

# NINE SPEECHES BY JUSTICE ROGER J. TRAYNOR

## EDITOR'S NOTE

Well known today for his legacy of legal writings, both in opinions and essays,<sup>1</sup> 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

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<sup>1</sup> 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)<sup>1</sup>

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.

<sup>1</sup> Address to the Lawyers' Club of Los Angeles, September 23, 1940.

## 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)<sup>5</sup>

President Marden,<sup>6</sup> General Decker,<sup>7</sup> 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,<sup>8</sup> and then the remarkably fine talks yesterday by Mr. Portman, Mr. Steward, and Judge Chapman,<sup>9</sup> that I decided to spend the few minutes that I'm going to steal

<sup>5</sup> International Conference Room, Department of State, Friday, May 16, 1969.

<sup>6</sup> Orison S. Marden, president, National Defender Project of the National Legal Aid and Defender Association, and past president, American Bar Association.

<sup>7</sup> General Charles Lowman Decker, director, National Defender Project, and former judge advocate general, U.S. Army.

<sup>8</sup> Maynard J. Toll, president, National Legal Aid and Defender Association.

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

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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.)