

Justice Traynor and the Law of Contracts

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In his twenty years on the Supreme Court of California Justice Roger J. Traynor has become one of the country's best known state judges. A number of his contracts opinions have been exhibited as prize specimens in casebooks and have been the subject of discussion in the law reviews. His work in contracts excites all this academic interest because he is willing, perhaps even eager, to strike out in new directions, overturning and modifying old rules and establishing new ones. A critical review of Justice Traynor's work in this area is appropriate at this time, since the innovations of a famous judge tend to influence the development of the law far beyond the boundaries of his own state.

The work of such an innovator can best be appraised by asking what he is trying to accomplish by his lawmaking and then considering the appropriateness of his goals. Unfortunately for easy analysis, Justice Traynor has not explained his design for California contract law fully.¹ As a result, one must pull his goals out of

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1. Justice Traynor's contracts opinions cannot always be taken at face value. Some are ingeniously technical and legalistic with almost no hint of the reasons for all the virtuosity. See, e.g., *Drennan v. Star Paving Co.*, 51 Cal.2d 409, 333 P.2d 757 (1958). Others simply avoid arguing the difficult policy or technical points. See, e.g., *D. L. Godbey & Sons Constr. Co. v. Deane*, 39 Cal.2d 429, 246 P.2d 946 (1952). Some clearly disclose his goals. See, e.g., *Ward v. Taggart*, 51 Cal.2d 736, 336 P.2d 534 (1959). However, his law review articles are more revealing and indicate that he is very concerned with questions of purpose and means. See *Badlands in an Appellate Judge's Realm of Reason*, 7 UTAH L. REV. 157 (1960); *Fact Skepticism and the Judicial Process*, 106 U. PA. L. REV. 635 (1958); *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211 (1957); *Unjustifiable Reliance*, 42 MINN. L. REV. 11 (1957); *Law and Social Change in a Democratic Society*, 1959 U. ILL. L.F. 230.

The Justice's reticence is perhaps explicable on two grounds. First, he is only one of seven judges on the Supreme Court of California, and he needs at least three concurring votes for effective action. His colleagues may prefer legalism to blunt consideration of policy. It is interesting to note that in several cases—*Peterson v. Lamb Rubber Co.*, 54 Cal.2d 339, 350, 353 P.2d 575, 583, 5 Cal. Rep. 863, 871 (1960) (concurring opinion); *Trust v. Arden Farms Co.*, 50 Cal.2d 217, 236-37, 324 P.2d 583, 594-96 (1958) (separate opinion); *Gordon v. Aztec Brewing Co.*, 33 Cal.2d 514, 530-33, 203 P.2d 522, 532-39 (1949) (concurring opinion); *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 461-68, 150 P.2d 436, 440-44 (1944) (concurring opinion)—Justice Traynor has advocated imposing absolute liability on manufacturers for injuries caused by their products rather than having liability turn on negligence. In these opinions he has been most candid about the policy choices involved. The Supreme Court of California has come within an inch of adopting absolute liability in effect by embracing a sweeping *res ipsa loquitur* doctrine. Yet none of his colleagues has joined in his position or even debated the policy issues involved. On the other hand, in *Drennan v. Star Paving Co.*, *supra*, Justice Traynor wrote an opinion which in effect imposes absolute liability on subcontractors for mistakes in bids even though the bid was withdrawn before acceptance by the general contractor. The

his opinions and writings, seeking clues in the pattern of positions he accepts or rejects either explicitly or implicitly. Of course, the danger of reading too much into this material is great, and it would be most surprising if Justice Traynor would agree with all my conclusions as to his purposes. It is necessary first to consider the ends a lawmaker might try to achieve through contract law and then to look for the pattern of choices, if any, that emerges from Justice Traynor's opinions in this area. After this is done, the question of appropriateness remains.

I. THE FUNCTIONS OF CONTRACT LAW

It is helpful at the outset to set up some tentative categories of goals and means of implementing them that a judge or legislator might seek to attain through contract law.² An important goal in this society is the achievement of the best balance of economic freedom and order. We seek the best proportion of (a) individual and corporate freedom to make choices in the market to (b) governmental action to promote general economic welfare.³ Contract law reflects this problem of proportioning.⁴ Clearly, contract is a legal device primarily designed to support the market institution; yet it shows as well the impact of ideas of economic planning and control apart from the market process. Further, within both the market and nonmarket sectors divergent policies, or strategies of reaching these goals, are sometimes pursued.

More particularly, it is a commonplace that contract law serves to support the market system, but one can isolate usefully at least

opinion involved matchless legalistic argument but shunned any policy discussion. All six of Justice Traynor's colleagues joined in this opinion.

The second reason for the Justice's technical emphasis to the exclusion of policy discussion is time pressure. Justice Traynor sits on a busy court, see Traynor, *Some Open Questions on the Work of State Appellate Courts*, *supra* at 215, and neither lawyers nor law teachers have offered much help to judges in determining the consequences of possible decisions in contract matters or the values these consequences are to be judged by.

Even though one can explain the several levels of meaning in a Traynor opinion in this way, whether or not his practice is justified is another difficult question and beyond the scope of this article. See LLEWELLYN, *THE COMMON LAW TRADITION* 135 (1960), for one view. See also Walton Hamilton's comments on Mr. Justice Brandeis' opinions. Hamilton, *The Jurist's Art*, 31 COLUM. L. REV. 1078-84, 1088-89 (1931).

2. The goals and means suggested here are a development of the position taken in Macaulay, *Restitution in Context*, 107 U. PA. L. REV. 1133, 1140-46 (1959).

3. "The most general objective of policy in our democratic society is twofold—freedom with order But the nature of the problem comes out as soon as we ask, how much freedom and in what connections and how much order and how it is to be achieved and maintained 'in a changing world.'" Knight, *Economic Objectives in a Changing World*, in *ECONOMICS AND PUBLIC POLICY* 49, 50 (1955). See also Stigler, *Prometheus Incorporated: Conformity or Coercion*, in *SOCIAL CONTROL IN A FREE SOCIETY* 77 (Spiller ed. 1960); Riesman, *Some Observations on Law and Psychology*, 19 U. CHI. L. REV. 30, 43 (1951).

4. See KESSLER & SHARP, *CASES ON CONTRACTS* 1-9 (1953).

three not always consistent policies concerning how that support ought to be given. *The self-reliance policy* dictates that courts should support the market by leaving it alone as much as possible. Wherever a rational economic man could have protected himself or made a choice the court should not protect the individual or make a choice for him. Responsibility is developed by giving it to individuals and making them take the consequences. If people behave rationally and responsibly, the market will work without disruption as people will either cover possible losses or take them. Common examples of this policy are the doctrine of *caveat emptor*, the rule imposing a heavy responsibility to check all representations for accuracy, and the dogma that courts do not make contracts for the parties.

The transactional policy calls for courts to support the market by taking action to carry out the *particular* transaction brought before them. The court should discover the bargain that was made and enforce it. If this discovery is not possible, the court should work out a result involving the least disruption of plans and causing the least amount of reliance loss in light of the situation at the time of the dispute. The market is supported by transactional policy because the legal system is directed to seek the result which best solves the problem in the particular case in market terms. A court following this policy will be eager to look at all the "legislative history" of a written contract and will confine or overturn rules which let people back out of bargains or disrupt plans.

Finally, *the functional policy* calls for the lawmaker to create generally applicable rules which facilitate bargaining by producing a system or structure in which exchanges can take place. Rules should be adopted which aid quick and rational bargaining and allow the parties to consider the impact of contract law in their planning. The courts should not seek the best result case-by-case since predictable law is a more important means of supporting the market. Most functional rules fill in gaps left in making contracts, or draw lines indicating when reliance will be protected or when a contract has been performed, and the like.

In sum, transactional policy calls for a case-by-case approach, and functional policy the creation of generally applicable rules.⁵ Of course, these are only extreme points on a scale useful for analysis. Few, if any, decisions turn on either an application of a general

5. See HURST, *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* 130-37 (1960), on the "creative tension" between the particular and the general in law.

rule to facts with no judicial choice involved or on an application of pure discretion unfettered by any standard.⁶ It is the tendency in either the direction of rules to promote individual planning or discretion to reach good results which is significant in the analysis presented here.

As in the case of the market-oriented policies, the strategies designed to promote general economic welfare through social control can be divided into the particular and the general. *The relief-of-hardship policy* calls for courts to let one party out of his bargain in exceptional cases where enforcement would be unduly harsh, or, where the content of the bargain is in doubt, to place the burden on the party best able to spread the loss or absorb it. This case-by-case approach is based not on considerations of market functioning but on ethical ideals and emotional reactions to the plight of the underdog, to pressing an advantage too far, to making undue profit, or to inequality of resources.⁷ It is reflected in some aspects of the impossibility-of-performance doctrine, of the certainty and foreseeability limitations on contract damages, of the requirement of mutuality of performance, and of the application of many other devices which let bargainers out of contracts.

The economic planning policy is the other nonmarket strategy and the one calling for generalized rules to promote economic welfare. This policy is something of a catchall as these goals can range from wealth redistribution to regulation of particular industries or types of transactions. The most obvious examples involve a change in the market context by removing certain types of bargains from the kinds which will be legally enforced or by requiring particular terms in some bargains. More subtly the policy may shape the construction of contracts in desirable directions or affect other general rules.

A great deal of overlap among these policies is possible. A particular result may be justified by reference to several different policies, both market and nonmarket in orientation. For example, in the typical employment contract the employee must work before the employer must pay for the service—the employer's duty to pay is constructively conditional on the employee's performance.⁸ One could justify this rule by reference to the market-oriented func-

6. See LLEWELLYN, *THE COMMON LAW TRADITION* 11-16 *passim* (1960). The analytical device used in this article was suggested by the work of Max Weber. See BENDIX, *MAX WEBER: AN INTELLECTUAL PORTRAIT* 405 n.55, 427, 431 (1960).

7. See Macaulay, *supra* note 2, at 1144 n.33.

8. RESTATEMENT, *CONTRACTS* § 270 (1932).

tional policy. It is likely that the result accords with the tacit assumptions of the parties because of well-established custom,⁹ and courts have adopted such a rule to fill the gap in the agreement. While the parties are free to contract differently, bargaining is facilitated if they need not bother to spell out such things. On the other hand, one can see here some economic planning. Employers as a class are probably better credit risks than employees paid in advance.¹⁰ Moreover, employers are more likely to be performing an entrepreneurial function, and in one view this risk taking and coordination is important enough to the general economic welfare to justify favoring the employer. Even though this overlap of policies exists, the classification suggested here may have utility. It serves to clarify the issues and separates distinct arguments so that they reinforce each other rather than confuse the issue. It also may serve as a checklist to avoid neglecting relevant arguments.

FIG. 1 — AN ANALYSIS OF CONTRACT POLICY

GOALS	MEANS
Support of the market institution	1. <i>The self-reliance policy.</i> The legal system should take minimum action, as bargainers must protect themselves.
	2. <i>The transactional policy.</i> The legal system should seek the best resolution of particular disputes in terms of minimizing disruption of plans and reliance loss, on a case-by-case basis.
	3. <i>The functional policy.</i> The legal system should create general rules designed to promote market functioning.
Social control to achieve economic welfare	1. <i>The relief-of-hardship policy.</i> The legal system should grant relief from unduly harsh obligations and allocate losses to the party who can best spread or absorb them, on a case-by-case basis.
	2. <i>The economic planning policy.</i> The legal system should adopt general rules which promote economic welfare apart from supporting the market system.

However, the policies listed can point to conflicting results. Obviously, the transactional and relief-of-hardship policies will always be difficult to reconcile. Where such a policy conflict is present, a choice must be made which should turn on the law-

9. *Id.* comment a.

10. See Patterson, *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 903, 919-20 (1942).

maker's views as to the weight to give market and nonmarket goals and the various means of attaining these goals. In this situation the classification should sharpen the issues. Yet the classification does not tell anyone when one policy ought to prevail over another. This remains in the realm of value judgments.¹¹

II. JUSTICE TRAYNOR'S CONTRACTS DECISIONS

Most of Justice Traynor's approximately fifty-six contracts opinions¹² are market-oriented, as one would expect in view of the major purposes of contract law. He gives a remarkably high priority to supporting the market through the transactional policy, seeking the best result in market terms in each case. Of course, transactional policy is built into much of contract law as it is administered by all judges, but a significant chunk of orthodox contract doctrine is inconsistent with upholding particular transactions and minimizing disruption of plans and reliance loss—prime examples are much of the consideration doctrine¹³ and the Statute of Frauds.¹⁴ What makes Justice Traynor's emphasis on the transactional policy worth comment is his reengineering of contract doctrine which overturns bargains. When he is finished reshaping this kind of rule, it will overturn very few transactions.

The other strategies for supporting the market are not employed too often. Only a few of Justice Traynor's contracts decisions seem based on functional policy. He seems unwilling to create many general rules which would interfere with a case-by-case approach. Relatively few of his opinions merely follow established rules. Also, there is no clear example of the self-reliance policy to be found in his contracts decisions, and many of them reach results directly contrary to those called for by this policy.¹⁵

Even though Justice Traynor's positions in bargaining situations often can be explained in nonmarket social control terms, such explanations are almost always secondary and only reinforce market-

11. "Ideals are not unitary, they conflict; and the problem is to secure the best balance and compromise, for which there is no simple formula; it is a matter of judgment." Knight, Book Review, 39 VA. L. REV. 871, 875-76 (1953). See also Hempel, *Science and Human Values*, in SOCIAL CONTROL IN A FREE SOCIETY 39, 51 (Spiller ed. 1960).

12. The total depends on what one calls a "contracts opinion." I have included several typically classified as "tort" or "restitution" but which relate to bargaining.

13. See, e.g., Sharp, *Pacta Sunt Servanda*, 41 COLUM. L. REV. 783 (1941).

14. See, e.g., Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?*, 59 YALE L.J. 821, 829 (1950); Comment, *The Statute of Frauds and the Business Community: A Re-Appraisal in Light of Prevailing Practices*, 66 YALE L.J. 1038 (1957).

15. See, e.g., Hefferan v. Freebairn, 34 Cal.2d 715, 214 P.2d 386 (1950); Industrial Indem. Co. v. Industrial Acc. Comm'n, 34 Cal.2d 500, 507, 211 P.2d 857, 860 (1949) (concurring opinion); Security-First Nat'l Bank v. Earp, 19 Cal.2d 774, 122 P.2d 900 (1942); Seeger v. Odell, 18 Cal.2d 409, 115 P.2d 977, 136 A.L.R. 1291 (1941).

oriented ones. Yet a few of his positions may be grounded on the relief-of-hardship or economic planning policies.

The cases will be considered in the order indicated: (A) Those carrying out the two market-supporting policies found in his opinions, (1) the transactional and (2) the functional. (B) Those carrying out the policies of social control, (1) relief-of-hardship and (2) economic planning.

A. Decisions Supporting the Market Institution

1. *Decisions Carrying Out Transactional Policy.* The bulk of Justice Traynor's contracts decisions are based primarily on the policy of upholding particular transactions and minimizing disruption and reliance loss. Examples will be taken from the Justice's work in two of the most common contract problem areas: construing the language of written documents, and applying statutory requirements that certain contracts be in writing to be enforceable.¹⁶ All of the cases discussed involve somewhat unorthodox positions in the service of transactional policy; many of them involve rather unsympathetic treatment of rules which carry out functional policy.

Justice Traynor's approach to construing contracts is to seek the best result for the particular transaction before him in terms of protecting the economic plans of the parties. Initially one can note that he believes that the Supreme Court of California should play an important role in construing written agreements and should give only minimum deference to the work of the lower court or jury.¹⁷ Where there are no disputed facts he would have the appellate court independently map out the boundaries of the contract.¹⁸ Even where there are disputed facts, he would have the appellate court exercise a great deal of control.¹⁹ He acknowledges the supremacy of the trier of fact where the issue is purely one of

16. See Shepherd, *Contracts in a Prosperity Year*, 6 STAN. L. REV. 208, 226, 227-28 (1954).

17. See Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 220-24 (1957).

18. *Trubowitch v. Riverbank Canning Co.*, 30 Cal.2d 335, 182 P.2d 182 (1947); *Stanley v. Columbia Broadcasting System, Inc.*, 35 Cal.2d 653, 672, 221 P.2d 73, 84, 23 A.L.R. 216, 233 (1950) (dissenting opinion); *Quader-Kino A.G. v. Nebenzal*, 35 Cal.2d 287, 297, 217 P.2d 650, 656 (1950) (dissenting opinion); *Estate of Rule*, 25 Cal.2d 1, 17, 152 P.2d 1003, 1011, 155 A.L.R. 1319, 1331 (1944) (dissenting opinion).

19. See *Union Oil Co. of Cal. v. Union Sugar Co.*, 31 Cal.2d 300, 188 P.2d 470 (1948); *Garrison v. Edward Brown & Sons*, 25 Cal.2d 473, 154 P.2d 377 (1944); *Estate of Rule*, *supra* note 18.

credibility,²⁰ but in practice Justice Traynor reviews all the evidence relevant to the construction of the contract before him.²¹ He is not content to search for any scrap or possible inference which might support the judgment below. His colleagues tend to favor a more traditional appellate role, and many of his views are expressed in dissents.²²

This expanded role for the appellate court is consistent with transactional policy and a case-by-case approach.²³ If the legal system errs in construing a contract, the victim of the error will lose rights he counted on or suffer a new and unexpected obligation. Thus the appellate court should try to catch any mistake made by the lower court. Moreover, a trial judge can hide in an interpretation of the language of a contract his view that a harsh liability ought not be imposed or that general economic welfare will be served by overturning the bargain the parties made. In tort or criminal cases we may want to allow the trier of fact covertly to modify out-of-date rules of law to reflect present community values by means of the power to find facts and draw inferences.²⁴ In the contracts area this is done at the cost of defeating expectations, and if the appellate court does not wish to adopt counterpolicies cloaked in the garb of construction it must be wary.

Not only does Justice Traynor's assertion of appellate power to construe contracts carry out transactional policy, but the methods he uses to construe contracts do so as well. If one seeks to minimize disruption of economic plans, he must have ways of discovering

20. *Royer v. Carter*, 37 Cal.2d 544, 233 P.2d 539 (1951); *Earl v. Saks & Co.*, 36 Cal.2d 602, 613, 226 P.2d 340, 347 (1951) (dissenting opinion); *Eastman Oil Well Survey Corp. v. Lane-Wells Co.*, 21 Cal.2d 872, 136 P.2d 564 (1943).

21. See, e.g., *Farmiland Irr. Co. v. Dopplmaier*, 48 Cal.2d 208, 308 P.2d 732, 66 A.L.R. 2d 590 (1957); *Palmtag v. Danielson*, 30 Cal.2d 517, 183 P.2d 265 (1947); *Haigler v. Donnelly*, 18 Cal.2d 674, 117 P.2d 331 (1941).

22. E.g., *Estate of Rule*, 25 Cal.2d 1, 17, 152 P.2d 1003, 1011, 155 A.L.R. 1319, 1331 (1944) (dissenting opinion).

23. Of course, an expanded role for the appellate court is consistent with the pursuit of any policy by that court. For example, legislatures are writing more and more compulsory contracts, such as standard form insurance policies, as an expression of the economic planning policy. See W. FRIEDMANN, *LAW IN A CHANGING SOCIETY* 105-9 (1959). If the construction of such contracts is centralized in one court, the legislature or the appropriate administrative agency can follow the operation of its statute and enact any necessary changes more easily than if this task of construction is done by many courts. Moreover, centralization will avoid conflicting constructions. See *Estate of Rule*, *supra* note 22, at 18, 152 P.2d at 1012, 157 A.L.R. at 1331. However, Justice Traynor has used this power to find facts, in the service of transactional policy.

24. "At present, triers of fact can achieve a rough justice by circumventing rules long out of tune with community values while appearing to enforce them, letting legally irrelevant considerations prevail over the facts presented or passively accepting an incomplete presentation." Traynor, *Fact Skepticism and the Judicial Process*, 106 U. PA. L. REV. 635, 638 (1958).

the bargain the parties made and of dealing with cases where this cannot be done, as, for example, where they failed to consider the point in issue or where they held different impressions as to what they had agreed. Justice Traynor is eager to look at all the facts relevant to the bargaining situation and is impatient with a literal four-corners-of-the-document approach. Where it is unlikely that the parties reached real agreement on the point in issue, he balances the degrees of disruption of planning which alternative constructions would cause. His approach is more like modern statutory construction than traditional contract interpretation.

Justice Traynor is not a great admirer of the parol evidence rule insofar as it would keep him from looking at all the facts relevant to a bargaining situation. Just as he is unwilling to be confined by a lower court's construction, he is also unwilling to be confined by a written document in seeking the parties' bargain. He has quoted with approval Professor Corbin's minimal definition of the parol evidence rule:

Any contract, however made or evidenced, can be discharged or modified by subsequent agreement of the parties. No contract, whether oral or written, can be varied, contradicted, or discharged by an antecedent agreement. Today may control the effect of what happened yesterday; but what happened yesterday cannot change the effect of what happens today. This, it is believed, is the substance of what has been unfortunately called the "parol evidence rule."²⁵

Moreover, Justice Traynor has attacked the rule that a court cannot consider extrinsic evidence unless the written contract is "ambiguous" on its face.²⁶ In dissenting opinions he has argued that this rule "simply means that the language used by the parties must be susceptible to the meaning claimed to have been intended by the parties."²⁷ Extrinsic evidence should be admissible whether or not the words appear ambiguous to the reader.

The Justice does not take a literal approach in dealing with the text of a document. One who seeks to find the actual agreement of the parties cannot have too much faith in a dictionary unless the bargain is between its coeditors. In *Trubowitch v. Riverbank Can-*

25. 3 CORBIN, CONTRACTS § 574 (1950), quoted in *Hotle v. Miller*, 51 Cal.2d 541, 546, 334 P.2d 849, 851 (1959).

26. See *Laux v. Freed*, 53 Cal.2d 512, 525, 348 P.2d 873, 880, 2 Cal. Rep. 265, 272 (1960) (concurring opinion); *Estate of Rule*, 25 Cal.2d 1, 17, 152 P.2d 1003, 1012, 155 A.L.R. 1319, 1331 (1944) (dissenting opinion). See also *Union Oil Co. of Cal. v. Union Sugar Co.*, 31 Cal.2d 300, 305-6, 188 P.2d 470, 473-74 (1948).

27. *Estate of Rule*, 25 Cal.2d 1, 22, 152 P.2d 1003, 1013, 155 A.L.R. 1319, 1331 (1944) (dissenting opinion).

ning Co.,²⁸ a corporation made a contract to purchase 3,900 cases of tomato paste from the defendant. The agreement was made on a trade association form which provided: "This contract is not assignable. . . ." The buyer corporation was dissolved after the contract was made but before defendant had performed and the assets of the dissolved corporation, including the contract with the defendant, were transferred to its stockholders who continued the business as partners. The partners sought to enforce an arbitration agreement in the contract with the defendant when it failed to complete delivery, but the trial court dismissed their petition because the partners could not own any rights under an unassignable contract. Justice Traynor wrote the majority opinion in a four-to-three decision reversing the judgment. Of course, there had been an attempted assignment from the buyer corporation to its shareholders and the language of the contract literally prohibited assignments. However, Justice Traynor held that if an assignment results only from a change in the legal form of ownership of a business, and, as here, does not affect the interests of the party protected by the nonassignability of the contract, the assignment is not of the type contemplated in the contract "as properly construed." The defendant could not resort to a dictionary to back out of the transaction.²⁹

Both Justice Traynor's impatience with the parol evidence rule and his willingness to look beyond the "plain meaning" of words implement transactional policy and involve a tacit rejection of the functional policy's dictate that written records be treated cautiously and with respect so that they may be relied on by businessmen. Put briefly, one who seeks to uphold transactions and minimize the disruption of economic plans in particular cases cannot be overly preoccupied with what the parties have written, or what is printed on a form which they have signed, until the care, foresight, and verbal facility of the general population increases drastically.

A common troublesome experience in construing contracts is the discovery that it is highly unlikely that, at the time they made the contract, the parties ever thought about the issue now brought before the court. In such cases Justice Traynor's goal is to minimize serious disruption of economic plans by seeking to carry out as far

28. 30 Cal.2d 335, 182 P.2d 182 (1947).

29. See Note, *Effect of Corporate Reorganization on Nonassignable Contracts*, 74 HARV. L. REV. 393 (1960).

as possible both parties' reasons for entering the contract. A recurrent theme in his opinions is that unusual and unreasonable risks must be shifted to the other party rather clearly in the contract or they remain with the bargainer who had them in the first place.³⁰ In other words, after a risk has materialized into a loss one party should not be able to push it on the other by ingenious work with the language of the agreement. Then too, Justice Traynor appears to balance the disruption of plans which would be caused by one construction against that following from another in arriving at a decision.³¹

One of the many examples of Justice Traynor's approach to situations where it is doubtful that the parties at the time of bargaining had considered the issue before the court is *Foley v. Sonoma Ins. Co.*,³² a case interpreting an exclusion of risk clause in an insurance policy. It is common practice in drafting insurance policies to cover a broad risk at the beginning of the policy but to shift certain risks back to the insurance buyer by means of exclusions stated later. In the *Foley* case a fire insurance policy covered a couple's house but provided that the insurance company would not be liable for losses if the house were "unoccupied beyond the period of ten consecutive days." The couple left their house to visit married daughters who lived in two other cities. They had been gone thirteen days when a fire destroyed their house. The company contended it was not liable since the house was "unoccupied beyond . . . ten consecutive days." Justice Traynor rejected the insurer's definition of the word "occupied" and found the company liable.

30. See, e.g., *Globe & Rutgers Ins. Co. v. Airborne Flower*, 49 Cal.2d 38, 44, 314 P.2d 741, 744 (1957) (dissenting opinion); *Gelhaus v. Nevada Irr. Dist.*, 43 Cal.2d 779, 278 P.2d 689 (1955); *Palmtag v. Danielson*, 30 Cal.2d 517, 183 P.2d 265 (1947); *Estate of Rule*, 25 Cal.2d 1, 17, 152 P.2d 1003, 1011, 155 A.L.R. 1319, 1331 (1944) (dissenting opinion).

31. See, e.g., *Farmland Irr. Co. v. Dopplmaier*, 48 Cal.2d 208, 308 P.2d 732, 66 A.L.R. 2d 590 (1957); *Gelhaus v. Nevada Irr. Dist.*, *supra* note 30; *Beck v. West Coast Life Ins. Co.*, 38 Cal.2d 643, 241 P.2d 544, 26 A.L.R.2d 979 (1952); *Quader-Kino A.G. v. Nebenzal*, 35 Cal.2d 287, 297, 217 P.2d 650, 656 (1950) (dissenting opinion); *Industrial Indem. Co. v. Industrial Acc. Comm'n*, 34 Cal.2d 500, 507, 211 P.2d 857, 860 (1949) (concurring opinion); *Culley v. New York Life Ins. Co.*, 27 Cal.2d 187, 163 P.2d 698 (1945).

Constructing contracts thus involves two steps: The first is to determine the agreement on the particular point, if any, which the parties actually made. This establishes one criterion of expectations and reasonable reliance. The second step is to look at the transaction at the time of the dispute and determine the "best" result at that time. Transactional policy deems the "best" result to be the one which least disrupts the plans then developed and least causes reliance loss as the situation then stands. Other policies would lead to other "best" results at this point. For example, the economic planning policy might call for a construction favoring one bargainer if he belonged to a group which it was desirable to favor even though this would disrupt plans and cause reliance loss. On this process of construction see *Parev Products Co. v. I. Rokeach & Sons, Inc.*, 124 F.2d 147 (2d Cir. 1941).

32. 18 Cal.2d 232, 115 P.2d 1 (1941).

He asserted that the term "occupied" required only the habitual reoccurrence of the owner's presence in the house which had been satisfied under the facts of the case.

It is difficult to ascertain the actual bargain of the parties in the *Foley* case as it is unlikely the insured couple and the agent ever considered the occupancy exclusion or the meaning of the term "unoccupied." Moreover, it is even possible that the Sonoma Insurance Company itself had never considered the question since its policy was a standardized form which it did not draft.³³ Justice Traynor's result furthers transactional policy by not unduly disrupting the planning of the insurer and by achieving the purposes of the insured couple. The result does not seriously prejudice the insurer's interest. The exclusion is in the policy because larger risks of serious fire damage are posed by houses where no one is present than houses where someone is always present. A person in the house can report fires or put them out. Yet the company took some risk of not having anyone on hand to deal with fires since the house could be "unoccupied," whatever meaning is given to that term, for ten days. The ten day cutoff is an arbitrary one since it would be hard to explain taking just ten days' risks and no more or no less. Moreover, the insured couple could have satisfied the company's definition of occupancy without significantly lessening the risk by merely returning to their house for an afternoon after they had visited one daughter before they went to see the other. All the company's exclusion assured it of in all cases, even under its own definition equating occupancy with presence, was that the house would not be abandoned for an unreasonably long period. Justice Traynor's broader definition equating occupancy with habitual reoccurrence of presence gives the insurer this protection.³⁴

It is likely that Justice Traynor's construction upheld the understanding of the insured couple. They thought they had fire insurance, and they had no reason to know they could not take normal trips away from home. The two week vacation, or a longer one, is

33. *Id.* at 234, 115 P.2d at 2.

34. One might infer from subsequent history that the insurer's interests were reasonably well protected by the result of the *Foley* decision. The present standard form of fire insurance policy for California provides that the company shall not be liable for loss occurring "while a described building . . . is vacant or unoccupied beyond a period of 60 consecutive days . . ." CAL. INS. CODE § 2071. The same language appears in the Standard Fire Insurance Policy adopted in at least thirty-one other states. American Mut. Alliance, "Insurance Study Kit" (1958-1959 ed.). The reasoning of the *Foley* decision may not give adequate recognition to the insurer's interest under the new standard provision. Suppose the facts of the *Foley* case reoccurred except that the new provision was in the policy and the couple stayed away from home sixty-three days.

something of an American custom. Trips of this duration to visit relatives or friends also are common. One could say that the insurer's construction allowing owners to leave their houses for only ten days runs counter to the folkways of our mobile society and therefore the likely assumptions of the insured. The increased risk of fire, and thus a likely exclusion of liability, would not be nearly as obvious as, for example, if they had stored gasoline on the premises. Finally, "occupied" is not a precise word, and it did not serve to shift this risk back to the insured clearly. As a result the risk of fire remains with the insurer who accepted it.

While the *Foley* case can be explained this way on transactional grounds, one seeing the familiar picture of an insurance company losing a lawsuit involving the construction of policy language might conclude instead that the case represents no more than a view of the general economic welfare held by some which finds redistribution of the wealth of insurance companies desirable. Alternatively, one might contend that the case was grounded on the functional policy and really was an attempt to induce insurance companies to explain their policies thoroughly and thereby promote better informed bargaining. However, Justice Traynor's transactional orientation becomes clearer when we consider another of his opinions construing an asserted exclusion in an insurance policy, *Volf v. Ocean Acc. & Guar. Corp.*³⁵ This time the insurance company wins since its interest outweighs the insured's, a result inconsistent with the purpose of wealth redistribution or coerced clarity of policy language.

In *Volf*, a general contractor used defective cement in applying stucco to a house. When the stucco cracked, a state administrative board ruled that the contractor had to apply a new coat to the building. This was done and the contractor then sought to recover the cost of the wasted labor and materials from his insurer under his manufacturers' and builders' comprehensive liability policy, which provided that the insurer was: "To pay . . . all sums which the insured shall become legally obligated to pay . . . because of injury to or destruction of property, including . . . the loss of use thereof, caused by accident."³⁶ However, the policy was not to apply to "injury to or destruction of . . . goods . . . sold . . . by . . . insured, or work completed . . . out of which the accident

arises. . . ."³⁷ In negotiating with his insurance agent the contractor had said he wanted "full coverage as far as materials and workmanship"³⁸ were concerned. Yet there was no discussion of the particular risks which were fully covered. The contractor's wife testified that there was no reference to a situation where a job had to be replaced "because we never had the need of it. We didn't think anything like that would come up."³⁹ Cost was a factor in these negotiations.

There are two plausible ways of reading the exclusion in the context of the *Volf* case. Justice Traynor wrote an opinion reversing a judgment for the general contractor, stating that the contractor was seeking protection for the very thing specifically excluded—"injury to . . . work completed" He further noted that there was no evidence that the contractor thought he was covered against losses in replacing or repairing his own work, and facts had not been alleged calling for reformation of the policy. Justice Carter, in a dissent,⁴⁰ disagreed. He argued that the exclusion of "injury . . . of . . . work completed . . . out of which the accident arises" could be taken to refer only to the defective cement since the trial court found that the accident arose out of its use. The rest of the first coat of stucco then would be outside the exclusion and thus covered. Justice Carter also relied on the rule that exclusions should be strictly construed against the insurer—a variant of the requirement that unusual or unreasonable risks be shifted clearly.

The exclusion, as Justice Traynor read it, makes sense from an insurance standpoint. Its effect is to make the manufacturer or contractor stand its own replacement and repair losses while the insurer takes only the risk of injury to other property. For example, suppose in the *Volf* case the contractor had to remove the defective stucco and this could not be done without damaging the structure of the house. The injury to the house would be covered, but the loss caused by having to remove the defective stucco would not be. This distinction is significant. Replacement and repair costs are to some degree within the control of the insured. They can be minimized by careful purchasing, inspection of material, quality control and hiring policies. If replacement and repair costs were covered,

37. *Ibid.*

38. *Id.* at 376, 325 P.2d 989.

39. *Ibid.*

40. *Id.* at 377, 325 P.2d 990.

35. 50 Cal.2d 373, 325 P.2d 987 (1958).

36. *Id.* at 374, 325 P.2d at 988.

the incentive to exercise care or to make repairs at the least possible cost would be lessened since the insurance company would be footing the bill for all scrap. Replacement and repair losses tend to be more frequent than losses through injury to other property, but replacement and repair losses are limited in amount since the greatest loss cannot exceed the cost of total replacement. If the insured will stand these losses, insurance can be provided more cheaply since the company will be freed from administering many small claims for repairs, and it can set a rate for the more unusual risk of injury to property other than the contractor's work or product. This risk can be the hazardous one since there are no natural limitations on the damage the contractor might do to a homeowner's or a neighbor's property.

Furthermore, the insured contractor's expectations in the *Volf* case are difficult to establish. In the *Foley* case we could be reasonably confident that the insured couple thought their house was protected by fire insurance and that they would not be alerted to the unusual restriction on taking vacations lasting more than ten days. However, such confidence in the contractor's expectations is hard to come by. We know from the contractor's wife's testimony that they did not talk to the insurance agent about coverage for replacement and repair losses "because we never had the need of it." It is possible to conclude that such coverage was not a reason for buying the policy when this testimony is coupled with the probability that the policy was purchased primarily to avoid the impact of large personal injury claims which typically far exceed any property damage claim. Furthermore, cost was a factor. One can speculate that the contractor would not have paid the extra premium to cover replacement and repair losses had the issue been discussed. He had not been required to replace work in the past and probably did not expect to do so in the future. Moreover, a good quality control program would have made more sense than insurance because it would have cost less and avoided losses rather than merely provided indemnity.

Justice Carter was more impressed with the merit of the insured contractor's expectations, and if he was right on this question of judgment, his construction of the exclusion would carry out transactional policy better than Justice Traynor's. On the other hand, in a later decision involving the same language in a manufacturers' and builders' comprehensive liability policy, Justice Carter suggest-

ed that a decision against the insurer in the *Volf* case would have caused insurance companies to clarify their policies so businessmen could understand the coverage they were buying and consider whether more was needed.⁴¹ This is an argument that the market ought to be supported through functional policy. Also one might support Justice Carter's reading of the exclusion on the ground that small businessmen ought to have replacement and repair losses covered as this will protect them from economic hardship—an economic planning policy contention.

The significant points about the *Volf* case are that Justice Traynor was not impressed by these functional or economic planning arguments and that he is willing to decide a case in favor of an insurance company where, in his judgment, its interest outweighs that of the insured. This willingness is consistent with transactional policy.⁴²

Dealing with statutes which require certain contracts to be in writing occupies almost as much of a judge's time as construing written contracts. As one would expect, California has a typical Statute of Frauds,⁴³ but there is section 1698 of the Civil Code as well. It provides "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." Most legislation calling for written contracts turns on the functional policy and the importance of written records for market operations. Yet, despite this importance and such legislation, people often deal on the basis of a man's word, by a handshake or by a telephone conversation. When these oral promises are broken economic plans

41. *Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co.*, 51 Cal.2d 558, 566, 334 P.2d 881, 886 (1959) (concurring opinion).

42. It is also consistent with policies as diverse as self-reliance—the contractor should have protected himself—and economic planning—insurance companies' rational calculation of risks should be fostered. Yet the *Volf* case fits into a pattern of transactional policy decisions while no other policy pattern emerges.

Another striking example of an expression of transactional policy where the parties when they bargained failed to consider the disputed issue is *Bewick v. Mecham*, 26 Cal.2d 92, 156 P.2d 757, 157 A.L.R. 1277 (1945) (Traynor, J.). The *Bewick* case involved the failure of a contractual provision for determining the price in a lease granting the tenant an option to purchase the property. Under the provision the tenant and the lessor each were to name an appraiser. The two appraisers were to name a third. The lessor refused to name his appraiser. The tenant had invested \$13,500 in improvements and probably built up a great deal of business goodwill at the location. Justice Traynor, in affirming a judgment for the tenant, said that the court could ascertain a fair price at which the lessor would have to sell to the tenant. The result is contrary in philosophy to the older common-law view which stressed that the lessor had agreed to sell at a price determined by a group of appraisers in which his nominee would have some voice and had not agreed to sell at a court's notion of a fair price. See *Milnes v. Gery*, 14 Ves. 400, 9 Rev. R. 307, 6 Eng. Rul. Cas. 684 (High Ct. Ch. 1807). Justice Traynor was willing to "write a contract for the parties" to avoid disrupting plans and causing reliance loss.

43. CAL. CIV. CODE §§ 1624, 1624a.

can be disrupted and serious reliance loss result. Justice Traynor gives legislation which overturns oral bargains rough treatment. Apparently, the legislature and Justice Traynor disagree on whether or not functional policy is worth this disruption and loss.

The Supreme Court of California has long recognized that one might be estopped to assert the Statute of Frauds.⁴⁴ However, it was generally assumed that one would be estopped only where he had informed the other party that he would not assert the statute, that a writing was unnecessary or that he would sign a writing. In *Monarco v. Lo Greco*,⁴⁵ Justice Traynor scrapped this requirement. Now, whether or not there was a representation about a writing, one can be estopped to assert the Statute of Frauds where unconscionable injury would result from denying enforcement of the oral promise or where unjust enrichment would result if the party who has received the benefits of the other's performance were allowed to use the statute.⁴⁶

The Justice's handling of section 1698 of the Civil Code, the written modifications statute, shows further the extent to which he has limited formal requirements which overturn bargains. In *D. L. Godbey & Sons Constr. Co. v. Deane*,⁴⁷ the plaintiff alleged that he had agreed in a written contract to do cement work for the defendant. Later they orally modified the written contract to provide for a new basis of computing the amount of money the plaintiff was to be paid and to require plaintiff to submit daily reports to the defendant. The plaintiff fully performed his side of the bargain, but the defendant only paid part of the amount due under the contract as modified. The trial court entered judgment for the defendant after sustaining a demurrer to the plaintiff's fourth amended complaint. This was a written contract which could be "altered by a contract in writing, or by an executed oral agreement, and not otherwise" under section 1698. Section 1661 of the Civil Code states "An executed contract is one, the object of which is fully performed.

44. See Note, *Part Performance, Estoppel, and the California Statute of Frauds*, 3 STAN. L. REV. 281 (1951).

45. 35 Cal.2d 621, 220 P.2d 737 (1950). See Justice Traynor's own discussion of the *Monarco* case, Traynor, *Unjustifiable Reliance*, 42 MINN. L. REV. 11, 18 (1957).

46. The new position calls for a case-by-case definition of when reliance loss is "unconscionable" and when enrichment is "unjust." The determination appears to be largely intuitive. Compare *Ruinello v. Murray*, 36 Cal.2d 687, 227 P.2d 251 (1951), with *Wilk v. Vencill*, 30 Cal.2d 104, 180 P.2d 351 (1947). Apparently, a very slight bit of unjust enrichment in the *Wilk* case swings the balance in favor of estoppel while comparable reliance loss in the *Ruinello* case is not enough absent any unjust enrichment. Compare *Friedman v. Bergin*, 22 Cal.2d 535, 140 P.2d 1 (1943).

47. 39 Cal.2d 429, 246 P.2d 946 (1952).

All others are executory." Since defendant had not fully performed his side of the bargain, the contract was executory and so unenforceable. Justice Traynor wrote an opinion reversing this judgment. He stated that one party had fully performed and that was enough to make the oral modification agreement "executed." It is hard to imagine a dispute where both sides have fully performed a modification of a contract; to read the statute to require this would give the "executed oral agreement" exception little, if any, meaning. His opinion does not discuss the language of the two Civil Code sections which certainly could be read to justify the trial court's position by one in sympathy with statutes requiring writings.

In *McKeon v. Giusto*,⁴⁸ Justice Traynor reworked the findings of the trial court to uphold the transaction. The trial court apparently had found that the parties made an oral modification of their written agreement. Justice Traynor reshuffled the findings to conclude that a *new* oral agreement had been made to take effect after the old written contract had terminated. Section 1698 deals only with oral *modifications*, and so it was inapplicable. This is a familiar technique to avoid that facet of the consideration doctrine which invalidates modifications of going business deals;⁴⁹ it serves equally well to sidestep the written modifications statute.

Justice Traynor's use of these techniques to avoid overturning oral bargains involves a tacit rejection of the legislature's judgment that the gains to the functioning of the market from requiring certain kinds of contracts to be written always are worth the cost in disrupted plans and reliance loss. The statutes must be justified primarily by an appeal to functional policy. Professor Fuller has listed three functions of legal formality: (1) the evidentiary, (2) the channeling, and (3) the cautionary.⁵⁰ Legislation requiring writings probably was enacted to serve mainly an *evidentiary* purpose.⁵¹ To handicap a plaintiff who might seek to establish a contract by perjured testimony, the Statute of Frauds requires him to found his case on a written memorandum signed by the defendant. For similar reasons section 1698 of the Civil Code, the written modifications statute, requires either a written modification of a written contract or an executed oral agreement. If a written modification

48. 44 Cal.2d 152, 280 P.2d 782 (1955).

49. See KESSLER & SHARP, *CASES ON CONTRACTS* 276, 286-87 (1953).

50. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-806 (1941). See the discussion of a fourth function, the bureaucratic, note 102 *infra*. See also Llewellyn, *What Price Contract?*, 40 YALE L.J. 704, 747-48 (1931).

51. See FULLER, *BASIC CONTRACT LAW* 941-43 (1947).

is made, there is no evidentiary problem. If performance according to the alleged oral modification is accepted or a modified counter-performance is given, there is some evidence that the modification was made.⁵² The evidentiary function may serve the functional policy by protecting bargainers from false claims that oral contracts had been made. If many false claims were asserted, and if jurors were unable to detect the perjury, contract law might be turned into an instrument for subverting the market institution. Moreover, writing requirements can serve an evidentiary function in the prelitigation stage of a dispute. Such requirements impede a party lacking a writing from falsely claiming that an oral contract exists in order to get a nuisance value settlement. If he does not have a writing, he does not have to be bought off to avoid the risk of an erroneous verdict and the costs of litigation. Perhaps a plaintiff's willingness to give perjured testimony is more common than his willingness to produce a forged document.

The statutes may serve a *channeling* function. If enforceable contracts of certain types or modifications of written contracts must be written, then both the parties and the courts will have the task of line drawing simplified. The parties can be certain that bargains are closed when a writing is signed, and only then. Functional policy is served since there is a rule of the road indicating that before a writing is signed one may back out and consequently reliance is unsafe; after this point one may proceed with whatever assurance legal enforceability may offer. Courts too can decide many questions easily and predictably with the probable result that the parties will perform rather than litigate or threaten to do so.

Finally, a writing may act as a check on inconsiderate action and thereby serve a *cautionary* function. Certainly one who writes out all the provisions of a contract has both the time and a reason to consider what he is doing. Even one who only signs his name perhaps ought to feel more of a sense of undertaking than one who merely nods his head in agreement. The Statute of Frauds requires writings in certain significant transactions where a long-term obligation, a large sum of money, or an important asset such as land is involved. Such bargains should not be entered casually. The written modifications statute may serve similar purposes. Written contracts tend to be drawn with some deliberation as to the allo-

52. See Note, 40 CALIF. L. REV. 599 (1952), criticizing the *D. L. Godbey & Sons* decision because it failed to create a rule which would ensure clear evidence of the oral modification.

cation of rights and duties. Oral modifications are often casual and made without obtaining advice from lawyers or technical experts. The cautionary function might implement functional policy insofar as it tends to make bargains more adequately serve the purposes of the parties.

Justice Traynor has not spelled out his reasons for limiting the required-writings legislation. However, one who believed in upholding transactions as the dominant purpose of contract law could challenge the assumption that the required-writings statutes significantly produce the benefits claimed for them. He could also argue that any possible benefits of required writings cost too much in terms of disrupted plans and reliance loss left unrecognized by the legal system. For example, the *channeling* function makes sense only if the requirement of a writing is generally understood and followed, because the parties must know about the cutoff point to make use of it. The evidence we have indicates that in many transactions the parties do not recognize the signing of a writing as essential to making a commitment.⁵³ Written contracts run counter to common behavior in many situations. An oral arrangement fits a friendly transaction while a demand for a signed writing may indicate distrust. To a great degree bargaining is an area where the law has not been successful in channeling conduct but has only produced friction as contract law has clashed with common behavior.⁵⁴

53. See Comment, *The Statute of Frauds and the Business Community: A Re-appraisal in Light of Prevailing Practices*, 66 YALE L.J. 1038 (1957). At present the writer is engaged in a long-term research project on the use of contract in manufacturing businesses. As part of this project, I have interviewed many purchasing agents, salesmen, house counsel, and lawyers with corporate practices. These interviews confirm many of the findings of the Yale Comment. Production is often begun on the basis of a telephone call, the signed writing being only an afterthought executed primarily for accounting purposes. However, some businessmen think the purchase order number is the talisman of obligation. If the purchasing agent orally gives a salesman the number of the purchase order which will be written to cover the transaction, both consider the deal closed at that point even though there is no memorandum signed by the party to be charged. Yet this custom of oral dealing, and those reported in the Yale Comment, must be considered in the context of the widespread understanding that the buyer has great freedom to cancel. It is understood that if the cancellation comes before work is begun, there will be no charge. If work has begun, the seller is liable only for the buyer's reliance expenditures which cannot be salvaged; the buyer is not responsible for the seller's lost anticipated profit, contract law notwithstanding. Thus, even if one side later wants to withdraw, the practical consequences seen by the businessman are little different than if a writing had been signed. The widespread rejection of compensation for expectation loss surprised me.

See also Skilton, *Cars for Sale: Some Comments on the Wholesale Financing of Automobiles*, 1957 WIS. L. REV. 352, 373.

54. For example, in Wisconsin requirements contracts are unenforceable for want of mutuality. *Hoffman v. Pfingsten*, 260 Wis. 160, 50 N.W.2d 369 (1951); *Strauss v. Eulberg Brewing Co.*, 250 Wis. 579, 27 N.W.2d 723 (1947); *Pessin v. Fox Head Waukesha Corp.*, 230 Wis. 277, 282 N.W. 582 (1938). But cf. *Levin v. Perkins*, 107 N.W.2d 492 (Wis.

One can question how far signing a writing makes a bargainer more cautious than does orally agreeing to a deal. Cases can be imagined where a nod of the head is a more serious act than a signature. Does a signature placed on an impossibly detailed printed form add any incentive to deliberate about the impulse purchase of an automobile? Moreover, one might contend that the cautionary function of required writings costs too much in disruption of plans and reliance loss. Some oral bargains undoubtedly are well considered even when performance later results in sufficient hardship to motivate one party to attempt to get out of the deal. It seems unlikely that anyone could establish that many more oral bargains are foolish than written ones, yet under the required-writings statutes one can back out of a well-planned bargain as well as a foolish one.

Finally, the writing requirement may protect against perjured claims of oral contracts. Yet this *evidentiary* function is carried out only at the expense of taking away the advantages of actual oral agreements if one party later wants to repudiate. It seems difficult to support the conclusion that fraudulent claims which fool juries, and appellant judges reviewing findings, are common enough so that all oral bargains of certain important kinds must be denied enforcement even when this will disrupt plans and cause reliance loss in particular cases. The nuisance value settlement function of writings is more difficult to evaluate. Even if it is assumed that required-writings statutes do impede false but plausible claims in a significant number of cases, one also could question whether the gain was worth the price. People do rely on oral agreements despite such statutes. Arguably, too, it is better to leave small demands to the jungle of nonlegal strategy and attack directly threats of perjured contract claims by better abuse-of-process rules and a more liberal restitution of payments-made-under-duress doctrine.

2. Decisions Carrying Out Functional Policy. Justice Traynor

1961). Yet in interviewing large firms in Wisconsin I have discovered that such indefinite quantity agreements are widely used by manufacturers selling paper or buying such items as chemicals and packaging. So far no businessman, or house counsel, has been concerned when I pointed out that one of his major contracts was legally unenforceable under the law likely to govern in case of a dispute. The UNIFORM COMMERCIAL CODE §§ 2-204(3), 2-306 (1958 Official Text), gives up the attempt to make the businessman conform to law on the issue of the requirements contract and follows current flexible quantity contracting practices. Of course, not all businessmen will be pleased by the Code's enforcement of requirements contracts, as often such contracts are written by one party in a manner most unfavorable to the other.

has only sparingly set up general rules to facilitate bargaining.⁵⁵ As previously indicated, he has given unsympathetic treatment to the parol evidence rule, the "plain meaning" rule, and statutes requiring writings—all expressions of functional policy. One who has undermined so many general rules which purport to facilitate bargaining is unlikely to create many new ones which might get in his way at some later time.

Justice Traynor's decisions in three contracts problem areas—commercial frustration, products liability, and liability for mistaken bids—appear to create functional policy rules.⁵⁶ His rules have certain things in common. All protect reliance by one bargainer, or the chance of reliance, in situations where that reliance is foreseeable by the other party. All uphold the likely tacit assumptions of the parties in a modern commercial setting, following common business practices rather than attempting to force bargaining into the legal stereotype. Yet all of his rules can involve the imposition of absolute liability because in some cases the obligation turns neither on a manifestation of choice nor on fault but on the Justice's view of the demands of functional policy.

The decisions in these three areas illustrate the problems inherent in using the classification of policies suggested in this article—things will not fit neatly into a single pigeonhole. Justice Traynor's apparently functional rules are not particularly inconsistent with transactional policy, since in most situations they will lead to the best balance of interests in the particular case. Moreover, all three doctrines have escape devices built in which may be used if a rule produces an undesirable result in a given instance in the future. On the other hand, all three rules also can be defended in nonmarket economic planning terms. Rules which facilitate bargaining are likely to have other economic effects as well. Nonetheless, there are indications that these rules are market-oriented and reflect functional policy.

Commercial frustration.—It is exceedingly difficult to avoid contractual liability by way of Justice Traynor's commercial-frustration

55. Only a very few of Justice Traynor's contracts opinions seem to unquestioningly follow existing functional policy rules. See, e.g., *Grayhill Drilling Co. v. Superior Oil Co.*, 39 Cal.2d 751, 249 P.2d 21 (1952); *Easton v. Ash*, 18 Cal.2d 530, 116 P.2d 433 (1941). But cf. *Reid v. Overland Machined Prods.*, 55 Adv. Cal. 208, 359 P.2d 251, 10 Cal. Rep. 819 (1961).

56. Also Justice Traynor's opinion in *Coughlin v. Blair*, 41 Cal.2d 587, 262 P.2d 305 (1953), refines existing rules expressing functional policy in the field of damages.

doctrine. In *Lloyd v. Murphy*⁵⁷ and *Mitchell v. Ceazan Tires, Ltd.*,⁵⁸ two cases involving attempts by lessees to get out of their leases because of the impact of World War II regulations on their businesses, the Justice strictly limited the scope of the frustration doctrine by setting out two requirements for its application. First, one seeking an excuse from his unqualified promise must prove that the risk of the event which frustrated his purpose was "not reasonably foreseeable,"⁵⁹ a requirement neither lessee in the two cases could satisfy. In *Lloyd v. Murphy* the lessee, an established automobile dealer with two showrooms, leased a third showroom from the defendant on August 4, 1941, for a term of five years. Apparently, one reason for making the lease was to take advantage of the increased demand for cars caused by fears of rationing. At the time the lease was negotiated many defense measures had been enacted including the statute which ultimately was used to limit automobile production and establish a priority system. In the *Mitchell* case the lessee was a franchised dealer in new automobile tires, whose business was seriously disrupted by tire rationing. The lease was made originally in 1937 and was renewed for three years on March 21, 1940. Justice Traynor remarked that entry of this country into war at that time was the subject of much debate.⁶⁰

The second requirement in Justice Traynor's frustration doctrine is that the value of the lessor's performance to the lessee must be "totally or nearly totally destroyed."⁶¹ Substantial frustration is not enough. Neither lessee could jump this hurdle either. In the *Lloyd* case a few new cars could be sold to civilians with priorities, and the dealer could still sell gasoline and do service, although this had been only ten per cent of the business done at this location before the government order controlling the sale of cars went into effect. Moreover, the building was suited for many other commercial purposes and was on a main street. The lessee could change businesses or sublease. Similarly, in *Mitchell*, Justice Traynor pointed out that the lessee could change his business to meet the demand for recapped or re-treated tires or he could sublease.

The first requisite—that the lessee prove the risk was not reasonably foreseeable—is difficult to rationalize neatly in terms of the policies discussed in this article, but it can best be explained in terms

57. 25 Cal.2d 48, 153 P.2d 47 (1944), 40 ILL. L. REV. 147 (1945).

58. 25 Cal.2d 45, 153 P.2d 53 (1944).

59. *Lloyd v. Murphy*, 25 Cal.2d 48, 54, 153 P.2d 47, 50 (1944).

60. *Mitchell v. Ceazan Tires, Ltd.*, 25 Cal.2d 45, 47, 153 P.2d 53, 54 (1944).

61. *Lloyd v. Murphy*, 25 Cal.2d 48, 54, 153 P.2d 47, 50 (1944).

of functional policy. Justice Traynor's own justification is transactional, and to a great extent the requirement is consistent with this policy of minimizing disruption of plans and reliance loss. He sees the question as whether the lessee who has made an unqualified promise to pay rent assumed the risk of the occurrence of the event which later frustrated his purposes in leasing the building. Clearly, if the risk were assumed, transactional policy would require the lessee to honor his obligation to avoid disrupting the lessor's plans. However, even if one accepts the transactional policy and does not consider the possible harshness of the burden on the lessee relevant, he must face the difficult question of how one determines if the risk had been assumed. Justice Traynor would answer this question by asking if the frustrating event was reasonably foreseeable: "[I]f it was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed."⁶² One must concede that this inference is justified in many cases.

Nevertheless, the problem is not always this simple. The "not reasonably foreseeable" burden of proof involves holding some bargainers to perform or pay damages where they neither have assumed the risk of the frustrating event nor have misled others into thinking they have.⁶³ This is true for several reasons. First, parties to contracts often fail to consider obvious risks which are out of the ordinary course of their businesses, such as the impact of war on retailing. Next, the test of risk assumption contained in this burden of proof is based on hindsight. In 1944 it was easy to say that a reasonable man should have seen a significant enough chance of war coming to this country when he considered the matter in 1940 so that he would make provision for it in his contracts. However, in early 1940 many believed war would not come or had little interest in the subject. Were they unreasonable to repress thoughts of disaster and carry on business as usual? Even today, after World War II, the Korean conflict, and years of cold war, clauses dealing with frustration of the buyer's purpose, as distinguished from impossibility of the seller's performance, are fairly rare in commercial contracts.⁶⁴ Finally, the "not reasonably foreseeable" burden of

62. *Ibid.*

63. See Note, 59 YALE L.J. 1511, 1512-13 (1950).

64. In my research project on the use of contract in manufacturing businesses, the form contracts of over 850 firms with plants in Wisconsin have been collected. In addition, many contracts drafted for particular transactions have been obtained. These contracts almost never contain a clause covering "frustration of the buyer's purpose" although a clause disclaiming liability because of the impossibility of the seller's performance is one of the most

proof is an unusually difficult one to carry. In the *Mitchell* case Justice Traynor said that the lessee failed to carry it because there was debate about American entry into war when the lease was made. Counsel for the lessee might ask Justice Traynor why, as of March 1940, a tire dealer in Long Beach, California, and his landlord should worry about the risk of war. Even if they should have foreseen war, should they have foreseen a war with Japan in which the Japanese would be so successful that they cut off American rubber supplies and created the need for tire rationing? One could make a tenable argument that the failure of the lessee in the *Mitchell* case to carry this burden of proof, as Justice Traynor applied it, does not give rise to a very strong "inference that the risk was assumed."

The "not reasonably foreseeable" burden of proof does not carry out transactional policy in cases where the "inference that the risk was assumed" is weak or nonexistent. These poor inference cases resemble the decisions construing agreements where it is unlikely that the parties thought about the issue when they bargained.⁶⁵ There Justice Traynor attempted to find the result in the particular case which would least disrupt plans and cause reliance loss. Yet in the frustration area he relies on a general rule—the "not reasonably foreseeable" burden of proof—which does not easily allow a case-by-case balancing of interests.⁶⁶

One has an easier time squaring the burden of proof with the functional policy which calls for general rules to implement bargaining. This policy dictates such a strict burden of proof because of the probability that if the burden cannot be carried the risk was tacitly assumed and because of the significant chance that relief in such cases would affect the lessor's interest adversely. Although reasonable men might have failed to consider the risk of war, the

common. Again the freedom of the buyer, as a matter of business practice, to cancel at little or no cost frequently solves the problem. See note 53 *supra*.

65. See text accompanying notes 30-42 *supra*.

66. Transactional policy would be better implemented by the "gap-filling" doctrine advocated by Hans Smit. Under this view in each case the court should determine whether or not the party assumed the risk of the frustrated event by his absolute and unqualified promise in the contract. Parties often overstate their actual allocation of risks, and the question is one of interpretation. The court does not read the words of the agreement literally, but it asks if they were meant or understood to apply even if a frustrating event occurs. Foreseeability of the risk is a helpful item of evidence, but not conclusive. See Smit, *Frustration of Contract: A Comparative Attempt at Consolidation*, 58 COLUM. L. REV. 287, 313-14 (1958); Comment, 59 MICH. L. REV. 98, 115-17 (1960). Compare Julius Stone's comment: "Systematic interference with transactions, which would normally be regarded as unsettling transactions, may thus in fact stabilise them in times of basic economic insecurity." STONE, *THE PROVINCE AND FUNCTION OF LAW* 562 (1946).

lessor might have resisted any qualification being put into the lessee's absolute promise to pay rent had the issue been raised. The lessor might assume the absence of qualification meant the lessee was bound come hell or high water. After all, many unexpected things happen which upset the smooth running of a business. Unless the lessor has agreed to qualify the obligation to pay rent, he may assume that any disruption is none of his concern; he is not a partner but a supplier of a factor of production at a fixed fee. Moreover, the lessor may place great reliance (in subtle ways which are difficult to prove) upon regular payments of rent. Functional policy calls for a rule protecting the lessor's likely reliance on the lessee's unqualified promise without forcing the lessor to prove he relied in every case. Such a position may also tend to encourage bargainers to behave more rationally, allocate risks, and thereby avoid lawsuits involving frustration problems.

Assuming a lessee can jump the hurdle of foreseeability, he must then show that the value of the lessor's performance was "totally or nearly totally destroyed." Justice Traynor explained this requirement by saying that to allow relief in cases of a lesser degree of frustration would cause confusion and encourage litigation whenever a business became unprofitable because of the impact of war.⁶⁷ The doctrine of "substantial frustration" would require definition by the slow, case-by-case process of the common law.

One cannot explain this requirement on the basis of transactional policy which, by definition, calls for weighing interests case-by-case. Arguably, this is a rule of functional policy. The vagueness as to what was and was not "substantial" frustration would likely disrupt lessors' plans and cause reliance losses since lessors would have to let lessees out of leases, litigate to collect payments, or negotiate settlements under the shadow of an uncertain doctrine. Yet not only functional policy but the economic planning policy as well support Justice Traynor's position. *Lloyd* and *Mitchell* were wartime cases, and governmental regulations disrupted many settled business practices then. An easily satisfied frustration doctrine would have overturned many contracts. It might have contributed to even further disruption of the civilian economy beyond that caused by shortages and regulations. Firms in the position of Ceazan Tires were encouraged, by Justice Traynor's position, to modify their businesses to ventures serving the national interest—

67. *Lloyd v. Murphy*, 25 Cal.2d 48, 57, 153 P.2d 47, 52 (1944).

here to replacement of needed consumer goods by a substitute. The case for an easy frustration doctrine, implicitly rejected by Justice Traynor, primarily turns on the policy of relieving hardship.⁶⁸ Frustration can serve as a rough loss-splitting device in cases where the losses are out of the ordinary run of business risks. The lessee would lose his business because of war, but the landlord would share in the hardship by losing his rent. While this result may appeal to some, the relief-of-hardship policy seldom carries the day with Justice Traynor.

Products liability.—Justice Traynor, with no support from his colleagues on the Supreme Court of California, would adopt a flat rule in the field of products liability. His approach is a simple one: "[I]t should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings."⁶⁹ Moreover, this absolute liability should apply whether the defect was in the product when the manufacturer put it on the market or resulted from normal handling in the chain of distribution after the manufacturer lost control of it.⁷⁰

He justifies absolute liability by reasons consistent with both the functional and the economic planning policies. First, it will facilitate bargaining. Our mass markets have moved from selling on the basis of minimal quality to selling on the basis of price and styling.⁷¹ To a great extent our society has abandoned the attitude of "buyer beware" for the tacit assumption that "it must be all right or someone would tell me." As a practical matter, consumers cannot get information about whether bottles will explode, or TV sets will have a shock hazard. Nor can one expect a consumer, before he puts his dime into the vending machine, to bargain with a local

68. See, e.g., Note, *The Fetish of Impossibility in the Law of Contracts*, 53 COLUM. L. REV. 94 (1953).

69. *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 461, 150 P.2d 436, 440 (1944) (concurring opinion). See also *Peterson v. Lamb Rubber Co.*, 54 Cal.2d 339, 350, 353 P.2d 575, 583, 5 Cal. Rep. 863, 871 (1960) (concurring opinion); *Trust v. Arden Farms Co.*, 50 Cal.2d 217, 235, 324 P.2d 583, 594 (1958) (separate opinion).

70. *Gordon v. Aztec Brewing Co.*, 33 Cal.2d 514, 523, 203 P.2d 522, 528 (1949) (concurring opinion).

71. "Of course cars today, in the neon-lit supermarkets . . . , can also be bought on impulse, and are meant to be. This shift to high-turnover retailing is made possible not only by raised living standards and confidence in meeting time payments over thirty months . . . , but also by the fact that the cars are so much alike, and on the whole such well-built standard products, that a customer does not gain significantly by deliberation." Riesman & Larrabee, *Autos in America*, in CONSUMER BEHAVIOR 69, 74 (Clark ed. 1958).

"Once the customer's main interest was in car quality and dealer reliability, and he bargained halfheartedly. . . . The first question a buyer now asks when he walks into a showroom is: How much below list can I get it for?" Time, March 24, 1961, pp. 78, 79-80.

bottler for an express warranty that a Coca Cola bottle will not explode. Justice Traynor's products liability rule would recognize this reliance on minimal quality and make the assumption part of the bargain without express provision—again he would have the law follow practice. It is unclear how far he would allow manufacturers to contract away this absolute liability.

His argument based on the economic planning policy is a familiar one. Manufacturers can insure against products liability and spread the loss to all consumers as a cost of doing business. The individual cannot do this, and in many cases the loss will be one he cannot handle. Absolute liability provides a kind of social security for those injured as a result of mass production and mass distribution.

Liability for mistaken bids.—In *Drennan v. Star Paving Co.*,⁷² Justice Traynor imposed an absolute liability on subcontractors for errors in bids on which general contractors rely even though the sub attempts to withdraw the bid before the general accepts it. The case has prompted a great flurry of activity in law reviews⁷³ and in mimeographed supplements to contracts casebooks. In part the stimulus for all this academic response was Justice Traynor's rejection of the result apparently dictated by orthodox contract law that an offer may be withdrawn before it is accepted.⁷⁴ In part it was his adoption, by means of some most unorthodox contract theorizing, of a result which carried out either the transactional or the functional policy and one view of the nonmarket general economic welfare as well.

In the *Drennan* case the plaintiff, a general contractor, wanted to bid on a school construction job. His bid had to be submitted before 8:00 P.M. on July 28, 1955. It had to be accompanied by the names of his subcontractors and by a bond guarantying he would enter a contract if he received the job. It was customary for general contractors to receive bids from subcontractors by telephone on the day set for bidding and to rely on them in computing bids for the entire project. On July 28th plaintiff's secretary received by telephone 50 to 75 bids from subcontractors on various parts of the job. Defendant, a subcontractor, did paving work. Late in the afternoon or early in the evening of that day defendant's estimator telephoned,

72. 51 Cal.2d 409, 333 P.2d 757 (1958).

73. Mueller, *Businessman's Reliance*, L.A.B. Bull., Dec. 1959, p. 41; 47 CALIF. L. REV. 405 (1959); 59 COLUM. L. REV. 355 (1959); 10 HASTINGS L.J. 435 (1959); 43 MARQ. L. REV. 384 (1959); 32 SO. CAL. L. REV. 413 (1959); 11 STAN. L. REV. 546 (1959).

74. 1 WILLISTON, CONTRACTS § 55 (Jaeger ed. 1957).

saying that he was bidding for defendant on the paving work involved in the school job and that the bid was \$7,131.60. He was asked to repeat the amount and did so. He did not state expressly that the defendant subcontractor would not withdraw the bid before it was accepted, that it was a "firm" bid or anything to that effect. Apparently, there was no showing at trial that there was any trade custom that bids could not be withdrawn before acceptance.

Defendant's bid for the paving work was low, and the general contractor used it in computing his bid though he did not notify the defendant of this. The general was awarded the job by the school district that night. The next morning the defendant informed the plaintiff that there had been a mistake, and defendant would not do the job at his bid price. Plaintiff protested without effect and sued to recover the \$3,817 above the defendant's bid which he had to pay to get the paving done by another firm.

Justice Traynor wrote an opinion affirming a judgment for the general contractor. As he saw it, there were two major issues: (1) Was there a promise not to revoke the subcontractor's bid "imposed by law or reasonably inferable in fact"?⁷⁵ (2) If there was such a "promise," is it enforceable absent bargained-for-and-given-in-exchange consideration to support it? He answered both questions affirmatively. He found a promise not to revoke the bid "whether implied in fact or law"⁷⁶ by drawing an analogy to the device used in section 45 of the *Restatement of Contracts*⁷⁷ to prevent an offeror in a unilateral contract situation from revoking just as the offeree is about to reach the top of Karl Llewellyn's flagpole.⁷⁸ Once such a subsidiary promise to hold the bid open had been dis-

75. *Drennan v. Star Paving Co.*, 51 Cal.2d 409, 414, 333 P.2d 757, 759 (1958).

76. *Id.* at 414, 333 P.2d at 760.

77. "If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time." *RESTATEMENT, CONTRACTS* § 45 (1932). The analogy between the mistaken bid withdrawal case and the unilateral contract withdrawal situation also appears in 9 U. CHI. L. REV. 153, 158 (1941), one of the best treatments of the problem of the firm offer.

78. "For it was Offer and Acceptance which first led each of us out of laydom into The Law. Puzzled, befogged, adrift in the strange words and technique of cases, with only our sane feeling of what was decent for a compass, we felt the warm sun suddenly, we knew that we were arriving, we knew we too could 'think like a lawyer': That was when we learned to down seasickness as *A* revoked when *B* was almost up the flag-pole. Within the first October, we had achieved a technical glee in justifying judgment then for *A*; and succulent memory lingers, of the way our dumber brethren were pilloried as Laymen still." Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance*, 1, 48 YALE L.J. 1, 32 (1938).

covered it was no trick at all to find that the "absence of consideration is not fatal to the enforcement of such a promise"⁷⁹ by reference to section 90 of the *Restatement* which provides: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." In taking these steps Justice Traynor went beyond any prior case⁸⁰ and differed with several authorities on contracts.⁸¹

The effect of the *Drennan* decision is clear in one respect but not in another. What is clear is that the case imposes absolute liability on subcontractors for errors in bids on which generals rely even though the subcontractor attempts to withdraw the bid before the general accepts it. The liability is absolute since it may be based on neither choice nor fault. Of course, a sub who submits a bid may assume that he cannot withdraw it after reliance by the general because of custom or business sanctions such as blacklisting. But the sub may not have considered the matter because he has never had a reason to try to withdraw a bid, and this lack of reflection on the point may hold true for the general as well. It is even remotely possible that the sub, the general, or both have taken a course in business law and assume an offer is revocable until accepted. Yet none of this is relevant under the reasoning of the *Drennan* case.

The unclear point about the effect of the decision is whether Justice Traynor has created a flat rule governing the subcontractor-general contractor relationship or a rule which calls for a case-by-case review of the interests of the parties. In effect, if not in its reasoning, the *Drennan* decision appears to have created a flat rule.

79. *Drennan v. Star Paving Co.*, 51 Cal.2d 409, 414, 333 P.2d 757, 760 (1958).

80. The *Drennan* case seems to go beyond Justice Traynor's own prior decision in *Bard v. Kent*, 19 Cal.2d 449, 122 P.2d 8, 139 A.L.R. 1032 (1942), which he attempts to distinguish in the *Drennan* opinion. See *Drennan v. Star Paving Co.*, *supra* note 79, at 416-17, 333 P.2d at 761. For the prior California cases see Note, *Promissory Estoppel in California*, 5 STAN. L. REV. 783 (1953).

The *Drennan* case also goes beyond statutes which do away with the requirement of orthodox consideration for firm offers in that the statutes require the offer to be written while the *Drennan* case does not. See N.Y. PERS. PROP. LAW § 33(5); UNIFORM COMMERCIAL CODE § 2-205 (1958 Official Text). Of course, this is consistent with Justice Traynor's views about the utility of requiring a contract to be written to be enforceable. See text accompanying notes 43-55 *supra*.

81. See *James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344 (2d Cir. 1933) (L. Hand, J.); 1 CORBIN, *CONTRACTS* § 51 (1950); Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237, 283-85 (1952). But see Sharp, *Promises, Mistake and Reciprocity*, 19 U. CHI. L. REV. 286 (1952); Sharp, *Pacta Sunt Servanda*, 41 COLUM. L. REV. 783, 792-93 (1941).

Justice Traynor impliedly found that "injustice" could "be avoided only by enforcement of the promise" when he relied on section 90 of the *Restatement of Contracts*. The facts of the *Drennan* case are typical of almost all subcontractor-general contractor mistaken-bid situations. Therefore, the case stands as a precedent for almost all of these situations. Certainly there was no weighing of the subcontractor's case for freedom from absolute liability in Justice Traynor's *Drennan* opinion. On the other hand, the reasoning of that opinion leaves the court free to find for a subcontractor in any future case where his interest calls for this result, and, in this sense, the *Drennan* case calls for a case-by-case approach. The effect of the decision will remain unclear until the court faces more cases involving attempts to withdraw mistaken bids before acceptance.

Absolute liability can be defended in both market and non-market terms. If the *Drennan* case creates a general rule of absolute liability governing the relations between sub and general contractors, it is an expression of functional policy.⁸² The rule will facilitate bargaining by protecting the general's reliance on tacit assumptions known to both parties.⁸³ The general contractor is likely to rely on telephone calls, as he did in the *Drennan* case, rather than adopt some formal procedure such as making written option contracts with each subcontractor. Such formal procedures are not likely to be used by businessmen since they are cumbersome and strike most businessmen as meaningless legalism. The sub is in the business of making bids, he said on the telephone that he would do the paving work for \$7,131.60, and the general is going to assume "it must be all right" and rely. Moreover, the general's reliance is significant. He must bid in a competitive system, and the more reliable information he has to base his bid on, the more rational his planning for profit can be. If subs can withdraw bids after the general has used them, the disruption of the general's plans can be costly, especially where the general is facing tough competition for the job.

Absolute liability is not an overly drastic burden on subcontractors. They are not surprised by the general's reliance; they actively seek it. Subs get a business exchange for standing behind their bids if the general uses their sub bid in computing his own. If this happens, it becomes more likely that the sub will get the job when the general gets the award. That is why they provide bidding service

82. Compare Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 818-19 (1941), on the concept of "transactions ancillary to exchanges."

83. See Schultz, *supra* note 81, at 268-69.

to the general.⁸⁴ Moreover, most subcontractors would not be surprised by a legal obligation to stand behind their mistaken bid. Many feel an ethical obligation to do so.⁸⁵ Furthermore, the subcontractor has a practical reason for exercising care in bidding and making whatever provision for absorbing losses he can—a reason which is unrelated to the problem of withdrawing mistaken bids. Errors may not be discovered as quickly as they were in the *Drennan* case, and a subcontractor could sign a contract with the general based on an erroneous bid before realizing what happened. In such a case a sub could not avoid losses caused by errors in bidding merely by revoking his offer. The fact that the sub discovers his error before a contract is signed but after the general has used the sub's bid is only an accident and diminishes neither the incentive to use care nor the injury caused by the error.

However, if the *Drennan* case calls for a case-by-case approach to the attempted withdrawal of a mistaken bid before acceptance, this complicates matters. If it does, one might view the case as an expression of transactional policy—a rule allowing the court to balance the interests of the parties to find a result which least disrupts plans and causes reliance loss. Yet it is difficult to imagine any facts relevant to disruption of plans and reliance loss which were not present in the *Drennan* case which would add enough weight to swing the balance to the subcontractor. All the sub can assert is that he will not get the profit he planned on, and that was true in the *Drennan* decision. Rather, the sub's interest which might swing the balance is that liability for the mistaken bid will impose great hardship on him while the general could better absorb or spread the loss. Of course, this is an expression of the particularized nonmarket value, the relief-of-hardship policy. All one can say is that the reasoning in Justice Traynor's opinion would not inhibit the Supreme Court of California or any lower court from lifting drastic losses from the shoulders of a subcontractor and dumping them on a rich general if the facts of a given case, and the values of the judges involved, make this appealing.

B. *Decisions Based on Nonmarket Concepts of Economic Welfare*

A central problem of contract law is the tension between promoting economic welfare through the market institution and

84. See Mueller, *supra* note 73, at 44-45.

85. See Schultz, *supra* note 81, at 268.

promoting it through social control of economic matters. Most of Justice Traynor's contracts opinions appear to be firmly in the market camp, but some of them can be explained alternatively on nonmarket grounds. Finally, there remain a few of his decisions which are based primarily on social control, reflecting either the particularized relief-of-hardship or the generalized economic planning policies. Of course, one cannot be sure that Justice Traynor would not make much wider use of social control in contracts if he had the opportunity. A judge is limited to the cases brought before him, and Justice Traynor has not had the chance to deal with many present-day contract issues which other judges are resolving in social control terms.

1. *The Relief-of-Hardship Policy.* Justice Traynor has had little to do with the relief-of-hardship policy. On the one hand, few of his cases have involved appropriate facts. On the other, relief-of-hardship stands directly opposed to the transactional policy as a means of supporting the market, which he has so often championed. The relief-of-hardship policy involves, first, lifting harsh burdens from a bargainer for whom a contract has turned out disastrously or, second, policing particular contracts for unfairness of the exchange. Such compromises with the demands of the market in the name of certain ethical ideals of our society can be achieved by the use of any of a number of orthodox contract doctrines. Consideration, duress, and construction of language are examples. More recently, it has been suggested that the policy be more openly expressed by a doctrine of "unconscionability."⁸⁶

Justice Traynor's attitudes about this policy must be wrung out of one case, *Drennan v. Star Paving Co.*,⁸⁷ and, as a result, the inferences drawn here are tenuous. The *Drennan* opinion is the only one in which Justice Traynor might be even suspected of embracing the idea of relieving a bargainer from the drastic consequences of his contract on a case-by-case basis.⁸⁸ As pointed out,⁸⁹ the *Drennan* opinion is based on section 90 of the *Restatement of*

86. See UNIFORM COMMERCIAL CODE § 2-302 (1958 Official Text); Note, 45 IOWA L. REV. 843 (1960); 18 U. CHI. L. REV. 146 (1950); Note, 109 U. PA. L. REV. 401 (1961); 70 YALE L.J. 453 (1961).

87. 51 Cal.2d 409, 333 P.2d 757 (1958).

88. Arguably, Justice Traynor's positions concerning interspousal support agreements, the power of a court to modify them, and the power of a court to enforce them through contempt proceedings, reflect the relief-of-hardship policy. See *Plumer v. Superior Court*, 50 Cal.2d 631, 638, 328 P.2d 193, 197 (1958) (dissenting opinion); *Plumer v. Plumer*, 48 Cal.2d 820, 313 P.2d 549 (1957); *Bradley v. Superior Court*, 48 Cal.2d 509, 523, 310 P.2d 634, 643 (1957) (dissenting opinion). The domestic relations setting of these decisions, however, makes conclusions about his views on "contracts" based on them unsafe.

89. Text accompanying notes 72-85 *supra*.

Contracts which is applicable if "injustice can be avoided only by enforcement of the promise." If the loss caused by a mistaken bid which a subcontractor attempted to withdraw before acceptance would break the sub, and if the general could absorb it without too much difficulty, one might say "injustice can be avoided" other than "by enforcement of the promise" and one might conjecture that Justice Traynor would then rule for the subcontractor. However, this conclusion would have to appear in the court's opinion, and a policy of contract compassion is seldom talked about in such places.

Drennan also may indicate that Justice Traynor rejects the idea that courts should police bargains for fairness at the time they were made; then again it may not. Six years before the decision Professor Schultz published "The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry."⁹⁰ Schultz studied the practices of sub and general contractors regarding standing behind bids. He found that some generals, after using a particular sub's bid in computing their own, when they get the job renegotiate with a number of subcontractors to get even lower bids. If section 90 of the *Restatement of Contracts* is applied to keep subcontractors from withdrawing their bids, subs will be bound while generals will not be. Professor Schultz regards this as an unfair situation and argues that section 90 ought not be applied and subcontractors should be left free to back out.⁹¹

Justice Traynor rejected Professor Schultz's advice in deciding the *Drennan* case, and one might infer that Justice Traynor does not think courts should attempt to insure a fair exchange. Yet two sentences in the *Drennan* opinion may indicate otherwise:

It bears noting that a general contractor is not free to delay acceptance after he has been awarded the general contract in the hope of getting a better price. Nor can he reopen bargaining with the subcontractor and at the same time claim a continuing right to accept the original offer.⁹²

This may mean that Justice Traynor accepts the responsibility for generally policing bargains, or it may mean no more than that courts should consider fairness in creating new rules which expand the category of enforceable obligations.

The evidence relevant to the relief-of-hardship policy is unsatis-

90. 19 U. CHI. L. REV. 237 (1952).

91. *Id.* at 284-85.

92. *Drennan v. Star Paving Co.*, 51 Cal.2d 409, 415, 333 P.2d 757, 760 (1958).

factory. All one can conclude is that Justice Traynor has not made much use of it yet.

2. *The Economic Planning Policy.* Many contract rules express the economic planning policy. Two more or less respectable arguments are current. First, courts should adopt rules which allocate losses to the parties best able to absorb or spread them.⁹³ Second, courts should "regulate" industries or types of transactions by making legal sanctions for breach of contract available only on certain conditions or by making them absolutely unavailable for certain kinds of contracts. In some of Justice Traynor's decisions the economic planning policy appears to reinforce market-oriented policies. In a few decisions economic planning appears to be the primary concern.

Rules allocating losses.—Justice Traynor's views about this part of the economic planning policy are not easy to determine. In one case he advocated adopting a general rule which would allocate losses so that they would fall on the party most likely to be able to absorb or spread them. Yet he has ignored this idea in construing insurance policies and in deciding *Drennan v. Star Paving Co.*

The Justice's reliance on the loss allocation argument was previously discussed in the products liability cases.⁹⁴ He argued that manufacturers should be absolutely liable for personal injuries caused by their products because they can insure and distribute the cost to the public. Yet this argument was coupled with one based on functional policy and perhaps should be viewed as only of secondary importance. Justice Traynor's opinions construing insurance policies⁹⁵ are transactional and do not reflect any urge to throw all losses on the superior assets of insurers.⁹⁶ Moreover, the *Drennan* decision, whether it establishes a case-by-case approach or a general rule, in many cases will result in placing losses caused by erroneous bids on subcontractors who, typically but not always,⁹⁷

93. See, e.g., Note, *The Fetish of Impossibility in the Law of Contracts*, 53 COLUM. L. REV. 94, 98-102 (1953). See also the careful analysis of this slogan in Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

94. See text accompanying notes 69-71 *supra*.

95. See text accompanying notes 32-42 *supra*.

96. Of course, several of his decisions do shift losses to insurers, but this is not a consistent policy. See *ibid*.

97. The reasoning of the *Drennan* case would seem to apply equally to a materials supplier. Frequently they are a good deal more wealthy than general contractors. See, e.g., *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F.2d 654 (7th Cir. 1941); *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933).

will not be as wealthy as general contractors or have the ability to pass losses on.⁹⁸

Rules regulating industries or types of transactions.—Up to this point one has had to indulge in a good deal of speculation to find nonmarket social control values lurking in Justice Traynor's opinions. However, clearly he has followed the economic planning policy in several areas by creating or carrying out general rules which "regulate" industries or types of transactions. Contract law regulates by providing legal sanctions for breach only on certain conditions or by denying them entirely to certain kinds of bargains. This kind of regulation can be only as effective as there is need for legal sanction and awareness by bargainers of these conditions and prohibitions.⁹⁹ Justice Traynor's attempts at regulation by contract rule are in the areas of insurance, construction, and real estate, all of which are at least marginally responsive to this type of indirect pressure.

The Justice's regulation of the insurance and construction industries has followed from some of his primarily market-oriented case law decisions. His transactional approach to construing insurance policies¹⁰⁰ may operate to slow the drift to standardized and bureaucratic ways of running large insurance organizations. Whether or not a particular obligation has been assumed in a policy turns on the expectations created by the insurer's actual system of selling its product rather than the dictates of the insurer's standard

98. "As between the subcontractor who made the bid and the general contractor who reasonably relied on it, the loss resulting from the mistake should fall on the party who caused it." *Drennan v. Star Paving Co.*, 51 Cal.2d 409, 416, 333 P.2d 757, 761 (1958).

In *Gagne v. Bertran*, 43 Cal.2d 481, 275 P.2d 15 (1954), Justice Traynor refused to impose absolute liability on a soil tester for errors in a professional opinion which lead to a large loss because of the client's reliance on that opinion. The Justice commented that the soil tester had made no "absolute promise" that his opinion would be accurate, and the amount of his fee (\$25) and the fact that he was paid by the hour indicated that he was selling service and not insurance.

The case is a puzzling one. A good deal of time can be spent attempting to square it with the *Drennan* decision. Even more difficult is the attempt to classify it in terms of the policies set out in this article. Justice Traynor's comments seem transactional. The tester did not assume the risk of losses caused by his nonnegligent errors, and the client did not pay for such insurance. Yet the result protects the small professional man from heavy losses and allocates them to the buyers of this kind of service. Perhaps, then, the case can be explained equally well under the economic planning policy.

99. Interviews with businessmen working for fairly large corporations engaged in manufacturing indicate a lack of concern about legal sanctions, or even commercial arbitration, and a surprising amount of misinformation about the requirements for a legally binding contract. See notes 53, 54 *supra*. Obviously these businessmen are not going to be regulated by manipulating the law of contract except insofar as absolute liability is imposed by lawmakers in the guise of contract law.

100. See text accompanying notes 32-42 *supra*.

operating procedure.¹⁰¹ Undoubtedly, rationality within the organization would be furthered by a literal reading of the policy terms, but this bureaucratic function of written documents is denied to the companies by Justice Traynor.¹⁰² Then the *Drennan* decision controlling a subcontractor's right to withdraw a mistaken bid can be viewed as a regulation of construction industry practices in the public interest to promote lower costs by facilitating the working of the bidding system.¹⁰³

However, more significant regulation of parts of these industries may follow from Justice Traynor's decisions carrying out legislative schemes of licensing insurance brokers and construction contractors.¹⁰⁴ The cases concern attempts to sue on contracts by individuals who did not have the licenses required by statute to engage in the occupations involved in the agreements.¹⁰⁵ In one case the statute made contracts unenforceable if the plaintiff were unlicensed.¹⁰⁶ In the other the court reached this result since the statute made dealing without a license illegal.¹⁰⁷ Although there was a tenable argument in both cases that the purposes of the statute did not require the unlicensed plaintiff to be deprived of his contract,¹⁰⁸ Justice Traynor refused to enforce either bargain.

101. *Cf. Industrial Indem. Co. v. Industrial Acc. Comm'n*, 34 Cal.2d 500, 507-10, 211 P.2d 857, 860-63 (1949) (concurring opinion); *Culley v. New York Life Ins. Co.*, 27 Cal.2d 187, 163 P.2d 698 (1945).

102. Professor Fuller sets out three functions of form, Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-806 (1941). See note 50 *supra*. The formality of a writing has a fourth function. It might be called the *bureaucratic* function. As organizations get larger and labor is divided and subdivided various officials within the organization must act based on the written record produced by the negotiator. For example, a production official must perform a contract written by a salesman who negotiated with the customer's purchasing agent. In a large firm the production official may not be able to discuss the matter with the salesman because of the problems of distance or organizational procedures; the writing is the production official's only guide as to what is required to perform the contract. Insofar as the economic planning policy favors rationality within the large organization it will call for a literal "plain meaning" interpretation of words of the contract because this is the only thing on which the production official can base the manner in which the goods are produced.

103. General contractors probably are better able to pass increased costs on to the owner of the building than subs are able to pass them on to generals. Thus, had the *Drennan* case been decided differently, owners would probably have borne the ultimate burden of subcontractors' bidding errors. *Cf. Schultz, The Firm Offer Puzzle: A Study of Business in the Construction Industry*, 19 U. CHI L. REV. 237, 285 (1952).

104. *Lewis & Queen v. N. M. Ball Sons*, 48 Cal.2d 141, 308 P.2d 713 (1957); *Fewel & Dawes, Inc. v. Pratt*, 17 Cal.2d 85, 109 P.2d 650 (1941).

105. See CAL. BUS. & PROF. CODE § 7028; CAL. INS. CODE § 1714.

106. *Lewis & Queen v. N. M. Ball Sons*, 48 Cal.2d 141, 308 P.2d 713 (1957). The statute was CAL. BUS. & PROF. CODE § 7031.

107. *Fewel & Dawes, Inc. v. Pratt*, 17 Cal.2d 85, 109 P.2d 650 (1941).

108. See Justice Carter's dissenting opinions. *Lewis & Queen v. N. M. Ball Sons*, 48 Cal.2d 141, 155, 308 P.2d 713, 722 (1957); *Fewel & Dawes, Inc. v. Pratt*, *supra* note 107, at 92, 109 P.2d at 654.

These statutes, and Justice Traynor's decisions carrying them out, further the economic planning policy by tending to limit the use of the market system to insurance brokers and construction contractors with licenses. Arguably, licensing insures that the public will deal with only qualified brokers and contractors. Moreover, a licensing scheme affords the state some control over how licensees perform in their occupation to supplement the often inadequate control provided by difficult and expensive lawsuits for breach of contract or misrepresentation. On the other hand, the statutes can serve to protect those licensed from the competition of those unlicensed and to control the type and degree of competition between those privileged to use the market. This promotes the general economic welfare if it is in the interest of society to have certain occupations or professions so subsidized. For example, higher income in a licensed area could attract more and better qualified people to it.

These two "illegal contract" decisions provide an interesting contrast to Justice Traynor's several opinions limiting the thrust of statutes requiring writings. Devices were available to limit the licensing legislation,¹⁰⁹ but he did not use them. Both kinds of statutes overturn transactions and may disrupt plans and cause reliance loss.¹¹⁰ Apparently Justice Traynor agrees with the legislature's use of licensing to control participation in the market whereas he disagrees with the purposes of the required-writings legislation.

Justice Traynor has regulated the selling of real estate by refusing to enforce certain common features of the land contract. The effect of a line of his decisions is to subvert provisions which would allow a vendor, if the vendee defaults, to quickly quiet title and regain possession and to keep the vendee's payments. He has given land contract vendees a right of redemption or the right to restitution of the balance between their payments and the vendor's damages even though there are express provisions in the contract to the contrary. This is the clearest instance in Justice Traynor's

109. See the opinions cited note 108 *supra*.

110. Both *Lewis & Queen v. N. M. Ball Sons*, 48 Cal.2d 141, 308 P.2d 713 (1957), and *Fewel & Dawes, Inc. v. Pratt*, 17 Cal.2d 85, 109 P.2d 650 (1941), involve not only reliance loss to the plaintiff but a gain to the defendant, as a result of the reliance loss, to which the defendant has but a weak claim. This is the strongest case for a remedy absent a countervailing policy. See Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 56 (1936).

contracts decisions where social control prevails over individual discretion.¹¹¹

In *Barkis v. Scott*¹¹² a vendor brought an action to quiet title against the vendees. They had purchased the house in question under a land contract and had been in possession approximately five years. They had paid close to half the amount due and had made \$3,100 worth of improvements. The land contract provided that time was of the essence and in the event of default, at the option of the vendor, all moneys paid by the vendees would be retained by the vendor as liquidated damages. When the vendees' checks for the June and August 1946 monthly payments were returned by the bank for insufficient funds, the vendor notified the vendees that he had declared a forfeiture and then brought the action. The trial court, following many prior California decisions, found for the vendor according to the terms of the contract. Justice Traynor's opinion reversed this judgment and, in effect, swept aside the prior California cases.

Justice Traynor stated that the old leading case of *Glock v. Howard & Wilson Colony Co.*¹¹³ was wrongly reasoned. There the court had said that the vendee forfeited the payments he had made if he defaulted. Apparently, the court in the *Glock* case had overlooked section 3275 of the Civil Code:

Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in the case of a grossly negligent, willful, and fraudulent breach of duty.

Justice Traynor found that section 3275 prevented a forfeiture. To apply the section he had to overturn the trial court's finding that the bad checks constituted a grossly negligent or willful breach. He did so, pointing out that they had resulted from illness disrupting the vendees' regular schedule of deposits.

Justice Traynor further broadened the rights of the defaulting vendee in *Baffa v. Johnson*¹¹⁴ and *Freedman v. The Rector*.¹¹⁵ In both cases vendees had made deposits of earnest money under con-

tracts for the purchase of property which provided that if the vendee failed to go through with the transaction, the vendor could retain the deposits as liquidated damages. Both vendees refused to go through with the deals, and both attempted to recover at least part of their deposits. In the *Baffa* case Justice Traynor said that a defaulting vendee may recover his deposit less the vendor's damages, but the vendee in the case had failed to prove that there was any balance in his favor. In the *Freedman* decision the case was remanded to give the vendee a chance to prove the amount of restitution due. In both cases liquidated damages provisions were ignored. However, the significance of the *Freedman* decision is that while the facts did not fall within section 3275 of the Civil Code because the breach was willful, Justice Traynor still decided that the vendee could obtain restitution. This result turned on his own judgment and not simply obedience to a legislative policy decision.

Why should vendors and vendees be inhibited from making agreements which allow the vendor to get the vendee off the property quickly and to retain all the vendee's payments if the vendee defaults? Why should the vendor be prevented from creating a situation in which the vendee will have a real incentive to perform? At the outset one can object that it is unlikely that vendees actually agree to such provisions but rather likely that they sign printed-form contracts with such provisions buried in the fine print.¹¹⁶ However, Justice Traynor's rule goes well beyond protecting such a vendee and encompasses even a vendee who is fully aware of the legal effect of his contract and defaults to serve his own purposes. To defend the position one must establish that the general welfare is furthered if vendees cannot make such bargains in any case.

The argument for Justice Traynor's position differs in the case of the security device where the default comes after substantial payments and in the case of the deposit, or "earnest money," contract made preliminary to closing. Yet in both instances the defense turns on the hardship such "forfeiture" provisions can bring to the vendee, assumptions about his ability to protect himself, and the weakness of the vendor's case for having a right to the property and

111. See Justice Traynor's own discussion of these cases: *Badlands in an Appellate Judge's Realm of Reason*, 7 UTAH L. REV. 157, 159-60 (1960); *Unjustifiable Reliance*, 42 MINN. L. REV. 11, 19-21 (1957).

112. 34 Cal.2d 116, 208 P.2d 367 (1949).

113. 123 Cal. 1, 55 Pac. 713 (1898).

114. 35 Cal.2d 36, 216 P.2d 13 (1950).

115. 37 Cal.2d 16, 230 P.2d 629, 31 A.L.R.2d 1 (1951).

116. While this often is undoubtedly the case, it is interesting to note that the authors of a recent empirical study of land contract practices in Wisconsin conclude: "[T]he general tone of the answers gives the impression that both sellers and buyers, often in spite of their scanty previous experience, usually know some of their basic legal rights and duties under the land contract; for instance, that the farm is lost upon default of payment after a short period of grace." Dolson & Zile, *Buying Farms on Installment Land Contracts*, 1960 WIS. L. REV. 383, 417.

the payments as well. First, under such agreements in a security contract where the default comes after substantial payments, the defaulting vendee and his family lose their house and their payments—in many instances the primary asset of the family unit. Typically, assuming such a risk on a long-term land contract is a bad gamble since defaults can be caused by a general economic downturn or personal misfortune over which a vendee has no control. The bargaining agent for the family ought not be induced to take such a gamble in a society interested in housing its members and insuring that family units have some measure of economic security. Moreover, such provisions, if widely used, would tend to magnify the effect of general economic downswings by financially wrecking many families at the same time. Finally, society also may have an interest in preserving confidence in the economic and social system. Many vendees lack the bargaining skill or power to object to such forfeiture clauses at the time the land contract is made. Years of payments and the house can be lost because of events unrelated to the ability of a family's primary wage earner. In many instances the cards are stacked against the vendee over the long run if his land contract provides he loses everything if he defaults. Those playing with the deck stacked against them seldom retain confidence in the game.¹¹⁷

Second, Justice Traynor's defaulting vendee rule also applies to earnest money payments made preliminary to the closing. Even the willfully defaulting vendee can get restitution of any balance left after the vendor's damages are applied against his deposit. "Liquidated damages" clauses to the contrary seem to be ineffective. It may be in the interest of the general welfare to allow vendees to back out of purchase agreements at the least cost consistent with the interests of the vendor. Frequently a house is the most expensive item a family unit will ever buy. Yet, also frequently, it is bought on an impulse, with little more deliberation than is exerted in buying a bottle of detergent at a supermarket.¹¹⁸ It may be that years of dealing with department stores has established the principle of "money cheerfully refunded" in the minds of many; we live in a kind of "implied warranty" society. Moreover, if one is to judge by the reported cases, real estate selling is an area where practices on the borders of fraud are not uncommon.

117. See Knight, *The Ethics of Competition*, in *THE ETHICS OF COMPETITION* 19, 58-66 (1935); Knight, *Economic Theory and Nationalism*, in *id.* at 277, 291-93.

118. See Norris, *Processes and Objectives in the New London Area*, in *CONSUMER BEHAVIOR* 25 (Clark ed. 1954).

The defaulting vendee rule also attends to the legitimate interests of the vendor.¹¹⁹ In the *Barkis* situation involving the security arrangement the default on the monthly payments must be made up and the payments must be resumed. What the vendor loses is the right to oust the vendee, keep all his payments, and resell at a profit.¹²⁰ In cases like *Baffa* and *Freedman* involving the marketing contract, in order to get restitution the vendee who backs out must prove that his deposit exceeded the vendor's damages. If courts administer this burden of proof wisely, the vendor will keep the earnest money where there is no balance in favor of the vendee or in cases of doubt. What the vendor loses is the right to retain the vendee's deposit over and above his damages as a windfall. For example, suppose a real estate developer sells a house to a vendee who cannot afford the monthly payments. The vendee pays \$1,000 down when he signs the contract, but a short time later he recognizes the foolishness of his commitment and repudiates. The developer immediately resells to a second vendee at the same price, incurring only a small additional selling expense. Why should the developer be able to keep all of the vendee's \$1,000 deposit?

In a recent article¹²¹ Professor Hetland objects to the *Barkis*, *Baffa*, and *Freedman* decisions because they may result in undue interference with the market system and the contribution made by that system to the general welfare. Initially he insists that we, unlike the Supreme Court of California, make a useful distinction between cases like *Baffa* and *Freedman*, which involve the "basic buy-sell" or marketing agreement, and cases like *Barkis* which deal with the parties' security device and problems of default after the transaction is under way. Next he makes an argument against the *Baffa* and *Freedman* cases which, in the terms of this article, is based on transactional policy. He contends that in the marketing agreement situation there is need for a valid liquidated damages device to protect the vendor from injury when the vendee withdraws. In theory requiring the vendee in default to prove that his deposit exceeds the vendor's damages will fully protect the vendor's interest, but in fact this may not always be true.

Professor Hetland gives the following illustration:¹²² The vendor wanted to sell his house in California because he had taken a

119. This was the primary argument in Justice Traynor's opinions in the *Barkis*, *Baffa*, and *Freedman* cases. The argument goes back to the classic case of *Britton v. Turner*, 6 N.H. 481 (1834).

120. Compare Dolson & Zile, *supra* note 116, at 413-14.

121. Hetland, *The California Land Contract*, 48 CALIF. L. REV. 729 (1960).

122. *Id.* at 738-40.

job in Florida which began on September 1st. It was important to the vendor to move his family together and get his children started in school at the beginning of the term. He had deposited earnest money on a house in Florida, but his contract there was contingent upon selling his California house by September 1st. By the end of July the vendor had turned down an offer of \$22,000, knowing his house was worth more. However, time now was growing short. The vendee offered \$18,000 on a deposit receipt contract on August 1st. He finally agreed to raise his deposit from \$500 to \$2,000 so that if he should default, the vendor would have something to cover his loss. Closing was set for August 29th, and time was made of the essence in a contract providing that the vendor should retain the \$2,000 in case of default.

On August 15th the vendee refused to go through with the deal and demanded his money back. The vendor at this point had no effective remedy for this breach. Specific performance would be undesirable since the vendor wanted an \$18,000 contract only if he could close by September 1st. Contract damages would be the difference between the contract price and the value of the house at the time of the breach,¹²³ the property clearly was worth more than \$18,000 then, and so there would be no damages.

The vendor gave up his Florida house and resigned himself to moving the family in several groups and forcing his children to change schools in the middle of the year. Without the pressure of time, he sold his house for a net to him of \$20,000 after September 1st. Then the vendee sued to recover his \$2,000 deposit back. Under the rule of the *Freedman* case the vendee would probably win. The vendor would have trouble proving any damages. He sold his California house for more than the agreed price of \$18,000, and this fact would probably be sufficient to justify judgment for the vendee. The loss on the Florida house probably is not a foreseeable consequence of breach and hence not recoverable or will require the vendor to bring experts from Florida to establish the value of the house there in order to determine his loss, and this cannot be done for the \$2,000 in dispute. The disruption of family plans and frustration cannot be measured in money damages. This, Professor Hetland asserts, shows that the *Freedman* rule is unfair in a mar-

keting contract situation and liquidated damages are needed. He continues that

[the vendor's] unprovable loss is only part of it. Avoiding the expense of trial, avoiding the expense of expert witnesses to prove value, taking away the club of a litigious vendee who knows that his threatened lawsuit is potentially dangerous enough to "nuisance out" a settlement, saving the developer from depressing the value of the rest of his tract by proving resale at a loss to be resale at true value—these, too, have some bearing on the problem.¹²⁴

Professor Hetland also sees a potential danger if the court were to extend *Barkis v. Scott*, a security device case, and give the defaulting vendee on a marketing agreement an equity of redemption as an alternative to his restitutionary rights. This has not been done, but it is consistent with the reasoning of the three opinions which have not distinguished marketing from security agreements. If the court failed to make this distinction, the defaulting vendee on a deposit contract could cloud the vendor's title, preventing quick resale except at the cost of purchasing a quitclaim deed.

When we turn to the security contract and facts such as those of *Barkis v. Scott*, Professor Hetland concedes that Justice Traynor's opinions make more sense as this is the situation to which most of the anti-windfall arguments are relevant. However, he points out, in effect, that social welfare may not be best served by removing from the list of permissible bargains the chance to gamble on a forfeiture. While an equity of redemption or restitution may help the defaulting vendee, it does little to make the land contract attractive to the vendor or the lender. In fact, the *Barkis* line of cases makes the land contract no longer a more attractive security device than a mortgage or deed of trust, since the land contract is no longer more quickly and less expensively enforced under California law.¹²⁵ Insofar as speed and expense of enforcement of a land contract lowered the amount of required down payments, they may have been worth the harsh consequences of forfeiture. The advantage of lower down payments will be lost if vendors take rational action in response to Justice Traynor's land contracts decisions.¹²⁶

124. Hetland, *supra* note 121, at 740-41. (Footnotes omitted.)

125. *Id.* at 760-75.

126. *But cf.* Beuscher, *Buying Farms on Installment Land Contracts—A Preface*, 1960 Wis. L. Rev. 379, 381: "It is quite possible that long established commercial practice has at least as much influence [as more expeditious remedies against defaulting land contract buyers] in inducing sellers to use a land contract rather than a mortgage to secure . . .

123. CAL. CIV. CODE § 3307, as construed in *Royer v. Carter*, 37 Cal.2d 544, 233 P.2d 539 (1951) (Traynor, J.).

All of Professor Hetland's objections to Justice Traynor's defaulting vendee cases indicate the difficulties of turning from supporting the market through contract law to attempting to shape men's affairs through it. They indicate the difficulty in knowing the consequences of a decision. In theory contract damages fully protect the vendor; in fact, as Hetland's hypothetical case indicates, contract damages only protect some of the vendor's interests, and even those are not too well protected when we add the common factors of distance and a lawsuit involving a small sum. Of course, one might think all of the vendor's legitimate interests are covered or that the chance of distance and small lawsuit complications in some cases does not justify allowing windfalls in others. Yet the problems deserve consideration.

Similarly, by focusing on the widow being thrown out into the snow one can arrive at an equity of redemption wholly inappropriate for a businessman backing out of a deposit agreement in a contract to buy a cocktail lounge. One can also undercut a common land-financing device by trimming it of all features that distinguish it from a mortgage without considering whether this is desirable. Of course, the advantages of Justice Traynor's positions regarding the land contract vendee in default may outweigh the disadvantages raised by Professor Hetland. Yet the point remains that knowledge of alternative solutions to legal problems and their consequences is hard to obtain.

III. EVALUATION

Justice Traynor's contracts decisions must be evaluated in terms of the balance he strikes between seeking the goal of market support and that of social control, and the proportions in which he makes use of the policies designed to carry out these goals.¹²⁷ Contracts problems arise from so many contexts that one would not expect any one goal or policy to be applied dogmatically. Rather the issue is whether or not the compromises made in his decisions maximize

¹²⁷ 'shoestring' down payment sales. The practice of insisting on a 25 to 40 percent down payment as a condition to mortgage financing is deep-grained."

127. "The right principle is to respect all the principles, take them fully into account, and then use *good judgment* as to how far to follow one or another in the case in hand. All principles are false, because all are true—in a sense and to a degree; hence, none is true in a sense and to a degree which would deny to others a similarly qualified truth. There is always a principle, plausible and even sound within limits, to justify any possible course of action and, of course, the opposite one. The truly right course is a matter of the best compromise or the best or 'least worse' combination of good and evil." Knight, *The Role of Principles in Economics and Politics*, in *ON THE HISTORY AND METHOD OF ECONOMICS* 251, 256 (1956).

general economic welfare. First, how far contracts decisions should support the market and how far they should carry out social control concepts will be considered. Then, the best balance of policies relevant to each of these two goals will be discussed.

A. *The Polarity of Market vs. Social Control*

Our society has strong commitments to freedom in economic affairs and to allocation of resources by the market institution. Contract law, it seems generally agreed, is and ought to be primarily designed to support the market institution. It should be aimed toward social control only in exceptional circumstances, but such circumstances exist. The incentive to depart from market thinking comes first from features of bargaining which some find objectionable. On one hand, individuals can make bad bargains which, if carried out, would have drastic consequences. Bad bargains can be caused by faulty perception or predictions of facts or by extraordinarily bad luck. Such a bargain ceases to be a mutually beneficial exchange and sometimes inflicts a large loss on a person ill-prepared to meet it. On the other hand, some individuals enter disadvantageous contracts because of an "inequality of bargaining power." They lack either the skill or the resources to do more than make the choice whether or not to enter a complex transaction on terms set by the other party in his favor.¹²⁸ The second incentive to use contract law to further social control comes from a determination that certain kinds of transactions ought to be favored or disfavored in the interests of the general welfare.

However, judges and legislators at least should use caution in introducing social control concepts into contract law. Obviously, these concepts limit free contract and its values. While one party may have made a terrible bargain, the other party may not be responsible for this or may have set up a chain of plans which would be toppled if any relief were given. Moreover, such plans are not always easy to prove in a lawsuit, and litigation encouraged by the chance of relief from an assertedly disastrous bargain can be expensive. Furthermore, it is easy to forget the interests of third parties in the resolution of a contract dispute. For example, one

128. See W. FRIEDMANN, *LAW IN A CHANGING SOCIETY* 94-101 (1959). *But cf.* KNIGHT, *INTELLIGENCE AND DEMOCRATIC ACTION* 113-14 (1960); Knight, *The Role of Principles in Economics and Politics*, *supra* note 127, at 265-66, 279; Knight, *Book Review*, 39 VA. L. REV. 871 (1953); Sharp, *Promises, Mistake and Reciprocity*, 19 U. CHI. L. REV. 286, 294-96 (1952).

would seriously limit the actions of large corporations if their dealings with those of lesser "bargaining power" were always in doubt. While such a limitation might serve some purposes, it would do so only at the cost of interfering with efficient operation of large economic institutions, the operation of which is significant to many not involved in the questioned bargain. Finally, rules concerning contracts are not likely to have much general effect in equalizing resources of personal skill or property. Such minor adjustments may divert attention from more major attacks on the problem of inequality of resources.

There are still other objections which indicate caution in turning from the market philosophy as the guide for contract law. We have at least a rough working agreement in our society on the market philosophy; social control is not as clearly accepted—at least there are important differences on when and how it should come into play.¹²⁹ Judicial lawmaking is open to some question in terms of the functions of the agencies of government when it is too original and goes very far beyond implementing an agreed-on philosophy. Of course, it is possible to argue that the judiciary can represent the community as a whole, a group which has no lobbyist before the legislature. A new judicially created rule can be viewed as something like a proposal which stands unless vetoed by the legislature. Legislatures seldom have the time or interest to deal with the "minor" problems of the common law. The court's new position will either dispose of the problem or call attention to it for legislative consideration.¹³⁰ Even granting all this, one can be more sanguine when the court is dealing with a generally accepted philosophy. When a legislature is occupied with widely publicized issues often it will not get around to reviewing even those judicial decisions which are far out of line with the existing legislative consensus.

The final caution is a practical one concerning the difficulties in creating effective laws generally but especially applicable to introducing social control ideas into contracts. Ideally, rational law-

129. Of course, our society has long used law positively in economic matters. "Our [19th century] working philosophy . . . was much more complex than the simple, straight-line belief in *laissez faire*, which it has sometimes been pictured to be." Hurst, *Law and the Limits of Individuality*, in *SOCIAL CONTROL IN A FREE SOCIETY* 97, 109 (Spiller ed. 1960). See also HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956); Auerbach, *Law and Social Change in the United States*, 6 U.C.L.A.L. REV. 516 (1959).

130. See Breitel, *The Courts and Law Making*, in *LEGAL INSTITUTIONS TODAY AND TOMORROW* 1 (Paulsen ed. 1959).

making requires knowledge of the alternative solutions to the problem, knowledge of the consequences of each solution, and the selection of the alternative with consequences which best attain a desired goal at the least social cost. Yet courts have limited resources for obtaining knowledge of alternatives and consequences. It is not always easy to determine whether a decision which attempts to implement social control will achieve its goal because of the almost necessary vagueness of that goal. Moreover, it is not easy to tell whether or not a position has undesirable side effects that cost more than any gain produced is worth. Of course, criticism of decisions in the law reviews can help in this regard, but too often it comes after the judge has made his decision on the facts available at the time rather than when it would have been of help.

While one cannot be certain how far Justice Traynor might attempt to carry out social control concepts if he had an unlimited opportunity to do so, he appears to turn in this direction with due caution. In one instance he vigorously opposed invalidating contracts between persons with certain political affiliations and manufacturers of products which are of public concern.¹³¹ His opposition was based on many of the objections to social control which have been listed. Remarkably few of his approximately fifty-six contracts decisions are oriented toward social control, and his bows in this direction have avoided many of the objections mentioned. For example, absolute liability of manufacturers for personal injuries caused by their products can be explained on market-oriented grounds as well as by social control ideas.¹³² Further, the Supreme Court of California has arrived at something approaching an absolute liability position through the negligence-*res ipsa loquitur* route, and so Justice Traynor's position is less a striking innovation than a plea that the court say what it means. Then, manufacturers are a group of such importance and the problem is so significant that the legislature is likely to consider any complaints as to the policy or the details of its operation.

His other social control positions at least begin with a legislative determination of policy. The licensing statutes¹³³ can be coupled with section 3275 of the Civil Code's disapproval of forfeitures¹³⁴

131. *Black v. Cutter Labs.*, 43 Cal.2d 788, 809, 278 P.2d 905, 918 (1955) (dissenting opinion).

132. See pp. 838-39 *supra*.

133. See note 105 *supra*.

134. See text accompanying note 113 *supra*.

to indicate that Justice Traynor is not imposing idiosyncratic values on the state. Furthermore, even though there are problems of knowledge of alternatives and consequences, the rights of a vendee in default under a land contract have been the subject of a good deal of discussion in law reviews,¹³⁵ and the equity of redemption of a vendee under a mortgage is a close analogy which has been around for quite a while.

In sum, Justice Traynor's balance between supporting the market and carrying out social control ideas seems excellent in the limited context of the cases he has decided. He shows caution but is willing to act when not all the danger signals are up. One can only anticipate with some eagerness his solution to any of such problems as the right of a manufacturer to cancel a dealer's franchise for reasons less than "cause,"¹³⁶ the effectiveness of a manufacturer's attempt, through a standardized industry-wide form contract, to disclaim all responsibility for injuries caused by his product,¹³⁷ or a landlord's attempt to disclaim liability for his negligence in a form lease executed during a housing shortage.¹³⁸

B. The Polarity Between Policies

Another problem of proportion remains. Justice Traynor's decisions reflect a balance between the alternative policies—those reflecting the particular and those the general—available to reach a particular goal.¹³⁹ Assuming market support is that goal, how far

135. The almost traditional citations are Ballantine, *Forfeiture for Breach of Contract*, 5 MINN. L. REV. 329 (1921); Corbin, *The Right of a Defaulting Vendee to the Restitution of Installments Paid*, 40 YALE L.J. 1013 (1931); Vanneman, *Strict Foreclosure on Land Contracts*, 14 MINN. L. REV. 342 (1930). Compare 1961 WIS. L. REV. 324.

136. See, e.g., *Gaines W. Harrison & Sons, Inc. v. J. I. Case Co.*, 180 F. Supp. 243 (E.D.S.C. 1960); cf. WIS. STAT. § 218.01(3)(a) (17) (1959), as construed in *Kuhl Motor Co. v. Ford Motor Co.*, 270 Wis. 488, 71 N.W.2d 420, 55 A.L.R.2d 467 (1955).

137. See *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

138. See, e.g., *O'Callaghan v. Waller & Beckwith Realty Co.*, 15 Ill. 2d 436, 155 N.E.2d 545 (1959).

139. Willard Hurst has well stated the problem and described the process: "General aspects of experience are abstract and common, or shared. Yet perception of abstracted likenesses among phenomena of richly diverse content has produced the practical results of science and technology. Particular experience is concrete, immediate and unique, the felt matter of life as men live it with ever fresh novelty moment to moment or year to year. Yet out of the tangible and unique qualities of particular experience, western man has made the intangible and shared value which he ranks first among secular goods—the dignity and creative worth of the individual human being. . . . Thus there can be creative tension between particular and general perceptions of experience. This creative tension can exist in ascending levels, for man has increased his capacity to abstract from experience to form more intricate patterns of generalization. So he turns his generalizations of today into the particulars from which he abstracts further to make his generalizations of tomorrow. On the other hand, effective generalization means perception of manipulable relationships—the surer grasp of cause and effect. . . . Effective generalization reduces confusing, apparently unrelated variety to statements of relative simplicity, yielding perception of relations that

is it to be achieved by functional policy and how far by transactional? A major part of any lawmaker's contract law will be functional, creating a system of general rules designed to facilitate bargaining. Rules are important. Rules allow a bargainer to take steps to reach the results he desires; rules fill gaps so that negotiations can proceed concerning the things the parties perceive as important and ignoring what they feel is unimportant; and rules serve to draw lines. One is given guidance on when he may back out and when he must perform, and on what he must do, and when, as well.

Of course, Justice Traynor recognizes the value of general rules governing contracts. He has created some new functional policy rules. His rules extend contractual obligation to protect reliance on likely assumptions in situations where the risk in question was not clearly assumed by one party. Yet his rules are designed more to protect common patterns of reliance than to create legal devices which parties can use if they know of them.

While generally applicable rules governing contracts are important, they have their costs, especially when the rule is not designed to correlate with modern bargaining practices. It is difficult to know the consequences of a rule. A rule which leads to good results in many cases may lead to a very poor one in a particular instance. If so, one can write off the particular case as the cost of a useful rule or he can undercut the rule. Justice Traynor has been willing to undercut a number of functional policy rules calling for certain contracts to be in writing or calling for deference to be given to what has been written. Here he prefers to deal on a particularistic basis.

Any system of flat rules must be tempered by the power to deal with particular cases—for one thing, it would be impossible to create a system of rules answering every question which will be brought before the courts.¹⁴⁰ Justice Traynor's contracts decisions show that he wants wide freedom to deal with particular bargaining transactions in search of the best result in market terms unhampered by general rules. On its face, transactional policy is appealing. Rules which in most, but not all, cases lead to support

can be manipulated. However, translation of this insight into action typically involves orderly re-creation of variety, defining limited objectives and contriving specific means to realize the new knowledge in the context of varying circumstance." HURST, *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* 133-34 (1960).

140. Compare HAYEK, *THE CONSTITUTION OF LIBERTY* 208 (1960), with J. STONE, *THE PROVINCE AND FUNCTION OF LAW* 262-63 (1946). See also LLEWELLYN, *THE COMMON LAW TRADITION* 17-18, 178-212 (1960).

of the market are discarded in favor of seeking in all cases the parties' bargain or the result which least disrupts plans and causes reliance loss.

Yet the transactional approach is not without problems. It requires a wise and sophisticated judge who can carry out the basic purpose of the actual agreement rather than, say, literally define and apply the phrase "This contract is not assignable."¹⁴¹ Moreover, even the wise and sophisticated judge will need a great deal of information, of a type often left out of a trial or a record on appeal, about the bargaining situation and the situation at the time of the dispute, and about what Llewellyn calls "the relevant problem-situation as a type."¹⁴²

Nor is an attorney attempting to draft a complex contract aided by a contract law which leans very far toward transactional policy. Of course, if he is perfectly clear in his drafting and if he brings home to both parties what his drafting means, he can have just what he wants. Yet these are not easy conditions to meet, especially when drafting a standardized contract to be used by many people in a large organization in their dealings with outsiders.

One can have some qualms about Justice Traynor's balance between flat rules and a case-by-case approach. Even though Justice Traynor can deal with commercial matters in a wise and sophisticated manner, we cannot expect any state to fill all of its judicial positions with such men; some judges surely do better with rules as flat as can be engineered. Moreover, one can feel uneasy about even Justice Traynor's ability to get the facts he needs to decide given cases or to create more general rules recognizing common bargaining patterns. It is difficult for any appellate judge to rise above the record, and records are often prepared by men whose standard of relevance is the sections on contracts in a legal encyclopedia.¹⁴³ However, the uneasiness is more in terms of what might happen¹⁴⁴ than what has happened. Justice Traynor's undermining of functional rules probably has not hurt the planning of lawyers. None of his transactionally oriented opinions appears to be clearly wrongly decided, and he has avoided some poor results to which

141. See the discussion of the *Trubovitch* case, text accompanying notes 28-29 *supra*.
142. LLEWELLYN, *op. cit. supra* note 140, at 268.

143. See Currie, *Appellate Courts Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation*, 1960 Wis. L. Rev. 39, 53 (Justice Currie is an Associate Justice of the Supreme Court of Wisconsin).

144. Justice Traynor has recognized many of the difficulties with judicial lawmaking and a case-by-case approach. See Traynor, *Comment on Courts and Law Making*, in *LEGAL INSTITUTIONS TODAY AND TOMORROW* 48 (Paulsen ed. 1959).

he would have been guided by the rules concerning writings. Moreover, his innovations on a case-by-case basis may have provided a needed dynamic in the California system of contract law to modernize it and align it with the goal of supporting the market. A case-by-case approach perhaps minimizes the cost of mistaken changes and allows for better adjustments as new situations arise.

The last compromise of policies to consider is the balance between the particular and the general approach to social control where social control is the appropriate goal of contract law. However, it is hard to find any evidence of the particularized relief-of-hardship policy in Justice Traynor's decisions. All of his excursions into social control have involved rule making.

One might argue that many of the benefits of social control as a goal of contract law can best be realized by relieving hardship in particular cases but avoiding generalization. Judges or juries can let a party out of a disastrous contract when they feel the other bargainer should have done this as a matter of ethics. If this is done only in those rare cases where the facts call for compassion, it will not impair the general structure of contract law and the values of a market system. Flat rules mark off an area from bargaining where it is likely that most contracts will turn out badly; yet it is hard to delimit such an area without outlawing harmless contracts in the process.

But the power to let a party out of his disastrous bargain on a case-by-case basis is an arbitrary one largely turning on the attitudes of the judge or jurors faced with the case.¹⁴⁵ Sometimes it will be used wisely; sometimes not. Moreover, it is hard for a legislature to control this kind of power "to do equity." There is nothing to debate or legislate about. One can hardly imagine a statute overturning the decision in a particular case where a party was let out of his contract, or legislation directing courts to cease "doing equity."¹⁴⁶ Finally, the only way a lawyer can plan so as to avoid courts letting the other party out if the bargain pinches is to draft so that no question about the reasonableness of the contract can be raised, and advise his client to let the other party out or compromise

145. An arbitrary decision is one turning on factors not applied to all cases with similar facts. For example, Zigurds Zile notes that in a 1944 Russian contracts case the court commented: "In deciding the present suit one should take into account the circumstance that two of the defendant's sons are serving in the Red Army while a third is a disabled veteran of the Patriotic War." Zile, *Remedies for Breach of Contractual Obligations in Soviet Law* 53 (unpublished paper in Harvard Law School Library).

146. Cf. Simons, *A Political Credo*, in *ECONOMIC POLICY FOR A FREE SOCIETY* 1, 20 (1948).

when performance would be very difficult. While this may sound appealing from an ethical standpoint, it presents some dangers of abuse if the party who wants out can push losses on to the other man or negotiate rather than perform whenever any kind of difficulty is encountered. The one who wants out would be given a negotiating lever by a case-by-case approach. The chance that judge or jury would believe his sad tale would have to be weighed by the one trying to get the contract performed.

The economic planning policy, on the other hand, calls for more or less flat rules. While it is hard to make delicate distinctions in a generalization, such rules do allow lawyers to plan so as to avoid them, and legislatures can veto them if a court has made a poor judgment in creating a rule or if a rule is out of date.

Justice Traynor's sparing use of the economic planning policy and failure to use the relief-of-hardship policy probably gives an inadequate basis for suggesting the balance he would strike if he had to make the decision. His use of transactional policy to support the market does show he is not afraid of a case-by-case approach. The more significant question is to what extent he favors action to cover the bad bargain or to equalize bargaining power. So far there is no clear answer.

In conclusion, perhaps it is remarkable enough to find any pattern of balance between the goals and policies in a judge's contracts decisions in light of the diverse elements covered by the term contract. Yet the compromises taken by Justice Traynor not only indicate direction rather than drift but indicate sensible direction as well.