

# WHERE, BUT FOR THE GRACE OF GOD, GOES HE? THE SEARCH FOR EMPATHY IN THE CRIMINAL JURISPRUDENCE OF CLARENCE THOMAS

*Eric L. Muller\**

## I. "BUT FOR THE GRACE OF GOD THERE GO I"

It was a riveting moment. Asked by a senator "why you want this job,"<sup>1</sup> then-Judge Clarence Thomas volunteered this to the Senate Judiciary Committee and the nation:

You know, on my current court, I have occasion to look out the window that faces C Street, and there are converted buses that bring in the criminal defendants to our criminal justice system, busload after busload. And you look out, and you say to yourself, and I say to myself almost every day, But for the grace of God there go I.<sup>2</sup>

As an Associate Justice of the United States Supreme Court, Judge Thomas said he would have the chance to "bring something different to the Court, . . . [to] walk in the shoes of the people who are affected by what the Court does."<sup>3</sup>

These striking images were part of a larger strategy to link the nominee with the tradition of Thurgood Marshall, the man he had been nominated to replace. Marshall had spent a career walking in the shoes of the least fortunate, both as an attorney and as a judge. President Bush's decision to replace Marshall

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\* Associate Professor of Law, University of North Carolina School of Law. A.B., Brown University; J.D., Yale University. I thank Sara Sun Beale, Leslie Branden-Muller, Robert Burt, Michael Gerhardt, Joel Selig, Gary Simson, and Maureen Ryan for reading and commenting on this essay. I wrote this article while on the faculty of the University of Wyoming College of Law; that school's Hopper Research Fund provided generous financial support.

1. Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary, United States Senate, 102d Cong., 1st Sess., pt. 1, at 259 (1991) ["Confirmation Hearings, Part 1"].

2. *Id.* at 260.

3. *Id.*

with Thomas, whose career and commitments seemed so at odds with Marshall's, had triggered concern from some quarters, protest from others.<sup>4</sup> Judge Thomas's advisers in the Bush Administration tried to blunt the opposition by encouraging Thomas to adopt what they called the "Pin Point Strategy"—a strategy of emphasizing his impoverished, racism-tinged upbringing in the tiny town of Pin Point, Georgia, rather than his professional accomplishments and commitments.<sup>5</sup>

The Pin Point Strategy was ultimately a strategy of persuading Thomas's inquisitors of his powers of empathy. In his opening statement to the Senate Judiciary Committee, Thomas recalled a time just after graduating from Yale Law School, when he had no money and no place to live. Margaret Bush Wilson, who, Thomas reminded the committee, "would later become chairperson of the NAACP,"<sup>6</sup> offered Thomas lodging at her house. As he was leaving at the end of the summer, he asked her what he owed her. She said, "Just along the way help someone who is in your position."<sup>7</sup> This was what Thomas said he would bring to the Court: a commitment to helping those least able to help themselves. "[W]hen all is said and done," Thomas concluded, "the little guy, the average person, the people of Pin Point, the real people of America will be affected not only by what we as judges do, but by the way we do our jobs."<sup>8</sup>

Thomas went no further in identifying the "little guy," the person "in his position," with whom he professed a special capacity for empathy. He did not explicitly describe the "little guy" as black, or as poor, or as the victim of race- or class-based discrimination. But sensitivity to race and class bias were plainly behind his words. From the first moment of his testimony, he emphasized to the Committee that his life in Pin Point had been one of grinding poverty<sup>9</sup> and of vicious race discrimination.<sup>10</sup> He

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4. See Timothy M. Phelps and Helen Winternitz, *Capitol Games* 61-79 (Hyperion, 1992) (describing early opposition to Thomas nomination); Manning Marable, *Clarence Thomas and the Crisis of Black Political Culture*, in Toni Morrison, ed., *Race-ing Justice, En-gendering Power* 61, 70 (Pantheon Books, 1992) (describing opposition by black organizations and leaders).

5. See Richard L. Berke, *In Thomas Hearing Room, Spirits of Hearing Past*, N.Y. Times, A25 (Sept. 11, 1991); Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas*, 60 Geo. Wash. L. Rev. 969, 971, 980-81 (1992).

6. See Confirmation Hearings, Part 1 at 109 (cited in note 1).

7. *Id.*

8. *Id.* at 110.

9. *Id.* at 108 ("We lived in one room in a tenement. We shared a kitchen with other tenants and we had a common bathroom in the backyard which was unworkable and unusable. It was hard, but it was all we had and all there was. Our mother only

was also careful to place himself openly on the path of the civil rights movement many had accused him of abandoning. He first praised Thurgood Marshall as "one of the great architects of the legal battles to open doors that seemed so hopelessly and permanently sealed and to knock down barriers that seemed so insurmountable to those of us in the Pin Point, [Georgia's] of the world."<sup>11</sup> Next came kind words for "[t]he civil rights movement, Rev. Martin Luther King and the SCLC, Roy Wilkins and the NAACP, Whitney Young and the Urban League, Fannie Lou Haemer, Rosa Parks and Dorothy Hite": "But for them," Thomas said, "there would have been no road to travel."<sup>12</sup> Finally, when the Judiciary Committee took up Anita Hill's allegations that he had sexually harassed her, Thomas immediately labelled the accusations as racist,<sup>13</sup> and based on white America's most vicious stereotypes of black men.<sup>14</sup> While he did not come out and say it in so many words, his message was clear: the "little guy" who would be his special concern was the "little guy" who had also been the special concern of Justice Marshall.<sup>15</sup>

Once Judge Thomas became Justice Thomas, this compassionate image tarnished quickly. Empathy was difficult to discern in his dissent in *Hudson v. McMillan*,<sup>16</sup> one of his very early opinions.<sup>17</sup> Prison guards handcuffed and shackled Hudson and

earned \$20 every 2 weeks as a maid, not enough to take care of us. So she arranged for us to live with our grandparents later, in 1955. Imagine, if you will, two little boys with all their belongings in two grocery bags.")

10. *Id.* at 108-09 ("I attended segregated parochial schools. . . . [M]y grandparents grew up and lived their lives in an era of blatant segregation and overt discrimination. Their sense of fairness was molded in a crucible of unfairness. I watched as my grandfather was called 'boy.' I watched as my grandmother suffered the indignity of being denied the use of a bathroom.")

11. *Id.* at 109 (alteration in original).

12. *Id.*

13. Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary, United States Senate, 102d Cong., 1st Sess., pt. 4, at 157 (1991) ("And from my standpoint, as a black American, as far as I am concerned, it is a high-tech lynching for uppity-blacks . . .") ["Confirmation Hearings, Part 4"].

14. *Id.* at 202 ("Senator, the language throughout the history of this country, and certainly throughout my life, language about the sexual prowess of black men, language about the sex organs of black men, and the sizes, et cetera, that kind of language has been used about black men as long as I have been on the face of this Earth. These are charges that play into racist, bigoted stereotypes and these are the kinds of charges that are impossible to wash off.")

15. See Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 *Wm. & Mary L. Rev.* 1201, 1201 (1992) ("Thomas presented himself as . . . enriched by his experiences of poverty and racial discrimination and therefore attentive to the concerns of disadvantaged people.")

16. 503 U.S. 1 (1992).

17. The *Hudson* dissent was Justice Thomas's fifth opinion.

pummelled and kicked him in the mouth, eyes, chest, stomach, and back, while their supervisor warned them "not to have too much fun."<sup>18</sup> Hudson emerged from the thrashing with minor bruises, a swollen face, mouth, and lip, loosened teeth, and a cracked dental plate.<sup>19</sup> The Supreme Court held by a vote of seven to two that this use of excessive force amounted to cruel and unusual punishment under the Eighth Amendment, even if his injuries were not serious.<sup>20</sup> In his dissenting opinion, Justice Thomas criticized the majority for forgetting that "prison was not a more congenial place in the early years of the Republic than it is today."<sup>21</sup> Justice Thomas saw the majority's "expansion of the Cruel and Unusual Punishments Clause beyond all bounds of history and precedent" as "yet another manifestation of the pervasive view that the Federal Constitution must address all ills in our society."<sup>22</sup> "The Eighth Amendment is not, and should not be turned into, a National Code of Prison Regulation."<sup>23</sup>

This opinion was the first in a pattern that Justice Thomas has followed to the present day. In his first six terms on the Court, he has been among the Court's most consistent opponents of the claims of criminal defendants<sup>24</sup>—so consistent, in fact, that some have wondered whether he was being sincere at his confirmation hearings when he professed such empathy for the incarcerated inmates he saw streaming from prison buses.<sup>25</sup>

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18. *Hudson*, 503 U.S. at 4.

19. *Id.*

20. *Id.* at 5-10.

21. *Id.* at 19 (Thomas, J., dissenting).

22. *Id.* at 28 (Thomas, J., dissenting).

23. *Id.* (Thomas, J., dissenting).

24. See note 71 and accompanying text.

25. See Gerhardt, 60 *Geo. Wash. L. Rev.* at 983-84 (cited in note 5); Joyce A. Baugh and Christopher E. Smith, *Doubting Thomas: Confirmation Veracity Meets Performance Reality*, 19 *Seattle U. L. Rev.* 455, 474-80, 495-96 (1996); Anton Bell, *Clarence Thomas: Evasive or Deceptive*, 21 *N.C. Central L.J.* 194, 205, 210-12, 213-14 (1995).

There is, of course, a separate literature on the question of whether Justice Thomas was truthful at his second set of confirmation hearings, when he denied Professor Anita Hill's allegations of sexual harassment. See Jane Mayer and Jill Abramson, *Strange Justice* (Houghton Mifflin, 1994); David Brock, *The Real Anita Hill* (The Free Press, 1993); Michael Thelwell, *False, Fleeting, Perjured Clarence: Yale's Brightest and Blackest Go to Washington*, in Morrison, *Race-ing Justice, En-gendering Power* at 86, 115-21 (cited in note 4); Curtis D. Lebaron, *Looking for Verbal Deception in Clarence Thomas's Testimony*, in Sandra L. Ragan, et al., eds., *The Lynching of Language* 113 (U. of Illinois Press, 1996); Gary J. Simson, *Thomas's Supreme Unfitness—A Letter to the Senate on Advise and Consent*, 78 *Cornell L. Rev.* 619, 633-36 (1993). One well-known commentator has even argued that Thomas committed perjury at the second set of hearings, and could be impeached for it. See Mark V. Tushnet, *Clarence Thomas: The Constitutional Problems*, 63 *Geo. Wash. L. Rev.* 466, 474-77 (1995) (book review). In this essay, I nei-

How could a Justice “walk[ing] in their shoes”<sup>26</sup> rule against them so frequently?

In this Essay I suggest a tentative answer to that question. I do so by contrasting two votes of Justice Thomas’s, one a dissenting vote for the criminal defendant in *United States v. Williams*,<sup>27</sup> a case from 1992, and the other a vote with the majority for the government in *United States v. Armstrong*,<sup>28</sup> a 1996 case. My answer is tentative because I can base it only on guesswork. Justice Thomas did not write an opinion in either of these two cases; he merely joined opinions written by others. This essay is an attempt—concededly a speculative one—to understand what may have prompted Justice Thomas to cast his highly unusual vote in *Williams*.

The two cases bore important similarities. In both, criminal defendants asked the Court to invoke its supervisory power over the administration of federal criminal justice<sup>29</sup> to require prosecutors to honor higher standards of fairness and openness than the Constitution and the rules of criminal procedure required. In *Williams*, the defendant contended that the prosecutor should be required to present exculpatory evidence to a grand jury considering an indictment. In *Armstrong*, the defendant sought discovery to support his claim that the prosecutor was illegally singling out black suspects for prosecution under draconian federal crack cocaine laws. The Court rejected both defendants’ claims.

If Justice Thomas were to find his empathic voice in one of these cases, *Armstrong* would have been the more obvious choice. Of the two, *Armstrong* was the case about the “little guy;” it engaged far more directly than *Williams* the sorts of compassionate concerns that Justice Thomas voiced so eloquently at his confirmation hearings. Yet it was in *Williams*, not in *Armstrong*, where Justice Thomas broke from his pro-government pattern, parted company with his ideological allies on the Court,<sup>30</sup> and voted with the criminal defendant.

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ther consider nor question Thomas’s truthfulness in responding to Hill’s allegations of sexual harassment.

26. Confirmation Hearings, Part 1 at 260 (cited in note 1).

27. 504 U.S. 36 (1992).

28. 517 U.S. 456 (1996).

29. See notes 43-44 and accompanying text.

30. See note 73; see also Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 Yale L.J. 93, 134 n.253 (1996) (describing pattern of agreement among Chief Justice Rehnquist, Justice Scalia, and Justice Thomas in criminal cases).

There is at least faint promise in Justice Thomas's vote in *Williams*; it shows him fulfilling his commitment to Margaret Bush Wilson that "along the way [he would] help someone who is in [his] position."<sup>31</sup> But when compared with the vote in *Armstrong*, his *Williams* vote also shows that he has yet to broaden the range of his empathy much beyond his own unique circumstances. The defendant in *Williams* was publicly accused of serious wrongdoing by an entity that had before it only the accuser's side of the story. For Justice Thomas, the target of Anita Hill's leaked accusations of sexual harassment, this must have been a painfully familiar scenario—familiar enough to dislodge him from his usual pro-government stance and trigger a rare vote for a defendant in a case that divided the Court. *Williams* therefore suggests that Justice Thomas can indeed "walk in the shoes"<sup>32</sup> of the criminal defendant. The trouble is that the shoes must be remarkably like his own.

## II. WILLIAMS AND ARMSTRONG

### A. WILLIAMS

*United States v. Williams* was a prosecution of an Oklahoma businessman for bank fraud. The government's theory of the case was that Williams had intentionally submitted misleading information to banks in order to obtain loans and loan renewals.<sup>33</sup> Specifically, the government had evidence that Williams had depicted nearly worthless assets as "current assets" worth millions of dollars on several financial statements, and on others had listed interest income as coming from outside sources when in fact it was coming from him.<sup>34</sup> On the strength of this evidence, a federal grand jury had indicted him for willfully defrauding a bank.<sup>35</sup>

What the government failed to do in the grand jury was to present rather powerful evidence that tended to show that Williams had not misled the banks willfully. The government's theory of the case was that Williams had intentionally distorted his depiction of his assets in his dealings with the banks. But this

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31. Confirmation Hearings, Part 1 at 109 (cited in note 1).

32. Confirmation Hearings, Part 1 at 260 (cited in note 1).

33. *United States v. Williams*, 899 F.2d 898, 899 (10th Cir. 1990), rev'd, 504 U.S. 36 (1992).

34. *Id.*

35. *Id.*

distortion was not something he shared just with the banks. Rather, he characterized his assets the same way everywhere. On all of his tax returns and financial statements, and even on his own internal ledgers, he accounted for the assets and interest income in exactly the same way as he had in his submissions to the banks.<sup>36</sup> Williams claimed that this evidence was substantially exculpatory because it suggested an innocent explanation for the way in which he had presented his assets to the banks. Williams asked the district court to dismiss the indictment for the government's failure to present this material exculpatory evidence to the grand jury.<sup>37</sup> The district court granted the motion,<sup>38</sup> and the Tenth Circuit affirmed.<sup>39</sup>

The question for the Supreme Court was whether a federal prosecutor must present material exculpatory evidence to a grand jury considering an indictment. Williams did not contend that the Constitution, federal statutes, or the Federal Rules of Criminal Procedure imposed such a duty;<sup>40</sup> the grand jury has historically heard just the government's side of the case,<sup>41</sup> and Williams did not contend otherwise. Instead, Williams contended that the district court had the power to impose the duty under its supervisory power over the administration of criminal justice.<sup>42</sup> The supervisory power is an authority of uncertain origin;<sup>43</sup> federal courts use this power to require greater integrity,

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36. Id. at 900.

37. Id. at 899-900.

38. Id. at 900.

39. Id. at 900-04.

40. *United States v. Williams*, 504 U.S. 36, 45 (1992).

41. See 4 William Blackstone, *Commentaries* 300 (the grand jury was "only to hear evidence on behalf of the prosecution: for the finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined[.]"); Francis Wharton, *A Treatise on Criminal Pleading and Practice* § 360, at 248 (Kay and Brother, 8th ed. 1880) ("The question before the grand jury being whether a bill is to be found, the general rule is that they should hear no other evidence but that adduced by the prosecution.").

An excellent history of the grand jury is Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 Am. Crim. L. Rev. 701 (1972). See also Andrew D. Leipold, *Why Grand Juries Do Not (And Cannot) Protect the Accused*, 80 Cornell L. Rev. 260, 280-88 (1995) (briefly summarizing the checkered history of the grand jury as a shield for the accused).

42. *Williams*, 504 U.S. at 45.

43. In her article *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433 (1984), Professor Sara Sun Beale argues powerfully that the supervisory power doctrine "has blurred the constitutional and statutory limitations on the authority of the federal courts and has fostered the erroneous view that the federal courts exercise general supervision over federal prosecutors and investigators." Id. at 1434. She contends that while the constitutional, statutory, and common law powers of the federal courts do support certain applications of the supervisory power, no source of authority supports the

accuracy, or fairness in federal criminal proceedings than the Constitution, statutes, and rules of criminal procedure demand.<sup>44</sup>

The Court rejected Williams's claim. Writing for a bare five-Justice majority, Justice Scalia observed that the Court's supervisory power is at its weakest in the context of the grand jury. The grand jury, Scalia explained, is virtually a freestanding institution; it operates almost wholly separately from the courts.<sup>45</sup> Thus, "any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings."<sup>46</sup> This very limited power, Scalia concluded, could not possibly support Williams's requested disclosure rule. To require the prosecutor to divulge exculpatory evidence to the grand jury would "alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body."<sup>47</sup> The supervisory power—whatever its foundation and whatever its reaches—would not support such a dramatic reconstruction of the grand jury.

Justice Stevens dissented, joined by Justice Thomas and Justices O'Connor and Blackmun. His dissent was perhaps the most scathing broadside against prosecutorial misconduct to appear in the United States Reports since 1935, when Justice Sutherland wrote that "while [a federal prosecutor] may strike hard blows, he is not at liberty to strike foul ones."<sup>48</sup> In that case, Justice Sutherland catalogued a number of foul blows that the prosecutor had struck,<sup>49</sup> and reversed the conviction to punish the prosecutor for the misconduct.<sup>50</sup> In his dissent in *Williams*, Justice Stevens picked up where Justice Sutherland had left off. Comparing prosecutorial misconduct to the many-headed "Hydra slain by Hercules,"<sup>51</sup> Justice Stevens added a number of other types of misconduct to Justice Sutherland's list—including misconduct in the grand jury.<sup>52</sup> He refused to join the majority in "hold[ing] that countless forms of prosecutorial misconduct must

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broad power of supervision that the federal courts now claim for themselves. *Id.* at 1464-1520.

44. *Id.* at 1448-64 (describing the scope of the supervisory power exercised by both the Supreme Court and the lower federal courts).

45. *Williams*, 504 U.S. at 47-50.

46. *Id.* at 50.

47. *Id.* at 51.

48. *Berger v. United States*, 295 U.S. 78, 88 (1935).

49. *Id.* at 84-88.

50. *Id.* at 89.

51. *Williams*, 504 U.S. at 60 (1992) (Stevens, J., dissenting).

52. *Id.* at 61-62 (Stevens, J., dissenting).



be tolerated—no matter how prejudicial they may be, or how seriously they may distort the legitimate function of the grand jury—simply because they are not proscribed” by rule.<sup>53</sup> Instead, Justice Stevens insisted that “[u]nrestrained prosecutorial misconduct in grand jury proceedings is inconsistent with the administration of justice in the federal courts.”<sup>54</sup> Those courts, he concluded, should be permitted to use their supervisory power to dismiss indictments tainted by such misconduct.

### B. *ARMSTRONG*

*United States v. Armstrong* also presented the Court with an opportunity to use its supervisory power to require more thorough disclosure from federal prosecutors than the Constitution, statutes, and rules required. Just as in *Williams*, however, the Court refused to do so. In *Armstrong*, several black men charged with federal crack cocaine offenses in the Central District of California contended that they were the victims of impermissibly selective prosecution. They claimed that the United States Attorney had selected them for prosecution in federal court, where penalties for crack cocaine distribution are especially harsh,<sup>55</sup> because of their race. They moved in the district court for discovery to substantiate that claim. In support of their motion they proffered an affidavit demonstrating that every one of the twenty-four crack cocaine cases that the Federal Public Defender for the Central District of California handled during 1991 had been against a black defendant.<sup>56</sup> They also submitted affidavits suggesting that equal numbers of blacks and non-blacks use and deal in crack, and that non-black defendants are regularly prosecuted in state court for crack offenses.<sup>57</sup>

The district court granted the motion.<sup>58</sup> It ordered the United States Attorney to provide the defendants with a list of cases from the preceding three years in which the government had charged both crack cocaine and firearms offenses, to identify the race of the defendants in those cases, and to account for why those defendants were prosecuted in the federal system.<sup>59</sup> When the government refused to comply with the discovery order, the

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53. *Id.* at 68 (Stevens, J., dissenting).

54. *Id.* at 69 (Stevens, J., dissenting).

55. See text accompanying note 110.

56. *United States v. Armstrong*, 517 U.S. 456, 459 (1996).

57. *Id.* at 460.

58. *Id.* at 461.

59. *Id.*; see also *United States v. Armstrong*, 48 F.3d 1508, 1511 (9th Cir. 1995) (en banc), rev'd, 517 U.S. 456 (1996).

district court dismissed the indictments.<sup>60</sup> An *en banc* panel of the Ninth Circuit affirmed the district court's dismissal order.<sup>61</sup> The Supreme Court, however, reversed. It held that the discovery provisions of the Federal Rules of Criminal Procedure did not permit any discovery to support a selective prosecution claim,<sup>62</sup> and that the equal protection component of the Fifth Amendment's Due Process Clause did not require such discovery in the absence of compelling proof that the government had failed to prosecute non-black crack dealers.<sup>63</sup>

Justice Stevens again dissented, this time alone.<sup>64</sup> He did not take issue with the majority's conclusion that neither the rules nor the Constitution authorized the district court's discovery order.<sup>65</sup> He relied instead on the district court's supervisory power,<sup>66</sup> as he had in *Williams*. According to Justice Stevens, the district judge perceived a "conspicuous racial pattern of cases before her"<sup>67</sup>—a pattern emanating from the office of the United States Attorney for the Central District of California, "a member and an officer of the bar of that District Court."<sup>68</sup> Justice Stevens concluded that "[i]f a District Judge has reason to suspect that [the United States Attorney], or a member of her staff, has singled out particular defendants for prosecution on the basis of their race, it is surely appropriate for the Judge to determine whether there is a factual basis for such a concern."<sup>69</sup> Faced with the "disturbing"<sup>70</sup> evidence of racially disparate prosecution that the defendants had presented, the district court, in Stevens's view, properly exercised its supervisory power over the administration of criminal justice by ordering discovery that might help explain the disparity.

### III. THE ODDITY OF JUSTICE THOMAS'S VOTES IN *WILLIAMS AND ARMSTRONG*

By any measure, Justice Thomas's dissenting vote in *Williams* was extraordinary. First, and most simply, Justice Tho-

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60. See *Armstrong*, 517 U.S. at 463.

61. See *Armstrong*, 48 F.3d at 1510.

62. See *Armstrong*, 517 U.S. at 463.

63. *Id.* at 464-70.

64. *Id.* at 476-83 (Stevens, J., dissenting).

65. *Id.* at 477 (Stevens, J., dissenting).

66. *Id.* (Stevens, J., dissenting).

67. *Id.* at 483 (Stevens, J., dissenting).

68. *Id.* at 477 (Stevens, J., dissenting).

69. *Id.* (Stevens, J., dissenting).

70. *Id.* at 483 (Stevens, J., dissenting).

mas's *Williams* vote was a pro-defendant vote. For each of his first five Terms, Justice Thomas was among the Court's most reliable opponents of the defendant's position in criminal cases.<sup>71</sup> Second, his *Williams* vote was a pro-defendant vote in a case that was not decided by a unanimous Court. About two-thirds of Justice Thomas's pro-defendant votes have come in cases where he joined all eight of his colleagues in reaching an uncontroversial pro-defendant position.<sup>72</sup> Third, by voting for the defendant in *Williams*, Justice Thomas visibly parted company with Justice Scalia, the author of the majority opinion. In each of his first five Terms on the Court, Justice Thomas agreed with Justice Scalia at least eighty-three percent of the time, and, in one term, as much as eighty-eight percent of the time.<sup>73</sup> Finally, Justice Thomas's split with Justice Scalia in *Williams* was especially notable because Justice Thomas, rather than Justice Scalia, was the one to vote for the defendant. Of the eleven criminal cases in which Justice Scalia and Justice Thomas parted company during

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71. See Richard G. Wilkins, et al., *Supreme Court Voting Behavior: 1995 Term*, 24 *Hastings Const. L.Q.* 1, 14-16 (1996) [hereinafter Wilkins, et al., *1995 Voting Behavior*] (in 1995 Term, Thomas voted for government in 66.7% of state criminal cases and 71.4% of federal criminal cases); Richard G. Wilkins, et al., *Supreme Court Voting Behavior: 1994 Term*, 23 *Hastings Const. L.Q.* 1, 13, 15 (1995) [hereinafter Wilkins, et al., *1994 Voting Behavior*] (in 1994 Term, Thomas voted for government in 91.67% of state criminal cases and 61.54% of federal criminal cases); Richard G. Wilkins, et al., *Supreme Court Voting Behavior: 1993 Term*, 22 *Hastings Const. L.Q.* 269, 286, 290 (1994) [hereinafter Wilkins, et al., *1993 Voting Behavior*] (in 1993 Term, Thomas voted for government in 87.5% of state criminal cases and 83.3% of federal criminal cases); Richard G. Wilkins, et al., *Supreme Court Voting Behavior: 1992 Term*, 8 *B.Y.U. J. Pub. L.* 229, 244, 246 (1994) [hereinafter Wilkins, et al., *1992 Voting Behavior*] (in 1992 Term, Thomas voted for government in 85.71% of state criminal cases and 81.25% of federal criminal cases); Richard G. Wilkins, et al., *Supreme Court Voting Behavior: 1991 Term*, 7 *B.Y.U. J. Pub. L.* 1, 13-14 (1992) [hereinafter Wilkins, et al., *1991 Voting Behavior*] (in 1991 Term, Thomas voted for government in 75% of state criminal cases and 54.55% of federal criminal cases).

72. Justice Thomas cast thirty-two pro-defendant votes in his first five Terms. Of these, nineteen were in cases that the Court decided unanimously. See Wilkins, et al., *1995 Voting Behavior* at 15-16 (cited in note 71); Wilkins, et al., *1994 Voting Behavior* at 13, 15 (cited in note 71); Wilkins, et al., *1993 Voting Behavior* at 286, 290 (cited in note 71); Wilkins, et al., *1992 Voting Behavior* at 244, 246 (cited in note 71); Wilkins, et al., *1991 Voting Behavior* at 13-14 (cited in note 71).

73. See *The Supreme Court, 1995 Term*, 110 *Harv. L. Rev.* 1, 368 (1996) (in 1995 Term, Thomas and Scalia agreed in 87.2% of cases); *The Supreme Court, 1994 Term*, 109 *Harv. L. Rev.* 10, 341 (1995) (in 1994 Term, Thomas and Scalia agreed in 88.2% of cases); *The Supreme Court, 1993 Term*, 108 *Harv. L. Rev.* 23, 373 (1994) (in 1993 Term, Thomas and Scalia agreed in 82.8% of cases); *The Supreme Court, 1992 Term*, 107 *Harv. L. Rev.* 27, 373 (1993) (in 1992 Term, Thomas and Scalia agreed in 86% of cases); *The Supreme Court, 1991 Term*, 106 *Harv. L. Rev.* 19, 379 (1992) (in 1991 Term, Thomas and Scalia agreed in 85.9% of cases). See also Muller, 106 *Yale L. J.* at 134 n.253 (cited in note 30) (noting similarity of Scalia's and Thomas's voting patterns, especially in criminal cases).

Justice Thomas's first five Terms,<sup>74</sup> Justice Thomas has cast an unambiguously pro-defendant vote in only two of them.<sup>75</sup>

Perhaps, then, *Williams* was a case that gave Justice Thomas the chance to make good on his commitment to "bring something different to the Court, . . . [to] walk in the shoes of the people who are affected by what the Court does."<sup>76</sup> But if he was going to pick a single criminal case in which to empathize with the plight of a criminal defendant, *Williams* was an odd choice. At his hearings, Thomas testified that his special concern on the Court would be "the little guy, the average person, the people of Pin Point,"<sup>77</sup> as well as the "busload after busload"<sup>78</sup> of shackled prisoners he saw arriving at the federal courthouse each day. John H. Williams was anything but a "little guy," and it is fair to guess that his circumstances bore scant resemblance to the conditions of poverty and disadvantage of Thomas's own Pin Point years, or of the inmates on the prison bus. Williams was a Tulsa businessman and investor whose specialty was venture capital.<sup>79</sup> In the transactions that resulted in his indictment, his investments in several companies had generated notes receivable, pay-

74. The eleven cases are *Ornelas v. United States*, 517 U.S. 690 (1996); *Tome v. United States*, 513 U.S. 150 (1995); *Garlotte v. Fordice*, 515 U.S. 39 (1995); *Thompson v. Keohane*, 516 U.S. 99 (1995); *Powell v. Nevada*, 511 U.S. 79 (1994); *Ratzlaf v. United States*, 510 U.S. 135 (1994); *Smith v. United States*, 508 U.S. 223 (1993); *United States v. Dixon*, 509 U.S. 688 (1993); *Richmond v. Lewis*, 506 U.S. 40 (1992); *Dawson v. Delaware*, 503 U.S. 159 (1992); and *Jacobson v. United States*, 503 U.S. 540 (1992).

75. In addition to *Williams*, Justice Thomas split with Justice Scalia and cast an unambiguously pro-defendant vote only in *Jacobson v. United States*, 503 U.S. 540 (1992). For a discussion of that case, see note 141.

Justice Thomas also parted company with Justice Scalia and cast a pro-defendant vote in *Richmond v. Lewis*, 506 U.S. 40 (1992), but his support for the defendant's position was at best tepid. In his *Richmond* concurrence, he explicitly stated that he believed the authority on which the majority's opinion partly rested had been wrongly decided. See *id.* at 52-53 (Thomas, J., concurring) (agreeing with the majority only because *Stringer v. Black*, 503 U.S. 222 (1992), which Thomas thought was wrongly decided, was still good law).

Additionally, in *Ornelas v. United States*, 517 U.S. 690 (1996), Justice Thomas parted with Justice Scalia and voted for the defendant, but the question in the case was one of appellate practice; the beneficiary of Justice Thomas's legal position in the case could just as easily have been the government had the case come to the Court in a different posture. *Ornelas* established that an appellate court must apply *de novo* review to a trial court's finding on the question of whether law enforcement agents had reasonable suspicion to stop a suspect and probable cause to search. *Id.* at 1663. The application of this standard benefited the defendant in *Ornelas* because he was the one who had lost in the trial court, but the government would benefit equally from *de novo* review in a case where it was the appellant.

76. Confirmation Hearings, Part 1 at 260 (cited in note 1).

77. *Id.* at 110.

78. *Id.* at 260.

79. See *United States v. Williams*, 899 F.2d 898, 899 (10th Cir. 1990) (Williams's investments were in new ventures with negative net worth), *rev'd*, 504 U.S. 36 (1992).

able to him, of between five and six million dollars.<sup>80</sup> His business dealings and holdings were complex enough to require the services of an independent accounting firm.<sup>81</sup> The judicial opinions disclose nothing more about Williams. But even this handful of facts reveals that he probably was not "the average person" to whom Justice Thomas alluded before the Senate Judiciary Committee. Of the 706 residents of Pin Point, Georgia,<sup>82</sup> it seems safe to assume that relatively few are venture capitalists.

*Williams* was also an odd moment for Justice Thomas to find his empathic voice because the defendant's legal position in that case was rather tenuous. It is now settled that the federal courts enjoy a power to supervise some aspects of the administration of criminal justice in the federal courts. But supervision of the grand jury is at the very fringes of that power, arguably beyond them.<sup>83</sup> The Court has rejected a number of requests to use its supervisory power to alter the grand jury's methods of taking evidence, always out of concern for protecting the independence of the grand jury.<sup>84</sup> In those rare instances when the Court has used its supervisory power in the setting of the grand jury, it has confined the power to enforcing codified rules;<sup>85</sup> it has resisted using the power to devise new rules of grand jury practice.<sup>86</sup> *Williams* was an invitation to use the supervisory power to create a brand new rule of grand jury practice; it is not too surprising that the Court declined the invitation.

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80. *Williams*, 899 F.2d at 899.

81. *Id.* at 902.

82. Telephone Interview with John Powell, Planner, Chatham County-Savannah Metropolitan Planning Commission, Savannah, Georgia (May 28, 1997). Mr. Powell based his estimate of 706 residents on information he gathered from the 1990 Census. He also stated that Pin Point is an old residential neighborhood that has changed little for many years, and that its population has remained about the same for decades.

83. See Beale, 84 Colum. L. Rev. at 1491-93 (cited in note 43).

84. See *United States v. Calandra*, 414 U.S. 338, 349 (1974) (declining to apply the Fourth Amendment's exclusionary rule to grand jury proceedings because of "the potential injury to the historic role and functions of the grand jury"); *Costello v. United States*, 350 U.S. 359, 364 (1956) (declining to enforce the hearsay rule in grand jury proceedings because that "would run counter to the whole history of the grand jury institution.").

85. See *United States v. Mechanik*, 475 U.S. 66 (1986) (finding that error involving Rule 6(d) did not warrant reversal of convictions); *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988) (affirming Tenth Circuit opinion that district court did not have authority to dismiss indictment even though there was a violation of Rule 6(d)).

86. See generally Beale, 84 Colum. L. Rev. at 1492-93, 1522 (cited in note 43) (arguing that the Court lacks authority to use the supervisory power to impose substantive rules of grand jury practice beyond those in Fed. R. Crim. P. 6); *United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir. 1977) (exercise of supervisory power over grand jury might violate separation of powers).

Indeed, the government's position in *Williams* should have been especially appealing to Justice Thomas because it was deeply conservative—conservative in the sense of tending to preserve existing institutions. This sort of conservatism is at the core of the judicial philosophy that Justice Thomas and Justice Scalia share.<sup>87</sup> For example, Justice Thomas joined Justice Scalia in decrying the Court's prohibition of gender-based peremptory challenges in part because the change "imperil[ed] a practice that has been considered an essential part of fair jury trial since the dawn of the common law."<sup>88</sup> To make inroads on the free exercise of the peremptory challenge was to "vandaliz[e] our people's traditions."<sup>89</sup> Of course, the grand jury has been hearing just the government's side of the case for at least as long as lawyers have been using peremptory challenges.<sup>90</sup> To require the prosecutor to present the defendant's side of the case to the grand jury would seem a comparable act of vandalism.<sup>91</sup> Yet Justice Thomas voted for such a change—a perplexing vote for a traditionalist.

Justice Thomas's pro-government vote in *Armstrong* was statistically far less remarkable; it was just another in the largely unbroken line of pro-government votes in non-unanimous decisions.<sup>92</sup> But *Armstrong* presented a much more logical place than *Williams* for him to walk in the shoes of "the little guy" to whom he referred in his confirmation hearing testimony. First, and most obviously, *Armstrong* was truly a case about the little

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87. On the traditionalism in Justice Scalia's jurisprudence, see Katharine T. Bartlett, *Tradition, Change, and the Idea of Progress in Feminist Legal Thought*, 1995 Wis. L. Rev. 303, 315-19; Cass R. Sunstein, *The Partial Constitution* 130-31 (Harvard U. Press, 1993). Justice Thomas has also been labelled a traditionalist because of his apparent use of the Burkean model as well as some aspects of formalism, see R. Randall Kelso, *The Natural Law Tradition on the Modern Supreme Court: Not Burke, but the Enlightenment Tradition Represented by Locke, Madison, and Marshall*, 26 St. Mary's L.J. 1051, 1087 n.113 (1995); this comes as no surprise in light of his high rate of agreement with Justice Scalia. See note 73.

88. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 163 (1994) (Scalia, J., dissenting).

89. *Id.* (Scalia, J., dissenting).

90. See note 41 (summarizing grand jury history); see also Carl Stephenson and Frederick G. Marcham, eds. and trans., *1 Sources of English Constitutional History* 77 (Harpers & Brothers, 1937) (predecessor to grand jury, hearing only accusations of wrongdoing, mentioned in the Assize of Clarendon of 1166).

91. Justice Scalia took great pains in *Williams* to point out how the defendant's proposed rule would violate the centuries-old common law of the grand jury. See *United States v. Williams*, 504 U.S. 36, 51-55 (1992). It was largely for this reason that Justice Scalia concluded that the supervisory power "would not permit judicial reshaping of the grand jury institution[.]" *Id.* at 50; see also *id.* at 52 ("Imposing upon the prosecutor a legal obligation to present exculpatory evidence in his possession would be incompatible" with the ancient history of the grand jury).

92. See note 71.

guy, the “busload after busload” of criminal defendants streaming into the federal courthouse. In 1992, Justice Thomas’s first full year on the Court, forty-three percent of the defendants prosecuted in United States District Courts were drug defendants.<sup>93</sup> Almost three-quarters of those defendants were detained for some or all of the time prior to trial, and therefore transported by bus for court appearances.<sup>94</sup> And about one-half of all drug defendants were charged with cocaine offenses.<sup>95</sup> So when Justice Thomas spoke of the “busload after busload” of criminal defendants that he saw arriving at the federal courthouse every morning, he was talking about people just like the defendants in *Armstrong*.<sup>96</sup>

Second, *Armstrong* presented a somewhat less controversial opportunity than *Williams* for invoking the Court’s supervisory powers.<sup>97</sup> While the defendant’s claim in *Williams* pushed the Court to the very edges of its supervisory power,<sup>98</sup> and maybe beyond them, the *Armstrong* defendants sought to engage the power a bit closer to its core. As Justice Scalia noted in *Williams*, federal courts have long used the supervisory power to “control their own procedures” (as opposed to the procedures of an independent body such as the grand jury), to “improve the truth-finding process of the trial,” and “to prevent parties from reaping benefit or incurring harm from violations of substantive or procedural rules . . . governing matters apart from the trial itself[.]”<sup>99</sup> The *Armstrong* defendants were seeking a comparably ordinary use of the supervisory power: they were asking for pre-trial discovery. Both the Supreme Court and the lower federal courts have used the supervisory power to craft rules of discovery and disclosure.<sup>100</sup> Justice Thomas is plainly sensitive to

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93. See Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 1995* at 467 tbl.5.18 (1996) (of 66,502 defendants prosecuted in federal court in 1992, 28,479 were prosecuted for drug offenses).

94. *Id.* at 460 tbl.5.11 (74.9 % of all defendants charged with drug offenses were detained for some period of time before trial).

95. *Id.* at 440 tbl.4.39 (in 1995, 49.5% of all drug arrests by the federal Drug Enforcement Administration were for cocaine offenses).

96. By this I do not mean African-Americans; at his confirmation hearings, Justice Thomas did not lay claim to an explicitly race-based empathy in criminal cases, and I am not suggesting that he *ought* to reserve a special degree of compassion for black defendants. Instead, Justice Thomas claimed a special capacity to empathize with disadvantaged people generally and with disadvantaged criminal defendants specifically. See Minow, 33 *Wm. & Mary L. Rev.* at 1201 (cited in note 15). The *Armstrong* defendants were far more representative of that group than was John Williams.

97. But cf. note 102.

98. See notes 45-47 and accompanying text.

99. *United States v. Williams*, 504 U.S. 36, 45-46 (1992) (emphasis deleted).

100. See *United States v. Nobles*, 422 U.S. 225, 230-32 (1975) (trial court may use su-

prosecutorial misconduct—the “Hydra slain by Hercules”<sup>101</sup>—and has no doctrinal qualms about deploying the supervisory power to punish and deter such misconduct. His *Williams* vote makes this clear. *Armstrong* presented a more commonplace scenario than *Williams* for invoking that power,<sup>102</sup> yet in *Armstrong*, Justice Thomas refused to do so.<sup>103</sup>

Finally, the merits of the *Armstrong* defendants’ claim seemed to engage the concerns and views that Justice Thomas shared at his confirmation hearings far more directly than a case such as *Williams*. Senator John Danforth introduced Clarence Thomas to the Senate Judiciary Committee with the nominee’s own words from a speech he had given: “What is more amoral,”

pervisory power to compel defendant to disclose defense investigator’s report to prosecutor for use in cross-examining investigator); *Jencks v. United States*, 353 U.S. 657, 668-69 (1957) (district court may use supervisory power to compel government to produce previously recorded statements of its witnesses for defendant’s use in cross-examination); *Roviaro v. United States*, 353 U.S. 53, 60-62 (1957) (district court may use supervisory power to require government to disclose identity of confidential informant who may be material witness); *United States v. Roybal*, 566 F.2d 1109, 1110-11 (9th Cir. 1977) (district court may dismiss indictment under supervisory powers to sanction the government for failing to comply with discovery order directing it to turn over information not required to be produced under the Constitution, statute, or rule); *United States v. Fischel*, 686 F.2d 1082, 1091-92 (5th Cir. 1982) (district court may use supervisory power to compel government to disclose to defendant the address of an informant whose identity is known). Cf. *Rosales-Lopez v. United States*, 451 U.S. 182, 190 (1981) (plurality opinion) (Supreme Court may, in the exercise of its supervisory powers, require in certain circumstances that a federal trial court ask voir dire questions of prospective jurors designed to discover racial prejudice).

101. *Williams*, 504 U.S. at 60 (1992) (Stevens, J., dissenting).

102. I do not mean to suggest that Justice Stevens’s proposed use of the supervisory power in his *Armstrong* dissent was entirely uncontroversial. Part of what made the *Williams* majority balk at using the supervisory power was a concern about separation of powers: The grand jury is an institution that is separate and largely independent from the court. See *Williams*, 504 U.S. at 47-50; see generally Beale, 84 Colum. L. Rev. (cited in note 43) (arguing that exercise of supervisory power to control prosecutors and grand juries violates separation of powers). *Armstrong* presented a similar difficulty. Due to separation-of-powers concerns, the courts have long hesitated to scrutinize a prosecutor’s exercise of discretion over whom and what to prosecute. See *Wayte v. United States*, 470 U.S. 598, 607-08 (1985).

Still, in using the supervisory power, the Court has never considered itself as circumscribed by the independence of the prosecutor as by the independence of the grand jury. While it has balked at altering grand jury practice, it has not hesitated to impose a great variety of obligations—including disclosure obligations—on the prosecutor. See note 100; see generally Beale, 84 Colum. L. Rev. at 1444-55 (cited in note 43). Furthermore, even if Justice Stevens’s proposed use of the supervisory power in *Armstrong* was every bit as troubling as the rejected use in *Williams*, the fact remains that Justice Thomas endorsed Justice Stevens’s proposed use in *Williams*, yet refused to do so in *Armstrong*.

103. In this Justice Thomas was not completely alone; Justice O’Connor also voted against deploying the supervisory power in *Armstrong* after voting to deploy it in *Williams*. Her vote in *Williams*, however, was neither as striking nor as seemingly revealing as Justice Thomas’s, because a pro-defendant vote in a criminal case is nowhere near as rare an event for her as it has been for Thomas.



Thomas had once asked, "than the vicious cancer of racial discrimination[,] a cancer that "exists in the factories and the plants and the corporate board rooms[?]"<sup>104</sup> Senator Danforth dared the Committee to "[n]ame one other member of the Supreme Court that talks like that."<sup>105</sup> And Justice Thomas, in his own way, continued the dare a few moments later in his own opening statement: he focussed unabashedly on the poverty of his own childhood in Pin Point, and on the race discrimination that he and his family had endured.<sup>106</sup> These experiences, and the values he had learned in coping with them and in watching others do the same, were what he had "always carried in [his] heart,"<sup>107</sup> and would continue to carry with him in his work on the Court.<sup>108</sup>

At bottom, the *Armstrong* defendants' assertion was that just as race discrimination exists "in the factories and the plants and the corporate board rooms," it could also make its way into a prosecutor's office. They claimed that the United States Attorney for the Central District of California appeared to be selecting only black defendants for prosecution under the harsh federal crack cocaine laws. They sought discovery to learn whether this was true.

While the Court dismissed as unconvincing the evidence of disparate treatment that the *Armstrong* defendants tendered,<sup>109</sup> their claim was by no means frivolous. Indeed, their claim arrived in the Supreme Court amid a swirl of very public allegations that the federal sentencing laws for crack cocaine were having an overwhelmingly disparate impact on blacks. And these were not just allegations from civil rights organizations and lobbying groups; these were allegations from the United States Sentencing Commission, the federal agency responsible for the design of the federal sentencing system.

In its Omnibus Crime Prevention Act of 1986, Congress adopted a one hundred-to-one quantity ratio for determining crack cocaine sentences: a defendant convicted of a crack cocaine trafficking offense would be subject to the same mandatory minimum sentence as a defendant convicted of trafficking in

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104. Confirmation Hearings, Part 1 at 97 (cited in note 1).

105. Id.

106. See notes 9-10.

107. Confirmation Hearings, Part 1 at 110 (cited in note 1).

108. Id.

109. See *United States v. Armstrong*, 517 U.S. 456, 470 (1996).

one hundred times as much powder cocaine.<sup>110</sup> The federal sentencing guidelines extended this one hundred-to-one ratio above the statutory mandatory minimums to *all* crack cocaine sentences.<sup>111</sup> It quickly became apparent that these laws had a dramatically disparate impact on blacks: blacks were the overwhelming targets of crack prosecutions, and received longer prison sentences than whites, both for crack offenses and for drug offenses overall.<sup>112</sup> Congress responded to complaints about this disparate impact by directing the Sentencing Commission to submit a report to it addressing problems in cocaine sentencing.<sup>113</sup>

The Commission's response was blunt: it reached the "inescapable conclusion that Blacks comprise the largest percentage of those affected by the penalties associated with crack cocaine"—a "matter of great concern."<sup>114</sup> The Commission noted that whereas blacks accounted for 88.3 percent of federal crack distribution convictions in 1993, and whites only 4.1 percent, 52 percent of reported crack users were white, and 38 percent black.<sup>115</sup> While the Commission found no evidence that Congress enacted the crack sentencing program with a racially discriminatory purpose, the Commission found the program's racially disparate impact severe enough to warrant change. Specifically, the Commission found that the disparate impact made it "reasonable to require the existence of sufficient policy bases to support such a sentencing scheme regardless of racial impact."<sup>116</sup> In other words, the Commission concluded that if the sentencing laws were to include a penalty differential with a severely disparate impact on a racial group, it would have to support that differential with clear, and clearly race-neutral, poli-

110. See 21 U.S.C. §§ 841(b)(1)(B), (A) (1994).

111. See United States Sentencing Commission, *Federal Sentencing Guidelines Manual* § 201.1(c) (1996).

112. See Douglas C. McDonald and Kenneth E. Carlson, *Sentencing in the Federal Courts: Does Race Matter?*, U.S. Dep't of Justice Bureau of Justice Statistics 83-114 (Dec. 1993); William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 *Ariz. L. Rev.* 1233, 1266-71 (1996).

113. See Pub. L. No. 103-322, § 280006, 108 Stat. 1796, 2097 (1994) ("Not later than December 31, 1994, the United States Sentencing Commission shall submit a report to Congress on issues relating to sentences applicable to offenses involving the possession or distribution of all forms of cocaine. The report shall address the differences in penalty levels that apply to different forms of cocaine and include any recommendations that the Commission may have for retention or modification of such differences in penalty levels.").

114. *U.S. Sentencing Commission: Executive Summary of Special Report on Cocaine and Federal Sentencing Policy*, 56 *Crim. L. Rep.* (BNA) 2159, 2168 (March 1, 1995).

115. *Id.* at 2167-2168.

116. *Id.* at 2168.

cies.<sup>117</sup> The Commission unanimously recommended to Congress in the middle of 1995—just a few months before the Supreme Court granted certiorari in *Armstrong*<sup>118</sup>—that it scrap the one hundred-to-one ratio, replace it with a lesser ratio, and make a number of changes to the sentencing guidelines.<sup>119</sup>

Against this background, the *Armstrong* defendants argued to the Supreme Court that a federal prosecutor's office appeared to be singling out blacks for crack prosecution at the federal level. This too was a claim with at least some support. In addition to the largely anecdotal evidence the defendants themselves tendered, a study of crack charging practices in Los Angeles revealed that blacks were significantly likelier than whites to be prosecuted at the federal level.<sup>120</sup> What the defendants sought to discover in their case was strikingly similar to what the United States Sentencing Commission had found to be dispositive for the crack sentencing system as a whole: whether a set of clear and race-neutral policies would explain and justify the racially disparate pattern. As Randall Kennedy has recently argued, the Court should have allowed the trial judge the freedom to order such discovery, since the defendants were "seeking [it] based upon preliminary indications that should have been seen as raising a substantial question regarding the racial evenhandedness of a U.S. Attorney's Office."<sup>121</sup>

Yet the Court—including Justice Thomas—overturned the district court's order requiring the prosecutor to supply the de-

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117. See *Amendments to the Federal Sentencing Guidelines, Policy Statements, and Official Commentary*, 57 Crim. L. Rep. (BNA) 2095, 2097 (May 10, 1995); *U.S. Sentencing Commission: Materials Concerning Sentencing for Crack Cocaine Offenses*, 57 Crim. L. Rep. (BNA) 2127, 2131 (May 31, 1995) (majority statement) ("When a sentencing policy has a severe disproportionate impact on a minority group, it is important that sufficient bases exist for the policy. The law should not draw distinctions that single out some offenders for harsher punishment unless these distinctions are clearly related to a legitimate policy goal.")

118. See *United States v. Armstrong*, 516 U.S. 942 (1995).

119. See *U.S. Sentencing Commission: Material Concerning Sentencing for Crack Cocaine Offenses*, 57 Crim. L. Rep. (BNA) 2127 (May 31, 1995). The Commission was not unanimous on the appropriate ratio to replace one hundred-to-one. The majority favored a one-to-one ratio between crack and powder cocaine quantities. *Id.* at 2129-30. Four dissenters opposed the one-to-one ratio. *Id.* at 2131-34.

In October of 1995, just days before the Supreme Court voted to hear the *Armstrong* case, the Congress voted to retain the one hundred-to-one ratio. See *Federal Sentencing Guidelines, Amendment, Disapproval*, Pub. L. No. 104-38, 109 Stat. 334 (1995).

120. See Richard Berk and Alec Campbell, *Preliminary Data on Race and Crack Charging Practices in Los Angeles*, 6 Fed. Sent. Rep., 36, 36-38 (July-Aug. 1993). But see Joseph E. Finley, *Crack Charging in Los Angeles: Do Statistics Tell the Whole Truth about "Selective Prosecution?"*, 6 Fed. Sent. Rep., 113, 113-15 (Sept.-Oct. 1993) (criticizing the Berk and Campbell study).

121. Randall Kennedy, *Race, Crime, and the Law* 358 (Pantheon Books, 1997).

fendants with the information necessary to such an inquiry. Justice Stevens, in dissent, explicitly linked the discovery issue in *Armstrong* to the simmering public controversy about federal crack sentencing: "The extraordinary severity of the imposed penalties and the troubling racial patterns of enforcement," he wrote, "give rise to a special concern about the fairness of charging practices for crack offenses"<sup>122</sup>—a concern that the district judge was right to explore through the supervisory power. Justice Thomas, who learned from his own experience that race discrimination is a "cancer . . . [that] exists in the factories and the plants and the corporate board rooms,"<sup>123</sup> might have been expected to agree.

He did not. Instead he voted as he almost always does in criminal cases: for the government, and with Justice Scalia. So *Williams* remains the oddity, the outlier, the brief moment of empathy in what has so far been a career of little compassion for the criminal defendant. Why? What was it that allowed Justice Thomas to rediscover, if only for an instant, the compassionate voice of his confirmation hearings?

#### IV. JOHN WILLIAMS AS CLARENCE THOMAS?

The answer, I think, lies in the confirmation hearings themselves—not the first set, in which the Judiciary Committee explored Justice Thomas's views and judicial philosophy, but the second set, in which the Committee publicly investigated Anita Hill's charge that Thomas had sexually harassed her. This second set of hearings became necessary after the media learned that Hill had given a statement to both the Committee and the Federal Bureau of Investigation charging Thomas with sexual harassment while he was her supervisor at the Equal Employment Opportunity Commission.<sup>124</sup> Thomas had initially been confronted with Hill's allegations confidentially, at his home, and he had denied them categorically.<sup>125</sup> For about a week, Hill's allegations remained confidential. But sometime during that week, Hill's statement was leaked to the press. On October 6, 1991, National Public Radio and a New York newspaper broke the story.<sup>126</sup> The Judiciary Committee was forced to schedule

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122. *United States v. Armstrong*, 517 U.S. 456, 1494 (1996) (Stevens, J., dissenting).

123. Confirmation Hearings, Part 1 at 97 (cited in note 1).

124. See Paul Simon, *Advice & Consent* 103-08 (National Press Books, 1992); Mayer and Abramson, *Strange Justice* at 241-57 (cited in note 25).

125. See Mayer and Abramson, *Strange Justice* at 246-47 (cited in note 25).

126. *Id.* at 254-61.

additional public hearings into Hill's allegations.<sup>127</sup> Those did not take place until October 11. So for five days the nation heard from Anita Hill and debated her allegations without hearing from Thomas. The nation did not hear his side of the story until he again took his seat as a witness before the Committee.<sup>128</sup>

Thomas denied Hill's allegations, as was expected.<sup>129</sup> But he also pressed further, taking the offensive and attacking the entire confirmation process. "My family and I have been done a grave and irreparable injustice," he said, referring not just to the "selective[]" and "distorted" leak[ing] of Hill's allegations against him, but also to the larger "ordeal" he had been through:

[C]harges of drug abuse, antisemitism, wife-beating, drug use by family members . . . . Reporters sneaking into my garage to examine books I read. Reporters and interest groups swarming over divorce papers, looking for dirt. Unnamed people starting preposterous and damaging rumors. Calls all over the country specifically requesting dirt.<sup>130</sup>

"This is not American," Thomas charged. "This is Kafkaesque. It has got to stop."<sup>131</sup> Calling up a powerful racial image, Thomas told the Committee that he would "not provide the rope for [his] own lynching or for further humiliation."<sup>132</sup> "Confirm me if you want, don't confirm me if you are so led," he demanded, "but let this process end."<sup>133</sup>

Later that day, after Anita Hill had spent hours making and defending her allegations to the Committee and the nation, Thomas appeared again. And this time he was even more explicit about what was wrong with the proceedings—proceedings he said "should never occur in America."<sup>134</sup> The problem was that the process was completely one-sided and utterly public:

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127. See Simon, *Advice & Consent* at 107-08 (cited in note 124).

128. Justice Thomas made no public appearances during the five days between the publication of Anita Hill's charges and the second round of the Senate Judiciary Committee's hearings. His only comment came in the form of a terse, five-sentence affidavit denying the charges, which Senator John Danforth distributed on his behalf. See Phelps and Winternitz, *Capitol Games* at 268 (cited in note 4).

129. See Confirmation Hearings, Part 4 at 5-8 (cited in note 13).

130. *Id.* at 8.

131. *Id.*

132. *Id.* at 10; see also *id.* at 157 (hearings examining Hill's charges were "a high-tech lynching for uppity-blacks. . .").

133. *Id.* at 9.

134. *Id.* at 157.

This is a case in which this sleaze, this dirt was searched for by staffers of members of this committee, was then leaked to the media, and this committee and this body validated it and displayed it in prime time over our entire Nation. . . . This is not a closed room. . . . This is not an opportunity to talk about difficult matters privately or in a closed environment. This is a circus.<sup>135</sup>

The target of his anger was the Committee itself.<sup>136</sup> Having heard only Hill's side of the story, the Committee had placed its imprimatur on Hill's devastating accusations<sup>137</sup> by making them public and calling on him publicly to respond and defend his actions and his reputation. And this he saw as an impossible task: "There is nothing this committee, this body or this country can do to give me my good name back, nothing."<sup>138</sup>

Seen in the light of his experience before the Senate Judiciary Committee, Justice Thomas's vote in *Williams* may become more understandable. In the *Williams* dissent that Justice Thomas joined, Justice Stevens pointed out that the price of prosecutorial misconduct before the grand jury is especially high because a grand jury has a unique capacity to injure a defendant, especially an innocent one: "For while in theory a trial provides the defendant with a full opportunity to contest and disprove the charges against him, in practice, the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo."<sup>139</sup> The trial, in other words, is just the defendant's appeal from the prosecutor's press release. For Justice Thomas, that may have been the insight that resolved the entire case. John Williams had suffered the devastation of a public accusation of serious wrongdoing by a deliberative body that had heard one side of the story—his accuser's—but had not heard his. This was Justice Thomas's own confirmation saga played out in the setting of a criminal trial. It is hard to believe that Justice Thomas could have missed the striking similarity between Williams's plight and his own. And it is easy to see Justice Thomas's vote as a vote against a kind of

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135. *Id.*

136. *Id.* at 185 (charging that the Committee's handling of the hearings was "ruining the country").

137. When I say that Hill's allegations were "devastating," I do not mean to suggest that they were *false*. As noted earlier, see note 25, I do not address the truthfulness of her allegations, or of Justice Thomas's denial, in this Essay. I mean only to suggest that from Thomas's perspective, the allegations were surely devastating.

138. Confirmation Hearings, Part 4 at 9 (cited in note 13).

139. *United States v. Williams*, 504 U.S. 36, 63 (1992) (Stevens, J., dissenting) (quoting *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979)).

unfairness that Thomas himself knew all too well from his own recent and bitter experience.

## V. AN UNDEVELOPED EMPATHY

As a young man, Justice Thomas promised a benefactor that he would help someone in his position.<sup>140</sup> I believe that he found that someone in John Williams.<sup>141</sup> And if so, he should not be criticized for that. Thomas learned from painful personal experience how catastrophic a public charge of wrongdoing can be, and when the time came, he allowed that heightened sensitivity to inform his understanding of what might have otherwise seemed a dry question of grand jury practice. This is what we expect of Supreme Court justices:<sup>142</sup> We hope that their deliberations, votes, and opinions will reflect not just what they have

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140. See text accompanying note 7.

141. It is tempting to say that Justice Thomas may also have met such a someone in Keith Jacobson, the defendant in *Jacobson v. United States*, 503 U.S. 540 (1992), the only other case in which he split with Justice Scalia to cast an unambiguously pro-defendant vote. See note 75. In that case Justice Thomas joined a bare five-justice majority in holding that the government had entrapped Jacobson into buying child pornography by trying over and over again for years to entice him into a purchase without any evidence that he had ever bought child pornography before. The majority opinion, which Justice Thomas joined, expressed disgust with the government's investigative methods in the case: "When the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene." *Jacobson*, 503 U.S. at 553-54.

It would not seem outlandish to speculate that Justice Thomas's own experiences with "[r]eporters sneaking into my garage to examine books I read[,] [r]eporters and interest groups swarming over divorce papers, looking for dirt," Confirmation Hearings, Part 4 at 8 (cited in note 13), may have sensitized him to overly prying and intrusive law enforcement techniques. In fact, Jane Mayer and Jill Abramson have reported that a former clerk of Justice Thomas's chalked up his vote in *Jacobson* to his confirmation experiences: "[A]fter all Thomas had gone through, the justice was especially sensitive to the overreaching powers of prosecutors." Mayer and Abramson, *Strange Justice* at 358 (cited in note 25). However, the breadth of the clerk's assertion about Thomas's sensitivity to prosecutorial misconduct seems questionable; Justice Thomas has not seen fit to condemn other instances of alleged prosecutorial misconduct. See *Kyles v. Whitley*, 514 U.S. 419, 456 (1995) (5-4 decision) (Justice Thomas dissenting from Court's conclusion that prosecutor in state trial suppressed material exculpatory evidence).

142. Indeed, we tend to worry a bit about justices who seem to lack broad experience: such was the case when the allegedly hermitic David Souter was nominated to the Court. See Ruth Marcus and Michael Isikoff, *Souter Declines Comment on Abortion, Nominee Moves to Dispel Image as Judge Lacking Compassion*, Wash. Post, A1 (Sept. 14, 1990); Keith C. Epstein, *Souter Appears to Shun Current Events*, Plain Dealer (Cleveland), 1990 WL 4622518 (Sept. 9, 1990); Roy L. Brooks, *Weigh Souter's Human Resume*, Houston Chron., 15 (Aug. 2, 1990); Ray Gibson & Mitchell Locin, *Souter's Career Largely Untouched by Broad Issues*, Chi. Trib., 1 (July 29, 1990); Carl M. Cannon, *Souter, Others Singled Out for Never Having Tied Knot*, Orange County Reg. (Cal.), 1 (July 29, 1990).

learned from briefs and books, but also what they have seen in their personal and professional lives.<sup>143</sup>

However, Justice Thomas's *Williams* vote stands virtually alone.<sup>144</sup> The nominee who claimed a unique ability to imagine himself as the inmate on the prison bus has rarely displayed that imagination in his first years on the Court. He proved himself unable to step into the shoes of the defendants in *Armstrong*, just as he was unable to step into the shoes of the pummeled inmate in *Hudson v. McMillan* or the defendants in so many of the other criminal cases he has been called upon to review. A wide gap has opened between his words as a nominee and his votes as a justice. The gap is hard to miss, and commentators have not missed it. They have asked whether Thomas may have been insincere when he told the Judiciary Committee that he looked upon the busloads of inmates arriving at court each morning and said to himself "But for the grace of God there go I."<sup>145</sup>

His vote in *Williams* suggests that he was not entirely insincere. But compared to his vote in *Armstrong* and dozens of other criminal cases, it also suggests that he has not yet broadened his empathy to anything like the full range he promised at his confirmation hearings. To say "[b]ut for the grace of God there go I," as Justice Thomas himself explained, is to recognize that "you have the same fate, *or could have*, as those individuals"<sup>146</sup>—the inmates on the bus. To empathize with someone who actually shares your fate is not especially difficult; this was the empathy that I believe motivated Justice Thomas in *Williams*. On the other hand, to empathize with a criminal defendant whose fate *could have been* yours under different conditions is a good deal harder.<sup>147</sup> The effort carries with it enormous danger: feelings of kinship with someone accused of serious crime can trigger revulsion and fear just as easily as compassion and support.<sup>148</sup> If Justice Thomas does feel a unique kinship with

143. See Minow, 33 Wm. & Mary L. Rev. at 1203 (cited in note 15) ("We . . . want [those who sit in judgment] to have the ability to empathize with others, to know what is fair *in this world*, not in a laboratory. And we want . . . judges to have, and to remember, experiences that enable their empathy and evaluative judgments.")

144. See notes 71-75 and accompanying text.

145. See note 25.

146. Confirmation Hearings, Part 1 at 260 (cited in note 1) (emphasis added).

147. Charles Black identified this difficulty, and preached the necessity of overcoming it, in his moving essay, "The Humane Imagination in the Great Society." See Charles L. Black, Jr., *The Humane Imagination in the Great Society*, in *The Humane Imagination* 1, 4-7 (Oxbow Press, 1986).

148. Indeed, revulsion and fear might be the likelier response. It is not pleasant to dwell on the fact that you and a dangerous criminal have something—perhaps even the



the inmates on the prison bus, it is by no means clear that that feeling of kinship will produce actions we would recognize as compassionate. The road on which Justice Thomas set himself at his confirmation hearings is a decidedly rocky one.

It is also, however, a road that others have travelled before him. Other Justices who came to the Court marked as outsiders by race or religion have struggled to define the appropriate scope of their empathy for, in Justice Thomas's words, "the little guy." Justice Felix Frankfurter claimed for himself a unique capacity for empathy with the outsider because of his membership in (in his words) "the most vilified and persecuted minority in history."<sup>149</sup> But Frankfurter never developed a jurisprudence of empathy for the outsider. He became instead, in the words of one commentator, "an overeager apologist for the existing order."<sup>150</sup> On the other hand, Justices Louis Brandeis and Thurgood Marshall more eagerly embraced their status as outsiders in developing judicial philosophies that were more indulgent of the claims of the little guy and more suspicious of the existing order—even though their views often placed them in lonely dissent.<sup>151</sup> If Justice Thomas chooses the path he identified at his

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raw potential for dangerous crime—in common. People develop defenses to protect themselves from the anxiety of such insights, and one common mechanism of defense is what psychoanalytic theory calls "reaction formation." See Lawrence Pervin, *Personality: Theory Assessment, and Research* 231-33 (Wiley, 1970). In reaction formation, a person "defends against expression of an unacceptable impulse by only recognizing and expressing its opposite," often in a rigid and exaggerated way. *Id.* at 232. In this way, a person trying in good faith to place himself in the shoes of a criminal might well be led to express great hostility toward him, rather than compassion. One prominent psychiatrist has argued that this dynamic of defense is at the heart of the criminal sanction generally. See Karl A. Menninger, *The Crime of Punishment* 153 (The Viking Press, Inc., 1968) ("We need criminals to identify ourselves with, to secretly envy, and to stoutly punish. Criminals represent our alter egos—our 'bad' selves—rejected and projected. They do for us the forbidden, illegal things we wish to do and, like scapegoats of old, they bear the burdens of our displaced guilt and punishment[.]"); cf. Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 *Stan. L. Rev.* 1149, 1235-36 (1990) (suggesting that retributive urge may stem from recognition that criminals are "no different from us.").

149. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).

150. Robert A. Burt, *Two Jewish Justices* 60 (U. of California Press, 1988); see also H.N. Hirsch, *The Enigma of Felix Frankfurter* 171-76, 191-200 (Basic Books, Inc., 1981) (describing singlemindedness of Frankfurter's commitment to judicial deference to the majoritarian branches, even in areas of individual liberties).

151. See Burt, *Two Jewish Justices* at 6-36 (cited in note 150) (describing Brandeis's "self-conscious marginality" and "passionate espousal of the outsider's perspective" throughout his career); William J. Daniels, *Justice Thurgood Marshall: The Race for Equal Justice*, in Charles M. Lamb and Stephen C. Halpern, eds., *The Burger Court* 212, 235 (U. of Illinois Press, 1991) (describing Marshall's commitment to the disadvantaged and his position as "foremost a dissenter" on the Burger Court). For a perceptive discussion of Brandeis's autonomy and detachment from the established order—and even at

hearings, he will not walk alone; he will have the rich and varied experiences of those who went before him as a guide.

There is little in Justice Thomas's record in criminal cases to date that shows him attempting the decidedly tricky task of allowing his professed kinship with the inmate on the prison bus to influence his outlook. With each passing term, his commitment to the task seems more questionable.<sup>152</sup> But it is a task he set out for himself in a very public way. If he has the will, his youth and his life tenure leave him plenty of time to attempt it.

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times from the perspective of his own clients—see Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 Yale L.J. 1445 (1996).

152. See, e.g., *O'Dell v. Netherland*, 117 S. Ct. 1969, 1971 (1997) (Thomas, J.) (rule requiring jury instruction to capital sentencing jury that life sentence means life without parole where state argues defendant's future dangerousness was new rule and therefore unavailable to capital defendant on habeas corpus); *Kansas v. Hendricks*, 117 S. Ct. 2072, 2076 (1997) (Thomas, J.) (statute permitting indefinite commitment upon expiration of criminal sentence of those with abnormality or disorder making them likely to engage in predatory acts of sexual violence does not violate the Constitution).