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FREEDOM OF THE MIND AND JUSTICE BRENNAN†

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The international ideological struggle of the last quarter century has been reflected in the controversies enacted in the courtrooms of our country during this period. Cases touching on religion, censorship, loyalty and associations have been the domestic counterparts of the worldwide conflict for the freedom of the human mind.

In this article two areas of controversy – freedom of speech and freedom of religion – will be considered. The tension or "public argument" (as Rev. John Courtney Murray calls it) inherent in a pluralistic society has centered, to some extent, about these two issues during recent years. In the first part attention will be focused upon the citizen's right to express himself in print, even though at times in an obscene manner, and the concurrent right of society to protect itself from obscenity through censorship legislation. The attempt to balance the freedom of worship guaranteed by the first amendment with society's legitimate religious needs will be considered in the second part.

The efforts of one judge, Associate Justice William J. Brennan, Jr. of the Supreme Court of the United States, to grapple with the problems of constitutional theory and conflicting social values raised by these issues dramatize the work of the entire judiciary during this period. Justice Brennan has been chosen as the subject of this study because he joined the Supreme Court at a time when litigation concerning these proceedings was intense, and thus his values and reactions would be quickly tested. In addition, his Catholicism presented a new factor not existing in the backgrounds of the other justices of the high court at this time.

† For the observations of Mr. Justice Brennan which he made after reading this article, see "Editorial Comment" in this issue at page 267.

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Obscenity and Censorship

One of the areas related to the first amendment's guarantee of free speech and press which has been a constant source of litigation in recent years is obscenity. Whether it takes the form of the "dirty book" on the newsstand, the unmarked envelope full of sex photos sent through the mails, or the "adult" movie shown at the local "art" theater, obscenity is of concern to local, state and federal governments as well as to religious groups, involving as it does the delicate balancing of the public interest in free speech with the public interest in the moral fabric of society.

Historical Background

At common law the publication of obscene printed matter was held to be a punishable offense in 1727.[1] In the United States some states used this ruling as the basis for prosecutions, while others enacted criminal statutes prohibiting the writing or printing of obscene material.[2] The common-law rule became statutory in England in 1857 through Lord Campbell's Act.[3]

In the case of *Regina v. Hicklin,*[4] the English courts formulated a test to determine what material was to be considered obscene under this statute:

> I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.[5]

The *Hicklin* test proved inadequate in protecting the right of free speech. It permitted the courts to judge a complete work to be obscene by reading only isolated passages out of context. The availability of a book to a susceptible audience could also result in a judgment of obscenity. Thus adults might be deprived of a book which might disturb the young. Finally, the *Hicklin* test made no provision for the literary, medical or sociological value of a particular work, and it considered irrelevant the author's motive in writing the book.

The test nevertheless became quickly established in the American courts, but not without objection. In 1913 Judge Learned Hand overruled a demurrer to an indictment for mailing Gandman's "Hagar Revelry," but added a note of personal protest:

> Indeed it seems hardly likely that we are even today so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature.[6]

The famous *Ulysses* case marked the first departure from the *Hicklin* rule.[7] Judge Woolsey denied the motion of the United States for a decree declaring the book not importable into the country on the ground that it was obscene matter under the Tariff Act of 1930, and for the seizure and destruction of the book under the act.

Judge Woolsey declared that the author's motive in writing the book was relevant in deciding whether the book was written for the purpose of exploiting obscenity, even though this intent was not the test of obscenity. He then defined obscenity as material

[1] Rex v. Curl, 2 Str. 788 (1727).
[2] Comment, 6 N.Y.L.F. 313 (1960).
[3] 20-21 Vict. c. 83 (1857).
[4] L.R. 3 Q.B. 360 (1868).
[5] *Id.* at 371.
[6] United States v. Kennerly, 209 Fed. 119, 121 (S.D.N.Y. 1913).
[7] United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd sub nom.* United States v. One Book Entitled "Ulysses," 72 F.2d 705 (2d Cir. 1934).

"tending to stir the sex impulses or to lead to sexually impure and lustful thoughts."[8] In deciding whether material was obscene, the court should consider the book's effect on the person with average sex instincts, just as it would use the "reasonable man" test in a tort action. Finally, the trier of fact must read the entire work.

In affirming this decision, Judge Augustus N. Hand formulated a new test for obscenity which was a considerable advance over the *Hicklin* norm.

> [W]e believe that the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence. . . .[9]

During these years the Supreme Court was not called upon to rule directly on the constitutional aspects of the regulation of obscenity. As a result the law in this area developed independently of the decisions dealing with freedom of speech. The lack of guidance from the Supreme Court on the constitutional issues created a dilemma for lower court judges trying to reconcile the theories underlying the free-speech cases with the decisions sustaining obscenity regulation.

Professor Kalven thus describes the constitutional problems facing the courts:

> The first revolves around the ambiguity of the term "obscenity." The lack of precision had in no way been abated by the slow evolution of the test for obscenity, from the measure of the impact of isolated passages on the susceptible . . . to the standard of the impact of the whole upon the average member of the audience. . . . At the time the problem came to the Supreme Court it could still be argued with some force that the term was irreducibly vague and that all definitions were circular – a poor predicate for a law inhibiting free speech.
>
> The second group of constitutional doubts derived from the clear-and-present-danger test. Toward what dangers was obscenity legislation directed? Analysis reveals four possible evils: (1) the incitement to anti-social sexual conduct; (2) psychological excitement resulting from sexual imagery; (3) the arousing of feelings of disgust and revulsion; and (4) the advocacy of improper sexual values.[10]

In 1957 the Supreme Court reached its first important decision concerning obscenity. A Michigan statute had made it a crime to "publish materials tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth. . . ." In *Butler v. Michigan*[11] Justice Frankfurter, speaking for a unanimous court, held the statute unconstitutional. He construed the statute as making it an offense to sell to the general public a book which might have a harmful influence only on the young.

Professor Kalven believes that the *Butler* case does more than merely shift the test audience from the young to the average adult, when the material in question is distributed to the general public:

> The Court was saying that the average adult is not merely the preferred test audience for materials distributed generally; it is the constitutionally required test audience. Moreover, if the state cannot bar materials generally distributed by using their impact on youth as a criterion of obscenity, it cannot use the young at all as a justification for regulation. That is, the state cannot justify

[8] *Id.* at 184.

[9] United States v. One Book Entitled "Ulyysses," 72 F.2d 705, 708 (2d Cir. 1934), *affirming sub nom.*, United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933).

[10] Kalven, *The Metaphysics of The Law of Obscenity*, 1960 SUPREME COURT REV. 1, 2-4.

[11] 352 U.S. 380 (1957).

> regulation on the ground that the regulated materials might move the young to anti-social conduct, or might excite the sexual imagination of the young, or might make premature disclosure of the "facts of life" to the young in a vulgar and debased form. Admittedly these are serious problems, particularly the last. They may well justify intervention of the state keyed specifically to distributions to children.[12]

The Roth Decision

Justice Brennan entered the picture in the obscenity decisions of *Roth v. United States* and *Alberts v. California,* handed down on June 24, 1957.[13]

Roth, an entrepreneur in erotica, had been convicted of violating the federal statutes prohibiting the mailing of obscene matter and advertisements for obscene matter. In the Supreme Court he argued that the federal obscenity statute violated the free speech and press guarantees of the first amendment, that the vagueness of the statute violated the due process clause of the fifth amendment, and that the statute improperly invaded the powers reserved to the states and the people by the ninth and tenth amendments.

Alberts had been convicted of violating a California obscenity statute by keeping obscene material for sale and advertising obscene materials. Again, as in the *Roth* case, Alberts phrased the issues on broad terms in his Jurisdictional Statement to the Supreme Court.[14]

Thus in both cases the Court was not asked to rule upon the obscenity of the materials actually involved in the cases. It was free to deal with the abstract constitutional issues of the regulation of obscenity.

The Court, speaking through Justice Brennan, sustained the validity of both the federal and the state regulations. The issue of the cases was "whether obscenity is utterance within the area of protected speech and press."[15] By way of historical background, he noted that the Court had in dicta of past decisions assumed the constitutionality of obscenity regulation. In the light of colonial history, the first amendment cannot be read as intended to protect every utterance. In fact, at the time of its ratification, thirteen states had laws prohibiting obscenity.

Justice Brennan recognized that "all ideas having even the slightest redeeming social importance – unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion" are protected against governmental restraint.[16] Obscenity, however, is "utterly without redeeming social importance."[17] He cited as proof the facts that over fifty nations have entered into international agreements for its regulation, and that twenty obscenity laws had been enacted by congress in the last century. Indeed, the Court itself had previously declared that "such utterances are no essential part of any exposition of ideas. . . ."[18] Justice Brennan concluded: "We hold that obscenity is not within the area of constitutionally protected speech or press."[19] As a corollary, it was therefore unnecessary for the Court to consider the issues behind the "clear and present danger" test applied in other areas of free speech.

Justice Brennan then formulated the acceptable test for obscenity: "Whether to the

[12] Kalven, *supra* note 10, at 7.
[13] 354 U.S. 476 (1957).
[14] Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 MINN. L. REV. 5, 21-22 (1960).
[15] Roth v. United States, 354 U.S. 476, 481 (1957).
[16] *Id.* at 484.
[17] *Ibid.*
[18] Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).
[19] Roth v. United States, *supra* note 15, at 485.

average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to a prurient interest."[20] He was careful to point out that not every portrayal of sex was obscene.

Constitutional Theory

The thesis implicit in Justice Brennan's statement of the issue in the *Roth* case has been described as a "two-level speech theory."[21] At one level are communications which, though unpopular and even hateful, must be measured by the "clear and present danger" rule. At the second level are communications which are socially worthless. Thus, to determine the constitutionality of a ban on communications:

> . . . the first question is whether it belongs to a category which has any social utility. If it does not, it may be banned. If it does, there is the further question of measuring the clarity and proximity and gravity of any danger from it.[22]

Professor Kalven therefore argues that the issue of the social utility of a communication has become as crucial a part of our free-speech theory as the issue of its danger. He believes that the concept of social utility rather than that of history gives a firm basis to the Brennan thesis that some communications are not protected by the first amendment. It would be too much to say that Justice Brennan has constructed an entirely new theory of free speech, since the two-level theory has appeared in Supreme Court decisions previously.[23] It seems more accurate to say that Justice Brennan's contribution has been to provide a rationale for the traditional exclusion of certain types of speech from the protection of the first amendment.

The test of social utility presents its own difficulties. The definition of obscenity must be carefully framed and applied, since material, once classified as obscene, will automatically be subject to regulation. Professor Kalven sees another difficulty in the test:

> The Court seems to have assumed that the only argument against the constitutionality of obscenity regulation rests on the broad premise that under the First Amendment no utterance can be prohibited and that if this broad premise were destroyed the argument must collapse.[24]

Another problem is Justice Brennan's use of history to prove the proposition that some forms of expression have never been entitled to the protection of the first amendment. Professor Kalven finds this technique alarming in terms of what other propositions might be proved by the same technique. "Is it clear," he asks, "that blasphemy can constitutionally be made a crime today? And what would the Court say to an argument along the same lines appealing to the Sedition Act of 1798 as justification for the truly liberty-defeating crime of seditious libel?"[25]

Professor Kauper is likewise disturbed by Justice Brennan's use of history:

> If the historical approach is used to exclude obscene publication from the free press guarantee, then it would seem also that the historical approach would determine the meaning of obscenity. Recourse to history is not completely satisfactory since the crime of obscene libel did not crystallize until after the middle of the last century.[26]

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[20] *Id.* at 489.

[21] Kalven, *The Metaphysics of The Law of Obscenity*, 1960 SUPREME COURT REV. 1, 10.

[22] *Id.* at 11.

[23] See Beauharnais v. Illinois, 343 U.S. 250 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[24] Kalven, *supra* note 23, at 9.

[25] *Ibid.*

[26] KAUPER, CIVIL LIBERTIES AND THE CONSTITUTION 67 (1962).

He adds that if history is important, then perhaps the *Hicklin* definition of obscenity would be controlling. But this test has been rejected by a number of federal courts and was rejected by Justice Brennan himself in formulating the *Roth* test of obscenity.

It seems, therefore, that "social utility" rather than history alone must be the primary test employed in determining whether communication is protected by the first amendment. But what standards should the Court use in determining what types of ideas are socially useful or of social importance? Here we encounter the problem of weighing competing values and choosing those which have priority. It is precisely in this area that Justice Brennan's opinion shows weakness. He side-stepped the issue by appealing to history, but as seen above, history may supply some rather undesirable answers. In spite of his deft side step, he was forced to make a choice of values. He chose to protect society against the deliberate arousal of "prurient interest" through certain types of printed matter, instead of allowing unlimited freedom to publish such material. His reasons for such a choice remain cloudy.

The Definition of Obscenity

Justice Brennan drew on the words of the Model Penal Code of the American Law Institute[27] in formulating the definition of obscenity. Professors Lockhart and McClure conclude that the Court thereby laid down two constitutional requirements for determining what is obscene.[28] The material must be judged as a whole, not by its parts, and it must be judged by its impact on the average person, not the weak and susceptible.

But the definition itself raises many problems, which will be explored in the following pages.

Prurient Interest

The term "prurient interest" had rarely been used in previous opinions of the Court, thus giving rise to the question whether the Court was using a circular definition. The term "appeals" likewise makes one ask what degree of causal relationship between the material and the arousal of interest is required.

To the American Law Institute, "prurient interest" is a "shameful or morbid interest in nudity, sex, or excretion;"[29] it is "an exacerbated, morbid or perverted interest growing out of the conflict between the universal sexual drive of the individual and equally universal social controls of sexual activity."[30] Material "appeals" to this interest when, "of itself," the material has "the capacity to attract individuals eager for a forbidden look behind the curtain of privacy which our customs draw upon sexual matters."[31]

The draftsmen of the American Law Institute used the expression "appeal to prurient interest" to focus on the nature of the appeal of the material – the kind of appetite to which the purveyor is pandering. This, the Institute pointed out, is "quite different from an inquiry as to the effect of a book upon the reader's thoughts, desire or action."[32]

But while the Supreme Court borrowed the American Law Institute's expression,

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[27] MODEL PENAL CODE, §207.10(2) (Tent. Draft No. 6, 1957).

[28] Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 53 (1960).

[29] MODEL PENAL CODE, §207.10(2), comment (Tent. Draft No. 6, 1957).

[30] *Id.* at 29.

[31] *Id.* at 10.

[32] *Ibid.*

"appeal to prurient interest," it did not accept the limited meaning which the Institute gave to that phrase. The Court said that "material which deals with sex in a manner appealing to the prurient interest" is "material having a tendency to excite lustful thoughts" and went on to say, "We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the American Law Institute's Model Penal Code."[33]

Four cases decided in the October 1957 term of the Supreme Court furnish some guidance, though of a negative nature, as to what Justice Brennan meant by "material appealing to prurient interest." Citing only *Roth* or *Alberts,* the Court reversed without opinion four United States Courts of Appeals decisions that had upheld obscenity censorship of: (1) the motion picture "The Game of Love,"[34] (2) an imported collection of nudist and art-student publications containing many nude photographs,[35] (3) "One–The Homosexual Magazine,"[36] and (4) "Sunshine and Health" and "Sun" magazines.[37] Thus nudity and stories appealing to homosexual interest were not considered by the Court to be obscene under the *Roth* test.

The latest decision of the Supreme Court in this area throws new light on the meaning of "material appealing to prurient interest." The Post Office Department had barred from the mails a shipment of magazines consisting primarily of photographs of male nudes designed to appeal to homosexuals. This ruling was based on alternative determinations that the magazines (1) were themselves obscene and (2) gave information where obscene matter could be obtained, thus rendering them non-mailable under the Comstock Act.[38]

In *Manual Enterprises v. Day,*[39] Justice Harlan, announcing the judgment for the Court, stated that two distinct elements are required for matter to be obscene under this statute: (1) patent offensiveness and (2) "prurient interest" appeal.[40] The former is a quality in a publication which makes it so offensive on its face as to affront current community standards of decency.[41] Justice Harlan considered the inter-relation of these two elements:

> Both must conjoin before challenged material can be found "obscene" under §1461. In most obscenity cases, to be sure, the two elements tend to coalesce, for that which is patently offensive – will also usually carry the requisite "prurient interest" appeal. It is only in the unusual instance where, as here, the "prurient interest" appeal of the material is found limited to a particular class of persons that occasion arises for a truly independent inquiry into the question whether or not the material is patently offensive.[42]

After conducting his own "independent examination" of the magazines, Justice Harlan concluded that they were "dismally unpleasant, uncouth and tawdry," but that this was "not enough to make them 'obscene.' "[43] He continued:

> . . . these portrayals of the male nude cannot

[33] Roth v. United States, 354 U.S. 476, 481 n. 20 (1957).
[34] Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957) (per curiam), *reversing* 244 F.2d 432 (7th Cir. 1957).
[35] Mounce v. United States, 355 U.S. 180, (1957) (per curiam), *reversing* 247 F.2d 148 (9th Cir. 1957).
[36] One, Inc. v. Olesen, 355 U.S. 371 (1958) (per curiam), *reversing* 241 F.2d 772 (9th Cir. 1957).
[37] Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958), *reversing* 249 F.2d 114 (D.C. Cir. 1957).
[38] 18 U.S.C. §1461 (1958).
[39] 370 U.S. 478 (1962).
[40] *Id.* at 482.
[41] *Ibid.*
[42] *Id.* at 486.
[43] *Id.* at 489-90.

> fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates. Of course, not every portrayal of male or female nudity is obscene.[44]

In retrospect, it is the *Roth* and *Alberts* cases themselves which give us the best guidance as to what material the Court thinks is obscene.[45] The publications distributed could certainly be classified as "hard-core" pornography. Professors Lockhart and McClure state that the Solicitor General had sent a carton of pornographic material to the justices during their consideration of these two cases.[46] They are of the opinion that this material must have had such a shocking and revolting effect upon the justices that they could not have put it out of mind. Therefore, they argue that the concept of obscenity which the justices had in mind in formulating the test included at least "hard-core" pornography.

Pornography, the professors conclude after a study of various authorities in the field, is "daydream material, divorced from reality, whose main function is to nourish erotic fantasies of the sexually immature."[47] To this term must be added the qualification "hard-core," in order to indicate that to be obscene in the constitutional sense, nonliterary material must not only nourish erotic fantasies but be grossly shocking as well.[48] This latter point seems to be the same as the standard of "patent offensiveness" proposed in *Manual Enterprises,* although the Court in that case expressly refused to make this equation.[49]

It is interesting to note that the Court of Appeals of New York has also equated obscenity with "hard-core" pornography:

> It focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose of justification . . . the obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents . . . "a debauchery of the sexual faculty."[50]

This minimal approach to the regulation of obscenity is also advocated by Rev. John Courtney Murray, S.J.:

> There ought to be a few, only a few, areas of concentration . . . I suggest that the chief area is the "pornography of violence . . . ." Mischief enough is done by the obscenities that occur in the portrayal of illicit love . . . . But here sex is at least rescued from full profanation by its tenuous connection with love, as love is still resident in lust. However, when sex is associated with, and becomes symbolic of, the hatreds and hostilities, the angers and cruelties, that lie deep in men and women, the profanation of the most sacred thing in sex – its relation to love and to the hope of human life – is almost complete. It could move perhaps only one step deeper into the diabolical–in that association of sex and blasphemy that pervades the Black Mass.[51]

It is hard to escape the conclusion that Justice Brennan meant only "hard-core" pornography when he used the term "material appealing to prurient interest" to describe obscenity in *Roth.* Unfortunately, the Court has not yet defined this term.[52]

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[44] *Id.* at 490.

[45] It is ironic that in these cases the obscenity of the publications was never at issue before the Court.

[46] Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 MINN. L. REV. 5, 59-60 (1960).

[47] *Id.* at 65.

[48] *Id.* at 66.

[49] Manual Enterprises, Inc. v. Day, 370 U.S. 478, 489 (1962).

[50] People v. Richmond County News, Inc., 9 N.Y.2d 578, 587, 175 N.E.2d 681, 686, 216 N.Y.S.2d 369 (1961).

[51] MURRAY, WE HOLD THESE TRUTHS 173 (1960).

[52] See Mulroy, *Obscenity, Pornography and Censorship,* 49 A.B.A.J. 869 (1963).

The "Average" Person

What kind of man is the "average" or "normal" person to whose prurient interest material must appeal in order to be considered obscene? In what circumstances is he the proper person to be so employed?

Some courts have described him as a composite, representing all elements of society, including the young and susceptible.[53] Others, like the trial court in the *Roth* case, have equated him with the man in the street.[54] In the *Ulysses* case, Judge Woolsey referred to him "as a person with average sex instincts . . . who plays, in this branch of legal inquiry, the same role of hypothetical reagent as does the 'reasonable man' in the law of torts and 'the man learned in the art' on questions of invention in patent law."[55]

Professors Lockhart and McClure find difficulties in all these formulations.[56] The "composite" test has many of the objectionable qualities of the old *Hicklin* rule. While the "man in the street" formula raises fewer problems, yet it is not adequate to cover the case of the common man who peruses material of substantial aesthetic value for his own private titillation, oblivious of its artistry. Finally, the peculiar appeal of "hard-core" pornography makes one question whether there is any great value in the standard of the "average" or "normal" person, considered either as the common man or as the person of average sex instincts.

> [H]ard-core pornography appeals to the sexually immature because it feeds their craving for erotic fantasy; to the normal, sexually mature person it is repulsive, not attractive. Consequently, neither the common man nor the person of average sex instincts is a suitable hypothetical person to use in determining whether hard-core pornography appeals to his prurient interest. If this were the exclusive test, hard-core pornography would never be obscene, although it is the one class of material now certainly obscene.[57]

It is the judgment of Professors Lockhart and McClure that the "average" or "normal" person test used in *Roth* is a means of stating a negative proposition, rather than a positive statement in itself. In other words, it is simply:

> . . . a way of stating that the material disseminated to the general public must not be judged by its effects upon or appeal to the weak or susceptible. If this interpretation is correct, the kind of person to be used as a standard in judging the effects or appeal of constitutionally obscene material is undetermined at this stage in the development of constitutional standards governing obscenity censorship.[58]

Viewed in this light, *Roth* would impose the "average person" test only when the work is so marketed that there is at least a reasonable possibility that it will reach a representative cross-section of the community. If this analysis of *Roth* is correct, then a result such as that reached in *Manual Enterprises* could be avoided. Material designed for a special audience (homosexuals in this case) would not be judged by its effect on the "average person" who has no contact with or interest in the work. A premium on perversity would be avoided.

Another result of thus limiting the "aver-

[53] See, *e.g.*, Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840 (1945).

[54] Roth v. United States, 354 U.S. 476, 490 (1957). The Court quoted the trial judge with approval.

[55] United States v. One Book Called "Ulysses," 5 F. Supp. 182, 184 (S.D.N.Y. 1933), *aff'd sub. nom.*, United States v. One Book Entitled "Ulysses," 72 F.2d 705 (2d Cir. 1934).

[56] Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 72-73 (1960).

[57] *Id.* at 73.

[58] *Ibid.*

age person" test would be to permit objectionable material to be distributed to an especially mature or educated audience which has a serious purpose for its use, even though the material appeals to the "prurient interest" of the "average person."[59]

Contemporary Community Standards

What is meant by the "community" whose "contemporary standards" are to be applied in the determination of obscenity? Who is to judge what are this community's "contemporary standards?"

One view is that Justice Brennan was not speaking of the standards of local or state communities, but indirectly of a national standard.[60] The Model Penal Code favors this view.[61] It provides for the admission of evidence of "the degree of public acceptance of the material in this country." In the comments, the draftsmen note that "evidence of 'public acceptance' in this country . . . is relevant under our definition of obscenity to show that the material went beyond 'customary limits of candor.' " They continue:

> For example, a book could hardly be held obscene in one county of a state if it appeared openly on public library shelves and in book stores throughout the state. And a tribunal in one state is entitled to know that a moving picture or book has circulated elsewhere in the United States, that it has been reviewed in responsible journals there, and, perhaps that it has been adjudicated to be or not to be obscene. Customs do indeed vary among our states, but it would be unfortunate to have no evidence on "public acceptance," in a case where material is challenged so promptly in a particular jurisdiction that the only opportunity to test public acceptance has been in other states. Also the divergence of custom between one state and another is probably far less than differences between various social and religious groups within any one state. Furthermore, since a large part of the responsibility in this area has been assumed by the national government enforcing federal obscenity legislation, a country-wide approach is almost unavoidable. That which does not offend the sensibilities of most Americans is likely to be in the area of controversial morals or aesthetics, inappropriate for penal control.[62]

One might argue that the provision for a jury trial in obscenity prosecutions which many states have adopted means implicitly that the jury will use only local or state standards. Since the *Roth* case, however, the Supreme Court has made an independent judicial review of all lower court findings.[63] The Court thus has the opportunity to overthrow decisions based on local community standards and not in accord with national standards.

The most recent word on this subject was spoken by Justice Harlan in his opinion in *Manual Enterprises:*

> We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency. We need not decide whether Congress could constitutionally prescribe a lesser geographical framework for judging this issue which would not have the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency.[64]

Even the application of national standards is not entirely satisfactory. It is difficult

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[59] See United States v. Thirty-One Photographs, 156 F. Supp. 350 (S.D.N.Y. 1957).

[60] Lockhart & McClure, *supra* note 56, at 111.

[61] MODEL PENAL CODE, §207.10(2) (d) (Tent. Draft No. 6, 1957).

[62] *Id.* at comment, 44-45.

[63] See *supra* notes 33-36.

[64] Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488 (1962).

to discover any national consensus about obscenity beyond the repugnance of the nation toward "hard-core" pornography. The problem is analogous to the one of judging whether a person has "good moral character."[65]

Procedural Problems

Since the landmark decision in the *Roth* case, Justice Brennan has devoted most of his efforts in the area of obscenity regulation to safeguarding the procedural rights of defendants.[66]

On the fundamental issue of prior restraint on the publication of obscene material his position is clear. In *Times Film Corp. v. City of Chicago*[67] a majority of five justices upheld a Chicago ordinance requiring submission of all motion pictures for examination by a censorship board prior to public exhibition. The Court answered in the negative the narrowly framed issue: "whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture."[68] No judgment was passed on the validity of the tests used by the censor to evaluate the films reviewed, nor was any indication of the content of the motion picture in question presented on the record.

Justice Brennan joined in Chief Justice Warren's dissent, which saw the issue of the case as presenting the "question of our approval of unlimited censorship of motion pictures before exhibition through a system of administrative licensing."[69] The dissent recognized that prior restraint as a constitutional bar does have exceptions, but that these exceptions were never thought to include censorship of motion pictures. The opinion also voiced serious objections to the administrative procedure of Chicago's censorship system, an argument wide of the issue to which the majority limited itself.

Unauthorized Censorship

Unauthorized censorship by governmental agencies lacking jurisdiction to reach a judgment about obscene material has also been of concern to Justice Brennan. In *Manual Enterprises,* Justice Harlan stated that magazines barred from the mails by the Post Office Department were not obscene because they lacked the quality of "patent offensiveness" required by constitutional standards.[70] Justice Harlan also stated that the obscene – advertising proscription of Section 1461 of Title 18 of the United States Code requires proof that the publisher knew that at least some of his advertisers were offering to sell obscene material.

Justice Brennan chose a narrower ground for reaching the same conclusion in a separate concurring opinion, in which he was joined by Chief Justice Warren and Justice Douglas.[71] He would reverse the judgment of the Court of Appeals because the statute under which the Post Office acted, being a criminal statute, could not be interpreted to authorize seizure of the mails and refusal to mail by that governmental department. After a painstaking survey of the legislative history of the statute, he concluded that Congress had not authorized the Postmaster

[65] See, *e.g.,* Johnson v. United States, 186 F.2d 588 (2d Cir. 1951); Repouille v. United States, 165 F.2d 152 (2d Cir. 1947); Petition of R - - - -, 56 F. Supp. 969 (D. Mass. 1944); Cohen, Robson and Bates, *Ascertaining The Moral Sense of the Community,* 8 J. LEGAL ED. 137 (1955).

[66] See Speiser, *Mr. Justice Brennan and The Bill of Rights,* 11 CATHOLIC U.L. REV. 15, 34 (1962).

[67] 365 U.S. 43 (1961).

[68] *Id.* at 46.

[69] *Id.* at 50, 51 (dissenting opinion).

[70] 370 U.S. 478 (1962).

[71] *Id.* at 495.

General to censor obscene material under this statute. "The area of obscenity is honeycombed with hazards for the First Amendment guarantees," he wrote, "and the grave constitutional questions which would be raised by the grant of such a power should not be decided when the relevant materials are so ambiguous as to whether any such grant exists."[72]

The two vices of prior restraint and lack of jurisdiction were found in a system of "informal censorship" struck down in *Bantam Books, Inc. v. Sullivan*[73] as a violation of the fourteenth amendment. The Rhode Island Legislature had created a "Commission to Encourage Morality in Youth," which notified distributors that books or magazines distributed by him had been found objectionable and that notification of this fact would be sent to local police departments for possible prosecution. There was no provision for notice and hearing before publications were listed as objectionable nor for judicial review of the Commission's determination. The vice of the system, in Justice Brennan's eyes, was this:

> The Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation 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. Criminal sanctions may be applied only after a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process. The Commission's practice is in striking contrast, in that it provides no safeguards whatever against the suppression of non-obscene, and therefore constitutionally protected, matter.[74]

[72] *Id.* at 500.
[73] 372 U.S. 58 (1963).
[74] *Id.* at 69-70.

"Guilty Knowledge"

While the *Roth* definition of obscenity eliminated many of the problems encountered by state legislatures in drafting obscenity statutes, not all such problems had disappeared. A Los Angeles ordinance had made it unlawful "for any person to have in his possession any obscene or indecent writing, [or] book . . . in any place of business where . . . books . . . are sold or kept for sale."[75] The California courts had construed the ordinance as imposing absolute criminal liability, regardless of the defendant's knowledge of the contents of the books he kept for sale. Reversing the conviction of the bookseller, the Supreme Court, through Justice Brennan, held that the state could not constitutionally eliminate all mental elements from the crime. To penalize booksellers "even though they had not the slightest notice of the character of the books they sold," would, he reasoned, impose a severe limitation on the public's access to constitutionally protected material. "[T]imidity in the face of absolute criminal liability" would lead booksellers to "self-censorship, compelled by the State . . . affecting the whole public, hardly less virulent for being privately administered."[76]

Justice Brennan did not attempt to determine the nature of the mental element necessary to satisfy the constitutional requirement. He recognized that circumstances might warrant the inference that a bookseller, despite his denial of knowledge, was aware of a book's contents. But in a separate concurring opinion Justice Frankfurter protested this failure to give "some indication of the scope and quality of *scienter* that is required."[77] He preferred that the

[75] Smith v. California, 361 U.S. 147, 148 (1959).
[76] *Id.* at 154.
[77] *Id.* at 162.

Court acknowledge that "a bookseller may . . . be well aware of the nature of a book and its appeal without having opened its cover, or, in any true sense, having knowledge of the book."[78]

The majority opinion explicitly left open the question whether an honest mistake as to whether a book's contents in fact were obscene need be an excuse. It has been argued that the strong public interest in encouraging dissemination of non-obscene literature dictates an affirmative answer.[79] Where "hard-core" pornography is involved, such a defense would obviously be rejected as untrue. But it would be very difficult for a bookseller to determine in advance of a judicial ruling whether a book is obscene, in view of the evolving constitutional standards. To require that a bookseller sell such a book at his peril would constitute a substantial deterrent to the sale of non-obscene literature.

Yet this answer creates the danger, pointed out by Justice Frankfurter, that effective state control over the distribution of obscene literature might be seriously hampered. As a solution to the dilemma, it has been proposed that where courts have found a book obscene in declaratory judgment proceedings or have issued an injunction against such a book, each bookseller within the state could readily be given notice of the decision, which notice would constitute adequate proof of *scienter*.[80]

Trials and Warrants

Justice Brennan was one of four Justices who dissented from the Court's decision upholding a New York law authorizing injunctive action by municipalities to prevent the sale or distribution of obscene material.[81] Justices Warren, Douglas and Black dissented because the statute imposed an invalid prior restraint. Justice Brennan, however, dissented on an entirely different ground — that the New York statute failed to provide for the right to a jury trial. He placed a high value on preserving the right to a jury trial in this area, since 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 obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards.[82]

The regard for a jury trial in this area, it should be noted, is not shared by Justices Black or Douglas or by Justice Harlan who stated in the *Roth* case:

> Many juries might find Joyce's "Ulysses" or Boccacio's "Decameron" was obscene, and yet . . . no such verdict would convince me, without more, that these books are "utterly without redeeming social importance."[83]

In another recent case, Justice Brennan experienced no difficulty in convincing the rest of the Court of the unconstitutionality of a Missouri law permitting the issuance of a search warrant for obscene publications in an *ex parte* hearing by a judge who did not even see the publication or specify the particular ones which were to be seized.[84] The warrants authorized police officers to search

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[78] *Id.* at 164.
[79] Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 106 (1960).
[80] *Id.* at 106-107.
[81] Kingsley Books, Inc. v. Brown, 354 U.S. 436, 447 (1957).
[82] *Id.* at 448.
[83] Roth v. United States, 354 U.S. 476, 498 (1957).
[84] Marcus v. Search Warrant, 367 U.S. 717 (1961).

for and so seize all "obscene publications." Justice Brennan, in a carefully worded opinion, ruled that because freedom of the press was involved, a state would have to be particularly careful in adopting procedures for dealing with obscenity. He compared step by step the Missouri procedure with the New York procedure upheld in *Kingsley Books, Inc. v. Brown*.[85] While a limited injunction had been allowed in the latter case, the closely defined procedural safeguards surrounding this remedy had led to its approval by the Supreme Court. But in this case he thought that "procedures which sweep . . . so broadly and with so little discrimination are obviously deficient in techniques required by the Due Process clause of the Fourteenth Amendment to prevent erosion of the constitutional guarantees."[86]

An Evaluation

An ethical or theological evaluation of the current legal climate concerning regulation of obscenity must begin with differentiation in the functions of the legal and moral orders. That which is obscene in the moral order is not necessarily obscene in the legal order. Thus a work may be called morally obscene if its intrinsic tendency is such as actually to arouse or is calculated to arouse sexual passion in the viewer or reader, but comparatively few works judged immoral would be legally prohibited under the *Roth* definition of obscenity and its later interpretations.

St. Thomas pointed out the fundamental distinction between the moral and legal orders:

> Human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices from which the virtuous abstain, but only the more grievous vices from which it is possible for the majority to abstain; and chiefly these that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft, and suchlike.[87]

Thus the law must consider the social aspects of a ban on obscenity. It must ask whether such a ban might have harmful effects on the dissemination of ideas and the distribution of literature, essential to the political processes and intellectual growth of a democracy. It must recognize that men can be coerced only into a minimal amount of moral action, especially in sexual matters. In view of the American community's presumption in favor of freedom, the law must make the advocate of constraint present a convincing argument for its necessity or utility. It will therefore often settle for a minimum of constraint because of the conflict of moral views in a pluralistic society. Mindful of its nature, the law will be tolerant of many evils that morality condemns.

This approach, however, is not without its own dangers. It is very hard to assess what are the right prudential limits of the toleration of moral evil. The state, independently of any moral consensus of its members, is charged by natural law to promote and to protect objective moral values that are indissoluble from any just appraisal of the common good.

One questions whether the Court is accurate in its appraisal that there is no moral consensus in the community in controlling obscenities beyond the area of "hard-core pornography." The law must at times perform an educative function, as illustrated in

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[85] *Supra* note 81, at 436.

[86] Marcus v. Search Warrant, *supra* note 84, at 733.

[87] SUMMA THEOLOGICA, I, II, q. 96, a.2. (Dominican Fathers translation).

decisions of the last decade concerning racial segregation.

Governmental censorship is an essentially negative weapon and leaves fundamental factors in the moral climate untouched. Private voluntary agencies using procedures analogous to the juridical must fill the breach. But even here the danger is a concentration on censorship to the neglect of encouraging the reading of good literature. "Our chief problem . . . is not literary censorship, but literary creation."[88]

THE RELIGION CLAUSES

Mr. Justice Brennan was the first Roman Catholic appointed to the United States Supreme Court since the death of Justice Frank Murphy in 1949. At the hearing of the Senate Judiciary Committee on his confirmation, Justice Brennan was asked to answer a question submitted by Charles Smith of the National Liberty League as to whether his primary loyalty was to the Catholic Church or to the Constitution. Brennan replied:

> Senator, I think the oath that I took is the same as the one that you and all of the Congress, every member of the executive department up and down all levels of government take to support the Constitution and laws of the United States. I took that oath just as unreservedly as I know you did, and every member and everyone else of our faith in whatever office elected or appointive he may hold. And I say not that I recognize that there is any obligation superior to that, rather that there isn't any obligation of our faith superior to that. And my answer to the question is categorically that in everything I have ever done, in every office I have held in my life or that I shall ever do in the future, what shall control me is the oath that I took to support the Constitution and laws of the United States and so act upon the cases that come before me for decision that it is that oath and that alone which governs.[89]

"Congress shall make no law respecting an establishment of religion nor prohibiting the free exercise therof." In sixteen words the Founding Fathers wrote into the Constitution a sentence which is at once both a fundamental tenet and a basic problem of American democracy. The "religion clauses" of this amendment were designed to prevent the development of religious wars and persecutions which had characterized European life since the time of the Protestant Reformation by keeping the Federal Government neutral in matters affecting religion and by guaranteeing individual citizens the right to believe and act according to their personal religious convictions. At the same time, the clauses were necessarily phrased in general terms, leaving to later generations their application to specific problems. The work of interpreting these clauses was vastly complicated by the fact that religious convictions are such a fundamental part of human nature and therefore lead so easily to controversy. It is in this context that the nomination of Justice Brennan to the Supreme Court took an added significance because of his Catholicism.

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[88] MURRAY, WE HOLD THESE TRUTHS 174 (1960).

[89] *Hearings before the Senate Committee on the Judiciary, on the Nomination of William Joseph Brennan, Jr. to be Associate Justice of the Supreme Court of the United States,* 85th Cong., 1st Sess., p. 34, n. 40 (1957). Smith accompanied his organization's question to Justice Brennan with a statement which speaks for itself: "We do not contend that confirmation of the appointment of Judge Brennan to the Supreme Court is illegal; we oppose it on the same ground that a Catholic in a predominantly Catholic country would oppose the nomination of a Protestant. This is a predominantly Protestant Country. In Catholic nations, we believe, Protestants are not appointed to the highest court." *Id.* at 32.

Before proceeding to describe and analyze Justice Brennan's opinions interpreting the first amendment's religion clauses, a short summary of the prior Supreme Court decisions in this area is necessary as a background.

Judicial Interpretation of the First Amendment

The Free Exercise Clause

The free exercise clause of the first amendment involves two problems which complement one another. To what extent shall governmental interests expressed in legislation override actions which violate the law but are based on religious convictions? On the other hand, when does governmental action infringe upon an individual's religious liberty?

The first cases dealing with the religion clauses which reached the Supreme Court concerned the former of these issues. In *Reynolds v. United States,*[90] the Court sustained the validity of a statute declaring polygamy illegal, in spite of appellant's argument that he had violated the statute because of his religious beliefs. The Court reasoned that, while "Congress was deprived of all legislative power over mere opinion," it nevertheless "was left free to reach actions which were in violation of social duties or subversive of good order." It found that the statute was within the scope of governmental authority and of general application, and therefore could be applied without regard for the religious convictions of those whose acts constituted wilful violation of the law.[91]

In *Davis v. Beason,*[92] the Court sustained the conviction of a member of the Mormon church for conspiracy to pervert the laws of the Territory of Idaho which required that, prior to exercising his franchise, a voter swear an oath that he was not a polygamist or member of a group advocating this practice. The Court ignored the appellant's contention that the statute violated Article VI of the Constitution.[93]

While the Court considered the national interest in upholding public morals was of sufficient importance to justify a prohibition against polygamy, the need for compulsory military service was not of the same character. The exemption from service granted to ministers, students and members of religious sects whose principles forbade participation in war was upheld by a unanimous court in the *Selective Draft Law Cases.*[94] Chief Justice White abruptly dismissed the contention that the exemption was a violation of the establishment clause, in spite of the fact that the exemption was based solely on a classification turning on religious belief.

The Court assumed a more neutral position in *Hamilton v. Regents of the Univ. of California.*[95] Two students had been suspended by the University when they absented themselves from R.O.T.C. classes because of their religious affiliation. The California courts denied the students' petition for relief, and after accepting jurisdiction, the Supreme Court of the United States dismissed the case for want of a substantial federal question.

For the first time, the Court invalidated state legislation in the area of religion in

[90] 98 U.S. 145 (1878).
[91] *Id.* at 164.
[92] 133 U.S. 333 (1890).
[93] It provides: "No religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."
[94] 245 U.S. 366 (1918).
[95] 293 U.S. 245 (1934).
[96] 310 U.S. 296 (1940).

Cantwell v. Connecticut,[96] holding that the liberty safeguarded by the free exercise clause was also protected from state action under the due process clause of the fourteenth amendment. The decision also held that the delegation of discretion to a public official to determine whether a particular cause was religious in nature was "censorship of religion" and violated the liberty guaranteed by the first amendment.

A new interpretation of the free exercise clause began to emerge in *Jamison v. Texas.*[97] The appellant had distributed leaflets inviting the reader to a religious meeting and advertising religious books for sale, in violation of a city ordinance forbidding the distribution of advertising handbills on its streets. The Supreme Court reversed appellant's conviction, holding that the religious nature of the leaflet removed it from the prohibition of the ordinance. Neither the advertisements nor the invitation, even if an admission fee were charged at the meeting, would classify the leaflet as commercial in nature.

In *Murdock v. Pennsylvania,*[98] the Court granted religious literature greater protection than that given to non-religious speech or literature. It invalidated a state tax on agents and distributors of religious literature, because no state may "impose a charge for the enjoyment of a right" granted by the Bill of Rights. "Freedom of press, freedom of speech, freedom of religion are in a preferred position."[99]

Religious belief was again the occasion for an exemption from state law in *West Virginia Board of Educ. v. Barnette,*[100] but the Court based its decision that Jehovah's Witnesses could not be compelled to salute the flag on non-religious grounds:

> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.[101]

The "preferred position" doctrine ran into difficulties at its first test.[102] The Court found the interest of the states in limiting child labor too compelling to ignore, in upholding the conviction of a member of the Jehovah's Witnesses whose nine-year old niece and ward distributed religious literature on the streets in the evening.

The doctrine was reiterated in *Follet v. Town of McCormick*[103] and was extented in *Marsh v. Alabama*[104] to include the restrictions placed on the religious activities within a "company town" by the owner of the property.

Any attempt to find a common theme running through decisions in the area of the free exercise clause is hazardous. At least these principles, however, can be gleaned from the foregoing decisions: (1) religious belief will not exempt an individual from a law intended to further public health or morals,[105] but it may win out when the law attempts to set a pattern of conformity in the expression of ideals or beliefs;[106] (2) gov-

[97] 318 U.S. 413 (1943).
[98] 319 U.S. 105 (1943).
[99] *Id.* at 115.
[100] 319 U.S. 624 (1943).
[101] *Id.* at 642. Justice Brennan believes that the key to this holding lies in the fact that attendance at school was compulsory. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 252 (1963) (concurring opinion).
[102] Prince v. Massachusetts, 321 U.S. 158 (1944).
[103] 321 U.S. 573 (1944).
[104] 326 U.S. 501 (1946).
[105] See, *e.g.*, Prince v. Massachusetts, *supra,* note 102; Davis v. Beasar, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878).
[106] See, *e.g.*, West Virginia Board of Educ. v. Barnette, *supra* note 100.

ernmental action may not forbid activities designed to disseminate religious beliefs, even though the same activities may be prohibited if they lack a religious nature, provided they are not contrary to public health or morals;[107] (3) it is not the function of government to determine what is a religious cause;[108] and (4) the free exercise clause of the first amendment is applicable to the states through the fourteenth amendment.[109]

The Establishment Clause

For the first 160 years of our national existence, litigation concerning the establishment clause seldom reached the Supreme Court of the United States. In most of the cases concerning the free exercise clause, the Court impliedly assumed that the two religion clauses were separable and of independent vitality.

The first comprehensive treatment of the establishment clause was given in *Everson v. Board of Educ.*[110] The Court upheld the plan of a New Jersey township for reimbursing parents for bus fare paid to transport their children to private school.

Justice Black, writing for the majority, expressed a sweeping view of the establishment clause:

> Neither a state nor the Federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion . . . . In the words of Jefferson, the clause against establishment of religion by law was intended to exert "a wall of separation between church and state."[111]

In spite of Justice Black's statement, the Court held that legislation justified by a secular welfare purpose was not a violation of the establishment clause, even though church schools indirectly benefited from the legislation.

But in *McCollum v. Board of Educ.*,[112] the Court refused to permit the compulsory educational machinery of the state to be used for religious instruction in public school buildings.

A different plan, however, which permitted students to leave school premises before the end of the school day to take religious instruction elsewhere, successfully met constitutional requirements in *Zorach v. Clauson*.[113] While "government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religions on some person,"[114] Justice Douglas recognized that the separation of Church and State demanded by the first amendment was not absolute. The state was permitted to respect "the religious nature of our people" and to accommodate "the public service of their spiritual needs."[115]

The only factual difference between the Champaign and the New York City programs was that the students released to take religious education in New York left the school premises in order to do so. To Justice Jackson the distinction was trivial, "almost

[107] See, *e.g.*, Marsh v. Alabama, *supra* note 104; Follett v. Town of McCormick, *supra* note 103; Murdock v. Pennsylvania, *supra* note 98; Jamison v. Texas, *supra* note 97; Cantwell v. Connecticut, 310 U.S. 296 (1940).

[108] See, *e.g.*, Cantwell v. Connecticut, *supra* note 107.

[109] *Ibid.*

[110] 330 U.S. 1 (1947).

[111] *Id.* at 15-16.

[112] 333 U.S. 203 (1948).

[113] 343 U.S. 306 (1952).

[114] *Id.* at 313.

[115] *Ibid.*

to the point of cynicism."[116] Perhaps the comment of Professor Kurland best summarizes the reaction of many scholars to the *Zorach* decision: "Even students of constitutional law would prefer the honest and open retraction utilized in the other cases to the patently disingenuous method of revision used in *Zorach*."[117]

Again some tentative conclusions can be drawn from the cases interpreting the establishment clause: (1) government cannot enact legislation favoring one religious sect over others or preferring religion against non-religion;[118] (2) the government cannot use public school buildings for religious instruction conducted by members of the various sects, but it can accommodate the class schedule in the public schools to allow children to go outside the public school premises for religious instruction;[119] (3) government may enact a legislative program designed to promote the safety of children and involving no direct grants to church-related schools, although incidental benefits to the latter derive from the program;[120] (4) government cannot enact legislation which shows preference for religious sects;[121] and (5) the establishment clause of the first amendment applies to the states through the fourteenth amendment.[122]

These propositions will be compared later with the opinions of Justice Brennan.

Justice Brennan's Decisions

New Jersey

While a member of the New Jersey Supreme Court, Justice Brennan had taken part in only one decision involving freedom of religion.[123] The Gideons International had arranged for the distribution of copies of the King James version of the Psalms, the Book of Proverbs and the New Testament with the Board of Education of Rutherford, New Jersey. These bibles were to be furnished to all public school children whose parents had signed forms requesting them. Justice Brennan joined in the opinion of the court that the distribution of bibles through the public school system was a preference of one religion over another and therefore violative of the establishment of religion clause of the first amendment as incorporated in the fourteenth amendment.

The Sunday Closing Laws

The first major test of Justice Brennan's attitude toward the concept of separation of Church and State came in 1961 in four cases before the United States Supreme Court, testing the validity of compulsory Sunday closing laws.[124] In the first of these cases, *McGowan v. Maryland,* the majority of the Court, speaking through Chief Justice Warren and joined by Justice Brennan, upheld

[116] *Id.* at 323, 325 (dissenting opinion).

[117] Kurland, *Of Church and State and The Supreme Court,* 29 U. CHI. L. REV. 26, 77 (1961). Justice Brennan sees a "deeper difference" between the McCollum and Zorach programs. The former "placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects." School Dist. of Abington Township v. Schempp, 374 U.S. 203, 263 (1963) (concurring opinion).

[118] See Zorach v. Clauson, *supra* note 113; McCollum v. Board of Educ., *supra* note 112; Everson v. Board of Education, *supra* note 110.

[119] See Zorach v. Clauson, *supra* note 113; McCollum v. Board of Educ., *supra* note 112.

[120] See Everson v. Board of Educ., *supra* note 110.

[121] *Ibid.*

[122] *Ibid*

[123] Tudor v. Board of Educ., 14 N.J. 31, 100 A.2d 857 (1953).

[124] McGowan v. Maryland, 366 U.S. 420 (1961); Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961).

the conviction of employees of a discount store who sold certain legally forbidden articles on Sunday. After holding that the appellants lacked standing to raise any question of infringement of religious freedom, the Court went on to deal with the "establishment" question. It stated that the establishment clause had its own vitality without dependence upon the free exercise clause, and therefore appellants had standing because they had suffered economic injury allegedly due to the imposition on them of the tenets of the Christian religion. But the Court found that Sunday closing laws were, in spite of their religious origin, now primarily secular in character and purpose:

> The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals . . . .[125] [W]e believe that the air of the day is one of relaxation rather than one of religion.[126]

Chief Justice Warren cited two reasons for the specification of a particular day of rest by statute: (1) the family and the community could share in a single day; and (2) enforcement of closing laws would be easier.[127]

In *Braunfeld v. Brown*[128] and *Gallagher v. Crown Kosher Super Market,*[129] the emphasis shifted from the establishment clause to the free exercise guarantee. The Court considered the question whether a Sunday closing law was invalid as applied to Orthodox Jewish storekeepers who were compelled, by their religion, to remain closed on Saturday. In sustaining the validity of the legislation, the Chief Justice reasserted the proposition that the state had no power to coerce belief; at its greatest the power extended only to the control of actions. But even actions were not absolutely subject to control by the state. He reasoned that to strike down legislation which imposed only an indirect burden on the exercise of religion would radically restrict the operating latitude of the legislature. The volume of current legislation which burdens the free exercise of religion, coupled with the vast number of religious denominations in the pluralistic American community, led him to conclude:

> Consequently it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions.[130]

He drew this distinction:

> If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that laws is constitutionally invalid even though the burden may be characterized as being only indirect. But if the state regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the satute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.[131]

Justice Brennan dissented in the *Braunfeld*[132] and *Gallagher*[133] cases. He contended that the Jewish storekeepers were being penalized for their religious beliefs which

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[125] McGowan v. Maryland, *supra* note 124, at 445.
[126] *Id.* at 448.
[127] *Id.* at 452.
[128] 366 U.S. 599 (1961).
[129] 366 U.S. 617 (1961).
[130] Braunfeld v. Brown, *supra* note 124, at 606.
[131] *Id.* at 607.
[132] *Id.* at 610 (dissenting opinion).
[133] Gallagher v. Crown Kosher Super Market, *supra* note 124, at 642 (dissenting opinion).

compelled them to close their stores on Saturday, while the state forced them to close on Sunday as well. He acknowledged that the Sunday closing laws served a valid secular purpose, but at the same time he saw in them a violation of the free exercise clause of the first amendment. In his view, legislation which infringes on constitutional rights guaranteed by the first amendment is subject to a more exacting standard than a statute which collides with the due process clause of the fourteenth amendment. Such legislation must have more than a mere "rational basis" for its adoption by a state legislature. "Substantial state interests," found by the majority of the Court to justify encroachment on religious practices, were not sufficient. The mere convenience of having everyone rest on the same day does not justify "this substantial though indirect limitation of appellant's freedom."[134] As an alternative, he argued that the states should grant exemptions from the Sunday closing laws to those whose religious beliefs forced them to close on another day of the week.

Justice Brennan agreed with the majority that Sunday closing laws, because of their valid secular purposes, do not establish the Christian religion, even though incidental benefits accrue to Christians as a result of these laws. At the same time he agreed with the other justices that these laws would have to be condemned as an attempt to establish religion if they could be justified only by religious considerations. Thus, his opinion is consistent with previous interpretations of the establishment clause in holding that governmental action serving a valid public purpose by reference to civil and secular considerations does not become invalid because it operates simultaneously to promote religious interests. His thought is parallel to the holding of the *Everson* case, that the spending of public money to send children by bus to parochial schools serves a valid secular purpose even though it also advances and helps a program of religious education.

Justice Brennan dissented, however, when he considered the implications of the Sunday laws in reference to the free exercise clause, and he thereby departs from prior constitutional interpretation. In proposing that Sabbatarians be granted an exemption from these laws as a matter of constitutional right he breaks new ground. Chief Justice Warren had carefully enumerated his objections, both theoretical and practical, to this proposal. Professor Kurland has thus summarized these objections: (1) such exemptions undermine the purpose of a day without the atmosphere of commercial noise and activity; (2) they would require inquiry by the state into religious beliefs; (3) they might interfere with the effectuation of the fair employment practices law; (4) they would make enforcement of the laws difficult; and (5) they would give Sabbatarians an economic advantage over their competitors who must remain closed on Sunday, so that Sunday observers might well complain that their religions were the victims of discrimination.[135]

Justice Brennan quickly refuted the practical argument concerning discrimination in hiring employees:

> Most such anti-discrimination statutes provide that hiring may be made on a religious basis if religion is a *bona fide* occupational qualification.[136]

He likewise saw little problem in enforcing these laws:

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[134] Braunfeld v. Brown, *supra* note 124, at 614.

[135] Kurland, *Of Church and State and The Supreme Court*, 29 U. CHI. L. REV. 1, 90 (1961).

[136] Braunfeld v. Brown, 366 U.S. 599, 615 (1961).

> ... the granting of such an exemption would make Sundays a little noisier, and the task of police and prosecutor a little more difficult. It is also true that a majority—21—of the 34 States which have general Sunday regulations have exemptions of this kind. We are not told that those States are significantly noisier, or that their police are significantly more burdened, than Pennsylvania's.[137]

It was rather on the level of first amendment theory that he endeavored to put the thrust of his dissent. He asked whether the interest of the state in having everyone rest on the same day is so compelling that it entitles the state to burden the Sabbatarian's freedom of worship. He distinguished the infringements upon the free exercise of religion permitted in *Reynolds v. United States*[138] and *Prince v. Massachusetts*[139] by arguing that the interests of the state in stamping out polygamy, "a practice deeply abhorred by society," and in protecting children provide a much stronger justification for an infringement upon religious beliefs, than does the state's interest in having everyone rest on the same day.[140]

One might ask whether Justice Brennan is prepared to grant exemptions from a law forbidding polygamy to those who practice plural marriage as a matter of religious conviction, or to grant exemptions from public health laws to persons who are opposed to medical treatment on religious grounds. His dissent indicates that his answer to these questions would be in the negative. It is the writer's view that the underlying reason for Justice Brennan's distinguishing these cases from the Sunday law cases is not based on constitutional principle but on subjective preference. Justice Brennan has "balanced the interests" involved, a uniform day of rest against the free exercise clause. He is quite willing to substitute his judgment about the relative worth of these interests in place of the state legislature's judgment. In reality, his dissent may be perfectly consistent with the *Reynolds* and *Prince* decisions, in that he happens to agree with the legislature's judgment in those cases. The difficulty is that Justice Brennan gives us no constitutional principles for distinguishing between these cases, and thus does not increase the predictability of future decisions in the hazardous area of the free exercise clause.

Another serious problem in Justice Brennan's dissent is his failure to answer the last objection to the exemption proposal raised by Chief Justice Warren who had observed that Sunday observers might complain of religious discrimination if Sabbatarians were permitted to gain an economic advantage by remaining open on Sundays. At issue here is the relationship which should exist between the establishment clause and the free exercise clause. An exemption from a police regulation, framed in terms of religious belief, seems to be a violation of the establishment clause, but Justice Brennan never discusses this possible conclusion. He seems to have ignored some of the later decisions, particularly *Zorach,* which had indicated that there was an interdependence between the two religion clauses, and has returned to the days of the "preferred position" doctrine, which considered the two clauses to be independent of one another.

The Notary's Oath

Shortly after the Sunday closing law cases, the Supreme Court was again called on to decide litigation concerning the religion clauses of the first amendment. Roy R.

[137] *Id.* at 614-615.
[138] 98 U.S. 145 (1878).
[139] 321 U.S. 158 (1944).
[140] Braunfeld v. Brown, *supra* note 136, at 614.

Torcaso, having been appointed by the Governor of Maryland to the office of notary public, had been denied his commission when he refused to sign the prescribed oath and affirmation of the existence of God.[141] His request for a writ of mandamus was refused in the circuit court and later in the Court of Appeals of Maryland.[142]

The Supreme Court of the United States unanimously reversed the state court's decision.[143] Justice Black wrote the opinion of the Court, in which all the justices joined, except Justices Frankfurter and Harlan who concurred in the result. After establishing that the oath was a religious test for office and examining the history of such tests in England and Colonial America, he cited Article VI of the Constitution[144] as proof that the "test oath is abhorrent to our traditions." The first amendment, he stated, was clearly designed to go beyond Article VI.

The opinion went on to refute a statement by the Maryland Court of Appeals that the holding and opinion in *Zorach*[145] had repudiated the broad statements in *Everson*[146] and *McCollum*.[147] The Court stated:

> Nothing decided or written in *Zorach* lends support to the idea that the Court there intended to open up the way for government, state or federal, to restore the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have . . . a belief in some particular kind of religious concept.[148]

The next paragraph appears to be the core of the Court's opinion:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[149]

In his final paragraph Justice Black based his opinion on what is apparently a paraphrase of the free exercise clause:

> This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him.[150]

At least some effects of the *Torcaso* decision are clear. The case clearly outlaws all religious tests for public office. Dicta in the opinion appears to invalidate any disabilities of witnesses based on religious belief. In fact, Leo Pfeffer, counsel for Torcaso, has advanced the view that the decision should, but will not, result in the amendment of state and federal statutes prescribing oaths so as to remove the phrase "so help me God."[151]

It seems also that the protection of the free exercise clause has been extended to include non-believers. This conclusion is based on the first two statements of Justice

[141] This affirmation was required on the basis of Article 37 of The Maryland Declaration of Rights, which reads as follows: "That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office other than the oath prescribed by this Constitution."

[142] Torcaso v. Watkins, 223 Md. 49, 162 A.2d 438 (1960).

[143] Torcaso v. Watkins, 367 U.S. 488 (1961).

[144] This article of the United States Constitution reads: "No religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

[145] Zorach v. Clauson, 343 U.S. 306 (1952).

[146] Everson v. Board of Educ., 330 U.S. 1 (1947).

[147] McCollum v. Board of Educ., 333 U.S. 203 (1948).

[148] Torcaso v. Watkins, *supra* note 143, at 494.

[149] *Id.* at 495.

[150] *Id.* at 496.

[151] Pfeffer, *Some Current Issues in Church and State*, 13 W. RES. L. REV. 9, 33 (1961).

Black noted above.[152] Leo Pfeffer sees here a parallel to the first amendment's guarantee of freedom of non-speech and non-listening.[153]

A more interesting aspect of the *Torcaso* case is the possible consequences of its definition of the term "religion." Justice Black spoke of religions founded on beliefs other than a belief in the existence of God.[154] He cited Buddhism, Taoism, Ethical Culture and Secular Humanism as examples. The implications of this definition will be explored later in this article.

Religious Activities in the Classroom

Two recent decisions banning religious activities in public school classrooms have provided the clearest exposition of both the Court's and Justice Brennan's thought about the implications of the first amendment.

In *Engel v. Vitale,*[155] the Court upheld the contention of parents of public school children that the daily, non-compulsory recitation in the classroom of a prayer composed by the New York State Board of Regents violated the establishment clause of the first amendment.[156] Justice Black, writing for the majority, interpreted the clause to mean that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[157]

He found support for this conclusion in the history of religious and political strife in England in the seventeenth and eighteenth centuries resulting from governmental adoption of the Book of Common Prayer. To avoid such strife the first amendment was composed by the Founding Fathers, who were unwilling "to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box . . . ."[158]

Neither the denominational neutrality of the Regents' Prayer nor the provision for voluntary participation by the students could remove it from the reach of the establishment clause. Evidence of coercion is constitutionally irrelevant when a violation of this clause is at issue.

He concluded:

> Government . . . should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves.[159]

One year later the Court reached a similar decision, but with a lengthier explanation, in *School Dist. of Abington Township v. Schempp.*[160] The reading of passages from the Bible and the recitation of the Lord's Prayer, in essentially the same circumstances as in *Engel,* could not constitutionally be required by state law or a school board under the establishment clause of the first amendment, made applicable to the states through the fourteenth amendment.

The majority opinion, written by Justice Clark, painstakingly develops the theme that the first amendment demands governmental neutrality in matters directly affecting religion or religious belief. The constitutional test of legislation touching religion was thus stated:

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[152] See notes 148 and 149, *supra.*

[153] Pfeffer, *supra* note 151, at 32.

[154] Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961).

[155] 370 U.S. 421 (1962).

[156] The prayer read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country."

[157] Engel v. Vitale, *supra* note 155, at 422.

[158] *Id.* at 429.

[159] *Id.* at 435.

[160] 374 U.S. 203 (1963).

> What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[161]

Justice Clark insisted that the prohibition of these religious exercises did not result in an establishment of a "religion of secularism" in the schools. In fact, he saw no inconsistency with the first amendment in permitting the study of "comparative religion or the history of religion and its relationship to the advancement of civilization," or of the Bible "for its literary and historic qualities."[162]

Finally, he did not agree that the concept of neutrality collided with the majority's right to free exercise of religion, since the free exercise clause has never meant that a majority could use governmental machinery to practice its beliefs.

In an extensive concurring opinion,[163] Justice Brennan set out his views on the theory, purpose and previous judicial interpretations of the religious clauses of the first amendment.

The separation which characterizes religion-government relations is not described by the doctrinaire "wall" metaphor.[164] Rather it is an "elusive" line difficult to define because of the "paradox central to our scheme of liberty," that "while our institutions reflect a firm conviction that we are a religious people, those institutions by solemn constitutional injunction may not involve religion in such a way as to prefer, discriminate against, or oppress, a particular sect or religion."[165] Justice Brennan carefully delineates the involvements of religion with secular institutions which the Constitution enjoins: (those which)

(a) serve the essentially religious activities of religious institutions;
(b) employ the organs of government for essentially religious purposes; or
(c) use essentially religious means to serve governmental ends where secular means would suffice.[166]

He points out, however, that "not every involvement of religion in public life is unconstitutional."[167]

Justice Brennan's opinion also provides an insight into the relative weight which he attaches to arguments drawn from the legislative history of the religion clauses. He accepts Justice Frankfurter's view that the establishment clause extends beyond a mere prevention of the setting up of an official church.[168] The prohibition of the clause "was designed comprehensively to prevent those official involvements of religion which would tend to foster or discourage religious worship or belief.[169] The historical record is ambiguous, however, on the issue whether the clause covered devotional exercises in the public schools. The more fruitful inquiry is whether these exercises threaten the interdependence between religion and government which the Framers feared. The use of history "must limit itself to broad purposes, not specific practices. . . . It is *'a constitution* we are expounding,' and our interpretation

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161 *Id.* at 222.
162 *Id.* at 225.
163 *Id.* at 230.
164 *Id.* at 241.
165 *Id.* at 231.
166 *Ibid.*
167 *Id.* at 232.
168 McGowan v. Maryland, 360 U.S. 420, 465-66 (1961).
169 School Dist. of Abington Township v. Schempp, *supra* note 160, at 232.

of the First Amendment must necessarily be responsive to the much more highly charged nature of religious questions in contemporary society."[170]

In answer to the contentions of the school officials, and indirectly of a large segment of the general public, Justice Brennan considered some of the permissible forms of accommodation between government and religion. Such accommodation is possible in the following instances:

1. When a too rigid interpretation of the establishment clause would violate liberties protected by the free exercise clause. Thus chaplains are provided for military personnel and prisoners who are deprived by the government of the opportunity of practicing their faith at places of their choice.

2. Challenges to the recitation of prayers in legislative halls and the appointment of legislative chaplains are precluded by reason of the maturity of the audience, the "political" nature of the issues, and a probable lack of standing to raise such challenges.

3. It is still permitted to teach about the Bible or about the differences between religious sects in literature or history classes.

4. Tax deductions and exemptions which are generally available to educational, charitable and eleemosynary groups, but incidentally benefit religious groups, are permissible.

5. Non-discriminatory programs of governmental aid may constitutionally include individuals who become eligible wholly or partially for religious reasons.

6. Activities which are religious in origin but have ceased to have a religious meaning are not within the scope of the establishment clause. Into this category fall the motto, "In God We Trust," and various patriotic exercises used in the public schools, including the reference to God in the pledge of allegiance.

While the rationale for some of the above permissible accommodations between government and religion may be strained, Justice Brennan does attempt to give a unifying theme for many of the Court's decisions about religion in the public schools. Parental responsibility is the prime element in the religious and academic education of the child. The first amendment forbids government to inhibit the freedom of choice of the individual parent between public and private education, each with its own values. The state cannot diminish "the attractiveness of either alternative – either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures."[171]

It is arguable that Justice Brennan would find no constitutional difficulty in a program of governmental aid to children attending schools, even though church-related, and to their parents. Their exclusion would certainly diminish and possibly destroy parental freedom of choice. "The Framers (of the establishment clause) were not concerned," in his opinion, "with the effects of certain incidental aid to individual worshippers which come about as by-products of general and non-discriminatory welfare programs."[172]

Justice Brennan has left unanswered several major problems dealing with religion (or its absence) in the public schools. Critics of the *Engel* and *Schempp-Murray* decisions maintain that, since all education involves the inculcation of values, the elimination of devotional exercises from the public schools

[170] *Id.* at 241.

[171] *Id.* at 242.

[172] *Id.* at 302.

now means that only secular values will be taught. Thus a "religion of secularism" is established in the schools, in light of the wide definition of the term "religion" employed in *Torcaso*.[175] The Court has not answered this argument, except to state its disagreement with it.[174] One wonders, however, whether the outlawed devotional exercises actually had as much educational value as their proponents claim for them.

The study of the Bible and comparative religion will not be easily implemented by the public schools. One can imagine questions and inevitable litigations about the way a particular religion is taught and about the value judgments made in comparing religions.

In retrospect, the *Engel* and *Schempp-Murray* decisions, and in a larger sense the neutrality principle which they enunciate, are not philosophically and theologically unacceptable. It has been argued that democracy, as a mode of policy formation by majority decision, demands equality of citizens and the political rights of free speech, free assembly and free press.[175] Even more important are the political rights of freedom of religious exercise and the equality of all religions before the law, both necessary as means to the end of democratic decision-making. Thus governmental neutrality, but not hostility, toward religion, seems to be the best guarantee that the democratic system will continue.

[173] See, *e.g.*, Ball, *"Legal" Religion in the Schools*, 197 CATHOLIC WORLD 366, 371 (1963); *The School Prayer Case – Alternate Solutions*, 8 CATHOLIC LAWYER 286 (1962); *The School Prayer Case: Dilemma of Disestablishment*, 8 CATHOLIC LAWYER 182 (1962); DRINAN, RELIGION, THE COURTS, AND PUBLIC POLICY 109 (1963).

[174] School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963).

[175] REGAN, AMERICAN PLURALISM AND THE CATHOLIC CONSCIENCE 26-27 (1963).

CONCLUSION

Seven years are a comparatively short time, and it is perhaps premature to attempt to draw conclusions about the legal philosophy of Justice Brennan with any degree of finality. At the same time, however, one can clearly discern the outlines of his thought and the direction it is taking.

His general views about the first amendment are clear. The rights which it guarantees, particularly those of free speech and free press, are not absolute, and in this he differs from Justices Black and Douglas. In the *Roth* case, for example, he was quite willing to accept the fact that not every utterance is protected by the first amendment. Thus he is faced with the delicate task of balancing the demands of the individual with the needs of society. The cases reveal, however, a predilection for the freedom of the individual, and thus the scale is weighed in advance when the balancing process begins.

Justice Brennan has adopted a middle-of-the-road policy on the question of the relationship between the Bill of Rights and the due process clause of the fourteenth amendment. He has rejected the "incorporation" theory advocated by Justice Black, which held that the fourteenth amendment made applicable to the states all the provisions of the Bill of Rights.[176] But he has not swung to Justice Frankfurter's extreme of deference to reasonable state action. As he indicated in his recent lecture at New York University,[177] he favors the theory of Justice Cardozo that some of the guarantees of the Bill of Rights have been brought within the fourteenth amendment by the process of

[176] See, *e.g.*, Adamson v. California, 332 U.S. 46, 68 (1947) (dissenting opinion).

[177] Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. REV. 761, 769 (1961).

absorption.[178] But he would give a broad interpretation to the criterion of "ordered liberty," which has been used by the Court to justify the absorption of a specific guarantee.[179]

The role which Justice Brennan assigns to the Supreme Court is an active one. His preference for protecting the individual's rights and his desire to see more of the guarantees of the Bill of Rights applied to the states through the due process clause of the fourteenth amendment lead him to consider the Court as the ultimate agent to bring about these ends. Beginning with the *Alberts* case, where he disagreed with Justice Harlan concerning the standard to be used in judging state legislation, and as recently as the *Engel* and *Schempp* decisions, where he rejected a public school's religious exercises even though surrounded by safeguards for the rights of non-participants, he has been a consistent advocate of Supreme Court supervision of state legislative, administrative and judicial action.

His approach is not doctrinaire, however, but rather that of the pragmatist. One does not find in his opinions expositions of political principles or statements of his personal hierarchy of values. His is not the method of a Jeremy Bentham or a Roscoe Pound. He is typically American in his case-by-case approach to the solution of the questions brought before the Court. Future decisions will be made when they arise, not in the dicta of a present case. The lawyer will find little beyond the holding of the instant case to guide future argument, and the political theorist will find no sweeping generalizations.

Justice Brennan's judicial technique reminds one slightly of Justice Cardozo. It will be recalled that the latter was ingenious in finding a meaningful distinction between the instant case and a line of precedent which he did not wish to follow. Justice Brennan's method is to scrutinize lower court procedure. As illustrated in the obscenity cases, even the slightest infringement of a defendant's rights can be fatal to a government case, and thus Justice Brennan can avoid deciding the larger constitutional issues. Such an approach has much to recommend it.

Justice Brennan will probably not attain the status of a Marshall or a Holmes, but he does appear to be endowed with the humane spirit, the intellectual integrity, the largeness of vision, so essential in the judge confronted by the issues brought before the Supreme Court in this age of ideological struggle.

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[178] Palko v. Connecticut, 302 U.S. 319, 326 (1937).

[179] Brennan, *supra* note 177, at 773.