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https://doi.org/10.15760/etd.3235

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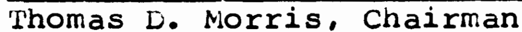
AN ABSTRACT OF THE THESIS OF David B. Brownhill for the Master of Arts in History presented April 12, 1983.

Title: Justice Brennan and The Bill of Rights

APPROVED BY THE MEMBERS OF THE THESIS COMMITTEE:


Thomas D. Morris, Chairman

David A. Johnson

Gordon B. Dodds

The research problem examined in my thesis is stated clearly in the title: Justice Brennan and The Bill of Rights. In my examination, I relied primarily on Brennan's opinions, and secondarily, on scholarly commentaries authored by Brennan and others. I located the cases through a combination of sources. Initially, I consulted the <u>Harvard Law Reviews'</u> "Supreme Court Term, (1956-1981) Term(s)," which is published annually in its November edition, and then, I turned to the writings by, and about, Brennan. My findings show that Brennan's approach in these cases has evolved over the years toward a more absolutist one.

JUSTICE BRENNAN
AND
THE BILL OF RIGHTS

by

David B. Brownhill

A thesis submitted in partial fulfillment of the requirement for the degree of

MASTER OF ARTS
in
HISTORY

Portland State University

1983

TO THE OFFICE OF GRADUATE STUDIES AND RESEARCH:

The members of the Committee approve the thesis of David B. Brownhill presented April 12, 1983.

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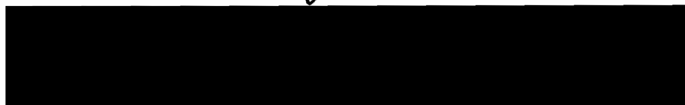

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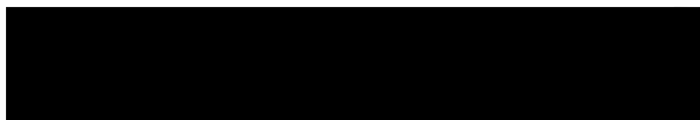

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TABLE OF CONTENTS

CHAPTER		PAGES
I	INTRODUCTION	1-5
II	HISTORICAL CONTEXT	6-12
III	FIRST AMENDMENT/FREEDOM OF RELIGION . . .	13-30
IV	FIRST AMENDMENT/FREE EXPRESSION	31-54
V	FIRST AMENDMENT/FREE EXPRESSION & OBSCENITY	55-72
VI	FIRST AMENDMENT/FREE EXPRESSION & LIBEL	73-82
VII	FOURTH AMENDMENT	83-102
VIII	FIFTH AMENDMENT	103-121
IX	SIXTH AMENDMENT	122-134
X	EIGHTH AMENDMENT	135-142
XI	CONCLUSION	143-145
BIBLIOGRAPHY		146-153

CHAPTER I

INTRODUCTION

President Dwight D. Eisenhower in the midst of the 1956 Presidential campaign telephoned Herbert Brownell, his Attorney General, and said, "Find me a Catholic real quick, Minton has retired."[1] Shortly thereafter, William J. Brennan, Jr., a distinguished Associate Justice of the New Jersey Supreme Court, was informed that he was President Eisenhower's choice to fill the seat on the United States Supreme Court vacated by the retirement of Associate Justice Sherman Minton.[2] His Congressional confirmation followed immediately, and he took his oath of office on October 16, 1956. He was then at the age of fifty the youngest member of the Court, and the first Catholic appointment since the death of Frank Murphy in 1949.

[1]William O. Douglas, The Autobiography of William O. Douglas: The Court Years, 1939-1975 (New York: Random House, 1980), p. 249. Given the impending election and the rising political star of John F. Kennedy, President Eisenhower was committed to getting "a young, liberal, Catholic Democrat" for political reasons.

[2]According to Francis P. McQuade and Alexander T. Kardos in "Mr. Justice Brennan and His Legal Philosophy," Notre Dame Lawyer, 33 (May, 1958), p. 324, Brennan attributed his appointment in part to the probable factors of "his interest in court reform and his advocacy of more enlightened trial procedures to avoid court congestion."

During his twenty-six years on the Court, Brennan has established himself as a judicial activist. He has espoused an expansive view of the Court's role in interpreting the Constitution. The guiding light of his activism has been liberalism.[3] Indeed, he was "the cutting edge of Warren Court liberalism."[4] In 1980, Frank I. Michelman wrote in tribute:

> No Justice in history, save Thurgood Marshall has stood as bravely and eloquently as has William Brennan for a thoroughly democratic vision of social justice and political liberty, in which status and opportunity are positively not allowed to depend upon accident of birth, background or economic fortune, nor upon conformity in matters of conscience, politics or association.[5]

While on the Court, Brennan's liberalism has evolved. During his formative years, his liberalism was best described as pragmatic, but over the years, particularly since 1969, it has become increasingly more idealistic.[6]

[3] Webster's New Collegiate Dictionary (1975 ed.) defines liberalism as "a political philosophy based on belief in progress, the essential goodness of man, and the autonomy of the individual and standing for the protection of political and civil liberties."

[4] Edward V. Heck, "Justice Brennan and the Heyday of Warren Court Liberalism," Santa Clara Law Review, 20 (Fall, 1980), p. 841.

[5] Frank I. Michelman, "A Tribute to Justice William Brennan," Harvard Civil Rights-Civil Liberties Law Review, 15 (Fall, 1980), p. 296.

[6] Webster's defines pragmatic as "relating to matters of fact or practical affairs often to the exclusion of intellectual or artistic matters: practical as opposed to idealistic." Conversely, it defines idealistic as "of or relating to the practice of forming ideals or living under their influence."

This evolution, however, is not complete. That is, while Brennan has moved toward an idealistic vision of liberalism, he has not completely abandoned a pragmatic one.

His Bill of Rights opinions[7] reflect his liberalism. In this area, he has revealed himself clearly as a civil libertarian by his preference for protecting the individual's liberties. Motivated by either his desire for democratic self-government, or his respect for personal privacy and human dignity, he has been a Court leader in the efforts to place an umbrella over the liberties of the individual vis-a-vis government intrusions. In this quest, he believes that the Court must take an active role. He declared that the special role assigned to the Supreme Court with respect to the Bill of Rights is to interpret it in such a way as to carry out the Framers' determination to prevent governmental oppression of individual liberties.[8] He draws upon history and legal precedent[9] as his primary

[7]This is a paper about civil liberties, not civil rights. There is a difference between the two. Civil rights are those rights of a citizen conferred by Congress such as the Civil Rights Acts of 1964, 1965, and 1968. Conversely, civil liberties are those liberties expressed in the Bill of Rights that guarantee the individual freedom from arbitrary governmental interference. In other words, civil liberties are a negation of governmental power.

[8]William J. Brennan, "Constitutional Adjudication," Notre Dame Lawyer, 40 (August, 1965), p. 559.

[9]He is not absolutely bound by precedent; nonetheless, he tended to respect it more than his libertarian, Warren Court Brethen.

tools in his attempt to carry out this special assigned role.

The evolution in Brennan's liberalism is evidenced in his evolving perception of civil liberty claims. Early on, he saw a great deal of "gray" in such claims, and used a balancing test to resolve them. His balance gave more emphasis to the individual's liberty vis-a-vis the proposed governmental policy reasons for abridging it. On the other hand, he employed an absolutist approach in cases in which the claim was presented in "black" and "white" terms. Over the years, as his liberalism has become more idealistic, he expanded this black and white area, and consequently, he has relied increasingly more upon an absolutist approach. In short, my thesis is that Brennan has moved increasingly toward an absolutist approach in the area of the Bill of Rights, but as of yet, not to the total disregard of balancing.

What factors lie behind this evolution? Three probable ones come to mind immediately. One, the change of guard between 1969 and 1975, from the libertarian Warren Court to the law-and-order Burger Court. Compared to Warren Court libertarians like Hugo L. Black, William O. Douglas, Arthur J. Goldberg, and Abe Fortas, Brennan seemed moderate. Conversely, in relation to Burger Court law-and-order stalwarts such as Chief Justice Warren E. Burger, and Justices Lewis F. Powell, William H. Rehnquist, Harry

Blackmun, and John Paul Stevens, Brennan appears radical. In fact, many of his most vigorous and passionate libertarian opinions in the past decade have been direct reactions to the Burger Court majority's law-and-order stance. Two, the breakdown of ethical consensus in contemporary America[10] has had a marked influence upon Brennan's growing tolerance of diversity in the areas of speech, belief, and lifestyle. Finally, the increasing absolutism, partly stimulated by this breakdown, in the scholarly studies Brennan has relied on. The effect of these studies is most obvious in his First Amendment decisions.

Edward V. Heck illuminates a fourth factor. He asserts that Brennan's evolution "may be. . .more the result of experience than a fundamental shift in his approach in constitutional adjudication."[11] According to him, Brennan's experience over the years has led to the diminishing of his confidence in the other governmental branches, as well as the lower courts, to give meaning to the Supreme Court decisions. Consequently, his approach has become more absolute in order to restrict the discretionary bounds in which trial judges, juries, and state legislatures can work out the fundamental principles announced by the Supreme Court.

[10]See G. Edward White, Patterns of American Legal Thought (New York & Oxford: Oxford University Press, 1978), pp. 167-172; and Tort Law in America: An Intellectual History (New York & Oxford: Oxford University Press, 1980), pp. 209-215.

[11]Heck, p. 876.

CHAPTER II

HISTORICAL CONTEXT

Justice Brennan's judicial product has not been formulated in a vacuum, but rather within the particular historical context encompassing his years on the Court studied here, 1956-1982.[1] The late 1950's witnessed the rapid decline in America's excessive Cold War fear of internal communism and political radicalism. While this fear receded into the background, liberalism moved to the forefront. Between 1960 and 1968, America experienced an unparalleled growth, in its history, of egalitarianism.[2] This growth,

[1]My outline is a synthesis of my readings on this period. These readings include: Charles C. Alexander, Holding the Line: The Eisenhower Era, 1952-1961 (Bloomington & London: Indiana University Press, 1975); Carl M. Brauer, John F. Kennedy and the Second Reconstruction (New York: Columbia University Press, 1977); John Lewis Gaddis, The United States and the Origins of the Cold War, 1941-1947 (New York: Columbia University Press, 1972); Jim F. Heath, The Decade of Disillusionment: The Kennedy/Johnson Years (Bloomington & London: Indiana University Press, 1975); J. Joseph Huthmacher, ed., The Truman Years: The Reconstruction of Postwar America (Hinsdale, Illinois: The Dryden Press, Inc., 1972); William Safire, Before the Fall: An Inside View of the Pre-Watergate White House (Garden City: Doubleday and Company, Inc., 1975); Milton Viorst, Fire in the Streets: America in the 1960's (New York: Simon and Schuster, 1979); and Theodore H. White, Breach of Faith: The Fall of Richard Nixon (New York: Atheneum Publishers, 1975).

[2]Webster's defines egalitarianism as "a belief in human equality esp. with respect to social, political, and economic rights and privileges."

however, waned in the late 1960's as frustration and disillusionment set in, and since 1968, America has reacted by shifting toward conservatism.[3] The purpose of this chapter is to outline the historical context in which Brennan has served on the Supreme Court.

The Cold War, pitting the United States and its Democratic way of life against the Soviet Union and its Communistic one, began even before the Second World War ended. One of its many initial consequences was the excessive fear of internal Communism and political radicalism that swept America in the decade after 1945. This fear, in turn, generated an anti-Communist crusade that was "compounded of a moderate element of intelligent concern for public security. . .and a very large component of emotionalism, irrationalism, and downright hysteria."[4] Alfred A. Kelly and Winfred A. Harbison outline the crusade's fundamental premise:

> It held that the American Communist Party, in cooperation with the Soviet Union, was engaged in a gigantic conspiracy to envelop the United States in a network of espionage, to penetrate

[3] _Webster's_ defines conservatism as "a political philosophy based on tradition and social stability, stressing established institutions, and preferring gradual development to abrupt change: a disposition in politics to preserve what is established."

[4] Alfred A. Kelly and Winfred A. Harbison, _The American Constitution: Its Origins and Development_, 5th Edition (New York: W. W. Norton & Company, Inc., 1976), p. 826.

> the government and pervert and paralyze American politics, and finally to destroy the American constitutional system in violent revolution.[5]

The crusade led to the adoption of an assortment of security and loyalty measures by the federal government and the states aimed at guarding against the dangers of an internal Communist conspiracy.

The "Red Scare" reached its apex in the early 1950's with the McCarthy era. In February 1950, Joseph McCarthy, an undistinguished junior Senator from Wisconsin, declared that he had a list of 256-known Communists in the State Department. Between 1951 and 1954, he conducted investigations and hearings, under the auspices of the Senate, to ferret out these Communists. It came to an abrupt end, however, after McCarthy's disastrous encounter with the brillant attorney Joseph Welch in the 1954 Senate hearings on Communism in the Army. In short, Welch revealed McCarthyism for what it was: a circus built on a foundation of fabrication. Overall, this unveiling did much to discredit America's excessive concern over Communist-controlled infiltration, subversion, and revolution.

In the late 1950's, as many Americans came to see its irrationality, the anti-Communist crusade burned itself out. While it was burning out, a powerful new egalitarian drive, the product of a myriad of forces, began to domi-

[5] Ibid., pp. 826-827.

nate the American way of life. The election of John F. Kennedy to the Presidency in 1960 marked its official beginning, and the assassinations of Martin Luther King, Jr. and Robert F. Kennedy in 1968 signalled its end. During these years, America's desire for egalitarianism was illustrated in Congress' enactment of four monumental pieces of legislation—the Civil Rights Act of 1964; the Economic Opportunity Act of 1964; the Voting Rights Act of 1965; and the Fair Housing Act of 1968. The Warren Court, meanwhile, continued to play the leading role it had assumed in 1954 in Brown v. Board of Education of Topeka, in realizing this desire.

During the 1960's, tens of thousands of Americans, many motivated by a desire for egalitarianism, took to the streets in protest. In the early part of the decade, their methods of protest, as mirrored in the freedom rides, the sit-ins, and the Martin Luther King led freedom marches, were ones of passive resistance or non-violent civil disobedience. But after 1965, the Johnson Administration escalated the United States' military involvement in Vietnam. Many Americans became frustrated and disillusioned, for they saw this escalation as an abandonment of liberalism. Their outrage was reflected in the protest movement's increasing use of violence. Indeed, the phrase "Fire in the Streets" aptly describes the historical period between 1965 and 1971. As they witnessed the Administration's offering

of their crusade for equality as a sacrificial lamb, many Black civil rights activists grew impatient with King's tactic of non-violent resistance, and accepted the violent means advocated by the "Black Power" movement. The "white" protest movement, concentrated exclusively by then against U.S. military involvement in Southeast Asia, likewise, became increasingly militant, as exhibited outside Chicago's 1968 Democratic National Convention. The protest movement and much of what it represented was defused by the rise of conservatism in the 1970's.

As frustration and disillusionment with liberalism hardened during the late 1960's, a sentiment of conservatism began to sweep the land. Indeed, since 1969, this sentiment has engulfed the American way of life. It was a major factor in the elections of Richard M. Nixon in 1968 and 1972, and Ronald Reagan in 1980. Moreover, it is illustrated in the Warren Court's law-and-order interpretation of the Bill of Rights.

Conservatism was so strong that it was able to withstand the shock of Nixon's "Imperial Presidency." During his years in the White House, Nixon, under the guise of the executive prerogative power, did much to undermine the credibility and respectability of the Executive Office. In June 1971, The New York Times and the Washington Post published the Daniel Ellsberg purloined Defense Department's "inside" account of U.S. military activities in

Southeast Asia. Prior to the publication of the so-called "Pentagon Papers," a special White House espionage unit dubbed the "Plumbers," in the name of national security, illegally tried to recover them; for Nixon regarded the "Papers" as a source of embarrassment to his administration. When these efforts failed, Nixon appealed to the courts in an unsuccessful attempt to suppress their publication. While his actions in this instance were questionable, they arguably were impeachable in connection with the Watergate Crisis. In June 1972, agents of the White House, acting on direct orders, staged a break-in of the Democratic National Committee's Washington, D.C. headquarters located at the Watergate apartment complex. After it came to the public's attention in February 1973, Nixon publicly prevaricated about his administration's involvement in the break-in and the subsequent coverup conspiracy. Later, he formally refused to comply with a court addressed subpoena ordering him to produce a series of tape recordings of his private conversations with the White House staff, covering the period from June 20, 1972 to April 15, 1973. Finally, he resigned as President on August 9, 1974, to avoid impeachment by the Congress for his complicity in the Watergate coverup.

Justice Brennan's position with respect to the Bill of Rights has evolved within this historical context. An understanding of that context is critical, for his position

is partially a product thereof, at least, to the extent that the cases were shaped within that context and brought before the Supreme Court for resolution. Moreover, Brennan revealed a consciousness of the context in a number of cases. A prime example of this is his dissenting opinion in _Walker v. City of Birmingham_ (1967). Therein, he wrote, "we cannot permit fears of 'riots' and 'civil disobedience' generated by slogans like 'Black Power' to divert our attention of what is here at stake."[6] In the next eight chapters, I intend to shed light on this evolution through an examination of Brennan's Bill of Rights opinions.

[6] _Walker v. City of Birmingham_, 87 S.Ct. 1824 (1967), p. 1647.

CHAPTER III

FIRST AMENDMENT/
FREEDOM OF RELIGION

The further breakdown of ethical consensus in contemporary America[1] is an underlying factor in the evolution of Brennan's judicial product. This breakdown has led increasingly toward a type of ethical relativism: what constitutes "ethical" or "propriety" depends upon the respective individual's view of it. Over the years, Brennan's decisions, partly fueled by this breakdown, have exhibited a growing toleration, indeed appreciation, for diversity in speech, belief, and lifestyle. In this chapter and subsequent ones, I intend to discuss its possible implications upon his First Amendment opinions.

The Founding Fathers wrote the guarantee of religious freedom into the First Amendment's Establishment and Free Exercise Clause. Brennan views freedom of religion as one of the most precious values in American society. He contends that governmental involvement in the establishment of religion, and/or its curtailment of the free exercise thereof, must be strictly guarded against. He points out,

[1]There is some scholarly debate over when the breakdown actually began, but one thing is certain, it continued during the 1960's and 1970's.

however, that not every interaction between religion and government is per se unconstitutional. As one who tolerates religion as broadly as possible,[2] Brennan argues that the free exercise principle should be dominant whenever the two clauses are in tension. He wrote, "the two clauses, although distinct in their objectives and their applicability, emerged from a common panorama of history"[3]: the Founding Fathers determination to make government and religion independent of each other. There are at least three distinct schools of thought that influenced the Founding Fathers in drawing a separating line[4] between the government and religion: the evangelical; the Jeffersonian; and the Madisonian. Laurence H. Tribe describes these three schools in the following passage:

> first, the evangelical view (associated primarily with Roger Williams) that 'worldly corruptions . . .might consume the churches if sturdy fences against the wilderness were not maintained'; second, the Jeffersonian view that the church should be walled off from the state in order to safeguard secular interests (public and private) 'against ecclesiastical depredations and incursions'; and,

[2]To some degree, Brennan's Catholicism possibly figures with regard to his toleration of religion.

[3]School District of Abbington Township v. Schempp, 83 S.Ct. 1560 (1963), p. 1577.

[4]Brennan does not subscribe to the doctrinaire "wall" metaphor as a description of the separation characterizing religion-government relations. Rather, he views the separation in terms of an "elusive" line that requires clarification.

> third, the Madisonian view that religion and secular interests alike would be advanced best by diffusing and decentralizing power so as to assure the competition among sects rather than dominance by any one.[5]

Brennan subscribes to the latter. He holds that the realization of both government's and religion's high purposes is contingent on keeping the two separate. Over the years, consonant with his shift toward absolutism, his determination to keep them apart has increased.

The breakdown of ethical consensus underlies his freedom of religion opinions. According to G. Edward White, "religious dogma was a major source of (America's) shared communal values (prior to 1850)."[6] This source, however, has diminished since then with the rise of industrialization and urbanization. Consequently, theological explanations were supplanted in the second half of the nineteenth century by scientific and secular ones, and, also, in the twentieth century by social science ones. The 1960's and 1970's phase of this breakdown, moreover, "fostered a strong interest in identifying one's own personal

[5]Laurence H. Tribe, American Constitutional Law (Mineola, New York: The Foundation Press, Inc., 1978), pp. 816-817. Also, see Mark DeWolfe Howe, The Government and The Wilderness: Religion and Government in American History (Chicago and London: The University of Chicago Press, 1965), for a more detailed account of the influence of the evangelical and Jeffersonian views.

[6]White, Patterns of American Legal Thought, p. 167.

convictions (and values),"[7] which in turn, has led to a greater diversification of religious practices in America. Tribe asserts, "religion in America, always pluralistic, has become radically so in the latter part of the twentieth century."[8]

The issue of religious services in the public schools was, and still is, controversial in the United States. In the cases of Engel v. Vitale (1962) and School District of Abbington Township v. Schempp (1963), the Supreme Court declared that the recitation of the New York State Board of Regent's recommended twenty-two word "non-sectarian" prayer in the public schools, and Pennsylvania's law requiring that at least ten verses from the Holy Bible be read daily without comment in its public schools, violated the Establishment Clause. Brennan joined in the majority opinion in Engel, but wrote a concurring opinion in Schempp because of his "great uneasiness that the Court's injunction of strict neutrality between religion and non-religion might have too wide a sweep in banning 'every vestige of cooperation between religion and government, however slight.'"[9] In his 74-page concurring opinion, he argued

[7] White, Tort Law in America, p. 213.

[8] Tribe, p. 826.

[9] Kelly and Harbison, p. 976.

that the Founding Fathers intended in the Establishment Clause "to end the extension of civil government's support of religion in a manner which made the two in some degree interdependent."[10] In a quest to honor this intention,[11] he adopted and applied Justice Robert H. Jackson's test for determining whether a particular exercise violated the Clause. He summarized the test as follows:

> the Clause enjoins those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends where secular means would suffice.[12]

He concluded that Pennsylvania's law clearly represented a form of involvement that violated the Establishment Clause, for it employed the public schools, an organ of government, for essentially religious purposes (i.e., the inculcation of Christian values).

Schempp is illuminating because it implicates the

[10] Schempp, p. 1577.

[11] According to M. Howe's interpretation, Brennan does not rely heavily upon the Founding Fathers' original understanding with respect to the religion clauses. Howe argued in The Garden and The Wilderness that their original understanding was best expressed in the evangelical view, and that the Supreme Court had distorted it by relying almost exclusively upon the Jeffersonian view. While his argument is appealing, it is incomplete. Granted, some of the Founding Fathers were influenced by the evangelical view, but others undoubtedly were influenced by the Jeffersonian view. In short, both are correct, and aptly expressed in the Madisonian view as adopted by Brennan.

[12] Schempp, p. 1576.

breakdown of ethical consensus. Underlying Brennan's opinion is his objection to the state involving itself in the inculcation of Christian values, particularly, considering the fact that many of the students and their parents were not of the Christian faith. Furthermore, many of those who were Christian did not completely agree with the particular values and doctrines enunciated. In short, Brennan thinks that the individual is afforded freedom of conscience (i.e., the right to believe as he wishes) by the First Amendment, and that the government is banned from tampering with this freedom in most contexts, including the area of religious belief or non-belief.

Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church (1969), presented the Supreme Court with the question whether the courts could resolve a church property dispute which turned on doctrinal differences. In 1966, two local Presbyterian Churches in Savannah, Georgia, voted to withdraw from the general church on doctrinal grounds. After a commission of the general church took over the administration of the local churches, the latter bypassed appeals to higher church authorities and sued in state court to enjoin the mother church from interfering with their exclusive use and control of the local church properties. The general church cross-claimed for similar injunctive relief. The Georgia Supreme Court granted the Blue Hull Church custody of the

property on the ground that the United States Presbyterian Church had departed from established church doctrine.[13] Brennan, speaking for the majority, reversed based on the principle that civil courts must defer resolution of all ecclesiastical questions to a religion's internal decision-making organs. He declared that "it is of course true that the State has a legitimate interest in resolving property disputes, and that a civil court is a proper forum for that resolution."[14] He stated, however, that the Establishment Clause "severely circumscribes the role that civil courts may play in resolving church property disputes."[15] He contended that it prevented the courts, as an agency of the government, from playing a role in resolving church property disputes that turned on resolution of ecclesiastical questions. He concluded that this case required the courts to resolve such questions, and as a result, the Georgia Supreme Court holding could not stand under the Establish-

[13]These departures from established church doctrine included such actions as the ordination of women ministers, the making of pronouncements on civil matters, the support of steps to end Bible reading in the schools, and the teaching of neo-orthodoxy alien to the Confession of Faith and Cathechism as originally adopted by the general church. These departures, moreover, reflect the Presbyterian Church of U.S.A.'s attempts to articulate some new religious consensus as a means of curbing its further breakdown.

[14]Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 89 S.Ct. 601 (1969), p. 605.

[15]Ibid., p. 606.

ment clause. Indeed, he held that any application of a departure-from-doctrine test by a civil court resolving a dispute over property was forbidden by the religion clauses. He commanded both parties to restructure their dispute so as to require the civil courts to resolve only non-ecclesiastical questions.

In 1969, Chief Justice Earl Warren retired, thus signalling the end of the Warren Court era, and in his stead, President Nixon appointed Warren E. Burger. On the whole, the Burger Court has continued the Warren Court's strict separationist stand on the interaction of religion and government. Chief Justice Burger, however, did not embrace this stand, but rather, unsuccessfully attempted to win majority support for his compromise approach between separationist and accommodationist positions.[16] His approach initially revealed itself in _Walz v. Tax Commission of the City of New York_ (1970). Speaking for the Court, he held that New York's statute exempting churches from real property taxes did not violate the Establishment Clause. The fact that such exemptions dated back to colonial times and existed, with various modifications, in every state and the District of Columbia weighed heavily in his decision, as well as in Brennan's concurrence. In his opinion, Brennan conducted an examination of the his-

[16] Kelly and Harbison, p. 995.

tory, purpose, and operation of real property tax exemptions for religious organizations in order to determine whether such exemptions breached the Establishment Clause. Against the background of this examination, he concluded that they did not breach the Clause, for they did not (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends where secular means would suffice. He supported this decision by stating that "the principle effect of the tax exemptions was to carry out secular purposes—the encouragement of public service activities and of a pluralistic society."[17] He further stated that "the means employed by churches to carry on their public services. . .are the same means used by any other purely secular organization—money, human time and skills, physical facilities."[18] Finally, he wrote, "all churches by their existence contribute to the diversity of association, viewpoint, and enterprise so highly valued by all of us."[19]

[17] Walz v. Tax Commission of the City of New York, 90 S.Ct. 1409 (1970), p. 1424.

[18] Ibid., p. 1424.

[19] Ibid., p. 1424. Citation of this contribution is in line with Brennan's broader adherence to the political foundation of the First Amendment. In short, he believes that tax exemptions for churches furthers the "self-governing powers" of the American people.

The issue of federal and state appropriations for private sectarian schools has come, in various forms, before the Burger Court. This issue increasingly drew the public's attention, and indeed after 1967, it became the dominant "establishment" question. Brennan consistently has held that such aid violates the Establishment Clause, for it, at the very least, indirectly benefits the schools' sectarian purposes. In Lemon v. Kurtzman (1971), the question was raised whether three state statutes providing for direct subsidies from public funds for secular activities carried on by sectarian educational institutions violated the Establishment Clause. The Court held that they violated the Clause, for they involved "excessive entanglement" between church and state.[20] In a concurring opinion, Brennan examined the purpose and operation of the particular statutes in order to ascertain whether they breached the Establishment Clause. Against this background, he concluded that they, unlike property tax exemptions in Walz, violated the Clause because they failed to pass muster under the three-factor test—secular purpose, primary secular effect, and absence of excessive entangle-

[20]The risk posed by the statutes for political division along religious lines figured in the Court's judgement. The "excessive entanglement" standard derived from the third prong of the Jacksonian test, and it reflected the strong separationist stance associated primarily with Justices Black and Douglas.

ment—applied by him.[21] He asserted that the statutes impermissibly involved the States and the Federal Government with essentially religious activities of sectarian educational institutions, and that each government used essentially religious means to serve governmental ends, where secular means would suffice. He proclaimed that when aid flows directly to the sectarian institution the function of religious instruction benefits. He wrote, "the statutes require 'too close a proximity' of government to the subsidized sectarian institutions and in my view create real dangers of 'the secularization of a creed.'"[22]

Prior to 1975, Brennan had always applied the three-factor test in Establishment Clause cases; however, in Meek v. Pittenger (1975), he expressly added a fourth—the political divisiveness factor. He added this factor because the conflict over the issue of public appropriations for private sectarian schools threatened to divide the elec-

[21]Public education is a key to understanding why he distinguishes the two cases. In Walz, he justified his decision by claiming that church property tax exemptions encourage churches to carry out public service activities. In Lemon, however, he infers that public education is not one of those activities. In short, it is the function of the state, not religious institutions. Another key is history. Brennan argued in Walz that history overwhelmingly showed that property tax exemptions for churches were an accepted form of interaction between government and religion. Conversely, in Lemon, he claims that history reveals that public subsidy of sectarian schools is not an acceptable form of interaction.

[22]Lemon v. Kurtzman, 91 S.Ct. 2105 (1971), p. 2129.

torate along religious lines. Organized religion, in particular, heavy Catholic populations in the Northeastern states, were seeking economic resources for their private schools through the political arena. According to Brennan, the factor had been added without express recognition by the Court in Lemon.[23] The factor guarded against excessive political entanglement of government and religion along religious lines. Brennan declared that "political division along religious lines was one of the principle evils against which the First Amendment was intended to protect."[24] Relying upon the factor, he concluded that all the provisions in Pennsylvania's law providing for state expenditures in connection with the education of students

[23]In Lemon, Burger predicted that "continuing financial pressure on nonpublic schools would, because of the annual nature of appropriations, generate considerable and recurring political activity to maintain, if not increase state aid. Since the vast majority of nonpublic schools are church affiliated, lobbying would inevitably be mounted along religious lines." He declared that "this probability that religious partisanship would intrude into the political arena could not be tolerated." According to Tribe, American Constitutional Law (1978), p. 867, the Court's reliance upon the political-divisiveness test in Lemon, Committee for Public Education v. Nyquist (1973), and Meek is "best understood as limiting the political role of organized religion when it seeks institutional power or economic resources for itself, but not when it seeks to persuade others of its views on public issues."

[24]Meek v. Pittenger, 95 S.Ct. 1753 (1975), p. 1769. It can not be reiterated enough that Brennan subscribes to the political foundation view of the First Amendment. In this particular case, he believes that the possibility of political division along religious lines can not be tolerated, for it is a threat to the normal political process and the realization of the "self-governing powers."

in nonpublic schools violated the Establishment Clause.

In 1971, the Maryland legislature enacted a statute that authorized the payment of noncategorical grants to private colleges awarding more than just seminarian or theological degrees; 5 of the 17 institutions receiving funds under the program in 1971 were religiously affiliated. In response to Lemon and other Supreme Court decisions prohibiting certain types of aid to parochial schools the legislature amended the statute in 1972 to ban the use of money for "sectarian purposes." In Roemer v. Board of Public Works of Maryland (1976), the Supreme Court upheld the constitutionality of the grants despite the aided colleges' formal affiliation with the Roman Catholic Church on the ground that they did not have the "primary effect" of advancing religion. In a dissenting opinion, Brennan stuck to his strict view of the Establishment Clause with respect to appropriations to religiously affiliated schools. The strict view, or as Tribe defines it—"the remote-indirect-and-incidental standard"—compels a more searching inquiry than the "primary effect" test, and comes closer to the absolutist no-aid approach to the Establishment Clause. Recalling his concurrence in Lemon, he declared that it is "pure fantasy" to assert that the religious mission of the schools does not benefit in some direct or indirect way by aid to "secular" aspects of a church-related school. He argued that the law "exposes State money for use in advanc-

ing religion."[25] He declared that "the discrete interests of government and religion are mutually best served when each avoids too close proximity to the other."[26] He believes that it is not only the nonbeliever who benefits from keeping the two separate, but also the devout believer.[27] He wrote:

> It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon government.[28]

He concluded that the Statute breached the Establishment Clause because it required "too close a proximity" between government and religion.

In the companion cases of McGowen v. Maryland (1961), Two Guys From Harrison-Allentown v. McGinley (1961), Braun-

[25] Roemer v. Board of Public Works of Maryland, 96 S.Ct. 2337 (1976), p. 2356.

[26] Ibid., p. 2357. This statement echoes, as Tribe describes, "a Madisonian concern that secular and religious authorities not interfere excessively with one another's respective spheres of choice and influence, lest both government and religion be corrupted, the political system strained 'to the breaking point,' and liberty of conscience ultimately compromised."

[27] This belief is a perfect reflection of Brennan's liberalism in the area of religious freedom. In The Garden and The Wilderness, Howe claimed that placing the believer and non-believer on an equal plane vis-a-vis the religious clauses, as Brennan does, mirrors the Warren Court's tendency to make equality the central objective of constitutional government. He argued, however, that this placement is an imprecise reading of the clauses' historical intent.

[28] Roemer, p. 2357.

feld v. Brown (1961), and *Gallagher v. Crown Kosher Supermarket* (1961), the Supreme Court addressed the constitutionality of Sunday Closing Laws. The Court held that the laws in question did not violate the First Amendment's guarantee of religious freedom and anti-establishment. Chief Justice Warren concluded that they regulated secular activities, not religious ones. Brennan joined in his decision in the first two cases, but dissented from his decision in the latter two. In *Braunfeld* and *Gallagher*, unlike in *McGowen* and *McGinley*, the emphasis shifted from anti-establishment to free exercise claims.

Brennan's dissent in *Braunfeld* covered both cases. The petitioner, a retailer who belonged to the Orthodox Jewish faith challenged the Pennsylvania laws, alleging that the enforced closing of his store on Sunday, combined with his voluntary closing on Saturday for religious reasons, would render him unable to continue his business. Brennan agreed with the majority's opinion that Pennsylvania's law did not violate the Establishment Clause, but he dissented from its view that it did not abridge the petitioner's right to practice his Jewish faith. He wrote, "religious freedom—the freedom to believe and to practice strange and, it may be foreign creeds[29]—has classically

[29]This statement reflects the greater diversification of religious practices that has characterized the latter part of twentieth century America.

been one of the highest values of our society."[30] He further wrote, "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of the governmental hand."[31] He claimed that the law penalized Braunfeld by placing him at a substantial competitive disadvantage with his non-Jewish competitors, for his religious faith compelled him to close his store on Saturday and the law forced him to close on Sunday. He stated that the law, in effect, made Braunfeld choose between his business and his religion.[32] Moreover, he contended that the law, like one declared unconstitutional in an earlier case, imposed a virtual tax on Braunfeld's right to exercise his religion. He thus concluded that it clearly breached the Free Exercise Clause.

Brennan's approach in freedom of religion cases reflects his determination to safeguard the high purposes of government and religion by keeping the two separate and independent of each other. His approach is consistent with

[30] Braunfeld v. Brown, 81 S.Ct. 1144 (1961), p. 1150.

[31] Ibid., p. 1152.

[32] In the face of free exercise claims, Brennan would declare all Sunday Closing Laws unconstitutional, for the "mere convenience of having everyone rest on the same day" is not a legitimate state interest to infringe religious freedom. On the other hand, he would not do the same in the face of anti-establishment claims as in McGowen and McGinley because the laws were, in spite of their religious origin, now primarily secular in character and purpose. In short, while the laws clearly did not serve to establish religion, they did inhibit the free exercise thereof.

the Madisonian view of the historical intent of the religion clauses. In his quest to honor this intent, he initially adopted and applied a three-factor test, and later, he added a fourth in anti-establishment cases. Against the background of this test, his opinions mirror a propensity to declare unconstitutional almost all acts that involve interaction between government and religion. Moreover, they reflect the breakdown of ethical consensus in contemporary America, and a movement toward an absolutist no-aid stance. In the cases of Schempp and Presbyterian Church (U.S.A.), he proclaimed that government support of prayer in the public schools, and judicial review of ecclesiastical questions breached the Establishment Clause. In Lemon, Meek, and Roemer, he declared that public subsidy of sectarian educational institutions infringed the Clause.

On the other hand, he announced in Walz that church property tax exemptions did not violate the Establishment Clause. At first glance, his decision seems to be an inconsistency; however, after scratching the surface, one finds that it is not. At the very least, Brennan views such exemptions as the lesser of two evils because they entail less entanglement than would taxation. Moreover, he looked at the history of such tax exemptions and found that they led to a greater free exercise of all forms of religious faith, not to an established church. In Braun-

feld, he claimed that the Sunday Closing Laws did not violate the Establishment Clause, for they served secular purposes. Conversely, he held that they abridged the individual's right to practice his religious faith.

Brennan argued in Roemer that the religion clauses protect both the non-believer and believer on equal terms. In Torcasco v. Watkins (1961),[33] the Supreme Court, speaking through Justice Black, held that a law requiring a declaration of belief in God as a condition of becoming a notary public was unconstitutional, for it placed that State "on the side of one particular sort of believers." Brennan joined in Black's opinion. In both cases, the non-believer and believer are placed on the same level in relation to the religion clauses. In sum, this placement illuminates Brennan's liberalism in the area of religious freedom and anti-establishment, for it reflects his proclivity to make equality the central objective of constitutional government.

[33] Torcaso v. Watkins, 81 S.Ct. 1680 (1961).

CHAPTER IV

FIRST AMENDMENT/ FREE EXPRESSION

The Meiklejohnian interpretation of the First Amendment's guarantee of free expression is the foundation of Brennan's approach in this area. He agrees with Dr. Alexander Meiklejohn's argument that in creating "a form of government under which they granted only some powers to the federal and state instruments they established," the American people exhibited a basic determination "to govern themselves rather than be governed by others."[1] He concurs that the guarantee of free expression "is the repository of these self-governing powers."[2] Finally, he acknowledges that freedom of expression absolutely protects from abridgement all forms of expression that fall within the category of subjects having "governing importance." These subjects included all expression which *directly* sustained and furthered the self-governing powers of the people. Over the years, Brennan has expanded the category of "self-governing subjects" beyond that outlined

[1] William J. Brennan, "The Supreme Court and the Meiklejohnian Interpretation of the First Amendment," *Harvard Law Review*, 79 (November, 1965), p. 11.

[2] *Ibid.*, p. 12.

by Meiklejohn[3] to include expression that may indirectly contribute to the knowledge of the electorate. This expansion, fueled partly by the increasing absolutism in the scholarly studies[4] he has relied upon and the breakdown of ethical consensus, mirrors Brennan's movement toward an absolutist position.

The companion cases of Barenblatt v. United States (1959) and Uphaus v. Wyman (1959) involved the relationship between the governmental investigatory function and the First Amendment. The Congressional investigatory power is implicit in the Constitution's grant of "legislative powers" to Congress. The power, however, is not unlimited. It can be exercised only to the extent that it is pertinent to the formulation of legislation. During the 1950's, Congress exercised this power in an effort to expose the Communist conspiracy. Barenblatt's conviction for contempt of Congress for refusing to answer questions before a House Un-American Activities subcommittee investigating communism in education pertaining to his past and/or present membership in the Communist Party gave birth to the former case.

[3]". . .free speech is protected by the first amendment as essential to intelligent self-government in a democratic system. As expounded by Alexander Meiklejohn, its most widely cited proponent, the theory would limit the special guarantees of the first amendment to public issues of civil importance." Tribe, p. 577.

[4]These scholarly studies include the writings and commentaries of Laurence H. Tribe, American Constitutional Law, and Thomas I. Emerson, The System of Freedom of Expression (New York: Vintage Books, 1970).

The Supreme Court sustained the conviction on the ground that the government's right to self-preservation in the face of Communist subversive activities was more important than Barenblatt's First Amendment rights. In a short dissenting opinion, Brennan declared that the purpose of the Congressional investigation was "exposure purely for the sake of exposure," and that this was not a valid purpose to which the government could subordinate Barenblatt's First Amendment rights.[5]

The origin of the latter case was Uphaus' conviction for contempt for refusing to answer questions or to produce certain documents for an anti-communist investigation into higher education conducted by the state of New Hampshire's attorney general under an authorizing resolution of the state legislature. As in Barenblatt, the Supreme Court affirmed the public's hysteria over the threat of a communist conspiracy by balancing away the individual's First Amendment rights in favor of the government's need for self-preservation. In another dissenting opinion, Brennan declared that the legislature's authorizing resolution clearly invaded Uphaus' constitutional rights of freedom of speech and assembly. He argued that the sole purpose of the legislative investigation in question was "exposure solely for the sake of exposure." He wrote:

[5] Barenblatt v. United States, 79 S.Ct. 1081 (1959), p. 1114.

> The investigation, as revealed by the report, was overwhelmingly and predominately a roving self-contained investigation of individual and group behavior, and behavior in a constitutionally protected area. Its whole approach was to name names, disclose information about those named, and observe that 'facts are facts.'[6]

He further argued that the State of New Hampshire was unable to show any state interest sufficient to subordinate Uphaus' constitutionally protected freedom of expression. In short, "exposure" was not "a valid legislative interest of the state." Consequently, he concluded, as in Barenblatt, that the conviction for contempt must be reversed.

The striking thing in both Barenblatt and Uphaus was that Brennan, the liberal, used the balancing test. The test was adopted and applied by conservatives in the post-World War II era as a means of realizing their political values of stability, order, and security.[7] Conservatives such as Justices Felix Frankfurter and John Marshall Harlan balanced civil liberty claims against proposed governmental policy reasons for abridging them. Giving more weight to governmental interests vis-a-vis those of the individual, they often ruled in favor of the government. Brennan balanced the same factors, but, unlike the conservatives, he, consistent with his libertarian concern for individual freedom and the open society, shifted the overburdening

[6] Uphaus v. Wyman, 79 S.Ct. 1040 (1959), p. 1056.

[7] Kelly and Harbison, pp. 825-826.

weight to the side of the individual. Over the years, reflecting his movement toward an absolutist position, he has increasingly added weight to the individual's side of the balance. Consequently, he almost always has decided in favor of the individual. Finally, his use of the test is an example of his pragmatic liberalism, in that, his method, in this case, was conservative, but his end was liberal.

In July 1963, Dr. Corliss LaMont was notified by the Post Office that, pursuant to section 305 of the Postal Service and Federal Employees Salary Act of 1962,[8] it was detaining an unsolicited copy of the Peking Review that had been addressed to him. LaMont promptly sued on First Amendment grounds. In LaMont v. Postmaster General of United States (1965), a unanimous Court held that section 305 was unconstitutional, for it placed a limitation on the addressee's First Amendment rights. In a concurring opinion, Brennan stated that in the absence of an overriding governmental interest, each person has an unconditional right of access to publications. He argued that "in the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which

[8]The act authorized the Post Office to detain and destroy mail that had been determined by the Postmaster General to be communist "political" propaganda, unless the mail was requested by the addressee or unless it was otherwise ascertained that delivery was sought.

are adequate for the purpose."[9] Furthermore, he asserted that "if the government wishes to withdraw a subsidy or privilege, it must do so by means and on terms which do not endanger First Amendment rights."[10] Finally, he drew an analogy between this practice and the practices of "the feared and hated" Communistic regimes from whence the propaganda emanated. He proclaimed:

> That the governments which originate this propaganda themselves have no equivalent guarantees only highlights the cherished values of our constitutional framework; it can never justify emulating the practice of restrictive regimes in the name of expediency.[11]

New York's loyalty program under the controverted Feinberg Law which, among other things, made membership in the Communist Party _prima facie_ evidence of disqualifica-

[9]_LaMont v. Postmaster General of United States_, 85 S. Ct. 1498 (1965), p. 1498. Brennan did not shut the door on governmental regulation of free expression in this area, nor did he explicitly outline what would constitute "a least intrusive regulation." One thing is certain though, Brennan believes that such a regulation can not cast the Postmaster General, indeed any Administrator, in the role of censor or "Big Brother," for he is not equipped to do so.

[10]_Ibid._, p. 1498. The right to access of publications is an implicit First Amendment right. Brennan pointed out that "the scope of the Bill of Rights extends beyond the enumerated guarantees to protect correlative interests without which the rights expressed would not be fully safeguarded." He concluded that "the right to receive publications is such an interest because the First Amendment's protection of the 'dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them.'"

[11]_Ibid._, p. 1498.

tion for appointment or retention in the public-school system came, for the last time, before the Court in Keyishian v. Board of Regents of the University of the State of New York (1967). The law was enacted in 1949, and sustained by the Vinson Court in the case of Adler v. Board of Education (1952). But by 1967, the anti-communist crusade had long ago burned out. Brennan, speaking for the Court, proclaimed that the "classroom is peculiarly the 'marketplace of ideas.'"[12] Indeed, he announced that "the Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers the truth 'out of a multitude of tongues, rather than through any kind of authoritative selection.'"[13] He asserted, therefore, that "the First Amendment does not tolerate laws that cast a pall of orthodoxy over the classroom."[14] And that since "First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[15] Against this background, he concluded that "New York's complicated and intrinsic scheme" clearly violated freedom of expression, and as such was unconsti-

[12] Keyishian v. The Board of Regents of the University of the State of New York, 87 S.Ct. 675 (1967), p. 683.

[13] Ibid., p. 683.

[14] Ibid., p. 683.

[15] Ibid., p. 684. For Brennan, "narrow specificity" means that government must define in extremely narrow and clear terms what it intends to regulate.

tutional.

In 1971, the Nixon Administration demanded that the Supreme Court enjoin two national newspapers, The New York Times and the Washington Post, from publishing "the contents of a classified study entitled 'History of United States Decision-Making Process on Vietnam Policy.'" In New York Times Company v. United States (1971), the Court refused the demand on the ground that the Administration had not met its burden of showing justification for imposition of prior restraint on publication of the "Pentagon Papers." The fact that all the Justices wrote opinions illustrates both the importance of the issue, and the public's justifiable interest in the study. Brennan wrote a separate concurring opinion to emphasize that "the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result."[16] He conceded, however, that there existed a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. He declared that

> our cases thus far indicated that such cases may arise only when the Nation 'is at war,' during which time 'no one would question but that govern-

[16] New York Times Company v. United States, 91 S.Ct. 2140 (1971), p. 2147. According to the Meiklejohnian interpretation, the historical study on Vietnam policy fell into the class of expression that had "governing importance." Therefore, Brennan afforded it absolute protection.

> ment might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number or location of troops.[17]

He concluded that since the nation was not at war,[18] the government's action constituted a prior restraint of the press that clearly violated the freedom of expression.

At issue in Broadrick v. Oklahoma (1973)[19] was the State of Oklahoma's statute forbidding "public" political activity[20] by state employees. The Supreme Court upheld the constitutionality of the statute on the ground that its overbreadth was not substantial. Brennan dissented. He argued that the statute was impermissibly vague because it failed "to provide the necessary 'sensitive tools' to carry out the 'separation of legitimate from illegitimate

[17]Ibid., p. 2147.

[18]In terms of the Constitution, Brennan did not look upon Vietnam as a war because United States' military involvement in Southeast Asia never was pursuant to a formal Congressional declaration of war. At most, the Tonkin Gulf Resolution of 1964 was an informal declaration, but in January 1971, Congress repealed it.

[19]Justices Lewis F. Powell and William H. Rehnquist had joined the Court in October, 1972. Along with Chief Justice Burger and Justice Harry A. Blackmun they combined to form a strong law-and-order bloc. After 1975, this bloc, although not always coherent, became the majority with the addition of Justice John Paul Stevens. In many cases, Brennan reacted to this bloc, thus, making his liberalism more pronounced.

[20]This activity included engaging in political-fund raising, belonging to any political party committee, being an officer or member of any partisan political club, running for any paid public office, or taking part in the management or affairs of any political party or campaign.

speech.'"[21] Consequently, according to him, the Act was "capable of application that would prohibit speech and conduct clearly protected by the First Amendment,"[22] and as such, it violated the guarantee of free expression.

In Columbia Broadcasting System, Inc. v. Democratic National Commission (1973), the Supreme Court held that the "public interest" standard of the Communication Act of 1934 did not require radio and television stations to sell broadcasting time for editorial advertising. Brennan wrote a dissenting opinion. He claimed that the principle at stake was one of fundamental importance, for it concerned the people's right to partake in vigorous debate through the broadcast media. He proceeded from the assumption, contrary to the Court, that "it is the right of the viewers and listeners, not the broadcasters, which is paramount."[23] He proclaimed that the First Amendment "itself testifies to our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen."[24] He argued that "'it is only through free debate and free exchange of ideas that govern-

[21] Broadrick v. Oklahoma, 93 S.Ct. 2908 (1973), p. 2924.

[22] Ibid., p. 2924.

[23] Columbia Broadcasting System, Inc. v. Democratic National Commission, 93 S.Ct. 2080 (1973), p. 2127. Furtherance of "self-governing powers" is contingent upon an informed public, i.e., viewers and listeners.

[24] Ibid., p. 2127.

ment remains responsive to the will of the people and peaceful change is effected.'"[25] Moreover, he asserted that this commitment to "uninhibited, robust, and wideopen" public debate is only realized if it is allowed to operate in an effective forum. The fact that in the 1960's thousands of Americans took to the streets to publicize their grievances seems to prevade his opinion. Indeed, he wrote:

> For our citizens may now find greater than ever the need to express their own views directly to the public, rather than through a governmentally appointed surrogate, if they are to feel that they can achieve at least some measure of control over their own destinies.[26]

A candidate for the Ohio General Assembly in the district including the city of Shaker Heights sought to purchase placard space on the vehicles of the city's Rapid Transit System. The system's advertising agent informed the candidate that although space was then available, the company's contract with the city forbade display of political messages. Indeed, the transit system had never accepted such advertisements, but had regularly accepted commercial ones, as well as messages for churches and public service organizations. In _Lehman v. City of Shaker Heights_ (1974), Justice Blackmun, speaking for a Court plurality, declared that the placard space was not a First Amendment forum; therefore, the refusal to accept political adver-

[25] _Ibid._, p. 2127.

[26] _Ibid._, p. 2123.

tisements did "not rise to the dignity of a First Amendment violation." Brennan, in a passionate dissent, held that the city's content-based ban violated the First and Fourteenth Amendments. He claimed that by accepting and displaying commercial and public service advertisements on its rapid transit system, the city opened a forum for communication. He declared that once a city created such a forum, it could not in accordance with free expression principles discriminate solely on the basis of subject matter or content. He concluded that the Court's "sanction of the city's preference for bland commericialism and noncontroversial public service messages over 'uninhibited, robust, and wide-open debate on public issues,'" in effect, reversed the traditional priorities of the First Amendment.[27]

In Greer v. Spock (1976), the Supreme Court upheld the constitutionality of federal military regulations which banned speeches and demonstrations of a political partisanship nature and prohibited distribution of literature, on a military base, in this case Fort Dix, New Jersey, without prior approval by headquarters. In a vigorous dissent, Brennan proclaimed that it is naive to believe that the military, given the fact that its interests and purposes are peculiarly affected by political affairs, is value-neutral; therefore, allowing candidates of all persuasions,

[27] Lehman v. City of Shaker Heights, 94 S.Ct. 2714 (1974), p. 2723.

including anti-military ones, to be heard on military bases might have a moderating effect on the inherent politicization of the military. In addition, he drew heavily upon an earlier precedent. In the earlier case of *Flower v. United States* (1972), the Court held that a peaceful leafleteer could not be excluded from the main street of a military installation to which the civilian public had been permitted virtually unrestricted access. Although the private parties in *Greer* included one of the nation's most vociferous opponents of the exercise of military power, Brennan argued that the two cases (i.e., *Flower* and *Greer*) could not be distinguished on First Amendment grounds. As a result, he concluded that the regulations as applied in *Greer* violated the First Amendment.

First National Bank of Boston v. Bellotti (1978) is one of the few cases in which Brennan sided with the government in the area of free expression. Moreover, the case illustrates, perhaps better than any other, his adherence to the Meiklejohnian interpretation. Justice Powell, writing for the majority, held that corporate expenditures in connection with referenda material was protected by the First Amendment. Brennan joined in Justice White's dissenting opinion. White argued that "the communications of profit-making corporations are not 'an integral part of the development of ideas, of mental exploration and the affirmation of self,'" nor do they "represent a manifestation

of individual freedom of choice."[28] He concluded:

> There can be no doubt that corporation expenditure in connection with referenda material to corporate business affairs falls clearly into the category of corporation activities which may be barred. The electoral process, of course, is the essence of our democracy. It is an arena in which the public's interest in preventing corporation domination and the coerced support by shareholders of causes with which they disagree is at its strongest and any claim that corporation expenditures are integral to the economic functioning of the corporation is at its weakest.[29]

One of the most controversial issues today is the relationship between a free press and fair trials. This issue was presented to the Court in the cases of Nebraska Press Association v. Stuart (1976)[30] and Richmond News-

[28] First National Bank of Boston v. Bellotti, 98 S.Ct. 1407 (1978), p. 1431.

[29] Ibid., p. 1439. Brennan believes that organized labor's use of fair share monies in connection with referenda material also is not afforded First Amendment protection, for it, like corporate expenditures, clogs the channels necessary for realization of the citizenry's "self-governing powers" by circumscribing individual freedom of choice. See Abood v. Detroit Board of Education, 97 S.Ct. 1782 (1977).

[30] The case grew out of a multiple murder in a small Nebraska town which immediately attracted widespread local, regional, and national coverage. A suspect, Erwin Charles Simants, was arrested and charged with murder of six members of a family in their home in connection with sexual assault. Before the preliminary hearing to determine whether Simants should be bound over for trial, the county judge on motion of the prosecution and defense counsel entered a broad restrictive order barring the publication of a vaguely defined category of information including all testimony and evidence introduced at the public preliminary hearing. The Supreme Court unanimously struck down the order on First Amendment grounds.

papers, Inc. v. Virginia (1980).[31] Brennan's approach is clear: he calls for an absolute rule that resort to prior restraints on the freedom of press is never a constitutionally permissible method of protecting the right to a fair trial. He wrote concurring opinions in both cases to emphasize this approach. In the former case, he wrote, "I unreservedly agree with Justice Black that 'free speech and fair trials are two of the most cherished policies of our civilization.'"[32] He asserted that

> Commentary and reporting on the criminal justice system is at the core of the First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.[33]

[31]On trial for the fourth time on the same murder charge, one John Stevens moved to close the courtroom to the public in order to prevent testimony from being relayed to remaining witnesses and to ensure that jurors did not obtain information about the case outside the courtroom. The judge granted the request. Richmond Newspapers, Inc. promptly sought to have the order vacated. The Court, in a plurality opinion, vacated the closure order because the judge had failed to "take the public character of the trial into account."

[32]Nebraska Press Association v. Stuart, 96 S.Ct. 2791 (1976), p. 2828.

[33]Ibid., p. 2816.

Moreover, he rejected the notion that a choice between the two values was necessary. He argued that "judges possess adequate tools short of injunction against reporting" by the press for relieving the tension between First and Sixth Amendment values.[34] He conceded that the available alternatives "may require greater sensitivity and effort on the part of the judges."[35] He concluded, however, "that sensitivity and effort is required in order to ensure the full enjoyment and proper accommodation of both First and Sixth Amendment rights.

In Richmond Newspapers, Brennan argued that the First Amendment secures a public right of access to a trial.[37] He argued that "the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republic system of self-govern-

[34]Ibid., p. 2828. These "adequate tools" include the trial judge's control over who will try the facts: he can eliminate potential jurors who exhibit a prejudice as a result of inflammatory news accounts; he can sequester jurors from one another, and from prejudicial news reports; and finally, if necessary, he can change the venue of the trial.

[35]Ibid., p. 2828.

[36]Ibid., p. 2828.

[37]Like the right of access to publications, the public right of access to a trial emanates from the penumbras of the First Amendment. See note 9, supra.

ment."[38] He claimed that "under our system, judges are not mere umpires, but, in our own sphere, lawmakers—a coordinate branch of government."[39] He asserted, therefore, that the trial was a genuine governmental proceeding. Because he believes that "valuable public as well as civic behavior must be informed,"[40] he concluded that public access to trials is essential to maintaining public confidence in the administration of justice.

The striking thing in Richmond is Brennan's use of the term "structural role." The model of "Structual Justice," as described by Tribe, "seeks to achieve such ends as human freedom not through any one characteristic structure of choice, but through that combination of structures that seems best suited to those ends in a particular context."[41] For Brennan, the structural role of the First Amendment seeks freedom of expression through the combination of structures best suited to realizing the republic system of self-government. The fact that this sounds like the Meiklejohnian interpretation is not by coincidence. In short, Brennan borrowed Tribe's term "structural role" because it clearly defined his established view, consonant

[38] Richmond Newspapers, Inc. v. Virginia, 100 S.Ct. 2814 (1980), p. 2833.

[39] Ibid., p. 2828.

[40] Ibid., p. 2828.

[41] Tribe, pp. 1137-1146.

with Meiklejohn, that the First Amendment rights of speakers and listeners to communicate freely do not exist solely to protect the intrinsic value of self-expression, but also to preserve the process of self-government—the retention of meaningful control over government through public discussion of its operation.

The city of San Diego, in its campaign of beautification, enacted an ordinance that totally banned billboards. In _Metromedia, Inc. v. City of San Diego_ (1981), a Supreme Court plurality, using a bifurcated approach, held that San Diego's ban of noncommercial billboards violated free expression, but that its ban of commercial ones did not. Brennan wrote a concurrence to register his objection to the majority's bifurcated approach. He proclaimed that its distinction between commercial billboards and noncommercial ones created First Amendment problems at least as serious as those raised by a total ban. He wrote:

> In individual cases, this distinction is anything but clear. Because making such determinations would entail a substantial exercise of discretion by city's officials, it presents a real danger of curtailing noncommercial speech in the guise of regulating commercial speech.[42]

He believes that this danger is indeed real because cities are not equipped to make decisions "based on the content of speech."[43] Moreover, he argued that San Diego was un-

[42] _Metromedia, Inc. v. City of San Diego_, 101 S.Ct. 2882 (1981), p. 2907.

[43] _Ibid._, p. 2908.

able to show that a sufficiently substantial interest was furthered by the total ban.[44] Thus, he concluded, unlike the plurality, that the ordinance's ban of commerical and noncommercial billboards was unconstitutional.

Board of Education, Island Trees, Etc. v. Pico (1982) grew out of the respondents' claim that the school board's removal of nine books[45] from the shelves of the local Junior High School and High School violated their First Amendment rights. Brennan, speaking for a three-member plurality, balanced the school board's legitimate interest in controlling the curriculum and the classroom against the individual's First Amendment right to the free access to information and ideas.[46] On the one hand, he wrote:

[44]Notice that Brennan is balancing. He balanced the city of San Diego's interest in creating a "beautiful" environment against the guarantee of free expression, and determined that this interest was not compelling enough to abridge the guarantee. Why did he balance? The answer lies in the fact that billboards are not of real "governing importance." Indeed, one would be hard pressed to show that they are.

[45]The Board of Education characterized the removed books as "anti-American, anti-Christian, anti-Semitic, and just plain filthy." These books were Slaughter House Five by Kurt Vonnegut, Jr.; The Naked Ape, by Desmond Morris; Down These Mean Streets, by Piri Thomas; Best Short Stories by Negro Writers, edited by Langston Hughes; Go Ask Alice, of anonymous authorship; Black Boy, by Richard Wright; A Hero Ain't Nothin' But a Sandwich, by Alice Childress; Soul on Ice, by Eldridge Cleaver; A Reader for Writers, edited by Jerome Archer, and The Fixer, by Bernard Malamud.

[46]Brennan generally balances in cases involving minors because he believes that the First Amendment does not afford them the full protection it does adults. See pages 65-66.

> local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values,' and that 'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.[47]

But, on the other hand, he wrote, "the Constitution protects the rights to receive information and ideas (as) an inherent corrolary of the rights of free speech and press."[48] He resolved the conflict by focusing on the intent of the school board. "Local school boards must discharge their 'important, delicate, and highly discretionary functions,'" he proclaimed, "in a manner that comports with the transcendent imperatives of the First Amendment."[49] Echoing the Meiklejohnian interpretation, he declared that they

> may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.[50]

He thus remanded the case to the lower courts for re-hearing in accordance with the "political intent" test.

Pico is striking, for it illuminates many of the factors underlying Brennan's First Amendment approach. One,

[47] *Board of Education, Island Trees, Etc. v. Pico*, 102 S.Ct. 2799 (1982), p. 2806.

[48] *Ibid.*, p. 2808.

[49] *Ibid.*, pp. 2806-2807.

[50] *Ibid.*, p. 2810.

the "political intent" test sounds quite similar to the Meiklejohnian "self-governing importance" test. Two, his statement that the government may not prescribe what shall be orthodox in politics, nationalism, religion, etc., is the fundamental belief in his First Amendment approach. And, three, this statement reflects the breakdown of ethical consensus.

In numerous contexts, Brennan has addressed the First Amendment's guarantee of freedom of association. Writing for the Court, Brennan held in _National Association For the Advancement of Colored People v. Button_ (1963), that Virginia's ban against "the improper solicitation of any legal or professional business"[51] to include the NAACP's legal activities abridged the First Amendment. He argued that its activities were modes of expression and association protected by the First Amendment. He wrote:

> The basic aims and purposes of the NAACP are to secure the elimination of all racial barriers which deprive Negro citizens of the privileges and burdens of equal citizenship rights in the United States. To this end the association engages in extensive educational and lobbying activities. It

[51]As part of its program of "massive resistance" to school desegregation, the Virginia legislature in 1956 made it a misdemeanor for any person or organization not having a pecuniary right or liability in a lawsuit to solicit legal business for itself or any attorney. Brennan did not shut his eyes to the legislature's motivation of opposition and resentment of the civil rights movement spearheaded, at that time, by the NAACP. Moreover, in this regard, he exhibited a consciousness of the historical context.

> also devotes much of its funds and energies to an extensive program of assisting certain kinds of litigation on behalf of its declared purposes.[52]

He claimed, therefore, "in the context of NAACP objectives, litigation is not a technique of resolving private differences," but rather, "a means for achieving the lawful objectives of equality of treatment" by all levels of government "for all members of the Negro community in this country."[53] In other words, he concluded that it was a form of political expression. This litigation, according to him, made "possible the distinctive contribution of a minority group to the ideas and beliefs of our society."[54] He proclaimed that there was no doubt that the First Amendment protects certain forms of orderly group activity. He concluded that the NAACP's litigation definitely fell within that area of protection.

In Cousins v. Wigoda (1975), Brennan, speaking for the Court, held that the National Democratic Party and its adherents enjoyed a constitutional right of political association under the First Amendment. He wrote:

> There can no longer be any doubt the freedom of association with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and

[52] National Association for the Advancement of Colored People v. Button, 83 S.Ct. 328 (1963), p. 331.

[53] Ibid., p. 336.

[54] Ibid., p. 337.

> Fourteenth Amendments. The right to associate with the political party of one's choice is an integral part of the basic constitutional freedom.[55]

He argued that Illinois could show no compelling state interest justifying its injunction against the seating of the pro-Daley delegates at the National Democratic Convention in 1972;[56] consequently, he declared that the injunction violated the First Amendment's guarantee of freedom of association.

In Elrod v. Burns (1976), noncivil service employees of the Cook County, Illinois, Sheriff's office brought a class action suit alleging that they were fired or threatened with dismissal for the sole reason that they were not affiliated with or sponsored by the political party of the current sheriff. In a plurality opinion, Brennan held that the plaintiffs stated a valid claim for deprivation of constitutional rights secured by the First Amendment. He argued that the practice of patronage dismissals clearly infringed the First Amendment rights of noncivil service employees. He declared that the practice was justified only when the government could show that it furthered some governmental end. He declared that the Sheriff's office could not do so.

[55] Cousins v. Wigoda, 95 S.Ct. 541 (1975), p. 547.

[56] An Illinois appellant court upheld a lower court's order preventing the 1972 Democratic convention from replacing certain delegates elected in conformity with Illinois law, but in violation of a party rule forbidding slatemaking.

In sum, Brennan's approach in these cases reflect his belief that the guarantee of free expression fosters the values of democratic self-government. His means hinge on whether a form of expression is of "governing importance" or not. If it is, he has used an absolutist approach, and if it is not, he has employed a balancing test which, consistent with his libertarianism, gives more weight to the individual's right or the public right to know vis-a-vis the governmental policy reasons for abridging it. Of the cases considered, his scale shifted in favor of the government only twice. In _Bellotti_ and _Abood_, it did so because of his view that corporate expenditures and organized labor's use of fair share monies in connection with referenda material subverts the proper working of the political process. In the next two chapters, I will examine Brennan's efforts in two equally critical free expression areas: obscenity and libel. Furtherance of "self-governing" powers, likewise, is the motivating force in his obscenity and libel opinions.

CHAPTER V

FIRST AMENDMENT/ FREE EXPRESSION & OBSCENITY

Prior to 1973, the Meiklejohnian influence was obvious in Brennan's opinions concerning the interrelationship between free expression and obscenity laws. In these cases, he adopted and applied a "redeeming social value" test. This test was, as he admitted, a qualification of the "self-governing importance" test. In 1973, however, he rejected it, except in a narrow class of instances, in favor of a more absolutist approach. The breakdown of ethical consensus, in particular the "sexual revolution" of the 1960's and 1970's, is possibly an underlying factor in his rejection of this test in the area of obscenity.

In a series of cases between 1957 and 1973, Brennan, by his own admission, unsuccessfully endeavored to formulate a comprehensive legal definition of obscenity and a statement of the interrelationship between free expression and obscenity laws. He laid the groundwork for this unsatisfactory formula in the seminal case of _Roth v. United States_ (1957). At issue in _Roth_ was the constitutionality of a long-standing federal statute which provided for postal censorship of obscene materials. Brennan, speaking for

the Court, held that the law did not violate the First Amendment. He contended that "the unconditional phrasing of the First Amendment was not intended to protect every utterance."[1] He argued that "the protection given speech and press was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[2] Looking at the implicit history of the First Amendment, he determined that obscenity was rejected "as utterly without redeeming social importance."[3] He thus concluded that obscenity clearly fell outside the First Amendment's area of protection. He then proceeded to formulate a legal definition of obscenity. He avoided the overly-broad definition that sex and obscenity were necessarily synonymous. Rather, he defined obscene material as "material dealing with sex in a manner appealing to (the) prurient interests"[4] of the average person in the community. Finally, he proclaimed that the test in each case, applying contemporary community standards, was "the effect of the book, picture or publication considered as a whole."[5]

[1] Roth v. United States, 77 S.Ct. 1304 (1957) p. 1308.

[2] Ibid., p. 1308.

[3] Ibid., p. 1309.

[4] Ibid., p. 1310.

[5] Ibid., p. 1312.

In *Kingsley Books, Inc. v. Brown* (1957), the Court upheld the constitutionality of a New York State statute permitting a temporary injunction at the instance of a municipal official, followed by a prompt trial at which, if the matter involved is held to be obscene, a permanent injunction against its possession or sale will be issued and the defendant ordered to surrender all copies to the sheriff for destruction. Brennan, dissenting, held that the statute was inconsistent with *Roth* because it did not afford the defendant a jury trial. He contended that the jury, representing a cross-section of the community, had "a special aptitude for reflecting the view of the average person."[6] He concluded, therefore, that it provided "a peculiarly competent application of the (*Roth*) standard of judging obscenity."[7]

At issue in *Smith v. People of the State of California* (1959) was whether a Los Angeles obscenity law, dispensing with the element of scienter (i.e., knowledge of the book's contents) and imposing strict criminal liability on booksellers for possessing obscene material, violated the First Amendment. Writing for the Court, Brennan concluded that it did, for it had a tendency to inhibit constitutionally protected expression. He argued that it was

[6] *Kingsley Books, Inc. v. Brown*, 77 S.Ct. 1335 (1957) p. 1331.

[7] *Ibid.*, p. 1331.

impossible for a bookseller to inspect all the books on his shelves to determine whether they are obscene or not. He thus declared that the ordinance's strict liability feature had the effect of seriously depleting the number of non-obscene books available on the booksellers' shelves; thereby, restricting the public's access to constitutionally protected reading matter.

In Marcus v. Search Warrants of Property, Etc. (1961), the Court, through Brennan, held that Missouri's particular use of the search and seizure power[8] to suppress obscene publications involved abuses inimical to protected expression. He asserted that the line between legitimate and illegitimate speech was finely drawn, and as such called for sensitive tools. He concluded that "mass seizure in the fashion of this case was effected without any safeguards to protect legitimate expression."[9]

[8] A Missouri law provided that if a written complaint is made under oath to a judge or magistrate which states "positively and not upon information of belief," or which states facts from which the judge finds "probable cause" to believe, that obscene material is being kept in a designated place, the judge shall issue a warrant directed to any police officer to search the premises and "to seize and bring before such judge or magistrate the personal property therein described.

[9] Marcus v. Search Warrants of Property, Etc., 81 S. Ct. 1708 (1961), p. 1719. Approximately 11,000 copies of 280 alleged obscene publications were seized pursuant to a judge issued warrant. Two months later, a judge found that only 100 of the 280 publications were in fact obscene; thus, 180 nonobscene publications, some of which were magazines saleable only when current, were kept from the stands.

At issue in Manual Enterprises, Inc. v. Day (1962) was postal suppression of three magazines devoted primarily to portrayal of nude males. The Court held that it violated the First Amendment. In a concurring opinion, Brennan disposed of the case by announcing that the Postmaster General could not employ any process of his own to close the mails to material he considers obscene, for Congress' Comstock Act[9] did not confer such a power upon him. Moreover, reflecting his general hostility to administrative censorship,[10] he wrote:

> Congress could constitutionally authorize a noncriminal process in the nature of a judicial proceeding under closely defined procedural safeguards. But the suggestion that Congress may constitutionally authorize any process other than a fully judicial one immediately raises the gravest doubts.[11]

In short, Brennan would declare unconstitutional any Congressional authorization of noncriminal administrative censorship.

In 1956, the Rhode Island legislature created a Commission to "Encourage Morality in Youth" with a generous mandate to educate the public on questions of obscene pub-

[9] Enacted in 1873, the Comstock Act made it a federal criminal offense to transport obscene materials through the mails. It authorized the Postmaster General to close the mails only after a determination of obscenity had been made in a criminal prosecution of the sender.

[10] See page 36, note 9, supra.

[11] Manual Enterprises, Inc. v. Day, 82 S.Ct. 1432 (1962), p. 1453.

lications and to investigate and recommend prosecutions. In a continuing series of official letters, the Commission informed wholesale distributors that enumerated books and magazines had been declared by a majority Commission vote to be objectionable for sale, distribution, or display for youths under 18. Bantam Books, Inc. brought suit alleging that the Commission's intimidating methods constituted a violation of its First Amendment rights. In _Bantam Books, Inc. v. Sullivan_ (1963), Brennan, speaking for the majority, held that the Commission's activities, in an attempt to regulate obscene publications, inhibited the circulation of publications that fell within the First Amendment's area of protection. "It is characteristic of the freedoms of expression in general," he claimed, "that they are vulnerable to gravely damaging yet barely visible encroachments."[12] He thus declared that "regulation of obscenity . . .must be ringed about with adequate bulwarks"[13] in order to ensure the larger principle of free expression. He concluded that the Commission's activities failed to erect such bulwarks, and as such violated the First Amendment.

[12] _Bantam Books, Inc. v. Sullivan_, 83 S.Ct. 631 (1963) p. 637.

[13] _Ibid._, p. 637. "Adequate bulwarks" for Brennan, consist of any means of regulating obscenity that does not infringe in any way upon legitimate forms of expression. His standard for adequacy was extremely high, particularly, for consenting adults.

Jacobellis v. Ohio (1964) grew out of a state criminal conviction for exhibiting an allegedly obscene movie, "Les Amants." In a plurality opinion, Brennan proclaimed that the issue of the proper standard for determining whether material is obscene "has been subject to much discussion and controversy since our decision in Roth seven years ago."[14] He conceded that the Roth definition of obscenity was imperfect, but reaffirmed nonetheless his commitment to it for want of a more workable one. He then proceeded to clarify the meaning of the standard. He declared that "a work cannot be prescribed unless it is 'utterly' without social importance."[15] In addition, he clarified the "prurient interest" test by adding a new ingredient—the deviation from society's standards of decency. He wrote:

> It should be recognized that the Roth standard requires in the first instance a finding that the material 'goes substantially beyond customary limits of such matter.'[16]

Furthermore, he contended that it was incorrect to read the

[14] Jacobellis v. Ohio, 84 S.Ct. 1676 (1964), p. 1680. This statement reflects the growing fragmentation within the Court over the issue of obscenity.

[15] Ibid., p. 1680. The Court majority split on this point; thereby, accounting for the plurality. Black and Douglas stuck to their absolutist approach against regulation of obscenity, thus removing the need to define it. On the other hand, Justice Potter Stewart clung to his visceral "I know it when I see it" test that defined obscenity simply as "hard-core pornography."

[16] Ibid., p. 1680.

"contemporary community standard" aspect as requiring a determination of obscenity by "the standards of the particular local community from which the case arises."[17] Rather, he stated that the standard required a determination on the basis of a national standard. "It is, after all," he asserted, "a national Constitution, we are expounding."[18] Relying on his clarification of the Roth standard, he held that the movie was not obscene, for it was not "utterly without social importance," and as such the conviction for showing it must be overturned.

Writing the Court opinion in A Quantity of Copies of Books v. Kansas (1964), Brennan, drawing heavily upon Marcus, held that the procedures followed in issuing a warrant for the seizure of allegedly obscene books, and authorizing their impounding pending a hearing, violated the First Amendment because they did not adequately protect against the suppression of nonobscene books. "Constitutionally protected expression," he declared, "is often separated from obscenity by a dim and uncertain line."[19] He proclaimed, therefore, that the First Amendment "requires a procedure 'designed to focus searchingly on the issue of

[17] Ibid., p. 1680.

[18] Ibid., p. 1682.

[19] A Quantity of Copies of Books v. State of Kansas, 84 S.Ct. 1723 (1964), p. 1726.

obscenity.'"[20]

Brennan added a new element to his standard of determining obscenity in _Ginzburg v. United States_ (1966). Speaking for the Court, he declared that evidence of "pandering in production and sale and publicity with respect to publications"[21] was relevant in determining the ultimate question of obscenity. "The question of obscenity," he wrote, "may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity."[22] He asserted that, although the accused publications were not in themselves obscene, "exploitation of interests in tiitillation of pornography through pervasive treatment or desription of sexual matters may support the determination"[23] to the contrary. He concluded that Ginzburg's "sole emphasis was on the sexually provocative aspects of his publication."[24] Consequently, he sustained Ginzburg's criminal conviction under the federal Comstock Act.

[20] _Ibid._, p. 1726.

[21] Among the evidence in the present case was the fact that Ginzburg had first sought mailing privileges for one of the publications from the post offices in Intercourse and Blue Ball, Pennsylvania, and had later obtained them from the postmaster in Middlesex, New Jersey.

[22] _Ginzburg v. United States_, 86 S.Ct. 942 (1966), pp. 44-45.

[23] _Ibid._, p. 950.

[24] _Ibid._, p. 947.

In *Mishkin v. New York* (1966), a companion case to *Ginzburg*, the Court, through Brennan, applied the new notion of pandering to sustain the conviction of a New York publisher for violating the state's obscenity law. Furthermore, he clarified the "average person" facet of the *Roth* "prurient interest" test. He wrote, the material must be assessed "in terms of the sexual interests of its intended and probable recipient group."[25]

The Massachusetts Supreme Court held that *Fanny Hill*, the notorious eighteenth-century book recounting a prostitutes intimate sexual experiences, was obscene and thus subject to censorship. In *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts* (1966), Brennan, speaking for a Court majority, declared that the lower court's holding was erroneous. Summarizing the development of his standard for determining obscenity, he wrote:

> it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[26]

He declared that these three elements must coalesce in order for a work to be declared obscene. He concluded that

[25] *Mishkin v. New York*, 86 S.Ct. 958 (1966), p. 964.

[26] *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts*, 86 S.Ct. 975 (1966), p. 977.

the book, even though it failed when judged against the first two criteria, was not obscene because it was not without redeeming social value; at the very least, it had a modicum of literary and historical value.

Ginsberg was convicted under a New York obscenity law[27] for selling a sixteen-year-old boy two "girlie magazines containing pictures of female nudes. He petitioned the Supreme Court to overturn his conviction on the ground that the statute violated the First Amendment. In Ginsberg v. New York (1968), Brennan, speaking for the Court, denied Ginsberg's petition, for the law did not violate the First Amendment. Conceding that the magazines were not obscene for adults, he contended, however, that the State possesses the power to adjust the definition of obscenity for minors because it retains an inherent interest in their well-being. He concluded that the law's "definition of obscenity on the basis of its appeal to minors under 17 had a rational relation to the objective of safeguarding such minors."[28]

[27]The statute made it unlawful for any person to sell to minors under seventeen years of age any picture of similar representation "which depicts nudity, sexual conduct, or sado-masochistic abuse and which is harmful to minors," or any book or other printed matter which contains similar material "or explicit or detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole is harmful to minors."

[28]Ginsberg v. New York, 88 S.Ct. 1274 (1968) p. 1274.

Thomas I. Emerson sheds light on this delicate aspect of the obscenity problem. He supports the differentiation between adults and minors vis-a-vis the First Amendment. He asserts that the First Amendment does not afford minors the full protection it does adults because they "(are) not permitted that measure of independence, or able to exercise the maturity of judgment, which a system of free expression rests upon."[29] For want of a better test, he recommends a due process one—that the restriction be a reasonable one. He issued a caveat, however, that the restriction pertaining to minors must not infringe upon an adult's First Amendment rights.

By 1973, Brennan had become so frustrated in his endeavor to formulate a perfect definition of obscenity, that he denounced it outright as an exercise in futility. One possible, underlying factor in his sudden abandonment of this endeavor was the fact that ethical consensus regarding what constituted "obscene" was breaking down with the so-called "sexual revolution" of the 1960's and 1970's. This revolution has led, in part, to greater discussion of sexual matters and practices which, in turn, has desensitized many Americans to matters once considered obscene; thereby, making them nonobscene. In short, "obscene" has become increasingly a relative term requiring individual

[29]Thomas I. Emerson, The System of Freedom of Expression (New York: Vintage Books, 1970), pp. 496-497.

definitions of it, not a societal one. Perhaps reflecting this, Brennan simply came to the conclusion that the vexatious line between obscenity and other sexually oriented but constitutionally protected expression was "too dim and too uncertain"; thereby, defying attempts to define it. Thus, he extricated himself from this constitutional quagmire by moving toward, but not unconditionally embracing, the absolutist approach.

This shift toward absolutism revealed itself, for the first time, in his dissenting opinion in Paris Adult Theatre I v. Slaton (1973), a companion case to Miller v. California (1973). In Miller, a Burger Court majority reshuffled the previously laid-down cards, many of which came from Brennan's hand, concerning the regulation of obscenity. The majority reaffirmed the Roth principle that obscenity is not afforded First Amendment protection, rejected the Memoirs "utterly without redeeming social value" test, and adopted Justice John Marshall Harlan's earlier view that in determining whether a work is obscene courts may apply state standards of candor and offensiveness rather than national ones. In capsulized form, Burger wrote:

> A finding of obscenity will now turn on (a) whether 'the average person, applying contemporary community standards' would find the work taken as a whole, appealing to prurient interests; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c)

> whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[30]

Brennan's dissent in Slaton covered both cases. In a remarkably frank confession, he announced that "our experience with the Roth approach has certainly taught us that the outright suppression of obscenity cannot be reconciled with the fundamental principle of the First Amendment."[31] He wrote:

> After 16 years of experimentation and debate, I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today (in Miller), can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between protection of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials.[32]

He asserted that "the concept of 'obscenity' cannot be defined with sufficient specificity and clarity * * * to prevent substantial erosion of protected speech."[33] Contrary to the absolutist approach, he stuck to his view that the government may suppress "sexually oriented materials on the basis of their allegedly 'obscene' contents" in instances involving "distribution to juveniles and obtru-

[30] Miller v. California, 93 S.Ct. 2607 (1973).

[31] Paris Adult Theatre I v. Slaton, 93 S.Ct. 2628 (1973), p. 2647.

[32] Ibid., p. 2647.

[33] Ibid., p. 2657.

sive exposure to unconsenting adults."[34] But in all other instances, he concluded "the First and Fourteenth Amendments prohibit the State and Federal Government from attempting wholly to suppress" such materials.[35]

In the early afternoon of October 30, 1973, a New York City radio station (WBAI) licensed to the Pacifica Foundation broadcast a prerecorded monologue by the comedian George Carlin as part of a discussion of contemporary attitudes toward language. The monologue, entitled "Filthy Words," repeated a variety of colloquialisms or seven words which Carlin quipped could never be said on public airwaves. Just before airing the skit, the program's host advised listeners that the record contained "sensitive language which might be regarded as offensive to some." Five weeks later, the Federal Communications Commission received a complaint about the program from a listener who had heard the broadcast while driving with his fifteen-year-old son. The FCC thereafter issued an order banning future broadcasting of the monologue because of its use of indecent

[34]*Ibid.*, p. 2662. This qualification separates Brennan from the absolutists such as Black and Douglas. Moreover, this qualification concurs with Emerson's theory on the problem of obscenity. See Emerson, pp. 502-503: "Dissemination of erotic materials to those who voluntarily choose to read or see them would be protected under the First Amendment. Forcing such material upon individuals who did not want them, or did not want their children to have them, or upon the public at large, would be prohibitable."

[35]*Ibid.*, p. 2662.

language. In _Federal Communications Commission v. Pacifica Foundation_ (1978), the Supreme Court, through Justice Stevens, upheld the FCC's order. Brennan filed a vigorous and passionate dissent. He wrote:

> I find the Court's misapplication of fundamental First Amendment principles so patent, and its attempt to impose its notion of propriety on the whole of the American people so misguided that I am unable to remain silent.[36]

He argued that acceptable words or expression vary according to differing socio-economic backgrounds. In this context, he viewed the Court's decision as "another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking."[37] He concluded that this "acute ethnocentricism," in effect, inhibited those broadcasters desiring to reach those people who were not members of the dominant culture. He agreed wholeheartedly with the Court's contention that the Bill of Rights guaranteed "an individual's right 'to be let alone' when engaged in private activity within the confines of his own home."[38] He

[36] _Federal Communications Commission v. Pacifica Foundation_, 98 S.Ct. 3026 (1978), p. 3047.

[37] _Ibid._, p. 3055. His abhorence of forced cultural conformity is a statement of his idealistic vision of liberalism. Moreover, it may derive, in part, from the breakdown of ethical consensus (i.e., the movement toward ethical relativism).

[38] _Ibid._, p. 3048.

argued, however, that "the radio is undeniably a public medium" which does not "implicate fundamental privacy interests."[39] Listening to the radio, according to him, is a voluntary act to partake in an ongoing public discourse. Since it is voluntary, he declared, the individual can change the channel or turn it off, if the discourse is found to be offensive. In other words, he believes that a radio broadcast can never constitute an "obtrusive exposure to an unconsenting adult."

In New York v. Ferber (1982), the Court unanimously upheld a New York criminal statute banning the distribution of nonobscene material depicting sexual conduct by children. The case grew out of the 1978 criminal conviction of Paul Ferber, the proprietor of a Manhattan bookstore specializing in sexually oriented products, for selling two films devoted almost exclusively to depicting young boys masturbating, to an undercover police officer. In a concurring opinion, Brennan clung to his "view (expressed in Slaton) that, in the absence of exposure, or particular harm to juveniles or unconsenting adults that State lacks power to suppress sexually oriented materials."[40] Since the case brought one of his excepting criteria—particular harm to juveniles—into play, he applied the "utterly with-

[39] Ibid., p. 3048.

[40] New York v. Ferber, 102 S.Ct. 3348 (1982), p. 3365.

out social value" test. Considering the harm to juveniles posed by the production and distribution of the films, he claimed that their "tiny fraction" of "serious literary, artistic, scientific, or medical value" did not justify striking down the statute.

In sum, Brennan initially relied upon the "redeeming social value" test in obscenity cases. Later, perhaps fueled partly by the breakdown of ethical consensus, he rejected it, except in a narrow class of instances, in favor of a more absolutist approach because the line between obscene and legitimate expression defies clear definition. Underlying this rejection is his condemnation of self-censorship deriving from official action that "creates a zone of uncertainty into which only the hardiest, not necessarily wisest, will dare to enter for fear of crossing the boundary from licit to illicit speech."[41] In addition, the fact that obscene expression neither advances or retards the citizenry's self-governing powers is a critical factor behind this rejection. Conversely, libelous expression is not neutral. Thus, Brennan has continued to rely upon the "social value test" in libel cases. Moreover, his distaste of self-censorship is particularly evinced in these cases. In the next chapter, I intend to examine his efforts in this area.

[41] Arthur J. Goldberg, "Mr. Justice Brennan and the First Amendment," Rutgers-Camden Law Journal, 4 (Fall, 1972), p. 12.

CHAPTER VI

FIRST AMENDMENT/
FREE EXPRESSION & LIBEL

In 1964, Brennan embarked on his attempt to formulate a standard defining the interrelationship between the First Amendment and libel laws. New York Times v. Sullivan (1964) is the seminal case. The case required the Court to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct. It had its origin in an advertisement published in The New York Times charging the police and city commissioners of Montgomery, Alabama, with instituting an "unprecedented wave of terror" in their attempt to suppress various desegregation activities. Significantly, several of the statements in the advertisement were erroneous, at least in detail, and a Montgomery city commissioner had promptly sued the newspaper for libel. Brennan, writing for an unanimous Court, contended that the case must be considered "against the background of a profound national commitment to the principle that debate on public issues should uninhibited,

robust, and wide-open."[1] He further contended that public debate "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[2] "Erroneous statement is inevitable in free debate," he wrote, consequently, "it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need * * * to survive."[3] He argued, however, that the First Amendment did not protect all erroneous statements. An erroneous statement that was libelous, according to him, fell outside the area of protected expression. He defined a libelous statement as one made "with knowledge that it was false or with reckless disregard of whether it was false or not." He concluded that the defendant's claim of libel was unjustified, for he failed to show "actual malice" on the part of the publisher.

A district attorney's conviction under the Louisiana Criminal Defamation Statute for remarks critical of judges in his district initiated the case of Garrison v. Louisiana (1964). Brennan, speaking for the Court, held that the New York Times rule limited state power to impose criminal sanctions for criticism of the official conduct of public officials. He asserted that debate on public issues must

[1] New York Times v. Sullivan, 84 S.Ct. 710 (1964), p. 721.

[2] Ibid., p. 721.

[3] Ibid., p. 721.

be uninhibited, and that "utterances honestly believed" must be protected because they "contribute to the free interchange of ideas and the ascertainment of truth."[4] He contended that just because "speech is used as a tool for political ends does not automatically bring it under the mantle of the Constitution."[5] "The knowingly false statement and the false statement made with reckless disregard of the truth," he proclaimed, "do not enjoy constitutional protection."[6] He wrote:

> Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[7]

The origin of Rosenblatt v. Baer (1966) was a newspaper columnist's criticism of the operation of a State recreation center and ski resort of which Baer had been supervisor. Baer brought suit for libel, alleging the column had imputed mismanagement and peculation to him. In a plurality opinion, Brennan declared that the New York Times rule applied "to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of

[4] Garrison v. Louisiana, 85 S.Ct. 209 (1964), p. 215.

[5] Ibid., p. 216.

[6] Ibid., p. 216.

[7] Ibid., p. 216.

governmental affairs." He argued that in the field of libel, "there must be evidence showing that the attack was read specifically directed at the plaintiff."[8] He contended that "criticism of government is at the very center of the constitutionally protected area of free discussion."[9] He concluded that "criticism of those responsible for government operations must be free, lest criticism of government itself be penalized."[10]

In _Time, Inc. v. Hill_ (1967), Brennan, speaking for the Court, ruled that the _New York Times_ standard applied to a privacy suit. The case grew out of the publication by _Life_ magazine of a series of pictures taken from a play that portrayed in fictionalized fashion an incident in which escaped convicts had invaded the Hill home and held the members of the family captive for nineteen hours. The _Life_ story identified the play as based originally on the Hill family's experience, but failed to make clear its fictionalized character. Even though the _Life_ story contained nothing libelous or disgraceful in any way concerning the Hill family, Hill nonetheless promptly sued the publishers of the magazine for invasion of his privacy under a New York Civil Code forbidding such invasions for commer-

[8] _Rosenblatt v. Baer_, 86 S.Ct. 669 (1966), p. 542.

[9] _Ibid._, p. 676.

[10] _Ibid._, p. 676.

cial purposes. Brennan argued that "the exposure of self to others in varying degrees is a concomitant of life in a civilized community."[11] He further argued that this was particularly so "in a society which places a primary value on freedom of speech and of press."[12] He concluded:

> We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to non-defamatory matter.[13]

Hill is an illuminating case, for it brought about a conflict between two libertarian values—free expression and privacy.[14] Brennan believes that the former, echoing the Meiklejohnian interpretation, is "the essence of democratic self-government," and that the latter is an implicit right secured by the Bill of Rights.[15] While both are

[11] _Time, Inc. v. Hill_, 87 S.Ct. 534 (1967), p. 542.

[12] _Ibid._, p. 542.

[13] _Ibid._, p. 542.

[14] As pointed out earlier, Brennan's Bill of Rights efforts are motivated by either his desire for democratic self-government, or his respect for personal privacy.

[15] In _Griswold v. Connecticut_ (1965), the Court established a new constitutional "right to privacy." Brennan joined in Douglas' majority opinion. Therein, Douglas wrote, "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Such penumbras guaranteeing zones of privacy for the individual lie around the guarantees of the First, Fourth, Fifth, and Ninth Amendments as protection against all governmental invasions of the sanctity of a man's house."

precious, the former is more so. Indeed, for Brennan, free expression is the most precious of all the Bill of Rights' guarantees.

In Rosenbloom v. Metromedia, Inc. (1971), Brennan took a significant step toward the absolute immunization of the news media from libel judgments. The case presented the question whether the New York Times knowing-or-reckless-falsity rule was applicable in a state civil libel action brought by a private individual for an erroneous statement uttered in a news broadcast by a radio station. In a plurality opinion, Brennan held that it did apply. He argued that "drawing a distinction between 'public' and 'private' figures makes no sense in terms of the First Amendment guarantees."[16] Instead, he claimed that a distinction between events of public concern and those not of public concern was a more meaningful one, for it considers both the public's need to know and the individual's interest in privacy. He contended that "voluntary or not, we are all 'public' men to some degree."[17] He concluded that "we honor the commitment to robust debate on public issues * * * by extending constitutional protection to all discussion and communication involving matters of public or general concern."[18]

[16] Rosenbloom v. Metromedia, Inc., 91 S.Ct. 1811 (1971), p. 1821.

[17] Ibid., p. 1822.

[18] Ibid., p. 1820.

In Gertz v. Robert Welch, Inc. (1974), the Court overturned Brennan's decision in Rosenbloom with respect to drawing a distinction between "public and private" figures. In a dissenting opinion, Brennan reaffirmed his commitment to Rosenbloom. He wrote:

> We strike the proper accommodation between avoidance of media self-censorship and protection of individual reputations only when we require states to apply the New York Times knowing-or-reckless-falsity standard in civil libel actions concerning media reports of the involvement of private individuals in events of public or general interest.[19]

In February 1973, the CBS documentary program "Sixty Minutes" carried a segment entitled "The Selling of Colonel Herbert," narrated by Mike Wallace and produced and directed by Barry Lando. Lieutenant Colonel Anthony Herbert, a war hero suddenly relieved of his battalion command in Vietnam, had publicly accused his superior officers of covering up American atrocities. The broadcast segment juxtaposed filmclips of Wallace's interviews with Herbert and his detractors in a manner casting doubts on Herbert's accusations. Herbert promptly sued Lando, Wallace, and CBS for libel. In Herbert v. Lando (1979), Brennan agreed with the majority's rejection of respondents' claim that an "editorial privilege" shields from discovery information that would reveal respondents' editorial process. He di-

[19] Gertz v. Robert Welch, Inc., 94 S.Ct. 2997 (1974), p. 1821.

verged from it, however, by holding that "the First Amendment requires predecisional communication among editors to be protected by an editorial privilege."[20] This privilege must yield, he conceded, when "a public figure plaintiff is able to demonstrate to the prima-facie satisfaction of a trial judge that the libel in question constituted defamatory falsehood."[21] He asserted that the Founding Fathers valued liberty both as an end and as a means. "In its instrumental aspect," he proclaimed, "the First Amendment serves to foster the values of democratic self-government."[22] He declared that "it is a great mistake to understand this aspect of the First Amendment solely through the filter of individual rights."[23] In short, he concluded:

> An editorial privilege would thus not be merely personal to respondents, but would shield the press in its function 'as agents of the public at large.' The press is the necessary representative of the public's interest in this context and the instrumentality which effects the public's right.[24]

Brennan's statement that the First Amendment's instrumental aspect is understood best through more than the filter of individual rights is certainly a striking one. For him, the First Amendment does more than confer individ-

[20] Herbert v. Lando, 99 S.Ct. 1635 (1979), p. 1651.

[21] Ibid., p. 1651.

[22] Ibid., p. 1653. Speaking in terms of "governing importance" reflects his commitment to the Meiklejohnian interpretation.

[23] Ibid., p. 1654.

[24] Ibid., p. 1656.

ual rights. In its instrumental aspect, it protects both the individual's right to speak and the public's right to know. The public's right to know is the basis of his approach in libel cases. Indeed, in this area, he attaches more importance to this right than the individual's right to speak. Of course at times, the two rights mirror one another. As Tribe asserts, however,

> the right to know at times means more: it may include an individual's right to acquire desired information or ideas free of governmental veto, undue hinderance, or unwarranted exposure. Such a right to know may entail no correlative right in any particular source to originate the communications.[25]

Moreover, this statement echoes the Meiklejohnian interpretation. Brennan wrote, "(t)hese powers which (Meiklejohn) labelled powers of 'governing importance,' are concerned, not with a private right, but with a public power, a governmental responsibility."[26]

In sum, Brennan continues to adhere to a "redeeming social value" test in the area of libel. He does so because he believes that calculated falsehoods or a wanton disregard for the truth, works to the detriment of democratic self-government. Indeed, he thinks that they could lead to its downfall. Of interest in the cases considered, however, is the fact that he did not sustain a single libel

[25]Tribe, pp. 675-676.

[26]Brennan, "The Meiklejohn Interpretation," p. 12.

judgment. Thus, though his approach in this area is not absolute, his results tend to be.

The Meiklejohn interpretation of the First Amendment is the skeletal framework of Brennan's free expression approach. Like Meiklejohn, he believes that the First Amendment absolutely protects expression of "governing importance." Over the years, he has fleshed out this skeleton by bringing expression of "social value" into the contours of this absolute protection. This fleshing out process was fueled partly by the breakdown of ethical consensus, and by the increasing absolutism in the scholarly studies he has relied upon such as the writings of Emerson and Tribe. Emerson's influence is clearly evidenced in the area of obscenity.

CHAPTER VII

FOURTH AMENDMENT

American criminal procedure is outlined in the Fourth, Fifth, and Sixth Amendments. The conceptual basis for Brennan's efforts in this area is threefold: (1) a deep commitment to the values of individual liberty as embodied in the right of personal privacy[1] and human dignity; (2) the value of a neutral and detached magistrate[2]; and (3) the spectre of "police state" activity and an indignation at the police cutting corners. Over the years, Brennan's approach in this area has become increasingly rigid and absolute in favor of the individual. A number of factors underly this movement. One, prior to his appointment to the Supreme Court, Brennan had shown an interest in, and indeed had advocated more enlightened criminal and trial procedures.[3] This interest carried over to his efforts in the area of criminal procedure. Two, the change of guard between 1969 and 1975, from the libertarian Warren Court to the law-and-order Burger Court is a pronounced

[1] See page 77, note 15, supra.

[2] Stephen J. Friedman, "Mr. Justice Brennan: The First Decade," Harvard Law Review, 80 (November, 1966), p. 7.

[3] See page 1, note 2, supra.

factor. It is reflected in the fact than many of Brennan's most passionate libertarian opinions are direct reactions to the Burger Court's law-and-order stance. Finally, the breakdown of ethical consensus to the extent that it "stimulated a concern with personal values"[4] may have somehow influenced Brennan to give greater emphasis to the protection of individual liberties against governmental intrusions. In the next three chapters, I will examine his criminal procedure opinions.

The Fourth Amendment does not forbid all searches and seizures, but only unreasonable ones. Thus, the operative word in Fourth Amendment cases is "unreasonable." Brennan believes that it absolutely bans all unreasonable searches and seizures. He holds, furthermore, that the exclusionary rule is part and parcel of it, and as such it bars the use of evidence obtained through unreasonable means in court.[5] Paying strict attention to the contextual reality in each case, he balances the individual's proposed Fourth Amendment right against the policy reasons advanced by the government in order to ascertain whether the search in question is reasonable. Consistent with his liberalism, his

[4] White, Tort Law in America, p. 213.

[5] Everyone does not agree with him on this point. In fact, conservative, law-and-order Justices such as Powell and Rehnquist believe otherwise. Valuing community stability and order, they contend that the Fourth Amendment does not necessarily forbid the use of illegally obtained evidence at trial. See United States v. Calandra, 94 S.Ct. 613 (1974) and United States v. Peltier, 95 S.Ct. 2313 (1975).

balance gives more weight to the individual's right to privacy. Indeed, over the years, he has tipped this scale increasingly in favor of the individual. Thus, in most cases he has determined that the search is unreasonable, and thus has decided in favor of the individual.

Concluding that it could not prosecute Abel, a suspected spy, the Federal Bureau of Investigation informed the Immigration and Naturalization Service that he was an illegal alien. Upon investigation, the Service found that he was subject to deportation, and arrested him. Following his arrest, the FBI, pursuant to the Hotel's permission, searched Abel's former room and seized a hollow pencil containing a "cipher pad." Later, Abel was brought to trial and convicted for conspiracy to commit espionage. His motion to suppress the FBI seized evidence on Fourth Amendment grounds was denied. In <u>Abel v. United States</u> (1960), the Supreme Court, denied his motion and upheld his conviction. Brennan, in a dissenting opinion, held that the search and seizure violated the Fourth Amendment, for it concentrated too much power in the hands of the executive branch. "The progress is too easy from police action unscrutinized by judicial authorization to the police state," he wrote, "and where a species of arrest is available that is subject to no judicial control, the possibilities become more and more serious."[6] Although the case was a notorious

[6] <u>Abel v. United States</u>, 80 S.Ct. 683 (1960), p. 705.

one involving a notorious defendant previously engaged in espionage, he proclaimed that "the (Fourth) Amendment's protection is made effective for everyone only by upholding it when invoked by the worst men."[7] He contended that the Fourth Amendment imposed substantive standards for searches and seizures. Critical among these standards, he asserted, was "independent (judicial) control over the actions of officers effecting searches of private premises."[8] He concluded that the warrantless search of Abel's premises completely removed this independent judicial control.

At issue in both Elkins v. United States (1960) and Mapp v. Ohio (1961) was the relationship between the Fourth Amendment and the exclusionary rule. The exclusionary rule holds that evidence obtained through unreasonable or illegal means can not be introduced in court. In Elkins, the Court held that evidence of a federal crime illegally seized by state agents and turned over to federal agents on a "silver platter" is not admissible in a federal criminal proceeding. The Court, however, left the door open to the admissibility of such evidence in a state criminal proceeding. It closed the door in Mapp. Justice Tom C. Clark, speaking for the Court, declared that common sense dictated that the exclusionary rule was part and parcel of the

[7] Ibid., p. 702.

[8] Ibid., p. 704.

Fourth Amendment, and that it was applicable to the states through the Fourteenth's Due Process Clause. Brennan joined in both majority opinions.

The question presented in Wong Sun v. United States (1963) was whether verbal evidence derived from an illegal search and seizure was admissible at trial. Brennan, speaking for the Court, held that it was not admissible under the Fourth Amendment. "Verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case," he argued, "is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion."[9] He further argued that "nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence."[10] He concluded that since the verbal evidence was obtained through illegal police actions, it must be excluded from court consideration.

At issue in Lopez v. United States (1963) was the admissibility as evidence of an internal revenue agent's secret tape recording of a conversation between himself and Lopez in which Lopez had offered him a bribe in connection with a cabaret tax delinquency. The Supreme Court, speak-

[9] Wong Sun v. United States, 83 S.Ct. 407 (1963), p. 416.

[10] Ibid., p. 416.

ing through Justice Harlan, held that the recording was admissible as evidence. Brennan, in a dissenting opinion, ruled that it was inadmissible, for it violated the Fourth Amendment. "In a free society," he argued, "people ought not to have to watch their every word so carefully."[11] He wrote, "I believe that there is a grave danger of chilling all private, free, and unconstrained communication if secret recordings"[12] as in the present case are judged to be admissible as evidence. He claimed that history and the content of the Constitution pointed to the true path to the answer of the question whether "the fruits of surreptious electronic surveillance" fell within the Fourth Amendment's regulatory area. Looking at these factors, he concluded that it did. He asserted that "the government ought not to have the untrammeled right to extract evidence from people."[13] He contended that surreptious electronic surveillance violated the "informing principles" of both the Fourth and Fifth Amendments: "the comprehensive right of personal liberty in the face of governmental intrusion."[14]

Police officers lost the trail of a man driving a car

[11] Lopez v. United States, 83 S.Ct. 1381 (1963), p. 1395.

[12] Ibid., p. 1395.

[13] Ibid., p. 1396.

[14] Ibid., p. 1396. These "informing principles" are synonymous with his key notion of personal privacy and human dignity.

they had observed participate in a transaction resembling a purchase of marijuana when he made a U-turn. Upon learning that Ker, the car's registered owner, was a known drug offender, the officers drove to his domicile. Gaining a noiseless entry[15] with a key obtained from the apartment building manager, they observed what appeared to be a package of marijuana in the kitchen and arrested Ker and his wife for possession of narcotics in violation of the California Health and Safety Code. In Ker v. State of California (1963), the Court held that under the circumstances including showing that arresting officers had observed Ker, a known drug user, contact a known marijuana dealer prior to driving to Ker's apartment, and that marijuana was in plain sight, which made it obvious to arresting officers, even before they started to search, that occupants were in process of commiting felony of possession of marijuana, arrest of occupants without warrants was valid, and the evidence seized was constitutionally admissible. Brennan dissented. He declared that the unannounced intrusion violated the Fourth Amendment. He argued that the Fourth Amendment's protections of individual freedom "undoubtedly included this * * * requirement of an announcement by police officers of purpose and authority before breaking into an in-

[15]As opposed to the traditional talisman of "Open the door in the name of the law."

dividual's home."[16] He further argued that "the requirement is no mere procedural nicety or formality attendant upon the service of a warrant."[17] He conceded that there was a narrow class of exceptions:

> (1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril or bodily harm, or (3) where those within, made aware of the presence of someone outside are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.[18]

He concluded that this unannouced intrusion did not meet any of the excepting criteria. Furthermore, he contended that the practical hazards of "mistaken identity" or of the "officers' dangerous calling" militated against expanding the number of exceptions.

Whereas Brennan condemned the police officers' intrusion in _Ker_, he sanctioned their actions in the cases of _Schmerber v. California_ (1966) and _Warden, Maryland Penitentiary v. Hayden_ (1967), for the warrantless searches in both met his excepting criteria of "ensuring the safety of arresting officers and the security of the arrest against the prisoner's (or evidence's) escape." Moreover, these cases reflect his "willingness to concede the legitimate

[16] _Ker v. State of California_, 83 S.Ct. 1623 (1963), p. 1637.

[17] _Ibid._, p. 1637.

[18] _Ibid._, p. 1636.

needs of the police as protectors of the social order."[19] In Schmerber, Brennan, joined by the four conservatives,[20] held that the taking of Schmerber's blood, pursuant to a police officer's request, at the hospital against his will for the express purpose of determining whether he had been driving while intoxicated following an accident in which he had sustained injuries did not violate his right under the Fourth Amendment to be free of unreasonable searches and seizures. He contended that "the overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."[21] Given the special facts of the case,[22] he argued that "the attempt to secure evidence of blood-alcohol-content * * * was an appropriate incident to petitioner's arrest"[23] for drunken driving. Citing the number of traffic fatalities due to drunken drivers,[24] he proclaimed that the State had

[19] Heck, pp. 866-867.

[20] Justices Tom C. Clark, Byron R. White, Potter Stewart, and John Marshall Harlan.

[21] Schmerber v. California, 86 S.Ct. 1826 (1966), p. 1834. Indeed, one of the central notions of Brennan's liberalism is this protection of personal privacy and human dignity against unwarranted intrusion by the State. This notion carries over to his approach in Bill of Rights cases.

[22] In particular, the facts that the blood was withdrawn in a hosptial by a doctor and that alcohol absorbed in the blood quickly dissipates.

[23] Ibid., p. 1836.

[24] For Brennan this alarming number justified shifting the balance in favor of governmental intrusion.

a legitimate interest in keeping them off the roads. He claimed that "there was plainly probable cause for the officer to arrest petitioner and charge him with driving an automobile while under the influence of intoxicating liquor."[25] He cautioned, however, that the holding was limited only to the facts of the present case.

This opinion certainly is not a libertarian one. In fact, Brennan's liberal Brethen Warren, Black, Douglas, and Fortas dissented from it. But it is a pragmatic one. This fact answers the question why Brennan, the liberal, took such a conservative stance. He was alarmed by the number of needless traffic fatalities due to drunk drivers. Consequently, he subtly balanced away Schmerber's right to privacy—the taking of one's blood against his will clearly cuts to the heart of privacy—in favor of the safety of society's highways. Edward V. Heck wrote: "convinced that society's interest in protection from drunken drivers required limited restriction on individual liberty, Brennan did indeed engage in a 'refined, subtle reasoning and balancing process.'"[26] Also, the concept of "ordered liberty" is reflected in the opinion. Consistent with the label of "pragmatic liberalism," Brennan wrote, "without 'order'

[25] Schmerber, p. 1645. Schmerber was visibly drunk.

[26] Heck, p. 868.

there is no 'liberty.'"[27] In this case, order is necessary to insure the safety of the highways and the greatest liberty of all: life itself.

Hayden had its origin in police officers' entrance into a house and search and seizure therein without a warrant of clothing—a cap, jacket, and pants—matching description of those worn by an armed robber who police had trailed there in "hot pursuit." Considering the circumstances of the case,[28] Brennan, joined once again by the four conservatives,[29] held that the warrantless search and seizure was reasonable. He contended that "the Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others."[30] He concluded that "'the exigencies of the situation made the course imperative.'"[31] He wrote:

> Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present

[27] William J. Brennan, Jr., "Ordered Liberty: The Beginning Lawyer's Challenge," Michigan State Bar Journal, 42 (April, 1963), p. 14.

[28] In particular, the fact that the search and seizure was incident to a "hot pursuit."

[29] Justices Black, Warren, and Fortas concurred, while Douglas dissented.

[30] Warden, Maryland Penitentiary v. Hayden, 87 S.Ct. 1642 (1967), p. 1646.

[31] Ibid., p. 1645.

> and that the police had control of all weapons which could be used against them or to effect an escape.[32]

In United States v. Dionisio (1973), the Supreme Court, through Justice Stewart, held that a grand jury subpoena ordering the defendant to appear before it and directing him to provide a voice exemplar did not violate his Fourth Amendment rights. In a dissenting opinion, Brennan agreed with the majority "that no unreasonable seizure of the Fourth Amendment is effected by a grand jury subpoena limited to requiring the appearance of a suspect to testify."[33] He argued, however, that a grand jury subpoena requiring a suspect's appearance for the reason of obtaining voice or handwriting exemplars from him was a completely different matter. He concluded that "the reasonableness under the Fourth Amendment of such a seizure cannot be simply presumed."[34]

While on routine patrol, a police officer stopped a car when he observed that a headlight and its license plate light were burned out. Bustamonte was one of six men in the car. When, in response to the officer's request, no one could produce any evidence of identification, except one Alcala, brother of the car's owner but not the driver,

[32]Ibid., p. 1646.

[33]United States v. Dionisio, 93 S.Ct. 764 (1973). p. 776.

[34]Ibid., p. 776.

the officer asked them to step out of the car. Upon the arrival of two additional officers, the original one asked if they could search it. Alcala consented; indeed, he offered to help with it. The officers found three checks, stolen from a car wash, wadded up under the left rear seat. On the basis of this and other evidence, Bustamonte was charged with possession of completed checks with intent to defraud. At trial he unsuccessfully moved to have the checks suppressed as evidence. In <u>Schneckloth v. Bustamonte</u> (1973), the Supreme Court upheld his conviction on the ground that consent may be voluntary even though the consenter did not know that he had a constitutional right to refuse to allow the search. Brennan dissented. He castigated the Burger Court majority's conclusion that the prosecution is not required to demonstrate the defendant's knowledge of his right to refuse as a prerequisite to establishing a voluntary consent to the warrantless search of his automobile. He declared that its conclusion "is supported neither by 'linquistics,' nor by 'epistemology,' nor, indeed, by 'commonsense.'"[35] He proclaimed that "it wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence."[36]

[35] <u>Schneckloth v. Bustamonte</u>, 93 S.Ct. 2041 (1973), p. 2073.

[36] <u>Ibid.</u>, p. 2073.

He argued that a third party, in this case Alcala, can not waive an individual's constitutional right to be secure against an unwarranted search of an automobile. The facts that no search warrant was obtained, and that the police officers as representatives of the State did not even suggest a probable cause[37] to search the vehicle or that the search was incident to a valid arrest of the car's occupants only added to his disbelief and shock with the Court majority's conclusion. In short, he concluded that the search was a constitutionally prohibited invasion of privacy.

Beginning in 1971, the Burger Court's law-and-order justices began their assault on the libertarian conception of the Fourth Amendment's exclusionary rule.[38] Brennan consistently has criticized this assault as an insult to the adjudicatory function, and the institutional integrity of the Court. Moreover, he has clung to the Warren Court's view, parts of which were painted by opinions authored by him, that the exclusionary rule is a necessary and inherent constitutional ingredient of the Fourth Amendment. He registered his complaint in both United States v. Calandra

[37]Reflecting his liberalism, Brennan's standard with respect to probable cause is a high one. Conversely, Justices Powell and Rehnquist use a lower standard.

[38]Chief Justice Burger's dissenting opinion in Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 91 S. Ct. 1999 (1971), commenced this assault.

(1974) and United States v. Peltier (1975). In Calandra, Powell, speaking for the Court, held that a witness summoned to appear and testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure. Brennan, in a passionate dissenting opinion, argued that the majority's opinion vitiated the exclusionary rule.[39] "This downgrading of the exclusionary rule to a determination whether its application furthers deterrence of future police misconduct," he wrote, "reflects a startling misconception of the historical objective and purposes of the rule."[40] He disagreed wholeheartedly with the Court's as-

[39]Whether Brennan is right or wrong on this point depends largely upon what side of the fence one is sitting on. It can be argued convincingly, however, that reducing the exclusionary rule only to its deterrent role waters down the guarantee of the Fourth Amendment to an inexcusable level. In short, the Burger Court is extracting the "teeth out of the guarantee." See Jeffrey M. Bain and Michael K. Kelly, "Fruit of the Poisonous Tree: Recent Devolopments As Viewed Through its Exceptions," University of Miami Law Review, 31 (Spring, 1977), pp. 615-650; Michael Billy, Jr., and Gordon A. Rehnborg, Jr., "The Fourth Amendment Exclusionary Rule: Past, Present, No Future," The American Criminal Law Review, 12 (Winter, 1975), pp. 507-537; John M. Burkoff, "The Court That Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine," Oregon Law Review, 58 (1979), pp. 151-192; Bernard J. Gilday, Jr., "The Exclusionary Rule: Down and Almost Out," Northern Kentucky Law Review, 4 (1977), pp. 1-19; Keith Allan Glover, "The Exlusionary Rule, Standing, and Expectation of Privacy For Car Passengers: A Confusion of Concepts," Baylor Law Review, 31 (Spring, 1979), pp. 227-241; and Robert S. Iron, "The Burger Court: Discord in Search and Seizure," University of Richmond Law Review, 8 (Spring, 1974), pp. 433-455.

[40]United States v. Calandra, 94 S.Ct. 613 (1974), p. 624.

sertion that the exclusionary rule was merely a judically created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect. Rather, he wrote:

> The exclusionary rule is 'part and parcel of the Fourth Amendment's limitation upon (governmental) encroachment of individual privacy,' and 'an essential part of both the Fourth and Fourteenth Amendments,' that 'gives to the individual no more than that which the Constitution guarantees him, to the police officers no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.[41]

Dissenting in Peltier, he vehemently objected to the Court's "slow strangulation" of the exclusionary rule as part and parcel of the Fourth Amendment. He argued that the Court's new formulation was fraught with uncertainty. He wrote:

> An analysis of the Court's unsuccessfully veiled reformulation demonstrates that its apparent rush to discard 61 years of constitutional development has produced a formula difficult to comprehend and, on any understanding of its meaning, impossible to justify.[42]

Furthermore, he protested strongly against the Court's adding a new layer of factfinding. Previously, the decision to exclude evidence had turned upon whether it was in fact illegally obtained. Justice Rehnquist's decision, however, expanded the inquiry to included whether the law enforcement

[41] Calandra, pp. 625-626.

[42] United States v. Peltier, 95 S.Ct. 2313 (1975), p. 2325.

officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. Reflecting his earlier interest in court reform, he asserted that the Court's new formulation involving consideration of the subjective state of mind of numerous people only added to the lower courts' already overcrowded dockets.

After an investigation by the State's Attorney's fraud unit of real estate settlement activities in certain Maryland counties indicated that one Andresen, while acting as a settlement attorney, had defrauded the purchaser of certain realty (Lot 13T), the investigators obtained warrants to search petitioner's offices. The warrants listed specified items pertaining to Lot 13T to be seized "together with other fruits, instrumentalities, and evidence of crime at this (time) unknown." In the ensuing search a number of incriminating documents, including some containing statements made by Andresen were seized. In _Andresen v. Maryland_ (1976), the Supreme Court, through Justice Blackmun, implicitly denied Andresen's motion to suppress the evidence seized pursuant to the general warrants.[43] Claiming that "general warrants are specifically

[43]Blackmun concentrated on the defendant's claim to the Fifth Amendment privilege against compulsory self-incrimination (See pp. 117-118), and did not directly address the Fourth Amendment one.

prohibited by the Fourth Amendment,"[44] Brennan dissented. He wrote, "the problem to be avoided is 'not that of intrusion per se, but of a general exploratory rummaging in a person's belongings."[45] He thus declared that the Fourth Amendment's end of protecting "'the sanctity of a man's home and the privacies of life'" clearly required that "a warrant specify with particularity the place to be searched and the things to be seized."[46] He concluded unequivocally that the warrants in question were indeed general, and as such unconstitutional.

United States v. Havens (1980) originated from the use of illegally seized evidence to impeach statements made by the defendant on cross-examination. The Court upheld the use of such evidence. Brennan dissented. He declared that such a use of unlawfully seized evidence violated the Fourth Amendment. He contended that "arriving at the truth is a fundamental goal of our legal system."[47] He argued, however, that it was a goal that could not be realized through illegal police conduct. He wrote, "the processes of our judicial system may not be fueled by the illegali-

[44] Andresen v. Maryland, 96 S.Ct. 2737 (1976) p. 2754.

[45] Ibid., p. 2754.

[46] Ibid., p. 2754.

[47] United States v. Havens, 100 S.Ct. 1912 (1980), p. 1920.

ties of government authorities."[48] He found the Court's treatment of Fourth and Fifth Amendment privileges disturbing. "The Court denigrates their unique status as constitutional protectors," he claimed, "by treating (these) privileges as mere incentive schemes."[49] He charged that the Court's decision "patently" disregarded its obligation and responsibility to enforce constitutional guarantees.

In New York v. Belton (1981), the Supreme Court ruled that a police officer's warrantless search of an automobile immediately subsequent to the driver's custodial arrest was reasonable as a contemporaneous incident to the arrest. Brennan, in a dissenting opinion, argued that "it has long been a fundamental principle of Fourth Amendment analysis that exceptions to the warrant requirement are to be narrowly construed."[50] He contended that the Fourth Amendment's essential purpose carried with it two corollaries:

> First, for a search to be valid under the Fourth Amendment, it must be 'strictly tied to and justified by the circumstances which rendered its initiation permissible.' Second, in determining whether to grant an exception to the warrant requirement, Courts should carefully consider the facts and circumstances of each search and seizure, focusing on the reasons supporting the exception rather than on any bright line rule of general application.[51]

[48] Ibid., p. 1920.

[49] Ibid., p. 1920.

[50] New York v. Belton, 101 S.Ct. 2860 (1981), p. 2886.

[51] Ibid., p. 2866.

Against these corollaries, he concluded that the search in the present case was invalid.

In Fourth Amendment cases, Brennan balances the individual's claim against the proposed governmental interest to determine reasonableness of the search. Valuing the protection of individual privacy and dignity against intrusion by the State, he usually has found that the search is unreasonable or unwarranted; and, thus, he has decided in favor of the individual. Over the years, particularly since 1969, this decision has become increasingly, almost automatic. In fact, of the thirteen cases examined, he ruled in favor the reasonableness of the government's search only twice. In both Schmerber and Hayden, he found the searches reasonable because the circumstances surrounding them implicated his excepting criteria of "ensuring the safety of the arresting officers and the security of the arrest against the suspect's or evidence's escape." In other words, both are classified as "Emergency Searches."[52]

[52] Peter W. Lewis, Criminal Procedure: The Supreme Court's View Cases (St. Paul: West Publishing Co., 1979), pp. 195-201.

CHAPTER VIII

FIFTH AMENDMENT

The Fifth Amendment encompasses the double jeopardy clause, the compelled self-incrimination clause, the due process clause, and the "taking" clause. The first three deal with criminal procedure.[1] Brennan has exhibited both a passionate concern for the rights of persons accused of crimes and an absolute intolerance for police misconduct in the course of a criminal investigation. For him, it is better to let ninety-nine guilty men go free than to convict one innocent man. Daniel M. Berman wrote, "the possibility of convicting an innocent man (for Brennan) is far more frightening than the chance that a scrupulous regard for the constitutional rights of defendants may result in allowing some criminal to escape punishment."[2] He does not see any gray in the area of these three Fifth Amendment guarantees. Thus, in cases involving them, he has employed an absolutist approach.

[1]The due process clause, of course, sweeps more broadly than just criminal procedure. It deals also with substantive rights.

[2]Daniel M. Berman, "Mr. Justice Brennan: A Preliminary Appraisal," The Catholic University Law Review, 7 (January, 1958), p. 15.

During the anti-Communist crusade, one Mrs. Brown, a defendant in denaturalization proceedings, was convicted of criminal contempt for refusing to answer questions on cross-examination of her voluntary testimony about her past and present affiliation with the American Communist Party. In Brown v. United States (1958), the Supreme Court held that Mrs. Brown could not invoke the privilege against compelled self-incrimination on cross-examination regarding matters made relevant by her direct examination because she had taken the stand voluntarily to testify in her own behalf. In a dissenting opinion, Brennan argued that the sentence was "far too drastic" considering the other available sanctions. He concluded that the trial judge's exclusive reliance upon the criminal contempt power was arbitrary in the circumstances, and, therefore violated Mrs. Brown's right to due process of law.

The issue of double jeopardy arose in Abbate v. United States (1959). The defendants were convicted in a Illinois State Court of conspiring to destroy property of telephone companies. Brennan, speaking for the Court, held that the subsequent federal prosecution did not violate the Fifth Amendment's double jeopardy clause. Drawing upon a huge body of precedent,[3] he concluded that "from the nature

[3]Brennan drew upon this body of precedent, while his libertarian Warren Court Brethen Warren, Black, and Douglas did not; thereby, accounting, in part, for their dissent.

of our government, the same act may be an offence against the laws of the United States and also of a State, and be punishable in both."[4] The dual sovereignty of the American government—Federal and State—was the decisive factor in his decision. Moreover, he suggested that a contrary holding might jeopardize an important federal interest in situations in which the federal sanction was far more severe than the penalty imposed by the State.

Throughout his years on the Court, Brennan has remained consistent to this view that the double jeopardy clause is not applicable in cases involving dual sovereignty. As will be shown in later cases, however, he believes that it can be invoked in cases involving successive prosecutions in the same state or sovereignty for the same offence. In short, the issue of sovereignty is a dividing line for his approach in double jeopardy cases.

Jencks, a labor-union officer, was charged with falsely swearing that he was not, on a specified date, affiliated with the Communist Party. The Government called as its principle witnesses two Party members who were also federal agents, and who made reports to the Federal Bureau of Investigation on Jencks' activities about which they testified. At trial, Jencks unsuccessfully moved that the Government produce these reports for the judge's inspection

[4] Abbate v. United States, 79 S.Ct. 666 (1959), pp. 669-670.

and, if any discrepancy appeared between them and the testimony of their authors, that they be turned over to him for use in cross-examination. In Jencks v. United States (1957), the Supreme Court, through Brennan, held that a prior showing of inconsistency was unnecessary and that the reports must be given directly to the defendant without any prior screening by the judge. He argued that Jencks was entitled to a court order directing the government to produce the reports. He asserted that the adequacy of Jencks' defense was contingent on his accessibility to them. Indeed, he proclaimed that "justice requires no less."[5]

Lerner v. Casey (1958) originated from the State of New York's dismissal of an employee of its Transit System under a Security Risk Law, on the basis that he had been disclosed to be of doubtful trust and reliability by his failure to answer a question concerning his present relationship to the Communist Party. Considering the facts, the Court declared that the dismissal was justifiable under the Security Risk Law, and was not rendered unconstitutional by Lerner's assertion of the Fifth Amendment privilege against compulsory self-incrimination. In a dissenting opinion, Brennan contended that the Court failed to grasp the right at stake. His concern arose from "the simultaneous public labeling of the employee as disloyal."[6] He

[5]Jencks v. United States, 77 S.Ct. 1077 (1957), p. 1103.

[6]Lerner v. Casey, 78 S.Ct. 1311 (1958), p. 1328.

concluded that the dismissal should be reversed, for it branded him a disloyal American without due process of law. He wrote:

> Strict adherence to required legal procedures, especially where one's loyalty is being impugned, affords the greatest and, in last analysis, the ultimate assurance of the inviolability of our freedoms as we have heretofore known them in this country. Least of all, should they be impaired or trenched upon by procedural shortcuts.[7]

The anti-Communist crusade led to the adoption of an assortment of security and loyalty measures by the federal government and the states aimed at guarding against the danger of an internal Communist conspiracy. One of these measures was the Subversive Activities Control Act of 1950. In the Act, Congress found that "there exists an world Communist movement * * * whose purpose it is, by treachery, deceit, infiltration. . ., espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world. . ." The Act, therefore, required that "Communist-action organizations" in the United States register with the Attorney General and file membership lists and other information, or face heavy criminal penalties. It created also the Subversive Activities Control Board and authorized it, upon petition by the Attorney General, to determine whether a named group is a "Communist-action

[7] Ibid., p. 1329.

organization" and to order such an organization to register in accordance with the Act. Conversely, while it required "Communist-action groups" to register, the sedition sections of the Smith Act (1940) created a prima facie case that membership in the Communist Party was a federal offence. This conflict was presented in both _Communist Party of the United States v. Subversive Activities Control Board_ (1961) and _Albertson v. Subversive Activities Control Board_ (1965).

The question posed in the former case was whether the registration requirements of the Subversive Activities Control Act violated the Fifth Amendment's privilege against self-incrimination. Justice Felix Frankfurter, in one of the longest opinions of Supreme Court history, spoke for the majority. He held that the public interest in disclosure outweighed the private right of free expression. With respect to the Fifth Amendment question, he declared that compulsory registration did not constitute compelled self-incrimination, for it required only the Party to register, not individual members. Brennan, in a dissenting opinion, concluded that it was a prime example of forced self-incrimination, and as such violated the Fifth Amendment. He wrote, "I believe that the officials cannot be compelled to complete, sign and file the registration statement without abridging their privilege against (compulsory) self-incrim-

nation."[8] "Registration is unique," he wrote, "because of the initial burden it puts on the potential defendant to come forward and claim the privilege."[9] He further argued that by registrating, the officials virtually established a prima facie case against themselves, for by so doing, they admitted an element of their possible criminality of belonging to the Communist Party in violation of the Smith Act's membership clause.

The Subversive Activities Control Board's order requiring petitioners to register individually their membership in the United States' Communist Party gave birth to Albertson. Brennan, speaking for an unanimous Court,[10] held that the orders requiring Albertson to register were inconsistent with the self-incrimination clause. As in Communist Party, he believed that the risks of incrimination imposed by the registration orders were obvious. He wrote, "such an admission of membership may be used to prosecute the registrant under the membership clause of the Smith Act."[11]

[8] Communist Party of the United States v. Subversive Control Board, 81 S.Ct. 1357 (1961), p. 1464.

[9] Ibid., p. 1462.

[10] The majority in Communist Party joined the dissenters. The distinction for Stewart, Clark, and Harlan (Frankfurter and Whittaker retired in 1962) between the two cases was that the former required organizations, not individuals, to register, while the latter required individuals to do so.

[11] Albertson v. Subversive Activities Control Board, 86 S.Ct. 194 (1965), p. 198.

In Schmerber (1966),[12] Brennan held also that the taking of plaintiff's blood over his protest on advice of counsel did not violate his Fifth Amendment privilege against compulsory self-incrimination. Indeed, he claimed that this action did not even implicate the privilege. He argued that history and legal precedent[13] limited the privilege's area of protection to those circumstances involving the State's obtaining of evidence "against an accused through 'the cruel, simple expedient of compelling it from his own mouth.'"[14] He wrote, "the privilege protects an accused only from being compelled to testify against himself or otherwise provide the State with evidence of a testimonial or communicative nature."[15] Conversely, he argued that "compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."[16] In fact, this distinction between "testimonial or communicative evidence" and "real or physical evidence" is the basis of his opinion. He concluded that the withdrawl of blood and use of the analysis was the latter form of evidence, and as such not inadmissible under the self-in-

[12]See pp. 90-93.

[13]Warren, Black, Douglas, and Fortas apparently did not afford history and legal precedent the same degree of respect as Brennan in this case.

[14]Schmerber, p. 1831.

[15]Ibid., p. 1830.

[16]Ibid., p. 1830.

crimination clause.

This distinction between types of evidence, moreover, is a dividing line for him in self-incrimination cases. If the compelled evidence is "real or physical," he relies upon the "shock the conscience" test. Consistent with his libertarianism, his conscience is shocked rather easily. It was not shocked in Schmerber, however, because the blood sample was taken in a hospital by a doctor in accordance with humane medical practices. But, one can strongly infer that such would not be the case if the circumstances differed even in the slightest degree. In fact, Brennan cautioned in Schmerber that the holding was limited only to the facts at hand. Conversely, he believes that the Fifth Amendment's self-incrimination clause absolutely prohibits the compelling of "testimonial or communicative" evidence.

In the 1969 Term, the Supreme Court, using the "same evidence" test, upheld plaintiff's plea vis-a-vis the Fifth Amendment's Double Jeopardy Clause in Waller v. Florida (1970) and Ashe v. Swenson (1970). Brennan concurred in both cases because he objected to the majority's use of the "same evidence" test rather than the "same transaction" one. In Waller, a Florida municipal court convicted one Waller for violating a city ordinance against destruction of city property and breach of the peace, and sentenced him to six-months in jail. Shortly thereafter, a State court tried, convicted, and sentenced him to six-

years for grand larceny, a charge concededly based on the same evidence as was involved in the municipal case. In his concurring opinion, Brennan disposed of the case by stating, consistent with Abbate, that successive prosecutions by one sovereign judicial entity violated the Double Jeopardy Clause. He believes that municipal and state courts are part of one sovereign judicial system.

Ashe had its origin in the armed robbery by three or four men of six poker players in the home of one of the victims. After being charged in separate courts with robbery of each of the six players, the defendant was acquitted for robbing one of the players in one court for insufficient evidence. Nonetheless, he still faced five more trials for the robbery of each of the five remaining players. Brennan, in his concurrence, expanded upon his Waller opinion and called for the adoption of the "same transaction" test over the "same evidence" test. He wrote, "the Double Jeopardy Clause requires in prosecution, except in limited circumstances, to join at one trial all the charges against a defendant that grow out of a single transaction."[17] He contended that the feared abuses of the criminal process may be most effectively avoided by adopting the "same transaction" test. He argued that the test protected the individual best against the "possible tyranny of

[17] Ashe v. Swenson, 90 S.Ct. 1189 (1970), p. 1199.

the overzealous prosecutor."[18] Finally, he proclaimed that the test

> not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience.[19]

Conversely, he expressed a real uneasiness with respect to the "same evidence" test. "The constitutional protection against double jeopardy is empty of meaning," he wrote, "if the defendant is forced to 'run the gauntlet' as many times as there are victims of a single episode."[20] Relying upon the "same transaction" test, he declared that subsequent trials for the same offence following the defendant's acquittal placed him in double jeopardy.

Miranda v. Arizona (1966)[21] stood as the Warren Court's shrine safeguarding criminal suspects against the forced disclosure of evidence. Chief Justice Warren declared that the privilege against self-incrimination attaches itself at the point an individual is taken into cus-

[18] Ibid., p. 1201.

[19] Ibid., p. 1199.

[20] Ibid., p. 1202.

[21] Miranda v. Arizona, 86 S.Ct. 1602 (1966).

tody, and positive safeguards must be employed to protect it.[22] According to him, these safeguards included informing a suspect undergoing interrogation that he had the right to remain silent, that anything he might say could be used against him, and that he was entitled to counsel during such pretrial interrogation. He overturned the conviction of Miranda, and three others on the ground that the safeguards protecting the privilege against self-incrimination were not met. Brennan joined wholeheartedly in Warren's majority opinion. Indeed, in an earlier case, he wrote:

> (T)he American system of criminal prosecution is accusatorial, not inquisitorial, and the Fifth Amendment privilege (against self-incrimination) is its essential mainstay. Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and not by coercion prove a charge against an accused out of his own mouth.[23]

In 1971, however, the Burger Court's law-and-order Justices began to undermine the authority of the *Miranda* safeguards. In *Harris v. New York* (1971), the Court held

[22]This certainly is in line with Leonard Levy's examination of the origins of the Fifth Amendment's self-incrimination clause in *Origins of the Fifth Amendment* (New York: Oxford University Press, 1968). Considering the fact that the clause was inserted in the Fifth Amendment, not the Sixth, led Levy to argue that the Framers clearly intended that the privilege against self-incrimination extended to all phases of the criminal proceeding, not just only to the actual trial. Brennan's conception of the privilege's scope is in accord with Levy's argument.

[23]*Malloy v. Hogan*, 84 S.Ct. 1489 (1964), p. 1493.

that a pretrial confession obtained without *Miranda* safeguards could probably be used to impeach the defendant's trial testimony. Brennan, in a passionate and angry dissenting opinion, declared that the Court's decision was "monstrous," for it went "far toward undoing much of the progress made in conforming police methods to the Constitution."[24] He argued that "the essential mainstay of (our adversary) system is the privilege against self-incrimination."[25] He concluded that the Court's opinion threatened to undercut it, thereby threatening the integrity of the entire system.

California v. Byers (1971) grew out of the defendant's prosecution for refusing to comply with a California statute which required those involved in an automobile accident resulting in property damage to stop and give their names and addresses, and which provided no immunity from use in subsequent criminal prosecutions of information obtained by the state as a consequence of compliance with the statute. The Supreme Court ruled that the statute did not violate individual's privilege against compulsory self-incrimination. Brennan dissented. He argued that "the statute requires an individual to admit that he has engaged in conduct likely to be the subject of criminal punishment

[24] *Harris v. New York*, 91 S.Ct. 643 (1971), p. 649.

[25] *Ibid.*, p. 649.

under the California traffic law."[26] Echoing the California Supreme Court's decision, he contended that the requirement may be enforced consistent with the privilege against compulsory self-incrimination, only if those reporting their involvement were made immune from prosecution of offence related to accident.

In _Paul v. Davis_ (1976), the Court held that a flyer which was distributed among merchants by the police containing Paul's name and photograph captioned "Active Shoplifters" did not violate his right to due process of law. Brennan, in a vehemently worded dissent, declared that the flyer clearly violated the Fifth Amendment's due process clause. He wrote:

> I have always thought that one of this Court's most important roles is to provide a bulwark against governmental violations of the constitutional safeguards securing in our free society the legitimate expectations of every person to innate human dignity and sense of worth.[27]

He charged that the majority's opinion constituted a "regretable" abdication of this role, and "a saddening denigration of our majestic Bill of Rights."[28] He contended that it validated the imposition by the police on Paul of "the stigmatizing label of 'criminal' without the salutary and constitutionally mandated safeguards of a criminal

[26] _California v. Byers_, 91 S.Ct. 1535 (1971), p. 1563.

[27] _Paul v. Davis_, 96 S.Ct. 1155 (1976), p. 1177.

[28] _Ibid._, p. 1177.

trial."[29] "Certainly the enjoyment of one's good name and reputation," he proclaimed, was "among the most cherished of rights enjoyed by a free people."[30] Moreover, he claimed that the Court's decision undermined the presumption of innocence.

During the 1975 Term, the Supreme Court considered the issue of self-incrimination and the compelled production of business papers in the separate cases of Fisher v. United States (1976) and Andresen v. Maryland (1976). In Fisher, the Government commenced enforcement actions in two cases to compel production of accountants' documents in possession of taxpayers' attorneys. In each of these cases taxpayers, who were under investigation for possible civil or criminal liability under the federal income tax laws, after having obtained from their respective accountants certain documents relating to the accountants' preparation of their tax returns, transfered the documents to their respective attorneys to assist the taxpayers in connection with the investigation. Subsequently, the Internal Revenue Service served summonses on the attorney's directing them to produce the documents, but the attorneys refused to comply on the ground that the documents served to self-incriminate their respective clients. The Supreme Court held that the compelled production of the documents did not vio-

[29] Ibid., p. 1168.

[30] Ibid., p. 1171.

late the self-incrimination clause, for taxpayers have no Fifth Amendment privilege to withhold such documents. Brennan wrote a concurring opinion because the majority neglected to stress the fact that the accountants' documents in question were not private papers or effects. He joined nonetheless in the result. He asserted that "the protection of personal privacy is a central purpose of the privilege (against self-incrimination)."[31] He contended that the historically recognized zone of privacy protected by the Fifth Amendment extended to all personal papers and effects. He stated that business records, except those of sole proprietors and practitioners,[32] generally fall outside that zone of privacy. Considering the facts that the accountants' work papers in question did not relate to the preparation of their personal tax returns, and that the papers were wholly business in nature (i.e., pursuant to the selling of their public services), Brennan concluded that they were public, not private papers and effects. Thus, he held that they fell outside the Fifth Amendment's zone of privacy.

On the other hand, _Andresen_ involved the business papers of a sole proprietor and practitioner.[33] The Court,

[31] _Fisher v. United States_, 96 S.Ct. 1569 (1976), p. 1583.

[32] He cited the fact that the Court previously had recognized that the self-incrimination privilege extended to this category of business papers.

[33] See p. 99 for facts of case.

nonetheless, held that the introduction at trail of petitioner's personal business documents, including some containing statements made by him, did not violate his privilege against self-incrimination. Without any hesitation, Brennan dissented. Focusing on the exception expressed in Fisher, he claimed that personal business papers (i.e., those of a sole proprietor and practitioner) fell inside the Fifth Amendment's zone of privacy. He thus held that the introduction of such papers, as in the present case, clearly violated the self-incrimination clause.

Speaking for the Court in United States v. Martin Linen Supply Company (1977), Brennan proclaimed that the double jeopardy clause barred an appeal by the Government of the United States of a judgment of acquittal following the discharge of a jury which had been unable to agree on a verdict in a criminal contempt trial. Since Congress had removed the statutory limitations to appeal, he claimed the relevant inquiry turns on the reach of the Double Jeopardy Clause. Indeed, he wrote, "it has become 'necessary to take a closer look at the policies underlying the Clause in order to determine more precisely the boundaries of the Government's appeal rights in criminal cases."[34] He argued that the Double Jeopardy Clause

[34] United States v. Martin Linen Supply Company, 97 S. Ct. 1349 (1977), p. 1353.

> guarantees that the State shall not be permitted to make repeated attempts to convict the accused 'thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuous state of anxiety and insecurity.[35]

The protections afforded by the Clause, he contended, do not come into play unless the accused has been placed in jeopardy. "This state of jeopardy attaches," he wrote, "when the jury is empaneled and sworn, or, in a bench trial when the judge begins to receive evidence."[36] He concluded that the state of jeopardy had been attached when the jury was empaneled.

In United States v. DiFrancesco (1980), the Court ruled that the United States may appeal a sentence imposed by a federal district judge on the ground that it was too lenient. In a dissenting opinion, Brennan declared that the United States may not appeal the sentence, for it violated the double jeopardy clause. He adhered to one view that the United States may not appeal an acquittal. That the Court showed no basis for differentiating between the finality of acquittals and the finality of sentences rated heavily in his decision. Moreover, he warned against allowing the government to enhance a sentence because he believed that it opened the door to the government appeal of acquittals.

[35]Ibid., p. 1353.

[36]Ibid., p. 1354.

Brennan's Fifth Amendment decisions with respect to the double jeopardy, the compelled self-incrimination, and due process clauses reflect his determination to safeguard the rights of the accused. Unlike in First and Fourth Amendment cases, Brennan does not employ a balancing test in Fifth Amendment cases. Rather, he has employed an absolutist approach. He believes that there are no legitimate governmental reasons for circumventing the privileges secured by the Fifth Amendment. For him, consistent with his libertarianism, the parameters of the privileges secured by the Fifth Amendment are wide. The critical question for his approach is whether the privilege attaches. In Schmerber and Fisher, he held that the compulsory drawing of a man's blood, who had been involved in an automobile accident, for purposes of determining his blood-alcohol-content, and the compelled production of papers of a wholly business nature did not implicate the privilege against self-incrimination. In Abbate, he declared that the successive prosecutions for the same offence in different sovereignties did not implicate the double jeopardy clause. In the vast majority of cases, however, he has ruled that the privilege attaches. In all these cases, he has afforded the individual's privilege absolute protection.

CHAPTER IX

SIXTH AMENDMENT

A fair trial encompasses the individual's right to confront the witnesses against him, the right to the aid or presence of counsel, the right to proof beyond a reasonable doubt, and the less fundamental right to present one's case before an impartial jury for judgment.[1] While many pay "lip service" to it, Brennan has adhered vigorously to the view that a defendant is innocent until proven guilty. Indeed, his Sixth Amendment approach reflects this adherence. For Brennan, the individual's rights to confront the witnesses against him and to proof beyond a reasonable doubt are unconditional. The individual's right to the aid of counsel, on the other hand, is conditional upon whether the incident in question is a critical stage of the prosecution. He has joined in expanding the parameters of what constitutes a critical stage. Thus, in cases implicating the Confrontation Clause, or the proof beyond a reasonable doubt clause, or the right to counsel's assistance at a critical stage of prosecution, Brennan has employed an ab-

[1]Brennan believes that this right is less fundamental in comparison with the other three. That he feels this way goes back to his faith in the judiciary as the protector of justice.

solutist approach.

Speaking for the Court in Douglas v. Alabama (1965), Brennan contended that the right to cross-examination was a primary interest secured by the Sixth Amendment's Confrontation Clause. He argued that this secured right may not be realized unless an accused is afforded an adequate opportunity for cross-examination. He claimed that the Solicitor's reading of a State witness' statement containing alleged confession to the crimes allegedly perpetrated by him and Douglas was "the equivalent in the jury's mind of testimony."[2] He thus concluded that the witness, one Loyd, could not invoke the Fifth Amendment privilege against compelled self-incrimination in order to shield himself from cross-examination by the accused. According to Brennan, the Fifth Amendment right was surrendered when the individual voluntarily testified against Douglas.[3]

In 1966, the Warren Court erected the skeletal framework of the Miranda rule.[4] The following year, through Brennan, it fleshed out some of this skeleton in the cases

[2]Douglas v. Alabama, 85 S.Ct. 1074 (1965), p. 1077.

[3]This does not deviate from Brennan's dissenting opinion in Brown v. United States (see page 104). In that case, he denied the plaintiff's self-incrimination claim, but declared conversely that the judge's arbitrary use of the contempt power violated her right to due process of law.

[4]Miranda v. Arizona, see pages 113-114. Relevant to the Sixth Amendment, Chief Justice Warren declared that its right to the aid or presence of counsel extended to all critical stages of prosecution.

of United States v. Wade (1967) and Gilbert v. California (1967) by extending the contours of "critical stage." At issue in Wade was whether the courtroom identification of an accused at trial is to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup conducted for identification purposes without notice and in the absence of the accused's appointed counsel. Brennan held that Wade was entitled to the aid of counsel during such a proceeding, for it was a critical stage of prosecution. He argued that the Sixth Amendment guaranteed that an accused will not have to "stand alone against the State at any stage of the prosecution, formal or informal, in court or not, where counsel's absence might derogate from the accused's right to a fair trial."[5] He contended that a post-indictment lineup for the purposes of eliciting identification evidence was "peculiarly riddled with innumberable dangers and variable factors which might seriously, even crucially, derogate from a fair trial."[6] Foremost, he expressed a real concern with the hazard of mistaken identity. He wrote, "the vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[7] He asserted that counsel was necessary

[5] United States v. Wade, 87 S.Ct. 1926 (1967) p. 1932.

[6] Ibid., p. 1933.

[7] Ibid., p. 1933.

in order to safeguard against prejudice. Indeed, he said that the adequacy of Wade's defense was contingent upon it. "The accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup," he wrote, "may deprive him of his only opportunity to meaningfully attack the credibility of the witness' courtroom identification."[8] Thus, he concluded that the defendant must be afforded counsel at such a proceeding in order to ensure that he will have a fair trial.

In Gilbert, State witnesses identified defendant in the courtroom, and testified, in substance, to their prior identification of him in a lineup conducted on a Los Angeles' auditorium stage behind-bright lights which prevented those in the lineup from seeing the audience, without notice to Gilbert's appointed counsel, sixteen days after his indictment for armed robbery. In addition, the defendant was required to take a handwriting exemplar in absence of counsel. Gilbert unsuccessfully moved to have the testimony and the exemplar excluded from court consideration on the grounds that they were obtained in violation of his right to counsel. On review, Brennan denied his motion concerning the exemplar, but sustained it regarding the testimony. He argued that the taking of the exemplar was

[8] Ibid., p. 1933.

not a critical stage of the prosecution.[9] Moreover, he claimed that if an unrepresentative exemplar were taken it could be corrected at trial. He contended that Gibert had

> the opportunity for a meaningful confrontation of the State's case at trial through the ordinary processes of cross-examination of the State's expert handwriting witness and the presenting of the evidence of his own handwriting experts.[10]

On the other hand, relying upon Wade, he declared that the lineup, without notification to appointed counsel, violated the Sixth Amendment, for it was a critical stage. Thus, he concluded that the witnesses' in-court identifications were tainted, and as such must be excluded. Indeed, he called for the adoption of a per se exclusionary rule. He wrote, "only a per se exclusionary rule as to such testimony can be an effective sanction to ensure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical line-up."[11]

The question presented in In re Winship (1970) was whether juveniles, in this case twelve-year old Samuel Winship, are entitled to proof beyond a reasonable doubt

[9]In Dionisio (see page 94), he declared, however, that a grand jury subpoena requiring a suspect's appearance for the reason of taking voice or handwriting exemplars violated the Fourth Amendment.

[10]Gilbert v. California, 87 S.Ct. 1951 (1967), p. 1954.

[11]Ibid., p. 1957.

when charged with a criminal offence.[12] Brennan, speaking for the Court, declared that they were entitled to the standard of proof beyond a reasonable doubt. He contended that the standard played "a critical role in the American scheme of criminal procedure," for it was "a prime instrument for reducing the risk of convictions resting on factual error."[13] He wrote:

> the standard provides concrete substance for the presumption of innocence—the bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'[14]

Finally, he claimed that the use of the standard was critical for cogent reasons. "A society that values the good name and freedom of every individual should not," he wrote, "condemn a man for commission of a crime when there is reasonable doubt about his guilt."[15] Moreover, he wrote, it was "indispensable to command the respect and confidence of the community in applications of the criminal law."[16]

At Green's trial, one Melvin Porter, called to testify for the State, claimed that he was unable to recall the

[12]The defendant was found guilty, despite some doubt, of juvenile delinquency in New York Family Court for breaking into a locker and stealing $112 from a women's purse. Of importance, the court applied New York's delinquency standard of a preponderance of evidence.

[13]In re Winship, 90 S.Ct. 1068 (1970), p. 1072.

[14]Ibid., p. 1072.

[15]Ibid., p. 1072.

[16]Ibid., p. 1072.

facts surrounding his purchase of marijuana from said defendant because he was under the influence of LSD at the time. Upon the judge's consent, the prosecution introduced Porter's preliminary hearing testimony in which he identified Green as his supplier. In California v. Green (1970), the Supreme Court ruled that the introduction of such evidence did not violate the Sixth Amendment's Confrontation Clause. Brennan, in a dissenting opinion, declared that it did, for it violated his "Sixth Amendment right to grapple effectively with incriminating evidence."[17] He argued that there was "no significant difference between a witness who fails to testify about an alleged offence because he is unwilling to do so and a witness whose silence is compelled by an inability to remember."[18] He claimed that the remaining question was whether a pretrial statement obtained at a preliminary hearing under oath and subject to cross-examination met the purposes of the Confrontation Clause at trial. He declared that it did not. He argued that "cross examination at the preliminary hearing pales beside that which takes place at trial."[19] Indeed, he wrote, "it ignores reality to assume the purposes of the Confrontation Clause are met during preliminary hearing."[20] Moreover,

[17] California v. Green, 90 S.Ct. 1930 (1970), p. 1956.

[18] Ibid., p. 1954.

[19] Ibid., p. 1955.

[20] Ibid., p. 1956.

he found that the witness' lapse of memory cast serious doubt upon the reliability of his preliminary hearing testimony. He concluded that this unreliability, coupled with the impossibility of its cross-examination at trial, denied the accused his Sixth Amendment rights.

A police station showup for purposes of identification, without the presence of counsel, that took place subsequent to Kirby's and a companion's arrest, but before they had been indicted or otherwise formally charged with robbing one Willie Shard of his traveler's checks and social security card gave birth to Kirby v. Illinois (1972). The Court held that the testimony at trial pertaining to showup identification was admissible because the police station showup was not a "criminal prosecution" at which Kirby possessed a constitutional privilege to the aid of counsel. In a dissenting opinion, Brennan, citing Wade, contended that the Burger Court law-and-order majority's opinion deviated from precedent.[21] He argued that since the police station showup was a critical stage of prosecution, Kirby was entitled to the presence of counsel. As in Wade, he asserted that the showup, like the lineup, "was particularly fraught with the peril of mistaken identification."[22] He wrote:

[21] This reflects his respect for precedent. Wade, of course, emanated from his pen, nonetheless, it was precedent.

[22] Kirby v. Illinois, 92 S.Ct. 1877 (1972), p. 1887.

> In the setting of a police station squad room where all present except the petitioner and Bean (Kirby's companion) were police officers, the danger was quite real that Shard's understandable resentment might lead him too readily to agree with the police that the pair under arrest, and the only persons exhibited to him, were indeed the robbers.[23]

In Scott v. Illinois (1979), the Supreme Court held that the Sixth and Fourteenth Amendments only require that an indigent criminal defendant, in this case one Scott, who was charged with the offence of "theft," be afforded the right to appointed counsel if he is sentenced to a term of imprisonment. On a broader scale, this holding reflected the Burger Court law-and-order majority's assault on the Warren Court's libertarian view of the indigent's right to counsel. For this precise reason, Brennan filed a dissenting opinion. He proclaimed that the "plain wording of the Sixth Amendment and the Court's precedents compel the conclusion that Scott's uncounseled conviction violated the Sixth Amendment."[24] He argued that the Court's opinion restricted "the right to counsel, perhaps the most fundamental Sixth Amendment right, more narrowly than the admittedly less fundamental right to a jury trial."[25] His

[24] Scott v. Illinois, 99 S.Ct. 1158 (1979), p. 1163. These precedents included Argersinger v. Hamlin, 92 S.Ct. 2006 (1972) in which the Court, through Douglas, held that "absent knowing and intelligent waiver, no person may be imprisoned for any offence, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at trial."

[25] Ibid., p. 1170.

decision turned on the possible sentence, rather than the actual one. The fact that the offence of "theft" with which Scott was charged was punishable by a sentence of up to one year in jail played a pivotal role in his decision. More importantly, he contended that conviction for theft carried "the moral stigma associated with common-law crimes traditionally recognized as indicative of moral depravity."[26] Consequently, he declared that Scott must be afforded the aid of counsel.

Brennan believes that the individual's right to a jury trial is fundamental, albeit less so than the other Sixth Amendment guarantees. His view is reflected in a number of cases. He joined in Justice White's majority opinion in Duncan v. Louisiana (1968). The case grew out of the denial of Duncan's request for a jury trial by the state of Louisiana on the ground that its Constitution granted jury trials only in capital cases or in cases of imprisonment at hard labor. Duncan, a black youth, was charged, convicted, and sentenced to sixty days imprisonment and a $150 fine for the misdemeanor of simple battery in connection with his slapping of a white youth. White declared that trial by jury in criminal cases is fundamental to the American scheme of justice. Thus, he concluded that the state of Louisiana was required to afford the accused a jury trial in criminal prosecutions, and as such

[26] Ibid., p. 1165.

Duncan's request was justifiable.

In Johnson v. Louisiana (1972), one Frank Johnson was tried in a Louisiana Court by a twelve-person jury and convicted for armed robbery by a 9-3 verdict as authorized by Louisiana law in cases where the crime is necessarily punishable by hard labor. The Burger Court upheld the verdict on the ground that state provisions allowing less-than-unanimous jury verdicts in certain criminal cases was constitutional. In a dissenting opinion, Brennan held, on the other hand, that such provisions were unconstitutional on Sixth and Fourteenth Amendment grounds. He claimed that emotions often run high at criminal trials. Thus, he called for an unanimous verdict as a means of counterbalancing the negative effect of these emotions upon the open-mindedness of jurors and their ability to fairly weigh the arguments opposing their predisposed position. He wrote:

> When verdicts must be unanimous, no member of the jury may be ignored by the others. When less than unanimity is sufficient, consideration of minority views may become nothing more than a matter of majority grace. In my opinion, the right of all groups in this Nation to participate in the criminal process means the right to have their voices heard. A unanimous verdict vindicates that right. Majority verdicts could destroy it.[27]

In Murphy v. Florida (1975), he dissented from the Court's decision that the petitioner was not denied a fair

[27] It is interesting, but not surprising, that he sees the need for unanimous verdicts through the perspective of free expression and the furtherance of the citizenry's democratic "self-governing powers."

trial for the charge of breaking into a house, armed with intent to rob, because members of the jury had learned from news accounts about a prior felony conviction for his involvement in the 1964 theft of the Star of India sapphire from a museum in New York, or certain facts about the crime with which he was charged. Citing the jurors' testimony about the effects of these accounts, Brennan claimed "that the taint of widespread publicity regarding his criminal background * * * infected the jury's deliberations is apparent."[28] He criticized the trial judge for failing to take the necessary steps both to insulate prospective jurors from media coverage of the prior case and to prevent pretrial discussion of the present case among them. He wrote, "the trial court made no attempt to prevent discussion of the case or petitioner's previous criminal exploits among the prospective jurors, and one juror freely admitted that he was predisposed to convict petitioner."[29] He thus concluded that the petitioner's right to a fair trial was violated.

For Brennan, a fair trial encompasses the accused's rights to counsel, to confront the witnesses against him, to an impartial jury, and to the use of the standard of proof beyond a reasonable doubt. He believes that an ac-

[28] Murphy v. Florida, 95 S.Ct. 2031 (1975), p. 2038.

[29] Ibid., p. 2038.

cused is entitled to the aid of counsel at all critical stages of prosecution. Thus, his approach in the area of this right has turned on his determination of whether an occurrence is a critical stage. In his decisions, he has declared that a post-indictment line-up, a pre-indictment police station showup for purposes of identification, and the trial itself constitute such a stage. Conversely, he has proclaimed that the taking of a handwriting exemplar was not a critical stage. He believes that the accused's opportunity to cross-examine or confront the witnesses against him at trial is an essential interest secured by the Sixth Amendment's Confrontation Clause. He has ruled that the introduction as evidence at trial of a witness' pre-trial statement, when the witness is unwilling or unable to take the stand violates the accused's right to confront him. In short, his approach in Sixth Amendment cases, when the right attaches, is an absolute one.

In the area of criminal procedure, Brennan has shown a deep commitment to the protection of the individual's liberties against unwarranted and illegal governmental intrusions. Over the years, this commitment has become increasingly absolute. Three probable factors underly this movement: (1) his continual interest in more enlightened criminal and trial procedures; (2) the change of guard from the Warren Court to the Burger Court; and (3) to a lesser degree, perhaps the breakdown of ethical consensus.

CHAPTER X

EIGHTH AMENDMENT

The Eighth Amendment protects the individual against the requirement of excessive bail, the imposition of excessive fines, and the infliction of cruel and unusual punishments. Brennan's Eighth Amendment decisions primarily have addressed the issue of cruel and unusual punishments. He believes that any punishment that derogates from human dignity is cruel and unusual. He has employed "the evolving standards of decency that mark the progress of a maturing society" test to determine whether a particular punishment is a derogation thereof. Relying on this standard, he unequivocally and without deviation has condemned the use of the death penalty. The critical underlying aspects of his standard, consistent with his liberalism and Christian faith, is a concern for human dignity, and the fact that he seems to hold hope for the reformation of even the most hardened and sadistic of criminals. In addition, the breakdown of ethical consensus may have a tenuous influence upon him in this area. Despite the fact that most of the states have reinstituted its use, many people and groups still believe strongly that the death penalty is morally wrong, including the Catholic Church. The degree of this

influence is debatable, but one thing is certain, Brennan agrees with them.

The issue of the death penalty vis-a-vis the Eighth Amendment's Cruel and Unusual Punishment Clause has been, and still is, one of the most controversial and problematic for the Burger Court. Many people, including the majority of Brennan's Brethen on the Burger Court,[1] believe that in certain circumstances the imposition of the death penalty is justifiable. Brennan simply does not agree with this belief, and has protested vociferously against its use, no matter the circumstances. His view is reflected in numerous cases, including Furman v. Georgia (1972), Gregg v. Georgia (1976), and Coker v. Georgia (1977).

In Furman,[2] the Court held that the imposition of the death penalty where statute failed to provide safeguards against arbitrary and capricious administration was cruel and unusual. Brennan filed a concurring opinion because, unlike the majority, he did not want to leave the door ajar, even slightly, for the use of the death penalty. He declared that its imposition, regardless of the crime, violated the Eighth Amendment's Cruel and Unusual Punishment

[1]This majority excludes Justice Thurgood Marshall who like Brennan, believes that the penalty is absolutely prohibited by the Eighth Amendment.

[2]The Supreme Court for the first time ruled on the constitutionality of the penalty under the cruel and unusual punishment clause.

Clause. Examining the history of the clause, he asserted that the Framers included it to restrict the legislative branch's power so that it would not have "the unfettered power to prescribe punishments for crimes."[3] He claimed, therefore, that the courts must determine the constitutional validity of punishment. Beyond that, however, he conceded that their intent was imprecise. He wrote, "we cannot know exactly what the Framers thought 'cruel and unusual punishments' were."[4] He stated that the Court "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[5] Applying these standards, he asserted that the Clause prohibited "the infliction of uncivilized and unhumane punishments" that did not "comport with human dignity."[6] He declared that "death was truly an awesome punishment" which by its nature involved "a denial of the executed person's humanity."[7] Moreover, he concluded that the death penalty "in comparison to all other punishments * * * is uniquely degrading to human dignity."[8] He proposed a test for determining whether a punishment violated the Clause. He wrote:

[3] Furman v. Georgia, 92 S.Ct. 2736 (1972), p. 2739.

[4] Ibid., p. 2739.

[5] Ibid., p. 2742.

[6] Ibid., p. 2742.

[7] Ibid., p. 2752.

[8] Ibid., p. 2753.

> The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause.[9]

Judged against this cumulative test, he concluded that the death penalty was absolutely inconsistent with the Clause.

In _Gregg_, the Court, concluding that capital punishment may serve the essential function of expressing society's moral outrage, declared that the imposition of the death penalty was not cruel and unusual where statute provided guidelines for mitigating factors and sentence is not automatic. Reaffirming his adherence to an absolute prohibition of the death penalty's use, Brennan dissented. He attacked the majority's opinion for requiring that "evolving standards of decency focus primarily upon the procedures employed by the State to single out persons to suffer the penalty of death."[10] Instead, he asserted that these standards must focus on the essence of the death penalty. He concluded that

> 'moral concepts' require us to hold that the law has progressed to the point where we should declare that the punishments of death, like punishments on the rack, the screw, and the wheel, is no longer morally tolerable in our civilized society.[11]

[9] _Ibid._, p. 2748.

[10] _Gregg v. Georgia_, 96 S.Ct. 2909 (1976), p. 2971.

[11] _Ibid._, p. 2972.

Ehrlich Anthony Coker, while serving sentences for murder, rape, kidnapping, and aggravated assault, escaped from prison. For his conduct during the single day of escape, he was convicted of escape, motor vehicle theft, armed robbery, kidnapping, and rape, the last three which were capital crimes in Georgia, and sentenced to the death penalty. Considering the fact that he had not murdered anyone during the spree, the Court held that the sentence was forbidden by the Eighth Amendment because it was grossly disproportionate and excessive vis-a-vis the crimes. Brennan, in a concurring opinion, clung to his view that the death penalty, regardless of the circumstances, constituted a cruel and unusual punishment. He thus called for the setting aside of the imposed sentence.

The death penalty is not substantially rejected by contemporary society. The fact that 38 out of 50 states have restored it bears this out. Nonetheless, Brennan continues to persist in his absolute disapproval of its use. His disapproval is based on his belief that our society has advanced beyond the "an eye for an eye, a tooth for a tooth" judicial mentality. Moreover, he believes that it is unusually severe, and that there is not reason to believe that it serves any penal purpose—retributive and/or deterrence—more effectively than some less severe punishment, such as life imprisonment. Remember that his proposed test for determining whether a punishment is cruel

and unusual is a cumulative one. That is, in order for a punishment to pass muster, it must meet all the criteria. He correctly surmises that the death penalty does not. In short, his visceral instinct tells him that it is wrong, and he finds substantiation for it in history and the language of the Eighth Amendment.

In the past decade, the national media has given wide coverage to the issue of the United States' overcrowded prisons. In fact, this issue was brought to the courts numerous times in case form for remedy. One of these cases was _Rhodes v. Chapman_ (1981). The Supreme Court held that prison overcrowding and double-celling such as existed at the Southern Ohio Correctional Facility did not constitute cruel and unusual confinement. In a concurring opinion, Brennan claimed that the courts had the responsibility to scrutinize such claims. He argued that "the courts have emerged as a critical force behind efforts to ameliorate inhumane conditions."[12] Indeed, he contended that the courts were peculiarly invested with the ability and opportunity to do so. He wrote:

> Insulated as they are from political pressures, and charged with the duty of enforcing the Constitution, courts are in the strongest position to insist that unconstitutional conditions be remedied, even at significant financial cost.[13]

[12] _Rhodes v. Chapman_, 101 S.Ct. 2392 (1981), p. 2405.

[13] _Ibid._, p. 2405.

He claimed that the task involved determining whether the challenged conditions of confinement comported with human dignity. Considering the findings of fact, he concluded that the conditions, examined in their totality, did not violate the Eighth Amendment, for they did not derogate from human dignity.

In sum, Brennan's Eighth Amendment decisions have addressed almost exclusively the Cruel and Unusual Punishment Clause. With respect to capital punishment, he is an absolutist. That is, he has erected an absolute ban against its use. He believes that it denies the executed individual his humanity and, as such deviates from the evolving standards of decency that mark the progress of a civilized society. Moreover, his faith in the reformation of the criminal, and respect for human dignity, are implicit in his capital punishment decisions. The breakdown of ethical consensus is also implicit, but to a much lesser degree. His absolutism, however, does not extend to other cruel and unusual punishment claims. In this area, he pays strict attention to the facts presented in each case. He does this in order to determine whether the punishment derogates from the individual's human dignity. Indeed, his decision turns on this determination. Finally, he believes that it is the courts' constitutional duty to consider such matters and, considering the fact that they are relatively immune

from political pressures, that courts are in the best position to do so.[14]

[14]See Richard Neely, How Courts Govern America, (New Haven and London: Yale University Press, 1981), for an interesting and cogent argument along these lines.

CHAPTER XI

CONCLUSION

Justice Felix Frankfurter once said that he had always taught his law students at Harvard to think for themselves. He claimed, however, that one of his former students, Justice William J. Brennan, Jr., went too far. Questioned as to how he felt about this statement, Brennan "thought a moment and said he would let the written words of his opinions tell their own story."[1]

In his Bill of Rights opinions, Brennan clearly has revealed himself as a civil libertarian. He believes that the Bill of Rights was intended by its Framers to prevent government oppression of individual rights. He consequently has shown a strong predilection for the protection of individual liberty against governmental intrusions. Indeed, over the years, this predilection in many circumstances has become increasingly absolute.

Two key notions are evidenced in his libertarianism: respect for personal privacy and human dignity; and democratic self-government. He views privacy as an intrinsic human privilege that the government can not abridge, unless

[1]Joseph Foote, "Mr. Justice Brennan: A Profile," Harvard Law School Bulletin, 18 (November, 1966), p. 20.

the societal need is compelling. Moreover, in many cases, he seemingly has ignored the government's proposed reason(s). While the notion of privacy is mirrored in all of his Bill of Rights decisions, the notion of democratic self-government is reflected primarily in his First Amendment opinions. He considers freedom of expression the most precious of the first ten amendments' guarantees, for it leads to the increased knowledge and sophistication of the electorate. In the event that the two notions come into conflict, as in Time, Inc. v. Hill,[2] he has resolved in favor of democratic self-government.

The concept of "ordered liberty," likewise, is critical to his libertarianism. In fact, it was primarily the determining factor for him in Schmerber v. California.[3] He wrote that individual liberty is the basis of American democracy. But, as he further wrote, this liberty has its limits. In short, "it is a liberty of the individual under such restraints as are necessary to preserve the same rights of others."[4] For Brennan, the unrestrained exercise of individual liberty leads to chaos or anarchy. In other words, it destroys liberty. Thus, a degree of order is imperative. He was undoubtedly correct when he said, "with-

[2] Id., at pp. 76-78.

[3] Id., at pp. 90-93, 110-111.

[4] Brennan, "Ordered Liberty," p. 14.

out 'order' there is no 'liberty.'"[5] Nonetheless, he realizes also that too much order suffocates liberty. Therefore, he calls for just enough order to attain the all-important desire for individual liberty. In the vast majority of cases, he has declared that the degree of governmentally imposed order was indeed too much.

During his twenty-six years on the Court, Justice William J. Brennan, Jr., has played a leading role in strengthening and expanding the liberties of the individual. As Edward V. Heck asserted, he was the cutting edge of Warren Court liberalism.[6] Moreover, he has continued in this role, indeed in more pronounced fashion, as a member of the Burger Court.

[5] *Ibid.*, p. 15.

[6] *Id.*, at p. 2.

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