Two Justices at Issue:
Goodwin and O’Connell

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INTRODUCTION

Alfred T. Goodwin served on the Oregon Supreme Court for almost ten years. He joined the court in 1960 after four years of service on the Circuit Court for Lane County. He then was appointed to the federal district court in 1969, having been recommended by Senator Mark Hatfield. In 1971, he was elevated to the U.S. Court of Appeals for the Ninth Circuit, which he eventually served as Chief
Judge. One of his Oregon Supreme Court colleagues was Kenneth O’Connell. O’Connell had joined the court in 1958, only a short time before Goodwin, but served twice as long, until 1977. O’Connell was the court’s Chief Justice from 1970 to 1976 and was thought to be the court’s intellectual leader.1

Justices Goodwin and O’Connell served together for all of Goodwin’s time on the court, except for the year O’Connell was on sabbatical at the Center for the Study of Behavioral Sciences at Stanford University. O’Connell, hired by Dean Wayne Morse at the University of Oregon School of Law in 1935, had been Goodwin’s professor when Goodwin, after completing a journalism degree upon his return from World War II, attended and graduated from law school. After Goodwin’s graduation, and before they became judicial colleagues, they did have some limited contact when O’Connell was of counsel to the Eugene law firm (Vonderheit & Darling) in which Goodwin was an associate and which O’Connell had helped form.2

As O’Connell was on the Oregon Supreme Court before Goodwin, he both reviewed rulings Goodwin handed down as a Circuit Judge in Lane County and then witnessed Goodwin’s adjustment. O’Connell has said of Goodwin, “The transition was fairly easy for him. It seemed like no transition problem at all,” with Goodwin “ready to go” on the job’s writing aspect, and “it was not strange for him to get to the books.”3 On the court, their relationship was not a distant one. “We had more than the usual close relationship because of the earlier contact as professor and student,” said O’Connell. “We kicked around things in each other’s office—things that were bothering us.”4

The views of Goodwin and O’Connell on a number of subjects, whether torts or civil liberties, resulted in not infrequent disagreement. As O’Connell was later to say, “[W]e participated in some very interesting law-making, not infrequently in disagreement,

3 Interview with Kenneth O’Connell, Former Chief Justice, Or. Sup. Ct., in Salem, Or. (Oct. 18, 1994) [hereinafter O’Connell Interview].
4 O’Connell particularly recalled what was probably Justice Goodwin’s most important ruling, the “Oregon beach” case, State ex rel. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969), as one in which Goodwin came to O’Connell’s office “to kick the problem around.” Because O’Connell had taught Property, he had casebooks on the subject, and he read to Goodwin “a section on property law developing out of custom in England,” and they “discussed it, explored the idea of customary law—it sort of comes out in the opinion.” O’Connell Interview, supra note 3.
and sometimes accompanied with sharp and heated debate." The intent of this Article is to explore the disagreements between these two justices. There is much evidence that the student didn’t always follow the teacher. In general, O’Connell, more “adventurous” in breaking new legal ground, was more precise, and he gave more extended treatment to key doctrinal matters than did Goodwin. As Goodwin has put it in writing to a law school classmate, “Ken and I are thinking of going on the road as The Judicial Activist and the Judicial Atavist.” However, their disagreement was professional, not personal. O’Connell has noted that Goodwin “never took things personally. On matters of disagreement, he recognized there were different points of view.” As O’Connell later stated it, “[W]e left our dueling foils at the conference table, and never let our differences affect our personal relationship.” Goodwin had observed to his law school classmate that he “wish[ed] that there were some way [the justices] could really help each other,” said “Ken and I do some of this, but even as detached as we try to be, we sometimes get in each other’s hair.” But he also said, “We fight, but have fun.”

This Article begins with a brief treatment of Justice O’Connell’s treatment of Judge Goodwin’s trial court rulings that came to the Oregon Supreme Court. Its core proceeds, through major areas of the law, to examine cases which Goodwin and O’Connell considered together and in which they disagreed. Given that this Article stems from a larger project involving Judge Goodwin, in some places he receives greater attention than does Justice O’Connell.

I
GOODWIN ON THE TRIAL COURT

Goodwin and O’Connell interacted as judicial subordinate and superior when Goodwin was a state trial judge and O’Connell was already on the state’s high court. O’Connell wrote opinions in several

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5 Induction Ceremony, supra note 2.
6 There is some limited treatment of this topic in Stephen L. Wasby, Looking at a State High Court Judge’s Work, 12 LEWIS & CLARK L. REV. 1135 (2008). See in particular “Some Patterns of Agreement,” id. at 1158–62, on voting patterns, and “More on O’Connell and Goodwin,” id. at 1162–66.
8 O’Connell Interview, supra note 3.
9 Induction Ceremony, supra note 2.
cases in which Circuit Judge Goodwin’s trial court decisions were reviewed.

In a case involving a burglary not in a dwelling, Judge Goodwin had denied a motion for acquittal upon the close of the State’s evidence.\(^{12}\) In one of the few instances in which the appeal was not heard until after Goodwin had joined the Supreme Court, a four-justice majority agreed that “there was sufficient evidence, although circumstantial, to deny the motion for acquittal” and rejected a challenge to the admission of statements made in defendant’s presence.\(^{13}\) However, the majority found that Judge Goodwin had erred in the admission of testimony about a check stolen in a burglary and that it was prejudicial to the defendant to show more than possession of the check, such as forgery, an attempt to pass the check, and a girl’s conviction and sentence resulting from the events.\(^{14}\)

Justice O’Connell, dissenting, would have upheld his former law school student’s opinion, saying admission of this testimony “did not constitute reversible error.”\(^{15}\)

Justice O’Connell, speaking for a four-justice department, affirmed Judge Goodwin’s ruling in a case involving a charge of sodomy based on homosexual relations with a fifteen-year-old minor.\(^{16}\) The legal question was when the charged events took place, as the indictment specified one date and the prosecutor offered a different date at trial.\(^{17}\) The high court’s affirmance was on the basis that despite the State’s choice to prove the charged event occurred “on or about” August 1, defendant’s admission was sufficient to corroborate an accomplice’s testimony that the acts in question occurred then.\(^{18}\) Justice O’Connell said the exact date must be stated “only if time is a material ingredient of the crime” and “time is not a material ingredient of the crime of sodomy,” because “sodomy is sodomy, irrespective of the precise time when the act is committed.”\(^{19}\)

Neither had the defendant established prejudice from the variance between the date in the indictment and that proved at trial. Moreover, the government had kept defendant’s other acts, introduced as to defendant’s sexual


\(^{13}\) Id.

\(^{14}\) Id. at 383, 359 P.2d at 561.

\(^{15}\) Id. at 385, 359 P.2d at 561 (O’Connell, J., dissenting).

\(^{16}\) State v. Howard, 214 Or. 611, 331 P.2d 1116 (1958).

\(^{17}\) Id. at 614–15, 331 P.2d at 1117–18.

\(^{18}\) Id. at 616, 331 P.2d at 1118.

\(^{19}\) Id. at 615, 331 P.2d at 1118.
inclinations, separate from the charged act, and Judge Goodwin had properly instructed the jury on this matter.\textsuperscript{20}

Justice O’Connell also wrote for the court in affirming an opinion by Judge Goodwin in a libel case that stemmed from a complaint a plaintiff had filed with the Lane County Grievance Committee, with a copy to the Oregon State Bar claiming that his adversary’s conduct was unethical and questioning whom the lawyer had been representing.\textsuperscript{21} That complaint led to a lawsuit claiming that the letter was false and libelous.\textsuperscript{22} Judge Goodwin felt that “because the proceedings of the Bar Grievance Committee are an exercise of the judicial branch of the government, and are judicial proceedings in nature,” absolute immunity applied to statements made to that body, and he therefore ruled for the defendant.\textsuperscript{23} In an extensive opinion, Justice O’Connell held that the letter was absolutely privileged, even with no formal hearing by the bar committee.\textsuperscript{24} He then saw a problem in the statute, as its limits on complainants’ privilege posed a separation of powers question. Disciplining lawyers was “an integral [and “traditional”] functioning of the judicial branch of government,” so the statute was unconstitutional for creating a “serious incursion” into the state supreme court’s “exclusive domain.”\textsuperscript{25}

Justice O’Connell did, however, disagree with Judge Goodwin over division of fees between two lawyers who, to put it mildly, had not clearly entered into an agreement and what they agreed to was unclear. Judge Goodwin had found that, despite the lack of an express understanding between the two men, there was a fee in which they should share equally. Justice Sloan, for the court’s majority, said the basic rule of equal payment in the absence of an explicit agreement was clear and it was “only necessary to state that the evidence is not sufficient to establish an ‘agreement.’”\textsuperscript{26} Praising Judge Goodwin by saying, “The trial judge heard and decided this case with meticulous and sensitive care,” he kept the ruling quite narrow, finding that “the ends of justice would best be served by limiting this opinion to [the] conclusion” that the justices “agree with his findings and concur with the opinion he rendered supporting

\begin{footnotes}
\item Id. at 616–17, 331 P.2d at 1118–19.
\item Id. at 384–85, 347 P.2d at 595.
\item Transcript of Record at 7–8, Ramstead v. Morgan, No. 51372 (Cir. Ct., Lane County, Or., 1957).
\item Ramstead, 219 Or. at 398, 347 P.2d at 601.
\item Id. at 400, 347 P.2d at 601–02.
\end{footnotes}
them. Justice O'Connell, by contrast, would have remanded to have Judge Goodwin establish the reasonable value of the legal services rendered by the plaintiff. He thought that the plaintiff had not carried his burden of proof, as much of the conflicting testimony “was sufficient to rebut the implied agreement for an equal division of the fee” but did not support the assertion that the plaintiff had been paid in full.

Justice O'Connell also agreed with Judge Goodwin in a contract case, somewhat unusual in its facts, which involved a claim for over $6000 lost from a bank’s night depository. Judge Goodwin had let the case go to the jury on the limited question of whether the deposit bag was delivered to the bank, and there was a verdict for the defendant. For a department of the Supreme Court, Justice O'Connell also sided with the bank. He thought the issue was in the depositing of the bag at which the delivery was consummated. The parties could set the point of delivery, but he thought a clause in the agreement “sets delivery at least at the point where the bag has actually entered the chute in the sense that it cannot thereafter be retrieved from the exterior of the depository,” which Judge Goodwin had conveyed in his jury instructions. For O'Connell, the parties had acceptably bargained over the bank’s liability and it was also acceptable that, for night deposits made when no bank employee was present, the depository was stated to be a convenience to the depositor, with the bank not liable for loss of bag or contents. To decline enforcement of the contract provision, he said, “would, in effect, render the defendant defenseless against the dishonest claims of its customers” which might result because its representative was not present.

There was, however, yet another instance in which the Oregon Supreme Court reversed Judge Goodwin. In a condemnation suit by the City of Eugene, Judge Goodwin, setting the value of the condemned land, agreed that damages could include the further assessment to which property owners would be subject after a sewer line was built, although he did instruct the jury to set off any benefit resulting from the improvement. Justice O’Connell found this ruling an improper mixture of the property value on the taking for the

27 Id. at 44, 332 P.2d at 87.
28 Id. at 53, 332 P.2d at 90–91 (O’Connell, J., dissenting).
30 Id. at 373, 349 P.2d at 820.
31 Id. at 372, 378, 349 P.2d at 820, 822.
easement and the assessment, so the case had to be remanded for a new trial, with the assessment and any protests therefrom to be handled in separate statutorily provided procedures.\(^{33}\)

Thus we see that when the sometime professor was “grading” the work of his erstwhile student, the professor approved some of the student’s projects but returned others for more work. Yet none of the subject matters were among those on which the two were to disagree once they became colleagues.

II
TOGETHER ON THE SUPREME COURT

Perhaps of greatest interest to the reader will be cases in those areas with marked disagreement—criminal procedure and torts—but we turn first to other subjects where Justices Goodwin and O’Connell ended up on opposite sides of a case. These included the practice of law and procedural matters, which we now explore.

A. Of Law Practice

One relatively early disagreement between the two justices came in a case on the unauthorized practice of law. The Oregon State Bar sued private escrow companies to prevent their preparation of conveyances and instruments.\(^{34}\) The court divided four-to-three, with dissents by Justices Lusk and O’Connell. Justice Goodwin wrote for the majority that an escrow agent exercising discretion in selecting and preparing instruments or in recommending and designing conveyances, even when not holding out himself as in the practice of law nor advising on legal rights, was in the “practice of law,” but there was no violation when someone only filled in the blanks on customer-selected instruments.\(^{35}\) Goodwin first avoided the separation-of-powers question of whether “the court or the legislature has the exclusive power to define the practice of law.”\(^{36}\) Saying the legislature had not done so, he said the court had to provide a definition for the case to be decided and had to draw the line “between those services which laymen ought not to undertake and those services which laymen can perform without harm to the public,” because “the discipline and control of lawyers is interwoven with the public interest” and “discipline of the bar is a matter of judicial

\(^{33}\) Id. at 328–30, 358 P.2d at 287–88.

\(^{34}\) Or. State Bar v. Sec. Escrows, Inc., 233 Or. 80, 81, 377 P.2d 334, 335 (1962).

\(^{35}\) Id. at 89, 377 P.2d at 339.

\(^{36}\) Id. at 83–84, 377 P.2d at 336.
Goodwin said the court had two good reasons for not deciding the separation of powers question:

(1) The question has not been briefed and argued with the thoroughness it deserves when and if it needs to be decided. (2) It is not necessary to decide the question because the legislature has not, since 1937, undertaken to define the practice of law.

As he then remarked, “We must hold that the legislature has not attempted to define the practice of law, and, accordingly, there is no need to inquire whether it has the power to do so.”

In a rather traditional defense of lawyers, Goodwin spoke of the need that they handle certain matters. He asserted that “the exercise of discretion concerning the property rights of another should be entrusted only to those learned in the law,” because “when laymen select and prepare instruments creating rights in land for other members of the public there is always the danger that they may do the job badly”; he took “judicial notice of the fact that badly drawn instruments create not only needless litigation but needless loss and liability.”

Because “any exercise of an intelligent choice, or an informed discretion in advising another of his legal rights and duties, will bring the activity within the practice of the profession,” he noted that “[i]f the draftsmanship is the product of an intelligent choice between alternative methods, and the choice is made by the escrow representative, then . . . it must be enjoined,” although such individuals “should be allowed . . . as scriveners, to fill in the blanks.”

Justice O’Connell disagreed on both the separation of powers and substantive issues. One of the bases of his dissent was that one could not determine the circumstances in which someone could “fill in the blanks.” Because laypersons were not capable of providing meaningful direction to someone filling in forms, there was no difference as to who completed the forms; the defects on the part of laymen and the escrow company were the same. On the separation—

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37 Id. at 86, 377 P.2d at 337.
38 Id. at 84, 377 P.2d at 336.
39 Id. at 85, 377 P.2d at 337.
40 “Specialized duties in certain areas of activity . . . fall upon the legal profession, not because lawyers need the business, but because the business needs lawyers.” Id. at 87, 377 P.2d at 338.
41 Id.
42 Id. at 89, 91, 377 P.2d at 339–40.
43 Id. at 93–94, 377 P.2d at 341.
44 Id. at 94, 377 P.2d at 341.
of-powers point, he found an early statute to be read against the escrow companies and complained about the majority’s exercise of judicial power and its having asserted an “inherent judicial power to decide what constitutes the practice of law,” as he doubted the court had that power.45

B. Matters of Procedure

Important as are substantive matters on which the two justices disagreed and to which much of this Article is devoted, also critical are matters of procedure, within which the substantive matters are addressed and which may preclude their being reached. Justices Goodwin and O’Connell disagreed over statutes of limitations, long-arm statutes, claim preclusion, choice of law, and matters relating to juries—voir dire and instructions.

Whether a suit could be maintained as timely filed led the two justices to engage in considerable disputation on a statute of limitations question, with Justice Goodwin extolling the virtue of consistency in interpretation of statutes and adherence to stated procedure.46 A four-justice majority, for which Justice O’Connell wrote, allowed a summons, which defendant sought to quash, saying that a summons correct except for designating the time for an out-of-state defendant to appear was not inadequate to give the court jurisdiction.47 A commentator thought this view “obviously fair and sensible” but did observe that many thought the position unreasonable.48 Justice Goodwin, joined by Justices Perry and McAllister, disputed O’Connell’s view and would have struck the summons for incompleteness.49 He pointed out that the complaint and service were filed two days before the statute of limitations ran, but because the service had not been in Oregon, the statute with which the summons complied “became irrelevant.”50 Instead, he argued, the court’s rulings held that “a summons that fails to contain the information required by statute is void.”51 He said the majority

45 Id. at 96, 377 P.2d at 342.
47 Id. at 419–22, 453 P.2d at 660–61 (Goodwin, J., dissenting).
48 Frank R. Lacy, Chief Justice O’Connell’s Contributions to the Law of Civil Procedure, 56 OR. L. REV. 191, 198 (1977). Lacy noted that a bar association gave O’Connell an “Oscar” for what the lawyers thought his most “alarming or wrongheaded or impractical” decision of the year. Id. at 198 n.24.
49 Kalich, 253 Or. at 424, 453 P.2d at 662 (Goodwin, J. dissenting).
50 Id.
51 Id.
had “judicially amended” the law to read, “A plaintiff who is rushed for time need not, however, comply with the foregoing statutes so long as he serves something upon the defendant within the statutory period,” adding that the “whole tenor of the majority opinion is to proclaim what the law should be, not what it is.” The court, he said, had “no power to adopt the Federal Rules of Civil Procedure, even though it might deem them superior to the statutes of Oregon.” In seeming exasperation, he also wrote, “Apparently the right to be free from the hazards of litigation after the statute of limitations has run is not a right worthy of protection in this state.” He said that in the states whose rulings his colleagues had used, courts could amend a summons, “[b]ut in Oregon a summons is not process. . . . An Oregon court has no statutory jurisdiction to do anything with a summons except to pass upon its legal sufficiency if it is challenged.”

Goodwin particularly extolled the virtue of certainty as to statutes “dealing with the commencement of actions during the period of limitations,” frustrated by the majority, but he went further, on the importance of procedural certainty in the face of litigants’ noncompliance:

I think this court would better serve the administration of justice if it would resist the temptation to grant relief from the errors and omissions of those who do not comply with our own procedural laws. Each time we adjust procedural rules to fit the needs of some litigant who has chosen to disregard procedural requirements, we deny the adversary his right to rely on procedural regularity. Even worse, we inject uncertainty into an area of law that needs to have fixed and definite boundaries for the good of all. If an occasional litigant has to suffer the consequences of his failure to read the statutes, so be it.

The commentator, who would have made “procedural regularity . . . a relatively low order value,” would have set aside violations only if they created injury to a party’s substantive interests or impeded the court’s work. He responded to Goodwin’s insistence on enforcing the statute of limitations by saying that the justification for such provisions was that delaying telling the defendant of the need to

52 Id. at 425, 453 P.2d at 662.
53 Id. at 427, 453 P.2d at 663.
54 Id.
55 Id. at 426, 453 P.2d at 663.
56 Id.
57 Id. at 429, 453 P.2d at 664.
58 Lacy, supra note 48, at 198.
investigate and preserve evidence might make it more difficult for the defendant to establish facts, and it sufficed if the defendant knew within the statutory period he was being sued.\textsuperscript{59}

The application of Oregon’s long-arm statute was to result in a solo dissent by Justice O’Connell from a Goodwin opinion. A Florida lumber wholesaler had ordered plywood by telephone from an Oregon wholesaler.\textsuperscript{60} In a suit by the unpaid seller of the plywood, Justice Goodwin, for the majority, held that the out-of-state wholesaler had by his phone call “transacted business” in Oregon and thus was within the long-arm statute.\textsuperscript{61} Given a challenge to jurisdiction in Oregon “on grounds of fairness and justice,” the “meaningful inquiry,” he said, “is whether a foreign purchaser has produced effects in the forum state of such significance that it is not manifestly unfair to require him to resolve a resulting legal dispute in this state.”\textsuperscript{62} As the statute’s legislative intent had been established,\textsuperscript{63} the question was “whether the alleged facts are such that the forum may exercise jurisdiction without offending traditional notions of fair play and substantial justice.”\textsuperscript{64} For Goodwin, the wholesaler’s “telephone order produced substantial business consequences in Oregon.”\textsuperscript{65}

With “[p]hysical presence within the forum state . . . not necessary to the existence of a tort within the state,” Justice Goodwin said that, “On the score of physical presence there is no substantial reason for distinguishing business transactions from personal injuries.”\textsuperscript{66} He found three criteria in the U.S. Supreme Court cases discussed in the earlier \textit{Western Seed} case that “define[d] the present outer limits of \textit{in personam} jurisdiction based on a single act”: a defendant’s purposefully causing important consequences in the forum state; consequences there from defendant’s actions; and “a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.”\textsuperscript{67} He found that these had been satisfied and concluded, “So long as the defendant is not

\textsuperscript{59} \textit{Id.} at 199.
\textsuperscript{60} \textit{State ex rel. White Lumber Sales, Inc. v. Sulmonetti}, 252 Or. 121, 122–23, 448 P.2d 571, 572 (1968).
\textsuperscript{61} \textit{Id.} at 126, 448 P.2d at 574.
\textsuperscript{62} \textit{Id.} at 124, 448 P.2d at 572–73.
\textsuperscript{64} \textit{White Lumber Sales}, 252 Or. at 124, 448 P.2d at 573.
\textsuperscript{65} \textit{Id.} at 125, 448 P.2d at 573.
\textsuperscript{66} \textit{Id.}
\textsuperscript{67} \textit{Id.} at 127, 448 P.2d at 574.
compelled to defend himself in a distant state with which he has had no relevant connection, he cannot be said to have been denied either fair treatment or substantial justice.”

Whereas Justice Goodwin applied prior case law and an existing U.S. Supreme Court standard, Justice O’Connell, in his lengthy dissent in which he would have had the court develop a new theory, both attacked the vagueness of Goodwin’s use of “reasonable” and “fair” and criticized the U.S. Supreme Court’s “continued adherence to the due process formula” in deciding these jurisdictional questions. He thought the formula “inappropriate for the solution of the problem and [one which] should no longer be employed.” Instead, he focused on horizontal federalism, saying the issue was a matter of “properly allocating the jurisdiction of the state courts” so that there would be limits on a state’s sovereignty “necessary to coordinate its assertion of power with those of its sister states.”

He would have had plaintiff seek out defendant in the latter’s domicile.

A commentator, who had approved Goodwin’s *Western Seed* opinion, applauded him here as well, saying that, in avoiding getting enmeshed in the question of when and where title passed, “The court is to be commended for avoiding the invitation to a self-deluding indulgence in the mechanical jurisprudence that has plagued this area in the past.” He also criticized O’Connell for a view that “seems to disregard two significant matters” and “does not take adequate account of the nature of our federal system, in which the states are not sovereign.”

If we move from jurisdictional issues to claim preclusion, we find Justice Goodwin, for a five-justice majority, and Justice O’Connell, dissenting, engaged in serious dispute about res judicata in a case about insurance payments. A house trailer, being towed, was damaged, and in a Deschutes County case, the jury found for plaintiffs who used a theory of transport for hire to sue those who towed the trailer. To collect the judgment, plaintiffs, using a different theory of their relationship with those doing the towing,

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68 *Id.*
69 *Id.* at 127, 448 P.2d at 575 (O’Connell, J. dissenting).
70 *Id.* at 129, 448 P.2d at 575.
71 *Id.* at 129–30, 448 P.2d at 575.
73 *Id.* at 277, 279.
75 *Id.*
successfully sued the insurance company in Coos County. The Oregon Supreme Court reversed in an opinion by Justice Goodwin which was a mixture of the question of insurance coverage, not really controverted; pleadings and the lack of other material from the prior case, leading to reliance on the pleadings; and some discussion of collateral estoppel. This led to the holding that “the judgment in Deschutes County is res judicata with reference to the terms of the transportation agreement.” This case is also one in which, in garnering a majority, Justice Goodwin took the case away from Justice O’Connell.

Dealing with a “fragmentary” record from the first (Deschutes County) trial, Justice Goodwin said the only inference that could be drawn was that plaintiffs had been successful in persuading the jury “that the transportation of the trailer was hired for a valuable consideration and was not part of a common undertaking. Such a state of affairs was not within the hazards the present defendant insured against.” Perhaps plaintiffs could have prevailed on some other theory, but that was the one on which they did prevail. Moreover, the insurer did not have to become involved in the earlier case if plaintiff’s theory was not one leading to coverage under the insurance policy, as “[t]he pleadings clearly took the case out of the coverage of the defendant’s insurance policy.” Essentially, Justice Goodwin assumed that the earlier case was decided on the pleadings.

In his long dissent, in which he focused on the collateral estoppel question, Justice O’Connell said the pleadings were not essential to the verdict in that first case and thought “the defendant fails to make out a case of collateral estoppel here.” He was more flexible as to the meaning of the first trial court ruling. Criticizing the majority for “select[ing] the part of the complaint that is most damaging to plaintiffs in the present action,” he claimed that the majority had changed the rules “so as to relieve the one asserting estoppel of the burden of proof and cast it upon the person against whom the estoppel

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76 The presiding judge was Robert Belloni, later Goodwin’s colleague on the federal district bench.
77 Id. at 511–18, 363 P.2d at 742–45.
78 Id. at 511, 363 P.2d at 742.
79 Id. at 515, 363 P.2d at 743.
80 Id. at 510–11, 363 P.2d at 744.
81 Id. at 529, 363 P.2d at 750 (O’Connell, J., dissenting).
82 The length of the dissent is explained by its having resulted from originally having been prepared as the court’s majority opinion, but “it did not receive the support of most of my brethren” and thus became a dissent for himself and one other justice. Id. at 520, 363 P.2d at 749.
is asserted.” 83 That, he said, “runs counter to the universal rule elsewhere.” 84 He asserted that collateral estoppel rules did not bind plaintiffs to their earlier-made allegations, and he would have treated the matter as one of evidence, not estoppel: “I am of the opinion that an inconsistent statement made in a pleading in a separate action should be treated as an evidentiary admission subject to explanation or contradiction in a subsequent action,” a view “adopted in a majority of cases and by the text writers.” 85

In a case on the law of spendthrift trusts, Goodwin and O’Connell were not in direct conflict but they wrote separate opinions, with Justice Goodwin producing a substantial dissent. Contracts had been made in California by a spendthrift under a guardianship, and the question was whether to apply California or Oregon law. 86 The five-justice majority, for whom Justice Denecke spoke, said that while some conflict principles led to applying California law, in an earlier case involving the same spendthrift and the same laws, “we decided that the law of Oregon, at least as applied to persons domiciled in Oregon contracting in Oregon for performance in Oregon, is that spendthrifts’ contracts are voidable.” 87 The majority thought the public policy of the forum state was relevant and was reinforced by other Oregon interests. 88 Justice O’Connell had dissented in that earlier case to say the statute should be construed to allow a creditor to recover from a spendthrift under the facts of that case, 89 but he now concurred separately because he felt he had to accept the earlier case’s rationale, felt it applied in the present one, and believed its application forced use of Oregon rather than California law. 90 He argued that the legislature didn’t intend to protect California creditors more than Oregon’s. 91

The use of public policy drew Justice Goodwin’s first objection, because it “has an overtone of predestination which sometimes tends to limit analysis.” 92 Here it had produced “a result that is contrary to generally accepted principles” when “the law of the forum differs

83 Id. at 519–20, 363 P.2d at 745.
84 Id. at 519, 363 P.2d at 745.
85 Id. at 536–37, 363 P.2d at 753.
88 Lilienthal, 293 Or. at 14–15, 395 P.2d at 549.
89 Olshen, 235 Or. at 445, 385 P.2d at 172.
90 Lilienthal, 293 Or. at 14–15, 395 P.2d at 549 (O’Connell, J., specially concurring).
91 Id. at 17, 395 P.2d at 550.
92 Id. at 18, 395 P.2d at 550 (Goodwin, J., dissenting).
from the law of the jurisdiction having the majority of contacts with the transaction. 93 That common law did not preclude spendthrifts from contracting suggested that protecting them was not a matter of public policy. He would have had the powers under the spendthrift statute “exercised with great caution” and saw “no compelling public reason for saving spendthrifts from the result of their folly at the expense of innocent merchants,” where, as here, “a merchant in California ... was approached in the ordinary course of business by a seemingly competent person and asked to enter into a business arrangement.” 94 Whatever Oregon’s policy as to transactions made in Oregon, which he characterized as “keep[ing] spendthrifts out of the almshouse,” he did not see why that policy “warrants its extension to permit the taking of captives from other states down the road to insolvency.” 95 Furthermore, with the parties assuming the applicability of California law in such situations, they would not be surprised by its application. 96 There were adequate contacts with California to make its law applicable and doing so would carry out the parties’ intent. 97 Goodwin ended by suggesting that “the policy of both states ... in favor of enforcing contracts has been lost sight of in favor of a questionable policy in Oregon which gives special privileges to the rare spendthrift for whom a guardian has been appointed,” with the majority’s position “a step backward toward the balkanization of the law of contracts.” 98

The use of juries also gives rise to procedural issues, which include whether a question should have been for the jury. Two cases on juries divided Justices Goodwin and O’Connell: one involved jury selection, the other, jury instructions. The voir dire case was a suit involving an automobile collision with a truck. 99 Plaintiff’s attorney had asked a potential juror whether a damage award in the case might possibly increase the juror’s cost of living, and the question was challenged as having injected the matter of insurance into the case. 100 The trial judge thought the attorney asked the question innocently, and on appeal the court ruled that the judge had not abused his discretion by

93 Id.
94 Id. at 18, 20, 395 P.2d at 550–51.
95 Id. at 25, 395 P.2d at 553.
96 Id. at 20, 395 P.2d at 551 (quoting Justice Cardozo that such would not “violate any ‘fundamental principle of justice’ or ‘prevailing conception of good morals.’”).
97 Id. at 21–22, 395 P.2d at 552.
98 Id. at 25, 395 P.2d at 553.
100 Id. at 3, 389 P.2d at 331.
Justice Goodwin said that “in the ordinary case, the presence or absence of insurance is not only irrelevant, but the unnecessary injection of the subject into the trial is prejudicial.”

For the less clear cases that arise on appeal, the court’s “long-standing rule [was] that the decision of the trial court to grant or deny a mistrial will not be disturbed unless there was a manifest abuse of discretion.”

Counsel had not laid a foundation for the inquiry concerning bias—which would be the same for other issues as for insurance—and there was no need to have raised the matter in this case, so “the inquiry was improper” as a matter of law, but that was prior to whether a mistrial should have been granted.

With no necessity “that every such blunder must result in a mistrial,” one had “the proper play of judicial discretion . . . brought to bear upon the question.” Here “the increment of prejudice . . . was very slight.”

Because “[t]he trial judge was in a good position to sense the subjective elements that made up the atmosphere of that particular jury trial” and there was no showing of impairment of a fair trial having been made, the judge’s exercise of discretion would be upheld.

With the law as Justice Goodwin interpreted it favoring the trial judge, we see here his deference to the trial judge, perhaps stemming from having been one himself.

Here we see that dissent was not necessary for disagreement between Justices Goodwin and O’Connell, which occurred even when they arrived at the same result. Where Justice Goodwin had found error, O’Connell, in a special concurrence, found the attorney’s question acceptable to ascertain juror bias. He would not have the plaintiff make an offer of proof as to the inquiry to be made, as this “affords no help in the solution of cases such as the one before us where consent to the inquiry was not obtained.”

He also thought that the focus on discretion had allowed Justice Goodwin to avoid dealing with “defining the area within which discretionary power is to
be exercised.” As to what could be asked, O’Connell thought that, in balancing the harm to plaintiff by not being able to ask the question, more weight should be placed on the concern stated by plaintiff’s counsel about the insurance industry’s campaign “to indoctrinate prospective jurors with the idea that high verdicts mean high insurance rates,” a matter Justice Goodwin had said plaintiff’s counsel had not raised.

As to jury instructions, one case in which Justice Goodwin wrote on the subject involved the burden of proof borne by one party or the other in an accidental death insurance case. Justice O’Connell’s opinion for a four-justice majority on a jury instruction about overcoming the presumption about suicide held it improper to place the burden on the insurer improper, but because the defect in the instruction had not been raised before the trial judge, the error was not a reversible one. While agreeing that there was error in the explanation of the presumption to the jury, Justice Goodwin dissented as he did believe a new trial was in order: “Whether or not the error which the majority recognizes as error was properly preserved by exception, the jury did not understand the effect of the presumption as the majority says it should be understood,” and defendant was thus denied a trial on the correct legal theory. Going further, he said that the facts in the case did not “support any plausible hypothesis of an accident,” and he questioned, because of its generality, the presumption against suicide “in every case of an unexplained violent death.” He also commented on the court’s calling the trial judge’s action error when that judge “was following the law as it had been declared in our former opinions.” He stressed that “when we are re-examining an important rule of law, a finding of error implies no want of learning upon the part of the trial court.”

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110 Id. at 11, 389 P.2d at 334 (O’Connell, J., concurring specially).
111 Id. at 14, 389 P.2d at 334.
113 Id. at 330, 396 P.2d at 776 (Goodwin J., dissenting).
114 Id. at 329, 396 P.2d at 776.
115 Id. at 331, 396 P.2d at 776.
116 Id. at 331, 396 P.2d at 777. As to litigants affected by rule changes, he added: “If we make a substantial change in the rule we likewise should not hold a litigant responsible for a failure to state his exception with prophetic insight concerning the rule that will emerge upon appeal.” Id.
We now turn from procedure to substantive law. We begin with speech and related activity before turning briefly to economic regulation and administrative law.

**C. On Matters of Speech**

Justices Goodwin and O’Connell were to disagree on matters of speech and related activity. The first instance was a libel suit. In a suit against news media, the court, four-to-three, upheld the constitutionality of a statute that required that a libel suit be based on proof of a defendant’s intent to defame or a failure of the defendant to retract on demand. The court based its ruling on a state constitutional provision (article I, section 10) that “every man shall have remedy by due course of law for injury done him in his person, property, or reputation.” Justice O’Connell, for the majority, relied on the statute and gave deference to the legislature’s ability to modify remedies and to the choice it had made concerning them. However, his opinion makes clear that he believed retraction a stronger and better remedy, and in a direct rejoinder to Justice Goodwin’s dissent called “not apposite” Goodwin’s analogy on valuing land for condemnation as the same as damage by defamation.

Justice Goodwin’s dissent focused on judicial review and remedy to the individual. He presented an argument to provide the person libeled with a stronger remedy for “negligent destruction of reputation” because retraction was insufficient, at least under the constitutional provision used by the majority. He observed that while the California Supreme Court had upheld a similar statute, California did not have Oregon’s constitutional provision. Moreover, the retraction statute had invaded the constitutionally established right: “a real and substantial remedy, not merely a

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118 Id. at 410, 365 P.2d at 848.
119 Id. at 411, 365 P.2d at 849.
120 See id. at 418, 365 P.2d at 852 (Goodwin, J., dissenting).
121 Justice Sloan, who wrote a separate dissent in which Justice Goodwin joined, spoke of the general importance of judicial review of legislative actions. Id. at 435–37, 365 P.2d at 859–60 (Sloan, J., dissenting).
122 Id. at 421, 365 P.2d at 853 (Goodwin, J., dissenting).
123 Id. at 431, 365 P.2d at 858.
colorable one” must be provided so that constitutional rights were “not merely false promises.”\textsuperscript{124} While there had to be a “remedy at law as demanded by the constitution,”\textsuperscript{125} the statute cut plaintiff off from a hearing, which was required by “due course of law.”\textsuperscript{126} A retraction, provided as an exclusive remedy, completely ended the matter by “clos[ing] the doors of the court.”\textsuperscript{127} Goodwin noted that one might debate whether retraction was, or was not, a more effective remedy than money damages, but retraction “does not compensate for the loss for which no proof can be produced, but which the law has traditionally protected by the jury verdict.”\textsuperscript{128}

What about obscenity rather than libel? Justice Goodwin was thought, largely on the basis of his having struck down the state’s obscenity law as a state circuit judge,\textsuperscript{129} coupled with his having been a newspaper reporter, to be a “First Amendment liberal,” and two early rulings on attempts to control movies and written material seemed to confirm that view.\textsuperscript{130} But if Goodwin was firm in dealing with efforts to control written matter and films, he upheld an effort to control behavior thought obscene, and in this instance, in dissent Justice O’Connell was the First Amendment liberal.\textsuperscript{131} A Portland ordinance directed at nude dancing required that, where food or liquor was served, a female could not have one breast or both wholly or “substantially” exposed in public view.\textsuperscript{132} Circuit Judge James Burns invalidated the ordinance but was reversed by a divided high court, with Goodwin writing for the majority.\textsuperscript{133} He agreed with Judge

\textsuperscript{124} Id. at 422, 365 P.2d at 854.
\textsuperscript{125} Id. at 423, 365 P.2d at 854.
\textsuperscript{126} Id. at 424–25, 365 P.2d at 855.
\textsuperscript{127} Id. at 424, 365 P.2d at 854. In saying that the legislature had acted “arbitrarily” in so declaring, he said it was like the legislature declaring a certain price to be paid per acre of land. Id. at 424, 365 P.2d at 854. Justice O’Connell, for the majority, disagreed. See id. at 409–11, 365 P.2d at 848–49 (opinion of the court).
\textsuperscript{128} Id. at 434, 365 P.2d at 859 (Goodwin, J., dissenting).
\textsuperscript{131} See Linde, supra note 1.
\textsuperscript{133} Judge Burns, later a federal district judge (“James the Just”), was to describe his trial court ruling as a “big long wordy opinion based on the U.S. Supreme Court,” whose rulings “cast doubt” on the ordinance. Justice Goodwin had disposed of the case in what Judge Burns said was a “flick of the wrist.” Burns had later told Goodwin, “You made it sound easy.” More generally, he commented in an interview that Goodwin’s opinions are concise, “getting to the issues, getting in and out in three to four pages rather than
Burns, and with the California Supreme Court’s treatment of a similar law, that dancing was “expression,” but he found “a valid distinction between conduct, which the government can regulate, and speech.” (Justice Goodwin’s stance in this case anticipated that of the U.S. Supreme Court on the same topic.134) With nudity, “employed as sales promotion in bars and restaurants,” being conduct,135 it was “as fit a subject for governmental regulation as is the licensing of the liquor dispensaries and the fixing of their closing hours,”136 he said in relying on a Commerce Clause case, not one under the First Amendment. The matter, he said, was “not one of legislative wisdom, but one of constitutional power,” which the city had and it had not “unreasonably impinge[d] upon those elements of communication . . . incidental to the regulated conduct.”137

Goodwin went on to hold the use of “substantial” not improper.138 The word might not carry a high “degree of certainty” but was “not without meaning” and “can be given effect without subjecting the public to harassment by easily offended police officers.”139 He also added some observations about obscenity, which are interesting because they came during his last year on the court and perhaps reflected fatigue at attempting to define what was “obscene.” He said about the use of the First Amendment to limit performances in taverns that “there is no limit but obscenity, whatever that is,”140 and in a footnote called attention to the Redrup case—a per curiam subsequently used as the sole citation in summary reversals of obscenity convictions—as one “that reveals the existence within the [U.S. Supreme C]ourt of at least four different points of view on the constitutionality of obscenity laws.”142

Justice O’Connell, in a stance quite different from Goodwin’s more traditional position, disagreed. For him, the city could not ban all dancing where food and liquor was served without violating the First Amendment, nor could it impose a ban “limited to dancing with

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135 Derrington, 253 Or. at 292, 451 P.2d at 113. This was not “free speech and nothing more.” Id. at 293, 451 P.2d at 114.
136 Id. at 296, 451 P.2d at 113.
137 Id. at 293, 451 P.2d at 113–14.
138 Id. at 295–96, 451 P.2d at 114–15.
139 Id. at 295, 451 P.2d at 114–15.
140 Id. at 292, 451 P.2d at 113 (emphasis added).
142 Derrington, 253 Or. at 292 n.2, 451 P.2d at 113 n.2.
exposed breasts” unless “obscene dancing” were the subject of the ban. For him, as for the California Supreme Court whose majority view he supported, dancing was expression unless obscene and “it cannot be prohibited merely because a part of the public, even a majority, regards nonobscene nude dancing as unacceptable.” For him, the constitutional rule trumped public distaste, while Goodwin deferred to the local legislature.

D. Economic Regulation and Administrative Law

The two justices were on opposite sides of one case involving economic regulation, specifically, labor relations, that produced a badly fractured court in what Goodwin, writing to a friend, called a “most interesting and troublesome case.” The question of whether workers on strike were eligible for unemployment compensation benefits required interpretation of a state law which sought “to disqualify a claimant who did not participate in a given dispute if he falls within a disqualified ‘grade or class.’” Workers unemployed as a result of a strike at a construction project where they had been employed applied for benefits, which an agency referee denied but the agency’s Appeals Board, affirmed by the state circuit court, allowed. The Oregon Supreme Court in turn reversed; no unemployment compensation claims should be paid because evidence did not support a finding that striking and nonstriking employees were not integrated. (Without double negatives: Striking and nonstriking employees were sufficiently integrated that bargaining benefits came to both.)

The court was badly fractured. Justice Goodwin’s opinion, for only a plurality, exhibited considerable knowledge of the interrelationships of strikers, nonstrikers, unions (of various types, craft and industrial), and nonunion workers, but it was mostly about who was disqualified from benefits by the statute and who could (re)qualify for them. Deferring to the legislature and asserting, as he

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143 Id. at 296, 451 P.2d at 115 (O’Connell, J., dissenting).
144 Id. at 297, 451 P.2d at 115.
146 Cameron, 230 Or. at 417, 370 P.2d at 713.
147 Id. at 415, 370 P.2d at 711.
148 Id. at 430–31, 370 P.2d at 718–19.
149 Justices McAllister and Warner joined Goodwin, while Justice Rossman concurred separately, Justices O’Connell and Perry concurred in part and dissented in part, and Justice Sloan dissented.
did in other cases, that courts did not have the “function to pass upon the wisdom of the law” but “must attempt to discern the legislative intent and give effect thereto.” Justice Goodwin noted that the legislature could sensibly try to avoid determinations of whether certain workers had concerted interests and “to protect compensation funds from abuse,” as might happen if nonstriking workers were “thrown . . . upon the compensation fund” when the unions chose to have only a few “key men” strike.\(^{150}\) He concluded “that no single test can be applied universally to all labor disputes” under laws like the one he was attempting to apply, but “a full and fair effect” could be given the law if work integration and claimants’ and participants’ community of interest, including their direct and indirect interests in other workers’ bargaining, were “carefully applied.”\(^{151}\) Goodwin’s opinion, while antilabor in result, seems moderate, as it left open the possibility that some workers would be able to (re)qualify for benefits while including pro-management comments as to the burden certain union tactics could have on employers’ unemployment compensation taxes. Questions of judicial review of administrative agency action were also entailed by the case. Appearing to give the agency little deference, Justice Goodwin held that the board had erred in placing the burden of proof on employers, in disregarding undisputed testimony about work integration, and in “treating them all alike” rather than “take[ing] account of the separate and divergent interests of the several claimants.”\(^{152}\) He also stressed that agency findings on such matters as work integration “must be set forth so that judicial review can be had . . . based on the record.”\(^{153}\)

Justice Rossman, whose vote created the majority, thought Goodwin’s opinion was “carefully reasoned” but preferred not to decide on work integration until the case returned after remand when, he hoped, the court “will be afforded a clearer impression of the facts” with “clear and cogent evidence” of whether the action of one group of workers affected another group.\(^{154}\) Justice O’Connell, in a separate opinion, said nothing about review of agency action. However, he objected that, without clear legislative history, Goodwin

\(^{150}\) *Cameron*, 230 Or. at 418, 370 P.2d at 713.

\(^{151}\) *Id.* at 421, 370 P.2d at 714. He had not hesitated to criticize aspects of the statute, saying that “the rationale of the grade and class disqualification [was] uncertain” and that “efforts to establish criteria for its application have not been crowned with success.” *Id.* at 419, 370 P.2d at 713.

\(^{152}\) *Id.* at 430, 370 P.2d at 718.

\(^{153}\) *Id.*

\(^{154}\) *Id.* at 431, 370 P.2d at 719 (Rossman, J., concurring in judgment).
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had been too speculative as to the legislature’s purpose, and, where “a simpler and more definite meaning” was needed, had created a class that was too broad, using an “elaborate and complicated definition” that “not only exceeds the permissible bounds of judicial imagination in the interpretation of statutes, but it also sets up a test which is so indefinite and complex that it will be impracticable to apply in the administration of the act.”

Justice Sloan, on the other hand, criticized Goodwin, first for impinging on the agency “when it undertakes to adopt ground rules to guide the functions of an administrative agency” and for having “exceeded the scope of review contemplated” by the law, and second, for failing “to give consideration to important facts and the knowledge than can, in part, be drawn from the facts.” Sloan thought the administrator should have far more flexibility than Goodwin’s view would permit: “If the administrator decides he needs rules to apply to these cases he has the power to adopt them. . . . That is an administrative function, not a judicial one.”

Justice Goodwin was to apply to this case his thoughts on the effect of “some rather difficult cases,” cases that were “not merely difficult in the sense that they were hard to write, but difficult in the sense that they presented difficulties to other members of the court.” He said that “[w]hen a case becomes controversial within the court, there is a certain amount of duplication of effort, as each judge has to satisfy himself first about the record and then about the application law,” something he said was “time-consuming, and . . . creates a nagging sort of undertow which saps your strength as you are working on other cases.”

E. Criminal Law

While there were a number of criminal procedure cases in which the two justices disagreed, there was only one on criminal law, and it was one in which Justice Goodwin’s ranching background was highly relevant, although whether that background led to his being assigned to write the case is unclear. The case turned on the specificity of

155 Id. at 433, 370 P.2d at 720 (O’Connell, J., concurring in part and dissenting in part).
156 Id. at 434–35, 370 P.2d at 721 (Sloan, J., dissenting).
157 Id. at 437, 370 P.2d at 721–22.
159 See also the discussion infra of State v. Wilson, 221 Or. 602, 351 P.2d 944 (1960), on larceny of a cow, in which Justice Goodwin spoke of the location of a brand.
language in a criminal statute.\textsuperscript{160} The indictment in a prosecution for stealing livestock stated that the stolen animal was a heifer, but the state’s evidence was that it was a steer.\textsuperscript{161} Justice Goodwin spoke for a four-justice majority, which reversed on finding this a material variance.\textsuperscript{162} The legislature, he said, “[f]rom the choice of the descriptive nouns employed in the statute . . . attached some significance to the enumerated classes of livestock” and it had indicated that the “designation of the class” of animal was “essential.”\textsuperscript{163} It was acceptable to substitute some words, for example, “ox” for “steer,” but not others, such as “filly” for “steer,” and if one took “heifer” out of the indictment, no crime was stated: “Neither the word Hereford nor the word yearling can be characterized as a synonym for the word heifer.”\textsuperscript{164} Justice Goodwin said the State could have acceptably used the neutral “calf,” a word “which disregards the sex of the creature,” but “the word heifer having been chosen, the state was bound to prove it.”\textsuperscript{165} The State could also have charged stolen property but would then have had to prove its value but instead had used “the livestock statute with its lighter burden of proof.”\textsuperscript{166} Making it more difficult for the State, Goodwin would not allow the defect in the indictment to be cured by defendant’s admission of taking the animal, saying, “We find no authority in a criminal trial to amend the pleadings to conform to the proof as is done in civil cases.”\textsuperscript{167}

For the dissenters, Justice O’Connell would have none of Goodwin’s wordplay: “The specification in the statute of the various types of bovine animals subject to theft was not intended to make the characteristics of each type of bovine animal a matter of importance

\textsuperscript{161} Id. at 318, 372 P.2d at 770.
\textsuperscript{162} Id. at 323, 372 P.2d at 772.
\textsuperscript{163} Id. at 319, 372 P.2d at 771. This was one of the cases that the Oregon Supreme Court heard during its annual sitting at Pendleton in eastern Oregon.
\textsuperscript{164} Id.
\textsuperscript{165} Id. at 320, 372 P.2d at 771. In his anatomical disquisition, he wrote, “While there may be some overlapping the common usage of the words calf and heifer, the two classes are not mutually inclusive. All heifers are no doubt calves at some time, but certainly all calves are not heifers. Indeed, in common usage, when a female calf is mature enough to be called a heifer, it ceases to be called a calf. A yearling Hereford is not necessarily a calf, and when further described as a heifer, it would be even more difficult to say the animal was described as a calf.”
\textsuperscript{166} Id. at 321, 372 P.2d at 772.
\textsuperscript{167} Id. at 322, 372 P.2d at 772.
in charging or proving the crime.”

Instead, it “was merely a method of more clearly describing the general class of animals the stealing of which would constitute a crime. Certainly the sex and maturity of the animals were not intended to be material elements in describing the property stolen.” The State could have charged the stealing of a calf, as Goodwin had indicated, but for O’Connell, “The recitation in the indictment of an immaterial descriptive element does not constitute the basis for asserting a variance when that element is not proved.”

Not only did defendant have knowledge “that he was charged with the theft of a yearling Hereford,” but the animal’s sex “was not a material factor in the preparation or presentation of his defense” and there also was no danger that the variance might put defendant in danger of double jeopardy.

Many years later, Judge Goodwin’s attention was called to an old English case, described as follows:

In 1994, Richard Cook was indicted ... for stealing a cow, but he protested that the animal stolen was a young female beast that had never been with calf, and so should have been denominated a heifer in the indictment. The twelve judges agreed, reasoning that as the statutes upon which the indictment was founded mention both heifer and cow in describing the several animals they were designed to protect, the one must have been used in contradistinction to the other.

Goodwin’s delightful response: “If we had Lexis or knew what ‘on line’ meant, we might have found the heifer case and O’Connell might have spared me his dissent.”

Although on some criminal procedure matters, O’Connell was more pro-defendant than Goodwin, the result here ran the other way. More importantly, Justice O’Connell’s dissent captured an important difference between the two judges when O’Connell said that the “majority opinion simply recites certain technical rules of criminal procedure and concludes that these rules must be applied in the

168 Id. at 323, 372 P.2d at 773 (O’Connell, J., dissenting).
169 Id.
170 Id. at 323–24, 373 P.2d at 773.
171 Id. at 324, 372 P.2d at 773.
173 E-mail from Alfred T. Goodwin to author (May 16, 2011, 12:49 EDT) (on file with author).
present case.” \footnote{Russell, 231 Or. at 324–25, 372 P.2d at 773 (O’Connell, J., dissenting).} This was “the pattern of decision” he called “characteristic of the cases of an earlier day when the law of criminal procedure was a body of hypertechnical rules.” \footnote{Id. at 325, 372 P.2d at 773.} Instead, O’Connell felt that “[t]he better reasoned cases today attempt to rid the law of these technical encumbrances,” an “enlightened view” he had hoped his colleagues would adopt. \footnote{Id.} It is somewhat ironic that O’Connell spoke of “technical encumbrances” to a conviction here when overall he was the stronger advocate for criminal procedure rules protecting defendants’ rights.

\textbf{F. Criminal Procedure}

The topics under the rubric of criminal procedure on which disagreements between Justices Goodwin and O’Connell were evident included trial rights of juveniles, confessions, and search and seizure. There was one area—right to counsel—in which the two agreed.

In two cases in which Justice Goodwin wrote for the court, the two justices were basically on the same side in one, \footnote{See State v. Freeman, 232 Or. 267, 374 P.2d 453 (1962).} and in the other, on a defendant’s waiver of his rights, Goodwin drew on an O’Connell opinion. \footnote{See Lawson v. Gladden, 245 Or. 492, 422 P.2d 681 (1967).} Finding that the uncounseled prisoner had not relinquished his rights to have counsel appointed for him, Justice Goodwin went further to underscore a previous concurring opinion by Justice O’Connell indicating that “it would be sound practice to appoint counsel in every case when a criminal defendant is unrepresented by retained counsel.” \footnote{Id. at 495, 422 P.2d at 83.}

In the former, a capital case in which the children of a woman in a lesbian relationship were murdered and their bodies thrown into a canyon, aspects of right to counsel were among several issues with which the court dealt. Although the defendant had consulted with a public defender in Oakland, California, from whom she received advice, she had not been brought before an Oregon magistrate until she had been in custody for seven days (in California, then in Oregon), and she did not have appointed counsel for eighteen days, during which she had made an incriminating statement. \footnote{Freeman, 232 Or. at 269–70, 374 P.2d at 454–55.} Justice
Goodwin dismissed the argument that a new trial was required under these circumstances, because he felt that whatever defendant had said to the police during the time in which she should have been brought before a magistrate was “no more damaging to her defense than was her own testimony to the same effect before the jury.” Thus he thought that reexamination of the court’s prior rulings not to apply the federal *McNabb-Mallory* rule, on bringing defendants before a magistrate, was not needed. Likewise, with “no undue delay in appointing counsel to represent” defendant, which occurred “as soon as practicable” after indictment, he thought it “unnecessary to decide . . . whether or not an attorney should have been appointed for the defendant at the time of her preliminary appearance in the justice court,” although that was now required by a statute which went into effect later. Goodwin acknowledged *Hamilton v. Alabama*, which required counsel at arraignment, but he distinguished it because arraignment in Alabama carried more consequences than in Oregon. Justice O’Connell concurred, but only in the result, “not wish[ing] to join in the comments on these matters made in the principal opinion,” a rather pointed suggestion that they were dicta—and, indeed, dicta with which he might not agree. He believed the court need not “consider the legality of police interrogation during detention nor the circumstances under which a person is entitled to counsel between arrest and trial.”

1. **Juveniles**

   Entitlement to a jury trial was a matter on which Goodwin and O’Connell differed, with Goodwin adopting a very traditional, rehabilitative, “best interests of the child” view of the twentieth-century juvenile justice system while O’Connell’s feet were firmly planted in due process. The U.S. Supreme Court’s ruling in *In re Gault* had not extended jury trial rights to juveniles, and the Oregon Supreme Court, per Justice Goodwin, also would not do so,

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181 *Id.* at 279, 374 P.2d at 459.
182 *Id.* at 278, 374 P.2d at 458. See generally *McNabb* v. United States, 318 U.S. 332 (1943); *Mallory* v. United States, 354 U.S. 449 (1957). Both *McNabb* and *Mallory* entail the U.S. Supreme Court’s supervisory power over the federal courts and not of constitutional dimension.
183 *Freeman*, 232 Or. at 280–81, 374 P.2d at 459.
185 *Freeman*, 283 Or. at 283, 374 P.2d at 461 (O’Connell, J., concurring in result).
186 *Id.*
instead holding that a child accused of causing a death during a robbery was not deprived of due process by the absence of a jury trial. 188 The Oregon courts had not considered juvenile proceedings “criminal,” Goodwin said, and would continue not to do so. 189 However, “this does not, of itself, end the inquiry,” because “[w]hen liberty is at issue, due process of law must be satisfied,” and a number of states had, in Gault’s aftermath, extended the jury trial right to juveniles. 190 This led him to analysis of the post-Gault status of the juvenile court, based as it was on parens patriae. 191 “The crucial distinction between juvenile and other loss-of-liberty cases is that the juvenile law is dealing with a child and not with an adult,” said Justice Goodwin, unwilling to give up the distinction. 192 Parens patriae held “some residual validity” post-Gault and he wished to retain it rather than put the child fully in the adult criminal system, which would provide more due process protections but would also have greater pains and penalties. 193 He did find language in key U.S. Supreme Court rulings on which one could base “an anticipatory holding” of a jury trial requirement, but he did not find that the Justices had “answered the functional question whether the difference between a child and an adult justifies a difference in the analysis of the role of the jury as a fact-finding instrument.” 194

Clinging to the juvenile system as it had existed, Goodwin found it “arguable whether the clash and clamor of a jury trial would enhance the rehabilitation of a child,” and he also put aside the suggestion that juries be used in “the adjudicative phase” even if not in “the dispositional phase,” because, “at least in cases of first offenders and of other children who have not yet embarked upon a criminal career, the adjudicative phase of their court experience presents an important rehabilitative opportunity.” 195 Moreover, looking at what he thought legislators must have had in mind in the majority of states not providing juries for juveniles while conceding that “virtually all these legislative decisions antedated Gault,” he still believed that legislators “must have believed that the danger of a miscarriage of justice in the

189 Id. at 238, 453 P.2d at 911.
190 Id. at 238–39, 453 P.2d at 912.
191 Id. at 240, 453 P.2d at 912.
192 Id. at 239, 453 P.2d at 912.
193 Id. at 240, 453 P.2d at 912.
194 Id. at 240–41, 453 P.2d at 913.
195 Id. at 243, 453 P.2d at 913–14.
absence of a jury was remote.” Thus he again showed his deference to that legislature, particularly as it had changed the juvenile code only ten years earlier, and he was unwilling to override that legislative judgment.

Justice O’Connell, in a clear clash of views with Justice Goodwin and the majority, adopted a pro-defendant due process stance that would have extended Gault and Duncan to juvenile proceedings. Indeed, for him, Gault had discarded a child’s “best interests” as the ultimate question, to be replaced by guilt and innocence, and he thought Goodwin’s opinion was built “upon a premise which is wholly inconsistent with the rationale of Duncan.” In another case shortly thereafter, Goodwin, in a brief statement citing Turner, stated flatly, “The right to a jury trial of a contested charge of conduct which, if committed by an adult, would be criminal, is not a requirement of due process for juveniles.” In that case, where the court found the underlying “contributing to the delinquency” statute void for vagueness, Justice O’Connell concurred on the basis of his Turner dissent.

2. Search and Seizure

Justice Goodwin’s several major opinions on search-and-seizure issues serve to confirm his favoring of law enforcement. In 1962 and 1963, there were two Goodwin opinions, each for a six-to-one court, with which Justice O’Connell took sharp exception. Also included here is an O’Connell–Goodwin disagreement on an issue related to law enforcement in a tort case concerning “nuisance” in the use of a police dog.

A case involving a warrantless search produced competing opinions in which both justices provided extended treatment. The police had conducted a warrantless search while looking for someone named in an arrest warrant for statutory rape. After arresting the

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196 Id. at 244, 453 P.2d at 914.
197 Turner v. Louisiana, 391 U.S. 145 (1968) (applying the jury trial right to the states through the Fourteenth Amendment).
200 Id. at 60–61, 457 P.2d at 496.
201 Id. at 263, 373 P.2d at 394.
203 Id. at 263, 373 P.2d at 394.
individual, they had seized material (bottles, camera, and bed sheets) they had seen prior to the arrest. The trial court had declined to suppress the evidence, and the defendant had been convicted. The Oregon Supreme Court majority affirmed the conviction and upheld the denial of suppression of the evidence. Justice Goodwin’s reading of the ability to search and to seize evidence was very broad, while Justice O’Connell, accusing Goodwin of distortion, focused on what the state legislature permitted. The two justices also disagreed as to whether a camera could have been part of statutory rape and whether officers should have obtained a warrant.

Justice Goodwin easily found the police officers’ presence in the apartment lawful, which made the issue “the legality of the search for and seizure of the challenged evidence.” Finding strong parallels between the Fourth Amendment and article I, section 9 of the Oregon Constitution, he drew heavily on U.S. Supreme Court cases in spelling out “some general principles which apply equally under our own constitution.” Among those, “Articles subject to seizure” was “the principal issue in the case at bar.” Favoring “[c]ommon sense rather than mechanical formality” as to what “should guide police officers in the course of their duty,” he allowed the search even though it took place some hours before the formal arrest upon defendant’s return to his apartment. The officers were, he said, “not obliged to shut their eyes when told that their suspect was not at home” and had a duty “to make certain” of that fact. Further, he opined, if the police could not look at visible items until after making an arrest, “law enforcement has been turned into some sort of a game.” He also would not have had the officers guess (prematurely) at what should be designated on a search warrant. His tilt toward the officers was also shown in his ruling that their having time to obtain a search warrant “does not necessarily render the evidence inadmissible” nor did it “render[] the search or the

205 Id. at 264, 373 P.2d at 394.
206 Id. at 263, 373 P.2d at 394.
207 Id. at 280, 373 P.2d at 401.
208 Id. at 269–78, 280–81, 373 P.2d at 397–402.
209 Id. at 278, 281, 373 P.2d at 401, 402.
210 Id. at 265, 373 P.2d at 395.
211 Id. at 266, 373 P.2d at 396 (footnote omitted).
212 Id. at 269, 373 P.2d at 397.
213 Id. at 270, 373 P.2d at 397.
214 Id.
215 Id. at 271, 373 P.2d at 397–98.
216 Id. at 273, 373 P.2d at 398.
seizure unreasonable.”\textsuperscript{217} Perhaps because the crime of conviction was statutory rape, he broadly upheld the seizure of evidence like the camera, saying it was used in commission of the crime.\textsuperscript{218} “To hold otherwise,” he said, “would be to prohibit the seizure of any evidence of the crime of rape or similar crimes.”\textsuperscript{219} The camera, he said, “was used in the debauchery of the child,” and added, “There is no need to canvass the other varieties of bizarre behavior that may appeal to a diseased mind.”\textsuperscript{220} Using his cowboy background, he also said, “It is no more necessary to say the child was raped with a camera than to say a calf was stolen with a running iron.”\textsuperscript{221} With this, one should compare Justice O’Connell’s view on this point: “To state as a general proposition that a camera is an instrumentality in the commission of the crime of statutory rape is quite a startling assertion and will certainly come as a surprise to the average reader.”\textsuperscript{222}

That the camera was at issue went to the principal problem Justice Goodwin faced—whether “mere evidence” could be seized incident to an arrest. His task would have been much easier had he been writing five years later when the U.S. Supreme Court then allowed its seizure.\textsuperscript{223} For Goodwin, use of what had been seized could be potentially blocked because “[e]vidence, merely as evidence, cannot be taken upon arrest if the same evidence could not have been taken under a search warrant.”\textsuperscript{224} However, he said, “We take it as settled that evidence which lawfully could be seized under a warrant ought also to be seizable upon a lawful arrest without a warrant.”\textsuperscript{225}

A further difficulty was that the state statute governing this part of the case, which specified what could be taken under a search warrant, did “not authorize the seizure of property other than the fruits and implements of crime.”\textsuperscript{226} However, Goodwin found the statute “broad enough to have justified a magistrate in listing the challenged articles in a search warrant” had one been sought, and thus the items were admissible.\textsuperscript{227} Writing later to a law student preparing a law

\begin{footnotes}
217 \textit{Id.} at 272–73, 373 P.2d at 398.
218 \textit{Id.} at 279, 373 P.2d at 401.
219 \textit{Id.} at 278–79, 373 P.2d at 401.
220 \textit{Id.} at 279, 373 P.2d at 401.
221 \textit{Id.} at 278, 373 P.2d at 401.
222 \textit{Id.} at 281, 373 P.2d at 402 (O’Connell, J., dissenting).
224 \textit{Chinn,} 231 Or. at 275, 373 P.2d at 399.
225 \textit{Id.}
226 \textit{Id.} at 278, 373 P.2d at 400.
227 \textit{Id.} at 279–80, 373 P.2d at 400.
\end{footnotes}
review Note, Goodwin said he and his colleagues in the majority “did not want to restrict the statute” by ruling the objects to have been seized illegally; he had found “no particular reason to turn a guilty man loose just to dramatize the need for legislative attention to . . . the statute’s reach.”

For Justice O’Connell, the items seized, not used as a means of committing the crime, were not within the statute. He accused the majority of having “indulge[d] in a distortion of language and ideas to affirm the conviction” instead of “think[ing] of the need for more efficient law enforcement methods.”

He said this had led the majority to approve an exploratory search and thus to “abrogate[] the most important aspect of the constitutional guarantee afforded by the Fourth Amendment and Article I, § 9.” For him, someone not happy with items the statute permitted to be seized should turn to the legislature that created the statutory limits instead of having a court “through word play extend[] the meaning” of the ‘means of committing’ a crime.”

There was no “exceptional circumstance” permitting a search without a warrant; requiring a warrant allowed a magistrate’s scrutiny before rather than after a search, a requirement that was not “mere formalism.”

The issue at hand, he stressed, had “constitutional content” and the majority had improperly treated the matter “as if it involved nothing more than a tort principle comparable to that which extends a privilege of entry upon private property to a fireman or policeman in carrying out a governmental function.” (Interestingly, Goodwin was later to use this case as an example of the Oregon Supreme Court’s “judicial foot dragging” on criminal procedure, which “continued to inhibit the setting aside of convictions of obviously guilty felons.”)

Eighteen months later, Justice Goodwin wrote to uphold another warrantless search, this time of an automobile. A deputy stopped a truck for a traffic violation; the driver was known by the deputy to be a poacher. When the truck was searched, a high-powered rifle was

228 Letter from Alfred T. Goodwin to Carroll J. Tichenor (May 9, 1963) (on file with author).
229 Chinn, 231 Or. at 281–82, 373 P.2d at 402–03 (O’Connell, J., dissenting).
230 Id. at 290, 373 P.2d at 406.
231 Id. at 287, 373 P.2d at 405.
232 Id. at 291–93, 373 P.2d at 407–08.
233 Id. at 295, 373 P.2d at 409.
seen in the back seat and a dead deer was found.\footnote{Id. at 157, 388 P.2d at 130.} Defendant was convicted of burglary from evidence—burglars tools and “loot”—found as a result of the search.\footnote{Id. at 137, 388 P.2d at 121.} The core of the case was the search. Justice Goodwin quickly dispatched the point that the search had been by police officers in Washington State, not Oregon, as the U.S. Supreme Court had imposed the rule excluding “the fruits of illegal police conduct” from state courts.\footnote{Id. at 138, 388 P.2d at 122.} Nor because of the passage of time since early car-search cases were decided, did he find those cases likely to be fully applicable.\footnote{Id. at 142–43, 388 P.2d at 124.} What was before the court was “the more common situation in which a minor traffic violation has called the attention of the police to a felon who might otherwise have gone his way un molested.”\footnote{Id. at 143, 388 P.2d at 124.}

An officer approaching a car he had stopped could take notice of what was in plain view, but was an officer allowed to act “upon the kind of intuition that comes from a policeman’s experience” when he “sees something that causes him to investigate a particular violator with more care than is routinely employed in handing out summonses to housewives and commuters”?\footnote{Id. at 144, 388 P.2d at 124.} Saying that police do “dangerous work” and that courts applied “hindsight” to “facts as they reasonably appear during the episode,” Goodwin argued that “a superficial examination of the automobile is not only reasonable, but is good police practice.”\footnote{Id.} Because, having seen contraband being transported, an officer had come to believe that the driver had violated the game laws and indeed was committing an offense in his presence, the officer might then “have probable cause to make an arrest for the newly discovered offense as well as for the traffic offense,” and the arrest for the more serious offense provided a basis for a more thorough search, with the evidence found in that search being admissible.\footnote{Id. at 145, 388 P.2d at 125.}

Justice Goodwin thus avoided a broad rule while upholding this search because the evidence was sufficient. Although he tried to impose some limits by saying, “We are not prepared to hold that the police may search an automobile for evidence of a game-law violation any time they observe a rifle in the vehicle,” he clearly allowed law
enforcement officers ("not constitutional lawyers") to draw inferences from what they found, at least that "a serious offense of some kind is being committed, or has been committed." He showed similar deference to the trial judge’s inferences from the facts presented as to the presence of contraband in the vehicle: “Where findings of fact have substantial support in the evidence, this court ordinarily does not retry facts which may underlie trial court rulings on the admissibility of evidence.”

Again in solo dissent, Justice O’Connell chastised the majority as he had in the previous case, to which he immediately referred as he accused Goodwin and the majority of “fashion[ing] the law of search and seizure to fit” the conviction of the “quite obviously guilty defendant” it had found and of bending the law to fit the search. Reading inferences and their strength differently, O’Connell made a strong statement about the Fourth Amendment’s purpose as more than a species of tort privacy protection. He found it “patent from the record” that the search was not incident to a game-law violation, just as it was not incident to the traffic violation and certainly not to the ultimate crime of conviction. Again inveighing against exploratory searches, he also believed that the majority had missed the constitutional issue. With no conflict in evidence, probable cause was for the court on the law, not for the finder of fact, so an appellate court, not relying on the trial court, could provide its own answer. This case is an instance to which Goodwin later referred where O’Connell’s “trenchant dissents were often as not vindicated by the federal courts” on habeas, as the federal district court did grant habeas upon invalidating the search.

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244 Id. at 150–51, 388 P.2d at 127–28. ("If an officer lawfully examines the trunk of an automobile and finds therein a bullet-riddled human body, the officer need not decide, on peril of voiding a future prosecution, whether to arrest the driver of the automobile for murder . . . or for transporting a body without a permit from the state board of health.").
245 Id. at 147, 388 P.2d at 126.
246 Id. at 152, 388 P.2d at 128 (O’Connell, J., dissenting).
247 The Fourth Amendment, he said, “is not just a shoddy piece of tort law.” Id. at 154, 388 P.2d at 129.
248 Id. at 152–53, 388 P.2d at 128.
249 Id. at 165, 388 P.2d at 134.
250 Goodwin, supra note 234, at 186.
251 United States ex rel. Krogness v. Gladden, 242 F.Supp. 499 (D. Or. 1965); see also James W. Korth, Note, Search and Seizure Incident to Traffic Violations, 4 WILAMETTE L. REV. 247 (1966).  Justice Goodwin later observed that state judges “didn’t take it personally” when, during the Warren Court criminal procedure revolution, a federal district judge would set aside Oregon Supreme Court rulings overtaken by that revolution. Conversation with Alfred T. Goodwin in Sisters, Or. (Oct. 12, 1999). However, Goodwin
A case in which the City of Salem was sued over an attack by a police dog centered on tort law but was related to law enforcement issues, if not specifically to a search. The court unanimously held for the city but the justices issued three opinions, with Justices Goodwin and O’Connell each concurring separately. The four-justice majority held there should be no recovery where nothing showed the city knew or should have known the dog had vicious propensities, although with such proof, the city would have been keeping a nuisance and would lack governmental immunity. Justice O’Connell’s solo special concurrence was a complaint that the majority did not say “what characterizes a nuisance or why the city is not entitled to immunity when a nuisance exists.” Quoting Prosser on the “anomaly” of a municipally created “nuisance,” he thought use of “nuisance” confused matters and that the case was better handled without that label, with the rules on liability for keeping a dangerous animal more applicable. He also disagreed that the city would be liable simply from knowledge of the dog’s dangerous propensities, as the utility of keeping such an animal might outweigh the risks.

Justice Goodwin had a different disagreement with the majority’s reasoning. He did not go head-to-head with O’Connell over doctrine but agreed with him that the nuisance theory was not helpful and that “[t]he nomenclature of nuisance should be discarded in personal injury actions for damages allegedly caused by a vicious animal.” However, he thought it “possible to construct a theory for this case within the precedent framework of some of our earlier cases dealing with nuisances.”

Where O’Connell balanced utility against dangerousness, Goodwin focused on government immunity, and his opinion reflects his views favoring law enforcement: “The employment of police officers to maintain order is precisely the sort of activity in which the

did express sensitivity when Parker v. Gladden, 245 Or. 426, 407 P.2d 246 (1965), a ruling by Justice Denecke which he had joined, was reversed by the U.S. Supreme Court two years later. Denying post-conviction relief, the Oregon Supreme Court had found no denial of a constitutionally correct trial in a court bailiff’s comments to the jury, but the U.S. Supreme Court found a violation of the Sixth Amendment right to an impartial trial and reversed per curiam. See Parker v. Gladden, 385 U.S. 363 (1966).

252 See Borden v. City of Salem, 249 Or. 39, 436 P.2d 734 (1968).
253 Id. at 43, 436 P.2d at 736.
254 Id. at 44, 436 P.2d at 736 (O’Connell, J., concurring).
255 Id. at 44–46, 436 P.2d at 737.
256 Id. at 46, 436 P.2d at 736–37.
257 Id. at 47, 436 P.2d at 738 (Goodwin, J., concurring).
258 Id. at 48, 436 P.2d at 739.
government should engage without fear of *respondeat superior* liability.” While he thought nonsuit “was correct on any theory” because there was no knowledge of dangerousness, he would have affirmed on government immunity, which the trial judge had used, because “a city government ought to be immune from vicarious tort liability in connection with reasonable force employed in police work,” whether that “force” was a stick or a dog. He felt that “[t]he denial of immunity to government in cases properly brought under the law of nuisance does not offend the principles underlying governmental immunity” and that “those suits and actions which have allowed relief against cities in case of true nuisance . . . are sound extensions of the principle that the government may not take private property for public use without payment.” Yet he objected to other states’ rulings which, “for the purpose of by-passing the immunity rule, haphazardly characterized negligent wrongdoing and intentional harms as public nuisances,” something that “need not be perpetuated as precedent in this state.” Indicating that the actions of the majority of other states need not dictate Oregon law, he said it was “irrelevant” “[w]hether or not sovereign immunity is a disfavored policy in a majority of the states.” Rather than “nuisance,” Goodwin preferred the Restatement’s use of strict liability, not that it mattered, as either way someone would be liable for maintaining a vicious animal after learning of its dangerousness.

3. *Confessions*

We now move from search and seizure to confessions, including when a suspect should be taken before a magistrate and the requirements of the *Miranda* ruling. We turn first to the question of what remedy was to be applied when a defendant was not taken promptly before a magistrate but made a confession prior to that appearance, an issue that somewhat divided Justices Goodwin and O’Connell in a murder case. A five-to-two majority of the court held that a confession was voluntary and admissible although made after the time when the defendant should have been taken before the magistrate, stated that the only test was the confession’s voluntariness, and ruled

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259 Id. at 49, 436 P.2d at 739.
260 Id. at 48, 436 P.2d at 738.
261 Id. at 49, 436 P.2d at 739.
262 Id.
263 Id.
that the U.S. Supreme Court’s McNabb-Mallory rule, adopted under its supervisory power and not adopted by any state, was not applicable. Concurring separately, Justice Goodwin thought that Justice O’Connell’s brief dissent arguing that Oregon should apply McNabb-Mallory “flashes a warning which should not be ignored by prosecutors and lawmakers.” Yet despite pointing to O’Connell’s position, Goodwin wasn’t as willing to adopt judicial remedies for the problem. Although Oregon statutes were clear that a defendant should be taken before a magistrate “without delay,” he was not persuaded that the Oregon court should apply the federal remedy, as the dissenters suggested. Instead he “would prefer first to give the legislative and executive branches a reasonable opportunity to make appropriate rules to ensure lawful conduct by police officers.” However, “[i]f those primarily charged with the duty of enforcing the law are unwilling or unable to discharge their duty in this respect, then the courts should not shrink from their duty.” Prosecutors, he thought, should give heed to how federal search law had evolved, as in Mapp v. Ohio, and the State “should not be unprepared for a similar evolution in the federal law on unreasonable delay in presenting an accused before a magistrate.”

An appeal of a burglary conviction involving Miranda’s application again revealed the two justices’ divergent approaches when Justice Goodwin wrote for a five-to-two majority and Justice O’Connell dissented. A police officer questioned defendant in a police car outside his home, advised him that the matter was a criminal one and that he could have an attorney present, but did not say that one would be appointed and did not mention the right to silence. The statement was admitted, and the Oregon Supreme Court majority affirmed the conviction. Goodwin said that the defendant was free of restraint and was a free man on leaving the field investigation, with his arrest not coming until much later; he was not “in custody” when interviewed and thus the failure to warn him did

267 Id. at 365, 375 P.2d at 242 (Goodwin, J., concurring specially).
268 Id. at 365–66, 375 P.2d at 242.
269 Id. at 366, 375 P.2d at 242.
270 Id.
271 Id.
273 Id. at 215, 441 P.2d at 598.
274 Id. at 218, 441 P.2d at 599.
not require excluding the statements.\textsuperscript{275} In taking this path, Justice Goodwin followed a device used by many other courts in the aftermath of \textit{Miranda}, with the requirement that the interrogation be “in custody” used to decline or resist application of the \textit{Miranda} rule.

Pre-\textit{Miranda}, said Goodwin, the Oregon court had allowed statements by “focal suspects . . . questioned while not under arrest even though the officers had not first advised them of their rights,”\textsuperscript{276} and it was not willing to overturn that decision. He did state that \textit{Miranda}, although on its facts a police-station interrogation, applied outside the station, and said the police were not able to “avoid the \textit{Miranda} rules by questioning an arrested suspect on the way to the police station or in the field”; however, when “field questioning . . . becomes custodial interrogation” was “not always clear.”\textsuperscript{277} He recognized but downplayed the “subtly coercive effect” of an officer’s badge, as he and his colleagues could not “believe that any psychological pressure emanating from an officer’s authority is likely to cause an innocent person, who knows that he is free to come and go, to confess a crime he did not commit.”\textsuperscript{278} In a seeming failure of logic, he said that if, per \textit{Miranda}, custody was “‘inhерently coercive,’” without custody “there is no danger that a coercive environment will be created.”\textsuperscript{279}

Expounding at greater length than the majority, Justice O’Connell found the Goodwin position “too restrictive,” with “this error . . . a result of reading \textit{Miranda} too narrowly” and of failing “to see that the Fifth Amendment privilege is more than a protection and prophylaxis against coercive practices and rests upon a broader base relating to notions of fair play designed to preserve the privacy of individuals and the integrity of our system of the administration of justice when the state prosecutes one of its citizens.”\textsuperscript{280} On O’Connell’s reading, it was “not necessary to establish the coercive character of the interrogation setting because these constitutional rights are recognized where coercion, actual or potential, is not relevant.”\textsuperscript{281} With the questioning in the present case “sharply ‘focused’ upon the accused,” and with probable cause then existing for an arrest, the questioning

\textsuperscript{275} Id.
\textsuperscript{276} Id. at 216, 441 P.2d at 598 (citing State v. Evans, 241 Or. 567, 407 P.2d 621 (1965)).
\textsuperscript{277} Id. at 216–17, 441 P.2d at 598–99.
\textsuperscript{278} Id. at 217, 441 P.2d at 599.
\textsuperscript{279} Id.
\textsuperscript{280} Id. at 218–19, 441 P.2d at 599–600 (O’Connell, J., dissenting).
\textsuperscript{281} Id. at 219, 441 P.2d at 600.
had to cease, with the defendant brought quickly before a magistrate.\textsuperscript{282}

\textit{G. Civil Law}

We now turn from criminal matters to the civil side of the law, looking first at contract issues and then at torts.

\textit{1. Contracts}

Three cases dealing with contracts produced at least some disagreement between the two justices. One involved relationships in which “there was no written agreement between \textit{[two companies]} upon which their relationship can be documented.”\textsuperscript{283} With “[n]o Oregon statutes characteriz[ing] a relationship such as existed between \textit{[them]} as a matter of law,” the court was required to establish the legal effects of the companies’ relationships “from their manner of doing business.”\textsuperscript{284}

In the case’s complicated facts, an agent had placed auto insurance with an insurer that became insolvent.\textsuperscript{285} The insolvent’s receiver sued the agent and the company that discounted the agent’s customers’ time payment contracts and won in the trial court.\textsuperscript{286} A five-to-two Oregon Supreme Court, per Justice Goodwin, reversed, holding that the agent had a claim as a general creditor against the insurer.\textsuperscript{287} The receiver had conceded that prior to the insolvency, the agent could settle accounts by sending only net balances but had argued that the agent was trustee for the funds and thus had to pay all funds (almost $47,000) unconditionally.\textsuperscript{288} Goodwin looked at the practices of companies doing business, which he said the trial court had disregarded. He found setoff “usually allowed where, through a course of separate transactions, two parties become indebted to each other” and “a matter of routine bookkeeping” when the entities were both solvent, whereas in an insolvency, the solvent entity “is held

\begin{footnotes}
\item[282] Id. at 225–26, 441 P.2d at 603.
\item[284] Id.
\item[285] Id. at 172, 428 P.2d at 173. The agent deducted from premiums due the insurer unearned premiums from cancellations, and, on cancellation, credited the insured with a refund and paid the unearned premium to the discounting company. No money moved from the insurer to the agent, but the current account showed that the refund reduced the amount the agent owed insurer. \textit{Id.} at 172–74, 428 P.2d at 172–73.
\item[286] Id. at 176, 428 P.2d at 175.
\item[287] See \textit{id.} at 178, 428 P.2d at 176.
\item[288] \textit{Id.} at 174–75, 428 P.2d at 174.
\end{footnotes}
only for the difference, if any, between his debt and the insolvent’s” as any other rule would have “injustice.”

Again looking to the companies’ way of doing business, he found the relationship to be that of a debtor and creditor, and in such a relationship, “setoff upon the insolvency of either is a recognized and accepted practice.”

Justice O’Connell, dissenting, disagreed with calling the relationship one between debtor and creditor. Where Goodwin had looked to business practices, O’Connell looked to general relationships. The majority’s “error,” he said, was “the assumption that because the parties employed a particular bookkeeping device for convenience in adjusting their mutual accounts they necessarily stand in a debtor–creditor relationship.”

Instead, in his view the case “should not turn upon the superficial fact that the parties set up a particular accounting system to adjust their accounts.” For O’Connell, “the important inquiry is whether there is a sound reason for permitting a set-off under the circumstances of this case.”

He thought the agent was only an agent for its principal, the insurance company. After all, it was the insurer, not the agent, “who undertook the risk of loss in case of an accident” and was thus “entitled to receive the premium for undertaking this risk.” Under the cases, he found “axiomatic . . . that premiums paid to an insurance agent constitute a payment to the insurer, and . . . the agent holds such premiums as a fiduciary for his principal, the insurer,” with the accounting procedure used here not having been deemed by the courts as “sufficient to change the basic relationship of principal and agent.”

O’Connell also argued that setoffs were an equitable matter, not to be “applied as between a debtor and creditor if it is not equitable to do so,” and he thought it “not equitable to permit set-off in the present case.”

Another case in which a lease had to be construed was decided by a several-judge department, not by the full court, thus indicating its lesser importance, and it produced only limited disagreement.

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289 Id. at 176–77, 428 P.2d at 175.
290 Id. at 177, 428 P.2d at 175.
291 Id. at 179, 428 P.2d at 176 (O’Connell, J., dissenting).
292 Id.
293 Id.
294 Id.
295 Id. at 180–81, 428 P.2d at 177.
296 Id. at 186, 428 P.2d at 180.
lease called for a payment of a percentage of gross sales made, in the key language, “upon and through” leased premises, including all departments, concessions and activities, wholesale and retail.\textsuperscript{298} In a unanimous ruling tied to the case facts, Justice O’Connell said that gross sales from affiliated businesses conducted off-premises that were included on income tax returns were properly held to be department or concessions.\textsuperscript{299} In his brief first separate concurring opinion, for himself and Justice Brand, Justice Goodwin agreed that the court could construe the percentage lease, but he disagreed with how the O’Connell plurality opinion had implied a falsehood by tenants as to their lack of knowledge about the inclusion of certain disputed sales in the calculation of the rent base, particularly where the same accountant served both parties.\textsuperscript{300}

In a case involving an anticompetition provision, Justice Goodwin had observed that “[d]ifficulties” with agreements “arise when one of the contracting parties changes his mind.”\textsuperscript{301} In another case involving a lease of land, one with an option to purchase, someone had repudiated the lease, and an O’Connell majority opinion prompted a Goodwin dissent of moderate length.\textsuperscript{302} The court held that a leasing tenant could, without first tendering the purchase price under the option, sue for breach of the option from the landlord on repudiation of the lease and option less than one year later.\textsuperscript{303} According to Justice O’Connell, “accepted principles of contract law compel [the court] to recognize the right of the option holder to recover damages upon breach of the option contract.”\textsuperscript{304} Otherwise the option holder would have to move up the decision to purchase after having bargained to obtain the entire period.\textsuperscript{305} This rule should apply even if damages were speculative because the option holder might not have exercised the option.\textsuperscript{306}

Justice Goodwin, joined by Justice Perry, instead found it “unwarranted” to assume that the option holder was denied a right to wait until the end of the option period to decide to exercise the

\textsuperscript{298} \textit{Id.} at 596, 366 P.2d at 729.
\textsuperscript{299} \textit{Id.} at 601–02, 366 P.2d at 732–33.
\textsuperscript{300} \textit{Id.} at 604–05, 366 P.2d at 733 (Goodwin, J., concurring).
\textsuperscript{301} McCallum v. Ashbury, 238 Or. 257, 263–64, 393 P.2d 774, 777 (1964).
\textsuperscript{303} \textit{Id.} at 324, 395 P.2d at 125–26.
\textsuperscript{304} \textit{Id.}
\textsuperscript{305} \textit{Id.}
\textsuperscript{306} \textit{Id.}
Moreover, while breaching the lease might be a possible basis for damages, it might not automatically terminate the option, so he believed the court should have held that the option continued to exist and plaintiff could exercise it, because the lessor hadn’t made it impossible to perform it. 308 “The more equitable rule would be to treat the interest created by the option as a separate interest . . . at least until it appeared that the lessee had abandoned it.” 309 Damages would be available only after the lessee had sought to exercise the option. 310

2. Torts

Perhaps the most significant area of differences between the two justices was torts, where we find cases in which Justice Goodwin wrote for the majority and Justice O’Connell dissented, presenting stark differences between the former professor and former student. While both men were common-law judges drawing on treatises and articles by leading torts scholars, the differences were quite noticeable. As Justice Goodwin observed at the time to a law school classmate, “As you may have gathered in reading our opinions and in talking with us, KJ and I have somewhat divergent views concerning the role of the court and jury in negligence cases.” 311 As Justice O’Connell was to say later, Justice Goodwin was “a little bit more precedent-minded”—“not hide-bound, but less inclined to depart from precedent”—while he himself was the justice most likely to start his tort analysis from scratch. 312 As their colleague Justice Holman later put it, Justice O’Connell was “the theory man,” while Justice Goodwin was “inclined to be practical.” 313

We should first note that while Goodwin and O’Connell disagreed on important aspects of tort law, they were not always at odds. For example, they joined in exploration of proximate cause. In a case involving injury to a longshoreman, which Goodwin later said “was

307 Id. at 326, 395 P.2d at 127 (Goodwin, J., dissenting).
308 Id. at 326–27, 395 P.2d at 127.
309 Id. at 327, 395 P.2d at 127.
310 Id. at 328, 395 P.2d at 127.
311 Letter from Alfred T. Goodwin to Walter Probert (July 3, 1962) (on file with author). He continued, “We also have some divergent views on other matters, but the negligence cases point up one phase of the problem rather nicely.” Id.
312 O’Connell Interview, supra note 3.
313 Interview with Ralph Holman, Justice, Oregon Supreme Court, in Salem, Or. (Oct. 17, 1994). On O’Connell and torts, see also Dominick Vetri, Tort Markings: Chief Justice O’Connell’s Contributions to Tort Law, 56 OREG. L. REV. 235 (1977).
not remarkable for its facts or its law,”
Justice O’Connell wrote a
long, scholarly concurring opinion proposing a new formulation of
proximate cause so that causation and liability issues would not be
collapsed, and Justice Goodwin joined what he later called “a
pretty good little symposium on proximate cause.” On its way to
deciding the case, the court asked for assistance in the form of amicus
briefs on the question, in a formulation specifically citing to Leon
Green. The Dewey case arrived at the court “at the time when the
court was ready to reexamine proximate cause.” This made it
unlike most cases, which “require nothing more than a decision...
that the judgment below should be affirmed or reversed,” because
“[T]here is no new law involved, no discriminating application of old
law to unusual facts, and, frequently, little reason for the appeal.”
Instead Dewey was one of the relatively few cases in which, at a
second level, the judges’ function was “to do something about the
law,” and Justice O’Connell had “assumed the role of catalyst in
bringing seven good minds to bear upon a problem that needed to be
reviewed afresh.”

When we turn to the two justices’ disagreement on tort matters, we
find an automobile accident case which provides an example of the
interplay of common-law court and legislature, as the former adjusts

314 Goodwin, supra note 234, at 188.
Sloan’s prevailing opinion was less than two pages long, while O’Connell’s special
conciliation was twelve pages long. Justice Denecke also wrote separately, and Justice
Perry dissented.
316 He did add, however, “I don’t think it would make any difference to the average
juror which method of instruction we used in telling them about proximate cause. But it
might make us feel better if we knew what we were doing when we instructed them.”
317 According to Goodwin, the court corresponded both with Green and with Prosser,
who held a differing view. Goodwin, supra, note 234, at 189. Dewey was first argued on
February 9, 1962, to Department 2, and then was reargued to the en banc court, initially on
July 2, 1962, and again on February 6, 1963. The request for assistance in that case came
after the first reargument, which was at roughly the same time as Goodwin’s concurrence
in Stoneburner v. Greyhound Corp., 232 Or. 467, 375 P.2d 812 (1962). Dewey was
eventually handed down on March 13, 1963. Goodwin’s writing about the correspondence
with the law professors is mentioned in T. Marvell’s Appellate Courts and Lawyers. T.
MARVELL, APPELLATE COURTS AND LAWYERS 318 n.22 (1978). Goodwin was to
observe to a law professor friend who had mentioned an article by Green that the article
“made quite an impact on me in 1962 when Ken [O’Connell] and I were studying
proximate cause and other imponderables.” Letter from Alfred T. Goodwin to Walter
318 Goodwin, supra note 234, at 189.
319 Id. at 188–89.
to the latter’s action.\textsuperscript{320} Whether violation of a statute established negligence was at the forefront in a vehicle collision case that arose when an automobile passenger was injured when the car collided with a truck whose brakes failed.\textsuperscript{321} Over separate dissents by Justices O’Connell and Denecke, Justice Goodwin wrote for five justices to affirm the trial judge’s directed verdict for the plaintiff on negligence and to hold that, although in some situations there might be a lawful excuse for violating a statutory standard of care, the truck driver’s testimony of driving over a ditch in the road did not present a jury issue of excuse for failure to have good brakes.\textsuperscript{322}

Goodwin began by referring to a 1958 ruling in which the court had found that, as a matter of law, a truck operator was liable when a truck’s brakes were not in good working order as per a state statute.\textsuperscript{323} He said that ruling had placed the state “among those jurisdictions that treat proof of a statutory traffic offense as conclusive proof of negligence.”\textsuperscript{324} The trial court, he noted, had taken that case to make negligence irrelevant, but another trial court, in a case in which Goodwin also wrote for the court the same day, had allowed brake failure to be considered by the jury as an excuse.\textsuperscript{325} The issue as to the scope of the rule was created—if not forced—in the present case by appellant’s claim that dictum in the earlier case “should be expanded to hold that facts other than latent defects may constitute a lawful excuse for a statutory violation involving safety equipment.”\textsuperscript{326}

Goodwin believed the court had four possible choices, each depending on the statute’s role: that violation of the statute (1) was irrelevant, (2) was prima facie evidence of negligence, (3) was conclusive proof of negligence (used by the trial judge, and said by

\begin{itemize}
  \item See McConnell v. Herron, 240 Or. 486, 402 P.2d 726 (1965).
  \item See id. at 488, 402 P.2d at 727.
  \item Id. at 493–94, 402 P.2d at 730.
  \item Id. at 488, 402 P.2d at 728 (citing Nettleton v. James, 212 Or. 375, 319 P.2d 879 (1958)).
  \item Id.
  \item Id. at 489, 402 P.2d at 728 (citing Hills v. McGillvrey, 240 Or. 476, 402 P.2d 722 (1965), in which Goodwin said that because the matter was dealt with in the companion case, discussion need not be repeated there). In McGillvrey, a mechanic had installed a wrong wheel bearing, leading to a death when the car with the defective bearing had rear-ended another auto, pushing it into the path of a truck, causing a fatality in that car. 240 Or. at 478–79, 402 P.2d at 723. There was a jury verdict against the auto parts store that sold the wrong bearing, its employee, and the mechanic who installed the part, and a verdict for the driver and owner of the car with the improper bearing and for the truck driver, which the Supreme Court affirmed. Id. at 479, 402 P.2d at 723.
  \item McConnell, 240 Or. at 489, 402 P. 2d at 728.
\end{itemize}
Goodwin to “find[ ] support in our earlier cases”), or (4) showed “negligence as a matter of law except that it may be excused where the party who failed to comply with the statute shows that his violation was caused by circumstances beyond his control and that it was, under the circumstances, impossible, regardless of the degree of care he might have exercised, for him to comply with the statute.”

It was this last theory that the majority adopted. Goodwin said the earlier case had been based on the notion that the legislature intended to make those who violated safety equipment laws liable regardless of possible excuses, but the majority now felt “that the motor vehicle code was not intended to eliminate the element of fault from the law of torts,” and the rule now adopted for defective equipment would be the same used in errors of vehicle operation.

Goodwin concluded that the truck driver’s evidence would not be a lawful excuse and did not suffice to go to the jury on the excuse question. The ditch across which the truck driver bumped would not have put otherwise satisfactory brakes out of commission, and the driver was not precluded from discovering damage to the brakes from the bump: “If he did encounter a bump severe enough to put his brakes out of service, the driver would have been under a duty to test his brakes before proceeding further, or to explain why he could not make such a test.”

Where Justice Goodwin had made a lengthy exploration of the role of the statutory standard in establishing negligence and had noted several alternatives, Justice O’Connell would not have statutory violations lead to negligence. He said he had made this point earlier in criticizing the former rule, but he now believed that having a violation of a statute be negligence per se “should be abolished,” because legislatures writing traffic laws were speaking of criminal offenses, not of personal injury plaintiffs’ rights. The majority was also wrong, he thought, in seeming to give traffic law violations higher standing (as presumptions) than judge-made rules about negligence, although he agreed that judge-made rules might well be affected by legislative pronouncements. Furthermore, in departing from the earlier case and setting aside strict liability, the majority was

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327 Id. at 489, 402 P.2d at 728.
328 Id. at 490, 402 P.2d at 729.
329 Id. at 491, 402 P.2d at 729.
330 Id. at 491, 402 P.2d at 729.
331 Id. at 493, 402 P.2d at 730.
332 Id. at 494, 402 P.2d at 730 (O’Connell, J., dissenting).
333 Id. at 495–96, 402 P.2d at 731.
developing a new standard and thus the statute had become irrelevant: “Why, then,” O’Connell asked, “mention the statute at all? It does not help to explain where the standard should be set.” 334 He thought it sufficient that “if it is conclusively established that” the plaintiff violated a statute, it would “weigh heavily against him” because he would have limited means remaining to show his actions did not cause the injury at issue and that “it is enough to say that he cannot get to the jury because there is insufficient evidence to support a verdict in his favor.” 335

Thus both justices agreed that the prior rule—violation of the brake law leads to strict liability—should be overruled but diverged as to what should come next. In the particulars of the present case, Justice O’Connell was more lenient to the defendant driver, and, as to the law, gave more weight to judge-created standards than those enacted by the legislature, and Justice Goodwin gave more—in O’Connell’s view, too much—weight to the latter. In his short separate concurrence in O’Connell’s dissent, Justice Denecke underscored what the whole court had done: “The entire court is now of the opinion that the doctrine of negligence per se as previously applied must be changed.” 336 Not only were the previous brake statute cases overturned, in what he called “a substantial change,” but “the majority also has changed the application of the statutes pertaining to the operation of vehicles.” 337 He took the new rule to be that “the only acceptable excuse for violating a statute is that it was impossible to not violate the statute.” 338 Yet he did not think that matters had come to rest: “I doubt the finality of the changes made.” 339 However, with “the entire court now believ[ing] that the negligence per se doctrine is in need of revision,” he would have used the case to discard that doctrine “as an illogical anomaly.” 340

On the related tort element of contributory negligence, there were two cases, both involving pedestrians—one an adult, one a child—which divided the two justices. 341 The adult was walking on the roadway, facing in the proper direction, talking with a friend, only to

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334 Id. at 499, 402 P.2d at 732.
335 Id. at 501, 402 P.2d at 733.
336 Id. at 502, 402 P.2d at 734 (Denecke, J., concurring in the dissent).
337 Id.
338 Id. at 503, 402 P.2d at 734.
339 Id.
340 Id.
be fatally struck from behind by a bus passing another vehicle.\footnote{Kellye, 249 Or. at 15–16, 436 P.2d at 727.} The court, through Justice Goodwin’s brief opinion, reversed the trial judge’s directed verdict for the bus company and held that the pedestrian’s possible contributory negligence was for the jury.\footnote{Id. at 17, 436 P.2d at 728.} Walking on the roadway was unquestionably “a contributing cause of the accident,” but “reasonable minds might differ” as to whether it was negligent, because the decedent was on the proper side of the road and no one had pointed to a rule of law requiring that pedestrians be on the shoulder rather than in the road.\footnote{Id. at 16, 436 P.2d at 728.} Thus the majority could not “say categorically that the pedestrian’s failure to anticipate and guard against such a possibility was negligence as a matter of law.”\footnote{Id.} Justice O’Connell dissented in what for him was an unusually fact-based statement. He agreed that the decedent was properly facing oncoming traffic, but he thought that “under the circumstances of this case he was contributorily negligent as a matter of law,” because “it is little short of suicide to be on the paved portion of a highway” in dark clothing, it was dark and misty, the road was narrow, and there was a wide shoulder.\footnote{Id. at 17, 436 P.2d at 728 (O’Connell, J., dissenting).} Thus, he said, “The jury could not reasonably find, on these facts, that the deceased exercised reasonable care for his own safety.”\footnote{Id.}

The other “pedestrian” was an almost six-year-old child who ran across a street and was struck by an automobile. The case was initially heard by a department of the court, with Justice O’Connell preparing an opinion. When a dispute over that opinion led to reargument before the whole court, O’Connell lost his majority and the case was reassigned to Justice Goodwin.\footnote{This account is Justice O’Connell’s own. Taylor v. Bergeron, 252 Or. 247, 249, 449 P.2d 147, 148 (1968) (O’Connell, J., concurring specially).} For four justices, he affirmed the trial court’s verdict for defendants on the basis that the issue of the child’s contributory negligence was for the jury, and he also stated briefly that it was not necessary to specify an age below which a child would have no responsibility for his actions.\footnote{Id. at 248–49, 449 P.2d at 148 (Goodwin, J., writing for the court).}

Justice O’Connell’s special concurrence addressed that last matter, as he reissued his original opinion for himself and two others.\footnote{This account is Justice O’Connell’s own. Id. at 249, 449 P.2d at 148 (O’Connell, J., concurring specially).} He
believed “that in every case in which the negligence of a child is an issue the trial court must decide, without the aid of any trial evidence, a preliminary question of the capacity of children generally to be negligent.” He wanted the court not to decide as to the specific age of the child involved in the particular case but “to determine whether four-year old children as a class can be capable of negligent conduct,” because “it would be of service to the trial bench and bar to decide it now.” Starting at six months, he moved up the age scale, indicating that the higher one went, the more difficult it was to determine when a child’s incapacity ceased. This decision was entangled in questions of “fault”; “the vague and imprecise” nature of “negligence” “presenting semantic problems of considerable complexity” with “moral culpability” and social policy (to compensate victims) involved; and children’s understanding of risk of harm and how to avoid it, which entailed measurement problems.

Difficult as were those matters, judges were expected to determine children’s negligence “at least for the purpose of deciding whether the issue of negligence is to go to the jury.” Because at some point “the trial court and this court, consistent with their traditional exercise of control over the jury, would be forced to hold simply because of the child’s age the jury could not properly find that the child was negligent,” the court “might just as well at this time attempt to fix the minimum age.” While further recognizing the difficulty of establishing an age precisely, he said that “the age of four years is a reasonable approximation.”

Among other auto accident cases producing disagreement was one in which, instead of driver (or passenger) negligence being the central issue, the question was one of liability for a defective product—in particular, a wheel on a pickup truck which had a rim-spider separation that produced an accident. For the five-justice majority, which found evidence about the wheel insufficient to establish a prima facie case as to whether it performed as an ordinary consumer would have expected, Justice Goodwin stated, “The principal question is whether the plaintiff produced sufficient evidence to support his

351 Id.
352 Id. at 250, 449 P.2d at 148–49.
353 Id. at 251, 449 P.2d at 149.
354 Id. at 251–52, 449 P.2d at 149.
355 Id. at 252, 449 P.2d at 150.
356 Id. at 253–54, 449 P.2d at 150 (footnote omitted).
357 Id. at 255, 449 P.2d at 151.
allegation that the wheel was dangerously defective.”

His exploration of cases started with a two-year-old ruling in which, because the item was ultrahazardous, the court “did not have to decide whether a lesser degree of danger”—the Restatement (Second) of Torts’ definition of “unreasonably dangerous”—would make the manufacturer liable. (The two justices had not been in disagreement in that case, as O’Connell was later to point out.) However, he said the court would now adopt the Restatement provision “and hold that if the product is in fact unreasonably dangerous the manufacturer is liable for the harms caused by such a defect,” with “unreasonably dangerous” meaning “in a condition unreasonably dangerous to the user.” If the injured party could not produce direct or circumstantial evidence about a manufacturing flaw, recovery could still occur upon proof “that the product did not perform in keeping with the reasonable expectations of the user.”

However, such evidence had not been produced in this case or what evidence had been produced would have caused the jury to speculate.

Here we see Justice Goodwin’s view of what degree of clarity in the evidence is necessary for a jury to be able to decide a case under the appropriate standards. If “performance failure occurs under conditions with which the average person has experience,” he said, “the facts of the accident alone may constitute a sufficient basis for the jury to decide whether the expectations of an ordinary consumer of the product are met.” As to a high-speed collision with a large rock, however, the matter was “not so common . . . that the average person would know from personal experience what to expect under the circumstances” and thus the jury “would . . . be unequipped” to make the appropriate decision. Allowing the jury to proceed in this sort of situation, “to decide purely on its own intuition how strong a truck wheel should be,” he said, “would convert the concept of strict

359 Id. at 470, 435 P.2d at 807–08 (citing Wights v. Staff Jennings, 241 Or. 301, 405 P.2d 624 (1965)). In Lewis v. Baker, 243 Or. 317, 320, 413 P.2d 400, 402 (1966), Justice Goodwin discussed that case and Cochran v. Brooke, 243 Or. 89, 409 P.2d 904 (1966), which held that a prescription drug was not a defective product if “reasonably safe for human consumption according to the terms of its maker’s representations.” Lewis, 243 Or. at 320, 413 P.2d at 402 (restating the holding of Cochran v. Brooke).
360 O’Connell Interview, supra note 3.
361 Heaton, 248 Or. at 470–71, 435 P.2d at 808.
362 Id. at 471–72, 435 P.2d at 808.
363 Id. at 473, 435 P.2d at 809.
364 Id.
liability into the absolute liability of an insurer.” With courts “having” already decided how strong products should be” by deciding the standard of “strong enough to perform as the ordinary consumer expects,” the jury should only “determine the basically factual question of what reasonable consumers do expect from the product,” not “how strong products should be, nor . . . what consumers should expect.” Nor did advertising about “durability” (we still have “Ford tough,” don’t we?) “help a customer to form an expectation about the breaking point of a wheel.” As Goodwin observed about Ford trucks, “A ‘rugged’ Ford truck could be expected to negotiate rough terrain, including five-or-six-inch rocks, at appropriate off-the-road speeds, but it does not follow that a user could expect the same thing at highway speeds.”

Justice O’Connell, dissenting, joined issue with Justice Goodwin over the province of the jury and clearly favored the jury more. He thought the majority, “irrespective of whether the question of strict liability is for the court or jury in a case of this kind,” had found a failure of proof, but he disagreed as to whether there was sufficient evidence for the jury. For him, “whether a manufacturer should be required to construct a wheel of such durability as to withstand the impact of a rock of the size in question . . . should depend . . . upon whether the manufacturer could reasonably foresee the likelihood that the hazard would be encountered by those using the product.” That in turn would “depend to some extent upon the representations made by the manufacturer with respect to the durability of the product.” The standard of reasonableness to be used was “similar to that employed in determining whether a defendant is negligent,” which he thought a jury was equipped to do. O’Connell said the majority’s “community standard” did not require an expert witness any more than one was required for the reasonableness of driving a car a certain way under particular conditions. In that situation, “we are willing to trust the jury’s judgment as to the community standard

365 Id.
366 Id. at 474, 435 P.2d at 809.
367 Id. at 475, 435 P.2d at 810.
368 Id.
369 Id. at 477, 435 P.2d at 810 (O’Connell, J., dissenting).
370 Id. at 478, 435 P.2d at 811.
371 Id.
372 Id. (“A jury is just as well equipped to judge the reasonableness of defendant’s conduct on this score as it is when the inquiry is made as to defendant’s negligence.”).
373 Id. at 479, 435 P.2d at 811.
and to appraise the defendant’s conduct in light of it,” and the same should be true here.\footnote{Id.}

O’Connell ended with particularly tart and severe criticism of the majority, saying it kept the case from the jury here “not because there is a lack of evidence upon which to sustain a verdict for plaintiff, but because, . . . finding the imposition of strict liability a severe burden upon the seller, [they] attempt[] to limit that burden by distorting the concept of the jury’s function.”\footnote{Id.} With Justice Goodwin having accepted liability for “unreasonably dangerous” products and devoted time to a definition, including the reasonable expectations by a consumer, in a way his opinion and that of Justice O’Connell went past each other.

3. **Damages**

On the question of “special damages,” the basis for damages for loss of earning capacity, in his last year on the court Justice Goodwin wrote for the court in two companion personal injury cases, with Justice O’Connell in the minority.\footnote{See Baxter v. Baxter, 253 Or. 376, 451 P.2d 456 (1969); Martin v. Hahn, 252 Or. 585, 451 P.2d 465 (1969).} The principal case\footnote{Baxter, 253 Or. 376, 451 P.2d 456.} was first argued to a department and assigned to Justice O’Connell. He initially took the position adopted by the ultimate majority but then shifted and his changed position did not command a majority. The case was then reargued before the full court, along with the companion case, and O’Connell’s position remained the minority one.

Writing for a four-justice majority, Justice Goodwin said there was no disagreement within the court that “any person, employed or unemployed, whose earning capacity has been impaired through the negligence of another, has a right to recover money damages for the impairment of his earning capacity”; whether the injured person was employed or seeking employment did not matter.\footnote{Id. at 378, 451 P.2d at 456–67.} Instead, “The difficulty lies in framing instructions for the jury on its function in dealing with these losses.”\footnote{Id. at 378, 451 P.2d at 457.} He noted that Oregon’s courts had placed impaired earning capacity from time of trial forward within “general damages,” while lost wages between injury and trial were “special damages,” to be awarded only if the injured party was employed at a fixed wage when injured; someone not employed at
that time could still recover for loss of earning capacity under “general damages.”

The majority found that arrangement acceptable, with the difficulties not “so great as to warrant wholesale overruling of former decisions,” and Goodwin said the rule “should not be disturbed,” as it was “understood by the bench and bar, and does not appear to have worked injustice.” As he put it, “It is possible that a clean sweep at this time might improve the trial practice, but we do not wish to upset a settled practice which appears to be working in order to test a speculative improvement.” However, he cautioned “courts to refrain from instructing on special damages in inappropriate cases.” He conceded that a person employed when injured had some advantage “not shared by his equally deserving but temporarily unemployed fellow plaintiff,” but “the law takes the two plaintiffs as it finds them.”

Justice O’Connell, having found the distinction in jury instructions of no logical sense, thought the instructions should be discarded. O’Connell thought the majority did not disagree with his analysis “but refuses to change the law.” He did not think “that many members of the bench and bar have really understood why loss of earnings before and after trial are treated differently,” and he also was unsure that the long-accepted instruction had not worked injustice. Going to the heart of his argument, he asked, “[W]hy should we perpetuate a distinction which is indefensible[?]” He said he saw no reason for a difference in treatment as to the amount of damages when the two types of injured parties were otherwise identically situated legally. In either case, “the calculation of the loss requires the jury to engage in a certain amount of speculation as to what the plaintiff would have earned had he not been injured,” both before trial and after. This was because, among other things, a person employed at the time of trial might become unemployed (and vice versa), although speculation as to post-trial earnings loss would be at

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380 Id.
381 Id. at 379, 451 P.2d at 457.
382 Id.
383 Id.
384 Id.
385 Id. at 381, 451 P.2d at 458 (O’Connell, J., dissenting).
386 Id.
387 Id. at 383, 451 P.2d at 459.
388 Id. at 383–84, 451 P.2d at 459.
389 Id. at 385, 451 P.2d at 460.
least somewhat greater than for the pre-trial period. Asking “whether this difference in the degree of speculation or certainty justifies separate methods of pleading pre-trial and post-trial losses,” he found the answer to be no. The court perhaps had added to the confusion and, in any event, clarification was needed. We see in this case an important difference in attitude and approach toward “clearing the decks” or cleaning house, with Justice O’Connell clearly willing to go further, while Justice Goodwin was satisfied with a settled practice he saw no need to disturb, particularly as the court agreed on the elements for which damages could be recovered.

Justice Denecke and Justice Sloan joined the O’Connell dissent but Justice Denecke also wrote separately to say that he had been prepared to join what became the Goodwin opinion but had changed his mind because “if we are going to make new law we should do so along the logical lines suggested” by Justice O’Connell. Instead the Goodwin opinion “has announced two new rules of law” which the court had not previously held—one, that “special damages for loss of earnings can only be recovered if the plaintiff was working at the time of injury,” and the other, “the inference that an unemployed plaintiff may recover for wages lost between injury and trial as an item of general damages,—impairment of early capacity.”

Opinions in the companion case were much shorter. Justice O’Connell simply referred to his Baxter dissent, and Justice Denecke did not write separately. For the majority, Justice Goodwin had to cut through pleading changes to get to the damages issue. Plaintiff, not being employed at the time of the accident, was entitled to the instruction for loss of earning capacity but not to a “special damages” instruction for lost wages, which the trial judge had given apparently as a matter of routine in such cases. Goodwin conceded that “[a]s an abstract matter of logic,” “there is no logical difference between a plaintiff’s impaired earning capacity measured from the date of the injury to the date of trial in terms of ‘lost wages’ and his impaired earning capacity measured from the date of trial into the future in terms of ‘general’ damages.” However, he relied on precedent, which “has established the date of the trial as the dividing point for the purpose of characterizing the damages of a person who was

390 Id. at 385, 451 P.2d at 462.
391 Id. at 393, 451 P.2d at 464 (Denecke, J., dissenting).
392 Id. at 393–94, 451 P.2d at 464.
394 Id. at 586–87, 451 P.2d at 465–66.
395 Id. at 589, 451 P.2d at 467.
employed at the time of his injury as ‘general’ or ‘special.’” As he had also said in *Baxter*, “These instructions . . . apparently satisfy Oregon litigants, whatever faults they may reveal when subjected to logical analysis.”

And in the present case, a new trial was required because the majority was unable to find the “special damages” instruction not prejudicial.

Before we discuss negligence cases further, we should note an observation Justice Goodwin made to a law professor friend during the time the two justices were considering important aspects of tort law. Goodwin observed that both he and O’Connell “tend to believe that there is some merit in the idea of enterprise liability and in the consequent suppression of the significance of fault. However, we would probably approach the problem from slightly different points of view and at different rates of speed.” In an important statement of his philosophy of judging, he said he

favor[ed] going more slowly, on a case-by-case method, leaving to a later case (perhaps a preferable or more attractive one on the facts) the matter of making new law . . . I would prefer to make a little bit of new law in one case and maybe a little bit more in another case or two later, and maybe a little bit more in yet another case, where others [O’Connell?] would prefer to make the jump in one case . . . in general I prefer to go a step at a time and then test my balance on the next step before trying to proceed much further.

Focusing more specifically on enterprise liability, he said “[t]he opportunity to make choices in [that] area . . . presents itself most often in the form of the question whether a matter should have been submitted to a jury,” adding that he found himself “unwilling to come right and say that we are imposing liability upon a particular defendant simply because it is good policy to do so.”

One could definitely see the application of this philosophy in practice, and its difference from Justice O’Connell’s approach, in their respective treatments of a different damages question that arose in two other product liability cases where the injury was caused by defective products. The specific new issue—or extension of the

396 Id.
397 Id.
398 Id. at 590, 451 P.2d at 467.
400 Id.
401 Id.
old one—was whether economic loss should be compensated. One case involved a defective vehicle, a tractor, while the other involved defective seeds but drew on (was pulled by?) the tractor case.\footnote{Price, 241 Or. 315, 405 P.2d 502.} In the “Case of the Defective Tractor,” which pitted Goodwin and O’Connell against each other, Goodwin gained only a plurality for his opinion, a rare occurrence. The purchaser of a defectively manufactured tractor for economic loss sued only the wholesaler and retailer, not the manufacturer.\footnote{Id. at 316, 405 P.2d at 502.} Upholding the trial court’s judgment against the retail seller, the four-to-three majority agreed that the purchaser could not recover for economic losses resulting from the manufacturer’s defective workmanship against a wholesaler not in privity and not at fault.\footnote{Id. at 317–18, 405 P.2d at 503.} A suit, like the one here, against a wholesaler who “innocently” passed along a defective product from the manufacturer to those further down the chain, with no fault or misrepresentation alleged, would not lie.

As to what he called “enterprise liability,” Justice Goodwin thought that “[t]he plaintiff is frankly searching for a solvent defendant, in this state, whose liability is to be grounded solely upon the fact that he shares in the profits generated by the distribution of merchandise” and “because he happens to lie in the stream of commerce.”\footnote{Id. at 317, 405 P.2d at 503.} Being unwilling in this case to address damages for economic loss against a manufacturer not in privity, the court did “not believe that the case at bar is a proper one in which to impose this new form of liability upon wholesalers.”\footnote{Id. at 318, 405 P.2d at 503.} Arguments adduced for enterprise liability where physical injury was involved were “not equally persuasive in a case of a disappointed buyer of personal property.”\footnote{403 P.2d 145 (Cal. 1965).}

Justice Ralph Holman concurred specially. Like Justice Goodwin, he pointed to the recent California Supreme Court decision in \textit{Seeley v. White Motor Co.}\footnote{Price, 241 Or. at 318, 405 P.2d at 503 (Holman, J., concurring specially).} His argument was direct: strict liability for “the sale of goods of unmerchantable quality should be limited to those situations where the use of the defective product results in physical harm to persons or property.”\footnote{403 P.2d 145 (Cal. 1965).} Distinguishing between damages for physical injury and for economic loss, Holman said that
“the hazard to life and health is usually a personal disaster of major proportions to the individual both physically and financially and something of minor importance to the manufacturer or wholesaler against which they can protect themselves by a distribution of risk through the price of the article sold.”411

Writing at considerably greater length than his majority colleagues, Justice O’Connell would have allowed suit against the wholesaler. He dissented basically over doctrine, disagreeing with Goodwin’s refusal to extend enterprise liability while criticizing the California majority. He first distinguished instances in which the defect results in personal injury or property damage from those “in which the defect causes a pecuniary loss not arising out an accident,” where the duty was an “obligation to refrain from intentional, negligent or innocent misstatements of fact which cause a pecuniary loss divorced from a tangible harm.”412

Justice O’Connell focused on misrepresentation, not of the tractor’s condition but of what the implement could do. He thought there should be tort liability “when . . . assurances create in the purchaser a reasonable expectation that the goods will meet the standard of quality represented.”413 Drawing on Prosser, he would have let plaintiff reach the distributor who advertises, because “the marketing of automobiles is an integrated process” of which the distributor is a part.414 And the plaintiff should be able to recover as damages “the difference between the price he paid for the tractor and the value of the tractor he received.”415 More generally, he argued that the damages rule for loss of profits under a theory of implied warranty—“if (a) they could be regarded as having been within the contemplation of the parties, and (b) the loss could not reasonably have been prevented by the plaintiff”—should be equally applicable in this tort cause of action.416

Almost three years later, the court again divided four to three, with Justice O’Connell again dissenting on the products liability issue.417 The court found a negligence cause of action where sugar-beet seeds purchased from defendant were defective, but, speaking through

411 Id. at 319, 405 P.2d at 504.
412 Id. at 320, 405 P.2d at 504 (O’Connell, J., dissenting).
413 Id. at 323, 405 P.2d at 505–06.
414 Id. at 330, 405 P.2d at 509.
415 Id. at 332, 405 P.2d at 510.
416 Id.
Justice Goodwin, was no more willing than earlier to allow recovery for lost profits on the basis of strict liability. The latter half of Goodwin’s opinion was directed to whether the long-arm statute allowed plaintiffs to reach defendants in the Oregon courts, but he had to decide first whether there was a cause of action. He noted that the damages alleged were “essentially of the same character” as in the defective tractor case.419 A producer, rather than a wholesaler, was being sued here, but neither was in privity with plaintiff, so the basics were the same.420 Matters were left to the common law because the Uniform Commercial Code (UCC) had “provide[d] a scheme of warranty recovery, in which fault is irrelevant, for all types of loss resulting from ‘unmerchantable’ products,” but it did not speak to privity in breach of warranty actions.421 Under the common law, said Goodwin, “this Court has not yet decided to abandon the traditional remedies under the law of sales,”422 He continued to avoid having the court decide “whether strict liability should be imposed upon remote sellers of products which cause property damage instead of personal injury;” so that application of the relevant Restatement section to such damages was still left “an open question.”423

For Goodwin, a suit against an entity not in privity for economic losses was not to lie, at least beyond for any breached warranties, with “[d]isclaimers and limitations of certain warranties [being] matters for bargaining.”425 The Price v. Gatlin rule was to stand, with breach of warranty reaching only to the “immediate seller unless [plaintiff] can predicate liability upon some fault on the part of a remote seller.”426 In a floodgates argument of the sort he seldom used, Goodwin asserted that “[s]trict-liability actions between buyers and remote sellers could lend themselves to the proliferation of unprovable claims by disappointed bargain hunters, with little discernible social benefit.”427 Moreover, allowing nonprivity actions in warranty “to vindicate every disappointed consumer would unduly

418 Id. at 270–71, 442 P.2d at 218–19; see also supra Part II.B.
419 Id. at 265, 442 P.2d at 217.
420 Id. at 266, 442 P.2d at 217.
421 Id.
422 Id. at 267, 442 P.2d at 217.
423 Id.
424 Id. (“A buyer who chooses his seller with care has an adequate remedy should any warranties be breached.”).
425 Id. at 267–68, 442 P.2d at 217.
426 Id. at 268, 442 P.2d at 218.
427 Id. at 268, 442 P.2d at 217–18.
complicate the . . . scheme” of the UCC, whereas Goodwin saw no conflict between the fault-based tort rules and the non-fault-based warranty provisions of the sales law now statutorily embedded.

Justice O’Connell concurred as to the long-arm statute but dissented on the products liability question, to which he gave another of his extended treatments. His disagreement was prompted at least as much by Goodwin’s rationale as by the result Goodwin had reached. Once again, O’Connell had a problem with the doctrinal footing of Goodwin’s opinion, arguing that theory is needed for imposing liability on sellers for loss of profits and that the majority opinion was unsatisfactory on express and implied warranties. He reached the nonprivity seller of a product more directly and cleanly than did Goodwin and was also more direct in using tort rather than contract to do so. He also resisted relying on previous distinctions without a reason for doing so.

Justice O’Connell found the state’s law on product liability as to personal injury, property damage, and loss of bargain and profits to be an amalgam of judge-made law and legislation (the UCC) that lacked a clear basis of allocation between court and legislature. The majority’s explanation of how the legislature took over the law as to loss of bargain and profits was “very difficult to follow” and its analysis of UCC provisions was “unacceptable.” For one thing, “the Code was not designed to confine the buyer’s warranty remedy to actions against the immediate seller,” he said; the official accompanying comment was “clear that the liability of the remote seller was left for the courts to work out through case law.” Unlike Justice Goodwin, Justice O’Connell did not think “the court is free to adopt a rule imposing liability upon a remote seller for the breach of an express warranty (whether or not the remote buyer bargained for the warranty) or for breach of an implied warranty,” as such action “would unduly complicate the Code’s scheme.”

However, “‘the more serious defect in the court’s analysis’ was its failure to deal with the possibility of recovery under implied warranty.” Were there a “policy justification” for strict liability for loss of profits, then privity should not be used to limit who would be

428 Id. at 267, 442 P.2d at 217.
429 See id. at 277–85, 442 P.2d at 222–25.
430 Id. at 277, 442 P.2d at 222.
431 Id. at 278, 442 P.2d at 222.
432 Id.
433 Id. at 279, 442 P.2d at 223.
434 Id. at 280, 442 P.2d at 223.
liable, and, as O’Connell further explained in discussing a seller’s “innocent misrepresentation,” no reason remained for “perpetuating the distinction” between immediate and “remote” sellers. Complaining that “the courts have not, generally speaking, explained adequately the basis” for their theory of implied warranty, O’Connell said he had tried to do so in the earlier case and again stated his basic argument.

III

CONCLUDING COMMENTS

What can we draw from this description of the competing views of two justices of a state high court in the decade of the 1960s? We learn more about the history of the Oregon Supreme Court, to which insufficient attention has previously been paid. And most specifically, we learn about two justices who played a key part in development of Oregon’s law at that time and who engaged with each other as they worked on the issues before them. Most basically and particularly, we see two common-law judges working on a range of issues with which a state high court dealt in that time period, many of which would arise in other state high courts. Of especial importance is that as to criminal procedure, the time portrayed was one when cases deriving from the Warren Court’s “criminal procedure revolution” were beginning to have an effect. The tensions between an emphasis on due process and on support for law enforcement, which could be seen then, still can be seen today.

The factual situations seen here might be particular to Oregon, although there are no cases related to the timber industry such as those Justice Goodwin had encountered as a state trial judge. That some of the case situations seem to be mine-run may result in part from the judicial services of Justices Goodwin and O’Connell before the creation of Oregon’s intermediate appellate court, which would serve to filter cases as they moved up the judicial hierarchy and made the Oregon Supreme Court more a court of discretionary jurisdiction.

The focus on cases in which Justices Goodwin and O’Connell disagreed, without also reciting those in which they agreed, of course serves to magnify their differences, portraying them as more stark than their overall work together would have been. Yet differences there were—plain from the opinions and reinforced by the justices’ own self-perceptions, as we have seen from Justice Goodwin’s

435 Id. at 284, 442 P.2d at 225.
436 Id. at 284–85, 442 P.2d at 225–26.
comments to a law school classmate (then law professor) and interviews with the two justices. On criminal procedure matters, one was generally conservative while the other was more a due process liberal. Interestingly, the criminal justice conservative, Goodwin, focused more on procedural technicality in civil matters than did his colleague O’Connell, who focused more on due process rules in criminal procedure. Perhaps the most striking difference between the two justices was on common law issues, where O’Connell, perhaps still the professor, was more concerned about the development of theory, and where differences in style and approach were quite evident, with O’Connell willing to “move the ball” down the field both further and faster, while Goodwin, no reactionary, was more committed to slow, incremental forward movement and thus to the maintenance of precedent.