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Justice William J. Brennan, Jr.—The Moral Force of His Language

Bennett L. Gershman†

The enduring strength of Justice William J. Brennan Jr.'s constitutional vision is a tribute to his extraordinary scholarship and powerful logic. His opinions will be studied, cited, and honored for generations for their immense contribution to the constitutional protection of individual rights. But there is a further dimension to his jurisprudence that has always struck me — the moral force of his language. Justice Brennan's eloquent, passionate, and compassionate prose constantly exhorts us to a higher moral plane. To the disadvantaged, the accused, the dissident, and the condemned, Justice Brennan's words are a timeless anthem of sustenance and hope.

Reverberating throughout his literature are themes of human dignity, autonomy, equality, and freedom. "Respect for the individual . . . is the lifeblood of the law,"¹ he wrote. His dissent in *Jones v. Barnes*² is insightful. The Court held that an indigent defendant has no constitutional right under the sixth amendment to require court-appointed counsel to raise viable issues on appeal if counsel, as a matter of professional judgment, feels otherwise.³ Justice Brennan disagreed. According to the sixth amendment, he wrote, "counsel must function as an advocate for the defendant, as opposed to a friend of the court."⁴ Counsel is obligated to respect his client's choices "unless they would require lawyers to violate their consciences, the law, or their duties to the court."⁵ The Court's decision "risk[s] deepen-

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1. *Illinois v. Allen*, 397 U.S. 337, 351 (1970).

2. 463 U.S. 745, 755 (1983) (Brennan, J., dissenting).

3. *Jones*, 463 U.S. at 750-54.

4. *Id.* at 758 (Brennan, J., dissenting).

5. *Id.* at 764.

ing the mistrust between clients and lawyers”⁶ “[H]aving a lawyer becomes one of the many indignities visited upon someone who has the ill fortune to run afoul of the criminal justice system.”⁷ He went on:

Finally, today’s ruling denigrates the values of individual autonomy and dignity central to many constitutional rights, especially those Fifth and Sixth Amendment rights that come into play in the criminal process. Certainly a person’s life changes when he is charged with a crime and brought to trial. He must, if he harbors any hope of success, defend himself on terms — often technical and hard to understand — that are the State’s, not his own. As a practical matter, the assistance of counsel is necessary to that defense. Yet, until his conviction becomes final and he has had an opportunity to appeal, any restrictions on individual autonomy and dignity should be limited to the minimum necessary to vindicate the State’s interest in a speedy, effective prosecution. The role of the defense lawyer should be above all to function as the instrument and defender of the client’s autonomy and dignity in all phases of the criminal process.⁸

An overarching theme of Justice Brennan’s vision of individual rights is his view that state criminal justice processes should embrace, through the due process clause of the fourteenth amendment, all of the fundamental values and standards contained in the federal Bill of Rights. Justice Brennan wrote in *Malloy v. Hogan*⁹ that adopting such standards “reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay.”¹⁰ He applied this reasoning in *Malloy*, holding that the fifth amendment privilege against self-incrimination should protect citizens in state courts to the same extent that it protects citizens in federal courts.¹¹

The Court thus has rejected the notion that the Fourteenth Amendment applies to the States only a “watered-down, subjective version of the individual guarantees of the Bill of Rights”. . . .

6. *Id.* at 762-63.

7. *Id.* at 764.

8. *Id.* at 763 (citation omitted).

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

10. *Id.* at 7.

11. *Id.* at 8.

It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.¹²

In the landmark case of *In re Winship*,¹³ Justice Brennan, writing for the Court, similarly espoused that in all criminal prosecutions the due process clause requires a standard of proof of "beyond a reasonable doubt."¹⁴ He further described the values underlying the concepts of accusation and guilt:

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

....

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.¹⁵

12. *Id.* at 10-11 (quoting *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 275 (1964) (Harlan, J., dissenting)).

13. 397 U.S. 358 (1970).

14. *Id.* at 361.

15. *Id.* at 363-64.

Justice Brennan's commitment to human dignity and autonomy inspired a broad defense of the right of privacy in a variety of contexts. In *Eisenstadt v. Baird*,¹⁶ for example, in striking down a statute that prohibited unmarried couples from having access to contraceptive devices, he wrote:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.¹⁷

Justice Brennan anticipated the Court's "gradual but determined strangulation" of the exclusionary rule.¹⁸ In *United States v. Calandra*,¹⁹ which foreshadowed this piecemeal erosion by holding that the exclusionary rule of the fourth amendment did not apply to grand jury proceedings,²⁰ Justice Brennan wrote: "The judges who developed the exclusionary rule were well aware that it embodied a judgment that it is better for some guilty persons to go free than for the police to behave in a forbidden fashion."²¹ In *United States v. Leon*,²² the controversial decision that modified the exclusionary rule to allow into evidence illegally seized items obtained by police in good faith reliance upon a search warrant, Justice Brennan's powerful dissent reminds us that we pay a price for living in a free society.

If nothing else, the Amendment plainly operates to disable the government from gathering information and securing evidence in certain ways. In practical terms, of course, this restriction of official power means that some incriminating evidence inevitably will go undetected if the government obeys these constitutional re-

16. 405 U.S. 438 (1972).

17. *Id.* at 453 (emphasis in original).

18. *United States v. Leon*, 468 U.S. 897, 928-29 (1984) (Brennan, J., dissenting) (fourth amendment exclusionary rule should bar evidence obtained by officers acting in reasonable reliance upon a warrant that ultimately proves invalid).

19. 414 U.S. 338 (1974).

20. *Id.* at 351-52.

21. *Id.* at 361 (Brennan, J., dissenting).

22. 468 U.S. 897 (1984).

straints. It is the loss of that evidence that is the "price" our society pays for enjoying the freedom and privacy safeguarded by the Fourth Amendment. Thus, some criminals will go free *not*, in Justice (then Judge) Cardozo's misleading epigram, "because the constable has blundered," but rather because official compliance with Fourth Amendment requirements makes it more difficult to catch criminals. Understood in this way, the Amendment directly contemplates that some reliable and incriminating evidence will be lost to the government; therefore, it is not the exclusionary rule, but the Amendment itself that has imposed this cost.²³

We also pay a price, Justice Brennan reminds us, for having the freedom to speak, to publish, and to think. In *New York Times v. Sullivan*,²⁴ one of his greatest first amendment achievements, he eloquently defended a newspaper's right to print false criticism about public officials. Holding that the first amendment protects such defamatory falsehoods unless there is proof of "actual malice," Justice Brennan wrote:

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.²⁵

Twenty-five years after *Sullivan*, an increasingly isolated voice on an increasingly conservative Court, Justice Brennan persuaded a majority of the Court, in *Texas v. Johnson*,²⁶ to strike down as violative of the first amendment a statute criminalizing the desecration of the American flag. He wrote:

The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. . . . And, precisely because it is our flag that is involved, one's response to the flag burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dig-

23. *Id.* at 941 (Brennan, J., dissenting) (citations and footnote omitted).

24. 376 U.S. 254 (1964).

25. *Id.* at 270.

26. 491 U.S. 397 (1989).

nity even of the flag that burned than by — as one witness here did — according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.²⁷

Justice Brennan's majestic language illuminates constitutional discourse and becomes a lyric to the highest aspirations of humanity. He was the champion of the dissident and the dispossessed. In *Trop v. Dulles*,²⁸ he defended the social outcast, arguing that Congress has no power to impose the punishment of expatriation upon an American citizen for desertion.²⁹ In *Keyishian v. Board of Regents*,³⁰ he championed academic freedom, ruling that loyalty oaths are anathema to constitutional liberty.³¹ In *Goldberg v. Kelly*,³² he championed the underclass, ruling that welfare benefits are not a mere privilege bestowed by an indulgent society upon poor people, but are an entitlement that may not be taken away absent the safeguards of due process.³³ Reverberating through his opinion are the themes of human dignity and autonomy:

From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. 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. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to re-

27. *Id.* at 419-20.

28. 356 U.S. 86 (1958).

29. *Id.* at 109-11 (Brennan, J., concurring).

30. 385 U.S. 589 (1967).

31. *Id.* at 603-04.

32. 397 U.S. 254 (1970).

33. *Id.* at 262-65.

ceive it; pre-termination evidentiary hearings are indispensable to that end.³⁴

Justice Brennan's commitment to the principles of human equality contended against the harsh realities of gender and racial discrimination in American life. This commitment inspired his memorable opinions in *Frontiero v. Richardson*,³⁵ and *Regents of the University of California v. Bakke*.³⁶ In *Frontiero*, Justice Brennan addressed the virulent prejudice against women:

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage. Indeed, this paternalistic attitude became so firmly rooted in our national consciousness that, 100 years ago, a distinguished Member of this Court was able to proclaim:]

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .

The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.

As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit

34. *Id.* at 264-65 (footnote omitted).

35. 411 U.S. 677 (1973) (statutes recognizing female, but not male, spouses of military personnel as dependents violated the due process clause of the fifth amendment).

36. 438 U.S. 265, 324 (1978) (Brennan, J., concurring) (the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions).

in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. And although blacks were guaranteed the right to vote in 1870, women were denied even that right — which is itself “preservative of other basic civil and political rights” — until adoption of the Nineteenth Amendment half a century later.³⁷

His concurring opinion in *Bakke* is a harbinger of the monumental debate over affirmative action:

Our Nation was founded on the principle that “all Men are created equal.” Yet candor requires acknowledgment that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery. The consequences of this compromise are well known and have aptly been called our “American Dilemma.” Still, it is well to recount how recent the time has been, if it has yet come, when the promise of our principles has flowered into the actuality of equal opportunity for all regardless of race or color.

The Fourteenth Amendment, the embodiment in the Constitution of our abiding belief in human equality, has been the law of our land for only slightly more than half its 200 years. And for half of that half, the Equal Protection Clause of the Amendment was largely moribund so that, as late as 1927, Mr. Justice Holmes could sum up the importance of that Clause by remarking that it was the “last resort of constitutional arguments.” Worse than desuetude, the Clause was early turned against those whom it was intended to set free, condemning them to a “separate but equal” status before the law, a status always separate but seldom equal. Not until 1954 — only 24 years ago — was this odious doctrine interred by our decision in *Brown v. Board of Education*, and its progeny, which proclaimed that separate schools and public facilities of all sorts were inherently unequal and forbidden under our Constitution. Even then inequality was not eliminated with “all deliberate speed.” In 1968 and again in 1971, for example, we were forced to remind school boards of their obligation to eliminate racial discrimination root and branch. And a glance at our docket and at dockets of lower courts will show that even today officially sanctioned discrimination is not a thing of the past.

Against this background, claims that law must be “color-

37. 411 U.S. at 684-85 (citations and footnote omitted).

blind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot — and, as we shall demonstrate, need not under our Constitution or Title VI, which merely extends the constraints of the Fourteenth Amendment to private parties who receive federal funds — let color blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.³⁸

No constitutional protection elicited Justice Brennan's involvement more passionately than his belief that the eighth amendment prohibits capital punishment. His relentless commitment to this position produced a massive body of literature against the death penalty. He dissented from every denial of certiorari by the Court in a capital case.³⁹ Thus, Justice Brennan, together with Justice Marshall, wrote: "Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, we would grant certiorari and vacate the death sentence in this case."⁴⁰ His majestic concurring opinion in *Furman v. Georgia*,⁴¹ embodied the emerging themes that reverberate in hundreds of his decisions. In *Furman* he wrote:

Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the

38. 438 U.S. at 326-28 (Brennan, J., concurring) (citations and footnote omitted).

39. A Westlaw search produced 1379 Brennan dissents from denials of certiorari in capital cases. See, e.g., *Boggs v. Muncy*, 111 S. Ct. 2 (1990) (Brennan, J., dissenting); *Albanese v. Illinois*, 490 U.S. 1075 (1989) (Brennan, J., dissenting); *Stewart v. Illinois*, 488 U.S. 900 (1988) (Brennan, J., dissenting); *Ghent v. California*, 485 U.S. 929 (1988) (Brennan, J., dissenting); *Mapes v. Ohio*, 476 U.S. 1178 (1986) (Brennan, J., dissenting); *Waldrop v. Alabama*, 471 U.S. 1030 (1985) (Brennan, J., dissenting); *Wilson v. Zant*, 459 U.S. 1092 (1982) (Brennan, J., dissenting); *Brown v. Georgia*, 454 U.S. 882 (1981) (Brennan, J., dissenting); *Steelman v. Arizona*, 449 U.S. 913 (1980) (Brennan, J., dissenting); *Jacobs v. Alabama*, 439 U.S. 1122 (1979) (Brennan, J., dissenting); *Woodkins v. Texas*, 431 U.S. 960 (1977) (Brennan, J., dissenting); *Aword v. Florida*, 428 U.S. 923 (1976) (Brennan, J., dissenting).

40. *Paradis v. Idaho*, 468 U.S. 1220, 1220 (1984) (Brennan, J., dissenting) (citations omitted).

41. 408 U.S. 238 (1972).

plight of a person punished by imprisonment is evident. An individual in prison does not lose "the right to have rights." A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a "person" for purposes of due process of law and equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts. His punishment is not irrevocable. Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know that death has been the lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court. The punishment itself may have been unconstitutionally inflicted, yet the finality of death precludes relief. An executed person has indeed "lost the right to have rights." As one 19th century proponent of punishing criminals by death declared, "When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world, take your chance elsewhere.'"⁴²

One death penalty case stands out from the rest. In *McCleskey v. Kemp*,⁴³ capital punishment and racial discrimination are dramatically fused. Notwithstanding a concededly valid statistical study showing that black defendants who killed white victims were much more likely to receive the death penalty than any other capital defendant, the Court declined to find this practice unconstitutionally discriminatory.⁴⁴ Against this judgment, Justice Brennan wrote:

At the time our Constitution was framed 200 years ago this year, blacks "had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect. Only 130 years ago, this Court relied on these observations to deny American citizenship to blacks. A mere three generations ago, this Court sanctioned racial segregation, stating that "[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plan."

42. *Id.* at 290 (citation omitted).

43. 481 U.S. 279 (1987).

44. *Id.* at 319.

In more recent times, we have sought to free ourselves from the burden of this history. Yet it has been scarcely a generation since this Court's first decision striking down racial segregation, and barely two decades since the legislative prohibition of racial discrimination in major domains of national life. These have been honorable steps, but we cannot pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries. Warren McCleskey's evidence confronts us with the subtle and persistent influence of the past. His message is a disturbing one to a society that has formally repudiated racism, and a frustrating one to a Nation accustomed to regarding its destiny as the product of its own will. Nonetheless, we ignore him at our peril, for we remain imprisoned by the past as long as we deny its influence in the present.

It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. "The destinies of the two races in this country are indissolubly linked together," and the way in which we choose those who will die reveals the depth of moral commitment among the living.

The Court's decision today will not change what attorneys in Georgia tell other Warren McCleskeys about their chances of execution. Nothing will soften the harsh message they must convey, nor alter the prospect that race undoubtedly will continue to be a topic of discussion. McCleskey's evidence will not have obtained judicial acceptance, but that will not affect what is said on death row. However many criticisms of today's decision may be rendered, these painful conversations will serve as the most eloquent dissents of all.⁴⁵

Justice Brennan's attack on the cold, mechanical manner in which capital sentencing decisions frequently are reviewed produced a wrenching dissent from the Court's refusal to stay an execution. In *Lowenfield v. Butler*,⁴⁶ the petitioner sought a stay on the ground that he lacked the mental capacity to be executed.⁴⁷ Supporting his application, Lowenfield presented to the Louisiana trial court, and then to the Louisiana Supreme Court,

45. *Id.* at 343-45 (Brennan, J., dissenting) (citations omitted).

46. 485 U.S. 995 (1988).

47. *Id.* at 995 (Brennan, J., dissenting).

an affidavit from Dr. Marc Zimmerman, a licensed clinical psychologist, who after interviewing and testing Lowenfield concluded that "it is highly probable that Mr. Lowenfield is suffering from paranoid schizophrenia."⁴⁸ Dr. Zimmerman testified that "[a]s a paranoid schizophrenic, Mr. Lowenfield's capacity to understand the death penalty would be impaired. Indeed, my clinical interview with Mr. Lowenfield indicated that *he is currently unable to understand the death penalty.*"⁴⁹ The prosecutor presented no evidence to refute this conclusion which, if accepted, would have constituted a more than sufficient showing to stay the execution.⁵⁰ Nevertheless, the state courts denied the motion without any findings or explanation.⁵¹ Lowenfield then filed an application for *habeas* relief with the federal district court.⁵² The district court denied the application on the basis of an "extended" *ex parte* conversation with Dr. Zimmerman.⁵³ A divided panel of the Court of Appeals for the Fifth Circuit affirmed in an opinion that reached the Supreme Court's chambers fifteen minutes before the scheduled execution.⁵⁴ The entire review process took less than thirty-six hours.⁵⁵ Justice Brennan wrote:

48. *Id.* (quoting affidavit A-792, *Lowenfield*, 485 U.S. 995 (No. 87-6780)).

49. *Id.* at 995-96 (emphasis in original).

50. *Id.* at 996.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Justice Brennan described the proceedings:

1) On the afternoon of April 11, petitioner filed in Louisiana state court a petition for postconviction relief raising the claims that are now before us.

2) Later that afternoon the state trial court denied relief.

3) At 6 p.m. (Eastern Daylight Time) the next day, April 12, the Louisiana Supreme Court denied relief and petitioner applied to the District Court for a writ of *habeas corpus*.

4) At 8:30 p.m. the District Court denied petitioner's application.

5) At 12:10 a.m. that same night the Court of Appeals affirmed.

6) At 12:45 a.m. (15 minutes before the scheduled execution) the Court of Appeals' opinions were circulated to this Court.

7) At 1:05 a.m., with petitioner already strapped in the electric chair, this Court denied his application for a stay of execution.

8) At 1:25 a.m. petitioner was pronounced dead. Time ran out before we voted on the certiorari petition that accompanied petitioner's stay application.

Id. at 999 (citations omitted).

The haste that attended disposition of this case is reprehensible. It is hardly surprising that a case scudding through the state courts in 24 hours should yield orders devoid of law or logic — the ones in this case simply read, “DENIED” — for which the description “terse” would be charitable. If the federal courts are intent on accelerating the pace at any cost, as they were in this case, their only choice is to take procedural shortcuts and give short shrift to substance. And simple arithmetic suggests grave injustice when the Court of last resort takes 15 minutes to read and analyze 17 pages of opinions from the court below and cast a vote on life or death.

Due process means little if it requires the courts to provide an “opportunity to be heard,” without imposing on them a concomitant duty to listen — and, at least when a life is at stake, to listen very carefully. Presumably, it was in recognition of the injustice that four of us (one less than the requisite five) voted to stay petitioner’s execution, so as to consider his insanity claim in an atmosphere that was not itself lunatic.

Regrettably, this case is not atypical. It is the natural product of a penal system conducive to inaccurate factfinding and shoddy analysis. And I doubt that any system could be devised to cure the evil, so long as States continue to impose punishments so severe as to be irrevocable. Even were I not convinced that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth Amendment, I would have no part of a penal system that permits a State’s interest in meting out death on schedule to convert our constitutional duty to dispense justice into a license to dispense with it.

I dissent.⁵⁶

Justice Brennan’s concluding words in his 1986 Oliver Wendell Holmes, Jr. Lecture at Harvard Law School provide a fitting coda to this great Justice’s career on the Court:

I am convinced that law can be a vital engine not merely of change but of other civilizing change. That is because law, when it merits the synonym justice, is based on reason and insight. Decisional law evolves as litigants and judges develop a better understanding of the world in which we live. Sometimes, these insights appear pedestrian, such as when we recognize, for example, that a suitcase is more like a home than it is like a car. On occasion, these insights are momentous, such as when we finally under-

56. *Id.* at 999-1000 (citations omitted).

stand that separate can never be equal. I believe that these steps, which are the building blocks of progress, are fashioned from a great deal more than the changing views of judges over time. I believe that problems are susceptible to rational solution if we work hard at making and understanding arguments that are based on reason and experience. With respect to the death penalty, I believe that a majority of the Supreme Court will one day accept that when the state punishes with death, it denies the humanity and dignity of the victim and transgresses the prohibition against cruel and unusual punishment. That day will be a great day for our country, for it will be a great day for our Constitution.⁵⁷

57. Brennan, *The 1986 Oliver Wendell Holmes, Jr. Lecture: Constitutional Adjudication and the Death Penalty: A View From the Court*, 100 HARV. L. REV. 313, 331 (1986).