

Justice Blackmun's Mark on Criminal Law and Procedure

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When Justice Blackmun was nominated to the Court in 1970, Americans were consumed with the idea of crime control. In the 1968 presidential campaign, Richard Nixon had called the Supreme Court “soft on crime” and had promised to “put ‘law and order’ judges on the Court.”¹ While sitting on the Eighth Circuit, the Justice had “seldom struck down searches, seizures, arrests or confessions,” and most of his opinions in criminal cases had “affirmed guilty verdicts and sentences.”² Thus, according to one commentator, Justice Blackmun seemed to be “exactly what Nixon was looking for: a judge who believed in judicial restraint, was strong on law and order, and weak on civil liberties.”³

During the Justice's twenty-four years on the Supreme Court, his colleagues—under the leadership of Chief Justices Burger and Rehnquist—narrowly interpreted and even overruled outright a number of the Warren Court's pro-defendant rulings. Despite initial predictions about Justice Blackmun's views on criminal issues and the general tendency of Supreme Court Justices to remain loyal to the policies of the President who nominated them,⁴ the Justice would eventually be

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1. David G. Savage, *Civil Rights, Pro-Police Rulings—High Court Dichotomy: Liberal & Conservative*, L.A. TIMES, May 13, 1987, at 1; see also Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2351 (1993) (noting that “Richard Nixon gained the White House by running as much against the Court as against his rival”).

2. Donald Lay, *The Cases of Blackmun, J. on the United States Court of Appeals for the Eighth Circuit 1959-1970*, 8 HAMLINE L. REV. 2, 15-16 (1985).

3. Jeffery M. Shaman, *Justice Harry A. Blackmun: The Evolution of a Realist*, 72 A.B.A. J. 38, 38 (1986).

4. See LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 50 (1985) (“For the most part, and especially in areas of particular and known concern to a President, Justices have been loyal to the ideals and perspectives of the men who have nominated them.”).

called a “swing Justice”⁵ and “a voice of reason”⁶ in criminal cases. The Justice himself, on the other hand, is fond of saying that his views never shifted, but that it was the Court that changed around him.⁷ In attempting to evaluate these various characterizations and to describe the Justice’s mark on criminal law and procedure, I first examine the Justice’s judicial personality, as reflected in his criminal law opinions, and then turn to the role he played in the Burger and Rehnquist Courts’ efforts to restrict the rights afforded criminal defendants.⁸

I. The Justice’s Judicial Personality

Justice Blackmun’s extraordinary—and endearing—humility has been the subject of extensive commentary.⁹ Likewise, much has been written about the careful attention the Justice gave to the specific facts of each case and his concern for the real-world impact of the Court’s decisions.¹⁰ Not surprisingly, these traits are evident in his criminal writings as well.

The Justice’s opinions in criminal cases often go beyond a discussion of the abstract legal rule at issue and emphasize the practical effect the decision is likely to have on the parties and others affected by the Court’s ruling. Perhaps the most widely cited illustration in the criminal law context is the Justice’s dissenting opinion in *United States v. Bailey*.¹¹ Disagreeing with the majority’s holding that defendants

5. Yale Kamisar, *The “Police Practice” Phases of the Criminal Process and the Three Phases of the Burger Court*, in *THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT* 143, 167 (Herman Schwartz ed., 1987).

6. Linda Greenhouse, *A Capacity to Change as Well as to Challenge*, N.Y. TIMES, Feb. 27, 1994, at E4.

7. See Linda Greenhouse, *Justice Blackmun, Author of Abortion Rights, Dies*, N.Y. TIMES, Mar. 5, 1999, at A1.

8. My discussion is limited to the Justice’s opinions in non-capital cases. For a description of his death penalty jurisprudence, see Malcolm L. Stewart, *Justice Blackmun’s Capital Punishment Jurisprudence*, 26 HASTINGS CONST. L.Q. 271 (1998).

9. See, e.g., Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51, 51 (1985) (referring to the Justice as “notoriously humble and self-effacing”); John A. Jenkins, *A Candid Talk with Justice Blackmun*, N.Y. TIMES, Feb. 20, 1983, § 6 (Magazine), at 20 (noting that “[t]he notion of humility is central to an understanding of Justice Blackmun’s place on the Court”).

10. See, e.g., Koh, *supra* note 9, at 103 (observing that the Justice’s equal protection theory of aliens’ rights “ensures . . . that the human concerns of resident aliens . . . will not be overlooked”); Jenkins, *supra* note 9, at 20, 23 (describing the Justice as “a jurist determined to make the Court responsive . . . to individuals,” and quoting him as saying, “I get disturbed when we have a case that goes off on theory and does injustice to the litigant”); Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717, 736 (1983) (noting that the Justice “emphasize[s] the human dimension in the cases confronting him”).

11. 444 U.S. 394, 419 (1980) (Blackmun, J., dissenting).

charged with the crime of escape are foreclosed from raising necessity or duress defense unless they made "a bona fide effort to surrender or return to custody . . . at their earliest opportunity,"¹² the Justice's dissent opens by noting that "[t]he atrocities and inhuman conditions of prison life in America are almost unbelievable."¹³ In chilling detail, he continues:

A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail. Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim. Prison officials either are disinterested in stopping abuse of prisoners by other prisoners or are incapable of doing so, given the limited resources society allocates to the prison system.¹⁴

In a similar, though less dramatic, vein, the Justice's separate opinion in *Michigan Department of State Police v. Sitz*,¹⁵ the case upholding the constitutionality of sobriety checkpoints,¹⁶ called "the slaughter on our highways" caused by drunk drivers a "tragic aspect of American life."¹⁷ When the Court held in *Tate v. Short*¹⁸ that sentencing a defendant to prison rather than a fine because of her indigency violates the Equal Protection Clause,¹⁹ the Justice wrote a concurring opinion, warning that the effect of the Court's ruling might be to encourage legislatures to abolish fines as a sentencing option for many traffic offenses.²⁰

And, finally, while the Justice joined the majority opinion adopting a good-faith exception to the exclusionary rule in *United States v. Leon*,²¹ he wrote a concurring opinion emphasizing the "provisional" nature of the Court's "empirical judgment" that the exclusionary rule has "little appreciable effect" in cases where police officers conduct a search in reasonable reliance on an invalid search warrant:

By their very nature, the assumptions on which we proceed today cannot be cast in stone. To the contrary, they now will be tested in the real world of state and federal law enforcement, and this Court will attend to the results. If it should emerge

12. *Id.* at 415 (majority opinion).

13. *Id.* at 421 (Blackmun, J., dissenting).

14. *Id.* (Blackmun, J., dissenting).

15. 496 U.S. 444, 455 (1990) (Blackmun, J., concurring in the judgment).

16. *See id.* at 455 (majority opinion).

17. *Id.* at 456-57 (Blackmun, J., concurring in the judgment).

18. 401 U.S. 395 (1971).

19. *See id.* at 398.

20. *See id.* at 401 (Blackmun, J., concurring).

21. 468 U.S. 897 (1984).

from experience that, contrary to our expectations, the good-faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here.²²

The Justice's concurrence in *Leon* demonstrates not only his concern for the real-world impact of the Court's decisions, but also his humility. He was not afraid to admit that his judgment might be wrong and might therefore need to be rethought. Another manifestation of this humble recognition of his own fallibility was the Justice's refusal to join the other members of the Court in articulating broad legal principles that were not absolutely necessary to the outcome of a case. In *United States v. Place*,²³ for example, Justice Blackmun agreed with the majority that a ninety-minute airport detention of the defendant's luggage was unreasonable and therefore could not be justified as a *Terry* stop and frisk,²⁴ but he refused to join the majority in reaching out and deciding the constitutionality of using a specially trained police dog to sniff the luggage in order to detect narcotics—an issue that the defendant had not raised, that the lower courts had not decided, and that the Supreme Court did not need to resolve.²⁵ Likewise, he refused to join the majority opinion in *Florida v. Wells*²⁶ because the Court went farther than he believed was necessary. Although the Justice agreed with the majority that the inventory search of a suitcase found in the trunk of the defendant's car was invalid because Florida Highway Patrol policy gave officers complete discretion in deciding whether or not to open closed containers during an inventory search, he refused to join the Court's opinion because it went on to address the question of "precisely *how much, if any*, discretion an individual policeman constitutionally may exercise."²⁷ Similarly, he wrote separately in *Graham v. Connor*,²⁸ agreeing with the majority that "the Fourth Amendment is the primary tool for analyzing claims of excessive force in the prearrest context," but suggesting that "the Court would have done better to leave . . . for another day" the question whether substantive due process has any applicability in

22. *Id.* at 927-28 (Blackmun, J., concurring).

23. 462 U.S. 696 (1983).

24. *See Terry v. Ohio*, 392 U.S. 1 (1968). For further discussion of the stop-and-frisk cases, see *infra* text accompanying notes 90-103.

25. *See Place*, 462 U.S. at 723 (Blackmun, J., concurring in the judgment).

26. 495 U.S. 1 (1990).

27. *Id.* at 10-12 (Blackmun, J., concurring in the judgment). For further discussion of the inventory search cases, see *infra* text accompanying notes 143-48.

28. 490 U.S. 386, 399 (1989) (Blackmun, J., concurring in part and concurring in the judgment).

such cases, given that the “petitioner apparently decided that it was in his best interest to disavow the continued application of substantive due process analysis” and his “litigation strategy . . . cannot be expected to . . . serve other potential plaintiffs equally well.”²⁹ And in *Colorado v. Connelly*,³⁰ the Justice declined to join the portion of the Court’s opinion discussing the standard of proof the prosecution must satisfy in order to establish a valid waiver of *Miranda* rights because that issue had not been raised or briefed by the parties and was not necessary to the Court’s decision.³¹

Finally, the Justice’s focus on the facts of each case and his reluctance to issue unnecessarily broad rulings often drew him to conduct a harmless error analysis in criminal cases. His criminal law opinions—especially in his early years on the Court—often inquired into the harmlessness of the error alleged by the defendant, requiring him to delve into the facts of the case to an extent unusual for an opinion at the Supreme Court level.³² In fact, the Justice’s first opinion in a criminal case—a concurrence in *Dutton v. Evans*³³—discussed why the harmlessness of the error alleged by the prisoner was an additional reason for reversing the lower court’s order granting habeas relief.³⁴ Likewise, his dissent in *United States v. Tucker*,³⁵ where the Court held that the defendant was entitled to resentencing because the trial judge had improperly considered two prior uncounseled felony convictions in imposing sentence,³⁶ was based on his assessment that the error was harmless. Calling the Court’s decision “an exercise in futility,” the Justice urged his colleagues to be “just a little realistic” and to realize that the trial judge was likely to impose the same maximum sentence on remand.³⁷

29. *Id.* at 399-400 (Blackmun, J., concurring in part and concurring in the judgment).

30. 479 U.S. 157 (1986).

31. *See id.* at 171 (Blackmun, J., concurring in part and concurring in the judgment). For further discussion of *Connelly*, see *infra* text accompanying notes 229-30.

32. One commentator attributes this tendency to the Justice’s lengthy tenure on the appellate court. *See* Stephen L. Wasby, *Justice Harry A. Blackmun: Transformation from “Minnesota Twin” to Independent Voice*, in *THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES* 63, 66 (Charles M. Lamb & Stephen C. Halpern eds., 1991).

33. 400 U.S. 74, 90 (1970) (Blackmun, J., concurring).

34. *See id.* at 90-93 (Blackmun, J., concurring).

35. 404 U.S. 443 (1972).

36. *See id.* at 448-49.

37. *Id.* at 452 (Blackmun, J., dissenting). *See also* *Parker v. Randolph*, 442 U.S. 62, 77-81 (1979) (Blackmun, J., concurring in part and concurring in the judgment) (refusing to consider the question whether the Confrontation Clause barred the admission of codefendants’ interlocking confessions because any error made in admitting the confessions was harmless); *Webb v. Texas*, 409 U.S. 95, 99 (1972) (Blackmun, J., dissenting) (agreeing with the majority that it was improper for the trial judge to make threatening remarks to a

Thus, the Justice's criminal jurisprudence reflected the judicial personality that was also evident in other cases—his humility, his refusal to ignore the facts of a case, and his concern for the practical impact of the Court's decisions. I turn next to consider this jurisprudence and judicial personality in the context of analyzing the extent to which the Justice participated in the Burger and Rehnquist Courts' narrowing of the rights afforded criminal defendants.

II. The Justice's Role in the Constriction of Defendants' Rights

The Burger and Rehnquist Courts' hostile treatment of the Warren Court's criminal law precedents has received a good deal of attention.³⁸ In analyzing Justice Blackmun's position on the Court's efforts to undo the work of its predecessor, I address the Court's opinions in the following areas: search and seizure, confessions, the right to counsel, habeas corpus, and the right to a jury trial.

A. The Search and Seizure Cases

In some respects, one could say that Justice Blackmun's approach in Fourth Amendment cases remained true to the "law and order" platform on which President Nixon nominated him.³⁹ In other respects, however, his views on search and seizure questions cannot be so easily categorized. In analyzing his contribution to this area of the law, I consider his views on the exclusionary rule, the definition of a "search" for Fourth Amendment purposes, other limits on the scope of the Fourth Amendment, and the exceptions to the warrant requirement.

1. *The Exclusionary Rule*

Justice Blackmun was not yet on the Court when it held in *Mapp v. Ohio*⁴⁰ that the states are obligated to apply the exclusionary rule,⁴¹ and he indicated early in his tenure on the Court that he did not believe the exclusionary rule was constitutionally required. "[T]he

defense witness, but concluding that there was insufficient evidence of prejudice given "the backdrop of . . . apparently overwhelming evidence of guilt").

38. See, e.g., Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748 (1987); Kamisar, *supra* note 5; Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1 (1995).

39. See *supra* notes 1-3 and accompanying text.

40. 367 U.S. 643 (1961).

41. See *id.* at 655.

Fourth Amendment supports no exclusionary rule,"⁴² he wrote in dissent in *Coolidge v. New Hampshire*. Although he exhibited some hesitancy in agreeing to create a good-faith exception to the exclusionary rule,⁴³ his concurring opinion in *Leon* made clear that he "share[d] the [majority's] view that the exclusionary rule is not a constitutionally compelled corollary of the Fourth Amendment itself."⁴⁴ And he joined the majority in refusing to apply the exclusionary rule in a grand jury proceeding,⁴⁵ a taxpayer's federal civil suit seeking a refund of money that had been illegally seized by the state police,⁴⁶ and a civil deportation hearing.⁴⁷ In fact, he wrote for the Court in the taxpayer case, *United States v. Janis*, referring to the exclusionary rule as a "comparatively late judicial creation"⁴⁸ and concluding that "[t]here comes a point at which courts . . . cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches."⁴⁹

Although the Justice may not have believed that the exclusionary rule was constitutionally required, he nevertheless viewed it as a critical tool for deterring unconstitutional police practices. His majority opinion in *Brown v. Illinois*⁵⁰ warned that "the effect of the exclusionary rule would be substantially diluted" and "the constitutional guarantee against unlawful searches and seizures [would] be reduced to 'a form of words'" if *Miranda* warnings were deemed sufficient to purge the taint of an invalid arrest.⁵¹ Likewise, he wrote the majority opinion in *Franks v. Delaware*⁵²—over the dissenting voices of Chief Justice Burger and Justice Rehnquist—holding that defendants may challenge the veracity of statements made in search warrant applications and that warrants must be invalidated if they are based on false statements that were made knowingly or with a reckless disregard for the truth.⁵³ The Justice's opinion in that case explained:

Despite the deep skepticism of Members of this Court as to the wisdom of extending the exclusionary rule to collateral areas,

42. 403 U.S. 443, 510 (1971) (Blackmun, J., dissenting) (joining Justice Black's dissenting opinion).

43. See *supra* text accompanying notes 21-22.

44. *United States v. Leon*, 468 U.S. 897, 927 (1984) (Blackmun, J., concurring).

45. See *United States v. Calandra*, 414 U.S. 338, 354-55 (1974).

46. See *United States v. Janis*, 428 U.S. 433, 459-60 (1976).

47. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1051 (1984).

48. *Janis*, 428 U.S. at 443.

49. *Id.* at 459.

50. 422 U.S. 590 (1975).

51. *Id.* at 602-03 (quoting *Mapp v. Ohio*, 367 U.S. 643, 648 (1961)).

52. 438 U.S. 154 (1978).

53. See *id.* at 155-56.

such as civil or grand jury proceedings, the Court has not questioned, in the absence of a more efficacious sanction, the continued application of the rule to suppress evidence from the State's case where a Fourth Amendment violation has been substantial and deliberate.⁵⁴

In certain circumstances, therefore, the Justice was actively committed to preserving the exclusionary rule.

2. *The Definition of a "Search"*

In *Katz v. United States*,⁵⁵ the Warren Court defined a "search" for Fourth Amendment purposes as encompassing any police activity that intruded on the defendant's "reasonable expectation of privacy."⁵⁶ One of the ways in which the Burger and Rehnquist Courts have constricted Fourth Amendment rights is by taking "a narrow, stingy view of what amounts to a 'search.'"⁵⁷ Although Justice Blackmun subscribed to this narrow view in some cases, in others he advocated a broader definition of Fourth Amendment "searches."

On the one hand, Justice Blackmun wrote the majority opinion in *Smith v. Maryland*,⁵⁸ holding that the use of a pen register to record the telephone numbers dialed from the defendant's home telephone did not violate his reasonable expectation of privacy and therefore did not constitute a "search" governed by the Fourth Amendment.⁵⁹ The Justice's opinion for the Court reasoned that a pen register only has "limited capabilities"⁶⁰ because it cannot reveal the contents of a conversation, and that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."⁶¹ Nine years later, the Justice joined the majority opinion in *California v. Greenwood*,⁶² which reiterated these arguments in support of its holding that the defendant lacked a reasonable expectation of privacy in garbage he had placed in plastic bags on the curb.⁶³

Nevertheless, the Justice refused to accept similar arguments in several cases where prosecutors argued that aerial surveillance did not

54. *Id.* at 171; *see also id.* at 169 (noting that "alternative sanctions" for impermissible searches—such as civil suits, internal police disciplinary procedures, and perjury prosecutions—are "not likely to fill the gap").

55. 389 U.S. 347 (1967).

56. *Id.* at 360 (Harlan, J., concurring).

57. Kamisar, *supra* note 38, at 35.

58. 442 U.S. 735 (1979).

59. *See id.* at 745-46.

60. *Id.* at 742.

61. *Id.* at 743-44.

62. 486 U.S. 35 (1988).

63. *See id.* at 41.

constitute a "search" within the meaning of the Fourth Amendment. In both *California v. Ciraolo*⁶⁴ and *Dow Chemical Co. v. United States*,⁶⁵ the Justice thought that the police surveillance qualified as a search and therefore joined the dissenters.⁶⁶ He likewise wrote a dissenting opinion in *Florida v. Riley*,⁶⁷ indicating that he would require the prosecution to shoulder the burden of proving that the defendant lacked a reasonable expectation of privacy, given his suspicion that "for most American communities it is a rare event when nonpolice helicopters fly over one's curtilage at an altitude of 400 feet."⁶⁸

3. *Other Limits on the Scope of the Fourth Amendment*

In other areas, Justice Blackmun was willing to impose limitations on the reach of the Fourth Amendment. He joined the majority opinion in *Stone v. Powell*,⁶⁹ which precludes prisoners from raising Fourth Amendment claims on habeas so long as they had a full and fair opportunity to litigate their claims in the state courts.⁷⁰ The Justice was likewise willing to impose standing requirements on defendants who wish to raise Fourth Amendment claims,⁷¹ at times perhaps even stricter standards than the majority would support.⁷² He also joined the majority in *Illinois v. Gates*,⁷³ which replaced the Warren Court's

64. 476 U.S. 207 (1986).

65. 476 U.S. 227 (1986).

66. See *Ciraolo*, 476 U.S. at 215 (Powell, J., dissenting) (disagreeing with the Court's holding that police did not conduct a search of defendant's fenced-in backyard when they secured a private plane, flew over the yard at an altitude of 1,000 feet, and discovered marijuana plants); *Dow Chemical Co.*, 476 U.S. at 240 (Powell, J., dissenting) (dissenting from the Court's holding that EPA officials did not conduct a search when they flew over large industrial complex and took photographs using a \$22,000 precision aerial mapping camera).

67. 488 U.S. 445, 467 (1989) (Blackmun, J., dissenting).

68. *Id.* at 467 (Blackmun, J., dissenting) (dissenting from plurality's conclusion that police did not conduct a search when they flew a helicopter over defendant's backyard at an altitude of 400 feet and observed marijuana plants through openings in the roof of his greenhouse).

69. 428 U.S. 465 (1976).

70. See *id.* at 481-82.

71. The Justice joined the majority in both *Rakas v. Illinois*, 439 U.S. 128, 148 (1978) (holding that defendants were not entitled to move to suppress evidence found in a car in which they had been passengers because they had no legitimate expectation of privacy in the car), and *Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980) (holding that defendant was not entitled to challenge the search of his companion's purse, into which he had put his drugs, because he had no legitimate expectation of privacy in the purse).

72. See *Minnesota v. Olson*, 495 U.S. 91, 101 (1990) (dissenting without opinion in case holding that defendant had standing to contest the entry into a home in which he was staying as an overnight guest and that exigent circumstances did not justify the warrantless entry).

73. 462 U.S. 213 (1983).

two-pronged test for ascertaining whether a tip satisfied the Fourth Amendment's probable cause requirement⁷⁴ with a looser totality-of-the-circumstances approach that instructs magistrates to make "a practical, common-sense decision whether, given all the circumstances . . . , there is a fair probability that contraband or evidence of a crime will be found in a particular place."⁷⁵ And despite the reservations about creating a good-faith exception to the exclusionary rule that he expressed in *United States v. Leon*,⁷⁶ he authored the majority opinion in *Illinois v. Krull*,⁷⁷ extending *Leon*'s good-faith exception to apply where the police reasonably relied on a state statute authorizing a warrantless search that was later determined to be unconstitutional.⁷⁸

Notwithstanding these instances where Justice Blackmun willingly imposed limits on the reach of the Fourth Amendment, he dissented when the Court held in *United States v. Verdugo-Urquidez*⁷⁹ that the Fourth Amendment did not apply to federal agents' search of property that was owned by a nonresident alien and located in a foreign country.⁸⁰ Although he agreed that the Fourth Amendment's warrant requirement did not govern searches conducted outside this country, he thought that the Amendment's reasonableness clause—typically necessitating a finding of probable cause—did apply in cases where "a foreign national is held accountable for purported violations of United States criminal laws" and "was lawfully (though involuntarily) within this country at the time the search occurred."⁸¹

4. *Exceptions to the Warrant Requirement*

Justice Blackmun's record in cases creating and construing the exceptions to the Fourth Amendment's warrant requirement is likewise difficult to categorize. Although, as detailed below, he supported the creation of a number of exceptions to the warrant requirement, he

74. See *Spinelli v. United States*, 393 U.S. 410, 412-13 (1969) (requiring proof that the informant was both credible and had a reliable basis for the information provided to the police); see also *Aguilar v. Texas*, 378 U.S. 108, 114 (1964).

75. *Gates*, 462 U.S. at 238.

76. 468 U.S. 897, 927 (1984) (Blackmun, J., concurring); see *supra* text accompanying notes 21-22.

77. 480 U.S. 340 (1987).

78. See *id.* at 349-50. Here again, however, as in *Leon*, the Justice expressed a willingness to "revise[]" his opinion "[i]f future empirical evidence ever should undermine [the] assumption" on which it was based. *Id.* at 352 n.8.

79. 494 U.S. 259 (1990).

80. See *id.* at 274-75.

81. *Id.* at 297 (Blackmun, J., dissenting).

became uncomfortable with the Court's tendency to evaluate the constitutionality of a warrantless search simply by using a balancing test to examine its reasonableness. Even though he had initially endorsed the balancing test,⁸² he expressed concern in his separate opinion in *United States v. Place*⁸³ with the "emerging tendency on the part of the Court to convert the *Terry* decision into a general statement that the Fourth Amendment requires only that any seizure be reasonable."⁸⁴ "While the Fourth Amendment speaks in terms of freedom from unreasonable seizures," the Justice continued, "the Amendment does not leave the reasonableness of most seizures to the judgment of courts or government officers."⁸⁵ Rather, the Justice noted, "the Framers of the Amendment balanced the interests involved and decided that a seizure is reasonable only if supported by a judicial warrant based on probable cause."⁸⁶ Only in those limited situations where there is "a special law enforcement need for greater flexibility,"⁸⁷ the Justice warned, "is a court entitled to engage in any balancing of interests in determining the validity of a seizure."⁸⁸ The Justice would reiterate this warning on other occasions as well.⁸⁹

Turning to some specific exceptions to the warrant requirement, the Justice was not a member of the Court when *Terry v. Ohio*⁹⁰ first authorized a warrantless stop and frisk based on reasonable suspicion,⁹¹ but he joined the majority in a number of cases extending the authority of the police to conduct an investigatory stop and frisk.⁹²

82. As discussed *supra* in text accompanying notes 45-49, the Justice joined the majority opinion in *United States v. Calandra*, 414 U.S. 338, 349 (1974), which balanced the "potential injury" caused by the exclusionary rule against its "potential benefits" in deciding whether to extend the exclusionary rule to allow a grand jury witness to refuse to answer questions based on an illegal search. The Justice then applied *Calandra's* balancing test in his majority opinion in *United States v. Janis*, 428 U.S. 433, 454 (1976), concluding that "exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the social costs imposed by the exclusion."

83. 462 U.S. 696, 720 (1983) (Blackmun, J., concurring in the judgment).

84. *Id.* at 721 (Blackmun, J., concurring in the judgment).

85. *Id.* at 722 (Blackmun, J., concurring in the judgment).

86. *Id.* (Blackmun, J., concurring in the judgment).

87. *Id.* (Blackmun, J., concurring in the judgment) (quoting *Florida v. Royer*, 460 U.S. 491, 514 (1983) (Blackmun, J., dissenting)).

88. *Id.* (Blackmun, J., concurring in the judgment).

89. *See, e.g.*, *O'Connor v. Ortega*, 480 U.S. 709, 741-42 (1987) (Blackmun, J., dissenting); *New Jersey v. T.L.O.*, 469 U.S. 325, 351-52 (1985) (Blackmun, J., concurring in the judgment).

90. 392 U.S. 1 (1968).

91. *See id.* at 27.

92. *See, e.g.*, *California v. Hodari D.*, 499 U.S. 621, 626-27 (1991) (holding that fleeing suspect had not been seized by police officer who was chasing him because the officer had

Likewise, he dissented when the Court decided in *Florida v. Royer*⁹³ that stopping a suspected drug courier in the airport and asking him to accompany two detectives to a private police room approximately forty feet away exceeded the scope of a permissible *Terry* stop.⁹⁴ Given “the extraordinary and well-documented difficulty of identifying drug couriers,” the Justice concluded that “the minimal intrusion in this case . . . was eminently reasonable.”⁹⁵ Eight years later, however, he refused to join the majority’s holding in *Florida v. Bostick*⁹⁶ that a bus sweep—where two police officers boarded a bus at a scheduled stop and asked passengers for permission to search their luggage—was not a “seizure” within the meaning of the Fourth Amendment.⁹⁷ Instead, he joined Justice Marshall’s dissenting opinion, which criticized this “latest tactic in the drug war”⁹⁸ as “inconvenient, intrusive, and intimidating” and prohibited by the Fourth Amendment.⁹⁹

The one majority opinion the Justice wrote in a *Terry* case steered a middle course. The issue in that case—*Michigan v. Chesternut*¹⁰⁰—was whether a suspect who fled at the sight of a police car, which then accelerated and drove alongside him for a brief period, had been stopped within the meaning of the *Terry* line of cases.¹⁰¹ The Justice

not used any physical force on the suspect and the suspect had not submitted to the officer’s assertion of authority); *Alabama v. White*, 496 U.S. 325, 330 (1990) (upholding *Terry* stop based on anonymous tip, and noting that the reasonable suspicion necessary to stop a suspect can be established with evidence that is not only lesser in quantity, but also less reliable, than that needed to satisfy the probable cause standard); *United States v. Sokolow*, 490 U.S. 1, 9 (1989) (upholding stop of suspect who matched the drug-courier profile); *United States v. Sharpe*, 470 U.S. 675, 688 (1985) (Blackmun, J., concurring) (joining majority opinion upholding 20-minute detention as permissible *Terry* stop, and also noting that he would have dismissed the appeal without reaching the merits because the defendants had become fugitives); *United States v. Hensley*, 469 U.S. 221, 229 (1985) (extending *Terry* to permit stops of those suspected of committing prior felonies); *Michigan v. Long*, 463 U.S. 1032, 1054 (1983) (Blackmun, J., concurring in part and concurring in the judgment) (joining portion of majority opinion that extended *Terry* frisk to a search of a car, but disagreeing with the Court’s creation of a presumption that state court rulings are not based on independent and adequate state grounds); *Adams v. Williams*, 407 U.S. 143, 147 (1972) (permitting *Terry* stop based on tip provided by known informant).

93. 460 U.S. 491 (1983).

94. *See id.* at 502.

95. *Id.* at 519 (Blackmun, J., dissenting).

96. 501 U.S. 429 (1991).

97. *See id.* at 439-40.

98. *Id.* at 444 (Marshall, J., dissenting).

99. *Id.* at 442 (Marshall, J., dissenting) (quoting *United States v. Chandler*, 744 F. Supp. 333, 335 (D.D.C. 1990)).

100. 486 U.S. 567 (1988).

101. *See id.* at 572.

rejected both the state's contention that "the Fourth Amendment is never implicated until an individual stops in response to the police's show of authority" and the defendant's position that "any and all police 'chases' are Fourth Amendment seizures," noting that the parties' attempts to "fashion a bright-line rule applicable to all investigatory pursuits" contravened the Court's "traditional contextual approach" of taking into account "all of the circumstances surrounding the incident" in each individual case.¹⁰² Noting that there was no indication that the police had used their sirens, flashers, or weapons or had tried to block the suspect's path, the Justice concluded that the suspect had not been seized within the meaning of the Fourth Amendment: "the police conduct involved here would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon respondent's freedom of movement," he wrote.¹⁰³

The Justice's record in the area of administrative searches is also difficult to categorize. In *Wyman v. James*,¹⁰⁴ the Justice's first majority opinion as a member of the Court, he concluded that a caseworker's home visit to a welfare recipient's home did not violate the Fourth Amendment.¹⁰⁵ The Justice's opinion questioned whether the home visit even qualified as a "search" for Fourth Amendment purposes, noting that the plaintiff was not "forced or compelled" to consent to the caseworker's visit (although denial of permission would have led to termination of her welfare benefits).¹⁰⁶ Even if the visit constituted a search, the Justice continued, it was a valid administrative search.¹⁰⁷ Describing the caseworker as "not a sleuth but rather . . . a friend to one in need" whose "primary objective is, or should be, the welfare, not the prosecution, of the aid recipient,"¹⁰⁸ the Justice thought that the state had a legitimate interest "in seeing and assuring that the intended and proper objects of . . . tax-produced assistance are the ones who benefit from the aid it dispenses."¹⁰⁹

Some of the same themes can be found in the Justice's majority opinion sixteen years later in *New York v. Burger*,¹¹⁰ which upheld a New York statute that authorized warrantless inspections of automo-

102. *Id.* at 572 (quoting *INS v. Delgado*, 466 U.S. 210, 215 (1984) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion))).

103. *Id.* at 575.

104. 400 U.S. 309 (1971).

105. *See id.* at 318.

106. *Id.* at 317-18.

107. *See id.* at 326.

108. *Id.* at 322-23.

109. *Id.* at 319.

110. 482 U.S. 691 (1987).

mobile junkyards.¹¹¹ Noting that junkyards were closely regulated businesses in New York, thus diminishing the owner's expectation of privacy, the Justice concluded that the state had a substantial interest in regulating that industry because "automobile theft has become a significant social problem."¹¹² He explained that frequent, surprise inspections were necessary because "stolen cars and parts often pass quickly through an automobile junkyard," so that "a warrant requirement would interfere with the statute's purpose of deterring automobile theft."¹¹³ Moreover, he refused to attach "any constitutional significance" to the fact that police officers conducted the inspections, reasoning that "[a]s a practical matter, many States do not have the resources to assign the enforcement of a particular administrative scheme to a specialized agency."¹¹⁴

111. *See id.* at 712.

112. *Id.* at 708.

113. *Id.* at 710.

114. *Id.* at 717. For other cases where the Justice approved of administrative searches, see *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989) (joining majority opinion allowing warrantless, suspicionless drug testing of Customs Service employees seeking a transfer or promotion to certain positions); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 633 (1989) (joining majority opinion upholding warrantless, suspicionless drug testing of federal railroad employees who had been involved in certain accidents or had violated certain safety rules); *United States v. Montoya de Hernandez*, 473 U.S. 531, 544 (1985) (joining majority opinion permitting customs officials to detain traveler based on reasonable suspicion that she was smuggling drugs in her alimentary canal); *Donovan v. Dewey*, 452 U.S. 594, 606 (1981) (joining majority opinion upholding federal mine safety statute's authorization of warrantless inspections of mines for health and safety violations); *Delaware v. Prouse*, 440 U.S. 648, 664 (1979) (Blackmun, J., concurring) (joining majority opinion striking down random suspicionless stops of vehicles to check license and registration with the understanding that the Court was not invalidating "other . . . purely random stops (such as every 10th car to pass a given point)"); *United States v. Martinez-Fuerte*, 428 U.S. 543, 566-67 (1976) (joining majority opinion allowing Border Patrol to briefly question occupants of vehicles passing through permanent fixed checkpoints away from the border, and to refer some of them, without reasonable suspicion, to a secondary inspection area for further limited inquiries); *United States v. Ortiz*, 422 U.S. 891, 915 (1975) (White, J., concurring in the judgment) (joining opinion concurring only in the result in case requiring that Border Patrol have probable cause before conducting warrantless searches of cars at fixed highway checkpoints; objecting that the Court had "dismantled major parts of the apparatus by which the Nation has attempted to intercept millions of aliens who enter and remain illegally in this country"); *Almeida-Sanchez v. United States*, 413 U.S. 266, 285 (1973) (White, J., dissenting) (refusing to join majority opinion holding that roving Border Patrol agents could conduct warrantless search of a car 25 miles from the border only if they had probable cause); *United States v. Biswell*, 406 U.S. 311, 317 (1972) (Blackmun, J., concurring in the result) (concurring in the result where majority upheld federal statute authorizing warrantless inspections of business premises of firearms dealers, and noting that he would have dissented in prior case, *Colonade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970), which invalidated warrantless forcible inspection of licensed liquor dealer).

But the Justice was not always so accepting of administrative searches. When the Court held in *New Jersey v. T.L.O.*¹¹⁵ that school officials could make a warrantless inspection of a high school student's purse based only on reasonable suspicion that she had violated school rules by smoking,¹¹⁶ the Justice concurred in the result. Although he agreed with much of the Court's opinion, he wrote separately because he thought the majority had missed "a crucial step" by failing to acknowledge that it was appropriate to use a balancing test to determine the constitutionality of a search, rather than "strictly applying the Fourth Amendment's Warrant and Probable Cause Clause, only when we [are] confronted with 'a special law enforcement need for greater flexibility.'"¹¹⁷ The Justice ultimately found such a need in that case, concluding that "[t]he special need for an immediate response to behavior that threatens either the safety of school children and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirement."¹¹⁸

In *Griffin v. Wisconsin*,¹¹⁹ by contrast, the Justice could not discern any special need that would support the warrantless administrative search of a probationer's home. Although he acknowledged that "a probation agent must have latitude in observing a probationer if the agent is to carry out his supervisory responsibilities effectively,"¹²⁰ and therefore would have permitted a search based only on reasonable suspicion, he did not find any "special law enforcement needs justify[ing] a modification of the protection afforded a probationer's privacy by the warrant requirement."¹²¹ Likewise, he dissented in *O'Connor v. Ortega*,¹²² finding no "special need" . . . to justify dispensing with the warrant and probable-cause requirements" because the hospital officials who searched the desk and file cabinets of a doctor under investigation for various improprieties could have sought a search warrant "[w]ithout sacrificing their ultimate goal of maintaining an effective institution devoted to training and healing."¹²³

In many areas, then, the Justice's Fourth Amendment jurisprudence cannot be easily characterized as either liberal or conservative.

115. 469 U.S. 325 (1985).

116. *See id.* at 340-42.

117. *Id.* at 351 (Blackmun, J., concurring in the judgment) (quoting *Florida v. Royer*, 460 U.S. 491, 514 (1983) (Blackmun, J., dissenting)).

118. *Id.* at 353 (Blackmun, J., concurring in the judgment).

119. 483 U.S. 868 (1987).

120. *Id.* at 882 (Blackmun, J., dissenting).

121. *Id.* at 883 (Blackmun, J., dissenting).

122. 480 U.S. 709, 732 (1987) (Blackmun, J., dissenting).

123. *Id.* at 742 (Blackmun, J., dissenting).

When it came to car searches, however, the Justice was willing to give the police a good deal of leeway. In his first full Term on the Court, he joined the dissenters in *Coolidge v. New Hampshire*,¹²⁴ disagreeing with the majority's holding that the police violated the Fourth Amendment when they seized the defendant's automobile from the driveway of his home, towed it to the police station, and searched it two days later without ever obtaining a search warrant.¹²⁵ Three years later, he wrote the plurality opinion in *Cardwell v. Lewis*,¹²⁶ upholding the warrantless seizure of a car from a public parking lot and the subsequent warrantless search of its exterior.¹²⁷ "The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building," the Justice wrote in *Cardwell*.¹²⁸ Thus, it was no surprise when he agreed with the majority's decision a decade later in *California v. Carney*,¹²⁹ which approved the warrantless search of a motor home parked in a public parking lot.¹³⁰

Justice Blackmun likewise sided with the government in a series of cases in which the Court vacillated concerning the constitutionality of warrantless searches of the containers found during automobile searches. He dissented from the Court's holding in *United States v. Chadwick*¹³¹ that the police violated the Fourth Amendment when they searched a locked footlocker that had been seized from the open trunk of a car parked outside a train terminal.¹³² Two years later, he dissented again in *Arkansas v. Sanders*¹³³ when the Court invalidated the search of an unlocked suitcase found in the trunk of a taxicab.¹³⁴ His dissenting opinion in *Sanders* took the position that "a warrant should not be required to seize and search any personal property found in an automobile that may in turn be seized and searched without a warrant" under the car search exception.¹³⁵

124. 403 U.S. 443, 510 (1971) (Blackmun, J., dissenting) (joining Black, J., dissenting).

125. *See id.* at 472-73 (majority opinion).

126. 417 U.S. 583 (1974) (plurality opinion).

127. *See id.* at 585.

128. *Id.* at 590 (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 279 (1973) (Powell, J., concurring)).

129. 471 U.S. 386 (1985).

130. *See id.* at 392-95; *see also* *New York v. Belton*, 453 U.S. 454 (1981) (joining majority opinion allowing search incident to arrest of the occupant of a vehicle to extend to the entire passenger compartment of the car).

131. 433 U.S. 1, 17 (1977) (Blackmun, J., dissenting).

132. *See id.* at 11-13 (majority opinion).

133. 442 U.S. 753, 768 (1979) (Blackmun, J., dissenting).

134. *See id.* at 766 (majority opinion).

135. *Id.* at 772 (Blackmun, J., dissenting).

Justice Blackmun steadfastly adhered to that position during the following twelve years, as the Court struggled with the issue.¹³⁶ He ultimately convinced the rest of the Court and wrote the majority opinion in *California v. Acevedo*,¹³⁷ putting the rulings in *Chadwick* and *Sanders* to rest. Noting that “[u]ntil today, this Court has drawn a curious line between the search of an automobile that coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile,”¹³⁸ Justice Blackmun’s opinion in *Acevedo* opted for “one clear-cut rule to govern automobile searches”:¹³⁹ that “[t]he police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.”¹⁴⁰ Interestingly, the Justice’s opinion held out some hope for criminal defendants when it noted that a search of Acevedo’s entire vehicle would have been impermissible on the facts there—where the police watched Acevedo leave the home of a suspected drug dealer carrying a paper bag the approximate size of packages they knew contained marijuana, place the bag in the trunk of his car, and drive away.¹⁴¹ Although the police had probable cause to believe the paper bag contained marijuana, the Justice wrote, they “did not have probable cause to believe that contraband was hidden in any other part of the automobile and a search of the entire vehicle would have been without probable cause and unreasonable under the Fourth Amendment.”¹⁴²

Even here, however, there was one type of warrantless car search—the inventory search of an impounded vehicle—that the Justice was less willing to accept than some of his colleagues. He did join the Court’s opinion in *South Dakota v. Opperman*,¹⁴³ which initially approved of warrantless inventory searches of impounded vehicles, so

136. See *Robbins v. California*, 453 U.S. 420, 436-37 (1981) (Blackmun, J., dissenting) (disagreeing with judgment that police violated the Fourth Amendment by opening two packages wrapped in green opaque plastic that were found in the luggage compartment of a station wagon); *United States v. Ross*, 456 U.S. 798, 825 (1982) (Blackmun, J., concurring) (indicating adherence to his previous dissents, but joining majority opinion overruling *Robbins* and upholding search of paper bag and leather pouch found in trunk of defendant’s car in the interest of obtaining an “authoritative ruling” that would end “the Court’s vacillation in . . . ‘this troubled area’”).

137. 500 U.S. 565 (1991).

138. *Id.* at 580.

139. *Id.* at 579.

140. *Id.* at 580.

141. See *id.*

142. *Id.*

143. 428 U.S. 364 (1976).

long as they were conducted pursuant to standard police practices.¹⁴⁴ When the Court approved of the warrantless inspection of a backpack found during an inventory search in *Colorado v. Bertine*¹⁴⁵ however, the Justice wrote separately in order to “underscore the importance of having such inventories conducted only pursuant to standardized police procedures,” so as to ensure “that inventory searches will not be used as a purposeful and general means of discovering evidence of a crime.”¹⁴⁶ Moreover, three years later, he concurred only in the judgment in *Florida v. Wells*;¹⁴⁷ he thought the majority’s suggestion that a police officer “may be afforded discretion in conducting an inventory search . . . creates the potential for abuse of Fourth Amendment rights our earlier inventory-search cases were designed to guard against.”¹⁴⁸

Though he was relatively accepting of warrantless car searches in most contexts, the Justice was more suspicious of warrantless entries into the home. When the Court held in *Payton v. New York*¹⁴⁹ that the police may not arrest a suspect at home without a warrant (absent consent or exigent circumstances),¹⁵⁰ the Justice wrote a concurring opinion, emphasizing “[t]he suspect’s interest in the sanctity of his home.”¹⁵¹ He dissented from the Court’s holding in *Maryland v. Garrison*¹⁵² that the police did not violate the Fourth Amendment when they mistakenly searched an apartment based on a warrant authorizing the search of another apartment located on the same floor.¹⁵³ Noting that “[t]he home always has received special protection in analysis under the Fourth Amendment,” the Justice’s dissent concluded that the warrant authorized the search of only one apartment and that it was unreasonable for the officers—who should have realized that there were seven units in the three-story building—not to have suspected that the third floor might contain more than one apartment.¹⁵⁴

144. *See id.* at 375-76.

145. 479 U.S. 367 (1987).

146. *Id.* at 376 (Blackmun, J., concurring).

147. 495 U.S. 1, 10 (1990) (Blackmun, J., concurring in the judgment).

148. *Id.* at 11 (Blackmun, J., concurring in the judgment).

149. 445 U.S. 573 (1980).

150. *See id.* at 576.

151. *Id.* at 603 (Blackmun, J., concurring).

152. 480 U.S. 79 (1987).

153. *See id.* at 88-89.

154. *Id.* at 90 (Blackmun, J., dissenting). *See also* *Segura v. United States*, 468 U.S. 796, 817 (1984) (Stevens, J., dissenting) (joining dissenting opinion concluding that police officers’ 19-hour stay in defendants’ apartment while awaiting issuance of a search warrant was an unconstitutional search and seizure of the apartment that could not be justified by exigent circumstances); *Welsh v. Wisconsin*, 466 U.S. 740, 755-56 (1984) (Blackmun, J.,

Thus, Justice Blackmun's philosophy in search and seizure cases does not easily fit into conservative/liberal labels. In certain cases, he was reluctant to give the Fourth Amendment a broad reading. He was, for example, unwilling to interpret the Amendment to require an exclusionary remedy, and he gave the police relatively free rein in conducting automobile searches. But in other areas, he strayed from the "law and order" platform on which he was nominated,¹⁵⁵ resisting, for example, the Court's tendency to ignore the warrant and probable cause requirements and instead resolve all Fourth Amendment cases by applying a balancing test.

B. The Confession Cases

Justice Blackmun was not yet a member of the Court in the mid-1960s when it held in *Massiah v. United States*¹⁵⁶ that the Sixth Amendment prohibits the police from interrogating a suspect outside the presence of counsel after the suspect has already been indicted,¹⁵⁷ or when it interpreted the Fifth Amendment to require the police to give the now famous *Miranda* warnings before interrogating a suspect in police custody.¹⁵⁸ But he did serve on the Court during the following two decades, as the Burger and Rehnquist Courts narrowed these Warren Court precedents. In analyzing Justice Blackmun's role in the Court's retreat in this area, I first consider the Court's *Miranda* cases and then its Sixth Amendment and due process cases.

1. The *Miranda* Cases

Justice Blackmun joined willingly in the Court's deconstitutionalization of *Miranda*. He signed on to Justice Rehnquist's majority opinion in *Michigan v. Tucker*,¹⁵⁹ which referred to the *Miranda* rights as "prophylactic standards"¹⁶⁰—"procedural safeguards [that] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimina-

concurring) (joining majority opinion finding that exigent circumstances did not justify warrantless entry into suspect's home to arrest him for driving while intoxicated, though noting his amazement that the State treated the crime as only a civil, nonjailable traffic offense); *Steagald v. United States*, 451 U.S. 204, 216 (1981) (joining majority opinion requiring search warrant to enter a third party's home in order to arrest a suspect).

155. See *supra* notes 1-3 and accompanying text.

156. 377 U.S. 201 (1964).

157. See *id.* at 205-06.

158. See *Miranda v. Arizona*, 384 U.S. 436, 478-81 (1966).

159. 417 U.S. 433 (1974).

160. *Id.* at 446.

tion was protected.”¹⁶¹ When the Court picked up on *Tucker*’s characterization of *Miranda* a decade later—both in creating an exception to *Miranda* for questions “reasonably prompted by a concern for the public safety” in *New York v. Quarles*,¹⁶² and then again in *Oregon v. Elstad*,¹⁶³ when it refused to apply the fruits of the poisonous tree doctrine to exclude a second confession that followed an earlier confession given without the benefit of *Miranda* warnings¹⁶⁴—the Justice agreed with the majority on both occasions.

Likewise, the Justice joined a group of opinions that refused to impose strict limitations on police officers seeking waivers of *Miranda* rights.¹⁶⁵ He wrote in only one of them—*North Carolina v. Butler*—to make clear his assumption that the standard applied in determining the validity of a waiver of “‘fundamental constitutional rights’” had no relevance in assessing the validity of a waiver “under *Miranda*’s prophylactic rule.”¹⁶⁶ He also joined the majority in a series of cases narrowly interpreting *Miranda*’s requirement that a suspect be in custody in order to trigger the right to warnings.¹⁶⁷

161. *Id.* at 444.

162. 467 U.S. 649, 656 (1984); *see also id.* at 654 (quoting *Tucker*, 417 U.S. at 444).

163. 470 U.S. 298 (1985).

164. *See id.* at 306-07 (citing *Tucker* and referring to *Miranda* as “sweep[ing] more broadly than the Fifth Amendment itself”).

165. *See Colorado v. Spring*, 479 U.S. 564, 577 (1987) (upholding validity of *Miranda* waiver despite the fact that suspect was not aware of all the crimes about which he was going to be questioned); *Connecticut v. Barrett*, 479 U.S. 523, 529-30 (1987) (upholding a qualified waiver of *Miranda*, where suspect indicated a willingness to speak to police but said he would not give a written statement unless his attorney was present); *Moran v. Burbine*, 475 U.S. 412, 422 (1986) (holding that the validity of defendant’s waiver of *Miranda* was not affected by the failure of the police to inform him that an attorney had been trying to call him because “[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right”); *North Carolina v. Butler*, 441 U.S. 369, 373-74 (1979) (refusing to require explicit waivers of *Miranda* and allowing for the possibility of implied waivers).

166. *Butler*, 441 U.S. at 377 (Blackmun, J., concurring) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

167. *See Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984) (ruling that suspect was not in custody during traffic stop); *Minnesota v. Murphy*, 465 U.S. 420, 430-34 (1984) (holding that defendant was not in custody when he made incriminating statement in his probation officer’s office during meeting he was required to attend under the terms of his probation); *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) (finding that defendant was not in custody during interview at police station because he came to the station voluntarily and was allowed to leave at the end of the meeting); *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam) (holding that conversation at police station was not custodial because the defendant came voluntarily, was told he was not under arrest, and left the station at the end of the interview); *Beckwith v. United States*, 425 U.S. 341, 347 (1976) (holding that defendant was not entitled to *Miranda* warnings during interview by IRS agents in a private home, even though he was the focus of their investigation of criminal tax fraud).

Although it took the Court fourteen years after *Miranda* to address the second prerequisite for the right to warnings—that the suspect be undergoing interrogation—once it did define “interrogation” in *Rhode Island v. Innis*,¹⁶⁸ the definition itself proved fairly noncontroversial.¹⁶⁹ More controversial was the majority’s holding that the police did not interrogate Innis by mentioning that a school for disabled children was located in the vicinity and then remarking, “‘God forbid one of them might find [the murder weapon] and they might hurt themselves.’”¹⁷⁰ There was no evidence that the police “should have known that their conversation was reasonably likely to elicit an incriminating response” from Innis, the majority concluded.¹⁷¹

Although Justice Blackmun agreed with the majority in *Innis*, he joined Justice Stevens’ dissenting opinion seven years later in *Arizona v. Mauro*,¹⁷² disagreeing with the Court’s ruling that a suspect who told the police that he did not want to make any further statements without an attorney was not subject to interrogation when the police allowed his wife to meet with him in the presence of a police officer and a tape recorder.¹⁷³ The majority noted that “[o]fficers do not interrogate a suspect simply by hoping that he will incriminate himself” and concluded that the police actions in *Mauro* were “far less questionable than the ‘subtle compulsion’ that we held *not* to be interrogation in *Innis*.”¹⁷⁴ In contrast, the dissenters, including Justice Blackmun, would have found that the “powerful psychological ploy” engaged in by the police—“[taking] advantage of Mrs. Mauro’s request to visit her husband [and] setting up a confrontation between them at a time when he manifestly desired to remain silent”—constituted an interrogation violative of *Miranda*.¹⁷⁵

But three years later, the Justice was once again a member of the majority when the Court held in *Illinois v. Perkins*¹⁷⁶ that a prisoner was not entitled to *Miranda* warnings when he was questioned by an

168. 446 U.S. 291 (1980).

169. The Court defined “interrogation” for *Miranda* purposes as either “express questioning or its functional equivalent”—i.e., “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Id.* at 300-01. Only Justice Stevens disagreed with this definition. *See id.* at 309 (Stevens, J., dissenting).

170. *Id.* at 294-95 (majority opinion).

171. *Id.* at 302.

172. 481 U.S. 520, 530 (1987) (Stevens, J., dissenting).

173. *See id.* at 527-29 (majority opinion).

174. *Id.* at 529 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 303 (1980)).

175. *Id.* at 531 (Stevens, J., dissenting).

176. 496 U.S. 292 (1990).

undercover police officer posing as another inmate.¹⁷⁷ “Conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*,” the Court concluded, because “[t]he essential ingredients of a ‘police-dominated atmosphere’ and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate.”¹⁷⁸

The precision of the language the police must use in giving a suspect *Miranda* warnings is another issue on which the Justice’s position seemingly changed during his years on the Court. He joined the Court’s per curiam opinion in *California v. Prysock*,¹⁷⁹ which held that a suspect was adequately informed of his *Miranda* right to counsel when the police told him that he had the right to have an attorney present during interrogation, and then “after a brief interlude,”¹⁸⁰ added that he had “‘the right to have a lawyer appointed to represent you at no cost to yourself.’”¹⁸¹ Although the three dissenters—Justices Brennan, Marshall, and Stevens—argued that the suspect was “‘not given the crucial information that the services of the free attorney were available prior to the impending questioning,’”¹⁸² the majority held that “no talismanic incantation” is required to satisfy *Miranda*¹⁸³ and concluded that the police had “fully conveyed” to the suspect his right to appointed counsel.¹⁸⁴

A similar issue arose eight years later in *Duckworth v. Eagan*,¹⁸⁵ where the police informed a suspect that he had the right to have an attorney present during interrogation “‘even if you cannot afford to hire one,’” and then said, “‘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.’”¹⁸⁶ Once again, the majority found that the police had “touched all of the bases required by *Miranda*,” dismissing the “if and when you go to court” qualification as “accurately describ[ing] the procedure for the appointment of counsel in Indiana.”¹⁸⁷ This time, Justice Blackmun joined the three *Prysock* dissenters, who chided the majority for making “a mockery” of *Miranda* by allowing the police to

177. *See id.* at 294.

178. *Id.* at 296.

179. 453 U.S. 355 (1981) (per curiam).

180. *Id.* at 363 (Stevens, J., dissenting).

181. *Id.* at 357 (per curiam) (quoting tape of interrogation session).

182. *Id.* at 363 (Stevens, J., dissenting) (quoting state appellate court’s opinion).

183. *Id.* at 359 (per curiam).

184. *Id.* at 361.

185. 492 U.S. 195 (1989).

186. *Id.* at 198 (quoting waiver form read to suspect).

187. *Id.* at 203-04.

create the misimpression that "only 'those accused who can afford an attorney have the right to have one present before answering any questions; those who are not so fortunate must wait.'"¹⁸⁸

Turning to the Supreme Court decisions involving suspects who were given *Miranda* warnings and attempted to invoke their rights, one of the two majority opinions Justice Blackmun wrote in the confessions area was such a case.¹⁸⁹ In *Fare v. Michael C.*,¹⁹⁰ the Court held that a juvenile had not invoked his *Miranda* rights by requesting to speak to his probation officer.¹⁹¹ Noting "the unique role the lawyer plays in the adversary system of criminal justice in this country,"¹⁹² the Justice's majority opinion distinguished requests for an attorney from requests for "a probation officer, a clergyman, or a close friend."¹⁹³ Although the Justice went on to observe that a request to speak to a probation officer may indicate that a juvenile did not knowingly and voluntarily waive *Miranda* rights under the totality-of-the-circumstances approach used to determine the validity of such waivers, he declined to "impos[e] rigid restraints on police and courts" in cases where a suspect does not ask for an attorney.¹⁹⁴

The Justice's reference in *Fare* to the "pivotal role of legal counsel"¹⁹⁵ proved to be prophetic: one group of cases in which he showed almost unwavering support for the defendant were those applying the per se rule that attaches when a suspect invokes the right to counsel. The Justice joined the majority's ruling in *Edwards v. Arizona*¹⁹⁶ that the police must immediately cease interrogation in such cases.¹⁹⁷ He also supported the Court's extension of *Edwards* to prohibit the police from interrogating a suspect who has invoked the right to counsel about an unrelated offense¹⁹⁸ and from reinitiating interrogation even

188. *Id.* at 215-16 (Marshall, J., dissenting) (quoting the Court of Appeals' opinion, *Eagan v. Duckworth*, 843 F.2d 1554, 1557 (7th Cir. 1988)).

189. For a description of the other case—*Oregon v. Hass*, 420 U.S. 714 (1975)—see *infra* text accompanying notes 200-04.

190. 442 U.S. 707 (1979).

191. *See id.* at 724.

192. *Id.* at 719.

193. *Id.* at 722.

194. *Id.* at 725.

195. *Id.* at 722.

196. 451 U.S. 477 (1981).

197. *See id.* at 487.

198. *See Arizona v. Roberson*, 486 U.S. 675, 683 (1988). In so holding, the Court distinguished its prior ruling in *Michigan v. Mosley*, 423 U.S. 96, 104 (1975) (an opinion which the Justice also joined), in which it had held that the police may question a suspect who invoked the right to remain silent about an unrelated crime so long as they "scrupulously honored" the suspect's right to silence.

after the suspect has consulted with an attorney, unless the attorney is present.¹⁹⁹

The Justice did write the majority opinion in *Oregon v. Hass*,²⁰⁰ which held that statements taken in violation of *Edwards* may be introduced for impeachment purposes.²⁰¹ Analogizing *Hass* to prior Supreme Court cases that had allowed the impeachment use of evidence seized in violation of the Fourth Amendment²⁰² and statements given without the benefit of *Miranda* warnings whatsoever,²⁰³ the Justice reasoned that excluding the defendant's statements from the prosecution's case in chief provided sufficient deterrence for *Edwards* violations and that "the shield provided by *Miranda* is not to be perverted to a license to testify inconsistently, or even perjurally, free from the risk of confrontation with prior inconsistent utterances."²⁰⁴ Nevertheless, the Justice joined with the dissenters on each of the two occasions when the Court attempted to limit the otherwise strict *Edwards* prohibition. He disagreed with the plurality opinion in *Oregon v. Bradshaw*,²⁰⁵ which concluded that a defendant who asked, "Well, what is going to happen to me now?" had initiated further communication with the police, indicating "a willingness and a desire for a generalized discussion about the investigation," and thus had taken himself out of the *Edwards* protection.²⁰⁶ He also refused to join the majority opinion in *Davis v. United States*,²⁰⁷ which held that a suspect who said, "Maybe I should talk to a lawyer,"²⁰⁸ had not invoked his right to counsel because the *Edwards* rule is triggered only if a suspect "unambiguously request[s] counsel . . . sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."²⁰⁹

199. See *Minnick v. Mississippi*, 498 U.S. 146, 154-56 (1990).

200. 420 U.S. 714 (1975).

201. See *id.* at 723-24.

202. See *id.* at 721 (citing *Walder v. United States*, 347 U.S. 62 (1954)).

203. See *id.* at 720-23 (citing *Harris v. New York*, 401 U.S. 222 (1971)).

204. *Id.* at 722.

205. 462 U.S. 1039 (1983) (plurality opinion).

206. *Id.* at 1045-46; see *id.* at 1051 (Marshall, J., dissenting).

207. 512 U.S. 452 (1994).

208. *Id.* at 455.

209. *Id.* at 459; see *id.* at 446 (Souter, J., concurring in the judgment). The Justice likewise voted in favor of the defendant in both cases that arose during his tenure on the Court concerning the applicability of the *Edwards* rule to the Sixth Amendment. In *Michigan v. Jackson*, 475 U.S. 625, 626 (1986), he joined the majority in applying *Edwards* to bar police from interrogating defendants who had invoked their Sixth Amendment rights by requesting the appointment of counsel at arraignment. And then, in *McNeil v. Wisconsin*, 501 U.S. 171, 175-76 (1991), he joined the dissenters when the Court distinguished *Jackson* and held that a defendant's invocation of his Sixth Amendment right to counsel at a bail hearing did

2. *The Sixth Amendment Cases*

Although the Supreme Court's recent confession cases involve *Miranda* claims more often than Sixth Amendment claims, the majority of Justice Blackmun's opinions are in the Sixth Amendment area. In his early years on the Court, he tended to vote in favor of the prosecution in such cases. He wrote a dissenting opinion in *Brewer v. Williams*,²¹⁰ disagreeing with the majority's ruling that Detective Leaming's "Christian burial speech"²¹¹ had violated Williams' Sixth Amendment rights under *Massiah*²¹² by "deliberately and designedly set[ting] out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him."²¹³ In dissent, Justice Blackmun disputed the majority's characterization of Detective Leaming's intent, noting that the victim had been missing for only a few days and might still be alive and concluding that "Leaming's purpose was not solely to obtain incriminating information."²¹⁴ More generally, the Justice argued that "not every attempt to elicit information should be regarded as 'tantamount to interrogation,'" and he criticized as "far too broad" the majority's holding that the Sixth Amendment is violated "whenever police engage in any conduct, in the absence of counsel, with the subjective desire to obtain information from a suspect after arraignment."²¹⁵

Eight years later, however, Justice Blackmun provided the crucial fifth vote in *Maine v. Moulton*,²¹⁶ which held that the police had violated the defendant's Sixth Amendment rights by arranging to have his codefendant record a meeting the defendant had set up to discuss strategy for their upcoming trial.²¹⁷ The majority concluded that the police had "knowingly circumvent[ed] the accused's right to have counsel present in a confrontation between the accused and a state

not bar the police from interrogating him about other unrelated crimes. *See id.* at 185-86 (Stevens, J., dissenting).

210. 430 U.S. 387 (1977).

211. The speech was so labeled because of Leaming's request that Williams think about helping the police locate the body of the girl he had killed because "the parents of [the] little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered." *Id.* at 393.

212. *Massiah v. United States*, 377 U.S. 201 (1964); *see supra* text accompanying notes 156-57.

213. *Brewer*, 430 U.S. at 399.

214. *Id.* at 439 (Blackmun, J., dissenting).

215. *Id.* at 439-40 (Blackmun, J., dissenting) (quoting majority opinion). Justice Blackmun also joined a dissent written by Justice White, which argued that Williams had waived his Sixth Amendment rights. *See id.* at 429 (White, J., dissenting).

216. 474 U.S. 159 (1985).

217. *See id.* at 180.

agent,”²¹⁸ rejecting the state’s argument (reminiscent of the Justice’s dissent in *Brewer v. Williams*²¹⁹) that the defendant’s statements should not be suppressed because the police had “other, legitimate reasons” for listening to his conversation—to investigate his plans to kill a prosecution witness and to protect the codefendant’s safety.²²⁰

Likewise, the Justice wrote a dissenting opinion in *Patterson v. Illinois*,²²¹ disagreeing with the majority’s ruling that a suspect who had been indicted on murder charges had waived his Sixth Amendment right to counsel by waiving his *Miranda* right to counsel.²²² Arguing that the Sixth Amendment—unlike *Miranda*—requires that defendants be provided with counsel even if they do not specifically make such a request, the Justice’s dissent maintained that “after formal adversary proceedings against a defendant have been commenced, the Sixth Amendment mandates that the defendant not be “subject to further interrogation by the authorities until counsel has been made available to him.””²²³

One area, however, where the Justice was steadfastly unsympathetic to defendants’ Sixth Amendment claims was in the so-called “listening post” cases—where a police informant merely listened to the defendant’s incriminating statements and reported them to the authorities. He dissented from the Court’s conclusion that the Sixth Amendment was violated in *United States v. Henry*,²²⁴ noting that the informant there had been instructed not to ask Henry any questions or initiate any conversations about the charges pending against him.²²⁵ And six years later, he joined the majority opinion in *Kuhlmann v. Wilson*,²²⁶ which ultimately upheld the constitutionality of using an informant who acts as a “listening post.”²²⁷ The police violate the Sixth Amendment only if they take “some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks,” the Court held in *Kuhlmann*.²²⁸

218. *Id.* at 176.

219. *See supra* notes 210-15 and accompanying text.

220. *Moulton*, 474 U.S. at 176, 178.

221. 487 U.S. 285 (1988).

222. *See id.* at 300 (Blackmun, J., dissenting).

223. *Id.* (quoting *Michigan v. Jackson*, 475 U.S. 625, 626 (1986) (quoting *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981))).

224. 447 U.S. 264, 277 (1980) (Blackmun, J., dissenting).

225. *See id.* at 278, 287-89 (Blackmun, J., dissenting).

226. 477 U.S. 436 (1986).

227. *See id.* at 459.

228. *Id.*

3. *The Due Process Cases*

The Justice's voting record in the few cases that arose during his tenure on the Court involving the third constitutional vehicle for attacking the admissibility of one's confession—the due process voluntariness test—is likewise difficult to characterize. In *Colorado v. Connelly*,²²⁹ he joined the majority's holding that a confession cannot be deemed involuntary in a constitutional sense absent proof of coercive police conduct, thereby rejecting the claim that the defendant's mental illness interfered with his free will and rendered his confession involuntary.²³⁰ Yet he voted against the government on both issues before the Court in *Arizona v. Fulminante*:²³¹ he agreed with the majority that an undercover informant's offer to protect Fulminante from "tough treatment" he was getting from other inmates so long as Fulminante would "tell [him] about it" rendered the resulting confession involuntary,²³² and he sided with the dissenters' view that coerced confession claims should not be subject to a harmless error analysis.²³³

Thus, as in the Fourth Amendment arena, the Justice's voting record in the confession cases is not easily categorized. Although he did not believe that the *Miranda* warnings are constitutionally required, he was sympathetic to suspects who had attempted to invoke their *Miranda* right to counsel. Perhaps linked to this tendency to support those seeking the advice of counsel, the Justice seemed more inclined to side with defendants who challenged confessions on Sixth Amendment grounds, especially in his later years on the Court (with the notable exception of the listening post cases). His votes in other confession cases were similarly split between the defense and the prosecution.

C. *The Right to Counsel Cases*

Although some of the confession cases discussed in the prior section implicate the Sixth Amendment right to counsel, Justice Blackmun wrote more frequently in the more traditional right to counsel cases. In analyzing his views in this area, I consider in turn the

229. 479 U.S. 157 (1986).

230. *See id.* at 170. The Justice did, however, decline to join the portion of the Court's opinion discussing the standard of proof the prosecution must satisfy in order to prove a valid waiver of *Miranda* rights because that issue had not been raised or briefed by the parties and was not necessary to the Court's decision. *See id.* at 171 (Blackmun, J., concurring in part and concurring in the judgment).

231. 499 U.S. 279 (1991).

232. *Id.* at 283, 287-88.

233. *See id.* at 288 (White, J., dissenting).

Supreme Court opinions analyzing the right to appointed counsel, the validity of waivers of counsel, claims of ineffective assistance of counsel, and the Fourteenth Amendment right to counsel on appeal.

1. *The Right to Appointed Counsel*

The Justice was not yet a member of the Court when *Gideon v. Wainwright*²³⁴ interpreted the Sixth Amendment to obligate the states to provide indigent defendants with appointed counsel,²³⁵ but three cases were decided during his second full Term on the Court regarding the reach of *Gideon*. In one of these cases, *Adams v. Illinois*,²³⁶ the Justice wrote an opinion concurring in the result, indicating that he thought the Court had been wrong in *Coleman v. Alabama*²³⁷ to extend the Sixth Amendment right to counsel to the preliminary-hearing stage.²³⁸ In the second, *Kirby v. Illinois*,²³⁹ he joined the plurality in refusing to require the appointment of counsel at a pre-indictment identification procedure on the grounds that the Sixth Amendment right to counsel was not triggered until “the initiation of adversary judicial proceedings.”²⁴⁰

On the other hand, in the third case, *Argersinger v. Hamlin*,²⁴¹ the Justice supported the Court’s extension of *Gideon* to require the states to appoint counsel for any indigent defendant who was imprisoned for any offense—whether a felony, misdemeanor, or petty offense.²⁴² Seven years later, he dissented in *Scott v. Illinois*,²⁴³ when the Court refused to apply *Argersinger* to indigent defendants charged

234. 372 U.S. 335 (1963).

235. *See id.* at 344-45.

236. 405 U.S. 278 (1972).

237. 399 U.S. 1 (1970).

238. *See Adams*, 405 U.S. at 286 (Blackmun, J., concurring in the result). The Court held in *Adams* that *Coleman* should not be applied retroactively to preliminary hearings conducted before the date *Coleman* was decided. *See id.* at 283-85 (majority opinion).

239. 406 U.S. 682 (1972) (plurality opinion).

240. *Id.* at 689 (defining “adversary judicial proceedings” to mean indictment, information, arraignment, preliminary hearing, or formal charge). The Justice himself wrote the majority opinion in *United States v. Ash*, 413 U.S. 300 (1973), another case involving the right to counsel at a pretrial identification proceeding. In holding that the right to counsel does not extend to a post-indictment photo display conducted by the government, the Justice’s opinion distinguished the Warren Court’s holding in *United States v. Wade*, 388 U.S. 218, 226-27 (1967) (guaranteeing defendants a right to counsel at post-indictment lineups) on the grounds that a photo display is not a “trial-like adversary confrontation” where a defendant might be “misled by his lack of familiarity with the law or overpowered by his professional adversary.” *Ash*, 413 U.S. at 317.

241. 407 U.S. 25 (1972).

242. *See id.* at 37.

243. 440 U.S. 367, 389 (1979) (Blackmun, J., dissenting).

with misdemeanors or petty offenses unless they actually received a prison sentence.²⁴⁴ Rather, the Justice's dissenting opinion in *Scott* argued for a "bright line" rule that would also require the state to appoint counsel for any indigent defendant charged with a nonpetty offense (i.e., a crime punishable by more than six months in prison).²⁴⁵

The Justice's position on a related issue—the permissible uses of prior uncounseled convictions—evolved somewhat during his time on the Court. In his early years on the Court, the Justice dissented from the majority's holding in *United States v. Tucker*²⁴⁶ that a defendant's Sixth Amendment rights were violated when the trial judge considered two prior convictions violative of *Gideon* in imposing sentence.²⁴⁷ He likewise dissented in *Loper v. Beto*,²⁴⁸ where the Court reversed the conviction of a defendant whose prior uncounseled convictions were introduced in order to impeach his testimony.²⁴⁹ His dissent in each case was tied to the particular facts and his belief that the use of the uncounseled convictions did not affect the outcome of the case.²⁵⁰

By 1980, however, the Justice's position on this issue had shifted in favor of criminal defendants. He wrote a concurring opinion in *Baldasar v. Illinois*,²⁵¹ adhering to the "bright line" position he had taken in his *Scott* dissent, and concluding that the defendant should therefore have received appointed counsel at his prior trial on misdemeanor theft charges.²⁵² Because that prior conviction was thus "invalid" in the Justice's view, he argued that it could not be used to convert a subsequent misdemeanor theft charge into a felony under the state's statutory enhancement provision.²⁵³ When the Court ultimately overruled *Baldasar* in *Nichols v. United States*,²⁵⁴ the Justice

244. *See id.* at 369 (majority opinion).

245. *Id.* at 389-90 (Blackmun, J., dissenting).

246. 404 U.S. 443 (1972).

247. *See id.* at 448-49.

248. 405 U.S. 473, 494 (1972) (Blackmun, J., dissenting).

249. *See id.* at 483 (plurality opinion).

250. *See id.* at 495-96 (Blackmun, J., dissenting) (noting the difficulty of retrying the defendant 25 years after the crime, his subsequent criminal record, and the fact that he was already out on parole); *Tucker*, 404 U.S. at 450-52 (Blackmun, J., dissenting) (observing that the defendant admitted his prior criminal conduct at trial and that the same judge who sentenced him had denied his habeas petition on the ground that any error was harmless).

251. 446 U.S. 222, 229 (1980) (Blackmun, J., concurring).

252. *See id.* at 229-30 (Blackmun, J., concurring).

253. *Id.* at 230 (Blackmun, J., concurring).

254. 511 U.S. 738, 748-49 (1994) (allowing the use of prior uncounseled misdemeanor conviction for which no prison term had been imposed to increase defendant's sentence under the federal sentencing guidelines).

wrote the primary dissenting opinion, arguing that “uncounseled misdemeanor convictions lack the reliability this Court has always considered a prerequisite for the imposition of any term of incarceration.”²⁵⁵

2. *Waivers of the Right to Counsel*

This belief in the importance of counsel led the Justice to solicitously protect defendants from unknowingly waiving or forfeiting their right to counsel. In fact, the first time he cast the deciding vote in favor of a criminal defendant came in one such case, *Boyd v. Dutton*,²⁵⁶ where the majority reversed the lower courts’ denial of habeas relief and held that an evidentiary hearing was required to determine whether the prisoner had knowingly and voluntarily waived his right to counsel prior to entering a guilty plea.²⁵⁷ Writing a separate concurring opinion, the Justice acknowledged some “initial hesitation” in voting to overturn “the unanimous judgment of four courts,” but ultimately voted in the defendant’s favor given the facts of the particular case:

[A] 20-year-old who claims he could not read or write (although he apparently was able to sign his name to the petition in the present proceeding) receive[d] four consecutive seven-year sentences, totaling 28 years, for forging three checks within a fortnight in the respective amounts of \$45, \$45, and \$40, and for possessing a forged check in the amount of \$10.²⁵⁸

Seventeen years later, the Justice showed no such hesitation in dissenting when the Court refused in *Caplin & Drysdale v. United States*²⁵⁹ to find that the federal statute requiring forfeiture of drug proceeds created an exemption for funds used to pay defense counsel.²⁶⁰ Emphasizing “the distinct role of the right to counsel of choice in protecting the integrity of the judicial process,”²⁶¹ Justice Blackmun’s dissenting opinion concluded that it was “unseemly and unjust for the Government to beggar those it prosecutes in order to disable their defense at trial.”²⁶²

255. *Id.* at 765 (Blackmun, J., dissenting). Interestingly, the Justice’s dissent relied on the *Tucker* decision, with which he had disagreed. *See id.* at 762.

256. 405 U.S. 1 (1972) (per curiam).

257. *See id.* at 3.

258. *Id.* at 3-4 (Blackmun, J., concurring).

259. 491 U.S. 617 (1989).

260. *See id.* at 619.

261. *Id.* at 645 (Blackmun, J., dissenting).

262. *Id.* at 635 (Blackmun, J., dissenting). *See also* *Wheat v. United States*, 486 U.S. 153, 172-73 (1988) (Stevens, J., dissenting) (joining dissenting opinion, which argued that the trial court had abused its discretion by refusing to allow the defendant to waive his

The Justice was so reluctant to see a defendant waive the right to counsel that he dissented in *Faretta v. California*,²⁶³ declining to read a right to represent oneself into the Sixth Amendment.²⁶⁴ Quoting the well-known proverb “[o]ne who is his own lawyer has a fool for a client,”²⁶⁵ the Justice wrote: “I do not believe that any amount of pro se pleading can cure the injury to society of an unjust result, but I do believe that a just result should prove to be an effective balm for almost any frustrated pro se defendant.”²⁶⁶ Then, in one of his last Terms on the Court, he dissented from the Court’s ruling in *Godinez v. Moran*,²⁶⁷ which held that the standard for determining a defendant’s competency to waive the right to counsel or plead guilty is no higher than the rational-understanding standard used to determine competency to stand trial.²⁶⁸ Noting that “[a] person who is ‘competent’ to play basketball is not thereby ‘competent’ to play the violin,” the Justice criticized the majority’s “monolithic approach to competency” as “true to neither life nor the law”²⁶⁹ and concluded that “a defendant who is utterly incapable of conducting his own defense cannot be considered ‘competent’ to make . . . a decision” to waive counsel.²⁷⁰

3. *The Requirement of Effective Assistance of Counsel*

The Justice’s voting record in cases raising ineffective-assistance-of-counsel claims is more difficult to categorize. He joined the Court’s opinions both in *Strickland v. Washington*,²⁷¹ which defined unconstitutionally ineffective assistance of counsel in a “highly deferential” manner, requiring “a strong presumption” that the attorney’s representation fell within “the wide range of reasonable professional assistance,”²⁷² and in the companion case, *United States v. Cronin*,²⁷³ which

right to conflict-free representation and retain the attorney who was representing two of his codefendants).

263. 422 U.S. 806, 846 (1975) (Blackmun, J., dissenting).

264. *See id.* at 807 (majority opinion).

265. *Id.* at 852 (Blackmun, J., dissenting).

266. *Id.* at 849 (Blackmun, J., dissenting).

267. 509 U.S. 389, 409 (1993) (Blackmun, J., dissenting).

268. *See id.* at 391 (majority opinion).

269. *Id.* at 413 (Blackmun, J., dissenting).

270. *Id.* at 416 (Blackmun, J., dissenting).

271. 466 U.S. 668 (1984).

272. *Id.* at 689. Specifically, the Court held that a claim of ineffective assistance requires proof that the attorney “fell below an objective standard of reasonableness” and also proof of prejudice—that is, “a reasonable probability that, but for the counsel’s unprofessional errors, the result of the proceedings would have been different.” *Id.* at 693-94.

273. 466 U.S. 648 (1984).

refused to presume ineffective assistance based on the inexperience of defense counsel (a young real-estate lawyer who had never conducted a jury trial) and his lack of time to prepare for trial (twenty-five days).²⁷⁴ But in subsequent cases requiring the Court to apply the standard set out in *Strickland*, the Justice dissented from the majority's findings that the Sixth Amendment had not been violated.²⁷⁵

Justice Blackmun's votes in cases raising a related question—when an attorney's conflict of interest rises to the level of ineffective assistance—reflect a similar trend. On the one hand, he joined the majority opinion in *Cuyler v. Sullivan*,²⁷⁶ which held that the Sixth Amendment is violated in cases where multiple defendants are represented by one lawyer only if there is proof of “an actual conflict of interest [that] adversely affected [the] lawyer's performance,” and not by the mere possibility of a conflict of interest.²⁷⁷ On the other hand, he wrote the primary dissenting opinion seven years later in *Burger v. Kemp*,²⁷⁸ disagreeing with the majority's conclusion that a defendant who had been represented by a partner of the lawyer who was representing his confederate in a separate trial had failed to meet the standard set out in *Cuyler*.²⁷⁹ Noting that the interests of the two defendants were “diametrically opposed” on the critical issue of their “comparative culpability” for the crime,²⁸⁰ the Justice dismissed the

274. *See id.* at 662-65.

275. *See* *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Stevens, J., dissenting) (disagreeing with the majority's conclusion that defense attorney's failure to object to the prosecution's reliance on a certain aggravating circumstance in a capital case—an objection that would have been successful at the time of the defendant's sentencing hearing under a binding appellate court ruling that was later overturned—did not constitute the prejudice necessary to make out an ineffective-assistance-of-counsel claim under *Strickland*); *Burger v. Kemp*, 483 U.S. 776, 811-17 (1987) (Blackmun, J., dissenting) (arguing that defense counsel's failure to investigate mitigating evidence and to present any evidence at capital sentencing hearing constituted ineffective assistance); *see also* *Morris v. Slappy*, 461 U.S. 1, 29 (1983) (Blackmun, J., concurring in the judgment) (refusing to join majority opinion, which held that the Sixth Amendment does not guarantee a meaningful lawyer-client relationship and therefore upheld the trial court's refusal to grant a continuance so that the public defender who had been representing the defendant could try the case; instead noting that the only issue before the Court was the trial judge's failure to ask how long a continuance was necessary and therefore declining to join in “rather broad-ranging dicta about the right to counsel and the concerns of victims (deserving of sympathy as they may be)”).

276. 446 U.S. 335 (1980).

277. *Id.* at 348.

278. 483 U.S. 776, 796 (1987) (Blackmun, J., dissenting).

279. *See id.* at 796 (majority opinion).

280. *Id.* at 802 (Blackmun, J., dissenting).

majority's efforts to explain away the attorney's failure to raise the defendant's lesser culpability on appeal as "sheer speculation."²⁸¹

4. *The Fourteenth Amendment Right to Counsel on Appeal*

Finally, the Justice's position in cases interpreting the reach of the Fourteenth Amendment right to counsel also seemed to evolve somewhat over the years. He was not sitting on the Court when it decided in *Griffin v. Illinois*²⁸² that the Equal Protection and Due Process Clauses require the states to provide indigent defendants with a trial transcript in order to appeal their convictions,²⁸³ or when *Douglas v. California*²⁸⁴ extended *Griffin* to require the appointment of counsel on appeal.²⁸⁵ But he agreed with the majority in *Mayer v. City of Chicago*²⁸⁶ that *Griffin* obligates the states to provide a free transcript even to defendants convicted of minor ordinance violations punishable only by fines.²⁸⁷ Nevertheless, he also joined the majority opinion in *Ross v. Moffitt*,²⁸⁸ which limited the *Douglas* right to counsel to the first appeal and therefore denied indigent defendants a right to appointed counsel in subsequent proceedings before the state supreme court or the United States Supreme Court.²⁸⁹

Two years later, however, the Justice refused to go along when a plurality of the Court said in *United States v. MacCollom*²⁹⁰ that a federal prisoner seeking habeas relief was not entitled to a free trial transcript, in part because he could have obtained a free transcript on appeal.²⁹¹ Having declined to appeal his conviction and therefore "[h]aving foregone this right," the plurality explained, the prisoner "may not several years later successfully assert a due process right to review of his conviction and thereby obtain a free transcript on his

281. *Id.* at 804 (Blackmun, J., dissenting).

282. 351 U.S. 12 (1956).

283. *See id.* at 19-20.

284. 372 U.S. 353 (1963).

285. *See id.* at 355.

286. 404 U.S. 189 (1971).

287. *See id.* at 193-94. The Justice filed a concurring opinion, suggesting that the state courts consider on remand whether the defendant was still indigent. *See id.* at 201 (Blackmun, J., concurring).

288. 417 U.S. 600 (1974).

289. *See id.* at 619. Eight years later, the Justice also agreed with the Court's holding in *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982) (per curiam), that *Ross v. Moffitt* forecloses defendants from raising ineffective-assistance-of-counsel claims to challenge the quality of representation received from even retained counsel on discretionary appeals to a state supreme court.

290. 426 U.S. 317 (1976) (plurality opinion).

291. *See id.* at 324-25.

own terms as an ancillary constitutional benefit.”²⁹² Apparently uncomfortable with this forfeiture argument, Justice Blackmun concurred only in the result. In his view, MacCollom had “a *current* opportunity to present his claims fairly” because he could obtain a transcript so long as his habeas claim was not frivolous and there was an articulable basis for believing a transcript would be helpful to him.²⁹³ Thus, the Justice found it unnecessary to consider “the constitutional significance of what he might have done at the time a direct appeal from his conviction could have been taken.”²⁹⁴

Although the Justice sided with both the prosecution and the defense in the right to counsel cases, just as he did in the Fourth Amendment and confession cases, he seemed to vote more consistently in favor of defendants asserting the right to counsel than in the other two areas. Even when he joined a majority opinion that articulated a standard tending to favor the prosecution—for example, the cases setting out the test to be applied to ineffective-assistance-of-counsel and conflict-of-interest claims—he was reluctant to give those opinions a broad reading when asked to apply them to the facts of individual cases.

D. The Habeas Corpus Cases

Perhaps the area in which the Burger and Rehnquist Courts have made the greatest inroads in undermining the work of the Warren Court has been in the law governing habeas petitions.²⁹⁵ While the Warren Court emphasized the critical role that the writ of habeas corpus plays in protecting individual rights and correcting constitutional errors, the Burger and Rehnquist Courts—“animated by a deep conviction that the overriding goal of the criminal justice system is to punish the guilty and exonerate the innocent”—have focused on the importance of finality and federalism.²⁹⁶

Early in his tenure on the Court, Justice Blackmun seemed more sympathetic to the views taken by Chief Justices Burger and Rehnquist, expressing misgivings about what he saw as the Court “wander[ing] a long way down the road in expanding traditional notions of habeas corpus.”²⁹⁷ But as the years progressed, he became

292. *Id.* at 323-24.

293. *Id.* at 329-30 (Blackmun, J., concurring in the judgment).

294. *Id.* (Blackmun, J., concurring in the judgment).

295. See Chemerinsky, *supra* note 38, at 749.

296. *Id.* at 769.

297. *Hensley v. Municipal Court*, 411 U.S. 345, 353 (1973) (Blackmun, J., concurring in the result); see also *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 501 (1973) (Black-

one of the writ's staunchest defenders.²⁹⁸ In fact, his final majority opinion, *McFarland v. Scott*,²⁹⁹ observed that "federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty."³⁰⁰ In examining the Justice's habeas jurisprudence, I consider the position he took in three areas: the substantive limits on the scope of the writ, the procedural hurdles erected by the Burger and Rehnquist Courts, and the degree to which habeas courts must defer to state court factfinding.

1. *Substantive Limits on the Scope of Habeas Relief*

In one of its leading habeas decisions, *Fay v. Noia*,³⁰¹ the Warren Court held that all constitutional claims are cognizable on habeas.³⁰² In *Stone v. Powell*,³⁰³ the Burger Court retreated from that position, barring prisoners from raising Fourth Amendment claims on habeas so long as they had a full and fair opportunity to litigate those claims in state court.³⁰⁴ As noted above, Justice Blackmun joined the majority opinion in *Stone*.³⁰⁵ Thereafter, however, he refused to endorse any further efforts to limit the type of challenges that may be raised on habeas.

In fact, three years after *Stone*, Justice Blackmun wrote the majority opinion in *Rose v. Mitchell*,³⁰⁶ refusing to preclude prisoners from bringing habeas petitions challenging the racial composition of the grand jury that indicted them.³⁰⁷ Observing that a "claim that the court has discriminated on the basis of race in a given case brings the integrity of the judicial system into direct question,"³⁰⁸ the Justice's opinion concluded that "the strong interest in making available fed-

mun, J., concurring in the result) (noting that "we have come a long way from the traditional notions of the Great Writ" and that "[t]he common-law scholars of the past hardly would recognize what the Court has developed").

298. Cf. Lay, *supra* note 2, at 14 (observing that even while on the appellate court, the Justice "generally took a middle of the road stance" in habeas cases and "show[ed] a high regard for prisoner's rights").

299. 512 U.S. 849 (1994).

300. *Id.* at 859 (holding that a capital defendant need not file a formal habeas petition in order to invoke the right to counsel under the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(q)(4)(B) (1994), and thereby give the federal courts jurisdiction to grant a stay of execution).

301. 372 U.S. 391 (1963).

302. *See id.* at 398-99.

303. 428 U.S. 465 (1976).

304. *See id.* at 481-82.

305. *See supra* notes 69-70 and accompanying text.

306. 443 U.S. 545 (1979).

307. *See id.* at 559-64.

308. *Id.* at 563.

eral habeas corpus relief outweighs the costs associated with such relief.”³⁰⁹ And in his last Term on the Court, he wrote the dissenting opinion in *Reed v. Farley*,³¹⁰ arguing that a state prisoner should be permitted to file a habeas petition challenging a violation of the Interstate Agreement on Detainers’ requirement that he be tried within 120 days, “a violation that Congress found troubling enough to warrant the severe remedy of dismissal.”³¹¹

Another innovation in habeas jurisprudence on which the Justice’s views evolved over the years concerned the Rehnquist Court’s announcement—in a line of cases beginning with the plurality opinion in *Teague v. Lane*³¹²—that a habeas petition should be evaluated according to “the law prevailing at the time the conviction became final,”³¹³ thereby foreclosing a prisoner from taking advantage of “a new constitutional rule of criminal procedure,”³¹⁴ i.e., any case whose “result was not *dictated* by precedent existing at the time the defendant’s conviction became final.”³¹⁵ The Justice did not sign on to the plurality opinion in *Teague*, but he did join Justice Stevens’ opinion,³¹⁶ which agreed generally with the approach taken by the plurality but took issue with the narrowness of the exceptions the plurality was willing to endorse.³¹⁷

Later in the same Term, however, the Justice joined another separate opinion written by Justice Stevens, which declined to go along with the majority’s decision to extend *Teague* to capital cases “without

309. *Id.* at 564. For further discussion of *Rose v. Mitchell*, see *infra* text accompanying notes 434-36.

310. 512 U.S. 339 (1994).

311. *Id.* at 368 (Blackmun, J., dissenting); see also *Withrow v. Williams*, 507 U.S. 680, 682 (1993) (joining majority opinion refusing to extend *Stone v. Powell* to *Miranda* claims); *Kimmelman v. Morrison*, 477 U.S. 365, 382-83 (1986) (joining majority opinion refusing to extend *Stone* to ineffective-assistance-of-counsel claims); *Jackson v. Virginia*, 443 U.S. 307, 323-24 (1979) (joining majority opinion refusing to extend *Stone* to insufficiency-of-the-evidence claims).

312. 489 U.S. 228 (1989) (plurality opinion).

313. *Id.* at 306.

314. *Id.* at 299.

315. *Id.* at 301.

316. See *id.* at 318 (Blackmun, J., concurring in part and concurring in the judgment).

317. Justices Blackmun and Stevens agreed with the plurality that a new decision that made it unconstitutional to punish the defendant’s conduct should be applied on habeas, see *id.* at 311 (plurality opinion), but they disagreed with the scope of the second exception the plurality created. While the plurality was willing to recognize an exception for new rules requiring procedures “central to an accurate determination of innocence or guilt,” *id.* at 313 (plurality opinion), Justices Blackmun and Stevens advocated a broader exception for new rules that “implicate[] concerns of fundamental fairness,” even if they do not undermine the factual accuracy of a conviction. *Id.* at 322 (Stevens, J., concurring in part and concurring in the judgment).

benefit of argument or briefing on the issue.”³¹⁸ Subsequently, he completely abandoned ship on the *Teague* issue. By the following Term, he was joining Justice Brennan’s dissent in *Butler v. McKellar*,³¹⁹ which condemned *Teague* for “manifest[ing] growing hostility toward Congress’ decision to authorize federal collateral review of state criminal convictions, curtailing the writ of habeas corpus by dramatically restructuring retroactivity doctrine.”³²⁰ He continued to side with the dissenters in subsequent similar cases.³²¹

Finally, the Justice refused to join the majority’s opinion in *Brecht v. Abrahamson*,³²² which held that a less onerous harmless error standard applies to “constitutional error[s] of the trial type” on habeas than on direct appeal.³²³ Instead of asking whether an error was “‘harmless beyond a reasonable doubt’” (the standard applied on direct review under the Court’s decision in *Chapman v. California*),³²⁴ the Court in *Brecht* chose to adopt the harmless error standard it uses for *nonconstitutional* errors committed in federal trials, which analyzes whether the error had a “‘substantial and injurious effect or influence in determining the jury’s verdict.’”³²⁵ Justice Blackmun joined Justice White’s dissenting opinion, which described the *Chapman* standard as “essential to the safeguard of federal constitutional rights.”³²⁶ The dissenters criticized the “confused patchwork” of the majority’s habeas jurisprudence, “in which the same constitutional right is

318. *Penry v. Lynaugh*, 492 U.S. 302, 349 (1989) (Stevens, J., concurring in part and dissenting in part).

319. 494 U.S. 407, 417 (1990) (Brennan, J., dissenting). The majority in *Butler* held that the Court’s decision in *Arizona v. Roberson*, 486 U.S. 675 (1988), was a “new rule” and thus could not be raised on habeas because the outcome “was susceptible to debate among reasonable minds.” *Butler*, 494 U.S. at 415. For a description of *Roberson*, see *supra* note 198 and accompanying text.

320. *Butler*, 494 U.S. at 417 (Brennan, J., dissenting).

321. See, e.g., *Sawyer v. Smith*, 497 U.S. 227, 259 (1990) (Brennan, J., dissenting) (describing majority’s decision to apply *Teague* as “elevat[ing] its preference for finality in state proceedings over Congress’ commitment ‘to provide a federal forum for state prisoners’”); *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (Brennan, J., dissenting) (disagreeing with majority’s holding that habeas petitioner was seeking to take advantage of a new rule). Justice Blackmun also joined the majority in those post-*Teague* cases that concluded that a habeas petitioner was not invoking a new rule. See *Stringer v. Black*, 503 U.S. 222, 229-36 (1992); *Penry v. Lynaugh*, 492 U.S. 302, 314-19 (1989).

322. 507 U.S. 619 (1993).

323. *Id.* at 638.

324. *Id.* at 622 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

325. *Id.* (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

326. *Id.* at 645 (White, J., dissenting).

treated differently depending on whether its vindication is sought on direct or collateral review.”³²⁷

2. *Procedural Hurdles*

In addition to cutting back on the substantive scope of habeas relief, the Burger and Rehnquist Courts also created increasingly rigorous procedural hurdles for habeas petitioners. Justice Blackmun joined the majority’s 1976 opinion in *Wainwright v. Sykes*,³²⁸ which overturned the Warren Court’s ruling in *Fay v. Noia*³²⁹ that state prisoners were barred from raising claims on habeas that they had not brought to the attention of the state courts only if they had “deliberately by-passed” the state courts.³³⁰ Relying on the criminal justice system’s interest in finality, the concern that the permissive *Fay v. Noia* standard might encourage defense counsel to engage in “sandbagging,” and the belief that “the state trial on the merits [should be] the ‘main event,’ . . . rather than a ‘tryout on the road,’”³³¹ the Court held in *Sykes* that a procedural default bars a prisoner from bringing a claim on habeas unless the prisoner can meet the two-pronged “cause and prejudice” standard,³³² which requires a showing of cause for the default and actual prejudice resulting from the alleged constitutional violation.³³³

By the mid-1980s, however, the Justice became less willing to join the Court in dismissing habeas claims on procedural grounds. Thus, when the majority in *Rose v. Lundy*³³⁴ held that federal courts are required to dismiss habeas petitions that contain both claims that have been exhausted in the state courts as well as unexhausted claims,³³⁵ Justice Blackmun wrote a separate opinion suggesting that the federal courts simply dismiss the unexhausted claims and consider the exhausted claims on the merits.³³⁶ Accusing the majority of

327. *Id.* at 649 (White, J., dissenting).

328. 433 U.S. 72 (1977).

329. 372 U.S. 391, 438 (1963).

330. *Sykes*, 433 U.S. at 87-88.

331. *Id.* at 88-90.

332. The “cause and prejudice” standard had been formulated in *Davis v. United States*, 411 U.S. 233 (1973), and *Francis v. Henderson*, 425 U.S. 536 (1976), and applied to prisoners who were collaterally attacking their convictions based on the racial composition of the grand jury that had indicted them. Justice Blackmun was likewise a member of the majority in both of these cases.

333. *See Sykes*, 433 U.S. at 87.

334. 455 U.S. 509 (1982).

335. *See id.* at 510.

336. *See id.* at 531-32 (Blackmun, J., concurring in the judgment).

“throw[ing] the baby out with the bath water,”³³⁷ the Justice thought that the Court should be less concerned about “detering the sophisticated habeas petitioner who understands, and wishes to circumvent the rules of exhaustion” than with protecting “the unwary pro se prisoner who is not knowledgeable about the intricacies of the exhaustion doctrine and whose only aim is to secure a new trial or release from prison.”³³⁸

The Justice likewise refused to completely endorse the Court's decision in two other cases decided the same Term that elaborated on the *Sykes* cause-and-prejudice standard. In the first case, *United States v. Frady*,³³⁹ the Court held that the federal rule permitting a criminal conviction to be overturned based on an erroneous jury instruction that had not been objected to at trial if the instruction amounted to “plain error”³⁴⁰ applies only on direct appeal and not on collateral review.³⁴¹ Justice Blackmun wrote separately, concurring only in the judgment. He thought that the plain-error rule had some applicability on collateral attack, noting that “[w]here a jurisdiction has established an exception to its contemporaneous-objection requirement and a prisoner's petition for collateral review falls within that exception, I see no need for the prisoner to prove ‘cause’ for his failure to comply with a rule that is inapplicable in his case.”³⁴²

In the second case, *Engle v. Isaac*,³⁴³ the Court held that habeas petitioners could not satisfy the cause requirement by arguing that it would have been futile to raise an objection to a long-settled state court practice and also, at least on the facts in that case, could not demonstrate cause by pointing to the novelty of their constitutional claims because the claims were “far from unknown at the time of their trials.”³⁴⁴ In the course of its opinion, the majority waged a broad attack on the writ of habeas corpus, noting that it “extends the ordeal of trial for both society and the accused,” “degrades the prominence of the trial itself,” and “frequently cost[s] society the right to punish admitted offenders.”³⁴⁵ Without comment, Justice Blackmun concurred only in the result.³⁴⁶

337. *Id.* at 522 (Blackmun, J., concurring in the judgment).

338. *Id.* at 530 (Blackmun, J., concurring in the judgment).

339. 456 U.S. 152 (1982).

340. FED. R. CRIM. P. 52(b).

341. *See Frady*, 456 U.S. at 166.

342. *Id.* at 177 (Blackmun, J., concurring in the judgment).

343. 456 U.S. 107 (1982).

344. *Id.* at 130-31.

345. *Id.* at 127-28.

346. *See id.* at 135 (Blackmun, J., concurring in the judgment).

Two years later, however, when the Court resolved the issue left open in *Engle* and held that the cause requirement is satisfied in cases where a prisoner failed to raise a claim that was “so novel that its legal basis [was] not reasonably available to defense counsel,”³⁴⁷ the Justice joined Justice Rehnquist’s dissenting opinion. The dissent argued that the majority’s “equating of novelty with cause pushes the Court into a conundrum,” because “[t]he more ‘novel’ a claimed constitutional right, the more unlikely a violation of that claimed right undercuts the fundamental fairness of the trial.”³⁴⁸

By the late 1980s, however, the Justice had moved solidly into the liberal camp on this issue, strenuously resisting the Court’s creation of additional procedural hurdles for habeas petitioners. In *Murray v. Carrier*,³⁴⁹ for example, the majority held that the cause-and-prejudice test is equally applicable to procedural defaults on appeal, and that the cause requirement is not satisfied by attorney error absent proof of ineffective assistance of counsel.³⁵⁰ Justice Blackmun joined a separate opinion written by Justice Stevens, who argued that less significance should be attached to procedural defaults that occur at the appellate stage.³⁵¹

Three years later, the Justice wrote the majority opinion in *Harris v. Reed*,³⁵² concluding that a procedural default does not bar consideration of a habeas petition unless “the last state court rendering a judgment in the case “clearly and expressly” states that its judgment rests on a state procedural bar.”³⁵³ Although the Justice acknowledged that “federal habeas review touches upon . . . significant state interests,” he rejected the state’s argument that applying the “plain statement” rule in this context would unduly burden “the interests of finality, federalism, and comity.”³⁵⁴

During the same Term, the Justice wrote the dissenting opinion in *Dugger v. Adams*,³⁵⁵ accusing the majority of “arbitrarily impos[ing] procedural obstacles to . . . send[] a man to a presumptively unlawful execution because he or his lawyers did not raise his objection at what

347. *Reed v. Ross*, 468 U.S. 1, 16 (1984).

348. *Id.* at 22 (Rehnquist, J., dissenting).

349. 477 U.S. 478 (1986).

350. *See id.* at 488, 492.

351. *See id.* at 501, 506-07 (Stevens, J., concurring in the judgment).

352. 489 U.S. 255 (1989).

353. *Id.* at 263 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983))).

354. *Id.* at 264.

355. 489 U.S. 401, 412 (1989) (Blackmun, J., dissenting).

is felt to be the appropriate time for doing so.”³⁵⁶ Specifically, the Justice argued that habeas relief should not be foreclosed in that case because the state courts had not consistently applied the procedural bar rule on which the majority was relying to preclude the petitioner’s habeas claim.³⁵⁷

The Justice again sided with the dissenters two years later when the Court decided in *McCleskey v. Zant*³⁵⁸ to apply the *Sykes* cause-and-prejudice standard in determining whether a habeas petitioner had “abused [the] writ” by filing a second habeas petition raising an issue that he had not raised in his first petition.³⁵⁹ The Justice joined Justice Marshall’s dissent, which criticized the Court for “radically redefin[ing] the content of the ‘abuse of the writ’ doctrine” by replacing the “deliberate abandonment” standard applied in such cases under the Warren Court’s precedents³⁶⁰ with the stricter cause-and-prejudice standard.³⁶¹ Rejecting the Court’s emphasis on finality, the dissenters noted that “the very essence of the Great Writ is our criminal justice system’s commitment to suspending ‘[c]onventional notions of finality of litigation . . . where life or liberty is at stake and infringement of constitutional rights is alleged.’”³⁶²

Finally, the Justice wrote a stinging dissent when the Court held in *Coleman v. Thompson*³⁶³ that a habeas petitioner cannot possibly satisfy the “cause” prong of the *Sykes* test if a procedural default occurred during state postconviction proceedings, because attorney error satisfies the cause requirement only if it rises to the level of ineffective assistance³⁶⁴ and a defendant has no constitutional right to effective representation during state postconviction proceedings.³⁶⁵ Calling the majority’s reasoning “a sleight of logic that would be ironic

356. *Id.* at 412-13 (Blackmun, J., dissenting).

357. *See id.* at 416-21 (Blackmun, J., dissenting).

358. 499 U.S. 467 (1991).

359. *Id.* at 496.

360. *See Sanders v. United States*, 373 U.S. 1, 18 (1963) (holding that prisoners forfeit the right to file a second habeas petition if they “deliberately withhold[] one of two grounds for federal collateral relief at the time of filing [the] first application, in the hope of being granted two hearings rather than one or for some other reason” or “deliberately abandon[] one of [the] grounds at the first hearing”).

361. *McCleskey*, 499 U.S. at 506 (Marshall, J., dissenting).

362. *Id.* at 517-18 (quoting *Sanders*, 373 U.S. at 8).

363. 501 U.S. 722 (1991).

364. *See id.* at 752 (citing *Murray v. Carrier*, 447 U.S. 478, 488 (1986)); *see also supra* text accompanying notes 349-50.

365. *See Coleman*, 501 U.S. at 752 (citing *Wainwright v. Torna*, 455 U.S. 586 (1982) (per curiam), an opinion that the Justice joined).

if not for its tragic consequences,³⁶⁶ Justice Blackmun criticized the Court for “creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights”³⁶⁷ and for “unjustifiabl[y] elevat[ing] abstract federalism over fundamental precepts of liberty and fairness.”³⁶⁸

The Justice also disagreed with the *Coleman* majority’s refusal to apply the “plain statement” rule set out in his majority opinion in *Harris v. Reed*³⁶⁹ because the state supreme court’s three-sentence summary order dismissing the prisoner’s appeal did not “‘fairly appear[] to rest primarily on federal law.’”³⁷⁰ Arguing that the majority had “wrested *Harris* out of the context of a preference for the vindication of fundamental constitutional rights and . . . set it down in a vacuum of rhetoric about federalism,” the Justice described the majority’s ruling as “the nadir of the Court’s recent habeas jurisprudence, [which] now routinely, and without evident reflection, subordinates fundamental constitutional rights to mere utilitarian interests.”³⁷¹

The Justice likewise voted consistently with the liberal Justices in those cases where the Court addressed the scope of the exceptions to the *Sykes* cause-and-prejudice standard. He refused to join the majority in *Murray v. Carrier*,³⁷² which held that a federal court may grant habeas relief on a defaulted claim absent proof of cause only in “an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent.”³⁷³ Instead, he joined Justice Stevens’ separate opinion, which argued that a broader exception to the cause-and-prejudice standard should be recognized whenever “the fundamental fairness of a prisoner’s conviction is at issue.”³⁷⁴

The Justice adhered to that position in a series of cases that created an even narrower exception to the *Sykes* standard for capital cases. In the first of these cases, *Smith v. Murray*,³⁷⁵ which was decided on the same day as *Murray v. Carrier*,³⁷⁶ the majority refused to

366. *Id.* at 771 (Blackmun, J., dissenting).

367. *Id.* at 759 (Blackmun, J., dissenting).

368. *Id.* at 762 (Blackmun, J., dissenting).

369. 489 U.S. 255 (1989). See *supra* text accompanying notes 352-54.

370. *Coleman*, 501 U.S. at 735 (quoting *Michigan v. Long*, 463 U.S. 1032, 1040 (1983)).

371. *Id.* at 764-65 (Blackmun, J., dissenting).

372. 477 U.S. 478 (1986).

373. *Id.* at 496.

374. *Id.* at 501, 506-07 (Stevens, J., concurring in the judgment).

375. 477 U.S. 527 (1986).

376. 477 U.S. 478 (1986). There were actually three habeas decisions issued by the Court that day. In the third one, *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986), a plurality

recognize an exception to *Sykes* absent a "substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination."³⁷⁷ As in *Carrier*, the Justice joined Justice Stevens' separate opinion, which concluded that when "a condemned prisoner raises a substantial, colorable Eighth Amendment violation," the federal courts should consider the merits of the habeas petition despite a procedural default if "the prisoner's claim would render his sentencing proceeding fundamentally unfair."³⁷⁸

The Court elaborated on its ruling in *Smith v. Murray* three years later, holding in *Dugger v. Adams*³⁷⁹ that the fact that an alleged error "might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received."³⁸⁰ This time, Justice Blackmun wrote the dissenting opinion himself, chiding the majority for "send[ing] respondent to an execution that not only is presumptively unlawful, but is presumptively inaccurate as well."³⁸¹

Finally, in *Sawyer v. Whitley*,³⁸² the Court again expanded its holding in *Smith v. Murray*, ruling that federal courts may not entertain habeas petitions filed by death-row prisoners who are raising defaulted or successive claims absent "clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applica-

of the Court said that "the 'ends of justice' require federal courts to entertain [successive habeas] petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." Thus, the plurality explained, the prisoner must show "a fair probability" that, in light of "all probative evidence of guilt or innocence"—even illegally admitted evidence—"the trier of the facts would have entertained a reasonable doubt of his guilt." *Id.* at 455 n.17 (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970)). Although the Justice joined the portion of the Court's opinion disposing of the case on the merits, *see supra* text accompanying notes 226-28, he did not join this part of the opinion.

377. *Smith*, 477 U.S. at 539.

378. *Id.* at 546 (Stevens, J., dissenting).

379. 489 U.S. 401 (1989).

380. *Id.* at 412 n.6.

381. *Id.* at 424 (Blackmun, J., dissenting). The respondent alleged that his rights under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), had been violated when the trial judge told the jury that he was responsible for the sentencing decision and that the jury's role was merely advisory. The Justice noted that unlike the habeas petition in *Smith v. Murray*, which challenged the constitutionality of admitting certain evidence in the capital sentencing hearing, the petition in *Dugger v. Adams* involved a "global" error that "necessarily pervade[d] the entire sentencing process [and] could not help but pervert the sentencing decision." *Dugger*, 489 U.S. at 423 (Blackmun, J., dissenting).

382. 505 U.S. 333 (1992).

ble state law.”³⁸³ Justice Blackmun again wrote separately, criticizing the majority’s “unduly cramped view of ‘actual innocence.’”³⁸⁴ Noting that the majority’s “single-minded focus on actual innocence . . . assumes, erroneously, that the only value worth protecting through federal habeas review is the accuracy and reliability of the guilt determination,” the Justice concluded that “[o]nly by returning to the federal courts’ central and traditional function on habeas review, evaluating claims of constitutional error, can the Court ensure that the ends of justice are served and that fundamental miscarriages of justice do not go unremedied.”³⁸⁵

3. *Deference to the State Courts’ Factfinding*

The Justice was also consistently in the liberal camp in cases discussing the degree of deference owed to state court decisions in habeas proceedings. He joined the majority’s holding in *Miller v. Fenton*³⁸⁶ that the voluntariness of a defendant’s confession is not a question of fact entitled to a presumption of correctness,³⁸⁷ but instead is “a legal question requiring independent federal determination.”³⁸⁸

Seven years later, when the Court was asked in *Wright v. West*³⁸⁹ to reconsider *Miller*’s more general ruling that mixed constitutional questions of law and fact are “subject to plenary federal review” on habeas,³⁹⁰ the Justice declined to join the plurality opinion, which seemed somewhat sympathetic to the state’s suggestion that de novo federal review of mixed questions of law and fact is inconsistent with the *Teague* line of cases³⁹¹ and that instead federal courts entertaining habeas petitions should inquire only whether the state court’s decision was reasonable.³⁹² Although the plurality ultimately found it unneces-

383. *Id.* at 336. After the Justice left the bench, the Court held in *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995), that the broader *Murray v. Carrier* standard, *see supra* text accompanying note 372-73, rather than the stricter *Sawyer v. Whitley* standard, applies to habeas petitions filed by death-row prisoners who are challenging their conviction rather than their sentence.

384. *Sawyer*, 505 U.S. at 351 (Blackmun, J., concurring in the judgment).

385. *Id.* at 356-57 (Blackmun, J., concurring in the judgment).

386. 474 U.S. 104 (1985).

387. Under 28 U.S.C. § 2254(d) (1994), federal courts entertaining habeas petitions are required to presume the correctness of a state court’s “determination after a hearing on the merits of a factual issue.”

388. *Miller*, 474 U.S. at 110.

389. 505 U.S. 277 (1992) (plurality opinion).

390. *Miller*, 474 U.S. at 112.

391. For a description of these cases, see *supra* text accompanying notes 312-21.

392. *See Wright*, 505 U.S. at 291-95 (plurality opinion).

sary to resolve this issue,³⁹³ Justice Blackmun joined Justice O'Connor's separate opinion, warning that "a move away from de novo review of mixed questions of law and fact would be a substantial change in our construction of the authority conferred by the habeas corpus statute."³⁹⁴

Thus, the Justice's views on habeas seemed to undergo a significant evolution during his time on the Court. Though initially hesitant to apply the writ broadly, he eventually came to believe that habeas corpus plays an important role in correcting constitutional errors and that his more conservative colleagues' exclusive focus on the question of factual innocence was seriously misguided.

E. The Right to Jury Trial Cases

Although the Sixth Amendment right to jury trial is not one of the rights that has received a great deal of attention in discussions of the Burger and Rehnquist Courts' treatment of the Warren Court's precedents, it is one of the criminal law topics on which the Justice most frequently wrote. In describing the Justice's contributions to the law in this area, I will consider the Court's opinions analyzing the scope of the right to jury trial, the constitutionality of altering the size of the jury or the unanimity requirement, and discrimination in the jury-selection process.

1. *The Scope of the Right to Jury Trial*

In the Justice's early years on the Court, he was unwilling to give the right to jury trial an expansive interpretation. He wrote the plurality opinion in *McKeiver v. Pennsylvania*,³⁹⁵ concluding that the states are not constitutionally obligated to provide a jury trial in juvenile delinquency proceedings.³⁹⁶ Noting that on its face the Sixth Amendment does not apply to juvenile court proceedings because they are not "criminal prosecutions," the Justice wrote that "one cannot say that in our legal system the jury is a necessary component of accurate factfinding."³⁹⁷

Likewise, the Justice dissented in *Codispoti v. Pennsylvania*³⁹⁸ from the Court's holding that the Sixth Amendment right to jury trial

393. *See id.* at 295.

394. *Id.* at 305-06 (O'Connor, J., concurring in the judgment).

395. 403 U.S. 528 (1971) (plurality opinion).

396. *See id.* at 551.

397. *Id.* at 541, 543.

398. 418 U.S. 506, 522 (1974) (Blackmun, J., dissenting).

applied to contempt proceedings stemming from the defendants' disruptive behavior at trial.³⁹⁹ The Justice's dissenting opinion argued that jury trials are unnecessary in contempt proceedings arising from behavior that took place in a courtroom because "the incident and all its details are fully preserved on the trial record."⁴⁰⁰ Therefore, the Justice concluded, "I am at a loss . . . to see the role a jury is to perform" in these cases.⁴⁰¹

Finally, the Justice wrote the majority opinion in *Ludwig v. Massachusetts*,⁴⁰² finding no constitutional defect in a "two-tier" system that initially gave defendants charged with certain crimes a bench trial, but then afforded those who were convicted a right to trial de novo before a jury.⁴⁰³ The Justice's opinion rejected the defendant's argument that the two-tier system unconstitutionally burdened his right to jury trial "by imposing the financial cost of an additional trial; . . . by subjecting an accused to a potentially harsher sentence if he seeks a trial de novo in the second tier; and . . . by imposing the increased psychological and physical hardships of two trials."⁴⁰⁴ Although the Justice was "not oblivious" to these concerns, he noted that "[t]he modes of exercising federal constitutional rights have traditionally been left, within limits, to state specification"⁴⁰⁵ and concluded that the two-tier system was "fair and not unduly burdensome."⁴⁰⁶

In *United Mine Workers v. Bagwell*,⁴⁰⁷ however, the Justice wrote the majority opinion, holding that the Sixth Amendment right to jury trial did apply to contempt charges filed against a labor union that led to fines of more than \$52 million.⁴⁰⁸ Observing that the fines imposed in this case were not "calibrate[d] to damages caused by the union's contumacious activities"⁴⁰⁹ and therefore were not compensatory; that

399. See *id.* at 523 (majority opinion). The Court distinguished *Baldwin v. New York*, 399 U.S. 66 (1970) (plurality opinion), in which it had held that there is no right to jury trial for petty offenses, on the ground that the various contempt charges filed against the defendants in *Codispoti* had been tried in a single proceeding after their criminal trial ended and had resulted in a total prison sentence that greatly exceeded six months. See *Codispoti*, 418 U.S. at 515-17.

400. *Codispoti*, 418 U.S. at 522 (Blackmun, J., dissenting).

401. *Id.* at 523 (Blackmun, J., dissenting).

402. 427 U.S. 618 (1976).

403. See *id.* at 632.

404. *Id.* at 626.

405. *Id.* at 628.

406. *Id.* at 630.

407. 512 U.S. 821 (1994).

408. See *id.* at 838.

409. *Id.* at 834.

“[t]he union’s sanctionable conduct did not occur in the court’s presence or otherwise implicate the court’s ability to maintain order and adjudicate the proceedings before it;”⁴¹⁰ and that the union’s behavior involved “widespread, ongoing, out-of-court violations of a complex injunction”⁴¹¹ rather than “simple, affirmative acts,”⁴¹² the Justice’s majority opinion concluded that “the serious contempt fines imposed here were criminal and constitutionally could not be imposed absent a jury trial.”⁴¹³

2. *Jury Size and Nonunanimous Jury Verdicts*

The Justice also wrote opinions in several cases discussing the constitutional implications of reducing the size of juries and altering the unanimous-verdict requirement. Although he joined the plurality opinion in *Apodaca v. Oregon*,⁴¹⁴ which concluded that the Sixth Amendment does not require a unanimous jury verdict and therefore upheld a scheme that required only ten votes to convict,⁴¹⁵ he wrote a separate concurring opinion, commenting that he did not consider the state’s practice “wise.”⁴¹⁶ The Justice indicated that he would have voted against it “as a matter of policy” if he had been a state legislator, but he joined the plurality opinion because he could not “conclude that the system is constitutionally offensive.”⁴¹⁷

When the Court subsequently evaluated the constitutionality of five-person juries in *Ballew v. Georgia*,⁴¹⁸ the Justice wrote the plurality opinion. Recognizing that the Court in *Williams v. Florida*⁴¹⁹ had previously approved of six-person juries on the ground that the Sixth Amendment requires only a jury “of sufficient size to promote group deliberation, to insulate members from outside intimidation, and to

410. *Id.* at 837.

411. *Id.*

412. *Id.*

413. *Id.* at 838. Describing the fine imposed here as “unquestionably . . . a serious contempt sanction,” the Justice saw no need to answer “the difficult question where the line between petty and serious contempt fines should be drawn.” *Id.* at 838 n.5. The Justice therefore did not attempt to draw a precise line between *Bagwell* and *Muniz v. Hoffman*, 422 U.S. 454 (1975), where the Court held – in an opinion the Justice joined – that a \$10,000 fine assessed against a labor union was not “a deprivation of such magnitude” to make the criminal contempt charge at issue there a nonpetty offense and implicate the Sixth Amendment right to jury trial. *Id.* at 477.

414. 406 U.S. 404 (1972) (plurality opinion).

415. *See id.* at 405-06.

416. *See Johnson v. Louisiana*, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring).

417. *Id.* (Blackmun, J., concurring).

418. 435 U.S. 223 (1978) (plurality opinion).

419. 399 U.S. 78 (1970).

provide a representative cross-section of the community,"⁴²⁰ the Justice distinguished *Williams* and concluded that the Sixth Amendment does not permit criminal trials with juries of fewer than six members.⁴²¹ Citing a number of empirical studies that, among other things, "suggest[ed] that progressively smaller juries are less likely to foster effective group deliberation"⁴²² and "raise[d] doubts about the accuracy of the results achieved by smaller and smaller panels,"⁴²³ the Justice thought that "the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members."⁴²⁴ Although he did not "pretend to discern a clear line" between the six-person jury approved in *Williams* and the five-person jury at issue in *Ballew*, he concluded that "[b]ecause of the fundamental importance of the jury trial to the American system of criminal justice, any further reduction that promotes inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance."⁴²⁵

3. *Discrimination in Selecting Juries*

As is evident from the Justice's opinion in *Ballew*, he was strongly committed to fair jury-selection procedures. That commitment was apparent from his early years on the Court, and he took an active role in trying to put an end to discriminatory jury-selection practices. He agreed with the majority's holding in *Taylor v. Louisiana*⁴²⁶ that "the systematic exclusion of women from jury panels"⁴²⁷ violates "an essential component of the Sixth Amendment right to a jury trial"⁴²⁸—namely, the right to have the jury selected from "a representative cross section of the community."⁴²⁹ The Justice likewise joined the majority opinion in *Duren v. Missouri*,⁴³⁰ which struck down a state

420. *Ballew*, 435 U.S. at 230 (citing *Williams*, 399 U.S. at 100).

421. *See id.* at 239.

422. *Id.* at 232.

423. *Id.* at 234.

424. *Id.* at 239. It was the Justice's detailed discussion of these empirical studies that reportedly led all but Justice Stevens to refuse to sign his opinion, even though each of the nine Justices had agreed with the result in conference. *See Jenkins, supra* note 9, at 20.

425. *Ballew*, 435 U.S. at 239. Not surprisingly, the Justice joined the majority opinion issued the following year in *Burch v. Louisiana*, 441 U.S. 130, 139 (1979), which held that the Sixth Amendment does not permit convictions by nonunanimous six-person juries.

426. 419 U.S. 522 (1975).

427. *Id.* at 522.

428. *Id.* at 528.

429. *Id.*

430. 439 U.S. 357 (1979).

statute that exempted women from jury service on request as violative of the Sixth Amendment's fair cross-section requirement.⁴³¹

The Justice wrote for the majority in two important cases dealing with discrimination in the selection of grand jurors. In the first case, *Castaneda v. Partida*,⁴³² the Justice's majority opinion concluded that the defendant had established a prima facie case of intentional discrimination, and the state had failed to rebut that inference of discrimination, where a "key man" system that relied on jury commissioners to select prospective grand jurors had resulted in gross underrepresentation of the county's Latino community.⁴³³

In the second case, *Rose v. Mitchell*,⁴³⁴ the Court held that defendants may allege discrimination in the selection of grand jury members when challenging their convictions on habeas, even though they were found guilty beyond a reasonable doubt by a jury that satisfied the fair cross-section requirement.⁴³⁵ Reasoning that "discrimination on the basis of race in the selection of members of a grand jury . . . strikes at the fundamental values of our judicial system and our society as a whole," the Justice wrote that "we . . . cannot deny that . . . racial and other forms of discrimination"—though "[p]erhaps . . . more subtle than before"—are "no less real or pernicious" and "still remain a fact of life, in the administration of justice as in our society as a whole."⁴³⁶

Likewise, the Justice played an active role in the Supreme Court cases discussing the constitutional implications of a litigant's exercise of peremptory challenges in a racially discriminatory manner. He joined the majority in *Batson v. Kentucky*,⁴³⁷ which struck down a prosecutor's use of peremptory challenges to exclude African-Americans from criminal juries as violative of the Equal Protection Clause.⁴³⁸ He also agreed when the Court voted to give white defendants standing to raise *Batson* challenges⁴³⁹ and to extend *Batson* to prohibit private litigants in civil cases from using their peremptory

431. *See id.* at 370.

432. 430 U.S. 482 (1977).

433. *See id.* at 500-01. Although 79.1% of the people living in the county were Mexican-Americans, only 39% of those who had been summoned for grand jury service over an 11-year period were Mexican-American. *See id.* at 495.

434. 443 U.S. 545 (1979).

435. *See id.* at 564-65.

436. *Id.* at 556. The Justice thought, however, that the defendants had failed to make out a prima facie case of racial discrimination. *See id.* at 564-74.

437. 476 U.S. 79 (1986).

438. *See id.* at 89.

439. *See Powers v. Ohio*, 499 U.S. 400, 416 (1991).

challenges in a racially discriminatory fashion.⁴⁴⁰ Furthermore, he sided with the dissenters in each of the two instances where the majority rejected similar challenges: first, in *Holland v. Illinois*,⁴⁴¹ when the majority held that a prosecutor's use of peremptory challenges to exclude African-Americans did not violate a white defendant's Sixth Amendment right to an impartial jury;⁴⁴² and then in *Hernandez v. New York*,⁴⁴³ where the majority found no *Batson* violation in peremptorily excluding Latino jurors because "they might have difficulty in accepting the translator's rendition of Spanish-language testimony."⁴⁴⁴

In addition, the Justice wrote the majority opinion in two cases that extended the ruling in *Batson*. In the first case, *Georgia v. McCollum*,⁴⁴⁵ the Court ruled that the Equal Protection Clause prohibits criminal defendants from exercising their peremptory challenges in a racially discriminatory fashion.⁴⁴⁶ Rejecting the defendants' argument that their use of peremptory challenges did not constitute state action,⁴⁴⁷ the Justice considered it "an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race."⁴⁴⁸

In the second case, *J.E.B. v. Alabama ex rel. T.B.*,⁴⁴⁹ the Justice wrote for the majority in extending *Batson* to forbid the use of peremptory challenges to exclude women from juries.⁴⁵⁰ Refusing to draw a distinction between race and gender, and finding it unnecessary to determine "whether women or racial minorities have suffered more at the hands of discriminatory state actors during the decades of our nation's history,"⁴⁵¹ the Justice reasoned that "gender, like race, is

440. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991).

441. 493 U.S. 474 (1990).

442. See *id.* at 490 (Marshall, J., dissenting).

443. 500 U.S. 352 (1991).

444. *Id.* at 361. The Justice dissented, "essentially" agreeing with Justice Stevens, see *id.* at 375 (Blackmun, J., dissenting), to reject the prosecutor's purported justification because it "would inevitably result in a disproportionate disqualification of Spanish-speaking venirepersons," it "could easily have been accommodated by less drastic means," and, if "valid and substantiated by the record, it would have supported a challenge for cause." *Id.* at 379 (Steven, J., dissenting).

445. 505 U.S. 42 (1992).

446. See *id.* at 59.

447. See *id.* at 50-55.

448. *Id.* at 57.

449. 511 U.S. 127 (1994).

450. See *id.* at 146.

451. *Id.* at 136.

an unconstitutional proxy for juror competence and impartiality.”⁴⁵² The Justice’s opinion closes with a stirring indictment of discrimination in the jury-selection process:

Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law—that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy. . . . When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.⁴⁵³

Although the Justice wrote these words during his last Term, he was an equally strong advocate of fair jury-selection processes throughout his entire tenure on the Court. At times he was reluctant to extend the right to jury trial to different settings, but in those cases where a jury was required, he was committed to ensuring that it was constituted in a way that would ensure a fair trial and a fair representation of the community.

III. Conclusion

Any discussion of the record of a jurist who served with such distinction for so many years on a court whose docket contains so many criminal cases must necessarily be somewhat selective. Thus, I have failed to mention some of the criminal cases in which Justice Blackmun wrote for the majority⁴⁵⁴ not because I view them as unimpor-

452. *Id.* at 129.

453. *Id.* at 145-46.

454. *See, e.g.,* *Austin v. United States*, 509 U.S. 602, 621 (1993) (concluding that the Eighth Amendment’s prohibition of excessive fines applies to drug-related forfeitures of property under federal statute); *Crosby v. United States*, 506 U.S. 255, 262 (1993) (holding that federal rules do not permit trying a defendant who is absent at the beginning of trial in absentia); *United States v. Halper*, 490 U.S. 435, 452 (1989) (finding violation of Double Jeopardy Clause when government imposes civil penalty bearing no rational relation to its loss on someone who has already been convicted), *overruled by* *Hudson v. United States*, 522 U.S. 93 (1997); *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (upholding federal sentencing guidelines in the face of separation-of-powers and delegation-doctrine challenges); *Kentucky v. Stincer*, 482 U.S. 730, 747 (1987) (permitting exclusion of criminal defendant from hearing to determine competency of two child witnesses); *United States v. Bagley*, 473 U.S. 667, 678 (1985) (holding that prosecutor’s failure to turn over exculpatory evidence to the defendant constitutes reversible error only if it is reasonably probable that the outcome of the trial would have been different had the evidence been disclosed); *Connecticut v. Johnson*, 460 U.S. 73, 87-88 (1983) (plurality opinion) (concluding that jury instruction creating conclusive presumption that one intends the natural and necessary consequences of one’s actions can never constitute harmless error); *United States v. DiFrancesco*, 449 U.S. 117, 143 (1980) (rejecting double jeopardy challenge to federal stat-

tant, but instead because I have chosen to focus on two issues in assessing the Justice's mark on criminal law and procedure: first, the Justice's judicial personality, as reflected in the opinions he wrote in criminal cases, and second, the role he played in the Burger and Rehnquist Courts' well-publicized narrowing of the rights accorded criminal defendants. With respect to the first issue, it is quite apparent that the Justice showed the same humility, careful attention to the facts of each case, and concern for the real-world impact of the Court's decisions in his criminal jurisprudence as he did in other areas. Although the second issue is more debatable, it is clear that the Justice did not remain as loyal to a "law and order" platform as President Nixon and the legal pundits might have predicted. At the same time, he did not align himself as closely with Justices Brennan and Marshall in criminal cases as he did in other areas. But whether it was the Justice whose views changed or the Court that changed around him, his votes and writings in criminal cases—most notably those involving habeas petitions and the right to a fairly selected jury—were often surprisingly protective of the rights of criminal defendants for a Justice nominated at a time when crime control was of such paramount concern.

ute that permitted prosecution to appeal sentences imposed on dangerous special offenders); *Ohio v. Roberts*, 448 U.S. 56, 77 (1980) (finding that admission of unavailable witness' preliminary hearing testimony at trial did not violate the Confrontation Clause); *United States v. Feola*, 420 U.S. 671, 696 (1975) (interpreting federal statutes that prohibit assaulting federal officials and conspiring to assault federal officials not to require proof that the defendant was aware of the victim's identity); *Jackson v. Indiana*, 406 U.S. 715, 729-30 (1972) (striking down state statute that authorized the commitment of defendants found incompetent to stand trial without requiring the same procedures and standards applied in other cases of involuntary commitment).