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Justice Brennan and freedom of expression.

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JUSTICE BRENNAN AND FREEDOM OF EXPRESSION

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OF EXPRESSION

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Justice Brennan and Freedom of Expression

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The study is an analysis of the views of Justice William Brennan in three kinds of free expression cases that have come before the Supreme Court since Brennan's appointment in 1957. The areas examined are obscenity censorship, libel and internal security. Justice Brennan's opinions in each of these areas are examined. Particular attention is paid to his use of the balancing approach and his view of the Supreme Court's role in protecting freedom of expression. The study demonstrates his influence in defining the Warren Court's position in each of the three areas examined.

As a freshman Justice, Brennan wrote the majority opinion in Roth v. United States [354 U.S. 476 (1957)], the first time the Court had squarely dealt with the constitutional status of obscene expression. From that original attempt to define obscenity, Brennan's evolution to a position rejecting such an effort is traced. The second section of the first chapter examines Justice Brennan's demands as to the proper procedures to be employed if regulation of obscenity is to meet the requirements of the First Amendment.

Justice Brennan's libel opinions are the subject of the second chapter. His majority opinion in New York Times v. Sullivan [376 U.S. 254 (1964)] constitutes one of the more important First Amendment decisions made by the Court and is the first libel case discussed. Brennan's consequent extension of the actual malice rule, established in New York Times, is examined.

While Justice Brennan's views in internal security cases have been of less influence than his efforts in the first two areas examined, one of his opinions, Uphaus v. Wyman [360 U.S. 72 (1959)] is an excellent example of the use of the balancing approach in free expression cases. Brennan's balancing is compared at that point to the use of that technique by Justice Harlan.

The concluding section of the work discusses Justice Brennan's views on several free expression issues which do not fit into any category. These include the right to access and the power of government to impose prior restraints on expression.

The study also indicates how Justice Brennan's position within the Court changed as a result of the four appointments made by President Nixon. Brennan's shift is shown to be particularly significant in obscenity censorship.

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INTRODUCTION

This study is designed to examine views of freedom of expression and its function in the American system of government. During the period covered, 1956-1975, three types of free expression cases comprised the bulk of the Court's work in that area. They were obscenity censorship, libel and internal security. Justice Brennan's position on each of these issues is examined separately.

William Brennan was appointed by President Eisenhower on September 29, 1956, and took his seat on the Court on October 16. A nominal Democrat, Brennan's appointment by the Republican President followed a pattern which had been established when Governor Driscoll, also a Republican, appointed him to the New Jersey Superior Court in 1949. Brennan rose very rapidly after this initial service, going to the Appellate Branch of the New Jersey Superior Court in 1950 and, in 1952, being appointed again by Driscoll, to the state's highest judicial body, the Supreme Court.

His elevation to the U. S. Supreme Court at the age of 50 to replace the retiring Justice Menton was the culmination of an impressive career of public service.

Justice Brennan's father was an Irish Catholic immi-

grant who was a union reformer and eventually became Newark's Commissioner of Public Safety. After attending high school in Newark, Justice Brennan entered the Wharton School of Finance and Commerce of the University of Pennsylvania from which he graduated with honors. He then entered Harvard Law School where he served as President of the Legal Aid Society. Upon graduation in 1931, he joined the Newark law firm of Pitney, Harden and Skinner and became a partner in 1937. With the coming of World War II, Brennan accepted a commission as a major in the Army Ordinance Department. After a brief tenure in that position he was called upon by the Air Corps to deal with problems in the west coast aircraft industry. Undersecretary of War Robert Patterson then put Brennan on his staff where he remained as a troubleshooter for manpower problems until the war was over. Between the end of the war and his appointment to the New Jersey Superior Court, Brennan was occupied with his private law practice.

Justice Brennan's appointment to the Supreme Court came at the beginning of a crucial period in the history of the Court. The civil rights struggle was just beginning and Americans were generally insecure because of the pressures of the Cold War. Both of these elements caused significant strains on First Amendment rights. But during the late 1940's and early 1950's the Court was dominated by a conservative majority that was not particularly sympathetic to

civil liberties claims. By 1955, a bloc consisting of Chief Justice Warren and Justices Black and Douglas were consistently calling for greater protection for individual freedoms. Unlike most freshman Justices, Brennan, upon assuming his seat in 1956, did not take a centrist position between the two blocs on the Court. Rather he very quickly alligned himself with the activist-libertarian wing of the Court. By the end of his first term of the Court then he was part of a group of Justices calling for a halt to the numerous attacks being made upon freedom of expression.

Before examining Justice Brennan's views, I should make clear my own position with respect to several of the free expression issues raised herein.

It is my view that freedom of expression plays the most important role in establishing the character of the American system. Most essentially it provides a means whereby the citizenry can participate in the governing of the nation. But more broadly, a vigorous system of freedom of expression plays a critical role in the evolution of society in general. The free interchange of ideas encouraged by a liberal reading of the First Amendment's protection of expression is necessary if social values are not to become stagnant.

While I view freedom of expression thusly, I do not favor an absolute or literal reading of the First Amendment. To my mind the absolutist approach is unwise for the most

obvious reason: There are some instances in which expression should be restricted. If it could be clearly shown, for example, that failing to limit expression would lead to violence then that particular expression should be limited in that particular context. Secondly, a wiser approach in dealing with free expression issues seems to me to be the balancing approach as employed by Justice Brennan. As we shall see, Brennan requires clear and convincing evidence that the interest asserted in opposition to expression is first, a valid interest and, second, one that could not be pursued by any means other than a limitation of expression. Further, I am of the view that the Supreme Court bears the primary responsibility for striking this balance. In short, I view the Court as the most important protector of free expression.

Overall then, I concur in Justice Brennan's reading of the First Amendment and his view of the Court's role in protecting freedom of expression. The points at which my views diverge from his are indicated in the text below.

CHAPTER I

JUSTICE BRENNAN AND OBSCENITY CENSORSHIP

Obscenity censorship is clearly the most difficult free speech issue with which the Court has dealt during Justice Brennan's tenure. The obvious problem of arriving at a definition of the obscene has rendered more complex other disagreements within the Court as to the constitutional status of obscenity, the procedural aspects of censorship and the relative powers of the state and federal governments to censor.

Justice Brennan has played a major role in developing the Court's position. Since 1957, the Court has handed down 33 written opinions in obscenity cases. Until 1968, Justice Brennan wrote more majority or plurality opinions than any other member of the Court--in eleven of the eighteen cases decided to that point. After 1968, and due in part to the changes which occurred in the makeup of the Court, Justice Brennan became one of the more frequent dissenters, dissenting in eight of the fifteen cases decided between 1968 and the end of the 1972-1973 term. While this pattern reflects to a great extent the impact of the four Nixon appointees, it is also a result of a significant change in Justice Brennan's views of the obscenity

censorship issue. As we shall see, he has rejected the rule for which he was primarily responsible.[1]

This chapter will be organized as follows. The first section deals with Justice Brennan's attempts to define obscenity. This will be followed by an examination of the procedures he would require if censorship of the obscene is to escape constitutional infirmity. In June of 1973, the Court handed down seven obscenity decisions,[2] and in each Justice Brennan dissented. The views expressed in those dissents mark a substantial shift in his position and warrant very close examination. Consequently, the section dealing with procedure will be followed by an analysis of Brennan's new position and the change effected in obscenity law by the Court majority. As will be seen, Justice Brennan has come to reject both his own early views and the Court's new stance.

Defining the Obscene

Barely six months after his appointment to the Court, Justice Brennan delivered the majority opinion in Roth v. United States.[3] This became the leading case in obscenity censorship, since the Court had never previously dealt squarely with the constitutional status of obscene expression.[4] The case involved an appeal from a conviction under the federal obscenity law which prohibits the use of the mails for the distribution of obscene materials.[5]

But Justice Brennan ignored the question of whether the challenged materials were in fact obscene. He discussed

instead whether obscene expression in general was afforded protection by the First and Fourteenth Amendments. It was clear, he felt, that that protection was not absolute. There were some forms of expression which could properly be limited. While the First Amendment protects some distasteful expression, it does so only when and because that particular expression stimulates the interchange of ideas. But for Brennan obscene expression contributed nothing to an exchange of views: it was "utterly without redeeming social importance." Consequently, it was outside the protection of the First Amendment. That view was confirmed, he said, by various Supreme Court dicta and the fact that every state and the federal government had legislated against obscene expression. Since obscene expression in general was outside constitutional protection, Brennan felt it was unnecessary to ask whether a specific instance of obscenity created a clear and present danger.

By fiat then, Justice Brennan condemned obscene expression to the lower level of what Kalven calls the "two-level-free-speech-theory."[6] Obscenity was grouped with expression so harmful by its very utterance that no consideration need be given to the circumstances surrounding its use.

Generally, Justice Brennan believes that in each case in which expression is challenged, a judge must balance the value of that particular expression against the value of those interests affected by it. But, of course, here,

in obscenity, he explicitly rejects that approach. The apparent reason for this tactic is the fact that one does not know what interest, if any, is being affected by the use of obscene expression. Even now, seventeen years after Roth, it is still unclear as to whether exposure to obscene expression leads to anti-social behavior or has broader harmful consequences to society. So Justice Brennan did not have clear evidence either that obscenity was harmful or harmless. Consequently, he, in effect, fell back on a view which ultimately reduces to this: since obscenity has been universally condemned as lacking in social value, it is therefore unprotected. But again, that is not at all an accurate reflection of the value he places on freedom of expression. As will be made clear, he is not one of those who would submit the First Amendment to popular referendum. He simply felt he had little other choice given the uncertainty of the empirical evidence as to the effects of obscenity.

Further, it is important to keep in mind that Brennan's declaration that obscenity is unprotected is of little practical consequence without a definition of what constitutes the obscene. At one time American courts used the Hicklin test.[7] That standard permitted the evaluation of allegedly obscene material on the basis of its likely impact on the person most susceptible to it. Further, isolated passages of a work could render the entire work obscene. Justice Brennan's Roth test, as it became known, sought to overcome the defects of the Hicklin formula. When evaluating whether

material is obscene, the test to be applied was

> . . .whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.[8]

As Justice Brennan himself later recognized,[9] the Roth test is not without problems, but any substitute would also be imperfect. There is simply no way to define precisely what is essentially a value judgment. But Justice Brennan later frequently attempted to explain what he meant by the Roth definition, and, in so doing, modified that standard.

Seven years after first announcing the Roth test, Justice Brennan sought to clarify it.[10] A work was obscene, he said, if it was patently offensive, a term Justice Harlan had employed in the Manual Enterprises case.[11] If obscene, it was unprotected because it was, as he said in Roth, "utterly without redeeming social importance." Justice Brennan uses the social value test as the dividing line between protected speech and unprotected obscenity. His insistence that a work be "utterly" devoid of value reflects his concern that serious literary and/or scientific work which is erotic and perhaps esoteric could be judged obscene if its value, albeit limited, were not taken into account. In short, what he has consistently attempted to do is to provide the broadest possible freedom for expression while at the same time leaving the door open for limiting expression he deems valueless. The difficulty with the social value test, however, is that it is not the kind of "sensitive

tool" Brennan recognizes as necessary

> . . .to separate obscenity from other sexually oriented but constitutionally protected speech, so that efforts to suppress the former do not spill over into the suppression of the latter.[12]

And again, it is probably not possible to devise such a tool given the inherent nature of obscenity.

At the same time that Justice Brennan was stressing the importance of social value as a guide in obscenity censorship, he made a significant change in what social importance represented. In the Roth case, Brennan had held that obscenity was unprotected because it lacked redeeming social importance--that lack of value was a characteristic of the obscene. But in his first major reinterpretation of Roth seven years later, social value becomes a measure of whether material is in fact obscene. And so he states

> Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance.[13]

This means then that a work may be patently offensive and possess a prurient appeal, but still not be obscene if it has some social value. Justice Brennan made this point even more clearly in the Memoirs case[14] where he again attempted to refine the Roth test. In Memoirs he expressed the view that Roth required the 'coalescing' of three elements before a work may be judged obscene.

> it must be established that (a) the dominant theme of the material taken as a whole

> appeals to prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[15]

For Brennan, each of the three tests must be applied independently and not balanced one against the other. Again here he stressed that the challenged work must be utterly lacking in social importance before it can be suppressed. That was in fact the reason the Massachusetts ban on Memoirs was rejected by Brennan; the state high court had ruled that the book was obscene even though it did possess some social value. So up to this point at least, the social importance standard was the major underpinning of Brennan's obscenity test, and as he frequently stated, it was in no case to be relaxed. In short, material had to be "utterly," totally, devoid of value before it could be censored.

But on the very same day he rejected a state court judgment of Memoirs as obscene because it was based on a relaxation of the social value test, he himself grafted an exception onto that standard.[16]

That exception was an element originally suggested by Chief Justice Warren in his Roth opinion.

> The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in a context from which they draw color and character.[17]
> . . . They [the defendants] were plainly

> engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct.[18]

Justice Brennan called this kind of conduct pandering, and so labelled the actions of Ralph Ginzburg, publisher of several works banned from the mails. The circumstances which led Brennan to the conclusion that Ginzburg had pandered were several. The publisher had tried to obtain mailing permits from first Blue Ball, and then Intercourse, Pennsylvania. Failing at both stations because of their inability to handle such a large amount of material, Ginzburg did all his mailing from Middlesex, New Jersey. Further the advertisements for the materials carried the assurance that in the event of Post Office censorship, the full purchase price would be refunded to the buyer. Justice Brennan felt that all of this was an attempt to further the materials "salacious appeal" and for him ". . . where the purveyor's sole emphasis is on the sexually provocative aspects of his publications that fact may be decisive in the determination of obscenity."[19]

Of course, none of this spoke to the content of the three challenged works; Eros, The Housewife's Handbook of Selective Promiscuity, and Liaison. Justice Brennan conceded, at least in the case of the first two, that each may have possessed some limited social value. And because the value was only limited, the "fact" that the seller had pandered rendered the works obscene.

Several points must be made here. First, and most important, Justice Brennan did in fact in this case relax the social value test. After 1966, and despite Brennan's disclaimers, a book needed no longer to be "utterly without redeeming social importance" before it might be declared obscene in a particular situation. Brennan claims this is not so, that all the Court does when it declares a pandered work of limited social value obscene is to accept the purveyor's judgment as to the nature of his wares.[20] But, regardless of whose judgment is being accepted, the fact remains that the effect of Brennan's position here is to permit the censoring of works possessing some social value. But there is a distinction to be made here which I think explains this seeming inconsistency. In confronting the Ginzburg case, Justice Brennan dealt with two elements; the challenged materials and the actions of the seller. Brennan conceded that the works in question possessed some social value. Consequently, standing alone they could not be obscene, they were not utterly lacking in value and could not therefore be censored. But of course they were not standing alone. Justice Brennan obviously disapproved of Ginzburg's "sordid business" and consequently sought to punish him. The materials then became, in a sense, the somewhat innocent victims of their promoter. What Brennan had done, in short, was to punish Ginzburg for pandering. He did not declare Eros, et. al., obscene in all contexts. But promoted in

the fashion Ginzburg employed, they became, in that context, obscene. Further, by allowing Ginzburg's fine and jail sentence to stand, the Court's decision had the practical consequence of censoring the cited works. Secondly, Justice Brennan's reliance on pandering as an element in his obscenity calculus is simply a recasting of the prurient appeal facet of the Roth test. In the Memoirs case, Brennan required a conjoining of prurient appeal, patent offensiveness and utter lack of social importance before a work could be held obscene. But, in Ginzburg, the nature of the appeal becomes determinative in spite of the fact that patent offensiveness is not demonstrated, nor even discussed, and the challenged works are admitted to possess some social value. In short, what was at one time one third of the obscenity test becomes for Brennan the sole determining standard in what he calls "close cases" wherein a work is of limited value and has been pandered. And that standard is employed as a measure of the purveyor's actions and not as a test of a book's contents.

Justice Brennan's use of the pandering test is an adaptation of a concept called "variable obscenity" discussed most fully by Lockhard and McClure.[21] As they explain it, this concept assumes that no material is inherently obscene but that obscenity varies with the circumstances of its distribution. A judge would evaluate challenged material in light of its appeal to and effect on the

audience to which it was primarily directed. If the circumstances indicated that the appeal was prurient and was aimed at the lustful interests of the average person in the intended audience, then the work would be judged obscene.

This approach has one great virtue: it is a far simpler approach to the question of obscenity than the rather thankless task of evaluating a work's content in an effort to determine whether it is obscene. Surely, a judge could more easily evaluate a purveyor's intent than that of a writer. But while it offers less complexity in application, the concept of variable obscenity has two very serious flaws. As Justice Douglas indicated in his Memoirs concurrence[22] and his Ginzburg dissent,[23] the nature of an advertisement has little to do with the quality of the product advertised. Would a lewd advertisement offering the Bible for sale thereby render it obscene?[24] In short, the variable obscenity approach and Brennan's use of it would have one believe, as it were, that you can tell an obscene book by its cover. The second problem with Brennan's use of variable obscenity in Ginzburg was also pointed out in a dissent, that of Justice Black.[25]

> Ginzburg is, as I see it, having his conviction affirmed upon the basis of a statute amended by this Court for violation of which amended statute he was not charged in the courts below. Such an affirmance we have said violates due process.[26]

What Black is saying here is simply that there is no law against pandering, the determinative factor in Brennan's

decision. Ginzburg was charged with using the mails to distribute obscene materials. The materials themselves were not found obscene but became so because of Ginzburg's actions, which actions, again, were not illegal, at least not before Justice Brennan's decision.

Justice Brennan again employed variable obscenity in a case involving materials designed for deviant sexual groups.[27] The publisher of the materials, Edward Mishkin, claimed that the materials could not be held obscene since they did not appeal to the prurient interest of the average person. Since the material was designed for deviant sexual groups, he claimed it would disgust the average person of the Roth test.

In short, the contention here was that Roth had imposed an inelastic standard that did not vary at all. In part this argument reflects a dependence on Justice Brennan's Jacobellis[28] opinion in which he so emphatically stressed that the components of Roth could not be "weighed." Of course, Brennan himself had in fact done precisely that in the Ginzburg case.

Consistent with Ginzburg, Brennan rejected Mishkin's argument. He said that the average person concept of Roth had been employed simply to counteract the most susceptible person facet of the Hicklin test.

> Where the material is designed for an primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement

> of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.[29]

In short, if the circumstances surrounding the production of challenged material indicated that it was designed to appeal to a particular group, then the average person in that group became the average person under Roth.[30] What this meant then was that a judge attempting to evaluate whether material was obscene must conduct a process which may be characterized as follows. He must first establish what group constitutes the primary intended audience. Then he must decide whether the material has prurient appeal to the average person in that group.

This 1966 trilogy of cases was the last time Justice Brennan dealt with defining obscenity until the Miller[31] and Slaton[32] cases which will be discussed separately below.[33] After nine years of struggling with the Roth definition then, Justice Brennan had arrived at a standard which may be restated as follows:

> A work is obscene when to the average person in the intended primary audience, applying the contemporary national community standards,[34] of that audience, the dominant theme of the work taken as a whole is characterized by a conjoining of prurient appeal, patent offensiveness and utter lack of redeeming social importance. If a work is of limited social importance and the purveyor has pandered it, he may be punished for distributing obscene material.

I think it unnecessary to further criticize this rule, at least at this point. The best attack on it came

from Justice Brennan himself in his Slaton opinion. As he there recognizes, his attempts at defining the obscene were in fact futile and did not provide the protection for non-obscene expression that he sought. Again, it was not a matter of Justice Brennan failing to fashion the proper standard that lead to the confused state of obscenity law, but rather the nature of the problem itself.

Justice Brennan's general approach to the problem of defining obscenity is indicative of his desire to provide broad protection for freedom of expression. What he has done has been to state, first, that obscenity is unprotected by the First Amendment. Standing alone, that view would appear to be inimical to free speech interests. But his attempts to define "obscene" and his application of that definition to challenged materials make it clear that his goal is to provide very broad protection for sexually oriented material. It is important to keep in mind that Justice Brennan did not find any of the materials before the Court obscene in and of themselves. It is true that Eros and Mishkin's materials were suppressed but, again, that was simply a consequence of the primary motive of Brennan's view in those cases, i.e., to punish those who had pandered. In practical terms, that distinction may not be terribly significant. But to Justice Brennan, it is a crucial one.

Brennan's commitment to a vigorous system of free expression is even more clearly demonstrated by his view of

the procedures required if censorship is to escape constitutional infirmity. As we shall now see, his goal here is the same as it was in his efforts to define: to insure that the non-obscene is not condemned along with the obscene.

Given the fact that Justice Brennan feels that obscene expression is unprotected, the procedures he requires of potential censors are critical in helping to define his commitment to freedom of expression. Clearly, were he to permit wide latitude, to allow censors to adopt any convenient procedure, the First Amendment would thereby suffer. But as we shall see below, Justice Brennan would in fact allow little variation in the procedures employed to suppress the obscene.

Justice Brennan's major concern in dealing with censorship procedures is to insure that protected expression is not suppressed along with the obscene.[35] In his words, the censor is required to employ "sensitive tools." Attempting to provide such aids, Justice Brennan has dealt primarily with two major aspects of the procedure issue: the status of prior restraint of expression and the role to be played by the judicial process. His opinion in the Marcus case[36] exemplifies this approach.

The procedure employed in that case was initiated by the filing of a sworn complaint by a police officer "positively" stating that obscene material was being kept. The judge receiving the complaint would then issue a warrant,

directed to any peace officer, to seize the cited material. Once the police had accomplished the seizure, the judge was to set a date not less than 5 nor more than 20 days after seizure for a trial to determine whether the material was in fact obscene. State law did not establish any time limit within which a decision had to be reached on that issue.

Justice Brennan found the procedure defective for several reasons. The initial complaint was itself defective in that it was too general. Citation of the specific works to be seized was not required, state law permitting a warrant to issue upon a complaint against "obscene materials." The warrant also did not cite particular materials. Further, judges were not required to render a decision as to whether the material was obscene within any specified time limit. But Justice Brennan's major objection to Missouri procedure was that the judge never saw the cited materials prior to issuing the warrant for seizure. In short, a restraint was imposed prior to an adversary hearing.

Justice Brennan sees an adversary hearing as a critical safeguard for protected expression. The censor's business is to censor and consequently

> there inheres the danger that he may well be less responsive than a court--part of an independent branch of government--to the constitutionally protected interests in free expression.[37]

Furthermore, Brennan would require the courts to act as a check prior to the imposition of an extensive restraint. Justice Brennan does not condemn all prior restraint.[38]

In Marcus he makes it clear that a restraint may be imposed prior to an adversary hearing. But that restraint must be brief: under the precedent he cites,[39] three days between the issuance of a pendente lite injunction and a decision on the issue. In short, a work can be temporarily restrained but only for a brief period while a trial is held to determine if it is obscene and will therefore be permanently restrained.

Justice Brennan spoke more directly to the prior restraint issue in Freedman v. Maryland.[40] This was also the opinion in which he provided the most precise statement of the procedures he requires if censorship of the obscene is to be permissible. As was the case in Times Film,[41] Freedman involved the refusal of an official board of censors to license the exhibition of a film[42] unless it was first submitted to them. Justice Brennan pointed out that like all forms of prior restraint, this particular method carried a presumption against its constitutionality. If such procedures were to escape constitutional infirmity, Justice Brennan would require that they incorporate the following minimal standards:

1. The burden of proof must rest upon the censor to establish that the film is obscene. In short, all films are assumed not obscene, protected, until proven otherwise.

2. The states may employ a prior restraint to bar exhibition of a film temporarily but a final restraint cannot be imposed until a judicial decision has been reached

that the film is in fact obscene.

3. Either the state courts or state law must require the censor either to license the film or go to court to restrain it within a specified period.

4. Any restraint prior to judicial determination of the issues must be as brief as possible.

5. State procedure must provide for "Prompt final judicial decision."

Again, these procedures emphasize that Justice Brennan views any proper scheme of censorship as basically a judicial procedure. While censors working under the aegis of an administrative agency may impose a brief restraint, it is only to provide them with time to bring the issue before a judge.[43] The final, permanent restraint can only result from the decision of a court.

Before proceeding to a discussion of the Slaton and Miller cases and the changes in Brennan's view evident therein, note must be taken of two cases in which Justice Brennan joined Justice White's majority opinions.[44] Those two votes, I think, illuminate an important facet of Justice Brennan's approach in obscenity censorship.

Both cases involved the majority's rejection of what might have seemed to be logical extensions of Stanley v. Georgia.[45] The majority in Stanley had held that mere private possession of obscene materials, in one's home, could not constitutionally be made a crime. Justice Brennan had not been part of the Stanley majority, joining instead

Justice Stewart's concurrence. Stewart felt that Stanley's conviction should have been voided on Fourth Amendment grounds: the allegedly obscene films were seized by police acting under a warrant permitting them to search for gambling materials. But five members of the Court had felt that the determinative issue was the ". . . right to receive information and ideas, regardless of their social worth. . . the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[46]

Obviously, if this right to possess any material in one's home is to be anything but empty words, one must be able to obtain it somewhere, someone must sell it to him. But Justice White, who also had joined Stewart's concurrence in Stanley, felt quite differently. In the Reidel case, White held that

> To extrapolate from Stanley's right to have and peruse obscene material in the privacy of his own home a First Amendment right in Reidel to sell it to him would effectively scuttle Roth, the precise result that the Stanley opinion abjured. Whatever the scope of the "right to receive" referred to in Stanley, it is not so broad as to immunize the dealings in obscenity in which Reidel engaged here--dealings that Roth held unprotected by the First Amendment.[47]

Again, in U. S. v. 37 Photos, White refused to "extrapolate" from the Stanley decision. But here the claimed extension of that case was the right to import obscene pictures for private and possible commercial use.

It seems to me that Justice Brennan's joining in these opinions reflects what is, I think, his sore point in

obscenity questions. While he would impose severe limitations on censors by requiring precise procedures,[49] and require a Solomon-like understanding of and concurrence with his definition of the obscene, he has demonstrated a total lack of patience with some sellers of obscene material. In that sense his vote in these two cases completes the pattern begun in his Ginzburg opinion. There as a result of his desire to punish Ginzburg, he permitted material to be judged obscene even though it did not fulfill all of the requirements of his own definition of obscene. And by joining in these two majorities he participates in a result which Justice Black concludes means that a man may possess obscene material as long as he ". . . writes salacious books in his attic, prints them in his basement and reads them in his living room."

I think it is this sort of illogic which finally led Justice Brennan to reject all he had fashioned in 16 years of toiling with obscenity censorship. But more importantly, Brennan's rather remarkable shift in Slaton was a product of his concern that the illogic was damaging to freedom of expression. In that sense then his Slaton views are his attempt to begin again to regulate obscenity while at the same time providing the broadest possible protection for what he views as the most critical of the Bill of Rights.

Miller v. California[50] and Paris Adult Theater v. Slaton[51] will be treated here as one case. The discussion

of Chief Justice Burger's views will focus on three major issues: the social value test; his use of the balancing approach; and the obscenity standard he produced. That will be followed by an analysis of Justice Brennan's dissent and an evaluation of the views contained therein.

The social value test was the nucleus of Justice Brennan's approach to obscenity and its status with respect to the First Amendment. Initially in Roth,[52] he had held obscenity unprotected because it lacked redeeming social importance. But then in Jacobellis[53] and later in Memoirs[54] he had employed social value as a measure of whether a work was obscene rather than as a characteristic of obscenity. Chief Justice Burger viewed that shift as a "sharp departure" from Roth. The fact that prosecutors would have to prove that a work was "utterly lacking in redeeming social importance" meant, he said, that virtually nothing could be proved obscene.[55] Consequently, Burger rejected the social value test as both impossible to meet and ambiguous. In its place, the Chief Justice substituted the following:

> At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political or scientific value to merit First Amendment protection.[56]

One might call this the "serious value" test. Of course, it is no less ambiguous than the social value rule and is in fact simply a rephrasing of the earlier formulation. In Jacobellis,[57] Justice Brennan wrote

> . . . material dealing with sex in a manner

> that advocates ideas. . .or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection.[58]

In short, Burger's changing of social value to serious value accomplishes nothing positive. The ambiguity remains as does the need to prove that a work possesses no serious value before it may be declared obscene. What the change does accomplish is to further obfuscate the already muddled state of obscenity law by giving the appearance of change while not changing at all.[59]

As pointed out earlier,[60] Justice Brennan did not employ the balancing approach in the obscenity cases. I am of the opinion that this was due to the fact that it was, and is, too unclear as to what interests obscenity effects. But that lack of certainty did not bother the Chief Justice.[61] Most generally, a state can censor obscenity under its "broad power to regulate commerce and protect the public environment." More specifically he argued that

> . . . there are legitimate state interests at stake in stemming the tide of commercialized obscenity. . . .These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself. The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime.[62]

It is clear from the tone of Burger's opinion that the most important interest he feels is being protected by censorship

of obscenity is the public safety. He does not explicitly state that obscenity leads to anti-social behavior but is prepared to permit regulation on the "assumption" that exposure to the obscene has "a tendency to exert a corrupting and debasing impact leading to antisocial behavior." But of course the majority report of the Commission on Obscenity and Pornography concludes that empirical research into the connection between obscenity and antisocial behavior has failed to turn up any evidence demonstrating a causal relationship.[63] Chief Justice Burger however would permit state legislatures to "reasonably" determine that exposure to obscenity might lead to antisocial conduct and upon that basis, regulate expression.

This is what I find to be one of the more objectionable features of the Burger view. What he permits here is the sacrifice of freedom of expression on the mere possibility that it might cause anti-social behavior. His view that limitation of expression may be properly based on an assumption that it has a "tendency" to debase and corrupt is a retreat to the vagaries of the Hicklin test. It demonstrates what is at best a very casual commitment to freedom of expression. The Chief Justice claims that it is not for the Court to settle the empirical uncertainties concerning the effects of exposure to obscenity. But of course, his opinions have precisely that effect in that lawmakers are now free to limit obscenity because it might lead to anti-social conduct.

Chief Justice Burger views this state power as limited to regulation of depictions or descriptions of sex that are obscene. The rule he provides as the test of a work's obscenity is very much a rephrasing of the Roth test.

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . (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.[64]

Basically of course this is Brennan's Memoirs formulation with the above discussed substitution of the "serious" value for "social" value.[65] But Burger does make several significant additions to the earlier test. First of all, he would require the states to specifically define the sexual conduct whose description can be limited. He suggests that these might include patently offensive depictions of ". . . ultimate sex acts, normal or perverted, actual or simulated. . . of masturbation, excretory functions and lewd exhibition of the genitals."[66] It should be pointed out that the Chief Justice is attempting to require some precision of obscenity law so that First Amendment interests are damaged as little as possible. But obviously, no law which requires that the depictions be "patently offensive" or "lewd" or "perverted" is very precise at all. Again, this area, obscenity, cannot be clearly and unambiguously defined. Further, it is difficult to conceive how legislatures can formulate statutes that

will specifically describe the acts subject to limitation. Either the law will be vague, as is the example given by the Chief Justice, or they will be so specific as to become easily evaded by those with imagination.

Burger's second major change in the Memoirs formulation concerns the community standards to which he refers. In Justice Brennan's hands, the community was national in character. But as Burger correctly indicates, that was never a majority view. For him, reliance on national standards is too hypothetical. But local juries can reflect a state standard in determining what appeals to prurience and is patently offensive. The Chief Justice feels that

> Under a national Constitution, fundamental First Amendment limitations on the powers of the states do not vary from community to community, but this does not mean that there are, or should or can be fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.'[67]

This facet of Burger's approach is at best extremely puzzling. I simply fail to see how both a uniform First Amendment and state determination of obscenity standards can coexist. When a jury decides what expression is obscene and therefore to be limited, it is at the same time determining the scope of the First Amendment. The Chief Justice indicates that different states will have different views as to what is obscene, and he is surely correct. That will mean that the scope of protection afforded by the First Amendment will likewise vary. Burger says that free expression inter-

ests will be protected by the power of state appellate courts to review the findings of local courts. So in the final analysis it is the state appellate courts which will determine obscenity standards and the extent of the First Amendment's protection of sexually oriented material within each state.[68] That is precisely the approach for which Justice Harlan so long argued.[69]

It is too early to determine accurately the practical consequences of this Balkanization of the First Amendment. But there are several possibilities. Movie producers and book publishers may very well have to release several different versions of a film or book, each version keyed to a particular state or group of states notion of what is not obscene. If that is economically unfeasible, and it may well be, the only other alternative is self-censorship in the form of producing a single version of a work inoffensive enough to escape limitation in the most sensitive state. In short, the media may well be reduced to observing the Hicklin test; to producing only that material which will not offend the most susceptible community.

All in all, Chief Justice Burger's opinion in the Miller and Slaton cases seems to me to be a considerable step backward. His views do nothing to clarify the very muddled condition of obscenity law and in fact add greatly to it by permitting the development of a multitude of obscenity standards. Further, there can be no doubt that his

approach will generate a large number of cases with which appellate courts will have to deal as the system attempts to determine precisely what the "new" law of obscenity means. One consequence of that approach is clear; the protection afforded sexually oriented expression has been considerably reduced.

In rejecting the majority view in Slaton and Miller, Justice Brennan also rejected his own substantial efforts to deal with the obscenity issue. His major objection to both approaches was that they were intolerably vague and consequently did not provide the "sensitive tools" required to distinguish between protected and unprotected expression.

> . . . 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, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections 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. Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as 'prurient interest,' 'patent offensiveness,' 'serious literary value,' and the like. The meaning of these concepts varies with the experience, outlook and even idiosyncracies of the person defining them. Although we have assumed that obscenity does exist and that we 'know it when [we] see it,' . . . we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.[70]

Brennan stated that in addition to the failure adequately to separate protected expression from the obscene, the vagueness

inherent in the Court's approach to obscenity censorship had produced several other problems. Lack of precision in the law meant that there was no fair notice of exactly what was prohibited. This in turn lead to arbitrary enforcement. Further, "institutional stress" was created since lower federal and state courts ". . . cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so."[71]

Justice Brennan felt that the Slaton-Miller approach not only failed to clear up any of these problems but also contributed several of its own. Chief Justice Burger's formulation, which Brennan labelled the "physical conduct" test, was only a slight variation from the Roth formula. It is premised on the view, as was Roth, that there exists an identifiable class of speech which can be limited consistent with the First Amendment. But in rejecting the social value test, the Chief Justice rejected the "key basis" of Roth:

> The Court's approach necessarily assumes that some works will be deemed obscene--even though they clearly have some social value--because the State was able to prove that the value, measured by some unspecified standard, was not sufficiently 'serious' to warrant constitutional protection. That result is not merely inconsistent with our holding in Roth; it is nothing less than a rejection of the fundamental First Amendment premises and rationale of the Roth opinion and an invitation to widespread suppression of sexually oriented speech. Before today, the protections of the First Amendment have never been thought limited to expressions of serious literary or political value.[72]

In short, Justice Brennan feels that the approach of the Slaton majority will insure the censorship of protected works.[73]

It is because of that conclusion that Justice Brennan bases his new approach on the view that ". . . outright suppression of obscenity cannot be reconciled with the fundamental principles of the First and Fourteenth Amendment."[74] But this does not mean that he would leave the states totally powerless to regulate sexually oriented material. The state has a proper interest in protecting juveniles and unconsenting adults from exposure to sexually oriented materials.[75]

What Justice Brennan has done here is, in a sense, a logical extension of his approach in Ginzburg. In that case, his emphasis was not on the content of the challenged works but rather on the manner in which they were advertised and distributed. In Slaton he goes even further in that direction. Because he demands precision in any law effecting free expression and because that degree of precision simply can't be attained with respect to obscenity without serious damage to the First Amendment, he has decided to attack the obscenity problem from another direction. The scheme he would seem to favor[76] can be outlined as follows.

States and the federal government would be stripped of any power to regulate the content of expression on the basis of its alleged obscenity. But government would be

free to control the way material is sold and distributed so as to protect minors and unwilling adults from being exposed to possibly offensive material. Brennan accepts the Stanley[77] ruling that the "Constitution protects the right to receive information and ideas" even if they are obscene. That right, he feels, is closely related to several others: the right to privacy from unwarranted government intrusion into personal matters, and in general; and the right to the free control over the development of one's personality. He then reasons

> that the recognition of these intertwining rights calls in question the validity of the two-level approach recognized in Roth. After all, if a person has the right to receive information without regard to its social worth--that is, without regard to its obscenity--then it would seem to follow that a State could not constitutionally punish one who undertakes to provide this information to a willing adult recipient.[78]

In short, no speech is a priori unprotected because of its content. But it may be regulated if it intrudes on juveniles or unwilling adults. Again, to extrapolate further, the practical system implied by this approach might permit laws which forbid, for instance, marquee displays advertising a sexually oriented movie. The movie itself could not properly be limited regardless of its content, as long as it gave clear warning to those who entered as to its exact nature.[79] But if a passerby could not avoid being confronted with scenes from the film, the theater could be held liable for

that kind of advertising. What this approach contemplates then is "obscenity" law based totally on the concept of pandering as discussed in Ginzburg.

That is precisely the system adopted by the Oregon legislature when it passed a revised Criminal Code in 1971. Part of the new code is an obscenity law patterned after that recommended by Richard Kuh in his book, Foolish Figleaves? Pornography in-and-out of Court.[80] The Oregon Law[81] prohibits furnishing obscene materials to minors (Sect. 256); sending obscene materials to minors (sect. 258); displaying obscene materials to minors (sect. 259); and publicly displaying nudity or sex for advertising purposes (sect. 261). The law defines obscenity as any one of the following: nudity; "slang words currently generally rejected for regular use in mixed society;" sado-masochistic abuse; sexual conduct; or sexual excitement. Each of these terms is in defined with, I think, a good deal of precision.[82] For example, nudity, is defined as

> uncovered, or less than opaquely covered, post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered human male genitals in a discernably turgid state. For purposes of this definition, a female breast is considered uncovered if the nipple only or the nipple and the areola only are covered.[83]

I think this kind of statute avoids the problems Justice Brennan feels are inherent in obscenity law. Oregon's statute is not vague and provides clear guidance as to

precisely what conduct is prohibited. While one may argue with the values reflected in the various definitions, they at least avoid the use of terms like "patently offensive" and "prurient." In addition, the law does not seek to regulate the private viewing or reading habits of consenting adults. It treats obscenity solely in terms of an intrusion and as Kuh states

> Were legislative enactment to succeed in driving objectionable items from public view, while permitting adults privately to buy, to read, to see, or to hear far more objectionable materials, the meaningful rights of all would be reconciled. The majority would be spared the discomfort of being forcibly confronted by the depersonalizing, the embarrassing, the crude; the minority would, as part of the same legislative framework, be freed to enjoy more of what it wished, quietly and without fanfare.[84]

Justice Brennan's approach in Slaton can be summarized as follows. He rejects the regulation of expression on the basis of its allegedly obscene content. That kind of expression cannot be defined with enough precision to avoid three major problems: (1) the inevitable censoring of materials that warrant First Amendment protection; (2) the failure to provide fair notice as to exactly what kind of expression is prohibited; (3) the creation of severe internal division within the Supreme Court and between that body and lower courts. To overcome these problems Brennan would require a system in which regulation of sexually oriented materials focus on the conduct of those distributing such material. Limitation of that conduct would be justified only when it

led to unwarranted intrusion into one's privacy. Obviously, such an approach is not without problems. But it is equally clear that use of some form of Justice Brennan's design would overcome many of the serious First Amendment problems generated by the vagueness of Roth and its prgeny.

The most consistent theme in all of Justice Brennan's obscenity opinions is his attempt to insure that protected expression is not censored along with the obscene. After 17 years of frustration with trying to fashion "sensitive tools" to separate obscene from non-obscene expression he simply surrendered the effort because, he felt, the task could not be accomplished. What he recommends as an alternative approach is one which treats obscenity primarily in terms of the use to which it is put rather than as a problem of evaluating the content of expression. In short, obscenity, whatever it may be, is subject to limitation, not as a form of expression but only when its use constitutes an invasion of privacy. Justice Brennan's shift to this position brings him very close to the absolutism of Black and Douglas at least in so far as obscenity censorship is concerned.[85] As such, it is clearly one of the more significant evidences of his concern that expression be as unfettered as possible.

CHAPTER II

JUSTICE BRENNAN AND LIBEL

Libel law is designed to afford the individual some protection against defamatory communication. An injured party can attempt to recover damages for harm inflicted and, in states with criminal libel laws, the government may choose to prosecute the alleged libellor. It is clear then that libel, as a means of directly punishing expression, raises First Amendment questions. But Justice Brennan and the Court did not deal with the general area of libel but instead with somewhat narrower questions. During the period covered herein, twelve of the seventeen libel cases decided by the Court involved alleged defamation of government officials.[86] The five remaining cases concerned people who, while not working for government, were, for some reason, in the public eye.[87]

As in the obscenity censorship cases, Justice Brennan played a major role in giving voice to the Court's position regarding libel. Of the seventeen decisions handed down between 1957 and 1974, Brennan wrote the majority or lead opinion in five cases and also clearly influenced the one *per curiam* opinion in the group.[88] But, as we shall see, these figures alone do not reflect the very substantial

contribution he has made to libel law and First Amendment theory.

Justice Brennan's opinions in this area of law deal primarily with two overlapping issues: the extent of First Amendment protection afforded critics of government, and the right of the press to publish, and the people to know, matters of public interest. As a result, his libel opinions constitute some of the more important statements of what Brennan views as the "central meaning" of the First Amendment. And perhaps his most important statement of all is contained in the first case to be considered here, New York Times v. Sullivan.[89]

The action reviewed in New York Times was initiated by L. B. Sullivan, a county commissioner of Montgomery County, Alabama. Sullivan claimed he had been libelled by an advertisement in the Times which discussed civil rights activities in Alabama.[90] Several of the statements in the ad were false.[91] The trial jury awarded Sullivan $500,000 in damages. That decision was upheld by the Supreme Court of Alabama against the Times' contention that such awards constituted an unconstitutional invasion of freedom of press.

In arriving at their decisions, Alabama courts had applied a rule of law which held that libel was unprotected by the First Amendment, that false communications were likewise unprotected, that injury to official reputation was a basis

for a recovery and that truth was a proper defense. But for a unanimous Supreme Court, the entire rule was defective.

In holding that libel was not afforded constitutional protection, the Alabama courts had relied on several rulings of the United States Supreme Court.[92] But it was clear, Brennan asserted for the Court, that none of these decisions upheld the use of libel as a means of regulating criticism of the conduct of government.

> In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law. . . . [L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.[93]

The First Amendment, for Brennan, had as its central purpose the assurance of free debate on public issues, debate which ". . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[94] The advertisement in question, he said, was an expression of protest on a significant social issue and as such was afforded constitutional protection unless that protection was to be voided by the falsity of statements in the ad.

But Justice Brennan also rejected this second feature of the Alabama rule. The First Amendment had never been viewed as protecting only "true" statements. False statements were inevitable in a free debate, Brennan said, and must therefore be protected if expression was to have the necessary "breathing space" to survive.

The fact that criticism of an official was effective and damaged his reputation was also insufficient justification for limiting expression. Government officials, city commissioners among them, are to be treated as " . . . men of fortitude, able to thrive in a hardy climate. . . ."[95]

For Justice Brennan, the history of the Sedition Act of 1798 indicated that the combination of these last two elements, factual error and defamatory content, also failed as justifications for limiting criticism of government. The Sedition Act, which in Brennan's words, " . . . first crystalized a national awareness of the central meaning of the First Amendment.",[96] had been condemned by Jefferson and Madison, by Justices of the Supreme Court, and by students of the Constitution.

> These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.[97]

The limitations that were now seen to render the Sedition Act unconstitutional were applicable to the states through the Fourteenth Amendment, and it does not matter at all that a state may permit restrictions on speech to be imposed through civil suit rather than criminal prosecutions. For Brennan, the crucial point was that the restrictions were effected. The means are irrelevant. Requiring truth in criticism, Brennan declared, would inhibit the critic. He would hesitate to attack government because of fear of a

libel action and awareness of the difficulties involved in proving the truth of all of his statements. Legislation or common law rules producing such a system of self-censorship are therefore contrary to the First and Fourteenth Amendments. To forbid such unconstitutional restrictions without creating an absolute constitutional bar against all libel suits, by public officials, Justice Brennan announced what has become known as the "New York Times Rule", the rule which summarized all his objections to the Alabama rule at issue here.

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"--that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[98]

Justice Brennan felt that the privilege created by this rule was "analogous" to that created in Barr v. Matteo.[99] That case had extended an absolute privilege to the statements of a government official when they were made as part of his official responsibilities.[100] But, of course, the New York Times privilege is conditional, not absolute, and thus the protection afforded the citizen critic and that available to the official are not identical.[101] Nevertheless, even under the New York Times rule, Sullivan did not have grounds to recover damages.

Justice Brennan's New York Times rule has the effect

of creating a constitutional standard for all libel cases involving criticism of the official conduct of public officials. And as Harry Kalven points out, the Court in this case was "compelled" to reach this result.[102] For what Alabama had tried to do was to punish an unpopular view, the pro-civil-rights policy of the New York Times, by allowing the award of monetary judgments which, if upheld as constitutional, could, in this case, have driven the paper into bankruptcy, and could have been employed against any newspaper voicing an opinion contrary to that favored by the citizens of a state who were likely to make up juries in civil or criminal cases.

Before examining Justice Brennan's Times interpretation of the First Amendment, several points should be made. First, one must keep in mind the "discrete context" in which the actual malice standard was formulated. It is a rule to be applied in libel cases brought by government officials against citizen-critics of their official conduct. It says nothing about criticism of an official's private life. Justice Brennan did not make that distinction explicit until a few months after Times when, in his Garrison[103] opinion he wrote

> We recognize that different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned; therefore nothing we say today is to be taken as intimating any views as to the impact of the constitutional guarantees in the discrete area of purely private libels.[104]

But the difficulty here is where to draw the line. Surely, there are facets of an official's private life which bear significantly on the performance of his official duties and would therefore seem to be germane to a discussion of "public affairs." And, obviously, providing such a public-private distinction *a priori* is impossible. Consequently, the potential critic cannot be sure ahead of time whether or not his criticism is covered by the *Times* privilege. Moreover, the *Times* privilege, even where it applies, is not absolute. If the comments are made with "actual malice"--knowing falsehood or reckless disregard of the truth--they may properly be the basis for the award of damages.[105] At the same time, the comments of a government official, speaking within his official responsibilities, are protected by an absolute privilege. Justice Brennan has commented that the citizen-critic has as much a "duty to criticize" as an official has to administer. But the conditional privilege he creates in *Times* does not equip the citizen with equal tools with which to perform his function.

While the *Times* case concerned the use of civil libel laws against critics of government, Justice Brennan made it clear that the same principles would apply to criminal libel[106]--in short, that the state could not punish one who had libelled a government official unless the criticism was motivated by actual malice. Thomas Emerson has commented

> the Sedition Act of 1798 applied only to 'false' utterances, made with 'intent' to

> defame. In denouncing the constitutionality of that legislation the Supreme Court never suggested it would have been valid had it clearly applied only to 'deliberate or reckless falsehood.' The fact seems to be that the majority of the Court in Garrison and Ashton had failed to distinguish between the use of criminal libel laws as seditious libel and their use as a criminal supplement to the law of civil libel.[107]

What Justice Brennan's application of the Times rule in Garrison does then is to severely narrow the grounds upon which the state can properly punish a critic of government. But it does not entirely eliminate such state power.

The fact that Justice Brennan does not call for an absolute privilege in either New York Times or Garrison is a result of his view of the First Amendment. He feels that the basic purpose, or "central meaning," as he says, of the First Amendment is to insure free public discussion of significant issues, particularly the operations of government. This is the reason, he feels, that the Sedition Act of 1798 has been rejected by a "broad consensus." The First Amendment shelters debate even when it is unpleasant, unpopular, or, in some cases, when it is false.[108] The Amendment must reach this far, he feels, if government is to be made responsive to the people and if the people are to retain the power to make the changes they desire through critical discussion of public issues.

And it is that kind of discussion that Justice Brennan seeks to protect in Times and Garrison. The protection afforded the expression in those cases exists not because of

the status of the persons discussed but rather because of the function performed by that kind of discussion. In other words, Justice Brennan's Times rule protects one of the tools of self-government. But actual malice does not serve that end.

> Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by social interest in order and morality. . . ." . . . Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.[109]

One year after writing the above, Justice Brennan enlarged on this point in delivering the Alexander Meiklejohn lecture at Brown University.[110]

> Note that the New York Times principle has an important qualification: it does not bar civil or criminal libel actions for false criticism of the official conduct of a public official if that criticism is made with knowledge of its falsity or in reckless disregard of whether it was false or true. The underpinning of that qualification is the 'redeeming social value' test.[111]

Brennan's Times-Garrison privilege is conditional then because actual malice, like obscenity,[112] contributes little to the interchange of ideas and therefore does not warrant First Amendment Protection.

One difficulty with this view has been pointed out by Justice Marshall in his dissent in Rosenbloom v. Metromedia.[113]

> In order for particular defamation to come within the privilege there must be a

> determination that the event was of legitimate public interest. That determination will have to be made by courts generally and, in the last analysis, by this Court in particular. . . . [C]ourts will be required to somehow pass on the legitimacy of interest in a particular event or subject; what information is relevant to self-government. . . . The danger such a doctrine portends for freedom of the press seems apparent.[114]

In short, the actual malice rule leaves the door open for limitation of criticism of government. Of course, the only way to avoid that possibility is to adopt Justice Black's view that all libel laws violate the First Amendment.[115] But in libel, as in obscenity, Justice Brennan stops just short of the absolutist view.

Justice Brennan did not attempt to define "public official" in either Times or Garrison. But he did confront that issue two years later in Rosenblatt v. Baer.[116]

Before the Supreme Court, Baer had argued that the question as to whether he was a public official within New York Times should be resolved by state standards. Justice Brennan rejected that view, stating that its recognition would result in constitutional protection varying with state lines. At the same time he refused to give any precise definition of "public official" because he insisted this case did not require such a definition. The purpose of the New York Times rule was to insure wide open discussion of public policy and of persons responsible for it.

> It is clear, therefore, that the "public official" designation applies at the very

> least to those among the hierarchy of government employees who have, or appear to the public to have, substantial control over the conduct of governmental affairs.[117]

In a footnote, Justice Brennan added to that definition:

> The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.[118]

If an individual fell under this definition, he was a public official within the meaning of the New York Times rule and, consequently, statements directed at him must meet the knowing falsity or reckless-disregard-for-truth standard before damages could properly be awarded.

It would be useful here to examine the components of Justice Brennan's definition of "public official". Clearly, it is one of the critical elements in the New York Times rule. Initially, it should be understood that Brennan sees his definition as minimal, or, in his own words, that it applies "at the very least" to the group he designates. This means, of course, that even those who fall outside the Rosenblatt definition might be brought within the concept of "public official". For Brennan, a public official is, first of all, and most obviously, one who is employed by government. That employee must have "substantial responsibility" for policy. Even if the employee only appears to have responsibility for policy, he is still within the Brennan definition.[119] All of this would seem to indicate an extremely broad definition which could conceivably include

almost all government employees. But, in the footnote to his opinion quoted above, Justice Brennan adds a significant limitation. The employee's position, he said, must be one which is the subject of public discussion in normal times--apart from a particular controversy. In short, it would seem that the Times rule does not become operative when controversy surrounds a government employee who would not be the subject of discussion except in the context of a specific controversy. Justice Brennan justifies this limit on his public official definition by stating that it is required if the social interest in protecting reputation is not to be ignored.

One potential problem with Brennan's limitation here is that it is precisely during controversy that the greatest latitude for discussion is required. While it is unlikely, it is possible that an unnoticed government employee, one who was not the subject of public discussion in normal times, could become involved in a controversy having consequences for public policy. But under the limitation Brennan places on his own definition, expression in such a case is not afforded the full protection of the New York Times rule.

Probably in such a situation Brennan would resort to weighing the social significance of the controversy against the interest in protecting the employee's reputation. Given Brennan's view of the role of free expression in a democratic system, the balance almost surely would be struck

in favor of an "unfettered interchange of ideas."

Justice Brennan's opinion also attempts to clarify the relationship between the privilege in Barr and the privilege created by New York Times. Justice Brennan seemed to make this connection himself in his Times opinion. Speaking of the Times rule he said,

> Such a privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen. In Barr v. Matteo, . . . this Court held the utterance of a federal official to be absolutely privileged if made 'within the outer perimeter' of his duties. . . . The reason for the official privilege is said to be that the threat of damage suits would otherwise 'inhibit the fearless, vigorous, and effective administration of policies of government' and dampen the ardor of all but the most resolute, or the most irresponsible in the unflinching discharge of their duties. Barr v. Matteo. . . . Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer.[120]

Brennan draws the same analogy in his Garrison opinion.[121] But in Rosenblatt, Justice Brennan states that official privilege and citizen privilege are not tied to one another.[122] The New York Times rule, he said, seeks to protect discussion and not "retaliation." The reference to Barr ". . . should be taken to mean no more than that the scope of the privilege is to be determined by reference to the function it serves."[123]

What Brennan means here is simply that the Barr and New York Times privileges exist for the purpose of insuring

effective government and effective public participation therein, and not to provide adversaries with similar weapons. For him, the governed and those who govern each have functions to perform, both of which can be aided by allowing them realtively free discussion.

Justice Brennan's basic goal in New York Times and Garrison was to protect the free flow of information. In order to achieve that goal his New York Times rule was fashioned to protect innocent error. But the New York Times rule applies only to libel of public officials by critics of their official conduct. But of course freedom of expression and the free flow of information can be limited by means other than libel suits filed by public officials or criminal prosecutions of the critics of public officials. Justice Brennan confronted such a situation in Time Inc. v. Hill.[124]

In 1952, James Hill and his family were held hostage in their home by three escaped convicts. After nineteen hours, they were released unharmed. In his comments following release, Hill emphasized that the convicts had treated all of his family well and that there had been no violence. Moving to Connecticut shortly after the apprehension of the convicts, Hill discouraged further publicity. The year following the incident, a novel was published, The Desperate Hours, which depicted an experience similar to that of the Hills except that the convicts in the book were violent toward their captives. The book was then made into a play.

A Life magazine story about the play became the subject of this case.

Life had run a story in February, 1955, which discussed the opening of the play and carried pictures of some of the scenes photographed at the house in which the Hills had been held captive. The text accompanying the pictures stated that the play had been "inspired" by the Hill incident. Mr. Hill then brought suit in New York courts, under a state law protecting privacy, charging that Life had falsely connected the play with his experience. He eventually won $30,000 in damages.

New York Courts had treated Hill as a "newsworthy" person. Under the prevailing interpretation of the state's privacy law, such persons were entitled to recover damages if reports of their activities were "fictitious". Justice Brennan felt that the law could not escape constitutional infirmity unless it required proof of knowing or reckless falsity before damages could be awarded. The protection afforded free expression is not reserved for political affairs only. The exposure the Hills experienced was, from Brennan's point of view, a consequence of living in a society which places great value on free public discussion. The Life article at issue was "a matter of public interest." For Brennan, discussion of that sort inevitably contained some error. And innocent error must be protected if expression is to perform its vital functions.

What Justice Brennan did in the Hill case was to impose the "actual malice" rule on privacy suits filed by newsworthy persons. As he pointed out, this was not a "blind application" of the Times rule for that rule applies only in libel suits filed by public officials. But the basic problem, the interruption in the free flow of information, was the same in Hill as in Times. In the former, the device employed to impose that limitation was a privacy action, in the latter, a libel suit. But, for Justice Brennan, what is important is not the nature of the device used to impose the restriction but simply the fact that speech has been limited. Free expression required the same degree of protection in both cases since it was performing the same function--facilitating discussion of issues of public interest.

The question of whether the Times rule was to apply to libel suits filed by someone other than a public official was not raised until three years after the initial formulation of the standard. The Court dealt with that issue in Curtis Publishing Company v. Butts and Associated Press v. Walker.[125] Wallace Butts was employed by a private corporation as athletic director at the University of Georgia. He brought suit against the Saturday Evening Post, published by Curtis Publishing Company, based on a Post article which alleged that he had fixed a football game between Georgia and Alabama by giving the Alabama coach, Paul Bryant, certain plays Georgia had planned to use. The trial in U. S.

District Court was completed before the New York Times decision was announced. Curtis offered no constitutional defenses, depending entirely on the defense of truth. In part of his charge to the jury, the judge made the award of punitive damages dependent on a finding of actual malice, which he defined as "'. . . the notion of ill will, spite, hatred and an intent to injure one. Malice also denotes a wanton or reckless indifference of culpable negligence with regard to the rights of others.'"[126] The jury found for Butts, awarding $60,000 compensatory damages and $400,000 punitive damages. Curtis' motion for a new trial was denied and the Court of Appeals affirmed.

The Walker case involved an Associated Press news dispatch concerning the activities of retired General Edwin Walker at the University of Mississippi during disturbances over integration of the University. The A. P. report stated that Walker had "assumed command" of a mob and had led a charge against federal marshals. Walker filed a libel suit in Texas courts seeking a total of $2,000,000 in compensatory and punitive damages. A.P. based its defense on truth and on constitutional defenses. The jury was instructed that it could award compensatory damages if the dispatch was not substantially true and that punitive damages could be added if the article was motivated by ill will, bad or evil motive or entire want of care. The jury awarded $500,000 compensatory damages and $300,000 punitive damages. But the

trial judge refused to enter the punitive award because, in his view, no actual malice was indicated. Both sides appealed to the Texas Court of Civil Appeals which affirmed. The Supreme Court of Texas denied a writ of error.

Justice Harlan's lead opinion presents an interesting alternative approach to that of Justice Brennan and will therefore be examined in some detail.

Harlan felt that freedom of expression is important both for society and for the individual. Socially, freedom of expression helps maintain our political system while at the same time permitting each man to state his opinion. But even though free expression is important, it is not unlimited. Limitations can be imposed when the rights and liberties of others are infringed. Yet not all forms of limitation are acceptable.

> Our touchstones are that acceptable limitations must neither affect 'the impartial distribution of news' and ideas. . . , nor because of their historical impact constitute a special burden on the press, . . . , nor deprive our free society of the stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish.[127]

The history of libel law made it clear, for Harlan, that there was a basic conflict between it and the American tradition of free expression. Libel had been changed because of that conflict but the basic antithesis remained, since libel still ". . . limits the freedom of the publisher to express certain sentiments at least without guaranteeing

legal proof of their substantial accuracy."[128] Falsity alone was not enough to remove a publisher's protection, Harlan stated. The Court had so indicated in New York Times and in Hill. But protection did cease when the record indicated that a publisher had conducted himself improperly and thereby created a false publication. The Times decision, Harlan said, made it clear that libel judgments based on misconduct were constitutionally permissible. The benefit of this approach, for Harlan, is that it permits limitation on expression which could be "neutral with respect to the content of the speech."

But while he saw the Times decision as providing some guidance in Curtis and Associated Press, he felt that the critical elements of Times were absent. While the Times case involved analogies to seditious libel, none were present in the instant cases, and neither Curtis nor the A.P. were entitled to special protection for their utterances. Since the context of these cases was different than that of Times, the Court, said Harlan, was required to rely on a standard other than the Times rule. That standard was provided by the prevailing rules of liability

> with respect to compensation of persons injured by the improper performance of a legitimate activity by another. Under these rules, a departure from the kind of care society may expect from a reasonable man performing such activity leaves the actor open to a judicial shifting of loss. In defining these rules . . . courts have consistently given much attention to the importance of defendants' activities.[129]

As well as focusing on a defendant's activities, courts also have examined the plaintiff's position in order to determine whether he was properly calling on the court for protection given his "prior activities and means of self defense."

For Harlan, the material in question in Curtis and Associated Press was of legitimate interest to the public. Further, both Butts and Walker were public figures within ordinary libel law and both also had access to means of self-defense against published charges. Given this type of case, involving public figures, the states, Harlan felt, could not be left free to devise whatever type of libel law they felt necessary. What was required was some "constitutional safeguard."

> We consider and would hold that a "public figure" who is not a public official may also recover damages for defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.[130]

Using this standard, Harlan found that the conduct of Curtis Publishing was an "extreme departure" from the investigatory standards followed by responsible publishers.[131] The A.P., on the other hand, had not acted improperly. Consequently, the judgment for Butts was upheld while the award to Walker was reversed and remanded.

Harry Kalven has commented that the Curtis-A.P. opinion represents Harlan in ". . . his familiar role as the

Justice who, in the aftermath of a fresh burst of energy by the Court, comes forward to tidy things up."[132] But Harlan's opinion in these cases is quite a bit more than just a clarification of New York Times. What Harlan did in Curtis-A.P. was to expand on his own concurring-dissenting opinion in Time v. Hill,[133] thereby making a significant departure from the Times rule.

He would have the Court employ a sliding scale of press privilege based upon the evaluation of several elements: the proximity to seditious libel, the status of the alleged libellant, and his related ability to respond to falsity.[134] Harlan would provide the most extensive privilege in cases involving public officials. There, the Times rule would apply. But as one moves away from cases analogous to seditious libel, the privilege shrinks. In effect, Harlan would apply three different standards: the Times rule where public officials are involved, a standard of gross negligence in cases involving public figures, and a fair comment rule when private persons involuntarily become newsworthy. The purpose of Harlan's calculus is to insure a competition of ideas. Consequently, the degree of protection afforded expression is pegged to the ability of the two "combatants" to respond to each others' arguments.

Justice Brennan's brief opinion explained his concurrence in the disposition of A.P. and his dissent in Curtis He agreed with Chief Justice Warren's view that the Times rule should apply to both public officials and public

figures. Since the lower court decision in A.P. was clearly inconsistent with Times, reversal was required. But he would have had the Court remand Curtis despite his view that the evidence would support a judgment for Butts under the "actual malice" standard. Brennan's concern in Butts was with the judge's charge to the jury, which he felt was not consistent with New York Times. The charge failed, he said, for two reasons. First, while allowing damages if actual malice was present, the trial judge defined actual malice, in part, as encompassing ill will or hatred. This meant that the motive of expression was made relevant, and he and the majority had rejected that view in Garrison. Second, Brennan indicated that the trial judge allowed the Post to show, in mitigation of damages, that it had relied in good faith on its sources. This resulted in the jury being authorized to award some damages even though the Post had acted in good faith. That, he said, was inconsistent with the Times ruling. Because of these defects in the instructions, Brennan would have required a jury to make the decision in Curtis with a proper charge even though he felt that the ultimate resolution of the case could be the same.

The basic difference between Justices Brennan and Harlan is that Brennan views freedom of expression as the most important interest to be preserved while Harlan views it as simply one of many important interests to be protected. Four years after the Curtis decision, Justice

Harlan stated

> Just as an automobile negligently driven can cost a person his physical and mental well being and the fruits of his labor, so can a printing press negligently set.[135]

In short, the publisher is dealt with as is any other tortfeasor. But Justice Brennan views the press as having a uniquely critical role to play in the free interchange of ideas. Consequently, he would have the Times rule protect the press be it public official or public figure who is discussed. And that is due to his focus on the function of expression in each case rather than the status of the people involved.

It should be noted here that the voting alignment in Butts and A.P. produced a rather curious result. There was no majority opinion in Butts. Justice Harlan's opinion, joined by Clark, Stewart and Fortas, rejected application of the Times rule to public figures. Instead he would require such persons to prove gross negligence on the part of the publisher before damages could be awarded. Chief Justice Warren concurred but only to carry the decision for Butts. He felt that the Times rule should apply to public figures. Justice Brennan, joined by White, felt that the judge's charge to the jury did not comport with Times and therefore dissented. Justices Black and Douglas dissented calling for the rejection of Times in toto to be replaced by an absolute privilege. In A.P., the Court voted unanimously to reverse the awarding of damages. The Chief Justice, speaking for

Brennan and White, held that the Times rule had not been met. Black and Douglas concurred, making Warren's opinion the majority view. Justices Harlan, Clark, Stewart and Fortas also concurred, but on the grounds that the A.P. had not been guilty of gross negligence. To summarize, Justices Harlan, Clark, Stewart, White, Fortas, Brennan and the Chief Justice felt that Butts and Walker were public figures. Brennan, White, Warren, Black, and Douglas voted in A.P. to make the Times rule applicable to individuals so defined. But, in Butts, Justices Harlan, Clark, Stewart and Fortas viewed New York Times as limited in reach to public officials only and sustained the awarding of damages to Butts on the grounds of Curtis' "extreme departure from the standards of investigation and reporting normally adhered to." The net result of these differences was that the Court had ruled that the Times rule applied to public figures when, as in A.P., libel judgments were reversed, but did not apply to public figures when, as in Butts, libel judgments were sustained.

The important element of these cases for this study is, of course, Justice Brennan's vote to extend the "actual malice" rule of New York Times to libel cases filed by public figures. But, as has been pointed out, the status of those filing libel suits was not, for Brennan, what defined the scope of the privilege. Rather he sought to protect discussion of public issues.[136] In this regard his views in

Butts and A.P. bring him closer to those of Justice Douglas.[137]

Curtis and Butts were the last major libel decisions handed down during Earl Warren's tenure on the Court.[138] The resignation of the Chief Justice in 1969 marked the beginning of a period of frequent changes in the membership of the Court. By 1971, when the Court made its decision in Rosenbloom,[139] the last major libel decision to date, two new Justices had taken their seats: Warren Burger had been appointed Chief Justice and Harry Blackmun had assumed the seat vacated by Justice Fortas. As we shall see, the two new members of the Court were to play a critical role in a significant extension of the "actual malice" rule.

Before turning to a discussion of Rosenbloom, brief mention should be made of several of the court's libel rulings immediately preceding that case. While none of them can be considered as significant as Rosenbloom, they did help to make the Times rule somewhat more specific.

Perhaps the most unique case in this group was a case the Court refused to hear, Ginzburg v. Goldwater.[140] The Justices allowed to stand a Circuit Court of Appeals ruling[141] that Senator Barry Goldwater had been libelled by an article in Fact magazine, whose publisher was Ginzburg, published during the 1964 presidential campaign. In that article, it was stated that Goldwater was a "paranoid personality" and therefore unfit for the Presidency. The Court of Appeals

held that since Ginzburg neither sought nor himself possessed the expertise to reach such a conclusion, publication of such a charge constituted "actual malice" as defined in the Times case. Justice Black, joined by Douglas, added a written dissent to the Court's memorandum decision. Black pointed out that while the Circuit Court's ruling exemplified the inadequacy of the Times standard, two additional factors made the lower court's decision "all the more oppressive and ominous." At the time the article was published, Goldwater was the Republican presidential nominee. For Black, untrue statements during a campaign were "inevitable and perhaps essential." Further, the damages awarded were totally punitive,[142] indicating that the jury did not find the article damaging. In fact, Goldwater himself did not claim he had been damaged. For Black, the proper course was to hear the case, reject New York Times and extend an absolute privilege to discuss public affairs.[143]

Justice Brennan joined Justice Stewart's majority opinion in the four other cases immediately preceding Rosenbloom. Handed down during the 1969-1970 and 1970-1971 terms, these decisions held that: (1) a public figure could not recover damages under a rule of liability which did not require a showing of actual malice;[144] (2) publications concerning candidates for public office are shielded by the privilege created in New York Times, and the privilege

extends to "a-ything which might touch on . . . fitness for office";[145] (3) a finding of actual malice requires a showing that the publisher had serious doubts about the truth of his publication;[146] (4) the failure of a lower court to consider the Times rule in a libel suit brought by a public official required reversal of that court's decision.[147] Brennan's silence ended with Rosenbloom v. Metromedia,[148] to which we now turn.

George Rosenbloom was a distributor of nudist magazines in Philadelphia. During a city campaign against obscenity, Rosenbloom was arrested for possession of obscene literature, and a quantity of the material was seized. His libel suit was based, in part, on a radio report of that arrest. In describing the event, the reporter failed to describe the seized books as "allegedly" obscene, an omission that was corrected in later broadcasts. Rosenbloom and some of his distributor colleagues then sought an injunction against local officials. Again, the radio station, in reporting that story, referred to the plaintiffs as "smut peddlers" who were trying to force local officials to "lay off the smut literature racket." In a separate action, a state court subsequently held the seized books not obscene. Apparently feeling that this finding gave him adequate grounds on which to institute a suit, Rosenbloom sued the radio station claiming that he had been defamed by the two radio broadcasts in question.

The District Court's handling of the case raised the issue which was to be of central concern to the Supreme Court. The lower court reasoned that since Rosenbloom was neither a public official nor a public figure, the Times requirement of actual malice did not apply. Instead the jury was instructed in accordance with Pennsylvania libel law which permitted recovery of damages if it could be shown that falsehoods had been published without reasonable care being taken to ascertain their truth. Rosenbloom was awarded general and punitive damages but, on appeal, the Circuit Court reversed, holding that the Times rule was in fact applicable, and that the evidence could not sustain a finding for Rosenbloom under that standard.

Justice Brennan delivered the lead opinion joined by Chief Justice Burger and Justice Blackmun. For him the issue was clear--whether the "actual malice" standard applied to private persons as well as to public figures and public officials. While New York Times and its progeny had referred to the status of the individuals discussed, Brennan indicated that those decisions most importantly dealt with issues of "public or general interest." In short, he maintained that while the Court had focused on the status of individuals, the determining factor was actually the nature of the issue involved. Free discussion of all public issues was necessary, he said, since

> Self governance in the United States presupposes far more than knowledge and debate

> about the strictly official activities of various levels of government. The commitment of the country to the institution of private property, protected by the Due Process and Just Compensation Clauses in the Constitution, places in private hands vast areas of economic and social power that vitally affect the nature and quality of life in the nation. Our efforts to live and work together in a free society not completely dominated by governmental regulation necessarily encompass far more than politics in a narrow sense.[149]

Since the First Amendment extended to "myriad" matters of public interest, it was artificial to base the degree of constitutional protection of expression on the status of the persons discu-sed. Even in cases in which a private individual was involuntarily thrust into discussion of an issue of public interest, his interest in his privacy was overridden by the necessity that the public have full information. So that the law would recognize that necessity, Brennan announced an extension of the Times rule.

> We thus hold that a libel action, as here, by a private individual against a licensed radio station for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not.[150]

No other standard, neither "reasonable care" nor negligence, would provide the required "breathing space" for the First Amendment. Within this reformulation of the Times rules, Rosenbloom had no basis for recovery of damages.

A word must be said here about Justice Brennan's two

supporters in Rosenbloom, Chief Justice Burger and Justice Blackmun. Burger and Blackmun joined what was, aside from the absolutist position, the most liberal view on the Court. But I think it would be an error to assume that this indicates their general agreement with Brennan's view of freedom of expression. What seems to me a more accurate reflection of their First Amendment views is found in the Miller[151] and Slaton[152] cases as well as in several other obscenity decisions.[153] It is clear from those opinions, written by the Chief Justice and joined by Blackmun, that they both object to what they call "commercial exploitation" of erotica. The broadcasts to which Rosenbloom objected concerned his alleged distribution of such material. In short, it seems to me that Burger and Blackmun joined Brennan's rejection of Rosenbloom's claims because they disapproved of the latter's "sordid business" rather than because they agreed with Brennan's broad reading of the First Amendment. This of course means that when a more savory individual presents similar issues to the Court, Brennan may not be able to attract their support.

Justice Brennan's libel opinions are clearly among the most significant statements he has made as to the meaning of the First Amendment. In them he makes clear his view that the Amendment's basic purpose is to protect the free flow of information about issues of interest to the public. And his view of just what constitutes a public

issue is extremely broad. As he said in another context:

> The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . .All ideas having the slightest redeeming social importance--unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion--have the full protection of the guarantees, unless excludable because they encroach on the limited area of more important interests.[154]

In libel cases, the only expression lacking social importance is calculated falsehood--speech resulting from actual malice. As he did in regard to obscenity, Justice Brennan condemns calculated falsehood to the lower level of Kalven's "two-level-free-speech-theory"[155]--that is, speech so harmful that no consideration need be given to the context in which it is used.

That limitation on absolute freedom to discuss public issues is a very small one indeed. What Justice Brennan has accomplished with the "actual malice" rule is to make it impossible to "accidentally" libel anyone when discussing public issues. He has provided protection for innocent error so that a publisher is aware that unless he knowingly lies or fails to make any effort at all to verify his statements, his discussion is shielded by the First Amendment. At the same time, Brennan has left the door open just enough to permit punishment of expression solely designed to inflict injury. In this sense then, Justice Brennan has struck what seems to me to be the proper balance between freedom of expression and the right of the individual to protection from defamation.

CHAPTER III

JUSTICE BRENNAN AND INTERNAL SECURITY

This final chapter examines Justice Brennan's views in several different kinds of freedom of expression cases which may be generally categorized as internal security cases. The organization of this discussion is similar to that employed by Thomas I. Emerson in his book, The System of Freedom of Expression.[156] The first section examines Justice Brennan's approach to the threats to expression posed by legislative investigations. This is followed by analysis of his view of the relationship between demonstrations and freedom of expression. Both federal and state governments have taken various steps to control allegedly subversive organizations. Two of the means employed, denial of benefits to members and attempts to limit the suspected organization's activities, comprise the next two sections of this study. The concluding section deals with Brennan's views in several First Amendment cases which do not fit into any neat classificatory scheme. But his opinions in several of those cases constitute significant discussion of such issues as prior restraint of the press,[157] and the right of access to the media.[158]

As pointed out earlier in this study, Justice Brennan

has consistently rejected an absolute interpretation of the First Amendment. Instead he has attempted to strike a balance between competing interests. It is in the internal security area that balancers are perhaps most seriously tested as to their commitment to that approach. This is so because the interest most often placed in opposition to free expression is the state's interest in self-preservation. As we will see, several of those Justices who claim to favor the balancing approach totally abandon it as soon as the state claims that self-preservation is the interest they seek to protect through limiting a particular form of expression. But Justice Brennan is not among that group. His willingness, in fact his insistence, on balancing as the proper approach is evident in many of the cases to be discussed below. This is particularly true of those involving legislative investigations, to which we now turn.

Most investigations by legislative committees have not raised First Amendment issues. But beginning in the 1930's both federal and state legislatures made increasing use of committee investigations to inquire into what were alleged to be subversive activities. Such investigations necessitated the calling of witnesses who were questioned as to their political opinions and associations. Inevitably, such persons, whether or not they cooperated with the committee, were stamped as disloyal and suffered the predictable consequences. But it was not the witnesses alone

whose First Amendment rights were infringed upon. Those who were fortunate to avoid direct confrontation with a committee like the House Committee on Internal Security[159] could not help but feel that it was dangerous to express an unorthodox political view. In short, the existence of such committees most surely has had a chilling effect on expression.

Justice Brennan's initial contact with the First Amendment issues raised by investigations of subversion came in the Watkins[160] and Sweezey[161] cases in 1957. In both cases he joined in Chief Justice Warren's opinion for the Court. In Watkins the Court held that a witness before the House Un-American Activities Committee (HUAC) could not be compelled to testify about the alleged Communist Party membership of others because he had not been informed of the pertinence of the question to the Committees task. Warren also stated that the First Amendment imposed limitations on the power of Congress to investigate. The Court, the Chief Justice held, must balance Congressional need for the information sought against "the individual interest in privacy." But Warren avoided striking any balance here basing the decision instead on the pertinence issue noted above. In Sweezey, involving an investigation conducted by a state attorney general, the Chief Justice again relied on due process grounds to reverse the contempt conviction of a witness who refused to answer questions relating to a lecture he gave at the University of New Hampshire. Speaking for himself and Justices Brennan, Black and Douglas, Warren

ruled that the authorization for the investigation had failed to set proper limits on the inquiry.

In both these cases First Amendment issues were recognized by the Court but did not serve as the articulated bases of the decisions. But at the same time it is clear that the presence of such considerations lead the Court to demand that investigating committees proceed with greater care than might be required if First Amendment rights were not involved.

Justice Brennan's first written opinion in this area was his dissent in Uphaus v. Wyman.[162] Willard Uphaus was executive director of World Fellowship, Inc. which operated a summer camp in New Hampshire. The Attorney General of that state acting, as in Sweezey, as a one man investigating committee, subpoenaed lists of the camp employees and its guests. Uphaus refused to produce the lists and was eventually jailed for contempt until he was willing to comply. His conviction was affirmed by the State Supreme Court. The U. S. Supreme Court vacated the judgment and remanded the case to the state high court for reconsideration in light of Sweezey. The state court reaffirmed its original decision and the case again came before the Supreme Court.

Justice Clark delivered the majority opinion.[163] The central issue, he felt, was whether the associational privacy of the persons on the subpoenaed lists was outweighed by the state's interest in self-preservation. That state interest

was 'the ultimate value of any society' and thus it must prevail. Consequently, the investigation in support of that interest was proper and punishment of Uphaus for refusing to cooperate with it did not constitute a denial of due process.

Justice Brennan's dissent attacked the majority for failing to balance the interests in conflict. Unless the Court was willing to make a "universal" subordination of speech and association to the state's interest, drawing the line between the competing values would be difficult.

> The problem is one in its nature calling for traditional case-by-case development of principles in the various permutations of circumstances where the conflict may appear.[164]

For Justice Brennan, the development of the required principles was clearly the responsibility of the judiciary. The majority had failed to fulfill that responsibility because it had treated the assertion of a state interest by the legislature as legitimizing the specific means chosen to support that interest. Brennan's own examination of the circumstances of the case led him to conclude that the only purpose served by the Attorney General's activities was exposure of suspected subversives. In short, he felt that there was no valid state interest present here against which to balance freedom of speech and association. Consequently, he would have reversed the state court.

As one writer has pointed out,[165] balancing is a

"much abused doctrine." The mistreatment has come primarily from Justices who profess that it is the proper method of resolving First Amendment issues and at the same time really fail to use it. Justice Harlan's opinion in Barenblatt v. U. S.[166] exemplifies this curious approach. On the one hand he states,

> Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.[167]

But, at the same time when Congress is investigating Communism in support of the right of self-preservation, that automatically quashes any First Amendment rights that have been asserted. For Harlan the balance has already been struck by the legislature and the judiciary cannot substitute its own judgment.[168]

What Justice Harlan fails to do is critical to a meaningful balancing process. He really does not examine the facts in the case to determine whether the recalcitrant witness in Barenblatt presented an actual threat to the preservation of the government. Surely no one can reasonably contend that if Barenblatt was in truth a threat to national security the First Amendment would require the government to stand back and do nothing,[169] but Harlan never reaches the point of asking that question. Any judicial protection of the First Amendment evaporates as soon as Congress asserts its interest.

Justice Brennan's use of the balancing approach is quite different for several reasons. First of all, unlike Harlan, Brennan does not believe in judicial self restraint. He is quite willing to employ the Court's power to block legislative activities he feels are improper. Secondly, he comes to a weighing of the facts in each case with a predisposition in favor of First Amendment rights. Consequently he demands very clear and convincing evidence that the investigation serves a legitimate legislative purpose, and that that goal cannot be achieved in a manner that does not infringe on First Amendment rights. The clearest indication of that fact is Justice Brennan's voting pattern and opinions in the ten cases examined for this section. In none of them did he vote to uphold the specific assertion of legislative power. In dissent his most frequent complaint was that the purpose of the particular investigation was "exposure purely for the sake of exposure." And for Justice Brennan that is not a purpose significant enough to limit First Amendment rights.

None of this means that Justice Brennan would absolutely forbid any legislative investigation which infringes on freedom of expression. Yet none of his own opinions give clear indication of the conditions under which he would permit such an investigation. However Justice Brennan did join Justice Goldberg's opinion in Gibson v. Florida Legislative Investigation Committee.[170] In that opinion Goldberg held

that individual and group rights would outweigh the state interest unless it was shown that the latter was compelling, substantial, immediate and subordinating. Both the language and tone of Goldberg's opinion suggest the clear and present danger test--that unless an individual or group presents a clear and present danger to the survival of the state their First Amendment rights cannot be limited by legislative inquiries.

I think it is safe to say that Justice Brennan would impose similar rigorous requirements on the investigatory power. And his opinions indicate that it matters little whether it is Congress or a state legislature which has limited free expression. Because of his belief in the great value of those rights he stands ready to employ judicial power regardless of the authority threatening them.

Demonstrations

Justice Brennan's opinions[171] in this area concern what Harry Kalven has called "public issue picketing".[172] Picketing is of course conduct as well as expression. Justice Brennan accepts the general proposition that 'picketing and parading are subject to regulation even though intertwined with expression and association.'[173] Within that general framework the problem becomes specifying under what conditions limitations may be properly imposed. As will be seen, Justice Brennan's belief in the "transcendant value" of First Amendment rights results in his

recognizing few conditions under which a state[174] may properly curb demonstrations.

The major weapon Justice Brennan employed to strike down state regulations was the doctrine of overbreadth.[175] A statute is overbroad when its prohibitions can encompass both protected and unprotected expression.[176] As Justice Brennan pointed out in his concurring opinion in Brown v. Louisiana,[177] overbreadth may be a result of the language used in the law. In that litigation, blacks had staged a sit-in at a public library. They were convicted for violating a state law making it a crime to congregate in a public building under circumstances likely to produce a "breach of the peace." Justice Brennan felt that there was danger that the broad sweep of "breach of peace" might include constitutionally protected activities.[178]

It is clear that Brennan also feels that one confronted with an overbroad statute should be free "to take his chances and express himself." This was his view in Walker v. Birmingham.[179] Reverend Wyatt Walker and several other black clergymen had applied for a permit to conduct a civil rights demonstration. The city of Birmingham denied the application[180] and obtained an injunction against any civil rights demonstrations by Walker and his colleagues. They did not reapply for a permit but instead conducted the demonstration whereupon they were arrested and convicted of contempt. Justice Stewart writing for the majority and upholding the convictions recognized that there were substantial

constitutional questions relating to the vagueness and overbreadth of the statute upon which the injunction was based. But the state court which had issued the injunction had jurisdiction so the injunction itself was valid. Since the demonstration was enjoined to support a valid government interest in regulation of the use of streets, Stewart concluded that the proper way for the plaintiffs to proceed was to challenge the injunction in Alabama courts rather than to violate it.

In a strongly worded dissent Justice Brennan indicated his view that the majority was asking too much of the petitioners. First of all, he felt that the permit statute was unconstitutional because it conferred unfettered discretion on local officials to grant or deny permits.[181] Secondly, to require Walker and his colleagues to challenge the injunction in court would result in delaying the protest. And for Brennan, "The ability to exercise protected protest at a time when such exercise would be effective must be as protected as the beliefs themselves."[182]

Justice Brennan also attacked the validity of the injunction itself. It had been issued ex parte. Brennan considers such a procedure an invalid prior restraint on expression, more dangerous to speech than statutes.[183]

In short, Justice Brennan would have permitted Walker and his colleagues to speak first and challenge the permit law later had they been prosecuted under it. Instead, the

majority had permitted the imposition of an improper prior restraint under an overbroad statute.

In Brennan's view overbreadth also justifies relaxation of rules which inhibit litigation of constitutional claims in federal courts. He has made that view clear in Dombrowski v. Pfister[184] which, although not dealing with limitation of demonstrations, established principles which were at issue in two cases[185] that did involve protest activities.

A civil rights organization filed suit in a federal district court seeking an injunction against its prosecution for alleged violation of Louisiana sedition laws. It charged that the laws were overbroad and therefore invalid on their face and that prosecution was threatened only to dissuade it from civil rights activities. The district court held to the doctrine of abstention.[186] That doctrine maintains that a federal court should avoid resolving unclear questions of state law when resolution of those questions by state courts might dispose of the constitutional question.

Justice Brennan, writing for the majority,[187] held that the district court's reliance on abstention was misplaced. Prosecutions under an overbroad statute had a "chilling effect" on freedom of expression. Given the fragile nature of that right all those subject to such laws could not be required to test their rights by risking prosecution. In addition, Brennan saw the record as indicating

harrassment of the petitioners by state officials seeking to discourage civil rights activities. That constituted sufficient irreparable injury to set aside recourse to abstention. Justice Brennan summarized his view as follows:

> We hold the abstention doctrine is inappropriate for cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities.[188]

Yet Justice Brennan seems to have limited the reach of this rule three years later in his Cameron[189] opinion. That case involved black pickets marching in front of a courthouse in Mississippi. For several months they had done so with the permission of local officials. The state legislature then passed an anti-picketing statute which forbade all picketing that "unreasonably" interfered with ingress or egress from public buildings. The day after passage of the statute local officials read it to the pickets and ordered them to leave. When the demonstrators appeared the next day they were arrested. In district court the law was challenged as void on its face due to vagueness and overbreadth. The pickets also sought an injunction against further enforcement, alleging that their arrest was part of a bad faith plan of selective enforcement for the purpose of harrassment, with no expectation of securing convictions. The district court rejected their contentions.

As one source has indicated,[190] Justice Brennan's opinion here was not inconsistent with his Dombrowski

ruling. He had held there that abstention was inappropriate if the challenged law was either overbroad or there was evidence of bad faith enforcement. But for Justice Brennan, neither element was present in Cameron. The law was neither vague nor overbroad.[191] In addition the record did not indicase any evidence of bad faith enforcement. Brennan recognized that proper enforcement of this valid law could have a chilling effect on protected expression but for him that in itself did not render the law unconstitutional. This was so, Brennan said, because the statute sought to regulate picketing, a form of conduct intertwined with expression. When such conduct constitutes an unreasonable obstruction to free access to public buildings it may be properly limited even thought it is related to protected expression.

It seems to me that what Justice Brennan did in Cameron was to relax the Dombrowski rule in light of the Court's decision in Cox v. Louisiana.[192] Two elements of Cox are particularly relevant to Cameron. The majority in Cox held that communication by conduct did not enjoy the same protection as communication by "pure speech."[193] Throughout his Cameron opinion, Justice Brennan stressed the conduct of the plaintiffs. Yet that element alone is not enough to explain Brennan's narrow reading of Dombrowski. Conduct was a part of all the demonstrations Brennan dealt with, and Cameron is the only instance in which he would permit limitation of the protest. But there is a second element of the Cox ruling which I believe to be the major

unarticulated premise of Justice Brennan's Cameron opinion. In Cox the Court upheld the constitutionality of a state law prohibiting demonstrations in front of court houses. Justice Goldberg stated that such laws were in support of the states interest in protecting the judicial process and that demonstrations "inherently threaten" that process.[194] The demonstration at issue in Cameron was also conducted in front of a courthouse. I believe that in the final analysis it was this fact which caused Justice Brennan to pull back from the Dombrowski ruling. While one can view the Mississippi Anti-Picketing statute as neither vague nor overbroad in its terminology, it takes very little perception to understand the purpose of passage of such a law during a major voting rights drive by civil rights organizations. Clearly, the goal was to stifle expression of unpopular views. But Justice Brennan put that consideration aside because he accepted, it seems to me, the assertion of a valid state interest, protection of the judicial process, as automatically validating the application of a law passed in support thereof. This is precisely the approach he so effectively attacked in Uphaus v. Wyman.[195]

Justice Brennan's opinions in cases involving demonstrations indicate a generally broad view of the right to express protest through conduct. The one significant exception would seem to be a limitation he would permit on obstructive picketing of court houses. That exception aside,

he would not permit limitation effected by overbroad statutes nor would he allow punishment of demonstrators whose words do not incite to violence but simply offend those who hear them.

Denial of Benefits

The cases examined in this section deal with loyalty programs designed to deny government benefits to alleged subversives. Five of the seven opinions Justice Brennan wrote in these cases deal with issues only remotely connected to freedom of expression.[196] The two remaining opinions, however, emphasize Brennan's insistence that statutes employed to regulate speech must be precise.

The California constitution required that tax exemptions be denied to any person who advocated violent overthrow of the state or federal government or who advocated support of a foreign government engaged in hostilities with the United States. As a result, the state legislature passed a law requiring property tax exemption claimants to sign an oath on their tax return stating that they did not engage in the proscribed advocacy. State courts ultimately upheld the constitutional provision and the exemption statute against challenges that each constituted a denial of freedom of speech without due process of law. The issues reached the Supreme Court in Speiser v. Randall.[197]

Justice Brennan's lead opinion focused on the procedure established by the California law. For him, the unconstitu-

tional vice of that procedure was that it imposed the burden of proof on the individual to demonstrate that his speech was not the advocacy proscribed by the law. Brennan felt that the result of that burden would be that

> The man who knows he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens.[198]

Ultimately then, Justice Brennan felt that the failure of the state to provide more "sensitive tools" with which to distinguish between protected and unprotected expression would have a chilling effect on speech shielded by the First Amendment.

That same chilling effect might be produced by laws whose substance did not clearly state what is proscribed. In holding four provisions of the New York loyalty program void for vagueness,[199] Justice Brennan indicated that the intricacy and complexity of the program coupled with the ambiguity of terms such as "seditious" stifled the academic freedom of teachers required to sign a loyalty oath as a condition of employment. For Brennan, academic freedom is a particular concern of the First Amendment, of "transcendant value" to all of society.

Justice Brennan's Keyishian opinion also held that a teacher could not be dismissed for mere membership in an organization with illegal goals even if the faculty member had knowledge of those goals. It must be shown that the

teacher himself had specific intent to commit illegal acts in pursuit of the organization's aims. Coupled with Justice Brennan's ruling in the Speiser case, this meant that the state had the burden to prove in each case that the allegedly subversive individual intended to commit illegal acts before he could be dismissed.

Justice Brennan's repeated demand, reflected in the two opinions discussed and in his voting in the cases not examined, is for precision in the laws seeking to deny benefits on the basis of alleged disloyalty. The interplay between Speiser and Keyishian is the culmination of this insistence. When the two cases are taken together, Justice Brennan very strongly implies that a loyalty-security program is only permissible under two conditions. First, the proscribed expression must be precisely defined by the law. Secondly, an employee cannot be dismissed for disloyalty unless the state has employed procedures akin to those required of it prior to the imposition of criminal sanctions. In short both substance and procedure must be precise in recognition of the fragile nature of freedom of expression.

Miscellaneous Cases

One of the most important freedom of expression cases to arise during Justice Brennan's tenure on the Court was the Pentagon Papers case.[200] The Nixon administration sought to enjoin the New York Times and the Washington Post from further publication of the Pentagon Papers, a history

of American involvement in Indochina which was written under government auspices. The per curiam opinion of the Court held that the government had failed to meet the heavy burden of justifying the imposition of a prior restraint on the press. In addition to that opinion, there were nine others handed down, six concurring and three dissent.

Justice Brennan's concurrence made it emphatically clear what he considered the only condition under which a prior restraint could be imposed on protected expression. That condition existed in a very narrow class of cases and only when the nation was at war. In order that a restraint be justified, Brennan would require that there was ample, clear evidence that publication would "inevitably lead to an event kindred to endangering the safety of a troop ship." But the government's case here was premised on the view that publication of the Papers "might" endanger national security. In Justice Brennan's view

> the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.[201]

Consequently, Brennan felt that every restraint permitted in the case, for whatever reason, had violated the First Amendment.

Justice Brennan's view here is perfectly consistent with his earlier discussions of prior restraint in the obscenity cases.[202] He indicated there that a temporary brief restraint could be imposed while a determination of whether

a challenged work was in fact obscene, that is unprotected expression, was being made. But here, where the material was clearly protected expression, he viewed the First Amendment as permitting "absolutely" no prior restraint.

The three remaining cases[203] in this group further demonstrate what Justice Brennan views as the reach of the concept of freedom of expression.

In the Button case Justice Brennan dealt with Virginia's attempt to apply its law forbidding solicitation of legal business to the N.A.A.C.P. He found the state law vague and overbroad because it could be applied to the N.A.A.C.P.'s efforts to advocate legal action to assert the rights of blacks. Constitutional protection, Brennan said, extends not only to activities which can be classified within a "narrow literal conception" of freedom of speech but also to other forms of political expression including litigation.

Concurring in Lamont v. Postmaster General, Justice Brennan expressed an even broader view of the rights protected by the First Amendment. In a tone similar to that of Justice Douglas in the Griswold case,[204] Justice Brennan stated

> the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful.[205]

This view is of course consistent with Brennan's overall ju-

dicial activism. In a sense he stands ready to "create" rights in order to augment the stipulated guarantees of the Bill of Rights.

The final case in this group is one of the clearest statements Justice Brennan has made as to the overall system of expression he feels is demanded by the First Amendment. In C.B.S. v. Democratic National Committee Justice Brennan dissented from the majority view that broadcasters had the right to refuse to sell air time to those wishing to speak out on public issues.

> balancing what I perceive to be the competing interests of broadcasters, the listening and viewing public, and individuals seeking to express their views over the electronic media, I can only conclude that the exclusionary policy upheld today can serve only to inhibit, rather than further, our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open.'[206]

For Justice Brennan, then, the First Amendment demands a marketplace of ideas. What he would require is a limited right of access.[207] He does not specify how that right would be limited. But he would have the Court read the First Amendment as protecting both the right to hear debate and the right to participate therein.

While Justice Brennan's view here is theoretically laudable there is one rather considerable practical problem. In order for there to exist any right to access someone, most probably the government, will have to tell broadcasters what to put on the air. That would seem to me to be a more

serious First Amendment problem than that Justice Brennan raises. As he himself said in his Slaton[208] opinion it is not the government's business to tell people what they should read or hear.

A CONCLUDING NOTE

At the time of this writing William Brennan has served on the Supreme Court for 18 years, the second longest tenure of the Justices presently sitting. During that period he has been a consistent proponent of a very vigorous system of freedom of expression. His views, as expressed in the cases examined in this study, can be discussed in terms of several different elements.

The most critical element is Justice Brennan's belief that freedom of expression plays the primary role in defining the nature of the American system. For him, that freedom insures that the people have the means to govern themselves. It provides both the right to check the government through criticism and the flow of information the people require if they are to criticize intelligently. But Justice Brennan does not view the First Amendment as shielding only that expression which deals with public issues. Rather, he views freedom of expression extending to all matters in which the prople are interested.

Given Brennan's view of freedom of expression as being of paramount value, one might then expect him to insist on an absolute, literal reading of the First Amendment admonition that "Congress shall make no law. . ." regarding speech. But he consistently rejects that approach in favor of the more flexible case-by-case balancing of freedom of expression against competing interests. At the same time he

brings to the balancing technique a strong bias in favor of expression and against any limitation. For Justice Brennan to permit an attempt to regulate expression, that limitation must be imposed in support of a clearly identifiable interest which is more important than expression given the particular circumstances of the specific case. Further he requires that there be compelling evidence that limiting expression is the only method whereby a competing interest can be protected. Justice Brennan also insists that the means chosen to impose restrictions on expression meet rigorous standards. The language of the law must be precise and the procedures it utilizes carefully designed and executed. This reflects Justice Brennan's demand that limitations on expression be carried out with tools sensitive enough to separate protected from unprotected expression.

While Brennan has been generally consistent in maintaining the views discussed to this point there are two notable inconsistencies. The first is of course his rejection of the balancing technique in his obscenity decisions. In Roth and its progeny Brennan fails to weight competing interests and instead simply labels one type of expression "unprotected." As has been pointed out,[209] it is my view that this is a result of a universal inability to identify what, if any, interest is being damaged by obscene expression. The second inconsistency occurs in Brennan's Cameron opinion. In that case he disregarded the circumstances of

the case and placed protection of the judicial process above the particular form of expression employed. One can only hypothesize that Justice Brennan's view here is a result of his personal sensitivity to the demands of the judicial process. But that of course does not make it any the less inconsistent with his general approach.

Justice Brennan's balancing of the "transcendent value" of freedom of speech against other values is also significant as an expression of his judicial activism. Brennan believes that the protection of First Amendment rights is the primary responsibility of the judiciary and ultimately of the Supreme Court. Consequently, he is quite willing to employ the power of the Court to vindicate freedom of expression where he sees it threatened. His activism also leads him to supplement the literal commands of the First Amendment with additional guarantees, like the right to access, which he feels are required if that Amendment is to be fully employed.

Justice Brennan's liberal activist views were of significant influence in shaping First Amendment law during the Warren court period. Thus was particularly true in obscenity and libel.[210] In the former, Justice Brennan formulated the Roth test which became the focal point around which the obscenity debate was conducted both within the Court and in society in general. Between 1957, the year of his appointment to the Court, and 1968 when the Court began to experience personnel changes, Justice Brennan wrote the majority

or lead opinion in eleven of the sixteen signed obscenity decisions handed down. If we make a gross count of the votes in each case, considering only agreement and disagreement with the conclusion of Brennan's opinion, only one case of the eleven, Ginzburg, was marked by a 504 division of the Court. In short, Brennan was able to gain support for his conclusions of at least six members of the Court in ten of the eleven obscenity opinions he wrote. But the gross count does give a misleading impression as to his persuasiveness. By examining concurrences and dissents one gets a somewhat different view of the interaction within the Court. The most consistent writers of concurring opinions were Justices Black and Douglas. They concurred six times, either when Brennan held a particular work not obscene or when he voided a censorship procedure. They reached the same result he did but from their own view that the First Amendment imposes an absolute prohibition against expression except when it is an inseparable part of illegal action. Their dissents came first when Brennan either held that obscenity was outside the protection of the First Amendment (Roth) and later when he upheld the conviction of sellers of obscene materials (Ginzburg, Mishkin, and Ginsberg). The most consistent dissenter was Mr. Justice Harlan, who disagreed with Brennan's finding in seven of the eleven cases. Harlan's disagreement with Brennan is essentially over the role of the Court with respect to state

activity in obscenity censorship. Harlan would limit the Court by allowing the states to enforce different obscenity standard and censorship procedures as long as they were "reasonable." He sees the states as having the primary responsibility for the regulation of morality and feels the Court should act as only a passive check on "irrationality." Justice Brennan, however, has viewed the Court as having the major responsibility for establishing an obscenity standard and censorship procedure, since questions involving expression raise constitutional issues which he feels are primarily the Supreme Court's concern. Consequently, he has not hesitated to strike down state laws when they don't square with the uniform requirements established by the Court.

Justice Brennan's most consistent supporter was Chief Justice Warren. The Chief Justice joined ten of the eleven obscenity opinions written by Brennan. His sole dissent came in the Jacobellis decision because, among other things, he felt the lower courts had acted reasonably in finding the cited film obscene. Warren's general support of Brennan was given despite the Chief Justice's view that obscenity cases should focus on the actions of the people involved rather than on the contents of the book or film. Brennan did not explicitly accept this concept of variable obscenity until the Ginzburg and Mishkin cases in 1966.

Given his own distaste for obscenity censorship then, Justice Brennan had a relatively consistent three man bloc

supporting him--Warren, Black and Douglas. The same bloc supported his five majority/lead opinions in libel.

What then can be said regarding Justice Brennan's "leadership" of the Court? It seems to me that leadership in this context is of two dimensions: the creation of a stable bloc of Justices through the persuasiveness of one of the bretheren's opinions; secondly, the shaping of basic doctrines of constitutional law. One cannot credit Justice Brennan with creating the liberal activist bloc on the Warren Court. It was there when he assumed his seat. Further, Black and Douglas most often concurred in Brennan's decision rather than accepted his reasoning. At the same time it must be recognized that neither Justice Black nor Justice Douglas, given their absolutism, could have attracted the fifth vote needed for a majority. Justice Brennan then can be credited with going far enough towards the Black/Douglas position to hold their concurrence while maintaining the flexibility needed to attract the additional vote(s) needed to maintain a majority.

It is in the second area of leadership, that of shaping the law, that I feel Justice Brennan has had the greatest influence. In both obscenity and libel, Justice Brennan's views have established the framework within which the respective legal issues were examined. The Roth test in obscenity and the actual malice rule in libel are still the starting points in dealing with those First Amendment

problems even the Burger Court, embarking on a proclaimed new direction in obscenity censorship, has anchored its position in Roth.[211]

By virtue of his ability to sustain a majority behind his views Justice Brennan has played perhaps the major role in shaping the Court's position on two important free expression issues. And his efforts in both areas have been directed towards facilitating the free interchange of ideas he feels so essential to the operation of the American system.

The changes in the personnel of the Court which have taken place over the past six years will serve to limit Justice Brennan's leadership. President Nixon's four appointments, all judicial conservatives, have formed a solid bloc which is generally less favorably inclined toward First Amendment claims than Brennan. Consequently, Justice Brennan will frequently dissent as he did in the Slaton and Miller cases.

FOOTNOTES

[1]See his dissent in Paris Adult Theater v. Slaton 413 U.S. 49, 73-114 (1973).

[2]Paris Adult Theater v. Slaton 413 U.S. 49 (1973). Miller v. California 413 U.S. 15 (1973). Kaplan v. California 413 U.S. 115 (1973). United States v. 12 Films 413 U.S. 123 (1973). United States v. Orito 413 U.S. 139 (1973). Heller v. New York 413 U.S. 483 (1973). Roaden v. Kentucky 413 U.S. 496 (1973).

[3]354 U.S. 476 (1957).

[4]It is of course unusual for a freshman Justice to be assigned the majority opinion in what is so clearly to be a precedent setting case. The obvious explanation for Warren's choice of Brennan is that the latter's views attracted more support within the Court than did the views of any of the other Justices. But I think one other point should be mentioned in this regard. The pro-censorship activity going on in 1957 was largely the work of the National Organization for Decent Literature which had been founded by the Roman Catholic Church. Although the NODL had eventually encompassed censorship groups of all faiths, it still did a great deal of work through the Catholic Church. Justice Brennan is himself Roman Catholic. It may well be that Warren assigned the Roth opinion to Brennan with that fact also in mind, hoping perhaps that the Comstocks of the day would be more inclined to listen to the Court when its spokesman was a fellow communicant.

[5]18 U.S.C. Sect. 1461. Alberts v. California was joined with Roth and concerned a state conviction for the sale of obscene material.

[6]Harry Kalven, "The New York Times Case: A Note on 'The Central Meaning of the First Amendment'," Supreme Court Review, (1964), p. 191-221.

[7]". . . whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into those hands a publication of this sort may fall." The test originated in Queen v. Hicklin, 3 Q.B. 360 (1868).

[8]354 U.S. 476, 489 (1957). It is clear that in seeking to overcome the defects of the Hicklin formula, Justice Brennan saw the Roth test as a more liberal standard than that in effect at the time. What he did not clearly perceive was the enormous difficulties the new rule would entail.

[9]See his opinion in Jacobellis v. Ohio 378 U.S. 184, 191 (1961).

[10]Ibid.

[11]In Manual Enterprises v. Day 370 U.S. 478 (1962), Justice Harlan had said that under federal law a work could not be judged obscene unless it possessed a "coalescing" of prurient appeal and patent offensiveness, the latter being defined as material which is so offensive on its face "as to affront current community standards of decency" (370 U.S. 478, 482). The patently offensive concept was first suggested in the Model Penal Code of the American Law Institute.

[12]Paris Adult Theater v. Slaton 413 U.S. 49 (1973).

[13]Jacobellis v. Ohio 378 U.S. 184, 191 (1964).

[14]Memoirs v. Attorney General of Massachusetts 383 U.S. 413 (1966).

[15]Ibid., p. 418.

[16]The case was Ginzburg v. U.S. 383 U.S. 463 (1966).

[17]Roth v. United States 354 U.S. 476, 495 (1957).

[18]Ibid., p. 496.

[19]Ginzburg v. United States 383 U.S. 463, 470 (1966).

[20]One of the implications of this view would seem to be that a work of limited social value that was not pandered could not properly be declared obscene. Justice Brennan did point out that under different circumstances the Court might come to a different decision.

[21]William Lockhart and Robert McClure, "Censorship of Obscenity: The Developing Constitutional Standards," Minnesota Law Review, 45 (1960), p. 5-121.

[22]383 U.S. 413, 427 (1966).

[23]383 U.S. 463, 482 (1966).

[24]This would not be a problem in Brennan's use of the approach since he restricts consideration of circumstances to "close cases," ones in which the challenged work is of limited social value. But even there, the determining factor as to the book's content is not the book itself.

[25]283 U.S. 463, 476-482 (1966).

[26]Ibid., p. 477.

[27]Mishkin v. New York 383 U.S. 502 (1966).

[28]Jacobellis v. Ohio 378 U.S. 184 (1964). See p. 191 particularly.

[29]383 U.S. 502, 508 (1966).

[30]Two years after Mishkin, Justice Brennan employed variable obscenity as the justification for permitting state legislatures to limit the availability of sexually oriented material to minors. It was permissible, he held, for states to "adjust" the definition of obscenity so that material could be evaluated in terms of its effect on minors. And in making that adjustment, the state could properly impose more severe restrictions on those under 17 than it could on adults. See Ginzberg v. New York 390 U.S. 629 (1968).

[31]Miller v. California 413 U.S. 15 (1973).

[32]Paris Adult Theater v. Slaton 413 U.S. 49 (1973).

[33]See below, p. 27.

[34]In his Jacobellis opinion (378 U.S. 184, at 192-195), Justice Brennan stated that the community to which the Roth standard referred was national in character. To permit states or local communities to apply their own standards would result in limits on free expression varying with state and/or local lines. As we shall see, one of the more serious problems with the majority view in Slaton is its explicit reliance on local communities as the source for community standards.

[35]Smith v. California 361 U.S. 147 (1959) very clearly reflects this concern. A Los Angeles ordinance made it a crime to have an obscene book in one's possession in any place where books were sold. Smith, owner of a book store stocking several thousand titles, was arrested for selling an obscene book to a policeman. Justice Brennan viewed the law's elimination of the scienter requirement as a fatal flaw. He concluded that the law restricted protected

works as well as the obscene since, if the bookseller was to escape liability, he would have to sell only those books he had personally inspected and found not obscene.

[36]Marcus v. Search Warrant 367 U.S. 717 (1961).

[37]Freedman v. Maryland 380 U.S. 51, 57 (1965).

[38]This point is clearly made by Justice Brennan's position in Times Film v. Chicago 364 U.S. 43 (1961). The majority in that case upheld licensing of motion pictures as a permissible form of prior restraint. Chief Justice Warren dissented, rejecting licensing as a form of restraint on expression which the Court had never accepted. Justice Brennan joined in that dissent. But he did not join Douglas' dissent which condemned any and all forms of prior restraint. In short, while he rejected the particular form of prior restraint employed in Chicago, he refused to dondemn all prior restraints.

[39]In his Marcus opinion, Justice Brennan cited the New York procedure involved in Kingsley v. Brown 354 U.S. 436 (1957) as the proper model for state censorship proceedings. That is rather curious since Brennan dissented in Kingsley. He objected to the failure of N.Y. law to provide for a jury trial in obscenity cases. Participation by a jury in an obscenity case was important, he felt, because, "The jury represents a cross-section of the 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 which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community stan-ards. A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene. Of course, as with jury questions generally, the trial judge must initially determine that there is a jury question, i.e., that reasonable men may differ whether the material is obscene." (354 U.S. 436, 448). In short, if a judge is uncertain as to whether a challenged work is obscene, he should be required to call for a jury since it is best equipped to apply the Roth test. But Justice Brennan never again raised the jury issue in any of the subsequent obscenity cases and in fact the issue is brought up only once again, in Chief Justice Warren's dissent, which Brennan joined, in Times Film v. Chicago 365 U.S. 43, 68-69 (1961).

[40]380 U.S. 51 (1965).

[41]356 U.S. 43 (1961).

[42]Justice Brennan would permit the censor greater procedural latitude when films rather than books are concerned. It is really quite inconceivable that Brennan would permit, for instance, any government agency to license books prior to their sale. At the same time ". . . the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films. . ." (Freedman v. Maryland 380 U.S. 51, 58 (1965)).

[43] This is also true of federal administrative censorship. In his Manual Enterprises opinion (370 U.S. 478, 495-519, (1962) Justice Brennan states that the proper reading of Congressional intent in giving the Post Office control over obscene mail is that that Department ". . . could stop obviously questionable matter for the purpose of transmitting it to prosecuting authorities, could stop matter already held obscene if it were sent again, and could investigate matter sent by persons previously convicted and, if the matter were found violative, could present it to the prosecuting authorities" (370 U.S. 478, 503). Again, the final restraint can properly occur only after a judicial hearing. In 1971, Justice Brennan specifically held Post Office procedure defective for its failure to comport with his Freedman requirements. See Blount v. Rizzi 400 U.S. 410, particularly 417-422 (1971).

[44]U.S. v. Reidel 402 U.S. 351 (1971) and U.S. v. 37 Photographs 402 U.S. 363 (1971).

[45]394 U.S. 557 (1969).

[46]Ibid., p. 564.

[47]402 U.S. 351, 355 (1971).

[48]402 U.S. 363 (1971).

[49]Of course in 37 Photos Brennan did not require precision in the procedures of the Customs Bureau. Justice White's opinion, in discussing the procedures employed, seems to give every benefit of the doubt to the censor. The time limits he interprets federal law as requiring are as follows: judicial proceedings must commence against the cited material within 14 days of seizure by Custom's agents; that judicial process must be completed within 60 days. In short, under those guidelines it could take almost two and a half months before material seized by the government was permanently held or released. Justice Brennan had consistently called for "prompt judicial determination." I cannot conceive of his permitting state or

federal censors to impose that extensive restraint under "normal" conditions. But here, again, the focus was on stemming commercial distribution of obscenity.

[50]413 U.S. 15 (1973).

[51]413 U.S. 49 (1973).

[52]354 U.S. 476 (1957), see above, p. 2-5.

[53]378 U.S. 184 (1964).

[54]383 U.S. 413 (1966), see above p. 6-7.

[55]Of course this may very well have been Brennan's intention.

[56]413 U.S. 15, 26 (1973).

[57]378 U.S. 184 (1964).

[58]Ibid., p. 191 (underlining mine).

[59]There are numerous questions which might be posed as a result of the semantics of this alteration. Are only those forms of expression which are "serious" protected by the First Amendment? If a form of expression is of serious value does it not thereby possess social value? Isn't frivolous expression sometimes valuable?

[60]See above, p. 3-4.

[61]It should be noted that Burger's use of the balancing approach is not the usual case by case weighing of a specific obscene expression against a specific interest. Rather he strikes what constitutes a final balance against all obscene expression. In this sense, the only difference between his approach and Brennan's is that the Chief Justice identifies the interests he feels outweigh obscene expression.

[62]413 U.S. 49, 58 (1973).

[63]U.S. Commission on Obscenity and Pornography, Report, 1970 (New York: Bantam Books, 1970) p. 32. And even Burger's own source, the Hill-Link report, does not at all claim that exposure to obscenity is the sole cause of anti-social behavior or that it is the state's interest in preventing such behavior that justifies censorship of the obscene. "The inference from this statement, i.e., pornography is harmless, is not only insupportable on the slanted evidence presented; it is preposterous. How isolate one factor and say it causes or does not cause criminal behavior? How determine that one book or one film

caused one man to commit rape or murder? A man's entire life goes into one criminal act. No one factor can be said to have caused that act. . . . The government interest in regulating pornography has always related primarily to the prevention of moral corruption and not to the prevention of overt criminal acts and conduct. . . ." (p. 457).

[64]413 U.S. 49, 58 (1973).

[65]The Memoirs formula was explicitly rejected by Burger. See 413 U.S. 15, 21-23 (1973).

[66]Ibid., p. 431.

[67]Ibid., p. 434.

[68]The New York Court of Appeals has already acted. In People v. Heller (joined for decision with People v. Buckley and Goldstein) the Court held: "We take pains to here declare that in determining whether any material is patently offensive or obscene, the community standard to be applied is a 'state' standard. . . . it becomes clear that the obscenity statute in any given State will be applied with uniformity statewide through the construction given it by the appellate courts" [33 NY 2nd 314, 316 (1973)]. But of course the reach of the First Amendment will still vary according to state lines. Further, part of Chief Justice Burger's rationale for permitting this variation is "It is neither realistic nor constitutionally sound to read the First Amendment as requiring depiction of conduct found tolerable in Las Vegas, or New York City" [413 U.S. 15, 32 (1973)]. One wonders if it is any more "realistic or constitutionally sound" to require that the people of New York City accept depiction of that found tolerable in Potsdam, New York.

[69]See his opinions in Roth v. U.S. 354 U.S. 476 (1957); Manual Enterprises v. Day 370 U.S. 478 (1962); Bantam Books v. Sullivan 372 U.S. 58 (1964); A Quantity of Books v. Kansas 378 U.S. 205 (1964); Memoirs v. Massachusetts 383 U.S. 413 (1966).

[70]413 U.S. 49, 84 (1973). Justice Brennan's concern that protected expression not be suppressed along with the obscene was the major reason that he imposed rigorous procedural requirements on the censor as well as insisting that a work be totally devoid of social value before it could be censored.

[71] Ibid., p. 478. Brennan also pointed out that there was considerable disagreement within the Supreme Court itself. That divergence led the Court, he said, to issue per curriam decisions in 31 cases. Thus it contributed to the tension between courts since the Supreme Court was providing little guidance to lower courts.

[72] Ibid., p. 481

[73] While Justice Brennan clearly feels that this is the most serious problem with Burger's approach, he recognizes several others. He does not feel that it will be possible for states to provide the kind of specific statutes for which the Chief Justice calls, that they will be unable to test every form of sexual conduct depictions of which are prhibited. Further, Brennan points out that Burger's formulation still leaves the ultimate decision as to what is obscene in the hands of the Supreme Court.

[74] 413 U.S. 49, 83 (1973).

[75] Brennan rejects the idea that a state might limit obscenity in the interest of preventing anti-social behavior. There is little empirical evidence, he feels, demonstrating a connection between exposure and action, and even if sufficient evidence did so indicate, the state should concentrate on punishment of the action and on education. Nor should the state be permitted to regulate expression in the interest of controlling the morality of thought; ". . . if a state may, in an effort to maintain or create a particular moral tone, prescribe what its citizens cannot read or cannot see, then it would seem to follow that in pursuit of the same objective a State could decree that its citizens must read certain books or must view certain films." [413 U.S. 49, 110 (1973)].

[76] Justice Brennan explicitly disclaims rendering any view as to the extent of state power to regulate the exposure of obscenity to juveniles and unconsenting adults [413 U.S. 49, 114, N. 29 (1973)].

[77] Stanley v. Georgia 394 U.S. 557 (1969). When this case was decided Justice Brennan did not join the majority but instead joined Justice Stewart's concurrence which was based on narrower grounds than that of the majority opinion.

[78] 413 U.S. 49, 85, N. 9 (1973).

[79] For instance, the meaning of the label "adult film" would be quickly understood without being in and of itself offensive.

[80]New York, MacMillan, 1967.

[81]Oregon Laws, 1971, c. 743, Art 29. Justice Brennan cites this statute as the only state law consistent with the Slaton majority's ruling that obscenity statutes must be specific in defining prohibited displays or depictions.

[82]See, Ibid., sect. 255.

[83]Ibid., 255-(5).

[84]Kuh, Foolish Figleaves?, p. 275.

[85]In his dissent in Slaton, Justice Douglas comments "I applaud the effort of my Brother Brennan to forsake the low road which the Court has followed in this field. The new regime he would inaugurate is much closer than the old to the policy of abstention which the First Amendment proclaims." [413 U.S 49, 72 (1973)].

[86]The seven cases in this group are: Barr v. Matteo 360 U.S. 564 (1959); Wood v. Georgia 370 U.S. 375 (1962); New York Times Co. v. Sullivan 376 U.S. 254 (1964); Garrison v. Louisiana 379 U.S. 64 (1964); Henry v. Collins 380 U.S. 356 (1965); Rosenblatt v. Baer 383 U.S. 75 (1966); Ashton v. Kentucky 384 U.S. 195 (1966); Ginzburg v. Goldwater 396 U. S. 1049 (1970); Greenbelt Cooperative Publishing Assoc. v. Bresler, 398 U.S. 6 (1970); Minitor and Patriot Co. v. Roy 401 U.S. 265 (1971); Time v. Pape 401 U.S. 279 (1971); Ocala Star Banner Co. v. Damron 401 U.S. 295 (1971).

[87]Time Inc. v. Hill 385 U.S. 374 (1967); Curtis Publishing Company v. Butts 588 U.S. 130 (1967); Associated Press v. Walker 388 U.S. 130 (1967); St. Amant v. Thompson 390 U.S. 727 (1968); Rosenbloom v. Metromedia 403 U.S. 29 (1971).

[88]Brennan's five majority/lead opinions were New York Times Co. v. Sullivan 376 U.S. 254 (1964); Garrison v. Louisiana 379 U.S. 64 (1964); Rosenblatt v. Baer 383 U.S. 75 (1966); Time Inc. v. Hill 385 U.S. 374 (1967); Rosenbloom v. Metromedia 403 U.S. 29 (1971). In addition, he was probably the author of the per curiam opinion in Henry v. Collins 380 U.S. 356 (1965). That opinion is simply a restatement of Brennan's opinions in New York Times and Garrison.

[89]376 U.S. 254 (1964).

[90]The ad was sponsored by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. Sullivan's suit was based on two paragraphs in the ad:

> In Montgomery, Alabama, after students sang "My Country, Tis of Thee" on the State Capitol Steps, their leaders were expelled from school, and truckloads of police armed with shotguns and teargas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.
>
> Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times--for 'speeding', 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'--a felony under which they could imprison him for ten years. (376 U.S. 254, 257-258 [1964]).

[91]Dr. King had been arrested four times, not seven. The students had not refused to reregister but instead had boycotted classes for one day. They were protesting the expulsion of several students for sitting in at a lunch counter--the expulsion did not result from a demonstration at the capitol. None of the students, excepting those without meal tickets, were barred from the dining hall. Police were present near the campus but did not "ring" it.

[92]The cases cited were Konigsberg v. State Bar of California 366 U.S. 36 (1961); Times Film Corporation v. City of Chicago 365 U.S. 43 (1961); Roth v. United States 354 U.S. 376 (1957); Beauharnais v. Illinois 343 U.S. 250 (1952): Pennekamp v. Florida 328 U.S. 331 (1946); Chaplinsky v. New Hampshire 315 U.S. 568 (1942); Near v. Minnesota 283 U.S. 697 (1931).

[93]376 U.S. 254, 269 (1964).

[94]376 U.S. 254, 270 (1964).

[95]Ibid., p. 273, quoting Craig v. Harney 331 U.S. 367, 376 (1947).

[96]Ibid., p. 273.

[97]Ibid., p. 276.

[98]376 U.S. 254, 280 (1964). Justice Brennan cited Coleman v. MacLennan 78 Kan. 711 (1908), as the precedent case for this rule.

[99]360 U.S. 564 (1959).

[100]Brennan dissented in Barr complaining that the decision ". . . insures that government officials of high and low rank will not be involved in litigation over their allegedly defamatory statements, but it achieves this at the cost of letting the citizen who is defamed even with the worst motives go without remedy." 360 U.S. 564, 589 (1959).

[101]This point is discussed below at p. 46.

[102]Harry Kalven, "The New York Times Case: A Note on 'The Central Meaning of the First Amendment'," Supreme Court Review (1964), p. 192, 193.

[103]Garrison v. Louisiana 379 U.S. 64 (1964).

[104]Ibid., p. 72, note 8.

[105]See Ginzburg v. Goldwater 396 U.S. 1049 (1970), below, p. 58.

[106]See, e.g., 376 U.S. 254, 277 (1964). Specific extension of the Times rule to criminal libel took place in Garrison v. Louisiana 379 U.S. 64 (1964).

[107]Thomas Emerson, The System of Freedom of Expression (New York: Random House, 1970), p. 391.

[108]As long as the falsity is "accidental" and not calculated or reckless.

[109]379 U.S. 64, 75 (1964).

[110]The lecture, given on 14 April 1964, was published as William Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment," Harvard Law Review, 70 (1965), p. 1-20.

[111]Ibid., p. 11.

[112]That is, obscenity before his Slaton opinion.

[113]403 U.S. 29, 78-87 (1971).

[114]Ibid., p. 79.

[115]See Edmund Cahn, "Justice Black and First Amendment 'Absolutes': A Public Interview," New York University Law Review, 37 (1962), p. 549-561, particularly at 557-558.

[116]383 U.S. 75 (1966).

[117] Ibid., p. 85.

[118] Ibid., p. 86-87, n. 13.

[119] This is of course consistent with the Times ruling that knowing falsehood is required for an official to recover damages. Brennan provides protection here for unknowing error, i.e., criticizing an official for policy for which he has in fact no responsibility.

[120] New York Times v. Sullivan 376 U.S. 254, 282 (1964). Brennan also expressed his concern for a balanced privilege in his dissent in Barr v. Matteo 360 U.S. 544, 589 (1959).

[121] Garrison v. Louisiana 379 U.S. 64, 74 (1964).

[122] 383 U.S. 75, 85 Note 10, (1966). Brennan cites Pedrick's article as exemplary of the improper analogy. See Willard Pedrick, "Freedom of the Press and the Law of Libel: The Modern Revised Translation," Cornell Law Quarterly, 49 (1964), p. 581-608 particularly 590-591. Pedrick says the privilege in Times has two grounds, the second of which ". . . is the proposition that since public officials, and particularly high public officials, are privileged as regards the law of libel to defame citizens, there should be an analogous privilege in the citizenry to defame public officials," p. 590. It is well to note, however, that Pedrick himself rejects this as an unsound basis for the Times rule, preferring instead the Court's reliance on the First Amendment's protection of public discussion. See p. 591.

[123] 383 U.S. 75, 85, Note 10 (1966).

[124] 385 U.S. 374 (1967).

[125] 388 U.S. 130 (1967). The two cases were joined for decision.

[126] Quoted at 388 U.S. 130, 138, n. 3 (1967).

[127] 388 U.S. 130, 150-151 (1967).

[128] Ibid., p. 152.

[129] Ibid., p. 154.

[130] Ibid., p. 155.

[131] The story in the Post was based upon a phone conversation between Butts and Paul Bryant, the Alabama coach. Through

an electronic error an insurance salesman, George Burnett, claimed to have overheard the discussion between the coaches. He reported what he had allegedly heard to the Post. The publishers failed to conduct any extensive investigation to determine if the story was accurate. For Harlan, this constituted a failure on the part of the Post to make "a reasonable investigation of the underlying facts" [Time v. Hill 385 U.S. 374, 409 (1967)].

[132]Harry Kalven, "The Reasonable Man and the First Amendment: Hill, Butts and Walker," Supreme Court Review, 1967, p. 270.

[133]385 U.S. 374, 402-411 (1967). See particularly p. 407-410.

[134]Kalven separates "assumption of risk of publicity," which I have called status of the libellant, from the "possibility of counterargument." See, Kalven, "The Reasonable Man," p. 298. It seems to me that these two elements are so closely related as to constitute a single factor. A public official, for instance, because of his position has a very great possibility for counterargument.

[135]Rosenbloom v. Metromedia 403 U.S. 29, 66 (1971).

[136]See his opinions in New York Times v. Sullivan 376 U.S. 254, 270 (1964); Garrison v. Louisiana 379 U.S. 64, 74-75 (1964); Rosenblatt v. Baer 383 U.S. 75, 85 (1966); Time Inc. v. Hill 385 U.S. 374, 387-388 (1967).

[137]See Douglas' opinion in Rosenblatt v. Baer 383 U.S. 75, 91 (1966).

[138]In 1968 the Court rendered its decision in St. Amant v. Thompson 390 U.S. 727. The case involved a libel award to a public official for statements made about him in a televised speech of a candidate for public office. The issue in the case was simply whether the state court had properly applied the Times rule. The Supreme Court, through Justice White, held that the requisite degree of actual malice was not present and reversed the state court. The vote was 8-1 with Justice Fortas dissenting on the grounds that the allegedly libellous charges were not made with reasonable care.

[139]Rosenbloom v. Metromedia 403 U.S. 29 (1971).

[140]396 U.S. 1049 (1970).

[141]Ginzburg v. Goldwater 414 F 2d 324 (1969).

[142]The jury did award Goldwater $1.00 in compensatory damages.

[143]Justice Brennan may have voted to grant review in this case but without a fourth vote, a hearing was denied. I think that is the least likely possibility. It is more probable that Brennan was convinced, like the lower court, that Ginzburg's publication evidenced actual malice. It would be fairly easy for him to reach that conclusion particularly since the petitioner, Ralph Ginzburg, was no stranger. Brennan's opinion in Ginzburg v. United States 383 U.S. 453 (1966), see above, p. 7, makes it clear that the Justice disapproved of Ginzburg's "misuse" of the First Amendment.

[144]Greenbelt Cooperative Publishing Co. v. Bresler 398 U.S. 6 (1970).

[145]Minotor Patriot Co. v. Roy 401 U.S. 265 (1971).

[146]Time v. Pape 401 U.S. 279 (1971).

[147]Ocala Star Banner Co. v. Damron 401 U.S. 295 (1971).

[148]403 U.S. 29 (1971).

[149]Ibid., p. 41.

[150]Ibid., p. 52.

[151]Miller v. California 413 U.S. 15 (1973).

[152]Paris Adult Theater v. Slaton 413 U.S. 49 (1973).

[153]See Kaplan v. California 413 U.S. 115 (1973); U.S. v. 12 Films 413 U.S. 123 (1973); U.S. v. Orito 413 U.S. 139 (1973).

[154]Roth v. United States 354 U.S. 476, 484 (1957).

[155]Harry Kalven, "The New York Times Case: A Note on 'The Central Meaning of the First Amendment'," Supreme Court Review, 1964, p. 191-221.

[156]New York: Vintage Books, 1970.

[157]New York Times v. U.S. 403 U.S. 713 (1971).

[158]C.B.S. v. Democratic National Committee 412 U.S. 94 (1973).

[159]This committee was originally called the House Un-American Activities Committee.

[160]Watkins v. United States 354 U.S. 178 (1957).

[161] Sweezey v. New Hampshire 354 U.S. 234 (1957).

[162] 360 U.S. 72, 82 (1959).

[163] He was joined by Justices Frankfurter, Harlan, Whitaker and Stewart.

[164] 360 U.S. 72, 85 (1959).

[165] Dean Alfange Jr., "The Balancing of Interests in Free Speech Cases: In Defense of an Abused Doctrine," Law in Transition Quarterly, 2 (1965), p. 35-63.

[166] 360 U.S. 109, 166 (1959). Justice Brennan dissented because he felt that the sole purpose of the investigation here was exposure.

[167] Ibid., p. 126.

[168] This view is perhaps most explicitly stated by Justice Frankfurter in Dennis v. U.S. 341 U.S. 494, at 544-545 (1954).

[169] In fact, that argument has been at least strongly implied. See Alexander Meiklejohn, "The Balancing of Self Preservation Against Political Freedom," California Law Review, 49 (1961), p. 4-15.

[170] 372 U.S. 539 (1963).

[171] Brennan wrote five opinions in this area: Brown v. Louisiana 383 U.S. 131 (1966, concurrence; Walker v. Birmingham 388 U.S. 307 (1967), dissent; Cameron v. Johnson 390 U.S. 611 (1968), majority opinion; Bachellar v. Maryland 397 U.S. 564 (1970), majority opinion; Gooding v. Wilson 405 U.S. 518 (1972), majority opinion. The first three cases arose from civil rights demonstrations while Bachellor and Gooding dealt with protests against American involvement in Indochina.

[172] Harry Kalven, "The Concept of Public Forum: Cox v. Louisiana," Supreme Court Review, (1965), p. 1-33.

[173] Cameron v. Johnson 390 U.S. 611, 617 (1968), quoting Justice Goldberg's majority opinion in Cox v. Louisiana 379 U.S. 559, 563 (1965).

[174] All of the cases Justice Brennan dealt with in this area concerned state government attempts to limit demonstrations.

[175] There are two cases in which Justice Brennan overturned convictions of anti war demonstrators on the grounds that

they did not employ "fighting words" in their protest. Those cases are Bachellor v. Maryland 397 U.S. 564 (1970) and Gooding v. Wilson 405 U.S. 518 (1973). In the latter case Brennan held that state court interpretation of a statute was overbroad because it did not restrict application of the statute to fighting words.

[176]Basically this is the difficulty that led Justice Brennan to reject his own and the Court's efforts in dealing with obscenity censorship. As he pointed out in his Slaton dissent, (See, Paris Adult Theater v. Slaton 413 U.S. 49, 73-114 (1973) (see above, p. 26)) the Court was simply unable to provide a means of separating obscene expression from protected expression.

[177]383 U.S. 131 (1966).

[178]It is also true that the Louisiana law at issue here was the same one declared overbroad in Cox v. Louisiana 379 U.S. 536 (1965). Brennan felt that that fact alone required reversal of the Brown convictions.

[179]388 U.S. 307 (1967).

[180]Public Safety Commissioner "Bull" Connor was the official to whom application was made. See Chief Justice Warren's dissent [388 U.S. 307, 324-325 (1967)] for a description of Connor's involvement in this case.

[181]Justice Brennan did not explicitly make this point in his dissent. Chief Justice Warren had done so and Brennan joined that dissent.

[182]388 U.S. 307, 349 (1967).

[183]Again, this is consistent with his view that the procedures employed to limit expression are as important at the substance of the law establishing the restraint. See above, p. 14-17.

[184]380 U.S. 479 (1965).

[185]Those two cases are Zwickler v. Koota 389 U.S. 241 (1967) and Cameron v. Johnson 390 U.S. 611 (1968).

[185]For a complete discussion of the abstention doctrine see D'Armey Bailey, "Enjoining State Criminal Prosecutions Which Abridge First Amendment Freedoms," Harvard Civil-Rights-Civil Liberties Review, 3 (1967), p. 67-123.

[187]He was joined by Justices Douglas, Goldberg, Stewart and Chief Justice Warren.

[188] 380 U.S. 479, 489-490 (1965).

[189] Cameron v. Johnson 390 U.S. 611 (1968). There was an additional case in the period between Dombrowski and Cameron. In Zwickler v. Koota 389 U.S. 241 (1967), Justice Brennan, speaking for a unanimous court, pointed out that federal courts could abstain only in 'special circumstances.' One of those, relied on by the district court in Zwickler, was that the state court could so interpret a statute as to remove constitutional infirmities. But for Justice Brennan that was possible only if the statute was challenged as vague rather than overbroad. An overbroad law infringes on protected expression and is therefore void on its face. No amount of construction by the state courts can remove that fact even if state courts had never had the chance to interpret an overbroad statute. Justice Brennan held that it was the responsibility of the federal judiciary to resolve the constitutional challenges to the law when they were presented.

[190] See Note, "The Chilling Effect in Constitutional Law," Columbia Law Review, 69-2 (1969), p. 808-842.

[191] The pertinent section of the Mississippi law is as follows: 'It shall be unlawful for any person, singly or in concert with others, to engage in picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any public premises, State property, county or municipal courthouses, city halls, office buildings, jails, or other public buildings or property owned by the State of Mississippi, or any county or municipal government located therein, or with the transaction of public business or administration therein or thereon conducted or so as to obstruct or unreasonably interfere with free use of public streets, sidewalks, or other public ways adjacent or contiguous thereto.' Miss Code Ann sect. 2318.5 (Supp 1966) quoted at 390 U.S. 611, 612 Note 1 (1968).

[192] 379 U.S. 536 (1965). Justice Brennan joined Justice Goldberg's majority opinion.

[193] Ibid., p. 555.

[194] Ibid., p. 562.

[195] 360 U.S. 72 (1959), see above, p. 68-71. The Cameron and Cox cases seem to display the Supreme Court's particular sensitivity to protest activity near courts. But the Court has not been as concerned about the effect demonstrators may have on the legislative process. In Edwards v. South Carolina 372 U.S. 229 (1963) overturned the breach of the peace convictions of a group which had

picketed the South Carolina legislature. As Harry Kalven indicates, the two decisions are logically consistent but their tone is considerably different. "As the parade leaves the State House grounds and moves toward the courthouse, it changes from an attractive group of concerned citizens using democratic avenues of protest on public issues to a mod, heavy with the promise of anarchy, seeking to dominate." Kalven, "The Concept of the Public Forum," p. 9.

[196]Those cases, and Justice Brennan's view expressed therein are: Beilan v. Board of Education 357 U.S. 399 (1958) and Lerner v. Casey 357 U.S. 468 (1958)--a state cannot fire an employee as disloyal without utilizing procedures which insure due process; Nelson and Glove v. County of Los Angeles 362 U.S. 1 (1960)--dismissal of a government employee because he has claimed protection of the Fifth Amendment is unconstitutionally arbitrary; Scales v. U.S. 367 U.S. 203 (1961)--section 4f of the Internal Security Act legislates immunity from prosecution under the membership clause of the Smith Act; Killian v. U.S. 368 U.S. 231 (1961)--direct proof of the act of joining is required before an individual can be held to be a member of the Communist Party; U.S. v. Robel 389 U.S. 258 (1967)--Congress had excessively delegated legislative authority to the Secretary of Defense to designate certain industries defense facilities.

[197]357 U.S. 513 (1958).

[198]Ibid., p. 526.

[199]The case is Keyishian v. Regents 385 U.S. 589 (1967). Justice Brennan wrote the majority opinion.

[200]New York Times v. U.S. 403 U.S. 713 (1971).

[201]Ibid., p. 725-726.

[202]See above, p. 16-18.

[203]N.A.A.C.P. v. Button 371 U.S. 415 (1963), Lamont v. Postmaster General 381 U.S. 301 (1965), C.B.S. v. Democratic National Committee 412 U.S. 94 (1973).

[204]Griswold v. Connecticut 381 U.S. 479 (1965).

[205]381 U.S. 301, 308 (1965).

[206]412 U.S. 94 (1973).

[207]For an extensive discussion of the right to access see Jerome Barron, "Access to the Press--A New First Amendment Right," Harvard Law Review, 80 (1967), p. 1641-1678 and Jerome Barron, "An Emerging First Amendment Right of Access to the 50 Articles Media?," George Washington Law Review, 37 (1969), p. 487-509.

[208]Paris Adult Theater v. Slaton 413 U.S. 49, 73-114 (1973).

[209]See above, p. 304.

[210]Justice Brennan's opinions in the internal security cases were of considerably less significance. The comments that follow should be taken to pertain primarily to obscenity censorship and libel.

[211]See above, p. 20-27.

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