate justice and later as Chief Justice of California. There, he

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used the judicial process to modernize much of California’s law. The Traynor opinions in torts, conflicts, civil procedure, and taxation, to name a few of the more prominent areas in which he worked, make special contributions to American law and to the American judicial tradition. These opinions created and solidified his reputation as one of the greatest judges of the common law in this century. Indeed, some would say that Roger Traynor should be ranked as one of the ten best judges in American history.¹

There has been no major study of Roger Traynor’s contributions to substantive criminal law, nor has there been a study of Traynor’s judicial philosophy and how it guided his creation of new substantive criminal doctrine.² Furthermore, until very recently, there had not been a new analysis of Roger Traynor’s judicial philosophy in the last two decades.³ A new study of Traynor’s judicial philosophy has recently appeared.⁴ This Article builds upon that work.

The goal of this Article is to analyze how Roger Traynor employed his remarkable philosophy of the judicial process to create a substantial body of new substantive criminal law in California. Our ultimate goal, of course, is to learn what we can from the legacy left us by Roger Traynor about how judges appropriately make substantive criminal law in our democracy today.

This discussion is divided into four parts. The first part looks at Roger Traynor and the status of substantive criminal law as it developed during his thirty years on the bench in California. We will see that during Traynor’s initial decade on the California Supreme Court, criminal law was in a moribund state. By the end of that decade, interest in the criminal law was sparked by a series of events that were not directly related to criminal law. This change in our legal culture continued until it developed into a renaissance in the substantive criminal law during the last decade of Traynor’s tenure on

² The only study of Justice Traynor’s contributions to substantive criminal law I am aware of is by Jerome Hall. Jerome Hall, Chief Justice Traynor and Criminal Law, 35 Hastings L.J. 817 (1984). This article makes no systematic attempt to analyze Traynor’s judicial philosophy as it applies across the entire range of his judicial lawmaking in substantive criminal law.
³ The most comprehensive analysis has been the chapter on Roger Traynor by G. Edward White. G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 292-316 (1988).
the bench. As we shall see, Justice Traynor's creativity with the substantive criminal law was the product of this renaissance. The second section presents an overview of Justice Traynor's creativity with substantive criminal law during this thirty year period. The third section analyzes how Justice Traynor's judicial philosophy produced this substantial body of judge-made doctrine. The Article ends with an assessment of Traynor's legacy to the judicial role in creating substantive criminal law.

II. ROGER TRAYNOR AND THE CONTEXT FOR HIS WORK

At an early point in the founding of our nation, we accepted the English common-law process as the model for our legal system. But because the state's authority to make and enforce substantive criminal law is truly awesome,\(^5\) and because there is a long history of its abuse in the not-too-distant past, the founders of our nation limited government power over criminal law in the federal constitution.\(^6\) With these modifications the common-law process has been used in American criminal law ever since.

A preference for defining crimes and defenses by statute, rather than by judicial decision, slowly evolved within the American common-law system. This change was brought about by a metamorphosis in our legal culture, not by constitutional command. The process began in England well before the American Revolution and ultimately became part of the legal culture in the New World. The development of the theft offenses, for example, illustrates the use of statutes to alter common-law crimes, to fill in unwanted gaps left by the cases, and to create new statutory offenses unknown to the

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5. For example, it authorizes the state to kill its citizens and to coerce them in the most rudimentary ways, such as depriving us of our freedom.

6. The provisions of the U.S. Constitution restraining federal power over the substantive criminal law are (1) the prohibitions against bills of attainder in Article I, § 9, Clause 3; (2) ex post facto laws in Article I, § 9, Clause 3; (3) the treason provisions of Article III, § 3, Clauses 1 and 2; and (4) the Cruel and Unusual Punishment Clause of the Eighth Amendment. Those provisions applying against the state substantive criminal law power are the prohibitions of bills of attainder and ex post facto laws in Article I, § 10, Clause 1. Other provisions such as the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment have been interpreted as imposing substantive restraints on the criminal law power. In addition, there are a number of procedural protections that heavily affect substantive doctrine. The primary example is the guarantee of trial by jury set forth in Article III, § 2, Clause 3, and in the Sixth Amendment.
common law.\textsuperscript{7} It is easy to imagine that at some time there was a virtual partnership between Parliament and the royal courts in creating and tending the criminal law. This shared function is part of the Anglo-American criminal law tradition.

Statutes have always played a significant role in American criminal law. Hence, we gradually developed a preference for statutory criminal law. Thus, rather than relying on the common-law of crimes, the first Congress enacted a comprehensive criminal statute as one of its initial acts.\textsuperscript{8} By the turn of the twentieth century, much, if not most, of American criminal law was to be found in the statute books. Finally, many American jurisdictions have ended the partnership between the legislature and the courts with respect to recognizing new offenses. The techniques used to withdraw the power to "recognize" new crimes from the court vary among jurisdictions. The most common patterns are to enact statutes that either abolish all common-law crimes or declare that conduct is not criminal unless made so by statute.\textsuperscript{9} On occasion, the judiciary's power to recognize new crimes has been curtailed by judicial decision.\textsuperscript{10} Where this power has not been officially withdrawn, it has been virtually abandoned by the courts.

There are undoubtedly many reasons for the triumph of the legislative process over the judicial process in the creation of new offenses. The embrace of democracy, the uncritical acceptance of the doctrine of separation of powers, and the rise in the prestige of legislatures made it inevitable that legislative attention would be focused on the power the state wields over its citizens through the substantive criminal law. By enacting penal statutes, the legislature preempts executive and judicial power to prosecute and recognize new crimes. With statutory enactments we need not concern ourselves with the sources of the criminal law or—because of the ex post facto clauses—with the problem inherent in the retroactive effect of judicial decisions. Penal statutes, in other words, because of their binding effect on the executive and judicial branches, operate as a type of bill

\textsuperscript{7} Examples are the statutory crimes of embezzlement and false pretenses.
\textsuperscript{8} Punishment of Crimes Act, ch. 9, 1 Stat. 112 (1790).
\textsuperscript{9} \textit{E.g.}, \textsc{Cal. Penal Code} § 6 (West 1988) ("No act or omission \ldots is criminal or punishable, except as prescribed or authorized by this Code, or by some of the statutes.").
\textsuperscript{10} \textit{E.g.}, United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) (holding that the United States Circuit Courts have no common-law jurisdiction in criminal cases).
of rights against executive and judicial oppression under the guise of the criminal law. I do not mean to suggest that high-minded theories of individual rights alone account for the triumph of legislation in the new-crime-creation enterprise. Many other concerns helped produce this result as well. The codification movement demonstrated the superiority of a theoretically and practically integrated penal code over the ad hoc judicial process of crime creation. As the common law moved away from the capital sanction for all felonies, legislation was the most convenient method of allocating punishment for the previously capital crimes. It was soon realized that legislation was also the most efficient method for specifying the punishment to be exacted for all crimes. As criminal law statutes were enacted to solve these and other problems, the criminal law became a routine area for legislative action. Furthermore, crime has always been a troubling social problem. Legislatures simply could not avoid enacting penal statutes even if the legislators did not care for individual rights and criminal law theory. For these and a myriad of other reasons, the business of creating new crimes is, and has been, since the early part of this century, almost exclusively a legislative affair.

As most American courts cannot or will not recognize new crimes in the course of the judicial process, the question remains as to their proper role in the substantive criminal law. The common-law process is not dead. It continues to predominate today in such areas as torts, conflicts of law, and, to a lesser extent, in the traditional areas of contracts and property. Since the judicial process continues in these common-law subjects, we are driven to ask, “What is the role of the courts in the substantive criminal law?” Are the courts limited to discovering and applying the legislative will or should they invoke the creative powers they still possess as modern common-law courts? Though they would not create, or recognize, new crimes out of whole cloth, what role should the courts play with respect to the development of the elements of the crimes defined by the statutes? Are there similar constraints on the power of courts to recognize new defenses or to develop their elements? Given his reputation as one of the great common-law judges of our time, an analysis of Justice

Traynor's treatment of these problems should help us formulate our answers to these questions.

There are additional reasons for looking to the legacy left to us by Justice Traynor to answer these questions. The first reason focuses on Roger Traynor. Justice Traynor had neither specific training nor a special interest in criminal law when he joined the California Supreme Court on July 31, 1940.\textsuperscript{12} At that time he had no identifiable criminal law ideology. What he learned about criminal law came from his typical brief encounter with that subject in the first year of law school and from his experience on the bench. Furthermore, there is no indication in either his off-bench writings or in his opinions that suggests he acquired a criminal law ideology as a result of his judicial experience. Though he wrote many articles on a variety of topics, none focused on the substantive criminal law. Yet he wrote a number of opinions significant enough to be included in criminal law casebooks.\textsuperscript{13} This apparent absence of an ideology about criminal law makes his opinions attractive vehicles for studying the judicial process in making substantive criminal law. Although Justice Traynor did not have an apparent criminal law ideology, he did develop a well-defined, sophisticated ideology about the judicial process.\textsuperscript{14} His criminal law opinions thus probably reveal more about his views on the proper role of a judge in the substantive criminal law than they do about an ideology on substantive criminal law.

Of equal importance is the era in which he worked. Justice Traynor's initial stoicism about the substantive criminal law reflected the legal profession's attitude about crime during his first decade on the California Supreme Court. Law schools typically had a single course on criminal law and procedure in the first year. There were no other criminal law courses in the curriculum. The criminal law course was generally assigned to the newest law teacher as a service obligation. Criminal law was not one of the preferred topics in the decades surrounding the Great Stock Market Crash, the Great Depression, and World War II. Criminal law writing in that era narrowly focused on doctrine. With few exceptions, it was not theoretical, integrative, or related to the then burgeoning social sciences. It ignored the moral and philosophical underpinnings of the

\textsuperscript{13} See infra text accompanying notes 113, 145.
\textsuperscript{14} Poulos, supra note 4.
criminal law and eschewed general theories. Instead, it focused on
the minutiae of the crimes and defenses, treating each as though they
were sui generis categories created by the ancient cases or by ad hoc
enactments. Seeing not the forest for the trees, "[t]he literature . . .
was almost universally, mundane."15

Simply put, criminal law was not a professionally interesting or
engaging topic during Roger Traynor's formative years and for the
first decade he was on the court. Furthermore, Justice Traynor's lack
of interest in criminal law was shared by the great majority of judges
and lawyers at that time. It is thus not surprising to find that Justice
Traynor wrote few significant opinions on substantive criminal law in
his first ten years on the bench.16

The bells and whistles that closed the decade of World War II
awoke the criminal law as though it were a sleeping giant. In the next
quarter of this century, from the 1950s through the middle of the
1970s, American criminal law entered what appears to be a modern
renaissance. In 1952, the American Law Institute, under the
leadership of Professors Herbert Wechsler and Louis B. Schwartz,
began work on the Model Penal Code (the Code).17 The Official
Draft was adopted by the Institute on May 24, 1962.18 The Code is
generally conceded to be one of the more important documents in the
history of Anglo-American criminal law. Drawing upon philosophical,
scientific, and social research, the Code provided the criminal law with
its first modern unifying theory. No longer would the criminal law be
regarded as a collection of unconnected, ad hoc doctrines that
protected various societal interests in disparate ways. Gone were the
sui generis rules and the mystifying language of the common law.
The Code created a common architecture for all crimes and defenses,
and constructed each from the same list of specified materials.

The Code has been pervasively influential. It became the Latin
of American criminal law, altering the way we think and talk about
crime and punishment. We reappraised much of the statutory law in
its light; and we bent common-law concepts to fit its mold. The Code
inspired legislators, judges, lawyers, law professors, and law students

15. Richard G. Singer, Foreword: Symposium—The 25th Anniversary of the Model
16. See infra notes 51-63 and accompanying text.
17. See Mueller, supra note 11, at 156.
18. Id. at 163.
to think about criminal law, to challenge the old ways, and to create new theories, principles, and doctrines.

One year before the Code was completed, another process began that would contribute to the radical change in our attitudes and thinking about criminal law:9 The Warren Court started the criminal law revolution.20 It began in the October Term of 1960 with the decision in Mapp v. Ohio.21 In a series of opinions following Mapp and extending throughout the 1960s, the United States Supreme Court applied most of the fundamental principles of criminal procedure found in the Bill of Rights to the states under the Fourteenth Amendment.22 For our purposes, the most important of these opinions is Gideon v. Wainwright,23 decided in 1963. Gideon established a right to counsel for the indigent accused in any state felony prosecution.24

The official draft of the Code was only a year old when Gideon was announced. By requiring the assistance of counsel in state felony prosecutions, Gideon created the foundation upon which the new criminal law would be argued and decided in courthouses throughout the nation. The new ways of thinking about criminal law spread rapidly from the Ivory Tower into the courtrooms of America.

Gideon made the criminal law a viable area of practice. The excitement and controversy generated by the Supreme Court's continuing revolution transformed the institutions of criminal law into

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9. Justice Traynor's opinion in People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955) predated the United States Supreme Court's decision in Mapp v. Ohio, 367 U.S. 643 (1961) by six years. One could argue that the same forces driving the Warren Court's criminal law revolution fueled Justice Traynor's Cahan opinion in California years before they were felt in Washington. A discussion of the California revolution in criminal procedure during the Traynor years must be left for another day.

20. The point at which a revolution begins usually is discernible only in hindsight.

21. 367 U.S. 643 (1961). The Court applied the "exclusionary evidence principle" to state prosecutions, thereby rendering inadmissible at trial evidence seized in violation of the Fourth Amendment. Id. at 657-60.

22. See, e.g., CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 1-3 (3d ed. 1993); THE BUREAU OF NAT'L AFFAIRS, INC., THE CRIMINAL LAW REVOLUTION AND ITS AFTERMATH: 1960-1977, at v-ix (1978) [hereinafter CRIMINAL LAW REVOLUTION]. It is generally agreed that the criminal law revolution began with Mapp and ended on June 23, 1969, with the Supreme Court's decision in Benton v. Maryland, 395 U.S. 784 (1969). See, e.g., CRIMINAL LAW REVOLUTION at v. In Benton, the last decision announced by the Court for the 1968-1969 Term, the Double Jeopardy Clause of the Fifth Amendment became the last provision of the Bill of Rights to be applied to the states by the Warren Court. Id. at vii.


24. Id. at 340-41, 344.
a growth industry. The demand for lawyers, for example, increased, and law schools responded with their own criminal law revolution. Criminal law became a vital, respectable subject. Courses were added to the curriculum, and professors stood in line to teach them. New casebooks appeared, and scholars began to write about the new criminal law. Much of this literature focused on topics ignored in the past. Theoretical, philosophical, integrative, and empirical articles began to appear.

The development of the Code and the Supreme Court’s criminal law revolution were the foundation stones supporting much of the new criminal law during this period, yet a number of other institutions and events contributed to what I have called the American Renaissance in criminal law. Though the history of this period is yet to be written, a few examples should suffice to illustrate the depth and breadth of the interest and innovation in criminal law during this period.

It is not extravagant to assume that the same forces that begot the Supreme Court’s criminal law revolution contemporaneously produced the American Bar Association’s (the ABA) Criminal Justice Standards Project (the Project). The Project originally was proposed by the Institute of Judicial Administration during the May 1963 meeting of the American Law Institute, shortly before Gideon was decided. The ABA officially launched the Project at its annual meeting in August 1964. “The Standards,” we are told, “were born in a climate of deep concern over the burgeoning problems of crime and the correlative crisis in our courts occasioned by overwhelming caseloads, recidivism, and a seeming incapacity of the system to respond to the challenges of the Sixties.”

The Project’s goal was to modernize the criminal justice system by developing standards that “walk the fine line between the protection of society and the protection of the constitutional rights of

26. Id. at 255.
27. Id. at 257.
28. Id. at 255-56 (quoting Tom C. Clark, The American Bar Association for Criminal Justice: Prescription for an Ailing System, 47 NOTRE DAME L. REV. 429 (1972)).
29. See id. at 256-57.
the accused individual." Seventeen sets of standards, covering nearly every aspect of the criminal justice system, except for the substantive criminal law, were eventually developed and approved by the ABA's House of Delegates in the decade between 1964 and 1973.

The Project symbolized a shift in our attitudes about crime and the criminal justice system: Crime was recognized to be a national issue warranting a national response. As the ABA's House of Delegates was debating the wisdom of the Standards Project, the 1964 presidential campaign transformed crime from a local concern into an important national political issue. It has remained so ever since. Borrowing from the war mentality of the mid-1960s, President Johnson declared a war on crime. On July 23, 1965, he established the President's Commission on Law Enforcement and Administration of Justice (the Commission). Its goals were to inquire into the causes of crime and delinquency, to report to the President with recommendations for preventing crime and delinquency, and to improve law enforcement and the administration of criminal justice. This massive project, headed by Professor James Vorenberg of Harvard Law School, assessed nearly every conceivable aspect of crime and the criminal justice system in America. On schedule, early in 1967, the Commission filed its report. It contained over 200 specific recommendations. Though the Commission did not focus on substantive criminal law, the Commission's work and its recommendations were significant aspects of the American Renaissance in criminal law.

31. Jameson, supra note 25, at 259-60. The last set of standards was approved in February, 1973. Id. at 260.
33. Id.
35. Less than one page of chapter five of the report is devoted to substantive criminal law. Id. at 126-27. After noting that about 30 states and the federal government were "taking a fresh look" at their substantive criminal codes and were considering revising them, the report observed, "The American Law Institute has given impetus to this effort through its Model Penal Code, produced after a decade of sustained labor. The model code offers a thoughtful and comprehensive re-examination of the substantive criminal law,
Several of the Commission's recommendations focused on our ignorance about crime and how the criminal justice system actually operates, the need for comprehensive empirical research at all levels, and the need for public support of these research activities.\textsuperscript{36} The Johnson Administration and Congress responded to these and other recommendations by enacting the Omnibus Crime Control and Safe Streets Act of 1968.\textsuperscript{37} This Act was the master plan for the national war on crime. It created the Law Enforcement Assistance Administration (the LEAA), mandated the creation of state planning agencies, and provided a mechanism for funneling federal funds to state and local criminal justice agencies.\textsuperscript{38} During its first seven years, the LEAA "awarded more than $4 billion to state and local governments to improve police, courts, and correctional systems; to combat juvenile delinquency; and to finance innovative crime-fighting projects."\textsuperscript{39} On occasion, the agency pursued its own empirical research projects,\textsuperscript{40} and as part of its campaign to standardize local planning for the war on crime, in 1971 the LEAA appointed a National Advisory Commission on Criminal Justice Standards and Goals.\textsuperscript{41}

The National Advisory Commission was conceived as a follow-up commission to the President's Commission on Law Enforcement and
Administration of Justice. Its task was to create “a clear statement of national goals, performance standards and priorities, to translate as quickly as possible the billions of dollars which will be coming to states and local governments through LEAA into effective crime reduction.”

By January 1973, the National Advisory Commission produced six reports containing standards and goals for the criminal justice system. Of particular interest is Standard 13.1 of the Report on the Criminal Justice System: “Any State that has not revised its substantive criminal law within the past decade should begin revision immediately. Federal or State funds should be provided as appropriate.” The Commentary noted that the Code is “[t]he greatest single force behind the new revisions” of the substantive criminal law.

These were the times in which the Supreme Court revolutionized criminal law; the American Law Institute’s Model Penal Code rethought and recast the substantive law; the American Bar Association’s Standards for Criminal Justice articulated the requirements of a fair system of criminal procedure; and, for the first time in our

42. Feeley & Sarat, supra note 41, at 86; Task Force, supra note 40, at 73-76. At the time the National Advisory Commission was created and the report was commissioned, “Democrats suggested that the motivation behind the report was to give President Nixon his own Crime Commission.” Id. at 74.


44. National Advisory Comm’n on Criminal Justice Standards and Goals, Criminal Justice System v (1973) [hereinafter Criminal Justice System]. The National Advisory Commission’s Standards are compared with the ABA’s Standards in American Bar Ass’n Section of Criminal Justice, Comparative Analysis of Standards and Goals of the National Advisory Commission on Criminal Justice Standards and Goals with Standards for Criminal Justice of the American Bar Association (1973); see also H. Lynn Edwards, The ABA Standards for Criminal Justice and the NAC Standards and Goals: A Comparative Analysis, 12 Am. Crim. L. Rev. 363 (1974) (concluding that the two sets of standards can serve to reinforce each other to improve the criminal justice system despite differences).

45. Criminal Justice System, supra note 44, at 175. Standard 13.6 addressed the problem of procedural law revision as follows:

Concurrently with or immediately after criminal code revision, each State that has not done so within the past decade should thoroughly revise its criminal procedure law, using the same drafting organization or a separate special committee. Federal or State funds should underwrite the expense. The draft rules or code should substantially incorporate the American Bar Association Standards for Criminal Justice and other uniform or model draft statutes on specialized topics.

Id. at 189.

46. Id. at 175.
history, our national political institutions sought to restructure state criminal justice systems so they would fairly and effectively solve the burgeoning crime problem. Crime, and fair and effective means of controlling it, became two of the most important national issues during this era of criminal law. We now know, of course, that not all of these efforts were equally successful or equally enduring. Nevertheless, the Court’s criminal law revolution, the Model Penal Code, and, perhaps to a lesser extent, the ABA Standards for Criminal Justice continue to affect criminal law today.

This brief summary, of course, touches only the tip of the iceberg. There is much more to be told about this era. But enough has been recounted to remind us of the major themes, and to recall for us that these were exciting, innovative, and controversial years for criminal law. For our purpose, this brief sketch provides us with the context in which Roger Traynor worked on substantive criminal issues in the last two decades of his judicial career, 1950-1970.

Given our interest in studying the proper role of the judiciary in the substantive criminal law, Justice Traynor provides a unique focus for this study. As we have seen, Justice Traynor had no discernible criminal law ideology when he joined the California Supreme Court. During his first decade on the court, criminal law was a moribund subject. Neither the judiciary nor the profession—nor any other segment of the criminal justice system—were particularly interested in the substantive criminal law. In the 1940s few issues of any enduring theoretical or doctrinal significance were presented to the court by counsel, and of course, few were decided by the court. Justice Traynor thus had a decade of judicial experience by the time the criminal law renaissance began to emerge in the 1950s, and twenty years of experience by the time the era was in full bloom in the 1960s.

Justice Traynor had time to work out a judicial philosophy before he was faced with the inevitable arguments that California criminal law should be modernized through the common-law process. Furthermore, as his off-bench writings demonstrate, Justice Traynor had an abiding interest in the judicial process. The absence of a criminal law ideology and the presence of a decade of experience with the art of judging, coupled with his self-conscious concern with the judicial process and his reputation as one of the great common-law

47. See, e.g., Feeley & Sarat, supra note 41, at 86-87; Task Force, supra note 40, at 15-16.
judges of this century, indicates the likelihood that Roger Traynor always had legal process issues in mind when he wrote opinions in criminal cases in the 1950s and 1960s. We have much to learn about the proper role of the judiciary in the substantive criminal law by studying these opinions.

We now turn to a brief overview of Justice Traynor's work in the substantive criminal law during his thirty years on the bench. Initially, we will look at the number and type of opinions he wrote, and the period in which they were written. This will provide us with context and perspective as we examine these opinions to learn what we can about the development of substantive criminal law under the modern common-law process.

III. AN OVERVIEW OF ROGER TRAYNOR'S WORK IN SUBSTANTIVE CRIMINAL LAW

In his thirty years on the bench, Justice Traynor wrote 259 opinions in criminal cases. Of these, 116 are for a majority of the court, eighty-two are unanimous opinions, and four are written for a plurality of the justices. There are thirteen concurring opinions and forty-four dissents. This is an average of nearly nine opinions per year over the thirty-year period. Justice Traynor's first opinion in a criminal case was released on January 29, 1942, and the last one was announced on January 27, 1970. Most of these 259 opinions focus on issues of criminal procedure. Only fifty of the 259 opinions—nineteen percent—resolve more than a trivial issue of substantive criminal law. In thirteen of these fifty opinions, the substantive issue is resolved by a routine application of existing law. The remaining thirty-seven Traynor opinions are the subjects of this study.

A. The First Decade: 1940-1950

Given the status of criminal law in American legal culture in the 1940s, it is not surprising that fewer than eighteen percent—forty-five—of Traynor's criminal law opinions were written during his first
decade on the bench. Of all of the opinions written this decade, only eight involve a substantial issue of substantive criminal law. In four of these eight opinions, Justice Traynor wrote for a unanimous court. Two of these four cases focus on a homicide offense; one, People v. Brown, deals with kidnapping, and the other case interprets a statutory crime dealing with telephones. One of the homicide cases and the kidnapping case are automatic appeals.


52. Given the subject of this study, cases adjudicating only procedural issues are excluded, regardless of the importance of the procedural issue. Substantive issues may be, and frequently are, decided along with important procedural issues. If the case adjudicates an important issue of substantive law, it is included in this analysis. On the other hand, if the substantive issue appears in a case in which an important procedural issue is adjudicated, and if the substantive issue is resolved by a routine application of settled doctrine, I have excluded the case completely from this study. Only one Traynor opinion fell into this category during this decade: People v. Gonzales, 20 Cal. 2d 165, 124 P.2d 44 (1942). In Gonzales, Justice Traynor wrote for a majority of five justices. Id. at 167-74, 124 P.2d at 45-49. He rejected the argument that the exclusionary rule was required under the United States and California Constitutions. Id. at 169-71, 124 P.2d at 48-49. A sufficiency of the evidence argument and a substantive-jury-instruction issue were also decided. Id. at 172-74, 124 P.2d at 46-47. But each was decided by a routine application of existing law. Id. The opinion did not clarify or extend the substantive law in any meaningful way. Accordingly, Gonzales is not included in the cases that were retained for further consideration in this study.

53. People v. Cornett, 33 Cal. 2d 33, 198 P.2d 877 (1948); People v. Brown, 29 Cal. 2d 555, 176 P.2d 929 (1947); People v. Trieber, 28 Cal. 2d 657, 171 P.2d 1 (1946); People v. Mitchell, 27 Cal. 2d 678, 166 P.2d 10 (1946). Justice Traynor wrote 23 substantive and procedural opinions that announced the decision of the court in criminal cases during this decade. There were 11 majority opinions and 12 unanimous opinions.


55. People v. Brown, 29 Cal. 2d 555, 176 P.2d 929 (1947) (kidnapping); People v. Trieber, 28 Cal. 2d 657, 171 P.2d 1 (1946). Trieber involved the interpretation of a statute making it a crime to connect a telephone to a telephone company's line without permission. Id. at 659-61, 171 P.2d at 2-3. Justice Traynor's opinion focused on issues of statutory construction. Id.

56. The automatic appeals were Brown and Cornett. The death sentence was imposed in Brown for violating Penal Code § 209—kidnapping for robbery with bodily harm. Brown, 29 Cal. 2d at 556-57, 176 P.2d at 929-30. The controlling question was whether the acts of the defendant constituted kidnapping for the purpose of robbery. Id. at 558, 176 P.2d at 930. Brown claimed that the initial act of kidnapping had to be for the purpose of robbery. Id. at 559, 176 P.2d at 931. Relying on the explicit language of the statute, the argument was rejected and the death judgment was affirmed. Id. at 560, 176 P.2d at
The remaining homicide case was heard under the court's petition procedure. Although each case involves at least one important substantive issue, no distinctly new law is created in any of these four unanimous opinions. Instead, the path of the law is tended and maintained, but no new course is struck.

In two of the remaining important substantive cases, Justice Traynor wrote a concurring opinion. Both were automatic appeals. One was reversed—*People v. Albertson*—and the other was affirmed—*People v. Lindley*. In both cases, Justice Traynor wrote for himself alone, and in both opinions the substantive criminal law is clarified and made consistent. Neither opinion suggests new law for consideration by some future majority.

The last two substantive opinions are dissents. The first came in *Halcomb* in 1942, and the second was filed two years later in

932. The death judgment in *Cornett* was for first degree murder. *Cornett*, 33 Cal. 2d at 35, 198 P.2d at 879. The focus of this opinion was substantive instructional errors. *Id.* at 39, 198 P.2d at 881. The death judgment was reversed due to instructional error, including the error first identified by Justice Traynor in his concurring opinion in *People v. Albertson*, 23 Cal. 2d 550, 581, 145 P.2d 7, 22 (1944) (Traynor, J., concurring).

57. *People v. Mitchell*, 27 Cal. 2d 678, 166 P.2d 10 (1946) (involuntary manslaughter). Two cases were affirmed, the one automatic appeal—*Brown*—and the telephone offense—*Trieber*, and the other two were reversed—*Mitchell* and *Cornett* (the other automatic appeal).


61. Justice Traynor wrote a total of 16 dissents in criminal—procedural and substantive—cases during this initial 10-year period. This is the highest proportion of dissents in criminal cases—36%—in any of the three decades he served on the court. Justice Traynor did join dissents written by others that raised important issues of substantive criminal law, but those dissents fall well beyond the scope of this study.

62. *In re Halcomb*, 21 Cal. 2d 126, 130, 130 P.2d 384, 387 (1942) (Traynor, J., dissenting). Three cases raised identical issues: *Halcomb*, *Petrie*, and *Haynes*. Each was a state habeas proceeding in which the petitioner escaped from custody while serving a jail sentence on a misdemeanor conviction. Each was charged with the felony of escape. However, the language of the statute made that crime applicable only to prisoners charged with, or convicted of, a felony. Since each petitioner was convicted of a misdemeanor, each argued that the statute did not prohibit his escape from misdemeanor confinement. Justice Curtis, joined by Chief Justice Gibson and Justices Shenk, Carter, and Schauer, held that, despite the statute's clear language to the contrary, the statute also applied to escapes from misdemeanor confinement. Justice Traynor, joined by Justice Edmonds, dissented. *In re Haynes*, 21 Cal. 2d 891, 892, 130 P.2d 388, 389 (1942); *In re Petrie*, 21 Cal. 2d 132, 134-35, 130 P.2d 712, 714 (1942); *Halcomb*, 21 Cal. 2d at 130-32, 130 P.2d at 387-88. These three cases were decided on the same day, Oct. 30, 1942. Since *Halcomb* is the lead
People v. Kolez. 63

The Traynor decisions of interest to us in this first decade thus can be counted on the fingers of both hands. Furthermore, one of the concurring opinions concerns the same issues that drew Traynor's concurring opinion in Albertson and his dissent in Kolez. 64 Only one of these eight opinions, the dissent in Halcomb, focuses on the substantive criminal law creating process. 65 The remainder of the cases fall into the law-maintaining category. 66

63. 23 Cal. 2d 670, 145 P.2d 580 (1944) (automatic appeal). The sole contention in this automatic appeal concerned the trial court's instruction on the nature of the jury's sentencing discretion in a capital case. In essence, the jury was told that it could return a verdict of life imprisonment only if it found "some extenuating circumstances or facts in the case." Id. at 671, 145 P.2d at 580. Absent a finding of extenuating circumstances, "it is the duty of the Jury to find a simple verdict of murder in the first degree, and leave with the law the responsibility of fixing the punishment." Id. at 672, 145 P.2d at 580. The jury returned a verdict finding Kolez guilty of murder in the first degree "without recommendation." Id. at 671, 145 P.2d at 580. Expressing the belief that capital punishment was mandatory in this situation, the judge sentenced Kolez to death. Id. At that time, a series of California Supreme Court cases indicated that this instruction erroneously interpreted the capital sentencing statute and that the instruction should not have been given, but it was not reversible error to do so. In an opinion by the court, the judgment of death was affirmed. Id. at 672, 145 P.2d at 581. Justice Traynor, joined by Justice Schauer, dissented. Id. at 672-76, 145 P.2d at 581-83. After pointing out the instruction was admittedly erroneous, Justice Traynor argued:

There can be no justifiable reliance on decisions allowing this instruction in view of the repeated warnings by this court that district attorneys should not offer and trial courts should not give it. A decision that cannot properly be relied upon cannot serve to justify adherence to an interpretation it condemns. Nothing is gained and much is lost by insisting upon a mechanical adherence to precedent that perpetuates an admittedly erroneous interpretation of a statute and defeats the very purpose of the Legislature in enacting it.

Id. at 676, 145 P.2d at 583 (Traynor, J., dissenting).

64. Lindley, 26 Cal. 2d at 794, 161 P.2d at 235 (Traynor, J., concurring).


66. We should remember, however, that we are concerned only with Traynor's opinions on substantial issues of substantive criminal law. The many opinions he wrote on other subjects during this period, such as criminal procedure, are beyond the scope of this discussion. Many of these opinions would be of interest to a broader study of the judicial process. In criminal procedure, for example, the following Traynor opinions decided during this first decade would be of interest: (1) People v. Gonzales, 20 Cal. 2d 165, 124 P.2d 44 (1942) (majority opinion) (finding that evidence obtained by a constitutionally invalid search and seizure is admissible under both state and federal constitutions—changed with respect to state constitution by a subsequent Traynor opinion in People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955)); (2) People v. Adamson, 27 Cal. 2d 478, 165 P.2d 3 (1946) (unanimous opinion) (permitting comment on defendant's failure to explain or deny by his testimony any evidence or facts in case against him), overruled
The paucity of relevant Traynor opinions during this period reflects a number of factors. As we have seen, the close of the decade of the 1940s marked the end of a long period of relative disinterest in the criminal law. The academy, the courts, and the profession all shared this apathy. This general indifference to criminal law profoundly affected the judicial process. There was no constitutional right to appointed counsel in the trial courts during this period, and the right to appointed counsel on appeal awaited the Supreme Court's decision in *Douglas v. California* in 1963. In addition, the statutory right to the appointment of counsel in criminal cases was woefully undeveloped during this period.

Even if the defendant was represented by counsel in the lower courts, criminal law generally was not practiced with an eye toward the creative powers of the judicial process. The focus, instead, was on the traditional fact-finding process and on more commonplace legal issues. The great practitioners of the criminal law during this period, that come to mind, Clarence Darrow and Lloyd Paul Stryker, for example, gained their reputations as men who were extraordinarily skilled in factual practice and advocacy. They were not known as architects of the criminal law.

Furthermore, even if a case was developed in the lower courts by defense counsel with the idea of raising an innovative legal argument on appeal, unless the lawyer was hired or volunteered representation in the appellate court, the issue probably failed for lack of advocacy on appeal. If the appeal was from a judgment other than death, the absence of counsel typically meant that no petition for a hearing was filed in the Supreme Court. Thus, even if an important legal process

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67. See supra text accompanying notes 13-20.
68. See supra text accompanying note 24.
70. For example, in 1951, an indigent defendant was first given the statutory right to appointed counsel for a preliminary hearing. *Cal. Penal Code* § 859 (West 1985). Before this amendment there was no right to appointed counsel at the preliminary hearing. See, e.g., *People v. Campos*, 10 Cal. App. 2d 310, 320, 52 P.2d 251, 256 (1935).
issue was presented, Justice Traynor had no real opportunity to consider it.

As we would anticipate, many if not most of the criminal cases decided in the California Supreme Court in this period were automatic appeals. Throughout most of this period, the court did not routinely appoint counsel to represent defendants appearing before the court, even in automatic appeals from a judgment imposing death. Inasmuch as the appellate system is designed to respond to arguments made by counsel, few of these cases would engage the court in challenging legal process issues. It is therefore understandable that in the handful of cases in which Justice Traynor did address interesting issues during this decade, the defendant was represented by counsel on appeal.7

Furthermore, Justice Traynor, who had no specific interest in criminal law when he was appointed to the bench, generally went along with the legal culture of his time. Thus, he silently joined the opinions affirming the death judgments of unrepresented defendants for whom no briefs were filed. Nevertheless, it is a tribute to his commitment to the legal process that he did respond to interesting legal process issues when they were presented in the cases noted above. Not all of the justices did so.

B. The Second Decade: 1950-1960

In the early 1950s, the moribund period of the criminal law began to fade away. Professional interest in criminal law started to grow and flower. While the constitutional right to counsel was yet to be

71. See, e.g., People v. Winton, 31 Cal. 2d 467, 189 P.2d 257 (1948); People v. Johansen, 17 Cal. 2d 479, 110 P.2d 406 (1941) (the defendant was not represented, counsel was not appointed, and no brief was filed on the defendant's behalf). In Winton, which was decided on February 10, 1948, the opinion reads:

Defendant is not prosecuting the appeal and has filed no briefs. He has repeatedly admitted his guilt and expressed his desire to pay the penalty imposed.

Notwithstanding these facts the record has been closely scrutinized for possible error prejudicial to defendant. None can be found. Therefore a brief statement of the facts will suffice to dispose of the appeal.

Id. at 468, 189 P.2d at 257. Justice Carter wrote the opinion for a unanimous court. The judgment imposing death, of course, was affirmed. Id. at 469, 189 P.2d at 258.

72. See People v. Lindley, 26 Cal. 2d 780, 161 P.2d 227 (1945); People v. Kolez, 23 Cal. 2d 670, 145 P.2d 580 (1944); People v. Albertson, 23 Cal. 2d 550, 145 P.2d 7 (1944); In re Haynes, 21 Cal. 2d 891, 130 P.2d 388 (1942); In re Petrie, 21 Cal. 2d 132, 130 P.2d 712 (1942); In re Halcomb, 21 Cal. 2d 126, 130 P.2d 384 (1942).

73. See cases cited supra note 71.
announced, the California Supreme Court began routinely appointing
counsel for indigent defendants on appeal, and counsel was
routinely provided in lower court proceedings. The court began to
hear more criminal cases, and Justice Traynor, responding to his time,
apparently became more interested in criminal law issues. Although
a variety of factors contributed to the court’s increasing criminal law
caseload, such as the burgeoning California population, it was partly
fed by the newly discovered interest in criminal law that permeated
all levels of the profession.

In this second decade, Justice Traynor’s work product in criminal
cases nearly doubled. Thirty-four percent—eighty-eight—of his
criminal law opinions were written during the 1950s. This increase
appears to be attributable to the fact that new arguments were being
made in the court, and the judges began taking these arguments and
the criminal law seriously. Most of the opinions, however, focused on
issues of criminal procedure. Of the eighty-eight Traynor criminal
law opinions, only thirteen—fifteen percent of his eighty-eight—
concerned substantive issues of any depth. Traynor wrote five of

76. In the first decade he wrote 45 opinions of various types. In the second decade he wrote 88 opinions in criminal cases.
78. Compared with the eight opinions involving substantive issues of any depth for the prior decade, see supra text accompanying notes 51-63, this is a considerable increase in Traynor’s substantive criminal-law work. These 13 cases are: People v. Camodeca, 52 Cal. 2d 142, 338 P.2d 903 (1959) (attempted grand theft—unanimous opinion); People v. Stuart, 47 Cal. 2d 167, 302 P.2d 5 (1955) (manslaughter—unanimous opinion); People v. Vogel, 46 Cal. 2d 798, 299 P.2d 850 (1956) (bigamy—majority opinion—6-1 split); People v. Burt, 45 Cal. 2d 311, 288 P.2d 503 (1955) (solicitation—unanimous opinion); In re Hess, 45 Cal. 2d 171, 288 P.2d 5 (1955) (rape—majority opinion—5-1-1 split); People v. Hallner, 43 Cal. 2d 715, 277 P.2d 393 (1954) (bribery—dissenting opinion); People v. Baker, 42 Cal. 2d 550, 268 P.2d 705 (1954) (automatic appeal—majority opinion—4-1 split); People v. Ashley, 42 Cal. 2d 246, 267 P.2d 271, cert. denied, 348 U.S. 900 (1954) (grand
these thirteen opinions for a majority of the court, and five were unanimous opinions.79 There was one concurring opinion80 and one dissent.81 Justice Traynor wrote no plurality opinions in important substantive cases this decade.82

Knowles, 35 Cal. 2d 175, 217 P.2d 1, cert. denied, 340 U.S. 879 (1950) (kidnapping for robbery and robbery—majority opinion—4-3 split).

Justice Traynor wrote seven additional opinions during this decade that disposed of substantive issues that cannot be fairly characterized as trivial. Nevertheless, these seven opinions were excluded from the study because they were decided by a routine application of settled substantive law. In other words, they are simply law-applying cases. These are the Traynor opinions in the following cases: People v. McCaughan, 49 Cal. 2d 409, 317 P.2d 974 (1957) (involuntary manslaughter—majority opinion—reversed); People v. Cheary, 48 Cal. 2d 301, 309 P.2d 431 (1957) (automatic appeal—majority opinion—6-1 split); People v. Malotte, 46 Cal. 2d 59, 292 P.2d 517, appeal dismissed, 352 U.S. 805 (1956) (conviction for conspiracy to commit misdemeanor—majority opinion—affirmed); People v. Caldwell, 43 Cal. 2d 864, 279 P.2d 539 (1955) (automatic appeal—majority opinion—death judgment affirmed); People v. Carnine, 41 Cal. 2d 384, 260 P.2d 16 (1953) (automatic appeal—majority opinion—death judgment reversed); People v. Mendes, 35 Cal. 2d 537, 219 P.2d 1 (1950) (automatic appeal—majority opinion—conviction reduced); People v. Huizenga, 34 Cal. 2d 669, 213 P.2d 710 (1950) (automatic appeal—opinion for a unanimous court affirming death judgment).

79. The five unanimous opinions—in chronological order—were in Martinez, Deloney, Burt, Stuart, and Camodeca. See cases cited supra note 78. The opinion in Deloney was written by Traynor and joined by Chief Justice Gibson and Justices Carter and Schauer (concurring). There is no indication that Justices Edmonds, Shenk, and Spence participated in the case. Accordingly, I have counted this opinion as a unanimous opinion. Justice Traynor wrote for a majority in Knowles, Ashley, Baker, Hess, and Vogel. See cases cited supra note 78.

80. People v. Thomas, 41 Cal. 2d 470, 261 P.2d 1 (1953) (automatic appeal). During his first decade on the bench, Justice Traynor wrote few concurring and dissenting opinions in substantive criminal cases. Adhering to this pattern, he wrote only one concurring opinion in the second decade—as contrasted with two concurring opinions of interest to us in the first decade.

81. People v. Hallner, 43 Cal. 2d 715, 277 P.2d 393 (1954) (bribery). Justice Traynor also filed an opinion concurring in part with the dissenting opinion of Justice Carter in People v. Byrd, 42 Cal. 2d 200, 266 P.2d 505 (1954) (automatic appeal). Traynor did not, however, join in the portions of the Carter opinion implying that the defendant was denied due process or equal protection of the laws. Byrd, 42 Cal. 2d at 218, 266 P.2d at 515. With these reservations, Justice Traynor joined the Carter dissent. Id. Because this opinion is essentially the same as though Traynor joined the Carter dissent, I have excluded this extremely short opinion from further consideration in this study.

The number of Traynor dissents in criminal cases remained fairly constant in the first two decades. Justice Traynor wrote 16 dissents in criminal cases during the first decade, and 18 during the second. See supra note 61. But only two of these 18 dissents involve significant issues of substantive criminal law. It should be noted here, however, that while the number of dissents remained fairly constant over these two decades, the proportion of dissents to other opinions declined significantly during the second decade. During the first decade, 36% of the Traynor opinions in criminal cases were dissents. See supra note 61 and accompanying text. In the second decade, dissents represent 20% of the opinions.

82. In contrast to the first decade, in which he did not write a single plurality opinion
Except for the unusual dissent in *Halcomb*, it is during this second decade that we first find Traynor opinions that alter the path of the substantive criminal law.\(^3\) Five of the thirteen opinions either make important changes in the substantive law or continue to build and develop new law based upon precedent created during this second decade.\(^4\) The remaining eight opinions\(^5\) maintain the path in several important ways but create no new substantive doctrine.\(^6\)

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\(^3\) The opinion in *In re Halcomb*, 21 Cal. 2d 126, 130 P.2d 384 (1942), filed in the first decade, is not an opinion suggesting that new law be created. In fact, Justice Traynor dissented from the creation of a new crime by the court in that case. But because the opinion focuses on the law-creating function, I classified *Halcomb* as a law-creating case.


The first case, *Camodeca*, is a close call. In his unanimous opinion in that case, Justice Traynor overruled a prior opinion of the Supreme Court and a court of appeal opinion that followed the case which held that to constitute an attempted grand theft on a false pretense theory, the victim must be deceived by and must rely on the false representations of the defendant. *Camodeca*, 52 Cal. 2d at 146-47, 338 P.2d at 906. The great weight of authority is to the contrary in both England and the United States. *Id.*

Finding that "the Werner case is unsound in so holding" because "[i]t failed to recognize the crucial distinction between the completed crime of false pretenses and an attempt to commit such a crime," *Werner* was overruled. *Id.* at 146, 338 P.2d at 906. *Camodeca* thus brought California law into conformity with then-existing California law that rejected the defense of factual impossibility for the crime of attempt and found that the making of the false representation, with the necessary culpable mental state, was a sufficient perpetrating act for attempt liability. *Id.* at 147, 338 P.2d at 906.

\(^6\) Though a purist may argue that new law is made in every case, even cases that apply settled rules to new facts, in my view the law-making produced by this endeavor is too minute to be classified as an exercise of a judge's creative powers. But it is not always easy to distinguish lawmaking from law maintaining. People v. Hallner, 43 Cal. 2d 715, 277 P.2d 393 (1954), presents a ready example. The two categories suggested by the foregoing analysis, law-tending and law-creating, probably are better viewed as representing polar-opposite extremes on a continuous scale. Our inquiry is better directed to the extremes since our goal is to learn what we can about the creative role judges play in making substantive criminal law in modern times; we are more likely to learn from clear examples than arguable propositions. Forced to choose between these two extremes, I have placed *Hallner* in the law-tending group of cases. Thus, seven cases are law-creating and seven
C. The Third Decade: 1960-1970

Criminal law, as we have seen, reached its golden age during Justice Traynor’s last decade on the bench. A brief recollection of the indicia of this age should prove helpful here. The Supreme Court’s criminal law revolution, which started in 1961 with the announcement of the decision in *Mapp v. Ohio*, continued unabated throughout this decade. Of particular interest to our inquiry are two cases decided during the October, 1962 Term: *Gideon v. Wainwright* and *Douglas v. California*. In *Gideon* the Court established a right to counsel for the indigent accused in all state felony prosecutions. With representation at trial, the facts and the arguments crucial to a rebirth of judicial lawmaking in the criminal law could now be presented to the lower courts and made part of the record on appeal. What *Gideon* gave to state felony prosecutions in the lower courts, *Douglas* gave to the state appellate court system: the guaranteed right of indigent defendants to appointed counsel on appeal.

*Gideon* and *Douglas* were crucial to the renaissance of criminal law that took place in this decade. The great majority of prosecutions involve indigents. These two cases and their progeny provided the means by which the new thinking about the criminal law could be translated into judicial lawmaking by a court inclined to listen and participate in the modern golden age of criminal law.

The criminal justice system thus was equipped to handle judicial lawmaking in criminal law at the same time, and partly as a result of, a variety of new ideas. New patterns of thinking about substantive criminal law emerged. For example, the Model Penal Code was promulgated; empirical research on criminal law issues was carried on with funding from foundations and government; the horrors disclosed

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87. 367 U.S. 643 (1961); see supra notes 21-22 and accompanying text.
88. The criminal law revolution is said to have ended “with a flourish, on June 23, 1969. On that date, the last day of the ‘Warren Court’ era, the Double Jeopardy Clause became the last Bill of Rights provision that the Court has applied to the states.” EDITORS OF THE CRIMINAL LAW REPORTER, THE CRIMINAL LAW REVOLUTION AND ITS AFTERMATH: 1960-1977 v (1978).
89. 372 U.S. 335 (1963).
by the Second World War reminded us of the importance of criminal law as a "bill of rights"; and the Civil Rights Movement gave us proof that much injustice thrived throughout the nation by virtue of the then-existing criminal justice system.93

The California Supreme Court faced the renaissance in criminal law with new tools in place, new empirical evidence of how criminal law actually worked, and with new modes of thinking about substantive criminal law and its purposes.

In this era Justice Traynor's work product increased by nearly seventy percent compared to the previous decade. He wrote 126 criminal law opinions during the decade of the 1960s. From the perspective of his thirty years on the bench, nearly one-half of all of his criminal law opinions were written during this period.94 This amounts to slightly more than twelve opinions each year, an average of one opinion each month.

Again, most of these opinions focused on problems of criminal procedure. Of these 126 opinions, sixteen—thirteen percent—were concerned with important substantive issues.95 Eleven were majority

93. Speaking in an entirely different context, Justice Traynor once said:

We like to believe that rules of law are free of tyranny and caprice, as men are not. For better or worse, however, they are man-made. There is always the risk that a rule may be defective at the outset or may become so in time. It could even prove as despotic as a despot. Whatever assurance we have against such risks depends upon our appellate judges, whose opinions set forth the rules of law. They must reason anew on each case to keep constant their watch on the law.


94. During his 30 years on the bench, Justice Traynor wrote 259 opinions in criminal cases. The 126 criminal law opinions written in this last decade thus amount to 49% of his total criminal law opinion writing.

opinions, and four expressed the views of a unanimous court. There was one dissent, but no plurality or concurring opinions. In varying degrees, and in all but one case, new substantive criminal law was made in each of these Traynor opinions.

Compared with Justice Traynor's work in the first two decades, this represents a substantial increase in judicial lawmaking. In the first decade, the moribund years, only one of Justice Traynor's opinions focused on the law-creating function. In the second decade, the transition years, five of the thirteen opinions, thirty-eight percent, created new substantive criminal law in one degree or another. During the last decade, fifteen of the opinions deciding a significant substantive issue created or urged new substantive doctrine—one hundred percent. Thus, while Justice Traynor's opinions on substantive criminal issues remained fairly stable over the last two decades he was on the bench—thirteen of these opinions were written during the second decade and sixteen in the third—the

96. The unanimous opinions were in Benson, Pierce, Chacon, and Hood. Except for Moran, in which Justice Traynor dissented, all of the remaining important substantive opinions were written for a majority of the court. Id.

97. The dissent was in Moran.

98. I classify Jackson as a law-maintaining case.

99. I eliminated five Traynor opinions from this study because the substantive issues were resolved by a routine application of settled law. These routine issues generally appeared in automatic appeals or in cases in which the substantive issue was joined with an important issue of criminal procedure. The cases are as follows: People v. Aranda, 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965) (first-degree robbery—majority opinion—6-1 split); People v. Hall, 62 Cal. 2d 104, 396 P.2d 700, 41 Cal. Rptr. 284 (1964) (second-degree murder—majority opinion—5-2 split); People v. Imbler, 57 Cal. 2d 711, 371 P.2d 304, 21 Cal. Rptr. 568 (1962) (automatic appeal—majority opinion—6-1 split); People v. Mason, 54 Cal. 2d 164, 351 P.2d 1025, 4 Cal. Rptr. 841 (1960) (automatic appeal—unanimous opinion); People v. Love, 53 Cal. 2d 843, 350 P.2d 705, 3 Cal. Rptr. 665 (1960) (automatic appeal—majority opinion—5-2 split).


101. As seen above, most of these routine issues appeared in either automatic appeals or were joined with an important issue of criminal procedure. See, e.g., supra text accompanying notes 71-72.
number of opinions creating new substantive criminal law increased substantially in the last decade. Of these twenty-nine opinions, five opinions in the second decade created new substantive doctrine, while fifteen did so in the third decade.

Before we turn to the specific cases to learn what we can about the judicial role in making substantive criminal law, a summary of these opinions may be helpful. There are thirty-seven opinions spread over three decades: There are thirteen unanimous opinions, seventeen majority opinions, three concurring opinions, and four dissents. If we exclude the moribund first decade, there are 8 in the first decade, 13 in the second decade and 16 in the third decade. See supra notes 51-57, 76-81, 95-99, and accompanying text.

These unanimous opinions were written in the following cases: People v. Hood, 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969); People v. Chacon, 69 Cal. 2d 765, 447 P.2d 106, 73 Cal. Rptr. 10 (1968); People v. Pierce, 61 Cal. 2d 879, 395 P.2d 893, 40 Cal. Rptr. 845 (1964); Benson v. Superior Court, 57 Cal. 2d 240, 368 P.2d 116, 18 Cal. Rptr. 516 (1962); People v. Camodeca, 52 Cal. 2d 142, 338 P.2d 903 (1959); People v. Stuart, 47 Cal. 2d 167, 302 P.2d 5 (1956); People v. Burt, 45 Cal. 2d 311, 288 P.2d 503 (1955); People v. Deloney, 41 Cal. 2d 832, 264 P.2d 532 (1953); People v. Martinez, 38 Cal. 2d 556, 241 P.2d 224 (1952); People v. Cornett, 33 Cal. 2d 33, 198 P.2d 877 (1948); People v. Brown, 29 Cal. 2d 555, 176 P.2d 929 (1947); People v. Triebel, 28 Cal. 2d 657, 171 P.2d 1 (1946); People v. Mitchell, 27 Cal. 2d 678, 166 P.2d 10 (1946).


These are the Traynor dissenting opinions in the following cases: People v. Thomas, 41 Cal. 2d 470, 475, 261 P.2d 1, 4 (1953) (Traynor, J., concurring); People v. Lindley, 26 Cal. 2d 780, 794, 161 P.2d 227, 235 (1945) (Traynor, J., concurring); People v. Albertson, 23 Cal. 2d 550, 581, 145 P.2d 7, 22 (1944) (Traynor, J., concurring).

cad from this calculation, there are twenty-nine opinions in twenty
years. This is an average of one and one-half opinions each year.

IV. ROGER TRAYNOR'S JUDICIAL PHILOSOPHY AND CREATIVITY
IN THE SUBSTANTIVE CRIMINAL LAW

Before we turn to the lawmaking opinions, we will take a brief
look at the Traynor substantive criminal law opinions that pursue
other goals. These cases fall into two categories: error-correcting
cases and law-maintaining cases.

A. Error Correction

In any legal system that enforces criminal law through courts, it
is axiomatic that judges will exercise a law-applying function. It is
neither problematic nor controversial that our judges perform this
task. It is, of course, inevitable that errors will be committed when
this is done. Part of the reason we have created appellate courts is to
correct errors committed in the courts of original jurisdiction. This
error-correcting function falls squarely within our expectations for
appellate judges in our common-law system; it is what we demand
they do. Indeed, this is the first function that comes readily to mind
when we think of the business of appellate court judging.

In a system with intermediate appellate courts, this task usually
is discharged by the lower appellate courts, rather than by the highest
court in the state. Although this is generally true in California, where
the district courts of appeal do the bulk of the error-correcting work,
the California Supreme Court performs this task in automatic appeals,
or when the court grants a hearing on one issue and error-correcting
issues also are presented in the same case. Since the court must
dispose of all issues that might affect the case, the court decides these
error-correcting issues along with the issues that moved it to grant a
hearing. These opinions have been eliminated from further consider-
ation because generally they do not raise significant legal process

dissenting), overruled by People v. Green, 47 Cal. 2d 209 (1956); In re Halcomb, 21 Cal.
2d 126, 130, 130 P.2d 384, 387 (1942) (Traynor, J., dissenting). See supra note 62 for an
explanation as to the Traynor opinions in Petrie and Haynes.

108. In terms of the type of opinion, there are 9 unanimous opinions, 17 majority
opinions, 1 concurring opinion, and 3 dissents.

109. For that reason, I have excluded the simple law-applying cases from our current
inquiry.
issues nor do they raise substantial questions of substantive criminal law.

B. The Law-Maintaining Cases

Given the common-law system's commitment to precedent and to stare decisis, and to the equality of the application of law inherent within those two concepts, appellate courts are also given the task of maintaining a uniform, consistent common law throughout the jurisdiction. This function of the appellate courts is the major reason for the pyramidal structure given to appellate court systems in the common-law world. Hence, appellate judges should make sure that precedent forms a logical, cohesive, understandable body of law that must be used in the law-applying function by all agencies throughout the legal system. All of our great common-law judges, including James Kent, Joseph Story, Lemuel Shaw, Oliver Wendell Holmes, Benjamin Cardozo, and Roger Traynor have been masters of the law-maintaining function. In no small part, it is because of their great skills in tending the common law that we remember them from among the thousands who have practiced the craft of appellate judging.

With one exception, all of Traynor's substantive criminal law opinions written in the first decade, eight of those written during the second decade, but only one of the substantive criminal law opinions in the third decade pursue this law-maintaining goal.

In a system with intermediate appellate courts, it is generally agreed that this is an important function of a supreme court with

110. See Roscoe Pound, The Formative Era of American Law 4-5, 4 n.2 (1938); Schwartz, supra note 1, at 407.

111. This task apparently was discharged by other justices during the third decade. Justice Traynor became Chief Justice of California in 1964. These new responsibilities may have affected the number and type of opinions that he wrote while he was Chief Justice. In reminiscing on the appointment of Roger Traynor as Chief Justice, Donald Barrett (Justice Traynor's chief of staff for a number of years) tells us:

I felt in a way it was unfortunate that Judge Traynor was made Chief Justice because I think when he was an Associate Justice he had more time available for pursuing his jurisprudential interests, than he did as a Chief Justice. I am not sure that the trade-off was worth it. Having the freedom from administrative chores of the Chief Justice position might well have been better in a way than having Justice Traynor made Chief. He was, however, certainly the logical choice.

respect to lower appellate court opinions. The law-maintaining
function, for example, promotes the uniformity of law within the state
by overruling discordant authority in the lower appellate courts. It
harmonizes the supreme court's own precedent when multiple cases
produce inconsistent lines of authority, and it assures that the law
articulated by the supreme court is taken seriously by the lower
courts. The law-maintaining function also clarifies existing law by
reformulating its expression, by explaining its purpose and the policy
that drives it, and by providing additional examples of how it should
function. In essence, law-maintaining work, in Justice Traynor's
words, keeps "the law straight on its course." It tends the path
of the law, restoring its surface, removing obstructions, and repainting
its signposts. Construction work is done to preserve the existing way,
not to create new routes, when the court is exercising this function.

Justice Traynor's law-maintaining opinions fall squarely within
this tradition. Four examples of this type of Traynor opinion should
sufficiently illustrate this point. Two opinions are taken from the first
decade and two from the second decade.

His first law-maintaining opinion is his concurrence in People v.
Albertson. In a murder trial, the court instructed the jury that
California Penal Code section 1105 allocates the "burden of
proving" mitigation, justification, or excuse to the defendant. Several early cases interpreted this section as placing a burden of
persuasion on the defendant. The defendant, it was said, must
prove these issues by a preponderance of the evidence. These early
cases were overruled and it was thereafter uniformly held that the
burden mentioned in this section is the burden of producing enough
evidence to raise a reasonable doubt about guilt. In Albertson's
trial for murder, the jury was instructed that the burden of proving
these issues falls upon the defendant. The instruction gave no
explanation of what was meant by the burden of proof. After
noting that it is illogical to impose a burden of raising a reasonable

[hereinafter Traynor, Reasoning]; R. J. Traynor, The Courts: Interweavers in the Reform-
ation of Law, 32 SASK. L. REV. 201, 212 (1967) [hereinafter Traynor, Interweavers].
116. Id. (Traynor, J., concurring).
117. Id. at 586-87, 145 P.2d at 25 (Traynor, J., concurring).
118. See id. at 586, 145 P.2d at 25 (Traynor, J., concurring).
doubt upon a defendant when the prosecution must prove guilt beyond a reasonable doubt, Justice Traynor explained that the defendant need only introduce evidence of justification, excuse, or mitigation to satisfy the section's requirements. The jury instruction was thus erroneous for it failed to explain the defendant's burden. It permitted a reasonable juror to believe incorrectly that the defendant bears the burden of persuasion on justification, excuse, or mitigation. Having rationalized, simplified, and explained the court's own caselaw, Justice Traynor then noted that an inconsistent precedent from the court of appeal should, accordingly, be overruled.

The Traynor opinion thus welds the cases into a logical, cohesive body of law and clearly informs the lower courts that a jury should not be instructed in the language of section 1105. Furthermore, the lower courts were assured that Justice Traynor meant what he said as the error was found prejudicial: His concurring opinion provided the crucial fourth vote for a reversal of Albertson's death judgment.

An equally important law-maintaining issue is the focus of Justice Traynor's dissent in People v. Kolez, another automatic appeal. The instruction on the jury's sentencing discretion in a capital case was the sole issue before the court in Kolez. The jury was told that once it found the defendant guilty of first degree murder, unless it also found some extenuating facts or circumstances, it was the jury's duty to find a simple verdict of murder in the first degree and leave with the law the responsibility of fixing the punishment. The defendant argued that existing precedent condemns this instruction and that the court should find the error prejudicial. In a per curiam opinion, the court affirmed the death judgment with a single dispositive sentence: "It has been held in a long line of decisions that the giving of an instruction similar to the [instruction given in this

119. Id. at 587, 145 P.2d at 25-26 (Traynor, J., concurring).
120. Id. at 588-89, 145 P.2d at 26-27 (Traynor, J., concurring).
121. Id. at 588, 145 P.2d at 26 (Traynor, J., concurring).
122. Id. at 581-89, 145 P.2d at 22-27 (Traynor, J., concurring).
124. Id. at 671-72, 145 P.2d at 580 (Traynor, J., dissenting).
125. Id. at 672, 145 P.2d at 581 (Traynor, J., dissenting).
126. Id. (Traynor, J., dissenting).
case] is not erroneous. The opinion then cites eighteen cases in support of its holding.

Justice Traynor, joined by Justice Schauer, dissented. His analysis of these cases shows that they tolerate giving the instruction they condemn. Seeking the middle ground between approving the instruction and overruling precedent, these cases admonish the trial courts not to give the instructions but to affirm the death judgments produced by them. Justice Traynor objected.

If the instruction is erroneous it should be held to be so outright. The dilemma is not resolved but perpetuated when this court, in deference to precedent, sanctions an incorrect instruction and at the same time admonishes the trial court to cease giving it. The repeated disregard of such admonitions demonstrates that if the correct rule is to be applied, this court must join in its enforcement and reverse the judgments of trial courts that vitiate it. Nothing is gained and much is lost by insisting upon a mechanical adherence to precedent that perpetuates an admittedly erroneous interpretation of a statute and defeats the very purpose of the Legislature in enacting it.

People v. Thomas, another automatic appeal, focuses on the validity of one of the lying in wait instructions. Thomas argued that the trial court erred because the instruction referred to a “killing” by lying in wait rather than to a murder by lying in wait. Justice Shenk’s opinion for the majority “assumed that the instruction standing alone is not as exact as it might be.” Nevertheless, the death judgment was affirmed on the ground that the instruction did not prejudice the defendant. When the instruction was read in conjunction with the other lying in wait instructions, Justice Shenk argued, the reference to a “killing” was reasonably understood by the jury to be a killing that constituted murder.

127. Id. (Traynor, J., dissenting).
128. Id. (Traynor, J., dissenting).
129. Id. (Traynor, J., dissenting).
130. Id. at 675-76, 145 P.2d at 582-83 (Traynor, J., dissenting).
131. Id. (Traynor, J., dissenting) (citations omitted).
132. 41 Cal. 2d 470, 261 P.2d 1 (1953).
133. Id. at 474-75, 261 P.2d at 3-4.
134. Id. at 475, 261 P.2d at 4.
135. Id.
136. Id.
Although Justice Traynor concurred in the majority opinion, he wrote separately as well. The goal of his concurrence was to clearly and unambiguously hold that the challenged instruction was "a gross misstatement of the law." In a scholarly opinion analyzing most, if not all, of the relevant authority, Justice Traynor demonstrated the instruction's fundamental error. Nevertheless, after painstakingly reviewing the evidence, he concluded that the instruction was harmless error. Despite the affirmance of the judgment, Justice Traynor's concurring opinion made very clear what the majority opinion did not; the instruction was erroneous and should not be given in any future case.

The last of the four examples of law-maintaining cases is People v. Ashley. Ashley gained sufficient renown to be reprinted in several casebooks and to be noted in the two standard student texts on criminal law. It remains one of the leading cases in the United States on whether the crime of obtaining property by false pretenses can be committed by a false promise. The cases in the California courts of appeal were in conflict on this issue. The older cases adhered to the majority rule, supported by the great weight of authority, that a false pretense must relate to an existing state of facts and that a false promise would not suffice as it refers to future events. The newer cases held that a false promise is a misrepresentation of the culprit's current state of mind, and as such it is a misrepresentation of an existing fact sufficient for false pretenses under the California statute. The California Supreme Court granted a hearing to resolve this important conflict in the California case law—an important aspect of the law-maintaining function.

Justice Traynor began his opinion by tracing the evolution of the crime of false pretenses from its birth in the English statute enacted
in 1757,\textsuperscript{144} to the dubious interpretation given to the statute by the early English cases when they created the no-false-promise rule, to the importation of that rule into American law, and its adoption by the great weight of authority.\textsuperscript{145} Although the conflict in the California cases focused on the existing-fact-future-conduct characterization of a false promise, this debate produced no convincing rationale for accepting or rejecting the no-false-promise rule.\textsuperscript{146} A rule without a sufficient rationale was an anathema to Justice Traynor. Reason, rationale, and utility were, for him, synonymous with the common law.

Unlike larceny and embezzlement, the two remaining crimes in the theft trilogy, the crime of false pretenses governs sales transactions. Criminalizing a false promise may unduly encumber the market by the ever present threat that the buyer or seller might be convicted of theft if, at the time of the transaction, the promising party was mentally a cheat.\textsuperscript{147} This would put power into the hands of the party on the losing end of a bad bargain to even the score against a judgment-proof adversary in the criminal courts. Though seldom articulated, this concern apparently is the rationale for adopting the majority no-false-promise rule, for surely the misrepresentation of a present state of mind is a misrepresentation of an existing fact.

The market concern supposedly driving the no-false-promise rule is the fear of erroneous prosecution and conviction for a simple breach of contract.\textsuperscript{148} In the typical case the false pretense is capable of objective verification—the brick is not gold or the bridge does not belong to the seller. When the false pretense is a misrepresentation of the culprit's state of mind, there is little to tie the offense to the objective world. Thus, the charge can be made in every case in which a promise is made and the deal later goes sour.

A false promise is actionable in the tort of deceit, and something more than mere proof of nonperformance is required to prove the defendant's intent not to perform the promise at the time it was made.\textsuperscript{149} Since the majority of jurisdictions recognize this tort and adhere to this rule, Justice Traynor argued that the existence of the

\textsuperscript{144} 30 Geo. 2, ch. 24, § 1 (1757) (Eng).
\textsuperscript{145} Ashley, 42 Cal. 2d at 259-62, 267 P.2d at 279-81.
\textsuperscript{146} See id. at 262, 267 P.2d at 281.
\textsuperscript{147} Id. at 262-63, 267 P.2d at 282.
\textsuperscript{148} Id. at 264, 267 P.2d at 282.
\textsuperscript{149} Id. at 263, 267 P.2d at 282.
tort is not seen as unduly encumbering the market. Moreover, in those few jurisdictions in which a false promise suffices as a false pretense, the same rule is followed—more than nonperformance is required to prove that the promise was false when made. Furthermore, the problem of proving the required mental state for this crime is no easier when the false pretense is a false promise than when it is a misrepresentation of some other existing fact. The prosecution must prove beyond a reasonable doubt both that the promise was false when made and that it was made with the intent to deceive the other party. Just as nonperformance of the promise does not suffice as proof that the promise was false when made, so it is also insufficient to prove that the maker made the promise with an intent to deceive. There is thus little reason, Justice Traynor wrote, to suspect that a threat of criminal liability will more encumber the market than the threat of civil liability existing in nearly all American jurisdictions. In addition, in a note falling squarely within Realist thinking, Justice Traynor cites the available empirical evidence suggesting that the market has not been adversely affected by allowing false promises to suffice as a false pretense.

Finally, sound policy reasons support extending criminal liability to false promises:

If false promises were not false pretenses, the legally sophisticated, without fear of punishment, could perpetrate on the unwary fraudulent schemes like that divulged by the record in this case. . . . To hold that false promises are not false pretenses would sanction such schemes without any corresponding benefit to the public order.

Accordingly, Justice Traynor’s opinion held that a false promise suffices as a false pretense under the California statute.

These four cases exemplify the law-maintaining function as Justice Traynor practiced it. The case before the court is resolved with an eye toward weaving its holding into the fabric of the law while simultaneously examining the fabric for logical flaws, for breaks

150. Id. at 265, 267 P.2d at 283.
151. Id. at 263, 267 P.2d at 282.
152. Id. at 263-64, 267 P.2d at 282.
153. Id. at 265, 267 P.2d at 283.
154. Id. at 265 n.6, 267 P.2d at 283 n.6.
155. Id. at 265, 267 P.2d at 283 (citations omitted).
156. See id.
in the pattern, for the soundness of thread, and for its utility. Jury instructions, for example, should faithfully and unambiguously communicate the law to the jury, and appellate opinions should clearly and unambiguously articulate the rules they apply. The system should not suffer with the logical blemishes and ambiguity found in Albertson, with the equivocation and its fatal consequences encountered in Kolez, and with the flabby, but fatal, assumption the majority willingly embraced in Thomas. Nor should the continuity of the law be broken out of speculative fear that the system will be abused by those who lose in market transactions, and by prosecutors and juries who might fail to adhere to the criminal law’s vigorous proof requirements. As the no-false-promise rule would have it, these fears outweigh the inducement the rule creates to cast deceit in a form not punishable by the criminal law despite their felonious intent to deceive and the success of their otherwise criminal endeavor.

In Albertson, Thomas, and Kolez, the majority opinions, written by others, focus on the dispute and pay little heed to the opinions’ impact on the path of the law. In Ashley, had Justice Traynor embraced the predominate rule, the purpose of the law would have been frustrated out of fear that the system would not function in false promise cases as it is assumed to work in other cases. This was not Roger Traynor’s way.

He looked at his work from two perspectives: as a weaver of the law, a maintainer of the path; and as a just judge of the dispute at hand. Indeed, I suspect that if either role predominated in his mind, Justice Traynor preferred tending the law to dispensing justice in the case at hand. In that way, by primarily focusing on the vitality, the utility, and the relevance of the law to the age of decision, both goals are arguably best served. The California Supreme Court was not vigorously exercising the law-maintaining function in the criminal law before Traynor was appointed to the court. That changed with his appointment. Tending the common law was one of his many strengths. He began that work shortly after he joined the court, and it continued throughout his judicial career. In his later years the California Supreme Court was regarded as a great common-law court,

157. This logical flaw is, of course, the inconsistency between imposing a burden on a defendant to raise a reasonable doubt as to guilt when the prosecution already has the burden of proving guilt beyond a reasonable doubt. Albertson, 23 Cal. 2d at 587, 145 P.2d at 25 (Traynor, J., concurring).
perhaps the greatest in the land. Much credit for this must go to Roger Traynor.

You might be skeptical of this assertion. You might suspect that I have chosen too few cases for discussion and that the Traynor opinions in *Albertson*, *Kolez*, *Thomas*, and *Ashley* are exceptions to Justice Traynor’s normal practice. If you read the Traynor opinions I have collected and categorized as law-maintaining opinions, I believe you will agree that these four cases are examples of the law tending apparent in all of his law-maintaining cases. However, just as they are coupled with the law-applying function, so the law-maintaining function frequently is coupled with the law creating function. Had *Ashley* not presented the task of resolving conflicting precedent in the courts of appeals, it would have been classified as a law-creating case. But *Ashley* selected between the conflicting lines of precedent in the district courts of appeals. The law creation primarily was done in the lower appellate courts. Had the Traynor opinion created the rule approved in *Ashley* out of whole cloth, the *Ashley* opinion would be characterized as a law-creating case.

Before we proceed to examine the more controversial cases, the cases creating substantive criminal law, we should take note of the tools Justice Traynor used to maintain the common law. The body of precedent relevant to the dispute before the court is both the source of the law and the subject of the law-maintaining process. This body of law is researched; described, often in its historical context; and then analyzed for errors in logic, consistency, and clarity. It is also evaluated in terms of its suitability to achieving the goals of the law. Defects are occasionally repaired by overruling inconsistent cases, as Justice Traynor would have done in *Albertson*[^158] and *Kolez*.[^159] The newly rationalized and often reformulated precedent is then used to resolve the dispute at hand. Precedent, reason, logic, and analysis are used by the worker to produce a rational, consistent, and understandable body of law that is enforced by the court through the doctrine of stare decisis and the law-applying function.

[^158]: See id. at 588, 145 P.2d at 26 (Traynor, J., concurring).
[^159]: See 23 Cal. 2d at 675-76, 145 P.2d at 582-83 (Traynor, J., dissenting).
C. The Judicial Creation of Substantive Criminal Law

1. Introduction

As we have seen before, in the early stages in the development of the common law, the courts began creating the common law of crimes. After the discovery of legislatures in the middle ages, Parliament began supplementing the common law with statutory offenses meant, primarily at first, to fill gaps in the common law. Familiar examples are the statutory crimes of embezzlement and obtaining property by false pretenses. Although this tradition was brought to America in the baggage of our nation's founders, it was rapidly altered to allocate the criminal lawmaking function primarily to the legislative branches of government. Our distrust of government and our commitment to democracy fueled this allocation of power to the legislative branches of government. Once the power to make substantive criminal law became firmly entrenched in the legislative halls, we began to withdraw that power from the courts. On occasion, this is done by statute. But even when there is no statute aimed at extracting this common-law power from the courts, it is generally agreed today that courts lack authority to create new crimes out of whole cloth.

Despite his belief that courts and legislatures share substantive lawmaking power today, Justice Traynor's opinions assiduously respect this modern tradition. He never sought to create a new crime in any of the opinions he wrote during his three decades on the bench. Nevertheless, in a country that enforces criminal law through a common-law system, it is inevitable that courts exercise considerable power over substantive criminal law. There is no question that appellate courts properly exercise the error-correcting function and the law-maintaining function even in substantive criminal cases. With respect to the latter function, few would argue, for example, that it is improper for a state supreme court to correct disparate lines of authority in the intermediate appellate courts' interpretation of a penal statute. Justice Traynor's opinion in *Ashley*, in other words, is never challenged as an illegitimate exercise of judicial authority.

Our inquiry goes further. Though we accept the tradition that courts have no authority to create new crimes, do courts retain power

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to create substantive criminal law of lesser scope? We know that Roger Traynor created substantive criminal law on a number of occasions in the second and third decades of his judicial career. Our goal is to learn what we can from his example. We will first look at the law he created and the process by which he did it. Later, we will analyze these law-creating opinions in the light of his judicial philosophy.

2. Four examples of Traynor lawmaking opinions

At the margins, it may be difficult to distinguish between the law-maintaining and the law-creating functions. As we have seen, the overruling of precedent provides no litmus test for law creation since that tool is used to maintain the law as well. For example, Justice Traynor would have overruled inconsistent precedent in *Albertson* and *Kolez*, and both are law-maintaining cases.

An opinion's reliance upon precedent can be equally deceiving. Though the care and upkeep of precedent are hallmarks of the law-maintaining function, we recognize that judges are constrained by the very process they invoke to create new law:

Unlike the legislator, whose lawmaking knows no bounds, the judge stays close to his house of the law in the bounds of stare decisis. He invariably takes precedent as his starting-point; he is constrained to arrive at a decision in the context of ancestral judicial experience; the given decisions, or lacking these, the given dicta, or lacking these, the given clues. Even if his search of the past yields nothing, so that he confronts a truly unprecedented case, he still arrives at a decision in the context of judicial reasoning with recognizable ties to the past; by its kinship thereto it not only establishes the unprecedented case as a precedent for the future, but integrates it in the often rewoven but always unbroken line with the past.

The reliance on precedent thus is a hallmark of judicial law creating, just as it is the currency of the law-maintaining function. Indeed, the creation of new law may be barely discernible on the face

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161. 23 Cal. 2d at 558, 145 P.2d at 26 (Traynor, J., concurring).
162. 23 Cal. 2d at 675-76, 145 P.2d at 582-83 (Traynor, J., dissenting).
of the opinion because it is so skillfully woven into the ever expanding pattern of the common law.\(^{164}\)

Law creating is best distinguished from law-maintaining not by the form the opinion takes or the tools used by the judge to reach the result, but by looking at the substance of the opinion. During his thirty years on the bench, twenty of Traynor’s opinions created new substantive criminal law: five were written in the second decade,\(^{165}\) and fifteen in the third decade.\(^{166}\) Another opinion, the first decade dissent in *Halcomb*, addresses the judicial lawmaker process in the substantive criminal law.\(^{167}\)

Four of these lawmakering opinions are directed at the actus reus elements of a particular crime. *Burt*, decided in the second decade, expands the crime of solicitation to include soliciting a crime within the state which is to be committed outside the state.\(^{168}\) *Washing-

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169. 62 Cal. 2d at 783, 402 P.2d at 134, 44 Cal. Rptr. at 446.

170. 63 Cal. 2d at 704-05, 408 P.2d at 373-74, 47 Cal. Rptr. at 917-18.
confinement. The latter three cases were decided in the third decade.

Three opinions create new mens rea—the culpable mental state—elements of several crimes. Stuart restricts the crime of involuntary manslaughter on an unlawful-act theory to unlawful acts committed with criminal intent or criminal negligence. Butler recognizes that the absence of a claim of right is a necessary component of the mens rea of robbery—and of first degree murder predicated on a felony-murder-robbery theory, and Murdock requires actual, not "constructive," knowledge for the crime of driving an automobile with "knowledge" that the operator's license was suspended. Stuart was decided in the second decade, Butler and Murdock in the third decade.

Three opinions either abolish an existing defense or reject a new defense, and four opinions create or expand new defenses. Justice Traynor's Benson opinion refused to recognize a defense of impossibility to the crime of solicitation. Pierce abolished interspousal immunity for the crime of conspiracy when the spouses conspire between themselves alone. On the other hand, Justice Traynor's Vogel opinion created the defense of honest-and-reasonable-belief-of-freedom-to-remarry to the crime of bigamy, and his Chacon opinion recognized the rule of provocation as a "defense" to the crime of assault with a deadly weapon by a life prisoner.

The Traynor opinions in Perez and Moran dealt with the defense of entrapment. In Perez the court overruled a long line of authority in the courts of appeal requiring a defendant to incriminate herself before invoking the entrapment defense. Justice Traynor's dissent in Moran, the last opinion he filed in a criminal case before he retired from the bench, urged his brethren to abandon the origin-of-intent test for entrapment as that test is inconsistent with the deterrence-of-

171. Culver, 69 Cal. 2d at 904, 447 P.2d at 637, 73 Cal. Rptr. at 397.
172. Stuart, 47 Cal. 2d at 172-74, 302 P.2d at 8-10.
173. Butler, 65 Cal. 2d at 573-74, 421 P.2d at 706-07, 55 Cal. Rptr. at 514.
175. Benson, 57 Cal. 2d at 243, 368 P.2d at 118, 18 Cal. Rptr. at 518.
176. Pierce, 61 Cal. 2d at 882, 395 P.2d at 896, 40 Cal. Rptr. at 848. In Quicke—one of the error-correcting cases—Justice Traynor refused to abandon the M'Naughton test and adopt the standard proposed by the Special Commissions on Insanity and Criminal Offenders. Quicke, 61 Cal. 2d at 159, 390 P.2d at 395-96, 37 Cal. Rptr. at 619-20.
177. Vogel, 46 Cal. 2d at 803-04, 299 P.2d at 854-55.
police-misconduct theory of the entrapment defense. The Pierce and Vogel opinions are still reproduced or discussed in contemporary casebooks and treatises.

Six of Traynor's opinions focus on theories of exculpation—evidence that disproves a mental element of the charged offense. One of the most important developments in the substantive criminal law in the 1960s was the recognition and elaboration of the theory of exculpation known as the "diminished capacity defense." Although this ground for exculpation began with the use of evidence of mental disease or defect falling short of the proof necessary for the insanity defense, it expanded to include exculpation on the theory of voluntary intoxication as well. Thus, although evidence that the defendant was voluntarily intoxicated was used well before the diminished-capacity defense was created in California, that theory of exculpation was so stimulated and affected by the mental-disease-or-defect version of diminished capacity as to become commonly joined with the new diminished-capacity defense in the mind of the profession. Traynor's six exculpation opinions all concern the diminished-capacity defense in the mental-disease-or-defect version, the voluntary-intoxication version, or, as is commonly the case, a mixture of the two.

One of these opinions refuses to extend the diminished-capacity defense as urged by the defendant, and five expand or elaborate the defense in important ways. Two of these opinions, Conley

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180. Moran, 1 Cal. 3d at 765-66, 463 P.2d at 768-69, 83 Cal. Rptr. at 416-17 (Traynor, J., dissenting).
181. E.g., LAFAVE & SCOTT, supra note 141, at 563 n.242; ROLLIN M. PERKINS & RONALD N. BOYCE, CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE 361 n.1a (6th ed. 1984) [hereinafter PERKINS & BOYCE, CASES AND MATERIALS]; PERKINS & BOYCE, CRIMINAL LAW, supra note 141, at 693 n.92, 1019 n.16.
182. E.g., LAFAVE & SCOTT, supra note 141, at 409 nn.26-27; PERKINS & BOYCE, CASES AND MATERIALS, supra note 181, at 672; PERKINS & BOYCE, CRIMINAL LAW, supra note 141, at 864 n.58, 917 & n.27, 1036 n.61, 1051 n.70, 1053 n.84; STEPHEN A. SALTZBURG, ET AL., CRIMINAL LAW, CASES AND MATERIALS 251 (1994).
184. Hood, 1 Cal. 3d at 455-59, 462 P.2d at 377-79, 82 Cal. Rptr. at 625-28; Conley, 64 Cal. 2d at 319-20, 411 P.2d at 917, 49 Cal. Rptr. at 821; Henderson, 60 Cal. 2d at 490-94, 386 P.2d at 682-84, 35 Cal. Rptr. at 82-84; Modesto, 59 Cal. 2d at 729-30, 382 P.2d at 37-38, 31 Cal. Rptr. at 229-30; Baker, 42 Cal. 2d at 571-77, 268 P.2d at 718-21.
185. 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966).
and *Hood*,¹⁸⁶ are frequently reproduced or cited in contemporary
criminal law casebooks and treatises.¹⁸⁷

*Halcomb*,¹⁸⁸ the last of the Traynor law-creating opinions that
we will consider, is concerned with the constraints upon judicial
lawmaking. *Halcomb* will be considered after examining the tools and
methods by which Justice Traynor created new substantive criminal
law.

The principal tools for judicial lawmaking include the tools used
for the law-maintaining function: precedent, logic, and reasoned
analysis. The way these tools are employed may differ in varying
degrees from the way they are used to maintain the law. Since by
definition there is no case directly on point supporting the new
rule,¹⁸⁹ precedent generally must be used differently. Logic, prin-
cipally inductive reasoning, is frequently employed to extract principles
from existing precedent in related doctrines. These principles are
then used both as authority for the new rule, which is applied through
deductive reasoning, and as the common threads that weave the new
law into the existing body of substantive doctrine. The path of the
law is extended into new ground, but it is always clearly connected to
the existing way.

The purpose of the crime or the rule under consideration, the
severity of the punishment, and the general legal policy on the topic
covered by the crime are commonly used in the law creating function
as well. In addition, there is the assessment of the utility of the
existing law—sometimes, though rarely, based upon empirical
evidence—and the anticipated utility of the new rule. Finally, there
is the leveling influence of experience and common sense.¹⁹⁰ All of
these considerations are found in various Traynor lawmaking
opinions, though each, of course, is not found in every case.

¹⁸⁷. E.g., JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 111 (Hood)
(1994); SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS
PROCESSES: CASES AND MATERIALS 463 (Conley), 949-52 (Hood) (1989); LAFAYE &
SCOTT, supra note 141, at 329-30 (Conley); PERKINS & BOYCE, CRIMINAL LAW, supra
note 141, at 130 n.91, 1014 n.49 (Conley); SALTZBURG ET AL., supra note 182, at 203 &
240 (Hood), 303 (Conley) (1994); RICHARD G. SINGER & MARTIN R. GARDNER, CRIMES
AND PUNISHMENT: CASES, MATERIALS AND READINGS IN CRIMINAL LAW 874 (Conley),
¹⁸⁸. 21 Cal. 2d 126, 130 P.2d 384 (1942).
¹⁸⁹. It is not uncommon, of course, to find precedent rejecting the new rule. In that
case, the inconsistent precedent must be overruled.
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It would extend the length of this discussion beyond reasonable limits if we were to consider all of Justice Traynor's lawmaking cases in detail. I have, therefore, selected four cases as examples of the judicial creation of substantive criminal law doctrine in Justice Traynor's opinions. These four cases are People v. Vogel, People v. Washington, People v. Pierce, and Benson v. Superior Court.

a. People v. Vogel

Justice Traynor's opinion in Vogel provides a ready example of how many of these tools and techniques are used to create new law. The issue in Vogel is whether the defendant's honest, though mistaken, belief that he is free to remarry is a defense to the crime of bigamy. This defense was squarely rejected in two previous cases. Putting these cases aside for the moment, Justice Traynor finds the relevant principles in People v. Harris and in the penal code's requirement that "there must exist a union, or joint operation of act and intent." Although Harris involved the use of evidence of voluntary intoxication to negate the existence of guilty knowledge for the crime of voting twice in an election, Justice Traynor extracts these fundamental principles from the case:

[T]o constitute what the law deems a crime there must concur both an evil act and an evil intent. *Actus non facit reum nisi mens sit rea.* . . . When the act is proved to have been done by the accused, if it be an act in itself unlawful, the law in the first instance presumes it to have been intended, and the proof of justification or excuse lies on the defendant to overcome this legal and natural presumption.

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191. 46 Cal. 2d 798, 299 P.2d 850 (1956).
195. 46 Cal. 2d 798, 299 P.2d 850 (1956).
196. Vogel, 46 Cal. 2d at 801, 299 P.2d at 852.
198. 29 Cal. 678 (1866).
200. Vogel, 46 Cal. 2d at 802, 299 P.2d at 853 (citation omitted) (quoting People v. Harris, 29 Cal. 678, 681 (1866)). Justice Traynor did not need to use inductive reasoning
Noting the reliance on these principles by the commissioners who drafted the penal code, Justice Traynor concludes that the omission of any reference to a wrongful intent in the statute was not meant to exclude intent as an element of the crime.\(^{201}\) The omission of a mens rea element from the definition of the offense is simply a device "to shift to defendant the burden of proving that he did not have the requisite intent."\(^{202}\) Accordingly, Justice Traynor concludes that guilty knowledge was omitted from the statute in order to reallocate the burden of proof on that issue in a bigamy trial.\(^{203}\)

This conclusion is bolstered by the severity with which bigamy is punished:

The severe penalty imposed for bigamy, the serious loss of reputation conviction entails, the infrequency of the offense, and the fact that it has been regarded for centuries as a crime involving moral turpitude, make it extremely unlikely that the Legislature meant to include the morally innocent to make sure the guilty did not escape.\(^{204}\)

The severity of the sanction strongly implies moral fault on the part of the remarrying spouse. And moral fault is brought into the crime by the culpable mental state of guilty knowledge. Only then will the punishment fit the crime.

Furthermore, as a matter of general policy, remarriage is favored in California.\(^{205}\) Thus, under California family law a marriage contracted in the belief that the former spouse is dead is valid until it is annulled.\(^{206}\) "It would be anomalous to hold," Justice Traynor wrote, "that although in the Civil Code the Legislature sanctions such a marriage and makes it valid until it is annulled . . . , in the Penal Code the Legislature makes such a person guilty of bigamy."\(^{207}\) In

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\(^{201}\) Id. at 801-02, 299 P.2d at 853.
\(^{202}\) Id. at 802, 299 P.2d at 853.
\(^{203}\) Id. at 802-03, 299 P.2d at 854.

Thus, the prosecution makes a prima facie case upon proof that the second marriage was entered into while the first spouse was still living, and [the defendant's] bona fide and reasonable belief that facts existed that left the defendant free to remarry is a defense to be proved by the defendant.

\(^{204}\) Id. at 804, 299 P.2d at 855 (footnote omitted).


\(^{206}\) CAL. FAM. CODE § 2201 (West 1994).

\(^{207}\) Vogel, 46 Cal. 2d at 803-04, 299 P.2d at 854.
other words, there is a policy favoring remarriage that would be frustrated if an honest belief in the freedom to remarry were not recognized as a defense to bigamy. The honest-belief defense harmonizes bigamy with California family law.

Justice Traynor overrules prior inconsistent authority and holds that a defendant’s honest, though mistaken, belief that he is free to remarry is a defense to bigamy.

The skill with which Traynor’s rule in Vogel is woven into the fabric of existing law obscures the creative forces that fathered it. The opinion gives the impression that the guilty-knowledge element was created by the legislative enactment. Thus the statute, properly understood, has always required guilty knowledge for bigamy in California. The omission of this mens rea element from the definition of the offense is simply the code’s way of allocating the burden of proof on this issue to the defendant. Furthermore, this interpretation of the statute was revealed by applying the fundamental principles set forth in California Penal Code section 20 and in People v. Harris to the language of the statute. The overruled precedent, People v. Hartman, simply erred by reaching the wrong conclusion.

The creativity of this decision is best seen by looking at the opposing arguments. If the legislature had meant for guilty knowledge to be an element of the offense, then why was it not spelled out in the statutory definition of the crime? Justice Traynor’s explanation that it was omitted in order to shift the burden of proof to the defendant is not overly persuasive. When the drafters of the code wished to allocate the burden of proof to the defendant, they knew how to do so in explicit language. For example, section 1105, which is the subject of Justice Traynor’s Albertson concurrence, expressly provides that in a trial for murder, “the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him.” Thus, if the legislature had meant to have guilty knowledge

208. People v. Kelly, 32 Cal. App. 2d 624, 90 P.2d 605 (1939) is disapproved; and People v. Hartman, 130 Cal. 487, 62 P. 823 (1900) is overruled. Vogel, 46 Cal. 2d at 805, 299 P.2d at 855; see supra note 197 and accompanying text.

209. Justice Traynor also found that the previous supreme court case that rejected this defense, People v. Hartman, had been overruled sub silentio in Matter of Application of Ahart, 172 Cal. 762, 159 P. 160 (1916). See Vogel, 46 Cal. 2d at 805, 299 P.2d at 855.

210. See supra text accompanying notes 113-22.

operate as a defensive matter similar to mitigation in a homicide case, as Justice Traynor would have us believe, a statute could have provided—in much the same way as California Penal Code section 1105 does—that “the contracting of a second marriage during the continuation of an existing marriage being proved, the burden of proving an honest belief in freedom to remarry devolves upon the defendant.”

More importantly, the next section in the code following section 1105 covers the question of the proof required in a trial for bigamy. Section 1106 reads as follows:

Upon a trial for bigamy, it is not necessary to prove either of the marriages by the register, certificate, or other record evidence thereof, but the same may be proved by such evidence as is admissible to prove a marriage in other cases; and when the second marriage took place out of this State, proof of that fact, accompanied with proof of cohabitation thereafter in this State, is sufficient to sustain the charge.\(^{212}\)

Since the drafters of the code created a specific provision governing proof in a bigamy trial, and since that provision follows immediately after the statute that allocates the burden of proof to the defendant on various defensive issues in a murder trial, how likely is it that the drafters of the code would select ambiguous silence as the method for allocating the burden of proof on the guilty-knowledge issue instead of adding a sentence to section 1106 as they drafted it? Certainly, reasonable minds readily could differ with Justice Traynor's conclusion that the drafters of the code preferred ambiguous silence as the allocating device rather than add a single sentence to be included in the other material covered in section 1106.

It is at least equally probable that: (1) the drafters did not think about the guilty-knowledge issue and therefore did not make any provision for it in any way, by silence or otherwise; or (2) the drafters rejected guilty knowledge as an element of bigamy, thus an honest belief in freedom to remarry is irrelevant to the crime and is not mentioned in any respect.

Justice Traynor's argument with respect to California Penal Code section 20 is equally doubtful. Section 20 requires a “union[] or joint operation of act and intent.”\(^{213}\) This provision is honored by the traditional definition of bigamy: The spouse must intentionally per-

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212. Id. § 1106 (repealed and superseded in 1989 by CAL. PENAL CODE § 281).
213. CAL. PENAL CODE § 20 (West 1988). This section has not been amended between 1872 and 1994.
form the act proscribed by the actus reus of the crime. In other words, the spouse must intentionally enter into a second marriage. Thus, there is a joint operation of act and intent. This is all that section 20 requires. Indeed, that is precisely the holding in People v. Hartman, the case Justice Traynor overrules in Vogel. Furthermore, Hartman explicitly rejects the argument that People v. Harris requires the court to imply a guilty-knowledge requirement for bigamy.

In the Harris case, David Harris was charged with the felony of having voted twice in an election. Harris first voted around ten o'clock in the morning. About two or three o'clock in the afternoon he returned to the same polling place very much intoxicated and offered to vote again. He was told he already voted and that he would get himself in trouble if he voted again. In reply, Harris vehemently protested that he had not voted and declared his willingness to make the oath required by the election law to overcome the challenge. The oath was administered and Harris voted a second time. His defense was that he was too intoxicated to know what he was doing at the time of the second vote. The Hartman court characterized Harris as holding:

[T]hat if he was unconscious at the time that he cast the second vote, he was not responsible under the criminal law for the act done. But that case is not in point here. . . . Here the defendant did know exactly and fully what he was doing when he married the second time . . . . The intent of defendant, as referred to in the code, is the intent to do the act, namely, contract the marriage.

In fairness to both the Hartman court and to Justice Traynor, we should acknowledge that the holding in Harris is wonderfully obscure. When Harris refers to the intent necessary for the offense, one cannot tell from the opinion if the court is referring to the intent to vote on the second occasion or the knowledge that Harris had already voted

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215. Id. at 491-92, 62 P. at 824-25.
216. People v. Harris, 29 Cal. 678, 679 (1866).
217. Id. at 681.
when he voted the second time. Both interpretations are possible from the wording of the opinion.219

Furthermore, the language from *Harris* quoted by Justice Traynor simply restates the traditional doctrine with respect to the burden of going forward with evidence of justification and excuse. It does not purport to imply unnamed culpable mental states in the many crimes created in the code, nor does it purport to allocate the burden of going forward with evidence tending to disprove these unnamed mental states to the defendant. This language simply refers to the accepted categories of justification and excuse and allocates the burden of going forward on those issues to the defendant. The code commissioners quoted this language from *Harris* to make it clear that section 20 did not alter the traditional rules governing the burden of proof of justification and excuse.220

Turning away from arguments based upon principles found in statutes and precedent to considerations of policy, we see that Justice Traynor's arguments fare no better. Except for a few constitutional constraints, the traditional view regards the measure of punishment as a legislative issue. The severity of the punishment for bigamy is meant to provide a strong incentive for those who remarry to make sure they are free to do so. Furthermore, the common law evolved in an environment of harsh punishments. At one time in the development of the common law, the death penalty was typically the punishment prescribed for all felonies. In addition, the common law frequently did not draw nice distinctions between the degree of a person's culpability and the severity of punishment. The felony-murder rule provides an excellent example. If one wishes to calibrate punishment to culpability, then one should seek a remedy in the legislative halls as was done, for example, with the division of murder into degrees.

Finally, there is no tension between the law of bigamy as it is traditionally understood and California family law. The crime of bigamy seeks to prevent bigamous marriages. Everyone understands, however, that the criminal law does not always achieve its goals. The law will be violated. There will be a number of bigamous marriages. The California code makes specified bigamous marriages valid until they are annulled to protect the innocent partner of the second

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219. This ambiguity simply underscores the fact that Justice Traynor was not "bound" by *Harris* in any meaningful way.
Though the example may sound distinctly quaint today, the validity of the marriage means that the innocent partner bears no moral fault for engaging in intimate relations with the bigamous spouse. Thus the rejection of the honest-belief defense for bigamy is perfectly consistent with California family law that makes certain bigamous marriages voidable, but not void.

The point of considering these arguments is to illustrate that each has a plausible counterargument. Justice Traynor was faced with a clear choice: Either follow the traditional doctrine announced in *People v. Hartman* or overrule *Hartman* and announce a new rule for bigamy in California. The "law" did not compel either choice. Either decision could have been woven into the fabric of existing law. Having chosen to abandon the traditional rule and to fashion a new rule that would fit into the existing system, Justice Traynor took the threads of his argument and skillfully interwove them into existing doctrine. Without a doubt, new substantive criminal law was created in *Vogel*; yet *Vogel"s* rule also seems to have always been the law.

b. *People v. Washington*221

Justice Traynor's opinion in *People v. Washington*222 creates new substantive criminal law on a different topic: the actus reus of murder. Washington was convicted of first-degree murder on a theory of felony murder-robbery and sentenced to life imprisonment. Washington's accomplice was killed by the robbery victim in the course of resisting an armed robbery. Washington was charged with first-degree murder for this death under California's felony-murder rule. On appeal, the dispute focused on whether a killing committed by someone other than the defendant or an accomplice sufficed for the felony-murder rule. The attorney general argued that the accomplice's death was proximately caused by the perpetration of the robbery. A case from the California court of appeal, *People v. Harrison*,223 and precedent from the Supreme Courts of Pennsylvania and Michigan supported this argument.224

The defendant did not dispute the proximate cause theory. Instead he argued that California should embrace the exception

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221. 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).
222. Id.
recognized in the Pennsylvania and Michigan cases that the killing of one of the felons by a person resisting the felony is not within the scope of the felony-murder rule. Such a killing, it is argued, is a justifiable homicide. Only unlawful homicides fall within the felony-murder rule. In other words, the defendant sought to create an exception to the proximate-cause rule recognized in *Harrison*.

At the outset of the dispositive portion of his opinion, Justice Traynor rejects the defendant’s submission:

> A distinction based on the person killed . . . would make the defendant’s criminal liability turn upon the marksmanship of victims and policemen. A rule of law cannot reasonably be based on such a fortuitous circumstance. The basic issue therefore is whether a robber can be convicted of murder for the killing of any person by another who is resisting the robbery.226

Turning then to the felony-murder statute, he argued that the common understanding of the phrase “‘murder . . . which is committed in the perpetration . . . [of] robbery’” is a killing committed by one of the felons.227 If the felon does not kill, “the killing is not committed to perpetrate the felony.”228

This interpretation of the statutory language is reinforced by the goal of the felony-murder rule: to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit.229 “This purpose,” Justice Traynor writes, “is not served by punishing them for killings committed by their victims.”230 It could

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225. *Id.*
226. *Id.* at 780, 402 P.2d at 132-33, 44 Cal. Rptr. at 444-45.
227. *Id.* at 781, 402 P.2d at 133, 44 Cal. Rptr. at 445 (quoting CAL. PENAL CODE § 189).
228. *Id.*
229. *Id.* Justice Traynor cites Holmes’s *The Common Law*, a tentative draft of the Model Penal Code, and the Report of the Royal Commission on Capital Punishment for this assertion. He dismisses the attorney general's argument that a second purpose of the felony-murder rule is to prevent the commission of robberies. Neither the common-law rationale of the rule nor the Penal Code supports this contention. In every robbery there is a possibility that the victim will resist and kill. The robber has little control over such a killing once the robbery is undertaken as this case demonstrates. To impose an additional penalty for the killing would discriminate between robbers, not on the basis of any difference in their own conduct, but solely on the basis of the response by others that the robber’s conduct happened to induce. An additional penalty for a homicide committed by the victim would deter robbery haphazardly at best. To “prevent stealing, [the law] would do better to hang one thief in every thousand by lot.” *Id.* (quoting O.W. HOLMES, JR., *THE COMMON LAW* 58 (1881)).
230. *Id.*
also lead to absurd results, as where one felon is arrested and held in custody at the time an unarmed co-felon is killed by a pursuing police officer.

Finally, the felony-murder rule itself is called into question: The felony-murder rule has been criticized on the grounds that in almost all cases in which it is applied it is unnecessary and that it erodes the relation between criminal liability and moral culpability. . . . Although it is the law in this state (Pen. Code, § 189), it should not be extended beyond any rational function that it is designed to serve.\textsuperscript{231}

Accordingly, the Traynor opinion holds that a felon is liable for murder under the felony-murder rule only if the act of killing is committed by the felon or an accomplice acting in furtherance of their common design. Insofar as it is inconsistent with this holding, \textit{People v. Harrison} is disapproved.

Justice Burke’s elaborate dissent establishes that each of Justice Traynor’s points are highly debatable.\textsuperscript{232} Justice Traynor’s interpretation of the statutory language, for example, is highly problematic. The words “in the perpetration of robbery”\textsuperscript{233} do not so clearly mean that the felon must commit the killing to perpetrate the felony. “Common understanding,”\textsuperscript{234} which Justice Traynor rallies to support his argument, permits us to read this language as requiring that the killing occur during the perpetration of the robbery. In other words, the language refers to the duration of the felony-murder liability, not to the identity of the killer or the purpose of the killing.

Indeed, Justice Traynor’s statutory interpretation argument is inconsistent with his argument about the purpose of the felony-murder rule. If the purpose of the felony-murder rule is to deter felons from killing negligently or accidentally, then the killing need not be “to perpetrate the felony.” “How can it be said,” Justice Burke asks in his dissent, “that such [an accidental killing] takes place to perpetrate a robbery?”\textsuperscript{235}

Little would be gained here by going through the remainder of Justice Traynor’s arguments as we did for his \textit{Vogel} opinion. The point to be made is that, Justice Traynor was just as free to choose

\textsuperscript{231} \textit{Id.} at 783, 402 P.2d at 134, 44 Cal. Rptr. at 446.
\textsuperscript{232} \textit{Id.} at 785, 402 P.2d at 135, 44 Cal. Rptr. at 447 (Burke, J., dissenting).
\textsuperscript{233} \textit{Id.} at 786-787, 402 P.2d at 136-37, 44 Cal. Rptr. at 448-49 (Burke, J., dissenting).
\textsuperscript{234} \textit{Id.} at 787, 402 P.2d at 137, 44 Cal. Rptr. at 449 (Burke, J., dissenting).
\textsuperscript{235} \textit{Id.}
the traditional rule already recognized in California law by the 
Harrison case or the new rule he created in his Washington opinion 
as he was when he addressed the issue presented to the court in 
Vogel. He chose a new path for the law of felony murder.

Though Vogel and Washington create new law with similar 
techniques, the Washington opinion is more overtly a law-creating 
case. This fact has nothing to do with the overruling of precedent, as 
both opinions cast aside existing law. Though legislative intent was 
never mentioned in Vogel, the opinion creates the impression that the 
linchpin of the decision is the code commissioners’ use of the Harris 
case as an illustration of the proper interpretation of section 20. This 
argument comes very close to a traditional argument about legislative 
intent. A legislative intent argument carries with it all of the 
trappings of the law-maintaining, rather than the law-creating, function 
of the judicial process. If the court is simply discovering and 
enforcing legislative intent, then there can be no challenge to the 
legitimacy of the court’s methodology. Justice Traynor’s Washington 
opinion makes no such argument. The wording of the statute is 
considered, but the weakness of the argument, the simple, question-
able assertions, informs us that the heart of the decision is elsewhere. 
While the Washington holding is woven into the fabric of the law, that 
accomplishment does not obscure the fact that law is created in 
Washington to the same degree that the interweaving veils the law 
creation in Vogel.

c. People v. Pierce

Although Vogel and Washington restrain the sweep of the 
substantive criminal law, Justice Traynor’s law-creating activity did 
not always do so. In People v. Pierce, an appeal by the prosecu-
tion, his opinion abolishes a defense created by California Supreme 
Court precedent in the 1889 case of People v. Miller. Based upon 
the common-law fiction that a husband and a wife are one person, 
Miller held that when spouses conspire only between themselves, they 
cannot be prosecuted for conspiracy. “The fictional unity of hus-
band and wife,” Justice Traynor wrote, “has been substantially

236. 61 Cal. 2d 879, 395 P.2d 893, 40 Cal. Rptr. 845 (1964).
237. Id.
238. 82 Cal. 107, 22 P. 934 (1889).
239. Id. at 108, 22 P. at 935.
vitiated by the overwhelming evidence that one plus one adds up to two, even in two-getherness.\textsuperscript{240}

By 1964, when \textit{Pierce} was decided, the marital harmony rationale for spousal immunity had been rejected in torts and in criminal law when one spouse acts against the other. When spouses act in concert to pursue lawful ends, the law poses no threat to their domestic harmony. Why then should the law promote harmony in unlawful activity? Seeing no indication "that either a husband or a wife is more subject to losing himself or herself in the criminal schemes of his or her spouse than a bachelor or a spinster is to losing himself or herself in the criminal schemes of fellow conspirators," Justice Traynor rejects the marital harmony rationale for the spousal immunity rule.\textsuperscript{241}

The Pierces' final argument is that the long-established immunity rule should not be overruled except by the legislature. "In effect," wrote Justice Traynor,

the contention is a request that courts abdicate their responsibility for the upkeep of the common law. That upkeep it needs continuously, as this case demonstrates. In view of the fact that the fiction underlying the rule in question has long been dead, we overrule \textit{People v. Miller} . . . [and] hold that even when a husband and wife conspire only between themselves, they cannot claim immunity from prosecution for conspiracy on the basis of their marital status.\textsuperscript{242}

\textit{Pierce} unabashedly creates new law. But it does so in the least controversial context. \textit{Miller} is judge-made law. Only the most conservative view of the legal process refuses to concede the power of a court to overrule its own decisions, especially when the case is incorrectly decided. The court probably decided \textit{Miller} incorrectly. But even if we assume that \textit{Miller} reflected contemporary values in 1889, few would argue that its rationale remained viable in the 1960s. With its original rationale "long dead," and with no discernible contemporary foundation or policy to support it, the \textit{Pierce} spousal-immunity rule is easily cast aside as an anachronistic artifact of another era.

\textsuperscript{240} \textit{Pierce}, 61 Cal. 2d at 880, 395 P.2d at 894, 40 Cal. Rptr. at 846.
\textsuperscript{241} \textit{Id.} at 881, 395 P.2d at 895, 40 Cal. Rptr. at 847.
\textsuperscript{242} \textit{Id.} at 882, 395 P.2d at 895-96, 40 Cal. Rptr. at 847-48.
Unless there is some independent reason for refusing to exercise the overruling power, the modern view is that a court may overrule its own moribund precedent. Indeed, Justice Traynor frequently referred to his Pierce opinion as an example of judicial creativity that falls squarely within the American common-law tradition. 243

d. Benson v. Superior Court 244

The creation of new law does not always produce a positive rule. A well-considered opinion rejecting a proposed rule is sometimes as important to the growth of the law as a positive statement of new law. Ralph Benson, a lawyer in Los Angeles, was charged with soliciting perjured testimony in violation of California Penal Code section 653(f). 245 In an investigation of adoption practices in Los Angeles, Benson was consulted by an undercover investigator. The investigator told Benson that she was pregnant and that she wanted to put the child up for adoption. Benson agreed to handle the matter. To facilitate the anticipated adoption, he solicited perjury from another undercover investigator who was posing as the supposedly pregnant client's friend. He was then arrested on the soliciting charge. In preliminary proceedings on that charge, Benson claimed that he could not have committed the crime of solicitation because the perjury would not have occurred. The investigator was not pregnant and thus there never would be an adoption proceeding. The trial court overruled his objection and these writ proceedings commenced. 246

The California Supreme Court decided to hear the case since it presented an issue of first impression: Is the "impossibility" of the commission of the crime solicited a defense to solicitation? Writing for a unanimous court, Justice Traynor rejected the defense.

He began his analysis with the goal of the crime: Solicitation is designed not only to prevent solicitations from resulting in the commission of the crimes solicited but also to protect people from

244. 57 Cal. 2d 240, 368 P.2d 116, 18 Cal. Rptr. 516 (1962).
245. Id. at 243, 368 P.2d at 117, 18 Cal. Rptr. at 517.
246. Id. at 241-43, 368 P.2d at 116-17, 18 Cal. Rptr. at 516-17.
being exposed to inducements to commit crime.\footnote{247} How is this goal achieved? Justice Traynor answered this question by quoting from the recently published tentative draft of the Model Penal Code provision on solicitation: "'Purposeful solicitation presents dangers calling for preventive intervention and is sufficiently indicative of a disposition towards criminal activity to call for liability.' \footnote{248} "If the solicitor believes that the [act] can be committed, 'it is immaterial that the crime urged is not possible of fulfillment at the time when the words are spoken . . . .' \footnote{249}.

Traynor fleshes out the opinion by citing supporting precedent from other states and concludes that "[s]olicitation itself is the evil prohibited by the Legislature, and prosecution therefor is particularly appropriate for the very case in which the crime solicited does not take place." \footnote{250}

\textit{Benson} thus creates new law in California, although it produces a negative rule: Factual impossibility is not a defense to solicitation.

These four cases, \textit{Vogel}, \textit{Washington}, \textit{Pierce}, and \textit{Benson}, provide us with the full range of Justice Traynor's substantive criminal lawmaking. New positive rules are created in \textit{Vogel} and \textit{Washington} and two defenses, one existing and one proposed, are rejected in \textit{Pierce} and \textit{Benson}. In each case Justice Traynor exercised judicial choice. He chose to create new law in \textit{Vogel} and \textit{Washington} rather than follow the traditional rule. The old common-law rule that produced interspousal immunity from conspiracy liability was cast aside in \textit{Pierce}, and \textit{Benson} reflects the modern approach to the defense of impossibility.

\textbf{D. The Judicial Philosophy of Traynor and the Creation of Substantive Criminal Law}

1. \textit{Introduction}

It is clear, of course, that Traynor created substantive criminal law in each of these cases. By what authority does a judge create substantive criminal law in our democracy? And how is it done? The

\footnote{247}{\textit{Id.} at 243, 368 P.2d at 117-18, 18 Cal. Rptr. at 517-18.}
\footnote{248}{\textit{Id.} at 243, 368 P.2d at 118, 18 Cal. Rptr. at 518 (quoting MODEL PENAL CODE § 5.02 cmt. (Tentative Draft No. 10, 1960)).}
\footnote{249}{\textit{Id.} (quoting GLANVILLE L. WILLIAMS, CRIMINAL LAW 468 (1953)).}
\footnote{250}{\textit{Id.} at 244, 368 P.2d at 118, 18 Cal. Rptr. at 518.}
answers to these questions may be found in the judicial philosophy of Roger Traynor.

As one would expect, Traynor’s philosophy evolved from the jurisprudential disputes raging in the United States during his formative years at Berkeley.251 The late nineteenth and early twentieth centuries were times of rebellion against the traditional Blackstonian view that judges did not make law, they applied it. In other words, in this traditional theory, appellate judges exercise error-correcting and law-maintaining authority, but they have no truly creative role. Law is made by some authority external to the judge. The judicial role is thus confined to finding the applicable law and applying it to the facts of the case at bar.252

Holmes, Pound, Cardozo, and the Realists rebelled against this traditional view of the judge’s role.253 Once Realism faded as an active movement, Reasoned Elaboration and “neutral principles” continued the rebellion against traditional theory and offered answers to Realism’s critics.254 Building upon these ideas, Roger Traynor rejected the traditional view of the judge’s task. In our democracy, which adheres to the common-law tradition, judges share lawmaking authority with the legislative branch of government. Judges have creative power to make new law; and that power, which is an essential part of the judicial process, should regularly be exercised in accordance with the common-law tradition. And, under that tradition, all judge-made doctrine is subject to the superior authority of legislative law.255 The idea that judges make law is heresy in the traditional Blackstonian view of the legal process. It is the backbone of Roger Traynor’s judicial philosophy.

The judicial creation of law appears to be antithetical to three distinct but related beliefs about our democracy. First, the authority to make law is exclusively allocated to the legislative branch of government. Second, our system is founded on the rule of law: It is the law, not the personal will of the people in power, that legitimately governs us. Third, the judicial role is properly devoted exclusively to the law-applying and error-correcting functions: Judges should not

251. For a summary of Traynor’s judicial philosophy, see an earlier article which is also the product of my research as the inaugural Roger Traynor Summer Research Professor at Hastings College of the Law. Poulos, supra note 4.

252. Id.

253. Id.

254. Id.

255. Id.
make law, for the law they would make would not be founded on the consent of the people. Traynor’s theory rejects each of these concepts.

It is true, of course, that primary lawmaking authority is allocated to the legislative branch of government in our democracy. But this grant of lawmaking authority is not exclusive. The heritage that produced the concept of our democracy also gives lawmaking power to the courts. The judicial creation of law for the resolution of cases submitted for decision lies at the heart of our common-law system, and the common-law system is part of our democracy. The power of the people to ultimately create the rules by which they are governed is retained, for that power is generally exercised by the legislative branch of government and the legislative branch of government has the power to replace judge-made law by statute. The primacy of legislation, the trumping power of statutes, thus preserves the authority of the people.

The fact that judges properly make law in our democracy means that there is no real inconsistency between judicial lawmaking and the power of the people to make the law that governs them. Judicial lawmaking thus is part of the legitimate role of the judiciary in our democracy. Though lawmaking is part of the judicial role, the interesting problem of how judicial law is rightfully made remains.

Rather than asking judges to make law based upon their own personal values, the common-law tradition requires judges to resolve disputes with the use of reason and precedent. Appellate opinions are thus exercises in reason, logic, precedent, and policy. They are not vehicles for the implementation of a judge’s personal preferences. But the Realists’ critique of our judicial process, which reached its apex in Roger Traynor’s formative years, claims that the form of appellate opinions masks their substance. Law is indeterminate, and a judge’s use of reason and precedent obscures the real basis upon which law is made. Judges are, in fact, quite free to convert their personal preferences into judge-made law.

Much of Roger Traynor’s judicial philosophy is aimed at answering this critique by establishing the methods judges should use to make new law. Yes, as we have seen, Traynor agrees that judges exercise choice in their lawmaking process and that the law does not

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256. Id.
257. Id.
bind them to decide cases in given ways. But the choice is not personally made in the sense in which judges make decisions about their own affairs. The judge's decision is circumscribed by the judicial office. It must first be a choice made without any personal interest at stake. But that alone is not enough. A judge, Justice Traynor tells us:

is painfully aware that a decision will not be saved from being arbitrary merely because he is disinterested. He knows well enough that one entrusted with decision, traditionally above base prejudices, must also rise above the vanity of stubborn preconceptions, sometimes euphemistically called the courage of one's convictions. He knows well enough that he must severely discount his own predilections, of however high grade he regards them, which is to say he must bring to his intellectual labors a cleansing doubt of his omniscience, indeed even of his perception.  

"[H]e 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 to spell out why." 

Personal disinterest and this "cleansed" judgment work in tandem to produce judicial, not personal choices. They allow the judge to arrive at a judicial "value judgment as to what the law ought to be." Judicial integrity, the ability of a judge to make law with "cleansed" disinterested judgment, is critical to Justice Traynor's philosophy of the judicial process. But judicial integrity is merely a necessary condition for the creation of judge-made law. The actual lawmaking decision is made by assessing the relative strength of a series of countervailing powers. Two types of forces apply whenever a judge considers the law he or she should use to decide a given issue. These are the creative forces that urge the judge to create new law, and the restraining forces that counsel the judge to apply existing doctrine. Any decision the judge makes is the product

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258. Traynor, Reasoning, supra note 112, at 750-51.
260. Traynor, Reasoning, supra note 112, at 751.
261. Id.
262. See Traynor, Hard Cases, supra note 259, at 234.
263. See Traynor, Reasoning, supra note 112, at 743-47.
of the relative strength of these opposing forces at the time the judicial choice is made.

The relative strength of the creative and restraining forces varies with a number of factors. Precedent prevails and the judge chooses to adhere to the common understanding of existing law when, for example, the forces of repose overpower what Holmes calls the "felt necessities of the time." On the other hand, when the creative forces overcome the restraining forces, the judge creates new law. In Justice Traynor's theory, this is the process he employs to decide all cases. This is the way the judge keeps a constant watch on the law.

The predominantly creative forces, which are discussed at length in another article, are (1) the rapidly changing world, (2) pragmatism, (3) empiricism, (4) intuition, and (5) policy. The predominantly restraining forces are (1) stare decisis, (2) the common-law tradition, (3) the tenet of lag, (4) deference to the legislature, (5) the internal institutional restraints, and (6) the external institutional restraints. Reason, which plays a central role in Justice Traynor's judicial philosophy, is the power that mediates between these creative and restraining forces. The individual factors, the elements of creativity and constraint, push and pull against each other until an equilibrium is reached. This equilibrium is the judgment on the issue in dispute. In Justice Traynor's words, it is the judge's "rational outcome," the "value judgment as to what the law ought to be." This, according to Justice Traynor, is the choice we pay

265. See Traynor, Reasoning, supra note 112, at 743-47.
266. Poulos, supra note 4.
267. Id.
268. Id. I have noted the references to the discussion of each of the individual factors in the prior article at the beginning of each of the following sections.
269. Id.
270. See Traynor, Reasoning, supra note 112, at 743.
271. Id. at 751.
272. Id. The complete quotation is as follows:

He comes to realize how essential it is also that he be intellectually interested in a rational outcome. He cannot remain disoriented forever, his mind suspended between alternative passable solutions. Rather than to take the easy way out via one or the other, 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 to 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, an honest term to describe the stubbornly rational search for the optimum decision. Would we have it otherwise? Would we give
It fully comports with our democracy and with
our conception of the rule of law. Individual judges make awesome
choices, but the restraining forces strip that choice of all of the
attributes of both purely personal choice and arbitrary action.

In the final analysis, Justice Traynor thus agrees with the Realists
that law is indeterminate, that judges make law, and that their
lawmaking is dependent upon their individual choice. But the judicial
process, properly understood, produces the individual choice of judges
that we have embraced since the founding of our nation.

With this summary of his judicial philosophy in mind, we will
now return to our four example cases to learn what we can about how
this philosophy produced new substantive criminal law. We begin
with the creative forces and how they influence a court to create new
document.

2. The predominantly creative forces

\textit{a. the rapidly changing world}^{274}

Justice Traynor believed that it is a judge's duty to constantly
review the common-law with a vigilant eye toward its maintenance
and revision. "[E]verything," Justice Traynor tells us, "is in flux,"^{275}
and the common law "must prove itself able to find reasonable
solutions for conflicts that proliferate as people make quantum leaps
and quaky landings in every field."^{276}

In slightly more than a single decade our interest in the substan-
tive criminal law quickened and our conception of its structure began
to change.^{277} Well before Justice Traynor's first decade on the
California Supreme Court, as we have seen, criminal law had become
a moribund subject.^{278} The judges gave little, if any, attention to
revising the criminal law through the judicial process. If the substan-

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up the value judgment for an abdication of judicial responsibility, for the toss of
the two-faced coin?
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\textit{Id.} A passage in an earlier article written for the \textit{University of Chicago Law Review} is virtually the same. \textit{See} Traynor, \textit{Hard Cases}, \textit{supra} note 259, at 234.


275. Roger J. Traynor, \textit{Transatlantic Reflections on Leeways and Limits of Appellate

276. \textit{Id.} at 257.

277. \textit{See} \textit{supra} text accompanying note 17.

278. \textit{See} \textit{supra} text accompanying notes 15-16.
tive criminal law were to be revised, the legislature should do so. The courts were primarily, if not exclusively, concerned with the error-correcting function in criminal cases. Their lack of interest in the substantive criminal law is evident from their neglect of even the law-maintaining function. No other judge, for example, joined Justice Traynor’s law-maintaining concurring opinions in *People v. Albertson* and *People v. Lindley*, and only Justice Schauer joined Traynor’s law-maintaining dissent in *People v. Kolez*. His brethren apparently saw no point in maintaining the California common law of crimes during the first decade Traynor was on the bench. It is thus accurate to say that the court did not see the world of criminal law in a state of flux during the 1940s in California.

As we have seen, criminal law began changing in the 1950s at an escalating pace. Professional interest in the criminal law quickened. Lawyers began representing indigents in criminal cases under court appointment, and they began pressing new issues in the California courts. The California Supreme Court began paying attention to these arguments and taking them seriously. The American Law Institute started the Model Penal Code project, and criminal law began to be taken seriously in American law schools. Interesting substantive cases began to be decided and the new precedent begot a seemingly ever increasing body of new substantive criminal law doctrine.

The 1950s faded into the 1960s. Early in that decade, the Model Penal Code was promulgated and the United States Supreme Court began the criminal law revolution. Modern criminal law, concerned with the mental elements and with the relationship between culpability and the criminal sanction, developed and flowered.

As our perceptions of the criminal law rapidly changed, and as the newly perceived problems were presented to the court by lawyers caught in the enthusiasm of the rapidly developing “new criminal law,” Justice Traynor and his colleagues on the California Supreme Court focused their attention and their judicial powers on the newly framed issues. The belief that new law must be created for new problems was one of the principle forces driving the judicial creativity.

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282. See supra text accompanying note 17.
283. See supra text accompanying notes 19-22.
we see in People v. Vogel,\textsuperscript{284} People v. Washington,\textsuperscript{285} People v. Pierce,\textsuperscript{286} Superior Court v. Benson,\textsuperscript{287} and the other Traynor law-creating cases of his last two decades on the bench.\textsuperscript{288} “[I]nnovative precedents,” Justice Traynor reminds us, reflect “a rapidly changing world.”\textsuperscript{289}

b. pragmatism\textsuperscript{290}

Law is not theology to Justice Traynor. It is a tie that binds a people together, adjusts their relationships, and assists in achieving their goals. His concern is thus not for the paper rule, but for how doctrine actually works to achieve the goals we have set for it. This pragmatic view of law, which was undeniably influenced by the writings of Holmes, Pound, and the Realists, is a fundamental component of Justice Traynor’s philosophy of the judicial process.\textsuperscript{291} Pragmatism, as we shall see, is one of the primary forces that drives the creation of new judge-made criminal law.

A pragmatic analysis of criminal law takes into account: (1) the aims of the criminal law; (2) the goals of the doctrine at issue;\textsuperscript{292} (3) the efficacy of the rules used to achieve those goals; (4) and the impact the questioned doctrine has on the offender and on society—especially the relationship between the actor’s culpability and the severity of the punishment.

The primary aim of the criminal law as it is written is to prevent socially harmful conduct. A secondary aim is to create the prevention system—the articulation of the rules of just punishment and the like. One of the hallmarks of the modern golden age of the criminal law is rethinking its general aims, including rethinking the type of conduct the criminal law should suppress. This has called into question, for example, the use of criminal law to enforce the majority’s moral code when there is no palpable injury to others. The crime of bigamy, the

\textsuperscript{284} 46 Cal. 2d 798, 299 P.2d 850 (1956).
\textsuperscript{285} 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).
\textsuperscript{286} 61 Cal. 2d 879, 395 P.2d 893, 40 Cal. Rptr. 845 (1964).
\textsuperscript{287} 57 Cal. 2d 240, 368 P.2d 116, 18 Cal. Rptr. 516 (1962).
\textsuperscript{288} On the other hand, a judge who perceives a stable world sees no new problems in need of new law to solve them.
\textsuperscript{289} Roger J. Traynor, The Limits of Judicial Creativity, 63 Iowa L. Rev. 1, 9 (1977) [hereinafter Traynor, Limits].
\textsuperscript{290} Poulos, supra note 4.
\textsuperscript{291} Id.
\textsuperscript{292} This is true whether it concerns the elements of a crime, a defense, or some other substantive criminal law doctrine.
offense involved in \textit{Vogel}, provides a ready example. When both parties to the second marriage know of the continuation of the prior marriage, there is no injury to the "innocent" partner of the second marriage. In these circumstances, the law of bigamy enforces the moral values of the majority though there is no specific victim of the crime. Undoubtedly the possible victimless nature of bigamy partially explains why it was not a crime under the common law of England.\textsuperscript{293} Bigamy was punished as an ecclesiastical offense.\textsuperscript{294} Although the Traynor opinion in \textit{Vogel} does not expressly allude to ambivalence about using the criminal sanction to enforce morality, he apparently gave that aim less weight in deciding the case.\textsuperscript{295} Assume, for example, the highly debatable proposition that the imposition of absolute liability on the issue of freedom to remarry will enhance the deterrent effect of the crime. The value of achieving this aim may be entitled to less weight when it is weighed against the burden imposed on the defendant who honestly and reasonably believes he is free to remarry. Apparently this is what Justice Traynor had in mind when he wrote that it is "extremely unlikely that the Legislature meant to include the morally innocent to make sure the guilty did not escape."\textsuperscript{296} A judge's attitude about the general aims of the criminal law and the crime in question obviously affects the law the judge creates.

The second consideration is of the goals of the crime or defense under analysis. As seen in our discussion of bigamy, these differ from the judge's view of the general aims of the criminal law and the offense in an important way. Here the suitability of the crime for inclusion among the penal statutes is not called into question. Justice Traynor, for example, did not question the propriety of making murder a crime in the \textit{Washington} case, nor did he question the criminal law's general goal of deterring socially undesirable conduct. The focus of this variable is on the socially harmful conduct the specific crime or rule seeks to prevent.

\textsuperscript{293} In California the "victimless" nature of the crime is enhanced by the family laws that make certain bigamous marriages voidable but not void. \textsc{Cal. Fam. Code} § 2201 (West 1994).
\textsuperscript{294} \textsc{2 Frederick Pollock & Frederic William Maitland, The History of the English Law Before the Time of Edward I}, at 543 (1959).
\textsuperscript{295} Justice Traynor obviously did not agree with Justice Shenk's assertion in his \textit{Vogel} dissent that bigamy "creates a serious mischief to society which the law seeks to prevent by penal sanctions." \textit{Vogel}, 46 Cal. 2d at 807, 299 P.2d at 857 (Shenk, J., dissenting).
\textsuperscript{296} \textit{Id.} at 804, 289 P.2d at 855.
The purpose or goal of the crime is an analytical focal point in each of our four example cases. Thus the socially harmful conduct sought to be suppressed by the crime of bigamy is a critical element in Traynor's analysis in \textit{Vogel}. The purpose of the felony-murder rule is a principal point of analysis in \textit{Washington}.\textsuperscript{297} The goal of the crime of solicitation is a principal issue in \textit{Benson},\textsuperscript{298} as is the purpose of the spousal-immunity defense in \textit{Pierce}.\textsuperscript{299}

Once the purpose of the doctrine is identified, the rules used to achieve that goal are assessed in terms of their suitability to the task. This is a pragmatic judgment. Thus Justice Traynor found that holding felons strictly responsible for homicides committed by others in resisting the felony does not serve the purpose of the felony-murder rule.\textsuperscript{300} Nor does holding a person strictly responsible for her actual marital status serve to prevent a second marriage when the actor honestly and reasonably believes that she is legally free to remarry.\textsuperscript{301} But the purpose of the crime of solicitation is amply served even when the solicited crime is impossible of commission;\textsuperscript{302} and granting immunity to spouses who conspire only with each other does not promote the type of marital harmony the law should protect.\textsuperscript{303}

\textsuperscript{297} According to Traynor, the felony-murder rule's goal is "to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit." \textit{Washington}, 62 Cal. 2d at 781, 402 P.2d at 133, 44 Cal. Rptr. at 444.

\textsuperscript{298} The court in \textit{Benson} stated that solicitation "is designed not only to prevent solicitations from resulting in the commission of the crimes solicited, but to protect 'inhabitants of this state from being exposed to inducement to commit or join in the commission of the crimes specified.'" \textit{Benson}, 57 Cal. 2d at 243, 368 P.2d at 117-18, 18 Cal. Rptr. at 517-18 (quoting People v. Burt, 45 Cal. 2d 311, 314, 288 P.2d 503, 505 (1955)).

\textsuperscript{299} Justice Traynor assumes that the purpose of the common law's fictional unity of wife with husband is "domestic harmony." \textit{Pierce}, 61 Cal. 2d at 880-81, 395 P.2d at 894-95, 40 Cal. Rptr. at 846-47.

\textsuperscript{300} \textit{Washington}, 62 Cal. 2d at 781, 402 P.2d at 133.

\textsuperscript{301} \textit{Vogel}, 446 Cal. 2d at 804, 299 P.2d at 854.

\textsuperscript{302} \textit{Benson}, 57 Cal. 2d at 243-44, 368 P.2d at 117-18, 18 Cal. Rptr. at 517-18.

\textsuperscript{303} \textit{Pierce}, 61 Cal. 2d at 881-82, 395 P.2d at 895, 40 Cal. Rptr. at 847. Thus Justice Traynor wrote that

\[ \text{[t]he law, however, poses no threat to their domestic harmony in lawful pursuits.} \]

\[ \text{...} \]

\[ \text{There is nothing in the contemporary mores of married life in this state to indicate that either a husband or a wife is more subject to losing himself or herself in the criminal schemes of his or her spouse than a bachelor or a spinster is to losing himself or herself in the criminal schemes of fellow conspirators.} \]

\textit{Id.} at 881, 395 P.2d at 895, 40 Cal. Rptr. at 847.
A pragmatic approach to law promotes the creation of new law by challenging the efficacy of paper rules to achieve the goals we set for them.

c. empiricism

Empiricism is pragmatism’s chief tool. In the context of the criminal law, it is the method of choice for deciding whether the doctrine of a given crime or defense actually achieves its professed goals.

The common law has always included an empirical element in its judicial process. Empiricism enters the judge’s analysis, though perhaps under another label, through the facts of the case at hand. The common law tethers legal rules to the relevant facts presented in the cases. Vogel’s honest and reasonable belief that he was free to remarry, for example, suggests that the imposition of criminal liability in those circumstances does not further the goal of deterring second marriages during the pendency of a valid existing marriage. And the existence of the mistake, as we shall soon see, removes the moral culpability that justifies the imposition of just punishment. Based upon the facts presented in Vogel’s case, we suspect that the challenged rule does not actually further the doctrine’s goals. The pragmatic judgment is thus assisted by the empirical inferences drawn from the facts of the case at bar.

Although the empiricism inherent in the common-law process is a necessary component of our system, it is also poor science. The creation of the rule that permits an honest and reasonable mistake of fact to function as an excuse in the crime of bigamy, based upon the single experience presented in Vogel, makes no scientific sense. These facts may be sufficient to generate a hypothesis for testing, but they can never support a scientifically significant inference that the old absolute liability rule at issue in Vogel does not further the goals of the law of bigamy; or that the proposed rule does so in a much more efficient way.

As we have seen, empiricism beyond the facts related directly to the dispute was introduced into our legal system during Justice Traynor’s formative years. Brandeis, for example, used empirical evidence in his famous “Brandeis Brief” in support of the empirical assumptions underlying the Oregon maximum hour statute he

304. Poulos, supra note 4.
defended in *Muller v. Oregon*; and Professors Pound and Frankfurter completed their empirical study in *Criminal Justice in Cleveland*.

Stimulated by these and other examples, legal empiricism was championed by the Realists in the 1920s and the 1930s. The need for empirical analysis of legal rules became a fundamental tenet of the Realist creed. Building upon this heritage, Justice Traynor embraced empiricism as an important tool for creating new law.

Unfortunately, there were few soundly based empirical studies of legal issues at the time Justice Traynor created the new law in our four example cases. No relevant empirical studies existed that would have aided Traynor’s pragmatic analysis of the relationship between absolute liability and the prevention of a second marriage that could be used to accept—and thus create new law—or reject—and thus maintain the status quo—the submission in *Vogel*. There was a similar lack of empirical evidence on the crucial issues presented to the Court in *Washington, Pierce*, and *Benson*. In the absence of such evidence, judges must “assume the risk of dubious a priori assumptions” and decide the case the best way they can. After all, that is the way the common law of England was created, and that is the way courts create new law today.

Empiricism is not simply a tool that enhances the accuracy of pragmatism. It also operates as a force for creating new law in much the same way as does the view that society is in constant flux—the force we have called the Rapidly Changing World. As empirical studies reveal new truths, they sometimes demonstrate that the “a priori assumptions” upon which the law is based are inaccurate and that the actual facts support the abandonment of the old rule and the creation of a new one. Quite obviously, empirical studies about a given rule may be a critical force in the revision or abandonment of that rule. But empirical studies may also promote the reexamination of rules even when the study is not directly relevant to their validity. New empirical insights generate new questions. When they do, lawyers and judges may be convinced to challenge the assumptions upon which various rules are based. Empiricism thus becomes part

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308. Id.

309. Id.; Traynor, *Limits, supra* note 289, at 12.
of the legal culture and it may foster the pragmatic review of a variety of rules in a given field such as the criminal law. Thus the empirical studies of various areas of criminal law, which were being carried out in the 1960s, may well have induced the lawyers and Justice Traynor to create new law during Traynor’s last decade on the bench.

But what precisely does a judge do when he is committed to a pragmatic approach to law and there are no relevant empirical studies to assist the judge’s analysis?

d. intuition

In the absence of relevant, reliable empirical evidence, the judge must use “combinations of analysis and intuition” to make the pragmatic assessment and to arrive at a prophetic judgment. The “innovative decision,” Justice Traynor tells us, “is the most difficult for a judge to elucidate, for it usually concerns a controversy that has compelled him to evaluate conflicting interests in terms of a changing social or economic context.” In making the pragmatic decision, the judge must take a long look at the past, in terms of the present, to evaluate whether once useful precedents are impaired by obsolescence, or whether there are no useful precedents, and then by a long look at the present in terms of the future, to evaluate what the long-range prospects of currently visible change are.

There are special problems, however, with the criminal law:

Prophecy is more difficult in areas such as the criminal law, whose development has rested with the courts since time immemorial. Had the world always known what we know now, had the learned judges of other days enjoyed the advantage of later learning, had more of them been courageous and imaginative as well as merely learned, had customary beliefs not always constituted a phalanx against

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310. See, e.g., Traynor, Domestacy, supra note 243, at 1107.
311. Poulos, supra note 4.
313. Poulos, supra note 4.
315. Id. at 9.
new ideas, we might have had a rational development of criminal law. Instead, its development has been warped by successive irrationalities that have matched the potions and bloodletting of medicine. The persistent inadequacy of our senseless hodgepodge of precedents is the more shocking in comparison with such undertakings as the Model Penal Code of the American Law Institute now evolving under the leadership of Professor Wechsler of the Columbia Law School.\textsuperscript{316}

As difficult as prophecy may be in criminal cases, Justice Traynor did not hesitate to use intuition, or what is frequently called "common sense," in making the judgments in criminal cases that he would have preferred to base on sound empirical evidence.\textsuperscript{317} Justice Traynor's assessment of the utility of absolute liability for bigamy to prevent second unlawful marriages was thus based on his "analysis and intuition."\textsuperscript{318} There were no available empirical studies to assist him. His assessment in \textit{Washington}\textsuperscript{319} of the efficacy of the felony-murder rule in deterring killings committed by a person who was resisting the felony was similarly based upon his analysis and intuition. How else can the pragmatic judgment be made in the absence of sound environmental facts? If he had not used his own analysis and intuition, informed as it was by "the advantage of later learning,"\textsuperscript{320} he would have been reduced to accepting the analysis and intuition of bygone judges who performed their judicial task in less learned times. Could Justice Traynor, in the latter half of the twentieth century, embrace the marital-exemption rule that conferred immunity from conspiracy liability at issue in \textit{Pierce}?\textsuperscript{321} Justice Traynor thought not:

Certainly we need to proceed from a little learning to a great deal more in history and political science. The orderly evolution of common-law rules depends very largely on the judge's understanding of the historical context in which the rules have evolved. The fictional unity of husband and wife,

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\textsuperscript{317} Poulos, \textit{supra} note 4.
\textsuperscript{318} See Traynor, \textit{Badlands}, \textit{supra} note 312, at 160.
\textsuperscript{319} 62 Cal. 2d 77, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).
\textsuperscript{320} Traynor, \textit{Comment on Breitel, supra} note 316, at 56.
\textsuperscript{321} 61 Cal. 2d 879, 395 P.2d 893, 40 Cal. Rptr. 845 (1964).
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for example, can hardly be understood except in a historical context. In a recent case a wife who conspired with her husband to commit a crime sought to evade responsibility through the disappearing act of fictional unity with her husband. The court took leave of the historical fiction, noting that in a modern context "one plus one adds up to two, even in twogetherness." 322

Analysis and intuition also convinced Justice Traynor to reject the claim that the marital-exemption rule promoted the type of matrimonial bliss the criminal law should foster. 323 Intuition thus supports judicial creativity in the criminal law in the same way it is supported by empiricism.

e. policy 324

Justice Traynor did not dwell on the use of policy in judicial lawmaking. 325 Initially he distinguishes between the use of policy by legislatures and courts. 326 He then tells us that policy may be "a basic consideration" in the judicial creation of law, and that judges sometime "weigh competing policies" in the lawmaking process. 327 Although he did not write extensively about the use of policy in his off-bench writings, we see his use of policy in each of the four example cases.

i. the policy of equal applicability

There is a general common-law policy which favors the equal application of common-law rules. This policy is one of the driving forces behind the doctrines of precedent and stare decisis. Like cases should be treated alike. What is good law for the litigant currently before the court must be good law for all future litigants similarly situated. Properly understood, this policy of equal treatment determines what is and what is not "the same situation" for any given judge-made rule. It determines the "validity" of the process by which

322. Traynor, Domesday, supra note 243, at 1107 (discussing People v. Pierce, 61 Cal. 2d 879, 395 P.2d 893, 40 Cal. Rptr. 845 (1964) (footnotes omitted)). Justice Traynor reviewed the history leading up to the Pierce decision in Traynor, Statutes, supra note 243, at 412-15.
323. Pierce, 61 Cal. 2d at 880-81, 395 P.2d at 894-95, 40 Cal. Rptr. at 846-47.
324. Poulos, supra note 4.
325. Id.
326. Id.
327. Id.
we distinguish one case from another for purposes of the doctrines of precedent and stare decisis. No common-law lawyer, for example, would argue that the holding in Pierce\textsuperscript{328} abolishing the spousal-immunity rule for the crime of conspiracy should apply only to women named "Pierce," or that the Washington\textsuperscript{329} holding that the killing must have been committed by one of the felons to qualify for the felony-murder rule applies only to defendants named "Washington." The equality principle would invalidate any such conception of "the same situation" for the doctrines of precedent and stare decisis. Of course our conception of facts that permissibly draw the line between "the same situation" and cases that are sufficiently different to render existing precedent inapplicable, changes over time and is at best illusive, for it is part of the lawmaking process we are discussing. This process is, in other words, part of the growth of the common law.

This policy of equality was a major factor in Justice Traynor's lawmaking in Pierce.\textsuperscript{330} In one of his many articles on the judicial process, Justice Traynor traces the development of gender equality at common law, and its impact in Pierce:

Though the law habitually moves in slow motion, it occasionally takes one step backward or two steps forward of remarkable span. An invigorating new environment increases the chances of forward motion, particularly in the traditional status of people. Women, who in recent centuries in some parts of the world have been recognized as people, played so significant a role in the everyday pioneering of this country that some significant developments in its law can be viewed as a tribute to their identity. In modern laws, trouvez la femme. She has not been easy to find as a person in her own right. We need not look back very far to note how scarce she was even in relatively modern law, how phantom an existence she eked out on the isles of man. Who today would condemn his mother or sister, let alone his wife or daughter, to banishment in the world of Blackstone? In that nineteenth-century world, he scarcely noticed a phantom until she emerged briefly from the shadows to walk down the aisle and become wedded to the idea that she had no life of her own. Blackstone made it plain that "the

\textsuperscript{328} 61 Cal. 2d 879, 395 P.2d 893, 40 Cal. Rptr. 845 (1964).
\textsuperscript{329} 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).
\textsuperscript{330} 61 Cal. 2d 879, 395 P.2d 893, 40 Cal. Rptr. 845 (1964).
husband and wife [became] one person in law,” and then made it plainer that the wife was not the one. He found eminently right magic words for this blunt fiction: “the very being or legal existence of the woman [was] suspended during the marriage . . . .”

By the late nineteenth century, the negative status of married women had become markedly anachronistic in the light of major departures from moral dogma and major changes in the economic facts of life. Given the omnipresent force of inertia, there is little cause for surprise that common-law judges nonetheless continued to apply old rules to women as if nothing had changed. It took legislation, commonly known as the Married Women’s Statutes, to give impetus to new judge-made rules . . . .

The new status symbols that married women acquired were substantial recognition that they were on the way to full participation in the legal benefits of living. It was inevitable that sooner or later they would be called upon to share corresponding legal burdens. Once the courts recognized that a married woman could enter into a contract independently, they automatically made her subject to rules of contract. She was coming of age in the world of law.

It took a long time for courts to recognize that she was an independent person . . . . The tempo at which courts advance in these matters depends not only upon their willingness to advance but also upon fortuitous cases that enable them to do so. In 1889 the Supreme Court of California had ruled that there could be no conspiracy between husband and wife. Not until 1964 was it able to overrule this decision on the ground that “[t]he fictional unity of husband and wife has been substantially vitiated by the overwhelming evidence that one plus one adds up to two, even in togetherness.”

Though three quarters of a century elapsed before the court could advance to such simple addition, preceding cases paved the way.331

331. Traynor, Statutes, supra note 243, at 412-15 (footnotes omitted). This article was written only four years after Justice Traynor wrote Pierce, and the last quotation comes directly from Pierce. The cases Justice Traynor refers to as paving the way for gender equality at common law are the cases in which the California Supreme Court judicially
Justice Traynor did not invoke the Fourteenth Amendment’s Equal Protection Clause or the equivalent provision in California’s Constitution to abolish the old rule granting immunity from liability for criminal conspiracy to spouses who conspire only among themselves. He relied on the developing common law and its evolving policy of equality.

In a less dramatic way we can see the equality policy also at work in Washington.332 In essence, the question in that case was whether first-degree murder should include situations where the homicide was committed by a person resisting the felony, not by one of the felons. From the standpoint of the equality principle, the question is whether Washington’s conduct and his mental state are sufficiently similar to the conduct and the mental states of others included within the category of first-degree murderers to permit his inclusion in that group. Finding important distinctions between Washington and other first-degree murderers, Justice Traynor created a rule that excluded him from that group.333 The common-law’s equality policy discourages wrongful inclusions—Washington—as well as wrongful exclusions—Pierce.

The common law’s evolving policy of equality thus exerts pressure on courts to create and maintain laws that are equally applicable to all.

ii. the policy of equal punishment

Another evolving general policy of the common law, applicable only to criminal law, is that culprits should be equally punished for crimes of equal severity. When the common-law judges were confronted with the continuing evolution of the law of homicide, for example, they developed the two major categories of crimes we see today—murder and manslaughter. Murder at common law, before legislation intervened, was punished by mandatory capital punishment.334 Manslaughter received a lesser punishment.335 The poli-

abolished spousal immunity and parental immunity from tort liability when one spouse injures another or when a parent injures a child. See Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962) (abolishing spousal immunity); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955) (abolishing parental immunity).
332. 62 Cal. 2d at 781, 402 P.2d at 133, 44 Cal. Rptr. at 445.
333. Id. at 783, 402 P.2d at 134, 44 Cal. Rptr. at 446.
The Legacy of Roger Traynor

The rise and fall of mandatory capital punishment was one of the principal driving forces for the judicial creation of these two offenses and for maintaining them as separate crimes for centuries. Culprits who commit murder are more deserving of severe punishment than those who commit manslaughter. From the perspective of punishment, the goal for sorting criminal behavior into one category or the other is to achieve equality of punishment.

This general policy is still at work today, even in California, which has an extensive penal code. Justice Traynor, for example, recognized new categories of voluntary and involuntary manslaughter in his famous *People v. Conley* opinion in 1966. In addition, the California Supreme Court added another category of manslaughter after Justice Traynor retired from the bench. This latter category of manslaughter, known as manslaughter on the theory of imperfect-self-defense, was recently reaffirmed by a majority of the California Supreme Court.

This policy of equal punishment for equal criminality is one of the driving forces behind Justice Traynor's judicial creativity in *Washington* and *Vogel*. Although the felony-murder rule complied with the equal punishment policy at the time that category of murder was first created by the common-law judges in England, by *Washington*'s time the felony-murder rule had evolved into a doctrine that was seen as being woefully out of step with that policy. Justice Traynor's *Washington* opinion sought to bring the felony-murder rule into conformity with this equality policy insofar as it was possible to do so within the strictures of the legislative embrace of the felony-murder rule. "The felony-murder rule . . . erodes the relation between criminal liability and moral culpability," he tells us in *Washington*, "[a]lthough it is the law in this state . . . it should not be extended beyond any rational function that it is designed to serve."
Justice Traynor’s Vogel opinion is also partly driven by the equal-punishment-for-equal-criminality policy. Vogel was subjected to significant felony punishment for conduct that was not accompanied by a morally culpable mental state. If one honestly and reasonably believes that he is free to remarry, the only mental state accompanying that conduct is the wholly innocent intent of remarrying. It is thus a violation of the equal-punishment-for-equal-criminality policy to place that person into a punishment category composed of actors who perform the criminal conduct with morally culpable mental states. Justice Traynor’s solution, one which conforms the law of bigamy to that policy, was to create a culpable mental state that must accompany the prohibited conduct. Actors who do not honestly and reasonably believe they are free to remarry may be subjected to the punishment prescribed for bigamy for their punishment is seen as equal to the punishment prescribed for other equally culpable actors.

The equal-punishment-for-equal-criminality policy is one of the driving forces that moves Justice Traynor’s judicial creativity in Washington and Vogel.

iii. the evolving mens rea policy

The next policy found in several of our example cases concerns the role of culpable mental states—mens rea—in criminal law.

As a general proposition, the old common law focused on the actus reus of crime. The culprit’s conduct and the result it produced in the physical world were the primary concerns of the early common law. Little attention was given to mens rea. The felony of rape, for example, was defined without an explicit mens rea requirement. When the mens rea of an offense was drawn into question, the typical response was to imply a mental state with respect to the act or omission, but to no other aspect of the actus reus. Indeed, there is little indication that the early common-law conception of crime included the possibility of a mental state for anything other than the act or omission proscribed by the actus reus of the crime. Hence the

341. Id. at 803, 299 P.2d at 854.
342. Id. at 801, 299 P.2d at 852-53 (footnote omitted).
343. Professors Perkins and Boyce offer the following definition: “Rape is unlawful sexual intercourse with a female person without her consent.” PERKINS & BOYCE, CRIMINAL LAW, supra note 141, at 197.
absence of mens rea language in the definition of the crime did not mean that no culpable mental state was required. It did mean, however, that in times long past the courts would imply a mental state only with respect to the act or omission described in the actus reus. Thus despite the absence of mens rea language in the definition of rape at common law, the courts implied a culpable mental state only with respect to the act of sexual intercourse. The older statutes, including the California Penal Code of 1872, used the common-law pattern: Most of the crimes defined in the code do not mention mens rea. They are defined solely in terms of the prohibited conduct.

Slowly the policy of the common law of crimes began to change. The mental elements of crime began to assume greater importance in our conception of the criminal law. The homicide offenses provide a ready example. In the later stages of the development of the homicide offenses at common law, the various crimes are sorted into greater and lesser offenses according to the mental state with which the homicide is committed. Murder, for example, is a homicide committed with an intent to kill; an intent to inflict great bodily harm, when the killing is caused by the actor’s extreme recklessness; or by application of the felony-murder rule. But an intentional killing during the heat of passion engendered by legally adequate provocation is classified by the common-law judges as the lesser offense of voluntary manslaughter. The distinction between murder and voluntary manslaughter is thus the additional mental state required by the rule of provocation. Without that additional mental state, the crime is murder, not manslaughter. What we now call involuntary manslaughter differs from murder by the absence of a mental state sufficient for murder and the presence of criminal negligence that causes the homicide or by an application of the unlawful act-man- slaughter rule. The mental state with which the homicide is committed is thus the sole basis for distinguishing among murder, voluntary manslaughter, and involuntary manslaughter.

For reasons that remain to be explored, the development of the mental elements of crime, so evident in the evolution of the homicide offenses at common law, has not followed an even, consistent path. The law, both statutory and judge-made, produced an inconsistent and often incomprehensible body of doctrine on the role of culpable mental states in criminal law. Thus criminal law at the end of the last
century and for half of this century resembled more of a patchwork quilt of ad hoc definitions of the various crimes than it did a carpet that reflects "the grace of coherent pattern."\textsuperscript{345}

While there was little interest in culpable mental states during Traynor's first decade on the bench, this began to change during the second decade. This renewed interest in the mental elements of crime is one of the hallmarks of what I have called the American Renaissance in modem criminal law. The Model Penal Code, which epitomizes the change in thinking during this era, identifies the mental states relevant in criminal law, simplifies their definition, and creates clear rules governing the use of these mental states for each aspect of the actus reus of any crime.\textsuperscript{346} For example, the Code creates the general rule that each element of the actus reus must be performed with a culpable mental state.\textsuperscript{347} This modern renewal of interest in the mens rea of crime is driven by concerns for justice and fairness to the individual offender tempered by society's need for just punishment and crime prevention.

This new-found interest in the common law's policy concerning the mens rea of crime was one of the forces pushing Justice Traynor to imply culpable mental states beyond the mens rea traditionally required for the act or omission at common law. In California's pre-Vogel law, bigamy was defined in accordance with the common law. The only mental state required was with respect to the act prohibited by bigamy: marrying a second time. There was no culpable mental state concerning the continuation of the first marriage. Severe punishment was thus imposed on a person who honestly and reasonably believed he was fully complying with the law. The imposition of severe punishment in these circumstances could not be justified on the ground that the offender chose to do wrong—the foundation of retribution; and it is unclear that deterrence functions when citizens believe they are acting according to the law. The absence of fault inherent in the traditional definition of bigamy erodes the relationship between culpability and punishment upon which modern criminal law and society rely. Bigamy can be made to serve

\textsuperscript{345} The phrase is taken from one of Justice Traynor's articles discussing the duty of judges to evolve the common law. The phrase was not specifically aimed at the evolution of the criminal law. Traynor, Interweavers, supra note 112, at 203.

\textsuperscript{346} MODEL PENAL CODE AND COMMENTARIES § 2.02 (Official Draft and Revised Comment Part 1, 1962).

\textsuperscript{347} Id. § 2.02(4). This is true unless a contrary intent appears on the face of the legislation.
both the justice interests of the offender and society's goals for the crime by creating a culpable mental state with respect to the existing marriage. That is why Justice Traynor and the court held in *Vogel* that an actor's honest and reasonable mistaken belief that the actor is free to remarry excuses the actor from criminal liability. In other words, under the modern definition of the offense, bigamy also has a mens rea element with respect to the existence of the second marriage.

Justice Traynor's *Vogel* opinion epitomizes the modern approach to criminal law. It also provides the basis, the precedent, for the judicial creation of mens rea elements in other offenses. The most prominent example of *Vogel*’s influence is the California Supreme Court’s recognition of a new mens rea element for the crime of rape. Following the traditional view, the California Supreme Court’s pre-*Vogel* law defined rape as requiring only a mental state with respect to the act proscribed by the actus reus of that offense—sexual intercourse. After the Traynor opinion in *Vogel* and in direct reliance upon it, the court revised the definition of rape to include a mental element with respect to the victim’s lack of consent. An honest and reasonable mistake as to the victim’s consent to sexual intercourse now operates as an excuse to a charge of rape. The reasoning upon which the court created this new mens rea requirement is precisely the same as that which Justice Traynor used in *Vogel*.

Justice Traynor’s opinion in *Benson* gives us another interesting example of how the resurgence in the common law’s mens rea policy influenced the creation of new law. Benson claimed that the offense he importuned was impossible of commission, and therefore he should not have been convicted of solicitation. In essence, Benson asserted that the defense of “legal impossibility,” which is usually asserted in prosecution for the crime of attempt, should be recognized in California as a defense to solicitation. As we have seen, Justice Traynor rejected Benson’s submission and held that legal impossibility

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348. 46 Cal. 2d at 801, 299 P.2d at 852.
351. *Id.*
352. *Benson*, 57 Cal. 2d at 243, 368 P.2d at 117, 18 Cal. Rptr. at 517.
353. *Id.*
is not a defense to this crime. Solicitation is an offense that is largely concerned with the offender's culpable mental state. This is also true of other modern crimes such as assault, attempt, and conspiracy. These offenses are creations of modern criminal law. None of them could have been developed until the courts, and legislatures, gave increased attention to the role of the mental elements in furthering the policy of the criminal law. In the older tradition, the actus reus wagged the mens rea tail, at least when the tail had not been completely bobbed, as it had been with the crime of bigamy. Under the new policy, as it was rapidly evolving when Benson was decided, the mental element of crime is as important as the actus reus.

The impossibility defense tendered by Benson relates to the actus reus of the crime, the possibility that the target criminal conduct can indeed be produced by the culprit's acts. But since solicitation focuses on the mental state of both the actor and the victim, the impossibility defense is irrelevant. That is what Justice Traynor meant when he wrote that "purpos[e]ful solicitation ... is sufficiently indicative of a disposition towards criminal activity to call for liability."355

Vogel and Benson are products of the modern concern with the role of the mental elements in criminal law. Justice Traynor created new law concerning the culpable mental states, the mens rea, of various other crimes in nine additional cases.355 Thus eleven of the twenty Traynor lawmaking opinions created new mental element law during the renaissance years in California. These opinions, which

354. Id. at 243-44, 368 P.2d at 117-18, 18 Cal. Rptr. at 517-18.
355. Id. at 243, 368 P.2d at 118, 18 Cal. Rptr. at 518 (quoting MODEL PENAL CODE § 5.02 cmt. 82 (Tentative Draft No. 10, 1960)).
Traynor tells us "reflect new insights into human behavior."
interpret the statutory definition of the various offenses "in the
interest of justice." Commenting on several of these cases, Justice
Traynor explains that the court "necessarily [had] to be creative in
interpreting incompletely coordinated provisions with due consider-
ation for the public interest in both crime prevention and protection
of the innocent." In other words, he sought to replace the
fragmented, patchwork quilt of existing mens rea law in California
with a modern body of law that protected the interests of both society
and the accused in an integrated, rational, and elegant way.

The common law's evolving policy on the importance of the
mental elements of crime is thus an important driving force in the
creation of new judge-made substantive criminal law. Vogel, Benson,
and the other nine Traynor opinions substantially contributed to the
evolving modern law on the role of the mental elements in criminal
law.

iv. systemic consistency in legal policy

The final policy seeks to assure that each part of the legal order
promotes the system's common goals. Recognizing that the criminal
law is a part of this larger system, insofar as it is feasible, criminal law
should support the system's common goals. The doctrine under
scrutiny in any particular case is but a single component in a complex
system of law, composed of other criminal laws and a number of
other nonpenal provisions which are aimed at furthering the same or
related policies. When a given criminal law doctrine works at cross-
purposes with other doctrines, pressure is created for judicial change.

Justice Traynor was particularly sensitive to this type of pressure.
He saw the common law as a seamless, ever changing whole. The
"perennial problem of a court," he told us, "is how to integrate the
bits and pieces . . . into a going system of common law," and how
to integrate new precedent "into the often rewoven but always
durable network of common law." We see this policy at work in
Vogel, where Justice Traynor sought to integrate the law of bigamy

357. Traynor, Reasoning, supra note 112, at 747 (footnote omitted).
358. Traynor, Comment on Breitel, supra note 316, at 65.
359. Id.
360. Traynor, Transatlantic, supra note 275, at 259 (speaking specifically about the
integration of statutory law into the system).
361. Id. at 262.
with California's family law. In his opinion, the best way to do so was to create the new mens rea requirement we discussed at length above.

The policy of coordinating the common law into a single system that promotes common goals is undoubtedly as old as the common law itself. It is a force that urges the creation of new law.

We have now looked at the predominantly creative forces that urge the judicial creation of new law, including the judicial creation of new substantive criminal law. But in Justice Traynor's theory of the judicial process, these predominantly creative forces, though necessary for creating new judge-made law, are not alone sufficient to induce a judge to do so. There are critically important countervailing forces that counsel the judge to leave well enough alone. It is to these countervailing forces that we now turn.

3. The predominantly restraining forces

a. introduction

It may be helpful at this point to stop and remind ourselves of the context of our discussion. Justice Traynor's theory of the judicial process predicates judicial lawmaking upon arriving at a point of equilibrium between two types of countervailing forces: the creative forces and the restraining forces. We have just completed our examination of the creative forces as they are illustrated in the four example cases in which Justice Traynor created new substantive criminal law. We are now about to look at the restraining forces to see how they operate in the four example cases. Later we will see how Justice Traynor uses analysis and reason to assess the relative weight of each of the countervailing forces and arrives at a decision on whether new law should be created, and how it should be formed.

The predominant restraining forces are: (1) stare decisis; (2) the common-law tradition; (3) the tenet of lag; (4) the retroactive effect of judicial decisions; (5) deference to the legislature; (6) the internal institutional restraints; and (7) the external institutional restraints.

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363. Poulos, supra note 4.
Stare decisis expresses a series of concerns that counter creativity in the judicial process. Courts generally are bound to follow precedent for the following reasons: It promotes the equal treatment of litigants; it provides stability and predictability in the law, which in turn nurtures certainty in the planning of one’s affairs and protects the reliance interests of the parties; it fosters judicial economy; and it enhances “the actual and perceived integrity of the judicial process.”

But in most American jurisdictions, “[s]tare decisis is not an inexorable command . . . [or] a mechanical formula of adherence to the latest decisions”: It is a “principle of policy.”

The binding effect of the doctrine varies by subject matter and with the views of individual judges.

“The serviceable consistency of stare decisis,” Justice Traynor tells us, “rightly discourages the displacement of precedent, absent overwhelming countervailing considerations.” Stare decisis “not only benefits the long-range evolution of the law, but also affords substantial protection against arbitrary judicial decision.”

“Overwhelming countervailing considerations” caused Justice Traynor to nudge stare decisis aside and overrule existing authority in Vogel, Pierce, and Washington. These “overwhelming
"countervailing considerations" were the creative forces discussed above.

On the other hand, the logical extension of precedent was used to create new law in *Benson*. *Benson* demonstrates that the adherence to stare decisis is not inexorably a restraining force. But the type of law created in *Benson*, the rejection of a tendered defense based upon existing authority, is the least problematic of all of the judicial lawmaking paradigms. It should also be noted that stare decisis prevailed in all of Justice Traynor's error-correcting decisions and in most of his law-maintaining opinions as well.

c. the common-law tradition

Although stare decisis plays a major role in the common-law tradition, there are other equally important components to the culture in which American judges work. Justice Traynor reminded us that the judge "invariably takes precedent as his starting-point; he is constrained to arrive at a decision in the context of ancestral judicial experience." Even in a case of first impression, the judge "arrives at a decision in the context of judicial reasoning with recognizable ties to the past; by its kinship thereto it not only establishes the unprecedented case as a precedent for the future, but integrates it in the often rewoven but always unbroken line with the past."

The tradition also counsels the judge to weave the rule, whether entirely or partly new, into the fabric of the law, giving it "the grace of coherent pattern as it evolves." Viewed in context, the common law is evolutionary, even when individual cases appear revolutionary. If the new rule cannot be integrated into the warp and woof of the law, tradition warns the judge to cast it aside as defective yarn.

By definition his language remains rooted in customary legal analysis and expands only with caution to become sufficient unto the judgment day. Such circumspection can do more than deter ill-considered charts for the future. It can also deter ritual invocation of an obsolescent precedent, a judgment that will barely do or will die on the morrow. Only then is a judge free to arrive at a rational transitional judgment, reasoning why every inch of the way.

376. *Id.*


...[J]udges [are] interweavers in this perennial reformation of law. They can work only case by case on whatever repairs and renewals appear necessary. Even so, there are few respites for interweavers.\textsuperscript{378}

Justice Traynor thus believed that the common-law tradition demands that judges constantly inspect the fabric of the law to make sure that the existing work remains in good repair, that the current day's effort flawlessly weaves complementary changes, and that tomorrow's work will predictably relate to what has been done before.

The common-law tradition also teaches the judge to arrive at her decision "within as straight and narrow a path as possible."\textsuperscript{379} Even when the judge does not hew entirely to the patterns of the past and thus takes "graceful leave of a dark landmark," the new rule must follow the design closely enough to provide a smooth transition from the abandoned detail to the new, evolving motif.\textsuperscript{380} The common law is humble in its strength. It is confined by the record and focused on the issues. The opinion addresses the task at hand and nothing more.

Finally, although the creative forces may urge the judge to make law at breakneck speed, Justice Traynor warns us that:

A decision that has not suffered untimely birth has a reduced risk of untimely death. Insofar as a court remains uncommitted to unduly wide implications of a decision, it gains time to inform itself further through succeeding cases. It is then better situated to retreat or advance with a minimum of shock to the evolutionary course of the law, and hence with a minimum of shock to those who act in reliance upon judicial decisions. The greatest judges of the common law have proceeded in this way, moving not by fits and starts, but at the pace of the tortoise that steadily makes advances though it carries the past on its back.\textsuperscript{381}

It is thus the burden of judges to evolve the law with "the grace of coherent pattern," with straight, precise weaving, but with the pace of the tortoise.\textsuperscript{382} No better examples of this grace can be found

\begin{footnotes}
\item[378] Traynor, \textit{Transatlantic}, \textit{supra} note 275, at 259 (footnote omitted).
\item[381] Traynor, \textit{Interweavers}, \textit{supra} note 112, at 203-04.
\item[382] Donald P. Barrett, a staff attorney at the California Supreme Court for 33 years,
\end{footnotes}
than in Justice Traynor's opinions in *Vogel, Pierce, Washington,* and *Benson.*

Since each of these four opinions create new law, how does the common-law tradition restrain judicial creativity? First, and most obviously, it confines the judge's lawmaking to the process of deciding cases. Judges have no roving commission to do good. They do not "make law on a massive scale, as legislat[ors] do."

Their creativity is limited by the dispute submitted to them, by the record in the case, and by language "rooted in customary legal analysis [which] expands only with caution to become sufficient unto the judgment day." This is a contextual limitation that does not usually appear in opinions, unless the judge is asked to rove outside the judicial role and create law on some ill-founded ground. This limitation is thus not mentioned in any of the four example opinions. Nevertheless, each of the four falls squarely within the environmental limitation imposed by the common-law tradition.

Second, the role of precedent within the tradition, the customary language and analysis, the interweaving goal, and the obligation of the appellate courts to decide cases by written opinions operate as subtle constraints on judicial lawmaking. Some opinions will not write and others will write only in certain ways. We know these constraints influenced each of our four example opinions, but we cannot tell precisely how these subtle forces played out their roles.

d. the tenet of *lag*

Related to the pace of the tortoise is what Justice Traynor calls "the tenet of *lag*": "[T]he law must lag a respectful pace back of popular mores, not only to insure its own acceptance, but also to delay formalization of community values until they have become seasoned." In other words, "the function of courts is not to innovate changes but only to keep the law responsive to significant

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384. *Id.* at 259.
changes in the customs of the community.\textsuperscript{388} And if the legislature fails to react to these significant changes, “a judge may eventually find it incumbent upon him to articulate rules responsive to long prevalent values and customs.”\textsuperscript{389} “The tenet of lag . . . is deservedly respected,”\textsuperscript{390} but it should not be used to “retreat from painstaking analysis within their already great constraints to safe and unsound repetitions of magic words from antiquated legal lore.”\textsuperscript{391}

Considering what Justice Traynor called “the advanced status of married women in this state” in 1964,\textsuperscript{392} and “the fact that the fiction underlying the rule in question has long been dead,”\textsuperscript{393} the tenet of lag was fully honored in \textit{Pierce}. Much the same can be said for Justice Traynor’s decision in \textit{Benson}.\textsuperscript{394} Neither \textit{Pierce} nor \textit{Benson} prematurely crystallized prevalent values and customs into judge-made law.

On the other hand, the tenet of lag arguably operated as a constraint in both \textit{Vogel} and \textit{Washington}, though it was overcome by countervailing creative forces in both cases. The defense of honest-and-reasonable-mistake-in-freedom-to-remarry was controversial in 1956, when \textit{Vogel} was decided; to a surprising extent, it remains controversial to this day.\textsuperscript{395} Insofar as Justice Shenk’s dissenting opinion is based upon a substantial division in community values on this issue, the tenet of lag would counsel the majority to refrain from embodying ambivalent values in judge-made law. This may have been the reason that, after observing that “bigamy involves moral turpitude

\textsuperscript{388} Traynor, \textit{Well-Tempered}, supra note 370, at 292.
\textsuperscript{389} Id.; see also Paul J. Mishkin, \textit{Foreward: The High Court, The Great Writ, and the Due Process of Time and Law}, 79 HARV. L. REV. 56, 60 (1965) (stating that “even when ‘new law’ must be made, it is often in fact a matter of the court articulating particular clear implications of values so generally shared in the society that the process might well be characterized as declaring a preexisting law” (footnote omitted)).
\textsuperscript{390} Traynor, \textit{Reasoning}, supra note 112, at 744.
\textsuperscript{391} Id.
\textsuperscript{392} \textit{Pierce}, 61 Cal. 2d at 882, 395 P.2d at 895, 40 Cal. Rptr. at 847.
\textsuperscript{393} Id.
\textsuperscript{394} 57 Cal. 2d 240, 368 P.2d 116, 18 Cal. Rptr. 516 (1962). In that opinion, for example, Justice Traynor observes that the rule which states it is immaterial that the crime solicited is not possible of fulfillment at the time when the words are spoken or becomes impossible of commission at some later date has existed in Massachusetts for nearly a century. \textit{Id.} at 243, 368 P.2d at 118, 18 Cal. Rptr. at 518. It is thus extremely unlikely that a rejection of this very idea in California in 1962 would risk pouring the concrete before the forms were set.
\textsuperscript{395} See, e.g., \textit{PERKINS & BOYCE}, supra note 141, at 1050-54.
on the part of the bigamist," Justice Shenk argued that "[a]ny change in this regard should be made by the Legislature."

Justice Traynor and a majority of his colleagues probably gave more than a casual ear to the tenet of lag's advice to leave well enough alone. But in weighing that counsel—along with the other forces of repose—against the creative forces, the creative forces prevailed. Justice Shenk simply struck a different balance.

A similar analysis seems appropriate for Washington. The scope of the felony-murder rule, like the mistake defense in bigamy, was highly controversial and plagued by a variety of inconsistent approaches at the time Washington was decided. Insofar as Justice Burke's dissent, which was joined by Justice McComb, expresses values held by a substantial portion of the community, the tenet of lag urged the court not to innovate change. But the Traynor opinion struck a different balance. It is interesting to note that Justice Traynor's opinions in Vogel and Washington are regarded as leading opinions in the United States on the new law they created; they remain the law of California to this day. Neither the legislature nor a subsequent majority of the court have abandoned either rule. Thus, although the tenet of lag apparently restrained judicial creativity in both cases, the balance ultimately struck by Justice Traynor's opinions, which preferred the creative forces over the forces of repose, has endured.

Of course, the creative forces always prevail when new law is judicially created. When that is so, the tenet of lag is overcome by the forces of creativity. But in many of the opinions I eliminated from this study, especially those classified as error-correcting cases, the tenet of lag apparently prevails. A single example should provide us with a ready reminder that the tenet of lag sometimes wins the day. In People v. Quicke, a third decade case I classified as predominately an error-correcting opinion, Justice Traynor refused to abandon the M'Naughton test for criminal insanity in California. That

396. Vogel, 46 Cal. 2d at 807, 299 P.2d at 857 (Shenk, J., dissenting).
397. Id. at 808, 299 P.2d at 857 (Shenk, J., dissenting).
398. E.g., LAFAVE & SCOTT, CRIMINAL LAW, supra note 141, at 742.
399. Washington, 62 Cal. 2d at 785, 402 P.2d at 135, 44 Cal. Rptr. at 447 (Burke, J., dissenting).
rule was initially adopted by the court one hundred years before *Quicke* was decided and reaffirmed in 1873, a year after the current California penal code was adopted. Justice Traynor disposed of the issue in two short sentences: "Defendant ... contends that we should replace [the *M'Naughton*] test by the one proposed in 1962 by the Special Commissions on Insanity and Criminal Offenders. We are not persuaded to do so, however, and adhere to our numerous decisions on the subject."  

*Nash*, the latest opinion cited by Justice Traynor in which the court refused a similar submission, contains the following important statement relating to the tenet of lag and the court's refusal to replace the *M'Naughton* test with some other formula:

> These strong persuasions of society ... cannot be adjudicated out of existence and we think that legal formulae designed to deal with them should come from the broad base of the Legislature, which is presumably more closely in touch with and sensitive to the views of the citizenry on this controversial subject than are the courts.

Justice Traynor apparently relied on this excerpt from *Nash* as part of the rationale for summarily rejecting the law-creating argument in *Quicke*. It is thus a fair inference that Justice Traynor believed that the tenet of lag, along with the doctrine of stare decisis, outweighed the creative forces at work in *Quicke*.

While stare decisis, the common-law tradition, and the tenet of lag restrain all judicial lawmaking, the next restraining element, the retroactive effect of judicial decisions, has special impact in substantive criminal cases.

**e. the retroactive effect of judicial decisions**

It is a venerable principle of our common-law tradition that judicial decisions relate back to the time the dispute arose and thus govern the relationship between the parties, even though the governing rule is newly created by the court. This "makes a great
deal of common sense,” Justice Traynor tells us, “if taken with the essential grain of salt, that a judicial decision is not hopelessly backward.”

The retroactive-application rule generally applies to all judicially created law regardless of whether the court creates a pristine new rule, replaces existing precedent, or simply applies existing doctrine to resolve the dispute at hand. But when new law is created that overrules previously governing precedent, the rule may cause substantial hardship. Justice Traynor believed that judges appropriately give retroactive effect to their decisions, provided they consider making exceptions for any undue hardship that normal retroactivity may impose.

In Justice Traynor’s world of judicial creativity, the retroactive-application rule thus begins to restrain judicial lawmaking when it creates undue hardship for a party to the litigation:

A judge is mindful of the traditional antipathy toward retroactive law that springs from its recurring association with injustice and reckons with the possibility that a retroactive overruling could entail substantial hardship. He may nevertheless be impelled to make such an overruling if the hardships it would impose upon those who have relied upon the precedent appear not so great as the hardships that would inure to those who would remain saddled with a bad precedent....

The idea that justifiable reliance may prevent the court from exercising its creativity, as when the hardships the new rule would impose are greater than the hardships that would accrue to those who would remain saddled with a bad precedent—to borrow from Justice Traynor’s example—is grounded in several of the same policies supporting stare decisis. It is thus easy to imagine that many judges will refrain from exercising their creative powers when to do so would trammel the reliance interests of one of the parties to the litigation.

408. Traynor, Well-Tempered, supra note 370, at 289.
409. Traynor, Quo Vadis, supra note 379, at 535-36.
410. Traynor, Hard Cases, supra note 259, at 231; see Traynor, Transatlantic, supra note 275, at 264-70; Traynor, Limits, supra note 289, at 10-11; Traynor, Well-Tempered, supra note 370, at 291-300.
411. Traynor, Hard Cases, supra note 259, at 229.
An injustice also may be caused when a court gives retroactive effect to new doctrine it just created. This may be true, for example, when a new judicially created rule retroactively imposes criminal liability on the appellant. In this situation, even if there is no reliance interest at stake, most judges would conclude that the retroactive application of a rule “imposing or expanding criminal liability would be inherently unjust.” Again, the harm imposed by the normal retroactive application of the newly created rule may restrain judicial creativity.

Of course, both types of hardship—the frustration of justifiable reliance interests and the injustice caused by the retroactive application of a new rule—may be encountered in a single case. Indeed, this was the situation Justice Traynor faced in his first substantive criminal law opinion which addressed the process by which judges rightly make new law—his dissent in *In re Halcomb.*

Under the California Penal Code section 4532, as it read in 1941, it was a felony for a “prisoner charged with or convicted of a felony” to escape from custody. Grady Halcomb was convicted of a misdemeanor and sentenced to one year in the San Bernadino County jail. While working on the county jail road gang, he escaped. He was recaptured and charged with the felony of escape. Although he pleaded guilty to the felony-escape charge, he challenged the conviction in state habeas corpus proceedings on the ground that the statute did not apply to a prisoner incarcerated on a misdemeanor conviction. Relying on a seventeen-year-old case interpreting similar language in the previous escape statute, *In re Haines,* a majority of five justices held that the felony-escape provision, despite its clear wording to the contrary, applied to an escape by a prisoner serving a term in jail on a misdemeanor conviction.

In essence, the court created a new crime: the felony of escape from misdemeanor imprisonment. The majority’s principal rationale

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413. 21 Cal. 2d 126, 130, 130 P.2d 384, 387 (1942) (Traynor, J., dissenting).
414. CAL. PENAL CODE § 4532(b) (West 1941).
415. *Halcomb,* 21 Cal. 2d at 126, 130 P.2d at 385.
416. *Id.* at 126-27, 130 P.2d at 385.
417. *Id.* at 127, 130 P.2d at 385.
418. *Id.* at 127-28, 130 P.2d at 385.
420. *Id.*
was that the legislature is presumed to have known of the court's precedent and had it in mind when it subsequently enacted section 4532 by using practically the same language of the previous provision. A court of appeal opinion reaching the opposite result was overruled, and the conviction was upheld.

Justice Traynor, joined by Justice Edmonds, dissented. He would interpret the statute as it was written and he would overrule Haines:

Misdemeanants are excluded because felons are singled out in a qualifying phrase that states what it means in the simplest terms. The court cannot reject its obvious interpretation without denying all assurance that an act of the Legislature will be interpreted to mean what it says. It is for the Legislature and not the court, to confirm the omission if it was intended, or to correct it if it was not. . . . The court's refusal to read it as it is written makes it impossible for any one to rely upon the written word of the Legislature.

In re Haines . . . should be overruled. Age has not hallowed [its] error. The qualifying phrase that [it] sought to conjure away still stands in plain, unmistakable words to mock the interpretation that would interpret away its existence. The failure of the Legislature to change the language of the statute thereafter, far from being an adoption of the court's revision, represents merely a failure to undertake its own revision. . . . The fiction that the failure of the Legislature to repudiate an erroneous construction amounts to an incorporation of that construction into the statute not only commits the Legislature to embrace something that it may not even be aware of, but bars the court from re-examining its own errors, consequences as unnecessary as they are serious.

Though a misdemeanor-escape crime undoubtedly was needed, Justice Traynor refused to create that crime by contorting the plain language of the statute and by resorting to a fiction that converted precedent into statutory law that bound the court, for better or for worse. He would follow the recent opinion of the court of appeal and keep the law within the bounds of the legislative language.

421. Halcomb, 21 Cal. 2d at 129, 130 P.2d at 386.
THE LEGACY OF ROGER TRAYNOR

Except for cases like *Halcomb* which present the problem of the judicial creation of a new crime in a debatable situation, there is nearly general agreement today that our judges no longer have the power—once freely exercised by common-law judges—to create new crimes. 424 This understanding frequently is codified in statutory form, as it is in California, 425 or it is set forth in judicial decisions. 426 Significant issues of constitutional law are also raised when judges create new crimes out of whole cloth. 427 But Justice Traynor never addressed these issues in an opinion, for his philosophy of the judicial process precluded him and most of his colleagues from creating new crimes from the bench. His dissent in *Halcomb* is the single situation in which Justice Traynor spoke directly to this issue.

The forces that restrain judicial creativity, justifiable reliance "upon the written word of the Legislature" 428 and the injustice of retroactively imposing the criminal sanction on conduct that was not a crime when it was performed, so significantly overwhelm the creative forces that Justice Traynor did not even advocate the judicial creation of a completely new crime in his thirty years on the bench. He thus resolved the troubling issues surrounding the judicial creation of new crimes by the common-law process, not by invoking constitutional doctrine. 429 In other words, as early as 1942, his second year on the bench, Justice Traynor had concluded that the entire common-law power to create wholly new crimes had been transferred by the judges to the legislative branch of government.

Nevertheless, Justice Traynor did create new substantive criminal law, law that varied the elements of existing crimes, and law that recognized or disavowed defenses. Judges still retain the power to create substantive criminal law, for the development of the criminal law "has rested with the courts since time immemorial," 430 but the law they create must be less than entirely new crimes. The retroactive effect of judicial decisions still invokes the restraining forces of

427. *See, e.g.*, Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) (decided shortly after Justice Traynor retired from the court); *see supra* text accompanying notes 1-6.
428. *Halcomb*, 21 Cal. 2d at 131, 130 P.2d at 387.
430. Traynor, *Comment on Breitel, supra* note 316, at 56.
undue hardship: the frustration of justifiable reliance interest and the injustice caused by the retroactive application of a new rule.\textsuperscript{431} Yet these two restraining considerations may be outweighed by the creative forces urging the court to make new substantive criminal law in the case at hand. This was so in all of the cases in which Justice Traynor created new substantive criminal law during his thirty years on the bench.

Returning to our four example cases, we see how Justice Traynor actually struck the balance among the competing forces. In \textit{Vogel}\textsuperscript{432} he created the honest-and-reasonable-mistake defense to bigamy, and in \textit{Washington}\textsuperscript{433} he altered the elements of the felony-murder rule to require that the killing be committed by one of the felons. Since the retroactive effect of each of these rulings favors the defendant over the state, there is no danger of injustice, or government oppression, to either the accused or the citizenry in either case.\textsuperscript{434} Furthermore, the retroactive application of these rules does not trammel the reliance interests of either defendants Vogel or Washington, but it does subvert any possible reliance interests of the state.

If we assume state reliance interests were implicated in both cases, the question is whether those interests should prevail over all of the creative forces that were operating in \textit{Vogel} and \textit{Washington}. In Justice Traynor’s words, it is whether “the hardship that would be caused by a retroactive application of a new rule would outweigh the benefits.”\textsuperscript{435} Without specifically discussing this issue in either case, Justice Traynor obviously concluded that the forces of creativity overwhelmed any possible countervailing weight attributable to the state’s reliance interests.\textsuperscript{436}

This balance appears to have been influenced by Justice Traynor’s belief that “normally, . . . reliance plays an inconsequential role, if any, in criminal cases, as in tort cases.”\textsuperscript{437} Nevertheless, it is nearly certain that the state relied on the precedent overruled in both cases in exercising its prosecutorial discretion and in preparing and presenting its case against both Vogel and Washington. But reliance on existing precedent to commence and shape the litigation itself

\textsuperscript{431} Traynor, \textit{Transatlantic}, supra note 275, at 266-67.
\textsuperscript{432} 46 Cal. 2d 798, 299 P.2d 850 (1956).
\textsuperscript{433} 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).
\textsuperscript{434} Traynor, \textit{Quo Vadis}, supra note 379, at 548-53.
\textsuperscript{435} Traynor, \textit{Transatlantic}, supra note 275, at 265.
\textsuperscript{436} Id. at 264.
\textsuperscript{437} Traynor, \textit{Quo Vadis}, supra note 379, at 549.
cannot be given significant weight in the law-creating process. New judge-made criminal law is always created in a prosecution in which the state relies on existing doctrine. If such reliance is counted in the lawmaking decision, judicial creativity in the criminal law would come to an end. Thus, both the state and the defendant must rely on existing law in some other way than in the litigation at hand. This is probably what Justice Traynor means when he says that reliance normally plays an inconsequential role in criminal cases. There was no indication of such additional reliance in either *Vogel* or *Washington*.

 Likewise, there was no justifiable reliance by either the state or the defendant in *Benson*. The Court refused to create Benson's proposed defense of impossibility. It is inconceivable that Benson's nonlitigation conduct was influenced in any way by existing law. There was no law on the topic when Benson solicited the crime in question and the Court's decision simply confirmed that the defense was unavailable at that time. The retroactive application of the Court's decision in *Benson* thus did not disparage any reliance interest in existing law.

 Since Justice Traynor's opinion neither expanded nor contracted Benson's criminal liability, there was no possibility of injustice or government oppression in following the traditional common-law rule and allowing the opinion to be fully retroactive.

 Justice Traynor's lawmaking opinions in *Vogel*, *Washington*, and *Benson* thus gave little or no weight to the restraining forces grounded in the retroactive application of judicial decisions. Neither reliance interests nor government oppression were significant factors in the lawmaking calculus, and there is no perceived injustice in allowing the decision to be fully retroactive in any of the three cases. A much different situation is presented in our final example, *People v. Pierce*. In *Pierce*, the Traynor opinion changed existing law to extend criminal liability to spouses who conspire solely among themselves. When the Pierces made their otherwise unlawful agreement, the rule announced in *People v. Miller* granted them immunity from prosecution. The retroactive application of Justice

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439.  Id. at 243, 368 P.2d at 118, 18 Cal. Rptr. at 518.
441. 82 Cal. 107, 22 P. 934 (1889).
442.  *Pierce*, 61 Cal. 2d at 880, 395 P.2d at 894, 40 Cal. Rptr. at 846.
Traynor's opinion, which overruled Miller, operated to make the Pierces' conduct criminal, though it did not amount to a crime when done.\footnote{443} Thirteen years after Pierce was decided, Justice Traynor tells us that the "traditional defenses against retroactivity of new rules of criminal law that would adversely affect a defendant are still firmly entrenched."\footnote{444} Why then did he allow the rule in Pierce to operate retroactively?

As we have seen, Justice Traynor did not believe that reliance plays a major role in criminal cases. There is no evidence that the Pierces read and relied on Miller when they conspired with each other. But given the unusual procedural posture of Pierce—it was an appeal from an order of the trial court dismissing the conspiracy count—any facts indicating actual reliance by the Pierces on Miller would not have been presented to the court. It is not completely implausible, however, that there might have been some form of actual reliance on Miller by Mr. and Mrs. Pierce.\footnote{445} The effect of the overruling of Miller and the reversal of the trial court's order dismissing the conspiracy count was to send the case back to the lower court for trial on the crime of conspiracy. Perhaps Justice Traynor was willing to allow possible "proof" of a claim of actual reliance to be litigated under a mistake-of-law defense at trial. That defense would not appear to be precluded by his opinion in Pierce.\footnote{446} Or perhaps he thought that any actual reliance on Miller would have been unreasonable as a matter of law for "the fiction

\footnote{443} Id. at 882, 395 P.2d at 895-96, 40 Cal. Rptr. at 847-48.
\footnote{444} Traynor, Quo Vadis, supra note 379, at 553.
\footnote{445} Justice Traynor seemed unwilling to factor in the possibility of actual reliance by the defendant on the overruled case in deciding whether the opinion should be given full retroactive effect, at least when there was no actual evidence in the record. For example, in James v. United States, 366 U.S. 213 (1961), a conviction for willfully and knowingly evading payment of an income tax on embezzled money was challenged on the ground that embezzled funds are not taxable income. In an earlier case, Commissioner v. Wilcox, 327 U.S. 404 (1946), the High Court had so held. Six members of the United States Supreme Court voted to overrule Wilcox, but the Court refused to apply the holding retroactively so as to make the defendant criminally liable for failing to pay the tax on the embezzled funds. James, 366 U.S. at 221-22. In commenting on this opinion, Justice Traynor tells us, after observing that "reliance plays an inconsequential role, if any, in criminal cases," that "[i]t is hardly persuasive that James failed to report his income in reliance on the old rule; there was an equal likelihood that he concealed his income to avoid prosecution for embezzlement." Traynor, Quo Vadis, supra note 379, at 549. Since this is a question of fact, it seems odd that Justice Traynor would not be willing to consider this possibility in the lawmaking equation.
\footnote{446} See People v. Pierce, 61 Cal. 2d 879, 395 P.2d 893, 40 Cal. Rptr. 845 (1964).
underlying the rule [in Miller] has long been dead." In any event, Justice Traynor did not give much, if any, weight to possible reliance interests in Pierce.

Although in another context Justice Traynor thought it "inherently unfair," and thus impermissible, for a court to give retroactive effect to a new rule imposing or expanding criminal liability, he was willing to do so in Pierce. It is true that the only distinction between the Pierces and those who are liable for conspiracy for the same conduct committed with the same state of mind is the marital status of the Pierces. Siblings or lovers who conspire only between themselves share equal guilt with conspiring strangers. But personal status is the principal distinction between a prisoner convicted of a felony who escapes from custody and his cellmate, who has been convicted of a misdemeanor, who accompanies the fleeing felon. In his Halcomb dissent, Justice Traynor thought it improper for the court to extend criminal liability for escape to the fleeing misdemeanant. Why would he object to the extension of liability in Halcomb but not in Pierce?

Can a meaningful distinction be drawn between the expansion of an element of the offense, which is what the court did over Justice Traynor's dissent in Halcomb, and the expansion of liability in Pierce by the withdrawal of the marital-immunity defense? That distinction would need some justification, and none was ever forthcoming from Justice Traynor.

It is true that there is little possibility of government oppression, at least in terms of the government's lashing out at given enemies or at a powerless, unpopular group, when a special immunity is abolished and criminal liability is allowed to fall upon the shoulders of all who commit the conduct with the required state of mind. The expansion of liability in Pierce simply made the exempted group—spouses—subject to the same law that governed all other persons in California. And for precisely the same reason, the expansion of liability of spouses to equal the liability of all other people does not seem to be significantly "unfair" in the context presented in Pierce—where one spouse conspires only with the other spouse. If this is so then the forces of repose that stem from the retroactive expansion of criminal

447. Id. at 882, 395 P.2d at 895, 40 Cal. Rptr. at 847.
448. Traynor, Quo Vadis, supra note 379, at 549.
449. See Pierce, 61 Cal. 2d at 882, 893 P.2d at 895, 40 Cal. Rptr. at 847.
450. Halcomb, 21 Cal. 2d at 131, 130 P.2d at 387 (Traynor, J., dissenting).
liability can readily be seen as failing to outweigh the creative forces
that support the creation of new judge-made substantive law—the
abolition of the spousal exemption from conspiracy liability.
Apparently this was the reasoning that supported the retroactive
application of the new substantive rule expanding criminal liability in
_Pierce._

If the choice was thus between suffering under the moribund rule
of spousal immunity created by _Miller_ and making new law in the
ordinary course of the judicial process, then _Pierce_ may be defensible
on the foregoing ground. But that was not the only choice available
to Justice Traynor. Years before he wrote the _Pierce_ opinion, Justice
Traynor championed the idea that judges could make their new
criminal law operate purely prospectively to protect the justifiable
interests that would be subverted by the usual rule of retroactivity:

_“Time has the aspect of an hour-glass in criminal law. In no
other area . . . is the problem of retroactive versus prospec-
tive application of such crucial importance. The time radius
of the decision may directly affect the freedom or the very
life of one accused or convicted of crime. An ex post facto
clause hence exerts its most dramatic prohibition against
retroactivity with regard to statutes that make conduct
criminal that has not been criminal before. Though there is
no comparable prohibition on a court, it usually also guards
against any retroactive application of a decision that marks
conduct as criminal for the first time.”_ 451

. . . .

Normally . . . reliance plays an inconsequential role, if any,
in criminal cases. . . . The decisive factor is usually the
injustice of retroactivity, dramatized by its penal consequenc-
es. . . . 451

Justice Traynor repeated this message on a number of occa-
sions. 452 And on several of them he emphasized what he called the
“principle” that “the retroactive operation of a rule imposing or
expanding criminal liability would be inherently unfair [or un-
just].” 453 To protect against this injustice, the judge should provide

452. _E.g.,_ _Traynor, Conflict, supra_ note 412, at 714-22; _Traynor, Quo Vadis, supra_ note
379, at 548; _Traynor, Transatlantic, supra_ note 275, at 265; _see_ _Traynor, Hard Cases, supra_
note 359, at 231-32.
453. _E.g._ _Traynor, Conflict, supra_ note 412, at 716 (“inherently unjust”); _Traynor, Quo
that new judge-made law that imposes or expands criminal liability should be made purely prospective in its operation. Thus, the force restraining judicial creativity that springs from the normal retroactivity of judicial decisions can be removed from the case by bifurcating the controversy “into two concomitant but distinct issues. First, should there be a new rule? If so, the second issue would be whether to apply the new rule retroactively?” Because it generally is inherently unfair or unjust to retroactively apply a rule imposing or expanding criminal liability, presumably the second question will be decided in favor of nonretroactivity in most of those cases.

We will never know why Justice Traynor’s opinion failed to consider using the nonretroactivity technique for the new substantive rule he created in *Pierce*. But we do know that even with the technique he devised for bifurcating the controversy into two separate but related issues, the impact of the normal retroactivity rule still exercises some restraint on the creative powers of the court. In a closely balanced case, a case in which the creative forces and the restraining forces are virtually evenly weighted, the normal retroactivity of judicial decisions may convince the court to refrain from creating new law imposing or expanding criminal liability. In other words,

Vadis, supra note 379, at 549 (“inherently unfair”).

454. Traynor, *Transatlantic*, supra note 275, at 269 (speaking generally about the when and how a judge should decide the retroactivity issue).

455. To be sure, Traynor believed that this “admirable technique” was “open to abuse by zealous advocates casting for new rules that escape rigorous analysis.” Traynor, *Limits*, supra note 289, at 11. Accordingly, he tells us that:

A judge must be on guard against invoking it carelessly to lend spurious grace to a departure from the old rule without painstaking explanation. . . . Before undertaking a dramatic leap forward, when it becomes clear that prospectivity will be an issue, he should wait until the litigants have had an opportunity to be heard on the issue via briefs and perhaps oral argument. By thus insuring that a decision on prospectivity will not have to await another case, a judge precludes the uncertainty that would otherwise bedevil counsel and other courts in the interim.

*Id.*

Since prospectivity should be an issue in any case in which the court creates a new substantive rule that imposes or expands criminal liability, one would have thought that the technique would have been argued by counsel and discussed in the *Pierce* opinion.

456. I am suggesting, of course, that though the controversy may be conveniently bifurcated for the purpose of focusing on the two issues, the impact of the normal retroactivity rule affects both issues—the lawmaking decision and the decision on retroactivity. Once the account is finally balanced, having taken the impact of the normal retroactivity rule into account, and the court decides in favor of making new law, retroactivity then becomes the focus of the second issue.

457. Although the prospective-ruling technique is usually applied when precedent is overruled, it is also appropriately used when new law is created and there is no precedent
the court does not typically create new law with those effects and then routinely invoke the nonretroactivity solution. Only occasional cases call for such a technique, but its rational use should foster public respect for courts.\textsuperscript{458} Thus, in only two cases during his entire thirty years on the bench did Justice Traynor write an opinion in which new substantive criminal law was created which burdened the defendant. One of these opinions is his Halcomb\textsuperscript{459} dissent. The other is his opinion in Pierce.\textsuperscript{460} Justice Traynor never invoked the nonretroactivity rule in any case in which he created new substantive criminal law. That is undoubtedly because in all of the those cases the new rule either restricted criminal liability—as in Vogel\textsuperscript{461} and Washington\textsuperscript{462}—or was neutral with respect to liability, as in Benson.\textsuperscript{463} But we cannot know how many cases in which the restraining effect of the normal retroactivity rule convinced Justice Traynor to refrain from creating new judge-made law and decide the case as an error-correcting or law-maintaining case.

\textit{f. deference to the legislature}\textsuperscript{464}

In our democracy, as it was at common law, the judiciary shares authority with the legislature in creating new law. Although the legislative branch of government has the final word—statutes may freely replace or revise judge-made law—Justice Traynor believed that courts have a responsibility to make new law and that judicial lawmaking is an essential component of our democratic system.\textsuperscript{465} Furthermore, this lawmaking duty extends throughout the universe of law, without exception. Substantive criminal law is thus as much within the ambit of this duty as the law of torts.

In Justice Traynor’s world, the courts had as much authority over criminal law as legislatures do. And when lawyers would argue that a challenged rule of substantive criminal law should be abolished only
by legislation, he would typically respond that "[i]n effect the contention is a request that courts abdicate their responsibility for the upkeep of the common law. That upkeep it needs continuously, as this case demonstrates."466

Although courts have as much authority to make substantive criminal law as they do in any field, the exercise of this jurisdiction is constrained. These constraints are not grounded in democratic theory. Except for constitutional and statutory limitations—which do not concern us here—they simply reflect the differing nature of the two branches of government. Courts make law only when they are adjudicating cases. Their lawmaking powers are both supported and restrained by the culture and the rules of litigation. On the other hand, the lawmaking competence of the legislative branch of government is legally restrained only by constitutional law.

The courts should not "abdicate their responsibility for the upkeep of the common law," to borrow Justice Traynor's phrase, simply because the legislative branch is commonly seen as the lawmaking arm in our democracy.467 Courts should defer to the legislature when the law they are requested to make falls beyond the competence of the judicial institution. Justice Traynor identified three instances, which are relevant to our current inquiry, where judges should consider deferring to the legislative branch for making the law in question. These three considerations concern: (1) the scope and context of the proposed new law,468 (2) the tenet of lag,469 and (3) the quality and quantity of the information available to the court.470

i. the scope and context of the proposed new law

There are occasions when judges are asked to create "new rules of such scope that only the legislature, with its freedom and resources for wholesale inquiry, can effectively formulate them."471 Justice Traynor thought that a court should not, for example, judicially abolish contributory negligence and replace it with comparative negligence, for it would require the court to enunciate principles of apportionment; and, perhaps more importantly, it would adversely

466. Pierce, 61 Cal. 2d at 882, 395 P.2d at 895, 40 Cal. Rptr. at 847.
467. Id.
468. See Traynor, Hard Cases, supra note 259, at 233.
469. See Traynor, Reasoning, supra note 112, at 744.
470. See Traynor, Transatlantic, supra note 275, at 280.
impact "the whole complicated—and partly regulated—structure of insurance rates."\textsuperscript{472} His refusal to abolish the \textit{M'Naughton} test of insanity and replace it with some other formula apparently was based, at least in part, on similar considerations.\textsuperscript{473} The court would need to articulate a new test for the insanity defense, and that new test, as controversial as it would be, could best be hammered out in the legislative halls. Accordingly, Justice Traynor deferred to the legislature to make new law on the test for insanity, even though the \textit{M'Naughton} rule was incorporated into California law by judicial decision.\textsuperscript{474}

There was no such concern with the new law created in any of our four example cases.

ii. the tenet of lag

Justice Traynor's tenet of lag, as we have seen, reflects his basic conception of the judicial institution: Judge-made law "must lag a respectful pace back of popular mores, not only to insure its own acceptance, but also to delay formalization of community values until they have become seasoned."\textsuperscript{475} In other words, "the function of courts is not to innovate changes but only to keep the law responsive to significant changes in the customs of the community."\textsuperscript{476} The tenet of lag plays an important role in the decision to defer lawmaking to the legislative branch of government. If the values and customs of the community remain in flux on a given issue, then the court should consider deferring to the legislature for the making of law to solve that problem. It is not the business of judges to make community values. Instead, they respond to existing community values when new law is made.

A word of caution is appropriate here. We are here concerned with the existence of identifiable controversy in the community. It is palpable controversy that usually invokes the tenet of lag. When Justice Traynor refused the request to judicially abolish the \textit{M'Naughton} test of insanity and replace it with some new rule in \textit{Quicke}, the tenet of lag apparently figured in his assessment of

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\textsuperscript{472} Id. (quoting Wolfgang Friedmann, \textit{Legal Philosophy and Judicial Lawmaking}, 61 \textit{COLUM. L. REV.} 821, 841 (1961)).
\textsuperscript{473} \textit{Quicke}, 61 Cal. 2d at 159, 390 P.2d at 395-96, 37 Cal. Rptr. at 619-20.
\textsuperscript{474} Id.
\textsuperscript{475} Traynor, \textit{Reasoning}, supra note 112, at 744.
\textsuperscript{476} Traynor, \textit{Well-Tempered}, supra note 370, at 292.
whether to create the new law or defer to the legislature. At that time there was considerable controversy over the proper test for insanity in California. The Model Penal Code project had recently abandoned the traditional M'Naughton test for a modern restatement of the rule, and California's "Special Commissions on Insanity and Criminal Offenders" advocated a substantial change in the law in its First Report, which was issued on July 7, 1962, less than two years before Quicke was decided. The Report apparently had not solidified community support for a change in the law. Since the controversy over the appropriate test for the insanity defense was still raging in the community, the tenet of lag apparently cautioned Justice Traynor to let the California Legislature resolve the matter.

On the other hand, when there is an absence of palpable controversy in the community, the tenet of lag does not have a major role to play. This was the situation in each of our four example cases. The Court did not step into the midst of a raging public controversy and attempt to settle it in Vogel, Washington, Pierce, and Benson, or in any of the other cases in which Roger Traynor created new law.

iii. the quality and quantity of the information available to the court

For the most part, judicial lawmaking must rely on information produced according to the ordinary rules of litigation. The principle exception to this restricted flow of information relates not to the facts involved in the dispute but to what Justice Traynor calls "the environmental data" or "the legislative facts" that form the factual foundation upon which a law is built. "Though only a fraction of cases," Justice Traynor tells us, "are of a complexity that calls for inquiry beyond the facts about the parties and the available precedents, those cases may be of major significance in the development of the law."

All too rarely, however, do the courts have the benefit of Brandeis briefs comparable to the original. Absent the presentation of such data, a court could well undertake

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477. See supra text accompanying notes 266-70.
479. E.g., Traynor, Transatlantic, supra note 275, at 280; see Poulos, supra note 4, at text accompanying notes 230-36.
480. Traynor, Transatlantic, supra note 275, at 280.
independent scrutiny of extralegal materials if it appeared that they might be useful to an analysis of the case. In that event, a court should alert counsel accordingly to assure them a fair hearing on whatever issues emerge from the acquired data as the case develops.481

But if such environmental data are needed and if they are not readily available, then the court should consider deferring to the superior environmental fact-gathering capacity of the legislative branch of government. Since none of our four example cases were seen as being complex enough to require that process, we do not have a ready example of the use of environmental facts in a substantive criminal case.

Justice Traynor was thus willing to defer lawmaking to the legislative branch of government only when the judicial institution could not properly respond to the challenge presented by the forces urging the court to make new law. The assessment of the court's ability to make "good law" for "hard cases" is necessarily a matter of degree. The relative weight of the three factors that we have been discussing, all of which restrain judicial lawmaking, must be considered in the accounting made to determine whether the court should make new substantive criminal law.

But before we move on to the next of the forces that restrain judicial creativity, we should heed some of the last advice Roger Traynor would give us as to why courts should not generally defer to the legislature in making new law. This observation seems particularly relevant as it applies to the judicial creation of the substantive criminal law today:

The argument then goes that innovation today rests with the legislators by virtue of their unique sensitivity to public moods, or what is sometimes called an ear to the ground. The trouble with this view is that we certainly cannot afford now, if we ever could, to play the law entirely by ear. There are a number of objections to such improvisation. The most obvious is that one who relies on the ear without attendant reflection offers no assurance of sensitive hearing. In the din of a largely urban society, he may hear the bellowing of militant groups or the siren songs of sophisticated special

481. Id.
482. Id.
pleaders, but not the murmurs of other individuals. He may be quick with a generous dispensation of public funds to groups for ostensibly worthy projects, so long as such dispensation attracts little public notice. He is given to assessing the effect of a given action upon his chances for re-election. His will for lawmaking is a will of many wisps. It is the exceptional legislator who is guided by *fiat lux* rather than the murky light of *ignis fatuus.*

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g. internal institutional restraints

In addition to the constraints imposed by the common-law environment in which American judges work—such as the restraints associated with *stare decisis,* the common-law tradition, the tenet of *lag,* the normal retroactivity of judicial decisions, and the rare situation in which deference to the legislature may be wise—there are institutional constraints imposed by the litigation process itself. The nature of the judicial institution constrains the judge's creative powers. Judges cannot reach out and make substantive criminal law though it is required by season and circumstance. The judge's powers are exercised only in response to properly presented claims. Their lawmaking is dependent upon the work of the police, the prosecutors, and defense counsel. Thus, as a general rule, a judge's creativity in the realm of criminal law is limited to the cases actually prosecuted in court. Within those cases, the judge is tethered by the record on appeal, by the issues and arguments presented by counsel, by obtaining the agreement of a majority of the judge's colleagues, and by the written-opinion requirement.

Ultimately, to make new criminal law the judge must persuade her colleagues to join in the creative act. Though the task of judging is solitary work, judge-made law is seldom woven by a single judge.

485. Thus Justice Traynor wrote: "Many forces constrain review within extremely narrow limits. The most immediate constraint is the controversy itself that calls for decision; even the unprecedented controversy automatically precludes any ambitious excursion beyond its own context." Roger J. Traynor, *No Magic Words Could Do It Justice,* 49 CAL. L. REV. 615, 620 (1961).
487. See Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts,* 24 U. CHI. L. REV. 211, 217 (1957). Justice Traynor believed it was permissible for the court to frame issues not raised by counsel as long as the court gave counsel the opportunity to submit additional briefs. *Id.* at 219.
The burden of convincing a majority of one’s colleagues is a significant impediment to judicial creativity by an appellate court judge. The decision and the resulting opinion thus bear “the marks of battle” in the tempering process generated by the collegial process of a multi-judge court. And there is always the possibility of a separate opinion, usually a dissent, that will display any weakness in the opinion for all to ponder.

As we shall see, reason is a central element in Roger Traynor’s theory of the judicial process. His lectures dwell on the reasoning requirements for appellate opinions and for the orderly development of law. “After a generation of experience,” Justice Traynor tells us in one of his last articles on the judicial process, “I believe 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.”

Appellate opinions that announce a new rule “must be supported by full disclosure . . . of all aspects of the problem and of the data pertinent to its solution.” They must be reasoned “every inch of the way,” and they must specify the reasons for choosing one policy over another. Although some academics would question the efficacy of these requirements as constraints on judicial creativity, for any decision can be cast in the language of reason, Justice Traynor obviously believed they affect both the quality and the result of a court’s decision. They constrain creativity to the realm of rationality. And they counsel caution: “A reasoning judge’s painstaking exploration of place and his sense of pace give reassurance that when he takes an occasional dramatic leap forward he is impelled to do so in the very interest of orderly progression.”

Finally, logic and reason are the tools that allow the other internal

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488. Such a tempering process is that of a group, not that of a justice alone. One who takes part in it knows the marks of battle in the opinions that bear his name. He ceases to mourn the loss of a frugal phrase that contained his meaning exactly, and comes to accept the prolix replacement for its easier way with a hard idea. And he can sometimes rejoice that the questions of others cleared the mists from his own thinking.

489. Id at 217.
490. Id at 218-19.
491. Id at 218-19.
492. Id at 218-19.
493. Id at 218-19.
494. Id at 218-19.
495. Id at 218-19.
constraints to function. Without them, lawyers could not persuade judges and judges could not persuade colleagues to make or reject a proposed new rule.

Though reason and logic are essential parts of the judicial opinion and the process that produces it, the written-opinion requirement yields additional restraints. The process of writing the opinion focuses the inquiry of judges, affects their analysis, and influences the way it is crafted. According to Donald Barrett, Traynor's chief of staff for a number of years, Traynor "felt the real test of a solution to a legal problem was whether you could put it down convincingly in writing"\(^4\) in words capable of being understood by children.\(^4\) Only then can the judge penetrate to the heart of the problem and resolve it convincingly. Opinions containing "repetitions of magic words from the legal lore" signal that the judge has retreated from the painstaking analysis required for the task of judging.\(^4\)

Since these internal restraints inhibit judicial creativity in the criminal law in essentially the same way as the external institutional constraints, we will look at our example cases in the ending portions of the following discussion.

\(h. ~ external ~ institutional ~ restraints^{499}\)

These restraints are created by the anticipated scrutiny the opinion will receive once it is published.\(^500\) Once published, the opinion...
is available for scrutiny by the public, the press, the bar, and the academy. With his typical good humor, Justice Traynor notes, for example, that 

[s]cholars inspect the output of the appellate process as if it were dynamite, and they comment exhaustively on innocuous defects as well as on patent dangers. There are law journals enough to train searchlights upon the courts everywhere in the land, and they are quick to note the errant ways of appellate decision from the most righteous sentimentalism to the most wrongheaded standpattism. And, in a similar vein, he observed that an opinion, if possible, should allay the suspicion of any man in the street who regards knowledge of the law as no excuse for making it. There is usually someone among them alert to note any misunderstanding of the problem, any error in reasoning, an irrelevance in data, any oversight of relevant data, any premature cartography beyond the problem at hand. Every opinion is thus subject to approval. It is understandable when a judge, faced with running such a gauntlet, marks time instead on the line of least resistance and lets bad enough alone.
It is here that reason again performs a vital function: It provides the standard by which the opinion, and the judge who wrote it, may be evaluated by the reader. A court’s power and influence, and the reputation of the judge crafting the opinion, depends upon the skill with which it is reasoned, for that is the universal measure of disinterested decision making. “Sustained, impartial ... criticism of [a court’s] opinions,” we are told, “would deter decisions made through excess or by fiat.”

On the other hand, a well-reasoned, well-tempered opinion “may serve to quicken public respect for the law as an instrument of justice.”

The same may be said for its author. The accountability that flows from the publication of the opinion and the scrutiny it will receive, though unmeasurable, is one of the important countervailing forces in Justice Traynor’s philosophy of the judicial process.

We will now return to the internal restraints and the four example cases.

Little needs to be said about the impediments to judicial creativity that are part of the environment in which judges work. Judges can only create law out of the “bits and pieces that blow into their shop on a random wind.” Judges are bound by the record on appeal and by the issues it presents. For example, Justice Traynor was able to create the honest-and-reasonable-mistake defense to bigamy in *Vogel* because the district attorney prosecuted the case and defense counsel filed the appeal and raised the issue before the court. Of course, there is some room for discretion within these constraints. Although judges are strictly limited by the cases brought before them and the record created in the lower courts, the judges are not as confined by the issues raised by counsel as they are by the record on appeal. As long as the issues spring from the record, judges can request briefing on a point omitted by the lawyers, and they are not bound to decide the case under the rubric of counsel’s argument.

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507. Traynor, *Limits*, supra note 289, at 12. In a similar vein, Justice Traynor tells us that “[a] judge ... cannot speak unless he is spoken to, and he must mind his musing when he does so.” *Id.* at 11.
Washington, for example, defense counsel sought a rule that would limit the scope of the felony-murder rule by the identity of the person killed.\textsuperscript{508} Justice Traynor rejected that submission and created a rule that made the identity of the killer the critical element of felony-murder.\textsuperscript{509}

How do the internal institutional constraints associated with a multi-judge court impact on judicial creativity?

When a judge writes a lawmaking opinion for at least a majority of the court, the internal institutional restraints transform the "cleansed," "judicial" choice of the individual judge into an opinion with the force of law, supported now by the cleansed judicial choice of a majority of the judges.\textsuperscript{510} Though we speak about a judge's opinion in a given case as though it represents his or her individual judgment, that professional habit obscures the role of the internal constraints and how they force compromise that may, at best, only be acceptable to the writer of the opinion. The opinion, in other words, may or may not reflect the writer's uncompromised views on the issues resolved in the opinion. The more colleagues who join the opinion, the more likely it is that the opinion represents the composite views of his or her colleagues, rather than the pristine thinking of the author. A unanimous opinion clearly speaks for the court as an institution. It is not clear how authentically it represents the writer's views. However, it should be safe to assume that there are limits to the judge's willingness to compromise. Thus the fact that the judge remains the author of the opinion indicates that the opinion is an acceptable statement of the author's views on the new law made in the case—and the views of all of the other judges who join the opinion.

Justice Traynor sought to minimize the extent of compromise that might be necessary to secure the votes of a majority of his colleagues by working through his first draft as carefully as possible:

He didn't like to waste time in circulating drafts that he knew must be revised. He would prefer not to expose his thinking to the rest of the judges until he could give them his best answer. He liked to have his calendar memo be as

\textsuperscript{508} Washington, 62 Cal. 2d at 780, 402 P.2d at 132, 44 Cal. Rptr. at 444.
\textsuperscript{509} Id. at 780-83, 402 P.2d at 132-35, 44 Cal. Rptr. at 444-47.
\textsuperscript{510} See supra text accompanying notes 203-09.
close to what he would deem a possible final opinion in the case.\textsuperscript{511}

Error-correcting opinions may be regarded differently from lawmaking opinions.\textsuperscript{512} Justice Traynor, we are told, treated them so:

If Traynor did not feel the issue was critical to the pattern of the law and the court wanted to go the way he didn’t, he might say he didn’t care and he’d write the opinion however the majority wanted it. I remember once he circulated an opinion and the majority wouldn’t go along with him. It was one of these sufficiency of the evidence cases and Judge Traynor wrote it the other way. Then Judge Shenk said, “well, I liked the first one better.” Traynor said, “so did I.” Then he said, “I’ll put the second one out By The Court and I’ll dissent to myself.” Traynor had both opinions. One was By The Court and then a dissent by Traynor.\textsuperscript{513}

Justice Traynor’s opinions in Pierce and Benson were joined by all members of the court. There were dissents to his opinions in Vogel and Washington. Justice Shenk dissented alone in Vogel.\textsuperscript{514} Justice Burke, joined by Justice McComb, dissented in Washington.\textsuperscript{515} One can assume that the internal constraints associated with acquiring the votes of a majority of the judges are at their apex when there is a dissent to the judge’s opinion. If this is so, the countervailing power restraining judicial creativity was stronger in Vogel and Washington than in Pierce and Benson.

The internal restraints created by the fact that appellate judges are required to decide the case by a written opinion seem obvious enough. Justice Traynor, we are told, believed that “the real test of a solution to a legal problem was whether you could put it down convincingly in writing.”\textsuperscript{516}

Judge Traynor liked to believe that if you worked hard enough you could find the only right answer to every case. Now, I think he must have known sometimes he just had to make up his own mind. Sometimes there is no way you can

\textsuperscript{511} Barrett Interview, \textit{supra} note 111, at 24.
\textsuperscript{512} This includes, of course, any error-correcting portions of a lawmaking opinion.
\textsuperscript{513} Barrett Interview, \textit{supra} note 111, at 26.
\textsuperscript{514} 46 Cal. 2d at 806, 299 P.2d at 856 (Shenk, J., dissenting).
\textsuperscript{515} 62 Cal. 2d at 785, 402 P.2d at 135, 44 Cal. Rptr. at 447 (Burke, J., dissenting).
\textsuperscript{516} Barrett Interview, \textit{supra} note 111, at 13.
Justice Traynor’s opinions in the four example cases obviously evidence the operation of these constraints.

Reserving our discussion of the role of reason as a constraint on judicial creativity for the moment, how did the external institutional constraints possibly function in the four example cases?

These constraints are grounded in the anticipated scrutiny the published opinion may receive by the public, the press, the bar, and the academy. Justice Traynor “followed the law reviews assiduously. Every issue that came to the court library was first sent to him before being shelved,” and his opinions frequently rely on scholarly commentary. In *Vogel*, for example, Justice Traynor cites law review articles written by Professors Sayre, Hall, and Wechsler. In *Washington*, he relies on seven learned treatises and two law review articles. He refers to the Model Penal Code and a learned

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517. *Id.* at 14.
518. *Id.* at 22.
519. See James R. McCall, *Roger Traynor: Teacher, Jurist, and Friend*, 35 Hastings L.J. 741, 742 (1984). Professor McCall tells us that Justice Traynor “elevated the importance of legal scholarship by initiating the practice of citing law review articles in California Supreme Court opinions.” *Id.* In this respect, Justice Traynor was following a trend set by others. In 1928, the year after Roger Traynor graduated from Boalt Hall, his colleague Professor Max Radin published a law review article discussing and approving of the existing use of law review articles by lawyers and judges as sources of the law. Max Radin, *Sources of Law—New and Old*, 1 S. Cal. L. Rev. 411, 413 (1928). Three years later, Justice Cardozo made similar comments in his introduction to the A.A.L.S. volume on readings in contract law: Benjamin N. Cardozo, *Introduction to ASSOCIATION OF AMERICAN LAW SCHOOLS, SELECTED READINGS ON THE LAW OF CONTRACTS* vii, ix (1931). This trend was part of the legal realism movement. See *Johnson*, *supra* note 305, at 61-65 (describing the beginnings of the use of law review articles as authoritative sources of law). One suspects that Justice Traynor was influenced to rely on law review articles by his Boalt Hall colleague Max Radin, by Cardozo, and by the legal realism movement.
520. *Vogel*, 46 Cal. 2d at 801 n.2, 299 P.2d at 833 n.2.
treatise in Benson.\textsuperscript{523}

His reliance on scholarly writing in his opinions and his constant perusal of the periodical literature demonstrate that Justice Traynor took scholarly commentary seriously and that he had scholarly commentary in mind when he wrote his opinions. Indeed, his chief of staff tells us that Justice Traynor "was very sensitive to areas where he knew the professors thought the California Supreme Court theories were cockeyed."\textsuperscript{524}

His insistence that opinions should be written in plain English capable of being understood by his children, without the use of "magic words" or legalese that was common in his time, empowered the lay public and the press to keep an eye on the law. This enhances judicial accountability and evidences Justice Traynor's concern for these external institutional restraints.\textsuperscript{525}

We have now discussed the major constraints on judicial creativity: stare decisis, the common-law tradition, the tenet of lag, the retroactive effect of judicial decisions, deference to the legislature, and the internal and external institutional constraints. These constraints exercise their countervailing power against the forces of creativity through the mediating power of reason.

4. Reason\textsuperscript{526}

Reason plays a central role in Justice Traynor's judicial philosophy.\textsuperscript{527} It is the power that mediates between the creative and the restraining forces. Reminiscent of statements made by Coke and Blackstone, Justice Traynor calls reason "the soul of law,"\textsuperscript{528} and he constantly refers to the "reasoning judge,"\textsuperscript{529} to "the rational development of the law,"\textsuperscript{530} and to "judicial reasoning."\textsuperscript{531} "A govern-

\textsuperscript{523} MODEL PENAL CODE § 5.01(1)(a) cmt. 31 (Tentative Draft No. 10, 1960); GLANVILLE L. WILLIAMS, CRIMINAL LAW (2d ed. 1961).

\textsuperscript{524} Barrett Interview, supra note 111, at 22.

\textsuperscript{525} Accountability is typically considered as a restraint on arbitrary authority. It is in this sense that the external institutional constraints restrain judicial creativity. Scholarly commentary, and perhaps lay commentary, can also stimulate judicial creativity. For the most part, however, it seems that generally creativity is stimulated as a reaction to critical commentary.

\textsuperscript{526} Poulos, supra note 4.

\textsuperscript{527} See supra text accompanying note 517.

\textsuperscript{528} Traynor, Limits, supra note 289, at 7.

\textsuperscript{529} E.g., id. at 6; Traynor, Reasoning, supra note 112, at 743.

\textsuperscript{530} Traynor, Lost Causes, supra note 239, at 566.

\textsuperscript{531} E.g., Traynor, Reasoning, supra note 112, at 742; Traynor, Interweavers, supra note
ment of laws," he writes, "suggests an ideal, a legal process as rational in all its ramifications as it has traditionally been in the courts."532

With reason as both the catalyst and the caldron, the judge assesses the mixture of forces presented in the case. The individual factors, the elements of creativity and constraint, push and pull against each other until an equilibrium is reached. This equilibrium is the judgment on the issue in dispute. All of the factors, of course, are not present in each case; even when they are, a different result may be reached because of a change in their relative weights. Ideally, in Justice Traynor's world, each judge calculates the point of equilibrium on each issue in the case. The product of these individual calculations, produced by the same process of give and take, represents the final joint calculation—the judgment of the court.

When the calculus favors restraint, the opinion is traditionally couched in terms of precedent and stare decisis. There is no change in doctrine. This is what happened, for example, in People v. Quicke, in which Justice Traynor refused to abolish the M'Naughton test of criminal insanity and create new substantive criminal law.533 When the creative forces prevail, new law is made.

The calculus also dictates the direction of the change. When the creative forces are joined by powerful forces of repose, the law changes to what it was at some time in the past. When the creative forces strongly predominate, new law emerges. But in Justice Traynor's view, it is never entirely new. The forces of repose are always present and influential. New judge-made law is thus always rooted in the common law. Like a new child, it owes its existence to its parental past and it carries the genetic code of its ancestors into the future. "Rational lawmaking," Justice Traynor reminds us, "involves far more than case by case response to such dramatic changes as have characterized our century."534

We should not forget that in deciding hard cases in new fields, a court is the one institution entrusted by peace-loving people to envisage a beneficent evolution of law for the long run. It must guard against the danger that evolution will take an ugly turn, back to an age of dim-eyed creatures

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112, at 203.
532. Traynor, Statutes, supra note 243, at 427.
534. Traynor, Transatlantic, supra note 275, at 283.
grounded in dogma or off course to an age of bats in blind pursuit of panaceas.  

Reason is thus the transmitter of the genetic code, the atomic force that binds the elements of law together. The judge, invariably looks for precedent as his starting point. He is constrained to arrive at a judgment in the context of ancestral judicial experience: the given judgments; or lacking these, the given dicta; or lacking these, the given clues. Even if his search of the past yields nothing, so that he confronts a truly unprecedented case, he still arrives at a judgment in the context of judicial reasoning with recognizable ties to the past. By that kinship, a judgment not only establishes the unprecedented case as a precedent for the future, but integrates it into the often rewoven but always durable network of common law.

This is what happened in our four example cases: Vogel, Benson, Pierce, and Washington. The creative forces overpowered the forces of repose and new substantive criminal law was created. But the new law in each case emerged from the pattern of existing law, born of judicial reasoning with recognizable ties to the past, and tightly integrated "into the often rewoven but always durable network of common law."

I do not mean to suggest that Traynor's theory of the judicial process employs a grand multiple regression formula that produces the correct legal rule when all of the relevant factors are included and are assigned their proper weight. When judges make law, they exercise their own power of choice. But that choice is not arbitrary, irrational, or based upon the personal interests of the judge. It is the product of "professional skill, . . . legal reasoning and legal imagination," after deep inquiry and "reflection enough to arrive at last at a value judgment as to what the law ought to be." In other

535. Id.
536. Id. at 262.
537. Id.
538. Traynor, Hard Cases, supra note 259, at 235. This idea was repeated in Traynor, Interweavers, supra note 112, at 213.
539. Traynor, Hard Cases, supra note 259, at 234. The quotation continues as follows:

When at last [the judge] reaches a juncture where he feels bound to commit himself to one value judgment or another, the intellectual quest merges with a yearning for something more than the mere orderly disposition of problems, a yearning often approximately defined as a sense of justice and culminating in what Edmond Cahn calls The Moral Decision. . . . We should be aware of how
words, judges exercise judicial, not personal, choices when they make new law.

V. THE LEGACY OF ROGER TRAYNOR

By word and deed Roger Traynor teaches us that judges share responsibility with the legislative branches of government in making substantive criminal law. Each branch has its own realm of lawmaking competence, its own essential perspective. Each complements the other.

The courts examine the law from the bottom up: Judges begin with the facts, examine how the law actually works, and create new doctrine needed to resolve the dispute at hand, but always in the context of the common law and always with an eye toward evolving a rational, coherent, just, and efficient body of criminal law.

Legislatures make law from the top down: They begin with abstract concepts and end with abstract doctrine—law designed to govern future conduct and to prevent future disputes. Though legislators gather the information they use to create new law from a variety of sources, one of the most important in our mature system of criminal law is the information gleaned from the work of courts. The courts serve as laboratories for the creation and testing of criminal law that fits carefully into both legislation and the common-law system. And because of the trumping power of legislation, judge-made law can always be displaced by statutory enactments.

From much of what Justice Traynor wrote, we may infer that both legislatures and the citizenry are hampered when judges fail to discharge their responsibility "of assuring the rational continuity of the law," and for "the recurring formulation of new rules to
supplement or displace the old." \(^{541}\) "Regardless of how a legislature is headed, toward a high or low road or pell-mell toward swamps, a court still has the obligation to establish beacon lights of reason so consistently reliable as to aid wanderers out of the swamplands." \(^{542}\)

There are limits, of course, to the competence of both institutions. But it is clear from all that Justice Traynor did and said about the judicial creation of new law that lawmaking by judges, even in the substantive criminal law, is consistent with the fundamental principles of our democracy. He shows us that even the judicial creation of new crimes may be permissible, provided the judges protect the reliance and justice interests at stake by making the new law apply only prospectively. This same technique also should be used when the new law expands existing criminal liability. There are no similar concerns, however, with the creation of new substantive criminal law that is neutral, as in *Benson*, or that limits criminal liability, as in *Vogel* and *Washington*.

Justice Traynor also teaches us that the choice exercised by judges when they make new law is consistent with our dedication to the rule of law, as long as the judge: (1) is personally disinterested in the outcome of the case; (2) exercises "cleansed" personal judgment; and (3) makes decisions by finding the point of equilibrium between the creative forces and the restraining forces at play in the case. Although the choice is initially the judge's, this process transforms the judge's decision into the judgment of the court—the choice that has been exercised by judges throughout our common-law heritage.

Finally, we have seen how Justice Traynor discharged his judicial responsibility in our common-law system. In *Vogel* and *Benson*, and in a number of other cases, he replaced what he could of the fragmented, patchwork quilt of mens rea law we inherited from earlier times with a modern body of doctrine that protected the interests of both society and the accused in an integrated, rational, elegant way. In *Washington* he curtailed the function of the felony-murder rule, insofar as statutory law permitted him to do so, by trimming it to fit more closely the pattern of our law that distributes punishment according to the moral culpability of the offender. And in *Pierce* he restored "the grace of coherent pattern" \(^{543}\) to our

\(^{541}\) *Id.* at 12.
\(^{542}\) Traynor, Transatlantic, supra note 275, at 283.
\(^{543}\) See Traynor, Reasoning, supra note 112, at 742.
criminal law by removing material that offended us and no longer served our goals for the criminal law.

Whenever the forces of creativity outweighed the forces of repose, Justice Traynor created new substantive criminal law throughout the second and third decades of his judicial career. During these years, the common law of crimes thrived in California in large part because of Roger Traynor's work on the California Supreme Court. His labors establish him as one of the most important judges in the history of American law. His opinions also establish him as a leader of the modern renaissance in substantive criminal law.