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## THE TWELFTH ANNUAL CHIEF JUSTICE JOSEPH WEINTRAUB LECTURE

### BRENNAN AND WEINTRAUB TWO STARS TO GUIDE US

*Some Reflections on the Roots of  
the Differing Judicial Philosophies  
of William J. Brennan, Jr. and  
Joseph Weintraub\**

*presented by  
The Honorable Daniel J. O'Hern\*\**

On October 16, 1956, President Dwight D. Eisenhower nominated William J. Brennan, Jr. of Rumson, New Jersey to be an Associate Justice of the Supreme Court of the United States.

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\* I wish to acknowledge the extensive research materials and insights given to me by my clerks, Elizabeth Kenny and Christopher Lenzo, legal interns, Hilary Thomas and Daniel Keegan, who gathered much of the research data, legal intern, Inez Linton, who helped in the editing, and the invaluable assistance of my secretary, Carol Rittershofer. I also thank Pat Restaino, former principal of Barringer High School, and the lawyers and judges who shared their insights with me.

\*\* Associate Justice, New Jersey Supreme Court.

This article is a copy of the speech given by Justice O'Hern at the Chief Justice Joseph Weintraub Lecture, February 24, 1994.

On November 19, 1956, Joseph Weintraub succeeded William J. Brennan, Jr. as a Justice of the Supreme Court of New Jersey. These two men had been moving inexorably together toward this defining moment from the time of their graduation together from Barringer High School in Newark in June 1924. Both had traveled to that "magnet school" of its era from other parts of Newark to enroll in its "classical program," and both would eventually practice law in their native City of Newark.

Of the two of them, I suppose that on their high school graduation day in 1924, classmates would have predicted for Joseph Weintraub the greater promise for a career in law. The Barringer High School yearbook profiled "Bill" Brennan: "Held his head high and cared for no man he." His ambition, his classmates prophesied, was "to follow Dad"; his weakness was "females"; his amusement was "dancing"; how he got through was "Dad's reputation." Of "Joe" Weintraub they wrote: "Knowledge comes, but wisdom lingers." His ambition was "to be a lawyer"; his weakness was that he was "argumentative"; his amusement was "cases in court"; how he got through was by "arguing." Joe's future seemed foreordained.

On the occasion of Chief Justice Weintraub's death, Justice Francis invoked Shakespeare's lines:

"When he shall die, take him and cut him out in little stars and he shall make the face of heaven so fine, that all in the world will be in love with night and pay no worship to the garish sun."

In his lifetime [Francis said], the Chief Justice cut out his own stars, and adorned the firmament of the law with them. They will stand as beacons for all future judges, showing the way to keep the basic principles of justice constantly attuned to the needs of the times. . . .<sup>1</sup>

A recent survey of ninety-six scholars<sup>2</sup> listed that other graduate of Barringer High School, William J. Brennan, Jr., as fifth in the list of all-time great Justices of the United States

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1. Proceedings Before the Supreme Court of New Jersey in Memory of Chief Justice Joseph Weintraub, May 24, 1977, 72 N.J. XIX, XXXI (1977).

2. WILLIAM D. PEDERSON & NORMAN W. PROVIZER, GREAT JUSTICES OF THE U.S. SUPREME COURT: RATINGS AND CASE STUDIES (1993).

Supreme Court. Ahead of him ranked only John Marshall, Oliver Wendell Holmes, Jr., Earl Warren, and Louis Brandeis. Included in the top ten with him were Hugo Black, the first Justice John Marshall Harlan, William O. Douglas, Felix Frankfurter, and Benjamin Cardozo.

Anyone who is familiar with my own judicial philosophy knows that I have not advocated reliance on state constitutional doctrine as a guarantor of liberties. In part, my views stem from a realization of how easy it is to change a state constitution, but also from an overwhelming sense of respect for the United States Supreme Court. It struck me when I read this recent account that five of the greatest justices ever to have sat on that Court were sitting when I arrived at the United States Supreme Court in the fall of 1957 to clerk for Justice Brennan. Little wonder then that I consider the Supreme Court the ultimate guarantor of our constitutional liberties.

But few predicted on his appointment that William J. Brennan, Jr. would be included among this elite company of the Court's greatest Justices. What was it that led Justice Brennan to this special place in our Nation's history? And, conversely, what was it that led Joseph Weintraub as Chief Justice of the New Jersey Supreme Court to resist so strongly the views that Brennan held that he would say that the "doctrines of the Federal Supreme Court have led to an impossible situation."<sup>3</sup>

As Weintraub explained:

After all, good law is a matter of "fairness" and one need but insist that a given rule is "fundamentally" unfair to call upon the Constitution to establish his view. The tendency is thus to claim "constitutional" moment in matters which, in my appraisal, are quite minimal in a scheme of values. The more the Constitution is found to be intolerant of disagreement upon arguable issues, the deadlier becomes the grip upon the genius of men. The price of such intolerance may be sterility.<sup>4</sup>

Yet, Weintraub was not an obstructionist. On the occasion of

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3. *State v. Funicello*, 286 A.2d 55, 62 (N.J.) (Weintraub, C.J., concurring), cert. denied, 408 U.S. 942 (1972).

4. *Id.* at 61.

a 1977 memorial tribute to Chief Justice Weintraub, Roger McGlynn, the son of Edward McGlynn, recalled:

An interesting footnote to this [*Funicello*] opinion was made just a few weeks ago in a tribute by Mr. Justice Brennan of the United States Supreme Court upon the presentation of the first annual award in his name to Chief Justice Weintraub. He referred to Chief Justice Weintraub being responsible for defeating a proposal at the conference of State Chief Justices aimed at formal criticism of the United States Supreme Court. Thus despite the Chief Justice's personal judicial disagreement he was quick to defend the institution of the United States Supreme Court.<sup>5</sup>

As most lawyers of that time, I greatly admired Chief Justice Weintraub for his leadership in areas of civil reform. I was not practicing much criminal law and thus was not cognizant of the deep philosophical differences between him and the Warren Court. In the years that I have sat on this Court, I have had occasion to read many of Chief Justice Weintraub's opinions in this field. I have found his attitude towards the United State Supreme Court little short of scornful. Speaking of what he called "a run of its decisions over the past 12 years or so,"<sup>6</sup> decisions that included *Miranda v. Arizona*,<sup>7</sup> *Mapp v. Ohio*,<sup>8</sup> *Gideon v. Wainwright*,<sup>9</sup> *Fay v. Noia*,<sup>10</sup> and *Furman v. Georgia*,<sup>11</sup> he wrote: "Those decisions were not at all compelled by 'my copy' of the Constitution or its history."<sup>12</sup> Implicit in his words is the stated belief that the Supreme Court had engaged in a clear misreading of the Constitution and that those transforming decisions represented little more than the personal predilections of the judges who sat there at the time.

It is not my mission to assess one way or another the merits of the views of either the Warren Court or the Weintraub

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5. *Proceedings Before the Supreme Court of New Jersey*, 72 N.J. at XXI.

6. *Funicello*, 286 A.2d at 60.

7. 384 U.S. 436 (1966).

8. 367 U.S. 643 (1961).

9. 372 U.S. 335 (1963).

10. 372 U.S. 391 (1963).

11. 408 U.S. 238 (1972).

12. *Funicello*, 286 A.2d at 60.

Court, but to review the paths of justice that led these two men to their divergent conceptions of constitutional law.

I will speak briefly of the lives of these two judges, will explore some theories of why their paths differed, and will offer my own conclusion.

As noted, each of them sprang from similar roots in the Newark community. Although Weintraub's life was surely the more difficult, basically, both were persons of modest circumstances. Justice Brennan was the second son born to an Irish immigrant family. He had the comfort and guidance throughout his early life of a father who was a noted labor leader and city commissioner in the City of Newark.

On the other hand, Justice Weintraub was left fatherless when he was five years old. Morris Schnitzer recalls:

Joe's parents were Jewish immigrants from Russia. His father died very young and Joe's mother supported the family from her meager earnings operating a produce store. Joe was about 12 when he became an office boy at Stein, Hannoch and McGlynn. Eddie McGlynn [whom Weintraub credits with being the largest influence in his life], virtually adopted Joe, putting him through Cornell College and Law School, where Joe became President of the Law Quarterly. Thereafter, Eddie formed McGlynn, Weintraub and Stein, where Joe remained until he went on the bench.<sup>13</sup>

There is one adjective that is always used to describe Chief Justice Weintraub, "brilliant." His academic career was unsurpassed, "one of the most brilliant in the history of [Cornell Law] School."<sup>14</sup> As he worked his way through law school, waiting on tables and holding summer jobs, he also managed to be first in his class and to serve as Editor-in-Chief of the *Cornell Law Quarterly*.

Justice Brennan's academic career only differed slightly. He attended the Wharton School of the University of Pennsylvania and the Harvard Law School. Again, Morris Schnitzer recalls:

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13. Letter from Morris M. Schnitzer to Honorable Daniel J. O'Hern 1 (Dec. 17, 1993) (on file with the author).

14. W. David Curtiss, *Chief Justice Weintraub—Cornellian*, 59 CORNELL L. REV. 183, 184 (1974).

His parents were Irish immigrants. His father, Bill, Sr., became a state leader of the building trades unions and then the perennial Director of Public Safety as one of Newark's five elected city commissioners. Bill, Sr., stood out among his fellow commissioners in preserving his reputation as an honest man.

Bill, together with Don [Kipp] [a Harvard classmate] joined Pitney, Hardin and Skinner. . . . Labor work became a new specialty for corporate law firms after the Wagner Act was adopted in 1935. Bill took to that field, on behalf of employers, as a duck to water.<sup>15</sup>

Both served their country in World War II. Justice Brennan having had an extensive labor practice, served in the Army Ordnance Department, and Justice Weintraub served in the Judge Advocate General's Corps, the Army's legal branch.

Both actively threw themselves into the rich ferment of New Jersey public life following World War II. Neither was a delegate to the Constitutional Convention of 1947, but each played a prominent role in the effectuation of the judicial article of that Constitution.

On a personal note, Weintraub remained single until he married Rhoda Levitt in 1960. In contrast, Brennan had married his first wife, Marjorie, when he entered law school.

New Jersey practitioners today, recalling the early years of these men, attest to their extraordinary skills. Their careers brought each of them to the Editorial Board of the *New Jersey Law Journal*.

Joe and Bill often engaged each other at the Editorial Board lunches and made an interesting contrast. Joe was brilliant. Nothing in the law was strange or mysterious to him. His development of any theme was luminous. But he often left the Board behind, so that he took the prize for the greatest number of editorials voted down and thereafter published as a signed letter to the Editor, as was the custom. Bill spoke only when he felt deeply involved and then with such conviction, authority and force that he carried the day. I never heard an analysis from him which could be character-

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15. Letter from Morris M. Schnitzer to Honorable Daniel J. O'Hern, *supra* note 13, at 2.

ized as fine spun.

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It is accurate that Bill did not often put questions to counsel when he sat on the New Jersey Supreme Court. But the same was true when I argued a case before the U.S. Supreme Court and spent the day before listening to argument and getting accustomed to the courtroom. Moreover, while on the New Jersey Supreme Court, I think that Bill was probably feeling his way and somewhat guarded, as anyone might have been with such powerhouses as Vanderbilt and [Nat] Jacobs, or a remote, impervious colleague such as [Harry] Heher, who was addressed as Justice or Mister by his fellow Justices, even in conference.

Joe was the most voluble Justice I have known. Totally unself-conscious, he engaged counsel in a dialogue as relaxed as if both were in easy chairs in a private office. He was always taken aback by any sign of impatience, sometimes nearly acerbic, by a fellow Justice. Nat once told me that Joe talked at length in conferences often to the discomfort of colleagues. I saw the same thing for myself when Al Clapp, Chairman of the Civil Practice Committee, took me along for the annual private conference of those days with the Court, about proposed new Rules.<sup>16</sup>

Retired Supreme Court Justice Haydn Proctor, who sat next to Weintraub at Court conferences, recalls the ease with which Weintraub "could write an opinion out on a yellow pad." "He used short words" and could express himself easily. Justice Proctor said he "never met anyone smarter than Weintraub."

Thomas J. Morrissey of the Carpenter Bennett firm in Newark recalls practicing as an associate in the Pitney firm. He saw Brennan as a lawyer who was committed to his clients and their causes. Like any good lawyer, "he was out to win cases." He described Brennan as "versatile. He could try a good case. He had total recall." A former secretary of Justice Brennan told Morrissey that Brennan could dictate a brief that was letter-perfect. Morrissey recalls Brennan as "a tireless worker, a person who could really tackle something, a person who had a tremendous capacity to grasp a complex issue."

Morrissey also remembers that Brennan had worked with

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16. *Id.* at 2-3.

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16. *Id.* at 2-3.



Arthur T. Vanderbilt on a major labor case. Vanderbilt, who became the first Chief Justice under the current New Jersey Constitution, is considered an architect of the judicial article of that Constitution. Vanderbilt immediately saw the enormous talent that Justice Brennan had then, and when Vanderbilt became Chief Justice of the New Jersey Supreme Court, he wanted Brennan to become a member of the New Jersey judiciary.

Once appointed to the New Jersey judiciary in 1949, Justice Brennan advanced rapidly, becoming Assignment Judge of Hudson County in 1950 and a judge of the Appellate Division later that year.

Justice Proctor sat with then-Judge Brennan in Hudson County. Justice Brennan once described those days to me as among the happiest of his life. He had absolute authority; he decided things instantly. Although he had no time for second thoughts, he always had time for lunch at Bruno's on Fridays with Justice Proctor. Justice Proctor recalls his first meeting with Justice Brennan when Justice Brennan, who looked "so young," walked into the chambers of Proctor's courtroom (Brennan had given Proctor the larger courtroom) and offered him part of a candy bar. Justice Proctor recalls too, however, that Bill Brennan was a "heck of a lawyer and judge."

When Brennan left to go to the Appellate Division, Proctor took over his files. In every file Justice Proctor found that Brennan "had it all worked out," leaving detailed notes for the disposition of each of the cases. (Parenthetically, Justice Proctor reflected nostalgically on an earlier term as Assignment Judge in Burlington County where the trial calendar looked like a "race track program" with ten or eleven entries that could be expected to collapse in time for an early afternoon outing.)

Brennan moved up to the New Jersey Supreme Court in 1952. In 1956, Justice Brennan was asked to move his home from Essex County to give the Court a better geographical balance. He decided to move to Rumson in Monmouth County, New Jersey. Monmouth County, you know, is not now, nor was it then a hotbed of liberalism. Justice Brennan did join the Rumson Country Club and also became a member of the Root Beer and Checker Club in Red Bank, a place that had the small-town feeling of boosterism seen in Sinclair Lewis's *Ze-*

nith Club.

Even then, though, the seeds of his philosophy were taking root. You need recall that in the fifties America was gripped with a fear of communism. It is so difficult now to recall that time during and immediately following the McCarthy era. Americans developed a consuming curiosity about confidential advisors to high officers of government. It went so far that Supreme Court law clerks were characterized as a "second team," as "ghost writers," and more insinuatingly, as "wielders of unorthodox influence."<sup>17</sup> The charge was made that "the influence they exert comes from the political Left."<sup>18</sup> This is all very amusing now, but it was very serious business then.

In fact, Justice Brennan's own confirmation as an Associate Justice of the United States Supreme Court was opposed because of views that he had expressed about McCarthyism. Specifically, in one speech that he made at the Monmouth County Rotary Club, he echoed remarks that he had made earlier to Boston's Charitable Irish Society in March 1954, referring to certain congressional inquiries as modern counterparts to the Salem witch trials.<sup>19</sup>

During those Brennan Court years, Weintraub was engaged in a busy practice with the McGlynn firm. Most of his work was appellate practice and much of that in the criminal field. Governor Robert B. Meyner appointed him Chairman of the Waterfront Commission and, at the same time, as Counsel to the Governor.

One cannot fully compare their judicial philosophies for in many areas of law federal jurisdiction and state jurisdiction simply do not overlap. In matters of civil law, Chief Justice Weintraub was in the forefront. Progressive changes in the law were the hallmark of his Court. For example, *Henningsen v. Bloomfield Motors, Inc.*<sup>20</sup> abolished the doctrine of privity of contract in products liability; *Unico v. Owen*<sup>21</sup> held that the

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17. Alexander M. Bickel, *The Court: An Indictment Analyzed*, N.Y. TIMES, Apr. 27, 1958, § 6 (Magazine), at 16.

18. *Id.*

19. KIM I. EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 81-82 (1993).

20. 161 A.2d 69 (N.J. 1960).

21. 232 A.2d 405 (N.J. 1967).

holder-in-due-course defense was unavailable in the context of consumer loans; *Marini v. Ireland*<sup>22</sup> implied a covenant of habitability between landlord and tenant; *Kievit v. Loyal Protective Life Insurance Co.*<sup>23</sup> reformed insurance law to meet the fair expectations of consumers; and *Robinson v. Cahill*<sup>24</sup> held that the Thorough and Efficient Education Clause of the State Constitution mandated a State obligation to finance education fairly.

A difference in philosophies of the two judges began to appear, however, in the field of constitutional criminal law. The central theme and organizing principle of Justice Brennan's work on the Supreme Court has been to fulfill the role of the judge as impartial guardian who stands between the citizen and the state. Speaking at the Annual Survey of American Law at New York University Law School on April 15, 1982, Justice Brennan looked back on his long career and reflected upon the changing process of law:

[N]ot too many decades ago practitioners of the law came to see that the law must be a living process responsive to changing human needs. The shift must be away from fine-spun technicalities and abstract rules. The vogue for positivism in jurisprudence — the obsession with what the law is . . . had to be replaced by a jurisprudence that recognizes human beings as the most distinctive and important feature of the universe which confronts our senses, and the function of law as the historic means of guaranteeing that pre-eminence. . . .

This philosophy of jurisprudence accounts for the phenomenon of constitutional change during the last half century: Supreme Court constitutional doctrine changed from primary concern with contests between state and federal authority and definitions of the powers of the federal executive and legislative branches to a distinct emphasis upon the interpretation and application of the constitutional limitations upon governmental power, federal and state — embodied primarily in the Bill of Rights — that secure the blessings of liberty for the individual citizen. Doubtless the most powerful expres-

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22. 265 A.2d 526 (N.J. 1970).

23. 170 A.2d 22 (N.J. 1961).

24. 303 A.2d 273 (N.J. 1973).

sion of this change was the extension against the states of almost all of the significant specific guarantees of the Bill of Rights.

Brennan spoke with pride of those changes in the law; yet, simultaneously, when the changes were made, Chief Justice Weintraub had reflected on them critically. The "nation's high court had omitted from its decisions a forgotten right, the right of protection from criminals," said Chief Justice Weintraub.<sup>25</sup> Some of his strongest criticism came after the Supreme Court required in *Mapp v. Ohio*<sup>26</sup> that all states adopt a rule that mandated suppression of evidence of guilt obtained through illegal searches and seizures. He wrote in *State v. Davis*<sup>27</sup> that the liberal criminal decisions of the Warren Court worked against protection of society's interest. He would not have construed the Constitution as requiring the exclusionary rule. He said:

Since the Fourth Amendment speaks, not in terms that are absolute, but rather of unreasonableness, it necessarily calls for a continuing reconciliation of competing values. Pre-eminent in the galaxy of values is the right of the individual to live free from criminal attack in his home, his work, and the streets. Government is established to that end, as the preamble to the Constitution of the United States reveals and our State Constitution, Art. I, ¶ 2, expressly says.<sup>28</sup>

Chief Justice Weintraub recognized that

while the sanction supports the high value inherent in freedom from unwarranted search, yet in another aspect it works against public morality because the suppression of the truth must tend to breed contempt for the long arm of the law. Such are the stakes, and it is in their light that the unreasonableness of a search must be measured.<sup>29</sup>

The inescapable inference from Chief Justice Weintraub's link-

25. John Kolesar, *Ex-N.J. Chief Justice Weintraub; often made state judicial history*, TRENTON TIMES, Feb. 7, 1977, at B5.

26. 367 U.S. at 643.

27. 231 A.2d 793 (N.J. 1967), cert. denied, 389 U.S. 1054 (1968).

28. *Id.* at 796.

29. *Id.* at 796-97.

age of the phrases "suppression of truth" and "contempt for the long arm of the law" is that the judiciary itself is the long arm of the law, and as such, should not be suppressing the truth. Earlier, in *Eleuteri v. Richman*,<sup>30</sup> he described the remedy of suppression of illegally-obtained evidence as allowing "[t]wo wrongs [to] go unpunished, at the expense of society."<sup>31</sup> The Chief Justice went on to observe that: "[u]nlike the Federal Government for which the exclusionary rule was conceived, the states must contend with many more crimes of violence. The stakes are different."<sup>32</sup>

Was Chief Justice Weintraub saying that constitutional guarantees are important but negotiable parts of the social compact? If so, Justice Brennan certainly would have disagreed. In his dissent in *United States v. Leon*,<sup>33</sup> Justice Brennan observed:

[T]he relaxation of Fourth Amendment standards seems a tempting, costless means of meeting the public's demand for better law enforcement. In the long run, however, we as a society pay a heavy price for such expediency, because as Justice Jackson observed, the rights guaranteed in the Fourth Amendment "are not mere second-class rights but belong in the catalog of indispensable freedoms."<sup>34</sup>

In that passage, Justice Brennan quoted from Justice Jackson's dissent in *Brinegar v. United States*,<sup>35</sup> in which Justice Jackson contemplated the importance of the Fourth Amendment from a perspective that was doubtlessly inspired by his experiences as a prosecutor at the Nuremberg war-crime trials after World War II. Justice Jackson wrote:

Indications are not wanting that Fourth Amendment freedoms are tacitly marked as secondary rights, to be relegated to a deferred position.

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30. 141 A.2d 46 (N.J.), *cert. denied*, 358 U.S. 843 (1958).

31. *Id.* at 50.

32. *Id.*

33. 468 U.S. 897 (1984).

34. *Id.* at 959-60 (Brennan, J., dissenting) (quoting *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (dissenting opinion)).

35. 338 U.S. 160 (1949).

These, I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.<sup>36</sup>

Following in Jackson's footsteps, Brennan believes that courts could protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty. Thus, for Justice Brennan and for Justice Jackson, those rare occasions on which evidence is suppressed occur not to protect the guilty but to protect the innocent.

Departing from the Supreme Court's exception to the exclusionary rule that allows the introduction in criminal trials of evidence obtained under a defective warrant when the officer executing the warrant acts in good faith, our Court had occasion only recently in *State v. Novembrino*<sup>37</sup> to reconsider the holding of *Eleuteri v. Richman*.<sup>38</sup> Our Court wrote:

The exclusionary rule, by virtue of its consistent application over the past twenty-five years, has become an integral element of our state-constitutional guarantee that search warrants will not issue without probable cause. [The exclusionary rule's] function is not merely to deter police misconduct. The rule also serves as the indispensable mechanism for vindicating the constitutional right to be free from

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36. *Id.* at 180-81 (Jackson, J., dissenting).

37. 519 A.2d 820 (N.J. 1987). Earlier in *State v. Macri*, 188 A.2d 389 (N.J. 1963), Brendan Byrne, then-Prosecutor of Essex County, had unsuccessfully argued for the same good-faith exception to the exclusionary rule, later adopted by the United States Supreme Court.

38. 141 A.2d 46.

unreasonable searches.<sup>39</sup>

Thus, to that extent, Justice Brennan's vision of the Fourth Amendment may have prevailed over that of Chief Justice Weintraub.

Both Weintraub and Brennan read the same Constitution; both trained at the same bar; both had roots in the same community. Why then did they differ? I asked this question of some who knew both men. Most are frank to say they simply did not know how Justice Brennan arrived at his judicial philosophy.

Justice Proctor recalls a big Rumson cocktail party that he had attended with so many of the Brennans' friends. Justice Proctor mused: "It wasn't in his background; just like it wasn't in Lincoln's."

Tom Morrissey suggested: "I think his roots, his Irish roots." Morrissey believes that Justice Brennan was highly influenced by his mother and father. Theirs was not an easy life. His mother must have struggled after William Sr. died in 1933. And yet Morrissey could not fully explain how Brennan could move so readily from representing the interests of management in its struggles against labor unions to become, on the bench, an advocate of individual liberties. His best guess was that Justice Brennan rarely had to tackle federal constitutional issues until he became a member of the United States Supreme Court. So far as Morrissey could tell, Brennan's practice was business oriented, rarely involving a vindication of individual civil rights. But Morrissey senses that underneath, Brennan had "deep-seated feelings about individual rights." He believes that Brennan's "loyalty to individual rights was very strong."

Morrissey's theory has other support. In Kim Isaac Eisler's recently-published biography of Brennan, he writes that a ten-year-old Bill Brennan, Jr. watched his father's union brethren carry the senior Brennan into the family home after he had been "bloodied and beaten" by the Newark police during a labor conflict.<sup>40</sup> As Eisler puts it, "[p]olice beatings would nev-

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39. *Novembrino*, 519 A.2d at 856.

40. EISLER, *supra* note 19, at 19.

er be anything abstract to the Brennans."<sup>41</sup> Because of this upbringing, Brennan may have identified more with the people than with the state.

Morris Schnitzer believes that "[v]indication of civil rights . . . may have been Bill Sr. speaking through Bill Jr."<sup>42</sup> In a 1988 interview with then-Chief Judge John J. Gibbons, Justice Brennan said of judging: "None of us can ever get rid of what we have been." Judge Gibbons then asked Justice Brennan: "What did you bring to the bench"? Justice Brennan replied: "My parents had an enormous influence on me." Although not poverty-stricken, his parents were hard workers who provided a modest, but to him beautiful, home life and inculcated their values in him, one of which was a "sympathy for people who don't have much."<sup>43</sup>

Former Governor Brendan Byrne, who had worked with Joseph Weintraub at the McGlynn firm and as Counsel to Governor Meyner, sees Weintraub as "more of a law and order man." Remember, Byrne says, that Weintraub had stayed in Orange while Brennan moved to Rumson, and perhaps became more acutely aware of the escalating incidence of crime in urban America. Byrne thinks, too, that although Weintraub may have shared with Brennan the desire to assure freedom for individual fulfillment, Weintraub saw the issue more in terms of what "ninety-nine would have to give up to assure the rights of one." And he believes that as Chief Justice, Weintraub sensed an institutional obligation for the preservation of order in society. As a then newly-appointed prosecutor, Byrne recalls the pointed direction Weintraub gave him for an overhaul of the personnel in the Essex County Prosecutor's Office. Finally, Byrne believes that Weintraub was so confident of his own powers of reasoning that he could not understand how others might not reach the same conclusion.

Joseph Jacobs, on the other hand, thinks the differences were rooted in jurisprudential views. He recalls Weintraub

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41. *Id.*

42. Letter from Morris M. Schnitzer to Honorable Daniel J. O'Hern, *supra* note 13, at 4.

43. Videotape interview with Honorable William J. Brennan, Jr. by Honorable John J. Gibbons (June 27, 1988) (on file with the Historical Society of the United State District Court for the District of New Jersey).



being a student of Justice Frankfurter. Justice Francis described Weintraub as one "steeped in the tradition of Brandeis, Holmes, [Cardozo] and Frankfurter, whom he considered great men of the bench."<sup>44</sup> By the mid 1950s, Frankfurter had become the leading advocate for judicial restraint and opposed the incorporation of the Bill of Rights under the Fourteenth Amendment. According to Court commentators, no love was lost between Brennan and Frankfurter.<sup>45</sup> However, Proctor recalls Brennan showing him a letter of warm regards from Frankfurter, and Morrissey thinks that "they were good friends" and that Frankfurter had initially influenced Brennan. Brennan was simply not ready to stop when Frankfurter was. Recall that Frankfurter had invoked the Bill of Rights to eradicate abusive police practices,<sup>46</sup> and to protect freedom of religion.<sup>47</sup> Frankfurter's ideal of a prosecutor was Henry L. Stimson. Frankfurter had served as a young attorney with Stimson, the sort of person who would never condone abusive police practices.

I once heard it said that Justice Frankfurter was more inclined to secure protections under the Fourth Amendment because of childhood memories of hearing of the Austro-Hungarian secret police breaking into homes in the dark of night. This may be so. Frankfurter had written to Earl Warren: "To the extent that I am charged, not by you, with being 'a nut' on the subject of the 'knock at the door,' I am ready to plead guilty.'"<sup>48</sup>

I have no such clue here. I am unable to find the single explanation of why Brennan and Weintraub diverged so radically. I leave to others the final accounting for their differences. What I do know is that the ideals of individual freedom so

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44. *Proceedings Before the Supreme Court of New Jersey*, 72 N.J. at XXVI-XXVII.

45. EISLER, *supra* note 19, at 162-64.

46. *Rochin v. California*, 342 U.S. 165 (1952).

47. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 212 (1948) (Frankfurter, J., dissenting).

48. BERNARD SCHWARTZ, *MAIN CURRENTS IN AMERICAN LEGAL THOUGHT* 539 (1993) (quoting Letter from Honorable Felix Frankfurter to Honorable Earl Warren (Apr. 19, 1957) (on file with Frankfurter Papers at Harvard Law School)).

long nurtured by Justice Brennan have had a world-wide influence. I also know that all of us are experiencing an encounter with the dark side of violent crime that threatens the very fabric of our society. Many believe, as Chief Justice Weintraub did, that protection from such violence is the preeminent value of society.<sup>49</sup>

Something as small as the way these two men looked at human nature may have accounted for their judicial differences. I have a sense that Chief Justice Weintraub saw, perhaps too well, the darker side of human nature. In questioning the role of the insanity defense in the trial of criminal causes, he complained that modern critics of the traditional approach to the insanity defense "can tear down the edifice [of the common law] but have nothing better to replace it."<sup>50</sup> He viewed as irresponsible the idea that the individual could be deemed the product of many causes. He wrote:

In short, so far as we know, no man is his own maker. I say so far as we know, for man has yet to catch a glimpse of the ultimate truth. The concept of cause-and-effect, satisfying though it may be for most matters, is a dead-end approach to the mystery of our being.<sup>51</sup>

Imbued with that sense of the mystery of our being, Weintraub seemed to regard the Bill of Rights more in the context of its application to the guilty than its application to the innocent. He wrote in *State v. McKnight*.<sup>52</sup>

When the guilty go undetected, or, if detected, are nonetheless set free because plain evidence of guilt is suppressed, the price is exacted from what must be the first right of the individual, the right to be protected from the criminal attack in his home, in his work, and in the streets. Government is constituted to provide law and order. The Bill of Rights must be understood in light of that mission.

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49. See A.M. Rosenthal, *Law and Order*, N.Y. TIMES, Dec. 28, 1993, at A-11 (commenting that to deal with crimes of violence in our society, Americans may have to "give up some of their cherished political positions and accept one or two they do not like at all").

50. *State v. Sikora*, 210 A.2d 193, 205 (N.J. 1965) (Weintraub, C.J., concurring).

51. *Id.*

52. 243 A.2d 240 (N.J. 1968).

There is no right to escape detection. There is no right to commit a perfect crime or to an equal opportunity to that end. The Constitution is not at all offended when a guilty man stubs his toe. On the contrary, it is decent to hope that he will.<sup>53</sup>

Yet, is there not something missing? Is it not the presumption of innocence? The United States Supreme Court has repeatedly held that "[t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."<sup>54</sup> The presumption exists because "ours is an accusatorial and not an inquisitorial system."<sup>55</sup> In this country, we need not prove our innocence.

Justice Brennan, it seems to me, perceived our constitutional guarantees in terms of the rights of the innocent. He would have judged McKnight as an innocent man, and then would have asked if the Constitution is offended when an innocent person is so treated.

In a tribute to Justice Brennan, his colleague Byron White remembered that Bill Brennan's creed was that a judge should proceed with "a sparkling vision of the supremacy of the human dignity of every individual."<sup>56</sup> That philosophy had been clear as early as 1953 in his dissent in *State v. Tune*<sup>57</sup> in which he would have allowed a capital defendant to inspect before trial a copy of his own confession. Brennan wrote:<sup>58</sup>

It shocks my sense of justice that in these circumstances counsel for an accused facing a possible death sentence should be denied inspection of his confession which, were this

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53. *Id.* at 250.

54. *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

55. *Rogers v. Richmond*, 365 U.S. 534, 541 (1961).

56. Byron R. White, *Tribute to the Honorable William J. Brennan, Jr.*, 100 YALE L.J. 1113, 1116 (1991) (quoting Honorable William J. Brennan, Jr., Lecture at Georgetown University (1985)). For the full text of this lecture, see Justice William J. Brennan Address at Georgetown University Law Center (Oct. 12, 1985), reprinted in *The Constitution of the United States: Contemporary Ratification*, 35 RES IPSA LOQUITUR 5 (Fall/Winter 1985).

57. 98 A.2d 881 (N.J. 1953).

58. *Id.* at 896, 897 (Brennan, J., dissenting).

a civil case, could not be denied.

....

In the ordinary affairs of life we would be startled at the suggestion that we should be not entitled as a matter of course to a copy of something we signed.

....

[T]he majority view sets aside the presumption of innocence and is blind to the superlatively important public interest in the acquittal of the innocent.

We have, then, two judges viewing the Bill of Rights from slightly different prisms—Justice Brennan from the viewpoint of an innocent accused, finding that no price is too great to pay to vindicate fundamental constitutional guarantees—and Chief Justice Weintraub from the perspective of the sacrifices a collective state would have to make were it to vindicate the constitutional rights of the guilty. The debate is as old as history. Mary Ann Glendon, author of *Rights Talk: The Impoverishment of Political Discourse*, identifies “the missing dimension of sociality” in our current debate on rights jurisprudence, and asks whether individual rights have been exalted at the expense of community rights.<sup>59</sup>

Beyond these views of the relationship between individual and community, I sense that there may have been one more difference between Brennan and Weintraub. In a recent critique of the *Passionate Sage*, a book concerning the character and legacy of John Adams, the reviewer asks why it is that John Adams’s legacy has largely been forgotten, while Jefferson has become a patron saint of American thought.<sup>60</sup>

As [the author] sees it, Adams’s political and philosophical views grew directly out of his personality. A realist when it came to assessing human nature, he did not share Jefferson’s sunny optimism about democracy and human reason. The human conscience, he believed, was not a match for human passions, human jealousy and the human drive for distinction.<sup>61</sup>

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59. MARY A. GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 17, 143 (1991).

60. Michiko Kakutani, *The Vinegar of the Revolutionary Salad*, N.Y. TIMES, May 14, 1993, at C28.

61. *Id.*

Adams's personality "impressed upon him the political importance of control, balance, and the modulated supervision of social change."<sup>62</sup> Jefferson, with a more confident faith in the American vision, "reversed the dichotomy."<sup>63</sup> For him, the primary task facing America's leaders was "to liberate individual energies, to destroy the institutional impediments to human progress."<sup>64</sup> Thus, Adams and Jefferson "shared a common vision of America's future but emphasized different features of the vision. . . . The glass was always half-full at Monticello and half-empty at Quincy, even though it was the same glass."<sup>65</sup>

Similarly, there was a difference in outlook between Brennan and Weintraub. Brennan has a sunny, uplifting personality. His good humor and camaraderie are legendary. Weintraub was discursive on the bench, but off the bench or outside of the judicial setting Roger McGlynn remembers Weintraub as a "very reticent person."

In his book, *Make No Law: The Sullivan Case and the First Amendment*, Anthony Lewis concludes with a reflection on what it is about the American spirit that makes it able to tolerate freedom of speech and to emphasize the rights of the individual. Lewis believes that Americans have a quality that, given their experience, other nations cannot have.<sup>66</sup>

Quoting in part the French constitutional lawyer, Roger Errera, Lewis identifies that quality as "an inveterate, social and historical optimism":

Americans *are* optimists. Madison had to be an optimist to believe that democracy would work in a sprawling new federation if only the people had "the right of freely examining public characters and measures." Martin Luther King Jr. had to be an optimist to believe that speech, appealing to conscience, could undo generations of racial discrimination. And optimism was the unstated premise when the Supreme Court looked to Madison's vision to resolve the case of *New York*

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62. *Id.*

63. JOSEPH J. ELLIS, *PASSIONATE SAGE: THE CHARACTER AND LEGACY OF JOHN ADAMS* 135 (1993).

64. *Id.* at 239.

65. *Id.*

66. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 247 (1991).

*Times Co. v. Sullivan*.<sup>67</sup>

Only a judge with "an inveterate, social and historical optimism" could have written *New York Times Co. v. Sullivan*<sup>68</sup> as Brennan did.

In all of my experience with Justice Brennan, I have never sensed in him the slightest twinge of fear or uncertainty that the decisions of the Warren Court may not have been right for the American people. It is not easy to maintain such optimism in the face of a disintegrating social order.

Possibly the greatest single historical event of the Twentieth Century has been the unexpected end of totalitarian states, and the rise of democratic states in their place. Václav Havel, the poet-playwright who led the Czechoslovakian state into freedom, believes that the beginning of the end of communism required one thing above all else: It required individuals committed to "living within the truth." When the "culture of the lie" (professing the existence of human rights while denying them in practice) no longer existed, law would cease to serve as an instrument of oppression.<sup>69</sup>

Writing in 1955, Erwin Griswold referred to the Fifth Amendment's privilege against self-incrimination as "an ever-present reminder of our belief in the importance of the individual, a symbol of our highest aspirations. As such it is a clear and eloquent expression of our basic opposition to collectivism, to the unlimited power of the state."<sup>70</sup> The Warren Court's decisions were premised on the importance of the individual. The Weintraub Court reminds us that the individual can exist only in a community that assures freedom from violence. Courts must continue to balance the interests of individual and community while "living within the truth" of our constitutional guarantees. We shall have the ideals of Brennan and Weintraub to guide us.

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67. *Id.* at 247-48.

68. 376 U.S. 254 (1964).

69. GEORGE WEIGEL, *THE FINAL REVOLUTION: THE RESISTANCE CHURCH AND THE COLLAPSE OF COMMUNISM* 45, 48 (1992).

70. ERWIN N. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 81 (1955).