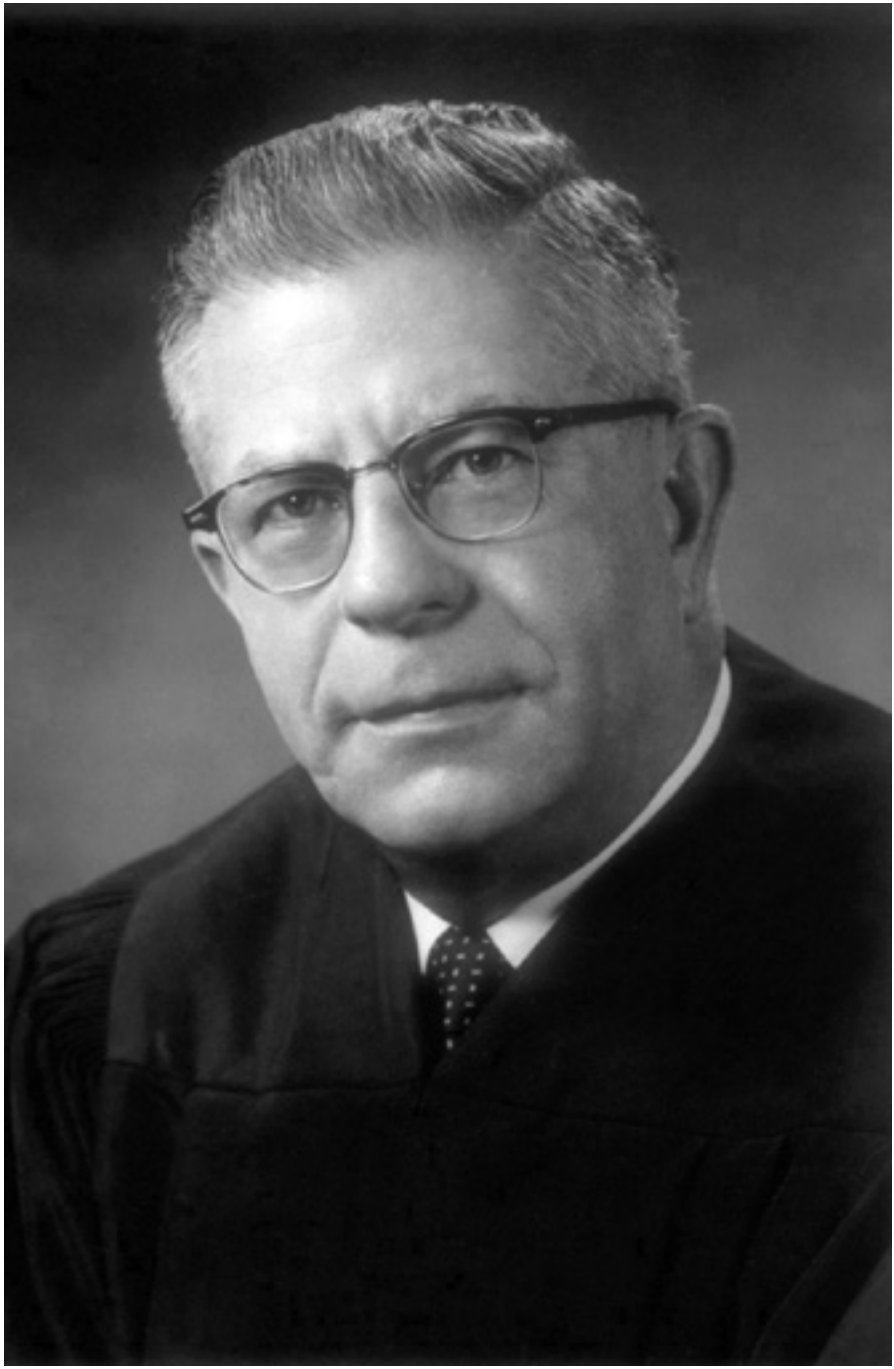
SPECIAL SECTION

NINE SPEECHES BY JUSTICE ROGER J. TRAYNOR



Justice Roger J. Traynor

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PREFACE

HARRY N. SCHEIBER*

In any list of the most admired and influential state judges in the nation's history, Roger Traynor stands at the very top level. Perhaps more than any other state judge of his day, Traynor sought explicitly to bring the law into line with the realities of mass (and diverse) society in the modern industrial world. Traynor did so under the banner of "judicial creativity." He believed that for courts always to defer passively and mechanically to doctrinal precedent was inconsistent with the great common law tradition, whose essence was the capacity for adaptation, change, and growth. Equally, he believed that it was inconsistent with American ideals regarding democratic governance for the courts to fail in their role as full partners in the process of legal ordering.

Where the court moved in an "activist" mode to institute change, as in the tort revolution that his decisions led — an area of the law in which "creativity" required innovation and doctrinal departures — Traynor built on the great Anglo-American judicial tradition of adaptation rather than perpetuating a mindless faithfulness to rules that no longer were responsive

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to the realities of modern California society, or doctrines that had produced manifest unfairness. In such instances, the court's innovations could be turned back in a day by a legislature determined to follow a different course of policy. With respect to constitutional decisions, too, Traynor did fearlessly what American courts must do if they are to be effective: Perhaps more than any state judge of his day, Traynor as a scholar and Traynor as a working jurist undertook fearlessly the reconsideration of the central concepts of constitutional law and their adaptation to the realities of the modern world.

In taxation (Traynor's teaching field at Boalt Hall before he went on the bench), in land law, and in conflict of laws, he was brilliant in the ways he applied conventional legal reasoning to produce practical consequences that did not offend modern notions of efficiency, justice, and legality. In family law, race relations, and the processes of the criminal justice system, Traynor's innovations blazed the path that other courts, and ultimately the U.S. Supreme Court, would follow. In tort reform, Traynor was of truly unique importance both for his basic jurisprudential methodology and for the results. And yet, for all his contempt for "judicial lethargy," and despite the boldness with which he sought to demonstrate the obsolescence of established but unfair or outmoded (or ridiculous) rules of law, Traynor's pragmatism extended to supporting in a sympathetic way what he saw as the legitimate activities and methods of the executive branch, not least the law enforcement agencies and officers. He did not reject wholesale the conservative activism of an earlier generation of judges, nor indeed that of some of his own colleagues on the Court; like others of the best "activist" judges, whether in a conservative or liberal mode, or still other "activists" who were simply difficult to label, Traynor was willing to acknowledge explicitly his penchant for creativity. Still, he was faithful — perhaps without peer in his day — to the requirement that a judge provide a carefully reasoned and clearly crafted opinion in reaching an innovative conclusion. Moreover, he was ever mindful of the heavy responsibility for assuring fairness, for maintaining the health of the law, and for protecting the integrity of the judicial branch.

Not least important, historically, is that with able fellow justices who served with him during his long tenure, the California Supreme Court was widely recognized as the most distinguished state bench in America. It was influential in shaping the direction of the law in many other state courts, as well as pointing the way to some major U.S. Supreme Court decisions.

This raises the most interesting question of all: the question of how, why, and in what ways, a state high court has truly and accurately lived up to the "bellwether" and "great exception" titles, has produced the kind of law — and innovations — that have come forward in a particular period of its history.

There is no simple answer. Rather than taking the posture of having a full and persuasive solution to that historical puzzle, I take courage in concluding with a recollection from an early occasion in my career: It happened at a panel at a UC Davis–sponsored meeting on the subject of legal innovation and agricultural development in the history of the Far West.[1] I had the great honor of being introduced as speaker by Roger Traynor, recently retired as chief justice and then a professor at UC Hastings College of the Law. In light of Chief Justice Traynor's reputation for oratory, which was no smaller than his reputation for erudition, all of us historians and others in that room were looking forward to what he would say in his assigned ten-minute slot as panel chair. We were certain he would provide an exposition offering important guidance on the approach we should be taking in analyzing the historical dynamics of legal change and innovation.

Roger Traynor did indeed give us his views — but to our amazement he took only about twenty seconds to do it. Let me quote his words. The papers in that panel, he said, "confront questions much like the one I was once called upon to unriddle: How does law evolve?" He paused . . . then continued, "Well, how does a garden grow?" Another pause, . . . and then he ended with, "How does agriculture in the West evolve?"[2] That was it. He sat down and graciously turned the podium over to us.

I have reflected many times on Chief Justice Traynor's statement of the question over the years, and I am still at a loss to come up with a better description of what is involved when we give our own best efforts at "unriddling," to use his word, the processes of legal evolution, including the dynamics of legal innovation.

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[1] Symposium on Agriculture in the Development of the Far West, UC Davis, June 19–21, 1974. *See* Harry N. Scheiber and Charles W. McCurdy, *Eminent-Domain Law and Western Agriculture, 1849–1900*, 49 Agricultural History 112 (1975).

[2] Roger J. Traynor, *Law and Government Policy for Agriculture: An Introduction,* 49 Agricultural History 111 (1975).

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EDITOR'S NOTE

Well known today for his legacy of legal writings, both in opinions and essays,[1] Justice Roger Traynor was equally well known by his contemporaries for the eloquent, yet direct and vivid, style of his oral communications. He was a frequent speaker at legal events during his years as an associate justice of the California Supreme Court (1940–1964), chief justice (1964–1970), and after his retirement from the Court. But rarely have the unmediated words of his spoken voice been transmitted to posterity. This volume of *California Legal History* is fortunate to present a group of speeches by Justice Traynor, ranging in date from 1940 to 1974. They have been graciously made available for publication by the UC Hastings College of the Law Library from the Roger J. Traynor Collection in their Special Collections. These are reproduced from the preserved manuscripts of his speeches, with minor copyediting for publication and the addition of necessary citations, footnotes and a short introduction to each group of speeches.

—SELMA MOIDEL SMITH

[1] *See,* for example, The Traynor Reader: Nous verrons: A collection of essays by the Honorable Roger J. Traynor (San Francisco: The Hastings Law Journal, 1987), which includes his major essays, a bibliography, and biographical appraisals.

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ON LAWYERS AND JUDGES

The first of the speeches presented here was delivered in September 1940 at the Lawyers' Club of Los Angeles, one month after Justice Traynor's appointment to the California Supreme Court. The subject is the role of the American lawyer in combating the danger to American liberty posed by the successes of totalitarian regimes at the start of World War II. Of special note — at this early date — is his line of reasoning that traces the spirit of personal liberty from the American tradition of democratic lawmaking to a lawyer's duty for legal innovation: "The law is not an encyclopedia to which lawyers may rush," he claims, but rather, it thrives on "conflict and fresh interpretation." This demand for legal innovation prefigures the recurring theme of much of his later writing — his insistence on legal innovation by judges — and it is the topic of the second speech presented here, "Stare Decisis versus Social Change" of 1963. The third speech contrasts the roles of lawyers and judges, and highlights the need for specialized training of judges, at the opening session of the California College of Trial Court Judges in 1967. (S.M.S.)

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I. ON LAWYERS AS GUARDIANS OF DEMOCRACY AGAINST TOTALITARIANISM (1940)[1]

I have been looking forward to this meeting, for now I can think aloud with you about one of the questions that has been haunting me since I undertook a job where one must eventually answer whatever query arises. While dive-bombers blow up the earth with a speed that leaves us with a sense of terrible impermanence, it is difficult to hold fast to values which are dancing on their foundations, and I should like to consider the question whether you and I, as lawyers, stand to gain more from that easy democratic way of life which is now everywhere on the defensive than from the rigorous submergence of individuals in a single-minded group.

[1] Address to the Lawyers' Club of Los Angeles, September 23, 1940.

It thrives on that conflict and fresh interpretation which has enabled our democratic judicial processes to grind out with amazing steadiness legal principles and justice.

A country is only as democratic as its legal processes. It is proper that the lawyers and judges who have always played so large a part in our democratic government now constitute its first line of defense. Theirs is a two-fold obligation. They must by their own work preserve the whole-hearted respect of their communities for the law, and they must of their own efforts preserve the vital force of a democratic law against any other force in their communities. When people have free access to legal redress of their wrongs, and confidence in the integrity of their lawyers and their courts, they will not easily turn away in bitterness from democratic methods. The stillness of a ruthless totalitarian order need never descend upon us if we carry on alertly that endlessly exciting search for the legal principles which may best reflect the activities and aspirations of free men.

II. STARE DECISIS VERSUS SOCIAL CHANGE (1963)[2]

It is common knowledge that lawyers base their everyday advice to clients on stare decisis. It Is also common knowledge that stare decisis dominates in the adjudication of the exceptional controversies that reach a court. Surprisingly enough there are pockets of resistance to the common knowledge that among the exceptional controversies that reach a court there are some so extraordinary that they cannot be laid at rest within the ordinary confines of stare decisis. Even today, some forty years after Justice Cardozo's revealing commentary on the judicial process, occasional lawyers cling to the notion that it is for judges to state, restate, and even expand established precedents, but that they go beyond the bounds of the Judicial process when they create new ones. These mystics avoid the blunt fact that all precedents had once to be created by an obscure thought process that apparently equates the creativeness of ancient judges with divination and then equates divination with antiquity. Those befogged by such double

[2] Dedication of the new Law Building, Duke University, April 26–27, 1963. Portions are drawn from his article, *La Rude Vita, La Dolce Guistizia; Or Hard Cases Can Make Good Law*, 29 U. Chi. L. Rev. 223 (1962).

is to do more good than harm, there must also be construction of new rules of such scope that only the legislature with its freedom and resources for wholesale inquiry can effectively formulate them. For all the widespread dissatisfaction with contributory negligence, for example, a court would be reluctant to substitute some alternative such as comparative negligence, which would involve spelling out the details of apportionment, and would also affect the structure of liability insurance. There are comparable problems, as in the field of creditors' remedies that are better left to the legislature because their solution entails extensive study or detailed regulation or administration.

In sum, stare decisis serves us best when we recognize that precedents are here to stay but not to overstay.

III. OPENING ADDRESS, CALIFORNIA COLLEGE OF TRIAL JUDGES (1967)[4]

This is a proud and memorable occasion for the California judiciary and I am delighted to be able to share it with you. In bringing its dream of a college for trial judges to fruition the Conference of California Judges, true to our state's pioneering tradition, puts California in the vanguard of states that are trying to improve the administration of justice by providing specialized instruction for members of the bench.

When I addressed the Conference at its 1965 annual meeting I commented on the excellent job that the Conference was then doing with its seminar program and exhorted it to continue and to expand its efforts in the field of judicial education. This evening's assembly shows that my exhortation has been heeded — or perhaps it was unnecessary. At that time I stated that it is a tribute to the unselfish devotion of our judiciary that you were able to find the time in your busy lives to do this fine work. I can only repeat that tribute tonight.

The successful launching of the College of Trial Judges has required the efforts of many judges and I shall not attempt to name them. The guiding impetus, however, has been the Conference's College Committee, formerly the Education Committee, and I do pay tribute to the two men who have

[4] UC Berkeley School of Law, August 20, 1967; now known as the Center for Judiciary Education and Research.

ON THE PUBLIC DEFENDER

A lesser-known interest of Justice Traynor's was his concern for provision of effective counsel to indigent defendants, particularly in state appellate proceedings. Two speeches delivered at the 1969 National Defender Conference in Washington, D.C., offer his perspective as the state's chief judicial officer. In the first, as moderator, he contrasts conditions in California with those discussed by speakers from other states. In the second, his own address focusing on California, he traces the origins and history of the public defender movement (at a time shortly before the widespread rediscovery of Clara Shortridge Foltz's role as inventor of the public defender). The second speech concludes with his arguments for creation of a state public defender's office to serve state appellate defendants, an office created by the state legislature in 1976. (S.M.S.)

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I. REMARKS AS MODERATOR, NATIONAL DEFENDER CONFERENCE (1969)[5]

President Marden,[6] General Decker,[7] and friends of the National Defender Project:

When I left San Francisco, I thought I would briefly review the public defender development in California, but we've had such splendid representation from California, beginning with President Toll,[8] and then the remarkably fine talks yesterday by Mr. Portman, Mr. Steward, and Judge Chapman,[9] that I decided to spend the few minutes that I'm going to steal

[5] International Conference Room, Department of State, Friday, May 16, 1969.

[6] Orison S. Marden, president, National Defender Project of the National Legal Aid and Defender Association, and past president, American Bar Association.

[7] General Charles Lowman Decker, director, National Defender Project, and former judge advocate general, U.S. Army.

[8] Maynard J. Toll, president, National Legal Aid and Defender Association.

[9] Donald Chapman, Merced Superior Court; Sheldon Portman, public defender, Santa Clara County; and Harry Steward, founding executive director, Federal Defenders, Inc.

of that very powerful and important committee of the American Bar Association — the Committee on the Administration of Justice.

It's a pleasure to present to you Justice William McAllister of the Oregon Supreme Court.

(Hon. William M. McAllister speaks)

Thank you very much, Bill, for your very stimulating account of the developments in Oregon.

It must be most encouraging and heartening to you, President Marden and General Decker, to hear these reports of the progress that has been made as a result of your devoted efforts. Your accomplishments have been tremendous, and we have only begun to reap the benefits of the great contributions you have made to the administration of criminal justice throughout this country. We deeply appreciate all that you have done and are most grateful to you for the splendid success of the National Defender Project.

II. ADDRESS, NATIONAL DEFENDER CONFERENCE (1969)[15]

As we approach the close of the National Defender Project I am delighted to join with you in this conference designed to take our present bearings and to set our future course. For years many of us on the appellate bench have been concerned about the adequacy of legal representation being afforded to the poor who are charged with crime. In extreme cases we have reversed judgments and returned the matters for new trials. Our action, however, could not guarantee effective representation — that could come only from the other side of the bench, and unfortunately in many areas neither the bar nor the public shared our concern.

The National Defender Project, by focusing attention on this problem and by utilizing the resources and talent at its disposal in pressing for a solution, has rendered a service of tremendous social significance. Hopefully, the termination of the Project will not result in a cessation of our interest because, although we have established some substantial beachheads, the major battle remains to be won.

[15] Washington, D.C., May 16, 1969.

ON CONSTITUTIONAL RIGHTS

A topic that appears with special prominence in Justice Traynor's speeches — more so perhaps than in his essays — is the Fourth Amendment's protection against unreasonable search and seizure. An early instance is his radio address of November 1941 in which he presents the history of abuses in England and colonial America that led to the Fourth Amendment. This address was delivered as part of the patriotic effort then in progress (often supported by the American Bar Association) to mobilize public opinion for the Bill of Rights as a symbol of democratic ideals in the period leading to America's entry into World War II. But, at this early stage of his judicial career, Justice Traynor stopped short of providing a judge's perspective of the Fourth Amendment.

Such a perspective would come twenty years later, in two speeches from 1962 and 1964, that discuss the evolution of his own thinking that came to favor the exclusionary rule. The prohibition on the use of evidence discovered or taken in contravention of the Fourth Amendment was adopted by the California Supreme Court in an opinion by Justice Traynor in 1955, seven years before the U.S. Supreme Court's decision in *People v. Mapp* extended the federal exclusionary rule to the states. The consequences of the *Mapp* decision for state court judges are the center point of these two speeches. The first of the two provides a revealing view of the discussions between chief justices of other states and Justice Traynor following his remarks. The second was delivered immediately after the announcement of his appointment to serve as chief justice.

The last, and latest, of the speeches to be presented here is one delivered in 1974 (after Justice Traynor's retirement as chief justice in 1970), in which he turns to the subject of the First Amendment and its guarantee of freedom of the press. His topic is the attempt by the State of Florida to enforce a statute providing for a right of reply to negative political newspaper coverage. Of particular interest is Justice Traynor's presentation of arguments from both sides of the case in a speech delivered during its appeal to the U.S. Supreme Court. (S.M.S.)

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I. THE RIGHT OF THE PEOPLE AGAINST UNREASONABLE SEARCH AND SEIZURE (1941)[19]

A sesquicentennial marks the passing of one hundred and fifty years and of five generations of men. It marks this year the one hundred and fiftieth anniversary of the American Bill of Rights, immortalized in the Constitution as the first ten amendments. It is easy to forget their dramatic beginnings. The Oakland Post No. 5 of the American Legion under the able leadership of Commander Homer W. Buckley[20] has appropriately undertaken this radio series on a Bill of Rights that should never be taken for granted.

I speak to you tonight of the Fourth Amendment which might well be called the guardian of our private lives. In simple forceful language it declares:

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

Here is the law at its best — deep-rooted in human experience, precise in language, clear in purpose. The Fourth Amendment sprang from a long history of arbitrary invasions of privacy through the device of the general warrant, which subjected all persons and property to search and seizure by specifying none. Long before the Revolution, there were notable abuses of the power symbolized by the general warrant. During the reign of Charles the First, in 1629, the Privy Council issued warrants for the search and seizure of the private papers of such men as John Selden and Sir John Elliot, outstanding members of Parliament, because of their speeches against taxation without the consent of Parliament. Even Sir Edward Coke, the great authority on the common law, witnessed the invasion of his home in 1634 as he lay on his deathbed. Angered by his forceful opposition to the crown, the Privy Council sent a messenger to search for his so-called "seditious

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[19] Radio station KLX, Oakland, California, November 14, 1941.

[20] At that time, assistant city attorney of Oakland; later, presiding judge of the Oakland Municipal Court.

themselves in a democratic country. The individual voluntarily subordinates himself to his country in critical times, but he remains a free citizen in a democratic state as he could not in a totalitarian one, by virtue of such privileges as those set forth in the Bill of Rights. In the stronghold of his own home he is secure, knowing that his threshold cannot be crossed without specific warrant. In that security men are bound together in a community not by fear of one another and the government above them but by respect for one another and the government that is a part of them.

II. ON *MAPP V. OHIO* AT THE CONFERENCE OF CHIEF JUSTICES (1962)[31]

Chief Justice Wilkins:[32] The chair recognizes Justice Traynor.

Justice Traynor:[33] I will talk first about Professor Packer's presentation because it was the last one.[34] On this problem of retroactivity, I am a little puzzled by all the "to do" on whether *Mapp*[35] was retroactive. It applied retroactively to *Mapp* itself, and it would apply retroactively to any other case on appeal.

The questions are different as to cases on appeal tried before *Mapp* and those where the judgments have become final. We had those problems in California after we decided the *Cahan*[36] case. It would be silly to require the defendant to have objected to the admission of evidence before he could raise the question when it was futile to do so, since the law was that the evidence was admissible. We handled that problem this way: If the record showed a prima facie case of illegal seizure of the evidence, he was permitted to raise the question even though he had not objected before. If a scrutiny of the record gave no indication of illegal search and seizure, we presumed it lawful, and he couldn't raise it. That may be rough justice, but it worked out well. You couldn't expect the defendant to object to evidence

[31] August 4, 1962, Hotel Mark Hopkins, San Francisco, during the Annual Meeting of the American Bar Association.

[32] Raymond Sanger Wilkins, Massachusetts.

[33] At that time, associate justice, California Supreme Court.

[34] Herbert L. Packer, Stanford University School of Law.

[35] Mapp v. Ohio, 367 U.S. 643 (1961).

[36] People v. Cahan, 44 Cal.2d 434 (1955).

Chief Justice Arteburn:[64] We have a condition resulting from a radical change of precedent, and now we have the right to collaterally attack judgments when those judgments at some time should become final.

Chief Justice Wilkins: I want to acknowledge our debt of gratitude to Judge Traynor. I now declare this matter adjourned but not finished.

III. *MAPP V. OHIO* STILL AT LARGE IN THE FIFTY STATES (1964)[65]

Mr. Chairman,[66] Mr. Justice Brennan, ladies and gentlemen:

Of all the two-faced problems in the law, there is none more tormenting than the admissibility of illegally obtained evidence. Whichever face one turns to the wall remains a haunting one because there is always that haunting fear that the court has impinged too far on one or the other of the two great interests involved: first, effective law enforcement, without which there can be no liberty; and second, security of one's privacy against arbitrary intrusion by the police, which Justice Frankfurter stated in *Wolf v. Colorado*,[67] is implicit in the concept of ordered liberty.

This concern has always been present in the development of the law on search and seizure, but since James Otis made his impassioned plea against the writs of assistance, I don't think there has been so much sensitivity in this area as there is today. The holding in *Mapp v. Ohio*,[68] which is still at large in the fifty states — and some fear, possibly, that *Escobedo v. Illinois*[69] will also go on a rampage — leaves the courts with the high responsibility of

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64 Apparently Judge Norman F. Arteburn of the Indiana Supreme Court, later chief justice.

65 Transcription of the speech delivered at the inaugural meeting of the Appellate Judges' Conference, during the Annual Meeting of the American Bar Association, August 9, 1964, Waldorf-Astoria Hotel, New York City. The title refers to the speech delivered two years earlier by Justice Traynor at Duke University Law School, published as "Mapp v. Ohio at Large in the Fifty States," 1962 Duke L.J. 319. Apart from the opening sentences, the latter talk does not duplicate the former, but offers a further development of his thinking on the subject of illegal searches.

66 Gerald A. Flood of the Superior Court of Pennsylvania.

67 338 U.S. 25 (1949).

68 367 U.S. 643 (1961).

69 378 U.S. 478 (1964).

Nevertheless, I think that we must have intelligent, effective police officers; we must have respect for them; we must pay them adequately, and we must have more of them. Thank you.

IV. THE FIRST AMENDMENT'S MOBILE TRIANGLE: MEDIA, PUBLIC AND GOVERNMENT (1974)[89]

Lawyers have been jolted by the news that in many a household the first ten Amendments are not household words. Though the Bill of Rights is doing reasonably well for its age, despite recurring assaults from right and left, it continues to suffer from lack of public understanding. Even lawyers need continuing education in the expanding context of such seemingly simple texts as the First Amendment. Plain words, like plain people, may be ridden with complications.

One of the most complicated problems now besetting the First Amendment is that of access to the news media. Getting down to cases, we find in them less than a clear reading of the meaning and portent of access. Much depends upon who demands access to the media and why. Something may depend on how tightly a journal or broadcasting station controls access to the public and how significant that public is. Something may also depend on who the beggar for access is. Can the beggar address a plea only to some metropolitan megaphone, or also to some provincial journal or some trade publication or scholarly bulletin? Does he seek vindication in consequence of an attack upon him, or does he seek equal time on some controversial issue, or does he simply demand an exclusive easement for some crusade of his own? Does it matter whether the beggar outside publication gates is in public or private life, a leading citizen or an obscure one, a well-tempered spokesman or a zealot with the gleam of half-truth in his eye? On an issue such as women's liberation would it matter whether

[89] Remarks before The Association of the Bar of the City of New York, January 29, 1974 (as former chief justice of California and chairman of the National News Council). The same or similar address was delivered to the New England Society of Newspapers Editors in Worcester, Massachusetts, November 9, 1973, and an expanded and annotated version was published as *Speech Impediments & Hurricane Flo: The implications of a right-of-reply to newspapers*, 43 U. Cin. L. Rev. 247 (1974).