

The Roles of Justice John Paul Stevens in Criminal Justice Cases

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I. INTRODUCTION

Justice John Paul Stevens began his thirty-first year on the U.S. Supreme Court in 2005 at a moment when the highest court faced imminent changes.¹ The death of Chief Justice William Rehnquist ended a remarkably stable, eleven-year “natural court”² period in which the same nine Justices worked together in deciding cases.³ As a result, the Court began its 2005 Term under the leadership of a new Chief Justice, John Roberts, an appointee of President George W. Bush.⁴ In addition, Justice Sandra Day O’Connor announced her retirement⁵ and departed from the Court when Justice Samuel Alito was confirmed to replace her.⁶ Justice Stevens himself is the Court’s oldest Justice.⁷ After celebrating his 85th birthday in April 2005, no one can avoid recognizing that John Stevens is also in the twilight of his career, and that there is uncertainty about whether in the foreseeable future he may depart and contribute to further changes within the Court. In light of Justice Stevens’ milestone thirtieth anniversary on the Court, and the recent end of the Rehnquist Court era in which Stevens was an important actor,⁸ this is an

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1. John Paul Stevens was appointed to the U.S. Supreme Court by President Gerald Ford in 1975. HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 323-24 (2d ed. 1985).

2. See Thomas R. Hensley & Christopher E. Smith, *Membership Change and Voting Change: An Analysis of the Rehnquist Court’s 1986-1991 Terms*, 48 POL. RES. Q. 837, 842 n.8 (1995) (defining natural courts as “periods in which the Court’s personnel remains unchanged”).

3. After the appointment of Justice Stephen Breyer in 1994, no justices left the U.S. Supreme Court until 2005. See generally Christopher E. Smith, Joyce A. Baugh & Thomas R. Hensley, *The First-Term Performance of Justice Stephen Breyer*, 79 JUDICATURE 74 (1995).

4. Sheryl Gay Stolberg & Elisabeth Bumiller, *Senate Confirms Roberts as 17th Chief Justice*, N.Y. TIMES, Sept. 29, 2005, at A1.

5. Anne E. Kornblut, *Court in Transition: The Timing; Personal and Political Concerns Lie in a Closely Held Decision*, N.Y. TIMES, July 2, 2005, at A12.

6. David D. Kirkpatrick, *Alito Sworn in as Justice After Senate Gives Approval*, N.Y. TIMES, Feb. 1, 2006, at A1.

7. John Paul Stevens was born on April 20, 1920. CONGRESSIONAL QUARTERLY, *THE SUPREME COURT AT WORK* 206 (1990). The next oldest justice, after the departing Rehnquist and O’Connor, is Ruth Bader Ginsburg who was born in 1933. See Legal Information Institute, Cornell Law School, at <http://straylight.law.cornell.edu/supct/justices/ginsburg.bio.html>.

8. See EDWARD LAZARUS, *CLOSED CHAMBERS* 279 (1998) (asserting “alone among the liberals, Justice

appropriate moment to evaluate Justice Stevens' contributions and impact to law and policy affecting criminal justice.

Only fifteen Justices have served on the high court for thirty or more years. Stevens' longevity places him in an exclusive club—one that includes many of the “giants” of Supreme Court history among its members.⁹ Although a few of these Justices, such as James Moore Wayne (1835-1867),¹⁰ are relatively obscure in the eyes of contemporary scholars, the others have received significant attention in books and articles.¹¹ One puzzling aspect of Stevens' stature after a long career during an era in which the Supreme Court was a major focal point for American politics and policy is that scholars have given relatively little sustained attention to his role on the Court and his impact on law and policy.¹² Stevens is certainly discussed along with other justices in works that focus on the Burger and Rehnquist Court eras.¹³ However, the lone book that focuses exclusively on Stevens and his judicial decision making was written after he had been on the Court for only a dozen years and thus it came too early in his career to adequately assess his impact.¹⁴ In light of the fact that Stevens is a prolific author of judicial opinions and is not an anonymous figure who merely joins the opinions of other Justices, he seems deserving of a more complete examination.¹⁵ This article represents an initial step toward an assessment of Stevens' impact on criminal justice but it certainly does not purport to be a definitive work systematically assessing Stevens' long career.

II. JUSTICE STEVENS: AN OVERVIEW

Justice Stevens was appointed to the Supreme Court by President Gerald

Stevens possessed the pure brains and quickness of mind to counter Scalia”).

9. See CONGRESSIONAL QUARTERLY, *supra* note 7, at 127-208 (listing Supreme Court Justices on bench for over thirty years). The following Supreme Court Justices served for over thirty years: Bushrod Washington (1798-1829); John Marshall (1801-1835); William Johnson (1804-1834); Joseph Story (1811-1845); John McLean (1829-1861); James Moore Wayne (1835-1867); Stephen Field (1863-1897); John Marshall Harlan (1877-1911); Oliver Wendell Holmes, Jr. (1902-1932); Hugo Black (1937-1971); William O. Douglas (1939-1975); William Brennan (1956-1990); Byron White (1962-1993); and William Rehnquist (1971-2005). *Id.*

10. See CONGRESSIONAL QUARTERLY, *supra* note 7, at 146-47.

11. See generally HOWARD HALL & PHILLIP J. COOPER, OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS, AND AMERICA'S CONSTITUTIONAL REVOLUTION (1992); ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES (2000); R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT (2001).

12. See DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS, 25-55 (4th ed. 1996) (discussing Court's influence over controversial issue of abortion during Stevens' tenure beginning in mid-1970s on Burger Court and continuing during Rehnquist Court era).

13. See *id.* at 56-58 (explaining role of Stevens during heated oral argument concerning abortion case).

14. See ROBERT JUDD SICKELS, JOHN PAUL STEVENS AND THE CONSTITUTION: THE SEARCH FOR BALANCE I (1988) (discussing Stevens' early years on Court).

15. See Lazarus, *supra* note 8, at 279 (describing Stevens' role during first decade of his career). Lazarus asserts that “[Stevens] seemed to revel in his solitary concurrences and dissents, which, in unequaled quantity, set forth an always intelligent but often quirky view of the law.” *Id.*

Ford in 1975.¹⁶ His nomination to the Court came at a moment when Ford was contemplating his impending election campaign.¹⁷ According to Professor Henry Abraham, Ford “may have shunned a controversial appointee to avoid having the Senate delay the confirmation until the election year of 1976.”¹⁸ John Paul Stevens, a former antitrust lawyer serving on the U.S. Court of Appeals for the Seventh Circuit, fit the bill for Ford because “‘centrist’ was the label most often attributed to [Stevens]; he was professionally perceived as a ‘legal conservative’.”¹⁹ Thus Stevens sailed quickly through the confirmation process and was approved by a 98-0 vote in the Senate.²⁰

Justice Stevens’ first year on the Supreme Court revealed characteristics that would continue throughout his career. In the words of Professor Ward Farnsworth, Stevens “immediately gained a reputation for unpredictability. Right away he became a frequent issuer of separate opinions, apparently setting a record during his first term for lone dissents by a new justice.”²¹ This starting point set a judicial career into motion that has been described through a variety of adjectives to depict Stevens’ independence. Linda Greenhouse set forth a typical description of Justice Stevens when she stated that “Justice Stevens has a list of labels all his own: enigmatic, unpredictable, maverick, a wild card, a loner.”²²

In examining Stevens’ voting record on the Court, he “generally provided a moderate level of support for civil rights and liberties during the Burger Court period, but that support increased during the Rehnquist Court era.”²³ If one looks specifically at criminal justice cases in the Rehnquist Court era, it is not clear to what extent Stevens changed his judicial philosophy and values or, alternatively, whether he became the most “liberal” Justice in the Rehnquist Court by default after the departures of the Warren Court holdovers, Justices William Brennan and Thurgood Marshall.²⁴ In the civil liberties arena, the

16. See Abraham, *supra* note 1, at 324-25 (tracing judicial career of Justice Stevens).

17. See Abraham, *supra* note 1, at 324.

18. See Abraham, *supra* note 1, at 324.

19. See Abraham, *supra* note 1, at 324.

20. DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 131 (1999) (evaluating Stevens’ position on Court).

21. Ward Farnsworth, *Realism, Pragmatism, and John Paul Stevens*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 157-58 (Earl M. Maltz ed., 2003) (appraising role of Justice Stevens on Supreme Court).

22. Linda Greenhouse, *Working Profile: Justice John Paul Stevens; In the Matter of Labels, A Loner*, N.Y. TIMES, July 23, 1984, at 8; see also BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 318 (1993) (drawing from Greenhouse’s description of Stevens for his own analysis of Stevens).

23. THOMAS R. HENSLEY ET AL., THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES 68 (1997).

24. See CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING JUDGES ARE WRONG FOR AMERICA 11 (2005) (evaluating Stevens’ position on Court). Sunstein argues that, “for a long period, Justice Stevens was well known as a maverick and centrist—independent minded, hardly liberal, and someone whose views could not be put into any predictable category. He is now considered part of the Court’s ‘liberal wing.’ In most areas, Justice Stevens has changed little if at all; what has changed is the Court’s center of gravity.” *Id.*

word “liberal” is used in the manner commonly applied in scholarly articles on the Supreme Court by referring to support for case outcomes that are “pro-person accused or convicted of a crime, pro-civil liberties or civil rights claimant, pro-indigent, pro-[Native American], and anti-government in due process and privacy.”²⁵ During the final terms of the Rehnquist Court era, Stevens was the Justice most likely to support individuals’ claims and oppose the government’s arguments in criminal justice cases.²⁶ For example, during the time period from the Supreme Court’s 1995-96 term through the 2000-01 term, Stevens cast liberal votes in 69.7% of the Supreme Court’s criminal justice cases.²⁷ The next most liberal Justices were Ruth Bader Ginsburg at 60%, David Souter at 57.6%, and Stephen Breyer at 54.9%.²⁸ By contrast, the more conservative Justices’ support for liberal outcomes ranged from 26.1% for William Rehnquist to 34.5% for Anthony Kennedy.²⁹ Justice Stevens’ support for liberal outcomes did not compare to the liberal voting records of Justices during the final years of the Warren Court, when six Justices (Hugo Black, Earl Warren, William Brennan, Thurgood Marshall, Abe Fortas, William O. Douglas) voted for individuals in 70% to 89% of criminal justice cases.³⁰ However, Stevens’ voting record clearly cast him as the most liberal Justice among those serving on the Court during the most recent decade.

The independence of Justice Stevens, as well as his differentiation from the Court’s more conservative Justices, is well illustrated in Professor Farnsworth’s descriptive comparison of Stevens and Rehnquist with respect to criminal justice cases in the period of the 1994-95 term through the 1999-2000 term.³¹ In nonunanimous cases,

Stevens voted for the defendant approximately 85% of the time Stevens wrote or joined dissents in favor of defendants or convicts sixty-four times, including eighteen times by himself. Rehnquist dissented in favor of defendants five times and never by himself. Rehnquist dissented in favor of the government twenty-one times; Stevens dissented in favor of the government in a criminal case just once during this period.³²

25. Harold J. Spaeth & Jeffrey A. Segal, *Decisional Trends in the Warren and Burger Courts: Results from the Supreme Court Judicial Data Base Project*, 73 JUDICATURE 103, 103 (1989).

26. See Christopher E. Smith & Madhavi McCall, *Criminal Justice and the 2002-2003 United States Supreme Court Term*, 32 CAP. U. L. REV. 859, 869 (2004) (providing chart of Justices’ voting pattern).

27. See Christopher E. Smith, *The Rehnquist Court and Criminal Justice: An Empirical Assessment*, 19 J. CONTEMP. CRIM. JUST. 161, 171 (2003) (using Rehnquist Court holdings to determine effect of Supreme Court on criminal justice).

28. *Id.*

29. *Id.*

30. CHRISTOPHER E. SMITH, *THE REHNQUIST COURT AND CRIMINAL PUNISHMENT* 7 (1997) [hereinafter SMITH, REHNQUIST COURT] (comparing voting records of Justices).

31. See Farnsworth, *supra* note 21, at 162.

32. See Farnsworth, *supra* note 21, at 162.

Because Stevens' lone dissent on behalf of the government came in the case of *United States v. Lopez*,³³ which primarily concerned congressional power to legislate under the Commerce Clause,³⁴ it is difficult to think about that case as concerning a liberal-conservative debate about constitutional rights as in many other criminal justice cases before the Supreme Court.

III. EVALUATING JUSTICE STEVENS

The foregoing description paints a picture of a Justice who is independent and assertive. Stevens appears quite willing to analyze cases in a manner that differentiates him from his colleagues.³⁵ He is also seemingly eager to assert and explain his views, even if that requires him to be the lone dissenter in many criminal justice cases.³⁶ This rough overview of Stevens' general patterns of decisions and behavior is useful as a starting point but it falls short of capturing his role on the Court and his impact on law and policy. A clearer understanding of Stevens requires a closer examination of three key elements: 1) the Justice's judicial philosophy and approach to decision making; 2) the Justice's role on the Court as a shaper of decisions, doctrines, and policies; and 3) the Justice's impact on law and policy through important judicial opinions.

A. Justice Stevens' Judicial Philosophy and Approach to Decision Making

One of the reasons that Stevens receives less focused attention from scholars than several other Justices stems from the lack of a clear judicial philosophy or an easily discernible set of values motivating decisions.³⁷ Justices Antonin Scalia³⁸ and Clarence Thomas,³⁹ by contrast, receive a disproportionate amount of attention because they purport to follow the Constitution's original intent,⁴⁰

33. 514 U.S. 549 (1995).

34. See TINSLEY E. YARBROUGH, *THE REHNQUIST COURT AND THE CONSTITUTION* 109 (2000) (detailing precedential value of *Lopez* decision). Yarbrough explains that "[T]he Rehnquist [majority] opinion and *Lopez* concurrences demonstrated a clear willingness on the part of a narrow majority of the current Court to significantly extend the reach of judicial review in commerce clause cases." *Id.*

35. See Farnsworth, *supra* note 21, at 157-58, 162 and accompanying text.

36. See Farnsworth, *supra* note 21, at 157-58, 162 and accompanying text.

37. See Hensley et al., *supra* note 23, at 69 (analyzing Stevens' judicial perspective). The authors state that "because Stevens has not been as ideologically predictable as some of his colleagues, many Court observers have found it difficult to discern his judicial philosophy." *Id.*

38. See RICHARD A. BRISBIN, JR., *JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL* 9 (1997) (providing overview of Scalia's role on Supreme Court).

39. See generally CHRISTOPHER E. SMITH & JOYCE A. BAUGH, *THE REAL CLARENCE THOMAS: CONFIRMATION VERACITY MEETS PERFORMANCE REALITY* (2000).

40. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358 (1995) (Thomas, J., concurring in judgment). In support of his concurring opinion, Justice Thomas argued that "when interpreting other provisions of the Constitution, this Court has believed itself bound by the text of the Constitution and by the intent of those who drafted and ratified it." *Id.* at 359. See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (discussing originalism theory).

they trumpet their advocacy of judicial restraint,⁴¹ and they harshly criticize their colleagues for failing to recognize the wisdom of their approach.⁴² In effect, these Justices are easy and attractive targets for scholarly analysis because researchers can dissect the consistency (or lack thereof) of such Justices' opinions while predicting and evaluating the doctrinal and policy implications of their approach to decision making.⁴³ Justice Stevens presents a more difficult challenge for scholars because his approach has been described as being that of a jurist "who eschews theory in favor of practical reason . . . [and who] deliberately makes decisions that would create the most reasonable results on the facts as he understood them."⁴⁴ Although he is praised for his "love of fairness in each individual case," he is also criticized because "his jurisprudence also will be associated with doctrinal unpredictability [and] a certain ad hoc quality."⁴⁵

Scholars describe Justice Stevens as one who closely examines the facts of each case in order to show concern about consequences of each decision.⁴⁶ In the words of Professor Pamela Karlan, Justice Stevens' "opinions reflect a tough-minded realism."⁴⁷ Professor Frederick Schauer argues that Stevens avoids the creation of doctrinal rules that will give clear guidance to judges in future cases because he prefers to develop standards that will assist with a case-by-case evaluation of the various situations that may give rise to legal disputes.⁴⁸ According to Schauer, Stevens' preference for standards instead of

41. See *Lewis v. Casey*, 518 U.S. 343, 367 (1996) (Thomas, J., concurring) (exposing strict constructionist approach to constitutional interpretation). Thomas noted that:

it is a bedrock principle of judicial restraint that a right be lodged firmly in the text or tradition of a specific constitutional provision before we will recognize it as fundamental. Strict adherence to this approach is essential if we are to fulfill our constitutionally assigned role of giving full effect to the mandate of the Framers without infusing the constitutional fabric with our own political views.

Id.

42. See *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting). Scalia criticized the majority opinion, writing:

what a mockery today's opinion makes of [Alexander] Hamilton's expectation . . . The Court reaches this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to "the evolving standards of decency," . . . The Court thus proclaims itself the sole arbiter of our Nation's moral standards

Id.

43. See generally Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 SETON HALL L. REV. 1 (1997); Christopher E. Smith, *Justice Antonin Scalia and Criminal Justice Cases*, 81 KY. L.J. 187 (1992-93).

44. See Farnsworth, *supra* note 21, at 178.

45. See Farnsworth, *supra* note 21, at 179.

46. See Sickels, *supra* note 14, at 8-14.

47. See Pamela S. Karlan, *Cousins' Kin: Justice Stevens and Voting Rights*, 27 RUTGERS L.J. 521, 522 (1996).

48. Frederick Schauer, *Justice Stevens and the Size of Constitutional Decisions*, 27 RUTGERS L.J. 543, 556-58 (1996).

rules reflects “a general desire to avoid wrong decisions, and to get each case as right as he can.”⁴⁹ By contrast, Justices Scalia and Thomas espouse clearly articulated rules—such as the framers of the Eighth Amendment did not intend for it to provide any rights concerning conditions of confinement in prisons⁵⁰—to demonstrate their emphasis on judicial restraint and fealty to a particular approach to constitutional interpretation without regard to the human consequences of the rules. For example, the Thomas-Scalia interpretation of the Eighth Amendment would eliminate any constitutional entitlements to medical care, food, shelter, and sanitation for prisoners.⁵¹ Justice Stevens appears to be keenly aware of the specific consequences of decisions and, therefore, often prefers a case-by-case analysis of facts to articulation of broad rules.⁵²

The absence of a clearly discernible constitutional theory driving Stevens’ decisions does not mean that he manifests uncertainty about how to decide cases. Indeed, Professor Robert Nagel describes Stevens as “a justice who exhibits considerable self-confidence, both about his views of proper public policy and about using judicial power.”⁵³ Stevens’ confidence seems evident in his assertiveness as an opinion writer who, more so than most other Justices, puts forth his views in concurring and dissenting opinions.⁵⁴

In analyzing the first half of Justice Stevens’ career on the Supreme Court, Professor William Popkin identified three elements of what he characterized as

49. *Id.* at 557.

50. *See Hudson v. McMillian*, 503 U.S. 1, 19-20 (1992) (Thomas, J., dissenting) (arguing Framers did not draft Eighth Amendment to protect inmates from harsh treatment).

51. These rights concerning conditions of confinement have all been identified as being mandated by the Eighth Amendment. *See generally Estelle v. Gamble*, 429 U.S. 97 (1976) (stating prisoners’ Eighth Amendment right against prison officials’ deliberate indifference to serious medical needs); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976) (holding housing, nutrition, and other conditions guaranteed as Eighth Amendment rights).

52. *See Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001). In this case, Stevens focused on facts and consequences in concluding that a hospital could turn over to law enforcement authorities patients’ blood tests indicating the existence of illegal drugs within their bodies.

In this case, however, the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment. This fact distinguishes this case from circumstances in which physicians or psychologists, in the course of ordinary medical procedures aimed at helping the patient herself, come across information that under the rules of law or ethics is subject to reporting requirements

Id.

53. Robert F. Nagel, *Six Opinions by Mr. Justice Stevens: A New Methodology for Constitutional Cases?*, 78 CHI.-KENT L. REV. 509, 510 (2003) (focusing on six opinions by Justice Stevens indicating his judicial philosophy).

54. For example, during his first decade on the Supreme Court, a scholarly analysis concluded that Stevens “wrote a large number of concurring and dissenting opinions, authoring more of these than any of colleagues in each of the Court’s last six terms.” *See Bradley C. Canon, Justice John Paul Stevens: The Lone Ranger in a Black Robe*, in *THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES* 344 (Charles M. Lamb & Stephen C. Halpern ed., 1991).

“a coherent judicial philosophy.”⁵⁵ According to Popkin, Stevens seeks to defer to decisions of other institutions by emphasizing such devices as independent state grounds for decisions and limiting grants of certiorari.⁵⁶ Second, Popkin characterizes Stevens as advocating that “the Court should decide no more than the facts of the case require[,] . . . avoiding overly broad generalizations and summary dispositions.”⁵⁷ Thus, “Justice Stevens extols the virtues of case-by-case deliberation and warns against the hazards of hypothetical rulemaking.”⁵⁸ Third, Popkin sees Stevens’ decisions as demonstrating his view that “the Court should protect *individual dignity* . . . [through] creative application of constitutional principles, such as due process and equal protection” (emphasis in original).⁵⁹ Because Popkin wrote his analysis prior to Stevens’ role as the Court’s *de facto* most liberal Justice⁶⁰ upon the retirements of Justices Brennan and Marshall, and this analysis does not include consideration of the Stevens’ most recent sixteen years on the Court, it is possible that Popkin would not present precisely the same conclusions today. Certainly, the emphasis on Stevens’ concern with facts and case-by-case analysis is consistent with other authors’ descriptions of Stevens.⁶¹ Stevens’ deference to other decision makers, however, seems to be a less accurate description of his decisions in criminal justice cases. Instead, the emphasis on individual dignity⁶² may be more important for Stevens’ decisions in criminal justice, especially in light of his liberal voting record on behalf of individuals and his assertiveness in writing dissenting opinions on behalf of defendants and convicted offenders.⁶³

B. Justice Stevens’ Roles on the Court

After the retirements of Justices Byron White and Harry Blackmun in the early 1990s, Justice Stevens became second in seniority to Chief Justice

55. William Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087, 1090 (1989) (explaining Stevens’ method of judicial interpretation).

56. *Id.* (illustrating first element of Stevens’ “coherent judicial philosophy”).

57. *Id.* (illustrating second element of Stevens’ “coherent judicial philosophy”).

58. *Id.* at 1105.

59. See Popkin, *supra* note 55, at 1090 (explaining third element of Stevens’ “coherent judicial philosophy”).

60. See Farmsworth, *supra* note 21, at 157-59.

61. See *supra* notes 47-48 and accompanying text (presenting evaluation of Justice Stevens’ judicial philosophy).

62. Stevens’ conception of human dignity emerges in non-criminal justice cases, too. See *Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding no fundamental liberty interest of physician-assisted suicide). Stevens wrote of “the only possible means of preserving a dying patient’s dignity and alleviating her intolerable suffering.” *Id.* at 752 (Stevens, J., concurring).

63. See Canon, *supra* note 54, at 370 (discussing Stevens’ voting record in Burger Court era). Canon notes that “in 85 miscellaneous constitutional cases [concerning criminal justice during the Burger Court era], [Stevens] dissented thirty-four times, favoring the defendant all but two of those times.” *Id.*

Rehnquist on the Rehnquist Court.⁶⁴ His seniority gave him two formal roles in the Court's deliberative processes. First, Stevens spoke immediately after Rehnquist during conference when the justices discussed cases and took their initial vote.⁶⁵ The opportunity to be the first Associate Justice to express a view presumably gave Stevens "a greater opportunity to persuade colleagues."⁶⁶ Second, when Rehnquist dissented and Stevens was in the majority, Stevens had the authority to assign opinion-writing responsibilities for the majority opinion to an Associate Justice.⁶⁷ In this position, Stevens had during the Rehnquist era, and continues to have in the early Roberts Court era, the opportunity to make strategic choices in order to hold the majority coalition together through the opinion-writing process.⁶⁸ As described by one observer,

Sometimes this is done by assigning the case to the [J]justice who is most likely to jump to the other side should the opinion be written too narrowly or too broadly. Sometimes the assigning [J]justice assigns the case to himself and then assumes the role of judicial diplomat, taking care to adequately address the concerns of each member of the majority.⁶⁹

Although Stevens is a frequent dissenter in nonunanimous criminal justice decisions,⁷⁰ there are occasions when his opinion-assignment role helps to shape law and policy in criminal justice. In identifying 5-to-4 cases, namely those in which there is the greatest risk that the initial majority will lose control over the decision if one Justice defects,⁷¹ there are examples in which it appears that Stevens may have assigned the opinion to a conservative Justice, perhaps as a means to hold that individual with the majority.⁷² When the least-committed member of a narrow majority is assigned to write the opinion, that

64. Justice Byron White retired in 1993 and Justice Harry Blackmun retired in 1994. YARBROUGH, *supra* note 34, at 28-31. They were senior to Stevens because they were appointed to the Court, respectively, in 1962 and 1970. CONGRESSIONAL QUARTERLY, *supra* note 7, at 201, 204. Upon their departures, Stevens, who was appointed in 1975, was senior to the remaining justices, except for Rehnquist, who was appointed in 1971. *Id.* at 205-06.

65. See LAWRENCE BAUM, *THE SUPREME COURT* 124 (4th ed. 1992) (discussing significance of seniority on Court). Baum explains that "the chief justice presides at the conference and opens discussion on each case. The other justices follow, from the most senior member (in service on the Court, not in age) to the most junior." *Id.*

66. Joan Biskupic, *It's Stevens' Time*, BEACON J., March 28, 1995, at A2.

67. See BAUM, *supra* note 65, at 125.

68. See O'BRIEN, *supra* note 12, at 311-12 (asserting opinion-assignment strategies used to strengthen majority by assigning opinion to someone who can persuade other Court members).

69. Warren Richey, *The Quiet Ascent of Justice Stevens*, CHRISTIAN SCI. MONITOR, July 9, 2004, at 1 (reporting on Justice Stevens' method of interpreting Constitution).

70. See Canon, *supra* note 54, at 370-71.

71. See O'BRIEN, *supra* note 12, at 309 (stating "sometimes justices switch votes after an opinion has been assigned").

72. See *infra* notes 75-80 (providing illustrations of Justice Stevens' assignment of opinion-writing to borderline justices in narrow majority cases).

Justice may subconsciously persuade him or herself to more strongly support the outcome in the course of writing an opinion to justify that outcome.⁷³ For example, in *Roper v. Simmons*,⁷⁴ the Court declared that the Eighth Amendment prohibits executing convicted murderers who committed their capital crimes while under the age of 18.⁷⁵ Justice Stevens, in his role as senior justice in the majority, gave Justice Anthony Kennedy, the most conservative member of the majority,⁷⁶ the assignment of writing the opinion for the Court. In *U.S. v. Bajakajian*,⁷⁷ Stevens assigned Clarence Thomas, the lone consistent conservative to join this majority,⁷⁸ to write the opinion finding a violation of the Excessive Fines Clause of the Eighth Amendment when a traveler at an airport forfeited \$357,000 for failing to file the proper paperwork to transport currency.⁷⁹

Beyond his formal institutional role as senior Justice in the majority, Stevens has played other roles over the years through the presentation of arguments and viewpoints in his opinions in criminal justice cases.

I. Advocate of Equal Protection

With the departures of William Brennan and Thurgood Marshall at the start of the 1990s, the Court lost its foremost advocates for the application of the equal protection doctrines to prevent discrimination against minorities, women, and the poor.⁸⁰ Justice Clarence Thomas, the lone African-American Justice, personally experienced racial discrimination during his youth in Georgia,⁸¹ and thus one might expect him to emerge as the Court's newest advocate for equal

73. See CHRISTOPHER E. SMITH, COURTS, POLITICS, AND THE JUDICIAL PROCESS 269 (2d ed. 1997) (discussing strategy of assigning opinion-writing). Recent research suggests that "a less committed member of the majority may receive the assignment to write the opinion with the hope that the justice's position will strengthen in the course of researching and writing." *Id.*

74. 543 U.S. 551 (2005).

75. *Id.* at 568.

76. During the 2003-2004 Term, for example, Justice Kennedy supported individuals' claims in only thirty-six percent of criminal justice cases while the other members of the *Roper* majority (Justices Stevens, Souter, Ginsburg, and Breyer) had supported individuals more frequently, with support levels ranging from fifty-seven (Breyer) to seventy-three percent (Souter and Stevens). Christopher E. Smith et al., *Criminal Justice and the 2003-2004 United States Supreme Court Term*, 35 N.M. L. REV. 123, 132 (2005).

77. 524 U.S. 328 (1998).

78. During the 1997-1998 Term in which the *Bajakajian* case was decided, Justice Thomas was the most conservative justice in criminal justice cases by supporting individuals in only twenty percent of such cases. Christopher E. Smith, *Criminal Justice and the 1997-98 U.S. Supreme Court Term*, 23 S. ILL. U. L.J. 443, 450 (1999). By contrast, the other four justices in the *Bajakajian* majority (Breyer, Ginsburg, Souter, and Stevens) all supported individuals in more than fifty percent of such cases in that Term. *Id.*

79. *Bajakajian*, 524 U.S. at 324.

80. See YARBROUGH, *supra* note 34, at 19-22 (discussing roles and contributions of Justices Brennan and Marshall). Yarbrough asserts that "Brennan was considered the principal architect of the massive body of civil liberties law." *Id.* at 19. Yarbrough described Marshall as the "pioneering figure of the modern civil rights movement." *Id.* at 22.

81. See KEN FOSKETT, JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS 59-65 (2004) (describing Justice Thomas's early years in segregated Georgia).

protection claims by members of racial minority groups. However, it is difficult to think of any cases in which he has been an advocate for rigorous application of equal protection principles to protect minorities against racial discrimination. Instead, equal protection claims by whites received support from Thomas. He strongly advocated equal protection principles in two affirmative action cases where whites alleged that they were victimized by racial discrimination,⁸² and in his support of the Equal Protection claim by Bush voters in Florida, which ended the disputed 2000 presidential election and placed a Republican in the White House.⁸³ In criminal justice, Justice Thomas stepped forward to voice concerns about racial discrimination against African Americans in only one case. It was a First Amendment case rather than an equal protection case.⁸⁴ In that case, the normally silent Thomas spoke up during oral arguments to condemn cross burning as an activity that did not deserve protection as expressive conduct.⁸⁵ Without Thomas or any other Justices taking the lead to raise equal protection issues, Justice Stevens has stepped forward to become a strong voice against discrimination directed toward minorities.

In 2005, the Supreme Court ruled that courts should apply the strict scrutiny standard in evaluating the practice in California's prison system of segregating prisoners by race and ethnicity during their first sixty days of incarceration.⁸⁶ The majority remanded the case for further consideration in light of its specification of the test to be applied under the Equal Protection Clause.⁸⁷ Only Justices Thomas and Scalia agreed with the state's argument that the deferential standard of *Turner v. Safley*⁸⁸ should apply, which would permit the state to provide a rational justification, rather than a compelling interest, to legitimate the segregation policy.⁸⁹ Justice Stevens also dissented, but for entirely different reasons.⁹⁰ He looked closely at the facts of the case and the justifications presented by California and argued that the Supreme Court should forthrightly rule that the state had violated the Equal Protection Clause by using

82. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (finding no violation of Equal Protection Clause by law school admissions policy); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding university admission policy violated Equal Protection Clause).

83. *Bush v. Gore*, 531 U.S. 98 (2000) (ruling manual recount did not satisfy minimum requirements mandated by Equal Protection Clause).

84. *Virginia v. Black*, 538 U.S. 343 (2003) (holding bill banning cross burning for purposes of intimidation prohibits only conduct not expression).

85. *Supreme Court Weighs Cross-Burning Bans*, FOXNews.com, Dec. 11, 2002, available at <http://www.foxnews.com/story/0,2933,72716,00.html> (reporting Thomas' participation during oral arguments).

86. *Johnson v. California*, 543 U.S. 499 (2005).

87. *Id.* at 575.

88. 482 U.S. 78 (1987).

89. *Johnson*, 543 U.S. at 530-36 (Thomas, J., dissenting).

90. *Id.* at 517-19 (arguing segregating state prisoners by race violated equal protection clause) (Stevens, J., dissenting).

racial segregation in its prisons.⁹¹ His solo opinion was, in effect, a call for more direct judicial action to extinguish the scourge of racial discrimination.

In *McCleskey v. Kemp*,⁹² which concerned the use of statistics to prove the existence of racial discrimination in the administration of the death penalty in Georgia, Stevens' dissenting opinion famously asserted:

The Court's decision appears to be based on a fear that the acceptance of McCleskey's claim would sound the death knell for capital punishment in Georgia. If society were indeed forced to choose between a racially discriminatory death penalty (one that provides heightened protection against murder "for whites only") and no death penalty at all, the choice mandated by the Constitution would be plain.⁹³

In another example, Stevens was the lone dissenter in *U.S. v. Armstrong*,⁹⁴ a case concerning allegations of racial discrimination by one U.S. Attorney's Office in selecting which defendants to prosecute for harshly-punished crack cocaine offenses. While the other Justices would not permit anecdotal evidence to provide the basis for discovery involving the prosecutor's records, Stevens used his solo dissent to lay out troubling statistics about differential impacts of federal cocaine investigations and prosecutions on African Americans and whites:

Finally, it is undisputed that the brunt of the elevated federal penalties falls heavily on blacks. While 65% of the persons who have used crack are white, in 1993 they represented only 4% of the federal offenders convicted of trafficking in crack. Eighty-eight percent of such defendants were black [B]lacks on average received sentences 40% longer than whites⁹⁵

Stevens saw the government's apparent emphasis on arresting, prosecuting, and punishing African American defendants for crack cocaine offenses as providing a sufficient basis to justify defense attorneys' access to prosecutors' records in order to examine whether this pattern of prosecutions was driven by discriminatory policies and decisions.

Justice Stevens' concerns about the real-world risks of racial discrimination also emerge in cases concerning issues other than the Equal Protection Clause. For example, in *Illinois v. Wardlow*,⁹⁶ the Supreme Court ruled that an

91. *Id.*

92. 481 U.S. 279 (1987).

93. *Id.* at 367 (Stevens, J., dissenting).

94. 517 U.S. 456 (1996).

95. *Id.* at 479-80 (Stevens, J., dissenting).

96. 528 U.S. 119 (2000).

individual's flight at the sight of police officers in a high-crime area can serve as a consideration to justify a *Terry* stop-and-frisk.⁹⁷ Justice Stevens, concurring in part and dissenting in part from the majority opinion, expressed a view that undoubtedly caused consternation for some criminal justice officials:

Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence For such a person, unprovoked flight is neither "aberrant" nor "abnormal."⁹⁸

In light of the views expressed in such opinions, it appears that Stevens plays a role in raising the other Justices' consciousness about issues of discrimination and disadvantage. Thus, Justice Stevens' perspective on equal protection may fit within Professor Popkin's identification of the advancement of "human dignity" as one of the three core components of Justice Stevens' judicial philosophy.⁹⁹

2. Prescient Pragmatist

Because of Stevens' focus on the facts and practical implications of cases, he may be well-positioned to warn other Justices about the pitfalls of adopting a particular rule or standard. In *Estelle v. Gamble*,¹⁰⁰ the Supreme Court made its first direct application of the Cruel and Unusual Punishments Clause to conditions of confinement in prisons. Justice Thurgood Marshall's majority opinion found that an Eighth Amendment violation can occur if prison officials are "deliberately indifferent" to a prisoner's serious medical needs.¹⁰¹ Justice Stevens dissented, despite acknowledging that "I have no serious disagreement with the way this area of the law had developed thus far, or with the probable

97. *Id.* at 124-25; *see also* *Terry v. Ohio*, 392 U.S. 1 (1968) (holding officer's reasonable belief that suspect is armed and dangerous justifies officer's stop of suspect).

98. *Wardlow*, 528 U.S. at 132 (Stevens, J., concurring in part and dissenting in part).

99. *See* Popkin, *supra* note 55, at 1090 (explaining individual dignity as substantive commitment and creative application of principles).

100. 429 U.S. 97 (1976).

101. *Id.* at 104-05; *see also* CHRISTOPHER E. SMITH, LAW AND CONTEMPORARY CORRECTIONS 208 (2000) (noting impact of *Estelle v. Gamble* decision). Smith argues that:

Although Gamble lost his case, the decision helped establish the legal standard for judges to apply in Eighth Amendment medical treatment cases. Justice Thurgood Marshall's majority opinion concluded that "deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," proscribed by the Eighth Amendment.

impact of this opinion.”¹⁰² Instead, Stevens dissented because he disagreed with the subjective test created by Marshall to evaluate prisoners’ medical claims under the Eighth Amendment.¹⁰³ According to Stevens,

[B]y its repeated references to “deliberate indifference” and the “intentional” denial of adequate medical care, I believe the Court improperly attaches significance to the subjective motivation of the [prison officials] as a criterion for determining whether cruel and unusual punishment has been inflicted [W]hether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it.¹⁰⁴

Justice Stevens did not write the foregoing words as a prediction about what would happen in the future, yet his words had a prescient quality as the composition of the Supreme Court changed and new Justices used Marshall’s “subjective-intent” standard for purposes that differed from Marshall’s intention.¹⁰⁵ In *Wilson v. Seiter*,¹⁰⁶ Justice Scalia drew from the subjective standard established for medical cases by the precedent in *Estelle v. Gamble* in order to make it more difficult for prisoners to win any Eighth Amendment cases about conditions of confinement.¹⁰⁷ Scalia’s majority opinion spread the application of the “deliberate indifference” standard to all conditions of confinement cases and thereby made it more difficult for prisoners to succeed because of the requirement that they provide proof of the prison officials’ state of mind, and not just proof about the nature of the conditions of confinement.¹⁰⁸ In *Wilson*, Justice Stevens joined Justice Byron White’s concurring opinion, which criticized Scalia’s application of the “deliberate indifference” standard to all “conditions of confinement” cases.¹⁰⁹ Even though Stevens did not write his own opinion in *Wilson*, he could have simply repeated the words from the historical reference in his dissent in *Estelle* fifteen years earlier: “Whether the conditions in Andersonville [the Civil War prison in which hundreds of Union troops held as prisoners of war died from disease and starvation], were the product of design, negligence, or mere poverty, they were cruel and

102. *Estelle*, 429 U.S. at 108 (Stevens, J., dissenting).

103. *Id.* at 108-09.

104. *Id.* at 116-17.

105. See Christopher E. Smith, *The Malleability of Constitutional Doctrine and Its Ironic Impact on Prisoners’ Rights*, 11 B.U. PUB. INT. L.J. 73, 84-87, 91-96 (2001) [hereinafter, Smith, *Malleability of Constitutional Doctrine*] (evaluating Supreme Court justices’ interpretation of Constitution according to individual judicial policies).

106. 501 U.S. 294 (1991).

107. *Id.* at 296-97.

108. See Smith, *Malleability of Constitutional Doctrine*, *supra* note 105, at 85-86 (discussing implications of *Wilson* decision).

109. *Wilson*, 501 U.S. at 310 (White, J., concurring).

unusual. . . .”¹¹⁰ Justice Marshall was undoubtedly disappointed that Scalia appropriated his words from an opinion that was intended to advance protections for prisoners (*Estelle*) in order to create a rule that would make it more difficult for prisoners to challenge the adequacy of their conditions of confinement.¹¹¹ Thus, one must wonder whether Marshall might have been able to craft a more effective standard to provide an entitlement to limited medical care if he had listened to Stevens’ warning in the *Estelle* dissent about the potential problems of relying on a subjective standard rather than an objective standard.¹¹²

Justice Stevens’ concern about the impact of a particular rule appears to relate to Professor Schauer’s claim that Stevens avoids the imposition of rules,¹¹³ as well as his concern about the human consequences of decisions, which is reflected in Professor Popkin’s assessment of the Justice’s emphasis of human dignity in judicial decisions.¹¹⁴

3. Advocate for Prisoners’ Rights

Justice Stevens stands out among the Justices as an advocate of legal protections for convicted offenders.¹¹⁵ As Professor Bradley Canon observed, “Throughout his tenure, Stevens took the lead in denouncing the majority’s deferential stance [toward prison administrators].”¹¹⁶ In expressing his views on prisoners’ rights, as in a manner parallel to his role concerning the issue of equal protection,¹¹⁷ Stevens may serve a function for giving credence to claims by the nation’s weakest and most despised political minority—convicted offenders;¹¹⁸ a minority that has earned its despised status by inflicting harms

110. *Estelle v. Gamble*, 429 U.S. 97, 116-17 (1976) (Stevens, J., dissenting).

111. See Smith, *Malleability of Constitutional Doctrine*, *supra* note 105, at 87 (analyzing Justice Scalia’s use of Marshall’s *Estelle* ruling). Smith asserts that “Justice Scalia, an apparent opponent of Justice Marshall’s decision in *Estelle*, used Justice Marshall’s *Estelle* test as a means to advance policy preferences diametrically opposed to Justice Marshall’s efforts to provide constitutional protections for incarcerated offenders.” *Id.*

112. See Smith, *Malleability of Constitutional Doctrine*, *supra* note 105, at 92 (suggesting “If [Marshall] could have foreseen Scalia’s opinio[n] in *Wilson* . . . , he might very well have sought to establish clearer, stronger rights in the first instance, such as an objective test for prison conditions in *Estelle* . . .”).

113. See generally Schauer, *supra* note 48.

114. See generally Popkin, *supra* note 55.

115. See Canon, *supra* note 54, at 370-71 (“In no other area of criminal justice did Stevens differentiate himself as much from the Burger Court majority as in prisoners’ rights cases. He supported the prisoner in 16 of the 17 cases considered; the Court did so only in 5 cases—and in none after O’Connor’s appointment.”).

116. See Canon, *supra* note 54, at 370-71.

117. See *supra* notes 78-94 and accompanying text (discussing Justice Stevens’ perspective on equal protection doctrines). Moreover, Stevens’ emphasis on equal protection may not merely parallel his interest in prisoners’ rights. These two topics are also interconnected through the history of racial discrimination in prisons and involvement of African American prisoners in the initiation of the prisoners’ rights movement in the federal courts. See generally Christopher E. Smith, *Black Muslims and the Development of Prisoners’ Rights*, 24 J. BLACK STUD. 131 (1993).

118. This political minority’s weakness is most evident in the lack of voting rights. See Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes*

on society.¹¹⁹ In addition to *Estelle v. Gamble*, discussed above, a survey of major cases concerning prisoners helps to illuminate Stevens' role in this regard. In addition to the examples of cases in which Stevens wrote dissenting opinions, he also joined the opinions of other Justices who disagreed with the majority opinions that limited the scope of prisoners' rights.¹²⁰

The following examples illustrate the point but do not purport to constitute an exhaustive list:

Meachum v. Fano:¹²¹ The majority of Justices found that no due process rights were implicated in the transfer of prisoners from one institution to another.¹²² Justice Stevens wrote a dissenting opinion arguing for a greater recognition of liberty interests for prisoners.¹²³

Bell v. Wolfish:¹²⁴ Justice Stevens' dissenting opinion complained that the majority tolerates violations of pretrial detainees' right to due process by permitting a federal jail to impose punitive policies regarding searches and other matters.¹²⁵

Hewitt v. Helms:¹²⁶ The dissenting opinion by Stevens argued that the right to due process should recognize a broader liberty interest in the case of a prisoner transferred to segregation for disciplinary reasons.¹²⁷

Hudson v. Palmer:¹²⁸ The majority of Justices found that prisoners had no Fourth Amendment interests with respect to their cells and property.¹²⁹ Justice Stevens wrote an opinion concurring in part and dissenting in part asserting that prisoners possess some Fourth Amendment protections for their personal

10 Years Later, 60 FED. PROBATION 12 (1996).

119. See SMITH, LAW AND CONTEMPORARY CORRECTIONS, *supra* note 101, at 20. Smith states:

Many people believe that convicted criminals should forfeit all of their rights. According to this argument, because they intentionally violated society's rules and caused harm to society, they should not gain society's benefits, such as the protections offered by constitutional rights. This argument is based on a social contract theory of rights.

Id. (emphasis omitted).

120. See, e.g., *Wilson v. Seiter*, 501 U.S. 294 (1991) (joining White's concurring opinion complaining about difficult-to-prove subjective standard for Eighth Amendment conditions of confinement cases); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (joining Brennan dissent against deferential standard allowing corrections officials to deny low-security Muslim prisoners access to essential weekly religious service); *Whitley v. Albers*, 475 U.S. 312 (1986) (joining Marshall dissent against difficult-to-prove standard for Eighth Amendment claims in improper use of force claims).

121. 427 U.S. 215 (1976).

122. *Id.* at 223-34.

123. *Id.* at 229-30 (Stevens, J., dissenting).

124. 441 U.S. 520 (1979).

125. *Id.* at 580-81 (Stevens, J., dissenting).

126. 459 U.S. 460 (1983).

127. *Id.* at 481 (Stevens, J., dissenting).

128. 468 U.S. 517 (1984).

129. *Id.* at 525-26.

property.¹³⁰

Turner v. Safley:¹³¹ Justice Stevens' opinion, concurring in part and dissenting in part, disagreed with the Court's conclusion that prisoners have no rights with respect to their desire to exchange correspondence with other prisoners.¹³²

Thornburgh v. Abbott:¹³³ The opinion by Justice Stevens, concurring in part and dissenting in part, sought stronger First Amendment rights for prisoners to receive publications from outside the prison than provided for by the majority opinion.¹³⁴

Hudson v. McMillian:¹³⁵ Justice Stevens' concurring opinion complained that the majority employed an excessively high subjective standard ("maliciously and sadistically for the very purpose of causing harm") and should instead use the less demanding "unnecessary and wanton infliction of pain" in a case concerning a prisoner who was beaten by corrections officers.¹³⁶

Schlup v. Delo:¹³⁷ Justice Stevens' self-assigned majority opinion emphasized that death row prisoners need only show that a constitutional violation "probably resulted" in a miscarriage of justice rather than fulfill the "clear and convincing evidence" standard when asserting the existence of new evidence of innocence and seeking judicial consideration of that evidence.¹³⁸

Lewis v. Casey:¹³⁹ Justice Stevens' dissenting opinion complained that the majority ignored the facts developed in the case in order to seize the opportunity to impose excessively strict standing requirements on prisoners as a means to reduce their right of access to the courts.¹⁴⁰

Hope v. Pelzer:¹⁴¹ Justice Stevens wrote a self-assigned majority opinion rejecting the qualified immunity claims of Alabama corrections officials who chained prisoners to an iron bar in the prison yard all day in the hot sun and thereby faced lawsuits for Eighth Amendment violations.¹⁴²

The foregoing examples do not imply that Justice Stevens supports prisoners' claims in every case. In *Overton v. Bazzetta*,¹⁴³ Stevens supported a unanimous decision that overturned lower court rulings identifying rights violations in a state's policies for withdrawing visiting privileges for prisoners'

130. *Id.* at 542-43 (Stevens, J., concurring in part and dissenting in part).

131. 482 U.S. 78 (1987).

132. *Id.* at 100-01 (Stevens, J., concurring in part and dissenting in part).

133. 490 U.S. 401 (1989).

134. *Id.* at 421-25 (Stevens, J., concurring in part and dissenting in part).

135. 503 U.S. 1 (1992).

136. *Id.* at 12-13 (Stevens, J., concurring).

137. 513 U.S. 298 (1995).

138. *Id.* at 326-27.

139. 518 U.S. 343 (1996).

140. *Id.* at 407-09 (Stevens, J., dissenting).

141. 536 U.S. 730 (2002).

142. *Id.* at 741-42.

143. 539 U.S. 126 (2003).

who do not pass drug tests and for imposing various restrictions on visits.¹⁴⁴ Even in that case, however, Stevens took the opportunity to write a brief concurring opinion that emphasized the point that the case should not be perceived as producing a diminution of prisoners' rights.¹⁴⁵ Instead, Stevens, in effect, reminded lower court judges about the continued existence of rights for prisoners.

Justice Stevens' advocacy for prisoners' rights seems clearly related to the value identified by Professor Popkin within Stevens' judicial philosophy: the emphasis on human dignity.¹⁴⁶

4. Advocate for Adversarial System and Right to Counsel

Justice Stevens stands out among the Justices as perhaps the foremost advocate of the right to counsel.¹⁴⁷ In this role, he reminds his colleagues about the justice system's presumed reliance on adversarial process and the need to ensure that defendant's interests are protected through professional representation and zealous advocacy.¹⁴⁸ For example, in *Moran v. Burbine*,¹⁴⁹ the majority ruled that police bore no responsibility for informing an arrested suspect that the suspect already had an attorney who was prepared to be present for any questioning.¹⁵⁰ In the case, the suspect waived the right to counsel during questioning and made incriminating statements without knowing that his defense attorney had already contacted the police and offered to be present during questioning.¹⁵¹ One of the issues that aroused Stevens' concern in this case was the fact that someone at the police station had falsely assured the defense attorney that the suspect would not be questioned on the night of

144. *Id.* at 137-38 (Stevens, J., concurring).

145. *Id.* at 138 (Stevens, J., concurring). Specifically, Stevens stated that:

it is important to emphasize that nothing in the Court's opinion today signals a resurrection of any such approach [that would deny the existence of prisoners' rights] in cases of this kind To the contrary, it remains true that the "restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual."

Id. (citing *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 712 (7th Cir. 1973)).

146. See Popkin, *supra* note 55, at 1090.

147. See HENSLEY ET AL., *supra* note 23, at 541. The authors argue that "the 1993 decision of *Lockhart v. Fretwell* [506 U.S. 364 (1993)] produced a 7-2 score favoring the government when Justice Thomas replaced Justice Marshall and Justices Stevens and Blackmun were left as the only remaining justices who sought to preserve a broad right to counsel." *Id.*

148. For example, a summary of the Burger Court era labeled Stevens as "one of the staunchest defenders of *Miranda* [v. *Arizona*, 384 U.S. 436 (1966)]." 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 1969-1986* 168 (Herman Schwartz ed., 1987).

149. 475 U.S. 412 (1986).

150. *Id.* at 425-27.

151. *Id.* at 416-18.

arrest.¹⁵² Justice Stevens objected to the Court's endorsement of police behavior that involved untruthful statements to deceive the defense attorney.¹⁵³ Justice Stevens' dissenting opinion called the majority's position "a startling departure from [the] basic insight" that our system is not inquisitorial.¹⁵⁴ He continued by complaining that "until today, incommunicado questioning has been viewed with the strictest scrutiny by the Court; today, incommunicado questioning is embraced as a societal goal of the highest order that justifies police deception of the shabbiest kind."¹⁵⁵

Justice Stevens' language in other dissenting opinions also reinforced his concern that the Supreme Court should remain firmly committed to the adversarial system. In his dissent in *McNeil v. Wisconsin*,¹⁵⁶ for example, Stevens complained that "as a symbolic matter, today's decision is ominous because it reflects a preference for an inquisitorial system that regards the defense lawyer as an impediment rather than a servant to the cause of justice."¹⁵⁷ In that case, a jailed defendant facing armed robbery charges was represented by a public defender at his bail hearing.¹⁵⁸ While in jail, he was questioned about a separate murder case.¹⁵⁹ The majority held that his Sixth Amendment right to counsel was offense-specific so that no rights were violated by questioning the suspect outside the presence of counsel on separate charges as long as he had waived his right to counsel after being informed of his *Miranda* rights.¹⁶⁰

Justice Stevens' vision of a strong right to counsel is evident in other opinions, including the following:

Murray v. Giarratano:¹⁶¹ The majority rejected a claim by a death row prisoner that he was entitled to representation by appointed counsel to assist with preparation of his post-conviction claims.¹⁶² Unlike the majority, which viewed the right to counsel narrowly in terms of representation in criminal trials and first appeals of right, Stevens argued that the Court should not focus on whether there is an absolute right to counsel in collateral proceedings, but whether due process requires that indigent death row prisoners be appointed counsel in order to pursue their legal remedies.¹⁶³

152. *Id.* at 443-44 (Stevens, J., dissenting). In fact, the suspect was questioned and incriminated himself. *Id.*

153. *Id.* at 452.

154. *Moran*, 475 U.S. at 434 (Stevens, J., dissenting).

155. *Id.* at 438-39.

156. 501 U.S. 171 (1991).

157. *Id.* at 183 (Stevens, J., dissenting).

158. *Id.* at 173.

159. *Id.* at 173-74.

160. *McNeil*, 501 U.S. at 175-76.

161. 492 U.S. 1 (1989).

162. *Id.* at 7-10.

163. *Id.* at 15-16 (Stevens, J., dissenting).

Patterson v. Illinois:¹⁶⁴ Justice Stevens' dissenting opinion objected to the prosecutor's action in directly communicating with an indicted, jailed defendant in order to gain incriminating statements.¹⁶⁵ Instead, Stevens would strictly enforce the right to counsel at the moment that adversarial proceedings begin.¹⁶⁶ Despite the fact that the defendant waived his right to counsel during questioning, Stevens characterized the prosecutor's actions as unfair and unethical because he, in effect, went behind the defense attorney's back when seeking to question the defendant.¹⁶⁷

Mickens v. Taylor:¹⁶⁸ Justice Stevens' dissenting opinion expressed strong disagreement with the majority's conclusion that no Sixth Amendment violation occurred when an appointed counsel in a capital case failed to reveal that he had previously represented the murder victim.¹⁶⁹

5. Advocate for Right to Trial by a Fair Jury

Two opinions by Justice Stevens arguably indicate that he is exceptionally concerned about criminal defendants' entitlement to jury trials by fair juries. In *Purkett v. Elem*,¹⁷⁰ Stevens wrote the dissenting opinion (joined only by Justice Breyer) against a *per curiam* opinion concerning racial discrimination in peremptory challenges,¹⁷¹ which he argued effectively permitted trial judges to accept weak, pretextual excuses when prosecutors systematically exclude potential jurors of a specific race.¹⁷² In the case, the prosecutor excluded African American jurors ostensibly because they had curly hair and moustaches.¹⁷³ Justice Stevens wrote:

164. 487 U.S. 285 (1988).

165. *Id.* at 310-11 (Stevens, J., dissenting).

166. *Id.*

167. *Id.* at 301.

168. 535 U.S. 162 (2002).

169. *Id.* at 180-82 (Stevens, J., dissenting).

170. 514 U.S. 765 (1995).

171. Peremptory challenges create risks that attorneys and judges will accept the application of discriminatory criteria in jury selection because they overestimate their ability to detect jurors' biases and because they may not risk the biased or discriminatory consequences of their own decisions. See Christopher E. Smith & Roxanne Ochoa, *The Peremptory Challenge in the Eyes of the Trial Judge*, 79 JUDICATURE 185 (1996).

172. *Purkett*, 514 U.S. at 770-75; see also CHRISTOPHER E. SMITH, CRIMINAL PROCEDURE 352 (2003). Smith states:

Although the defendant's attorney claimed that the prosecutor's excuses were clearly a pretext for making improper race-based exclusions from the jury pool, the Supreme Court, in a 7-to-2 decision supporting the trial judge's ruling in the prosecutor's favor, said that reasons for exclusion can be silly, superstitious, implausible, or fantastic . . . as long as prosecutors and defense attorneys do not admit that they are making the exclusions based on race or gender.

Id.

173. *Purkett*, 514 U.S. at 766. In justifying the use of peremptory challenges against the African Americans in the jury pool, the prosecutor said: "I struck number twenty-two because of his long hair. He had

It is not too much to ask that a prosecutor's explanation for his strikes be race neutral, reasonably specific, and trial related. Nothing less will serve to rebut the inference of race-based discrimination The Court's unnecessary tolerance of silly, fantastic, and implausible explanations . . . demeans the importance of the values vindicated by our decision in *Batson* [*v. Kentucky 1986*].¹⁷⁴

In *Lewis v. United States*,¹⁷⁵ Stevens' dissenting opinion argued that the right to trial by jury existed in all cases for which the maximum penalty could be six months or more of incarceration.¹⁷⁶ By contrast, the majority said that no such right existed when the defendant faced charges for petty offenses, even if conviction of multiple counts of those petty offenses could result in sentences that, when served consecutively, run for many, many years.¹⁷⁷

6. Law Shaper in Majority Opinions

The authorship of majority opinions shapes the specific content and tone of explanations of decisions in the Supreme Court's cases, which is why Professor Bernard Schwartz has stated that "the decision on which Justice shall write the Court's opinion remains of crucial importance."¹⁷⁸ The author of the majority opinion provides guidance to lower court judges, lawyers, and criminal justice officials about the rule of law, its justification, and the requirements for implementing the rule.¹⁷⁹ As Professor Stephen Wasby notes, "major changes

long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard. And juror number twenty-four also has a mustache and a goatee type beard. Those are the only two people on the jury . . . with any facial hair . . . And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me."
Id.

174. *Purkett*, 514 U.S. at 775, 777-78 (Stevens, J., dissenting).

175. 518 U.S. 322 (1996).

176. *Id.* at 339-40.

177. *Id.* at 330-31; see also SMITH, CRIMINAL PROCEDURE, *supra* note 172, at 346-47.

178. BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 44 (1996).

179. See DAVID G. BARNUM, THE SUPREME COURT AND AMERICAN DEMOCRACY 76 (1993). Barnum states that

[R]esponsibility for formulating the grounds for the decision and the reasoning of the Court will rest with the justice who is assigned the task of writing the opinion of the Court. The designated author may choose to write a 'narrow' opinion, that is, one that is based strictly on the facts of the case and disclaims any intention to announce sweeping principles of law. Alternatively, the opinion writer may choose to prepare a "broad" opinion, that is, one that aims for wide impact by including language that could apply to a variety of factual situations other than those on which the case itself was based.

Id.

in law [by the Supreme Court], particularly if they are clear, can be heard and understood by the lower courts”¹⁸⁰ who play a primary role in interpreting, disseminating, and enforcing Supreme Court doctrines.¹⁸¹ It not clear whether Stevens’ role as an advocate for equal protection, prisoners’ rights, and the rights to counsel and jury trials has had a definite impact on shaping the law since so many of the Court’s decisions in those cases have gone against Stevens’ views.¹⁸² However, when Stevens writes majority opinions affecting criminal justice, more so than other Justices, his unadulterated thinking can be presumed to underlie influential opinions because he is the primary drafter of his own opinions¹⁸³ without the usual reliance on law clerks for first drafts.¹⁸⁴

If we evaluate the impact of Stevens through important majority opinions, it is possible to identify several recent examples of criminal justice issues that bear the imprint of Stevens’ analysis and values:

Justice Stevens was the author of the self-assigned majority opinion in *Apprendi v. New Jersey*,¹⁸⁵ which, along with other cases based on its reasoning, such as *Blakely v. Washington*¹⁸⁶ and the Stevens-authored *United States v. Booker*,¹⁸⁷ has forced reconsideration of the application of sentencing guidelines by requiring that facts used in sentencing be found during the trial by the jury rather than announced in post-trial sentencing proceedings as findings by the judge. The implications of these cases are described as “far reaching [because they] could spell the beginning of the end for federal sentencing guidelines as we know it.”¹⁸⁸

180. See STEPHEN L. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 373 (4th ed. 1993).

181. See BRADLEY C. CANON & CHARLES A. JOHNSON, *JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT* 29-61 (2d ed. 1999). Lower court judges, as well as officials in the criminal justice system, are regarded as “interpreters” of judicial decisions and their interpretations affect whether and how policies are implemented.

182. See *supra* notes 78-142 and accompanying text (describing Stevens’ dissenting and concurring opinions that embody his various roles in affecting criminal justice).

183. See DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST COURT* 64 (1992) (reporting on Stevens’ judicial style). Savage argues that “Stevens works alone and works hard Where other justices use four law clerks, he uses two. Where others are happy to delegate much of the writing to others, Stevens wants to do most of it himself.” *Id.*

184. See WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 298-99 (1987). Rehnquist states:

I ask the law clerk to prepare a first draft of a Court opinion, and to have it for me in ten days or two weeks When I receive a rough draft of a Court opinion from a law clerk, I read it over, and to the extent necessary go back and again read the opinions of the lower court and selected parts of the parties’ briefs. The drafts I get during the first part of the term from the law clerks require more revision and editing than the ones later in the term, after the law clerks are more used to my views and my approach to writing. *Id.*

185. 530 U.S. 466 (2000).

186. 542 U.S. 296 (2004).

187. 543 U.S. 220 (2005).

188. Gene Healy, *Introduction*, *GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING*

In *Atkins v. Virginia*,¹⁸⁹ Justice Stevens was the self-assigned author of the majority opinion declaring that the execution of mentally retarded offenders violates the Eighth Amendment.¹⁹⁰ The case also reinforced the vitality of the *Trop v. Dulles*¹⁹¹ standard for assessing the Eighth Amendment's Cruel and Unusual Punishments Clause through the evolving standards of contemporary society and set the stage of the Supreme Court's subsequent decision in *Roper v. Simmons*¹⁹² invalidating the use of capital punishment for offenses committed by juveniles under the age of 18. In *Roper*, Stevens may have strategically selected Justice Anthony Kennedy as the author of the majority opinion in order to hold the small majority together by having the presumptive "weak link" assume authorship responsibilities. Justice Stevens also wrote his own brief concurring opinion reiterating that the *Trop v. Dulles* standard is an important reflection of the best aspects of our common law tradition—a tradition that never intended for law to be stagnant as the Eighth Amendment would be under the original-intent approach of Scalia and Thomas.¹⁹³ Seventeen years earlier, Justice Stevens was the author of the plurality opinion in *Thompson v. Oklahoma*,¹⁹⁴ in which he laid out the arguments that eventually gained majority support in *Roper v. Simmons*.¹⁹⁵

In *Ferguson v. City of Charleston*,¹⁹⁶ Stevens wrote a self-assigned majority opinion that found the existence of an unreasonable search in violation of the Fourth Amendment when hospital officials submitted the results of diagnostic medical tests to law enforcement officials without the permission of the individuals involved.¹⁹⁷ In this case, the hospital was cooperating with law enforcement officials in identifying pregnant women who had used cocaine.¹⁹⁸

Justice Stevens also wrote the majority opinion in *Rasul v. Bush*¹⁹⁹ declaring that federal courts have jurisdiction over challenges to the legality of detentions of foreign nationals at Guantanamo Bay, Cuba.²⁰⁰ This self-assigned opinion represented one of the Supreme Court's first responses to assertions of executive authority by the Bush administration that imposed indefinite incommunicado detentions as part of the "War on Terrorism."²⁰¹ The Court's

xv (Gene Healy ed., 2004).

189. 536 U.S. 304 (2002).

190. *Id.* at 321.

191. 356 U.S. 86 (1958).

192. 543 U.S. 551 (2005).

193. See Christopher E. Smith, *The Constitution and Criminal Punishment: The Emerging Visions of Justices Scalia and Thomas*, 43 DRAKE L. REV. 593 (1995).

194. 487 U.S. 815 (1988).

195. 543 U.S. at 561-79.

196. 532 U.S. 67 (2001).

197. *Id.* at 82-84.

198. *Id.* at 70.

199. 542 U.S. 466 (2004).

200. *Id.* at 483-84.

201. See generally Christopher E. Smith & Cheryl D. Lema, *Justice Clarence Thomas and Incommunicado*

opinion in *Rasul*, as well as the accompanying decision in *Hamdi v. Rumsfeld*,²⁰² forced the Bush administration to modify its unilateral assertions of unchecked authority and struggle with developing a plan to introduce elements of due process into cases concerning terrorism suspects detained in the United States and at Guantanamo Bay.²⁰³ It remains to be seen how the Court will deal with other legal challenges to “War on Terrorism” practices that are sure to arise in the future,²⁰⁴ but it seems clear that Stevens is one of the Court’s foremost defenders of constitutional rights, due process, and individual liberty in this context.

IV. CONCLUSION

In light of Justice Stevens’ roles in criminal justice cases, what is his impact on law and policy? In his law-shaping role as the author of majority opinions, he has not had frequent opportunities to present views on behalf of the Court in criminal justice cases. This result is not surprising in light of the fact that Chief Justice Rehnquist controlled opinion assignments for most cases and Stevens was the most frequent dissenter against the generally conservative trends of the Rehnquist Court’s decisions.²⁰⁵ The previously discussed important majority opinions by Stevens²⁰⁶ were all self-assigned opinions from the relatively small number of criminal justice cases in which Rehnquist was not in the majority. Because they agreed so infrequently in nonunanimous cases, there were few opportunities for Rehnquist to consider assigning majority opinions to Stevens for those decisions.²⁰⁷ As a result, Rehnquist typically assigned only a modest

Detention: Justifications and Risks, 39 VAL. U. L. REV. 783 (2005) (discussing Thomas’ “key opinions concerning deprivations of liberty”).

202. 542 U.S. 507 (2004).

203. See Editorial, *The Guantanamo Trials*, WASH. POST., Sept. 7, 2005, at A24. The editorial reports:

There are serious problems of fairness and appropriate process for the defendants who could face long prison terms or even the death penalty. The administration’s changes improve the system in subtle but important ways, moving it closer to the system of courts-martial by which the military tries its own soldiers. But they don’t entirely fix the problems.

Id.

204. For example, there are certain to be legal challenges if Congress ultimately approves House-passed provisions of the Patriot Act renewal that would permit federal juries to have fewer than 12 members in death penalty cases and would permit prosecutors to attempt to persuade a second jury to impose the death penalty if a first jury could not reach an agreement. See Editorial, *The House’s Abuse of Patriotism*, N.Y. TIMES, Oct. 31, 2005, at A18.

205. In the Supreme Court’s 2000-01 Term, for example, two-thirds of the Court’s criminal justice decisions supported conservative outcomes and Stevens and Rehnquist were the two Justices least likely to agree with each other nonunanimous cases. See Christopher E. Smith & Madhavi McCall, *Criminal Justice and the 2001-02 United States Supreme Court Term*, 2003 MICH. ST. DCL L. REV. 413, 417, 426 (2003) [hereinafter Smith & McCall, *Criminal Justice*].

206. See *supra* notes 185, 189, 196, 199, and accompanying text (discussing Stevens’ dissenting opinions).

207. See Smith & McCall, *Criminal Justice*, *supra* note 205, at 426.

number of unanimous criminal justice opinions to Stevens.²⁰⁸

In assessing Stevens' impact, it may be more fruitful to consider if and how his roles on the Court contribute to his influence over criminal justice. It can be difficult to assess the impact of a frequent dissenter unless and until those dissents are adopted at a later date as opinions of the majority.²⁰⁹ Some observers claim to see evidence of Stevens' impact through, for example, "his [recent] ability to appeal for votes more broadly across the court's usual ideological divide."²¹⁰ This commentator cited evidence in two 2004 criminal justice decisions of the Supreme Court:

In *Blakely v. Washington*,²¹¹ the court extended the Sixth Amendment right to a jury trial in a way that raises significant concerns about the continued vitality of federal sentencing guidelines. The five-Justice majority included conservatives Clarence Thomas and Antonin Scalia. Justice Scalia's opinion echoes a position raised in a Stevens dissent written 18 years earlier.

In *Crawford v. Washington*,²¹² the court put new teeth into the Sixth Amendment right to confront witnesses by barring prosecutors from introducing certain kinds of recorded statements as evidence at trial.

Again the decision was written by Justice Scalia. It essentially laid out a position embraced by Stevens 25 years ago. The vote in the case was 9-0.²¹³

Do these examples show that Stevens' myriad dissenting and concurring opinions over the years will ultimately have significant impact over criminal justice? It is difficult to predict what will happen, especially since so much depends on the nature of changes in the Court's composition that will occur in the years to come. Whenever he leaves the bench, Justice Stevens will leave behind more than three decades' worth of judicial opinions that will be

208. See, e.g., *Martinez v. Court of Appeals of California*, 528 U.S. 152, 160 (2000) (denying right to self-representation for appellate cases); *Taylor v. Illinois*, 484 U.S. 400 (1988) (rejecting Confrontation Clause claim when judge barred witness from testifying after defense attorney violated procedural rules); *Richards v. Wisconsin*, 520 U.S. 385, 394-95 (1997) (clarifying "no-knock" rules for executing search warrants).

209. See WASBY, *supra* 180, at 239. Wasby suggests:

Although many dissenters are defending an outdated status quo, dissents are indeed potential majority opinions of the future. Certain 'Great Dissenters' such as [Oliver Wendell] Holmes and [Louis] Brandeis are certainly well remembered for their contributions in this regard. Although other factors also contribute to the Court's overruling of past decisions, in three-fourths of the Court's overruling actions from 1958 through 1980, justices gave dissents in earlier cases as the basis for overruling those decisions or based overruling opinions on ideas from prior dissents.

Id.

210. See Richey, *supra* note 69, at 4.

211. 542 U.S. 296 (2004).

212. 541 U.S. 36 (2004).

213. See Richey, *supra* note 69, at 4.

available for use by his successors on the Supreme Court.

It is interesting to see such influence attributed to Stevens in recent years, especially because other commentators believe that Stevens' *ad hoc* approach to decision making has created "a level of influence that . . . turned out to be minor."²¹⁴ Obviously, a satisfactory answer to questions about the nature of Stevens' influence will require passage of time to monitor developments yet to come, systematic analysis of Stevens' entire record, and greater specification of criteria for defining "impact." Although further analysis of Justice Stevens remains to be conducted, it is already quite clear that his myriad roles in criminal justice cases have distinguished him from other Justices on the contemporary Supreme Court. More importantly, a recognition of his roles also raises a question about whether and how those roles will be fulfilled when this long-serving, influential justice eventually leaves the Court.

214. See Farnsworth, *supra* note 21, at 179.