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Mr. Justice Brennan and the Bill of Rights

LAWRENCE SPEISER*

Every lawyer has his own secret life just as did James Thurber's Walter Mitty. For most lawyers, the daydream of being sworn in as a Supreme Court Justice probably ranks second only to the daydream of destroying arrogant and hostile witnesses through perceptive, brilliant, relentless cross-examination. This is not because being a Supreme Court Justice is any less important than being as good as Perry Mason, but only because most lawyers have enough grasp on reality to know that the chances of becoming a Supreme Court Justice are almost as remote as being the first man to land on the moon, while there is always the lively possibility of that happy congruence of circumstances under which a witness goes to pieces as a result of the superb intellectual and technical skill that every lawyer knows deep down inside he possesses.

It is likely that Justice Brennan felt a sense of unreality when he was appointed to the Supreme Court in 1956. Until seven years before, he probably thought that he would spend the rest of his professional life in a private law firm. In 1949, however, he was appointed a judge in the Law Division of the New Jersey Superior Court, and then, a year and a half later, to its Appellate Division. In March 1952, he was chosen for the New Jersey Supreme Court, where he served until his appointment to the United States Supreme Court.

Although it is true that Justice Brennan is widely known as a member of the liberal bloc on the Court, he is by no means a rubber stamp for Chief Justice Warren or for Justices Black or Douglas (nor for that matter are any of them rubber stamps for each other). He has a judicial philosophy all his own. More often than not, in matters affecting individual liberties protected by the Bill of Rights, he will be aligned with Black, Douglas, and Warren, but repeatedly he has written his own concurring opinions to assure an accurate presentation of his own views. It is only by an examination of his record, his voting, and the articulation of his ideas that an assessment can be made of his judicial philosophy. Only a few of these relevant areas will be explored here.

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They should, however, be sufficient for an appraisal of Justice Brennan's concern for individual rights during his first five years on the United States Supreme Court.

I. DUE PROCESS FOR DEFENDANTS IN CRIMINAL CASES

Right to Counsel

Of all the procedural protections set forth in the Constitution, the one that Brennan probably feels most strongly about is the right to counsel. Brennan strenuously disagrees with the present Supreme Court decision law on the right to counsel in state court cases—that the state need not appoint counsel to represent indigent defendants in non-capital cases unless the failure to do so results in "fundamental unfairness." Only where the offense is punishable by death has the Supreme Court held that the due process clause of the fourteenth amendment requires the states to appoint counsel for the indigent accused. He alone concurred with Justice Douglas in the recent case of McNeal v. Culver in urging the overruling of Betts v. Brady which first drew the line for the states between the right to appointed counsel in capital and non-capital offenses.

Brennan is profoundly disturbed, and properly so, that an accused who is too poor to retain counsel will suffer many disadvantages in a criminal trial compared with a person who wants an attorney and can afford to hire one. He expressed this concern most vigorously in a recent speech, "The Bill of Rights and the States," which was delivered as the second annual James Madison Lecture at the New York University Law Center in February, 1961. There he emphasized that "without the help of a lawyer all the other safeguards of a fair trial may be empty." He made no secret of his puzzlement that a state is held to violate the equal protection clause if it fails to provide a convicted indigent defendant with a free transcript of the trial proceedings for the purpose of appeal while its failure to supply free counsel to any indigent accused is not held to violate this guaranty.

In a recent case, Ferguson v. Georgia, Justice Brennan, who wrote the Court's opinion, enunciated his feeling on the importance of the aid a counsel

3 287 U.S. 45, 68-69 (1932).
4 316 U.S. at 455.
6 351 U.S. at 12 (1956).
7 Cf. Smith v. Bennett, 365 U.S. 708 (1961) (decided after Brennan's James Madison Lecture) where a unanimous Supreme Court, in an opinion by Justice Clark, held that the State of Iowa violated the equal protection clause if it refused to permit the filing of applications for writs of habeas corpus unless accompanied by a four dollar filing fee, or the allowance of an appeal unless accompanied by a three dollar filing fee. The Court reiterated its excellent statement from Griffin v. Illinois, 351 U.S. 12, 19 (1956), "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."
can give to a criminal defendant. The case involved a Georgia law under which a defendant in a criminal case was incompetent to testify in his own behalf. This was the common law rule, but it had been removed by statute in every Anglo-American jurisdiction except Georgia. There a defendant could only make an unsworn statement to the jury and was not subject to cross-examination. The particular defendant, charged with murder, sought to have his counsel ask him questions, but the judge refused to allow this and instead required him to make his statement in narrative form without the aid of his lawyer’s interrogation. The Court held that the resulting conviction violated the due process clause in depriving the defendant of the “guiding hand of counsel.”

Justice Brennan must have enjoyed the irony of the fact that he wrote the opinion for the Court while that pastmaster of judicial self-restraint, Justice Frankfurter, wrote a separate opinion agreeing that the conviction should be reversed, but arguing that the basic underlying statute (disqualifying the defendant from testifying under oath) should be ruled unconstitutional even though not specifically challenged by the defendant. Brennan restrained himself and merely noted in a footnote the “incongruity of passing upon the statute the appellant expressly refrained from attacking.”

Justice Brennan, however, did not let pass the opportunity to take a swipe at *Betts v. Brady* by specifically noting that the result did not turn on the fact that the appellant was being tried for a capital offense and was represented by employed counsel. His bland statement at the end of the opinion that “the command of the Fourteenth Amendment also applies in the case of an accused tried for a non-capital offense, or represented by appointed counsel” should be taken as a storm signal that the rule of *Betts v. Brady* is in for heavy weather ahead.

Nevertheless, Brennan’s sincere concern for the right of an indigent to have the state provide counsel has been overcome where he has been convinced that the federal claim is not ripe for review. He joined in a *per curiam* opinion in *Newsom v. Smyth* dismissing a writ of certiorari on that ground, over the dissents of Chief Justice Warren and Justices Black and Douglas, who argued that the case did present a clear cut question of whether the equal protection clause required the appointment of counsel to represent indigents on appeal from state court convictions.

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9 Id. at 594, citing *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

10 Id. at 572.

11 Id. at 596.


13 Cf. Justice Brennan joining in the majority opinion in *Mapp v. Ohio*, 367 U.S. 643 (1961) over the vigorous dissents of Justices Harlan, Frankfurter, Stewart and Whittaker that the issue decided by the majority had not been properly raised. The Court held that the evidence obtained in violation of the fourth amendment’s stricture against unreasonable search and seizure would no longer be admissible in state criminal trials. The Court specifically overruled *Wolf v. Colorado*, 338 U.S. 25 (1949).
In view of Justice Brennan's insistence on the importance of counsel, it is no surprise that he will not lightly find a waiver of this right by a defendant. In *Moore v. Michigan*, for example, he wrote the majority opinion in a 5-4 case overturning a life sentence at hard labor imposed in 1938 on a 17 year old Negro of limited education and mental capacity, who, after expressly disavowing a desire for counsel, pleaded guilty to a charge of murder. Brennan pointed out that the sheriff had told the defendant, just before he confessed, that "tension is very high outside and there could be trouble." He added that "a rejection of federal constitutional rights motivated by fear cannot, in the circumstances of this case, constitute an intelligent waiver."

Brennan's strong feelings about the importance of counsel are not restricted to the purely criminal field. He has, for example, joined with the Chief Justice and Justices Black and Douglas in vigorous dissents to Court holdings that there was no constitutional right to the effective assistance of counsel in an arson investigation by a fire marshal or in a judicial investigation of "ambulance chasing."

Although Brennan has stated that he believes an accused has the right to the assistance of counsel at every stage of the proceedings, he apparently takes a more limited view than does either Black or Douglas as to when the state must first furnish an attorney to an indigent defendant. He did join Douglas' dissent in *Crooker v. California*, urging that a confession obtained from a college-educated first-year law student during police interrogation should have been excluded when the defendant had not been permitted by the police to contact an attorney. (Douglas wrote: "The demands of our civilization expressed in the Due Process Clause require that the accused who wants a counsel should have one at any time after the moment of arrest." Crooker had wanted to contact a specific attorney and there was no indication that he was indigent.

In other cases, however, where confessions were obtained from defendants during police interrogation, Brennan has refused to join in upholding Douglas' principle that "any accused—whether rich or poor—has the right to consult a lawyer before talking with the police; and if he makes a request for a lawyer and it is refused, he is denied 'the assistance of counsel for his defense' guaranteed by the Sixth and Fourteenth Amendments." 

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18 357 U.S. 433, 441 (1958).
19 Id. at 448.
Significantly, on the same day that *Crooker* was decided, Brennan joined with the majority in *Ashdown v. Utah,* a 7-2 decision upholding a conviction based on a confession obtained during a four-and-one-half hour interrogation of a female defendant suspected of murder. The defendant had not, in fact, asked to see an attorney. Justices Black and Douglas dissented on the ground that, even though the defendant had not asked specifically for an attorney, her father and uncle who were kept outside the interrogation room had suggested she should not be questioned without one.

Justice Brennan also did not associate himself with a concurring opinion by Douglas in *Culombe v. Connecticut,* in which Black joined. There an illiterate mental defective was interrogated by police for five days until he confessed to participating in a holdup in which two men were murdered. He said he wanted a lawyer but could not afford one. Black and Douglas urged that the confession be excluded because it was obtained in violation of his constitutional right to counsel. Brennan, in a separate concurring opinion, merely held that the confession should have been barred because it was, in fact, coerced. In another case, however, Brennan agreed that, if a defendant has been indicted and then surrenders after retaining counsel, his confession obtained during a subsequent police interrogation should be barred, where his repeated requests to contact his own attorney were refused.

Perhaps the distinguishing feature of all these cases is that Brennan does not believe the state is bound to furnish an attorney to an indigent accused at the time of arrest even if he requests it. If, however, the accused has an attorney or wants to contact a specific one and the police refuse simply because they

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a 357 U.S. 426 (1958).

b Justice Brennan took no part in the decision of *Cicenia v. Lagay,* 357 U.S. 504 (1958) decided the same day on a similar issue as *Crooker* possibly because the case was on appeal from New Jersey.


d Joined by the Chief Justice and Justice Black.

e Here again, this case should cause some surprise and disturb Justice Frankfurter's reputation for being the leading exponent of judicial self-restraint. He took 77 pages for the Court's opinion in which Justice Stewart alone joined. Chief Justice Warren concurred and dryly remarked, "It has not been the custom of the Court, in deciding the cases which come before it, to write lengthy and abstract dissertations upon questions which are neither presented by the record nor necessary to a proper disposition of the issues raised. The opinion which announces the judgment of the Court in the instant case has departed from this custom and is in the nature of an advisory opinion, for it attempts to resolve with finality many difficult problems which are at best only tangentially involved here. The opinion was unquestionably written with the intention of clarifying these problems and of establishing a set of principles which could be easily applied in any coerced-confession situation. However, it is doubtful that such will be the result, for while three members of the Court agree to the general principles enunciated by the opinion, they construe those principles as requiring a result in this case exactly the opposite from that reached by the author of the opinion."

prefer to interrogate the accused incommunicado, Brennan feels there is an interference with the right to counsel and he would bar confessions thus obtained.

**Discovery**

Because of his experience in the practice of law and on the trial court bench, Justice Brennan is wholeheartedly dedicated to the value of discovery as "basically a tool for truth" and "the most effective device yet devised for the reduction of the aspect of the adversary element to a minimum." He has confessed to an "arbitrary prejudice" in favor of discovery in order to insure that "justice shall be done."

While on the New Jersey Supreme Court, Brennan filed an outraged dissent in a murder case in which an accused was denied a copy of his own confession. "It shocks my sense of justice," he wrote, "that in these circumstances, counsel for an accused facing a possible death sentence should be denied inspection of his confession, which, were this a civil case, could not be denied..." Interestingly enough, in a recent address Brennan discussed this case and his dissenting opinion and then indicated that he felt compelled to agree that the United States Supreme Court properly denied review because "the Fourteenth Amendment as presently interpreted does not command the States to have any particular form of discovery practice in criminal cases or indeed any discovery practice at all..."

Even though due process may not now require that a defendant in a criminal case be entitled to discovery, it is clear that Brennan will do all in his power to extend this valuable tool whenever possible to defendants in criminal trials. He feels strongly that the values of discovery for the purpose of effective cross-examination are as applicable to criminal cases as to civil cases.

It is therefore no surprise that Brennan wrote the Court’s opinion in *Jencks v. United States.* That case held that the defendant in a criminal trial is entitled to inspect and to use for impeachment purposes prior relevant statements or reports of government witnesses touching the subject matter of their testimony at the trial, even though there has not been an advance demonstration of inconsistency.

The *Jencks* decision produced an uproar, particularly in Congress, which promptly pushed through a law to limit its effect. In a series of subsequent

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29 State v. Tune, supra note 27.
31 553 U.S. 657 (1957).
cases, the Supreme Court issued a number of 5-4 rulings curtailing the right to see documents and materials. Brennan voted with the dissenting minority of Warren, Black, and Douglas. The same four refused to join in the Court's opinion written by Justice Frankfurter in *Palermo v. United States* that the Jencks Act was to be the sole and exclusive means of determining which statements in the possession of the government could be required for cross-examination purposes.

Clearly, Justice Brennan will continue to urge as full disclosure as possible in criminal as well as civil cases in order to assure that "right and justice shall have the most favorable opportunity of prevailing in cases that are tried."

**Privilege Against Self-Incrimination**

In 1958, there appeared in the *Catholic University of America Law Review* an article written by Daniel M. Berman entitled "Mr. Justice Brennan: A Preliminary Appraisal." In it, Mr. Berman took a skeptical view of Justice Brennan's expressed devotion to the privilege against self-incrimination. This was based largely on Brennan's New Jersey Supreme Court decisions, in which it appeared that the Justice did not believe the privilege against self-incrimination protected a witness as to matters which might incriminate him under the laws of another jurisdiction, and that the federal privilege against self-incrimination was not made applicable to the states through the due process clause of the fourteenth amendment.

Berman may have been unfair to the Justice in not realizing that Brennan was applying the law as a state court judge on the privilege as enunciated by the United States Supreme Court, and that he felt bound to do this. On the United States Supreme Court, of course, Brennan is in an entirely different position. He now has the opportunity to reexamine prior Supreme Court decisions, and it is an opportunity that he apparently intends to make the most of.

Brennan's belief in the importance of preserving the privilege against self-incrimination has been of long standing. He had eloquently set forth his views in a speech to the Monmouth Rotary Club on February 23, 1955:

> In re Pillo, 11 N.J. 8, 93 A 2d. 176, 180 (1952).
> "Hearings Before the Senate Committee on the Judiciary, on the Nomination of William Joseph Brennan, Jr. to be Associate Justice of the Supreme Court of the United States. 85th Cong., 1st Sess. (1957)."
But if we pause and think a moment and ask ourselves, "What is it really that the privilege aims to accomplish?" we come to the different, and, for me at least, more persuasive conclusion that it is not abolition of the privilege but greater respect for it that we should foster, for the need for it is as great or perhaps greater in our day.

This expressed analysis did not escape the eye of Senator Joseph R. McCarthy, who subsequently voted to oppose Justice Brennan's nomination (for this reason, among others).

In his subsequent opinions, Justice Brennan has retained this devotion to the privilege against self-incrimination. In *Cohen v. Hurley*, he dissented (along with Black, Douglas and Warren) from the Court's holding that a state may disbar an attorney who pleads his state's privilege against self-incrimination in refusing to answer questions during an investigation of "ambulance chasing." Brennan explicitly set forth his belief that the privilege against self-incrimination secured by the fifth amendment is absorbed by the due process clause of the fourteenth amendment. He reaffirmed his position that individuals should neither suffer civil penalties (such as discharge from employment) nor be disbarred, for exercising constitutional privileges; otherwise these privileges would be undercut by drawing an arbitrary inference of unfitness.

During the last term of the Supreme Court, Brennan wrote the majority opinion in *Reina v. United States*, upholding the validity of a federal law granting immunity from prosecution by both the state and federal government to a witness compelled to testify before a grand jury on narcotics violations. He feels that, when an appropriate opportunity arises, the Court should reexamine its position that a person may be convicted of a federal crime on the basis of testimony he is compelled to give in a state investigation.

Thus it is apparent that, of Berman's two criticisms of Justice Brennan's position on the privilege against self-incrimination, one was unwarranted (that he did not feel it was applicable through the due process clause of the fourteenth amendment). For the other, he has not yet expressed himself, awaiting an appropriate case.

*Unreasonable Searches and Seizures*

Evolution of the law is something that does not surprise Justice Brennan. He

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42 Nelson v. County of Los Angeles, 362 U.S. 1, 10 (1960) (dissenting opinion).
has demonstrated an ability to trace evolutionary trends, while exhibiting impatience with a somewhat illogical interim position.

In his speech on "The Bill of Rights and the States," Brennan recounted the development of the applicability to state officials of the fourth amendment's guaranty against 'unreasonable searches and seizures.' From the Court's holding in 1914 that the guaranty was not directed against state officials, the trend continued until 1949, when the Court held that it was applicable but refused (because of considerations of federalism) to make it enforceable by the application of the exclusionary rule. In his Bill of Rights speech, Brennan said:

Should the exclusionary rule be treated as a mere rule of evidence or does it take on constitutional mien in the context of the Fourth Amendment? There are members of the Court who insist that the rule must be treated as a constitutional requisite or the 1949 extension of the Fourth Amendment's protections to state power has been a meaningless exercise. They point out that state officers have little incentive to obey the Fourth Amendment's commands if evidence seized in defiance of them may be used against the victims in state courts. Those who find it surprising that a state should be allowed to send a man to prison or to his death on evidence which state officials have obtained in disregard of the Constitution of the United States believe that inevitably the Court must reconsider its 1949 holding.

On the last day of the term, the Court did indeed reconsider and in Mapp v. Ohio held, 5-4, that evidence obtained by state officials in a manner violating rights protected by the fourth amendment (as made applicable to the States by the fourteenth) could not be introduced in evidence in a state court criminal proceeding. Brennan joined in Clark's opinion.

He has, however, remained in a minority in arguing against the right of health and housing inspectors to search homes without judicial search warrants.

**Double Jeopardy**

Although Brennan generally is not too impressed by the argument that states rights should inhibit the Supreme Court from protecting the rights of individuals who run afoul of state laws, he seems to have some mixed feelings about the scope of the double jeopardy provision in the federal constitution. He implied in his speech, "The Bill of Rights and the States," that the provision

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was among those "fundamental principles of liberty and justice which lie at
the base of all our civil and political institutions," and criticized "[j]udicial
self-restraint which defers too much to the sovereign powers of the states." He strongly urged that the federal provision against double jeopardy was one
of those rights necessary "to the very existence of a scheme of ordered liberty."
Yet, in spite of these views, Brennan failed to join Black dissenting in Ciucci
v. Illinois, arguing the fifth amendment guaranty against double jeopardy
was made applicable to the states by the fourteenth amendment. Instead, he
dissented, but only on the ground that the case demonstrated "an unseemly
and oppressive use of a criminal trial" in violation of due process.

While sitting on the New Jersey Supreme Court, Brennan had vigorously
dissented in a case in which a defendant had been placed on trial for robbing a
victim in a tavern although the same man had been acquitted earlier of rob-
bining three other patrons at the same time. Brennan argued that the test of
double jeopardy was whether the accused was being harrassed by successive
trials for essentially the same alleged criminal act.

Yet, in Abate v. United States Brennan, writing for the majority, stated
that the rule against double jeopardy did not apply to federal and state
trials for the same offense, but only against successive federal trials. The
defendant and his co-defendants had first been tried by Illinois, convicted, and
given comparatively light sentences; then they were tried by the federal gov-
ernment and given much stiffer sentences. On appeal, Brennan asserted that
federal law enforcement would be hindered if the states were free to prosecute
criminal acts violating their laws, thereby barring subsequent federal prose-

cution. Almost sotto voce, he then wrote an unusual additional opinion for
himself, after having written the Court's opinion, rejecting an alternative
government argument that the majority of the Court had found unnecessary
to discuss. His argument was that, in any case, the double jeopardy clause did
not apply, since the two prosecutions were under statutes requiring different
evidence for a conviction and protecting different interests. Brennan's later
explanation for his seemingly contradictory views on this subject as being
required by the "demands of federalism" does not appear to be convincing.

Brennan, supra note 47, at 22.
Id. at 24.
356 U.S. 571 (1958) (dissenting opinion).
Id. at 575.
not participating).
Id. at 196.
Address, supra note 28, at 10-11.
II. First Amendment

Freedom of Speech and Press

Whether by choice or by happenstance, Justice Brennan appears to be the "obscenity" man on the present Supreme Court. It was he who authored the landmark decisions in this field: Roth v. United States, and its companion case, Alberts v. California. Until then, the Supreme Court had never ruled directly on whether laws banning obscene publications were violative of the first amendment's guaranty of freedom of the press. Roth was charged with circulating obscene material in violation of a federal law controlling the mails. Alberts and his wife, who operated a mail-order business in Los Angeles, were charged with stocking obscene books in violation of a California statute.

Excluded from both cases was the question of whether the publications for which Roth and the Alberts had been arrested were obscene in fact or as a matter of law. The statutes, the Court held, did not violate freedom of expression or the definiteness requirements of the United States Constitution. In the Court's opinion, Justice Brennan wrote that "obscenity is not within the area of constitutionally protected speech or press" because it is "utterly without redeeming social importance." He emphasized, however, that "sex and obscenity are not synonymous . . . [and the] portrayal of sex, e.g., in art, literature and scientific works . . . [is entitled to] the constitutional protection of freedom of speech and press" so long as it does not fall into the category of obscenity. Brennan concluded by stating: "It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." He specifically turned down the contention made by the appellants that these obscenity statutes as interpreted offended the Constitution because they punished incitement to impure sexual thoughts not shown to be obscene.

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62 62 Stat. 768, 18 U.S.C. §1461 (1948), the pertinent provisions of the statute read: "Every obscene . . . book, pamphlet, picture . . . or other publication or an indecent character; and . . . Every . . . circular . . . advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned . . . things may be obtained . . . Is declared to be nonmailable matter and shall not be conveyed in the mails. . . . Whoever knowingly deposits for mailing . . . anything declared by this section to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . ."
63 Cal. Pen. Code Ann. §311 (1955), the relevant provisions of the obscenity statute read: "Every person who willfully and lewdly, either . . . keeps for sale, or exhibits any obscene or indecent writing, paper or book . . . or . . . publishes any notice or advertisement of any such writing, paper, book, picture, print or figure; . . . is guilty of a misdemeanor."
64 Roth v. United States, supra note 61, at 485.
65 Id. at 484.
66 Id. at 487.
67 Id. at 488.
related to any overt anti-social conduct. He set forth what he considered to be a proper standard in judging what is obscene: "[W]hether to the average persons, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest," i.e., whether it is material having a tendency to incite lustful thoughts.

As might be expected, Justice Brennan's opinion in Roth-Alberts has been subjected to trenchant criticism. Some of the most critical comments were by Mr. Justice Harlan, who concurred in Alberts but dissented in Roth. He wanted to limit federal obscenity censorship strictly to hard-core pornography, while according to the states broader censorship powers (the limits of which he did not spell out). Chief Justice Warren, on the other hand, concurred in the result. He would give some constitutional protection to material relating to sex but thought that the essential issue in obscenity cases was not "the obscenity of a book or picture" but the "conduct of the defendant." Therefore, he voted to affirm the convictions of both Roth and Alberts because they were in the business of appealing to the erotic interests of their customers. Both Douglas and Black dissented on the ground that the obscenity laws as interpreted by the majority provided punishment for thoughts provoked, not for overt acts or anti-social conduct.

Subsequently, Brennan delivered an opinion for the Court in the case of Smith v. California. That case involved Eleazer Smith, a bookseller, who was convicted for violating a Los Angeles ordinance making it unlawful "for any person to have in his possession any obscene or indecent writing, [or] both... in any place of business where... books... are sold or kept for sale." This ordinance was construed by the California courts as imposing an absolute criminal liability, not dependent upon any "guilty knowledge," or knowledge on the part of the defendant of the contents of the books that he kept for sale. The Supreme Court reversed the conviction with Justice Harlan dissenting in part. Brennan noted that the practical consequence of a rule of absolute liability would be a self-imposed censorship on the part of the booksellers, who would limit their sales activities to those books they investigated and concluded to be clearly not obscene. The resulting restriction on dissemination of non-obscene material would be the consequence of governmental action even though not directly required by the government. Brennan wanted the require-

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6 Webster's New International Dictionary (unabridged, 2d ed., 1949) defines prurient, in pertinent part as follows: "...itchings; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity or propensity, lewd..."

77 Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L.Rev. 5 (1960).

78 Roth v. United States, supra note 61, at 495.

79 Id. at 508.

80 361 U.S. 147 (1959).
ment that criminal statutes be definite and clear to be applied with special strictness where there is a potential restriction on freedom of speech or press. In requiring some element of a guilty intent, however, he specifically refused to lay down guidelines for courts and legislatures as to what sort of an intent is required by the Constitution.

Although Brennan parted company with Black and Douglas by upholding anti-obscenity laws, he does not differ with them on the importance of procedure for determining what is obscene. Warren and Brennan agree that there should be no prior restraint on obscene publications or materials.

For this reason, it is not surprising that Brennan voted with the dissenters in the 5-4 decision upholding a Chicago ordinance requiring submission of all films for examination by a censorship board prior to public exhibition. Nor is it surprising that he was one of the four justices who dissented from the Court's decision upholding a New York law authorizing an injunction action by municipalities to prevent the sale or distribution of obscene material. Warren, Douglas and Black dissented on the ground that the statute imposed an invalid prior restraint. Brennan, however, dissented on an entirely different ground—that the New York statute failed to provide for the right to jury trial. He places a high value on preserving the right to a jury trial in this area, since a jury represents a cross-section of a community and has a special aptitude for reflecting the view of the average person. "Jury trial of obscenity, therefore, provides a peculiarly competent application of the standard for judging obscenity, which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards." The regard for a jury trial in this field, it should be noted, is not shared by Justices Black or Douglas or by Justice Harlan, who stated:

Many juries might find Joyce's 'Ulysses' or Bocaccio's 'Decameron' was obscene, and yet... no such verdict would convince me, without more, that these books are utterly without redeeming social importance.

There was, however, no difficulty convincing the rest of the Court of the unconstitutionality of a Missouri law permitting the issuance of search warrants for obscene publications by a judge (in an ex parte hearing) who did not even see the publications or specify the particular ones which were to be seized. The warrants authorized police officers to search and seize all "obscene publications." Brennan, in a carefully written opinion, ruled that because free-
The freedom of the press was involved a State would have to be particularly careful in adopting procedures for dealing with obscenity.

From Brennan's opinions in the obscenity field, this conclusion may be drawn. Rejecting Black's absolutist position on the first amendment, he actually contributed nothing to a field that has defied solution for centuries. Indeed, he apparently only laid down two—and only two—constitutional requirements for determining what is obscene: the material must be judged as a whole, not by its parts, and it must be judged by its impact upon average persons, not upon the weak and susceptible. All that remains, apart from this, is that Brennan, along with Warren, Black, and Douglas, would retain the age-old stricture against any form of prior restraint in full vigor. Beyond that, Brennan will probably seek ways to protect freedom of speech and press by an exacting concern over procedural due process.

Brennan has, indeed, in a recent decision upholding penalties imposed on the Communist Party and its members, dissented from the majority opinions, not on free speech grounds but on due process grounds. Yet in other cases involving the National Association for the Advancement of Colored People, in which the same freedom of association arguments were made as in the Communist Party case, he joined in the majority opinions holding that the attempted forced disclosure of membership violated the first amendment.

Brennan has been perplexed, just as have the other members of the Court, on the problem of the free speech rights of individuals compelled to join organizations that engaged in political activity. He attempted to steer a middle course in writing the Court's decision in International Association of Machinists v. Street, but apparently satisfied no one. He was joined by the Chief Justice and Justices Clark, Stewart, and Douglas, the latter "dubitante" only agreeing in order to solve the practical problem of mustering five Justices for a majority. The Court held that union members should not be forced to contribute toward the support of political causes that they oppose. The remedy selected by the Court was to permit dissident union members to sue to recover the proportional share of their dues used for political purposes objectionable to them. Only Black, in his dissent, voted to condemn the statute involved as violative of the first amendment.

Brennan, in another case involving a similar problem—that of an attorney forced to join an integrated bar system that had a legislative program—was
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unable to muster a majority to join in his opinion.\textsuperscript{86} He wrote for himself, the Chief Justice, and Justices Clark and Stewart that the record did not enable the Court to pass on the plaintiff's claim that using part of his dues to promote legislation against his wishes violated his right to freedom of speech. The four Justices reserved that question for future determination.

\textit{Freedom of Religion and Separation of Church and State}

Although there was some expressed concern about Justice Brennan's appointment because of his membership in the Catholic Church, it is apparent that the concern in most cases was religious bigotry. At the Senate Judiciary Committee hearing on his confirmation, he was asked whether his primary loyalty was to the Catholic Church or to the Constitution. The question had been submitted by Charles Smith of the National Liberty League but was asked by Senator Joseph C. O'Mahoney, himself a Catholic, who put the question to Brennan to make sure that no one could accuse him of any favoritism to a co-religionist. Brennan replied,

\begin{quote}
Senator, I think the oath that I took is the same one that you and all of the Congress, every member of the executive department up and down all levels of government took to support the Constitution and laws of the United States. I took that oath just as unreservedly as I know you did, and every member and everyone else of our faith in whatever office elected or appointive he may hold. And I say not that I recognize that there is any obligation of our faith superior to that, rather that there isn't any obligation of our faith superior to that. And my answer to the question is categorically that in everything I have ever done, in every office I have held in my life and that I shall ever do in the future, what shall control me is the oath that I took to support the Constitution and laws of the United States and so act upon the cases that come before me for decision that it is that oath and that alone which governs.\textsuperscript{87}
\end{quote}

While on the New Jersey Supreme Court, Brennan had concurred in an opinion that distribution of bibles through the public school system was violative of the establishment of religion clause of the first amendment as incorporated in the fourteenth amendment.\textsuperscript{88} But the major test of his (and all the other Justices' as well) adherence to the classic concept of separation between church and state was in the four cases before the Supreme Court during

\textsuperscript{87} \textit{Hearings Before the Senate Committee on the Judiciary, op. cit., supra, note 40 at 34.}
Smith accompanied his organization's question to Justice Brennan with a statement which speaks for itself: "We do not contend that confirmation of the appointment of Judge Brennan to the Supreme Court is illegal; we oppose it on the same ground that a Catholic in a predominantly Catholic country would oppose the nomination of a Protestant. This is a predominantly Protestant Country. In Catholic nations, we believe, Protestants are not appointed to the highest court." \textit{Id.} at 32.
\textsuperscript{88} Cf. Tudor v. Board of Education, 14 N.J. 31, 100 A. 2d 857 (1953).
its last term, testing the validity of the compulsory Sunday closing laws in Maryland, Massachusetts, and Pennsylvania. Only Justice Douglas voted to declare all the statutes unconstitutional. Justices Brennan and Stewart dissented in the two cases involving Jewish owners of businesses who contended that they were being penalized for their religious beliefs which caused them to close their stores on Saturday, while the state forced them to stay closed on Sunday as well. Acknowledging that the Sunday laws were, in fact, social welfare statutes, Brennan and Stewart argued that they nonetheless infringed upon the constitutional rights of persons who observed a day other than Sunday as their day of rest. They asserted that a statute infringing upon personal liberty, particularly religious liberty, should be subjected to a far more exacting standard than one that might logically be applied to laws concerning only economic interests.

In another case, the perplexities of the separation problem were far less troublesome to the Court. Justice Brennan joined in the unanimous opinion in the case of *Torcaso v. Watkins,* which held unconstitutional a provision in the Maryland state constitution requiring all public officials to take an oath or make a declaration that they believe in the existence of God.

It seems apparent that, despite those fearful souls who dreamed up phantasmagorical conflicts between Justice Brennan's Catholicism and his oath as a Supreme Court Justice, such problems just do not exist. If Brennan has held to a less vigorous separationist position than that desired by many liberals, he is apparently in good company.

### III LOYALTY-SECURITY

**Privileges and Jobs**

Certainly Justice Brennan, along with all the members of the Court, is aware of the conflicts and contradictions in our society that have brought forth the spate of cases in which the rights of individuals have been brought into seeming conflict with the right of the state to protect itself against threats to its continuation. He made this clear in his 1955 Rotary Club speech:

> Infiltration is a furtive weapon, elusive, hard to meet and to grasp. Our imaginations build pictures of its size and shape, and the picture I draw is not the picture you draw of it. But a portrait of ourselves as petrified by the fear of this thing is neither true nor flattering. Americans of all races and creeds have closed

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8. The irony of this may be gauged by the fact that ever since Justice Douglas wrote the Court's opinion in *Zarach v. Clauson,* 343 U.S. 306 (1952), his statement "We are a religious people whose institutions presuppose the existence of a Supreme Being" has been cited by the proponents of Sunday Blue Laws as an argument in favor of their validity.


ranks against the godless foe. Whatever of treasure, or time, of effort required to defeat him, we will provide, and gladly.92

Yet such sentiments were not sufficient to fend off the dark suspicions of Senator McCarthy, who was the only Senator to vote against Justice Brennan's nomination.

Interestingly, McCarthy's forebodings about where Brennan would find himself on the Court were essentially correct, for the Justice has no doubt about "our strength to conserve, without the sacrifice of any, all our guaranties of justice and fair play, and simple human dignity which have made our land what it is."93

In the case of Speiser v. Randall,94 Brennan warned, in writing the Court's opinion, of how dangerous it is to penalize people for their speech. In that case and an accompanying one,95 the issue was the validity of a "loyalty oath" required as a condition for tax exemptions given to veterans and churches in the state of California. Brennan showed, in the words of one writer, "creative jurisprudence at its best"96 in writing that the procedural provisions under the California law were in violation of due process. He observed that the taxpayer had the affirmative burden of proving that he was a proper person to claim an exemption. He wrote:

When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the working of a free society.... Where the transcendent value of speech is involved, due process certainly requires... that the State bear the burden of persuasion to show the appellants engaged in criminal speech.97

Brennan makes clear that, because of the transcendental value of free speech and because of the importance of doing justice to individuals in a free society, he will examine with care the contention that governmental interests demand sacrificing individual rights for national security. Eloquently, but to no avail, he argued there had been no such demonstration when he rejected as "transparent" the state's contention that a New York subway conductor98 and a Philadelphia school teacher99 were discharged for unreliability and incompetency when, in fact, they were being branded as disloyal and as security risks. He

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92 Hearings Before the Senate Committee on the Judiciary, op. cit. supra note 40, at 14.
93 Ibid.
95 First Unitarian Church v. County of Los Angeles, 357 U.S. 545 (1958).
97 Speiser v. Randall, supra note 82, at 526. The decision was 7-1 with the Chief Justice abating, Justice Burton concurring with the Court's decision and Justice Clark dissenting.
98 Lerner v. Casey, supra note 43, at 417 (dissenting opinion).
argued that, since these were far more serious in their consequences than any ordinary dismissals, certain minimal procedures should be required.

He similarly expressed concern in a case in which a short-order cook who had worked for six years in a leased cafeteria on the grounds of the Naval Gun Factory suddenly had her pass revoked with no stated reason or explanation other than "security reasons". Brennan cut through the sophistry of the majority's 5-4 decision that the only thing involved was the historical right of a military commander to determine who could enter a military base; he pointed out that the ousted employee would continue to wear a "badge of infamy" as a "security risk". Again, he emphasized the importance of some sort of procedural due process since the majority conceded that the cook could not be barred for a discriminatory or unconstitutional reason. How, Brennan wanted to know, can an individual know what the real reason is "unless a government official is foolish enough to admit what he is doing—and few will be so foolish after today's decision."

At times Brennan does split with the other members of the "liberal" bloc in cases in the loyalty-security field. While Black and Douglas have consistently argued that denying individuals jobs or privileges based on refusal to answer questions concerning membership in the Communist Party or advocacy of proscribed doctrines violates freedom of speech and association, Brennan generally prefers to rest his dissents in cases of this kind on procedural due process grounds.

**Legislative Investigations**

It was in his Monmouth Rotary Club speech that Brennan made clear his abhorrence of some congressional investigative committees. At his confirmation hearing, however, he retreated under the challenge of McCarthy: "[P]ersonally I cannot think of a more vital function of the Congress than the investigatory function of its committees, and I can't think of a more important or vital objective of any committee investigation than that of rooting out our subversives in Government." Since that time, however, Brennan has generally

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101 Id. at 899.
102 Id. at 900.
105 Hearings Before the Senate Committee on the Judiciary, op. cit. supra note 40, at 16.
106 Id. at 17.
voted along with Black, Douglas, and Warren in favor of defendants who have been convicted of contempt for refusing to answer questions of Congressional legislative committees. Nonetheless he has often gone off on his own grounds.

In *Barenblatt v. United States*, the “liberals” were the dissenters in a 5-4 decision. Brennan’s three colleagues voted to strike down the mandate of the House Un-American Activities Committee as being too vague to support a conviction for refusal to testify, and they forcefully rejected the Court’s balancing concept. Brennan, however, filed a one-page dissent, agreeing only with their third point that “no purpose for the investigation of Barenblatt is revealed by the record except exposure purely for the sake of exposure.”

In another opinion filed the same day, in the case of *Uphaus v. Wyman*, Brennan dissented in an opinion to which the Chief Justice and Justices Black and Douglas subscribed. The basic point of his dissent was that the record “not only fails to reveal any interest of the state sufficient to subordinate appellant’s constitutionally protected rights, but affirmatively shows that the investigatory objective was the impermissible one of exposure for exposure’s sake.” Brennan suggested that the investigation of individual conduct could be legitimate only if “bills of attainder were still a legitimate legislative end.”

In the next term of Court, there were a number of cases involving contempt convictions of witnesses before congressional investigative committees who had refused to answer questions without relying on the privilege against self-incrimination. In *Wilkinson v. United States*, Brennan did not subscribe to dissenting opinions written by Black and Douglas, but wrote his own—an opinion (joined by Justice Douglas) urging the reversal of conviction on the ground that the purpose of the questions was “to harass the petitioner and expose him for the sake of exposure,” as shown by the fact that some nineteen months earlier Wilkinson had been called before the committee and had refused to answer the very same questions on substantially the same grounds and the committee had no reasonable basis to hope that different answers would later be forthcoming.

Apparently, Brennan seeks to protect the rights of individuals before congressional committees by reversing convictions on the narrowest grounds possible. He is unwilling to intrude the judiciary into the workings of Congress by passing judgment on mandates of congressional committees. He takes a
much more limited view of the scope and the reach of the first amendment in this respect than do Black, Douglas, and Warren.

CONCLUSION

In five years on the Supreme Court, Justice Brennan has established a number of guideposts for assessing his judicial and legal philosophy. An examination of these indicates that he has not changed any fundamental concepts he held before joining the Court. He still believes deeply that procedural due process must be rigidly protected. He obviously adheres to the statement of Justice Brandeis that "in the development of our liberty, insistence upon procedural regularity has been a large factor." Over the course of centuries, our jurisprudential system has hammered out procedures and methods for arriving at fair and just determinations. Justice Brennan is a traditionalist in wishing to preserve these procedures. At the same time, he is a dedicated reformer, in seeking to improve our judicial machinery, to make it more efficient and more speedy, for example. But concerning some things he will not countenance any nibbling away. The right to counsel must not merely be preserved for defendants, but it must be expanded so that no defendant in a criminal case will suffer any disadvantage from lack of funds to retain counsel. The jury system should be preserved. Discovery procedures should be developed, improved and used.

Although Brennan does not adhere to the absolutist view of the first amendment, he will not permit the freedoms of speech, press or religion to be infringed on the basis of mere legislative preferences. These freedoms he considers the very matrix of our society. If there is a choice to be made, he tends to protect first amendment freedoms by some procedural due process ruling. He is deeply conscious of the tragic brandings with the "badge of infamy" that have been committed in the name of "national security." He has sublime faith in the ability of traditional procedural due process to prevent injustices in the name of national security.

How will history assess Justice Brennan? It is still far too early to tell. But that he will be considered a "liberal" member of the Court, there can be no doubt. The stream of 5-to-4 decisions emanating from the Supreme Court and apparently fluctuating with the heat of the Cold War has found him firmly beside the Chief Justice and Justices Black and Douglas. At a time when many liberals were willing to balance the public's interest in national security against the individual's interest in free expression and procedural rights, Brennan has refused to be panicked from the position that protection for the rights of individuals is not incompatible with protection of the country.