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Justice Brennan's Significant Departure and Warning of an Evisceration

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Justice Brennan's "Significant Departure" and Warning of an "Evisceration"

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When scholars, historians, teachers and students discuss the impact of former U.S. Supreme Court Justice William Brennan, they often discuss his remarkable First Amendment jurisprudence. Remarkable it was indeed. He constitutionalized libel law in *New York Times Co. v. Sullivan*, ensuring that "debate on public issues should be uninhibited, robust and wide-open."[1] He protected even repugnant forms of political protest in the flag burning cases of *Texas v. Johnson*[2] and *U.S. v. Eichman*.[3] There is no better mantra of the First Amendment than Brennan's classic phrase in the case of Gregory "Joey" Johnson: "if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable."[4] He showed deep commitment to religious liberty in *Sherbert v. Verner*, writing that "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[5]

But, Justice Brennan's greatest devotion to the First Amendment can be seen in two areas: (1) his remarkable "departure" in the obscenity arena; and (2) his warning about the secondary-effects doctrine.

Obscenity

Justice Brennan's first opinion for the United States Supreme Court was

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not one that he relished. Chief Justice Earl Warren assigned Brennan to the unenviable task of trying to define the indefinable. Brennan drafted the Court's first significant opinion on obscenity in 1957.[6] However, 16 years later Justice Brennan changed his mind, writing:

> I am convinced that that the approach initiated 16 years ago in *Roth v. United States*, and culminating in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure from that approach.[7]

His transformation deserves special scrutiny as the executive branch recently has instituted an upsurge in obscenity prosecutions.[8] The judiciary should carefully heed Brennan's warnings in his classic dissent in *Paris Slaton* that vagueness predominates in obscenity prosecutions.

Roth v. United States

The Court had addressed obscenity prosecutions before the consolidated cases of Samuel Roth and David Alberts, but this was the first time the Court squarely addressed the constitutional protection of material declared legally obscene.[9] Roth was charged with violating a federal obscenity law for mailing obscene materials. According to Brennan, "the dispositive question is whether obscenity is utterance within the area of protected speech and press."[10]

Justice Brennan reasoned that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance" and "obscenity is not within the area of constitutionally protected speech or press."[11]

However, the difficult task remained for Justice Brennan to explain what material qualified as obscenity. He noted that just because material relates to sex does not mean that it is obscene. "Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern," he wrote.[12]

Stressing the importance of the First Amendment, Brennan warned that the traditional standard for judging obscenity — from the British case of *Regina v. Hicklin* — was not adequate. The *Regina v. Hicklin* standard provided that obscenity could be determined by examining the effect of an isolated passage of a work upon particularly susceptible people. The *Hicklin* test was dangerous because it judged works of art according to the most susceptible person and because it allowed works of art to be judged by isolated passages. "The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press."[13]

Brennan approved of another test for obscenity – one that examined the material as a whole. This test asked "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[14]

This test, elaborated in later cases, provided for a three-prong test: (1) the dominant theme of the material as a whole appeals to the prurient interest; (2) the material is patently offensive; and (3) the material is utterly without redeeming social value.[15] Brennan

emphasized in a 1964 case that material which "has literary or scientific, or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection."[16]

Despite his best efforts, the number of obscenity cases exploded, pouring into the hallowed halls of the Supreme Court. "Meritorious literary works and critically acclaimed movies clearly deserving of constitutional protection continued to be declared obscene by community censors."[17] The U.S. Supreme Court decided more than forty decisions dealing with obscenity.[18] Apparently, Justice Brennan wearied of these cases. He allegedly remarked to Justice Hugo Black: "I'm sick and tired of seeing this goddam shit."[19]

Paris Adult Theatre I v. Slaton

Brennan's distaste for the obscenity cases culminated in his 1973 dissent in Paris Adult Theatre, a case decided the same day the Court decided *Miller v. California*. *Paris Adult Theatre I. v. Slaton* involved obscenity charges against a Georgia movie theatre for showing two films: *It All Comes out in the End* and *Magic Mirror*.

The problem for Brennan was that he saw no way to separate obscenity from constitutionally protected material. He worried that efforts to suppress obscenity would also suppress material that deserved First Amendment protection.[20]

Brennan warned that the obscenity problem continued to create an eye-of-the-beholder phenomenon in which a censor's heavy hand could fall on material that should not be criminalized. He wrote:

> But after 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today [in *Miller v. California*], can reduce the vagueness to a tolerable level, while at the same time striking an appropriate balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials.[21]

Brennan's conclusion was bolstered by the fact that material kept being prosecuted for obscenity that should not have been. What a community prosecutor thinks as obscene differed greatly from jurisdiction to jurisdiction. Obscenity laws still threaten more than just the hardest of hard-core pornography. Obscenity prosecutions have been placed upon comic book artists[22] and even the owners of gay bars for nude artwork.[23]

From Obscenity to Zoning, the Rise of the Secondary Effects Doctrine and Justice Brennan's Warning

Obscenity prosecutions proved difficult for many prosecutors. The standard in *Miller v. California* provided an avenue for defense attorneys to argue that material was accepted in the particular community, that the material really wasn't patently offensive and that it did have some serious social value. Perhaps for this reason, prosecutors turned to zoning and licensing as their primary weapon in combating the proliferation of adult entertainment.

In 1976, the U.S. Supreme Court upheld a Detroit zoning law that limited the location of adult businesses.[24] In an ominous footnote, Justice John Paul Stevens wrote that city zoning law did not target adult theatres because of their

offensive expression, but because of "the secondary effect" of increased crime and property deterioration.[25]

John Weston, a leading adult entertainment attorney, said: "During depositions in the case, the government attorneys basically admitted that they were turning to zoning because they couldn't get obscenity cases against the theatre owners."[26] The Court upheld a similar law in Renton, Washington, in 1986, without showing that there were any harmful affects caused by adult businesses in their particular locale.[27] These cases saw the rise of the secondary effects doctrine, a perversion of the basic content-discrimination model in First Amendment jurisprudence.[28]

In First Amendment law, content-based laws are subject to strict scrutiny, while content-neutral laws are subject to intermediate scrutiny.[29] However, under the secondary-effects doctrine, laws that target adult businesses are subject to a reduced constitutional review because they are aimed not at the content of expression, but at the harmful adverse effects allegedly associated with the expression. Examples of commonly-cited secondary effects are increased crime and decreased property values.[30]

Prosecutors and city officials can punish purveyors of adult material directly with obscenity prosecutions. But, they have found it far easier and less painful to use the back door method of zoning and licensing laws. Because of the secondary effects doctrine, government officials can claim that they are not regulating speech because they dislike it or find it offensive. They are merely protecting their community from real-world problems.

But, Justice Brennan warned us about the secondary-effects doctrine just as he did with obscenity laws. In *Boos v. Berry*, a case that dealt with a law restricting political speech outside embassies in Washington D.C., Justice Brennan warned of the malleability of the doctrine.[31] He warned that the secondary-effects doctrine "creates a possible avenue for governmental censorship whenever censors can concoct 'secondary' rationalizations for regulating the content of political speech."[32]

Allowing relaxed First Amendment review for any governmental regulation is not justified because the secondary effect can be manipulation by government officials. Justice Brennan warned that the doctrine "could set the court on a road that will lead to the evisceration of First Amendment freedoms."[33]

Brennan has proved prescient in the area of secondary effects. The doctrine has been extended from zoning to regulation of nude performance dancing.[34] It has even been applied far outside the adult entertainment context, such as being used to uphold a dress code in a public high school.[35]

Conclusion

There is little doubt that Justice Brennan will be most remembered in the First Amendment arena for his protection of press freedoms during the height of the civil rights movement in *New York Times Co. v. Sullivan*. The author certainly does not question the impact of *Times v. Sullivan*, a case that Anthony Lewis rightfully said caused a "sea change" in First Amendment law."[36]

But, society's commitment to freedom of speech can best be gauged by how it protects speech at the margins, speech that many do not even think worthy of protection. "The strength of First

Amendment freedoms can be gauged by the level of tolerance for unpopular expression."[37]

In the age of Ashcroft and beyond, when obscenity prosecutions are on the rise and when the secondary-effects doctrine dominates adult entertainment jurisprudence, Justice Brennan deserves acclaim for his First Amendment devotion.

Obscenity laws do present a vagueness risk that material composed of consenting adults could draw the ire of a particular prosecutor. The secondary-effects doctrine is a dangerous concept that creates an easy path to censorship. For recognizing the dangers of the vagueness of obscenity law and for warning about the secondary-effects doctrine, Justice Brennan deserves his place in the First Amendment pantheon.

NOTES

1 New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964).

2 491 U.S. 397 (1989).

3 496 U.S. 310 (1990).

4 *Johnson*, 491 U.S. at 414.

5 374 U.S. 398, 405 (1963).

6 Roth v. United States, 354 U.S. 476 (1957).

7 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 74 (Brennan, J., dissenting).

8 Laura Sullivan, *Obscenity: For the first time in 10 years, the U.S. government is spending millions to file charges across the country*, The Baltimore Sun, Apr. 6, 2004 at 1A.

9 *See, e.g.*, W. WAT HOPKINS, MR. JUSTICE BRENNAN AND FREEDOM OF EXPRESSION 21 (Praeger Press, 1991).

10 *Roth*, 354 U.S. at 481.

11 *Id.* at 485.

12 *Id.* at 487.

13 *Id.* at 489.

14 *Id.*

15 Jacobellis v. Ohio, 378 U.S. 184, 191 (1964); Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).

16 *Jacobellis*, 378 U.S. at 191.

17 David L. Hudson, Jr., *Brennan's struggle with the detestable was the truest mark of his First Amendment devotion,* FIRST AMENDMENT NEWS (Aug. 1997).

18 Geoffrey R. Stone, *Essay: Justice Brennan and the Freedom of Speech: A First Amendment Odyssey,* 139 U. PA. L. REV. 1333, 1345 (1991).

19 H. Franklin Robbins, Jr. and Steven G. Mason, *The Law of Obscenity — or Absurdity,* 15 ST. THOMAS L. REV. 517, 525 (2003).

20 *Paris Adult Theatre I*, 413 U.S. at 79-80.

21 *Id.* at 84.

22 James McWilliams, *Comic Books: Overview, at* http://www.firstamendmentcenter.org//speech/arts/ topic.aspx?topic=comix (Last system update: Wednesday, Jan. 19, 2005).

23 Tipp-It, Inc. v. Conboy, 596 N.W.2d 304 (Neb. 1999).

24 Young v. American Mini Theatres, 427 U.S. 50 (1976).

25 *Id.* at 81, n.4.

26 David L. Hudson, Jr., *Adult Entertainment and the Secondary Effects Doctrine: How a zoning regulation may affect First Amendment freedoms*, Vol. 2, No. 1 Freedom Forum First Reports 1, 17 (2002), *available at* http://www.freedomforum.org/publications/first/adult.entertainment/FirstReport.AdultEntertainment_FINAL.pdf [hereinafter *Zoning Regulation*] (Revised June 19, 2003).

27 City of Renton v. Playtime Theatres, 475 U.S. 41 (1986).

28 David L. Hudson, Jr., *The Secondary Effects Doctrine: The Evisceration of First Amendment Freedoms*, 37 WASHBURN L.J. 55 (1997).

29 *Id.* at 55-59.

30 *Id.*

31 Boos v. Berry, 485 U.S. 312 (1988).

32 *Id.* at 335 (Brennan, J., dissenting).

33 *Id.* at 338.

34 Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); City of Erie v. Pap's A.M., 529 U.S. 277 (2000).

35 Long v. Bd. of Educ. of Jefferson County, 121 F. Supp. 2d 621 (W.D. Ky. 2000).

36 ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 234 (First Vintage Books 1992) (1991).

37 Hudson, Jr., *supra* note 26.