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Of Laws and Men: An Essay On Justice Marshall's View of Criminal Procedure

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ARTICLES

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I. INTRODUCTION

As a general rule, criminal defendants whose cases made it to the Supreme Court between 1967 and 1991 must have thought that, as long as Justice Thurgood Marshall occupied one of the nine seats, they had one vote for sure. And Justice Marshall rarely disappointed them — certainly not in cases of any broad constitutional significance. From his votes and opinions, particularly his dissents, many were quick to conclude that the Justice was another of those "bleeding heart liberals," hostile to the mission of law enforcement officers and ready to overlook the gravity of the crimes of which the defendants before him had been convicted.

A short conversation with the man would have put any such assumptions to rest. One needed only to sense his pride in his son John's work as a Virginia State Trooper,[1] his respect for clever but honest

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1. In Holbrook v. Flynn, 475 U.S. 560 (1986), Justice Marshall wrote an opinion for an unanimous Court finding no inherent prejudice in the deployment of four uniformed state troopers in the spectator section of a Providence, Rhode Island, courtroom during a criminal trial. The troopers, Marshall wrote, were "unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings." *Id.* at 571.

prosecutors, or his hostility and contempt for drug traffickers ("dopers" he would call them), to be sure that Justice Marshall had little sympathy for outlaws, and much for those trying to enforce the law. Furthermore, there was no disjunction between the Justice's privately expressed sentiments and public utterances. It is true that many of his criminal procedure opinions,[2] had they become law, might have made it more difficult to convict criminal defendants. His legal positions, however, seem to have been rooted, not in any overarching ideology of limited government, but in an intense awareness, based upon long experience, that those who wield the authority of the state are but human actors. Just as he respected those who exercised this authority with decency and integrity,[3] he sought to ensure that those who did not would not prevail.[4] He was also keenly aware of the humanity of those against whom the forces of the state were arrayed, and he recognized that illegitimate coercion can arise as easily from a suspect's fear of official misconduct as it can from actual misconduct.

Justice Marshall's jurisprudence in criminal cases was not merely a product of his own experiences, but what he had learned about the realities of the criminal justice system before taking his seat at the Supreme Court surely informed the approach he took to criminal cases. This was not someone prone to speak in abstract terms about fine-tuning the scales of justice. While a student at Howard Law School, he participated in one of the earliest clinical programs in criminal law[5]

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2. Adhering to Justice Marshall's view that "death is different," Ford v. Wainwright, 477 U.S. 399, 411 (1986) (opinion of Marshall, J.), we do not address the positions that he took in capital cases. For an insightful examination of these positions, see Jordan Steiker, *The Long Road Up from Barbarism: Thurgood Marshall and the Death Penalty*, 71 TEX. L. REV. 1131 (1993).

3. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 502 (1985) (Marshall, J., dissenting) ("The only restraining influence on the 'inexorable expansion of the mail and wire fraud statutes' has been the prudent use of prosecutorial discretion.") (citation omitted) (quoting United States v. Siegel, 717 F.2d 9, 24 (2d Cir. 1983) (Winter, J., dissenting in part and concurring in part)).

4. As Martha Minow observed in her tribute to Justice Marshall, 105 HARV. L. REV. 66, 70-71 (1991):

> For Justice Marshall, . . . it was worth fighting with his colleagues when they ignored the temptations government officials often have to deceive in order to achieve their goals. He fought to fulfill the Court's duty to guard against those failings. This mission meant telling and facing up to the often dark truth about government. It meant not forgetting that government employees are human, too; they will sometimes lie and use tricks contrary to the directives of the Constitution and to the demands of fairness.

When one of the authors, while clerking for Justice Marshall, announced that he had taken a job as a prosecutor, the Justice seemed quite pleased. Several days later, with great glee, Marshall pulled out an advertisement for a treatise entitled "Prosecutorial Misconduct" and suggested that the book would be needed in the future.

5. *See* Douglas A. Aube, *Justice Thurgood Marshall*, 27 NEW ENG. L. REV. 625, 628 (1993).

and worked as an assistant to Charles Houston on death penalty cases.[6] When he began a private practice in Baltimore, he took on many criminal cases,[7] and his first appearance before the Supreme Court was in a capital case.[8] The NAACP had, since its inception, waged a campaign against racial inequities in the administration of criminal justice,[9] and Thurgood Marshall played a leading role in this campaign, first at the NAACP and then at the NAACP Legal Defense Fund.[10] No one would call him a desk-bound general. Travelling around the country, and especially the deep South, he learned about local law enforcement practices from clients, sheriffs, prosecutors, and judges.[11] While, on at least one occasion, he may narrowly have escaped violence at the hands of police officers,[12] he was also the beneficiary of police work. Later, he often spoke with affection about the Texas Rangers who protected him on some of his trips, and would tell of mobs that sometimes pursued him. Marshall's tenure as Solicitor General may have given him an even greater appreciation of law enforcement interests in criminal cases. Indeed, in one of his few unsuccessful appearances before the Supreme Court, he argued the government's position in *Westover v. United States*, a companion case to *Miranda v. Arizona*.[13]

Although Justice Marshall's experiences offered him a unique perspective on the criminal process, the Warren Court's progress before Marshall took the bench somewhat limited his impact as a Justice on

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6. *Id.* at 629-31.

7. *Id.* at 628.

8. Taylor v. Alabama, 335 U.S. 252 (1948). Justice Marshall's story about the case is recounted by Justice Anthony M. Kennedy in *The Voice of Thurgood Marshall*, 44 STAN. L. REV. 1221, 1223-25 (1992).

9. *See, e.g.*, MINNIE FINCH, THE NAACP: ITS FIGHT FOR JUSTICE 45-57 (1981) (discussing NAACP's anti-lynching efforts between 1911 and 1925); RICHARD KLUGER, SIMPLE JUSTICE 101 (1975) (noting role of newly-organized NAACP in seeking clemency for Pink Franklin following his conviction on capital murder charge); *id.* at 113-14 (describing NAACP's role in Moore v. Dempsey, 261 U.S. 86 (1923)); *id.* at 144-49 (discussing NAACP's role in connection with Powell v. Alabama, 287 U.S. 45 (1932)); *id.* at 147-57 (describing NAACP's defense of George Crawford on capital murder charges); *id.* at 220 (noting NAACP's role in Chambers v. Florida, 309 U.S. 227 (1940)); HERBERT SHAPIRO, WHITE VIOLENCE AND BLACK RESPONSE 282-87 (1988) (discussing NAACP's anti-lynching efforts in the 1930s).

10. *See, e.g.*, KLUGER, *supra* note 9, at 225 (participation in 1946 in assault trial of twenty-five black defendants); *id.* at 561 (participation in defense of young African American man for assault, kidnapping, and rape); SHAPIRO, *supra* note 9, at 318-19 (noting Marshall's authorship of section of NAACP police report on Detroit riots dealing with role of police); *id.* at 360-64 (discussing Thurgood Marshall's role in Ingram case and defense of arrested defendants in Columbia).

11. *See, e.g.*, KLUGER, *supra* note 9, at 225-26, 561 n.*.

12. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 52-55 (1994) (discussing 1946 incident in Columbia, Tennessee).

13. 384 U.S. 436, 436 n.*, 438 (1966).

this area of the law. By 1967, when Thurgood Marshall became an Associate Justice, the Warren Court had rendered many of the landmark decisions that transformed the constitutional landscape in the area of criminal procedure.[14] Over the previous half dozen years, the Court had decided *Mapp v. Ohio*,[15] holding that state courts must exclude evidence obtained by unreasonable searches and seizures;[16] *Gideon v. Wainwright*,[17] establishing the right of indigent defendants to appointed counsel in state criminal proceedings;[18] *Massiah v. United States*,[19] extending the right to counsel to defendants' encounters with police and police informants after criminal proceedings commence;[20] and *Miranda v. Arizona*,[21] holding that the police must advise individuals taken into custody, even prior to the commencement of formal proceedings, of their right to remain silent and their right to counsel, and that the police may not interrogate suspects unless they knowingly and voluntarily waive those rights.[22] While the outcome of some of these cases might be traced, directly or indirectly, to the work of the NAACP Legal Defense Fund under Thurgood Marshall's leadership,[23] he played no role as a Justice in deciding them.

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14. The most prominent exception to this generalization — the death penalty cases decided shortly after Thurgood Marshall came to the Court — are not discussed in this essay. *See supra* note 2.

15. 367 U.S. 643 (1961).

16. *Id.* at 655.

17. 372 U.S. 335 (1963).

18. *Id.* at 344.

19. 377 U.S. 201 (1964).

20. *Id.* at 206.

21. 384 U.S. 436 (1966).

22. *Id.* at 444-45.

23. *See* Louis H. Pollak, *The Limitless Horizons of* Brown v. Board of Education, 61 FORDHAM L. REVIEW 19, 20 (1992):

> The wider implications of *Brown* can be seen across the entire spectrum of the Supreme Court's jurisprudence for the quarter-century following the decision. . . .
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> . . . [T]he Warren Court presided over extraordinary change in the area of criminal procedure which became constitutionalized during the 1960s and 1970s. This change recognized in many ways that the most frequent users of the American criminal process are the poor and deprived — mainly Black Americans. Certainly, this recognition has informed the capital punishment jurisprudence in the Supreme Court.

As Marvin Frankel has noted, the *Miranda* opinion "was so strongly undergirded by the desire to achieve equal treatment for the poor and the rich, the ignorant and the sophisticated." Marvin E. Frankel, *From Private Fights Toward Public Justice*, 51 N.Y.U. L. REV. 516, 527 (1976); *see also* Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 711 (1968). The same might be said of the Court's decision in Gideon v. Wainwright, 372 U.S. 335 (1963).

During the twenty-four years of Thurgood Marshall's tenure, the task of the Court in the area of criminal procedure largely was to fill in a picture whose broad outlines already had been painted. Justice Marshall may have seen his mission as essentially a conservative one: ensuring that the constitutional safeguards that the Court had already announced had meaning in the world he had seen before becoming a Justice — the world where poor and unsophisticated defendants, often victims of societal discrimination, found their fates, and sometimes their lives, placed in the hands of police officers, prosecutors, judges, juries, and even defense lawyers who had yet to heed the Court's ringing calls for equality, fairness, and individual treatment. We aspire to a government of "laws not men," but Marshall understood how bias or misunderstanding could infect a criminal justice system of laws *and* men. And he understood how individuals would implement, be affected by, or react to the Court's decisions interpreting and applying constitutional provisions. Repeatedly, and, as the years went on, often in dissent, Justice Marshall reminded his brethren of the human interactions at the heart of the criminal process and argued, often unsuccessfully, for a jurisprudence that would limit the ability of human actors to corrupt that process.

II. Criminal Investigations

During Justice Marshall's years on the Court, its criminal docket was crowded with cases involving the propriety of police conduct during the investigation of a crime. Most dealt with either the admissibility of evidence seized from the defendant or the admissibility of the defendant's confession. The Court had given hope to the hundreds of convicted defendants who asked the Court for review of their cases in the succeeding years by extending the Fourth Amendment's exclusionary rule to state-court proceedings in *Mapp*, and imposing new constraints in *Miranda* and *Massiah* on methods of police interrogation.

The number of criminal cases the Court chose to hear was sizeable in relation to the number heard prior to the 1960s and to the number dealing with most other bodies of law. However, the number was small in proportion to the vast number of convicted defendants whose petitions complained of improper police practices. Of course, many of these petitions raised claims that lacked merit, and many others raised well-settled issues of law and were therefore uninteresting to a Court whose role is to make precedent, not to correct errors. But, what made it particularly unlikely that the Court would hear any individual defendant's case was that, as the Court grew more conservative during

Justice Marshall's tenure, it became far more disposed to review criminal cases that state officials brought complaining of unjustly overturned convictions than to review cases that prisoners brought asking for reversal of their convictions.

Despite the strong disagreements on the Court about the resolution of many of the criminal procedure cases selected for review, there was a wide range of agreement about the general constitutional framework within which the police operated. In the absence of some articulable and reasonable suspicion, the police could not stop or search a suspect.[24] The police remained free, however, to confront an individual with their suspicions and attempt to ask questions, notwithstanding the unwelcome and, perhaps, coercive nature of any such encounter.[25] An individual, however, could refuse to answer questions, could refuse to submit to searches, and could choose to walk away. At a later stage, if the police developed "reasonable suspicion," they could stop a suspect,[26] and if they developed "probable cause," they could make an arrest.[27] But, if no longer permitted to walk away, the suspect still could refuse to talk to the police and still could refuse to submit to some, though not all, searches.

Within this framework, either of two questions typically arose in the cases dealing with the propriety of police investigative conduct (as distinguished from the remedy for improper conduct). First, did the police impermissibly intrude upon the defendant's autonomy or privacy when they engaged in particular conduct, *i.e.*, a search, a seizure, or an interrogation, at a particular stage of a criminal investigation? And, second, in those cases where the defendant purportedly surrendered a recognized right by consenting to a search or seizure or responding to police questioning, did the police ensure the defendant's free choice to exercise that right? The latter question, which the Court faced in

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24. *See generally* Terry v. Ohio, 392 U.S. 1 (1968).

25. *See id.* at 34 (White, J., concurring).

26. In *Terry*, shortly after Thurgood Marshall's arrival, the Court determined (with Justice Douglas alone dissenting) that police could make an on-the-street stop of an individual when "specific and articulable facts" reasonably suggest that the individual has committed or is about to commit a crime. *Id.* at 21.

27. The Court resolved the question whether the police needed an arrest warrant in addition to probable cause in United States v. Watson, 423 U.S. 411 (1975). The Court held that, at least in felony cases, the police could dispense with an arrest warrant — a result it justified largely on the basis of its reading of history and the common law. *Id.* at 418-21. In a dissent joined by Justice Brennan, Justice Marshall took issue with the majority's reading of both history and the common law, *id.* at 438-42 (Marshall, J., dissenting), and argued that, as in the case of searches, the Court should require a warrant to make an arrest except when there is an unanticipated exigency. *Id.* at 450 (Marshall, J., dissenting).

Miranda v. Arizona[28] shortly before Justice Marshall's appointment to the Court, was perhaps more important. Limits imposed on police authority to conduct searches or interrogate suspects would become meaningless if the police could avoid these limitations by securing the suspect's permission through unfair means.[29]

Justice Marshall's dissenting opinions in two cases, *Schneckloth v. Bustamonte*[30] and *Florida v. Bostick*,[31] provide particular insight into how he approached the latter question — the extent to which police must respect the exercise of individual choice in their encounters with those suspected of wrongdoing. Written almost two decades apart, these dissents, which dealt with different Fourth Amendment doctrines, illustrate Justice Marshall's adherence to an approach (never embraced by the full Court) that reflected, in his words, "a realistic assessment of the nature of the interchange between citizens and the police,"[32] as well as a realistic assessment of which citizens were likely to be involved in that interchange. In light of these assessments, his jurisprudential scheme sought to eliminate, to the extent reasonably possible, the impact of misunderstandings and biases both in the police officer's initial confrontation with a citizen and in the judicial fact-finding process that commences afterwards when the citizen, now criminal defendant, challenges the propriety of police conduct.[33]

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28. 384 U.S. 436 (1966). *Miranda* identified the two key problems that arise in this situation. First, the individual may not be aware that he has a right to say no to the police. *Id.* at 468. And, second, if he does know, he may doubt (at times rightly) that police will respect his right to say no. *Id.* In the context of an arrested person's decision whether to answer a police officer's questions or to defer answering questions until conferring with an attorney, the *Miranda* Court responded to these problems with two injunctions to the police.

Miranda instructed the police, first, that they must tell individuals taken into custody what their rights are. *Id.* This would better ensure that arrested defendants know what choices they have and would help resolve any later questions about whether defendants knew their rights. *Id.* at 468-69. It would also signal to arrested defendants that these particular arresting officers will respect their rights to choose, thereby alleviating to some degree the compulsion that arrested persons feel. *Id.* at 468. Second, the *Miranda* Court told police that they must give arrested defendants some breathing room within which to make the choices that they are entitled to make. The police could not question defendants until they had affirmatively chosen to answer questions. *Id.* at 475. And, the choice was not effective if it was a response to police coercion. *Id.* at 476.

29. Many might find it curious that certain officers or agencies secure confessions or consents to search with so much greater regularity than others, although they seem to possess no greater persuasive ability.

30. 412 U.S. 218 (1973). For commentary, see Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 56-58 (1974).

31. 111 S. Ct. 2382 (1991).

32. *Bustamonte*, 412 U.S. at 289 (Marshall, J., dissenting).

33. For a far more comprehensive review of Justice Marshall's opinions in the Fourth Amendment area, see Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723 (1992). For discussions of Justice Marshall's opinions in *Bustamonte* and *Bostick* in particular, see *id.* at 792-95, 800-12.

In *Bustamonte*, the Court considered whether a search was proper under the Fourth Amendment when the suspect may have submitted to it without being aware that he had a right to refuse.[34] The majority concluded that the State did not have to show that an individual who submitted to a search knew he could have refused.[35] The Court accepted that, where a magistrate has not issued a warrant and no particular exigency requires dispensing with a warrant, an individual has a right to refuse consent. Nevertheless, the Court held that if the suspect consents and the consent is not coerced, then the search is lawful.[36] Focusing primarily on the police officers' perspective on the encounter, the majority rejected as "impractical" the idea of requiring that the police advise individuals of their right to refuse consent.[37] And, from the individual's perspective, the Court assumed that this encounter (at least if it preceded an arrest) would not be so inherently coercive that an individual who knew of the right to refuse consent would nevertheless feel incapable of asserting it.[38] Under the Court's ruling, an individual's consent would be effective even if his experience made him uncertain at the time that there was a right to say "no" or that, if he did say "no," his refusal would be respected, except where he could show that his consent was involuntary, that is, "the product of police coercion."[39]

In dissent, Justice Marshall had his own views on how real people, many of whom fear that police officers will resort to force or other coercion, will understand the encounter with the police. "[C]onsent searches are permitted," Marshall explained, "because we permit our citizens to choose whether or not they wish to exercise their constitutional rights."[40] Moreover, "it follows that [an individual's] consent cannot be considered a meaningful choice unless he knew that he could in fact exclude the police."[41] He recognized that a police officer's request for permission to search would not in itself make it clear to a person to whom the request was directed that he could refuse to submit to a search. Therefore, no meaningful choice was afforded those who were otherwise unaware that they could effectively withhold permission. Justice Marshall saw nothing "impractical" in a requirement that police

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34. 412 U.S. at 222. Essentially, the Court was asked to extend to searches the approach adopted in *Miranda* with respect to custodial interrogations. *See supra* note 28.

35. *Bustamonte*, 412 U.S. at 232-33.

36. *Id.* at 248-49.

37. *Id.* at 231.

38. *Id.* at 227-29.

39. *Id.* at 229.

40. *Id.* at 283 (Marshall, J., dissenting).

41. *Id.* at 284-85 (Marshall, J., dissenting).

advise people of their right to refuse consent: "I doubt that a simple statement by an officer of an individual's right to refuse consent would do much to alter the informality of the exchange, except to alert the subject to a fact that he surely is entitled to know."[42]

Bostick, like *Bustamonte*, was about whether individuals must know their Fourth Amendment rights before effectively relinquishing them and how much latitude the police must give individuals to exercise a Fourth Amendment right that those individuals *may* know (in the abstract) they have. While en route by bus from Miami to Atlanta, Bostick was confronted by two officers who had boarded during a stop in Fort Lauderdale, in connection with a "bus sweep."[43] Although they had no apparent reason to be suspicious of Bostick, the officers asked for his ticket and identification, which he provided, and then secured his permission to search his luggage, which led to the discovery of cocaine.[44] In constitutional terms, the question presented by this scenario was whether Bostick had been "seized."[45] The analysis turned, however, on the extent to which Bostick, whom the officers lacked authority to arrest or stop, had freedom to decide whether to respond to the officers' requests.[46]

Both the majority and Justice Marshall approached the question of whether the officers had seized Bostick in like manner. The majority held, and Justice Marshall agreed, that the answer depended on whether someone in Bostick's position "would feel free to decline the officers' requests or otherwise terminate the encounter."[47] They disagreed, however, on the answer. While remanding the case, the majority clearly expressed its view that, as a general rule, a suspicionless sweep of buses traveling from state to state is permissible, because this police practice would rarely amount to a "seizure" under the agreed-upon test: "[N]o seizure occurs when police ask questions of an individual, ask to examine the individual's identification, and request to search his or her luggage — so long as the officers do not convey a message that compliance with their requests is required."[48]

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42. *Id.* at 287 (Marshall, J., dissenting). The premise of Justice Marshall's dissent, much of which was devoted to discussing prior precedent and responding to the majority's reasoning, has been succinctly restated as follows: "[P]olice officers exert force, whether they intend to or not, unless the person from whom permission is requested understands the rules of the consent game." STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 291 (1992).

43. Florida v. Bostick, 111 S. Ct. 2382, 2384-85 (1991).

44. *Id.*

45. *Id.* at 2386.

46. *Id.*

47. *Id.* at 2387; *id.* at 2391 (Marshall, J., dissenting).

48. *Id.* at 2388. For a discussion analyzing the majority opinion in *Bostick* and the other

Justice Marshall, on the other hand, expressed disbelief that an individual on the receiving end of a dragnet-style sweep through buses could possibly feel free to walk away from the confrontation. His opinion described this increasingly used weapon in the war on drugs:

> [The sweeps] occur within cramped confines, with officers typically placing themselves in between the passenger selected for an interview and the exit of the bus. Because the bus is only temporarily stationed at a point short of its destination, the passengers are in no position to leave as a means of evading the officers' questioning.[49]

Marshall described how the officers' confrontation of Bostick "exhibit[ed] all of the elements of coercion associated with a typical bus sweep."[50]

> Two officers boarded the Greyhound bus on which respondent was a passenger while the bus, en route from Miami to Atlanta, was on a brief stop to pick up passengers in Fort Lauderdale. The officers made a visible display of their badges and wore bright green "raid" jackets bearing the insignia of the Broward County Sheriff's Department; one held a gun in a recognizable weapons pouch. . . . Once on board the officers approached respondent, who was sitting in the back of the bus, identified themselves as narcotics officers and began to question him. One officer stood in front of respondent's seat, partially blocking the narrow aisle through which respondent would have been required to pass to reach the exit of the bus.
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> As far as is revealed by facts on which the Florida Supreme Court premised its decision, the officers did not advise respondent that he was free to break off this "interview."[51]

Under these circumstances, Justice Marshall reasoned that a passenger in Bostick's position was severely constrained in his ability to end the encounter with the officers.

> Apart from trying to accommodate the officers, respondent had only two options. First, he could have remained seated while obstinately refusing to respond to the officers' questioning. But in

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four majority opinions in Fourth Amendment cases during the 1990 Term and concluding, based on the inconsistency of approaches, that the majority decisions "could have been dictated only by [the individual Justices'] personal preferences," see Bruce A. Green, *"Power, Not Reason": Justice Marshall's Valedictory and the Fourth Amendment in the Supreme Court's 1990 Term*, 70 N.C. L. REV. 373, 412 (1992).

49. *Bostick*, 111 S. Ct. at 2390 (Marshall, J., dissenting) (citing United States v. Chandler, 744 F. Supp. 333, 336 (D.C. Cir. 1990)).

50. *Id.* at 2392 (Marshall, J., dissenting).

51. *Id.* (citations omitted).

> light of the intimidating show of authority that the officers made upon boarding the bus, respondent reasonably could have believed that such behavior would only arouse the officers' suspicions and intensify their interrogation. Indeed, officers who carry out bus sweeps like the one at issue here frequently admit that this is the effect of a passenger's refusal to cooperate. The majority's observation that a mere refusal to answer questions, "without more," does not give rise to a reasonable basis for seizing a passenger is utterly beside the point, because a passenger unadvised of his rights and otherwise unversed in constitutional law *has no reason to know* that the police cannot hold his refusal to cooperate against him.
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> Second, respondent could have tried to escape the officers' presence by leaving the bus altogether. But because doing so would have required respondent to squeeze past the gun-wielding inquisitor who was blocking the aisle of the bus, this hardly seems like a course that respondent reasonably would have viewed as available to him. . . .
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> Even if respondent had perceived that the officers would *let* him leave the bus, moreover, he could not reasonably have been expected to resort to this means of evading their intrusive questioning. For so far as respondent knew, the bus's departure from the terminal was imminent. Unlike a person approached by the police on the street or at a bus or airport terminal after reaching his destination a passenger approached by the police at an intermediate point in a long bus journey cannot simply leave the scene and repair to a safe haven to avoid unwanted probing by law-enforcement officials. The vulnerability that an intrastate or interstate traveler experiences when confronted by the police outside his "own familiar territory" surely aggravates the coercive quality of such an encounter.[52]

Thus *Bostick*, like *Bustamonte*, was seen by Justice Marshall to be a case about the exercise of free choice — the choice of walking away when confronted by the police. The crux of the problem, for a traveler confronted on a bus while passing through a strange city en route to a distant destination, was that he usually would not recognize that he had a choice to terminate the confrontation. Even if he did know there was a choice, he might not know how to exercise it, because he could not walk off the bus without cost, and it would be far from obvious that the police would leave if asked to do so. Justice Marshall's solution — hearkening back to *Miranda* — was for police to advise the passenger

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52. *Id.* at 2393-94 (Marshall, J., dissenting) (citations and footnote omitted).

of the right to refuse to cooperate and thereby send the police on their way.[53] Such advice would at once apprise the passenger of a right he was probably unaware of and, at the same time, establish an atmosphere in which he could freely exercise the right.

Given the rich personal experience with the criminal justice system that Justice Marshall had before coming to the Court, what is perhaps most interesting about his dissents in *Bustamonte* and *Bostick* is that, at least on the surface, neither places much weight on the kinds of contextual knowledge that Marshall's experience would have provided. In this respect, these dissents were typical of his criminal procedure opinions. For example, when considering the *Bustamonte* case, Justice Marshall understood, and was troubled by, the fact that the Court's constrictive reading of the Fourth Amendment would most clearly affect members of the underclass and especially minority groups. They were least likely to know, unless so assured, that they could deny permission to the police officers who asked to search them or their belongings and that the police would respect their denial. Their knowledge about constitutional rights likely would come from experience, not books, and their experience often taught that in day-to-day encounters one resisted the police only at considerable peril. Indeed, knowledge of constitutional law would help them little if they also knew that police officers could and would violate the law with impunity.[54] Yet Justice Marshall expressed these concerns only obliquely, and without elaboration, in the concluding section of the dissent, which noted that the majority's holding "confines the protection of the Fourth Amendment against searches conducted without probable cause to the sophisticated, the knowledgeable, and, I might add, the few."[55]

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53. *Id.* at 2394-95 (Marshall, J., dissenting).

54. Lest anyone think this is no longer true, consider the evidence adduced at public hearings conducted by a recent New York City commission convened to investigate the perennial problem of police corruption. For example, one former police officer, nicknamed "the Mechanic," testified as follows, explaining how he won his nickname:

> Q. Your nickname was the Mechanic?
> A. Yes.
> Q. And why were you given this nickname?
> A. Because I used to tune people up.
> Q. What do you mean tune people up?
> A. It's a police word for beatin' up people.
> Q. Did you beat up people who you arrested?
> A. No. We just beat people up in general. If they're on the street, hanging around drug locations. Just — It was a show of force.
> Q. Why were these beatings done.
> A. To show who was in charge. We were in charge, the police. . . .

Ex-Officer's Account of a Brutal Police Fraternity, N.Y. TIMES, Sept. 30, 1993, at B3.

55. Schneckloth v. Bustamonte, 412 U.S. 218, 289 (1973) (Marshall, J., dissenting).

Similarly, in the *Bostick* case, Justice Marshall understood that "bus sweeps" had a particular impact on minority travelers, because, when police officers looking for drugs and drug dealers are allowed standardless discretion to decide whom to confront, they confront members of minority groups in disproportionate numbers. Indeed, he forcefully made this point during oral argument of the case, as recounted by one of his former law clerks, Carol Steiker, in a moving memorial to the Justice:

> Just a few years ago, the Supreme Court decided *Florida v. Bostick*, a case challenging "bus sweep" searches — the practice by which armed police officers would board interstate buses and ask passengers if they would "consent" to a search of their luggage or person for drugs. The Florida state Attorney General's office was arguing to the Court that such searches were in fact "consensual," because the presence of an armed officer blocking the door of the bus did not necessarily indicate to the targeted passengers that they weren't free to leave or to decline to be searched. Justice Marshall asked the Florida A.G.'s office only one question about a fact buried deep in the record of the case, but a fact Justice Marshall deemed crucial to the exercise of police authority in the case: "Was the defendant in this case by any chance a Negro?" The Florida A.G.'s lawyer and the coterie of lawyers at counsel table all turned red and shuffled their feet before giving what was by then the obvious answer: "Yes." Justice Marshall sat back; he had made his point. His question illuminated the single most troublesome aspect of this method of law enforcement — that those targeted for such "consensual" encounters with the police tend to be overwhelmingly members of racial minorities.[56]

In his dissenting opinion, Marshall made a similar point about discriminatory enforcement. In the course of describing how officers question bus passengers "without an 'articulable suspicion,'" he observed in a footnote:

> [A]t least one officer who routinely confronts interstate travelers candidly admitted that *race* is a factor influencing his decision whom to approach. . . . Thus, the basis of a decision to single out particular passengers during a suspicionless sweep is less likely to be *inarticulable* than *unspeakable*.[57]

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56. Carol S. Steiker, *"Did You Hear What Thurgood Marshall Did For Us?" — A Tribute*, 20 AM. J. CRIM. L. vii, ix (1993).

57. *Bostick*, 111 S. Ct. at 2390 n.1 (Marshall, J., dissenting) (citations omitted).

Yet when it came to addressing the central question in the case — whether Bostick had been "seized" — Marshall assiduously avoided any reference to the racial aspects of the confrontation. Like the *Bustamonte* dissent, the *Bostick* dissent contained only the most oblique recognition that factors like race and class may affect how an individual perceives an encounter with a law enforcement officer and, thus, whether the individual feels free to terminate the encounter rather than accede to the officer's request. The concern is captured, if at all, only in Justice Marshall's observation that "a passenger unadvised of his rights and otherwise unversed in constitutional law *has no reason to know* that the police cannot hold his refusal to cooperate against him."[58] Indeed, unlike in the earlier dissent, Justice Marshall did not add (although by now perhaps he had no need to) that those individuals who *were* sophisticated enough to know were few among those who were subjected to this type of police encounter. This is true, not only because police were likely to single out members of minority groups among bus passengers, but also because members of economically disadvantaged minority groups, being less likely to afford alternatives, were more likely to ride buses in the first place.

Still, on another level, Justice Marshall's experience suffused the dissenting opinions in *Bustamonte* and *Bostick*. He was always aware of which types of people are most likely to be the object of police action, and this awareness was central to the common, and crucial, point of both opinions. He recognized that the Court's majority might have been correct about the concept of free choice as an abstract matter and correct that *some* persons confronted by police may exercise free choice. But, as a practical matter, police rarely confront sophisticated, confident persons, and those whom they do confront are all too often accustomed to police "requests" that thinly veil the threat of force. Even though, in such circumstances, an officer's explicit acknowledgement of the individual's right not to cooperate might not fully overcome the citizen's fears, such an acknowledgement would affect both the officer's and the citizen's perception of the encounter and at least reduce its coercive aspect.

It is easy to understand why Thurgood Marshall would not refer explicitly to his personal experience in his judicial opinions, although he had earlier done so as an advocate arguing before the Court[59] —

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58. *Id.* at 2393.

59. During a program held in Justice Marshall's honor and attended by the Justice following his retirement from the bench, Jack Greenberg recited passages from the argument Thurgood Marshall made to the Court in *Brown v. Board of Education* when he rose in rebuttal to John

the legitimacy of Supreme Court opinions may depend, to some extent, on the appearance that they are something other than the product of the Justices' individual experiences and preferences. Justice Marshall, however, would draw on his experience in conference when discussing cases with the other Justices[60] or in chambers when discussing cases with his law clerks.

Still, one might ask why Justice Marshall would not explicitly bring his personal experience to his opinions, even if at a somewhat greater level of generality. For example, why didn't his dissents more pointedly take the Court to task for ignoring how encounters with the police are actually viewed by members of the underclass — those most often the subject of the kinds of encounters at issue in cases such as *Miranda*, *Bustamonte*, and *Bostick* and with whom other Justices had far less familiarity? Why didn't his opinions explicitly say that these cases are about unequal justice — that the question they raise is whether the poor and minorities who are least likely to know their rights and most likely to be intimidated when confronted by the police should be placed on an equal footing with middle- and upper-class citizens who, because of a vastly different experience, have more confidence that they can stand up to the police without coming to harm? Why didn't Justice Marshall endorse the type of jurisprudence urged by commentators such as Tracey Maclin[61] and the late Dwight Greene[62] that would explicitly take account of the difference between how African Americans and whites are likely to perceive a police encounter? Why didn't he say, in Dwight Greene's words, that "the target's race is one of the circumstances surrounding the determination of whether free choice exists in an encounter with police"?[63]

W. Davis. The Orison S. Marden Lecture in Honor of Justice Thurgood Marshall, 47 The Record of the Association of the Bar of the City of New York 255-56 (1992) [hereinafter "Marden"] (remarks of Jack Greenberg). Marshall's final words to the Court included a reference to his own experience: "Those same kids in Virginia and South Carolina — and I've seen them do it — they play in the streets together, they play on their farms together, they separate to go to school, they come out of school and play ball together. They have to be separated in school." *Id.* Greenberg cited Marshall's concluding words in *Brown* as "my favorite passage in all of oral advocacy." *Id.*

60. *See* Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992); Byron W. White, *Tribute to Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992).

61. *See* Tracey Maclin, *"Black and Blue Encounters" — Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243 (1991).

62. *See* Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in* Bostick v. Florida, 67 TUL. L. REV. 1979 (1993).

63. *Id.* at 2040.

The answer, we think, is two-fold. First, Justice Marshall was dedicated to rooting racial stereotyping out of judicial decision-making, just as he was dedicated to rooting it out of society in general. Thus, not only were his opinions lawyerly and well-crafted, but they took a wide frame of reference. On the bench, in conference, or in chambers, his voice was distinctive — but not in his opinions. In part, he would not give fodder to those who might have pointed to his status as an African American Justice as cause for dismissing his opinions. More generally, it was important to Justice Marshall as a jurisprudential matter to reject the idea that constitutional provisions should be read through the prism of any individual Justice's experience.[64] Nor would it move society in a positive direction for the Court to issue rulings based on an assumption that the poor and minorities are ignorant of their rights or that the police act brutally toward them. To do so would merely reinforce negative stereotypes. To a careful reader, sensitivity to these issues lay just below the surface of Marshall's opinions.[65]

There is a second, and perhaps more important, reason why Justice Marshall's *Bustamonte* and *Bostick* opinions, among others, did not emphasize the particular perspective of the poor, minorities, immigrants, and others who comprise the overwhelming majority of the criminal defendant population. Any emphasis on the individual characteristics of underclass defendants would only have undercut the central theme

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64. An approach too closely rooted to the experiences of one or more Justices would both invite criticism that the jurisprudence takes insufficient account of how the world has changed since the particular experience was acquired and invite the Court to erode previously established rights based on changes in how the world is experienced. *Miranda* in particular would be susceptible precisely because that decision helped effect an enormous cultural transformation. The *Miranda* warnings seem by now to have become so much a part of the popular culture that people arrested today are far more likely to know their rights, at least at the minimal level of understanding that *Miranda* was aiming for, than in 1966 when the case was decided. Moreover, at least in some parts of the country, if not all of our cities, *Miranda* has led to a change in police culture as well; the police exercise greater restraint than they did at an earlier time. If the Court's jurisprudence placed too great a premium on its experience of the world, one could argue that the very success of *Miranda* eroded the premises of that decision, and it should be overruled.

65. Perhaps, too, Justice Marshall felt he could not convince other Justices that the Court should explicitly interpret the Constitution with greater solicitude for certain classes of defendants. Additionally, he may have felt that other Justices lacked adequate experience to understand, for example, the threatening nature of everyday police encounters in many minority and poor inner-city communities. Yet this would be, at best, a small part of the explanation, because Justice Marshall's criminal dissents were not prepared to persuade the Court's majority that it was wrong; the votes simply were not there. Finally, the premise of judicial knowledge far beyond the Justices' immediate experience was central to one of the decisions Justice Marshall supported most staunchly — Miranda v. Arizona, 384 U.S. 436 (1966). The Court's assumption that it understood the very private practices of police custodial interrogation — challenged by Justice White's dissent, *id.* at 532-33 (White, J., dissenting) — was central to its decision. *Id.* at 445-56.

of Justice Marshall's criminal procedure jurisprudence: a call for the Court to move away from vague doctrinal standards whose outcome turned on a consideration of myriad individual details.

Justice Marshall's approach in both *Bustamonte* and *Bostick* was designed to do two things: first, to replace vague standards governing the conduct of police and the decision-making of courts with categorical rules; and second, to minimize the significance of wide-ranging fact-finding.[66] The *Bustamonte* Court ruled that the legitimacy of a consent search would turn exclusively on whether the consent was "voluntary" under essentially the same ad hoc, fact-intensive inquiry into both police conduct and the defendant's subjective characteristics that had been employed in all confession cases until the Court decided *Massiah* and *Miranda* — a standard that the Court had earlier characterized as an "amphibian."[67] In contrast, the requirement endorsed by Justice Marshall would have eliminated the need to inquire into the voluntariness of consent in the overwhelming majority of cases. As the majority recognized, a police officer's advice that the individual was entitled to refuse consent would make it substantially more likely that consent given thereafter would be not only knowing, but voluntary.[68] Similarly, the *Bostick* Court endorsed a vague, ad hoc, and wide-ranging standard to determine whether an individual caught in a "bus sweep" had been seized: "whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' request or otherwise terminate the encounter."[69] Justice Marshall's approach, in contrast, would have practically eliminated the need for

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66. For other discussions of bright-line rules versus ad hoc standards in investigative procedure cases, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 73 (1991); Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1982); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985); Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: One Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307 (1982); Wayne R. LaFave, *"Case-by-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127. For a general discussion of rules versus standards in Supreme Court adjudication, see Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

Our view is that, at least in the area of criminal procedure, members of the Court have had no abstract preference for rules versus standards — and Justice Marshall was no exception in this regard — but have preferred one approach or the other depending on the nature of the case. This was true throughout Justice Marshall's tenure, including during the 1991 Term. *See generally* Green, *supra* note 62. As the cases discussed in this essay reflect, and for reasons we discuss, Justice Marshall generally preferred rules when the majority preferred standards, and vice versa.

67. Columbe v. Connecticut, 367 U.S. 568, 605 (1961).

68. *See Bustamonte*, 412 U.S. at 227-28.

69. *Bostick*, 111 S. Ct. at 2389.

this inquiry. A court's inquiry would essentially end once it ascertained whether the defendant had been *told* that he had a right to terminate the encounter.

Justice Marshall's preference for clear-cut rules reflected his belief that the Court's vague standards left police officers and judges free to follow their instincts and apply their assumptions about human behavior to critical procedural issues. The Court expected these men and women "to know it when they saw it." In *Bustamonte*, the "it" was the "voluntariness" of a defendant's consent to search; in *Bostick*, "it" was the extent to which police conduct would have conveyed to a reasonable person that he was not free to end the encounter. This approach reflects the confidence of a governing class. It is the attitude of individuals who trust their own instincts, and, more importantly — given the Supreme Court's role in the criminal justice system — who trust that others will see it their way. Marshall knew, however, that this approach would ensure that the courts would rarely see police encounters from the perspective of members of the underclass, minorities, and the poor.[70] He knew this, not only from his experience as a lawyer, but also increasingly from his experience on the Court. In case after case, looking at the same facts under the same vague standards that other Justices applied, Marshall saw it differently from most of his brethren. This difference in perspective was true in cases involving whether law enforcement officers had "reasonable suspicion,"[71] whether a defendant who asserted his *Miranda* rights had subsequently "initiated" a dialogue about the investigation,[72] and whether a witness's out-of-court identification in response to unnecessarily suggestive police

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70. *Cf.* Weinreb, *supra* note 30, at 57 ("The product of *Schneckloth* is likely to be still another series of fourth amendment cases in which the courts provide a lengthy factual description followed by a conclusion (most likely, in the current climate, that consent was given), without anything to connect the two.").

71. *See* United States v. Sokolow, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting); Adams v. Williams, 407 U.S. 143, 158-60 (1972) (Marshall, J., dissenting).

72. *See* Oregon v. Bradshaw, 462 U.S. 1039, 1052-54 (1983) (Marshall, J., dissenting). The question in *Bradshaw* was whether an arrested defendant meant to invite a discussion about the murder for which he was arrested when, moments after asserting his right to counsel, and while being transported from the police station, he asked a police officer: "Well, what is going to happen to me now?" *Id.* at 1041-42. To the majority, Bradshaw's question "evinced a willingness and a desire for a generalized discussion about the investigation." *Id.* at 1045-46. In response, Justice Marshall's dissent underscored the majority's failure to take adequate account of who the defendant was and the circumstances in which he found himself. *See id.* at 1055-56 (Marshall, J., dissenting). Bradshaw was not a philosopher addressing a class of students, but a murder suspect who, having just asked for a lawyer, was taken from the police station and placed in a police car. *See id.* Bradshaw did not desire to discuss the investigation; his "only 'desire' was to find out where the police were going to take him." *Id.* at 1055.

procedures was reliable.[73] Although over time the decisions of lower court judges would make the application of the Supreme Court's vague standards more determinate — and perhaps give police officers more guidance — these precedents would, with each successive case, turn the preconceptions of individual judges into binding doctrine.

Conceivably, even vague and wide-ranging standards could encourage judges to consider the perspective of those who bear the brunt of police encounters. For example, in place of the "reasonable person" standard used in cases like *Bostick* to determine whether a person had been seized, the Court might have adopted a standard asking whether the police communicated to this *particular* individual that he or she was not free to leave. However, although such a standard would seemingly take account of differences in the way people view police encounters, middle- and upper-class judges would be applying the standard and would inevitably view a defendant's perception through the prism of their own experience. More importantly, this standard would not address what was, for Marshall, perhaps the greatest problem with vague standards: systematically placing defendants at a disadvantage by providing police officers with little guidance and requiring courts to make broad, fact-intensive inquiries.

Justice Marshall recognized that suppression hearings and other similar factual inquiries often are needed to determine the validity of a defendant's claim that some legal right has been violated. But, he equally believed that the legal rights of most defendants are more secure if retrospective inquiries are minimized through the adoption of specific prophylactic rules. Defendants are less likely to have access to relevant facts than the prosecution. And even where defendants might be able to develop facts, most will lack the resources and zealous legal counsel needed to do so.[74] At the hearing, a defendant also is disadvantaged because judges will usually resolve credibility issues in the prosecution's

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73. *See* Manson v. Brathwaite, 432 U.S. 98, 129-35 (1977) (Marshall, J., dissenting).

74. United States v. Bagley, 473 U.S. 667, 694 (1985) (Marshall, J., dissenting). In *Bagley*, Marshall noted

> the frequently considerable imbalance in resources between most criminal defendants and most prosecutors' offices. Many, perhaps most, criminal defendants in the United States are represented by appointed counsel, who often are paid minimal wages and operate on shoestring budgets. In addition, unlike police, defense counsel generally is not present at the scene of the crime, or at the time of arrest, but instead comes into the case late. Moreover, unlike the government, defense counsel is not in a position to make deals with witnesses to gain evidence. Thus, an inexperienced, unskilled, or unaggressive attorney often is unable to amass the factual support necessary to a reasonable defense.

Id.

favor. Trial judges must weigh the credibility of one or more police officers, who probably know what sort of testimony will satisfy applicable legal standards, against that of a defendant; a ruling for the defendant typically means not only telling the police that they are liars, but throwing out evidence that may be needed to convict someone of a serious crime.

Although we have focused on two characteristic Fourth Amendment opinions, Justice Marshall's preference for clear-cut rules is evident in his opinions in *Miranda* cases as well.[75] In *Duckworth v. Eagan*,[76] for example, the issue was the adequacy of the *Miranda* warnings the police officer gave to a defendant who was taken into custody for attempted murder.[77] In addition to the standard warnings, the officer told him:

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75. *See, e.g.*, Illinois v. Perkins, 496 U.S. 292, 308-09 (1990) (Marshall, J., dissenting); Pennsylvania v. Muniz, 496 U.S. 582, 609-10 (1990) (Marshall, J., dissenting); New York v. Quarles, 467 U.S. 649, 679 (1984) (Marshall, J., dissenting). In *Quarles*, the Court adopted a "public safety" exception to *Miranda*, authorizing officers to interrogate defendants who had not voluntarily and knowingly waived their rights where necessary to secure the officers' own safety or that of the public. 467 U.S. at 655-56. Although suspects still had a right not to answer questions when there was a threat to public safety, the police could exploit their ignorance of that right or take advantage of the pressure inherent in custodial interrogation to make it hard for them to assert that right. *Id.* at 678 (Marshall, J., dissenting). Justice Marshall's dissenting opinion rejected this exception principally because it would "[destroy] forever the clarity of *Miranda* for both law enforcement officers and members of the judiciary." *Id.* at 679 (Marshall, J., dissenting). A principal virtue of *Miranda*, as he saw it, was its removal of discretion from decision-making by officers and courts: "The now-familiar *Miranda* warnings offer law enforcement authorities a clear, easily administered device for ensuring that criminal suspects understand their constitutional rights well enough to waive them and engage in consensual custodial interrogation." *Id.* at 683-84 (Marshall, J., dissenting). After *Quarles*, in contrast, arresting officers would have to make on-the-scene judgments about whether circumstances objectively posed a special threat to safety and about when the threat had abated. *Id.* at 680 (Marshall, J., dissenting).

Like his dissents in *Schneckloth* and *Bostick*, Justice Marshall's opinions interpreting *Miranda* did not characterize the issue as one involving equality between poor and minority defendants and those who were wealthy and sophisticated, although they might easily have done so. *Miranda* was in itself no less a civil rights decision than a criminal procedure decision. *Cf. supra* note 23. If, as Justice Marshall noted in his *Quarles* dissent, *Miranda* was "the culmination of a century-long inquiry into how this Court should deal with confessions made during custodial interrogations," 467 U.S. at 682 (Marshall, J., dissenting), it was also, to be more precise, the culmination of three decades of Supreme Court decisions, beginning with Brown v. Mississippi, 297 U.S. 278 (1936), dealing with the use of physical and psychological coercion by police and sheriffs to extract confessions from the most powerless members of society, many of them impoverished, uneducated African Americans.

76. 492 U.S. 195 (1989). This case was notable for Justice O'Connor's argument in a concurring opinion that *Miranda* claims, like search-and-seizure claims, should generally not be cognizable in federal habeas corpus proceedings. *Id.* at 211 (O'Connor, J., concurring). Justice Marshall's dissent argued strenuously against this view. *Id.* at 221-28 (Marshall, J., dissenting). Last Term, the Court considered the question and, by a five-Justice majority, adopted Justice Marshall's view. *See* Withrow v. Williams, 113 S. Ct. 1745, 1754 (1993).

77. *Eagan*, 492 U.S. at 200-01.

"We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court."[78] The majority found that this statement was a clear and unequivocal warning that the defendant was entitled to counsel before questioning; however, Justice Marshall found "nothing of the kind."[79] His dissent focused on the one truth, which the majority ignored in this case and in many others, that defined Marshall's approach to cases involving criminal investigations: the class of individuals customarily subject to police investigation was very different from the class of those who sat in judgment on them. He reminded the Court "that the recipients of police warnings are often frightened suspects unlettered in the law, not lawyers or judges or others schooled in interpreting legal or semantic nuance."[80] Such a suspect, told that he was entitled to a lawyer "if and when you go to court," would be led "to believe that a lawyer will not be provided until some indeterminate time in the future *after questioning*."[81] Moreover, insofar as the advice was ambiguous, the Court should not guess what the defendant would have understood. Instead, Justice Marshall suggested that the Court should interpret the ambiguous warning in the light least favorable to the State because "[i]t poses no great burden on law enforcement officers to eradicate the confusion."[82] Thus, he stood opposed to a ruling that encouraged police officers to exercise discretion in how they phrased their warning to an arrested defendant and placed the burden on courts to ascertain precisely what advice was given and what the advice meant.[83]

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78. *Id.* at 198.

79. *Id.* at 214 (Marshall, J., dissenting).

80. *Id.* at 216 (Marshall, J., dissenting).

81. *Id.* at 214 (Marshall, J., dissenting).

82. *Id.* at 220 (Marshall, J., dissenting).

83. Justice Marshall took a similar approach in *Florida v. Jimeno*, where the question was whether an individual's consent to search his car authorized an officer to search a brown paper bag found on the floorboard. 500 U.S. 248, 249 (1991). Dissenting from the Court's determination that the search was within the proper scope of Jimeno's consent, Justice Marshall argued that general consent to search a car is ambiguous with respect to closed containers inside the car and that officers should have the burden of clarifying what is permitted. *Id.* at 251 (Marshall, J., dissenting). Justice Marshall's approach, characteristically, would have eliminated the need for a fact-intensive inquiry:

> Under this approach, factual nuances concerning what the officer said, what the suspect replied, and what the officer then did in conducting a consensual search are comparatively unimportant. The officer knows at the time of the search whether he is acting within the scope of authorization, rather than having to interpret an ambiguous, general consent. The trial court in turn is spared having to make a post hoc legal finding about whether the officer reasonably construed the scope of the suspect's consent.

Green, *supra* note 62, at 382. This approach would also have reduced the likelihood that officers

Not all of Justice Marshall's opinions dealing with criminal investigations were driven by a desire to adopt categorical rules as a substitute for ad hoc decision-making by the police and ad hoc review by the courts. This theme was irrelevant in some cases. In many others, experience suggested that the ordinary benefits of a categorical rule were not present or various disadvantages would outweigh such a rule.[84] Thus, Justice Marshall dissented in *United States v. Robinson*,[85] where the Court held that, to protect against danger to the police or the destruction of evidence in *some* cases, the police were permitted to search arrested defendants in *all* cases.[86] In this case, Marshall believed the adoption of a categorical rule was "misguided";[87] the police should make judgments about whether a search was necessary, and the courts should review those judgments rather than permit the police to search arrested defendants as a matter of course.[88] The concerns that warranted a categorical approach in *Schneckloth* and *Bostick* simply were inapposite here. Inevitably, the police would conduct a search whenever they anticipated a danger to themselves or a risk that evidence would be lost and that a court would uphold its validity. Justice Marshall's approach in *Robinson* was in fact typical of the approach he took in search and seizure cases involving possible exceptions to the ordinary warrant requirement. In place of broad categorical rules allowing warrantless searches or seizures, he consistently favored standards tailoring the exception to the warrant requirement to particular circumstances explaining and justifying such an exception.[89]

Justice Marshall's opinion in *Berkemer v. McCarty*[90] provides another example of his view of the limits of a categorical approach to consti-

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and courts, viewing the individual's words and acts through the prism of their own experience, would construe the individual's authorization differently from how it was intended.

84. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 441 (1984), discussed *infra*, text accompanying notes 90-94; Oliver v. United States, 466 U.S. 170, 187-88, 196 (1984) (Marshall, J., dissenting); Pennsylvania v. Mimms, 434 U.S. 106, 120 (1977) (Stevens, J., joined by Marshall, J., dissenting); United States v. Robinson, 414 U.S. 218, 238-39 (1973) (Marshall, J., dissenting); *see also infra* note 89 (citing search and seizure cases).

85. 414 U.S. 218 (1973).

86. *Id.* at 234-35.

87. *Id.* at 248 (Marshall, J., dissenting).

88. *See id.* at 239 (Marshall, J., dissenting).

89. *See, e.g.*, New York v. Belton, 453 U.S. 454, 469-72 (1981) (Brennan, J., joined by Marshall, J., dissenting); South Dakota v. Opperman, 428 U.S. 364, 392 (1976) (Marshall, J., dissenting); United States v. Watson, 423 U.S. 411, 450 (1976) (Marshall, J., dissenting), discussed *supra*, note 27; *see also* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 635-36, 654 (1989) (Marshall, J., dissenting) (arguing that blood and urine tests of railroad workers involved in accidents should not be conducted absent "corroborative evidence" giving rise to "individualized suspicion").

90. 468 U.S. 420 (1984).

tutional interpretation in the area of criminal procedure. Writing for the Court, Justice Marshall rejected a defendant's argument that a roadside stop of a motorist should always be regarded as "custody" under *Miranda*, thereby requiring warnings before questioning the driver.[91] At the same time, he rejected a contrary rule providing that a traffic stop can never amount to "custody."[92] Instead, the opinion endorsed an ad hoc approach for determining the atypical cases where the restraint imposed on the driver was comparable to a formal arrest.[93] The opinion explained the preference for an ad hoc approach as follows:

> Admittedly, our adherence to the doctrine just recounted will mean that the police and lower courts will continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody. Either a rule that *Miranda* applies to all traffic stops or a rule that a suspect need not be advised of his rights until he is formally placed under arrest would provide a clearer, more easily administered line. However, each of these two alternatives has drawbacks that make it unacceptable. The first would substantially impede the enforcement of the Nation's traffic laws — by compelling the police either to take the time to warn all detained motorists of their constitutional rights or to forgo use of self-incriminating statements made by those motorists — while doing little to protect citizens' Fifth Amendment rights. The second would enable the police to circumvent the constraints on custodial interrogations established by *Miranda*.[94]

As Justice Marshall understood, the routine traffic stop was one police encounter where one could not generalize or presume that individuals would expect to suffer a long-term deprivation of their freedom of movement. Rather, most motorists expect from past experience that, after a brief stop, the police will send them on their way. In exceptional cases, however, the police, by their words or conduct, will communicate to a driver that the stop is not routine and that a long-term deprivation of liberty will ensue. The Court's vague, fact-intensive standard for defining "custody" will not invariably capture all such cases. But a categorical rule cannot improve on the standard because experience suggests that, in the case of traffic stops, coercion is the exception rather than the norm.

For Justice Marshall, then, the preference for categorical rules was not abstract. He held that preference for a particular, practical reason:

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91. *Id.* at 435-37.
92. *Id.* at 441.
93. *Id.* at 435, 441-42.
94. *Id.* at 441 (footnote omitted).

to protect against both official and judicial bias and the fallibility of the fact-finding process. The preference gave way where, as in *Robinson*, a rule was unnecessary to avoid these dangers or where, as in *Berkemer*, a rule would be based on a gross overgeneralization. Still, Justice Marshall's preference for rules as a way of restraining police discretion was the dominant and most personally characteristic theme of his criminal procedure jurisprudence in the area of investigations — just as, at the other extreme, a dominant theme of Justice Powell's criminal procedure decisions was the preservation of ad hoc, case-by-case judicial inquiry.[95] Justice Marshall's approach reflected, but abstracted from, the years of experience in criminal procedure he brought to the bench and expanded on as a jurist.

III. Criminal Adjudications

Just as Thurgood Marshall was highly skeptical of the value of vaguely defined constitutional standards enforceable only through fact-finding against police officers, he was even more skeptical of rights that could be vindicated only if trial judges made findings of fact condemning the good faith or professionalism of the prosecutors or defense lawyers who practiced before them. Suspecting that credibility questions would generally be resolved in favor of the attorneys, Marshall campaigned — with little success — for prophylactic rules that might have avoided, or at least minimized, the need for such factual inquiries.

In *Kastigar v. United States*,[96] the Court upheld the new federal immunity statute, which permitted the government to prosecute a previously immunized witness, so long as "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) [was] used against the witness in any criminal case."[97] Brushing aside claims that this use and derivative use prohibition would be "difficult and perhaps impossible" to enforce, given "the subtle ways in which the compelled testimony may disadvantage a witness, especially in the jurisdiction granting the immunity,"[98] the Court explained that an immunized

95. *See, e.g.*, Dow Chem. Co. v. United States, 476 U.S. 227, 240-52 (1986) (Powell, J., dissenting); New York v. Class, 475 U.S. 106, 120 (1986) (Powell, J., concurring); Immigration and Naturalization Serv. v. Delgado, 466 U.S. 210, 221 (1984) (Powell, J., concurring); Michigan v. Clifford, 464 U.S. 287, 292 (1984) (plurality opinion of Powell, J.); Oregon v. Bradshaw, 462 U.S. 1039, 1051 (1983) (Powell, J., concurring); Brewer v. Williams, 430 U.S. 387, 409 (1977) (Powell, J., concurring).

96. 406 U.S. 441 (1972).

97. *Id.* at 460 (quoting 18 U.S.C. § 6002).

98. *Id.* at 459.

witness who is prosecuted thereafter "is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities."[99] The Court found substantial protection in the fact that the prosecution would have "the affirmative duty to prove that the evidence it proposes to use [in the subsequent proceeding] is derived from a legitimate source wholly independent of the compelled testimony."[100]

Justice Marshall was not so easily convinced that this burden of proof would prevent tainted prosecutions from going forward. He agreed with the majority that the relevant inquiry was whether the immunity statute left "'the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege.'"[101] And he was willing to assume "that in theory that test would be met by a complete ban on the use of the compelled testimony, including all derivative use, however remote and indirect."[102] But he did not share the majority's confidence that courts could implement such a ban simply by requiring the government to show that the witness's testimony had not tainted its case. The government could easily meet this burden by "mere assertion."[103] Although the defendant might try to show taint in response, he would be "hard pressed indeed to ferret out the evidence necessary to prove it," because "the information relevant to the question of taint is uniquely within the knowledge of the prosecuting authorities."[104] Under these circumstances, Marshall concluded, the constitutionally required "margin of protection" owed

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99. *Id.* at 460.

100. *Id.*

101. *Id.* at 468 (Marshall, J., dissenting) (quoting majority opinion of Powell, J., at 462).

102. *Id.*

103. *Id.* at 469.

104. *Id.*

Justice Marshall made a similar point in *Murray v. United States*, where he dissented from a decision upholding the admission of evidence that federal agents first discovered during an illegal warrantless search and later "rediscovered" when the agents obtained a warrant for the premises. 487 U.S. 533, 544 (1988). The Court rejected claims that this application of the "independent source" doctrine would lead police routinely to enter premises illegally before seeking warrants:

> By doing so, [an officer] would risk suppression of all evidence on the premises, both seen and unseen, since his action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it.

Id. at 540.

Justice Marshall found these procedural safeguards illusory:

> Under the circumstances of these cases, the officers committing the illegal searches have both knowledge and control of the factors central to the trial court's deter-

to an immunized witness could be implemented "only by immunity from prosecution for the offenses to which the testimony relates, *i.e.*, transactional immunity."[105]

Marshall may have underestimated the vigor with which some courts would enforce the immunity statute's bar against derivative use.[106] But his *Kastigar* dissent showed a keen awareness of the deference with which all too many judges blindly accept the "representations" of prosecutors, and the difficulties that accused or, even worse, convicted defendants,[107] face with little documentary evidence to support what might be perceived as a challenge to the good faith of an "officer of the court."[108] Here, as in his later dissent in *United States v. Bagley*,[109] Marshall's reluctance to rely on prosecutorial assertions also may have reflected his familiarity with the pressures on an official who is "by trade, if not necessity, a zealous advocate"[110] when asked "to identify the material that could undermine his case."[111]

> mination. . . . [T]oday's decision makes the application of the independent source exception turn entirely on an evaluation of the officers' intent. It normally will be difficult for the trial court to verify, or the defendant to rebut, an assertion by officers that they always intended to obtain a warrant regardless of the results of an illegal search. The testimony of the officers conducting the illegal search is the only direct evidence of intent, and the defendant will be relegated simply to arguing that the officers should not be believed. Under these circumstances, the litigation risk described by the Court seems hardly a risk at all; it does not significantly dampen the incentive to conduct the initial illegal search.

Id. at 547-48 (Marshall, J., dissenting) (footnotes omitted).

105. *Kastigar*, 406 U.S. at 468-69 (Marshall, J., dissenting).

106. *See* United States v. North, 910 F.2d 843, 854-55 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2235 (1991); William J. Bauer, *Reflections on the Role of Statutory Immunity in the Criminal Justice System*, 67 J. CRIM. L. & CRIMINOLOGY 143, 153 (1976) (noting fears that the government might too easily meet its burden of showing the absence of taint, but concluding that "[t]he few cases that have dealt with this problem would seem to allay Justice Marshall's concern").

107. The *Kastigar* Court did not address exactly when a court should conduct a hearing to determine whether the evidence against a defendant has been tainted. As one court noted, soon after *Kastigar*:

> A trial court faced with a pretrial motion to dismiss the indictment because of immunity granted by Federal or State Governments has basically four alternative procedures for determining whether or not the prosecution's evidence is tainted: (1) it can hold a pre-trial evidentiary hearing; (2) it can hold a taint hearing during the trial as the questioned evidence is offered; (3) it can hold a post-trial hearing to determine taint; or (4) it can use a combination of these alternatives.

United States v. De Diego, 511 F.2d 818, 823-24 (D.C. Cir. 1975).

108. Justice Marshall noted that:

> even [prosecutors'] good faith is not a sufficient safeguard. For the paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony.

Kastigar, 406 U.S. at 469 (Marshall, J., dissenting).

109. 473 U.S. 667 (1985).

110. *Id.* at 696 (Marshall, J., dissenting).

111. *Id.* at 696-97 (Marshall, J., dissenting).

Prosecutors were not the only "officers of the court" who Justice Marshall feared would be given too wide a berth by judges charged with assessing their conduct or thought processes. In *Strickland v. Washington*,[112] when establishing a standard for determining when a criminal defendant had received ineffective assistance of counsel, the Court worried that "the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause."[113] It also feared that "[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges."[114] The Court consequently eschewed any precise framework for judging the quality of advocacy and instead held:

> A convicted defendant making a claim of ineffective assistance of counsel must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. . . . [T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.[115]

Lest anyone miss this message of deference to defense attorney conduct, the Court went on to note:

> Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.[116]

Why then did Thurgood Marshall, renowned for his creativity and skill in the "art" of advocacy that the Court so respected, find himself filing a lone dissent in *Strickland*?[117] The consequences of the Court's vague standard were all too clear for him:

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112. 466 U.S. 668 (1984).
113. *Id.* at 689.
114. *Id.* at 690.
115. *Id.*
116. *Id.* at 693.
117. Justice Brennan filed a separate opinion that joined the Court's Sixth Amendment analysis, but dissented from the judgment because it upheld the respondent's death sentence. *Id.* at 701 (Brennan, J., concurring in part and dissenting in part).

> My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts. . . . In essence, the majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes "professional" representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel.[118]

Although Marshall spoke of the possibility of "excessive variation," he hardly feared that lower courts would be unduly solicitous of defendant claims.[119] When convicted defendants — often pursuing collateral attacks *pro se*, without the right to appointed counsel — alleged deficient performance by active members of the Bar, the problem was not likely to be that courts would bend over backward to find Sixth Amendment violations. Left with little guidance as to how they might define constitutionally adequate performance, courts could be expected to find some plausible explanation for every "tactic" or "strategy" that a lawyer pursued or omitted.

The issue of a counsel's performance would not even arise in most cases, given the framework established in *Strickland*:

> If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.[120]

Wherever possible, the Supreme Court advised, lower courts were to find that a defendant had failed to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of

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118. *Id.* at 707-08 (Marshall, J., dissenting). As one of us has noted: "[T]he *Strickland* standard affords no relief in cases where unqualified defense counsel provides poor representation in every respect, but commits no single egregious error that, standing alone, cannot be explained away as a reasonable strategic option." Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 503 (1993).

119. Soon after *Strickland* was decided, in a speech addressing the plight of defendants facing the death penalty without effective assistance of counsel, Marshall was clearer in his prediction of how courts would apply the decision: "[I]n all but the most egregious case, a court cannot or will not make a finding of ineffective assistance of counsel because counsel has met what the Supreme Court has defined as a minimal standard of competence for criminal lawyers." Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 3 (1986).

120. *Strickland*, 466 U.S. at 697.

the proceeding would have been different."[121] For Justice Marshall, the fact-finding on this issue, as well, would be skewed against defendants:

> [I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.[122]

Marshall did not propose shifting the burden of showing ineffective assistance away from the defendant or excusing a defendant from identifying the specific errors defense counsel made. Indeed, the same day that *Strickland* was handed down, Marshall concurred without opinion in the reversal of a lower court decision that had freed a defendant from these burdens.[123] Marshall simply recognized that, given the realities of the criminal justice system, a Sixth Amendment standard created more for the expeditious processing of claims than for inquiry into their factual allegations would ensure that the right to effective assistance of counsel remained only aspirational.

Perhaps Justice Marshall's strongest statement of skepticism about the value of a right whose vindication depended on probing an attorney's motivations came in *Batson v. Kentucky*.[124] There, the Court finally held that the Equal Protection Clause forbids a prosecutor from exercising peremptory strikes "to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[125] By rights, this should have been Justice Marshall's

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121. *Id.* at 694.

122. *Id.* at 710 (Marshall, J., dissenting); *see also* Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Road, New Paths — A Dead End?*, 86 COLUM. L. REV. 9, 93 (1986) ("[S]uperimposing an outcome-centered prejudice element on the basic ineffectiveness claim risks not only unwarranted imposition on courts confronted with the speculative task of retrying issues of guilt and innocence on a cold or belatedly 'beefed up' record, but also great unfairness to defendants.").

123. United States v. Cronic, 466 U.S. 648, 666-67 (1984).

124. 476 U.S. 79 (1986).

125. *Id.* at 89. The *Batson* Court explicitly "express[ed] no views on whether the Constitution

triumph. He had long urged the Court to overturn or circumvent *Swain v. Alabama*,[126] which had withheld relief from defendants complaining of race-based strikes but unable to show that prosecutors were doing the same "in case after case."[127] Now, the Court had finally come around to his position, with only Chief Justice Burger and then-Associate Justice Rehnquist dissenting.[128] Even Justice White, the author of *Swain*, joined the majority opinion.[129]

But Justice Marshall, although joining the majority opinion in *Batson*, could not have authored it — even if Justice Brennan had been willing to assign the opinion to him. Here again, although Marshall appeared to agree with the Court on the general definition of a constitutional right,[130] he did not share the Court's faith that trial judges could protect this right through ad hoc inquiries into prosecutorial motivations.

Writing for the majority, and looking largely to employment discrimination cases for guidance, Justice Powell explained how the right that the Court had just recognized was to be vindicated. First, the defendant had to show that he was a member of a "cognizable racial group" and that the prosecutor had "exercised peremptory challenges to remove from the venire members of the defendant's race."[131] The defendant would also have to "show that these facts and any other relevant circumstances raise[d] an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."[132] Then, the trial court would decide, based on "all relevant circumstances," whether the defendant had made a prima facie case.[133] A pattern of strikes or the prosecutor's conduct during *voir dire* might

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imposes any limit on the exercise of peremptory challenges by defense counsel." *Id.* at 89 n.12. This question was answered in the affirmative in Georgia v. McCollum, 112 S. Ct. 2348, 2359 (1992).

126. 380 U.S. 202 (1965).

127. *Id.* at 223; *see also* McCray v. New York, 461 U.S. 961, 964 (1983) (Marshall, J., dissenting from denial of certiorari) (noting that "[i]n the nearly two decades since it was decided, *Swain* has been the subject of almost universal and often scathing criticism"). *See generally* Randall Kennedy, *Doing What You Can With What You Have: The Greatness of Justice Marshall, in* Marden, *supra* note 59, at 235-46.

128. *Batson*, 476 U.S. at 112.

129. *Id.* at 100-01 (White, J., concurring).

130. Although the precise dimensions of the Fourteenth Amendment right that the Court recognized in *Batson* soon became a matter of controversy as questions arose as to who could assert the right, whether it extended to defense peremptory strikes, and whether it applied in civil cases, the *Batson* majority's analysis simply focused on prosecutors' peremptory strikes of blacks in criminal cases. *Id.* at 105 (Marshall, J., concurring); *see also* Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It Anyway*, 92 COLUM. L. REV. 725 (1992).

131. *Batson*, 476 U.S. at 96.

132. *Id.*

133. *Id.* at 96-97.

support or refute an inference of discriminatory purpose, but the Court noted that "[t]hese examples are merely illustrative" and simply proclaimed its "confidence" that trial judges would reach the right results.[134] Upon a judge's finding that the defendant had made a prima facie case, the burden would "shift[] to the State to come forward with a neutral explanation for challenging black jurors."[135] The only guidance the Court gave to trial judges assessing the "neutrality" of such explanations was that (1) the prosecutor's strikes could not be based on juror's race or the assumption that jurors of the defendant's race "would be partial to the defendant because of their shared race," and that (2) the neutral explanation must be "related to the particular case to be tried."[136]

Justice Marshall's sense of courtroom realities left him with little confidence in the majority's scheme. Judges were unlikely to find a prima facie case where the prosecutor had struck only one or two black jurors — even though those jurors might have been the only black jurors to have survived challenges for cause. The Court's vague standard consequently left prosecutors "free to discriminate . . . provided that they [held] that discrimination to an 'acceptable' level."[137] And even when judges found a prima facie case, they would still "face the difficult burden of assessing prosecutors' motives."[138] Marshall explained:

> Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, or seemed "uncommunicative," or "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case"? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.
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> Nor is outright prevarication by prosecutors the only danger here. . . . A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have

134. *Id.* at 97.
135. *Id.*
136. *Id.* at 97-98.
137. *Id.* at 105 (Marshall, J., concurring).
138. *Id.*

> come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.[139]

The Court's answer to Justice Marshall was that, with all due "respect" to his views, it had "no reason to believe that prosecutors will not fulfill their duty," and could assume that trial judges "will be alert to identify a prima facie case of purposeful discrimination."[140] Marshall, however, was unwilling to presume good faith on the part of prosecutors in this area and harbored no illusions about trial judges' abilities and inclinations. Judges with the best intentions might still be reluctant to accuse lawyers regularly appearing in their court of racist conduct. And judges were simply not up to the job of distinguishing between the flimsy reason offered because a prosecutor had not given enough thought to jury selection and the flimsy reason offered to excuse a strike motivated by crude racial stereotyping.[141]

The result would be that blacks would continue to be discriminatorily excluded from juries. Just as Marshall never argued that the standard for judging African Americans' encounters with police should explicitly turn on any special minority perspective, neither would he stereotype blacks by identifying a peculiar perspective that would be lost from jury deliberations through race-based strikes. Long before *Batson*, Marshall addressed the consequences of racial exclusions from a jury pool and explained:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury

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139. *Id.* at 106 (Marshall, J., concurring) (citations omitted).

Marshall's fear that judges would tolerate prosecutors' pretextual explanations seems to have been realized since *Batson* was decided. *See* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 173-76 (1989).

140. *Batson*, 476 U.S. at 99 n.22.

141. We would like to think that Justice Marshall may have underestimated the degree to which prosecutors would obey *Batson*'s bar on race-based strikes, even in the absence of judicial enforcement. Marshall reported that "[m]isuse of the peremptory challenge to exclude black jurors has become both common and flagrant." *Batson*, 476 U.S. at 103 (Marshall, J., concurring). However, *Swain* had all but authorized a prosecutor to strike blacks for reasons "related to the case he is trying, the particular defendant involved and the particular crime charged." Swain v. Alabama, 380 U.S. 202, 223 (1965). This language would appear to permit challenges made on the basis of assumptions that a black juror would favor a black defendant. Because it was not until *Batson* that the Court held these challenges unconstitutional, Marshall may have been unduly pessimistic in thinking that prosecutors would not harken to this change in law. Still, a right dependent on prosecutors' good faith is a fragile one, and Marshall was surely correct in arguing that discrimination could be *ended* "only by banning peremptories entirely." *Batson*, 476 U.S. at 108 (Marshall, J., concurring).

> room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.[142]

How then would Marshall combat the "inherent potential of peremptory challenges to distort the jury process"?[143] As in *Kastigar*, where a right could not, as a practical matter, be protected through fact-finding tailored to the right's formal dimensions, Marshall sought the prophylaxis of a structural change. In *Kastigar*, this meant giving immunized witnesses transactional protection, even though a formal Fifth Amendment analysis required only use immunity. In *Batson*, this meant eliminating peremptory challenges altogether, even though the right to be protected implicated strikes made only on the basis of race. Better to deprive prosecutors, *and* defense lawyers if need be,[144] of this valued strategic tool than to announce a right that would exist more in theory than practice.

IV. CONCLUSION

Out of Thurgood Marshall's experience came an understanding of the criminal justice process that was translated into a doctrinal approach, most often expressed in dissents, that sought to compensate for the human limitations of the players in the criminal justice system. Even though he respected the mission of law enforcement officers and prosecutors, Justice Marshall refused to presume that every person so employed would instinctively honor the letter and spirit of well-established constitutional rights. He therefore believed that for many citizens — and for the vast majority of those who are actually stopped, searched, arrested, and prosecuted — the rights the Supreme Court so carefully described would remain meaningless in the absence of clearly enunciated procedures to ensure that the rights were known and enforceable. Without clear standards to guide the conduct of police, prosecutors, and even defense lawyers, criminal defendants would be forced to rely

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142. Peters v. Kiff, 407 U.S. 493, 503-04 (1972); *see also* McCray v. New York, 461 U.S. 961, 967 (1983) (Marshall, J., dissenting from denial of certiorari).

143. *Batson*, 476 U.S. at 107 (Marshall, J., concurring).

144. Although *Batson* involved only prosecutors' exercise of peremptory challenges, Marshall noted: "If the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay." *Id.* at 108 (Marshall, J., concurring).

on retrospective fact-finding inquiries in which they inevitably would be at a disadvantage. Marshall's views on these matters rarely prevailed at the Court, but they stand as examples of what it means to take a right seriously in the hurly-burly world of the criminal process.

We acknowledge that our thoughts about some of the currents running through Marshall's opinions are not terribly complicated, profound, or original. Still, we think they have the virtue of being true. And we think a similar point might be made of Justice Marshall's criminal procedure jurisprudence itself. If he had a "judicial philosophy" about criminal cases, it was that judicial philosophies in this area can be dangerous if they fail to recognize that at the heart of the criminal justice system are encounters between human beings, usually of vastly different power and sophistication. Starting from principles on which the Justices often agreed, he argued for doctrines that would give practical effect to those principles. Although Justice Marshall's conception of the criminal justice process was not terribly complex, at least it was true — true in capturing and responding to how the law is interpreted and applied by people in the real world and true to his own experience.