

William & Mary Bill of Rights Journal

Volume 7 (1998-1999)
Issue 1

Article 5

December 1998

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Stephen J. Wermiel, *Law and Human Dignity: The Judicial Soul of Justice Brennan*, 7 Wm. & Mary Bill Rts. J. 223 (1998), <https://scholarship.law.wm.edu/wmborj/vol7/iss1/5>

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LAW AND HUMAN DIGNITY: THE JUDICIAL SOUL OF JUSTICE BRENNAN

Stephen J. Wermiel*

The concept of human dignity has emerged in the United States in recent decades as an important theoretical and sometimes practical source of individual rights and liberties. Human dignity is cited in jurisprudential writings and discussed in some court opinions as a means of enhancing the broad phrases of the Bill of Rights and the Fourteenth Amendment.

This Essay examines the pivotal role that the late Justice William J. Brennan, Jr., played on the United States Supreme Court in making concepts of human dignity a valued and essential part of rights formulation. This essay explores Justice Brennan's vision of the role that human dignity should play in our constitutional system and evaluates criticism of this still controversial approach.

* * *

The Constitution, Justice William J. Brennan, Jr. declared in a 1985 speech,¹ “is a sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law.”² This is a theme that Brennan began to develop early in his Supreme Court tenure and that remained central for him during his years on the bench. He used the theme more often in speeches than in judicial opinions, and more often in both speeches and opinions in the second half of his thirty-four year tenure on the United States Supreme Court. Over time it became a profound moral vision, some would say even a radical one. It animated his thinking and much of his judicial decision making, even when he did not specifically use the words “dignity” or “human dignity.” The purpose of this essay is to explore

* This Essay is adapted from a lecture delivered at the William and Mary School of Law on March 19, 1998. The lecture was delivered under the auspices of the Institute of Bill of Rights Law, and I am grateful to the Institute's director, Professor Davison M. Douglas, for his support and encouragement. I completed the work for this Essay while I was a fellow at the Woodrow Wilson International Center for Scholars in Washington, D.C. Ann Robinson provided helpful assistance. In the fall semester of 1998, I have been a visiting professor at American University's Washington College of Law. This work is part of the research for my biography-in-progress of Justice Brennan for which I had Justice Brennan's cooperation.

¹ William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, Delivered at Georgetown University Law Center (Oct. 12, 1985), in William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986). This lecture also was reprinted as William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 35 RES IPSA LOQUITUR 4 (1985); and as William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 19 U.C. DAVIS L. REV. 2 (1985).

² William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986).

the background of this concept, to elaborate on Justice Brennan's use of the idea, and to touch briefly on the jurisprudential context of law and human dignity. The reason for exploring this theme is that Brennan's moral vision was central to this nation's thinking about constitutional rights and individual liberties in the second half of the twentieth century. His vision was central to the elaboration of the meaning of the Bill of Rights and to the evolution of the nation's understanding of the meaning of liberty and due process, a major source of rights and liberties today.³

I. DIGNITY: TRADITIONAL MEANING

In some respects the word "dignity" is a paradox, both in its dictionary definition and in its track record of Supreme Court usage. The dictionary defines dignity as, among other things, "self-respect."⁴ But the dictionary also defines dignity in terms of "nobility."⁵ In today's world, no one seriously would contend that self-respect is reserved for the nobility. Yet, the equation of dignity with nobility is most likely a historically accurate observation, one that Brennan and others helped to change; indeed, Brennan argued that it was the self-respect of all persons with which he was concerned.⁶ His was an equal opportunity dignity.

There is a much greater paradox that is more significant for examining the legacy of Justice Brennan. The United States Supreme Court used the term "dignity" in 578 cases in the 167 years before Justice Brennan took his place on the bench in 1956.⁷ In the overwhelming majority of those cases—552 of the 578, or 95.5%—the Supreme Court used the word "dignity" in one of six ways. Most commonly, the Court referred to the dignity of the state implicated in a case,⁸ or to the dignity of a sovereign.⁹ The word "dignity" also was part of the standard grand jury felony

³ Harvard Law Professor Laurence Tribe captured Brennan's centrality when he wrote: "Justice Brennan played the pivotal role in . . . building an enduring edifice of common sense and uncommon wisdom that transformed the landscape of America." Laurence H. Tribe, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 1, 43 (1997).

⁴ THE AMERICAN HERITAGE DICTIONARY 522 (3d ed. 1992).

⁵ *Id.*

⁶ See *infra* text accompanying notes 47-104.

⁷ This statistic is based on a search of Westlaw and LEXIS, using the word "dignity" as the search term and then spot-checking dozens of opinions to ascertain the word's usage. A very helpful and thoughtful earlier study of this field examined several variations of the phrase "human dignity," but not past usage of the word "dignity" alone. See Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L.J. 145 (1984).

⁸ See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). Discussing the Eleventh Amendment to the Constitution, Chief Justice John Marshall commented, "We must ascribe the amendment, then, to some other cause than the dignity of a State." *Id.* at 406.

⁹ See, e.g., *United States v. Bank of N.Y. & Trust Co.*, 296 U.S. 463 (1936). Ruling that the federal government needed to bring an action in New York state court rather than federal court, Chief Justice Charles Evans Hughes wrote, "We cannot see that there would be impairment of any rights the United States may possess, or any sacrifice of its proper dignity

indictment language.¹⁰ This use of “dignity” remains standard language in the grand jury indictments of many state statutes or state constitutions today.¹¹ Next, not surprisingly, the Court displayed concern for the dignity and authority of courts.¹² Another frequent use of the word “dignity” was in patent cases in which the item in question lacked “the dignity of invention.”¹³ In addition, the Court referred to the validity of a legal claim, usually concerning a debt or property, such as when a claim for land was entitled to equal dignity with another claim.¹⁴ Finally, the case history is filled with references to stature—the dignity of an argument,¹⁵ for example—or to status, such as the dignity of citizenship.¹⁶

Sometimes this usage produced surprising results or, more aptly, omissions. In the *Dred Scott*¹⁷ case and *Lochner v. New York*¹⁸—cases in which it might seem by today’s standards that the concept of individual dignity would have been relevant—the Court did not use the term “dignity” anywhere. Another likely candidate for airing the concept of individual dignity, *Plessy v. Ferguson*,¹⁹ includes only a passing reference, in the dissent of Justice John Marshall Harlan, to the Fourteenth Amendment’s contribution to the “dignity and glory of American citizenship.”²⁰ Seeming omissions abound in cases that use “dignity” in stock indictment language. In 1860, when a free black man, Willis Lago, was charged with

as a sovereign, if it prosecuted its claim in the appropriate forum where the funds are held.” *Id.* at 480-81.

¹⁰ See, e.g., *Kirby v. United States*, 174 U.S. 47 (1899). Justice John Marshall Harlan, ordering a new trial for Kirby for the theft of postage stamps, cited the language of the indictment as an offense “against the peace and dignity of the United States.” *Id.* at 49.

¹¹ See, e.g., VA. CODE ANN. § 19.2-221 (Michie 1995) (specifying that indictments for murder and manslaughter shall close with the words “against the peace and dignity of the Commonwealth”); see also N.J. CONST. art. 10, ¶ 3 (West 1971) (“All indictments shall conclude: ‘against the peace of this State, the government and dignity of the same’”).

¹² See, e.g., *Ex parte Secombe*, 60 U.S. (1 How.) 9 (1856). Chief Justice Roger Taney, refusing to reinstate a Minnesota lawyer to practice in that state’s courts, made reference to the “rights and dignity of the court itself.” *Id.* at 13.

¹³ See, e.g., *Magin v. Karle*, 150 U.S. 387 (1893). Rejecting the patentability of a beer-cooling device, Justice Howell Jackson wrote, “This change in the apparatus does not rise to the dignity of invention such as would entitle him to a patent.” *Id.* at 392.

¹⁴ See, e.g., *Bagnell v. Broderick*, 38 U.S. (1 Pet.) 436 (1839). Justice John Catron, ruling in a Missouri land dispute, wrote “[W]e deny that the states have any power to declare certificates of purchase of equal dignity with a patent.” *Id.* at 451.

¹⁵ See, e.g., *United States v. Wood*, 299 U.S. 123 (1936). Chief Justice Charles Evans Hughes reinstated a criminal conviction and rejected a challenge to certain jurors because “[i]t does not rise to the dignity of an argument.” *Id.* at 150.

¹⁶ See, e.g., *Buchanan v. Warley*, 245 U.S. 60 (1917). Justice William Day, describing the Fourteenth Amendment, said former slaves were “raised to the dignity of citizenship.” *Id.* at 76.

¹⁷ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

¹⁸ 198 U.S. 45 (1905).

¹⁹ 163 U.S. 537 (1896).

²⁰ *Id.* at 555 (Harlan, J., dissenting).

a crime for inducing a slave to escape, the Supreme Court used the word “dignity” in its decision.²¹ Despite the circumstances of the case, the use of the word did not pertain to a person; dignity appeared only in the indictment for breaching the “peace and dignity of the Commonwealth of Kentucky.”²² Similarly, when the Supreme Court upheld Oregon’s law limiting the working hours of women in *Muller v. Oregon*²³ early in this century, the only use of the word “dignity” was in the indictment of a laundry manager who made a woman work more than ten hours in a day “against the peace and dignity of the State of Oregon.”²⁴

The search for the precursors to Justice Brennan and his vision of human dignity is not all so bleak. The first Supreme Court reference to individual dignity came early in the Court’s history. In the early jurisdictional case of *Chisholm v. Georgia*,²⁵ which spawned the Eleventh Amendment, Justice James Wilson wrote of the dignity of the individual. Although he did not use the phrase specifically to suggest an independent source of rights, Wilson recognized that “[a] State; useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity derives all its acquired importance.”²⁶

A comparatively more modern predecessor to Brennan may be found in Justice Stephen Field. In the 1896 case of *Brown v. Walker*,²⁷ Field became the first member of the Supreme Court in more than 100 years to refer to individual dignity. Dissenting from the majority’s rejection of a Fifth Amendment self-incrimination argument, Field referred to the “sentiment of personal self-respect, liberty, independence and dignity which has inhabited the breasts of English speaking peoples for centuries.”²⁸

The great Justices of the first half of this century—Harlan, Holmes, Brandeis, and Cardozo—never used “dignity” to refer directly to the self-respect of an individual. However, there may be a subtle point of distinction to make. Use of the term “dignity” to apply to individuals generally denotes an approach that is protective of individual liberty; and it is certainly possible to take positions in Supreme Court cases supporting individual liberties without actually using the word “dignity.” In 1947, Justice Felix Frankfurter noted in *Adamson v. California*²⁹ that a number of his most respected predecessors wisely had rejected application of the Fifth Amendment self-incrimination clause and other Bill of Rights provisions to the states, although they were “judges who were alert in safeguarding and promoting the interests of liberty and human dignity through law.”³⁰ He named, among others, Holmes,

²¹ See *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1860).

²² *Id.* at 67.

²³ 208 U.S. 412 (1908).

²⁴ *Id.* at 417.

²⁵ 2 U.S. (2 Dall.) 419 (1793).

²⁶ *Id.* at 455 (emphasis omitted).

²⁷ 161 U.S. 591 (1896).

²⁸ *Id.* at 632 (Field, J., dissenting) (emphasis omitted).

²⁹ 332 U.S. 46 (1947).

³⁰ *Id.* at 62 (Frankfurter, J., concurring).

Brandeis, and Cardozo.³¹ This characterization must be correct. Surely, Justice Cardozo's standard, in *Palko v. Connecticut*,³² for applying to the states those guarantees of the Bill of Rights that are "implicit in the concept of ordered liberty"³³ was a means of talking about the human dignity implicit in the Fourteenth Amendment guarantee of due process. Notwithstanding this point, it is striking that none of these Justices apparently ever used the phrase "human dignity" in an opinion.

It was not until the 1940s that the phrase "individual dignity" began to have some regular constitutional currency.³⁴ It is too cumbersome to go through the entire period; a few examples will make the point. Serving from 1940 to 1949, Justice Frank Murphy advocated most forcefully, consistently, and directly the tradition to which Brennan became heir in the 1960s and beyond. Dissenting in *Screws v. United States*,³⁵ in which the majority ordered a new trial for a local sheriff convicted in a civil rights prosecution for the beating death of a black man, Murphy wrote of the "fair treatment that befits the dignity of man, a dignity that is recognized and guaranteed by the Constitution."³⁶ The following year, in a concurring opinion, Murphy decried racism because "[i]t renders impotent the ideal of the dignity of the human personality, destroying something of what is noble in our way of life."³⁷ He also provided the first Supreme Court use of the phrase "human dignity" in a dissenting opinion the same year.³⁸

It is worth noting that Murphy's use of the concept of individual dignity roughly coincides with the emergence of the idea of human dignity on the international scene. Both the United Nations Charter³⁹ and the Universal Declaration of Human Rights⁴⁰ make reference to the concept of dignity in all persons.⁴¹

³¹ *See id.*

³² 302 U.S. 319 (1937).

³³ *Id.* at 325.

³⁴ There are several thorough explorations of the background and origins of the concept of human dignity. *See generally* Paust, *supra* note 7 (examining trends in the use of and problems presented by judicial employment of the concept of "human dignity"). *See also* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES (Michael J. Meyer & W.A. Parent eds., 1992) (This volume contains a variety of essays exploring the constitutional parameters of "human dignity.").

³⁵ 325 U.S. 91 (1945).

³⁶ *Id.* at 135.

³⁷ *Duncan v. Kahanamoku*, 327 U.S. 304, 334 (1946) (Murphy, J., concurring).

³⁸ *See In re Yamashita*, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting) (arguing that the Due Process Clause of the Fifth Amendment applies to the prosecution of a World War Two Japanese officer for war crimes: "If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness," *id.* at 29.).

³⁹ *See* U.N. CHARTER preamble (proclaiming a determination "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person").

⁴⁰ *See* G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948) ("All human beings are born free and equal in dignity and rights.").

⁴¹ For a discussion of this development in international affairs, see Paust, *supra* note 7,

There are a few other examples from the 1940s and early 1950s in which Justices Felix Frankfurter⁴² and Robert Jackson⁴³ referred to the individual dignity protected by the Bill of Rights. Also in the 1950s, Justices Hugo Black⁴⁴ and William O. Douglas⁴⁵ began to refer to individual dignity. Much of the discussion in this period centered on coerced criminal confessions and improper police searches—practices, these Justices argued, that failed to heed the balance struck between law enforcement needs and human dignity.

There are other examples of Justices using the concept of human dignity.⁴⁶ It certainly is clear, however, that the meaning and relevance of human dignity as a constitutional concept was far from fully developed prior to the appointment of Justice Brennan to the Supreme Court.

II. DIGNITY AND JUSTICE BRENNAN

Justice Brennan was a Democrat appointed to the United States Supreme Court in 1956 by Republican President Eisenhower from his position on the New Jersey Supreme Court. Brennan served for thirty-four years until he retired in 1990. He died in 1997.

at 146-47, 151, 185.

⁴² See, e.g., *Carter v. Illinois*, 329 U.S. 173, 175 (1946) (“It is for them, therefore, to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures.”); *McNabb v. United States*, 318 U.S. 332, 343 (1943) (“A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process.”).

⁴³ See, e.g., *American Comm. Ass’n v. Douds*, 339 U.S. 382, 435 (1950) (Jackson, J., concurring and dissenting each in part) (“The public welfare . . . outweighs any affront to individual dignity.”).

⁴⁴ See, e.g., *Abbate v. United States*, 359 U.S. 187 (1959):

It is just as much an affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the offense.

Id. at 203 (Black, J., dissenting); *Johnson v. Eisentrager*, 339 U.S. 763, 798 (1950) (Black, J., dissenting) (“Our nation proclaims a belief in the dignity of human beings as such, no matter what their nationality or where they happen to live.”).

⁴⁵ See, e.g., *Ullman v. United States*, 350 U.S. 422, 449 (1956) (Douglas, J., dissenting) (“The Fifth Amendment protects the conscience and the dignity of the individual, as well as his safety and security, against the compulsion of government.”); *Stein v. New York*, 346 U.S. 156, 207 (1953) (Douglas, J., dissenting) (“[T]hat rule is the product of a civilization which, by respecting the dignity even of the least worthy citizen, raises the stature of all of us and builds an atmosphere of trust and confidence in government.”).

⁴⁶ See Paust, *supra* note 7, at 150-62 (discussing exhaustively the use of the concept of human dignity in the United States Supreme Court’s jurisprudence).

Brennan came from Newark where his father rose through the labor ranks to become a labor leader.⁴⁷ When it became apparent, during a 1916 trolley workers strike, that workers had little chance of success on their picket lines because the big corporate interests that ran the city also controlled law enforcement, the senior Brennan ran for the city commission. By virtue of his success with the voters, he soon became the city commissioner in charge of the police and fire departments. His message to the voters, to his department, and to his son was simple: "A square deal for all, special privileges to none"⁴⁸ was his oft-used campaign slogan. Put slightly differently, the elder Brennan urged that everyone be treated with the respect and dignity to which they were entitled.

This influence, frankly, is as close as one can come to finding an explanation for the origins of Brennan's concern with individual dignity. In the story of Justice Brennan, there is neither a defining philosophical moment nor an epiphany when the close reading of Jefferson, Madison, or Locke, or the teaching of Harvard Law Professors Felix Frankfurter or Zechariah Chafee⁴⁹ suddenly revealed to him an inherent purpose or for in Constitution. Neither did Brennan resort to a clearly defined school of philosophical thought. Immanuel Kant often is credited with elevating the importance of human dignity on the world stage,⁵⁰ but there is no evidence that Kant influenced Brennan. Brennan is not one who obviously invokes the spirit of the Declaration of Independence, or who finds his philosophical guidance in natural law or in the teachings of God and religion. There can be little doubt though, that his socially progressive Catholic upbringing influenced him.

Yet, in his first speech for which there is a text available, Brennan was already on the path that he would later follow while on the United States Supreme Court. In a speech delivered in 1954 to the Irish Charitable Society in Boston on St. Patrick's Day,⁵¹ he said "[W]e cannot and must not doubt our strength to conserve, without the

⁴⁷ For a brief summary of this background, see Stephen J. Wermiel, *The Nomination of Justice Brennan: Eisenhower's Mistake? A Look at the Historical Record*, 11 CONST. COMMENTARY 515, 516 (1994). See also Stephen Wermiel, *William J. Brennan, Jr.*, in THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1995, at 446-47 (Clare Cushman ed., 2d ed. 1995).

⁴⁸ THE SUPREME COURT JUSTICES, *supra* note 47, at 447. See also, e.g., *Murray and Brennan Present Municipal Views*, NEWARK EVENING NEWS, May 5, 1925, at 11.

⁴⁹ Brennan attended Harvard Law School from 1928 to 1931. He studied Equity with Chafee during his second and third years and Public Utilities with Frankfurter during his third year. See Letter from Annie C. Bombard, Associate Registrar, Harvard Law School to Stephen J. Wermiel (Aug. 1, 1990) (on file with author).

⁵⁰ See A.I. Melden, *Dignity, Worth, and Rights*, in THE CONSTITUTION OF RIGHTS, *supra* note 34, at 29 ("The familiar talk about the dignity and worth of the person is usually associated in the philosophical literature with Immanuel Kant's discussion of these topics in the second and third sections of *The Foundations of the Metaphysics of Ethics*."). Melden says, "Hence it is that Kant declares that the basis of the dignity of human beings—a dignity possessed even by the servile slave—is their autonomy, their determination in moral matters by their own rational nature." *Id.* at 31.

⁵¹ William J. Brennan, Jr., Speech to the Irish Charitable Society in Boston (Mar. 17,

sacrifice of any, all of the guarantees of justice and fair play and simple human dignity which have made our land what it is."⁵² Later in the same speech—two years before he joined the Supreme Court—Brennan referred to ours as “a system of government based upon the dignity and inviolability of the individual soul.”⁵³

Even with this early exposition of an interest in protecting human dignity, Brennan’s views developed slowly and on two separate tracks. Brennan used the phrase “human dignity” less often in his Court opinions than he did in speeches at law schools and before bar groups. There are numerous instances in which Brennan’s discussion of human dignity seems to be an *ex post facto* attempt to provide a unifying theme for his jurisprudence. Nonetheless, even if Brennan was more sparing in his judicial reliance on this concept, the central point remains that he expanded the uses of the concept of human dignity in United States jurisprudence. For Brennan, it became an essential focus of our understanding of the Constitution’s guarantee of liberty and due process; and he expressed this view in his speeches and opinions. It remains a core part of our constitutional value system today.

While the invocation of human dignity as a justification for rights is always controversial in this country, the vitality of this concept is still very much apparent in the leading international law human rights documents such as the Universal Declaration of Human Rights.⁵⁴ Professor Louis Henkin of Columbia Law School has argued that international conceptions of human dignity have outpaced the capacity of the United States to give meaning to the phrase.⁵⁵

III. EXAMINING BRENNAN’S ROLE

A closer look at Brennan’s use of the critical concept of human dignity in speeches and opinions is necessary. There are also a number of ways in which this concept may have influenced Brennan even when he did not say so—that is, when he did not use the term “human dignity.”

As a Justice, Brennan first used the term dignity in an important speech in which he described Madison, but could have been referring to himself. For Madison, Brennan said in his 1961 speech outlining the importance of applying the Bill of Rights to the states through the Due Process Clause, “the suppression of individuality was the deadly enemy of the spirit, making a mockery of the dignity of man.”⁵⁶

1954) (on file with author). The only known publication of the text of the speech is in Brennan’s Supreme Court confirmation hearing transcript. See *Nomination of William Joseph Brennan, Jr.: Hearings Before the Senate Comm. on the Judiciary*, 85th Cong. 8 (1957) [hereinafter NOMINATION HEARINGS].

⁵² NOMINATION HEARINGS, *supra* note 51, at 11-12.

⁵³ *Id.* at 12.

⁵⁴ See *supra* note 40.

⁵⁵ See Louis Henkin, *Human Dignity and Constitutional Rights*, in THE CONSTITUTION OF RIGHTS, *supra* note 34, at 210. Henkin says, “Once the United States set the world a standard, the standard of freedom and equality; now the world is showing us a standard of human dignity that includes also the obligation to satisfy basic human needs.” *Id.* at 228.

⁵⁶ William J. Brennan, Jr., James Madison Lecture at the New York University School

The Madison Lecture was a highly visible and prestigious occasion. Commentators paid much less attention to a speech Brennan gave later the same year in Newark to the Morrow Citizens Association on Correction. The speech, which elaborated on Brennan's thinking, was entitled, "The Essential Dignity of Man."⁵⁷ Describing the rights of the accused criminal, Brennan said, "All of these safeguards stem from the firm conviction of a free society that these safeguards are essential to preserve simple human dignity."⁵⁸ He concluded with what seems, with the benefit of hindsight, a profound statement of judicial philosophy: "The dignity of man is therefore to be prized more today than ever before."⁵⁹ "Simply stated," Brennan said, "the Morrow Association, as are the New Jersey courts, and as I hope is the Supreme Court of the United States, is engaged in assuring the dignity, the worth and value of the individual."⁶⁰ Made only five years into his lengthy tenure, this assertion is one of the clearest and strongest Brennan ever made concerning the Supreme Court's protection of individual dignity.

The appearance of this concept in the opinions of Justice Brennan, however, was a much slower development. In one 1959 decision, for example, Brennan's majority opinion rejecting a constitutional double jeopardy claim prompted Justice Hugo Black to complain in his dissent that the Court was offending basic notions of human dignity.⁶¹

Brennan later would characterize the concept of one person, one vote, as furthering individual dignity;⁶² but there was no such reference in his 1962 decision, *Baker v. Carr*,⁶³ which began the crucial process of opening federal courthouse doors to constitutional claims of disproportionate voting districts.

Rather, it was not until he had been on the Court for a decade that Brennan heavily relied on the concept of human dignity in a decision. In *Schmerber v. California*,⁶⁴ he concluded that basic concepts of human dignity did not dictate the outcome of the case. While declaring that "an overriding function of the Fourth Amendment is to protect personal privacy and dignity,"⁶⁵ Brennan upheld a compulsory blood test to check an arrested driver's alcohol level as a valid search and seizure.

In 1970, in *Goldberg v. Kelly*,⁶⁶ it became apparent that Brennan truly was doing something different: he was harnessing the power of the moral vision of vindicating

of Law (Feb. 15, 1961), in William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761, 771 (1961).

⁵⁷ William J. Brennan, Jr., *The Essential Dignity of Man*, Remarks to the Morrow Citizens Association on Correction (Nov. 21, 1961) (copy on file with author).

⁵⁸ *Id.* at 4.

⁵⁹ *Id.* at 13.

⁶⁰ *Id.* at 13.

⁶¹ See *Abbate v. United States*, 359 U.S. 187, 203 (1959) (Black, J., dissenting).

⁶² See Brennan, *supra* note 2, at 442.

⁶³ 369 U.S. 186 (1962).

⁶⁴ 384 U.S. 757 (1966).

⁶⁵ *Id.* at 767.

⁶⁶ 397 U.S. 254 (1970).

human dignity and putting it to work to drive the constitutional engine in the decisions of the Supreme Court. Up to this point, the sparse references in the Court's history to individual dignity involved the criminal justice process. The *Goldberg* holding moved the human dignity focus to a realm beyond the criminal justice system. The decision held that welfare and other government benefits created a statutory entitlement for the recipients; and it held that the benefits could not be cut off or substantially altered without prior notice and a prior hearing, as required by the Fourteenth Amendment's Due Process Clause.⁶⁷ "From its founding," Brennan wrote, "the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders."⁶⁸ He explained what this notion of dignity meant beyond the realm of criminal justice: "Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community."⁶⁹

For Brennan, that was the moral vision in its full glory. Human dignity meant that even the most down-trodden in our society deserved a chance to participate as full citizens.

Not everyone saw this vision. Professor Owen Fiss of Yale Law School has extolled the virtues of *Goldberg v. Kelly* as a simple and rational development of fair procedures necessary to implement due process as required by the exigencies of the times.⁷⁰ Fiss complained that the decision should stand on this solid, rational ground and that Brennan undercut its logic and reasoning when he described *Goldberg* as a triumph of human dignity in a 1987 speech.⁷¹ Brennan entitled his speech *Reason, Passion, and the Progress of Law*.⁷² It described the *Goldberg* opinion "as an expression of the importance of passion in governmental conduct, in the sense of attention to the concrete human realities at stake."⁷³ Elsewhere in the speech, Brennan made the connection between passion and individual dignity:

Whether the government treats its citizens with dignity is a question whose answer must lie in the intricate texture of daily life. Neither a judge nor an administrator who operates on the basis of reason alone can

⁶⁷ *Id.* at 263-64.

⁶⁸ *Id.* at 264-65.

⁶⁹ *Id.* at 265.

⁷⁰ See Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 794 (1990).

From my perspective, a justice charged with the duty of construing the due process clause, as Justice Brennan was in *Goldberg v. Kelly*, should be seen as engaged in a process of trying to understand what it means for a society to be committed to procedural fairness, and to elaborate that understanding in a certain practical context.

Id. at 794.

⁷¹ *Id.* at 803-04.

⁷² William J. Brennan, Jr., *Reason, Passion, and the Progress of Law: The Forty-Second Annual Benjamin N. Cardozo Lecture to the Ass'n of the Bar of the City of New York*, in William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3 (1988).

⁷³ *Id.* at 20.

fully grasp that answer, for each is cut off from the wellspring from which concepts such as dignity, decency, and fairness flow.⁷⁴

Perhaps the best-known and most visibly explicit use of human dignity in Brennan's Supreme Court decisions was in death penalty cases, in which he repeated his vision most often, but made relatively little substantive progress in persuading others. Brennan began to spell out his view in his separate opinion in *Furman v. Georgia*,⁷⁵ the Court's 1972 decision that invalidated the death penalty, albeit for only four years. Brennan recognized that "[t]he State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings."⁷⁶ He argued that "[a] punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity."⁷⁷ Brennan argued that the principle that "even the vilest criminal remains a human being possessed of common human dignity" was at the heart of the Eighth Amendment.⁷⁸ When the Court upheld the next generation of death penalty statutes in 1976,⁷⁹ Brennan remained no less convinced that the law was depriving the condemned of their basic constitutional entitlement to human dignity.⁸⁰ He remained convinced of this down to his last moments on the bench. He even dissented in one of his last cases in 1990 "that the death penalty is wholly inconsistent with the constitutional principle of human dignity."⁸¹

Brennan has been criticized widely for his record of dissenting in all death penalty cases during the fourteen years from *Gregg v. Georgia* until his retirement. Harvard Law School Professor Raoul Berger often said that Brennan's view of the death penalty was wrong as to the constitutional origins of the Eighth Amendment guarantee against "cruel and unusual punishment," was wrong because the death penalty was accepted by the American people for nearly two centuries before the Supreme Court began to meddle in it, and was wrong because Brennan should have stopped dissenting and accepted the determination by a majority of Justices that the ultimate penalty was constitutional.⁸² Brennan was not fazed. In a 1985 lecture entitled *In Defense of Dissents*, he replied to his critics that "when a justice perceives an interpretation of the text to have departed so far from its essential meaning, that justice is bound, by a larger constitutional duty to the community, to expose the departure and point toward a different path."⁸³ "On this issue, the death penalty,"

⁷⁴ *Id.* at 21-22.

⁷⁵ 408 U.S. 238 (1972) (Brennan, J., concurring).

⁷⁶ *Id.* at 270.

⁷⁷ *Id.*

⁷⁸ *Id.* at 273.

⁷⁹ See *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁸⁰ See *id.* at 227 (Brennan, J., dissenting).

⁸¹ *Walton v. Arizona*, 497 U.S. 639, 675 (1990) (Brennan, J., dissenting).

⁸² See Raoul Berger, *Justice Brennan vs. the Constitution*, 29 B.C. L. REV. 787, 796-98 (1988); Raoul Berger, *Justice Brennan, "Human Dignity," and Constitutional Interpretation*, in *THE CONSTITUTION OF RIGHTS*, *supra* note 34, at 129.

⁸³ William J. Brennan, Jr., *In Defense of Dissents*, The Mathew O. Tobriner Memorial Lecture, Delivered at the University of California, Hastings College of Law (Nov. 18 1985)

Brennan said, "I hope to embody a community striving for human dignity for all, although perhaps not yet arrived."⁸⁴

Brennan's assertion that the aim of law was to vindicate human dignity grew stronger in his opinions over time. In 1976, when the Supreme Court in *Paul v. Davis*⁸⁵ found no redress for a man whose name and photograph had been included improperly on a flyer showing shoplifters, Brennan dissented: "I have always thought that one of this Court's most important roles is to provide a formidable bulwark against governmental violation of the constitutional safeguards securing in our free society the legitimate expectations of every person to innate human dignity and sense of worth."⁸⁶

In 1984, Brennan wrote for the Court to uphold a Minnesota law that required the Jaycees organization to admit women as a form of public accommodation.⁸⁷ Criticizing gender stereotypes that have been used to discriminate against women, Brennan said such gender bias "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life."⁸⁸

When state prison officials in New Jersey found that there was no reasonable way they could accommodate the religious practices of Islamic inmates, the Supreme Court agreed in a 1987 decision, *O'Lone v. Shabazz*.⁸⁹ Brennan disagreed and wrote that, "[t]o deny the opportunity to affirm membership in a spiritual community . . . may extinguish an inmate's last source of hope for dignity and redemption."⁹⁰ Also in 1987, in *United States v. Stanley*⁹¹ the Supreme Court found that a former military serviceman who was given LSD without his knowledge, as part of a secret military experiment, could not sue for damages for violation of his constitutional rights.⁹² The Court found that the remedy for a constitutional tort does not apply to military service.⁹³ Said Brennan in dissent, "Soldiers ought not to be asked to defend a Constitution indifferent to their essential human dignity."⁹⁴

There are two other areas of law that bear scrutiny, although they are not examples in which Brennan expressly used the phrase "human dignity." Instead,

(on file with author), reprinted in William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 437 (1986).

⁸⁴ *Id.* This passage appears in the original text of Brennan's speech immediately following the text accompanying note 83, *supra*, but is omitted from the *Hastings Law Journal* version. This passage also appears in another published version of the speech. See William J. Brennan, Jr., *In Defense of Dissents*, PA. GAZETTE, Feb. 1986, at 20, 23.

⁸⁵ 424 U.S. 693 (1976).

⁸⁶ *Id.* at 734-35 (Brennan, J., dissenting).

⁸⁷ *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

⁸⁸ *Id.* at 625.

⁸⁹ 482 U.S. 342 (1987).

⁹⁰ *Id.* at 368 (Brennan, J., dissenting) (footnote omitted).

⁹¹ 483 U.S. 669 (1987).

⁹² See *id.* at 678-84.

⁹³ See *id.* at 684.

⁹⁴ *Id.* at 708 (Brennan, J., dissenting).

they are lines of cases that were very important to him and that may well have been influenced by his moral vision of law and human dignity. The first is the line of cases involving government accountability to individuals, sometimes called constitutional torts. Brennan wrote the majority opinion in *Bivens v. Six Unknown Named Agents*⁹⁵ in 1971, in which the Court found that a person arrested in his home by federal narcotics agents without any justification could sue for damages under the Fourth Amendment.⁹⁶ He expanded this principle in 1979 in *Davis v. Passman*,⁹⁷ to allow suit under the Fifth Amendment's Due Process Clause by a woman who accused the congressman for whom she worked of discriminating against her on the basis of her gender.⁹⁸ It was Brennan, as well, who in 1978 wrote the lead opinion in *Monell v. Department of Social Services*,⁹⁹ which held that local governments could be sued for civil rights violations under section 1983 as "persons" who were acting under color of state law.¹⁰⁰

Taken together, these cases establish a powerful right of citizens to hold their government accountable for individual harms. This was a marked departure from the more traditional democratic approach that says United States citizens hold the government accountable collectively by exercising the will of the majority at the ballot box. Brennan's vision is that government also must be accountable to the individual for the harms to that individual and must pay damages when appropriate. While Brennan never expressly said so in public, it clearly is plausible that the motivation for this line of cases is the same one outlined in this essay. For Brennan, it was a core part of the dignity of an individual in a democratic society that prizes the right of each citizen, and not just the will of the majority, to be able to seek individual vindication from government for wrongs done to that person.

Asked about the origin of his commitment to human dignity, on one occasion Brennan made this connection. For him, the analysis was "how people ought to be treated by authority and how the rights of people should be respected by authority. I always couch it in the [terms that] society's basic value is enhancing human dignity. And that covers so much."¹⁰¹

It is possible to see in Brennan a similar moral justification for his unwavering effort to reinvigorate the procedure of habeas corpus. This again is illustrated in a line of cases in which Brennan never specifically used the words "human dignity." But beginning with his 1963 opinion *Fay v. Noia*,¹⁰² some aspects of which have now

⁹⁵ 403 U.S. 388 (1971).

⁹⁶ *See id.* at 397.

⁹⁷ 442 U.S. 228 (1979).

⁹⁸ *See id.* at 248-49.

⁹⁹ 436 U.S. 658 (1978).

¹⁰⁰ *See id.* at 700-01.

¹⁰¹ These comments were made to the author in one of more than 60 tape-recorded interviews with Justice Brennan between 1986 and his death in 1997. Interview #60 by Stephen J. Wermiel with William J. Brennan, Jr., Associate Justice, United States Supreme Court, Washington, D.C. (May 2, 1990) (transcript on file with author).

¹⁰² 372 U.S. 391 (1963).

been overruled,¹⁰³ Brennan articulated a consistent view that the writ of habeas corpus allowed vigorous and substantial federal court review of state criminal court proceedings,¹⁰⁴ and that the writ must be given broad leeway to hold the criminal justice system accountable for errors and unconstitutional procedures.¹⁰⁵ Like the constitutional tort cases, this line of cases makes most sense when understood as an essential component of a scheme to vindicate human dignity. A core part of the notion of human dignity is that persons convicted of crimes should have some redress for misconduct committed in the course of their convictions. Of course, the writ goes back centuries and there is no need here to rewrite British or American history to suggest that it had its origin in notions of human dignity. The point is only that it would help to explain Brennan's unwavering commitment to and deep-seated belief in the writ of habeas corpus which took second place to no one in the history of the Supreme Court.

IV. CRITICIZING THE BRENNAN VIEW

Numerous scholars have focused on the problems with Brennan's vision of law and human dignity. The following list is not exhaustive, but mentions a few prominent criticisms.

First, there is the criticism that Brennan's vision of human dignity was self-serving. Pro-life scholars have wondered how he could see himself as a protector of human dignity and ignore the dignity of the unborn fetus.¹⁰⁶ His answer, which certainly would not satisfy his critics, surely would have been that he was concerned with the dignity of the woman who faced the choice of whether to continue her pregnancy and that the fetus never was determined to be a person within the meaning of the Constitution. However difficult and controversial this balance may have been, once Brennan made it he never looked back.

A second problem involves the area of free speech. Those who advocate protection of the interests of the community fairly may ask how First Amendment protection for offensive, unwanted, or hateful speech advances the interests of human dignity.¹⁰⁷ For Brennan, it was the ability of the speaker to speak that was at the core

¹⁰³ See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 749-51 (1991) (limiting *Fay* to its facts and applying the "cause and prejudice" standard, rather than *Fay*'s "deliberate bypass" standard, to federal habeas corpus review of state proceedings).

¹⁰⁴ See *Fay*, 372 U.S. at 406.

¹⁰⁵ See *id.* at 422.

¹⁰⁶ See, e.g., Mary Ann Glendon & Eric W. Treene, *Selective Humanism: The Legacy of Justice William Brennan*, HUM. LIFE REV., Winter 1998, at 65, 75 ("He was a man of many talents who often professed his dedication to human dignity. . . . Somehow, this man, remembered by so many for his personal warmth and compassion, became complicit in the slaughter of innocents.").

¹⁰⁷ The works of Professors Richard Delgado, Mari Matsuda, Charles Lawrence, and Owen Fiss, among others, raise these concerns. See, e.g., Richard Delgado, *Are Hate-Speech Rules Constitutional Heresy? A Reply to Steven Gey*, 146 U. PA. L. REV. 865 (1998); Owen M. Fiss, *The Supreme Court and the Problem of Hate Speech*, 24 CAP. U. L. REV. 281

of the ideal of human dignity. In this respect, as in numerous others, it was the individual's dignity that he sought to protect, even in the face of—or perhaps especially in the face of—the countervailing interests of the majority that found the speech unwanted or offensive.¹⁰⁸

Yet another concern is the question of where one finds the standards of human dignity to apply. It is a difficult question, but Brennan would say that these standards were discernible in evolving standards of decency and that this enterprise was not very different from the many formulations other Justices have used to find meaning in the Due Process Clause—“implicit in the concept of ordered liberty”¹⁰⁹ is the most frequently cited formulation.

Finally, as already discussed, there are those who would ask skeptically, “What do you mean moral vision? What relevance does moral vision have to the process of constitutional interpretation?” Judge Frank Easterbrook of the United States Court of Appeals for the Seventh Circuit made precisely this point when he said, “When we observe that the Constitution . . . stands for ‘human dignity’ but not rules, we have destroyed the basis for judicial review.”¹¹⁰

These criticisms never shook Brennan's faith. His answer, in a 1987 speech at Columbia Law School,¹¹¹ was that the reading of human dignity into the Constitution was not new or in any way unique to him. He thought it was a transcendent value embedded in the Constitution: “The vision of human dignity embodied in our Constitution throughout most of its interpretive history is, at least for me, deeply moving. It is timeless. It has inspired citizens of this country and others for two centuries.”¹¹²

(1995); Charles R. Lawrence, III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787 (1992); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

¹⁰⁸ See *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that a conviction for burning the United States flag was inconsistent with the First Amendment).

¹⁰⁹ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), discussed *supra* in text accompanying notes 32 and 33.

¹¹⁰ Raoul Berger, *Justice Brennan, “Human Dignity,” and Constitutional Interpretation*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES*, *supra* note 34, at 130 n.2 (quoting Judge Frank Easterbrook, *Approaches to Judicial Review*, in *POLITICS AND THE CONSTITUTION: THE NATURE OF AND EXTENT OF INTERPRETATION* 17, 29 (American Studies Center ed., 1990)).

¹¹¹ William J. Brennan, Jr., *The Worldwide Influence of the United States Constitution as a Charter of Human Rights*, Lecture delivered at Columbia Law School Bicentennial Celebration (Nov. 20, 1987) (copy on file with author).

¹¹² *Id.* at 10.

V. CONCLUSION

There is no richer discourse on the scope and breadth of Justice Brennan's moral vision than his own discussion in a 1985 speech on constitutional interpretation delivered at the Georgetown University Law Center.¹¹³

Indeed, it is because we recognize that incarceration strips a man of his dignity that we demand strict adherence to fair procedure and proof of guilt beyond a reasonable doubt before taking such a drastic step. . . . There is no worse injustice than wrongly to strip a man of his dignity. And our adherence to the constitutional vision of human dignity is so strict that even after convicting a person according to these stringent standards, we demand that his dignity be infringed only to the extent appropriate to the crime and never by means of wanton infliction of pain or deprivation. I interpret the Constitution plainly to embody these fundamental values.

Of course, the constitutional vision of human dignity has, in this past quarter-century, infused far more than our decisions about the criminal process. Recognition of the principle of "one person, one vote" as a constitutional principle redeems the promise of self-governance by affirming the essential dignity of every citizen in the right to equal participation in the democratic process. Recognition of so-called "new property" rights in those receiving government entitlements affirms the essential dignity of the least fortunate among us by demanding that government treat with decency, integrity, and consistency those dependent on its benefits for their very survival. After all, a legislative majority initially decides to create governmental entitlements; the Constitution's due process clause merely provides protection for entitlements thought necessary by society as a whole. Such due process rights prohibit government from imposing the devil's bargain of bartering away human dignity in exchange for human sustenance. Likewise, recognition of full equality for women—equal protection of the laws—ensures that gender has no bearing on claims to human dignity.

Recognition of broad and deep rights of expression and of conscience reaffirm the vision of human dignity in many ways. These rights redeem the promise of self-governance by facilitating—indeed demanding—robust, uninhibited, and wide-open debate on issues of public importance. Such public debate is vital to the development and dissemination of political ideas. As importantly, robust public discussion is the crucible in which personal political convictions are forged. In our democracy, such discussion is a political duty; it is the essence of self-government. The constitutional vision of human dignity rejects the possibility of political orthodoxy imposed from above; it respects the

¹¹³ See *supra* note 1.

rights of each individual to form and to express political judgments, however far they may deviate from the mainstream and however unsettling they might be to the powerful or the elite. . . .

I do not mean to suggest that we have in the last quarter-century achieved a comprehensive definition of the constitutional ideal of human dignity. We are still striving toward that goal, and doubtless it will be an eternal quest. For if the interaction of this Justice and the constitutional text over the years confirms any single proposition, it is that the demands of human dignity will never cease to evolve.¹¹⁴

¹¹⁴ Brennan, *supra* note 2, at 442-43.