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Mr. Justice Brennan: The First Decade

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ON June 21, 1966, Mr. Justice William J. Brennan, Jr., delivered the majority opinion in *Schmerber v. California*.[1] That opinion concluded his first decade on the Supreme Court of the United States, an extraordinarily fruitful decade in the evolution of constitutional doctrine. While it is too early to attempt a final assessment of his contribution to the work of the Court, this anniversary provides an appropriate occasion for a review of that contribution.

There has been some tendency to classify Mr. Justice Brennan as a judicial liberal — which he assuredly is — reflecting the absolutist views of Mr. Justice Black — which he does not. Reading his opinions of the last ten years, two pervading themes, one substantive and the other functional, are particularly apparent.[2] First, he is deeply committed to the values of individual liberty as embodied in the passive "right to be let alone," which he views as in constant danger of being overreached by governmental action. These values are broader than the provisions of the Bill of Rights, and for Mr. Justice Brennan they are guideposts in expanding the meaning of that list of specific guarantees. Second, he believes that the constitutional framework accords to the judiciary the primary task of protecting the integrity of the individual and that the procedural aspects of the judicial process are essential safeguards for substantive rights. These themes are clearly reflected in the closing passage of a speech given by Mr. Justice Brennan not long ago: [3]

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This article is based on the first chapter of a collection of Mr. Justice Brennan's opinions and speeches, edited by the author, which will be published by Atheneum next year.

[1] 384 U.S. 757 (1966).

[2] The limited scope of this article precludes even a mention of many important opinions of Mr. Justice Brennan, *e.g.*, those in the areas of labor law, antitrust, reapportionment, state libel laws and the first amendment, and the important opinions of last Term considering the power of Congress to define the scope of the fourteenth amendment.

[3] Brennan, *Constitutional Adjudication*, 40 NOTRE DAME LAW. 559, 569 (1965) (footnote omitted).

> The constant for Americans, for our ancestors, for ourselves, and we hope for future generations, is our commitment to the constitutional ideal of libertarian dignity protected through law. Crises in prospect are creating, and will create, more and more threats to the achievement of that ideal — more and more collisions of the individual with his government. The need for judicial vigilance in the service of that ideal will not lessen. It will remain the business of judges to protect fundamental constitutional rights which will be threatened in ways not possibly envisaged by the Framers. Justices yet to sit, like their predecessors, are destined to labor earnestly in that endeavor — we hope with wisdom — to reconcile the complex realities of their times with the principles which mark a free people. For as the nation moves ever forward towards its goals of liberty and freedom . . . the role of the Supreme Court will be ever the same — to justify Madison's faith that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of [constitutional] rights."

A. "[A] BROAD RIGHT TO INVIOLATE PERSONALITY" [4]

Paul Freund has noted that "there are civil liberties which point to insurgency and there are those which look to integrity." [5] While Mr. Justice Brennan has been by no means indifferent to the former,[6] his principal substantive concern has been with the rights of privacy, the passive liberties broadly conceived.

His views are seen most clearly in opinions dealing with the fourth amendment guarantee against unreasonable searches and seizures and the fifth amendment privilege against self-incrimination. While the language of these amendments speaks to procedural aspects of the criminal process, for Mr. Justice Brennan they are expressions of the constitutionally fixed relationship between the individual and the state. Thus, in speaking of the fourth amendment he has said: "Like most of the Bill of Rights it was not designed to be a shelter for criminals, but a basic protection for everyone . . . . It is the individual's interest in privacy which the Amendment protects . . . ." [7] For him the fourth and

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[4] Lopez v. United States, 373 U.S. 427, 456 (1963) (dissenting opinion of Mr. Justice Brennan).

[5] P. FREUND, ON UNDERSTANDING THE SUPREME COURT 24 (1949).

[6] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964); NAACP v. Button, 371 U.S. 415 (1963).

[7] Abel v. United States, 362 U.S. 217, 255 (1960) (dissenting opinion); *see* Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960) (dissenting from the judgment of an equally divided Court).

fifth amendments are intertwined and together grant to the individual a broad right to be let alone in his person, home, and effects. He is fond of quoting the passage from *Boyd v. United States* [8] in which Mr. Justice Bradley first noted that "the Fourth and Fifth Amendments run almost into each other."

This view permeates his opinion for the Court in *Malloy v. Hogan*.[9] In that case the Court reconsidered its prior holdings that the fifth amendment privilege against self-incrimination was not one of the "principles of a free government," [10] and therefore was not applicable in its full scope to the states through the fourteenth amendment. Prior cases had considered that question in the narrow context of the enforcement of criminal justice,[11] and it may well be that our broadly conceived federal privilege against self-incrimination is not an essential element of a civilized criminal process. In Mr. Justice Brennan's view, however, it is less the privilege than the notion that "[g]overnments, state and federal, are . . . constitutionally compelled to establish guilt by evidence independently and freely secured" [12] that is one of the "principles of a free government." And in our constitutional system the privilege against self-incrimination is an essential protection for the individual's right to be free from governmental interference.

Mr. Justice Brennan's analysis of the role of the fourth amendment is similar. His dissenting opinions in two cases decided in the 1962 Term are particularly interesting in this regard. While both cases arose from criminal prosecutions, his opinions speak to broader values. In *Ker v. California* [13] he insisted that police officers could not, consistently with the fourth amendment, use a passkey to enter the apartment of a suspected dope peddler, even though they had reasonable cause to believe there was marijuana within, without first announcing their presence and demanding entry. Mr. Justice Brennan voiced his repugnance to the prospect of the police breaking into anyone's home and a belief that the restriction on police conduct would not be unduly burdensome.

The *Ker* dissent raised the spectre of "police state" activity and arbitrary invasion of the privacy of the householder. In the face of such conduct the guilty have as strong a claim to protec-

[8] 116 U.S. 616, 630 (1886).

[9] 378 U.S. 1 (1964).

[10] *Id.* at 9, quoting Boyd v. United States, 116 U.S. 616, 632 (1886).

[11] *See* Mr. Justice Moody's opinion for the Court in Twining v. New Jersey, 211 U.S. 78 (1908).

[12] Malloy v. Hogan, 378 U.S. 1, 8 (1964).

[13] 374 U.S. 23, 46 (1963) (dissenting opinion).

tion as the innocent. In *Lopez v. United States*[14] Mr. Justice Brennan found a similar spectre when the claims of criminal law enforcement were far stronger. Lopez's attempt to bribe a revenue agent to overlook his failure to pay the federal cabaret tax was recorded by a device secreted on the agent's person, and the recording so obtained was introduced in evidence at Lopez's trial for attempted bribery. These facts make a strong case for admission of the recording. No significant interest of Lopez's was involved. The statements recorded were made to an agent of the Government; thus, the case does not involve electronic eavesdropping on conversations of third parties. There was a clear risk that the agent would report the conversation. Lopez's interest in being able to contradict the agent's oral testimony at a subsequent trial would seem to have only a slight claim to protection.

Yet Mr. Justice Brennan used the case as a platform for a dissenting opinion repudiating *On Lee v. United States*,[15] in which a federal agent was permitted to testify about a conversation he overheard between the defendant and a police informer who carried a hidden transmitter. Not surprisingly, the part of Mr. Justice Brennan's opinion dealing with the facts of *Lopez* is noticeably strained in its attempt to emphasize the similarity to *On Lee*.[16] But the part dealing with the danger to individual liberty created by electronic surveillance and with the applicability of the fourth amendment is a compelling statement of the necessity of constitutional evolution to meet technological change.

Reviewing the history of the fourth and fifth amendments and the *Boyd* case, he reaffirmed that together the "informing principle of both Amendments is nothing less than a comprehensive right of personal liberty in the face of governmental intrusion."[17] Then he argued that *On Lee* and its predecessors[18] had carved out anomalous exceptions to the rule that wiretapping and electronic eavesdropping fall within the prohibitions of the fourth amendment.[19] The opinion reviewed the "terrifying facts" of the

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[14] 373 U.S. 427 (1963).

[15] 343 U.S. 747 (1952).

[16] *See* 373 U.S. at 447–50.

[17] *Id.* at 455.

[18] *See* Goldman v. United States, 316 U.S. 129 (1942) (electronic eavesdropping); Olmstead v. United States, 277 U.S. 438 (1928) (wiretapping).

[19] In *Olmstead* the Court held that the fourth amendment had not been violated because there had been no physical invasion of the defendant's home. 277 U.S. at 464–65. In *Goldman* a preliminary trespass by the agents who later installed a "detectaphone" in the office adjoining defendant's was held to have borne no ma-

advances in electronic surveillance technology which give rise to the possibility of abuse. He pointed out that while the existence of an informer or an eavesdropper is "the kind of risk we necessarily assume whenever we speak. . . . [As] soon as electronic surveillance comes into play, the risk changes crucially. There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy." [20] Finally, Mr. Justice Brennan's portrait of privacy, begun with the fourth and fifth amendments, is rounded out with the first. He stated that electronic eavesdropping may infringe upon the first amendment rights to free speech and "under certain circumstances, to anonymity" [21] as well as the right to physical privacy. Thus he feared that the inevitable effect of eavesdropping by the government would be to inhibit people from expressing their true feelings, even in "private."

The weakness of the *Lopez* dissent derives from the fact that the precise question raised by the facts seems confined to the criminal process. A majority opinion permitting the police to record conversations with a person known by the speaker to be a government agent — especially when the speaker attempts to enlist the agent in the commission of a crime — could readily have been written so as to carry no implied permission to eavesdrop on the conversations of third parties. However, Mr. Justice Harlan's opinion for the Court rests on the technical ground that there was no unlawful invasion of Lopez's premises by the agent, a condition upon the application of the fourth amendment with which Mr. Justice Brennan may well have felt bound to take issue. On balance, one would feel more comfortable with the dissenting opinion if it had expressed the view that the fourth amendment reaches such recordings, but that under the circumstances of this case the "search" was not unreasonable.

This was the analysis adopted by Mr. Justice Brennan, writing for the Court, in *Schmerber v. California*,[22] a case which at first glance seems inconsistent with the thrust of ideas in his prior opinions on the fifth amendment. In fact, however, the opinion is a good exposition of his view of the interrelationship between the fourth and fifth amendments. After sustaining injuries in an

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terial relation to the subsequent eavesdropping and therefore not to have introduced a fourth amendment violation. 316 U.S. at 134–35.

[20] 373 U.S. at 465–66.

[21] *Id.* at 470.

[22] 384 U.S. 757 (1966).

automobile accident, Schmerber was taken to a hospital for treatment. He appeared to be drunk and was arrested at the hospital. Over his protest on the advice of counsel, a blood sample was taken at the hospital to determine the alcohol content of his blood, and the results of the test were introduced at his trial for drunken driving. In rejecting the argument that Schmerber's privilege against self-incrimination had been infringed, Mr. Justice Brennan began with the proposition: "If the scope of the privilege coincided with the complex of values it helps to protect, we might be obliged to conclude that the privilege was violated." [23] But in the context of the privilege against self-incrimination, the alcohol blood test is virtually indistinguishable from other well accepted methods of police investigation such as fingerprints, police line-ups, and voice and handwriting identification. While the blood test was one way of proving "a charge against an accused out of his own mouth," [24] to extend the protection of the fifth amendment to this situation would deny to the police many of the traditional methods of investigation. Thus, the opinion concludes that the privilege in general reaches only "testimonial compulsion" or "enforced communication." [25] It then proceeds, however, to rule that the withdrawal of blood is a search and seizure within the meaning of the fourth amendment. But in contrast to *Lopez* the search in this case was held to be reasonable although made without a warrant. In reaching this conclusion, Mr. Justice Brennan was much influenced by the facts that the blood sample was taken by a doctor and that since alcohol absorbed in the blood quickly dissipates, the test had to be administered immediately.[26]

Mr. Justice Brennan's emphasis upon the passive liberties may explain such an apparent anomaly as *Ginzburg v. United States*.[27] Ginzburg was the publisher of two magazines, *Eros* and *Liaison*, and a book entitled *The Housewife's Handbook on Selective Promiscuity*. Each publication was advertised frankly to appeal to sexual curiosity. Writing for the Court, Mr. Justice Brennan assumed that these publications and the advertisements, each standing alone, would not be obscene. He concluded, however,

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[23] *Id.* at 762.

[24] Malloy v. Hogan, 378 U.S. 1, 8 (1964).

[25] 384 U.S. at 765.

[26] *Cf.* Carroll v. United States, 267 U.S. 132 (1925) (possibility of fast escape one reason for permitting search of moving vehicle without warrant).

[27] 383 U.S. 463 (1966).

that "the question of obscenity may include consideration of the setting in which the publications were presented," [28] that "the 'leer of the sensualist' also permeates the advertising for the three publications," [29] and that "[w]here the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity." [30] Finally, he found comfort in the fact that the proceeding did not "necessarily" imply suppression of the materials involved.[31] *Ginzburg* seems inconsistent with the series of Mr. Justice Brennan's opinions in the obscenity area, beginning with *Roth v. United States*,[32] and ending with *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*,[33] decided the same day as *Ginzburg* and according broad protection to material challenged as obscene.

The opinion in *Ginzburg* seems to focus only upon the personal liberty of Ginzburg to publish what he pleases. Granting that assumption, Mr. Justice Brennan's reasoning is impeccable: in *Roth* the Court held that a government may punish distribution of "obscene" literature; if it were Ginzburg's intention to sell literature which the public would accept as obscene, the case presents much the same issues as an attempt to commit a crime, and may be resolved in the same way. But the first amendment embodies two quite different and often competing interests: the right of an individual to speak his mind and the right of the public to hear or read as it chooses. If we are concerned with the public's right to read, then the judgments whether material appeals to "prurient interest" and whether the book is "utterly without redeeming social value" ought to be made without regard to whether the publisher attempted to exceed the permissible bounds of his personal liberty to print.

As in his dissent in *Lopez*, Mr. Justice Brennan has emphasized the passive liberties in connection with the first amendment.[34] This pattern is seen clearly in the series of cases dealing with the power of state and federal investigating committees to inquire

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[28] *Id.* at 465.
[29] *Id.* at 468.
[30] *Id.* at 470.
[31] *Id.* at 475.
[32] 354 U.S. 476 (1957).
[33] 383 U.S. 413 (1966).
[34] *Cf.* Roth v. United States, 354 U.S. 476 (1957).

into the activities of alleged Communists. In his first term on the Court, he joined opinions holding that questions asked of witnesses must be both pertinent to the investigation [35] and clearly within the scope of the legislature's authorizing resolution.[36] But these decisions merely fixed basic conditions of the power to investigate, postponing the difficult balancing of the competing interests of personal liberty and the power of the state to investigate.

When these cases arose, in his early years on the Court, Mr. Justice Brennan did not brush aside as unreal the dangers of international Communism.[37] At the same time, he was acutely sensitive to the infringement on liberty of thought and expression created by calling men to answer for their past political associations and to the drastic consequences of "exposure" as a Communist in those days of public hysteria. Thus, in balancing the competing interests of state and citizen, Mr. Justice Brennan early came to the conclusion that "exposure" was not a "valid legislative interest of the State." [38] This was so, not because unlawful advocacy could not be punished, but because it could not be punished in the procedural framework of a legislative investigation. Without the full panoply of procedural safeguards incident to criminal justice, the range of the inquiry, and hence the infringement on liberty of thought and expression, would inevitably be broader than in a criminal trial where inquiry must be confined to prohibited activity. This is not to suggest that a legislature is precluded, in Mr. Justice Brennan's view, from investigating for the purpose of determining the need for legislation. But whether the investigation is confined to that purpose is for him a question for independent determination by the judiciary.[39]

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[35] Sweezy v. New Hampshire, 354 U.S. 234 (1957).

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

[37] "We are at a crucial hour and Americans of all faiths have a common stake in the outcome and are commendably alert, although for decades our cries of danger fell upon deaf ears. But, certainly we need not panic . . . . Americans of all races and creeds have closed ranks against the godless foe. Whatever of treasure, of time, of effort required to defeat him, we will provide, and gladly. But we cannot and must not doubt our strength to conserve, without the sacrifice of any, all of the guarantees of justice and fair play and simple human dignity which have made our land what it is." Unpublished Address of Mr. Justice Brennan Delivered Before the Charitable Irish Society, March 17, 1954.

[38] Uphaus v. Wyman, 360 U.S. 72, 106 (1959) (dissenting opinion).

[39] "True it is . . . that any line other than a universal subordination of free expression and association to the asserted interests of the State in investigation and exposure will be difficult of definition; but this Court has rightly turned its back

Moreover, to the extent that "exposure" for its own sake becomes a form of punishment,[40] the legislative investigation has a flavor of the bill of attainder. This danger was made explicit in *Lerner v. Casey*,[41] a case involving the dismissal under the New York Security Risk Law of a New York City subway conductor who pleaded the fifth amendment in an investigation of Communists in state bureaus or agencies. A majority of the Court was satisfied with the state court's explanation that "because of doubtful trust and reliability" [42] Lerner's continued employment would endanger national and state security. In dissent, Mr. Justice Brennan pointed out that the state's determination of Lerner's unreliability was not based on a finding that Lerner was not closing the subway doors effectively, but upon a determination that he was disloyal. Furthermore, as applied to a subway conductor, such a determination carries with it an indelible stigma of suspected sabotage. He noted that "[t]he people of New York . . . have voiced through their . . . [legislature] their determination that the stain of disloyalty shall not be impressed upon a state employee without fair procedures in which the State carries the burden of proving specific charges by a fair preponderance of evidence." [43] And by invoking the Security Risk Law, he thought New York was publicly announcing that it had requisite evidence of disloyalty, while at the same time avoiding all of the procedural protections which should precede such a finding.

In his views about the controlling importance of the broader values of personal liberty underlying the specific provisions of the Bill of Rights, Mr. Justice Brennan is not unlike Mr. Justice Black. Yet his philosophical approach to the protection of these values is not the absolutism of Mr. Justice Black. Rather, he is a balancer of interests and, more than any other member of the liberal wing of the present Court, he has worked to create a coherent yet flexible analytical framework within which to isolate the values to be protected.

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on the alternative of universal subordination of protected interests, and we must define rights in this area the best we can." Mr. Justice Brennan, dissenting in Uphaus v. Wyman, 360 U.S. 72, 85 (1959).

[40] *Cf.* Barenblatt v. United States, 360 U.S. 109, 166 (1959) (dissenting opinion of Mr. Justice Brennan).

[41] 357 U.S. 468 (1958).

[42] *Id.* at 472.

[43] *Id.* at 479.

B. "[T]HE PROCEDURES BY WHICH THE FACTS OF THE CASE ARE DETERMINED ASSUME AN IMPORTANCE FULLY AS GREAT AS THE VALIDITY OF THE SUBSTANTIVE RULE OF LAW TO BE APPLIED" [44]

Mr. Justice Brennan's analysis of the relation between the procedural context of legislative investigations and the substantive rights involved suggests the second theme pervading his opinions: the essential role of the judiciary and judicial procedures in protecting individual rights.

It is fair, I think, to say that in Mr. Justice Brennan's view of the constitutional scheme, the Supreme Court does not decide constitutional issues solely because the process of litigation happens to throw them up for review. Although of course recognizing that the power of the Court to decide is limited to litigated cases, he believes that these most basic issues are litigated precisely because, in the evolution of our constitutional system, the Court has come to be viewed as the appropriate institution for their resolution. Thus, he is not hesitant to interpose the Court's judgment in cases raising questions of individual liberties and the allocation of power among governmental institutions: "I don't think there can be any challenge to the proposition that the ultimate protection of individual freedom is found in court enforcement of [the Bill of Rights]." [45]

Moreover, it is apparent that Mr. Justice Brennan believes that the judiciary, because of its independence and accumulated experience with the criminal process, is uniquely fitted for the task. The importance of an "independent magistrate" in protecting the governed from the governing is a leitmotif that runs throughout his opinions. In *Abel v. United States*,[46] Colonel Abel was arrested pursuant to an administrative warrant issued by an officer of the Immigration and Naturalization Service. The hotel room in which he was arrested was searched, and the evidence seized was introduced at a subsequent trial for espionage. Mr. Justice Brennan dissented from a judgment affirming Abel's conviction. Pointing out that the search was broader than one merely insuring the safety of the arresting officers and preventing Abel from escaping, he thought it appropriate that there be "some inquiry into the over-all protection given the individual by the totality of

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[44] Speiser v. Randall, 357 U.S. 513, 530 (1958).

[45] Brennan, *supra* note 3, at 567.

[46] 362 U.S. 217 (1960).

the processes necessary to the arrest and the seizure." [47] Emphasizing that the arrest "was made totally without the intervention of an independent magistrate," either before or after the arrest, he argued that without such a magistrate, "sitting under the conditions of publicity that characterize our judicial institutions," [48] there is created precisely that "concentration of executive power over the privacy of the individual that the Fourth Amendment was raised [to prevent]." [49]

The "independent magistrate" theme has also appeared in his opinions in cases where administrative activity has infringed on first amendment rights. *Bantam Books, Inc. v. Sullivan* [50] called into question the constitutionality of the procedures employed by the Rhode Island Commission to Encourage Morality in Youth, which, although a creature of the state legislature, was composed of private citizens. If the Commission decided that material distributed in the state was "objectionable" for sale to those under eighteen years of age, it "recommended" to the distributor that it be withdrawn from circulation. The distributor would often be reminded of the Commission's duty to suggest prosecutions for the sale of obscene matter to the state attorney general. Usually a police officer would inquire whether the distributor had followed the recommendation. Mr. Justice Brennan, writing for the Court, pointed out that the Commission's operation made the state's criminal regulation of obscenity largely unnecessary: "In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of the criminal process . . . creat[ing] hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." [51] The result was a system of prior restraints, he thought, which could be "tolerated . . . only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint." [52] And in *Manual Enterprises, Inc. v. Day* [53] Mr. Justice Brennan argued that a narrow construction ought to be given to the statute authorizing the Post Office Department to withhold obscene matter from the mails, since "the suggestion that Congress may constitutionally author-

[47] *Id.* at 251.
[48] *Ibid.*
[49] *Id.* at 253.
[50] 372 U.S. 58 (1963).
[51] *Id.* at 69–70.
[52] *Id.* at 70; *accord*, Freedman v. Maryland, 380 U.S. 51 (1965).
[53] 370 U.S. 478, 519 (1962) (concurring opinion).

ize any process [for determining whether matter is obscene] other than a fully judicial one immediately raises the gravest doubts."

In a somewhat different context, the strongest affirmation of the role of the judiciary, in this case the federal courts, is to be found in *Fay v. Noia*.[54] This case was concerned with the scope of the doctrine of exhaustion of state remedies as a bar to the federal habeas corpus power. Mr. Justice Brennan's opinion represents an article of faith about the role of the federal judiciary in protecting individual rights: [55]

> It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely . . . . Although in form the Great Writ is simply a mode of procedure . . . . [i]ts root principal is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment.

Related to Mr. Justice Brennan's commitment to the importance of the judiciary in protecting individual liberty is his special concern with the impact of procedure on the protection of substantive rights. This concern was present in the loyalty oath cases, but it is most apparent in criminal cases, where the liberty of the accused hangs in the balance. As a justice of the New Jersey Supreme Court he dissented in a case in which a copy of the confession given to the police had been denied to the defendant.[56] And in his first term as a Supreme Court Justice he wrote the Court's opinion in *Jencks v. United States*,[57] which established the right of a criminal defendant in a federal court to examine reports which have been given to the Government by witnesses who later testify for the Government about events described in the report.[58]

When rights other than liberty are at stake, Mr. Justice Brennan has been quick to appraise the effect of the procedural context upon those rights. In *Smith v. California* [59] the proprietor of a bookstore was convicted under a Los Angeles ordinance for possessing obscene matter. The California courts interpreted the ordinance as permitting conviction solely on the basis of posses-

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[54] 372 U.S. 391 (1963).

[55] *Id.* at 401–02.

[56] State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953).

[57] 353 U.S. 657 (1957).

[58] *Jencks* was apparently grounded on the Supreme Court's supervisory power over the federal courts. Congress enacted a similar, but narrower rule in the *Jencks* Act, 18 U.S.C. § 3500 (Supp. 1966), in an attempt to limit the application of the *Jencks* decision.

[59] 361 U.S. 147 (1959).

sion and held that the defendant's knowledge of the contents of the book was not relevant. Justice Brennan, writing for the Court, ruled that the strict liability thus imposed violated the first amendment. Pointing out that the effect of the ordinance was to impose upon a bookseller the impossible burden of being familiar with the contents of every book in his store in order to avoid a violation, he concluded that the resulting pressure to refuse books which had not been inspected had the effect of suppressing books which are not obscene and that *Roth v. United States* [60] gave the states no license to suppress such books. Mr. Justice Brennan conceded that strict liability might, in appropriate cases, be accompanied by criminal sanctions, but not where it had the effect of working a substantial restriction on freedom of the press.

A Quantity of Copies of Books v. Kansas [61] involved the validity of a Kansas statute under which a warrant was issued for the seizure of written material which had been described in an information as obscene. The information identified the titles of fifty-nine novels. In a forty-five minute ex parte hearing, the issuing judge examined seven of the books, all of which carried the following imprint: "This is an original Night Stand book." He concluded that the seven books appeared to be obscene, and issued a warrant for the seizure of all the books identified in the information which bore the same imprint. More than 1,700 copies of the books were seized and at a later hearing were declared obscene. Before the Supreme Court, the State of Kansas argued that obscene books, like contraband, were not subject to the normal, strict standards governing searches and seizures. As in *Smith*, Mr. Justice Brennan thought that the prior restraint created by removing the books from circulation without an adversary hearing on their obscenity outweighed considerations of traditional criminal invesigation techniques, and he found the procedure inadequate to protect activity within the first amendment.

When conduct which may be protected by the Bill of Rights is the subject of a nonjudicial proceeding, Mr. Justice Brennan has insisted that similar standards of procedural fairness be observed. Thus he dissented in *Cafeteria Workers v. McElroy*,[62] in which the majority found no constitutional defect when the identification badge of a civilian cafeteria worker in a defense installation was revoked by the Naval Security Officer on the

[60] 354 U.S. 476 (1957).
[61] 378 U.S. 205 (1964).
[62] 367 U.S. 886 (1961).

ground that she was a security risk, although she was given no idea of the nature of the charges against her and no opportunity to defend against them. For Mr. Justice Brennan the absence of these fundamental elements of procedural fairness was a denial of due process of law. Here, as in the legislative investigation cases, he felt that the fact that she was characterized as a security risk "makes this particularly a case where procedural requirements of fairness are essential." [63]

In cases involving nonjudicial proceedings, Mr. Justice Brennan has given special attention to the effect of the allocation of the burden of proof on first amendment rights. This concern grows out of an analogy, largely unexpressed in his opinions, between the liberty of a defendant at stake in a criminal trial and other rights at issue in administrative proceedings. *Speiser v. Randall* [64] concerned a special exemption for veterans from the California property tax. Veterans were required to file a request for the exemption each year, accompanied by the affirmation: "I do not advocate the overthrow of the Government of the United States or the State of California by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in event of hostilities." [65] Under California law the affirmation was merely evidence of the facts asserted, the truth of which was a condition of the exemption. The burden of establishing those facts before the tax assessor rested with the taxpayer, and if the assessor denied the exemption, the burden remained with the taxpayer to challenge the denial before a reviewing court. Drawing the analogy to criminal proceedings, Mr. Justice Brennan pointed out that: [66]

> There is always in litigation a margin of error . . . which both parties must take into account. Where one party has at stake an interest of transcending value — as a criminal defendant his liberty — this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt

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[63] *Id.* at 901.

[64] 357 U.S. 513 (1958).

[65] 357 U.S. at 515. The California Supreme Court construed the exemption as being denied only to those engaging in activity which could be punished consistently with the first amendment, applying the standards set forth in Dennis v. United States, 341 U.S. 494 (1951). *See* First Unitarian Church v. County of Los Angeles, 48 Cal. 2d 419, 328, 438–40, 311 P.2d 508, 513, 519–20 (1957).

[66] 357 U.S. at 525–26.

> . . . . Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech.

This concern was repeated three years later in a dissenting opinion filed in *Konigsberg v. State Bar of California.*[67] Under the bar admission procedure in California, the applicant has the burden of showing "that he is possessed of good moral character, of removing any and all reasonable suspicion of moral unfitness, and that he is entitled to the high regard and confidence of the public." [68] One of the statutory criteria for lack of good moral character is advocacy of the overthrow of the government of the United States or California by force or violence. The California Committee of Bar Examiners refused to certify Konigsberg because of his repeated refusal to answer questions about his past or present membership in the Communist Party. Mr. Justice Brennan, quoting Justice Traynor's dissent in the California Supreme Court,[69] felt that "[t]he possibility of inquiry into . . . [applicants'] speech, the heavy burden upon them to establish its innocence, and the evil repercussions of inquiry despite innocence, would constrain them to speak their minds so noncommittally that no one could ever mistake their innocuous words for advocacy." [70] Similarly, in *Freedman v. Maryland,*[71] he wrote an opinion for the Court declaring unconstitutional a system of prior censorship of motion pictures because, *inter alia*, if a license to exhibit the film were denied by the censors, the exhibitor had the burden of proof in attacking the denial before a court.

This concern with procedural issues plays a uniquely substantive role in Mr. Justice Brennan's jurisprudence. It goes far beyond the concern for elemental fairness expressed in his dissenting opinion in *Cafeteria Workers v. McElroy.* The procedures of the criminal process upon which he has drawn so heavily do more than simply attempt to create an equal balance between the state and the accused. They embody the presumption of innocence. Just as the liberty of the defendant is thus "hedged about with the procedural safeguards of the criminal process," [72] so, for Mr.

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[67] 366 U.S. 36, 80 (1961).

[68] *Id.* at 38.

[69] Konigsberg v. State Bar of California, 52 Cal. 2d 769, 777, 344 P.2d 777, 782 (1959).

[70] 366 U.S. at 81.

[71] 380 U.S. 51, 58 (1965).

[72] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

Justice Brennan, must be the other attributes of individual freedom. The notion that "First Amendment Freedoms need breathing space to survive"[73] is an expression of the need for creating procedural safeguards to insure that the state shows clearly that putatively protected conduct should be punished in a given case. It is in this area, the relation between procedural safeguards and the attributes of individual liberty, that Mr. Justice Brennan has made a unique contribution to the work of the Court. He has turned to matters of procedure, not to avoid adjudication, but to insure that the Court is called upon to balance competing interests of state and citizen only when the judgment that conduct should be punished has been made in a setting which is designed to discriminate between protected and unprotected activity.

I began this review by saying that it was too early in his career to attempt a final assessment of Mr. Justice Brennan's contribution to the work of the Court. That is certainly true. Yet at the end of his first decade of service, it is plain that he has been true to his vision of a society in which personal liberty is sacred. He has expressed that vision as[74]

> . . . the age-old dream for recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family, for in that recognition is indeed the foundation of freedom, justice and peace in the world. The dream, though always old, is never old, like the Poor Old Woman in Yeats' play. "Did you see an old woman going down the path?" asked Bridget. "I did not," replied Patrick, who had come into the house just after the old woman left it, "but I saw a young girl and she had the walk of a queen."

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[73] NAACP v. Button, 371 U.S. 415, 433 (1963).

[74] Address by Mr. Justice Brennan, Louis Marshall Award Dinner of the Jewish Theological Seminary of America, New York City, November 15, 1964.