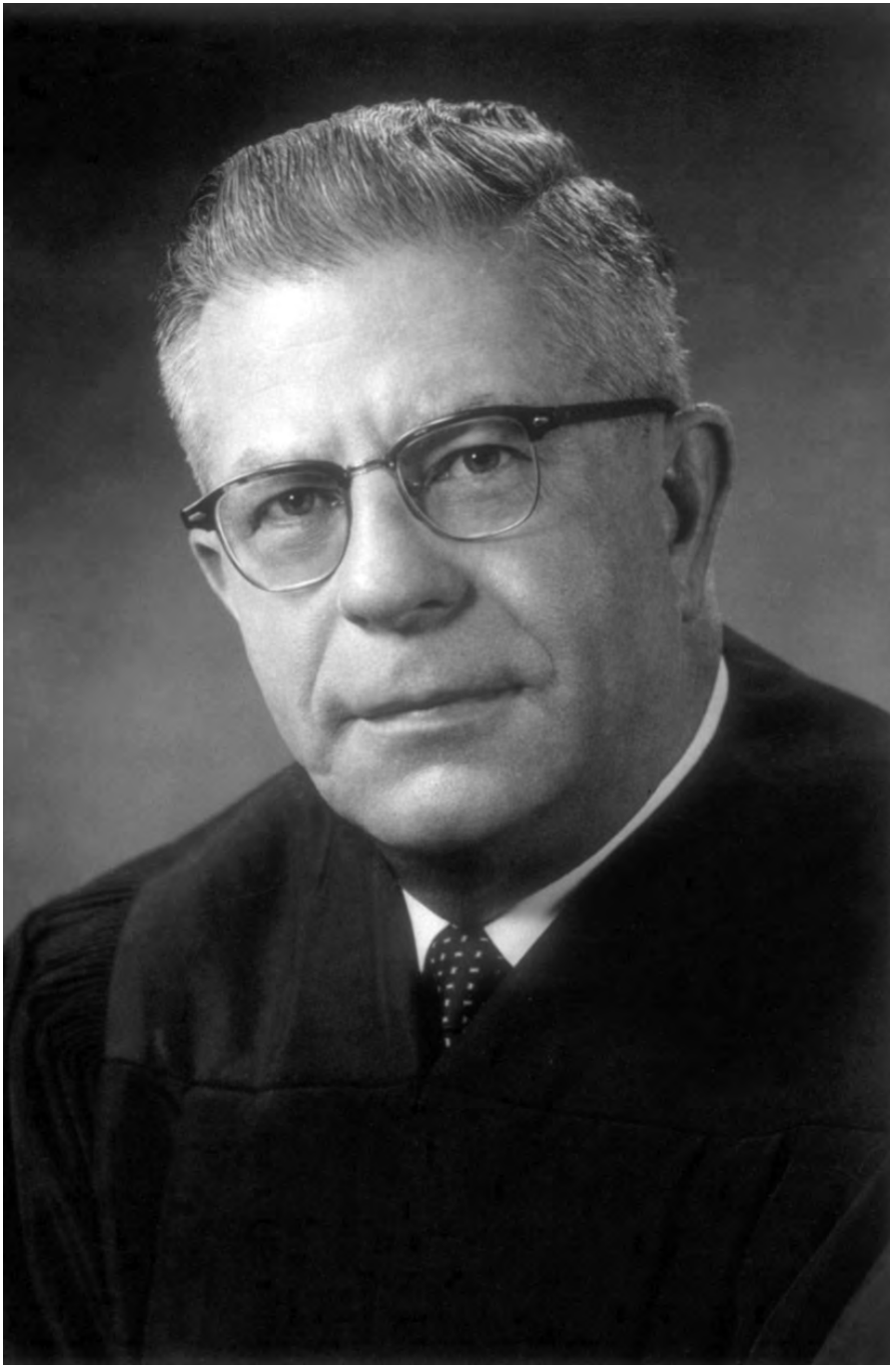
# SPECIAL SECTION

## NINE SPEECHES BY JUSTICE ROGER J. TRAYNOR



Justice Roger J. Traynor

# NINE SPEECHES BY JUSTICE ROGER J. TRAYNOR

## 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).

# NINE SPEECHES BY JUSTICE ROGER J. TRAYNOR

## 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.

Nothing succeeds like success, and the totalitarian methods which have left in Europe only the bleeding remnants of democratic doctrines have engendered revulsion in our country but also a harrowing doubt that perhaps the survival of the victorious is proof of their superiority. There is a dramatic impressiveness about regiments of men marching not to the inner strains of intellectual conviction, but to the Wagnerian thunderclaps of emotional faith. The man who has always had the sweet privilege of being left alone with his thoughts and his feelings blinks at the outward forcefulness of the groups of men who think and feel as they are directed. We have so long taken for granted the refuge of an inner sanctuary that we have never visualized what its loss would mean. Freedom of thought and speech are pleasant abstractions to live with which have seldom before seemed to us so rare and precious.

The butcher, the baker, and the candlestick-maker will be affected by the outcome of the present conflict of democratic and totalitarian doctrines, but none so much as the lawyer. That regulation of human relations which is law seeks in a democratic state to maintain the freedom of citizens, and in a totalitarian state to render the citizen subservient to the group. In the first instance the lawyer is himself a free citizen engaged in that formulation, revision and interpretation of laws which constitutes a perennial challenge to the mind. In the other instance he fulfills the ritual function of a high priest whose exposition of the law serves the religion of the state.

I leave it to others to compare the economic advantages of the average man in democratic and totalitarian states. We have reflected much of late on the tightening of belts amongst regimented peoples. There is even more reason for concern, however, about the consequences of the tightening of minds of entire populations.

In this country, to which men have always fled from economic serfdom and political tyranny, and then hewed their way as free men from the east coast to the west, the law has developed against the background of a democratic tradition of the utmost individual freedom consistent with law and order. The wider a citizen's activities within the community, the more he is subject to regulation, but he remains a free spirit, who may seek the revision of whatever law he considers unjust, and invoke a judicial interpretation of whatever law appears to him ambiguous.

It is a far cry from the tradition that every man may have his day in court to the doctrine that every man must bow to laws which he dare not criticize. We speak in this country of law and order as in conjunction, for a basic condition of order in a country of free men is a democratic judicial process. Elsewhere there is a new philosophy of the state whereby order rides herd over law and commands silent men to accept a judicial system enshrined above them like a primitive idol.

Under such a system most people may still go about their work, whatever the impoverishment of their spirits. The architect may build great buildings, and the engineer great bridges. The doctor may alleviate physical suffering, even though he must keep to himself whatever scientific theories may differ from those of the group. The skilled worker may produce fine steel, and the manual laborer may haul water and hew wood. But what of the lawyer, whose only tool is an alert mind and whose work has to do not with sticks and stones nor with physical ills, but with the abstract problems of human relationships?

Most of us learned young how the law thrives on the winds of inquiry. Succeeding years of experience in the practice of the law have intensified our awareness of how infinitely complex are human relations, and how much subtlety and depth of spirit must enter into their regulation. Legal problems confront us in shadows and half-lights, and defy easy elucidation. Often they elude any final solution, and those who are wise then content themselves with finding what Justice Cardozo called the least erroneous answers to insoluble problems. Lawyers and judges have worked hard to find these least erroneous answers, and they know as few laymen do that the constant search for approximate justice has made the laws of this country operate generally to protect the uninitiated from harsh legalism. It has not been easy to develop a law that affords a day-to-day justice while preserving a long-range stability, but great lawyers have enabled it to function like a beacon light which, from its focal point of stare decisis, illuminates the various angles of a legal problem.

The practice of the law in our country calls not merely for disciplined minds which can take cognizance of the limits set by precedent, but for critically alert minds which can clarify whatever inner darkness exists within those limits. The law is not an encyclopedia to which lawyers may rush and, to paraphrase James Stephens, elicit legal pearls as with a pin.

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).

equations are untroubled by the attendant assumptions that the judges of another time have been wise beyond the capacity of contemporary judges and that they have had foresight enough to anticipate contemporary problems, when there is evidence so overwhelmingly to the contrary that it cannot be ignored by even the most obtuse. The mystics are still not ready to concede that contemporary revision or innovation can be left to the judges of our day. They would leave such tasks instead to the legislators of our day. To the objection that arriving and departing legislators may have little awareness of the developing problems of the common law, let alone a sense of its continuity, the anti-judges respond with the ipse dixit that the legislators have a unique sensitivity to popular needs or what is sometimes called an ear to the ground.

This way of thinking has enough vogue to warrant a reminder that we certainly cannot afford now, if we ever could, to play the law by ear. There are a number of objections to such improvisation. The most obvious is that one who relies on the ear rather than the mind offers no assurance of sensitive hearing. He may be quick to pick up the bellowing of small vocal groups and incapable of noting the murmurs of many individuals, the more so in an urban society, where there may be little reality to the supposed closeness of a legislator to the needs of all his constituents.

If we are really concerned with the last of the law, we should not minimize the role of the shoemaker who knows it best. His training, his experience, and his very office combine to develop in a judge a reliable sense of responsibility for the continuity of the law that perforce develops daily. No one is more appreciative than he of the stability that proceeds from stare decisis, of the solid base it affords for legal transactions, of the impartial application of the law that it makes possible. An appellate judge coming upon a precedent that he might not himself have established will ordinarily feel impelled to follow it to maintain the stability in the law that has value per se. Better the settled precedents that have proved reasonably in tune with the times than endless re-examinations that create uncertainty without ensuring improvement.

The great strength of the common law has been its reconciliation of this stability with a continuing evolution that has enabled it to respond sooner or later to the recurring reminders that there is nothing forever as of old under the sun. Sometimes a precedent can be amplified to cover a situation

that could not have been envisaged in an earlier day. Sometimes it can be diminished, through the process of distinction, to preclude its application to a situation that it could literally but not appropriately govern.

Now and again, however, particularly in a controversy that compels a judge to weigh conflicting interests in terms of a changing social context, contemporary weights given to such interests gradually vitiate the authority of established precedents and serve to develop a new line of precedents. Professor [Robert A.] Leflar has already considered such major changes in the evaluation of conflicting interests in tort law, such as the judge-made law expanding product liability, diminishing charitable immunities and sovereign immunity, and establishing new intra-family obligations.

In the course of such development old lines of precedent tend to linger in the shadow of the new, usually as harmless anachronisms though also as unseemly and occasionally confusing clutter. There are no good reasons, even sentimental ones, against overruling them outright once their day is clearly done. It better serves stability to abandon such precedents openly than to smother them with distinctions. A fortiori courts should overrule a precedent that was never sound and that served only to breed injustice or circumvention.

A judge who undertakes such an overruling must anticipate captious objections, usually more vociferous than serious ones. He can do this first by an exposition of the injustice engendered by the discarded precedent, and then by an articulation of how the injustice resulted from the precedent's failure to mesh with accepted legal principles. When he thus speaks out, his words may serve also to quicken public respect for the law as an instrument of justice.

Now that space and time are at a premium for the storage and study of even superlative matter, it is folly to clutter and confuse work papers with materials that are either obsolete or repetitious or ridden with inept or fallacious analysis. Less than ever can we assume that all the good enough thoughts and ways of yesterday are adequate today, however superbly undated some remain. There is no place in the living law for period pieces or parrot paragraphs or ill-conceived figments of what has passed as legal imagination.

Of course a judge is mindful that an overruling, unlike a statute, is normally retroactive. He is aware of the traditional antipathy to retroactive

law that springs from its recurring association with injustice; he reckons with the possibility that a retroactive overruling could entail substantial hardship. He may nevertheless be impelled to make such an overruling if the hardships it would impose upon those who have relied upon the precedent appear not so great as the hardships that would inure to those who would remain saddled with a bad precedent under a prospective overruling only.

An immediate consideration will be that statutes of limitation, by putting an end to old causes of action, markedly cut down the number of possible hardship cases. Again, the outworn precedent may be so badly worn that whatever reliance it engendered would hardly be worthy of protection. In some areas of the law, as in torts, it may be unrealistic to assume reliance at all. A person does not ordinarily commit or suffer a tort in reliance upon a tort precedent. Reliance seems the more implausible in relation to precedents embodying such concepts as governmental immunity or charitable immunity, which are overripe for overruling. Whatever the hardship a retroactive overruling may impose on a government or a charity that has failed to anticipate the risks of litigation by precautionary measures such as insurance, it would hardly outweigh the hardship that its tort has brought to others.

A court might decide, upon weighing the relative hardships, to give prospective effect to an overruling, following the example in *Great Northern Ry. v. Sunburst Oil & Refining Co.*[3] An overruling that is prospective only may appear particularly appropriate in such areas of the law as contracts and property; where reliance is apt to count heavily.

Such temporary application of the rule of an overruled case may be prescribed by appropriate legislation as well as by judicial decision, for the legislature is no less competent than the court to evaluate the hardships involved and decide whether considerations of fairness and public policy warrant the granting of relief.

However timely an overruling seems, a judge may still be deterred from undertaking it if there are good reasons for leaving the task to the legislature. What considerations make it preferable to leave liquidation to the legislature? Sometimes it becomes quickly apparent that if liquidation

[3] 287 U.S. 358 (1932).

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.

served as chairmen of that committee: Presiding Justice Hilton McCabe of the Fourth District Court of Appeal, who is now serving as president of the Conference of Judges Foundation; and Judge Donald Fretz of the Merced Superior Court, who is serving also as dean of the College. Appreciation is due to the Ford Foundation for its financial support of the program and to Mr. William Pincus, program officer in Government and Law for the Foundation, for his wise decision to recommend use of Ford Foundation funds for this purpose. And I am delighted that the College has found a home here on the Berkeley campus in the legal center named to honor our eminent chief justice of the United States [Earl Warren] who has contributed so much to the cause of justice in America.

I do not belittle the qualifications of our judiciary when I say that an orientation program of this kind for new judges is sorely needed. For all too long we have indulged in the irresponsible delusion that the making of a judge requires only the taking of an oath of office and ascending to the bench. Unlike the practice in many countries where law students and lawyers who aspire to the judiciary receive specialized courses of instruction and in-service training that prepares them for a judicial career, American judges receive no formal training or apprenticeship in the judicial function. They are generally selected from the ranks of practicing attorneys and often their practice has been limited to a few specialized areas.

The lawyer is an advocate; his art is persuasion. The judge, in contrast, must listen and weigh and ultimately decide between conflicting claims. The transition from advocate, often in a limited area of law, to impartial arbiter of cases ranging the entire spectrum of the law is not easy. This transition generally cannot take place overnight, especially when the fledgling judge has no place to turn for guidance in meeting his new and awesome responsibilities. To the extent that the program of the College of Trial Judges helps bridge this gap it will be an invaluable asset to new judges and, more importantly, it will contribute immeasurably to improving the administration of justice. Hopefully, a system can be devised before long for making this orientation program available to trial judges at the time of their appointment or election, which is, of course, the time when they are most in need of help.

The recent *Task Force Report on the Courts* of the President's Commission on Law Enforcement and Administration of Justice states that, among

the individual states, California has had perhaps the most ambitious program for the education of its judiciary. The establishment of the College of Trial Judges is another giant step forward. If a system can be established to ensure that the best qualified lawyers are appointed to the bench and if programs of this nature can speed their adjustment to the role of judge, then indeed luster will be added to California's already illustrious judiciary.

Parenthetically, I am most hopeful that the creation of a merit plan for selecting judges is in the offing. The governor has stated his support for it and the State Bar and Judicial Council are actively supporting such a change. If we can reach agreement on details I believe the matter can be put before the voters within the next several years.

In wholeheartedly endorsing this educational program, I do not overlook the substantial amount of judicial time that it entails. With approximately 110 judges in attendance, either as students or instructors, some 220 weeks or about five years of judicial time is being devoted to study rather than to the disposition of court cases. I am especially conscious of this investment of time because of my duty to assign judges to courts that need help. It has not been an easy task, I assure you, to find enough judges available for assignment to keep the courts adequately staffed during this two weeks' period, especially since it falls at a time when many judges are having their annual vacation. The expense and the slight inconvenience to the public will, however, be a small price to pay for the benefits that can be expected to accrue.

In concluding, I wish to express my personal appreciation to those of you who have undertaken to serve as faculty members, and to congratulate those who are here as students for your zeal and interest in becoming better judges. The success of this initial effort — and I am confident that it will be successful — will not only ensure that funds will be forthcoming for its continuation in future years but undoubtedly will also inspire other states to initiate similar programs.

You have my best wishes for a pleasant and productive session.

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## 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.

from the panel on some of the sensitive problems as I've seen them in California.

The most serious problem we face now, and I think this leads directly into the main subject of our discussion at this time, the state public defender, is the obtaining of counsel on appeal. We have, as you know from our discussion yesterday, excellent representation in the trial court, but on appeal, we use the assigned counsel system.

In talking to various presiding justices of intermediate appellate courts, I find that they are beating the bushes for counsel and that counsel are beginning to complain of the small fees that we've been paying them. I noticed that in the Supreme Court of California the average fee is around $300 to $500. Even so, the total state budget for assigned counsel on appeal amounts to about $580,000, and I've had the Judicial Council staff make a study of the possibility of a state public defender in California. We find that for that $580,000, we could have a state public defender. To my great delight, I think the State Bar of the state is going to support us. I don't mean to imply that the representation on appeal of — I don't like to use the word indigents — the people who couldn't otherwise get adequate counsel — has been inadequate. On the whole it has been excellent, largely because we've been relying on recent law school graduates. I think their law school training aptly fits them for appellate court work, probably more so than for the trial of cases.

As you sit on the appellate bench and hear these young fellows, not graduated long from law school, you can't help but be proud of the modern American law school and the product it is turning out.

I think we've been relying too much on some old standbys who are willing to undertake these assignments. In the long run, I think it would be much more effective to have a statewide public defender who can be the spokesman for the defender system throughout the state and who can represent the defender system before the Legislature and before the county boards of supervisors.

As you know, the county boards of supervisors have been very generous — like the County Board of Supervisors of Los Angeles where, as you recall, they have about 250 attorneys in the Public Defender's Office with a budget — up until now — of four and a half million dollars a year. I was told yesterday that the contemplated budget for next year is six million.

I was speaking to one of the staff members of the Conference here who noted that the annual amount spent throughout the country is about thirty million, and I mentioned that to President Marden. He said, "No, it's about forty-two million." A $6,000,000 budget for one county shows that there is a great popular support for the public defender system. In Santa Clara County, the budget runs about $350,000. We have more difficulty in getting funds from the state legislature, apparently, than we do from the county boards of supervisors.

In the course of our discussions, some basic problems have been raised. I think the one that Judge Oliver[10] talked about just a few minutes ago is one of the most pressing, and that's the representation of the people in prison. In California, we have expanded the writ of habeas corpus to take care of what might be incorporated in post-conviction statutes, which are certainly needed in states where the writ of habeas corpus is not as liberally applied as it is in California. We don't assign counsel, however, until the court has decided that an order to show cause should issue. We use the order to show cause device to avoid the necessity of bringing the prisoner into court. After we've decided that there has been a prima facie case, we issue an order to show cause and then appoint counsel. Counsel are not appointed to help the person in prison to make his prima facie case. In the light of *Johnson v. Avery*[11] that Judge Oliver mentioned, something is going to have to be done about that problem. We've taken a little step in that direction in death penalty cases by making counsel available to all prison inmates under sentence of death to seek any legal remedy that may be available.

We had an extremely important case in California recently — Anderson [and] Saterfield[12] — which raised the question as to the constitutionality of the death penalty — the main ground of attack on it being that the jury had the absolute discretion to return a verdict of death or life imprisonment. In almost everything else that you can think of in the legal system, there are guides and standards. For example, you don't take a fox terrier away from a wife or a husband in a division of property on divorce

10 John W. Oliver, United States District Court, Western District of Missouri.

11 393 U.S. 483 (1969).

12 *In re* Anderson, 69 Cal.2d 613 (1968), upholding the constitutionality of the death penalty in the appeals of Robert Page Anderson and Frederick Saterfield (Traynor, J., dissenting).

without such guides or standards. For the licensing of dogs or of lawyers or chiropractors, for the revoking of licenses for wrestling matches, boxing matches, and so forth, there's some guide and standard. For the death penalty, there's no guide or standard whatever. That was the issue on which our court divided, which reminded me of a point that was made by Dean Meador[13] yesterday — maybe there's too much instinctive desire for revenge in the minds and hearts of people. Maybe that desire for revenge is the real basis for the death penalty. I don't know what you think of the merits of the death penalty, but aside from the merits, I am convinced that if we were rid of the death penalty, the burden on courts would be decreased by at least 20 percent.

I also noted two or three other things that we probably have too much of. I was impressed by the remarks of the attorney general [John Mitchell] the other night that we put too much of a burden on the criminal law, that too many things are made criminal, that maybe the criminal law should be relieved of such burdens as those of alcoholism, traffic accidents, and so forth.

Dean Meador's remarks indicated that maybe the solution to crime is not in imposing more and more penalties, such as the provision we have in California that one twice convicted of the possession of marijuana is sentenced to fifteen years in the state prison without opportunity for parole.

Another sensitive problem also ties in with what Judge Oliver mentioned — that we have too much review, and this point was also brought out yesterday in that very stimulating talk by President [William] Gossett of the American Bar Association. Judge Oliver's discussion of habeas corpus also suggests that perhaps repeated review by this route can be better managed.

The application of the federal Habeas Corpus Act of 1867 has long been a puzzle to me. That act provides that habeas corpus lies in any case in which a person is in custody in violation of the statutes and laws of the United States. If a state court bases its decision on an adequate and an independent state ground, the United States Supreme Court is bound to deny certiorari. If, however, the petitioner chooses the habeas corpus route, even though there was an adequate and independent state ground for the state court decision, he can get relief by habeas corpus. It is still an unanswered question in my mind as to how a person can be held to be in custody in

[13] Daniel John Meador, dean, University of Alabama School of Law.

violation of the laws and Constitution of the United States when, if he went up on certiorari, the United States Supreme Court would be bound to deny his petition. Otherwise it would be writing an advisory opinion on the federal questions, for if it sent the case back to the state court, the state court would again decide on its adequate and independent state ground.

I think that every rational lawyer will agree with most of the categorical imperatives in *Townsend against Sain,*[14] particularly, that a person is entitled to a full, fair, and complete opportunity to present his federal question; that he's entitled to a full, fair, and complete hearing on the federal question; and that he's entitled to a full, fair, and complete application of federal law on the federal question. When these imperatives have been fully complied with, it would seem that one review ought to be enough. Maybe the solution is along the lines that President Gossett suggested.

Another very sensitive question in this area — I have not talked to our panelists as to whether it is going to be covered — is the right to counsel on the revocation of parole and the right to counsel on the revocation of probation. One of the most sensitive problems of all is the representation of people who don't qualify as indigents and yet are of modest means. Maybe some system can be worked out whereby people who need representation, who don't qualify on the grounds of indigence can make modest contributions to — say a state public defender. Those problems, I will leave to the panelists and will not steal any more time from them.

Our first speaker is Chief Justice [Oscar] Knutson of the Supreme Court of Minnesota. Chief Justice Knutson has been a judge for thirty-nine years — twenty-one years as a chief justice of the Supreme Court of Minnesota and eighteen years as a trial judge. He's the chairman-elect of the Conference of Chief Justices of the fifty states — a wise, excellent judge. It's a pleasure to present Chief Justice Knutson.

(Justice Knutson speaks)

Thank you, Chief Justice Knutson. I'd like to talk to you later, in the hope that you will reveal the secret by which you charmed that senator who is chairman of the Finance Committee in the Minnesota Legislature who telephones to ask what you want for your courts and then gets it for you. The chief justice has amply demonstrated the soundness of General Decker's

[14] 372 U.S. 293 (1963).

comment that the Minnesota public defender system is the best we have in the country.

My ears pricked up particularly at the reference to post-conviction proceedings. As I noted earlier, I think that is one of the most sensitive problems that we have. In California, we have about 1,500 petitions for habeas corpus a year, and those are carefully processed in our court. Over 95 per cent of them are denied, but once in a while, you find the needle in this haystack — and to find that needle is the grand objective of justice.

Just recently, for example, we issued an order to show cause in a case that was uncovered by our careful processing of petitions for habeas corpus. A prisoner was in the Los Angeles County Jail six months longer than he should have been. As soon as we issued our order to show cause, the attorney general's return came in promptly conceding that the petitioner should be released.

As Judge Oliver said with reference to post-conviction proceedings, we have only seen the tip of the iceberg. I am hopeful that the fine example set in Minnesota will establish a standard to be followed throughout the country. I am not too hopeful that we'll soon get the integrated system that they have in Minnesota, but it's a splendid start.

Thank you very much, Chief Justice Knutson.

Our next speaker is Wally Schaefer; I call him Wally because I have been a close friend of his for many years and one of his many admirers. Walter Schaefer is one of the most beloved and respected judges in the country. He is so deeply concerned with improving the administration of justice in this country that he always responds, if he possibly can, to a call of this kind. It's wonderful for us that he has accepted our invitation to be with us today. Justice Walter Schaefer of the Illinois Supreme Court.

(Judge Schaefer speaks)

Thank you, Walter, very much. Your remarks suggested many problems that we could spend the whole day on. Maybe we can go into them in further detail in our workshops this afternoon. Your reference to the adversary system suggests that it's not a game and that the proper definition of a district attorney is not one who always convicts the guilty and makes it tough for the innocent, but one who cooperates with the opposing

counsel to make as sure as they both can that the objective of finding the truth is attained.

Your references to criminal discovery raise a number of interesting possibilities. We've made great progress in my state in the area of criminal discovery. Walter has mentioned it's not yet being a two-way street — that you don't get discovery from the defendant. Maybe something can be done along those lines. We had an interesting case in California in which we held that the defendant could be required, say in a case of an alibi, to let the prosecution know what witnesses he was going to call. One of the big questions is whether such a practice violates the Fifth Amendment.

Another sensitive point that you raised, Walter, is one that's of great concern to all of us, and a tough one for appellate courts, namely, the adequacy of counsel. Many people think that any lawyer can try a criminal case; that's a great mistake. The criminal law calls for a great deal of specialization, and there are cases an adequate and competent counsel ought to know about. Once in a while, we run across cases in our appellate review in which counsel just didn't know about a very important case. We've had one case in which we reversed, and I'm sad to say, I think the defendant's counsel was a public defender. You public defenders are doing a wonderful job but you still don't hit 100 percent all of the time. One of the embarrassing things about reversal for inadequacy of counsel is that it might lead to a trial on appeal, not on the merits of the case, but of appellant's counsel.

The point, which was also brought out yesterday, is a good one, namely, the interchange of people who've worked for the prosecution with those who've worked for the defense. The English system has always impressed me. They don't have professional prosecutors in England. As Walter mentioned, a barrister may appear one day for the crown and the next day for a defendant. With the development of discovery, with the taking of gameship out of this business, with emphasis on the search for truth, and with emphasis on getting competent counsel on both sides, I think, we will make progress.

It is now my pleasure to call on Mr. Justice McAllister, former chief justice of the Oregon Supreme Court. Some states, like Oregon and Illinois, rotate their chief justices once in a while. I'd known Bill for a long time while he was chief justice. He is a former chairman of the Conference of Chief Justices of the fifty states. At the present time, he is the chairman

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.

This conference has already heard from four Californians — including Chief Justice Warren, whom we are about to reclaim — and you may be wondering what more has California to offer.

Judge Donald Chapman[16] and Messrs. Sheldon Portman[17] and Harry Steward,[18] my fellow Californians, have given us a look at county defender offices from the operating level, with answers to such questions as: "How does such an office originate and how should it be organized and structured?" and "How can it be made to operate effectively and economically?" These are very practical problems and I am sure that their observations will be helpful to all who may be contemplating the establishment of a public defender system.

I propose to view the California scene statewide from the vantage point of the office of chief justice. My inquiry is: How close are we to the goal of providing equal justice to all defendants accused of crime, and what plans are underway to attain that goal?

The plight of indigents charged with criminal offenses evoked a sympathetic response in many Californians at a comparatively early date. Counsel were being assigned to represent these unfortunates, to be sure, but the quality of representation provided by these uncompensated attorneys frequently fell far short of the goal of equal justice. The assigned counsel system of providing representation which had worked with reasonable satisfaction in rural areas and small towns proved unequal to the challenge presented by the growing metropolis. As population and crime increased and as the practice of law became specialized, more and more assignments had to be made to a decreasing proportion of the bar with experience or interest in criminal practice. All too often assignments fell to young and inexperienced attorneys who happened to be present in court when the need for assigned counsel arose.

The residents of Los Angeles County decided that there must be a better way to meet this problem and in 1913 they established the first public defender office in the United States organized to offer counsel to all indigents. The City of Los Angeles followed suit in 1915, and the offices in Los Angeles proved so successful that there was agitation to establish public

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16 Merced Superior Court.

17 Public defender, Santa Clara County, 1968–1986.

18 Founding executive director, Federal Defenders, Inc., 1964–1969.

defender offices in other areas of the state. A bill introduced in the California Legislature in 1915 would have made public defender offices mandatory in the ten largest counties. However, the defender system met serious opposition from some members of the bar who viewed it as "socialistic" and argued that it was improper for the state to undertake both the prosecution and defense of defendants.

In 1921 the California Legislature passed an act permitting all counties to set up a defender system by ordinance, which could provide for either the election or appointment of the defender. San Francisco established an elective public defender that same year, and Alameda County set up an appointive defender office in 1927. I would note that to this day San Francisco remains the only county to have an elected public defender, and that fortunately the office of public defender is essentially nonpolitical in all counties where it has been established.

World War II gave renewed impetus to the establishment of defender offices in California. The scarcity of lawyers during the war led to adoption of the public defender system in other metropolitan areas, and also in some smaller counties. The organized bar of one county instituted an informal practice of paying one attorney to handle all assigned criminal cases, and this action created an atmosphere favorable to the defender system. Attorneys felt increased dissatisfaction with the assigned counsel system also because unequal burdens were placed on some members of the bar who were being repeatedly assigned. Nor was the burden of unequal caseloads effectively remedied by the passage of a statute in 1941 enabling the counties to give courts discretion to compensate counsel for their services.

An amendment to the compensation statute in 1951, that made reasonable fees and reimbursement for expenses mandatory for assigned counsel, was designed to improve the quality of representation by attracting capable attorneys and to save both counties and the state the expense of unnecessary trials forced by inexperienced attorneys. Paradoxically the amendment spurred the adoption of a public defender system in some counties because the boards of supervisors found it less expensive, and led to the retention of assigned counsel in others because the bar associations continued to oppose the defender system and regarded the statutory fees as rightfully theirs.

By 1959, when the Association of the Bar of the City of New York and the National Legal Aid and Defender Association published the results of their monumental study of the defense of indigents in their report entitled *Equal Justice for the Accused*, California had a public defender in 20 of its 58 counties. In the last decade, and especially with the impetus provided by the National Defender Project, the rate of growth has been speeded. Today I am in the fortunate position of being able to report that we now have excellent public defender offices operating in about 60 percent of the counties of California and that these counties contain nearly 90 percent of the California population. This record is one of which we are justifiably proud, but I hasten to say, we are not about to rest upon our laurels. A number of formidable problems still confront us.

Before discussing the problems that remain, I will take a moment to note recent developments in two of our counties, San Diego and San Mateo, which are of interest and which, I believe, may demonstrate the strength of the county option system that we have in California, namely, the opportunity for any county to experiment in developing a plan best suited to its needs.

In most of our counties the public defender is appointed to represent all indigent defendants who need the assistance of counsel. In San Diego County, however, under the plan recently adopted there, as Mr. Steward, the executive director of Defenders, Incorporated, explained yesterday morning, the staff attorneys actually represent only a small proportion of the indigent defendants. The major thrust of the program is to make the assigned counsel system work effectively by [providing] educational and intern programs in criminal practice for law students and young attorneys and by providing both legal and investigative services to attorneys who are assigned to represent indigents. Some promising benefits of this approach, it seems to me, are the substantial involvement of a large part of the county bar in the program and the emphasis on developing a large cadre of lawyers who will be able to give effective representation in criminal cases.

San Mateo County has within recent months embarked on a program which is essentially a coordinated assigned counsel plan and is of interest because it seems to be the first instance, at least in California, where a county has entered into a contract with the county bar association to provide legal services for indigents charged with crimes. The bar association has

appointed a program administrator who works with the courts in assigning counsel when needed and aids the attorneys in carrying out their assignments. Nearly 25 percent of the county bar has volunteered to participate in the program. The plan is apparently the organized bar's alternative to establishment of a public defender system. On a cost basis, it is interesting to note that the fee per case that the county will pay the bar association is nearly double the cost per case of operating the public defender office in neighboring Santa Clara County. It is, of course, too early to say whether the San Mateo plan is a feasible alternative to a public defender system. However, even if experimental programs like those in San Mateo and San Diego do not prove to be feasible alternatives, I cannot help feeling that the defender program will have been enriched by the experience they provide.

The first problem I would note in operating an effective public defender office, and one that is not at all limited to California, is that of providing adequate financial support. In my state the major share of the cost of providing counsel for indigents falls upon county government which, in turn, is largely dependent upon the real property tax for its support. In general, the county boards of supervisors have shown a reasonable understanding of the needs of public defenders. For example, Los Angeles County in providing a staff of 250 attorneys in the defender's office can hardly be said to have shown a penurious attitude. In a number of instances, however, the defenders feel that they are understaffed.

A California statute provides that the state shall reimburse the counties for up to 10 percent of the cost of legal services for indigent defendants. The statute, however, does not include any reimbursement for the cost of services rendered by the public defender in probation hearings or in representing juveniles and mentally ill persons. Last year the state appropriated funds sufficient to make only about a 7½ percent reimbursement and the pending budget bill calls for an appropriation of only 6½ percent. When we consider the mobility of many criminals today, I think it would be timely to examine whether the state, and possibly the federal government, should not bear more responsibility for the cost of prosecuting and defending persons accused of crime.

A recent instance in California illustrates the financial hardship that can befall a small county under the existing system. Two young men from the state of Washington, without any prior connection with California,

drove to California where they were charged with having kidnapped a youth in one county and carrying him into an adjoining rural county and murdering him. Because of the deep emotions aroused by the crime it was necessary to transfer the case to a metropolitan county for trial. The trial took six weeks and, I understand, the fees ordered to be paid the two defense attorneys were in excess of the total annual budget for the public defender's office in many of our smaller counties. In fact, this one trial cost the county where the murder occurred more than one dollar for every man, woman and child residing in the county. This situation, in my opinion, needs a careful study designed to effect a more equitable distribution of such costs.

Various proposals have been advanced to permit recoupment of the cost of some of the services rendered by public defenders from the persons receiving such services. To the extent that such costs can be recouped, the counties would be enabled to provide more support for the defender's office. Although our Legislature has not yet been able to agree upon a plan, I anticipate that a suitable measure will soon be enacted.

Another problem that concerns me, and one that may be aggravated by establishment of a public defender system unless precautionary measures are taken, is that of assuring adequate representation for persons of modest means who are ineligible for the defender's services. When a public defender is appointed there can be a tendency for the bar to assume that criminal representation is now taken care of and can be forgotten. A few high-priced specialists will remain for those with substantial means, but a person of ordinary means may find that he is unable to obtain competent counsel. To guard against this situation developing I think it is necessary for the local bar to be involved and remain interested in the operation of the defender's office and for that office to conduct a continuing educational program for lawyers, especially for the young attorneys and law students. I am delighted that many of our California defender offices have established this type of program. In this way, I think it will be possible to generate an interest in criminal practice among the younger lawyers and that this interest will insure a sufficient number of competent lawyers to represent defendants who are not eligible for public defender representation.

The number one problem in the representation of indigents in California, however, is that of providing adequate representation on appeals. Although we have made tremendous strides in providing excellent legal

services through our public defenders at the trial court level, we have had no comparable development at the appellate court level. The existing statutes provide that the county public defenders shall take an appeal in meritorious cases, but in a number of counties the press of trial work has precluded the defenders from prosecuting any appeals. As a result, in our appellate courts we still rely upon appointed counsel. Although some compensation is provided such counsel, it is generally little more than a token payment.

With the constant growth in the number of appeals, the assigned counsel system is becoming increasingly difficult to administer. Last year, for example, there were more than 2,000 appeals in felony cases, and about 90 percent of the appellants were indigent. The Courts of Appeal have literally had to "beat the bushes" to find counsel for these appeals. Generally, they have had to rely upon volunteers, many of whom are young attorneys interested in handling a few cases for the experience. Their inexperience may handicap the cause of their clients and certainly places an added burden on our already overburdened appellate courts in making sure that a just result is achieved.

The inadequacies of the existing appellate counsel system have created substantial interest in establishing an office of State Defender. The California Judicial Council, on which I serve as chairman, has had this subject under consideration for several years, and its Appellate Court Committee has recommended that the Council support the creation of such an office. We have asked the State Bar to study the proposal and are awaiting its report. The California Public Defenders Association is already on record in support of such an office. In addition, a legislative committee recommended the creation of a State Defender office several years ago, but at that time the various interested groups were unable to agree upon the nature of the office and the duties to be performed.

I think the time has come when California must move forward in establishing a State Defender. The appropriations for payment of counsel assigned to handle appeals, although insufficient to provide adequate compensation for the assigned attorneys, are nevertheless approaching a sum that would support a State Defender. Since the need is so evident and the added cost would not be burdensome, I am confident that very shortly California will have a State Defender.

The primary responsibility of the State Defender will be, of course, to handle appeals. A skilled staff of experts under his direction would provide better representation for appellants and also lighten the work of the appellate courts. He may also assist the county defenders in cases when there are conflicts of interest.

In addition, the State Defender would serve in other necessary and useful roles. He can be the spokesman statewide for the local defenders and defense interests generally and represent those interests before the Legislature and in dealings with the executive department. He can coordinate the activities of the local defenders and by developing statewide standards assist them with their boards of supervisors in securing needed personnel and support. Through his review of trial transcripts he can detect errors made by local defenders and suggest methods of improving trial practices. These are only some of the functions that could be performed by a State Defender and I am sure each of you could add to the list. Needless to say, they are important functions, and unfortunately there is now no office in California with responsibility for their performance. I believe this deficiency will soon be corrected.

In concluding, I want, as chief justice of California, to express our state's gratitude for the help that the National Defender Project has given various defender projects in California. I am confident that time will prove that its efforts were helpful in achieving equal justice for all accused.

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## 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.

and dangerous papers."[21] Both his home and his chambers at the Inner Temple were searched, and all of his writings seized, along with his jewelry, his money and his will.

Despite political upheavals, the use of general warrants continued throughout the next century under such statutes as the Press Licensing Act, authorizing search and seizure of the private papers of persons suspected of publishing seditious attacks on the government. In 1728 John Wilkes, a member of Parliament, undertook to publish anonymously a series of pamphlets, called the "North Briton," highly critical of the government. By the following year, the secretary of state issued a warrant to four messengers ordering them "to make strict and diligent search for the authors [,] printers and publishers of a seditious and treasonable paper entitled the *North Briton*, No[.] XLV,"[22] with the object of arresting them and seizing their papers. Armed with this roving commission the messengers arrested forty-nine persons on suspicion in three days, and when they finally apprehended the actual printer, they learned from him that Wilkes wrote the pamphlets. Thereafter, they searched Wilkes' house and seized all his private papers, including his pocketbook and his will. When he successfully brought suit against the government for damages, the phrase "Wilkes and Liberty" echoed throughout the country.

In a series of opinions that are landmarks in English constitutional law, the English courts held illegal general warrants that failed to state the name of the person to be apprehended or describe the place to be searched and the thing to be seized. In a famous judgment awarding damages to another journalist, John Entick, Lord Camden declared that such general warrants violated the basic Anglo-Saxon right to security of person and property; that if suspicion were tolerated as a ground of search it would threaten the security of every man's home. He held that an extraordinary power such as the power to rifle a person's house and seize his most valuable papers must not be exercised without specific justification. "[T]he law to warrant it should be clear in proportion as the power is exorbitant."[23]

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[21] Roger Coke, *A Detection of the Court and State of England during the Four Last Reigns, and the Inter-regnum*, 3rd ed. (London: 1697), p. 253.

[22] As published in *The Annual Register, or a View of the History, Politicks, and Literature for the Year 1763* (London: 1764) , p. 135.

[23] Entick v. Carrington, 19 Sp. Tr. 1030 (1765).

In 1766 the House of Commons held general warrants illegal in libel cases. William Pitt thereafter fought successfully to have the House declare all general warrants invalid, unless specifically provided for by Act of Parliament. He expressed dramatically the right of every man to privacy:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail — its roof may shake — the wind may blow through it — the storm may enter — the rain may enter — but the King of England cannot enter! — all his force dares not cross the threshold of the ruined tenement![24]

In the colonies, the use of general warrants for search and seizure became one of the chief causes of friction with the mother country. Revenue officers, carrying general warrants, searched private premises merely on suspicion that they harbored property imported in violation of the navigation laws aimed at colonial commerce. Orders came from England to the collector of customs in Boston to apply for general warrants, euphemistically called "writs of assistance" because they enabled the customs officers to command all officers and subjects of the crown to assist in breaking open houses, shops, ships, and personal possessions in a search for the goods imported despite parliamentary prohibition or without payment of the tax imposed by the revenue laws. In 1761 James Otis, the advocate general of the colony of Massachusetts, resigned his post in protest against the legality of such writs. In a series of stirring speeches he described how they enabled officers or their servants to enter, break locks, bars and everything in their way "and whether they break through malice or revenge, no man, no court, can inquire. . . . Every man, prompted by revenge, ill humor, or wantonness, to inspect the inside of his neighbor's house" could get one of these writs.[25] He dramatically characterized the general warrant as "the worst instrument of arbitrary power, the most destructive of English liberty . . . that ever was found in an English law-book."[26] In the Council Chamber in Boston, where he addressed himself to the five colonial judges

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[24] As quoted in Henry Lord Brougham, *Historical Sketches of Statesmen who Flourished in the Time of George III* (London: Charles Knight & Co., 1838), pp. 41–42.

[25] As cited in Charles Francis Adams, ed., *The Works of John Adams, Second President of the United States: with a Life of the Author*, vol. 2 (Boston: Charles C. Little and James Brown, 1850) p. 524–525.

[26] Ibid., p. 523.

arrayed in scarlet robes, his words bore effect on the audience, which included a young lawyer, John Adams. Years later Adams wrote, "Every man of that crowded audience appeared to go away, as I did, ready to take arms against Writs of Assistance . . . . Then and there . . . independence was born."[27]

Nevertheless, the writs continued, deeply resented by the colonists. Following the Stamp Act Riot of 1765, however, most of the colonial courts refused even to grant them, and popular opposition made their execution increasingly difficult. They became perhaps the most important single cause of the American Revolution.

Actually, the first protection against search and seizure appeared in the state constitutions. Over a decade elapsed between the Declaration of Independence and the establishment of the Constitution, and the Virginia Bill of Rights of 1776, subsequently copied in other states, was the earliest precedent for the first ten amendments to the federal constitution. Now, nearly every state constitution has a bill of rights containing almost verbatim the wording of the Fourth Amendment on searches and seizures. When the Constitutional Convention met in 1787, it set forth constitutional proposals for a strong, federal government, but failed to submit a bill of rights as a counterweight. The omission of a bill of rights became the leading issue in the succeeding debates on state ratification, and so controversial an issue as to threaten the existence of the new nation. Many believed that the check upon federal power afforded by the states rendered unnecessary any additional checks; others feared that the Bill of Rights would interfere with the effective exercise of the federal powers. Jefferson considered these objections in a letter to James Madison, who eventually sponsored the first ten amendments successfully through Congress. From Paris in 1789, Jefferson wrote:

> There is a remarkable difference between the characters of the inconveniences which attend a declaration of rights, and those which attend the want of it. The inconveniences of the declaration are, that it may cramp government in its useful exertions. But the

[27] As cited in Charles Francis Adams, ed., *The Works of John Adams, Second President of the United States: with a Life of the Author*, vol. 10 (Boston: Little, Brown and Company, 1856) pp. 247–248.

> evil of this is short-lived, moderate and reparable. The inconveniences of the want of a declaration are permanent, afflicting, and irreparable.[28]

There have been periodic echoes of Jefferson's thought in more recent times. Thus Cooley in his book on constitutional liberties writes that

> it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his desks broken open, his private books, letters, and papers exposed to prying curiosity, and to the misconstructions of ignorant and suspicious persons, . . .[29]

Whether a man's home is literally a castle or a hut, no officer of the government now has the right to break into it or search it without a legal warrant, authorized by law and issued only after a showing made before a judicial officer, under oath, that a crime has been committed, and that the party complaining has reasonable cause to suspect that the specified property is the subject or instrument of the crime, and is concealed in a specified house or place. It must state the place to be searched, and the thing to be seized and if a person is to be seized, it must state his name. In the words of Justice Brandeis:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness . . . . They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[30]

The right to security of persons and property takes on new meaning in times of crisis. The more disorderly the world we live in, the more must be cherished the orderly legal processes by which human beings govern

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[28] Thomas Jefferson Randolph, ed., *Memoir, correspondence, and miscellanies : from the papers of Thomas Jefferson* (Charlottesville : F. Carr, 1829), p. 443.

[29] Thomas McIntyre Cooley (Victor H. Land, ed.) , *A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union*. 7th ed. (Boston: Little Brown, 1903), p. 432.

[30] Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting), p. 478.

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).

in view of the prior rule; you couldn't expect the prosecution to muster the evidence to demonstrate that the search and seizure was reasonable. In *People v. Kitchens*,[37] we held the question could be raised. Where there was no indication of illegal search — *People v. Farrara*[38] — it couldn't. There can be some carping about our solution but it was the expedient way to weather the intermediate storm.

Then there is the question as to people already convicted, where the judgments are final and the appellate process completed. Should the exclusionary rule apply? We considered it a rule of evidence and saw no ground for habeas corpus. That "out" is no longer available to us, for better or worse. It is now part of the Constitution of the United States that illegally obtained evidence cannot be admitted.

In one type of case we have a prisoner convicted long before the *Mapp* case. Should we allow habeas corpus? I take the position we should not. The argument is that you look at the basic reason why we got the *Mapp* case. I think a convincing argument can be made for the proposition that *Mapp* came about solely to deter illegal police activity. You can find that purpose in the reasoning of Justice Frankfurter in the *Wolf* case,[39] in which it was first announced that you have a constitutional right not to have arbitrary intrusion by the police on your privacy. The core of the Fourth Amendment was incorporated into the Fourteenth.

Then came the *Irvine*[40] case, which really put the whole problem to the acid test. The United States Supreme Court, in an opinion by Justice Jackson, urged the state courts to reconsider the exclusionary rule. Finally came *Mapp,* after the failure by the states to do what the Supreme Court suggested in the *Irvine* case — the failure by the states to do anything whatever to curb violations of the Fourth Amendment, as incorporated in the Fourteenth by the *Wolf* case. I am convinced that the whole reason that we have the *Mapp* case is that it had been demonstrated that other expedients had failed, and that the only way to curb police activities is to exclude the evidence. Unlike the other cases where habeas corpus is available, it was not necessary to protect the fairness of the trial. There was no unfairness.

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37 46 Cal.2d 260 (1956).

38 46 Cal.2d 265 (1956).

39 Wolf v. Colorado, 338 U.S. 25 (1949).

40 Irvine v. California, 347 U.S. 128 (1954).

The defendant had notice, representation by counsel, and the evidence was good, relevant, material, and devastatingly demonstrated the guilt of the defendant. We must remember that the expansion of habeas corpus, beginning with *Moore v. Dempsey*,[41] *Mooney v. Holohan*,[42] and other cases, was to guarantee fair trials and to make sure that innocent people were not convicted. It is easy to make a verbal argument that *Mapp* makes habeas corpus available: constitutional rights can be vindicated on habeas corpus. It is mechanical reasoning, and it overlooks the purpose of the exclusionary rule. What social good are we attempting to accomplish? Why do we have this rule? If you grant my major premise that we have this rule because it is necessary to deter illegal police activity, and if you follow that premise all the way through, then I think you will agree that it would be a mistake to allow collateral attack on final judgments, even those that become final after *Mapp* — as Professor Packer stated, that it is my position — it would apply in the future also.

The main objective and purpose of *Mapp* to deter illegal police activity can be accomplished through the normal processes of the trial and appeal. Illegal activity will be deterred little more and at terrific cost by making final judgments subject to collateral attack.

There is another argument of expediency, if the Supreme Court expands or contracts the scope of the Fourth Amendment itself — as in the *Elkins* case,[43] where the "silver platter doctrine" was overruled, or in the *Jones* case,[44] where it expanded the concept of who has standing to raise it. Each time the court liberalizes or contracts the rule, people who have long since been convicted will raise the problem on habeas corpus. It seemed to me that the policy underlying the *Mapp* case to deter illegal police activity is outweighed by the policy of the finality of judgments. It seems too mechanical to me to say that since some constitutional rights are vindicated by habeas corpus, this one must be. There has been too much of magic words without examining why we have a rule. What is the purpose we are attempting to accomplish: does that purpose require this particular remedy?

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41 267 U.S. 86 (1923).

42 294 U.S. 103 (1931).

43 Elkins v. United States, 364 U.S. 206 (1960).

44 Jones v. United States, 362 U.S. 257 (1960).

I shall take a few minutes for my reactions to Professor Collings' speech.[45] He put his finger on one of the most sensitive problems in this area, the scope of the search incident to lawful arrest. What is lawful arrest, and the relationship between the warrant requirements of the Fourth Amendment and the scope of search and arrest? All these years elapsed after the *Wolf* case before we had the *Mapp* case. Had *Wolf* incorporated the *Mapp* doctrine we might have had some workable rules from the Supreme Court. We don't have any articulation as to just what the Fourth Amendment is designed to protect. How wide and how narrow is the right to privacy? What we have is a number of ad hoc decisions full of uncertainty. You can't tell whether the evidence was excluded because of a violation of the Fourth Amendment, a violation of a federal statute, or a violation of a state statute. When there is no federal statute controlling federal officers, they must abide by state statutes governing arrest. There is no indication whether the evidence excluded in certain cases was excluded because of the Supreme Court's supervision of the administration of criminal justice. So I agree with Professor Collings heartily that to follow federal rules blindly would be a complete giving up. It would be easy and simple, and it would relieve our burden tremendously if we could stop thinking and mechanically follow federal rules, but I don't think there is any justification for doing so. Some federal rules are beyond my understanding, like the one stated in *Gouled v. United States*,[46] that you cannot have a search simply to get evidence. You can have a search warrant or a search incident to a lawful arrest if the goods are contraband, or stolen, or if they are the fruits of a crime, but otherwise you can't. Professor Collings' story about arson investigations illustrates how absurd the rule is.

That suggests another problem we have not had light on — the relationship of the Fifth to the Fourth Amendment. The *Mapp* case became a majority decision by virtue of Justice Black's concurring opinion invoking the Fifth Amendment. I do not think that amendment is apposite. In the *Silverthorne* case,[47] it was held that corporations are protected by the Fourth Amendment from illegal searches and seizures but not from self-incrimination. When the police go in under a warrant to take books and

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45 Rex A. Collings Jr., UC Berkeley School of Law.

46 255 U.S. 298 (1921).

47 Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

papers, there is no implied admission by the defendant that they are his. If the police take books and papers under a warrant, there cannot be a violation of the Fifth Amendment.

One other sensitive area is the scope of search and seizure under administrative arrests. You may recall *Frank v. Maryland*,[48] where the health inspector found indications of rat infestation in a particular house and called on the householder for permission to make an inspection; and she wouldn't let him. An ordinance imposed a fine of $25 for each refusal to allow the inspector in. In what is, to me, a difficult opinion to follow, it was held that the Fourth Amendment does not operate in these cases; it is designed to protect people accused of crime — implying that people suspected of crime have the benefit of the Fourth Amendment, but people not suspected of crime do not. Justice Frankfurter, I think, was afraid that accepting more liberal standards for warrants in an administrative case like health inspection would imperil the standards for search and seizure in criminal cases, but, as Justice Brennan says, to require no warrant at all is like burning the house down to roast the pig.

I might conclude by saying that we desperately need an articulation from the Supreme Court as to just what it is the Fourth Amendment protects. We need articulation of the relationship between its two clauses. Was the relationship what the *Trupiano* case[49] held? Does the *Chapman* case[50] indicate a return to *Trupiano*? Does *Rabinowitz*[51] still control as to what is reasonable?

You can read through our hundred or more opinions in this area and you will find an inarticulate [unarticulated] premise. If you were the Chief of Police, and an officer didn't make a search or seizure, would you consider him so incompetent that you ought to fire him? I think there has to be some common sense.

I admit that the problem of collateral attack is a sensitive one. It would be easy to be mechanical about it and say a constitutional right is violated, therefore habeas corpus lies. That would reflect a failure to examine into

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48 359 U.S. 360 (1959).

49 Trupiano v. United States, 334 U.S. 669 (1948).

50 Chapman v. United States, 365 U.S. 610 (1961).

51 United States v. Rabinowitz, 339 U.S. 50 (1950).

the basic objectives and purposes back of the exclusionary rule. I don't know whether my position will prevail. I hope it does.

Chief Justice Wilkins: Thank you, Justice Traynor. I feel compelled to make a statement myself at this point. I feel one shouldn't try to follow a Supreme Court decision unless he knows what it is. I have found much fault in some of these subjects. You can bring them out only by making a statement at some point that the Supreme Court has not said it isn't so. If they see that, they may take the case on certiorari or some other means. I had a case about some gentleman who had been in our prison for thirty years. He claimed his auto had been searched and they shouldn't have, but he hadn't raised that point. The federal courts in my area do not allow objection to the exclusion of evidence. You have to make a motion in advance of the trial, which he had not done; but I don't know whether the *Mapp* ruling is prospective in the minds of the authors. Are there any questions?

Chief Justice Weintraub:[52] Gentlemen, since reference was made to *State v. Valentin*,[53] I will bring it down to date. This June, the case *State v. Smith*[54] wrestled with a lot of the problems. Judge Traynor, we are much in your corner. We just had an avalanche of motions and did not want them running after any federal case they could find. The purpose was to lay out the problem. We made it plain we would not recognize a collateral attack.

The thesis stated by Professor [Paul] Bender is that the thesis of *Mapp v. Ohio* is to prevent violations of the constitutional provision against search and seizure.[55] The purpose of the Fourth Amendment is not violated by the use of the evidence. Original invasion of privacy is involved, and since the only purpose of exclusion is to prevent future similar violation rather than to repair a violation permitted, there is no need to make it prospective. It is enough to impose sanction for the future. To impose it for the past is unnecessary emphasis. The difficulty I had with *Mapp* was what was the thesis of Justice Clark's opinion. In *Elkins*, the court flatly used this preventive thesis. In *Mapp*, most of Justice Clark's opinion is in the same

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[52] Joseph Weintraub, New Jersey.

[53] 36 N.J. 41 (1961) (mistakenly spelled "Ballantine" in the transcript of the meeting).

[54] 181 A.2d 761 (N.J. 1962).

[55] *See* Paul Bender, *The Retroactive Effect of an Overruling Constitutional Decision*, 110 U. Pa. L. Rev. 650 (1962).

vein, and he quotes from *Elkins* the passage saying the exclusionary rule is intended to deter violations rather than to repair.

Justice Black, as has been pointed out, filed a separate opinion. Going back to the *Boyd* case,[56] he held that the Fourth and Fifth Amendments are companions. I think they are almost antithetical, but he said the Fourth and Fifth ran together and that it was the use of the evidence which constitutes the violation.

Justice Clark very carefully avoided any statement that self-incrimination was involved. He did, however, use two expressions which made me wonder. He said [in essence], "If it is unconstitutional to use an involuntary confession, why then isn't it equally bad to use the product of illegal search?" If you compare this with illegal confession, you immediately run into the Fifth, and the difference between the Fourth and the Fifth is that the Fourth contemplates that force can be used but not the Fifth. I can get a warrant and use force to convict a man with it. If you want to say the Fourth and Fifth Amendments have the same role to prevent self-incrimination, you will have to say that, while you may raid under a warrant, you can't use the contraband as evidence. Once you start using what you seize, it seems to me you are going contrary to the Fifth Amendment. I hope they will settle the problem of why evidence may not be used. I would like to know how you can exclude a search for the purpose of evidence while permitting the use for contraband or instrument of crime. I would like to know what to do with a lot of recent cases.

If Justice Clark meant to stay strictly with the notion that the exclusionary rule is wholly as to the future and not to repair injury, and the use of evidence is not per se a violation of a right, then I think there is great substance to the notion that it should not be made retroactive.

We did say, Judge Desmond,[57] that where on direct appeal there appears evidence of illegality, we will accept the issue even though no objection was made, and we could not expect an objection if we had followed the rule of admissibility. Two years ago, we suggested that we might modify our rule and adopt the exclusionary rule if it were perfectly plain that police officials were acting arrogantly and with the purpose to violate

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[56] Boyd v. United States, 116 U.S. 616 (1886).

[57] Charles S. Desmond, chief judge, New York Court of Appeals.

the constitutional right of privacy. We will accept the issue if the records suggest that evidence of illegality and demand that the state be permitted to complete its proof. In pre-*Mapp* cases, the state, being aware of our old admissibility rule, did not bother to bring out all that it might have. We have not passed on this question. We have left that door open.

The real question is, is it unfair to use the conspicuous fact that the evidence seized illegally was evidence that could have been seized legally, that heroin is heroin; that invasion of privacy does not question truth or integrity of the verdict, unlike where a confession has been obtained by force. There is that residual question whether the situation is true, or where counsel is not furnished, or where no one can eliminate the possibility that judgments are unfair for want of help.

Another question we have left open is whether we are bound by federal consent of search and seizure. The dictum is simply to warn the trial courts to go easy, and we have left open the question of whether it will satisfy the U.S. Supreme Court if we confine the rule of exclusion to those situations where there is this defiance and insolence as distinguished from cases where good faith and the attempt to comply with constitutional rights existed but there was mistaken judgment. For example, in a case cited in *Elkins* in the Missouri opinion, we have a situation where the state trooper went to the wrong magistrate. Well a magistrate's judgment did intervene, although he had no jurisdiction of that area, but none of us could say there was insolence in office. We are hopeful that when it is all over, we can confine the rule of exclusion to those situations where it is evident that police officers did not care about constitutional rights.

Chief Justice Dethmers:[58] On this business of disinterring dead dogs that ought to stay buried, I would welcome with open arms what I think is Chief Justice Weintraub's and Justice Traynor's way out, but the difficulty is in understanding why the Supreme Court of the United States has the authority to make rules of evidence for state courts. It seems to me it can only be on one basis, and they have planted it on due process. You and Justice Traynor have insisted on that business of constitutional rules. If that is so, it seems to me the Supreme Court of the United States is without competence to make such a rule for state courts. I think it is

[58] John R. Dethmers, Michigan.

an inescapable conclusion that it is a constitutional matter. Saying the exclusionary rule is a deterrent on police officers is a poor answer and is just like saying to the boys in prison, "Your rights don't count anymore." That is what bothers me.

Justice Traynor: I don't think the solution Chief Justice Weintraub and I have reached is easy. I think it would be easier to follow the federal rules.

As to the wisdom of the Supreme Court's doing what it did, there is a lot to be said in its favor. It reminds me of the evolution of my thinking on this problem. In 1942, I wrote an opinion holding that illegally obtained evidence was admissible. It had nothing to do with the fairness of the trial. The evidence of guilt was devastating. We shouldn't adjust the rules of evidence as an expedient to enforce the Fourth Amendment. I lived with this position from 1942 to 1955, and cases like the *Rochin* case[59] came along. That case didn't bother me for the reason it bothered Justice Frankfurter. I didn't think it was brutal. What offended me was the breaking into the bedroom without probable cause and without a warrant. With all these petitions coming up after the 1942 case, I did a great deal of squirming. Justice Jackson was so shocked that he urged the federal government to bring an action against the Los Angeles police for putting microphones in bedrooms. When the question was put, "how did you make your entry, and where did you put the mike?" it was brazenly objected that the information was privileged for the protection of the public. We hoped, as I am sure the Supreme Court had hoped, that the state would do something about it by way of bringing an action against the police, or by affording some civil remedy, but the state did nothing. Here is a right that was declared in *Wolf v. Colorado*[60] to be necessary to order and liberty. You can't say anything better about a right than that. To have that great right absolutely without any remedy is ironic. The Supreme Court was driven to the exclusionary rule for the same reason we were driven to it in this state. I think the *Mapp* decision was a good decision. I think it unfortunate that there was no better remedy, but I insist (and I am happy to have the support of Chief Justice Weintraub on this) that when you look at the history of the exclusionary

59 Rochin v. California, 342 U.S. 165 (1952).

60 338 U.S. 25 (1949).

rule from *Weeks*[61] through *Elkins*, it is evident that the *Mapp* rule is the only way to enforce this kingly right. I am convinced it is the only way. It was necessary to prevent flagrant violations of the Constitution. In working out the rules on collateral attack, reasonable investigations, arrest, and so forth, the big objective to keep in mind is the purpose of the rule and to avoid formula thinking — magic words thinking — and to avoid what I think would be the unfortunate result of allowing convictions to be upset on collateral attack. I am afraid, however, that the Supreme Court cannot handle a procession of cases from the fifty states and may deny certiorari and turn them over to the district courts to reconsider on habeas corpus. I predict a mess if it does that.

Chief Justice Weintraub: I had the feeling that he too was recognizing, in that opinion, that their concern was this insolence in office, and that may very well mark the outer limits to which they will go on the exclusionary rule.

Chief Justice Dethmers: My problem is a lot simpler than I have made plain. I can't understand how any provision of the Constitution can be made the solid base for the Supreme Court of the United States to make a policy announcement calculated to deter officers from doing what they should not do.

Justice Traynor: Once having adopted *Wolf*, it could not be left in the abstract with no implementation.

Chief Justice Dethmers: Whose constitutional rights are involved?

Chief Justice Weintraub: Yours and mine. We are not so much concerned with *Mapp* as that a right was violated. I think of that rule as to prevent further infractions.

Professor Packer: Whatever else it may have been doing, it seems to me clear that the Supreme Court was granting a constitutionally conferred remedy to Miss Mapp for infringement of her rights. This bears directly on the question of availability and collateral attack. I have great sympathy with the policy reasons that Justices Traynor and Weintraub have been advancing for not opening the flood gates, however big or small they may

[61] Weeks v. United States, 232 U.S. 283 (1914).

be. The Supreme Court has committed itself to the position that this is a constitutional right and it therefore carries with it the doctrine that it has been evolving concerning federal habeas corpus. It is not impossible for the Court to be so taken with these policy arguments that it will qualify what it has done and view habeas corpus as a discretionary remedy to be granted or withheld within the judgment of whoever is doing the granting or withholding, but that will be a departure not only from what the Court has held but what it says. It seems to me that there is a very clear analogy between the use of this exclusionary rule and the rule the courts developed with respect to involuntary confessions. The Court has held unmistakably that this rule is not limited to those states where the guilt of the petitioner turns on the confession. It is perfectly clear that in cases where there is no question at all about guilt or any question about the reliability of the confession itself, nonetheless due process requires the conviction to be reversed. Perhaps I am getting simple-minded about this, but it seems clear that we want to deter this kind of police conduct. However that may be, they are reversing convictions where there is no question about the petitioner's guilt, and no question about fairness of the trial aside from admission into evidence of an unconstitutionally obtained confession. It takes more subtle a mind, I am afraid, to see a distinction that can be thrown on habeas corpus.

Chief Justice Weintraub: Where you are dealing with an involuntary confession, you run squarely into the Fifth Amendment.

Professor Packer: The reliability of the confession has nothing to do with it.

Justice Traynor: Isn't one of the grounds for exclusion that it is untrustworthy? Then you would have the problem that it would be awkward to have a rule that habeas corpus will lie only in those cases where the court is convinced that the confession was untrustworthy. It is common in the law to have a rule that for convenience applies more broadly than is necessary. Habeas corpus should lie in the involuntary confession cases, for such confessions may go to the issue of guilt, just as does denial of counsel, mob domination or a refusal to allow a defendant to put in a defense. Habeas corpus is designed to protect the innocent and to guarantee fair

trials and I don't agree with your suggestion that I would make this thing discretionary. Absolutely not. There is nothing discretionary about it.

Chief Justice Dethmers: Assuming that authority resides in the Supreme Court of the United States to make a policy decision on the exclusionary rule for the purpose of deterring officers, doesn't its authority for so doing in federal cases and its authority for so doing in state courts have to rest on different grounds?

Chief Justice Day:[62] We have to come to grips with two words not heard thus far — what if the conviction is erroneous or void? If it is merely erroneous, that is one thing, but if the conviction obtained is void then it has no stature at all and habeas corpus has to be the remedy. So now we come to the question of, is this conviction erroneous, reverse and retry, and see if we can get the conviction, or was the conviction void? If so, you can't escape habeas corpus.

Chief Justice Weintraub: To think in terms of void as against erroneous will not help because both words are labels of the end result. Before we call it void or merely erroneous, we must start to arrive at either conclusion. I think the constitutional wrong is not in the use of the evidence but in the original invasion of privacy which is done. That is the whole preventive thesis, and if Justice Clark's opinion stays with it — and there are some passages that make one wonder — this is a different animal. It is not denial of counsel or use of confession gotten by force which you couldn't get under any legal warrant. You are dealing with evidence that could have been obtained by a warrant, and hence I agree with Judge Traynor in what you are trying to accomplish. So far as the man convicted is concerned, it is wholly fortuitous to him that the officer didn't have a warrant.

Chief Justice Parker:[63] We rely sometimes almost wholly on evidence presented by an applicant for habeas corpus which is long since dissipated and not available. If we take the position that *Mapp* is retroactive, this is the only evidence.

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62 Edward C. Day, Colorado.

63 Jay S. Parker, Kansas.

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).

finding the kindly course between these two great interests and of adjusting and adapting rules so that one interest is not so far advanced as seriously to impair the other.

I don't think there are any here who would disagree with the basic constitutional guarantee in the Fourth Amendment, which as I recall provides:

> 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.

It is difficult, however, for courts to get the message over to the people as to how important it is that this right be enforced. Normally, the usual law-abiding person is preoccupied with private lawlessness and doesn't envisage himself as a likely candidate for arbitrary police intrusion upon his privacy, and he views with dismay the release of the guilty when there has been a violation of the Fourth Amendment, not realizing that it is important for his own protection that there be effective enforcement of that amendment even if the guilty go free when the evidence obtained against them was illegally obtained. Some of the arguments made against the exclusionary rule, I think, are utterly foolish; arguments that I have read were made by district attorneys and by chiefs of police, particularly the argument that the admission of illegally obtained evidence is essential to effective law enforcement. That argument was lost when the Fourth Amendment was adopted. The question does not arise if it is not violated. I think it is a large assumption that law enforcement requires violation of the Fourth Amendment. I believe there are great opportunities for effective law enforcement that abides by the Constitution. There is, however, in my opinion, reasonable grounds for differences of opinion as to the means of enforcing the Fourth Amendment.

One cause for my thinking that there can be reasonable differences of opinion on the subject is that I have differed upon it myself. I will take only a few minutes to relate that experience.

In 1942, I was one of those who urged the other members of the Supreme Court of California to grant a petition for hearing in a case

involving an illegal search and seizure.[70] One of the reasons why I urged them to grant the hearing was that I thought at that time that the exclusionary rule should be adopted in California. After the case was assigned to me, however, I changed my mind. I have always believed that the trier of the facts needs all the good, relevant, material evidence he can get and that in case of doubt, we should lean toward admission of evidence rather than exclusion, and that privileges and any other exclusionary rules should be invoked with great caution. Here was a situation where the evidence was relevant, material, even devastating. The problem was, should the court adjust the rules of evidence, adopt new rules of evidence and depart from basic concepts of admissibility simply as an expedient to enforce the Fourth Amendment? I have long believed that courts should not take upon themselves all the responsibilities of making a better world and concluded that we should not attempt to do so in this area; that the responsibility lies with law enforcement officers and other agencies of the government; that enforcement of the Fourth Amendment should be by prosecution, fines, imprisonment and so forth, and that there was nothing unfair about a trial in which illegally obtained evidence was admitted. There was no denial of due process of law. The defendant had counsel, fundamental rules of evidence and other rules necessary for a fair trial were properly applied, and it was a matter of complete indifference to the court where the evidence came from. If the Fourth Amendment was not being enforced, that was not the responsibility of the courts; that was the responsibility of the law enforcement officers, the governor, and the state legislature.

Well, I lived with that decision from 1942 until 1955 and saw case after case come before the court where illegally obtained evidence was being obtained and used as a mere routine. It became abundantly clear that it was one thing to condone an occasional constable's blunder but another thing to condone deliberate and systematic routine invasions of the Fourth Amendment.

I was alarmed by such cases as *Irvine v. California*,[71] where microphones were put in bedrooms and took note of the message of the United

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

[71] 347 U.S. 128 (1954).

States Supreme Court, in an opinion written by Justice Jackson, urging state courts to reconsider their rules admitting evidence so obtained.

In *Rochin v. California*,[72] the United States Supreme Court held that at least evidence that was obtained by brutality, or in a manner that shocked the conscience or violated one's sense of decency must be excluded.

I was not shocked by the forcible taking of the narcotic that that defendant swallowed in *Rochin*. That didn't shock me nearly so much as the breaking into the defendant's bedroom without probable cause. By the time *People against Cahan*[73] came to the court in 1955, it had been demonstrated that illegal search and seizure was an ordinary police routine, that the courts were part of this dirty business because it was owing to our approval that the police were making these illegal searches and seizures. When the petition for hearing in *People against Cahan* reached us, I talked to our chief justice [Phil S. Gibson] and said, "I have had enough of this," and he said he had, too. We were successful in getting the petition granted. I then had the great pleasure and privilege of writing the opinion overruling my earlier decision and adopting the exclusionary rule in California. It was like going to confession or taking a shower. It left a clean feeling and a sense of great relief. But only then did the problems begin.

We adopted the exclusionary rule as an ordinary judicially declared rule of evidence. Since *Mapp v. Ohio*, however, it is no longer a judicially declared rule of evidence; it is part of the Constitution. Our problem therefore shifted from trying to find flexible, workable rules to trying to determine what rules we could properly adopt that differed from the rules that the federal courts had laid down. Until *Mapp v. Ohio*, the United States Supreme Court did not have occasion to articulate with specificity for the guidance of state courts when an arrest or a search was without probable cause within the meaning of the Fourth Amendment.

Until *Mapp v. Ohio*, there was no need for the United States Supreme Court to articulate the distinction between a rule of exclusion that was based on a federal statute only or on the United States Supreme Court's supervision of the administration of criminal justice, and a rule that was based on the Fourth Amendment. I became convinced and am still convinced that

[72] 342 U.S. 165 (1952).

[73] 44 Cal. 2d 434 (1955).

state courts are not bound by all the pre-*Mapp* federal rules. Some of those rules, I think, are confusing. I am not alone in stating that. The United States Supreme Court justices have often stated it themselves and in vigorous and colorful language. Some of the rules are over-refined; some are underdeveloped, and there had been no clear articulation as to their being based on the Fourth Amendment or as to what they were based on.

You will now find in the recent decisions of the United States Supreme Court great pains being taken to point out when a rule is based on the Fourth Amendment, and I think most of the recent decisions expressly state when an exclusionary rule is based on that amendment.

It would be easy for state judges just to follow automatically the pre-*Mapp* federal rules. In doing so, I don't think they do the law any service, and I am sure they do not do the United States Supreme Court any service. It seems to me that it is incumbent on state judges, when they are convinced that a federal rule is not based on the Fourth Amendment and that it is unsound, to articulate as best they can for the benefit of the United States Supreme Court why the state is departing from a federal rule that hasn't been specifically declared to be based on the Fourth Amendment.

Some state rules do not go so far as the federal rules and some go farther. For example, in one of the cases we had, *People against Martin*,[74] I wrote an opinion based on the conviction that the only reason we got the exclusionary rule was to deter illegal police activity. I am still convinced of that for I don't think the rule is part of the Fourth Amendment, as if it were written expressly in that amendment that any evidence obtained in violation of it shall not be admitted. I think the only reason we got *Mapp v. Ohio*, and its exclusionary rule, like the only reason we got *People v. Cahan*[75] in California, was that it had been demonstrated that it was the only way that illegal searches and seizures could be deterred. Such deterrence is the heart and soul of the reason for the exclusionary rule. Now, if I am right on that major premise, it seems to me to follow that it makes no difference whose right to privacy has been violated. If there was illegal police activity, arrest or a search without probable cause, exclusion of the illegally obtained evidence shouldn't depend on whether it was A's property

[74] 46 Cal.2d 106 (1956).

[75] 44 Cal. 2d 434 (1955).

that was searched when the evidence was introduced against B, and we so held in *People against Martin*. I was somewhat dismayed in reading in an otherwise splendid opinion by Mr. Justice Brennan, *Wong Sung against the United States*,[76] a holding without so much as a nod to the theory underlying *People v. Martin* that one whose own right to privacy had not been violated had no standing to object to illegally obtained evidence.

I can only hope that someday there may be a return to the basic concept of deterrence in this respect. If I am right that deterrence is at the heart of the rule, and that any illegal police activity that results in illegally obtained evidence should be excluded, anyone against whom such evidence is offered has standing to object to its admission. We should get away from too much preoccupation with tort concepts and property concepts. The purpose of excluding the evidence is not to make amends to the defendant but to deter illegal police activity. What difference does it make whether it was A's home that was illegally invaded or the defendant's home?

I have the impression that in the earlier formulation of the federal rules there has been altogether too much preoccupation with property concepts and with tort concepts. I also think that what we desperately need at the outset is a clear articulation of just what it is the Fourth Amendment protects. It seems to me that there has been too much emphasis on the man's castle, too much emphasis on the law of trespass. I think it was emphasis on property concepts that led to that unfortunate *Olmstead* decision[77] that evidence obtained by wiretapping was admissible because there was no trespass to the defendant's property. I think that a case like the *Goldman* case[78] was wrong, where a detectograph was put up against a wall and conversations that went on in a bedroom were overheard by the police. I was grateful for the United States Supreme Court's opinion in the *Silverman* case,[79] where Justice Stewart wrote, if I recall correctly, that the Court declined to go beyond *Goldman* by even a fraction of an inch.

In *Silverman* you will recall there was a spike put into a wall. There was a trespass, however, though slight. Then there is a recent case of the United States Supreme Court that also encourages me. I think it is *Clinton against*

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76 371 U.S. 471 (1963).
77 277 U.S. 438 (1928).
78 316 U.S. 129 (1942).
79 365 U.S. 505 (1961).

*Virginia*,[80] where a spike microphone was put into a party wall. Apparently, under the law of Virginia each owner owned half the wall. In this case the spike didn't go beyond the middle, so I suppose there was no trespass. The United States Supreme Court nevertheless held that the evidence so obtained was inadmissible. In the dissenting opinion in *Lopez against the United States*,[81] Justice Brennan speaks at great length, I think, somewhat along these lines as to the danger to the right to privacy by all these electronic devices and so forth that we now have. The witty diversities of the law of trespass should not impede protecting that right from such danger.

I hope you will bear with me, for there are a number of other sensitive areas I should like to cover. The first such area involves a federal rule with which I am in complete disagreement. This is the rule that the police cannot search, even with a search warrant, no matter how much probable cause there is, simply to obtain evidence; they cannot seize merely evidentiary matters. So, the crucial question is what is an evidentiary matter? The leading case on that question is *Gouled against the United States*,[82] a 1921 case written by Chief Justice Hughes.

The defendant there was charged with using the mails to defraud. There was a search warrant and in the course of the search the officers found a receipted bill for legal services, an executed contract, and an unexecuted contract. The United States Supreme Court held that the seizure of the bill for legal services and the unexecuted contract and the executed contract violated the Fourth Amendment and that the introduction of those materials into evidence violated the Fifth Amendment. I might put in a parenthetical remark at this point. For the life of me, I cannot see how the Fifth Amendment is involved. You will recall, however, that it was only because of Justice Black's concurring vote in *Mapp v. Ohio* that you had a court for *Mapp v. Ohio*, and Justice Black based his concurrence on the Fifth Amendment. I have tried my best to understand how the Fifth Amendment has anything to do with the question, but so far without success.

It has been held that contraband can be seized and admitted into evidence if there was probable cause for the search because the defendant has no right to own it. Stolen goods can be introduced into evidence because the

[80] 377 U.S. 158 (1964).
[81] 373 U.S. 427 (1963).
[82] 255 U.S. 298 (1921).

defendant doesn't own them. You begin to think that maybe property concepts are going to dominate but no; you go on and you find that the fruits of a crime are admissible, even though the defendant owns them and the instruments of a crime are admissible even though the defendant owns them. Moreover, a record that the defendant is required by law to keep is admissible. Now, why doesn't the Fifth Amendment control, if it has any application at all? What difference does it make so far as the Fifth Amendment is concerned whether the property is or is not contraband, stolen goods, or the fruits or instruments of a crime, or a record one is required to keep?

When you look at the decisions in the various federal courts and try to interpret *Gouled* as to what is a fruit and what is an instrument, you find that in some cases account books are, in some cases registers are, in some cases intangibles are, and when you try to find out why, to find the basic guiding principle, I think you can't help but be confused, which prompted me to ask on another occasion, perhaps impishly yet somewhat seriously, why should any state court in its right mind risk losing it in the pursuit of learning what the total message is of a federal rule of such elaborate obfuscation?

I hope that since *Mapp v. Ohio*, which puts the high responsibility on the United States Supreme Court to articulate with care what rules of exclusion are based on the Fourth Amendment and what are based on its supervision of justice in the federal courts, or on statutes, that we might get a departure from the *Gouled* case or at least for my own personal intellectual satisfaction a good plausible explanation that a reasonable open mind can accept, as to what on earth the Fifth Amendment has to do in this area. It might well be that when the message comes I will agree with it quickly. Of course I will abide by it faithfully even if I don't agree with it.

There are two or three other sensitive points where the law desperately needs clarification. The first is on the problem of the right of the police to investigate short of arrest. What we need, in the first place, is a good, workable definition of probable cause. We need a good, acceptable definition of when an arrest occurs, and I hope that it will be liberal enough that it will not preclude stopping and even frisking when there have been suspicious circumstances short of probable cause for arrest, that would at least prompt any law enforcement officer properly doing his job to investigate or

that would impel you, if you were the chief of police, to fire the officer if he didn't investigate.

Let me tell you about a case that presents the problem. The case is *People v. Michelson*[83] in California. There was a robbery at a supermarket and an employee of the supermarket described the robbers as two tall men, as I recall, one of them wearing a red sweater or a red jacket. So, the police were on the lookout for such men when, lo and behold, within a few minutes coming toward the supermarket was an automobile with two men, one of whom was wearing a red sweater. So the police followed the car and it went up one block, turned around and went up another, then turned around and went up another. This erratic behavior together with the description they had of the robbers prompted the police to stop the car. The two men got out and when the police asked them what they were doing, they responded that they were looking for the Hollywood Freeway. I had a great deal of sympathy with that response for I have had identically the same experience. It's not only hard enough to find an entrance to these freeways but once on them, it is sometimes an awful job to get off them. After the officers got this explanation, they nevertheless went some distance from where these two men were standing and rummaged through the car. Underneath the seat of the automobile they found a sock full of coins. There had been robberies of telephone booths recently, and through further questioning it was disclosed that these men were returning from the robbery of a telephone booth.

In the opinion I wrote we held that the suspicious circumstances, the strange driving and the fact that one of the men was wearing a red jacket (there may be thousands of people in Los Angeles that wear red jackets; I haven't seen many in San Francisco), justified the stopping and the questioning and I think would have justified frisking them for firearms to protect the lives of the officers, but that the further search went beyond permissible limits.

Now, whether the United States Supreme Court would hold we were right or wrong in view of the *Henry* case,[84] I'm not sure. This is a very difficult area. In any event, I am of the tentative opinion that the Uniform Arrest Act goes too far. I don't think the police can take people they have

[83] 59 Cal. 2d. 448 (1963).

[84] 361 U.S. 98 (1959).

no probable cause to arrest to the police station for questioning. I don't think the police can take too long in stopping and questioning. If we had an hour or two, I should like to explore this subject with you further. The most I can say very briefly is that I hope the Supreme Court doesn't seize on the law of torts, the law of false imprisonment, and write the law of torts into the Constitution. I think we need a little more flexibility in this area.

As you can gather from these remarks, I do not like too much preoccupation with the law of torts and with the law of property in working out solutions to search and seizure problems. I think the right to privacy that we are trying to protect should not be confined in some situations within such narrow limits and in other situations it should be confined more than it would be confined under tort and property law.

Now, two more sensitive subjects that I really must get off my chest because I think they are extremely important. The first is the effect of the harmless error rule and the second is the retroactivity of *Mapp v. Ohio*.

With respect to the harmless error rule, a very sensitive question is: when is the admissibility of illegally obtained evidence prejudicial? You will recall that it has been definitely settled that admission of an involuntary confession, no matter how much evidence is developed that it was true, how much other evidence of guilt there is, is automatically prejudicial. Should the same rule prevail with respect to illegally obtained evidence? The United States Supreme Court has had one recent case in which it did not have to decide that question for it found that the admission of the evidence was prejudicial. Let me tell you about a case of my own where we were faced squarely with the question. The case is *People v. Parham*,[85] which involved a bank robbery. There was ample evidence of probable cause for the arrest and search of the defendant, and the particular item of evidence that was obtained illegally was completely unnecessary to the prosecution's case, and we thought it did not contribute at all to the conviction. It was obtained in this way: The bank robber's modus operandi was to present a check or a piece of paper that looked like a check to be cashed. Then he would bring out a gun and rob the bank. Well, after the police officers, with what we thought was abundant evidence of probable cause that I will not take the time to detail to you, had captured the bank robber, he

[85] 60 Cal.2d 378 (1963).

then at the time of his arrest put what looked like a check into his mouth and started chewing it. The officers tried to remove it from his mouth, but he wouldn't disgorge, so they took their billy clubs and hit him over the head and then got the masticated piece of paper. At the trial all this evidence was introduced, including the masticated piece of paper, which was really unimportant to the prosecution's case. The conduct of the officers is of course not to be condoned, but the real blunder so far as the exclusionary rule is concerned was that the district attorney, with an otherwise strong case, put in this completely unnecessary item of evidence and embarrassed the court with an unnecessary problem that . . . . [Laughter]

I toyed with the idea of saying the error was automatically prejudicial but concluded that the facts of that case were just too strong for such a holding. You might say, "Well, if the object of the exclusionary rule is to deter, that would deter." It is true that it would deter illegal police activities, if the exclusionary rule does deter, but my notion of the deterrence concept is that the police should not profit by their wrongs and we didn't believe they were profiting here by the introduction of this small item of evidence in view of all the other evidence in the case that convinced us that it was most improbable that this item influenced the verdict in any way.

Now, if you will permit me a little parenthetical remark, I sometimes wonder — or let me put it this way — as I have emphasized and cannot emphasize too much because it is the basis of so many of my views on these problems, deterrence of illegal police activity is the heart and soul of the exclusionary rule. Now, the thing that gives me pause is that I wonder sometimes if it really does deter or deters as much as it should. I have been very much interested in the development of Justice Jackson's views on the exclusionary rule. He started out in his early opinions by enforcing strictly the exclusionary rule. I think he wrote the opinion in *Johnson v. United States*,[86] which I never agreed with. In that case an officer smelled opium smoke coming out of the edges of a hotel door and the court held that it was not probable cause for entry and arrest. It made me wonder how much you really need.

[86] 333 U.S. 10 (1948).

Then there was the case of *Brinegar v. United States*[87] during prohibition days. Justice Rutledge wrote what I thought was an excellent opinion finding probable cause. Jackson, however, dissented.

Then I notice that as the years went by Justice Jackson became less and less an ardent advocate of the exclusionary rule and in one opinion questioned whether it really does deter. It might make a good project for some research scholar with a Ford Foundation grant to really find out — which leads me to this: Maybe it doesn't deter; maybe the police will say, "We are going to do our job as best we can. Our responsibility is effective law enforcement; we are going to catch these crooks, these rapists, these murderers, these narcotics addicts, these people who insist on bookmaking and other things that are antisocial — that is our responsibility. What the courts do with them is up to the courts." I earnestly hope we never come to such a defiance of law by those entrusted to enforce it. Another parenthesis: I think maybe it might be wise for legislatures to reconsider some statutes that regulate conduct that may not really be so antisocial that it should be made criminal and yet which put so much pressure on the exclusionary rule. Close parenthesis.

We now come to the last subject and that is whether there should be collateral attack in a case where there has been a violation of the Fourth Amendment, violation of a federal rule clearly based on the Fourth Amendment.

My argument is this, and I might say in passing that I was delighted to find support from one of the strong courts of this country, the Court of Appeals of the Fifth Circuit, in *Linkletter v. Walker*,[88] an excellent opinion somewhat along the lines I had set forth in a concurring opinion, which I like to believe was of some help to that court. I welcome all the support I can get. The Ninth Circuit went the other way and I believe also the Third Circuit. In any event, the problem is now before the United States Supreme Court, and Justice Brennan may close his ears, but I think he is aware of these arguments, anyway, and moreover he is a strong-minded fellow. A good verbal argument can be made for the proposition that habeas corpus should lie when there has been a conviction based on illegally obtained evidence even though the judgment of conviction has become final. The

87 338 U.S. 160 (1949).

88 *See* 381 U.S. 618 (1965).

argument is that, now that it has been determined by *Mapp v. Ohio* that the exclusionary rule is based on the Constitution, there is a constitutional right to have illegally obtained evidence excluded. It has been settled for generations that constitutional rights can be vindicated on habeas corpus; ergo, this constitutional right can be vindicated on habeas corpus. Now, my answer to that, for what it is worth, is this: That argument is verbal, it is logical in a fashion, if you accept the premise, but it doesn't get to the heart of the exclusionary rule. Why do you have the exclusionary rule? What brought it on? The whole object of it is to deter illegal police activity. That objective can be adequately attained, I believe, by allowing the defendant to raise the question, say on a motion to suppress the evidence, or as we do in California, by allowing him to object to the introduction of the evidence and to present his case on appeal and that I think is enough. The heroic remedy of upsetting final judgments is just too heavy a price to pay in the interest of deterrence. I think the objective of deterrence can be accomplished by allowing the question to be raised at the trial and on appeal and that the importance of sustaining final judgments outweighs the slight deterrent effect of upsetting such judgments. Moreover, if final judgments are to be upset every time the exclusionary rule is expanded, police activity that would otherwise be condemned may be condoned, and needed expansion of the exclusionary rule foreclosed. It remains to be seen whether the Fifth Circuit and I will be vindicated in that respect.

We speak so much of illegal police activity and of the lawlessness of the police. I should like to put in a plea for understanding the tough job that the police have and the great risk to their lives that they go through daily. I am convinced that effective law enforcement is important to liberty. Without effective law enforcement we would not have this ordered liberty of which the Fourth Amendment is such an essential part. We must have skilled and intelligent police officers and, above all, we need respect for the police and we need wholehearted cooperation with them, and I think we need many more of them. I am still of the opinion, however, that the Fourth Amendment is a vital bulwark against a police state, not because of police officers, but because of their superiors and I mean those who may get in control of the government. It is the Fourth Amendment as much as any other constitutional guarantee that will keep us from a Hitler system or worse.

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).

the would-be spokesperson were an adult male, an adult female, or a child under or over thirty?

With so many questions unanswered, a storm was bound to come. It came in the form of a decision that rolled out of Florida shortly after the Fourth of July, headed in all directions. We might well call it Hurricane Flo, given the wails from the news media. A taciturn down-easter might be moved to observe that henceforth, "As Flo goes, so goes the nation." That depends, of course, on how appealing Flo will look upon final appeal. The Supreme Court of Florida held that the Miami Herald Publishing Company is bound by Florida's right-of-reply statute to publish the reply of a candidate for public office to two editorials allegedly attacking his personal character.[90]

An editor of the *Wall Street Journal*, Michael Gartner, thereafter quoted Yale Professor Thomas Emerson: "It means the government can tell the newspapers that the newspapers can be forced to print material they don't want to print. This is the very opposite of freedom of the press." Editor Gartner's own comment on the decision is that "the government is our new managing editor."

Certainly the new religion of Open Up prescribed for editors is shoving hard against editorial freedom, the old-time religion of Shut Out. Whoever cries Wolf or Censor, however, had better first make sure that others will trust his message that the danger is indeed at the door. The Florida case has no such open-and-shut simplicity. It is in fact a classic hard case, and no one can predict whether it will finally lead to bad law or good.

Consider, for example, the sweet reasonableness attending the plea that a publisher who dominates or perhaps even monopolizes access to a large audience should leave some access road open to others for response to whatever attack he publishes against them. His very power delineates his freedom, so goes the argument; he cannot be equated with legendary Tom Paine, who had no dominant access to large audiences and whose own freedom would have been destroyed by any compulsion to share access with others. There was no need for every Tom, Dick, and Harry to go down Paine's alley when they had equal opportunity to open up alleys of their own. The situation is quite otherwise, said the Florida court, when one or

90 Tornillo v. Miami Herald Publishing Co., 287 So.2d 78 (1973). *Reversed*, 418 U.S. 241 (1974) (unanimous opinion by Burger, C.J.).

two publishers dominate the main avenues of communication. The fewer they are, the more powerful they become as they edit the news and voice their editorial opinions thereon. When they use their power to attack anyone without comparable access to their audience, they have a corresponding responsibility to observe Florida's right-of-reply statute.

Newspeople may view such legal workings as the work of the devil, but it is sound practice to give the devil his due. It may be particularly appropriate for a Californian to assume the role of devil's advocate for Florida.

Many have revolted against what Florida has wrought, on the usual hearsay of not necessarily unimpeachable sources. It would be wiser to examine the original source, the opinion itself of the Florida Supreme Court. There is plausibility to that opinion. The language is cool, not florid. The Court believes that Florida's right-of-reply statute "enhances rather than abridges freedom of speech protected by the First Amendment . . . ," and it explains why. Consider the reasoning straight from the Florida opinion:

> The right of the public to know all sides of a controversy and from such information to be able to make an enlightened choice is being jeopardized by the growing concentration of the ownership of the mass media into fewer and fewer hands, resulting ultimately in a form of private censorship. Through consolidation, syndication, acquisition of radio and television stations and the demise of vast numbers of newspapers, competition is rapidly vanishing and news corporations are acquiring monopolistic influence over huge areas of the country. . . .
>
> Freedom of expression was retained by the people through the First Amendment *for all the people* and *not merely for a select few*. The First Amendment *did not create a privileged class* which through a monopoly of instruments of the newspaper industry would be able to *deny to the people the freedom of expression* which the First Amendment guarantees.[91]

The Florida Supreme Court reasoned that access at least for reply to an attack is particularly necessary in the case of a political candidate, since the very integrity of democratic elections depends upon an informed public.

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91 *Id*. at 80.

The Florida Court is beaming a twofold message. First, those who rule the fine or gross print, like those who rule the airwaves, have a constitutional obligation to fulfill the public's need to know. Second, they are accordingly obliged to give reply space to whomever they have attacked. The outcry of the print media at this twofold message carries undertones of injured amour-propre. Suddenly the scribblers, far from being the untouchable loners of the communications industry, find themselves charged with social obligations like any ordinary licensee of broadcasting. No longer can they be sure of breathing a headier freedom than the poor licensees, whose rich livelihood depends on their pleasing as many people as possible, with better programs or worse, for richer ratings or richest, in news as in entertainment, in sick comedies as in health messages, always with eyes at the back of their heads to see whether Granny Government also looks pleased enough to let them live another few years. It has come as a shock to proud earthlings that their freedom may not be much loftier than the pedestrian freedom of those who tiptoe on air.

A devil's advocate is bound to remind the shaken freemen that the Florida Supreme Court spoke the language of freedom, not repression. It leaned heavily on the 1964 decision of the United States Supreme Court in *New York Times v. Sullivan*[92] and its 1971 decision in *Rosenbloom v. Metromedia*.[93] These two cases were landmarks of freedom for the press. Are they also landing fields for Hurricane Flo as the Florida opinion suggests?

*New York Times v. Sullivan* holds that a government official cannot recover damages from a publisher for a defamatory falsehood relating to his official conduct if he fails to prove "actual malice," namely, that the defendant made the statement with knowledge that it was false or with reckless disregard for its truth or falsity. The United States Supreme Court thus declared the First Amendment to be the safeguard of a right to speak on public issues forcefully, carelessly, and even falsely, without stammering deference to other points of view.

The *Times* case involved no reporter's tall story, no columnist's small talk, no editor's slip of a paragraph, but a paid advertisement that allegedly libeled a local police commissioner. Nonetheless, the Court found that,

92 376 U.S. 254 (1964).

93 403 U.S. 29 (1971).

unlike the usual commercial advertisement, this one "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."[94]

In the area of public issues the *Times* case thus marks a new tolerance for misstatements, cracker-barrel views, and freewheeling language. Better the smog of error or eccentricity or zealotry that others are free to deplore or dissipate than a pall of black-letter law whose immutable and oppressive presence would impel people not only to watch for fatal flaws in the words of others but also to keep uneasy watch on their own words. Self-censorship, in the view of the Court, is as deadly as any other censorship to freedom.

The Florida opinion is also forcefully linked to the language of the more recent decision in *Rosenbloom v. Metromedia*, which not only accorded *Times* freedom to a broadcaster, thus narrowing the gap between print media and government-stamped broadcasters, but also extended *Times* freedom to speech about a private citizen, on the ground that it concerned primarily a matter of public interest, namely, the peddling of allegedly obscene materials.

By clothing the distribution of nudist magazines as an issue of public interest, the United States Supreme Court in the *Metromedia* case went beyond the *Times* case to enlarge not only the chorus but the score of freedom. Now the rising voices of mere licensees could join with those of venerable *Times* publishers, and the newly aggrandized chorus could sound out lustily on new great social issues of the day, such as girlie magazines. On high constitutional ground an aggrieved peddler, charging libel in vain, bit the dust as had an aggrieved police commissioner before him.

Given the heady freedom of the *Times* and *Metromedia* cases, the old boys and girls of the print media may have failed to take note of all the sobering implications of their new links with the lads and lassies of broadcasting. It took the Florida connection in the *Miami Herald* case to bring them to a day of reckoning with the most sobering implication of all. If *Times* and *Metromedia* are kissing cousins in a family chorus of freedom, they may then likewise be linked in an obligation to accord to an importunate outsider a right of access to their professional chorus, at least when they have been singing away about his failings in matters of public interest.

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94 376 U.S. 254, 266 (1964).

When a government itself has little right to make a newspaper shut up, why should a newspaper that has freely criticized a political candidate shut out his right of reply in its pages? If a candidate cannot shout back to the same audience the newspaper reached, has he encountered an insurmountable obstacle to speech more serious than the restraining threat of official sanctions would be? If he is cut off from even whispering to the only audience he wants, is he any less bereft because he can shout at the moon from the rooftops?

The growing clamor now for a right of access should hardly come as a surprise. A complainant carrying the heavy burden of proving actual malice feels doubly aggrieved if his already meager chance of proving such malice is cut down at the very time the press has gained new constitutional freedom to publish falsehoods without liability. It is no longer enough for a complainant to catch the publisher in a lie; he must catch him in a malicious lie, while sinking under a crushing burden of proof. If a publisher fails to distinguish true from false and then fails to retract the falsehood and still remains immune from liability, it does not seem so unreasonable to grant the target of the falsehood at least a chance to bring the facts into line. It was grievance upon grievance that drove complainants to demand a right of reply. Hurricane Flo might not be blowing so hard without the opinion of the United States Supreme Court in *Red Lion Broadcasting Co. v. FCC* in 1969,[95] five years after the *Times* case. The Court let no one forget that FCC was the den mother of Red Lion. It upheld the authority of the FCC to implement the established Fairness Doctrine on coverage of public issues by spelling out mandatory procedures in the event of a broadcasting of a personal attack or political editorial. The opinion recognized that "broadcasting is clearly a medium affected by a First Amendment interest,"[96] but also clearly viewed broadcasters such as Red Lion as a special breed of cat because their capacity to roar can drown out other voices.

The Court was concerned not only with how raucously a Red Lion could roar, but also how it could dominate the air to the exclusion of others, given the shortage of frequencies. In its view, "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[97]

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[95] 395 U.S. 367 (1969).

[96] *Id*. at 386.

[97] *Id*. at 388.

It is significant that, in the four years between the *Red Lion* case of 1969 and the *Miami Herald* case of 1973, technology has advanced by leaps and bounds to give promise of many more frequencies for broadcasting and hence many more possibilities for making inroads into the current domination of the airwaves. The more frequencies there are, the fewer may be the problems of short supply, or of oft-mentioned chaos and cacophony, still invoked as a basis for regulating broadcasters and not print media. At the same time, there has been a growing domination of major print media by fewer publishers, as well as recent severe shortages of timber for newsprint. The fewer major print media there are, the more their domination of major audiences will come to resemble the current domination of the airwaves. Hence it is a good deal more plausible in 1974 than it would have been earlier for the public to view broadcasters and print publishers as Tweedledee and Tweedledum rather than as Red Lion and Tom Paine.

It took Hurricane Flo to bring that news home to us. The Florida court desegregated the broadcasters. The newly integrated print publishers learned from the court's opinion that Florida's reply-of-reply statute, applied against a newspaper, is consistent with the First Amendment by virtue of such cases as *Metromedia*. The *Metromedia* case, like the *Times* case before it, had won new freedom to comment without liability on "social issues." Nonetheless there were signs that the United States Supreme Court was increasingly troubled by the problem of access. The times were ringing changes.

In sum, the *Times* case let freedom ring for the newspaper publishers, and the *Metromedia* case let freedom tinkle for the broadcasters, but there were outsiders who felt correspondingly stifled. Given the concentrated power of the media, the *Red Lio*n case found justification for an outsider's right of access to the broadcasting stations, in the context of the Fairness Doctrine. The *Miami Herald* case found comparable justification for access to newspapers. Let freedom ring for everyone, said the Florida court in effect, across airwaves and the rivers of ink.

With such words a devil's advocate for Hurricane Flo might close his case. For the good sake of an open hearing, however, I now likewise present the other side.

The Florida Court has attempted a soft landing for Hurricane Flo on constitutional grounds. The right of access was presented narrowly in the *Miami Herald* case as a right of reply in the event of a newspaper's attack on

a political candidate. Is such access of a piece with the theme of "uninhibited, robust and wide-open speech"[98] that runs through the opinions of the United States Supreme Court on First Amendment freedom? To answer this question, we must first answer another. When a newspaper dominates an audience, is it then constitutionally obliged to fulfill what has been vaguely called the people's right to know? Just what is this right to know?

The people's right to know means everyone's freedom to seek out information from others and to receive whatever information others wish to dispense. The right carries no power, however, to compel others to dispense information to the public at large. No thirster after knowledge can compel even his own government to dispense information. A fortiori, he cannot demand access to the government printing office to publicize a rejected request for information, let alone to publicize his own arguments against government secrecy. Whatever limited access he can gain results not from any First Amendment mandate, but from such statutes as the Freedom of Information Act, wherein the government voluntarily grants a measure of access to official information. Such access for the passive receipt of information is a far cry from access for the active distribution of one's own views.

If the right to know, in the light of the First Amendment, does not empower an outsider to compel even his own government to print and distribute his copy, how can he compel a newspaper to do so? Moreover, the First Amendment mandate against abridging the freedom of the press is closely attuned to the editorial freedom of large publishers as well as small, the corporation as well as Tom Paine. The complex task of putting together a large daily newspaper could be disrupted by volunteer composers in the composing room.

An adherent of this thesis may have been nearly blown out of his mind by Hurricane Flo in July. He may find some reassurance, however, in recalling the merrier month of May when the United States Supreme Court held the line against access even to electronic media. The Democratic National Committee and the Business Executives' Move for Vietnam Peace had demanded access to broadcasting facilities for paid editorial advertisements. The Court upheld the FCC ruling that a broadcaster had discretion to deny such access, in light of its record of full and fair coverage of

98 Citizens Communications Center v. FCC, 447 F.2d 1201, 1214 (D.C. Cir. 1971).

the controverted issues. The Court squared such discretion with the FCC's statutory authority to command access, as in the *Red Lion* case. Once the FCC determined that a broadcaster met the obligations of the Fairness Doctrine incumbent upon him, would-be advertisers could not invoke the First Amendment to plead access. The right of the public to be informed did not endow a private individual or group with "a right to command the use of broadcast facilities."

These various opinions combine to remind the public that the First Amendment continues to stand guard against access to newspapers. Nonetheless the case narrowed the gap between newspapers and broadcasters, not by reducing the First Amendment freedom of the press, but by augmenting the freedom of broadcasters via an outward push against the flexible boundaries of statutory regulation. Any Tom Paine remained the darling of the First Amendment, even when he had grown to monstrous size. The new twist in the case was the Court's concern over Red Lions, which had been kept in captivity since infancy, because of their own monstrous size, and now bleeped more than they roared. There were intimations that maybe even a firmly regulated old Red Lion should be trusted to exercise a little more freedom to make it a little more robust. Too many bleeps in the bellows and a lion loses its tone.

There are many straws in this case that go counter to Hurricane Flo. It would be premature, however, to rest easy that the hurricane has spent its force. There are other straws to indicate that it may still blow strong.

In the decade since the *Times* case made waves in the flow of communication, the United States Supreme Court has been of various minds on what amateurs, if any, can crash onto the established routes of publishers. The rationale of amateur hours is that they counteract the concentrated power of publishers. The dilemma remains, however, that every amateur entry is by grace of an official ruling, and each ruling strengthens the power of government over the press. Whatever the grievance of an amateur shut out by a powerful broadcaster or publisher, there is still the risk that he may lose more than he gains when he gains access with the help of a government more powerful than the press. Is he not then in turn subject to government control in a rulemaking process without end? As against the government is his First Amendment freedom now worth any more than that of the one ordered to

yield him time or space? Will he not also feel the king's chilling presence at the microphone or typewriter?

Oppressive supervision is apt to begin with incidents too small for general notice. Few take alarm if an official referee appears on the bank of a tributary to the main flow of communication to gain access to someone else's facilities for a would-be sender of messages or a would-be editor of other people's messages. The scene may even appear to illustrate our democratic way of life. Nonetheless, as Justice Brandeis has warned, "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[99]

The one who secures government sanction for an indefinite sit-in may bode more impediment to speech than a raging oncomer armed only with a temporary right of reply. Consider the recent case of *Pittsburgh Press Company v. The Pittsburgh Commission on Human Relations*.[100] The Commission was no wounded victim of bad publicity rearing for a right of reply. It was merely a small government agency entrusted to be a great leveler. It was a constant reader of want ads, and it cried "Whoa" at certain sex-designated jobs at odds with the Commission's own list. The United States Supreme Court also cried "Whoa," by a vote of five to four. The *Pittsburgh Press* failed in its plea that its placement of ads came within First Amendment protection.

The effect of the majority opinion was to render the publishers half slave and half free in the advertising domain. They were now bound by the Commission's order not to publish commercial ads at odds with a local ordinance against discrimination in job advertising. The rationale was that such commercial advertising involved virtually no editorial Judgment and hence could be consigned to the limbo outside the First Amendment.

A speech impediment is never a minor ailment, even when it affects only the commercial tract, only the tone of a want ad. Orders for fairness go to the heart of editorial judgment, which is by definition partisan. An editor cannot also be a carrier of sandwich signs, his head lost between neatly balanced sides of Pros and Cons. A speech impediment becomes incurable

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99 Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J. dissenting).

100 413 U.S. 376 (1973).

when official observers take a permanent stand to make an editor watch his words. An editor's freedom may be vitiated when he's ordered to distribute the occasional compositions of others; but it risks total destruction when he must take orders on the writing of his own compositions. Only by dehumanizing his own mind can he assemble his words as a commissioner of human relations or community relations or foreign relations dictates in the name of justice or fairness or Regulation X.

The case for an editor's freedom might be summed up as a case for everyman's freedom. If First Amendment freedom once ceased to ring, we would know from deadly drumbeats the dominant force of our new commanders on the front lines of communication.

This presentation of both sides of the access problem is the merest introduction to its defiant complexity. The times may be a-changing, but the morrow is not yet clear. Will Hurricane Flo be stopped dead in its tracks at some ivied temple of Fair Comment or some more recent shrine of Fair Falsehood? Will it gain instead enough momentum to carry along Red Lion still up in the air, and deposit it as a graven image of the Fairness Doctrine for a new cloverleaf of intertwining access routes to land, sea, and air? Or will the hurricane wind down in the gray lands between the temples and shrines and a distant cloverleaf site?

We need to know much more about those gray lands, if we are to deal with storms more rationally than by adding wings at random to the sanctums of wise or wanton editors or by embarking on random sorties of road construction with wise or wanton Populists. As a step toward rational exploration and development, the recently established National News Council has begun work on its first major project, the question of access to news media, under the direction of Professor Benno Schmidt, Jr. of the Columbia Law School.

Whatever the measures taken to contain a hurricane, however random or rational, they are bound to have repercussions on the interaction of government, the press, and the people — on what access each should have to the others. It is time to keep a weather eye out on that basic question of freedom, for more storms are on the way.

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