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# THURGOOD MARSHALL AND THE ADMINISTRATION OF CRIMINAL JUSTICE: AN ANALYSIS OF DISSENTING OPINIONS

William J. Daniels\*

Thurgood Marshall was seated as an Associate Justice on the United States Supreme Court on September 1, 1967. Thus, he became the ninety-seventh person, and the first Black man, to serve on the Supreme Court. Marshall, 59 years old at the time, brought a wealth of legal experience to the Court. In fact, his record of legal achievements had been rarely equalled by any other person coming to the highest Court in the land.<sup>1</sup> At the time of Marshall's nomination to the Court by President Lyndon B. Johnson, the *New York Times* noted, "He is not particularly interested in the purely technical side of the law"; he is apt "to look behind a case to see how it came about and what it means."<sup>2</sup> Another comment embodying a similar thought was attributed to a colleague of Marshall: "His deep concern is for the human side of any case."<sup>3</sup>

The purpose of this paper is to explicate Marshall's judicial philosophy with regard to the administration of criminal justice. The primary source materials for this analysis are criminal justice cases from 1967 to 1976 in which Marshall filed a separate dissenting opinion.<sup>4</sup> The paper is divided into four sections: Section I discusses the particular utility of dissenting opinions for assessments of a justice's personal philosophy; Section II focuses on Marshall's specific disagreements with

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1. Prior to his position as an Associate Justice of the United States Supreme Court, Thurgood Marshall had served as counsel for the Baltimore Branch of the NAACP (1934); Counsel on the national staff of the NAACP (1936); Chief Legal Officer of the NAACP national staff (1938); Director and counsel for the NAACP Legal Defense and Educational Fund (1940); United States Circuit Court Judge for the Second Circuit (1961); and Solicitor General of the United States (1965).

In the thirty-two cases Thurgood Marshall argued before the Supreme Court, he established the remarkable record of winning twenty-nine. Marshall's record of achievements are well documented in the following government publications: Nomination of Thurgood Marshall of New York to be the United States Circuit Judge for the Second Cir. Hearings Before the Sub-comm. on Committee On The Judiciary, U.S. Congress, Senate, 87th Cong., 2d. Sess. (1962); Nomination of Thurgood Marshall to be the Solicitor General of the United States, Hearings Before the Sub-comm. on Committee On The Judiciary, U.S. Congress, Senate, 89th Cong., 1st Sess. (1965); Nomination of Thurgood Marshall of New York to be an Associate Justice of the Supreme Court of the United States, Hearings Before Committee On The Judiciary, U.S. Congress, Senate, 90th Cong., 1st Sess. (1967).

Other general background material on Thurgood Marshall can be found in these sources: R. Bland, *Private Pressure on Public Law: The Legal Career of Justice Thurgood Marshall* (1973); L. Fenderson, *Thurgood Marshall: Fighter for Justice* (1969). Also, the works of two students deserve mention: C. Kenny, *The Early Life of Thurgood Marshall* (Spring, 1975) (unpublished paper submitted to Prof. D. Danelski, Cornell Univ.); A. Rothschild, *The Judicial Philosophy of Thurgood Marshall* (Spring, 1975) (unpublished paper submitted to Prof. W. Daniels, Union College).

2. *New York Times*, June 14, 1967, at 32, col. 1.

3. *Id.*

4. The twenty-nine cases included in this analysis are listed in Appendix I.

the Court's majority on criminal justice controversies presented to the Court for consideration; Section III notes the rationale given and the values articulated by Marshall which support and justify his views on the administration of criminal justice in the United States; and Section IV contains some concluding observations.

## I

This analysis is predicated on several well established assumptions regarding the conduct of an individual justice sitting on a collegial appellate court. Included among these assumptions are: justices are not isolated from politics or controversial political questions;<sup>5</sup> a judge's decision is not reached on a plane, or in a vacuum, apart from his background, prior experiences, or convictions;<sup>6</sup> or more pointedly, justices vote as they do because of their predispositions toward the public policy issues they face.<sup>7</sup> These assumptions find support in comments made by former Supreme Court Justice Benjamin N. Cardozo. Cardozo, who takes "judge-made law as one of the existing realities of life,"<sup>8</sup> observes:

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense . . . of "the total push and pressure of the cosmos which, when reasons are nicely balanced, must determine where choice shall fall."<sup>9</sup>

Clearly, the written majority opinions of appellate courts reflect the collective values of the justices with regard to the issues they decide. But the force of a majority opinion as a statement of law or policy, in large measure, depends on the number of justices who join in agreement on a particular issue. That is to say, since Chief Justice John Marshall dispensed with the practice of seriatim, or separate opinions delivered by justices, in order to impress the country with the unity of the highest Court of the nation,<sup>10</sup> unanimous opinions have come to be regarded as a tour de force. But, given the merits of a unanimous or majority opinion of the Court, the means by which they arrived—including fierce arguments, persuasion, bargaining, compromise, negotiation, shifts of opinion, and alteration of wording<sup>11</sup>—tends to mask individual assessments of the justices toward the issue presented to the Court. Karl Llewellyn has concluded that the purpose of a majority opinion "is to pick up votes, or to hold votes."<sup>12</sup> Moreover, he notes that "I do not think that . . . a [majority] opinion reflects with any accuracy a third of the variegated great and petty motivating stimuli that have

5. J. Eisenstein, *Politics and the Legal Process* 186 (1973).

6. *Id.* at 187. See generally: B. Cardozo, *The Nature of the Judicial Process* (1921) (hereinafter cited as Cardozo); W. Murphy, *Elements of Judicial Strategy* (1964) (hereinafter cited as Murphy); J. Schmidhauser, *The Supreme Court: Its Politics, Personalities, and Procedures* (hereinafter cited as Schmidhauser).

7. Schubert, *Judicial Attitudes and Voting Behavior*, 28 L. & CONTEMP. PROB. 100 (1963).

8. Cardozo, *supra* note 6, at 10.

9. *Id.* at 12.

10. Beveridge, 3 *The Life of John Marshall* 16 (1919).

11. Murphy, *supra* note 6, 185 *et. seq.*

12. Llewellyn, *The Common Law Tradition: Deciding Appeals* 132 (1960) (hereinafter cited as Llewellyn).

somehow combined to produce the particular decision . . . ."<sup>13</sup> Therefore, dissenting opinions, although not backed by the authority of the Court, perhaps best reflect the perceptions of the individual judge.

The dissenting opinion is a cherished part of the common law tradition<sup>14</sup> and serves a variety of functions for an appellate court. John Schmidhauser states that "[d]issents are appeals to the brooding spirit of the law; to the intelligence of a future day . . . ."<sup>15</sup> They note an error and hope that it will be corrected and as such may exercise a "corrective and reforming influence on law."<sup>16</sup> Moreover, dissenting opinions serve as a "safeguard against judicial lethargy" and as a "prescription needed to keep any court healthy."<sup>17</sup> Other functions of dissenting opinions are to "ride herd on the majority, and help keep constant the due observance of that law,"<sup>18</sup> to encourage other justices to examine carefully their views,<sup>19</sup> and to improve the craftsmanship of the [C]ourt.<sup>20</sup>

Some scholars have asserted that there are occasions when a justice has a responsibility to dissent.<sup>21</sup> Walter Murphy in discussing this point suggests that "a judge who felt that policy endorsed by the Supreme Court in a given field was unwise, unconstitutional, or unjust and did not use the latitude available to him, would face ethical problems no less serious than a judge who chose to exploit his opportunities for exercise of discretion."<sup>22</sup> Thus a justice who does not agree with the majority should not remain silent, lest he disregard his duty to himself and to the general public.<sup>23</sup> Nor shall he, asserts Schmidhauser, "submerge his views to achieve institutional unity."<sup>24</sup>

Thus, it can be said that when a justice writes a dissenting opinion, he implicitly asserts that judge-made law is a reality of life and that judges are fallible, that he has resisted the need to conform with the majority, and, furthermore, that he has concluded that the decision reached by the majority has clashed sharply with his philosophy of life and the law to the extent that his views can best be expressed in a decision apart from the opinion of the Court. Dissenting opinions do in fact provide insight into a justice's thinking. R. Dean Moorhead amplifies this point by stipulating that dissenting opinions:

13. *Id.* at 131.

14. *See, e.g.*, Murphy, *supra* note 6 at 61. The first reported dissent was in *Georgia v. Brailsford*, 1 U.S. (1 Dall.) 13 (1793).

For a spirited utilization of dissenting opinions, *see* Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. of the Am. Jud. Soc. 104 (1948). A critique of dissenting opinions may be found in Kirt, *In the Matter of Dissents Inter Judices de Jure*, 31 PA. BAR A.Q. 257 (1960).

"[T]here is a good deal of historical evidence which indicates that the evolution of the Supreme Court's enterical procedures and customs was strongly influenced by the currents and eddies of political conflict. Such matters as the castenary attitudes toward the writing of dissenting . . . opinions . . . were conditioned by the political realities of eras long forgotten." Schmidhauser, *supra* note 6 at 104. *See also* Lief, *The Dissenting Opinions of Mr. Justice Holmes* (1929).

15. Schmidhauser, *supra* note 6 at 145.

16. Carter, *Dissenting Opinions*, HASTINGS L.J. 118 (1953) (hereinafter cited as Carter).

17. *Id.*

18. Llewellyn, *supra* note 12 at 26.

19. Carter, *supra* note 16 at 118.

20. Moorhead, *Concurring and Dissenting Opinions*, 38 A.B.A. J. 823 (1952) (hereinafter cited as Moorhead).

21. *See*: Simmons, *The Use and Abuse of Dissenting Opinions*, 16 LA. L. REV. 449 (1956); Hughes, *The Supreme Court of the United States* 68 (1928).

22. Murphy, *supra* note 6 at 25.

23. Carter, *supra* note 16 at 118.

24. William O. Douglas, cited in Schmidhauser, *supra* note 6 at 146.

Provide clues as to the justice's ability, technique and his predilections . . . . Many can be gleaned from opinions in which he expresses the majority view, but clues of a *more intimate and individual nature* [emphasis added] may be gathered from . . . dissenting opinions in which he delineates the personal reasoning which has set him apart from his brethren.<sup>25</sup>

Thurgood Marshall filed 29 dissenting opinions in criminal justice cases from 1967 through 1976.<sup>26</sup> It should be noted that not once was he a lone dissenter in the cases reviewed here. Douglas joined in dissent with Marshall on 93% of the cases included here (27 of 29), and Brennan joined on 76% (22 of 29). Five (17%) of the 29 cases were decided by a bare 5-4 majority of the Court; 17 (59%) were decided by a 6-3 majority; and in 7 cases (24%), Marshall was joined by one other member of the Court.<sup>27</sup>

Three justices joined in with Marshall in the dissenting opinions he wrote. Brennan concurred with Marshall's dissenting opinions 64% of the time they jointly dissented (14 of 22 cases); Douglas 48% (13 of 27 occasions); and Black (1 of 1). The frequency of occasions in which his brethren joined in dissent with Marshall tends to attest to the power of the appeal of his dissenting opinions.

## II

The utility of dissenting opinions for denoting the judicial philosophy of individual appellate court justices has been given; the substantive disagreement between Marshall and the majority of the Court in the administration of criminal justice cases is the subject here. Roscoe Pound has remarked that dissents "should express reason . . . not emotion."<sup>28</sup> Pound explains that, in order to be useful, a dissenting opinion involves responsibility to afford a useful critique of the opinion of the Court when it is to be used as precedent. Unless it can be so used, the dissenting "judge can satisfy his conscience by the bare announcement of his dissent."<sup>29</sup> Thurgood Marshall did not merely announce his dissents, but consistently expressed his views in an extensive and clearly articulated manner.

Martin P. Golding points out that the philosophy of law deals with essentially two kinds of issues: the analytic or conceptual and the normative or justificatory.<sup>30</sup> Although the present analysis does not treat Marshall's judicial philosophy in a manner similar to that of philosophers of law, it is maintained that the dichotomy utilized by philosophers of law has applicability here for organizational purposes. First, a conceptual synthesis of Marshall's differences with the Court's majorities will be given. This conceptual analysis will be followed by an assessment of Marshall's normative explanations given to justify the substantive disagreements expressed in his dissenting opinions.

For analytical purposes, the 29 cases considered here are grouped into five

25. Moorhead, *supra* note 20 at 823.

26. This number does not include Marshall's total record of dissenting opinions. Not included in this number are dissents where Marshall concurred in a dissenting opinion written by another member of the Court. Also not included are dissenting opinions written by Marshall from the time this paper was written in May 1976 until the conclusion of the 1976 term of the Supreme Court in July. For a discussion of these eight additional cases, see *postscript note, infra* note 172.

27. See Appendix II for a listing of the justices who joined Marshall in dissent.

28. Pound, *Cacoethes Dissentiendi: The Heated Judicial Dissent*, 39 A.B.A. J. 749 (1953).

29. *Id.* at 749.

30. M. Golding, *Philosophy of Law* 2 (1975).

categories: police and investigatory powers, proceedings before trial, the trial, sentencing, and appeals and post-convictions issues.<sup>31</sup>

#### POLICE AND INVESTIGATORY POWERS

In eleven instances, policy and investigatory practices, approved by the majority of the Court, were found unacceptable to Marshall. Five cases raised the issue of what constitutes a proper search by the Police. In *Adams v. Williams*,<sup>32</sup> the majority held that a policeman making a reasonable investigatory stop of an automobile may conduct a limited protective search for concealed weapons and, if the search produced weapons and contraband, all such evidence may be properly introduced at a subsequent trial. Marshall could not accept the broad scope of authority given police in this case. He wrote: "This decision . . . expands the concept of warrantless searches far beyond anything heretofore recognized as legitimate."<sup>33</sup> His view is that an officer may, short of probable cause, act only on the basis of reliable information to make a stop and ultimately frisk an individual. In *Schneckloth v. Bustamonte*,<sup>34</sup> Marshall disagreed with the majority view which held that the state need not prove that one giving permission to a "consent search" knew that he had a right to withhold his consent. Marshall contends that, under this ruling, "all the police must do is conduct what will inevitably be a charade of asking for consent. If they display any firmness at all, a verbal expression of assent will undoubtedly be forthcoming."<sup>35</sup> Furthermore, Marshall maintains "where the police claim authority to search yet in fact lack such authority, the subject does not know that he may permissibly refuse them entry, and it is his lack of knowledge that invalidates the consent."<sup>36</sup> One must be aware of one's constitutional protections in order to exercise them, for in Marshall's words, "permitting searches . . . without any assurance at all that the subject of the search knew that, by his consent, he was relinquishing his constitutional rights, is something that I cannot believe is sanctioned by the Constitution."<sup>37</sup>

Two cases, namely *United States v. Robinson*<sup>38</sup> and *Gustafson v. Florida*,<sup>39</sup> presented similar issues. The ruling of the majority, which applied to the circumstances of both cases, was that the full search of the person of the suspect made incident to a lawful custodial arrest did not violate the Fourth and Fourteenth Amendments. In *Robinson* the police found a cigarette package containing heroin, and in *Gustafson* the police seized marijuana cigarettes. In both cases, the contraband seized was introduced at trial and the individuals possessing it were convicted.

Marshall's opinion in *Robinson* was expressed, in part, with these thoughts:

The majority opinion fails to recognize that the search conducted . . . did not merely involve a search of respondent's person. It also included a separate search of effects found on his person. And even were we to

31. These categories are extrapolated from D. Karlen, *Anglo-American Criminal Justice* 97 (1967) (see ch. "Stages of Criminal Prosecution").

32. *Adams v. Williams*, 407 U.S. 143 (1972).

33. *Id.* at 55.

34. 412 U.S. 218 (1973).

35. *Id.* at 284.

36. *Id.* at 285.

37. *Id.* at 289.

38. 414 U.S. 218 (1973).

39. 414 U.S. 260 (1973).

assume, *arguendo*, that it was reasonable . . . to remove the object . . . felt in respondent's pocket, clearly there was no justification consistent with the Fourth Amendment, which would authorize . . . opening the package and looking inside.<sup>40</sup>

In noting that his dissent in *Robinson* also applied to *Gustafson*, Marshall added: "The only need for a search in this case was to disarm petitioner to protect [the arresting officer] from harm while the two were together in the patrol car. The search conducted . . . went far beyond what was reasonably necessary to achieve that end."<sup>41</sup>

The scope of a national statutory provision<sup>42</sup> was raised in *Gooding v. United States*.<sup>43</sup> The Court held that the legislation required no special showing of cause for a nighttime search, other than a showing that the contraband was likely to be on the property of the person to be searched at the time of the search. Marshall said that he could not "subscribe to such an evisceration of the statute."<sup>44</sup> His opposition to the majority interpretation was that "the only acceptable interpretation of the statute is one which requires some additional justification for authorizing a nighttime search over and above the ordinary showing of probable cause to believe that a crime has been committed and that evidence of the crime will be found upon the search."<sup>45</sup>

The Court held, in *United States v. Watson*,<sup>46</sup> that the warrantless arrest of respondent by postal officers, based on probable cause, was in strict compliance with statute and regulations<sup>47</sup> and did not violate the Fourth Amendment. The majority supported this holding on the basis of its views of precedent and history. But Marshall found fault with both modes of justification. With regard to precedent, Marshall found that "the case-by-case justification undertaken . . . demonstrates, the dicta relied upon by the Court in support of its decision today are just that—dicta," and he argues that dicta "are no substitute for reasoned analysis of the relationship between the warrant requirement and the law of arrest."<sup>48</sup> As for the Court's view of history, Marshall found two flaws:

First, as a matter of factual analysis, the substance of the ancient common-law rule provides no support for the far-reaching modern rule that the Court fashions on its model. Second, as a matter of doctrine, the long standing existence of a government practice does not immunize the practice from scrutiny under the mandate of our Constitution.<sup>49</sup>

Three issues, namely, proper police questioning, the right to counsel, and the admissibility at trial of incriminating evidence, were jointly considered by the Supreme Court in *Oregon v. Hass*.<sup>50</sup> The Court held that information given by a suspect in police custody is admissible in evidence at the suspect's trial solely for impeachment purposes after he has taken the stand and testified. The circumstances leading to this holding were as follows: The suspect, while in police

40. 414 U.S. at 255-56.

41. 414 U.S. at 268.

42. 21 U.S.C. § 879(a) (1970).

43. 416 U.S. 430 (1974).

44. *Id.* at 467.

45. *Id.* at 462.

46. 423 U.S. 411 (1976).

47. 18 U.S.C. § 3061(a) (1968).

48. 423 U.S. at 437-38.

49. *Id.*

50. 420 U.S. 714 (1975).

custody after accepting the warnings prescribed by *Miranda*,<sup>51</sup> was told that he must wait until they reached the station to telephone a lawyer. However, prior to reaching the station, the police continued to question him and he provided inculpatory information. It was this information, even though ruled inadmissible for the prosecution's case in chief, that the Court held could be used for impeachment purposes after the defendant took the stand and testified to the contrary. Since the Oregon Supreme Court had affirmed a decision of the Oregon Court of Appeals reversing the conviction of Hass on the ground that his statements were improperly used to impeach his testimony,<sup>52</sup> Marshall's dissent agreed with the rulings of the state courts. He stipulated, "it seems much the better policy to permit the state court the freedom to strike its own balance between individual rights and police practices, at least where the state court's ruling violates no constitutional prohibitions."<sup>53</sup>

The privilege against self-incrimination was the issue in *Couch v. United States*, *United States v. Mara*, and *United States v. Dionisio*.<sup>54</sup> In *Couch* the majority held that the respondent had effectively surrendered tax records to an accountant to prepare tax returns and that the Internal Revenue Service could directly summon the accountant for such records. Moreover, even though the IRS tax investigation may entail possible criminal consequences, the respondent was not under personal compulsion and therefore the Fifth Amendment could not bar the production of such records. An attempt by Marshall was made "to develop criteria for determining whether evidence sought by the government lies within the sphere of activities that petitioner attempted to keep private."<sup>55</sup> The criteria he developed are reflected in this observation: "I would think that, privileged or not, a disclosure to an accountant is rather close to disclosure to an attorney."<sup>56</sup> In conclusion Marshall posited this thought: "It is not impossible that petitioner had indeed abandoned her claim to privacy in the papers sought by summons in this case . . . . I would vacate judgment and remand the case to the District Court for reconsideration."<sup>57</sup>

In both *Mara* and *Dionisio*, the claim of search and seizure was raised in conjunction with self-incrimination. The Court in *Mara* ruled that a grand jury directive to furnish a handwriting specimen involved production of physical characteristics and was not a compelled search and seizure. *Dionisio* involved the compelled production of voice exemplars. Here, too, the majority opinion found that such exemplars were used for identification purposes—not for the testimonial or communicative content of the utterances—and therefore violated no legitimate Fourth or Fifth Amendment claim. Marshall accuses the Court of being too restrictive in *Mara*; he admonishes that nowhere is the Fifth Amendment's privilege "explicitly restricted to testimonial evidence."<sup>58</sup> Indicating clearly why he is at odds with the majority opinion, Marshall writes: "For, I cannot accept the notion that the government can compel a man to cooperate affirmatively in securing incriminating evidence when that evidence could not be obtained without

51. *Miranda v. Arizona*, 384 U.S. 436 (1966).

52. See: 13 Or. App. 368, 374, 510 P.2d 852 (1973); 267 Or. 489, 517 P.2d 671 (1973).

53. 420 U.S. at 728.

54. 409 U.S. 322 (1973); 410 U.S. 19 (1973); 410 U.S. 1 (1973).

55. 409 U.S. at 349.

56. *Id.* at 351.

57. *Id.* at 351.

58. 410 U.S. at 33.



cooperation of the suspect."<sup>59</sup> The dissenting opinion in *Dionisio* closely parallels the argument in *Mara*.

Thus, the Court's decisions today can only serve to encourage prosecutorial exploitation of the grand jury process . . . the Court fails to appreciate the essential difference between real and testimonial evidence in the context of these cases, and thereby hastens the reduction of the grand jury into simply another investigative device of law enforcement officials.<sup>60</sup>

The final case in this section, *United States v. White*,<sup>61</sup> concerns the use of testimony of government agents obtained by the use of electronic surveillance. Such testimony based on monitored conversations was held by the Court not to violate Fourth Amendment protections. The dissent by Marshall was short and direct. He maintains that the "correct view" of the Fourth Amendment's warrant requirement applies to investigatory activity and technological innovations are covered by existing constitutional rights.<sup>62</sup>

#### PROCEEDINGS BEFORE TRIAL

A plea of guilty was at issue in two cases under this category. A defendant's desire to withdraw a guilty plea and stand trial was not permitted by the Court in *Dukes v. Warden*.<sup>63</sup> The majority opinion stated that a claim that a guilty plea was not voluntarily and intelligently made because of an alleged conflict of interest on the part of counsel had no merit and the plea could not be vacated. In another action, *Tollett v. Henderson*,<sup>64</sup> the Court decided that, once a defendant pleads guilty, only the voluntary and intelligent character of the guilty plea may be challenged subsequent to the plea. In this case, the Court ruled against an attempt to raise independent claims relating to the deprivation of constitutional rights that antedated the guilty plea.

Marshall in *Dukes* asserts that "petitioner's lack of confidence in his lawyer finds striking support in the hearing record,"<sup>65</sup> and that he "would permit petitioner to withdraw his guilty plea."<sup>66</sup> Marshall continues, "I adhere to the view that where the defendant presents a reason for vacating his plea and the government has not relied on the plea to its disadvantage, the plea may be vacated and the right to trial regained . . ."<sup>67</sup> As for the finality of the guilty plea in *Tollett*, Marshall feels that "[t]he Court adopts an inflexible rule in a case where . . . the facts establish a need for flexibility."<sup>68</sup> It is Marshall's view that the defendant must rationally weigh the advantages of going to trial against the advantages of pleading guilty. The role of counsel is to assist in this effort, "[y]et nothing like that happened in this case."<sup>69</sup> Unfortunately, according to Marshall,

The Court evokes the specter of requiring counsel to present his client

59. *Id.* at 32.

60. 410 U.S. at 47.

61. 401 U.S. 745 (1971).

62. *Id.* at 795.

63. 406 U.S. 250 (1972).

64. 411 U.S. 258 (1973).

65. 406 U.S. at 262.

66. *Id.* at 264.

67. *Id.* at 265.

68. 411 U.S. at 269.

69. *Id.* at 271.

"every conceivable constitutional plea in abatement," suggesting, I suppose, that there are such a large number of conceivable constitutional objections to the prosecution as to make such a requirement utterly impractical. I doubt that this accurately reflects the true situation. . . .<sup>70</sup>

The defendant in *United States v. Kahan*<sup>71</sup> maintained that he had asserted a constitutional right when he committed perjury before a grand jury. In his testimony before the grand jury he said he did not have sufficient funds to retain a lawyer, for to reveal his bank deposits would incriminate him. The majority of the Court held that the incriminating component of respondent's pretrial statements derives from his knowledge of their falsity, there was no involvement of what was believed to be a valid constitutional claim, and hence he was not faced with the intolerable choice of having to surrender one constitutional claim for another.

Marshall disagreed with the Court's finding that no valid constitutional claim could be attached to perjury before a grand jury. He then provided a remedy:

The solution, then, to the tension between the Fifth and Sixth Amendments is to require the defendant seeking appointment of counsel to tell the truth at his indigency hearing, and to bar use of any incriminating information so revealed. This approach is fully consistent with our Fifth Amendment cases.<sup>72</sup>

*Davis v. United States*,<sup>73</sup> is the final "proceeding before trial" case. In this case, it was decided by the Court that a federal law<sup>74</sup> governed an untimely claim of grand jury discrimination. The petitioner's charge, made in a collateral attack three years after a federal conviction, was that the grand jury that indicted him was unconstitutional because Negroes were excluded by reason of their race. The Court held that, since the claim was not timely, the petitioner had waived his right to challenge the composition of the grand jury.

This "holding [which] bars the raising of meritorious claims not raised before trial"<sup>75</sup> is defective, asserts Marshall. "The only issue in this case is whether one who claims that he did not intentionally relinquish a known right is to be afforded the opportunity to prove that claim, as a step toward establishing that his rights were in fact infringed."<sup>76</sup> Several logical steps, claims Marshall, buttress this point of view.

First we must assure that no one is excluded from participation in important democratic institutions like the grand jury because of race. Second, convicted offenders will be more amenable to rehabilitation when they know that all their claims of unfairness have been considered, unless they deliberately refrained from raising them at an earlier point. Finally, providing the opportunity to raise such claims at any point in the process, so long as the offender did not willingly conceal them for strategic reasons, helps guarantee that the process of criminal justice is fair . . . .<sup>77</sup>

### *The Trial*

Ten cases are the focus for presenting Marshall's views on criminal justice trials. The cases relate to these constitutional issues: confrontation of witnesses,

70. *Id.* at 271-72.

71. 415 U.S. 239 (1974).

72. *Id.* at 249.

73. 411 U.S. at 16.

74. FED. R. CRIM. P. 12(6)(2).

75. 411 U.S. at 245.

76. *Id.* at 250.

77. *Id.* at 253.

admission of evidence at trial, immunity and compulsory testimony, nonunanimous jury verdicts, and double jeopardy.

First, consideration is given to the cases involving the issue of confrontation, namely *Dutton v. Evans*,<sup>78</sup> *Nelson v. O'Neil*,<sup>79</sup> and *Mancusi v. Stubbs*.<sup>80</sup> In *Dutton*, the Court concluded that an extrajudicial statement, attributed to an alleged partner in crime, admitted at trial did not deny the respondent's right to be confronted with the witness against him. The Court ruled in *Nelson* that a cautionary instruction to the jury satisfied the full and effective cross-examination requirement in a trial where a codefendant takes the stand in his own defense and denies making an alleged out-of-court statement implicating the defendant, but the defendant does not take the stand in his behalf. And, finally, in *Mancusi* it was held that when a witness is found to be unavailable, there was no constitutional error in permitting his prior recorded testimony to be read to the jury at the trial.

Marshall, in disagreement with these rulings, declared in *Dutton* that "the majority reaches a result completely inconsistent with recent opinions of this Court."<sup>81</sup> Furthermore, "I would eschew such worries [of whether evidence admitted is crucial or devastating] and confine the inquiry to traditional questions. . . ."<sup>82</sup> A plea for the adoption of new rules regulating the use of joint trials is made by Marshall in *Nelson*.<sup>83</sup> Specifically, he suggests that the American Bar Association 1968 Project on Standards for Criminal Justice should be adopted. The dissenting opinions contain the forceful argument that saving time, money, and energy, through the use of joint trials, is no excuse for a violation of constitutional rights.<sup>84</sup> Marshall did not accept the contention that the witness was unavailable in *Mancusi*. "I cannot agree, however, that if neither state nor federal authorities had the power to compel appearance, that fact relieved the [s]tate of its obligation to make a good-faith effort to secure [the witness'] presence . . . . The right of confrontation may not be dispensed with so lightly."<sup>85</sup>

The petitioner's claim in *Schneble v. Florida*<sup>86</sup> that a codefendant's testimony admitted at his trial was prejudicial was rejected by the majority in its opinion. The Court maintained that the evidence was harmless beyond a reasonable doubt in view of the overwhelming evidence of petitioner's guilt as manifested by his confession, which completely comported with the objective evidence.

Marshall, in reviewing this case, found it "easier than most, because it is impossible to read the record and to conclude that the evidence 'so overwhelmingly' establishes petitioner's guilt that the admission of codefendant's statement made no difference to the outcome."<sup>87</sup> Marshall argues, "We need not assume

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78. 400 U.S. 74 (1967).

79. 402 U.S. 622 (1970).

80. 408 U.S. 204 (1972).

81. 400 U.S. at 100.

82. *Id.* at 109.

83. 402 U.S. at 635-36.

84. *Id.*

85. 408 U.S. at 223.

86. 405 U.S. 427 (1972).

87. *Id.* at 433.

that the jury ignored incriminating evidence in reaching its verdict."<sup>88</sup> "[L]ittle evidence remains to support the verdict."<sup>89</sup> "I submit that [the] decision is clearly wrong."<sup>90</sup>

One dissenting opinion by Marshall pertained to two related holdings in these cases: *Kastigar v. United States*,<sup>91</sup> and *Zicarelli v. New Jersey State Commission of Investigation*.<sup>92</sup> In short, the Court held that the government, after granting immunity, can compel testimony from an unwilling witness over a claim of privilege, providing that the government in a subsequent criminal prosecution has the burden of proving affirmatively that evidence proposed to be used is derived from a legitimate source wholly independent of the compelled testimony.

The dissenting opinion stipulates, "The only way to provide [the guarantee from self-incrimination] is to give the witness immunity from prosecution for crimes to which that testimony relates."<sup>93</sup> Marshall found, pressing his point, "[t]he Court asserts that the witness is adequately protected by a rule imposing on the government a heavy burden of proof if it would establish the independent character of evidence to be used against the witness."<sup>94</sup> Under the ruling, "the good faith of the prosecuting authorities is thus the sole safeguard of the witness' rights [but] even their good faith is not a sufficient safeguard."<sup>95</sup>

*Johnson v. Louisiana*<sup>96</sup> and *Apodaca v. Oregon*<sup>97</sup> provided the occasion for the Supreme Court to hold that less than unanimous jury verdicts in criminal cases do not violate the due process clause for failure to satisfy the reasonable doubt standard.

Marshall wrote a strong dissenting opinion which applied to both cases. Marshall wrote, "Today the Court cuts the heart out of two of the most important and inseparable safeguards the Bill of Rights offers a criminal defendant . . ."<sup>98</sup> "[T]he majority has embarked on a 'functional' analysis of the jury that allows it to strip away, one by one, virtually all the characteristic features of the jury as we know it."<sup>99</sup> Upon reviewing the standard of justice resultant from the Court's new rule, Marshall retorts, "In such circumstances, it does violence to language and logic to say that the government has proved the defendant's guilt beyond a reasonable doubt."<sup>100</sup> In Marshall's judgment, the Court's holdings are pernicious, for "to fence out a dissenting juror fences out a voice from the community, and undermines the principle on which our whole notion of the jury now rests."<sup>101</sup> This is not an inconsequential point, because "[t]he doubts of a single juror are in my view evidence that the government has failed to carry its burden of proving guilt beyond a reasonable doubt."<sup>102</sup>

88. *Id.* at 437.

89. *Id.* at 435.

90. *Id.* at 437.

91. 406 U.S. 472 (1972).

92. 406 U.S. 441 (1972).

93. *Id.* at 471.

94. *Id.* at 468.

95. *Id.* at 469.

96. 406 U.S. 356 (1972).

97. 406 U.S. 404 (1972).

98. *Id.* at 399.

99. *Id.* at 400.

100. *Id.* at 401.

101. *Id.* at 401.

102. *Id.* at 403.

In *Illinois v. Sommerville*,<sup>103</sup> Marshall dissented in a decision of the majority which, in his opinion, condoned a misuse of judicial discretion. The Court ruled that the double jeopardy provision of the Fifth Amendment as extended to the states through the Fourteenth Amendment, did not bar respondent's retrial in these circumstances. Respondent was brought to trial under an indictment which contained a defect that could have been used to overturn any judgment of conviction. The trial judge declared a mistrial, over the respondent's objections, and the respondent was reindicted, tried and convicted.

Marshall's dissent was directed at the actions of the trial judge as well as the majority of the Supreme Court. He states,

If the only alternative to declaring a mistrial did require the trial judge to ignore the tenor of previous state decisional law, though, perhaps declaring a mistrial would have been a manifest necessity. But there obviously was another alternative. The trial judge could have continued the trial. The majority suggests that this would have been a useless charade. But to a defendant, forcing the Government to proceed with its proof would almost certainly not be useless. The Government might not persuade the jury of the defendant's guilt.<sup>104</sup>

An allegation of a violation of the double jeopardy provision was presented to the Court in *Chaffin v. Stynchcombe*.<sup>105</sup> In rejecting the claim, the majority of the justices held that the rendition of a higher sentence by a jury upon retrial does not violate the double jeopardy clause as long as these conditions are met: the jury is not informed of the prior sentence, and the second sentence is not otherwise shown to be a product of vindictiveness. The possibility of a higher sentence does not impermissibly chill the exercise of a defendant's right to challenge the first conviction by direct appeal or collateral attack.

The second jury should be restricted from imposing a higher sentence according to Marshall. He observes,

I cannot agree with the Court that it is permissible for a jury, but not a judge, to give a defendant on his retrial a sentence more severe than the one he received in his first trial, without specifying particular aspects of his behavior since the time of his first trial that justify the enhanced sentence.<sup>106</sup>

In discussing restrictions on the second jury, Marshall stipulates, "when the costs, in terms of other values served by juries . . . are balanced against the minor degree to which restrictions on jury resentencing impair the values served by jury sentencing, the need to vindicate the constitutional right warrants restrictions on juries."<sup>107</sup>

### *Sentencing*

Two cases fall within this category. The first, *Michigan v. Payne*,<sup>108</sup> relates to the matter of retroactivity of decisional law which could serve to restrict a judge from imposing a higher sentence upon conviction on retrial. The holding of the Court in *Michigan* was that the "prophylactic" due process limitations estab-

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103. 410 U.S. 458 (1973).

104. *Id.* at 480.

105. 412 U.S. 17 (1973).

106. *Id.* at 38.

107. *Id.* at 38.

108. 412 U.S. 47 (1973).

lished by *North Carolina v. Pearce*<sup>109</sup> are not retroactively applicable to resentencing proceedings occurring prior to the date of the *Pearce* decision. The second case is *Marshall v. United States*.<sup>110</sup> It was found that a national statute<sup>111</sup> which excludes from rehabilitative commitment addicts with two or more felony convictions, does not deny due process or equal protection.

In his *Payne* dissenting opinion, Marshall presses two points. First,

I believe . . . that the State has an obligation to present to the court reviewing the second conviction evidence from which that court can determine whether a new sentence, more severe than that imposed at a prior trial, resulted in part from the sentencing authority's desire to punish the defendant for successfully appealing his first conviction.<sup>112</sup>

Secondly, "considerations of fairness rooted in the Constitution lead me to conclude that cases in the pipeline when a new constitutional rule is announced must be given the benefit of that rule."<sup>113</sup>

Marshall noted that *Marshall* did not neatly fit into any "fundamental interest" or "suspect classification" mold. He argued,

[n]otwithstanding, I find it hard to understand why a statute which sends a man to prison and deprives him of the opportunity even to be considered for treatment for his disease of narcotics addiction, while providing treatment and suspension of prison sentence to others similarly situated, should be tested under the same minimal standards of rationality that we [would] apply to statutes regulating who can sell eyeglasses or who can own pharmacies.<sup>114</sup>

Moving from the rationality of the majority to the rationality of the statute, Marshall concludes,

a careful analysis of the two-felony exclusion and the ends Congress sought to achieve shows that the exclusion is a totally irrational means toward those ends. If deferential scrutiny under the equal protection guarantee is to mean more than total deference and no scrutiny, surely it must reach the statutory exclusion involved in this case.<sup>115</sup>

### *Appeals and Post-Conviction Issues*

Two cases remain to be discussed of the original twenty-nine. The Court held states may disenfranchise convicted felons who have completed their sentences and paroles and not violate the equal protection clause in *Richardson v. Ramirez*.<sup>116</sup> The Court decided, in *Schick v. Reed*,<sup>117</sup> that the conditional commutation of petitioner's death sentence by the President was not affected by the Court's prior ruling in *Furman v. Georgia*.<sup>118</sup>

Marshall, who accuses the majority opinion of unsound historical analysis in *Richardson*, argues in part, "Disenfranchisement for participation in crime, like durational residence requirements, was common at the time of the adoption of the Fourteenth Amendment. 'But constitutional concepts of equal protection are not

109. 395 U.S. 711.

110. 414 U.S. 417 (1974).

111. 18 U.S.C. § 4251 (1966).

112. 412 U.S. at 59.

113. *Id.* at 60.

114. 414 U.S. at 423-33.

115. *Id.* at 433.

116. 418 U.S. 24 (1974).

117. 419 U.S. 256 (1974).

118. 408 U.S. 238 (1971).

immutably frozen like insects trapped in Devonian amber.'''<sup>119</sup> Marshall outlines the conditions restrictive legislation of this kind must satisfy. First,

the challenged disenfranchisement is necessary to a legitimate and substantial state interest; second, that the classification is drawn with precision [in] that it does not exclude too many people who should not and need not be excluded; and third, there are no other reasonable ways to achieve the State's goal with a lesser burden on the constitutionally protected interest.<sup>120</sup>

The conditions are applied by Marshall and the restrictive legislation does not satisfy them. "There is certainly no basis for asserting that ex-felons have any less interest in the democratic process than any other citizen. Like every one else, their daily lives are deeply affected and changed by the decisions of government."<sup>121</sup>

It is contended by Marshall that the *Schick* decision pays only lip service to our decision in *Furman*.<sup>122</sup> He argues that the retrospective application of *Furman* is unclouded and "requires us to vacate petitioner's sentence [to] life with the opportunity for parole."<sup>123</sup> On the matter of retroactivity: "The full retroactivity of a constitutional ruling is aimed at the eradication of all adverse consequences of prior violations of that rule." Therefore, this case "should be simple to resolve."<sup>124</sup>

### III

The essence of the disagreements between Thurgood Marshall and the majority of the Court in twenty-nine cases, grouped into five substantial categories, have been discussed. In this section, an effort is made to transverse the administration of criminal justice categories utilized above and the substantive issues embodied therein, which provided the foundation for the conceptual analysis. The intent here is to isolate and explicate the prevailing ideas and values which permeate the dissenting opinions of Thurgood Marshall.

Given this objective, the moral element of the dissenting opinions, which rests on notions such as "fair," "right," or "wrong," "preferable," or "not preferable," become important.<sup>125</sup> Clearly, Thurgood Marshall in his dissenting opinions contrasted the law as it is with the law as it should be. In an off-the-bench remark pertaining to the power of the judiciary, he indicated that "the only tool at our hand is moral suasion."<sup>126</sup> In fact, Ronald Dworkin has observed that legal rules, which judges are asked to apply, contain implicit moral principles. He argues that terms like "just" or "unjust" makes "the application of the rule

119. 418 U.S. at 76.

120. *Id.* at 78.

121. *Id.* at 78.

122. 419 U.S. at 268.

123. *Id.* at 268.

124. *Id.* at 270-71.

125. It is not uncommon for an appellate decision to be cast in moral terms. See, e.g., Stumpf, *The Moral Element in Supreme Court Decisions*, 6 VAND. L. REV. 63 (1952).

126. Marshall, *Remarks of the Honorable Thurgood Marshall*, 29 REC. A. B. CITY OF N.Y. 15, 21 (1974). These remarks were made on November 20, 1973, upon the occasion of his acceptance of an honorary membership in the Association of the Bar of the City of New York. For other off-the-bench remarks of Thurgood Marshall, see the following: Marshall, *The Continuing Challenge of the Fourteenth Amendment*, WIS. L. REV. 979 (1968); Marshall, *Group Action in the Pursuit of Justice*, 44 N.Y.U. L. REV. 661 (1969); Marshall, *Financing Public Interest Law Practice: The Role of the Organized Bar*, 61 A.B.A. J. 1487 (1975).

which contains it depend to some extent upon principles . . . lying beyond the rule, and in this way makes that rule itself more like a principle."<sup>127</sup>

Thurgood Marshall's judicial philosophy can be conveniently synthesized within five precepts: (1) the proper balance between the rights of the individual and the needs of justice; (2) the legitimate and illegitimate interests of the government in limiting the constitutional rights of individuals; (3) the fair allocation of the prosecutorial burden on the government; (4) the use and abuse of history in the explanation of constitutional principles; and (5) the obligation of justices to provide "just" solutions to thorny constitutional principles.

The first precept finds expression in several dissenting opinions, as well as an off-the-bench remark: "In my view we must attempt to strike a *new balance* (emphasis added) between the competing goals of individualized justice and the rule of law. Discretion, where it exists and where it is necessary to ensure that justice retain its human element, should be rationalized and controlled."<sup>128</sup> Marshall found an unsatisfactory balance struck in *Adams*: "The balance struck [here] is . . . heavily weighted in favor of the government [and] involves the specter of a society in which innocent citizens may be stopped, searched, and arrested,"<sup>129</sup> and in *Dukes* where the defendant was not allowed to withdraw his guilty plea, Marshall's point was, if the government had shown specific and substantial harm, then a defendant may be held to his plea. But, if the government can claim only disappointed expectations, then "[i]n such a case, the balance of interests must favor vindication of the individual's most basic constitutional rights."<sup>130</sup>

On two other occasions, Marshall accused the Court of resorting to a "balancing" test when no such test was necessary. In a double-jeopardy case, *Sommerville*, where a mistrial was declared, and subsequently the state successfully prosecuted the defendant, Marshall declared, "I see no reason . . . to adopt a new balancing test whose elements are stated on such a high level of abstraction as to give judges virtually no guidance at all in deciding subsequent cases."<sup>131</sup> And in *Payne*, Marshall expressed these feelings. In "[i]nspecting the cases dealing with retroactivity, I find that they appear to fall into three groups. . . . Our time would be better spent, I think, in attempting to delineate the basis for those classifications, and to derive from them some constitutional principles, rather than . . . 'applying' a balancing test."<sup>132</sup> "I believe that principled adjudication requires the Court to abandon the charade of carefully balancing countervailing considerations when deciding the question of retroactivity."<sup>133</sup>

In Marshall's scheme of values, the majority struck an improper balance in *Hass*, but he also suggested how a new balance would apply to the facts of this case. "It is peculiarly within the competence of the highest court of a [s]tate to determine that in its jurisdiction the police should be subject to more stringent rules than are required as a federal constitutional minimum."<sup>134</sup>

The second precept deals with the legitimate interests of the state. In three

127. Dworkin, *The Model of Rules*, in *Law and Philosophy* 446, 451 (E. Kent ed. 1970).

128. 29 REC. A. B. CITY OF N. Y., *supra* note 124 at 20.

129. 407 U.S. at 62.

130. 406 U.S. at 266.

131. 410 U.S. at 483 (1973).

132. 412 U.S. at 61-62.

133. *Id.* at 61.

134. 420 U.S. 714 (1975).



instances, Marshall felt that state regulations were not justified because state interests were not impaired, but damage was in fact done to individual rights. His dissent in *Chaffin* criticized the actions of the state with these words. The "state interest is not substantially impaired by limitations designed to preclude the second jury from imposing a sentence based on part, on a desire to punish the defendant for taking an appeal."<sup>135</sup> Pressing his views further, he declared, "Since no state interests in jury sentencing would be impaired to any significant degree by imposing such limitations . . . the question should be resolved in favor of limiting the jury's power."<sup>136</sup> In discussing state disenfranchisement of former felons, Marshall observed, "There is certainly no basis for asserting that ex-felons have any less interest in the democratic process than any other citizen."<sup>137</sup> The state did not satisfy Marshall that it had a rational and compelling interest in denying former felons the right to vote. And, finally, Marshall concluded in *Davis*, "the legitimate governmental interests that support a strict system of forfeitures with respect to claims about the composition of the grand jury are, in my view, outweighed by other important public interests."<sup>138</sup>

The obligation of the state to overcome the standard of reasonable doubt is the premise of the third precept. Marshall expressed his views on these subjects: informing suspects of constitutional rights, the obligations of defense attorneys, the production of witnesses, the character of evidence, and the use of the jury to establish guilt. First, according to Marshall, police must possess authority to search when they claim this authority. If they do not possess the authority, then the subject must be informed that he may permissibly refuse. "If one accepts this view . . . must the government show that the subject knew of his rights, or must the subject show that he lacked such knowledge?"<sup>139</sup> Marshall responds to his question, "I think that any fair allocation of the burden would require that it be placed on the prosecution."<sup>140</sup>

If plea bargaining is to be constitutionally acceptable, maintains Marshall, then the defendant must personally make the choice after being informed of the options by his attorney. The state is not living up to its obligations if it permits an attorney to advance the interests of his client without informing the client of the alternatives. To permit such an arrangement, as the Court did in *Tollett*, accused Marshall, "[is] to adopt a concept of professional conduct that I cannot accept."<sup>141</sup>

In *Mancusi*, as noted above, Marshall could not accept the contention that if neither state nor federal authorities could compel the appearance of a witness, then the state could proceed to permit the jury to hear testimony recorded at an earlier date, without a good faith effort to secure the witness' presence.<sup>142</sup>

The state cannot maintain as it did in *Kastigar*, that it has satisfied its constitutional obligation not to compel a person to testify against himself by merely asserting that it will take care to establish that evidence relating to testimony given under immunity was secured independently of the immune

135. 412 U.S. at 43.

136. *Id.* at 42.

137. 418 U.S. at 78.

138. *Davis v. United States*, 411 U.S. 233, 252 (1973).

139. 412 U.S. at 285.

140. *Id.* at 285.

141. 411 U.S. at 272.

142. 408 U.S. at 223.

testimony. The adequately protected constitutional rights requires more than this. In the eyes of Marshall, the "good faith" of the prosecutor "is not a sufficient safeguard."<sup>143</sup>

Strong criticism was directed at the members of the Court in *Johnson* and *Apodaca*. To permit less than unanimous jury verdicts does violence to history, logic and fairness, Marshall chided. Marshall declared, "The doubts of a single juror are in my view evidence that the government has failed to carry its burden of proving guilt beyond a reasonable doubt."<sup>144</sup>

For precept four, we note several dissenting opinions by Marshall which censure the Court for relying unnecessarily on history in arriving at its judgments. Oliver Wendell Holmes, in consternation once remarked: "[I] look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them."<sup>145</sup> Thurgood Marshall supported these sentiments on several occasions.

To permit grand juries to compel voice exemplars, as the Court held in *Dionisio*, was a decision which broadened the scope of the evidence heretofore permitted by the Supreme Court in grand jury proceedings. "In my view," asserts Marshall, "the Court makes more of history (in *Dionisio*) than is justified . . . ."<sup>146</sup>

In *Button*, the Court decided that an extrajudicial statement attributed to an alleged partner in crime was permissible and did not deny the defendant a right to confront the witness against him. According to Marshall, the Court arrived at this decision by abusing history. "I am troubled by the fact that the (Court) . . . unable when all is said to place this case beyond the principled reach of our prior decisions, shifts its ground and begins to hunt. . . ."<sup>147</sup> In Marshall's opinion, it was only after this unnecessary hunt that the Court reached its conclusion.

Marshall describes the Court's examination of history in *Robinson* as "not only wholly superficial, but totally inaccurate and misleading."<sup>148</sup> Marshall concluded, "It is disquieting, to say the least, to see the Court at once admit that [v]irtually all of the statements of this Court affirming the existence of an unqualified authority to search incident to a lawful arrest are dicta and concede that we are presented with an open question on which 'further examination into history and practice' would be helpful. . . ."<sup>149</sup> However, Marshall, as indicated, found the Court's examination of "history and practice" to be seriously flawed.

And in *Watson*, Marshall charged that, rather than a critical analysis of the constitutional interests involved, the Court resorted to an "unblinking liberalism."<sup>150</sup> That is, the Court decision was, in effect, a direct transfer of an ancient common law rule to the present without proper consideration to intervening conditions and circumstances. Marshall warns,

143. 406 U.S. at 449 (1972).

144. 406 U.S. at 403.

145. Holmes, *The Path of the Law*, 10 HARV. L. REV. 439 (1897).

146. 410 U.S. at 40.

147. 400 U.S. at 109.

148. 414 U.S. at 248.

149. *Id.* at 247-48.

150. 423 U.S. at 442.

[w]hile we can learn from the common law, the ancient rule does not provide a simple answer directly transferable to our system. Thus, in considering the applicability of the common-law rule to our present constitutional scheme, we must consider both of the rule's two opposing constructs: the presumption favoring warrants, as well as the exception allowing immediate arrests of the most dangerous criminals. The Court's failure to do so, indeed its failure to recognize any tension in the common-law rule at all, drains all validity from its historical analysis.<sup>151</sup>

The fifth precept may be generally stated: there are exceptional cases which require appellate justices to provide solutions which may not fit a narrowly prescribed judicial role. For example, in *Schneble*, where Marshall took exception with the majority judgment that evidence admitted at trial was not prejudicial, he stipulated "the limited nature of the grant [of certiorari] does not bar us from looking at the entire record in the case in order to dispose of the one issue presented."<sup>152</sup>

On other occasions, Marshall eschewed liberal approaches to constitutional interpretation or statutory construction because such approaches would not have been just. In his judicial mind, his actions were proper in order to represent larger and deeper social interests. Of particular note here are his dissents in *Marshall*, *Kahan* and *Nelson*.

In *Marshall*, where he could not accept the logic of the Court in affirming the application of a statute which would send a man to prison rather than consider him for treatment for narcotics addiction, Marshall wrote, "if deferential scrutiny under the equal protection guarantee is to mean more than total deference and no scrutiny, surely it must reach the statutory exclusion involved in this case."<sup>153</sup>

The dissent registered in *Kahan* notes that the tension between the Fifth and Sixth Amendments should be resolved in favor of the defendant, namely, "the defendant seeking appointment of counsel . . . (should be permitted) to tell the truth at his indigency hearing, and (the Court should) bar use of any incriminating information so revealed."<sup>154</sup>

And, finally, Marshall argued eloquently in *Nelson* for the adoption of new rules regarding the use of joint trials. The essence of his thoughts are reflected in these words.

Those that argue for the use of joint trials contend that joint trials, although often resulting in prejudice to recognized rights of one or more of the codefendants, are justified because of the saving of time, money and energy that result. But, as this case shows, much of the supposed saving is lost through protracted litigation that results from the impingement or near impingement on a codefendant's rights of confrontation and equal protection.<sup>155</sup>

#### IV

And now some concluding observations. This effort has involved the analysis of dissenting opinions written by Thurgood Marshall, Associate Justice of the United States Supreme Court, in an effort to explicate his judicial philosophy toward the administration of criminal justice. In summary, what does the analysis reveal?

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151. *Id.* at 442.

152. *Schneble v. Florida*, 405 U.S. at 427.

153. 414 U.S. at 433.

154. 415 U.S. at 249.

155. 402 U.S. at 635.

It has been argued that: dissenting opinions provide clues of an intimate nature about a judge, and a judge's decisions are not reached in a vacuum apart from his background, inherited instincts and beliefs. Furthermore, it has been asserted that dissenting opinions are appeals to the "brooding spirit of the law," and to the "intelligence of a future day." Concluding remarks which affirm these stipulations would require a thorough psycho-social explanation of Thurgood Marshall's values.<sup>156</sup> Such an analysis is not possible by way of examining a small aspect of his work. However, it is possible to discuss the significance of Marshall's dissents by placing them within the broader context of the Warren Court and the Burger Court and the administration of criminal justice.

Earl Warren was appointed Chief Justice of the Supreme Court in 1953. At the time of his appointment, the Supreme Court had been involved generally, since 1937, in the creation and development of new protections of personal rights. But it was under Warren's leadership that the Court became the cutting edge for the expansion of rights for persons accused of crime.

The fundamental changes in criminal justice came inchmeal through a succession of cases. Some noteworthy rulings were: the Fourteenth Amendment precluded the use, by states, of unconstitutionally seized evidence;<sup>157</sup> the right to appointed Counsel was not limited to capital cases;<sup>158</sup> the Fourth Amendment's "search and seizure" requirement, and the Fifth Amendment's "self-incrimination" requirement, as coalesced, were applicable to the states;<sup>159</sup> one jurisdiction within the federal system may not compel an immunized witness to give testimony which is then used to convict him of a crime against another such jurisdiction;<sup>160</sup> a suspect has a right to an attorney before interrogation;<sup>161</sup> the police must warn a suspect that he has a right to remain silent and, if he chooses to remain silent, interrogation must cease;<sup>162</sup> and, the right to confront witnesses was applied to the states.<sup>163</sup>

Of course, Earl Warren did not single-handedly bring about these additional protections for criminal suspects. But he possessed strong moral feelings and exercised a tremendous influence on the Court. Warren embodied the spirit of the Court; the legacy he left was that criminal suspects must be treated fairly and must have an equal chance to defend themselves. The Court, under Warren's leadership, had provided the constitutional tools to accomplish these objectives.

However, this legacy came under attack. Richard Nixon, in his quest for the presidency in 1968, criticized the Warren Court. Often during his campaign, he repeated this theme: "I believe some Court decisions have gone too far in the past in weakening the peace forces as against the criminal forces in our society . . . I believe the peace forces must not be denied the legal tools they need to protect the

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156. There is forward reaching work being done with regard to the issues raised here. For explanations of why justices make the decisions they do within the context of a predictive theory of decision-making in the U.S. Supreme Court, see D. Rhode and H. Spaeth, *Supreme Court Decision Making* (1976). For a book which describes and classifies the continuities and differences in policy choices for the individual justices of the Court, see G. Schubert, *The Judicial Mind Revisited: Psychometric Analysis of Supreme Court Ideology* (1972).

157. *Mapp v. Ohio*, 367 U.S. 643 (1961).

158. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

159. *Malloy v. Hogan*, 378 U.S. 1 (1964).

160. *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

161. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

162. *Miranda*, *supra* note 51.

163. *Pointer v. Texas*, 380 U.S. 400 (1965).

innocent from criminal elements . . . ."<sup>164</sup> Often, Nixon was even more specific in his expressions of dissatisfaction with the Warren Court.

The *Miranda*<sup>165</sup> and *Escobedo*<sup>166</sup> decisions of the High Court have had the effect of seriously hamstringing the peace forces and strengthening the criminal forces. From the point of view of the criminal forces, the cumulative impact of these decisions has been to set free patently guilty individuals on the basis of legal technicalities. The tragic lesson of guilty men walking free from hundreds of courtrooms across the country has not been lost on the criminal community.<sup>167</sup>

Nixon was a skillful politician. He had assessed the mood of the country in 1968 and capitalized on it. The country was in the throes of violence, plagued by lawlessness, and was ripe for the law-and-order campaign he mounted. Prior and during the presidential campaign, there were bombings, incidents of arson, violent demonstrations and riots. Martin Luther King, Jr., was assassinated, and eight and a half weeks later, Robert Kennedy was assassinated. The popularity of the Supreme Court had dropped nine percent from 1967-1968.<sup>168</sup>

It was against this backdrop that Nixon promised, if elected, to appoint judges who would "not twist or bend the Constitution in order to perpetrate (their) personal, political and social values."<sup>169</sup> His term for these justices was "strict-constructionists," judges who would be subdued, and who would defer to the other branches of government. In short, Nixon promised to appoint justices who would redress the peace forces—criminal forces balance which resulted from criminal justice decisions of the Warren Court.

Richard Nixon was elected President in 1968, and on four occasions, during his first term, appointed justices whom he felt to be "strict-constructionists," to the Supreme Court: Chief Justice Warren Burger (1969), Harry Blackmun (1970), Lewis Powell (1970), William Rehnquist (1971). Chief Justice Warren Burger, prior to his appointment to the Supreme Court, served for 13 years on the U.S. Court of Appeals for the District of Columbia Circuit. His opinions while on that court clearly showed that he tended to be in agreement with Nixon that the Supreme Court, under Warren, had gone too far in protecting the rights of criminal defendants.<sup>170</sup> Under Burger's leadership, the Supreme Court is arresting, and occasionally reversing, the Warren Court's decisions on the administration of criminal justice. It was the Nixon appointees on the Supreme Court who most often constituted the majority for the Court in decisions in which Thurgood Marshall dissented.<sup>171</sup>

It would seem that the dissenting opinions of Thurgood Marshall, at once, were brooding reflections of the past spirit of the law, appeals to the intelligence of a future day, and blueprints for corrective influences on the law of criminal justice.

Marshall's deeply felt precepts about the administration of criminal justice are clearly reflected in his dissenting opinions. His view is that a judge has a crucial role to play in cases which involve a man's life and liberty. The judge

164. J. Simmons, *In His Own Image: The Supreme Court in Richard Nixon's America* (1973).

165. *Miranda*, *supra* note 51.

166. *Escobedo*, *supra* note 161.

167. Simmons, *supra* at 161.

168. *Id.* at 21.

169. *Id.* at 227.

170. *See generally*, *id.* at 79 *et. seq.*

171. *See* Appendix

must safeguard the high standards set forth in the Constitution which cannot be ignored. To execute this judicial function may require the justice to question the logic of legislative intent, to advance the interests of the individual against the convenience of the government, and to read greater prohibitions into the Constitution. To do less in the preservation of individual liberty, for Marshall, results in an abdication of the judicial responsibility.

Marshall does not question the liability of criminals under the law, but maintains that suspects must be emancipated from capricious actions of the government. The U.S. Constitution applies to persons suspected of criminal activity and officers of the Court. Marshall's position, stated simply, is there should be a *procedural balance* in criminal courts, defendants should have an *equal chance* to defend themselves. For Marshall, at a minimum, these requirements must prevail if the process of criminal justice is to be fair. A proper search is a restricted search; a search for weapons should not include other personal effects; the privilege against self-incrimination must be inviolate; a defendant should be able to withdraw a guilty plea if a plausible reason is given; meritorious claims should not be automatically barred at any time; a defendant must be personally confronted with witnesses against him; as a general rule ameliorable criminal law decisions should be made retroactive; a grant of immunity should bar the use of testimony given, and the fruits of such testimony, at any trial; and a unanimous jury verdict is a necessity to prove guilt beyond a reasonable doubt. These conditions bear a striking similarity to the substance and spirit of the criminal justice decisions of the Warren Court.

Beyond these substantive matters, in a technical sense, it is evident that Marshall made a conscientious effort to relate his dissenting views to those expressed in the majority opinions. His dissents reflected care and precision and were quite clear with respect to his views on the issues at hand, how he perceived the judicial function, his personal techniques of legal reasoning, the proper application of precedent, the logic applicable to the case, the correct utilization of history and what the deeper interests of society required. Marshall's dissenting opinions also reveal his perceptive assessment of the proper place of statistics, formality and technicality in appellate adjudications. Whereas these factors ought not be disregarded completely, the value accorded to them must be weighed against other competing, and, often, more significant factors. For Marshall, the human element takes precedence over statistics, reason outweighs formality, and intelligence supercedes blind technicality. He is particularly sensitive to law-in-action: its human impact as contrasted with its technical form or formal configurations.<sup>172</sup>

In conclusion, the words of Thurgood Marshall are offered: "In our hurrying to erect a more sufficient system of justice, we must not forget that our system derives its strength from the fact that it deals with individuals. To mechanize the system, to make it lose its human element, to forget that in every case we are dealing with a human being who, before the law, deserves to be treated as an equal of any other man, is to lose that which gives any judicial system its very life."<sup>173</sup>

172. For an elaboration of this distinction, see R. Gambitta, *Toward a Contextual Jurisprudence: Preliminary Investigations on the Construction of a Jurisprudence Based upon Ordinary Conceptions of the Law* (March 27, 1976) (unpublished paper presented at the 1976 New York Political Science Association).

173. 29 REC. A.B. CITY OF N.Y., *supra* note 124 at 16.

Author's Note. From the time this paper was written for delivery at the Annual Meeting of NCOBPS in May 1976 until the conclusion of the 1976 Term of the Supreme Court in July, 1976, Thurgood Marshall wrote six dissenting opinions which applied to eight cases. The "postscript note" contains a discussion of these dissenting opinions.

The additional cases in which Marshall dissented are: *Ristaino et al v. Ross*, March 3, 1976; *United States v. Miller*, April 21, 1976; *United States v. Santana et al*, June 24, 1976; *United States v. Agurs*, June 24, 1976; *Gregg v. Georgia*, July 2, 1976; *Proffitt v. Florida*, July 2, 1976; *Jurek v. Texas*, July 2, 1976; and *South Dakota v. Opperman*, July 6, 1976. Two of the dissenting opinions represent direct extensions of modes of thought by Marshall discussed earlier in this paper. In *Santana* Marshall argued that in the absence of exigent circumstances, the policy may not arrest a suspect without a warrant (see the discussion of Marshall's dissent in *United States v. Watson*, *supra* pages 7-8). The *Opperman* case found Marshall dissenting from the Court's interpretation that the Fourth Amendment permits a routine police inventory search of the closed glove compartment of a locked automobile impounded for ordinary traffic violations (see the discussion of Marshall's dissent in *Oregon v. Hass*, *supra* page 8).

The *Miller* case pertains to the admissibility at trial of certain evidence. Marshall dissented from a ruling which permitted a customer's bank records to be admitted in evidence in the absence of a warrant and probable cause. He argued that such records fell within the constitutionally protected zone of privacy by virtue of the Fourth Amendment (See generally, *supra* pages 8-10).

Dissenting opinions in two cases fall into the category above classified as "The Trial" (See, *supra* generally pages 13-17). The dissents were in *Ristaino* and *Agurs*. In *Ristaino*, Marshall argued that questions to veniremen about general prejudices did not suffice for specific questions about racial prejudice in a trial where a Negro had been accused of committing violent crimes against a white security guard. The dissent in *Agurs* was a plea by Marshall for greater responsibility on the part of the prosecutor. Marshall agreed with the Court that a prosecutor has a constitutional duty to provide exculpatory evidence to the defense even when the defense does not make a specific request for such evidence. But he believed that the Court, in *Agurs*, had so narrowly defined the category of material evidence embraced by this duty as to deprive it of all meaningful content.

Marshall wrote a dissenting opinion in *Gregg* which applied to two other cases as well, namely, *Proffitt* and *Jurek*. This dissenting opinion in opposition to capital punishment was short, but Marshall's concurring opinion in *Furman v. Georgia*, 408 U.S. 238 (1972), more fully elaborates his thoughts on the subject. The gist of Marshall's opinions in these cases is that the death penalty violates the Eighth and Fourteenth Amendments because it is excessive punishment, unnecessary punishment, it does not promote the goal of deterrence of crime, it does not accomplish the legitimate legislative purposes in punishment, and that it is morally unacceptable.

## APPENDIX

## I

ADMINISTRATION OF CRIMINAL JUSTICE CASES IN WHICH JUSTICE  
THURGOOD MARSHALL FILED A SEPARATE DISSENTING OPINION  
1967-1976

- 1) *Dutton v. Evans*, 400 U.S. 74, 100-111\* (1967).
- 2) *United States v. White*, 401 U.S. 745, 795-796 (1970).
- 3) *Nelson v. O'Neil*, 402 U.S. 622, 635-636 (1970).
- 4) *Schneble v. Florida*, 405 U.S. 427, 432-437 (1971).
- 5) *Dukes v. Warden*, 406 U.S. 250, 259-271 (1971).
- 6) *Johnson v. Louisiana*, 406 U.S. 356, 399-403 (1971).
- 7) *Apodaca v. Oregon*, 406 U.S. 404, 399-403 (1971).
- 8) *Kastinger v. United States*, 406 U.S. 441, 467-471 (1971).
- 9) *Zicarelli v. New Jersey Investigation Commission*, 406 U.S. 472, 467-471 (1971).
- 10) *Adams v. Williams*, 407 U.S. 143, 153-162 (1971).
- 11) *Mancusi v. Stubbs*, 408 U.S. 204, 216-223 (1971).
- 12) *Couch v. United States*, 409 U.S. 322, 344-351 (1972).
- 13) *United States v. Dionisio*, 410 U.S. 1, 31-51 (1972).
- 14) *United States v. Mara*, 410 U.S. 19, 31-51 (1972).
- 15) *Illinois v. Somerville*, 410 U.S. 458, 477-483 (1972).
- 16) *Davis v. United States*, 411 U.S. 233, 245-257 (1972).
- 17) *Tollett v. Henderson*, 411 U.S. 258, 269-278 (1972).
- 18) *Chaffin v. Stynchcombe*, 412 U.S. 17, 38-46 (1972).
- 19) *Michigan v. Payne*, 412 U.S. 47, 59-66 (1972).
- 20) *Schneckloth v. Bustamonte*, 412 U.S. 218, 277-290 (1972).
- 21) *United States v. Robinson*, 414 U.S. 218, 238-259 (1973).
- 22) *Gustafson v. Florida*, 414 U.S. 260, 267-269 (1973).
- 23) *Marshall v. United States*, 414 U.S. 417, 430-440 (1973).
- 24) *United States v. Kahan*, 415 U.S. 239, 246-249 (1973).
- 25) *Gooding v. United States*, 416 U.S. 430, 461-469 (1973).
- 26) *Richardson v. Ramirez*,\*\*418 U.S. 24, 56-86 (1974).
- 27) *Schick v. Reed*, 419 U.S. 256.
- 28) *Oregon v. Hass*, 420 U.S. 714 (1975).
- 29) *United States v. Watson*, 423 U.S. 411 (1976).

\* Page numbers refer to Marshall's dissenting opinion.



## APPENDIX II

### DISSENTING JUSTICES IN THE ADMINISTRATION OF CRIMINAL JUSTICE CASES IN WHICH THURGOOD MARSHALL FILED A SEPARATE DISSENTING OPINION

Case*	William O. Douglas	William J. Brennan	Hugo L. Black	John M. Harlan	Potter Stewart	Byron R. White
1)	(X)**	(X)	(X)			
2)	X ***			X		
3)	X	X				
4)	(X)	(X)				
5)	(X)					
6)	X	(X)			X	
7)	X	(X)			X	
8)	X					
9)	X					
10)	(X)	X				
11)	(X)					
12)	X					
13)	X	X				
14)	X	X				
15)	X	X				X
16)	(X)	(X)				
17)	(X)	(X)				
18)	X	X			X	
19)	X				X	
20)	X	X				
21)	(X)	(X)				
22)	(X)	(X)				
23)	(X)	(X)				
24)	X	X				
25)	(X)	(X)				
26)	(X)	(X)				
27)	(X)	(X)				
28)		(X)				
29)		(X)				

\* Numbers refer to case citation in Appendix I.

\*\* (X) Justices who concurred in dissenting opinion written by Thurgood Marshall.

\*\*\* X Justices filing separate dissenting opinions.