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I am submitting herewith a dissertation written by Kathleen Marie Littwin Simon entitled "John Paul Stevens and the Dynamics of the Criminal Process." I have examined the final copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in Political Science.

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JOHN PAUL STEVENS AND THE DYNAMICS OF THE CRIMINAL PROCESS

A Dissertation

Presented for the

Doctor of Philosophy

Degree

The University of Tennessee

Kathleen Marie Littwin Simon

August 1993

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DEDICATION

This dissertation is dedicated to my husband

Stephen Joseph Simon, PhD

and children

Patricia Eileen and Joseph John
(classes of '93)

No wife or mother could have received more love, patience, and support.

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ABSTRACT

The primary focus of this work was to systematically analyze the opinions of Supreme Court Justice John Paul Stevens from selected federal and state criminal procedure cases in order to discover and relate how he has participated in the development of legal standards affecting criminal justice issues, in the context of federalism, as these doctrines have unfolded, have been refined, or have become entrenched by the Court over a fifteen term period (1975-1990). The secondary focus was to search out his judicial philosophy and its underpinnings by means of a review of his public statements and non-opinion writings, as well as of his personal biography and socialization. It was expected that the discovery of Stevens' role orientation would aid in an explanation of his decision-making practices and preferences in the criminal justice context. An anticipated additional benefit would be a record of how Stevens values the personnel and institutions who put into effect and are affected by these decisions as well as of how he comprehends the functions of criminal justice apparatus within public administration and society at large.

The overall conclusion is that Stevens' approach is to give equal attention to the real and ideal dimensions of a procedure. He conscientiously addresses the specific facts, issue, and arguments presented for each case, but includes in his reasoning a decision's implications for future practitioner conduct and for the legitimacy of both the administration of justice and the Court. In the cases under review, Stevens tended to apply general principles of law similarly to state and federal cases. In evaluating specific procedures he begins with the basic premises that federal entities are limited in jurisdiction and function by constitutional design, but that state law and the actions of its personnel and processes should be respected unless they deny constitutional protections. Thus, he welcomed state experimentation and innovation, and

criticized premature federal judicial intervention. He is distinct from the more ideological justices because he has chosen to assume the role of a "professional judge," and be restrained by the Court's institutional contraints and traditional reasoning techniques. Individual experiences (family criminal trial, schooling, world events, and personal contacts) could account for his sensitivity to the impact of a decision upon future accused persons (Everyman). Numerous findings reflect the nuances of his approach and responses to specific procedural areas.

TABLE OF CONTENTS

CHAPTER PAGE

I. INTRODUCTION 1

II. IN QUEST OF A JUDICIAL PHILOSOPHY 9

A Biographical Sketch of John Paul Stevens 9

Role Perceptions and Attitudes 33

Current Appraisals of Stevens' Jurisprudence 57

III. FIT AND PERFORMANCE ON THE HIGH COURT 84

The Burger Court and Stevens' Part in It:
A Survey of the Literature 84

Stevens' Opinion Writing and Alignment Patterns:
United States Supreme Court Terms, 1975-1989 102

IV. APPROACHES TO CRIMINAL PROCEDURE 111

The American Criminal Justice Environment 111

Criminal Procedures: Pretrial 121

Criminal Procedures: Trial and Post-Conviction 183

Criminal Procedures: Statutes and the Criminal Sanction 243

V. FEDERALISM: MICHIGAN V. LONG AND ITS PROGENY 255

Michigan v. Long and Its Critics 256

The Cases "Wrought" by Michigan v. Long 263

Stevens' Opinions and Federal Intrusion 272

VI. THE ADMINISTRATION OF JUSTICE 280

The Chicago Criminal Justice Environment 280

Criminal Justice Apparatus: Personnel and Institutions 305

CHAPTER PAGE

VII. CONCLUSION 331

John Paul Stevens and the Dynamics of the Criminal Process 331

Justice Stevens, Role Orientation, and Criminal Procedure 341

BIBLIOGRAPHY 356

VITA 378

CHAPTER I

INTRODUCTION

John Paul Stevens was appointed as an associate justice to the United States Supreme Court by President Gerald Ford in November of 1975 upon the retirement of Associate Justice William O. Douglas. Generally accepted as an able successor to Douglas because of his expertise in antitrust matters, Stevens nonetheless was the object of much speculation in both the popular and scholarly press as to how he might respond to specific categories of cases brought before the Court. Douglas had been notable for promoting the incorporation of the Bill of Rights to the states, especially in criminal procedure matters; in contrast, it was apparent that Stevens' judicial experience in criminal issues had been limited primarily to federal cases. How would a former antitrust lawyer-teacher and midwestern judge fare in this important area of law at a time when administration of justice issues were highly volatile and with a court dominated by justices chosen by a president who had promised a pro law and order federal judiciary? This study will provide an answer through a systematic analysis of a select number of Stevens' opinions concerning criminal procedure questions addressed by the Court over fifteen terms from his first court session in January of 1976 to July 1990.

As a statistical analysis will show, Justice Stevens wrote almost 800 opinions during this period; about one quarter of them concerned criminal procedure matters. The major thrust of this study will be to examine select cases from the latter group in order to discern Stevens' views regarding the administration of justice, including the rights of the accused, as well as the work of personnel within the criminal justice system. Particular attention will be given to his concurring and dissenting opinions. These are seen as better sources of his approach to legal

issues since majority opinions tend to be more the result of consensus among several justices than expressing the views of the individual author.[1] In order to make this work more manageable, emphasis will be on Stevens' positions regarding federalism as it affects decisions in the criminal justice field, that is, what legal concepts and principles he believes the Court should use in dealing with questions concerning federal and state criminal procedure. This analysis is expository in nature and its main purpose is to discover and to relate how Stevens has participated in the development of legal standards affecting criminal justice issues as these doctrines have unfolded, have been refined, or have become entrenched by the Burger and Rehnquist Courts. Federalism is an appropriate framework for such analysis since, throughout Court history, Supreme Court justices have disagreed on the nature of federalism and the proper role of the Court as arbiter of intergovernmental issues.[2] This debate has been evident particularly in opinions from criminal process cases that have articulated which, and in what manner, federal constitutional requirements under the Bill of Rights are to be imposed upon the states through the Fourteenth Amendment. Stevens' voice has been added to this judicial antiphonal chorus as it responds to dilemmas concerning its supervisory role over lower courts, the standards to set for resolution of state or federal pretrial and trial matters, the limits of review over state cases, and the suitable approach to statutory questions .

More thorough examination regarding Justice Stevens' response to criminal justice issues is long overdue. A cursory glance over the titles of recent legal scholarship reveals that

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[1]Lawrence Baum, The Supreme Court 167, 215 (2d ed. 1985).

[2]Edward G. White, The American Judicial Tradition: Profiles of Leading American Judges (1988); William Lasser, The Limits of Judicial Power: The Supreme Court in American Politics (1988); Robert F. Nagel, Constitutional Cultures: The Mentality and Consequences of Judicial Review (1989).

researchers have passed up Stevens, giving more attention to Justice Sandra Day O'Connor, the first woman appointed to the Court, and to Reagan appointees Kennedy and (especially) Scalia. As will be shown, a number of scholars have attempted to reveal overall trends and approaches of the Burger Court and emerging Rehnquist Court and, while Stevens' positions on legal issues and contribution to doctrinal analysis are highlighted, conclusions as to his status or distinction as a justice vary from author to author. Appraisals of his individual jurisprudence, though sparse, draw mixed conclusions as well. He appears to defy traditional labels, though he tended to be characterized early on as a moderate or swing vote and now more frequently as a liberal.

This inability to categorize Stevens' work or to fit him into a pre-conceived mold should not deter one from examining this justice and his views, for two reasons. First, one should look at what Stevens has produced and said as statements emanating from one of our important and contemporary political actors. This stance is in tandem with the prevailing assumption in political science circles that the Supreme Court is generally accepted as a political institution which influences policy directions by defining the boundaries of discourse and outlining possible actions that can be taken.[3] Laurence Tribe builds a case for the validity of studying the work of an individual jurist by noting how the presence and arguments of one justice can make a difference in the outcome of cases, "broadening the range of

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[3]John H. Ely, Democracy and Distrust: A Theory of Judicial Review (1979); Henry J. Abraham, The Judiciary: The Supreme Court in the Governmental Process (5th ed. 1980); Jesse H. Choper, Judicial Review and the National Political Process (1980); Leif Carter, Contemporary Constitutional Lawmaking: The Supreme Court and the Art of Politics (1985); Laurence Tribe, God Save this Honorable Court: How the Choice of Supreme Court Justices Shapes Our History (1985); John Brigham, The Cult of the Court (1987). But see Frank H. Easterbrook, Ways of Criticizing the Court, 95 Harv. L.Rev. 802 (1982); Richard A. Posner, The Federal Courts: Crisis and Reform (1985).

acceptable views," and "preserving the overall balance of opposing views" so necessary to the survival of a living Constitution in this republic.[4] Second, if a Supreme Court justice is not labeled "pro defense" or "pro prosecution" (and thus, not "predictable"), what approaches to issues and resolutions of questions he puts forth may actually contribute greatly to just results rather than ideological positioning. Criminal processing is dynamic, not static, since it concerns the continuous operations of both federal and fifty state procedures by a variety of personnel dealing with clientele in a myriad of situations. The volume of Stevens' opinions in this area suggests a recognition of the primacy of this human condition, in time and place, coupled with a desire to contribute to the Court's role of framing legal guidance for future procedural conduct. It is important to highlight the work of this justice in an area where he has made a significant contribution to the jurisprudence of the Supreme Court.

No person or institution (or set of cases, for that matter) can be studied in a vacuum. If Stevens has been viewed generally as a moderate and non-ideologue, how has he seen his role as a justice and what could account for it? A secondary purpose of this study, then, will be to search out the causes for these evaluations of Stevens' performance. In an effort to bring into focus the underpinnings for his judicial philosophy, one need examine his written work or speeches, as well as his statements before the Senate Judiciary Committee to discern his views of the judicial role, judicial responsibilities, and basic legal concepts. But this quest for philosophy would be rendered incomplete without an investigation of Stevens' socialization. Thus, where feasible, an attempt will be made to identify and discuss what influences may have shaped his views of the world, the judicial role, and the workings of the criminal justice system. These influences include family genealogy and events, social life and acquaintances,

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[4]Tribe, supra note 3, at 32, 36, 49.

formal education and campus environment, and non-judicial professional experiences. Assigning weight to each factor and accurately measuring degrees of influence is more in the realm of psychology than political science, but one can venture a few preliminary observations.[5] After the inquiry into Stevens' judicial philosophy, the systematic analysis of selected opinions is introduced by a brief overview of the environment in which criminal justice decisions have been made, from the late 1960s through the 1980s, to include public perceptions of criminal matters and actual government responses. It will serve as a national historic and political context with which to view Court activity. The examination of cases is in accord with the various stages in the processing of a criminal defendant, from initial police contact through appeal. Other cases interpreting select statutes were included to illustrate his view of the Court in relation to the federal and state legislative branches. We will see how Stevens' views and approaches correspond with earlier standards he set for himself and with those of his fellow justices, the criminal justice community and public opinion, as well as discuss observable traits in the development of his jurisprudential style.

Recent literature explores the evolution of the Court's approach to intergovernmental issues and records the reactions of several state court judges to the perception that the Burger Court was "cutting back" on civil rights protections.[6] As the federal district and appellate

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[5]I borrow this disclaimer in part from Helen Shirley Thomas who took a similar position when offering background on Justice Felix Frankfurter, the object of her study in Felix Frankfurter: Scholar on the Bench 5 (1960.

[6]Ronald K. L. Collins et al., State Constitutional Law, special section to the Nat'l. L.J., Sept. 29, 1986; R. K. L. Collins, The Once "New Judicial Federalism" and its Critics, 64 Wash. L. Rev. 5 (Jan. 1989); Peter J. Galie, State Supreme Courts, Judicial Federalism and the Other Constitutions, 71 Judicature 100 (1987); Shirley Abrahamson and Diane S. Gutman, The New Federalism: State Constitutions and the State Courts, 71 Judicature 88 (1987); John Kincaid, The New Judicial Federalism, 61 J. St. Gov't. 163 (Sept./Oct.1988); Steven Pressman, Protecting Rights in State Courts, Editorial Research Reports, May 26, 1988, at 274; G. Alan

court rulings have become more restrictive--the results of judicial appointments by the Reagan administration--the state courts of last resort have become the sources for broader interpretations of federal law and expansions of individual rights under state law--the so-called "new judicial federalism." A majority of the Supreme Court has used the "adequate and independent state grounds" rule established in Michigan v. Long[7] to assume jurisdiction over state cases and has reversed several of these decisions; Stevens' dissent in Long predicted such "intrusive" consequences on state law. Review of this dissent and subsequent opinions reveal a current of discontent regarding what Stevens' sees as the abdication of the court's protective role in this line of state criminal procedure cases.

Apart from recording Stevens' criminal process positions, this study presents one other set of observations: how Stevens views the institutions and personnel who put into effect and are affected by these court decisions, and speculates about the impact of such decisions on the criminal justice components and on the society in which they function. Much of this information comes from dicta and reveals certain values Stevens identifies with criminal justice administration and helps us understand how he sees these values protected and balanced by his judicial approach. These observations are made after a presentation of the political movements, historic events, intellectual currents, and Stevens family tragedies related to the administration of criminal justice in early 20th century Chicago. These factors, when added to other aforementioned influences, make up the fabric of a backdrop to the staging of Stevens' judicial role. What results is a glimpse at the justice's vision of the social order, that is, how

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Tarr and Mary Cornelia Porter, State Supreme Courts in State and Nation (1988); Robert F. Utter, State Constitutional Law, the United States Supreme Court, and Democratic Accountability, 64 Wash. L. Rev. 19 (1989).

[7]103 S.Ct. 3469 (1983).

he comprehends the functions of the criminal justice apparatus within the broader context of public administration and society at large.

Taken in its entirety, this dissertation is not a full-scale judicial biography, yet it relies in part on the well-established biographical tradition of public law scholarship.[8] Such an endeavor joins a long and significant tradition of those scholars who attempted to analyze the contributions of individual Supreme Court justices through exploration of biography and substantive analysis of legal opinions,[9] but it goes further in some respects. Larry Baum suggests that two positive trends in judicial research have been the interdisciplinary foci of questions advanced by political scientists and the integration of the judicial politics field with

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[8]J. Woodfard Howard, Judicial Biography and the Behavioral Persuasion, 65 APSA 704 (1971). Howard describes "judicial biography" as "a life study of a judge written substantially as a case-history in the judicial process," with its "prime object to describe and relate the judge's personality, background, and belief system to his conduct on the bench and impact on the law and politics of his time," id. at 704-705. Each biography he reviewed "illuminate[d] relationships among a personality (independent variable), his court or institution (intervening variable), and his polity (dependent variable)," id. at 705 n.6.

[9]Howard, id., includes the following works: Floyd B. Clark, The Constitutional Doctrines of Justice Harlan (1915); Carl B. Swisher, Stephen J. Field: Craftsman of the Law (1930) and Roger B. Taney (1935); Charles Fairman, Mr. Justice Miller and the Supreme Court (1939); Alpheus T. Mason, Brandeis: A Free Man's Life (1946); Harlan Fiske Stone: Pillar of the Law (1956); John P. Frank, Mr. Justice Black: The Man and His Opinions (1949); Joel F. Paschal, Mr. Justice Sutherland: A Man Against the State (1951); Louis Jaffe, Mr. Justice Jackson, 68 Harv. L. Rev. 940 (1955); Helen Shirley Thomas, Felix Frankfurter: Scholar on the Bench (1960); W. Mendelsohn, Justices Black and Frankfurter: Conflict in the Courts (2d ed. 1966); Robert Faulker, The Jurisprudence of John Marshall (1968); J. Woodfard Howard, Mr. Justice Murphy: A Political Biography (1968); David Shapiro, The Evolution of a Judicial Philosophy: Selected Opinions and Papers of Justice John M. Harlan (1969). More recent works include: H. N. Hirsch, The Enigma of Felix Frankfurter (1981); Bruce A. Murphy, The Brandeis/Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices (1982); H. L. Pohlman, Justice Oliver Wendall Holmes and Utilitarian Jurisprudence (1984); Phillipa Strum, Louis Brandeis: Justice for the People (1984); R. Kent Newmyer, Supreme Court Justice Joseph Story: Statesman of the Old Republic (1985); Sue Davis, Justice Rehnquist and the Constitution (1989).

other fields of political science.[10] This study reflects both characteristics by placing Stevens' contributions and opinions within an historical and societal context and by linking his judicial behavior to actual administration of criminal justice and public policy concerns.

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[10]Larry Baum, Judicial Politics: Still a Distinctive Field, in Political Science: The State of the Discipline 189, 195-96 (Ada Finifter ed., 1983).

CHAPTER II

IN QUEST OF A JUDICIAL PHILOSOPHY

A Biographical Sketch of John Paul Stevens

In order to gain greater insight into the views of Mr. Justice Stevens, it is important to look into that which helped to shape his views of the world and of the judicial role in it--family influences and social life, formal education and non-judicial professional experiences.[1]

John Paul Stevens was born on April 20, 1920 in Chicago, the fourth son of Ernest James and Elizabeth (Street) Stevens. The family lived at 1314 E. 58th Street in the then fashionable Hyde Park neighborhood across from the University of Chicago campus. They spent summers in Lakeside, Michigan near Mrs. Stevens' childhood home where Grandmother Street taught her grandsons Ernest Jr., William, Richard, and John to play bridge and where, at age six, John "could play better bridge than most adults today."[2]

His mother attended Vassar College and graduated with honors from the University of Chicago. The late Ernest Stevens Jr., oldest brother of John Paul, reminisced that Mrs.

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[1]Inclusion of judicial biography follows the more traditional approach to public law study, but is still an acceptable addition to the knowledge of judicial behavior. See Sheldon Goldman and Thomas P. Jahnige, The Federal Courts as a Political System 51-56 (3d ed. 1985). Also, J. Woodford Howard, Jr., Judicial Biography and the Behavioral Persuasion, 65 APSR 704 (Sept. 1971); John R. Schmidhauser, Judges and Justices: The Federal Appellate Judiciary (1979); and Lawrence Baum, Judicial Politics: Still a Distinctive Field in Political Science: The State Of The Discipline 189, 194 (Ada Finifter ed., 1983). For a more in-depth biography on Stevens, see Kathleen M. L. Simon, John Paul Stevens and the Fourth, Fifth, and Sixth Amendments (1980)(unpublished M.A. thesis, Appalachian State University) [hereinafter Simon, Thesis].

[2]Anthony Moncini, N.Y. Post, Dec. 6, 1975, at 20 (quoting brother Ernest Jr.). Today John holds the "Life Master" bridge title. See infra, Chapter Six, for description of the Chicago environment in which Stevens grew up.

Stevens was a strong influence on her family and instilled patriotism, love of literature, and appreciation of the arts in her four sons.[3]

A glimpse into the Stevens' genealogy reveals long-standing familial traits and expectations of success, achievement, public recognition and enterprise. The Stevens family is of Norman descent, able to trace its heritage back to Nicholas Stevens, a brigadier general in Oliver Cromwell's army.[4] As was the case with many high-ranking military, Cromwell meeded Nicholas with an estate in Ulster, Ireland and appointed him lord-lieutenant of Dublin. He came to America in 1669 and settled in Stonington, Connecticut with four sons.[5] It is from

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[3]Telephone interview with the late Ernest Stevens Jr. (Nov. 10, 1987). According to Ernest, although Elizabeth Stevens was small in stature, she had an outgoing, persuasive manner. She conducted the Pen Women of America study club in her home, was an officer of the DAR, a confirmed Christian Scientist after a healing experience (from an injury received at the site of the construction of the Stevens Hotel in the 1920s), and an enthusiastic painter. According to her obituary (Chi. Trib., October 25, 1979, sec. 3, at 19), "She was by avocation a poet, painter, and patron of the theater; her paintings were sometimes exhibited in Chicago showings, and some of her poetry was published."

[4]Genealogy to Socrates Stevens from Stevens, John Henry in 34 National Encyclopedia of American Biography 463 (1948), and from Stevens, John P. in N-63 National Encyclopedia of American Biography 29 (1984).

[5]Historians report that many "military adventurers" who reaped these spoils displacing the Catholic lords stayed only long enough to collect rents and departed. After 1653, "these officials, each in his district, repressed malcontents, vagabonds, and bandits, closed ale houses, and prohibited cockfights, in a mixture of moral puritanism and political dictatorship." (R. R. Palmer and Joel Colton, A History of the Modern World 170-171 [6th ed. 1984]) Without more, one can only speculate as to Nicholas' activities and loyalties after Cromwell's death and the motives for his immigration to the colonies. John Stevens' own view was shared during a speech in 1983: "Based on very sketchy evidence, I have drawn the inference that dissatisfaction with the way James the Second was conducting the business of government may have played a part in that decision. My reading of Macaulay's History of England [from the Accession of James the Second (1879)] led me to believe that it was the King's attempt to stir up a little judicial activism concerning the patronage system that might have been at the heart of the problem." J. P. Stevens, "Reflections on the Removal of Sitting Judges," 13 Stetson L. Rev. 215 (1984). (See infra, Chap. II, for a synopsis of this article.) This "inference" is a little perplexing, given that the date of Nicholas' emigration was 1669 and James the Second reigned 1685-1688. Perhaps Stevens' references to his ancestor and to James II was done with

Nicholas' son Henry and his wife Elizabeth Gallop that the family line progresses through seven generations to John Paul's father Ernest James[6] who, in the late 1920s, continued to celebrate his family's Norman roots by naming one of the Stevens Hotel dining rooms the "Colchester Grille" after Colchester, England, claimed birthplace of the Stevens' ancestors.[7] Coincidentally, another Colchester--less remote in both distance and memory (and named for its abundant coal fields and in honor of a railroad surveyor, not England)--was also of significance to the Stevens family.

Socrates (1824-1874) and Amanda Jane (Stevens)(1828-1905) Stevens arrived in Illinois from Indiana in 1844. He was a school teacher and they lived on a farm in McDonough County, just south of what was soon to become Colchester, where they eventually reared six sons and a daughter: Edward D. (1848-19--), James W. (1853-1936), John H. (1856-1943), Charles A. (1859-1932), J. Frank (1861-19--), Thomas A., and Elizabeth (Mrs. John Stookey).[8] Socrates was one of the first founders, an officer and trustee of the Christian

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a bit of "poetic license" as a clever way to introduce his topic, for at its end, he revealed: "Since I would like to have you think of me as a reliable lawyer--even though you may disagree violently with my opinions as a judge--I now feel compelled to tell you that an examination of the entire record convinces me that the suggested finding on the issue of motivation is not only unsupported by the evidence but must be branded as clearly erroneous because of its inconsistency with the fact that Nicholas left the shores of England before James put the arm on brother Jones." [Jones was Chief Justice of Common Pleas], id. at 220.

[6]The family line extends from Nicholas' son Henry and his wife Elizabeth (Gallop), Henry and Anna (Babcock), Simeon and Hannah (Rosewell), Benjamin and Hopestill (Shaw), Benjamin and Lydia (Fields), James and Nancy (Miles), Socrates and Amanda (Stevens), James W. and Jesse Louise (Smith), to Ernest James and Elizabeth (Street) Stevens.

[7]John Drury, Dining In Chicago: An Intimate Guide 163 (1931).

[8]Much of the following information comes from History of McDonough County, Illinois (1885) [hereinafter: 1885 History]. Also consulted were History of McDonough County, Illinois: Its Cities, Towns and Villages (1878); Atlas Map of McDonough County, Illinois (1871); Records from Mount Auburn Cemetery, Colchester Township, Colchester, Ill. (1987); and June Moon, A History of Colchester, Illinois (1956) [hereinafter: Moon, History]. Mrs.

Church of Colchester. He ran unsuccessfully for county treasurer in 1863 on the Republican ticket (1818 votes out of 3655) at a time when there was a "tendency for the Republican and Democratic votes to be close and races congenial."[9] He and eldest son Edward began a general merchandise store, Stevens Bros., in 1869 with stock worth $1500. James W. (John Paul's grandfather) took over for Socrates in 1872, but discontinued the business in 1874 upon Socrates' death. A short venture into clayworks lasted two years and then the brothers became partners in the general merchandise business of A. J. Smith, father-in-law of James.[10] In 1881, Smith sold his interest to Edward and James, who re-established Stevens Brothers, and were soon joined in partnership by brothers John H. and J. Frank, former Smith clerks. According to town historian June Moon, by 1885 (when John Paul's father was barely one year old) "the Stevens' Brothers were well established in their business and well-known

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Frances Welch, Colchester town clerk, and Marla Vizdal, archival specialist at University Library, Western Illinois University, Macomb, Illinois, assisted in providing excerpts, copies and microfilm reels of these documents.

[9]1885 History, supra note 8, at 255.

[10]James W. Stevens married Jesse L. Smith (1856-1946) on Feb. 26, 1874. They had two sons, Raymond W. (1874-1933) and Ernest J. (1884-1972). He divorced her in 1903, let her keep the family house in Chicago and paid her alimony, but never saw her again. He married one of his employees, Alice M. Bradley, in 1905. A. J. Smith, Jesse's father and John Paul's other paternal great-grandfather, was born in Lower Canada in 1830, son of Joseph M. and Eliza (Westover) Smith, natives of Vermont. He located in Colchester as an agent for the Chicago, Burlington, and Quincy Railroad (1863-1879), engaged in the coal business, hotel business, and eventually the mercantile trade. He married Francis A. Cuyler, native of Canada and the sister of Jesse M. Cuyler, wife of Edward D. Stevens. According to 1885 History, supra note 8, at 604, "Mr. Smith . . . ranks among the substantial business men of McDonough County." and Edward Stevens "is one of the most prominent of Colchester citizens . . . and present treasurer of the city. . . . The firm [Stevens Bros.] of which he is a member, has by fair and honorable dealings, built up a reputation second to none in McDonough County, or in the counties adjoining," id. at 601. The only Stevens' daughter, Elizabeth, married John A. Stookey in November of 1871. He founded a successful general merchandise business in 1872, and their son Bert would have a prominent place in the future mishaps of Ernest Stevens.

throughout the county. It was said that to hear of Colchester without hearing of the Stevens' Bros. would be like hearing of Washington, D.C. without hearing of the government."[11] By 1889, she revealed, they had 16 clerks, waited on 132,227 customers, and had total sales of $114,250.50. Their building housed the Opera House, the Post Office, a hardware store, and they established the town's first bank.

Contemporaneous with the success of Stevens Brothers was the mail order import silk business of brother, Charles A. Stevens. After its beginnings in 1879 in Avon, Illinois, he established a store in Chicago and eventually sold dress silks at both retail and whole sale. Gradually, his five brothers began to buy into his firm and by 1889 he had renamed the company Charles A. Stevens and Bros. In 1891 the Stevens Brothers' store in Colchester was sold and the brothers, wives and children had begun to reside in and around Chicago. These new urban surroundings and the challenges faced by Justice Stevens' family will be discussed further in a different context. But it is evident that the legacy of family success and achievement had relied upon entrepreneurship, enterprise, and initiative as well as family pride and loyalty. Evidently, no grass was going to grow under a Stevens' foot!

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[11]Moon, History, supra note 8, at 56. The brothers were said to own among the finest homes in Colchester; James W. Stevens was the first resident to have hot water installed in 1884, and advertised his house and grounds for sale in 1890 for $5,000--"a trifle over half its cost." Family folklore may have noted that A.J. Smith Hall and Stevens. Bros. Hall hosted school library benefits, the first meetings of the First Methodist Church, and an organizational meeting for a new Building and Loan Association. Amanda J. Stevens, John Paul's great-grandmother, helped to organize the Women's Temperance Union of Colchester in 1884, becoming one of its vice-presidents and later president. In 1885 she was treasurer of the Christian Church, and held a "milk and mush social" in her residence in 1886. Stevens Bros. was among the first to set up a fire company, to install telephone lines, to put up a street lamp light. They also owned a grist mill which serviced a number of localities along the train line, and in 1890 even shipped grain to Glasgow, Scotland.

John Paul Stevens' paternal grandfather, grand-uncles, uncle, and father were successful in the retail mercantile business, and insurance and hotel companies until the Great Depression of the 1930s (and defense against criminal indictments for embezzlement) nearly bankrupted them.[12] His father and brothers, William and Richard, became attorneys and brother Ernest Jr. was an investment stockbroker; all were alumni of the University of Chicago. All of the aforementioned gentlemen belonged to prominent social or country clubs, resided in prestigious areas of metropolitan Chicago, and supported the arts. None of the elder Stevenses were active politically yet all were registered Republicans--two traits common to John Paul Stevens. No particular religious affiliations dominated the family: Stevens' uncle and father were Presbyterians and his grandfather was a Christian Disciple, his mother was a Christian Scientist, and Stevens himself is a Baptist.

In keeping with family tradition, John Paul attended the University of Chicago High School and later graduated from the University of Chicago with a B.A. degree in English literature, completing high school and college in six years, Phi Beta Kappa, and with a reputation of being a political moderate.[13] It is significant to note that at this time the University was under Robert M. Hutchins' "Chicago Plan" of education which was an interdisciplinary course of study that emphasized not what to think but how to think. Students

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[12]Grandfather James W. Stevens helped organize the Illinois Life Insurance Co.; grand-uncles Charles and Edward maintained the very successful Charles A. Stevens and Co. women's clothing retail chain and Edward's son Edgar (1876-1942) eventually established a large retail silk store bearing his name in Evanston, Ill; uncle Raymond Stevens was president of Illinois Life Insurance Co. until he died in 1933; his father Ernest built the Stevens Hotel (now the Conrad Hilton) in 1927 and later became a director of Charles A. Stevens and Co. See Simon, Thesis, supra note 1, at 5-8, for family information sources. For further insight into the success and downfall of the family businesses and possible influence upon John Paul as a young man, taken in the context of the city of Chicago, see infra, Chapter Six.

[13]Success a Way of Justice Stevens' Life, Chi. Trib., Nov. 29, 1975, sec. 1, at 5.

were exposed to specific subject matter, then expected to formulate a position, give reasons for it, and defend it against objection--a truly "liberal" education in the traditional sense and obviously of great aid to Stevens in anticipating the demands of a legal career.[14]

In 1942 Stevens entered the Navy as a lieutenant and was stationed in Washington, D.C. (and later, Hawaii) as an intelligence officer under Admiral Chester Nimitz breaking Japanese codes. Though never seeing action, he received the Bronze Star at the end of World War II. Stevens married high school friend Elizabeth (Betty) Jane Sheeran on June 7, 1942, and after the war in 1945 he returned to Illinois to pursue a legal career at his father's alma mater, Northwestern University School of Law, on a Navy scholarship. The family lived in the Beverly neighborhood of Chicago, south of Hyde Park, and soon included two adopted children, John Joseph and Kathryn.

According to Professor Fred. E. Inbau, the post-World War II era at Northwestern University was "one of the most exciting times to teach because the students were older and more mature and eager to learn."[15] A Stevens' contemporary, and member of NUSL class

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[14]For an explanation of this approach, see Robert M. Hutchins, The State of the University (1949) and Charles H. Faust, The Idea and Practice of General Education: An Account of the College of the University of Chicago by Present and Former Members of the Faculty (1950). See Simon, Thesis, supra note 1, at 8-10, for a more in-depth discussion of the connection between educational techniques and Stevens' jurisprudence. For insight into the attitudes and capabilities of University of Chicago graduates as seen by alumni who worked in Washington (in or out of government) in high visibility positions in 1976, see Don Sider, Washington's Midway Connection: How the University of Chicago Generates Power for the Potomac, in Chi. Trib. Magazine, August 29, 1976, at 30-36. Common characteristics were reported to include "agility of the mind," a stress on diversity of opinions and interdisciplinary work, discussions of public affairs, "a belief in intellectual structures" and "seeing the world as a whole," thinking "clearly." UC education is said to foster people that are "highly individualistic, even eccentric, (who) see themselves making it on their own." Stevens is noted in the article as being among this unique group then in Washington.

[15]Telephone interview with Fred E. Inbau, Professor Emeritas, Northwestern University School of Law (January 19, 1993).

of 1949, recalled that all of his classmates had been war veterans and all but one were former officers.[16] He remembered John Paul Stevens as the "big man on campus," whom "everybody thought was going to do great things." A soft-spoken," yet "competent" student, he was known to always be "well-prepared" for class and could be seen "in the library all the time," though he was "not athletic" and, unfortunately for some teammates, "not a good softball player!" Professor Inbau remembered that Stevens "impressed him very much" as a "very bright and likable" person with a "very acute mind," who was known among the faculty to pose "troublesome questions." Though another of Stevens' student contemporaries (and later a fellow NUSL professor), Francis A. Allen, observed that good students tend to do this in part to test the profs and in part to exhibit their powers of thinking.[17] Inbau taught Criminal Evidence and said that John Stevens received the highest grade in that class. He posted his exam on the bulletin board for the rest of the class to see because Stevens had answered the questions "as perfectly as [Inbau] thought they should be answered." On reflection, another Northwestern instructor, antitrust law professor James Rahl, said of his dear friend (and one of his first students), that Stevens was "an intellectually secure person because he has such great mental power."[18]

The aforementioned fellow student stressed that Northwestern's campus maintained a somewhat "liberal faculty," noting for example that Dean Leon Green publicly expressed his

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[16]Telephone interview with Robert Casey, attorney and former Illinois judge (January 12, 1993).

[17]Telephone interview with Francis A. Allen, Professor of Law, University of Florida Law School (January 22, 1993).

[18]David W. Hacker, Questions for Stevens, Nat'l Observ., Dec. 13, 1975, at 4. See also Simon Thesis, supra note 1, Appendix, for letter to author from Rawls regarding qualities common to Stevens and a person "well-qualified" to be a federal appellate judge and justice.

view that workers in the auto industry had a right to sitdown strikes, a position "unusual for that time." In addition, students had to do pro bono work at a law firm or public defender's office in order to graduate. Francis Allen began his student days at Northwestern in 1940, went into active duty during the war, and returned to campus to complete his studies. It was his impression that the "overall posture of the school was very liberal" and that students would "inevitably be influenced by the liberal ethos that pervaded the school." When pressed for a definition or description of the term "liberal," he suggested "broad support for administration [or government] powers in the cause of social reform legislation" coming from "New Deal ideas such as the Wagner Act," in contrast to the legal environment of a "conservative judiciary stymieing and nullifying legislation." He saw general "support for human rights as defined in the Bill of Rights" and support for things such as "increased access to lawyers, representation of the indigent, and expanded use of the Fourth Amendment" which eventually "come into fruition through the Warren Court decisions." He noted that until he joined the faculty in 1948, after a clerkship with Chief Justice Vinson, previous instruction in the areas of Criminal Law, Procedure and Evidence had been from the "law enforcement/prosecutorial attitude" as taught by Professor Inbau.[19]

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[19]Professor Inbau, supra note 15, described his background as much influenced by his experiences over several years beginning in 1932 working with Northwestern in liaison with the Chicago Police Department on a variety of ventures. He considers John Paul Stevens a good friend with whom he has kept in contact through the years and urges that they get along very well "despite our philosophical differences." Inbau is opposed to unnecessary restrictions on the police and has filed a number of amicus curiae briefs which, he says, "I know Stevens has read," but only on occasion has seen matters his way. Inbau believes that this contrast in positions may be because Inbau "has had actual police experience and Stevens has not." Francis Allen's interest in criminal procedure, on the other hand, is rather inclusive. But he has written that federal judges' concerns for problems involving criminal justice procedures which began in the 1930s coincided with memories of European dictatorships and "the uses of the instruments of criminal justice as instrumentalities for the systematic destruction of political values upon which free societies rest." Francis A. Allen, The Judicial Quest for Penal

While at Northwestern, Stevens became co-editor of the law review, received the Order of the Coif honors, and graduated in 1947 first in his class magna cum laude. Stevens and his fellow editor, Arthur Seder, Jr., considered themselves "friendly rivals" as well as "very good friends" as they vied for top honors at the law school.[20] Fresh out of the service, in their mid-twenties, with new families to care for, these two young men saw law school "as a full time job" and were motivated to do well and not waste time. (However, they did find moments for regular noontime bridge games while enjoying brownbag lunches!) Mr. Seder recollected that during the Spring of 1947, after graduation, the Northwestern law faculty had the opportunity to nominate a candidate for clerk to Associate Justice Wiley Rutledge. Not wanting to have to choose between Stevens or Seder, the two colleagues were called to the dean's office, told of the clerkship and asked to flip a coin. Stevens won the toss, and went to Washington a few months later, while Seder did graduate work and taught for a semester. But the story does not end here. As luck would have it, Mr. Seder was chosen to be a clerk for Chief Justice Vinson the next term. In retrospect, Seder believed it turned out for the best, since in his view Stevens' philosophy was more attuned to that of Rutledge (as was his to Vinson). He has observed that when a clerk and his justice share similar ways of thinking, it makes for a better working relationship.[21]

Justice: The Warren Court and the Criminal Cases, 1975 U.Ill.L.F. 518, 518.

[20]Telephone interview with Arthur Seder, Jr. (February 9, 1993).

[21]Id. Seder believed that in the 1940s Stevens was somewhat of a middle of the road, (though not a "flaming") liberal thinker, and that he would have fit right in with Rutledge and the other justices of the "left wing" at that time--Black, Murphy and Douglas. He thought of Stevens in this way because of his education and upbringing among "intellectual people" at home and in and around the University of Chicago community. Compared to UC, he did not consider Northwestern that liberal. He enthusiastically recalled his clerkship and that Justice Frankfurter often interacted not only with his own clerks, but also with those of other justices as well, and conducted lively conversations on numerous topics with them.

Stevens served as law clerk from 1947 to 1948. Writing of his "Rutledge experience" in a published biography of this justice, Stevens elaborated upon Rutledge's careful use of precedent, his concern for the importance of procedural safeguards, his many-sided approach to problems, and his belief in respecting the discretion of judges, juries and administrative agencies[22]--characteristics that will later be reflected in the judicial reasoning of Stevens himself.[23] Stevens recalled that a lot of habeas corpus litigation arrived at the Court that term, especially from the state of Illinois, whose complex remedy procedures gave rise to a number of Rutledge opinions.[24] From his vantage point as clerk, Stevens "personally observed the prodigious and perceptive character of [Justice Douglas'] work in the most complex cases that came before the Court" and remarked that "his competence was truly unique."[25] Justice Jackson had returned from the Nuremberg trial and had much to say about procedural injustice under the guise of nationalism. In November of 1947, a young Thurgood Marshall argued before the Court (and won) a case involving Mississippi's exclusion of black citizens from grand and petit juries,[26] and that same term neophyte attorney Archibald Cox

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[22]John P. Stevens, Wiley Rutledge, in Mr. Justice 177 (P. Kurland and A. Dunham eds. 1956).

[23]See SIMON, Thesis, supra note 1, at 184 (conclusions recorded by author after reviewing opinions by Stevens from both the United States Seventh Circuit Court of Appeals and Supreme Court, 1970-1978).

[24]John P. Stevens, Remarks before the American Bar Assn. Annual Aummer Meeting (1992) (rebroadcast on C-SPAN, August 22, 1992) [hereinafter: Stevens, 1992 ABA Remarks].

[25]John P. Stevens, Comments by Justice Stevens upon the death of Justice William O. Douglas, in Chi. Trib., January 26, 1980, sec. 1, at 9.

[26]Patton v. State of Mississippi, 332 U.S. 463, 68 S.Ct. 184 (1948).

successfully argued against a Pennsylvania habeas corpus statute, challenging the absence of counsel in its application to defendants.[27]

From 1948 to 1952 Stevens was an associate in the Chicago firm of Poppenhusen, Johnston, Thompson and Raymond, and a protege of Edward R. Johnston in antitrust matters. However, antitrust was not the only law he practiced. Stevens recently recalled that after the Illinois legislature passed the Post-Conviction Hearing Act, he assumed some habeas corpus cases, pro bono.[28] He recounted one case in vivid detail. The client had been arrested and convicted in 1937 of the murder of a cashier of a motion picture theater based upon a station house confession obtained by Chicago police after the suspect had been handcuffed, hoisted off the floor and beaten severely with a nightstick several times. During their first encounter at Joliet Prison, Stevens asked the prisoner to describe the physical sensation of the torture, and as he told of the pain in his shoulders (as opposed to that of his wrists), Stevens mused that "it struck [me] at the time that he was telling the truth." Corroborating evidence such as testimony from the defense attorney who had been denied access to his client until after the confession had been signed, testimony from the man's wife who visited him after the beating, the seven day delay between arrest and booking, a newspaper photograph showing his contusions, the record of his physical exam record upon admittance to the county jail, and the few weak responses in cross-examination of the testimony by a police captain helped Stevens "to learn the importance of a thorough job at getting at facts," and, "that there are on occasion witnesses that do not always tell the truth." Despite the tight case, the Illinois judge denied

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[27]Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256 (1948).

[28]Stevens, 1992 ABA REMARKS, supra note 24. Stevens appeared to have a sense of satisfaction from these cases, and noted the "rewards" one may get, such as the Christmas cards he still receives from some of his former habeas clients.

the petition since the issue had been raised at the original trial. Stevens claimed to have "detected a feeling that there was a reluctance to second-guess a colleague on the bench." This taught him two other lessons: "Sometimes the identity of the decision-maker is of some importance in cases of this kind," and "sometimes there is an advantage to having access to a federal forum when the result is one that might not be popular with those that elect judges." On appeal, however, the Illinois Supreme Court reversed the order and remanded the case with instructions to set aside the murder conviction and to grant a new trial.[29] Admittedly, this case left quite an impression.

John Stevens performed other public service as well. In 1951 he served in Washington, D.C. as counsel for the United States House of Representatives Judiciary Committee's Subcommittee on the study of monopoly power, and from 1953 to 1955 as a member of the Attorney General's National Committee to Study Antitrust Laws. Along with Edward Rothschild, Stevens established the law firm of Rothschild, Stevens, and Barry in 1952 and remained a partner there until his nomination to the Seventh Circuit Court of Appeals in 1970. Dealing primarily in commercial law and antitrust matters, this firm was unusual, according to Stevens,[30] in that it took on both plaintiff and defendant claims at a time when most firms of its size were labeled as either pro-defendant or pro-plaintiff based upon certain antitrust policy viewpoints. Between 1950 and 1958, Stevens lectured on antitrust and other law subjects first at Northwestern University School of Law (1950-54) and later at the University of Chicago Law School (1955-59). Evidently, "He might have made [teaching] a full-time occupation if it

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[29]People v. LaFrana, 4 Ill. 2d 261, 122 N.E. 2d 583 (1954).

[30]See Nomination of John Paul Stevens to be a Justice of the Supreme Court: Hearings before the Committee of the Judiciary United States Senate, 94th Cong., 1st Sess. 32-33 (1975) [hereinafter, Hearings].

hadn't been for his dislike of grading students."[31] He began to speak publicly and to publish professional articles on antitrust matters.[32] In 1960 he served as chairman of the Chicago Bar Association Antitrust Section.

In his personal life he had the unanticipated but welcome role of father to two daughters, Elizabeth Jane and Susan Roberta, born to Betty and him in the early 1960's. During 1969 Stevens was appointed chief counsel to a special ad hoc commission chosen by the Illinois Supreme Court to investigate charges of influence-peddling by two Illinois Supreme Court Justices.[33] Then, in 1970, upon the recommendation of his former University of Chicago classmate and United States Senator Charles Percy (R-Ill.), Stevens was appointed by President Richard Nixon to fill a vacancy on the Seventh Circuit Court of Appeals.[34] He served in this

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[31]Glen Elsasser, Justice Stevens Returns to Roots, Chi. Trib., October 10, 1979, sec. 2, at 2.

[32]John P. Stevens, Exemption from Anti-trust Coverage, 37 Antitrust L. J. 706 (1968); id., Introductory Remarks--Regulated Industries and Antitrust, 32 Antitrust L.J. 215 (1966); id., Cost Justification, 8 Antitrust Bull. 413 (1963); id., The Regulation of Railroads, 19 A.B.A. Sec. of Antitrust L. 355 (1961); id., Robinson-Patman Act: Prohibitions, 38 Chi. B. Rec. 310 (1957); id., Proceedings at Annual Meeting--A.B.A. Section of Antitrust Law, 28 Notre Dame Law. 430 (1953). For a review of these articles and case analyses of Stevens' antitrust opinions, see Robert E. Riggs and L. Cordell McCarrey, Justice Stevens and the Law of Antitrust, 43 U. Pitt. L. Rev. 649 (1982); and infra Chapter II.

[33]This involved investigation of the integrity of the judgment and conviction of former Governor and Seventh Circuit Court of Appeals Judge Otto Kerner in People v. Isaacs. Stevens later said that it was his work on the commission and the notoriety it received which prompted his name to come to the attention of those seeking to fill a Seventh Circuit Court vacancy. See Simon, Thesis, supra note 30, at 15 n.3. He mentioned this connection again during a lecture in the summer of 1992. (See 1992 ABA Remarks, supra note 28.)

[34]The appointment of Stevens was undoubtedly made out of deference to senatorial courtesy by Nixon to Percy since, by and large, the Nixon judicial appointments tended to be Republican party loyalists or activists who came with a strong "law and order" philosophy. See Donald D. Jackson, Federal Roulette in American Court System 267 (S. Goldman and A. Sarat eds. 1978) and The Judiciary: Nixon Nearing Record on Nominees, Cong. Q. Wkly Rep. 3158 (Dec. 16, 1972).

capacity, except for a short leave in August 1974 to undergo open heart surgery, until 1975 when he received the invitation from President Gerald Ford to replace retiring William O. Douglas as an associate justice to the United States Supreme Court.[35]

Senate Judiciary Committee confirmation hearings began on December 8, 1975. Attorney General Edward Levi, a friend of the Stevens family and former University of Chicago classmate of Ernest Stevens Jr., as well as Illinois Senators Republican Charles Percy and Democrat Adlai Stevenson Jr., opened the Committee hearings with glowing testimonies of Stevens' fitness to serve on the high court.[36] The American Bar Association Standing Committee on the Federal Judiciary, after reviewing five years of his circuit court opinions, rated him "exceptionally qualified"--the highest evaluation in professional competence, judicial temperament and integrity.[37]

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[35]His name was chosen by Ford from two lists drawn up by Attorney General Levi which included Senator Robert Griffin (R-Mich.), U.S. Congressman Charles E. Wiggins (R-Calif.), Solicitor General Robert Bork, Five U.S. Court of Appeals Judges (Stevens, Paul H. Raney, William Webster, Arlin Adams, J. Clifford Wallace, and Shirley Hufstedler), U. S. District Court Judge Cornelia Kennedy, and Secretary of Housing and Urban Development Carla Hill as well as law professors Gerald Gunther, Philip Kurland and Paul Mishkin. See Henry J. Abraham, Justice and Presidents: A Political History of Appointments to the Supreme Court 323 (2d ed. 1985). For an in-depth analysis of Ford's nominating process, see David M. O'Brien, The Politics of Professionalism: President Gerald R. Ford's Appointment of Justice John Paul Stevens, 21 Presidential Studies 103 (Winter 1991).

[36]See Hearings, supra note 30: Levi stressed his craftsmanship, "innate sense of what a judge is supposed to do," judicial restraint and forthrightness, id. at 3; Percy highlighted his "integrity, temperament, intellect," being a "lawyer's lawyer . . . in the tradition of Brandeis and Douglas," id. at 4; Stevenson described him as one with "discipline and intellectual capacity" though "not doctrinaire or judicially adventurous" who "sees it as his duty to apply the law and not to make it," id. at 4-5.

[37]Id. at 17-21. For an understanding of the ranking terminology, see the A.B.A. booklet Standing Committee on the Federal Judiciary: What It Is and How It Works 5 (1977).

At the same time the press attempted to identify Stevens with some specific ideology, but was unsuccessful; persons interviewed, while praising his professionalism, were unable for the most part to give him a strictly conservative or strictly liberal label.[38] National commentators concluded that Ford chose this non-controversial, relatively bland, very competent yet moderate judge as a political move to avoid controversy and to assure a rapid Senate confirmation.[39] The country had just reeled from the Watergate scandals and did not need more upset. Predictions abounded on how Stevens would respond to various types of Supreme Court cases and with whom he would align on the Court. Generally he was seen as a

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[38]Lesley Oelsner, Ford Chooses a Chicagoan for Supreme Court Seat, N.Y. Times, Nov. 29, 2975, at 14; id., Opinions by Stevens Hint Attitudes of Nominee to Court, N.Y. Times, Dec. 8, 1975, at 37; Anthony Lewis, The Stevens' Nomination, N.Y. Times, Dec. 4, 1975, at 41; Pressure Behind the Choice, The Economist, Dec. 6, 1975, at 69; Supreme Court Nominee, 49 Cong. Q. Wkly. Rep. 2634 (Dec. 6, 1975); Ford's Court Choice, Guardian, Dec. 10, 1975, at 6; Hacker, Questions, supra note 18, at 5; Arthur S. Miller, Mr. Justice Stevens, Progressive, Feb. 1976, at 8; Washington, Atlantic Monthly, Feb. 1976, at 8.

[39]Justice Stevens' Nomination, Chi. Trib., Dec. 1, 1975, at II-2; The Stevens' Nomination, Wash. Post, Dec. 3, 1975, at A14; Richard Evans and Robert Novak, The Reasoning Behind Stevens' Nomination, Wash. Post, Dec. 4, 1975, at A19; Patrick Buchanan, Two Cheers for President's Man in the Middle, Chi. Trib., Dec. 9, 1975, at II-6; Good Choice--For A Change, 221 The Nation 612 (Dec. 13, 1975). See also, Laurence Tribe, God Save This Honorable Court 130 (1985) and David M. O'Brien, Storm Center 55 (1986). But see V. H. Kramer, The Case of Justice Stevens: How to Select, Nominate and Confirm a Justice of the United States Supreme Court, 7 Const. Comment. 325, 337-38 (Summer 1990).

potential swing vote between the liberal and conservative blocs,[40] though some envisioned him as joining the conservatives.[41]

During the three days of Senate Judiciary Committee hearings, the only negative statements came from several women's organizations protesting Stevens' perceived indifference to woman's rights based upon his circuit court decisions, and from a person accusing Stevens of impropriety while counsel to the 1969 commission investigating corruption among Illinois Supreme Court justices.[42] After unopposed approval by the Judiciary Committee on December 11, 1975, the full Senate unanimously confirmed Stevens' nomination on December 17th. John Paul Stevens took the judicial oath administered by Chief Justice Burger on December 19. In recollection of this day, Stevens said, "I have an especially vivid memory of [Justice Douglas'] warm welcome to the Court during the hour we spent together in his chambers on the day I was inducted. He could not have been more gracious. It is a special honor to have succeeded him on the Court."[43]

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[40]This was the view of Philip Kurland (Oelsner, supra note 38, at 14), Alan Dershowitz (Man for the Middle, Newsweek, Dec. 8, 1975, at 22), Arthur Miller (Mr. Justice Stevens, supra note 38, at 9), and feature writers for the Congressional Quarterly Weekly Report, (supra note 16, at 3634) and Time (Craftsman for the Court, Dec. 8, 1975, at 58). Jerald terHorst (Justice Stevens Faces the Toughest Test, Chi. Trib., Dec. 28, 1975, sec. 2, at 6) predicted an independent spirit on the Court, and Trial saw him as simply a pragmatist (Douglas the Progressive Departs--Stevens the Pragmatist Arrives, Trial, Jan. 1976, at 3).

[41]This included Senator James Eastland, head of the Senate Judiciary Committee (Supreme Court Nominee, supra note 38, at 2634), and editorialists from U.S. News and World Report (Supreme Court--More Conservative, Dec. 8, 1975, at 30) and The Guardian (supra note 38).

[42]Hearings, supra note 30, at 60-66, 185-227. Stevens' testimony relevant to this study will be dealt with in the following section.

[43]See supra note 25.

Stevens attended his first Supreme Court session on January 12, 1976. After assuming the role of Associate Justice of the Supreme Court, he maintained a relatively low public profile during his first several years on the bench. On the occasion of Stevens' return to the University of Chicago campus in the Fall of 1979 as the first fellow in a new Fellowship Program, Glen Elsasser of the Chicago Tribune gathered together a few interesting personal insights.[44] Upon his arrival at the Court, Stevens was first assigned to the former offices of Chief Justice Earl Warren, and then occupied the former chambers of Justice Tom Clark. During oral arguments, "Stevens' body language is restrained: he occasionally swings back and forth in his high-backed chair, leans forward to ask questions, as if to increase his concentration. The questions always are to the point. In the courtroom he wears dark-rimmed glasses and favors skinny bowties to dress up the judicial starkness." Elassar added, "During the recent papal visit, television cameras gave the public a rare glimpse of the justices in the White House reception line, where Stevens reportedly greeted the Pope by saying, 'I'm John Paul, too.'"

Privately, in 1979, Stevens divorced wife Betty (now deceased) and married Maryan Mulholland Simon, a family acquaintance from Chicago. Socially, he continues to enjoy playing bridge, golf and tennis, and flying small aircraft. In apparent good health since his heart surgery in 1974, Stevens was treated for prostate cancer in February of 1992, which prompted some unfounded speculation that he may retire from the bench.

Commentaries on his role on the Court will be dealt with in the next two sections, however, early on it became apparent that Stevens would continue his practice begun on the

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[44]Elsasser, supra note 31.

circuit court of appeals to dissent whenever he disagreed with the majority.[45] He has written little beyond his opinions, but does give an occasional address before legal associations or law schools. He has spoken publicly on topics such as judicial restraint, judge-made rules, establishment of a sub-Supreme Court, removal of sitting judges, cameras in the Supreme Court, Edwin Meese's suggestion for a jurisprudence of original intent, the concept of liberty and on judges' use of history.[46] Interestingly, on July 17, 1987, during a speech in Colorado before the Eighth Circuit Judicial Conference, Stevens endorsed President Ronald Reagan's nomination of Judge Robert Bork as a welcome addition to the Supreme Court, and likened Bork's views of First Amendment and libel laws to his own.[47]

Justice Stevens received very little press coverage during his first fifteen terms beyond decision votes or quotations from opinions. However, in more recent newspaper or popular newsmagazine references to Stevens, one discovers that during the Reagan administration Stevens was viewed as "a loose cannon expressing his ideas with no sense of institutional restraint or cohesion," saw himself in the self-appointed role of "maverick" and "purist," and

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[45]In response to Senator Byrd during the Senate hearings, Stevens said: "I know there is one school of thought that the appearance of unanimity tends to add stability and respect to the law. My own view is that it actually facilitates the fair adjudication process if everyone states his own conclusion as frankly as he can. . . . [The litigants] are entitled to know that their arguments were understood and they were persuasive to some even though not to all. And I found that in my court, although I did dissent a great deal, that if it is done in a forthright way it does not stimulate dissension within the court." Hearings, supra note 30, at 41. John P. MacKenzie, Stevens Emerges as Master of Dissent, Wash. Post, July 18, 1976, at A4.

[46]See infra Chapter II, for an overview of these addresses.

[47]Stuart Taylor Jr., Justice Stevens, in unusual move, praises Bork as nominee to Court, N.Y. Times, August 1, 1987, at A1/A12. It must be remembered, however, that Stevens had become familiar with Judge Bork's aptitudes through his appearances as advocate and as solicitor general before the Court. His writings are notorious and he is, after all, a graduate of the University of Chicago, and like Stevens, he enjoys argument and debate.

that without explanation he had artist sketches of himself removed from a courthouse exhibit overseen by Justice Burger.[48] John MacKenzie, in an editorial observing the concurrence and dissent of Justices Stevens and White respectively in an abortion case (Thornburgh v. American College of Obstetricians and Gynecologists [1986]), appeared to be delighted with their "sharp but civilized debate" on the merits from two "normally the coolest of judges."[49] Al Kamen raised a judicial ethics question in 1987 while reporting that Justices Stevens, White, and O'Connor and spouses attended a New York City Ballet performance at the Kennedy Center as guests of a telecommunications firm whose subsidiary, ten days earlier, had been a litigant before the court.[50] In 1989 Stevens went on record as approving televised hearings of Supreme Court proceedings, and also said that strong words by justices in their opinions do not necessarily reflect "the true personal relations in the court."[51] Stephen Wermiel, commenting on the "full time role" of dissenting that Justices Marshall, Brennan, Blackmun, and Stevens seem to have assumed on the Rehnquist Court, noted that Stevens appeared to be "the most philosophical of the dissenters about his role, in part because he may be the least liberal of the four, but also because he enjoys the intellectual challenge of arguing with the majority more than the others."[52] Then, in a January 1990 public opinion poll on

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[48]Lyle Denniston, "Judicial activism" disturbs loner on high court, Balt. Sun, August 12, 1984. (Located in Newsbank [microform], Law 86:G14.)

[49]The Abortion Dialogue at Court, N.Y. Times, June 17, 1986, at A26.

[50]Ex-litigant Sponsored Justices' Night on the Town, Wash. Post, October 23, 1987, at A4.

[51]Henry Weinstein, Televised High Court Hearings Backed, L.A. Times, July 14, 1989, at I3, I30.

[52]Four Justices Seem Prepared to Assent To a Full-Time Role Focusing on Dissent, Wall St. Jl., October 16, 1989, at B13.

the Court, conducted by The National Law Journal/Lexis, it was recorded that of the 41% of the interviewees who could name at least one current high court justice, only 1% named Justice Stevens.[53] Finally, in May of 1990, an Associated Press release reported that Stevens had joined Sandra Day O'Connor as the second millionaire on the Court, listing assets (minus personal property and primary residence) as between $1.13 and $2 million dollars.[54] But what of his rapport on the Court during oral arguments since Elsassar wrote of them in 1979?

Two court watchers, a public radio commentator and a constitutional scholar, recently shared their observations of Stevens during the Court's oral arguments.[55] He is perceived to be a "sharp" and "very acute questioner" who appears, along with Scalia, to be among "the best prepared" and one who has obviously read the advocates' briefs--sometimes knowing their contents better than the attorneys themselves. The commentator said that if Stevens sees a "hole in an argument," he "goes after it and probes it," often taking the "opposite view of what another justice might be pursuing." He is "very serious and very focused" and will "push an advocate to the ultimate of his argument;" if he sees an open-end to an argument, "he will hit [the attorney] over the head with it." For instance, she remembered he gave the Solicitor General a hard time in 1991 during the argument of an abortion case questioning the impact on the Fourteenth Amendment if they accepted his argument. In her view, this is consistent

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[53]Marcia Coyle, How Americans View High Court, in Nat'l L. Jl., February 26, 1990, at 1.

[54]Now, 2 Millionaires on High Court, N.Y. Times, May 18, 1990, at A32.

[55]Telephone interview with National Public Radio legal commentator who asked to remain anonymous (January 12, 1993). Interview with Dr. Richter Moore, Professor, Appalachian State University (January 14, 1993), who had just returned from a sabbatical in Washington D.C. where he had attended all but one of the oral arguments of the Supreme Court during the Fall of 1992.

with some of Stevens' footnotes in recent cases suggesting the extent to which the Justice Department had become politicized. The scholar noted that during one session when an attorney general appeared flustered by so many questions put to him by the justices, Stevens leaned forward and tried to indicate to him that the justices were merely "trying to help" him emphasize certain points from the brief. When asked whether Stevens had a negative attitude about the lack of preparedness of some advocates as had been expressed by Chief Justice Burger on several occasions, a former law clerk retorted that Stevens would never be so critical because he understands that a practicing attorney has a lot of pressures in his or her life beyond the practice of law and the appearance before the Court and that the quality of a case may be a reflection of a lot of factors existing during its preparation. This show of sensitivity to fellow attorneys was seen to bring a bit of humaneness to an otherwise trying encounter.

Summary

What does this information really tell us about John Paul Stevens and what is its relevance to a study of his judicial behavior? If would be foolish to suggest that one could assign a weight to each factor and accurately measure the degree of influence each had upon this judge's intellectual or emotional development which ultimately affects his jurisprudence, but one could venture a few preliminary observations.

Such a sketch put together from materials in the popular press and public histories and biographies, as well as conversations with Stevens' brother Ernest and others, indicate a judge who is a product of the Protestant Ethic: a person who worked hard, performed his tasks well, and was rewarded for them by advancement in his chosen field of law by the high honors of judge and justice.

He seems to have been imbued with the spirit of his ancestors who enthusiastically seized opportunities as they came along and made the most from them. Each success or achievement brought public recognition, adding to family pride and a heightened expectation for the next generation. When it comes to the nuclear family influences on his future behavior or manner, it seems relevant to note that the Stevens' Norman and early American roots, frequent family discussions on issues of the day, the prevalence of family lawyers, the lack of actual partisan political activity, the artistic, literary and history interests of his mother, and the loss of his father's business during the Depression are significant in that they could help to explain Stevens' interest in and desire to understand or preserve common law and democratic principles, delight in lively debate, his choice to study law, his belief that judges should not be elected by partisan ballots, his frequent references to and obvious respect for the history of legal concepts, and his sensitivity to the fluctuations of a competitive market. The public trial of his father, when Stevens was but a young teen, in a city as political as Chicago, certainly could account for a heightened sensitivity toward anyone subject to procedures of the criminal justice system.

When looking at his social life one can assume that the high concentration and combative nature necessary for a serious bridge and tennis player show an appetite for challenge and competition, yet the activities of golf and especially piloting an airplane could be likened to Justice Douglas' outdoor walks (which gave him time to think as well as relax or appreciate nature) or be purely an indication of a diversity of interests and skills.

Most significant to his views of the judicial role would be the early schooling Stevens received at the University of Chicago. During his "formative" years, under the accelerated program, he not only finished high school and college in six years but was forced to research a variety of views and take positions on specified issues in areas such as history, philosophy, or

social problems. This regimen, encouraged and refined during his stint at Northwestern University School of Law, certainly could account for his present willingness to put forth original ideas in opinions, for his delight in public debate of constitutional issues, and for his alleged disappointment in the Court's lack of time for in-depth discussions during its weekly conferences. It could also help to explain his comfort with frequent dissent from the majority, as well as his affirmation that one should not infer personal animosity among justices because of the Court's many divided decisions. His major in English literature as an undergraduate could account for his references to Shakespeare and other literary authors as well as for his familiarity with British customs and traditions expressed in opinions. Surely his frequent return visits and lectures at both campuses reflect pride in his alma maters as well as appreciation of and respect for their educational missions and societal contributions.

Stevens' professional experiences prior to being a judge also could account for present judicial behavior. The intelligence work during World War II required varied methodical approaches to task. His choice of words to describe Justice Rutledge's manner of decision-making reflect a personal admiration for the man and his method and could be accounted for as an example to him of how to judge. Contact with other justices as well as observations of their work patterns and manners of thinking would naturally make an impression on a clerk. The fact that his law firm was client-oriented and not ideological foretells the inability to label Stevens in the more traditional terms of liberal or conservative, defendant's or state's judge. His experiences in habeas corpus cases further sensitized him to the foibles of the criminal process. Stevens' stint as part-time law professor well-prepared him for his role as the "interlocutor" he is seen to be when asking probing questions of lawyers during oral argument. Lastly, the choice of him to participate in an Illinois state team investigating corruption further indicates his objective, non-partisan approach to professional responsibilities.

The preceding speculations cannot stand alone, however. One must turn to Justice Stevens' own words for clues to understand his judicial behavior more fully. This will be the focus of the following section.

Role Perceptions and Attitudes

Much has been written in the past several decades on the significance of a judge's perception of the judicial role and also of the link between judicial attitudes and case results.[56] The value of such studies as predictive tools continues to be debated,[57] yet in the realm of judicial politics an individual's role perception and attitudes continue to be significant factors in judicial selection, particularly at the federal level.[58] Therefore, it would seem timely to review some of John Paul Stevens' testimony before the Senate Judiciary Committee in 1975[59] and the handful of published speeches he has given since becoming a judge for a

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[56]Review of this literature can be found in Goldman and Jahnige, supra note 1, at 137-169; Henry R. Glick, Courts, Politics and Justice 251-263 (1983); Sheldon Goldman and Austin Sarat, American Court Systems: Readings in Judicial Process and Behavior 417, 467 (1978); Joel B. Grossman and Joseph Tanenhaus, Toward a Renascence of Public Law in Frontiers of Judicial Research 3 (J. Grossman and J. Tannenhaus eds., 1969); C. Herman Pritchett, The Development of Public Law in id. 27; Glendon Schubert, From Public Law to Judicial Behavior in Judicial Decision-making 1 (G. Schubert ed., 1963).

[57]See Lawrence Baum, The Supreme Court 144 (2d ed. 1985). But see also Jeffrey A. Segal and Albert D. Cover, Ideological Values and the Votes of U.S. Supreme Court Justices, 83 APSR 557, 557 (June 1989) (suggesting that newspaper editorial predictions of judicial behavior published during confirmation hearings indicate values which correlate highly with bench votes, "providing strong support for the attitudinal model.").

[58]Regarding the Nixon, Carter, and Reagan appointments to the federal courts, see Goldman and Jahnige, supra note 1, at 39-51; and Glick, supra note 1, at 90-109. See also, The Bork Nomination, 9 Cardozo L. Rev., October 1987, at 1-530; H. J. Reske, Did Bork Say Too Much? 73 A.B.A. J., December 1987, at 74.

[59]Hearings, supra note 30.

glimpse at his views on judicial matters. This should lead us to a better understanding of his philosophy as an appellate judge and help put the following examination of criminal justice issues within a general framework.

The Senate Hearings

During his three-day testimony before the Senate Committee on the Judiciary, Stevens was asked a variety of questions by the Senators[60] concerning his views of the judicial role, judicial responsibilities, and legal concepts. In a written answer to questions submitted by Sen. McClellan, Stevens succinctly stated his approach to judging: (1) He will subordinate his own views to an understanding of the law of a case; (2) He will defer to the intent of the authors of the Constitution or statutes when it is ascertainable; (3) He will decide cases on law despite his own policy views; (4) He will attribute the meaning of words as fairly intended by the authors; and (5) He will not give unwarranted meaning to provisions of the Constitution.[61] The Senators attempted to more fully explore many of the above principles. However, as in such congressional hearings, the questioning took many twists and turns, and was repetitious; it was obvious that some senators were not in attendance when others had asked similar questions. As a result, the judge seemed to graze only the surface of a question

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[60]In order of seniority and according to party, the senators were: James O. Eastland, chairman (D-Miss.), John L. McClellan (D-Ark.), Philip A. Hart (D-Mich.), Edward M. Kennedy (D-Mass.), Birch Bayh (D- Ind.), Quentin N. Burdick (D-N.D.), Robert C. Byrd (D-W.Va.), John V. Tunney (D-Calif.), James G. Abourezk (D-S.D.), Roman L. Hruska (R-Neb.), Hiram L. Fong (R-Haw.), Hugh Scott (R-Pa.), Strom Thurmond (R-S.C.), Charles McC. Mathias Jr. (R-Md.), and William L. Scott (R-Va.).

[61]Hearings, supra note 30, at 8.

and then the subject matter was changed. Nevertheless, Stevens' positions on the following aspects of judicial behavior are discernible:

1. On the role of a circuit court judge contrasted to a Supreme Court judge, Stevens claimed the former has clearer legal guideposts and operates in a more restricted framework; presents less inconveniences to the court panels if a judge recuses him/herself from a case; and requires the same respect for stare decisis and a similar reasoning process.[62]

2. On the role of the Supreme Court, the justice expressed belief that the Court is limited by cases that come to it and is not a "roving commission" for legal reform; that the Court is not to be an "instrument of policy" even in drastic circumstances; that it has a duty to avoid decisions on constitutional grounds if there is sufficient basis for deciding the case without reaching such grounds.[63]

3. On judges as policy-makers, Stevens stated that judges have a duty to defer to the legislature, subordinating their own views on policy questions, yet, he acknowledged that each person is a product of their own background and inevitably a judge may be somewhat influenced by his or her own views, especially in "open areas" of the law.[64]

4. On his judicial identity, Justice Stevens would not label himself nor did he think it appropriate for others to label him as either an activist or a strict constructionist since he considered himself a professional who merely dealt with work as it came his way.[65]

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[62]Id. at 13, 32, 40, 43.

[63]Id. at 30, 44, 50, 67.

[64]Id. at 42, 44.

[65]Id. at 32.

5. On the judicial responsibility of screening certiorari petitions, Stevens thought that such petitions should be examined on the basis of the merit of the issue and its importance to the country rather than on how much granting certiorari would increase the Court's workload; that since there is little real difference between appeals and petitions for certiorari, they both should be discretionary; and that if three justices wish to grant certiorari and one is particularly earnest, another justice out of courtesy should complete the rule of four.[66]

6. When asked of his intention to exercise judicial restraint, Stevens exerted that a justice must "decide those cases that come before him," but that his philosophy is "to decide cases on the narrowest ground possible and not to reach out for constitutional questions."[67]

7. On the principle of stare decisis, the Justice declared that it adds certainty and predictability to the law; that though he was "most reluctant" to depart from prior precedent in constitutional issues, he would not feel "one hundred percent bound" to all past decisions; that the age of a decision should not be a limiting factor (sometimes the most recent one is not the most authoritative), but even more respect should be given to who wrote the precedent opinion and to the extent to which a decision had been closer to unanimity.[68]

8. On political questions, Stevens asserted that one needs to distinguish between political questions and questions with political overtones or ramifications, and that it is on the latter that the Court has the responsibility to act.[69]

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[66]Id. at 50, 68.

[67]Id. at 36.

[68]Id. at 39, 40, 41.

[69]Id. at 44, 69.

9. On the frequency of concurring or dissenting opinions, Stevens urged that it is his "personal philosophy" to dissent if he does not agree with the result of the majority in a case or "to write a brief concurrence" if he finds "something in the reasoning that is unacceptable" in order to let the litigants know that the judges were aware and understood the arguments that were presented. This addition to the case record "will help at a future date when the same issue may again be presented for reexamination."[70]

10. On the principle of the court's duty to discover the "original intent" of the framers, Stevens claimed that the ambiguity of some statutes causes judges to make exceptions to the general rule that the legislature is to make laws and judges only interpret them, and that open areas of statutes and the Constitution require that a judge "do his best" guided "by history, by tradition, by his best understanding of what was intended by the framers, and yet he also must understand that he is living in a different age in which some of the considerations that happen today must inevitably affect what he does."[71]

The Senators also queried Judge Stevens for his positions on criminal justice matters. One is able to discover the following principles:

1. On reasons for the apparent increase in the nation's crime figures, Stevens speculated that the crime rate growth could have many explanations such as higher unemployment or more sophisticated methods of crime reporting, but he did not see a causal connection between the Warren Court decisions and this rise in crime since such law decisions were "just

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[70]Id. at 41, 69.

[71]Id. at 35, 42.

procedural adjustments." He believes that the key to combatting crime is not in unnecessarily expanding federal jurisdiction since this is primarily a state problem.[72]

2. On the conflict of a defendant's right to a fair trial and free press rights, Stevens urged that a balance needs to be struck so that the press is not inhibited from reporting what it discovers, but that release of pre-trial information should be more controlled in order to preserve a defendant's impartiality rights.[73]

3. On Fourth Amendment rights, the judge asserted that the Supreme Court's refusal to extend the protections against illegal search and seizure should not be interpreted as a reversal trend but only as a refusal to extend law further; the exclusionary rule should be accepted as a present day "given" with which the courts' work and which includes the balancing of the "countervailing values" of citizen privacy against unapproved police conduct versus the fair establishment of a defendant's guilt.[74]

4. Similarly, on government wiretapping, Stevens reminded the committee that right to privacy interests should always be evaluated before such procedures are used by law enforcement.[75]

5. On the right to counsel, Stevens said that it is "one of the most important aspects of procedural fairness" assured to "the litigant on either side," and that he "could not

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[72]Id. at 25, 28, 29, 57.

[73]Id. at 31, 46, 56, 73, 75.

[74]Id. at 76-77.

[75]Id. at 46.

overemphasize the importance of the lawyer's role in the adversary process" since it is "unquestionably a matter of major importance in all litigation.[76]

6. On capital punishment, Stevens commented that our system requires impartiality and the even-handed administration of such and all laws regardless of the litigants involved. (He felt he could not comment further since capital cases were on the Court's docket.)[77]

7. On the criminal justice system in general, Stevens urged that there is a great need for improvements in procedures, personnel, and alternative methods of judicial selection to remedy the problems of great delays in the courts in order to assure both "justice" and the "prompt disposition of cases."[78]

It is apparent that these views of the judicial role, judicial responsibilities, and legal concepts need to be used as standards by which to evaluate Justice Stevens' reasoning processes and decision- making in the criminal justice cases to be analyzed in forthcoming chapters. But one can also consider other sources for such views.

Published Speeches

Between 1974 and 1990, John Paul Stevens gave a number of formal addresses and lectures before bar associations and law school assemblies. Thirteen of these have been

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[76]Id. at 78.

[77]Id. at 26.

[78]Id. at 25-26.

selected[79] and should be perused since they are the only sources other than his written opinions from which to gain insight into Stevens' judicial philosophy.[80]

In a speech given shortly before his Supreme Court appointment to honor past presidents of the Chicago Bar Association,[81] Stevens confirmed the value of the intellectual give and take promoted among association members by bar association presidents, and urged that when a president temporarily subordinates his/her partiality for one segment of the bar to the welfare of the whole, it is analogous to when a state judge is elected to office and must become accountable to all the people. However, recognizing that state judges need to be "indifferent to [public] unpopularity" in the face of having to decide many unpopular contemporary issues, Stevens suggested that perhaps Illinois is ready to do away with its judicial retention ballot and grant elected judges life tenure so that making an unpopular decision, while maintaining judicial integrity, does not become grounds for removal by popular vote.[82] Acknowledging that politics is often the initial criterion for judicial selection, he encouraged the use of outside independent professionals to screen candidates on the basis of merit. His main goal appears to

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[79]These published articles were the only ones listed under either the topics "Biography" or "Stevens, John P." in the Index to Legal Periodicals (1974-1990).

[80]Stevens has indicated that his general policy is not to grant any interviews to the press or to researchers. Letter from John P. Stevens to Kathleen Simon (May 26, 1979)(denial of answers to written questions). See also Hearings, supra note 30, at 47: "I think the fact that I have been reluctant as a judge to communicate generally with the press should not be taken as any lack of intent or sympathy for the very important work they perform. It is just that in my particular office it is inappropriate for me to make statements about policy." For overview of his speeches published before 1974, see Simon, Thesis, supra note 1, at 13-15, 221.

[81]John P. Stevens, The Office of an Office, 55 Chi. B. Rec. 276 (1974).

[82]Id. at 281.

be the upgrading of the judiciary, thus making the office more attractive to more qualified persons.

While addressing the Illinois Bar Association in 1977, Stevens again depicted "disagreement, discussion and debate" within the legal community as the "raw materials . . . used in building progress, civilization and justice."[83] Disagreement, "without being disagreeable," hallmarked Stevens' experiences on both the federal Circuit and Supreme Courts and so he felt comfortable highlighting some weaknesses in both courts for purposes of stimulating further discussion in the legal community. Thus, he opined that "no appellate court should attempt to prevent its work product from being cited as precedent" since no judge is in the proper vantage point to determine its quality or importance.[84] Nor did he see an overriding need for the Supreme Court to control its own discretionary docket since allowing another body (such as a specialized court) to select certiorari petitions would only make the Court better able to perform its higher function of processing cases.[85] Stevens also suggested that though a lower court judge may need to disqualify himself from a case for sake of "appearances," a Supreme Court justice should hold higher the need for full court consideration of a national issue and not worry about "appearances." Public disclosure of reasons for disqualification or for dissents from denial of certiorari are also inappropriate for a judge because it might prejudice a litigant's case and give unwarranted precedential character

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[83]John P. Stevens, Address to Illinois State Bar Association's Centennial Dinner, 65 Ill. B.J. 508 (1977).

[84]Id. at 510.

[85]Id. at 511-12. See also H. W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court 66, 174-175, 186-187 (1991)(Stevens' rationale for and rates of certiorari dissent, 1976-1980).

to such denials.[86] Finally, he listed three ways of dealing with the nation's litigation explosion: (1) creating more courts and judgeships; (2) better utilizing staff assistance and new case management techniques, and improving the quality of state judges and the character of the judicial office itself by granting judges life tenure; and (3) seeking alternatives to resolving disputes.[87]

In a speech prepared for the University of Arizona College of Law Dedication Ceremony in 1979,[88] Stevens commented upon the Supreme Court's recent state court procedure case of Gannett Co. v. De Pasquale[89] which allowed a trial court judge to conduct an in camera pretrial hearing to determine a confession's voluntariness in order to preserve the defendant's fair trial rights, thereby overriding the press and public assumption of open trials. Justice Stevens expressed his confidence in state trial judges' competence and their ability to protect a defendant's fair jury trial rights from prejudice by news coverage under this new ruling as well as under other pretrial procedural rules.[90] He then quite strongly urged the distinction (which he feels had been lost on numerous commentators of Gannett) between "the dissemination of

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[86]Stevens, Address, supra note 83, at 513. But see also his written remarks in John P. Stevens, Dedication to John Simpson Hastings, 52 Ind. L.J. 521, 522 (1977):

> John [Hastings] felt that if a judge had a question about whether or not he should sit on a case, the question itself was usually a sufficient reason for not sitting. There are reasons why that test may be too strict, but I concluded that I could not improve upon it when I was considering whether or not a Supreme Court Justice should participate in cases in which he had reviewed a petition for rehearing en banc or otherwise acted as a Circuit Judge.

Compare to Hearings, supra note 30, at 32.

[87]Stevens, Address, supra note 83, at 514.

[88]John P. Stevens, Some Thoughts About a General Rule, 21 Ariz. L. Rev. 599 (1979).

[89]443 U.S. 368, 99 S.Ct. 2898 (1979).

[90]Stevens, Some Thoughts, supra note 88, at 600, 604.

information and ideas"--which the Court has afforded almost absolute protection--and "the acquisition of newsworthy matter"--which the Court has not acknowledged constitutional protection--and from the latter he paraphrased the general rule that the Court has not yet given a "First Amendment right of access to judicial or other governmental proceedings."[91] Stevens appeared to be delighted with the debate this general rule had brought forth in the press and legal community, and cited it as an example of how the Court is not taking away press rights, but actually just refusing "to develop or to recognize new rules of law."[92] He viewed such debate as "constructive" in the sense that it would make judges more conscientious in their press exclusion choices and may encourage lawmakers to modify this general rule by legislation rather than have it done by judicial fiat.[93]

At the 1982 Annual Meeting of the American Judicature Society, Stevens again emphasized priorities associated with the Supreme Court workload and revealed that, since hearing and discussing and writing opinions on fully argued cases take up most of the justices' energies, their law clerks generally write per curiam opinions and review most of the certiorari petitions.[94] Stevens concluded that the quality of processing the petitions was "below that of argued cases," which resulted in the Court granting too many certiorari petitions and added to its workload. Stevens rejected his colleagues' suggestion for the creation of a new National

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[91]Id. at 602.

[92]Id. at 603. (During his Senate confirmation hearings he spoke similarly about search and seizure law; see supra, note 74.)

[93]Id. at 605.

[94]John P. Stevens, Some Thoughts on Judicial Restraint, 66 Judicature 177 (1982). A cursory view of material about the Burger Court indicates that this fact revealed by Stevens has gotten the most attention of anything he has said!!

Court of Appeals, believing that the lower federal and state supreme courts are well-qualified to determine most litigation, and urged that the Court assume more judicial restraint in "the process of making judicial decisions," thereby avoiding "unnecessary lawmaking."[95] Citing several recent cases to illustrate his point, Stevens showed how the Court lacks discretion and increases its workload when it grants certiorari to cases where the constitutional issue is not fully clarified ("timing") or binds a limited geographical area (no court conflicts), or advances constitutional doctrine unnecessarily (novel case), or disallows a state court to give more protection to a resident than the federal constitution requires (no national necessity).[96] To encourage judicial restraint, Stevens suggested the creation of a separate court to decide which certiorari petitions should be granted or denied. Further, he revealed that the number of cases involving conflicts among the circuits is exaggerated, that having differing rules of law in sections of the country is "not always an intolerable evil," and that ambiguous statutory provisions are better clarified by the creation of a new standing committee of Congress given "the task of performing the necessary corrective lawmaking."[97] In conclusion, he stated that though the most important role of a judge is "the thoughtful application of impartial judgment," such judicial talent should be used with restraint, but once cases are chosen, each case should be treated as equally important.[98]

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[95]Id. at 180.

[96]Id. at 180-81.

[97]Id. at 183

[98]Id. See Jeffrey J. Jones, Comment: Justice Stevens' Proposal to Establish a Sub-Supreme Court, 20 Harv. J. on Legis. 201, 201 n.4, 203 n.18 (1983).

In a 1982 Fall lecture at New York University School of Law, Stevens attempted to calm the fears of those mourning the death of the application of the principle of stare decisis by the current Supreme Court, and illustrated how previously decided cases continue to play a prominent part as the framework for analysis and discussion during Court's conference deliberations.[99] However it appears he intended to put judge-made rules in proper perspective. He indicated that only two or three cases out of the thousands of cases determined by the Court every year actually require overrulings; that it is inevitable that judge-made rules need to be reexamined given the evolution of our society; and that rules of law are really only "guides in the exercise of judgment" by human beings--juries, administrators and judges.[100] He condoned this realistic approach to such rules by citing favorable passages from Justices Reid, Brandeis, Holmes and Cardozo indicating the judges' role in the evolution of law as it is adjusted to reflect the circumstantial needs of the public. All of this is a prelude to the point he really wanted to make about certiorari petitions. After an historic overview of the Rule of Four traditionally used by the Supreme Court to grant a hearing for certiorari petitions, Stevens depicted the changes in the Court's caseload over the past 35 years since he served Justice Rutledge which have made it necessary for several justices to pool their law clerks and share petition memoranda. Furthermore, he discovered that more than 25% of petitions granted in recent terms were chosen by only four justices and, of these, "the law would have fared just as well if the decisions of the courts of appeals or the state courts has

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[99]John P. Stevens, The Life Span of a Judge-made Rule, 58 N.Y.U. L. Rev. 1, 4 (1983)

[100]Id. at 5.

been allowed to stand."[101] Rather than propose a change to a Rule of Five, Stevens again urged the Congress to do away with the Court's remaining mandatory jurisdiction, and his colleagues to practice judicial restraint in case selection. If all else fails, he admitted that the Rule of Four is "a luxury we can no longer afford."[102]

Stevens echoed an earlier lecture when he spoke before Stetson University College of Law in 1983 concerning the place of judges, in contrast to other officials in public service.[103] He contended that judges need to be "indifferent to unpopularity" and again suggested that retention elections are out of place in judicial systems where judges are faced with explosive popular issues more and more frequently and where a judge's awareness of being voted out at the next election could have a "subtle" bearing on judicial performance.[104]

In an address before the University of San Diego School of Law in 1984 recognizing his former Northwestern Law School professor Nathaniel Nathanson, Stevens again took up the theme of judicial restraint in the context of his mentor's teaching method.[105] Just as law students must understand both (or many) sides of a constitutional question before they stake a

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[101]Id. at 17. Contra, Hearings, supra notes 61 and 66, at 4 (here Stevens had asserted that if three justices really wanted to hear a case, a fourth should join them to grant certiorari out of judicial courtesy).

[102]Stevens, Life-Span, supra note 99, at 21.

[103]John P. Stevens, Reflections on the Removal of Sitting Judges, 13 Stetson L. Rev. 215 (1984). See supra, note 81.

[104]Id. at 220.

[105]John P. Stevens, Judicial Restraint, 22 San Diego L. Rev. 437 (1985). Robert Sickels makes much of the influence of this mentor upon Stevens' judicial reasoning processes. (See Robert J. Sickels, John Paul Stevens and the Constitution 37-38 [1988].) However, it was my view in 1980, and which I continue to hold, that this many-sided approach and legal indefiniteness stems more from very early family influences and particularly from Stevens' experiences at the University of Chicago. (See Simon, Thesis, supra note 30, at 9.)

preference, recognize basic themes in legal discourse, and not always be content with a seeming "black-letter rule," so too must judges "avoid answering profound questions of constitutional law for as long as possible" so as not to decide law prematurely or disallow further adjustment by the other government branches.[106] He also took this opportunity to respond to some criticism leveled at the Court when its opinion appears inconsistent, such as in University of California Regents v. Bakke.[107] Stevens implied that perhaps a measure of uncertainty and inconsistency was the best way to serve the national interest at the time. He asserted that both substance and timing are part of judicial restraint and cautioned judges against producing (and students of law from expecting) "wide-angled decision-making;" such over-statements may mislead judges in future applications of law to new circumstances.[108] Stevens suggested that judges should take the example of restraint from the writers of the constitution (who did not write anymore than they felt necessary) and not decide anymore than is absolutely necessary to resolve a case.

In dedicating the law library at Florida State University in 1985, Justice Stevens revealed the four vantage points from which he has looked at the law: as a citizen, a law student, a lawyer, and a judge.[109] He first saw law as a set of rights and duties for both citizen and government, then as a dynamic as well as a practical device used to accommodate the many factual life patterns, then as a series of procedures for resolving conflict, and finally as

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[106]Id. at 442.

[107]438 U.S. 265, 98 S.Ct. 2733 (1978).

[108]Stevens, Reflections, supra note 103, at 448.

[109]John P. Stevens, Legal Questions in Perspective, 13 Fla. St. U. L. Rev. 1 (1985).

responses to the question "who shall decide" an issue.[110] He then used these perspectives to explore the question of whether the Supreme Court should allow cameras in its courtroom during oral arguments. Stevens speculated that the average citizen would want coverage for only a few interesting cases and special ceremonial proceedings; the law student would be most interested in the oral arguments of a small number of "significant" cases; the practicing lawyer may be distracted by the television cameras during oral argument, possibly causing an "adverse impact" upon this very important process; but the judge finally must determine the value of televising in terms of whether the procedure "would best enable it [the Court] to discharge its constitutional responsibilities."[111] He hinted that perhaps he would consider the video-taping of arguments for future reference, but he would not go so far as to support the adoption of live coverage except for ceremonial events such as the installation of a new justice or a memorial for a departed justice.

In October of 1985 Stevens addressed the Federal Bar Association in Chicago and answered critics, who suggested that the Court's workload problem could be dealt with by shortening the justices' yearly three month recess, by repeating his argument that the Court already takes on too many cases that do not demand national attention.[112] Stevens then reviewed his activities during the past summer. He had some genuine (and needed) rest and "rehabilitation;" answered mail; interviewed prospective law clerks; reviewed the Reporter of

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[110]Id. at 2-3.

[111]Id. at 6.

[112]John P. Stevens, The Supreme Court of the United States: Reflections After a Summer Recess, 27 S. Tex. L.J. 447 at 448 (1986). See supra notes 83, 94, 99, 105. (Same address published in Symposium: Construing the Constitution--J. P. Stevens, 19 U.C. Davis L. Rev. 15 [1985]).

Decisions recommendations for style changes in recent opinions; attended a judicial conference and bar association function and made one or two public addresses; read some of the criticisms of the Court's recent cases; screened over 1000 certiorari petitions, jurisdictional statements and motions; prepared for 230 cases to be on the Court's September conference "discussion list;" and studied the briefs on the merits for the two-week October argument session.[113] Obviously the implication here is that the typical justice does not waste the summer recess!! An interesting aside in this presentation was a reference to then U.S. Attorney General Edwin Meese's notable comment made that same summer in which he urged the Court to return to what he termed a "jurisprudence of original intention."[114] Apparently in an attempt to enlighten Mr. Meese, Stevens evaluated Meese's limited view of federalism as well as the current understanding of the evolution of the Fourteenth Amendment. He pinpointed the weaknesses of Meese's argument, which is an appeal to the views of the founding fathers, by illustrating the difficulty of projecting back 200 years to discern the meaning of words in context as well as of trying to establish which historic individuals--a "diverse lot"--Meese would consider as "the founders."[115] Stevens did not resolve the question, but evidently intended to provoke thought (and put the executive branch in its place).

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[113]Stevens, The Supreme Court, supra note 112, at 449-50, 453.

[114]Id. at 451. For text of speech, see Symposium: Construing the Constitution--Edwin Meese, 19 U.C. Davis L. Rev. 22 (1985). See also, Kathleen M. Simon, The Supreme Court on Rights of the Accused: Trial by Jury, 1975-1986, paper presented at the Southern Political Science Association Annual Meeting, Charlotte, N.C. (Nov. 5-7, 1987)(analysis of possible application of Meese's theory to actual cases).

[115]Stevens, The Supreme Court, supra note 112, at 452.

While participating in a lecture series at the University of Miami Law School in 1986, Justice Stevens expressed his understanding of the meaning of the concept of liberty as found in the U.S. Constitution's preamble and amendments. He indicated initially that he welcomed the opportunity since the "audience" he "most frequently addresses does not always seem to be listening to what [he] had to say" on this topic.[116] He appeared to agree with Mortimer Adler's concept of liberty that man possesses (1) a natural freedom of choice "to become," (2) an acquired liberty or moral freedom to make right or wrong choices, and (3) a circumstantial freedom to carry out choices.[117] According to Stevens, only the last type may be publically regulated since it is in overt action that one individual could harm another. However, Stevens noted that sometimes restricting freedom actually could widen the circumstantial freedom of others. The task for a judge, he proposed, is to determine what should be the standard for the "democratically elected majority--or super majority--to constrain the liberty of the individual citizen."[118] Significantly, Stevens expressed the belief that it is difficult for any judge to come up with a single answer to such questions, and urged that, in determining a constitutional deprivation of liberty, precedent dictates that a court must be assured that neither procedural nor substantive due process has been denied. Despite this obvious principle, Stevens cited several recent cases where in his view the Supreme Court majority ignored the "simple proposition" that "one of the elements of liberty is the right to be respected as a human

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[116]John P. Stevens, The Third Branch of Liberty, 41 U. Miami L. Rev. 277 (1986).

[117]Id. at 278-9.

[118]Id. at 283.

being."[119] He then reviewed a line of cases since 1923 which have used the concept of liberty as the basis for substantive due process decisions and concluded that, despite criticism to the contrary, the Supreme Court has properly assumed the "implicitly delegated" task of filling in the "vast open spaces" of the Constitution left open by the Framers concerning "liberty," just as it has done for the commerce clause, unreasonable search and seizure cases, and other parts of the document.[120] He inferred from the original constitutional design of the Judiciary that, although judges are chosen in a way to make them more sympathetic to Government and majority views, the protections of tenure and of salary assure them that they are well-positioned to make unpopular minority decisions without fear of reprisal for their impartiality. As for the source of liberty, Stevens still maintained, as he has since his days on the Circuit Court, that "liberty is one of the cardinal inalienable rights," not a privilege or immunity that can be taken away from an individual by state action.[121]

Justice Stevens commented on three other constitutional concepts during a symposium at the University of Pittsburgh Law School in 1988.[122] In direct exposition, he addressed the manner by which he approached cases concerning individual rights, federalism, and judicial review. Regarding an individual's rights under the First Amendment Establishment Clause, Stevens stressed that in addition to understanding the clause in its historic context--the

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[119]Id. at 284. He cited Hudson V. Palmer, 468 U.S. 517, 104 S,Ct, 3194 (1984)(constitutionality of seizing a prisoner's personal effects); Walters v. National Association of Radiation Survivors, 473 U.S. 305, 105 S.Ct. 3180 (1985)(statute imposing $10 ceiling on lawyer fee for veterans' benefits claim constitutional); Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135 (1986)(no right to defense by attorney until after police interrogation).

[120]Stevens, The Third Branch, supra note 116, at 291.

[121]Id. at 292. See Simon, Thesis, supra note 1, at 92, 191

[122]John P. Stevens, Commentary, 49 U. Pitt. L. Rev. 723 (1988).

Founding Fathers seeking religious toleration for Christian religions--it must logically be extended to include the value which underlies the clause: tolerance of all religions, matters of conscience, and personal beliefs.[123] As for federalism, Stevens said he seeks guidance from "tradition and our understanding of the basic concept of the relationship between states and the federal government," and made a distinction between "cases which test the power that the central government may exercise over the states . . . and cases involving the question whether Congress intended to exercise its power."[124] For questions in the latter category Stevens affirmed that "when Congress has not expressly acted, there should be the strongest presumption of respect for individual state action," and in questions whether Congress has preempted state law, one should presume "that the state decision should be respected absent clear evidence that Congress intended a different result."[125] He used his dissent in Michigan v. Long[126] to illustrate when the Court should address criminal procedure matters: if it appears that the state decision was based upon state grounds the Court should not enjoin federal standards; if the decision was based upon federal grounds, then the Court is justified to intervene.[127]

Lastly, Stevens used the concept of liberty--a term he noted is not defined in the Constitution but a concept of importance nonetheless--to illustrate how judges have

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[123]Id. at 725.

[124]Id.

[125]Id. at 726.

[126]463 U.S. 1032, 103 S.Ct. 3469 (1983).

[127]Stevens, Commentary, supra note 122, at 726. (Here again Stevens maintained that states should be given much leeway to experiment with "new ideas and approaches" in criminal procedure. See infra, Chapter IV for more in-depth coverage of this principle.)

legitimately exercised judicial review to fill in constitutional "gaps." Cognizant of American history and tradition, judges have interpreted this concept to include protection of the rights to travel, to marry, and to live with whomever one chooses.[128] He saw this exercise of power as a proper role for judges.

Justice Stevens delivered the first Thomas E. Fairchild Lecture, named in honor of his mentor, colleague and friend Judge Fairchild, at the University of Wisconsin Law School on September 9, 1988.[129] He began by offering this assertion:

> Law is a discipline with many dimensions. Political science, ethics, religion, economics, literature, and history are among the fields of study that may illuminate the work of the lawyer or the judge. Every lawyer must be an educated person.[130]

and then, using three of Judge Fairchild's many opinions, proceeded to illustrate the manner by which a judge may incorporate history to reveal the meaning or development of a particular law or legal concept. He said these cases depict how "the judge's task includes the study of the past, the faithful description of contemporary events, and decision-making that may affect the future.[131] After discussing Fairchild's approach to these cases involving a state's antitrust statute as applied to a national baseball team, the scope of protected speech and a

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[128]Id. at 727-728.

[129]John P. Stevens, A Judge's Use of History, 1989 Wis. L. Rev. 223. Judge Fairchild was the Chief Judge of the United States Court of Appeals for the Seventh Circuit at the time of Stevens' nomination to the high court.

[130]Id. at 224.

[131]Id. at 225. The cases reviewed were State v. Milwaukee Braves, Inc., 31 Wis. 2d 699, 144 N.W. 1 (1966); United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972); and Donnelly v. Lynch, 525 F. Supp. 1150 (D.R.I. 1981).

federal anti-riot statute, and the conflict between use of public funds to provide holiday decorations and the establishment clause of the First Amendment, Stevens used Justice Burger's opinion from the third case, on appeal to the Supreme Court,[132] in contrast, to exemplify how a judge may questionably use isolated historical points to substantiate his position. Then, in caveat, Stevens presented a glimpse of what he considered a proper jurisprudential use of history:

> An historical inquiry has both a horizontal and a vertical dimension. The isolated fact must be studied in its contemporary setting, as well as in relation to what may have preceded or followed. For history, like the law and life itself, involves a process of change, growth, and of improvement. The first step in the development of any rule of law is of critical importance, but one cannot ignore the subsequent steps that mark the path from the past to the present and beyond. . . .We must learn as much as we can about the original intent of our lawmakers, but we must also remember that that learning is merely the beginning, not the end, of a dispassionate attempt to understand any rule of law.[133]

Stevens concluded this lecture by quoting Justice Cardozo's tribute to Justice Holmes in 1931 which contains the famous quote from Holmes' The Common Law which articulated the experiential, evolutionary and dynamic nature of rules of law.

Summary

In addition to the points Stevens expressed during his Senate confirmation hearings,[134] his attitudes toward the role of a justice and toward other legal concepts can be gleaned from

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[132]Lynch v. Donnelly, 465 U.S. 668, 104 S.Ct. 1355 (1984).

[133]Stevens, "A Judge's Use," supra note 129, at 235. (note omitted)

[134]Supra notes 62-78.

Stevens' published public speeches and writings reviewed above. The following summary lists his positions:

1. A justice should practice judicial restraint in making policy and defer to the legislature where appropriate. The key to restraint is in the substance and timing in the choice of issue, and in making decisions incrementally on narrow constitutional grounds. Refusal to extend the scope of a rule should not be interpreted as denying an individual right. Restraint is applicable to political questions but not to political ramifications of a decision. Restraint is imperative in the consideration of certiorari petitions, so the Court reserves its time for only the most important national issues. However, once the court chooses to hear a case, a justice should give it his full attention.

2. In deciding constitutional questions, a justice cannot take only the Framers' original intent, but must also consider history, tradition, and society. The Court must fill in the "constitutional gaps" left by the Framers. The historical inquiry must reflect its horizontal and vertical dimensions and not be limited to isolated fact.

3. Even though previous rules provide the framework for analysis of most present cases, nevertheless, a justice must allow that rules from precedent cases have a "life-span" and can be adjusted to correspond to public circumstances, in order to respond to the evolution of society.

4. An appellate court should not limit its work product from being cited as precedent since no judge has the proper vantage point to determine its quality or importance.

5. Judges should be cautioned that well-settled law is not always attainable and that differences among circuits is tolerable. States should be allowed to experiment where federal law is not express. States should be allowed to give a broad interpretation to protection of its citizens' civil rights.

6. A justice's lack of certainty and consistency may better serve the nation at the time of a particular decision since it is difficult to anticipate all future applications of a rule at once.

7. The Court should acknowledge Liberty as a right, not a privilege or an immunity. In determining whether government has constrained individual liberty, a judge must be assured that neither procedural nor substantive due process has been denied.

8. A justice should not write a dissent for denying certiorari; it gives too much weight to the case. If the Supreme Court set guidelines, another body could review certiorari petitions if the caseload becomes unmanageable: a new congressional committee for questions on ambiguous statutes and a reviewing court (without power to decide on merits) for other federal questions. All cases before this court should be discretionary.

9. The work product of trial judges should be highly regarded by reviewing appellate court judges.

10. A Supreme Court justice must be more conservative than a federal circuit court judge in recusing oneself, due to the hierarchy of importance of the decisions from the former court. In contrast to the pace of the circuit court term, it is appropriate that Supreme Court justices have a longer summer break than circuit court judges in order to catch up on reading and paper work as well as to recreate.

11. Cameras should be allowed in the Supreme Court chamber only if it helps the Court better discharge its constitutional duties.

12. Debate within the legal community, both before and after an issue is determined, results in a positive and welcome approach to legal questions.

13. There is a need for improvements in the procedures, personnel, and alternative methods in the administration of justice to meet the needs of increased caseloads. The quality

of state judges would be increased by merit appointment. A retention ballot for state judges does not isolate them from popular recriminations.

14. Every lawyer must be an educated person. Academic fields that "illuminate" the law include political science, ethics, religion, economics, literature, and history.

It becomes apparent from the above notations that Stevens has made little reference to criminal procedure matters in his public addresses, in contrast to more specific allusions during the Senate Hearings. Yet, one is able to discern from these speeches some general standards followed by Stevens in his decision-making that can be used to evaluate consistency in his approach to the cases under consideration below. But how have other scholars critiqued his jurisprudence?

The last section of this chapter will review the literature solely devoted to the work product of this justice.

Current Appraisals of Stevens' Jurisprudence

Only one book, one dissertation, and a handful of articles analyzing Stevens' jurisprudence are included in the bibliographic literature, written since 1975, devoted exclusively to Justice Stevens. This section will review that literature regarding the researchers' foci and overall conclusions. Of particular interest will be references to the Justice's approach to criminal procedure cases.

In 1976, Francis Beytagh, in attempting to predict Stevens' position on the Court by using his testimony before the Senate Judiciary Committee and his opinions from the Seventh Circuit Court of Appeals, characterized Stevens as "a centrist, a moderate, a balancer" likely to hold a

"pivotal position" on the Supreme Court.[135] He noted his interpretation of judicial restraint to decide cases "circumspectly" rather than avoiding constitutional issues as did Justice Frankfurter, yet believed Stevens "is likely to be unpredictable as regards approach and perspective" in contrast to Justice Douglas.[136] If Justices Brennan and Marshall retire, Beytagh predicted Stevens to join Justices Stewart and White in dissent on occasion as the Warren Court decisions are "dismantled" by a more conservative Burger Court. However, if Brennan and Marshall are replaced with like-minded justices, Beytagh predicted Stevens to "become the swing vote in a number of significant issues," and to have a "principled and articulate approach" and be "a positive, constructive and uplifting force on the Court" on the basis of his past record of "openness and moderation."[137] Beytagh concluded that Stevens' experience on the Court should not be dull, in any event, because the Burger Court's decision-making had been so erratic that it sounds an "uncertain trumpet" in many areas, including criminal procedure.

Ball and Uhlman, in a 1978 work, gave an "initial assessment" of Justice Stevens' political views "by comparing [his] votes cast in economic and personal liberty cases during his seven year judicial career to those of his colleagues on both" the Seventh Circuit Court of Appeals from 1969-1974 and the Supreme Court from 1974-1977 and concluded that Stevens continues to be an "ideological enigma."[138] Using issue voting analysis on the order of Pritchett,

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[135]Francis X. Beytagh, Jr. Mr. Stevens and the Burger Court's Uncertain Trumpet, 51 Notre Dame Law. 946, 951-952 (1976).

[136]Id. at 951.

[137]Id. at 955.

[138]Branch Y. Ball and Thomas M. Uhlman, Justice John Paul Stevens: An Initial Assessment, 1978 B.Y.U. L. Rev. 657, 569.

Schubert, and Goldman, Ball and Uhlman measured Stevens' position on the cases as "liberal" or "conservative,"[139] and also weighed his votes if he wrote or sided with a concurring or dissenting opinion. Judges and justices were ranked as more or less conservative or liberal as a result of their average scores. The researchers concluded that in economic cases Stevens "departed only marginally from an ideologically neutral position" with his colleagues on a circuit court that tended to vote in a slightly liberal manner, and was "well within the moderate third" on a Supreme Court that "appears to be basically moderate on economic policy."[140] Evaluating the personal liberty cases, Stevens is again viewed as moderate though he ranked the fourth most conservative judge on a court that tended to be more conservative on personal rights cases, whereas, on the Supreme Court, Stevens is seen as a true moderate, aligning as often with the liberals as the conservatives, on a Court seeming to be "more sharply divided over personal liberty than economic questions."[141] Ball and Uhlman saw Stevens' centrist position as an asset since it will "bridge the ideological gap between left and right," and they predict him to become a "unifying force in the years ahead," helping the Court reach compromise or as a swing vote in closely divided cases.[142]

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[139]Id. at 571 n. 19 (citing C. Herman Pritchett, The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947 (2d ed. 1969); Glendon Schubert, The Judicial Mind (1965); and Sheldon Goldman, Conflict on the U.S. Court of Appeals 1965-1971: A Quantitative Analysis, 42 U. Cin. L. Rev. 635 (1973).

[140]Id. at 574-5. On the Supreme Court in these cases he had the highest rate of agreement with White (79.2%) and Blackmun (78.9%) but was as likely to align with the conservatives as the liberals.

[141]Id. at 579.

[142]Id. at 582.

A rather lengthy evaluation of Stevens' first few years on the high bench was published by Carlson and Smith in 1978 and examined a sampling of Stevens' constitutional opinions concerning the regulation of offensive speech, state aid to religion, Fourth Amendment protections against administrative and third party searches, Fifth and Fourteenth Amendment guarantees of procedural due process and equal protection, and the rationality of the legislative process.[143] The researchers concluded that Stevens takes novel approaches to these types of cases and is liable to "reformulate judge-made rules of constitutional law in a manner closer to his perception of the fundamental principles of the Constitution."[144] In Fourth Amendment cases he stresses to his colleagues the historic distinction of the two parts of the amendment, and distinguishes precedent cases as possibly not applicable based upon the context of the present circumstances. In due process cases they determined that Stevens has also rejected the Court's use of a precedent in finding protected liberty interests in a situation even if not based on particular statutory or constitutional sources when he believes the Court has not made a linkage between a precedential rule and the principle it is supposed to uphold. Generally, he is seen to emphasize "fundamental principles and goals, but not strict constitutional rules," however, by balancing principles in First Amendment and equal protection cases, they believe "his own notion of common sense" is behind his tendency to prioritize one interest over another.[145] In routine state/individual conflicts he defers to the legislature or government administration for their judgment, but if the conflict is "extraordinary" it is believed that

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[143]Jonathan Carlson and Alan D. Smith, The Emerging Constitutional Jurisprudence of Justice Stevens, 46 U. Chi. L. Rev. 155, 157 (1978).

[144]Id. at 232.

[145]Id. at 233-4.

Stevens is more willing to let the federal courts take a protective role for the individual. Though not a pure realist, Carlson and Smith noted that Stevens still relies ultimately upon the constitutional text and judicial restraint where he believes they are required. In what they call the due process of lawmaking, Stevens is observed to differ from his Court peers and "demands that legislative and administrative lawmaking be the result of a demonstrably rational process by a competent decisionmaker."[146] Overall, the authors found Stevens' value on the Court as one who re-thinks doctrine and "challenges old assumptions," making his mark by preserving the essence of old rules in a doctrinal context appropriate for a modern society.[147]

Similarly, George Lamb III and others reviewed 136 opinions from Stevens' first three full Supreme Court terms for the purposes of identifying "his philosophical orientation," of evaluating "the consistency of his views," and of determining "the extent to which he has developed workable analytical methods."[148] Because of the "proclivity of opinions," the authors deduced that Stevens is willing to assert distinct views and could play a "significant role in determining the future direction of a changing Court."[149] In the area of federalism, the authors determined that Stevens gives consideration to both state and federal interests when interpreting the commerce clause, and would allow the states to experiment in solving local problems, yet they note he often defers to Congress when determining the constitutionality of

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[146]Id. at 235.

[147]Id.

[148]George C. Lamb III at al., Project, Justice Stevens: The First Three Terms, 32 Vand. L. Rev. 671, 672-673 (1979).

[149]Id.

legislation regulating commerce for uniformity. Similarly, in interpreting the supremacy clause, he has considered some state interests over federal legislative interests, but not in the antitrust area. Logic and reason based upon constitutional principles were seen permeate these decisions.

In dealing with the rights of the accused, the authors used the basic premises underlying Packer's Due Process and Crime Control models of the criminal process to delineate Stevens' positions on the pre-trial, trial, and post-trial conviction issues.[150] They concluded that again Stevens appears to strike a balance, demanding that the criminal justice processes adhere to procedures to protect the defendant's individual rights, but at the same time he shows concern for efficiency of the criminal justice system by deferring to the discretionary judgment of the "best-informed decision-makers" in making his rulings.[151]

According to the researchers, in First Amendment cases concerning obscenity, a free press, and the establishment of religion, Stevens appeared to hold a strong pro-individual stance. But in opinions chosen to illustrate his approach to equal protection issues, Stevens was seen to reject the Court's traditional two-tiered analysis and not to use traditional terminology such as "rational basis" test, "suspect classification" or "compelling state interests." Instead, he has chosen grounds narrower than the Equal Protection Clause to decide cases or, in applying equal protection, merely states the validity of a classification and explains why.[152] Lamb concluded that there is some pattern in Stevens' analysis, and that is to discover the actual

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[150]Id. at 684-5 for explanation of models from Herbert Packer, The Limits of the Criminal Sanction (1968).

[151]Id. at 696.

[152]Id. at 711.

legislative purpose for a classification, as opposed to accidental or stereotypical classifications, and to defer to it; if no purpose exists, he will not substitute his own purpose for that of the legislature. However, Lamb surmised that Stevens still has not yet developed an equal protection analysis satisfactory to himself.[153] Stevens has enunciated his views on the proper constitutional and political role of the Supreme Court and Lamb pinpointed Stevens' "high standards for granting certiorari," his narrow view of mootness, his criticism of colleagues' dissents to grant certiorari, "his willingness to defer to the judgment of other branches and levels of government," and "his preference for an adjudicating rather than a policy-making judicial branch."[154] This study did not examine Stevens' approach to substantive areas or to problems of statutory interpretation of the Fifth and Fourteenth Amendment due process questions, although in its equal protection analysis it did criticize Stevens for substituting a weak procedural due process argument in the absence of a stronger equal protection analysis and for assuming a policy-making stance which the researchers believed Stevens has said he rejects.[155] Lamb also speculated that perhaps Stevens is an "activist" in that by deferring to other branches or persons he actually achieves the results he wishes, and by his unorthodox constitutional interpretation he intervenes in cases to put forth his own philosophical views.[156]

Reviewing the same period as Lamb and Ball, Keating produced what he termed "incisive analyses" of the objectives and reasoning found in Stevens' opinions concerning equal

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[153]Id. at 715.

[154]Id. at 716.

[155]Id. at 734.

[156]Id. at 737.

protection, substantive and procedural due process, and First Amendment freedom of expression issues from the perspective of whether Stevens sided with the appellant's argument, how his opinions compared to those of other Court members, and finally, whether his opinions are consistent within a policy area and within his perception of the judicial function.[157] From two terms of opinions, Keating concluded that Stevens appears to be attracted to a teleological, or purposive, jurisprudence which comes into play as a judicial approach to cases such that once societal goals have been articulated, the justices merely set the pace of movement towards the goals.[158] Thus, once Stevens believes goals have been identified in earlier cases, such as in segregation, he urges immediate response. When applying equal protection standards to discrimination cases, he wishes to apply an "effect" rather than a subjective intent standard, seeking analysis beyond the traditional or strict scrutiny test for equal protection questions. The author maintained that Stevens treats early cases interpreting the Due Process Clause with a little more caution, however, and noted that "he is hesitant to expand the implicit constitutional rights of privacy, employment or reputation by means of substantive due process" and "appears content to articulate and clarify already existing safeguards to unconstitutional deprivations of liberty or property interests."[159] However, according to Keating, Stevens shows much willingness to extend First Amendment protections through a hierarchical approach to types of speech, recognizing a constitutional right of the press to gather information, and also expresses a desire to legitimate obscenity. Alternatively,

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[157]Michael J. Keating, Comments, Mr. Justice Stevens: An Examination of a Juridical Philosophy, 23 St. Louis U. L.J. 126 (1979).

[158]Id. at 131.

[159]Id. at 153.

Keating also concluded that Stevens does not consistently use the teleological approach but alternates with the more scholarly traditional approach in other areas of the law, resulting in a "judicial decision-making mode" similar to that of Justices Frankfurter or Black.

I completed a masters thesis in 1979 which examined the decisions and opinions of Stevens from 1970-1978 dealing with the Fourth, Fifth, Sixth, and Fourteenth Amendments' protections of the rights of the accused and of the convicted.[160] Primary to the work was an analysis of these opinions for his judicial reasoning concerning the individual rights; secondly, the work was an examination of the value principles evident in the opinions. Regarding the Supreme Court cases, I concluded that a key to understanding Stevens was to acknowledge that though he neither reached out for constitutional questions nor ignored court precedents, he did not always agree with his colleagues on the issue to be faced or the proper precedent to be applied. Overall, Stevens was critical of decisions by the majority to exempt a case from precedent if, in his estimation, the Court's judgment lacked thorough reasoning. He held to the facts of each case at hand and was dismayed if the other justices depended upon appellate rather than trial transcripts in reaching a decision. He objected to summary judgment if, in his opinion, disputed facts called for full argument and plenary consideration.[161] He indicated

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[160]Simon, Thesis, supra note 1. This work also contains an extensive biography of the justice as well as scale analysis of the Supreme Court decisions. A substantial part of the analysis was devoted to Stevens' opinions from the Seventh Circuit Court of Appeals. A follow-up to the prisoner rights cases was done in 1982 in Kathleen M. Simon, Justice John Paul Stevens: Views on the Rights of the Convicted, paper presented at the Annual Meeting of the Academy of Criminal Justice Sciences, Louisville, Ky (March 23-27, 1982). Regarding Stevens as a swing voter, see id., Justice Stevens and his Position on the Court, 1975-1980, unpublished paper presented at University of Tennessee colloquium, (Winter 1984). Regarding Stevens' views concerning facets of criminal justice, see id., "Justice Stevens and Criminal Justice Issues, 1981-1986, paper presented at the Annual Meeting of the Southern Criminal Justice Association, Birmingham, Al. (October 8, 1987).

[161]Simon, Thesis, supra note 1, at 181-2.

that the Due Process Clause protected each individual's liberty, which goes beyond those rights enumerated in the Bill of Rights or created by the states. He voted most often with the majority judgment, though not always with the majority opinion in all cases but those involving the rights of the convicted, when he voted consistently with Brennan and Marshall in the minority. In the cases reviewed (1976 and 1978), Stevens voted most often with Stewart and White, least with Blackmun and Rehnquist, as often with Brennan and Marshall as with Powell and Burger, and sided with the defendant in about half the cases, leading to the conclusion that Stevens maintains a centrist position, holds moderate views on most issues, and follows a pattern of reasoning similar to that of Benjamin Cardozo.[162]

Particularly concerning search and seizure questions, Stevens tended to follow Court precedent and did not reach out for constitutional questions; he maintained a high respect for an individual's privacy, disdained overzealous police, and attempted a balance between the discretion of law enforcement to apprehend a criminal with an individual's expectation of non-government interference with privacy. He held a hard line on self-incrimination violations (expecting the appellant to show a clear violation of this right), would be willing to extend Miranda-type warnings to grand jury witnesses and parolees, and disapproved of majority positions not substantiated by legal doctrines. In evaluating Sixth Amendment violations he took a traditional tact and weighed the alleged error in the context of the total trial. If in his opinion federal standards set down by case law were "too elusive" he would not apply them to the states.

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[162]Id. at 183. Cardozo believed that in coming to a decision a judge was to follow the pattern already established by precedent, history, or the customs of the community, breaking ground only in a small number of cases. See Gary J. Jacobsen, Pragmatism, Statesmanship, and the Supreme Court, (1977).

The secondary consideration of what "value principles" were held by Stevens, and were apparent in his opinions, included: the rights and roles of the individual and minority groups in society, the role of government in society, the role of the judge in government, the promotion of law and order, and the promotion of the status quo or of change.[163] Generally, in these early opinions, Stevens appeared to hold the government answerable more strictly to some rights (such as privacy and fair trial) over others (such as challenges to self-incrimination and double jeopardy) and would extend certain rights to prisoners more often than the majority. He indicated respect for the three branches of government and the distinct role each fulfills in the system, was less likely to impose federal law on the states if he felt state law was sufficient, yet was more willing to overturn state law in favor of individual rights if the free exercise of a right appeared to be impeded. In cases involving federal statutes he always attempted to determine Congressional intent and was critical of his colleagues if they made policy not intended by Congress or extended law enforcement discretion unreasonably.[164] When evaluating trial judge conduct he usually began from the position that the judge had conscientiously protected the defendant's rights. He opposed the making of policy by the judiciary, deferring such activity to the legislative branch, however, he did take seriously the Supreme Court's responsibility to oversee lower court procedures as well as to issue clear opinions so that lower courts could understand whether or not a case contained a general directive. He could not be typed as either a defendant's judge or a "hanging judge" for, like Justice Learned Hand, he did not evaluate law and order questions to the advantage of either side. He expected professionalism from the police yet appeared generally to approve of most

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[163]Simon, Thesis, at 192-199.

[164]Id. at 195.

prosecutor tactics as mere strategy. Though he professed to promote judicial restraint and to leave policy- making to the federal or state legislatures, there were instances in criminal court procedure where he recognized that these bodies were lagging behind the times and urged that they react to societal needs.

Basically, his opinions were judged to be clear, precise, to the point, and often contained lengthy footnotes discussing varied points of view on the issue before the Court. It was my conclusion that his propensity for seeing issues from various angles was in part due to the educational techniques he experienced during his time as an undergraduate at the University of Chicago, in addition to the influence of Justice Rutledge for whom he clerked after law school.[165] Finally, it was determined that his approaches to and positions on these constitutional issues varied little in the transition from the Circuit Court to the Supreme Court bench.

Two works published in 1982 dealt with Justice Stevens' jurisprudence concerning the Equal Protection Clause: a Ph.D. dissertation by Melusky focused on the consistency of Stevens' equal protection opinions for his first 5 1/2 terms;[166] a law review article by Wagner looked at only Stevens' opinions for the same period concerning sex discrimination.[167] Melusky concluded that in approaching equal protection questions Stevens, "on a case by case basis . . . weighed and balanced competing interests and adjusted his level of scrutiny along a variable analytical scale," such that a more strict scrutiny was

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[165]Id. at 9, 11, 13, 63, 82.

[166]Joseph A. Melusky, Justice John Paul Stevens' Equal Protection Analysis (1983)(unpublished Ph.D. dissertation, University of Delaware).

[167]John P. Wagner, Justice Stevens and the Emerging Law of Sex Discrimination, 9 Pepperdine L. Rev. 315 (1982).

given to discrimination of a distinct class and more leniency was given to a classification if the government showed a real, legitimate or "weighty" purpose.[168] Melusky typed Stevens as a "balancer" using a "sliding scale analysis" that makes his opinions lack "guidance for private parties, legislators, lawyers, and lower courts" on the meaning of equal protection.[169] Though an examination of past opinions does not make the outcome of future cases easy to predict, nevertheless, Melusky did find that Stevens "refers to a consistent set of analytical factors from case to case."[170] Wagner, on the other hand, cited Stevens' "pragmatic" rather than logical approach to sex discrimination questions, attributing his actions in part as a reaction to the criticism from women's organizations he encountered during his Senate confirmation hearings. Similar to Melusky, Wagner also found inconsistency in Stevens' approach and lack of clarity in his opinions, but he also saw Stevens playing a critical role on the Court, not as a swing voter or one who holds a strong position, but one who attempts "to reconcile and compromise competing positions" in a controversy and giving close attention to the facts of each individual case.[171] Wagner expressed belief that the Court's movement forward in sex discrimination matters is dated from Stevens' arrival in 1975 and the flexible, progressive, and pragmatic role he has played.[172]

Riggs and McCarrey looked at Stevens' positions and reasoning in the field of antitrust by comparing earlier views as expressed in published articles written by Stevens while he

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[168]Melusky, supra note 166, at 241.

[169]Id. at 243.

[170]Id.

[171]Wagner, supra note 167, at 425.

[172]Id. at 426.

practiced as an antitrust lawyer with later philosophy gleaned from his opinions on the federal courts.[173] They concluded that Stevens' opinions show consistency with notions on antitrust matters expressed in his earlier writings as well as with the majority of his colleagues on the High Bench: he continues to be a champion of a competitive market and have a preference for the Sherman Act over the Robinson-Patman Act. The authors also concluded that some of his writings reflect congruence with proponents of the Chicago School of economics (similar to Robert Bork and Richard Posner) despite the fact that he is of a different generation than these theorists and would not have been at the University of Chicago during the fermentation of this tradition.[174] In analyzing antitrust cases, Stevens is seen to reluctantly allow exemptions to the prevailing statutes if clearly violated, yet Stevens, like the Burger Court, gives the antitrust laws wide application to plaintiffs' attempts to meet statutory requirements. While deferring policy decisions to Congress, he feels that the only role of the Court is to evaluate the significance of the restraint on market competition, not to decide on the public or private merits of the antitrust policy itself. Overall, in the 32 Supreme Court decisions in which Stevens participated, Stevens showed more of a tendency to favor the view of the claimant seeking to invoke the federal antitrust laws, "most likely to hold for a position that resulted in increasing the variety or intensity of competition in the relative market," and most likely to show a deference to federal more than state policy.[175] The authors found a direct link

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[173]Robert E. Riggs and L. Cordell McCarrey, Justice Stevens and the Law of Antitrust, 43 Univ. Pitt L. Rev. 649 (1982). (See supra note 32, for listing of Stevens' early articles.)

[174]Id. at 662.

[175]Id. at 701.

between Stevens' values and attitudes as expressed in published journal articles when a practitioner and in his present judicial behavior.

A more recent law review note exposed Stevens' approach to Equal Protection Clause questions and argued that it has advantages over the Supreme Court's traditional three-tiered analysis.[176] As opposed to abstract analysis, Stevens would use a "contextual approach" and inquire as to the relevance of a classification to a "valid public purpose," while maintaining a "normative social vision of equality" that "rejects stereotypical thought and seeks to include minorities in the institutions and activities of a society."[177]

In a cleverly done 1987 piece, Burris depicted a hypothetical student interview/discussion with Justices Stevens, Marshall and Rehnquist, made up of exact quotes and arguments from their Supreme Court opinions used to illustrate their individual positions on the death penalty and how its imposition should be determined.[178] Stevens' stance received particular attention: since the death sentence is morally different from other sentences, capital sentencing procedures must include certain standards by which the jury (or judge) can make a "rational"

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[176]Note: Justice Stevens' Equal Protection Jurisprudence, 100 Harv. L. Rev. 1146 (1987). Id. at 1149-50 for author's reference to a "rational basis" review, a heightened scrutiny for suspect classifications, and a third tier intermediate below the other two for quasi-suspect classifications. But see Lamb, supra note 152, where author indicates a two-tier approach as traditional.

[177]Note, supra, at 1154.

[178]Scott Burris, Death and a Rational Justice: A Conversation on the Capital Jurisprudence of Justice John Paul Stevens, 96 Yale L.J. 521 (1987). Rehnquist's basic position is that the death penalty is constitutional if chosen by the state as a form of punishment for fairly convicted murderers where one aggravating circumstance can be found and that the Court should not impose criteria for administration upon the states. Marshall, conversely, considers the death penalty unconstitutional, per se, as it is cruel and unusual punishment for a civilized society and, as applied, has been imposed with discrimination by state juries and disproportionately on the poor, uneducated, and minorities.

decision on who would die.[179] In the dialogue, the student and other justices attempt to show the weakness of Stevens' position as it has evolved through Supreme Court case decisions from 1976 to 1984. i.e., to take away the "unbridled discretion" of the decision maker and replace it with a structure that allows the jury to consider the aggravating and mitigating circumstances of each individual case. The apparent critique is that Stevens leaves no way by which each aggravating or mitigating factor can be weighted, and, without such guidance the decision maker still continues to have much discretion, not the "guided discretion" to which Stevens assents.[180] Similarly, to Stevens' position that it should be a jury, not a judge, who determines the death penalty since the jury is better able to represent the community's "moral outrage" with the crime, his adversaries counter that this position indicates a decision made in the direction of "outrage" rather than rationality.[181] Lastly, in response to Stevens' view that a "meaningful appellate review" would be "an essential safeguard against the arbitrary and capricious imposition of the death sentences," the opponents again point to Stevens' inability to guide appellate courts in what standards to use for review.[182] To his retort that a statistical "comparative proportionality review" of like cases to determine by which standards the "worst" murders are chosen, the student answers that such cases may not have been determined by the rational jury he desires. All in all, Stevens' views

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[179]Id. at 523. Stevens claims death is different because it is irrevocable, is a total rejection of rehabilitation and is a negation of the person's humanity, id. at 525.

[180]Id. at 530.

[181]Id. at 538.

[182]Id. at 539.

are made out to look "confusing, inconsistent, and unachievable" as applied to the typical death penalty case.[183]

Robert Sickels has published the first book on Justice Stevens and has concluded that in "his search for balance" of individual rights against other values in constitutional issues Stevens is basically a "pragmatist."[184] Accordingly, this "pragmatist" is one who is concerned about "rational decision-making, with clear rules, ample facts, balancing, and the consideration of likely effects" of a decision by a court, working in tandem with the other two branches of government.[185] Sickels did not give a working definition of pragmatism per se (although he referred to philosopher William James' adjectives), but nevertheless, likened Stevens' judicial approach to that of Benjamin Cardozo, and Stevens' view of the role of the Supreme Court to that of Alexander Bickel. He contended that, of all the constitutional issues, Stevens is "most interested in questions of individual rights," and felt that the Justice's "open, pragmatic and eclectic view of the law" was firmly in place by the time he graduated from law school and has not wavered.[186] Though affected by the legal realism of the time via professors such as Leon Green and Nathaniel Nathanson at Northwestern University School of Law, Sickels maintained that Stevens actually settled for a middle or compromise position in acknowledging the uncertainty of law and the judge's responsibility to "use it wisely," similar

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[183]Id. at 546.

[184]Robert J. Sickels, John Paul Stevens and the Constitution: The Search for Balance (1988).

[185]Id. at 31.

[186]Id. at x, 39, 41. According to Sickels, Stevens' experience clerking for Justice Wiley Rutledge after law school resulted in merely to "reinforce his pragmatic tendencies and increase his sensitivity to liberal views," id. at 39.

to the views of Cardoza, Jerome Frank, Louis Brandeis and "mainstream America".[187] In his view, Stevens approaches every case by "examining consequences with care and striving for clarity, objectivity, and balance."[188]

After setting forth an explanation of a continuum of judicial balancing forms used by the Court, Sickels then devoted the remainder of the book to an examination of Stevens' opinions concerning First Amendment, Due Process, and Equal Protection issues to illustrate Stevens' pragmatism at work.

Regarding First Amendment questions, Sickels said about Stevens that "in every application of the amendment except to religious establishment questions, he assesses countervailing interests and assigns weights . . . not only to the government interest in regulation from case to case, but to different kinds of expression as well"--a method Sickels calls a form of compound balancing.[189] Sickels claimed that generally the "main ingredients of Justice Stevens' due process opinions are . . . respect for principle, a sense of its costs as well as its benefits, and deference to lower courts and other primary decision makers." Stevens looks at such issues case by case, concentrating upon the facts in context.[190] Particularly with trial procedure, as a "practical reality" Stevens was seen to defer to principle

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[187]Id. at 39. (But see supra note 165, conclusions as to the effect of his high school and college experiences.)

[188]Id. at 40.

[189]Id. at 53. In establishment of religion and obscenity issues he is critical of the court's complex judge made rules and is more absolutist, finding that for the former the Founding Fathers were very clear in demanding no regulation of religion; for the latter rejecting criminal prosecution under obscenity statutes because of the futility of the Court's attempts at workable guidelines.

[190]Id. at 71.

decision makers (such as the judge or jury) as most suited to resolve procedural and factual questions, assuming that they acted fairly and looking to the transcript of the whole trial to weigh errors in context.[191] Similarly, Stevens is said to rely upon the "first hand" experience of administrators (such as in prison cases) as the best determiners of what is required in a situation, believing that appellate judges should bring federal power to bear only in a limited number of situations. According to Sickels, Stevens gives varied weights to different types of procedural limitations, heralding those involved with liberty over those of property.[192]

In equal protection cases Stevens is seen to be even more judicially restrained, deferring "to the judgment of elected legislators and executives" because of the social and political policy nature of most equal protection questions.[193] In addition, Sickels observed that in approaching legislation Stevens does not require a law to be "perfectly matched nor perfectly mismatched with legislative purpose," but weighs each law in context and "analyzes the costs and benefits of legislative means to public ends," frequently approving of general means to reach legitimate ends, but also sometimes recognizing a limit to official discretion.[194] After examining several equal protection cases, such as those dealing with race, sex and poverty, Sickels concluded that in order to understand Stevens' analysis, it is easier to note at which

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[191]Id. at 74.

[192]Id. at 94.

[193]Id. at 99. Rejecting the Court's two-tier and recent three-tier standard, and the majority's varied approach "to different kinds of classifications with predetermined levels of tolerance or suspicion," Stevens balances "individual rights against the societal interest in treating one group differently from another," and uses a five step process to haunt out the presence of discrimination, id. at 101.

[194]Id. at 121, 123, 126.

point or "decision stage" he reaches to decide a case rather than grouping cases together as to issue.[195]

In the final chapter, Sickels attempted to use "balancing" as the means by which to assess Stevens' work product. He used several justices' opinions from two 1984 search and seizure cases concerning the good faith exception to the exclusionary rule to illustrate the prevailing academic legal arguments surrounding the use of balancing to decide individual rights cases,[196] and concluded that, contrary to his more common compound balancing, in these cases Stevens used "simple balancing" akin to that described by Benjamin Cardozo.[197] In addition, Sickels contrasted Stevens' votes for individual rights claims with those of the other justices from 1975 to 1985 and concluded that "Stevens is more liberal than the rest of the Court" on the four issues studied in this book.[198] Of the five so-called "moderates (Stevens, Stewart, White, Blackmun, and Powell), Stevens is the only one to take "a firm stand in favor of the rights of criminal defendants," and least likely to be a swing voter because of his

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[195]Id. at 126.

[196]Id. at 129-40. Arguments included the absolutist view that no government interest supersedes the exercise of certain rights versus the cost/benefit arguments of whether the costs of upholding an individual right outweighs the future benefits of maintaining it in certain specific situations. He simply stated the positions of Dworkin, Black, Ely, Tribe, Posner, Karst, and Easterbrook.

[197]Id. at 140.

[198]Id. at 147.

preference to formulate his own views rather than build consensus.[199] In the end, Sickels saw Stevens as fundamentally principled, yet not ideological.[200]

Viewing American constitutional law as the "product of compromise and debate rather than of a single plan or philosophy," Leslie Bender studied the judicial "debates" of Justices Powell and Stevens as revealed in their Supreme Court opinions over an eleven and a half year period.[201] She chose to study these two justices over the justices labeled "liberals" or "conservatives," speculating that perhaps centrists actually may have the more "rigid" views and may have been successful (or unsuccessful in the case of Stevens) to persuade his brethren to his camp. She first traced the evolution of law in cases concerning the separation of powers between the Congress and federal courts dealing with private rights of action under federal statutes and under the Constitution. Bender concluded that when federal statutes were silent regarding remedies Powell viewed this "as an intentional prohibition against court action," whereas, Stevens "believed that the judiciary was obligated to imply remedies for wrongs . . . unless Congress affirmatively prohibited court action."[202] She then analyzed federalism issues arising under the Tenth and Eleventh Amendments as well as in the areas of abstention and preemption. She discovered that in all but the labor law area, Justice Powell projected a

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[199]Id. at 153, 158-59.

[200]Noting particularities, Sickels observes that though not an empiricist, Stevens shows "some willingness to use social science information when the occasion arises," that "his legislative facts are anecdotal and speculative," that when balancing he "favors some values over others," on occasion is "critical of blatant pro-government bias that allows efficiency to outweigh liberty," that "he is unusually sensitive to a diversity of values," that he "does not mechanically favor" government interests over individual rights (or vice versa), but "enforces individual rights seriously but not rigidly," id. at 150-52.

[201]Leslie Bender, The Powell-Stevens Debates on Federalism and Separation of Powers, 15 Hastings Const. L.Q. 549 (Summer 1988).

[202]Id. at 559.

"steadfast state sovereignty position" whereas, in all but the labor area Stevens can be seen as "a strong champion of a national market and federal dominance.[203] Justices Powell and Stevens, though viewed generally as "moderates" or "centrists," were discovered to be statistically as well as ideologically on opposite ends of the arguments in the areas under consideration.

In 1989, legal periodicals offered three articles concerning Stevens' jurisprudence. Steven Biddle presented a brief comment on regulatory takings cases since 1982 and how Justice Stevens appeared to be indicating a "pro-land use planning" view.[204] Stevens is seen as a "positivist" who "does not believe in some notion of natural justice or preordained rights; rather, he feels that the government creates all rights including property interests, and the government can justifiably condition those interests."[205] With his more contemporary position of giving great deference to land use planners and acknowledging only due process remedies, rather than just compensation remedies, for regulatory takings, Biddle determined that Stevens consistently has shown an anti-Lockean attitude toward private property ownership.[206] However, this is seen as not contrary to his "liberal" stance but a means necessary "to protect the environment and the public generally," along the line of thinking of a Justice Brandeis.[207] Whereas Biddle assumed Stevens to have a "liberal" label, Paula

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[203]Id. at 583.

[204]Steven G. Biddle, Justice Stevens' Pro-Land Use Planning Views and Recent Regulatory Takings Cases, 21 Urb. Law. 579 (Summer 1989).

[205]Id. at 586.

[206]Id.

[207]Id. at 588.

Arledge coined him a "moderate" justice [208] and William Popkin revealed him as a "common law lawyer on the Supreme Court."[209] Arledge limited her appraisal to four types of civil liberties questions: freedom of speech and press, search and seizure, equal protection, and prisoner rights in cases decided between 1975 and 1985. Stevens' support rates for these constitutional claims show him to be a "centrist," "the third or fourth vote on the liberal side," and a justice who has written the most opinions within this period.[210] In attempting to discern which individuals and what rights Stevens champions, Arledge detected Stevens' apparent similarity to Justice Stone who, in United States v. Carolene Products, proposed that the Court should use a two-tier level of scrutiny, reserving "the most exacting scrutiny for governmental actions that impinged on provisions of the Bill of Rights, restricted political processes, or had adverse effects on what Justice Stone referred to as 'discrete and insular minorities.'"[211] In her analysis, Arledge determined that Stevens' concern for the latter is the key to understanding his civil liberties cases--he has a broad view, though less inclusive than Brennan or Marshall, of which groups deserve constitutional protections. Thus, he consistently applies "an apparent 'natural rights' philosophy" toward prisoners in recognizing that because of their great isolation they are entitled to a protected liberty interest.[212] However, in First Amendment and equal protection questions Stevens is particular about which groups deserve

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[208]Paula C. Arledge, John Paul Stevens: A Moderate Justice's Approach to Individual Rights, 10 Whittier L. Rev. 563 (1989).

[209]William D. Popkin, A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens, 1989 Duke L.J. 1087 (November 1989).

[210]Arledge, supra note 208, at 568.

[211]Id. at 569 (quoting from 304 U.S. 144, 152-153 [1938]).

[212]Id. at 571. (But contrast his positivist approach supra note 205.)

protection and which ones do not. He appears to give more support to nonpolitical rather than political speech, and to the press when "seen as a 'surrogate' for other interests in society."[213] His positions on equal protection questions reflect a view that "the sovereign should govern impartially," and when it fails a group (such as prisoners, aliens, illegitimates, and minorities) the Court can offer a remedy for this type of discriminatory behavior.[214] Thus, Arledge labeled Stevens to be an "individualist" whose "central theme" is protection of the individual.[215]

Popkin's extensive and highly scholarly evaluation of the votes and opinions of Justice Stevens from 1976 to 1987 confirmed his label as "a highly independent judge," that is, one who tends to vote more or less at the same rate with a wide range of justices as well as one who writes a significant number of concurring and dissenting opinions.[216] Popkin concluded that, despite his independence and the difficulty to predict his voting behavior, Stevens "has a coherent judicial philosophy--that of a common law lawyer adapting his views to modern conditions."[217] This approach includes (1) a judicial restraint characterized by his deference to other governmental decision makers at the state and federal levels, as well as requiring deliberation limited to the facts of particular cases, and (2) a commitment to what Popkin calls

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[213]Id. at 574-75.

[214]Id. at 582, 587. He is ambivalent on affirmative action questions however, id. at 583.

[215]Id. at 588. Though Arledge used the votes from the search and seizure cases to determine Stevens' "centrist" status, she did not address their substantive content.

[216]Popkin, supra note 209, at 1089-90.

[217]Id. at 1090.

"individual dignity goals," which can be reached by both the rational deliberation of executive and executive agency bodies as well as through the judiciary when the former fail.[218]

Summary

Between 1976 and 1989 various authors made the following observations regarding Justice John Paul Stevens and his behavior on the Supreme Court.

An early prediction suggested a moderate, swing voter who would be an "uplifting force" (Beytagh). Shortly thereafter, he became an "ideological enigma," as the fourth most conservative judge in voting on liberty cases but still viewed as a "moderate" (Ball and Uhlman). Carlson and Smith noted his novel approach to cases and his expectation that the Court should link judge-made rules and constitutional principles. Their appraisal of search and seizure law pinpointed his persistence to take a historic view of both clauses of the Fourth Amendment as well as to consider precedent in light of the context of case facts. This early research also noted Stevens' favoritism of fundamental principles and goals over strict constitutional rules, prioritization of First Amendment and Equal Protection issues, and deference for legislature or administrative actions. Sickels and Popkin echoed these characteristics several years later, but for different reasons: Sickels saw him acting as a "pragmatist," whereas Popkin coined him a "common law lawyer" exhibiting judicial restraint. Lamb is the only early writer discovered to predict Stevens as an "activist" and potential leader on the Court because of his distinct views. He noted his successful balancing of the rights of

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[218]Id. at 1095, 1135. See also Arledge, supra note 211, for a similar conclusion regarding the role of the judiciary and individual rights. This is also consistent with early appraisals by Carlson and Smith, supra note 143, and Lamb et al., supra note 148.

the accused with the efficiency of the criminal justice system, and this consistency is reaffirmed in future commentaries (Simon; Sickels).

Those observing Stevens' Equal Protection cases revealed: his reluctance to expand individual rights under this clause but to protect those rights already recognized by the Court (Keating); his "balancer" approach by development of a "sliding scale" analysis for sex discrimination cases which, though lacking in guidance was seen as applied consistently (Melusky); his "pragmatic," progressive, flexible approaches to sex discrimination cases and the obvious movement of the Court in his direction since his arrival (Wagner); his "contextual approach" to Equal Protection problems (student Note); his more developed approach to equal protection issues through a five step process which weighed each law in context and limited application of Equal Protection to a narrow category of cases, weighing legislative means with public ends (Sickels); and his penchant as a "moderate" to offer this judicial remedy to certain traditionally-discriminated- against groups possessing no other governmental recourse (Arledge).

Riggs and McCarrey showed Stevens' "consistency" with earlier written views and lower court behavior in the area of antitrust, with his congruence (but not complete agreement) with the Chicago School, and his tendency to favor protection of the antitrust laws to promote market competition. Less complimentary was the critique concerning Stevens' approach to capital punishment decisions, where his goals were seen to be "confusing, inconsistent, and unachievable" and to lack guidance for deliberating juries as well as for reviewing courts (Burris). The only "small group" analysis dealt with federalism and separation of powers questions. It revealed that the so-called "centrist" Stevens may actually be seen as a leader in these areas, though one unable to muster a majority to his views (Bender). A lone article tackling recent regulatory takings cases under the Fifth and Fourteenth Amendments noted the

only "positivist" judge and anti-Lockean labels heretofore (Biddle), which can be contrasted to his "natural rights," Lockean labels in prisoner rights cases (Arledge).

Outside of Lamb's three year review, Carlson and Smith's earlier appraisal of search and seizure law, and Burris' evaluation of Stevens' approach to capital punishment, only Sickels and myself have dealt particularly with criminal procedure issues, with the former under the generalized heading of "Due Process." Thus, it is evident that analyses of Stevens' approach to constitutional matters concerning the administration of justice is lacking. The following chapters should fill this void.

CHAPTER III

FIT AND PERFORMANCE ON THE HIGH COURT

The Burger Court and Stevens' Part in It:

A Survey of the Literature

The focus of this section is to survey some of the literature on the Burger Court, as published chronologically, covering the period just prior to Stevens' appointment in 1975 to the retirement of Chief Justice Warren Burger in 1986. This will be for the purposes of understanding: the Court's general trends and approaches in contrast to the Warren Court at the time Stevens joined the bench; the environment of the Burger Court, particularly in the civil liberties area; and the way Stevens has been viewed generally by contemporary researchers. Not surprisingly, some of the commentaries refer to Stevens particularly, some in general, and others don't mention him by name at all (yet highlight the work of other Burger Court justices). If Stevens has been ignored or dismissed by scholars in deference to other justices, all the more reason to find out what he has to say and what approaches he takes to criminal cases, thereby, making a contribution to the Court's literature.

Richard Funston, in comparing and contrasting the Warren and Burger Courts, revealed the trends of the Court on which Stevens found himself in 1975.[1] In his view, the Burger Court was striking a balance in favor of the government interest in investigating crime over the individual's interest in privacy by increasing law enforcement powers and emphasizing the

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[1]Richard Y. Funston, Constitutional Counterrevolution? The Warren Court and the Burger Court: Judicial Policy-making in Modern America (1977).

interests of the victim-individual over those of the accused-individual.[2] In his view, the Burger Court also stressed its preference for legislation as a reform tool over that of judicial policy-making.[3] While not reversing many Warren Court precedents, this court has "simply refused to extend many of them [such as Miranda] yet one more step," deduced Funston.[4] By the same token, the Burger Court has broadened self-incrimination, right to counsel and double jeopardy principles. Thus, Stevens joined a court which basically adhered to precedent but was willing to respond to the social needs around it.

Similarly, Alpheus Mason implied the trends of this Court by contrasting the criminal law and procedure case results of the later Warren and early Burger Court terms (including the arrival of Stevens), noting the "shift in the judicial winds" from "pro" to "con" defendants' rights.[5] In Mason's view, the Warren Court's tendency to prefer liberty over restraint, though threatened, was not in danger of being completely reversed. In fact, as he saw it, the Court had involved itself in numerous social, political and cultural questions. Yet, he noted its continuing struggle with death penalty questions and the inability to simplify these rulings. In the face of mounting criticism that the Court under Burger's leadership had chipped away at many Warren Court criminal procedure decisions, Mason pointed out that in 1976 Chief Justice Burger stressed that in actuality little significant change had been made in the Court's attitude regarding criminal defendants and, in fact, the Court had actually expanded prisoners'

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[2]Id. at 206-7.

[3]Id. at 208.

[4]Id. at 231.

[5]Alpheus T. Mason, The Supreme Court: From Taft to Burger (1979).

rights.[6] In viewing the Court personnel, Mason put Justices Marshall and Brennan on the liberal side, Burger and Rehnquist on the conservative side, saw Blackmun and Powell as not classifiable, Stewart and White as the swing voters, and (new arrival) Stevens as one blessed with "rare judicial temperament" and a "balancing influence." Yet for all the attempts at categorizing, Mason maintained firmly that "it is no longer safe to predict how the Justices will vote either as a bloc or individuals."[7] Harold Spaeth attempted to do just that by categorizing Supreme Court justices according to their value systems based upon the manner in which they voted on various policy issues reflecting "freedom, equality, and New Dealism."[8] He placed Stevens in the "moderate" category during his first two years on the Burger Court along with Stewart and White, countering the liberals Brennan and Marshall and conservatives Blackmun, Powell, Burger, and Rehnquist. Such a position is supposed to reflect Stevens' neutrality toward the values in question, making it harder to predict how he would vote in future cases.

Heck and Hall tended to confirm Spaeth when they applied Snyder's freshman effect hypothesis and discovered that between 1953 and 1978 only Stevens as a freshman justice did not tend to align with any other member of the Court over a large number of votes during his first three years on the bench.[9]

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[6]Id. at 311.

[7]Id. at 316.

[8]Harold J. Spaeth, Supreme Court Policy-making: Explanation and Prediction, 128-39 (1979). Spaeth contended that personal attitudes have a bearing upon policy choices.

[9]E. V. Heck and M. G. Hall, Bloc Voting and the Freshman Justice Revisted 43 JP 852, 858 (1981).

One of the highly controversial books on the Supreme Court to come along in recent times is Woodward and Armstrong's The Brethren.[10] It offered a few insights as to how Justice Stevens supposedly had been assimilated into the Court during his first year there. Justice Stewart at first called Stevens a "wild card" because of his unpredictable voting habits, yet respected his "intelligence and willingness to work."[11] Justice White considered him erratic and referred to him as "the one-eyed Jack" for his eccentric views and limited regard for precedent.[12] The authors claimed that the relationship between Chief Justice Burger and Stevens gradually deteriorated as Burger ignored Stevens' views and that Stevens grew more cynical about the Chief Justice's ineptness.[13] The Brethren also included references to the politics involved in President Ford's selection of Stevens in 1975; Stevens' ability to change a 7-2 vote to uphold a second degree murder plea to a 7-2 reversal by means of persuasion; Stevens' swing vote position in the 1976 death penalty decision and the eventual coaptation of the majority opinion from Justice White to plurality opinions by Justices Stevens, White, Powell and Stewart; and Stevens' appraisal of his colleagues after a year on the bench.[14] About the Court in general, supposedly Stevens was discouraged with "the absence of

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[10]Bob Woodward and Scott Armstrong, The Brethren: Inside the Supreme Court (1979).

[11]Id. at 508.

[12]Id.

[13]Id. at 509.

[14]Id. at 475-77; 478-79; 511-13. Allegedly according to Stevens, Burger read directly from his clerks' notes at conference, and would not commit to a position until the last moment; Brennan had knee-jerk liberal reactions; Stewart was hard-working but distracted; Marshall parroted Brennan; Blackmun was tormented and indecisive; Rehnquist was very intelligent and hard-working but too right-wing; Powell was the most thoughtful, best-prepared and least doctrinaire; White was willing to discuss issues informally, but could become unnervingly harsh.

intellectual context or meaningful discussion;" the carelessness of case selection; the choice of pragmatic over principled decisions; and the absence of real deliberation.[15] Woodward and Armstrong concluded that, by the end of the 1975-76 term, Warren Court civil rights precedents were being "orchestrated and controlled not by Warren Burger, but by Stewart and White, who had served on the Warren Court, Powell, the most moderate of the four Nixon appointees, and by Stevens, the new moderate. The center was in control."[16]

In a review of the first ten years of the Burger Court, Steven Saltzburg came to a conclusion similar to Mason about the misperception that this Court was dismantling progress in criminal procedure made by the Warren Court.[17] In his view, both Courts suffered from doctrinal inconsistency in dealing with Fourth and Fifth Amendment questions on search and seizure and confessions and that, despite changes in personnel, the Burger Court "adhered to its basic regard for constitutional values" as had its predecessor.[18] Yale Kamisar, while looking at the same period, similarly suggested that when faced with search and seizure and confession questions, the Burger Court trend was to show "less hostility" toward earlier Warren Court police practices decisions as was the prevailing public perception.[19] Neither researcher singled out Stevens in their critique of these decisions.

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[15]Id. at 526-7.

[16]Id. at 528.

[17]Steven Salzburg, Criminal Procedure in the Warren and Burger Courts, 69 Geo. L.J. 151 (1980).

[18]Id. at 209.

[19]Yale Kamisar, The Warren Court (Was It Really So Defense- Minded?), The Burger Court (Is It Really So Prosecution-Oriented?) and Police Investigatory Practices" in The Burger Court: The Counterrevolution That Wasn't 91 (V. Blasi ed., 1983).

An early appraisal of Stevens came from an essay by Leonard Orland who saw Stevens' distinctiveness from other junior justices in his willingness to write his own opinions.[20] He noted that during his first full term 1976-77, Stevens wrote more separate concurring and dissenting opinions than any other justice![21] Secondly, Orland elucidated upon Stevens' independence in not aligning himself with any one voting bloc on the Court. Orland believed these "twin proclivities" result in Stevens' ability to provide an analytical framework for mediating between the conservative and liberal blocs and also allow him to develop new constitutional doctrine.[22] He particularly pinpointed the prisoner rights cases and opinions in criminal procedure as illustrative of his innovation. Stevens was observed to have three distinct approaches to his work: "He gives unusual consideration to findings of courts below and insists on meticulous adherence to the record; he reads prisoner's rights pro se complaints liberally; and he believes in molding procedural doctrine to advance what he sees as judicial economy."[23] Unlike the judicial economy of Justices Burger and Rehnquist which suggests limiting access to the federal judiciary, Stevens is seen as one who is concerned with the quality of criminal justice and regrets judicial haste. Orland showed appreciation for Stevens' vigorous honesty, sense of propriety and forthrightness.[24] Vincent Blasi's collection of essays

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[20]Leonard Orland, John Paul Stevens in 5 The Justices of the United States Supreme Court: Their Lives and Major Opinions: The Burger Court 1969-1978, 149-162 (ed. L. Friedman 1978).

[21]Id. at 151. These included 17 separate concurring and 27 separate dissenting opinions.

[22]Id. at 152.

[23]Id. at 159.

[24]Id. at 161.

on the Burger Court,[25] published in 1982, was predicated upon the idea that the Court under Warren Burger did not create a counterrevolution to the judicial activism of the Warren Court but, in fact, should be labeled as a Court of "rootless activism." Blasi identified the "pragmatic" men in the middle--Stewart, White, Blackmun, Powell, and Stevens--as intelligent, open-minded and dedicated justices, yet the ones responsible for both generating and moderating the Burger Court's own brand of activism.[26] He suggested that neither basic constitutional principles nor political ideals are the sources for their decisions, but rather "the belief that modest injections of logic and compassion by disinterested, sensible judges can serve as a counterforce to some of the excesses and irrationalization of contemporary governmental decision-making."[27] Blasi concluded that the Court's findings "have been inspired almost exclusively by discrete, pragmatic judgments regarding how a moderate, sensible judicial accommodation might help to resolve potentially divisive public controversy."[28] However, the inclusion of Stevens in the group as a "pragmatist" is contrary to what Woodward and Armstrong as well as Orland had to say about Stevens' approach to issues.[29]

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[25]Vincent Blasi, The Rootless Activism of the Burger Court, in The Burger Court: The Counterrevolution That Wasn't (V. Blasi ed., 1982).

[26]Id. at 210.

[27]Id. at 211.

[28]Id. at 217.

[29]See supra notes 15 and 24. In profiling the Burger Court justices, Blasi included the following about Stevens:

> As Stevens begins his service as a justice, knowledgeable observers expected him to become a leader on the Court by virtue of his powerful intellect and moderate instincts. That has not happened. Instead, Stevens has tended to develop highly original, sometimes idiosyncratic theories that fail to

Henry Abraham determined that President Ford's selection of Stevens as a Supreme Court justice was primarily based upon ideological compatibility, in addition to objective merit.[30] After examining his first eight years on the bench, Abraham concluded that Stevens had confounded those who predicted him as a swing vote with White and Stewart or Powell and Blackmun, by being found more frequently with the liberal bloc of Justices Brennan and Marshall. In his view, Stevens' "prorights and proindividuals score has constantly been high, exceeded only by his two libertarian activist brethren and by Justice Blackmun in racial discrimination litigation."[31] Abraham appeared to praise the craftsmanship of Stevens' opinions which he felt have been tightly "reasoned, if somewhat crochetlike, written with directness, forcefulness, and often blunt incisiveness; addressing statutory construction with literateness and literalness."[32] When functioning as a Supreme Court justice, Abraham saw Stevens in a positive light as an asker of probing questions during oral arguments, a promoter of novel legal theories in constitutional interpretation, a student of history and supporter of

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> win the endorsement of his brethren. He is a formidable but unconventional legal thinker. With Stevens operating as he has at the center of the Court's divisions, the effect of his independence of mind often has been to fragment potential majorities and leaves the state of the law indeterminate. His preferences are particularistic and difficult to categorize. He is the only justice appointed in the last fifteen years who does not consistently rule against an expansive view of the rights of persons accused of crime.

Id. at 252.

[30]Henry Abraham, Justices and Presidents: A Political History of Appointments to the Supreme Court 323-24 (2d ed. 1985). Abraham proposed that Ford's memoir suggests that he wanted a person who would support Chief Justice Burger in his attempt "to limit federal jurisdiction and let state courts make more final judgments themselves."

[31]Id. at 325. See also Jeffrey A. Segal and Albert D. Cover, Ideological Values and the Votes of U.S. Supreme Court Justices, 83 APSR 557, 562 (June 1989)(indicating that in civil liberties cases decided up until 1986, Stevens was about 17 percent more liberal than expected).

[32]Abraham, supra note 30.

stare decisis, and an upholder of legislative language and intent. The author asserted that Stevens also participated in bringing about the timely evolution of law where necessary. Like Blasi, however, Abraham expressed regret that Stevens has not taken on the role of a leader on the Court and lamented his "veritable flood" of concurring opinions which to his mind "muddy the constitutional waters and lay themselves open to the charge that they are ego trips."[33] Regardless, Abraham viewed Stevens as an "unceasing stimulation of reflection, of innovation, of disciplined literateness of cerebral combat in constitutional law, logic and theory."[34]

After recalling a decade of his jurisprudence, Elder Witt identified Stevens as the "least political and most independent" of the then sitting Burger Court justices because Stevens coupled an active intellect with an open judicial mind--characteristics which Witt believed make him the least predictable member of the Court.[35] He attributed Stevens' slight, subtle shift from center to liberal with the departure of Stewart and the arrival of Sandra Day O'Connor, and pointed at his ability "to crystallize an issue in a single question and to illustrate complex concepts in blunt, down-to-earth language" among his outstanding assets.[36] Witt evidenced that "when the Court wishes to state its position with precision (such as in search and seizure questions) it often chooses Stevens as its spokesman."[37] Yet, he also observed that more recently Stevens had criticized the Court for its conservative positions.

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[33]Id. at 326. (But see Tribe, infra, note 8.)

[34]Id. at 327.

[35]Elder Witt, A Different Justice: Reagan and the Supreme Court 91 (1986).

[36]Id.

[37]Id.

Writing in the same time period, Laurence Tribe determined that Justice Stevens' moderate judicial approach had been greatly needed on the ideologically divided Burger Court.[38] That he often writes concurring opinions with constitutional interpretations different from the majority, or tends to uphold the rights of the accused in dissenting opinions, or defies traditional categorization is seen by Tribe as positive contributions to the overall balance on the Court. In evaluating the Burger Court years, Tribe concludes that "it has displayed some troubling tendencies and made many disturbing decisions,"[39] yet has made positive steps in the areas of affirmative action, the rights of the public to attend public trials, protection of the rights of the mentally ill, and the application of equal protection of the law to women facing government discrimination.[40] Basically, Tribe rendered his opinion that the Burger Court has left the "core of principles" from the Warren Court in place, despite some whittling and pruning of its own, but stressed a change in Court membership could upset this delicate balance.[41]

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[38]Laurence Tribe, God Save This Honorable Court: How the Choice of Supreme Court Justice Shapes Our History 130-31 (1985). See also Thomas R. Marshall, Public Opinion and the Supreme Court 106 (1988) (concluding that in 25 opinions over the same period Stevens cast 56 percent of his votes counter to a clear public opinion majority.

[39]Tribe, supra at 134: "It has often been insensitive to the rights of prisoners and criminal defendants; it has been too differential to executive and bureaucratic authority; it has been unenthusiastic in defense of rights of free expression where the poor and discontented are concerned; its has devalued the government's moral and legal obligation to obey the Constitution in the course of law enforcement; and it has manifested a fascination with pseudo-economic modes of analysis that resolve questions of constitutional principle by calculating costs and benefits and computing marginal effects."

[40]Id. at 135.

[41]Id. at 150.

In Lawrence Baum's examination of the Supreme Court as an important political institution, the author made the significant point that when the Burger Court policies are evaluated in the context of a longitudinal view of Supreme Courts since the 1930s, it "resembles the Warren Court much more closely than it resembles the Court prior to 1937."[42] Thus, an historic view would make the Burger Court appear less conservative and less anti-libertarian than critics might lead one to believe. However, he conceded that since the arrival of moderate-to-liberal John Stevens and conservative Sandra Day O'Connor, both of whom were more conservative than their predecessors Douglas and Stewart, the Court policy-making had become more conservative, particularly in the area of criminal procedure.[43] He deduced that the Court's trend toward more conservative policy decisions can be explained in great part by the justices' personal attitudes about policy preferences, but not necessarily by the way they view their judicial role.[44] Like other scholars, Baum observed that the Burger Court has been short on unanimity, with the moderate middle determining the Court's position.[45] However, the author pointedly stressed Justice Stevens' complaints about the Court's over-use of summary decisions for cases which he charges either merit full treatment or are too trivial for consideration or are used as a technique to reach conservative results.[46]

In his 1986 appraisal of the Burger Court, Christopher Wolfe determined that though the Court has turned out to be more conservative than the Warren Court, contrary to early

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[42]Lawrence Baum, The Supreme Court (2d ed. 1985).

[43]Id. at 23, 143.

[44]Id. at 143.

[45]Id. at 24.

[46]Id. at 150.

expectations the actual court case results cannot be characterized as major policy shifts.[47] Also, he surmised that the Warren and Burger Courts' approaches to constitutional interpretation and judicial review were basically the same in the way they decide cases, in their modern conception of judicial power, and their more modern application of constitutional language.[48] Looking to criminal defendants' rights cases as a litmus test for the "law and order" results promised by President Nixon in his judicial appointments, Wolfe concluded that these decisions "were dictated by an uncertain, somewhat shifting middle" (White, Stewart, Blackmun, Powell, and Stevens), resulting in "a Court that reworks precedents, narrowing previous holdings, and often creating distinctions contrary to the spirit (if not the holdings themselves) of those precedents."[49] Wolfe believed this causes moderate public-policy making with lack of the consistency and predictability that the rule of law should have. He viewed the Burger Court's death penalty cases as "another manifestation of the continuing commitment of the Supreme Court to social reform" respecting evolving social standards.[50] In final analysis, Wolfe lamented the uncertainty and incoherence of the Court's constitutional doctrine which he identified with the Court's willingness to legislate, its lack of a shared political ideology, and reluctance to overrule precedents. He found ad hoc judicial decision-making of little value in the long run.

Charles Whitehead and John Heilman examined the Burger Court criminal procedure decisions and, contrary to Blasi, confirmed a counterrevolution in this area, "characterized in

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[47]Christopher Wolfe, The Rise of Modern Judicial Review 293 (1986).

[48]Id.

[49]Id. at 296.

[50]Id. at 312.

general by a lack of sympathy towards the rights of criminal defendants."[51] They determined that this phenomenon manifested itself even more clearly with the arrival of Justice O'Connor and came about for several reasons: because of the Court's eagerness "to accommodate the concerns of law enforcement and prosecution;" the creation of a hierarchy of rights such that those impacting on guilt ranked above those impacting on the fact- finding process; a preference for issue analysis on a case-by-case basis; a preference for emphasizing the defendant's factual guilt over a constitutional claim; and preference for giving the presumption of correctness to state court generated cases.[52] Quick to point out weaknesses and incongruities with each of the approaches, nevertheless, Whitehead predicted that the Rehnquist Court will be sure to follow the same path in criminal procedure cases since Justice Rehnquist and now Justice O'Connor appear to lead the Court in this area.

Alschuler affirmed the more recent appraisals of the Burger Court's performance in its lack of direction, but gave some reasons to explain the "drift" and its "failed pragmatism."[53] He particularly noted the Court's "guerilla warfare" approach to criminal procedure cases which "typically left the facade of Warren Court decisions standing" while it attacked these decisions from the sides and underneath."[54] He evidenced how the Court has tended to take a supervisory role over state criminal justice administration through its exclusionary rulings,

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[51]Charles Whitehead and John Heilman, The Interpretation of Constitutional Rights-- Reflections on the Burger Court's Counter- revolution in Criminal Procedure, 4 Det. C. L. Rev. 935 (1986).

[52]Id. at 935-944.

[53]Albert W. Alschuler, Failed Pragmatism: Reflection on the Burger Court, 100 Harv. L. Rev. 1436 (1987).

[54]Id. at 1442.

citing this as an example of judicial activism. Alschuler identified several causes for the Court's overall inconsistency: changes in membership, swing votes, plurality, lack of time to take long-range views and to reason better, inadequate service by constitutional scholars to provide doctrinal ideas, and the reluctance of some justices to overrule precedent Warren Court cases in a distorted loyalty to stare decisis.[55] Aschuler concluded that cost-benefit analysis, rule skepticism and public interest litigation along with pragmatism, legal realism and empiricism have lead to a court without a core vision of society and lead to the resolution of "few great decisions decisively" by a Court void of leadership, inspiration and guidance.[56] Justices Blackmun's and Powell's votes were seen as most inconsistent and Justice Rehnquist and White were alleged to have offered disingenuous arguments most often. He called for a return to more principled decision-making and less to a seeking of the middle-ground result. However, like Whitehead, he made no direct reference to Justice Stevens.

During his tenure as a Supreme Court fellow, David O'Brien had the best recent vantage point by which to view the Burger Court and conduct personal interviews with most of the sitting justices.[57] Nevertheless, Justice Stevens' profile still remains sketchy when contrasted with what one knows about the other justices. O'Brien revealed that Stevens met regularly for lunch with Justices Burger or O'Connor on oral argument days. He maintains a warm relationship with his two clerks and relies upon them to screen certiorari petitions and unpaid case petitions (and write memos for those which they believe are most important) instead of

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[55]Id. at 1454.

[56]Id. at 1455.

[57]David M. O'Brien, Storm Center: The Supreme Court in American Politics (1986).

participating in the certiorari pool.[58] He then spends about 1 1/2 days a week screening cases himself. O'Brien presented some of Stevens' comments upon institutional norms. In light of the burgeoning caseload, Stevens has suggested that the Court adopt majority rule in place of the rule of four to grant certiorari petitions.[59] He rejected Justice Burger's idea of an intermediate court to determine inter-circuit court squabbles, laying the blame for caseload not on such cases but on the lack of self-restraint by the justices in deciding to review too many cases.[60] He adamantly opposes the writing of dissents for denials of certiorari as some of his colleagues have done and he also disapproves of summarily deciding cases the he believes raise important issues that should be addressed.[61] He appears to lament the lack of personal interaction and discussion with other justices,[62] which O'Brien suggested may account for Stevens' aggressiveness and relentlessness in questioning attorneys during oral arguments.[63] Stevens continues the practice of writing concurring and dissenting opinions (begun on the Court of Appeals) since "they may be required because of a greater institutional interest in the forthrightness of differing justices' views," however, he believes such opinions should not be

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[58]Id. at 131, 183. According to O'Brien, six justices (Powell, White, Blackmun, Rehnquist, O'Connor, and Burger) pooled their clerks and shared certiorari memos prepared by them.

[59]Id. at 194. It appears that he believes this may be a last resort but he does not advocate it exclusively and without trying self- restraint first. In O'Brien's 1990 edition of Storm Center 236, Stevens is said to have recanted this position.

[60]Id. at 156.

[61]Id. at 203.

[62]Id. at 153. See also Woodward and Armstrong, supra note 15. It appears that Stevens felt this way since he first came to the Court.

[63]O'Brien, supra note 57, at 229.

used "to send signals to lower courts about the direction of Supreme Court policymaking."[64] The Court has resorted to summary announcements of most of its cases on decision day to alleviate the time-consuming practice of reading full opinions out loud. However, Stevens has been known to read a dissent in full and out loud if he believed the press might ignore the case as unnewsworthy.[65] In a follow-up piece, O'Brien briefly reviewed the Court "from Warren to Burger to Rehnquist"[66] and observed that in contrast to the Warren Court, the Burger Court was more likely to take cases regarding individual rights brought by the Government against the individual.[67] In addressing individual justices, he maintained that Stevens "considers himself a judicial conservative but without the political agenda of the Nixon and Reagan appointees," and predicted that since Brennan (the Irish Catholic) and Scalia (the Italian Catholic) "work well and wear well" with others that they will know how to do some "old-time consensus building" in order to "shape opinions and forge coalitions" thus creating some new alignments on the Rehnquist Court.[68]

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[64]Id. at 268-69. This is one of the few statements based upon O'Brien's personal interview with Stevens; all of the preceding come from Stevens' published speeches. Interestingly, O'Brien concluded that because the Court spends less time in conference discussions and because the justices have less time to argue on opinions, compromises are not reached and more individual opinions are the result.

[65]Id. at 280.

[66]David M. O'Brien, The Supreme Court from Warren to Burger to Rehnquist, 20 PS 12 (Winter 87).

[67]Id. at 17.

[68]Id. at 15, 20.

Summary

From the authors reviewed above, one could reach the following conclusions concerning general trends, the environment of the Court, and how Stevens has been appraised by commentators writing about the Burger Court.

Generally, in contrasting the Warren Court with the Burger Court at the time of Stevens arrival, most commentators appear to agree that the Burger Court had attempted to strengthen law enforcement powers and the interests of individual-victims, indicated a preference for legislative over judicial policy-making, was less predictable than its predecessor overall, was inconsistent in its approach to criminal procedure questions (as had been the Warren Court), was similar to the Warren Court in constitutional interpretation and judicial review, was a source of disappointment in its lack of intellectual discussion, and consisted of four polar justices (Brennan and Marshall on the left, Burger and Rehnquist on the right) and four "middle" justices (Stewart, White, Powell, and Blackmun). Stevens was later to make up the fifth "middle" justice.

Concerning civil liberties questions, most commentators agreed that the middle justices tended to wield control. This has led the justices to attempt to "fine tune" precedent cases to the point of uncertainty and incoherence (Wolfe). Where Blasi noted the "rootless activism" of a Court controlled by the middle--a group of intelligent, open-minded, dedicated pragmatists--who have attempted moderate though sensible judicial accommodation to constitutional issues, Tribe maintained that the "core principles" of the Warren Court remain intact despite the insensitivities to the rights of the accused and convicted indicated by some of the justices. Where Baum believed the policy preferences of Stevens and O'Connor are the sources for these judicial shifts, Aschuler deplored the obvious lack of leadership, inspiration and guidance

by the Court in general, and calls for more principled decisions. Whitebread disagreed with all those who don't see how pointedly the Burger Court has revolutionized the administration of criminal justice.

Early on, Stevens was presumed to be a moderate and a swing voter, but within the first year, it was discovered that the "freshman effect" was not operative in his case and that he was not likely to align exclusively with any other Court colleague. The Court's "middle" members were said to have noted Stevens' individuality almost immediately, but many Burger Court commentators did not particularly highlight his views. Those that did observed his tendency to write concurring and dissenting opinions frequently, to attempt to "forge" new constitutional thinking, to give deference to lower courts, and to practice a form of judicial economy which cautioned the Court not to act in haste but to be concerned with the quality of justice. After eight years, it was noted how Stevens had begun to vote more frequently with Marshall and Brennan than with the other justices, his aggressiveness in oral argument, his respect for stare decisis and for the legislative role, his novel constitutional theories, his pro-individual rights stance, but also his lack of leadership in persuading other justices to his way of thinking. With the arrival of Sandra Day O'Connor, his shift to the liberal side was viewed by some as more the result of the personnel shift and less as stemming from ideology. He continued to be viewed as the least political and most independent of the justices, as one who aims at precision, deplores the lack of discussion on the Court, and contributes balance to an ideologically divided Court. However, Stevens himself has cautioned observers not to take an individual justice's opinions as "signals" for future Court direction.

A brief statistical analysis of Stevens' overall voting and alignment activities will now follow this perusal of general studies on the Burger Court and Stevens' performance on it.

Stevens' Opinion Writing and Alignment Patterns:

United States Supreme Court Terms, 1975-1989

Justice Stevens' fifteen terms of service on the Supreme Court during the period under study can be viewed in three segments. The first two cover the Burger Court periods from 1976 to 1981 and 1981 to 1986, reflecting the remaining years of Justice Stewart's tenure and the appointment of Justice O'Connor, to the resignation of Chief Justice Burger. The third time period covers the formation of the Rehnquist court, from Rehnquist's designation as Chief Justice in 1986 and the appointments of Justices Scalia and Kennedy, to the resignation of Justice Brennan in the summer of 1990. Using the statistical tables from the Harvard Law Review end of term annual reports[69] for the Supreme Court, one can glean Stevens' opinion-writing activities throughout these fifteen terms and three time periods. One can also observe, generally, Stevens' alignments with other justices when on the Burger Court in contrast to alliances with the new justices under Chief Justice Rehnquist. Based upon his tendencies to align more or less consistently with certain justices, Stevens could be identified with the left wing (Brennan, Marshall), right wing (Burger, Rehnquist, Scalia, Kennedy, O'Connor) or center (Stewart, White, Powell, Blackmun) of the Court.

Table 1[70] includes the data from the Harvard Law Review enumerating the number of majority (MO), concurring (CO), dissenting (DO), and total (TO) opinions filed in relation to the possible opinion opportunities (PO). Beside each of the opinion columns is the same

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[69]90-104 Harv. L. Rev. (November issues, 1976-1990).

[70]Id. (Compiled from Table I[A] of each report.)

Table 1 Stevens' Opinion Writing Patterns

Term	PO	MO	%	CO	%	DO	%	TO	%
1975	79	9	11.39	8	10.12	17	21.51	34	43.0
1976	139	13	9.35	17	12.23	27	19.42	57	41.0
1977	133	14	10.52	10	7.51	21	15.78	45	33.8
1978	134	15	11.19	7	5.22	13	9.70	35	26.1
1979	148	14	9.45	12	8.10	21	14.18	47	31.7
1980	136	11	8.08	17	12.50	25	18.38	53	38.9
TL	759	76	10.01	71	9.35	124	16.33	271	35.7
1981	164	15	9.14	15	9.14	26	15.85	56	34.1
1982	162	15	9.25	12	7.40	27	16.66	54	33.3
1983	161	16	9.93	18	11.18	34	21.17	68	42.2
1984	149	16	10.73	9	6.04	33	22.14	58	38.92
1985	157	17	10.82	15	9.55	36	22.92	68	43.3
TL	793	79	9.96	69	8.70	156	19.67	304	38.3
1986	151	16	10.59	14	9.27	32	21.19	62	41.0
1987	140	19	13.57	6	4.28	17	12.14	42	30.0
1988	141	16	11.34	14	9.92	22	15.60	52	36.8
1989	139	14	10.07	17	12.23	29	20.86	60	43.1
TL	571	65	11.38	51	8.93	100	17.51	216	37.8
OTL	2123	220	10.36	191	8.99	380	17.89	791	37.25

Source: Yearly totals from and percentages calculated based upon data from The Supreme Court, Table I(A), 90-104 Harv. L. Rev. (November issues, 1976-1990).

information by percentages (%). The three time period totals (TL) and overall totals (OTL) for the fifteen terms complete this table. Table 2 aggregates the data by the three time periods under study, indicating the average number of majority (AvMO), concurring (AvCO), dissenting (AvDO), and total (AvO) opinions for each time period as well as for the fifteen terms. Figure 1 and Figure 2 depict Stevens' opinion writing patterns in graph form using numbers and percentages from Table 1.

Generally, during his tenure on the Court, Justice Stevens has written about ten percent (220) of all the majority opinions (2123) and has penned concurrences in about nine percent (191) of all the Court's cases in which he participated. During the 1975 through 1989 terms he averaged almost 15 majority opinions (MO) and about 13 concurring opinions (CO) each year. When observed according to the three time periods, his average majority opinion productivity was 12.6, 15.8 and 16.2 opinions, respectively, and the average number of concurring opinions was 11.8, 13.8, and 12.7 opinions respectively. Stevens' 380 dissenting opinions (DO) almost equate the total of his majority and concurring opinions combined, averaging about 20 opinions a term during the first period on the Burger Court, 31 during the second period, 25 for the terms on the Rehnquist Court, with 25 dissenting opinions per term overall. The number of dissents increases progressively between the 1978 and 1985 terms, shows a sharp drop in the 1987 term (wherein he wrote the most majority opinions of his career [19]), and indicates a steady climb again from that point to 1990.

Table 2 Average Number of Opinions Per Year Per Period

term period	AvMO	AvCO	AvDO	AvO
1975-80	12.67	11.83	20.67	45.16
1981-85	15.8	13.8	31.2	60.8
1986-89	16.25	12.75	25.0	54.0
1975-89	14.67	12.73	25.33	52.73

Source: Averages calculated based upon data from The Supreme Court, Table I(A), 90-104 Harv. L. Rev. (November issues, 1976-1990).

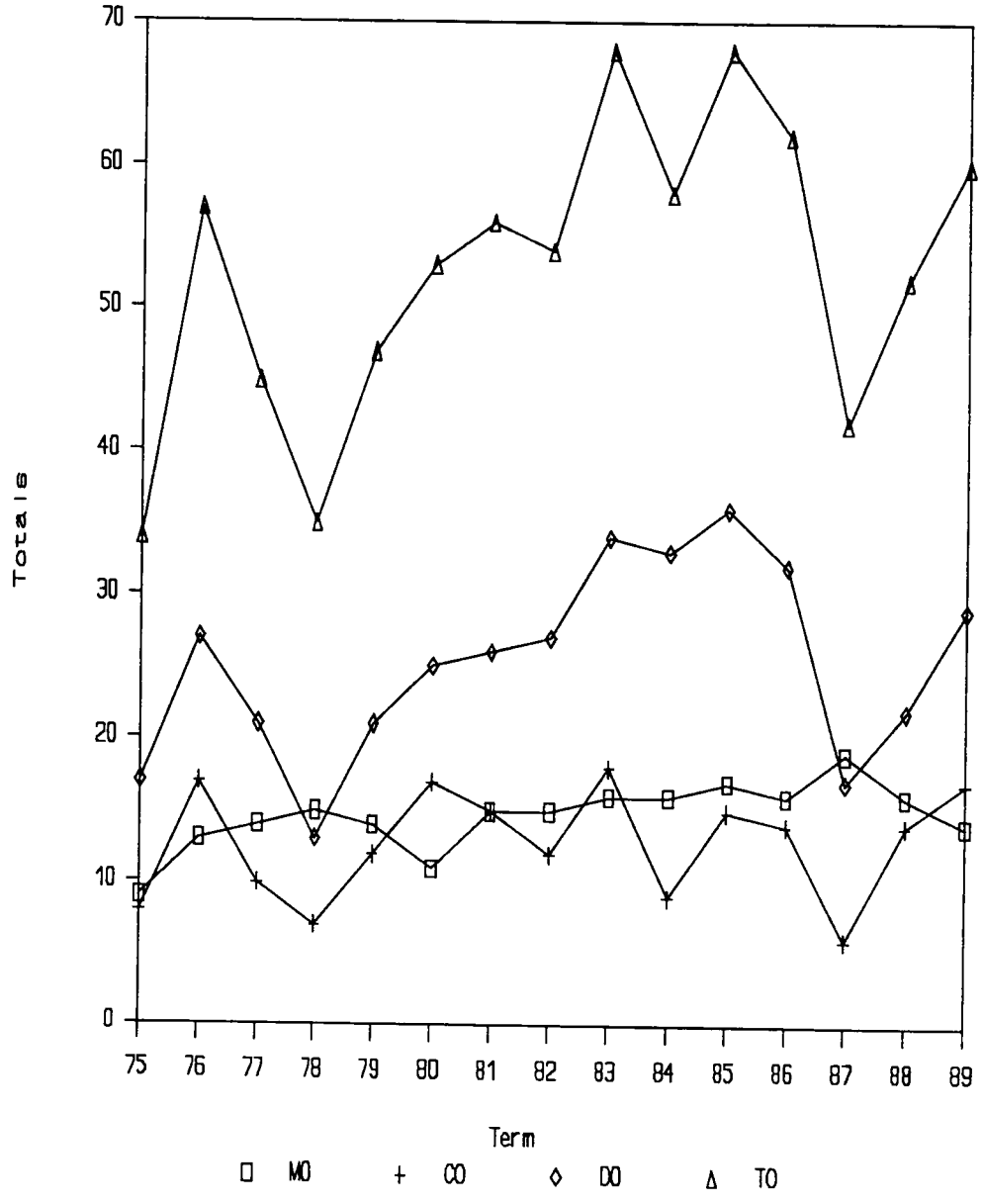


Figure 1. Stevens' Opinion Writing Patterns

Source: Yearly totals from The Supreme Court, Table I(A), 90-104 Harv. L. Rev. (November issues, 1976-1990).

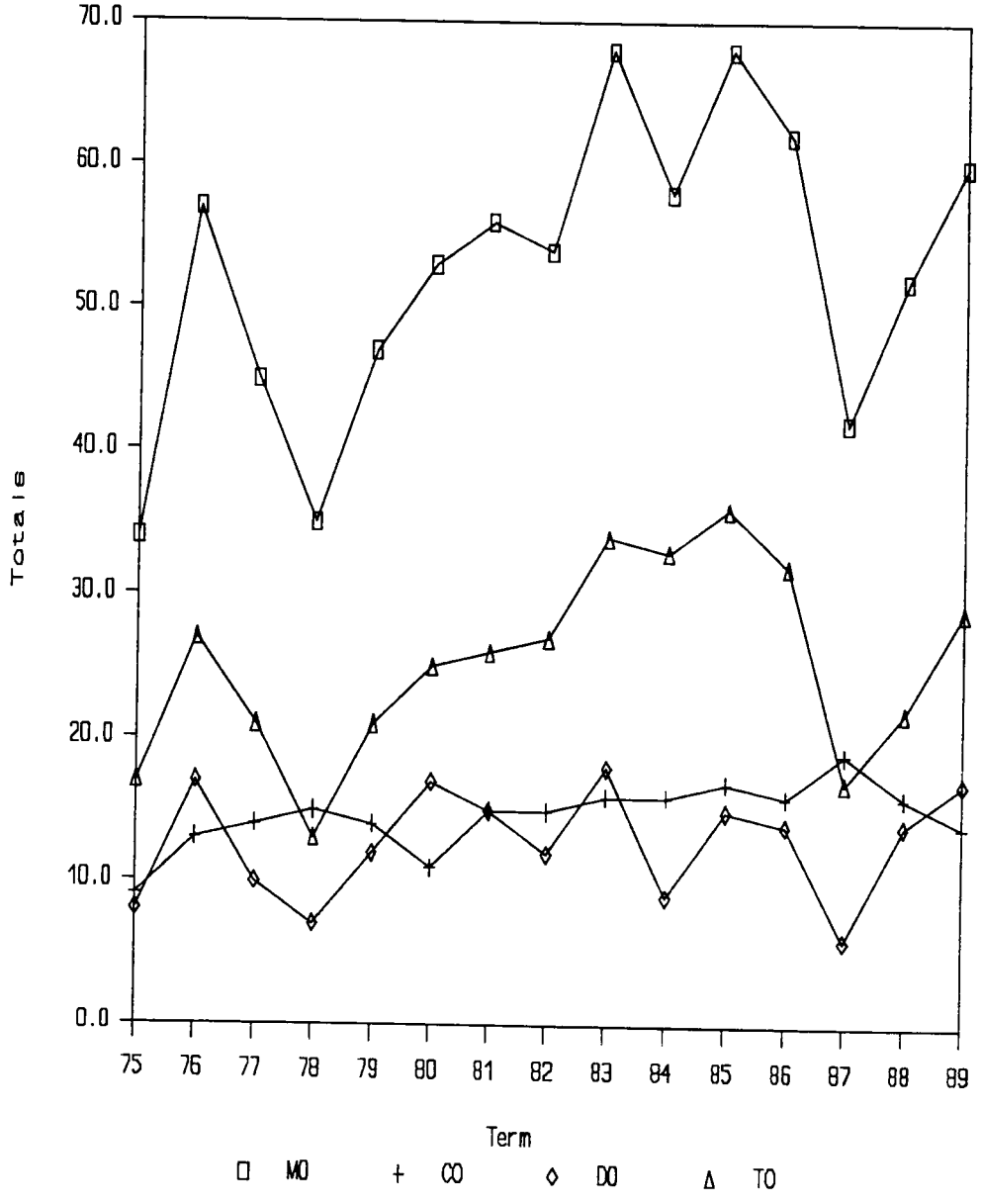


Figure 2. Stevens' Opinion Writing Patterns by Percentages

Source: Percentages calculated based upon data from The Supreme Court, Table I(A), 90-104 Harv. L. Rev. (November issues, 1976-1990).

Table 3[71] shows the cumulative averages for voting alignments of Justice Stevens with his judicial brethren, as well as the averages for each time period under study. During the 1975-1980 terms, Stevens aligned most often with Stewart (ST) (62.1%), least often with Rehnquist (RE) (54.4%), and almost as often with Burger (BU) (55.6%) as with Marshall (ML) (55.9%). Yet, there is only a 7.7% difference in alliance with Stewart and Rehnquist, and a general agreement of over 50% with all eight justices. Such a relatively small range of disagreement between Stevens and the other justices suggests a "moderate" label for the period. Stewart's retirement and O'Connor's (OC) arrival begins the second five year span with no personnel changes on the Court. During this time, Stevens appears to have agreed the least with Rehnquist (53.0%) and the most with Brennan (BR) (68.4%), reflecting a larger difference of 15.4% between these two justices. Just as in the previous terms, Stevens agreed with each of the eight justices more than half the time. The third period covers the beginning of the Rehnquist Court. During its first four years Stevens showed a willingness to agree with Marshall, Brennan and Blackmun (BL) over 70% of the time, with Scalia (SC) least often (54.8%), with White (WH) and Kennedy (KY) over 60%, and with O'Connor, Rehnquist and Powell (PO) about 57% of the time. Differences between the lowest and highest agreement patterns for Stevens is about 17.2% The 1987 term (when Kennedy arrived on the Court) shows a high agreement level among all the justices. Stevens percentages for 1987 show higher agreement levels with all the other justices than in the preceding twelve terms; the 1988 term reflects his highest agreement levels with Brennan (77.7%), Blackmun (74.5%) and Marshall (76.4%). After the 1987 term, however, Stevens agreement levels with his other five colleagues begin to fall, as do the levels with the more liberal brethren in 1989.

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[71] Id. (Compiled from Table I[B] of each report.)

Table 3 Voting Alignments with Stevens by Percentages

term	BL	BR	BU	KY	ML	OC	PO	RE	SC	ST	WH
1975	55.7	55.0	53.8	--	53.9	--	72.7	56.2	--	68.4	55.0
1976	55.1	56.8	51.4	--	56.9	--	58.4	52.4	--	62.0	60.4
1977	50.4	56.3	59.4	--	53.4	--	54.7	58.6	--	65.2	53.4
1978	61.2	62.9	61.2	--	61.9	--	55.4	60.9	--	62.1	62.9
1979	52.0	63.7	58.2	--	55.1	--	57.5	49.7	--	64.1	62.1
1980	57.5	56.3	49.6	--	54.4	--	56.2	48.9	--	51.1	61.8
75/80	55.3	58.5	55.6	--	55.9	--	59.1	54.4	--	62.1	59.2
1981	61.0	59.8	49.4	--	61.3	53.4	56.8	52.1	--	--	55.8
1982	66.7	70.4	57.4	--	61.5	58.4	54.1	51.9	--	--	55.6
1983	66.3	75.0	55.9	--	67.5	58.5	55.6	51.6	--	--	61.0
1984	66.7	69.1	60.1	--	65.3	63.3	63.1	60.1	--	--	63.5
1985	64.1	67.9	48.4	--	67.1	58.1	56.1	49.7	--	--	56.7
81/85	64.9	68.4	54.2	--	64.5	58.3	57.1	53.0	--	--	58.5
1986	70.9	67.5	--	--	68.2	52.0	56.7	47.7	51.0	--	58.0
1987	73.6	74.1	--	67.7	74.3	67.6	--	71.2	64.5	--	75.0
1988	74.5	77.7	--	63.3	76.4	66.4	--	63.6	59.3	--	61.7
1989	61.1	65.5	--	55.8	64.0	47.1	--	48.2	45.3	--	53.2
86/89	70.0	71.2	--	62.2	70.7	58.2	56.7	57.6	55.0	--	61.9
75/89	62.4	65.2	54.9	62.2	62.7	58.3	58.1	54.8	55.0	62.1	59.7

Source: Yearly percentages from The Supreme Court, Table I(B), 90-104 Harv. L. Rev. (November issues, 1976-1990).

In contrasting the agreement patterns throughout the three periods, it appears that Stevens has shown a growing tendency to agree more often with Brennan, Blackmun and Marshall, from over 55% in the first period to about 65% in the second period to over 70% agreement in the last four terms. He shows consistency in agreement with O'Connor with levels of 58% over the past nine terms. Overall, Stevens seems to have agreed the most with Brennan (65.2%), the least with Rehnquist (54.8%), Burger (54.9%), and Scalia (55.0%), about 62% of the time with Blackmun, Kennedy, Marshall, and Stewart and 58% of the time with O'Connor, Powell, and White. Generally, this shows Stevens' agreement with all his colleagues at least 55% of the time over the course of 15 terms, with a range difference of 7.7%, 15.4%, and 17.2% respectively for the three periods and a 10.4% difference overall. One may conclude that Stevens has maintained a "moderate" status throughout his first fifteen terms on the high bench, yet he appears to veer more to the left as each Reagan appointee arrived.

CHAPTER IV

APPROACHES TO CRIMINAL PROCEDURE

The American Criminal Justice Environment

More than one-quarter of the 791 opinions written by Justice Stevens in the course of fifteen years on the High Court concern criminal procedure. Because of the volume of opinions, this chapter will analyze only selected opinions and explore Stevens' position concerning the role of the Supreme Court in reviewing issues in state criminal cases in contrast to cases generated from the federal courts. The examination will be divided according to the various stages in the processing of a criminal defendant, from initial police contact through appeal. In order to place Stevens' jurisprudence in some sort of context, it may be desirable to first present a brief overview of the historic and political environment in which recent criminal justice policy decisions have been made.

As a practicing attorney and law school professor, Stevens' field of concentration had been antitrust law. But, as a judge on the Seventh Circuit Court of Appeals and then as a member of the Supreme Court he has been challenged to make decisions which affect criminal justice policies at the federal and state levels. This transition in his professional career came at a time when such issues were highly volatile on the American scene.

Stevens was placed on the federal court of appeals by a president whose rhetoric showed a disdain for Warren Court criminal decisions and capitalized upon the public's prevailing fear of crime by calling for a "war on crime" and a pro "law and order" judiciary. This was in response to the turmoil of the 1960s which had included a growth in the 15-24 year old portion of the population and increases in the juvenile and street crime rates, numerous civil

rights and Vietnam War protests, a series of ghetto riots, political assassinations, televised and documented cases of police brutality and corruption, as well as the growth of alternate life styles and the spread of drug use among all segments of the population. Within the six years prior to Stevens' Supreme Court appointment, commissions appointed by Presidents Johnson and Nixon had published studies on the causes for recent civil disorders, had sponsored the first national survey of crime victimization and made recommendations for crime control and the administration of justice, and had set standards for justice institutions and personnel.[1]

In light of the assassinations of Dr. Martin Luther King and Robert Kennedy and the increased use of handguns for violent crimes, Congress passed a controversial gun control bill as did a number of cities and state legislatures in the years to follow.[2] Also in 1968, Congress validated the Omnibus Crime Control and Safe Streets Act which provided the opportunity for massive grants to state and local governments through creation of the Law Enforcement Assistance Administration; allowed for the admission of all voluntary confessions and eyewitness identifications in federal courts; attempted to overrule Miranda for federal cases, and allowed wiretaps without court order for state and local law enforcement.[3] Similarly, in 1970 Congress approved the Comprehensive Drug Abuse and Control Act which gathered together all federal drug laws under one statute and acted as a model for state drug

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[1]Report of the National Advisory Commission on Civil Disorders (1968); The Challenge of Crime in a Free Society and Task Force Reports (1967); Reports of the National Advisory Commission on Criminal Justice Standards and Goals (1973).

[2]For an overview and retrospective of federal and state gun control legislation and policy issues to 1980, see Gun Control, 455 Annals Am. Acad. Pol. & Soc. Sci. 1 (May 1981).

[3]18 U.S.C. secs. 921 et seq., 2510 et seq.; 18 U.S.C. App. secs. 1201 et seq.; 42 U.S.C. sec. 3501; 42 U.S.C. secs. 3701 et seq.

statutes in classifying illegal drugs according to their dangerousness.[4] Throughout the 1970s various proposals to revamp the state and federal criminal codes were considered and reflected the public desire for harsher and more deliberate sentences. The revelation of long court delays in the federal system brought about the passage of the federal Speedy Trial Act of 1974 which set forth the goal of 100 days from point of arrest to trial and also provided a model for state court systems.[5]

With such activity, it appears that presidents and Congress undoubtedly were aware of various public opinion polls taken between the mid 1960s to early 1970s indicating that crime was viewed as one of the "most important problems" facing the nation, that courts "deal not harshly enough" with criminals, that the FBI was held three times more favorably than the NAACP, that support for the death penalty continued to rise, that Presidential appointments to the Supreme Court should be more conservative in political views, and that Congress should vote more money to help law enforcement agencies deal with crime.[6] However, early in his second executive term, President Nixon's enthusiasm for his war on drugs, which allowed for infusion of major federal expenditures for drug abuse prevention and law enforcement programs, was stifled by the revelations of Watergate. This event, along with the extent of police corruption as revealed by New York's Knapp Commission, led to public disillusion with the presidency as well as members of the legal profession and law enforcement.[7]

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[4]21 U.S.C. secs. 801 et seq.; 42 U.S.C. secs. 257 et seq.

[5]18 U.S.C. secs. 3152 et seq., 3161 et seq.

[6]The Gallop Opinion Index (Sept. 1980; Mar. 1969; Aug. 1970; Mar. 1986; May 1970; Nov. 1970).

[7]Sourcebook of Criminal Justice Statistics 234 (1982), Table 2.30; Herman Goldstein, Police Corruption: A Perspective on its Nature and Control (1975).

Nevertheless, by the time he resigned in 1974, Nixon believed he had made good on his promise to appoint more conservative Supreme Court justices with the designation of Warren Burger as Chief Justice in 1969, followed by placements of Justices Blackmun, Powell, and (particularly) Rehnquist.

During the 1960s Mr. Stevens' work in antitrust and commercial law took place in a Chicago urban environment not immune from turmoil. Despite attempts at police professionalism reform by police superintendent O. W. Wilson in the early 1960s, Chicago experienced a rise in its crime rate, proliferation of juvenile gangs, organized crime activities, numerous civil rights demonstrations and racial incidents, the 1965 and 1966 ghetto riots and charges of police corruption, indifference and brutality.[8] Televised encounters between police and protesters outside the 1968 National Democratic Convention site, the notorious trial of the "Chicago Seven," and charges of corruption within the ranks of the judiciary ended the decade. In 1969, John Stevens was appointed chief counsel by a special ad hoc commission to investigate charges that two Illinois Supreme Court justices had acted improperly while on the bench by accepting bank stock to influence their decisions. The probe led to their resignation and made Stevens a public figure and one to be considered for a federal judgeship.[9] Stevens served on the Seventh Circuit Court of Appeals between October 1970 and November 1975, and participated in about 448 cases. Of these, 222 dealt in whole or in part with criminal

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[8]Charles E. Silberman (Criminal Violence, Criminal Justice [Vintage Books, 1980][1978]) and Samuel Walker (Popular Justice [1980]) document the history of criminal justice in America and both highlight events in Chicago, including this period. For extent of police corruption, see Mike Royko, Boss, Richard Daley of Chicago (1971). See infra, Chapter VI for further references to the Chicago of Stevens' youth.

[9]Kathleen M. L. Simon, John Paul Stevens and the Fourth, Fifth, Sixth and Fourteenth Amendments 15-17 (1980)(unpublished M.A. thesis, Appalachian State University).

matters, for which he wrote 81 opinions (about 33%).[10] This gave him ample experience in addressing federal criminal matters and reckoning with the behavior of personnel in the criminal justice organizations before he came to the Supreme Court in January 1976.

From 1976 to 1990 public opinion polls progressively reflected more conservative attitudes toward criminal matters, despite the fact that crime itself was viewed by less than five percent of those polled over fifteen years as "the most important problem facing this country today."[11] Over time, respondents had less regard for the honesty and ethical standards of lawyers than of police and show a gradual but small increase in regard for the latter and decrease for the former.[12] Consistently, over 82% of those polled felt that the courts in their locale "deal not harshly enough" with criminals, and move gradually from 16% to 22% in their approval of wiretapping, from 66% to 74% in favor of capital punishment for persons convicted of murder, and from 28% to 16% in support of the legalization of marihuana (despite some polling results showing an increase from 70% to 79% favoring a law requiring police permit for gun purchases and stable support of about 42% over time in favor of laws restricting the distribution of pornography to all persons).[13] Polling of high school seniors and college freshman over the same fifteen year period also reflects the country's move toward

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[10]Id. at 31. Only a few of these cases came from state courts and these were on federal habeas corpus petition from federal district courts; the rest of the cases were from federal criminal courts.

[11]The Gallop Poll Index (Sept. 1980); Sourcebook of Criminal Justice Statistics 152 (1990) Table 2.1. Hereinafter, 1990 Sourcebook. Until the mid 1980s, concerns about inflation and then unemployment were paramount, followed by fear of war and excessive government spending in the mid 1980s; concerns about poverty and especially drug abuse ended the decade.

[12]1990 Sourcebook, supra, at 164, Table 2.14,; 165, Table 2.16.

[13]Id. at 192-193, Table 2.44; 196-197, Table 2.49; 200-201, Table 2.51; 228-9, Table 2.87; 204-205. Table 2.56; 240-241, Table 2.101. .

more conservative views. In the mid 1970s one-third of the seniors and over half of the college freshman favored the legalization of marijuana, but this gradually declined to 16% and 18% by 1990.[14] In 1975, a little over half the freshman polled believed that "the courts showed too much concern for the rights of the accused" and felt that capital punishment should be abolished, but these numbers gradually changed to 66.3% and 21.5% respectively by 1990.[15] However, freshman support for legally prohibiting homosexual relationships grew from 47% in 1976 to 53% in 1987, and showed a decline to 44.4% by 1990.[16] From 1976, about 37% of seniors consistently felt that police are doing a "good" or "very good" job until a high of 40.5% in 1986 and then a decline to 34.3% in 1990, but over time only 23% of seniors polled consistently recorded the view that "problems of dishonesty and immorality exist in the leadership of the courts and the justice system in general."[17]

Recent criminal justice and criminology literature reviews reflect the amount and variety of research done since the 1960s, as well as the change in the nature of the foci, as individuals became more skeptical of the prevailing theories for effective law enforcement, court processing and corrections.[18] The Ford Foundation's Commission to Study Law and Justice attempted to cut through the false perceptions about the nature and extent of crime and the

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[14]Id. at 222, Tables 2.72; 223, Table 2.74.

[15]Id. at 224, Table 2.76 and Table 2.77.

[16]Id. at 225, Table 2.78.

[17]Id. at 213, Table 2.64; 211, Table 2.62.

[18]Terence P. Thornberry, Cultural Literacy in Criminology, 1 JCJE 33 (Spring 1990); Larry J. Siegal and Marvin Zalman, "Cultural Literacy" in Criminal Justice: A Preliminary Assessment, 2 JCJE 15 (Spring 1991); Gregg Barak, Cultural Literacy and Multicultural Inquiry into the Study of Crime and Justice, 2 JCJE 173 (Fall 1991).

limits of the justice system. It's lengthy report,[19] penned by Charles E. Silberman in 1978, contrasted with the views of the neo-conservative lot headed by James Q. Wilson, joined by Robert Martinson and Andrew von Hirsch, who advocated the "lock 'em up"--"deterrence,"--"unleash the cops,"--"close the loopholes,"--"protect the victims" positions.[20] This was during the height of the Carter presidency, which had been required to tackle a number of other domestic problems in addition to crime, such as the energy crisis, civil service reform, urban policy restructuring, inflation and unemployment. Despite his opportunity to appoint over 150 new federal judges (although no Supreme Court vacancy occurred) and his administration's efforts against domestic hyjackings, international terrorism, organized crime and white collar crime, President Carter was defeated by Ronald Reagan, who advocated a clear, albeit simplistic, cry for an assault on the advances of violent crime. His Attorney General, William French Smith, appointed a task force to evaluate the federal role in fighting violent crime, but an assassination attempt on Reagan's life by a lone individual brandishing a handgun immediately rose the public ire and brought on a flurry of articles in the popular press on the "curse" and "epidemic" of crime and where the system needed attention.[21]

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[19]Silberman, supra note 8.

[20]Samuel Walker, Sense and Nonsense About Crime: A Policy Guide (2d ed. 1989). According to Walker, the liberal agenda reflected the need for criminal justice reform as part of an inclusive reprioritizing in economic and societal institutions, decriminalization of so-called victimless crimes, rehabilitation and treatment for prisoners, and continued preservation of basic procedural rights.

[21]Attorney General's Task Force on Violent Crime: Final Report (1981). (James Q. Wilson was a prominent member of this task force.) eg.,The Epidemic of Violent Crime, Newsweek, March 23, 1981, at 46-56; The Curse of Violent Crime, Time, March 23, 1981; Why So Many Juveniles are Troubled and Destructive, U.S. News and World Report, May 4, 1981; The Juvenile Court Mess, id., June 1, 1981; The Prison Nightmare, Time, June 8, 1981; We the Jury Find the . . ., Time September 28, 1981. See also American Justice: the ABCs of How It Really Works, U.S. News and World Report, November 1, 1982.

Ronald Reagan declared a "Victim's Rights Week" in 1981, and in 1982 appointed the Task Force on Victims of Crime. In response to Reagan's plan to dissolve the Bureau of Alcohol, Tobacco and Firearms to weaken enforcement of the federal gun laws, and in light of the national increase in arson-for-profit crimes since the mid 1970s, Congress approved the Anti-Arson Act of 1982.[22] In 1983 the president presented numerous proposals to Congress for revamping of the focus of the criminal justice system to reflect a hard line toward criminal suspects and concern for their victims; Congress responded in 1984 with passage of the Comprehensive Crime Control Act.[23] Other legislation approved that election year included the Victims of Crime Act, the Bail Reform Act (allowing for a no bail presumption), the Racketeer Influenced and Corrupt Organizations Act (RICO) targeted at organized crime, and the Sentencing Reform Act (providing for presumptive sentences)[24]--all conservative theorists' dreams come true! After appointing Sandra Day O'Connor to the High Court in 1981, the President had to wait five more years to fulfill his campaign promises to move the Court further to the right with the appointments of William Rehnquist as Chief Justice and Antonin Scalia as Associate Justice. Most controversial were the nominations of Robert Bork and Douglas H. Ginsburg to replace Justice Powell in 1987. After the Senate soundly rejected

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[22]18 U.S.C. secs. 844, 846. Through this legislation, arson was made a Part One Index Offense in the FBI national crime reports and the BATF jurisdiction was increased to include investigation of interstate arson-related crimes and assistance to state and local law enforcement agencies in arson investigations. See Kathleen M. Simon, The Anti-Arson Act of 1981, paper presented at the Annual Meeting of the Academy of Criminal Justice Sciences, Orlando, Florida (March 17-21, 1985).

[23]98 Stat. 1837

[24]18 U.S.C. secs. 3013, 33671, 3672, 4207, 4215, and 10601 et seq.; 18 U.S.C. secs. 636 and 3041, 3042, 3062, 3141 et seq., 3731, 3772, 4282; 18 U.S.C. secs. 1961 et seq.; 2 U.S.C. secs. 211 et seq.

Bork on ideological grounds and Ginsburg withdrew his name because of controversy surrounding his former use of marijuana, Anthony M. Kennedy was confirmed by the Senate in January of 1988. Consequently, President Ford's attempts at moderation in facing post-Watergate and Vietnam challenges, the absence of a Supreme Court vacancy during the Carter administration, and the conservative stronghold in the White House since 1980, makes Stevens the only justice appointed between 1968 and 1990 by a president without an apparent "agenda" for constitutional interpretation.

By 1985 the views of Attorney General Edwin Meese and the Justice Department to screen all federal judicial nominees for their ideological position were well-known.[25] By the end of his second term, President Reagan had appointed well over two-thirds of the federal judiciary with relatively young, conservative attorneys. Federal prosecutors also tended to reflect the administration's views. The ideological contrasts between the federal appointees and several state appellate judges produced many clashes affecting differing constitutional interpretations of criminal matters. Generally, the "war on drugs" became the focus of Reagan's second term, with the crowning of William Bennett as "drug czar," a larger role for the FBI in coordinating the federal efforts with state and local law enforcement agencies, Mrs. Reagan's "Just Say No" campaign with school children, and efforts to slow drug trafficking from outside the country. In the meantime, in 1987, the Office of Legal Policy of the Department of Justice circulated a report endorsed by Attorney General Meese that the time was ripe to exert pressure on the Supreme Court to overturn Miranda. Strategies to counter the numerous international terrorist incidents aimed at Americans during this time as well as successful prosecutions for white

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[25]See Chapter II, supra note 112, for Stevens' views regarding Meese's quest for a "jurisprudence of original intent."

collar crime and against organized crime figures also merited federal attention, while the state and local criminal justice personnel dealt with more and more homeless people on the streets, rising drug-related crime, over-loaded courts, filled-to-capacity prisons and jails, probation and parole departments, and loss of LEAA and other federal program funds since the early 1980s. Increased attention to crimes such as domestic (child/spouse/elderly) violence, and spouse and acquaintance rape as well as grass roots efforts by organizations such as Mothers Against Drunk Driving (MADD) and Students Against Drunk Driving (SADD) to stiffen DWI penalties also increased the clientele subject to the system. At this point, over 70% of the state legislatures had approved the death penalty for certain felonies.

This decade of slogans and appeal to traditional values, and politicians' inferences that those who disagreed with the prevailing conservative views were unpatriotic, ended with Congress' passage of the Flag Protection Act of 1989 criminalizing desecration of the American flag.[26] By the end of the Court's 1989 term, in July of 1990, this picture of the state of criminal justice activities and problems had not changed very much, but the faces of some of the criminal players (such as those involved in scandals on Wall Street, in the board rooms of soon-to-be-defaulted savings and loan associations, and in trading illegal arms with terrorists) and the enormity of the stakes had changed. This was to have major ramifications for the economic well-being of the country far beyond the cost of our twenty-five year modern fight against street crime.

And so it was that during this period, briefly described above, Justice John Paul Stevens served his first fifteen years as an Associate Justice of the Supreme Court. How does he handle the criminal procedure questions that come to the Court from state and federal courts in

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[26]18 U.S.C. sec. 700.

this atmosphere of changing public attitudes and ideological differences? Does he see the Court's role and functions differently when it addresses state court generated cases in contrast to federal court generated questions? The following analyses will attempt to answer these queries.

Criminal Procedures: Pretrial

How has Justice Stevens seen the role of the Supreme Court in reviewing issues in state criminal cases in contrast to cases generated from the federal criminal courts, i.e., what legal concepts and principles does he believe the Court should use in dealing with cases concerning federal and state criminal processes?

The following section will attempt to answer this broad question by analyzing selected opinions. After reading each of the almost 200 opinions, I categorized them as federal or state "pretrial," "trial," and "post-conviction," according to the process issues addressed. Each category of cases was organized according to the steps within the process. Pretrial matters include search and seizure, custodial interrogation, counsel, grand jury and speedy trial concerns. Trial issues reflect the procedures from the selection of the jury to the imposition of sentence, including capital sentencing issues. Post-conviction matters include appeal, exhaustion of remedies, counsel, habeas corpus, and retroactivity of court rules. Other cases interpreting selected federal and state criminal statutes were used to further illustrate Stevens' view of the responsibilities of the Court in relation to the legislative branch. Because of accessibility, the Supreme Court Reporter is the main legal resource used for opinion citations.

The Fourth Amendment

Justice Stevens wrote 46 opinions concerning Fourth Amendment issues, which amounted to 23% of his total opinions. These include one plurality and seven majority opinions over eleven of fifteen terms.[27] Several of Stevens' earlier opinions dealt with the use of electronic devices by federal law enforcement agents under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 as well as the standards regarding both federal and state administrative searches. A series of vehicle search and container search and seizure issues offered Stevens further opportunity to clarify his views and present contrasts between his majority opinions on these topics and subsequent concurring and dissenting opinions. He also addressed a number of cases where the majority modified or clarified rules concerning the applicability of the exclusionary rule, in addition to rules involving warrantless seizures and searches. In the interest of time and space, a few selected opinions will be used to illustrate Stevens' application of legal principles involving search and seizure questions. This discussion will follow an overview of his basic understanding of these principles. However, since such a large proportion of his opinions dealt with Fourth Amendment matters, this topic will be given a bit more attention, on balance with other topics in this chapter.

The Fourth Amendment - Overview of Principles

Justice John Stevens relies heavily upon a reading of British and early American history for his interpretation of Fourth Amendment protections. Accordingly, he believes that the

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[27]United States v. Caceres, 99 S.Ct. 1465 (1979); Payton v. New York, 100 S.Ct. 1371 (1980); Walter v. United States, 100 S.Ct. 2395 (1980); Michigan v. Summers, 101 S.Ct. 2587 (1981); United States v. Ross, 102 S.Ct. 2157 (1982); United States v. Jacobsen, 104 S.Ct. 1652 (1984); Maryland v. Garrison, 107 S.Ct.1013 (1987); and Horton v. California, 110 S.Ct. 2301 (1990).

Founding Fathers wrote the amendment more in opposition to the use of general warrants, that is, warrants that are "overreaching" in scope because they lack adequate probable cause determination, than to warrantless searches, but he also argues that the plain language of the Amendment prohibits warrantless searches as an "unreasonable" type of search.[28] In recognizing a distinction between the amendment's two clauses, he sees the purpose of its first clause as a prohibition against unreasonable searches and seizures, and the purpose of the second to prohibit "the issuance of warrants that are not supported by probable cause or that do not particularly describe the place to be searched and the persons or things to be seized."[29] Stevens has indicated his understanding of the meaning of the individual terms "search" and "seizure." A "search" would occur "when an expectation of privacy that society is prepared to consider reasonable is infringed," and a "seizure" results "when there is some meaningful interference with an individual's possessory interests in property."[30] The key principles herein are that of privacy and possession. In regard to privacy, he would suggest that government agents do not have "unfettered discretion" in carrying out a search, for the Founding Fathers put great value in the privacy interests of innocent citizens.[31] Ideally, the

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[28]Marshall v. Barlow's, Inc., 98 S.Ct. 1816, 1828 (1978); United States v. Leon, 104 S.Ct. 3405, 3451-52 (1984); Garrison, 107 S.Ct. at 1017; Payton v. New York, 108 S.Ct. 1371, 1379 (1980). He consistently uses J. Landynski, Search and Seizure and the Supreme Court (1966); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1937); and T. Taylor, Two Studies in Constitutional Interpretation (1969) as resources for historic overview in this area.

[29]Leon, 104 S.Ct. at 3446, 3451.

[30]Hudson v. Palmer, 104 S.Ct. 3194, 3209 (1984); Segura v. United States 104 S.Ct. 3380, 3393-94 (1984); Horton, 110 S.Ct. at 2306.

[31]Anderson v. Creighton 107 S.Ct. 3034, 3052 (1987); Zurcher v. Stanford Daily, 98 S.Ct. 1970, 1988 (1978).

government must justify its intrusion by putting forth government interests that outweigh those of the citizen.[32] Typically, this is done before a magistrate who would issue a search warrant based upon his determination that the government has probable cause to suspect criminal activity. Generally, Stevens would agree that a search within the parameters of the warrant would be deemed "reasonable" unless the applying officers did not give the magistrate sufficient information upon which to make an independent decision.[33]

A threat to privacy arises for Stevens when a warrantless search occurs. He accepts past case law that such searches are deemed "unreasonable" per se--the so-called "bright line standard"--and that the burden is heavy upon the government to justify an exception to this rule.[34] Exceptions to the warrant requirement acknowledge that in certain circumstances the public's interest in effective law enforcement would outweigh the privacy right. However, in attempting to specify from whose perspective a privacy interest should be recognized, it appears that he prefers that of society over that of law enforcement,[35] thus, he continues to look to history or legislative enactment for the answers to the question of when privacy interests exist. As will be illustrated below, this is particularly evident in the way he holds in high regard the common law protection of the sanctity of a person's home, which can be contrasted to his acceptance of the legislative option to allow for warrantless searches of conveyances.[36] Similarly, since the Court has recognized a showing of exigent circumstances

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[32]New Jersey v. T.L.O, 105 S.Ct. 733, 761 (1985).

[33]Garrison, 107 S.Ct. at 1019; Payton, 100 S.Ct.at 1380.

[34]Ross, 102 S.Ct. at 2164. California v. Carney, 105 S.Ct. 2066, 2074 (1985).

[35]United States v. Karo, 104 S.Ct. 3296, 3314 (1984).

[36]Carney, 105 S.Ct. at 2078; Illinois v. Gates, 103 S.Ct. 2317, 2362 (1983).

as justification for a warrantless search and seizure, Stevens accepts this principle. Nevertheless, if in his view exigent circumstances do not exist, he calls for application of the exclusionary rule which disallows illegally seized evidence from criminal trials. He peppers his opinions with references to the historic rationale for this rule which is its deterrent effect upon law enforcement personnel.[37]

In regard to a citizen's possessory right, Stevens accepts the premise of past Court interpretation that if a citizen's property is not in public view it is protected under the Fourth Amendment,[38]and that if the government must interfere with the citizen's meaningful interests in such property, a warrant based upon a magistrate's determination of probable cause is required. But when exigent circumstances exist, "reasonableness" again is the standard for an agent who asserts "dominion or control" over the property in any way which deprives the citizen of its access.[39] The government must show that legitimate law enforcement interests outbalance the interests of the citizen.

Stevens understands that, in attempting to prevent general searches, the Founding Fathers put a substantial burden upon the judiciary to act as a buffer between citizen and law enforcement. When the latter seeks a warrant the magistrate must be convinced that probable cause exists and that the information which will appear on the warrant "contain a description sufficient to enable the officers who execute it to ascertain with reasonable effort where they

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[37]Murray v. United States, 108 S.Ct. 2529, 2540 (1988); Segura, 104 S.Ct. at 3392, 3398-99; Leon, 104 S.Ct. at 3454; Dunaway v. New York, 97 S.Ct. 2248, 2261 (1979).

[38]Karo, 104 S.Ct. at 3311; Texas v. Brown 103 S.Ct. 1535, 1546 (1983).

[39]Hudson, 104 S.Ct. at 2909.

are to search and what they are to seize."[40] The purpose of such a warrant is to limit the scope of the search and hence limit the discretion of the officer.[41]

The Fourth Amendment - Approaches

During his first few years as Supreme Court justice, Stevens had an opportunity to stipulate how the Court should approach cases involving claims that federal personnel acting under color of federal statutes had nevertheless violated Fourth Amendment protections. He very clearly states:

> I realize that since Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, the Court has applied the same Fourth Amendment principles to state and federal law enforcement officers alike. Nevertheless, I purposely limit my discussion here to the federal context. For purposes of discussing the necessity of statutory authority, it seems useful to me to treat the Fourth Amendment concept of reasonableness as flexible enough to recognize differences between state and federal courts and police forces. Thus, because the power of the Federal Government to combat crime, like the jurisdiction of its courts, is more limited than the comparable power and jurisdiction inhering in the States, it is logical in the federal context to assume that government authority is lacking unless expressly mandated by legislation.[42]

In interpreting the application of the 1968 Omnibus Crime Control and Safe Streets Act to actions of federal judges and FBI agents, Stevens would determine that without statutory authorization, a federal agent could not request, nor could a federal judge grant, orders to authorize installation of a pen-register for surveillance nor to compel a private company to

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[40]Leon, supra note 28, 104 S.Ct. at 3448.

[41]Walter, supra note 27, 100 S.Ct. at 2401; Garrison, supra note 27, 107 S.Ct. at 1017.

[42]Dalia v. United States, 99 S.Ct. 1682, 1697 n.6 (1979).

render assistance,[43] nor to justify agents to secretly enter an office building to install a listening device.[44] Similarly, he asserts that the Court should not tolerate interpretation of an 1866 smuggling statute by federal treasury and postal officials to allow the opening and inspection of foreign mail by Customs officers without either addressee consent or warrant, absent express congressional consent.[45] Generally, he urges that the Court should approach such cases with the understanding that Congress would not "ignore its conscientious attention to the importance of safeguarding the rights of individual privacy," and that its "silence should not be construed to authorize the Executive to violate state criminal laws or to encroach upon constitutionally protected privacy interests."[46] Fourth Amendment issues should thus not be addressed until the Court has first identified "explicit and specific" statutory authorization to its national police. Yet, Stevens would distinguish between statutes allowing electronic surveillance of unsuspecting targets and statutes not restricting the recording of conversations when one of the target individuals consents.[47] He concludes that a tape recording between an IRS agent and taxpayer under audit, used as evidence for a bribe, need not be excluded from trial even though it had been obtained in exigent circumstances contrary to IRS internal procedural rules not mandated by a federal tax statute. Out of concern for the separation of powers, Stevens refuses to impose this exclusionary rule on the federal courts. He speculates that future procedural standards on federal prosecutors and law enforcement officers could be

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[43]United States v. New York Telephone Co., 98 S.Ct. 364, 376 (1977).

[44]Dalia, 99 S.Ct. at 1696.

[45]United States v. Ramsey, 97 S.Ct. 1972, 1983-87 (1977).

[46]Dalia, 99 S.Ct. at 1704-5.

[47]Caceres, supra note 27, 99 S.Ct. at 1470.

weakened if a strict exclusionary rule would be imposed for non-deliberate or non-prejudicial violation of voluntary internal rules in situations that "reflected a reasonable, good faith attempt to comply."[48]

He has a different standard for those state and federal administrative procedures that in his view do call into question Fourth Amendment protections. On numerous occasions he has challenged his colleagues' inability to reckon with the "reasonableness" clause separately from the warrant clause in their analysis of investigative searches conducted by public officials.[49] He charges that they seem to disregard what he would consider an otherwise reasonable search because officials lack a traditional warrant, yet they would allow for an administrative-type warrant that can be obtained with less than probable cause to suspect violative activity. The root of his disagreement can be traced to the Court's 1967 decision[50] which legitimized such administrative ex parte warrants and which has, to his dismay, become the basis for disapproving legislatively-sanctioned warrantless searches in the area of health and safety concerns. Though agreeing that "each of us [justices] has a duty to accept the law as it is," nevertheless, he would narrowly apply its reach in such cases.[51]

Stevens often refers to passage from a 1978 opinion to illustrates how he views the Amendment's clauses and the Founding Fathers' rationale behind its plain language:

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[48]Id. at 1474.

[49]See Michigan v. Clifford, 104 S.Ct. 641, 650 (1984), referring to his opinions in Michigan v. Tyler, 98 S.Ct. 1942, 1951 (1978); Barlow's, supra note 28, 98 S.Ct. at 1827; Stanford Daily, supra note 31, 98 S.Ct. 1987-88; and Donovan v. Dewey, 101 S.Ct. 2534, 2542 (1981).

[50]Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 87 S.Ct. 1727 (1967).

[51]Donovan, 101 S.Ct. at 2542.

> Since the general warrant, not the warrantless search, was the immediate evil at which the Fourth Amendment was directed, it is not surprising that the Framers placed precise limits on its issuance. The requirement that a warrant only issue on a showing of particularized probable cause was the means adopted to circumscribe the warrant power. While the subsequent course of Fourth Amendment jurisprudence in this Court emphasizes the dangers posed by warrantless searches conducted without probable cause, it is the general reasonableness standard in the first clause, not the Warrant Clause, that the Framers adopted to limit this category of searches. It is of course true that the existence of a valid warrant normally satisfies the reasonableness requirement under the Fourth Amendment. But we should not dilute the requirements of the Warrant Clause in an effort to force every kind of governmental intrusion which satisfies the Fourth Amendment definition of a "search" into a judicially-developed, warrant-preference scheme.[52]

Thus, in deferring to Congressional judgement to act in the public's best interest, he would have upheld the warrantless inspection of the workplace by public officials acting under the Occupational Health and Safety Act[53] and the Federal Mine Safety and Health Act.[54] Similarly, he would find a warrantless search by a city firefighter for arson investigation on the day of the fire without consent of the owner, and with notice days after the fire, as meeting the "reasonableness" requirement of the Fourth Amendment,[55] but believes that his colleagues are wrong in condoning the use of an administrative warrant issued upon less than probable cause for an unannounced, forced entry, post-fire search by fire investigators to determine the cause of a fire.[56] For purposes of analysis, he believes that "we must assume that the postfire

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[52]Barlow's, 98 S.Ct. at 1828 (emphasis added).

[53]Id.

[54]Donovan, 101 S.Ct. at 2542.

[55]Tyler, 98 S.Ct. at 1952.

[56]Clifford, 104 S.Ct. at 652.

investigation cannot be supported on an emergency rationale but rather is justified by the general regulatory interest in preventing similar fires, including those set by arsonists.,"[57] so that "a postfire search is reasonable--even without either suspicion or probable cause--when advance notice is given to the homeowner, the purpose of the Reasonableness Clause can be satisfied without obtaining an administrative warrant that is nothing more than a rubber stamp."[58] Such notice would protect the owner's privacy interests by "allowing him to place certain possessions he would legitimately prefer strangers not to see out of sight, and permitting him to be present during the search to assure that it does not exceed reasonable bounds."[59]

A plurality and two majority opinions penned in the early 1980s address issues involving the warrantless search of containers by federal law enforcement agents, and the approaches taken therein appear to become the sources of both agreement and disagreement for his colleagues in subsequent cases. In analyzing the validity of a search of containers by federal agents, Stevens would first determine whether the agent has mere possession of a container and the extent of his authority to search. Particularly, he would evaluate the owner's subjective expectation of privacy for the container. Writing for a plurality in Walter v. United States, he reaffirms that particularly if a package contains contraband, "it has been settled that an officer's authority to possess a package is distinct from his authority to examine its contents," and that if and when "an official search is properly authorized--whether by consent or by the issuance of a valid warrant--the scope of the search is limited by the terms of its

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[57]Id. at 651 n.4.

[58]Id. at 652, n.5.

[59]Id. at 652.

authorization."[60] However, for a Court majority in United States v. Jacobsen, he urges that if the official warrantless search is preceded by a search by a private party, "the reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred. . . . and by the degree to which [the agents] exceeded the scope of the private search."[61] In his view, "the Government may not exceed the scope of the private search unless it has the right to make an independent search."[62]

In the third opinion, United States v. Ross, Stevens voices the majority's attempt to aid law enforcement officers in determining when they have a right to examine the contents of containers in a lawfully stopped automobile, and begins by recalling the general principle from Carroll v. United States that warrantless searches of automobiles must be based upon probable cause to suspect that the vehicle contains contraband, one that "must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers."[63] In an historic review of the "automobile exception" cases, he attempts to draw a line between containers suspected to contain contraband and trailed to automobiles, and containers come upon by officers conducting a warrantless search of a lawfully stopped vehicle. In the former, an officer would be required to obtain a search warrant before opening the container; in the latter, search of the vehicle

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[60]100 S.Ct. at 2400-1 (note omitted).

[61]104 S.Ct. at 1657. See also id. at 1660 n.17 (countering Justice White's concern that this view allows for warrantless searches of all containers after a private search, Stevens repeats that, "a container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant.").

[62]Walter 100 S.Ct. at 2402.

[63]102 S.Ct. at 2164 (discussing Carroll v. United States, 267 U.S. 132, 45 S.Ct. 2164 [1925]).

would also include search of containers likely to contain the suspected contraband. He recalls the general rule for searches authorized by warrant:

> When a legitimate search is underway, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.[64]

to which he notes that there would be more of a threat to privacy if the police were not able to immediately search a container, but be forced to search the entire vehicle first.[65] By analogy, he states that, just as a person's privacy interest is diminished when a magistrate approves a search, so too, "an individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband. . . . [and] the search . . . is as the magistrate could authorize."[66] The key guide to officers is that:

> The scope of a warrantless search based on probable cause is no narrower--and no broader--than the scope of a search authorized by a warrant supported by probable cause. Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize.
>
> The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found.[67]

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[64]Id. at 2171.

[65]Id. at 2171 n.28.

[66]Id. at 2172.

[67]Id. at 2172 (notes omitted)(emphasis added).

Suggesting the use of the scope of the warranted search as a guide to officers engaged in the warrantless search of a vehicle and its contents, and making the distinction between containers tracked to vehicles and containers in a lawfully stopped automobile, are views reminiscent of his statements from two earlier state court generated cases which broadened the automobile exception to include the search of containers without probable cause in a vehicle whose driver had been placed under warrantless arrest.[68] In one of these opinions he caustically cautioned drivers that, after such a decision, only state statutory law limiting traffic violation arrests or state court interpretations of a "state constitution's equivalent to the Fourth Amendment" will protect stopped traffic violators from unreasonable searches![69]

Despite his attempt in Ross to give guidance to law enforcement officers for container searches, the very next term he chastises the Court for not recalling its principles regarding the probable cause standard for a such warrantless search as applied to a balloon ("container") seized in plain view in a vehicle stopped at a driver's license checkpoint.[70] He takes the opportunity to remind the plurality that there are differences between searches and seizures, and the corresponding individual interests involved, depending upon the factual context: a seizure may threaten one's possessory interests and a search may threaten one's privacy interest. Factually, a seizure could threaten a possessory right without violating a privacy right and a search could threaten a privacy right without threatening a possessory right. Factually, a seizure could follow a search or a search could follow a seizure. The Court's failure to give

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[68]Robbins v. California, 101 S.Ct. 2841, 2857 (1981); New York v. Belton, 101 S.Ct. 2860, 2865 (1981).

[69]Robbins, 101 S.Ct. at 2858.

[70]Brown, supra note 38, 103 S.Ct. at 1546.

more clarity to the state court concerning distinctions in cases involving containers discovered in "plain view" and the Court's first impression inquiry into the facts of a case where the record lacks facts crucial to the constitutional issue, prompts Stevens' concurrence. Beginning with the principle that "an object may be considered to be 'in plain view' if it can be seized without compromising any interest in privacy,"[71] Stevens recalls that this applies to the seizure of abandoned containers or warrantless seizure of containers suspected to be associated with criminal activity, or seizure of containers discovered as part of a warrant authorized search. He believes that consideration of the legality of a search of a seized container deserves separate analysis, and reflects upon the principle articulated by Justice Jackson from a 1948 federal case that once a container is in police custody he has a continued duty to obtain a search warrant from a neutral magistrate despite the inconvenience.[72] He urges that only a determination of exigent circumstances could justify giving discretion to search to the officer. The standard he would suggest for determining whether the plain view doctrine would support a warrantless search as well as the seizure of the balloon and allow its contents into evidence would be "only if there was probable cause to search the entire vehicle or there was virtual certainty that the balloon contained a controlled substance."[73] He particularly maintains that

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[71]Id. at 1546.

[72]Id. at 1547 (referring to Johnson v. United States, 333 U.S. 10, 15, 68 S.Ct. 367, 369 [1948]). Stevens was clerking for Associate Justice Rutledge at the time of the Johnson decision.

[73]Id. at 1548. He must have been successful in convincing the plurality to his position because, using this same standard, he concluded for a majority in Horton v. California, 110 S.Ct. 2301 (1990) that once a warrant, judged to be valid, provided an officer access to an area to search for evidence of a crime, the "advertent" discovery of weapons used in the crime which are found "in plain view" would not be unconstitutional. Since the items noted on the warrant had not been found when the officers came upon the weapons, the scope of the search had not been improperly enlarged by their seizure, such as in a general warrant, id. at 2310, and no privacy rights had been violated since the seizure of an item in plain view concerns only possessory rights,

"in evaluating whether a person's privacy interests are infringed, 'virtual certainty' of the contents of a container is a more meaningful indicator that visibility."[74]

In his dissent in United States v. Karo, he similarly recalls for the majority the distinctions made in Jacobsen between possessory and privacy interests as applicable to actions of federal agents who attached a beeper to a container with consent of the owner but without knowledge of the buyer whose movements were the target of the beeper.[75] Where the majority saw only a search violation, he would also find that by the government "asserting dominion and control over" the buyer's property by attaching the beeper, a seizure violation was also present.[76] According to his understanding of the standard set forth in Ross, "'the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view,'" and, since "the beeper enabled the agents to learn facts that were not exposed to public view," the search right was violated as well.[77] Generally, he maintains that "the private citizen is entitled to assume, and in fact does assume, that his possessions are not infected with concealed electronic devices," and concomitantly, he proposes that "the expectation of privacy should be measured from the standpoint of the citizen whose privacy is at stake, not of the Government. It is compromised the moment the invasion occurs."[78] But this is not his last

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id at 2307.

[74]Brown, 103 S.Ct. at 1548 n.5. See also Illinois v. Andreas, 103 S.Ct. 3319, 3330 (1983), for Stevens' view that the state's "absolute certainty" test is more than is required by the Fourth Amendment.

[75]Supra note 35, 104 S.Ct. at 3310.

[76]Id. at 3311.

[77]Id. at 3311-12.

[78]Id. at 3313-14.

opportunity to address container search issues. In 1990, in upholding a Florida Supreme Court's suppression ruling, the majority held that evidence found in closed containers and seized by state police during an inventory search of an impounded car was not admissible absent a state policy governing the opening of containers.[79] Stevens attacks the majority for its "unabashed judicial activism" in correcting a "minor flaw" in the state supreme court's opinion which suggested that earlier Supreme Court cases require that a policy should allow for either that all containers be opened or no containers be opened. To the majority's appeal to state policy makers that officers should be given latitude to determine which containers should or should not be opened, Stevens expresses alarm that no real standards will exist if officers can open even locked containers at "whim."[80]

Two dissents written within a thirteen year span illustrate Stevens' unchanged views concerning police seizure justified under Terry v. Ohio as applied to investigative stops of vehicles.[81] In both cases the state supreme courts had upheld suppression of seized evidence as fruits of improper detention. In the earlier case, the Court decided that even without reason to suspect foul play, an officer can order an individual out of a vehicle stopped for a minor traffic violation, and in the second case, the Court decided that upon an anonymous tip and police investigation, an officer can make an investigatory stop of a vehicle. Stevens objects to both decisions because of their lack of guidance to law enforcement personnel in the various situations they may encounter and the potential threat to the privacy rights of innocent drivers

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[79]Florida v. Wells, 110 S.Ct. 1632 (1990).

[80]Id. at 1639-40.

[81]Pennsylvania v. Mimms, 98 S.Ct. 330, 338 (1977), and Alabama v. White, 110 S.Ct. 2412, 2418 (1990)(application of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 [1968]).

by "the overzealous and unscrupulous officer."[82] The form of Stevens' objection to the Court's approach to the 1977 case will be repeated again and again in future opinions: the Court summarily reverses an error from a state decision that "afforded [the defendant] greater protection than is required by the Federal Constitution" and that it need not have reviewed in the first place because it was a decision creating "no conflict requiring resolution by this Court on a national level."[83] In the process, it lowers the standard of justification for police seizures without "benefit of differing judicial evaluations of an issue before it is finally resolved on a nationwide basis."[84] Chapter Five will address Stevens' charges against this form of the Court's judicial activism in more detail.

Apparently, the issue as presented in a 1980 case, Payton v. New York, questioning "the constitutionality of a New York statute authorizing police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest," had had more time to "ripen" in Stevens' view;[85] federal circuit courts, state courts and state legislatures as well as common law scholars had dealt with the matter. Though historically such arrests had been permitted, Stevens notes a trend by recent state courts to declare routine, warrantless

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[82]Mimms, 98 S.Ct. at 338; White, 110 S.Ct. at 2418. In dissent in Michigan State Police v. Sitz, 110 S.Ct. 2481, 2495 (1990), Stevens also accuses the Court of allowing broad discretion to state highway police by determining that the brief detention of motorists by the use of random sobriety checkpoints did not violate the Fourth Amendment's ban on unreasonable police seizures. Alluding to Nazi tactics, Stevens sees the procedure as a serious intrusion upon individual liberty not defensible on the basis of public safety, since statistics showed no greater arrest rates than use of the traditional "reasonable suspicion" stops by routine patrol.

[83]Mimms, 97 S.Ct. at 336; Florida v. Meyers, 104 S.Ct. 1852, 1855 n.3 (1984). See also Michigan v. Long, 103 S.Ct. 3469, 3492 (1983); Carney, supra note 34, 105 S.Ct. at 2072.

[84]Mimms, 97 S.Ct. at 336.

[85]Supra note 28, 100 S.Ct. at 1387.

arrests invalid, with seven courts basing their decisions upon state constitutional law. He urges that this "is significant because by invoking a state constitutional provision, a state court immunizes its decision from review by this court."[86] Ultimately, he recalls Justice Jackson's warnings about giving too much discretion to officers, and reaffirms his concern for the value of preserving the protection of the "sanctity of the home" by requiring officers to obtain an arrest warrant from a neutral and detached magistrate to authorize entering a residence to make a routine arrest.[87]

The principles from Stevens' Payton and Ross majority opinions concerning the extent of an individual's expectation of privacy converge in what he calls the "hybrid" case, California v. Carney, concerning a nonexigent, warrantless search of a parked mobile home.[88] Besides criticizing the Court for addressing a "novel" issue, barely in "percolation" by the state and lower federal courts, in its attempt "to eradicate disuniformity as soon as it appears," he questions their acceptance of law enforcement claims of necessity to justify the exception to the warrant requirement.[89] Stevens argues that the Court's analysis is faulty because it "relies on the inherent mobility of the motor home to create a conclusive presumption of exigency,"

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[86]Id. at 1387.

[87]Id. at 1380, 1388. He uses the same rationale for the majority opinion the following year in Summers, supra note 27, 101 S.Ct. at 2595, to allow police to detain an individual, whose house is the object of a warranted search for contraband, in the house on the basis of "articulable and individualized suspicion" of criminal behavior. He urges that the imposition of the magistrate's determination of probable cause authorizes the search and thus "implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."

[88]105 S.Ct. at 2074.

[89]Id. at 2074, wherein he describes percolation as "the independent evaluation of a legal issue by different courts."

which lessens an individual's expectation of privacy and allows the Court to apply the automobile exception rule, instead of acknowledging that this mobile home "was designed to accommodate a breadth of ordinary everyday living," which requires recognition of a citizen's greater expectation of privacy and requires consideration of rules regarding the warranted search of a home.[90] The California courts saw no reason to reverse the suppression of evidence ruling which extended Fourth Amendment protections to its citizen. Stevens believes that the Court should have "allowed the decision below to stand" in that one state since "premature resolution of the novel question presented has stunted the natural growth and refinement of alternative principles" from other cases[91] which could have been used by the Court in resolving matters of constitutional law that have a national impact.

A few opinions from 1983 and 1984 concerning the validity or proper execution of warrants and exclusion of evidence seized exemplify Stevens' dismay with Court analysis, particularly with its failure to properly address the separate clauses of the Fourth Amendment. In Illinois v. Gates, Stevens dissented from the application of the majority's holding that "totality of circumstances" be the standard for a magistrate in determining probable cause for the issuance of a search warrant of a home since it appeared to him that the information provided to the police by an anonymous tip, which contradicted what the police officer knew, was inadequate basis for the issuance regardless of what incriminating evidence was found as a result of the search.[92] Similarly, in United States v. Leon, Stevens dissented when the majority recognized a "good faith" exception to the exclusionary rule by allowing evidence

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[90]Id. at 2075, 2077.

[91]Id. at 2073

[92]Supra note 36, 103 S.Ct. at 2260.

seized pursuant to a warrant whose affidavit was faulty to be admitted in court, instead of sending the case back to the Court of Appeals to be reconsidered in light of the Gates holding.[93] Whereas, in the warrantless search and seizure situations above, Stevens articulated the requirement for the value of the intervention of a "neutral and detached magistrate" per se, in Gates he relies upon "the fact-bound inquiry" of the three levels of Illinois judges "to better evaluate the probable reliability of anonymous informants in Bloomingdale, Illinois."[94] Since these courts had determined that there was no basis upon which the magistrate could determine probable cause, the evidence seized pursuant to the warrant should be suppressed. Once the Gates standard was established, however, Stevens urged that the Court should have adhered to its "normal practice" following the announcement of a new rule, and sent Leon back to the Court of Appeals for reconsideration in light of Gates, rather than using Leon as a means to create a "broad new rule."[95] Instead, Stevens charges that the Court seeks to use the federal case of Leon with the state case Massachusetts v. Sheppard to announce the new rule without practicing any judicial restraint in a decision "unlikely to withstand the test of time."[96] He continues:

> Judges, more than most, should understand the value of adherence to settled procedures. By adopting a set of fair procedures, and then adhering to them, courts of law ensure that justice is administered with an even hand. ... Of course this Court has a duty to face questions of constitutional law when

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[93]Supra note 28, 104 S.Ct. at 3446. (Decided with Massachusetts v. Sheppard, 104 S.Ct. 3424 [1984].)

[94]Gates, 103 S.Ct. at 2362.

[95]Leon 104 S.Ct. at 3446. He notes that even the United States Solicitor General sought similar resolution, id. at n.3.

[96]Id. at 3447.

> necessary to the disposition of an actual case or controversy. Marbury v. Madison, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). But when the Court goes beyond what is necessary to decide the case before it, it can only encourage the perception that it is pursuing its own notions of wise social policy, rather than adhering to its judicial role. I do not believe the Court should reach out to decide what is undoubtedly a profound question concerning the administration of criminal justice before assuring itself that this question is actually and of necessity presented by the concrete facts before the Court. Although it may appear that the Court's broad holding will serve the public interest in enforcing obedience to the rule of law, for my part, I remain firmly convinced that "the preservation of order in our community will be best ensured by adherence to established and respected procedures." Groppi v. Leslie, 436 F.2d 331, 336 (CA7 1971) (en banc) (Stevens, J., dissenting), rev'd, 404 U.S. 496, 92 S.Ct. 582, 30 L.Ed.2d 632 (1972).[97]

If Gates requires that the reviewing court give deference to the magistrate's determination of probable cause and if the magistrate judgment must be made "in a practical and nontechnical manner," law enforcement will have plenty of leeway to execute the warrant in a reasonable manner.[98] Stevens' understanding of the intent of the Founding Fathers regarding the warrant clause of the Fourth Amendment leads him to conclude that if the Court determines that probable cause did not exist, a consequent search and seizure would be unreasonable and therefore unconstitutional. The majority in Leon found the warrant to be defective, but its execution to be "reasonable," resulting in what Stevens terms the creation of a "double standard of reasonableness" and a "product of constitutional amnesia," as well as erosion of "the deterrence rationale that still supports the exclusionary rule" and a tarnishing of "the role of the judiciary in enforcing the Constitution."[99] For the Court to "concede the existence" of

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[97]Id. at 3447.

[98]Id. at 3450.

[99]Id. at 3452, 3454.

a violation without remedy is to "convert a bill of Rights into an unenforced honor code that the police may follow in their discretion."[100]

When the exclusionary rule is under consideration, Stevens tends to part company with his colleagues in the process of balancing the costs to society of excluding tainted evidence from a criminal case with the benefit of preserving the principle of individual privacy.[101] Leon followed on the heels of Segura v. United States, where the majority allowed the admission of evidence seized pursuant to a warrant obtained after a warrantless entry and agent occupation of the premises.[102] Both of Stevens' dissenting opinions here can be used to illustrate his concern that in the Court's effort to help government authorities combat crime by narrowing the application of the exclusionary rule, it actually may encourage future indiscrete conduct by expecting a lesser standard of conduct from law enforcement officers "throughout the land" whose "professionalism" has been cultivated over a period of years since the 1960s criminal procedure cases appeared. In both opinions he most emphatically recalls the words of Justice Jackson, after returning from the Nuremburg trials, as a caveat to the possible impact on "Everyman" for the Court's rulings to make secondary one's Fourth Amendment rights.[103] His method in Segura to cite past cases in an effort to preserve, not extend, the exclusionary rule is consistent with the restrained approach he said he would use as a justice during

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[100]Id. at 3455 n.37.

[101]Robert J. Sickels (John Paul Stevens and the Constitution: the Search for Balance 129-42 [1988]), contrasts the types of balancing used by Court members in the Leon case.

[102]Supra note 30, 104 S.Ct. 3380 (1984). See also Murray, supra note 37, 108 S.Ct. at 2540, for similar reasoning.

[103]Segura, 104 S.Ct. at 3403 n.31; and Leon 104 S.Ct. at 3453 (referring to Jackson's dissents in Brinegar v. United States, 338 U.S. 1302, 1313 [1949] and Harris v. United States, 331 U.S. 145, 158, 67 S.Ct. 1098, 1120 [1947]).

comments made during his Senate Confirmation hearings. He views the exclusionary rule cases, going all the way back to Weeks v. United States, as approving the suppression of evidence obtained by law enforcement officers because their "access to the evidence in question was not properly authorized and hence was unconstitutional," and he proposes that the Court should basically inquire as to "whether the deterrent purposes of the exclusionary rule would be served or undermined by suppression of the evidence."[104] This approach reflects Stevens' apparent on-going frustration with the position of some of his colleagues, as expressed five years earlier in comments directed to Justice Rehnquist and Chief Justice Burger:

> I recognize that the deterrence rationale for the exclusionary rule is sometimes interpreted quite differently. Under that interpretation, exclusion is applied as a substitute for punishment of the offending officer; if he acted recklessly or flagrantly, punishment is appropriate, but if he acted in good faith, it is not. But when evidence is excluded at a criminal trial, it is the broad societal interest in effective law enforcement that suffers. The justification for the exclusion of evidence obtained by improper methods is to motivate the law enforcement profession as a whole--not the aberrant individual officer--to adopt and enforce regular procedures that will avoid the future invasion of the citizen's constitutional rights. For that reason, exclusionary rules should embody objective criteria rather than subjective considerations.[105]

Stevens' majority opinion in 1987 in Maryland v. Garrison reversing a state court determination that execution of a search warrant broader than appropriate was invalid,[106] at

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[104]Segura, 104 S.Ct. at 3400, 3400 n.27, 3402. Weeks, 232 U.S. 383, 34 S.Ct. 341 (1914).

[105]Dunaway, supra note 37, 99 S.Ct. at 2261 (notes omitted) .

[106]Supra note 27, 107 S.Ct. at 1015 (1987). The warrant had authorized search of one apartment, but when the police began to search the premises, they discovered that the original area actually housed two apartments on the third floor.

first blush appears to contradict his earlier expressed standards for evaluating proper authorization of a valid search such as the one conducted in Leon. In both cases he begins with the assumption that the police officer, being a well-trained professional, will act in a reasonable manner and not conduct even a warranted search knowing that it would be unconstitutional because of invalid authorization of "the place to be searched." Once the police officers pass that threshold of assuming proper authorization, the Court "must judge the constitutionality of their conduct in light of the information available to them at the time they act."[107] Unlike Leon (and its companion case), where the Court determined that the warrant was invalid, yet still upheld the search and admitted its fruits, here Stevens notes that all three Maryland courts deemed the warrant valid, since the magistrate as well as the police had acted reasonably upon information (available from various reliable sources) about the configuration of the residence at the time the warrant was procured. Once the factual mistake is realized during execution, however, Stevens cautions that the police must (and did in this situation) limit their search. Again, Stevens attempts to make the applicability of this rule as specific as possible for both the law enforcement community as well as judges.

Finally, Stevens issued dissents in three other cases which concerned the application of Fourth Amendment "reasonableness" standards: to a state prison inmate whose cell was searched by a guard, to a student whose purse was searched by a school administrator, and to a probationer whose home was searched by a state probation officer.[108] Two of these cases are more appropriately discussed in the "Post-Conviction" section of this chapter. However,

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[107]Id. at 1017.

[108]Hudson v. Palmer, supra note 30, 104 S.Ct. at 3207-17; New Jersey v. T.L.O, supra note 32, 104 S.Ct. at 3583-85; id., 105 S.Ct. at 758-67; Griffin v. Wisconsin, 107 S.Ct. 3164, 3175 (1987).

the question confronting the Court in the school search case gave Stevens an occasion to scold his colleagues for the method by which they took on the case from the state court. Originally, the New Jersey Supreme Court had determined that "reasonable suspicion" was the proper standard for a school official's search of a student's purse, that that standard had been violated by the official, and that the seized evidence was barred from use in a subsequent criminal hearing against the juvenile. On petition for certiorari, the state asked the United States Supreme Court to review only the third question, which was briefed and argued. The Court asked the parties to reargue the case and also address the first question. In Stevens' view, the Court should have dismissed the petition as improvidently granted, instead of dealing with the merits of a question for which there is no party conflict, "in a context in which a ground for decision that the Court currently views as nonconstitutional is available."[109] The last remark makes reference to views expressed in his Leon dissent above chastising the Court for treating the Bill of Rights as an unenforced "honor code" when treating the exclusionary rule as a nonconstitutional remedy for Fourth Amendment violations. He continues sarcastically:

> Apparently, this Court has imposed the exclusionary rule on the States as a result of the Fourth Amendment's "invisible radiations," Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780, n. 12, 104 S.Ct. 1473, 1481, n. 12, 79 L.Ed.2d 790 (1984), which act to somehow give the Court nonconstitutional supervisory powers over the State courts. My own view is different.[110]

After reargument, Stevens continued to maintain that the "activist" Court improperly reached out to decide a question on constitutional grounds not raised by the parties, which thereby

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[109]T.L.O., 104 S.Ct. at 3585.

[110]Id. at 3585 n.5. See supra note 100.

"undermines the Court's power to perform its central mission in a legitimate way[111]." Where initially the certiorari question involved use of the seized evidence for a criminal proceeding, implicating the deterrence rationale of the exclusionary rule, now the Court decided the case on the question of searches based upon reasonable suspicion of a student violation "of either the law or the rules of the school," without narrowing the standard to specification of which type of school rules.[112] Stevens suggests that school personnel could search with reasonable suspicion to find "evidence that the student is violating the law or engaging in conduct that is seriously disruptive of school order, or the educational process."[113] His main concern involves the mixed message being communicated to the nation's young people when those in authority are given "open-ended" permission to intrude on their privacy interests. Where the majority appears to limit the scope of the search on the basis of the objective of the search and the age and sex of the child in an apparent "effort to establish a standard that is, at once, clear enough to allow searches to be upheld in nearly every case, and flexible enough to prohibit obviously unreasonable intrusions," Stevens urges that one should begin (as did the State Supreme Court) "not based on a manipulation of reasonable suspicion" but with an evaluation of "the character of the rule infraction that is to be the object of the search."[114] Consequently, if this standard is applied, he would find no reasonable suspicion to justify the search of the juvenile's purse for violation of a "no smoking" rule.

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[111]T.L.O., 105 S.Ct. at 761. For further discussion of this case and the Court's activism, see Chapter Five.

[112]Id. at 762.

[113]Id.

[114]Id. at 764-65.

Police Interrogation, Self-Incrimination and Right to Counsel Issues

Overview of Issues

Among the many Warren Court rules subject to interpretation or application by subsequent decisions are those stemming from Massiah v. United States,[115] which protected a post-indicted defendant against uncounseled co-defendant/informant questioning, Escobedo v. Illinois,[116] which extended the Sixth Amendment right to counsel to re-indicted criminal suspects in police custody, and Miranda v. Arizona,[117] which held the Fifth Amendment protection against self-incrimination applicable to custodial interrogation. After Massiah, the Burger Court specified some pretrial "critical stages" at which the Sixth Amendment right to counsel applied,[118] and acknowledged interrogation situations where apparent violations of Miranda did and did not threaten Fifth Amendment protections of counsel and self-incrimination requiring exclusion at trial of evidence obtained.[119] In Edwards v. Arizona, the Court attempted to draw the line that once a pretrial defendant in custody says he won't speak to police without counsel, he cannot be subject to interrogation unless he initiates the

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[115]377 U.S. 201, 84 S.Ct. 1199 (1964).

[116]378 U.S. 478, 84 S.Ct. 1758 (1964).

[117]384 U.S. 436, 86 S.Ct. 1602 (1966).

[118]Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877 (1972); Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232 (1977); United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183 (1980); Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477 (1985).

[119]Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974); New York v. Quarles, 467 U.S. 649, 104 S.Ct. 2626 (1984); Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285 (1985).

conversation; any police-initiated conversation would not be considered a waiver of defendant's right to counsel.[120] On the other hand, the Court has gotten around some strictures on the use of evidence obtained through improper interrogation under certain circumstances,[121] by electing to permit the introduction of such evidence for impeachment purposes.[122] Nevertheless, questions in these areas continue to face the Court and are the sources for conflict among justices.

Justice Stevens has issued a number of opinions in cases where the Court has confronted questions concerning pre-trial police interrogation, the protection against self-incrimination and provisions for the assistance of counsel. Aside from United States v. Gouveia,[123] the cases are state-court-generated. The passage of Title II of the Omnibus Crime Control and Safe Streets Act of 1968 which "purports to repeal Miranda in federal prosecutions," replacing it with a previously used "voluntariness" test,[124] would account for the dirth of federal-court-generated cases. However, Stevens does address the application of the principles concerning right to, or waiver of, counsel under Massiah to a few state cases. He reiterates the point that it is through Malloy v. Hogan[125]that the federal standards for Fifth Amendment protection

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[120]451 U.S. 477, 101 S.Ct. 1880.

[121]New Jersey v. Portash, 440 U.S. 450, 99 S.Ct. 1292 (1979); Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408 (1978).

[122]Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215 (1975); Harris v. New York, 401 U.S. 222, 91 S.Ct. 643 (1971).

[123]104 S.Ct. 2292 (1984)

[124]Yale Kamisar, Jerold H. Israel, and Wayne R. LaFave, Criminal Procedure and the Constitution 289-90 (1989).

[125]378 U.S. 1, 84 S.Ct. 1489 (1964)

against self-incrimination as a fundamental right was extended to the states.[126] A number of cases under consideration here came to the Court on appeal from the state after the court of last resort recognized a protected federal right, and in some of them Stevens uses footnotes to point out when, and on what basis, the federal government filed amicus curiae briefs on the side of the state.[127] This could be Stevens' subtle way of indicating one of the methods used by the Justice Department (and Attorney General Meese in particular) to wage its declared war against Miranda during the 1980s. He is quick to chide the Court for its lack of restraint in taking on matters better left to the state courts and their criminal justice apparatus, and in assuming an activist stance to help the states more easily convict those who commit crimes. He sees this as an abdication of the Court's traditional role of preserving and protecting constitutional protections for citizens generally as well as an upset of hallowed notions of federalism.

Aside from Michigan v. Jackson and Arizona v. Roberson for which Stevens wrote for the majority,[128] the opinions discussed in this section are from relatively close-margin cases and are primarily dissents (on the side of the defendant) concerning matters such as interrogation and waiver of the right to counsel or the right not to self-incriminate, the timing of Miranda warnings, the definition of "interrogation," and the use of uncounseled statements for impeachment purposes at trial. Generally, Stevens' frustrations with the majority tend to lay with the Court's judicial approach to questions and its apparent disregard for the rules or

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[126]E.g., Doe v. United States, 108 S.Ct. 2341, 2353 n.1 (1988); Moran v. Burbine, 106 S.Ct. 1135, 1148 n.1 (1986); Oregon v. Elstad, 105 S.Ct. 1321, 1323 n.9 (1988).

[127]Moran, 106 S.Ct. at 1163 n.51; Patterson v. Illinois, 108 S.Ct. 2389, 2413 n.5 (1988); Arizona v. Roberson, 108 S.Ct. 2093, 2100 n.6 (1988).

[128]106 S.Ct. 1404 (1986); 108 S.Ct. 2093 (1988).

rationale of past cases, or for historically-held distinctions of counsel rights under the Fifth and Sixth Amendments. He becomes bothered by the Court's lack of concern for the impact that the narrowing of what he perceived to be a "bright line rule" may have on the future practices of personnel in the criminal justice system in their dealings with pre and post indicted individuals. He finds cause to argue with his colleagues over the place of prophylactic rules in constitutional rights determinations as well as over the roles of the attorneys in our accusatorial system. Typically, he is in the company of Justices Brennan, Marshall or Blackmun, and finds himself particularly challenged by Justices Burger, White or O'Connor, and often at odds with Justice Rehnquist. The following commentary will reveal some of Stevens' concerns and analytical approaches to these procedural guarantees and thereby further illustrate his judicial philosophy.

Approaches

Basically, Stevens can be seen as a justice who questions the majority's propensity to tinker with what he considers the clear dictates of Miranda. For instance, when the Court appears to narrow the definition of "interrogation" to include only those practices which, from the police perspective, would "elicit an incriminating response," Stevens is concerned that this will "reinstate the imbalance between police and suspect that the Miranda warnings are designed to correct."[129] To respect this rationale, "any police conduct or statements that would appear to a reasonable person in the suspect's position to call for a response must be considered 'interrogation'."[130] He fears deceptive police conduct if they are free to make

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[129]Rhode Island v. Innis, 100 S.Ct. 1682, 1695 (1980)(notes omitted).

[130]Id. (emphasis added).

attempts to get information from a suspect after the suspect invokes his counsel right "so long as they are careful not to punctuate their statements with question marks."[131] In his view the Rhode Island Supreme Court had properly concluded that a police officer's statement made during suspect's transport which appeared to be an appeal to his conscience constituted "interrogation." Similarly, seven years later Stevens again condoned a state supreme court's judgment in determining what was interrogation: a tape- recorded conversation between a husband and his wife conducted while they were in custody and in the presence of an officer.[132] Even under the stiffer standard of Innis, Stevens' colleagues found no violation here. In dissent, Stevens criticized the Court for moving from a standard which excused the unforeseen results of police practice to "the mere lack of explicit police subterfuge that the Court now finds adequate to preclude a finding that an interrogation has taken place."[133] He, in contrast, would defer to the reliability of the State court's evaluation of the trial record and "assessment of the actual intent of the Arizona police officers," because "whenever this Court reviews a state appellate court's examination of a trial record there is a special risk of error resulting from lack of familiarity with local conditions and from the limited time the Members of this Court can devote to study of the trial record."[134]

Two other dissents involving police interrogation issues, penned in the mid-1980s, reveal contention between factions of justices, as articulated by Justice O'Connor and Justice Stevens,

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[131]Id. at 1696.

[132]Arizona v. Mauro, 107 S.Ct. 1931, 1937 (1987).

[133]Id. at 1939.

[134]Id. at 1938. Of course, Stevens admits he would not have granted certiorari in this case in the first place. See also California v. Beheler, 103 S.Ct. 3517, 3521 (1983), for similar response to the Court's evaluation of the voluntariness of a custodial confession.

over the place of Miranda in the overall federal Constitutional scheme. In Oregon v. Elstad, the Court reaffirmed the "bright line rule of Miranda," yet carved out an exception to it by accepting as valid a waiver of rights and admission into evidence of a second confession by a warned defendant, despite the fact that his first confession had been obtained as the result of unwarned yet noncoercive questions by the police.[135] In dissent, Stevens expresses his belief that the clarity that was achieved by Miranda concerning rebuttable and irrebuttable presumed coercion has been "blurred" by the Court.[136] Even more significant to Stevens is the Court's rationale that violation of Miranda is violation of a "prophylactic rule," not of the federal Constitution, such that, when the Court excludes confessions of this sort it does so under a Court rule, not the Constitution. After recalling that it was through Malloy v. Hogan that the guarantee against self- incrimination was secured against state action through the Fourteenth Amendment Due Process Clause and applied in the original Miranda case, Stevens strongly comments upon the role of the United States Supreme Court in relation to state courts:

> This Court's power to require state courts to exclude probative, self-incriminatory statements rests entirely on the premise that the use of such evidence violates the Federal Constitution. The same constitutional analysis applies whether the custodial interrogation is actually coercive or irrebuttably presumed to be coercive. If the Court does not accept that premise, it must regard the holding in the Miranda case itself, as well as all of the federal jurisprudence that has evolved from that decision, as nothing more than an illegitimate exercise of raw judicial power. If the Court accepts the proposition that respondent's self-incriminatory statement was inadmissible, it must also acknowledge that the Federal Constitution protected him from custodial police interrogation without first being advised of his right to remain silent.

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[135]Supra note 119.

[136]105 S.Ct. at 1321.

> The source of respondent's constitutional protection is the Fifth Amendment's privilege against compelled self-incrimination that is secured against state invasion by the Due Process Clause of the Fourteenth Amendment. Like many other provisions of the Bill of Rights, that provision is merely a procedural safeguard. It is, however, the specific provision that protects all citizens from the kind of custodial interrogation that was once employed by the Star Chamber, by "the Germans of the 1930's and early 1940's," and by some of our own police departments only a few decades ago. Custodial interrogation that violates that provision of the Bill of Rights is a classic example of a violation of a constitutional right.[137]

The following term Stevens reacts even more passionately with a lengthy dissent objecting to the Court's conclusion in Moran v. Burbine that since a suspect had confessed to a murder after being informed of his rights and signing a series of written waivers, the suspects's right against self-incrimination had not been offended by the actions of police which he viewed to include incommunicado questioning of the suspect and interference with communication between the suspect and his attorney trying to contact him.[138] He surmises that the balance struck by Miranda (and cases denouncing incommunicado questioning) between law enforcement and individual interests has now been tipped to justify "police deception of the shabbiest kind" by a majority who uses this decision to forward its "overriding interest in obtaining self-incriminating statements in the lawyer-free privacy of the police interrogation room" and uses its own "unshocked conscience" as the standard of fairness by which to evaluate the facts.[139] Justice O'Connor believes the majority position promotes less federal interference in state criminal processes and brings clarity to those police and judges who implement Miranda, but she sees his view as an attempt to place the interests of the defendant

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[137]Id. at 1325-26 (notes omitted; emphasis added).

[138]Supra note 126, 106 S.Ct. at 1148..

[139]Id. at 1151, 1150 n.8, 1165

as "paramount" and to implement the dissenters "subjective notions of sound policy" by reaching beyond Miranda "as written."[140]

From Stevens' vantage point, approving such police practices threatens the accusatorial nature and libertarian values of our legal system. In attacking the Court's approach, he berates the majority, who professes minimum interference in state practices, for refusing to respect and rejoin to the many recent state court decisions, as well as the American Bar Association standards, denouncing incommunicado questioning under Miranda. In addition to the detrimental impact he predicts this decision will have on future police practices, he notes how this decision, as well as those from Quarles and Elstad, "reflect a recognition [from a few state courts] that this Court is increasingly less than faithful to Miranda's clear teachings."[141] In distinguishing an inquisitorial system from our accusatorial system, he describes the on-going dilemma one encounters when balancing the "costs" of letting an obviously guilty person go free by upholding an absolute personal right. For him, "as a matter of law, the assumed right of the police to interrogate a suspect is no right at all; at best, it is a mere privilege terminable at the will of the suspect."[142]

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[140]Id. at 1147-48.

[141]Id. at 1159 n.40. (See supra note 119 for citations.)

[142]Id. at 1161 (emphasis added). Despite the affirmation by the majority in Moran that a waiver of the right to counsel during interrogation must be "the product of a free and deliberate choice," the Court continued to chip away at Miranda the following year by approving a waiver by a suspect in custody even though he was determined to be incompetent to stand trial, Colorado v. Connelly, 107 S.Ct. 515 (1987). Stevens would have upheld the state Supreme Court and urged that if one is incompetent to stand trial, surely he was incompetent to waive the right to remain silent as well. In a familiar refrain, he further criticized the Court for going beyond the issues on the petition for certiorari, id. at 524-25.

Another issue involving police interrogation appears to be the source for dissension between Justices White and Stevens. White had written the majority opinion (for which there were several concurrences but no dissents) for Edwards v. Arizona, yet he and Stevens have taken different sides in its application or interpretation, sometimes in close margin cases. A 1984 case can be used as illustration. When asked whether Edwards should be applied retroactively, White wrote for the majority in Solem v. Stumes that because Edwards had established a "new rule" it could not be retroactively applied.[143] Stevens, in dissent, notes that just two years before in United States v. Johnson the Court had described its general approach to such questions and reaffirmed that unless there is a "clear break" from past doctrine, which replaces an old rule, a rule could be retroactive.[144] Consequently, since the majority in Edwards had acknowledged "the per se aspect of Miranda," and "explained how its holding was derived directly from Miranda," its conclusions for Solem contradict both cases.[145] Stevens is critical of the majority for again not following a recent precedent which had as its "expressed purpose" to "lend order and predictability to the law of retroactivity."[146] From this and other opinions, it is more and more evident that the conflict among the justices concerns their views of per se or "bright line" and prophylactic rules in relation to Miranda and its corollaries.

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[143]104 S.Ct. 1338 (1984).

[144]Id. at 1348, 1353 (discussing Johnson, 102 S.Ct. 2579 [1982]).

[145]Id. at 1350.

[146]Id. at 1354. One might also note that Johnson had been a 5-4 decision and White had written the dissent; Johnson dealt with a Fourth Amendment retroactivity question applying a 6-3 ruling in Payton v. New York, supra note 28, 100 S.Ct. at 1371, for which Stevens wrote the majority opinion and White wrote the dissent. (See supra notes 85-87, and accompanying discussion of Payton.)

Through majority opinions Stevens was able to maintain White's support in two subsequent cases stemming from Edwards. In Michigan v. Jackson the Court determined that the Michigan Supreme Court had properly applied the Edwards rule in suppressing the confessions of two arraigned defendants gained as the result of police questioning after the right to counsel had been requested at arraignment and after Miranda warnings had been given, but before their consultation with counsel.[147] Reaffirming the "bright line" character of Edwards such that a waiver would no longer be valid only upon advice of rights prior to police questioning of suspects, Stevens cites the discussion of Sixth Amendment counsel rights in Edwards as well as the "critical" nature of the status of an accused (thus the need for a broader rule) and concludes that the same "bright line" should be extended to the accused as well.[148]

By 1988 it is noted in Arizona v. Roberson that there was conflict among several state courts in the proper application of the Edwards rule to the interrogation of a suspect "about an offense that is unrelated to the subject of their initial interrogation."[149] Since Edwards focused "on the state of mind of the suspect and not of the police," writes Stevens for the majority, "custodial interrogation must be conducted pursuant to established procedures, and those procedures in turn must enable an officer . . . to determine whether the suspect has previously requested counsel;" thus, "mere repetition of Miranda warnings would not overcome the presumption of coercion that is created by prolonged police custody."[150]

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[147]Supra note 128.

[148]106 S.Ct. at 1408-9.

[149]Supra note 128, 108 S.Ct. at 2096.

[150]Id. at 2100-1.

Four years after his majority opinion in Jackson, Stevens seems to have lost the support of White (and not won over either Scalia or Kennedy); in Michigan v. Harvey a 5-4 Court majority allowed statements taken from suspects in violation of the rule under Jackson to be used by the prosecution for impeachment purposes.[151] Stevens' dissent could be looked upon as an example of the dialogue over pretrial procedure that apparently must have been going on between him and Rehnquist ever since Stevens arrived on the Court. Though initially Stevens attempts to make clear the rationale of Jackson and its inclusion of both Fifth and Sixth Amendment protections, the dissent includes an exposition on the role of counsel as it has evolved in the system, the Court's "recharacterization" of constitutional violations, and why the Court should not use the same approach to Sixth Amendment rights as it does to the Fourth and Fifth Amendments when applying what it believes to be prophylactic rules.[152] If, as he believes, Jackson was also rooted in the Sixth Amendment, then the Court in Harvey short-changes the accused in limiting his assistance of counsel. Unlike the Fifth Amendment counsel right, "the Sixth Amendment right to counsel is much more pervasive because it affects the ability of the accused to assert any other rights he might have," and also, because "that guarantee applies equally whether the defendant is presenting his case or the State is

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[151]110 S.Ct. 1176 (1990). In Jackson, Stevens was joined by Justices Brennan, Marshall, White, and Blackmun; Chief Justice Burger concurred in the judgment on stare decisis grounds, but Rehnquist filed a dissent, joined by Powell and O'Connor. In Harvey, Chief Justice Rehnquist was joined in majority by O'Connor, Scalia and Kennedy, in addition to White. It is interesting to note the difference in judicial approach maintained by the two Chief Justices: where Burger felt restrained by past cases despite his criticism of the majority in Jackson for trying to lesson the Court's caseload by attempting to fashion bright line rules, Rehnquist in Harvey disregards prior interpretations and successfully puts forth his view of prophylactic rules which he had held since his days in the federal Justice Department. (See Kamisar, supra note 124, at 470, 543-559, for examples of the on- going controversy over Miranda principles among legal scholars and practitioners.)

[152]Id. at 1189-90.

rebutting or impeaching the defendant's evidence."[153] In addition to trial, past Courts have applied the right to counsel to a number of pretrial processes, which Stevens claims "constitutes simple recognition that under the modern system of law enforcement and public prosecution, the 'criminal prosecution' to which the Sixth Amendment refers begins when formal charges are filed," so that "after the right to counsel has been implemented, the State may not shortcircuit the adversarial system by confronting the defendant behind counsel's back."[154] Since the Court has "recharacterized" the "plain violation of respondent's Sixth Amendment right" as "involving nothing more than a violation of a 'prophylactic rule'" that allows them to draw analogies to other cases involving prophylactic rules and the use of evidence (obtained in violation of Miranda or the Fourth Amendment) for impeachment purposes, Stevens shows the majority that unlike the other cases, it is "the use of the evidence for trial, not the method of its collection prior to trial, that is the gravamen of the Sixth Amendment claim."[155] In his view, the deterrent value of the exclusionary rule for police involved in investigations dissipates once the suspect becomes "the accused," and he speculates that if the police know that the results of further questioning could be used to impeach at trial they would be more likely to use that tactic without threatening the prosecutor's case in chief. Stevens criticizes the majority for not setting a standard for judging the "voluntariness" of the accused's response as well as for condoning such an unethical and "shabby practice," and concludes:

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[153]Id. at 1183-84.

[154]Id. at 1185 n.5, 1186.

[155]Id. at 1186-87.

> Apparently as a means of identifying rules that it disfavors, the Court repeatedly uses the term "prophylactic rule." . . . It is important to remember, however, that all rules of law are prophylactic. Speed limits are an example; they are designed to prevent accidents. The Sixth Amendment is another; it is designed to prevent unfair trials. An argument that a rule of law may be ignored, avoided or manipulated simply because it is "prophylactic" is nothing more than an argument against the rule of law itself. The tragedy of today's decision is not merely its denigration of the constitutional right at stake; it also undermines the principle that those who are entrusted with the power of government have the same duty to respect and obey the law as the ordinary citizen.[156]

Again we see Stevens' concern for the value of a constitutional right as well as for the impact of a decision on future professional conduct. A few more cases will also illustrate his high regard for the role of counsel in the pre-trial setting.

As was illustrated in the discussion of the Fourth Amendment cases, it is not unusual for Stevens to side with the judgment of the majority, yet spend an inordinate amount of time clarifying or explaining or reaffirming a recent decision which the Court appears to him to be misinterpreting in a present case. This was so in a controversial 5-4 decision rendered ten years after Massiah. The Court granted a new trial to Robert Williams because evidence of the whereabouts of the body of his child-victim, admitted at his trial, had been obtained without benefit of counsel from post-indictment questioning during police transport of the defendant.[157] Seven years later, after a retrial during which the challenged evidence was admitted under the "inevitable discovery" exception to the exclusionary rule, Williams' fate was again before the Court,[158] and this time his conviction was upheld. Stevens wrote

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[156]Id. at 1189-90.

[157]Brewer v. Williams, 97 S.Ct. 1232 (1977) [hereinafter "Williams I"].

[158]Nix v. Williams, 104 S.Ct. 2501 (1984) [hereinafter "Williams II"].

concurrences in both cases, in reaction to Chief Justice Burger's dissent in Williams I and majority opinion in Williams II. He attempts to place the decisions within the context of "Sixth Amendment guarantees that the conviction of the accused will be the product of an adversarial process, rather than the ex parte investigation and determination by the prosecutor" or "be undermined by the strategies of the police," rather than within the context of the exclusionary rule.[159] Despite criticism by Justice White (in Williams II) that Stevens' "lecture" on the unconstitutionality of the officers' questioning is unwarranted given that the four dissenting justices in Williams I (now five in Williams II) had seen nothing wrong with the behavior, Stevens' concern in both concurrences is to note the impact of the decision upon the future conduct of police and prosecutors as well as the societal costs of such prolonged cases.

Tracing the evolution of "effective counsel" cases decided on Sixth Amendment grounds, he reaffirms his earlier evaluation of Williams' transport questioning as being a "critical stage of the proceeding" where "the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen."[160] Unlike the Williams II majority, Stevens is less concerned with the result of the application of the exclusionary rule that allows an obviously guilty person to go free and is more concerned with preserving the integrity of the adversarial process and the burden of proof on the prosecutor to secure evidence in order to convict despite the "blunder" of the police. In comments similar to those he presented in Fourth Amendment exclusionary rule opinions, he suggests that the majority's concern for the societal cost of excluding evidence is far surpassed by "the more relevant cost

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[159]Williams II at 2514.

[160]Williams II at 2515 n.4.

. . . imposed on society by police officers who decide to take procedural shortcuts instead of complying with the law" which cost the state of Iowa 15 years of money and labor in the officer's defense.[161]

Earlier this same term, Stevens concurs in the judgment in United States v. Gouveia yet berates the Court for deviating from the standard affirmed in Williams I interpreting the Sixth and Fourteenth Amendment right to counsel to mean "at least that a person is entitled to the help of a lawyer at or after the time judicial proceedings have been initiated," by adopting a "broad rule, stating that 'the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant.'"[162] In his view, this position rejects the approach taken in a line of cases extending to United States v. Wade where the Court's "Sixth Amendment jurisprudence has turned not on the formal initiation of judicial proceedings but rather on the nature of the confrontation between the authorities and the citizen."[163] He maintains:

> If the authorities take a person into custody in order to interrogate him or to otherwise facilitate the process of making a case against him, then under the rationale of Escobedo, Miranda, and our other cases, the person is sufficiently "accused" to be entitled to the protections of the Sixth Amendment. . . . Thus, when a person is deprived of liberty in order to aid the prosecution in its

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[161]Williams II at 2516. Sickels, supra note 101, at 13-14, uses this case as an example of how Stevens, "characteristically wary of irrelevancies," addresses the facts of a case in relation to the case's constitutional issue in contrast to the other justices whose opinion is affected by emotion over the child-victim. I would not cast Stevens in such a hard light. Rather than distinguishing between "relevant" and "irrelevant," I would suggest that Stevens uses a "more" or "less" relevant standard; this would go along with Sickels' "balancing" theory of Stevens' overall approach.

[162]Supra note 123, 104 S.Ct. at 2300.

[163]Id. at 2301 (citing Wade, 388 U.S. 218, 87 S.Ct. 1926 [1967]).

> attempt to convict him, and when the deprivation is likely to have the intended effect, that person is, in my judgment, "an accused."[164]

Even though this case arrived from a federal court, he does not distinguish between federal or state cases here in interpreting this Sixth Amendment right, but uses both sources to illustrate a seventeen year continuity in Court approach which seems to have begun to detour.

Stevens uses one other Massiah-related case, Patterson v. Illinois, to indicate his exasperation with the Court for refusing to draw "a firm and unequivocal line" specifying when adversarial proceedings begin.[165] In dissent he objects to the Court's rationale for upholding a waiver of the right to counsel for a post- indicted defendant who was questioned by the police (as an "agent of the prosecutor") about the charged crime without the presence of counsel. He believes both ethics and fairness considerations dictate that the Court should make clear to prosecutors and police, as well as the defendant, when protections of the right to counsel under the Sixth Amendment attach. Underlying his dissatisfaction with the Court's reasoning is its position that since the value of an attorney to both the suspect and the accused at pretrial questioning is the same, recitation of Miranda warnings to an indicted person, without also being told more of the "dangers and disadvantages of self-representation," properly treats the defendant no differently from an unindicted individual in custody.[166] To Stevens, this is contrary to earlier decisions where the Court identified "critical stages" in judicial proceedings when Sixth Amendment protections attached; permitting the prosecutor or his agents to advise the defendant of his rights ignores the "adversary posture of the parties"

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[164]Id. at 2302.

[165]108 S.Ct. 2389, 2401.

[166]Id. at 2403.

which should be (but may not be) clear to the defendant.[167] In predicting the possible impact of such a decision, Stevens concludes:

> It is true, of course, that the interest in effective law enforcement would benefit from an opportunity to engage in incommunicado questioning of defendants who, for reasons beyond their control, have not been able to receive the legal advice from counsel to which they are constitutionally entitled. But the Court's single-minded concentration on that interest might also lead to the toleration of similar practices at any stage of the trial. I think it is clear that such private communications are intolerable not simply during trial but at any point after adversary proceedings have commenced.[168]

Along with Michigan v. Harvey, this dissent could be used to show that as he approached his fifteenth year on the high bench Stevens continued in his efforts (along with Brennan and Marshall and sometimes Blackmun) to convince the Court that it should hold criminal justice personnel to high standards of fairness and integrity in pretrial processes rather than encourage what he sees as unethical conduct.

Other Pretrial Concerns

A few opinions can be perused to illustrate Stevens' approach to other pretrial matters. These include prosecutorial concerns such as discovery and plea-bargaining, as well as due process questions regarding the selection of grand jury foremen, the discretion of judges regarding defense counsel and the rights of pretrial detainees. Stevens also addressed issues from federal statutes dealing with preventive detention and speedy trial and a state statute limiting press access to a preliminary hearing.

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[167]Id. at 2404.

[168]Id. at 2415.

One of Justice Stevens' first majority opinions discusses the application of the rule from the state case of Brady v. Maryland that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment."[169] In United States v. Agurs he sets forth three situations where this rule might apply if it was discovered after trial that the prosecution had pretrial knowledge of evidence: if the prosecution knowingly uses perjured testimony, if the prosecution suppresses specifically requested favorable evidence, or if the prosecution withheld unrequested evidence that could have produced reasonable doubt.[170] Stevens writes for the majority that the Brady rule applied to the first two situations, but not the third, based upon the trial judge's firsthand consideration of the omitted evidence taken in the context of the entire record that the defendant was guilty beyond a reasonable doubt. He concludes that "if the suppression of evidence results in constitutional error, it is because of the character of the evidence not the character of the prosecutor."[171] Two subsequent cases purporting to apply the Brady/Agurs analysis prompt Stevens to recall for his brethren the actual holding in Agurs as well as the constitutional law significance of the Brady rule.

In United States v. Bagley, the Court determined that a prosecutor's failure to disclose requested impeachment evidence would be constitutional error only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.[172] From Stevens' vantage point, not only did the Court suggest

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[169]83 S.Ct. 1194, 1196 (1963).

[170]96 S.Ct. 2392 (1976).

[171]Id. at 2400.

[172]105 S.Ct. 3375 (1985).

that a violation of the Brady rule might not be constitutional error (it would be for him), but the Court also made an "unwarranted decision to rewrite the rule itself" by using Agurs' discussion of the materiality of evidence for unrequested evidence instead of the Brady standard of materiality for requested evidence as applicable to the facts of Bagley's case.[173] Agreeing with Justice Marshall that creating the "reasonable probability" standard for requested evidence gives a bad signal to prosecutors to "take a chance" to withhold evidence, he speculates that its use may result in the affirmance of more convictions "despite evidentiary suppression."[174] He appears particularly dismayed at the majority for its watering down of the Brady rule, as reaffirmed in Agurs, that "when the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable."[175] Three years later the Court decided that, absent a showing of bad faith on the part of the police, the failure of the police to preserve potentially useful evidence in a rape case was not a denial of due process of law.[176] Concurring in the judgment, Stevens agrees that the materiality standard from Agurs was properly applied and that the state's failure to turn over the evidence had been evaluated by the jury "in the context of the entire record." Nevertheless, he would not go as far as the majority in requiring a "bad faith" showing:

> In my opinion, there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of

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[173]Id. at 3398-99.

[174]Id. at 3400.

[175]Id.

[176]Arizona v. Youngblood, 109 S.Ct. 333 (1989).

> evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair.[177]

Just as in the right to counsel cases above, Stevens can be seen trying to persuade the Court to understand and follow the reasoning in an opinion he has written for a past majority. It should be noted that he makes no distinction between state and federal cases here in linking the Brady discovery standard with Agurs and Agurs with Youngblood.

Pennsylvania v. Ritchie involved the Sixth Amendment compulsory process and confrontation rights of a defendant charged with child abuse to subpoena state youth protective services records containing confidential child mistreatment and neglect investigation reports for pretrial discovery purposes.[178] The Court supported the Pennsylvania Supreme Court's order to allow the trial judge to examine the records to see if any information therein could have changed the outcome of the trial, but would not support the same order for the defendant's counsel. Justice Stevens, joined in dissent by Justices Brennan, Marshall, and Scalia, directs his strongest remarks to the propriety of the Court's premature review of this case:

> Over the years the Court has consistently applied a strict test of finality to determine the reviewability of state court decisions remanding cases for further proceedings, and the reviewability of pretrial discovery orders. Given the plethora of such decisions and orders and the fact that they often lead to the settlement or termination of litigation, the application of these strict rules has unquestionably resulted in this Court not reviewing countless cases that otherwise might have been reviewed. Despite that consequence--indeed, in my judgment, because of that consequence--I regard the rule as wise and worthy of preservation.[179]

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[177]Id. at 339.

[178]107 S.Ct. 989 (1987).

[179]Id. at 1010.

In answering the majority's fear that if the Court does not review at this time, the defendant's opportunity for having the federal constitutional issue presented would be lost, Stevens echoes Justices Brandeis and Rutledge and recalls the Court's "long tradition of avoiding, not reaching out to decide, constitutional decisions when a case may be disposed of on other grounds for legitimate reasons."[180] Since the Children and Youth Services had not as yet been given the opportunity to refuse the production of the documents, the issue was similar to a series of federal cases dating back to the early 1900s and the rule, as "exemplified" by the 1971 case of United States v. Ryan, that "if disclosure will, in and of itself, be harmful, the remedy is for the individual to decline to produce the documents, and immediately appeal any contempt order that is issued."[181] To the Court's belief that review will "expedite the termination of litigation," Stevens counters that "the efficient enforcement of the finality rule precludes a case-by-case inquiry to determine whether its application is appropriate," and concludes:

> Of course, once the case is here and has been heard, there is natural reluctance to hold that the Court lacks jurisdiction. It is misguided, however, to strain and find jurisdiction in the name of short-term efficiency when the long-term effect of the relaxation of the finality requirement will so clearly be inefficient. If the Court's goal is expediting the termination of litigation, the worst thing it can do is extend an open-ended invitation to litigants to interrupt state proceedings with interlocutory visits to this Court.[182]

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[180]Id. at 1011 (citing Ashwander v. TVA, 297 U.S. 288, 346- 49, 56 S.Ct. 466, 482-483 [1936][Brandeis, J., concurring] and Rescue Army v. Municipal Court, 331 U.S. 549, 571, 67 S.Ct. 1409, 1421 [1947][opinion of Rutledge, W.])

[181]Id. at 1011 (discussing Ryan, 402 U.S. 530, 91 S.Ct. 1580 [1971]).

[182]Id. at 1013.

Such comments regarding the Court's jurisdiction are consistent with remarks on the necessity for the justices to practice judicial restraint made during his confirmation hearings and subsequent speeches.

From his first term on the bench Stevens has been assigned several majority opinions in relatively non-controversial cases dealing with plea-bargaining and due process.[183] However, in Corbitt v. New Jersey[184] he was joined in dissent by Justices Brennan and Marshall in opposing the Court's view that a New Jersey law which imposed a mandatory life sentence upon jury conviction for first degree murder, but allowed judicial discretion for a lesser sentence upon a pretrial plea of nolo contendere, as not violative of the Fifth Amendment right not to plead guilty, the Sixth Amendment right to a jury trial or Fourteenth Amendment right to due process by the state. The majority had distinguished this statutory scheme from that of a federal kidnapping statute reviewed in United States v. Jackson[185] in which the Court declared unconstitutional a death penalty provision which permitted imposition of the death penalty only upon recommendation to the judge by the jury. Stevens, on the other hand, sees New Jersey's statute as a threat to the Fifth Amendment right against self-incrimination:

> The concept of a "false" not-guilty plea has no place in our jurisprudence. A defendant has a constitutional right to require the State to support its accusation with evidence. He is therefore given an unqualified right--before trial when he retains the presumption of innocence--to plead not guilty. Because entry of such a plea cannot at once be criminally punishable and

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[183]Henderson v. Morgan, 96 S.Ct. 2253 (1976); United States v. Timmreck, 99 S.Ct. 2085 (1979); United States v. Goodwin, 102 S.Ct. 2485 (1982); Mabry v. Johnson, 104 S.Ct. 2543 (1984). See infra Chapter Six, for comments concerning the role of prosecutor from latter two cases.

[184]99 S.Ct. 493, 502 (1978).

[185]390 U.S. 570, 88 S.Ct. 1209 (1968).

> constitutionally protected, a statute that has no other purpose or effect than to penalize assertion of the right not to plead guilty is "patently unconstitutional." The Court so held in United States v. Jackson, 390 U.S. 570, 581, 88 S.Ct. 1209, 1216, 20 L.Ed. 2d 138, and that holding is dispositive of this case.
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> Today, however, the Court decides that a defendant who has been convicted after a full trial may be punished not only for the crime charged in the indictment but additionally for entering a "false" plea of not guilty. The holding in Jackson, though not specifically overruled, has been divorced from the rationale on which it rested.[186]

This rationale appears to be that a defendant who pleads guilty should be subject to the same punishment as one who wishes to stand trial. He does not agree with the Court that the statute is similar in effect to the state's economic, efficiency and punitive interests in plea bargaining generally, for the give and take and individualization of the bargaining process "does not mandate a different standard of punishment depending solely on whether or not a plea is entered."[187] Nor does he believe that "The right of the defendant to stand absolutely mute before that bar of justice and to force the government to make its case without his aid [which has] been accepted since the earliest days of the Republic," be violated by state legislation, in contradiction to Jackson.[188] Here again, it is possible to observe Stevens' frustration with the Court when it deviates from historic tradition as well as what he considers to be sound precedent. He finds it appropriate to evaluate federal and state statutory provisions similarly. When it comes to some grand jury issues, he also has treated federal and state cases alike.

Two very short dissents from cases concerning discrimination in the selection of grand jury foremen provide a glimpse of another angle by which Stevens may approach a case. In

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[186]Id. at 502 (notes omitted).

[187]Id. at 504 (notes omitted).

[188]Id.

Rose v. Mitchell the Court reconsidered, and then rejected, Justice Jackson's 1950 argument that racial discrimination in the selection of the grand jury should constitute harmless error where the defendant had been convicted by a fairly selected petit jury, when applied to the selection of the grand jury foreman by a Tennessee circuit court judge.[189] Five years later in Hobby v. United States, the Court agreed that the selection of federal grand jury foremen should also meet the requirements of cross-section representation as assured by the Due Process Clause, but that discrimination against minorities and women in the foreman selection did not violate a white male defendant's due process rights.[190] Twice admitting that he could have been persuaded by Justice Jackson's arguments had he been on the high bench with him in 1950, and that he may still have some inclinations toward his position, Stevens nevertheless stresses the importance of the principle of stare decisis in deciding both cases. In Rose he shows respect for the majority's consistency in interpretation of the Fourteenth Amendment Due Process Clause over a one hundred year period and votes to reverse the conviction, and in Hobby he insists that if the Court demands that state grand jury selection adhere to due process standards than so must the federal system in order to maintain the "integrity of the judicial process."[191]

Dissenting opinions from a state case and a federal case penned in 1979 can be used as examples of Stevens' concern for giving too much discretion or not enough guidance to judges

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[189]99 S.Ct. 2993 (1979)(discussing Cassell v. Texas, 339 U.S. 282, 298, 70 S.Ct. 629, 634 [1950][Jackson, R., dissenting]).

[190]104 S.Ct. 3093 (1984).

[191]99 S.Ct. at 3020; 104 S.Ct. at 3105.

so as not to threaten the due process rights of pretrial defendants. In Leis v. Flynt[192] the Court upheld an Ohio judge's ruling to deny a pro hac vice request to allow out of state lawyers to aid in the defense of Larry Flynt in an obscenity case. Stevens sees this action as "capricious" and immediately denounces the Court for its summary reversal. In responding to the majority's appraisal in terms of whether a right or privilege under the "liberty or property language of the Fourteenth Amendment" has been threatened by such a ruling, Stevens suggests that this matter be viewed by "the nature of the activity and the implicit promise Ohio has made to these petitioners."[193] This leads him to conclude that, because "the nature of law practice has undergone a metamorphosis during the past century" in the creation and need for interstate and multi-state law firms to accommodate the federal questions brought before state criminal courts, because "[h]istory attests to the importance of pro hac vice appearances," and because they have become "routine" and "customary" throughout the country as well as Ohio "for at least a quarter of a century," that "the interests of justice would be served by allowing the defendant to be represented by the counsel of his choice."[194] Since the Ohio Supreme Court had merely dismissed a writ of mandamus and had not ruled on the merits of the petitioners claim, it was Stevens' view that past assurance by Ohio courts "to out-of state practitioners that they are welcome in Ohio's courts unless there is a valid articulable reason for excluding them . . . is adequate to create an interest that qualifies as 'property' within the Due Process Clause."[195] Looking at Ohio case law, Stevens draws the inference that an

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[192]99 S.Ct. 698 (1979).

[193]Id. at 704.

[194]Id. at 705-6.

[195]Id. at 706.

arbitrary ruling by a state judge constitutes reversible error, and concludes that since the actions of the judge in the Flynt case had been "capricious," Due Process demanded some opportunity for them or their client to compel reasons for the judge's denial.[196] This opinion is more important as a source for Stevens' approach to Due Process questions and his critique of the Court's approach, for he says:

> The mode of analysis employed by the Court in recent years has treated the Fourteenth Amendment concepts of "liberty" and "property" as though they defined mutually exclusive, and closed categories of interests, with neither shedding any light on the meaning of the other. Indeed, in some of the Court's recent opinions it has implied that not only property but liberty itself does not exist apart from specific state authorization or an express guarantee in the Bill of Rights. In my judgment this is not the way the majestic language of the Fourteenth Amendment should be read.
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> As is demonstrated by cases like Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042; Morrissey v.Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484; Bell v. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90, and Mr. Justice Frankfurter's concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162, 71 S.Ct 624, 643, 95 L.Ed. 817, judicial construction of the words "life, liberty, or property" is not simply a matter of applying the precepts of logic to accepted premises. Rather, it is experience and judgment that have breathed life into the Court's process of constitutional adjudication.[197]

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[196]This view of giving too much discretion to state judges here should be contrasted to his position regarding trial judges generally. See Wheat v. United States, 108 S.Ct. 1692 (1988)(Federal district court's refusal to permit defendant to substitute counsel for that of codefendant was within its discretion and did not violate defendant's Sixth Amendment rights.) "In my view, deference to the trial judge is appropriate in light of his or her greater familiarity with such factors as the ability of the defendant knowingly and voluntarily to waive a potential conflict (including the possibility that a codefendant may be exerting undue influence over the defendant), the character of the lawyers, the particular facts of the case, and the availability of alternative counsel of a like caliber. . . . [A]lthough I agree with the Court's premise that district judges must be afforded wide latitude in passing on motions of this kind, in this case it is abundantly clear to me that the District Judge abused his discretion and deprived this petitioner of a constitutional right of such fundamental character that reversal is required." id. at 1704 (Stevens, J., dissenting).

[197]99 S.Ct. at 708. In a note he includes reference to a quote from his opinion in a prisoner rights case (Meachum v. Fano, 96 S.Ct. 2532, 2241), his first opportunity on the Court to

Later this same term the Court determined the constitutionality of various restrictive practices conducted toward pretrial detainees in a federal facility.[198] In dissent, Stevens recalls his comments above from Flynt and rejoices that "without the help of any statute, regulation, or express provision of the Constitution, the Court has derived the innocent person's right not to be punished from the Due Process Clause itself." and has "abandoned its parsimonious definition of the 'liberty' protected by the majestic words of the Constitution."[199] Despite the setting of this standard, however, the majority found acceptable reasons for the holding facility's application of the same restrictions on both pretrial and convicted detainees. Stevens views the restrictions as punitive and as such, not properly applicable to those who have not been found guilty of anything but the inability to make bail. He scoffs at the idea that the majority cannot seem to fashion a standard for the courts to follow by which to determine whether "a particular restraint serves the legitimate, regulatory goal of ensuring a detainee's presence at trial and his safety and security in the meantime, or the unlawful end of punishment."[200] He suggests following the criteria set forth in Kennedy v. Mendoza-Martinez which gives guidance to judges by providing "objective criteria" to use in determining whether official action is punitive even absent the availability or trustworthiness of "objective manifestation" of legislative or administrative purpose, noting that some state courts

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articulate his approach to "liberty," and reaffirms this view, id. at n.28.

[198]Bell v. Wolfish, 99 S.Ct. 1861 (1979).

[199]Id. at 1895.

[200]Id. at 1897.

have used such criteria for many years.[201] Undoubtedly, to him this Court has done only half its job in applying Due Process to this case:

> It is admittedly easier to conclude that the Due Process Clause prohibits preconviction punishment than it is to articulate a standard for determining if such punishment has occurred. But if the standard is to afford any meaningful protection for the citizen's liberty, it must require something more than either an explicit statement by the administrator that his rule is designed to inflict punishment, or a sanction that is so arbitrary that it would be invalid even if it were not punitive. However, the test is phrased, it must at least be satisfied by an unexplained and significant disparity between the severity of the harm to the individual and the demonstrated importance of the nonpunitive objective served by it.[202]

Since these early cases Stevens has maintained concern for clarity and consistency in the application of due process to pretrial detainees. This can particularly be seen in dissenting opinions questioning the constitutionality of the preventive detention provisions of the federal Bail Reform Act of 1984.

Stevens issued a short dissent following the Court's 1987 determination that the preventive detention provision of the Bail Reform Act of 1984 was not violative of due process nor the excessive bail clause of the Eighth Amendment.[203] For the most part, he agreed with

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[201]Id. at 1899, 1899 n.19 (discussing standard from Mendoza- Martinez, 372 U.S. 144, 168-9, 83 S.Ct. 554, 567-68 [1963]: "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment--retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.").

[202]Id. at 1905.

[203]United States v. Salerno, 107 S.Ct. 2095, 2112 (1987) (concerning 18 U.S.C.A. sec. 3142(e)).

reasons set forth by Justice Marshall that the Act's "pretrial detention on the basis of future dangerousness is unconstitutional," yet left some leeway to government power generally by maintaining a view he had expressed in a 1974 circuit court opinion that "[t]here may be times when the government's interest in protecting the safety of the community will justify the brief detention of a person who has not committed any crime."[204] He is particularly critical of Solicitor General Charles Fried for his apparent rationale in pursuing this case since one of the litigants had already been convicted of other charges and the other litigant was presently "at large," and suggests that perhaps "the Government is more interested in litigating a 'test cast' than in resolving an actual controversy concerning respondents' threat to the safety of the community."[205] Three year later the Court ruled on the application of this preventive detention provision, not finding a constitutional violation when the government held a detainee for thirteen days and then conducted the prescribed detention hearing.[206] Stevens' dissenting opinion exemplifies his meticulous, yet somewhat conventional, approach to cases involving federal statutory interpretation: a review of the historic context in which the statute was passed, the legislative history of the provision in question, the provision's literal context, and the holding of relevant Supreme Court cases on point. He begins with very strong admonition that "it is well to remember the magnitude of the injury that pretrial detention inflicts and the

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[204]Id. at 2112. See United States v. Greene 497 F.2d 1068, 1088-1089 (CA7 1974)(Stevens, J., dissenting), wherein, he determined that a federal judge has discretionary powers to briefly detain a dangerous person under English and American common law as well as the Tenth Amendment.

[205]107 S.Ct. at 2113.

[206]United States v. Montalvo-Murillo, 110 S.Ct. 2072 (1990) (regarding 18 U.S.C.A. sec. 3142).

departure it marks from ordinary constitutional governance" as well as its relation to "the totalitarian state," and then recalls that the pretrial detention sections of the statute had been "enacted against [an] historic backdrop" of two hundred years of federal law protecting one's freedom before conviction. [207] Looking at the House and Senate Reports, he cites specific references indicating Congress's recognition of the necessity for "carefully prescribed stringent procedures to govern this extraordinary departure from the guarantee of liberty normally accorded presumptively innocent individuals," and then, after quoting the exact text of Section 3142 subsections (e) and (f), he notes how the procedures had not been followed for Montalvo-Murillo despite the obvious conclusion that "the clear terms of the statute demand strict adherence."[208] In Salerno the Court had deemed this federal preventive detention practice as constitutional because of the "procedural protections it affords," but in practice uses a harmless-error analysis to find the tardiness in the use of the protections inconsequential to the overall goal of public safety. Stevens chides the Court for this approach as well as for its misunderstanding of the separation of powers expressed by Justice Kennedy:

> The Court vigorously declines to "satisfy some perceived need to coerce the courts and the Government into complying with the statutory time limits," in the belief that compliance can be presumed "without the threat that we must embarrass the system by releasing a suspect certain to flee from justice." This analysis incorrectly assumes that the courts have discretion over such matters. Congress has "perceived" the need to ensure that detention hearings are held promptly and has shouldered the responsibility for any "embarrassment" by precisely defining the authority of courts to order pretrial detention.[209]

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[207] Id. at 2080-81.

[208] Id., at 2081-82.

[209] Id. at 2083 n.11.

and recalls that a federal prosecutor has had, and continues to have, a number of options open to him by which to assure both the defendant's appearance and the public's safety. In one last swipe at the majority's decision and its possible impact, Stevens concludes: "Congress has written detailed legislation in a sensitive area that requires the Government to turn square corners. The Court today, however, permits federal prosecutors to violate the law with impunity."[210] Evidently Stevens was quite aware of the political climate and focus of the Bail Reform Act of 1984 and its particular target of organized crime and drug trafficking violators, yet did not wish to give cues to federal prosecutors that they had unlimited power. However, ten years earlier Congress was more concerned with long delays in the processing of federal arrestees and passed the Speedy Trial Act of 1974. Stevens has a different set of concerns regarding the application of this statute.

Three opinions illustrate his high regard for and the respect to be accorded to the lower court records in determining whether provisions of the federal Speedy Trial Act have been violated. During his second term on the court Stevens filed a dissent opposing Justice Marshall and seven other justices who had determined that allowing eighteen months between the commission of a crime and a federal indictment did not violate due process.[211] As he will do on a regular basis, Stevens finds fault with the Court for deciding on an issue not disclosed by the facts of the case from the records of both the District and Appeals Courts. Here the majority determined that "the Government had postponed action . . . to await the results of additional investigation," as suggested by the Government in its appellate briefs,

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[210]Id. at 2084.

[211]United States v. Lovasco, 97 S.Ct. 2044 2053 (1977).

after accepting the fact that there was "no evidence concerning the reasons for delay in the record" of the District Court; Stevens notes that "it is not the business of appellate courts to make decisions on the basis of unsworn matter not incorporated in a formal record."[212] To set forth the proper perspective, Stevens reminds the Court:

> The requirement of speedy justice has been part of the Anglo-American common law tradition since the Magna Carta. It came to this country and was embodied in the early state constitutions, see the Massachusetts Constitution of 1780, Part I, Art. XI, and later in the Sixth Amendment to the United States Constitution. . . .
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> If that right is not honored in a case of this kind, the basic values which the Framers intended to protect . . . and which motivated Congress to enact the Speedy Trail Act of 1974, will become nothing more than managerial considerations for the prosecutor to manipulate.[213]

Yet in an apparent turnaround five years later, the Court heard an appeal from the notorious triple murder case involving Dr. Jeffrey MacDonald's claim of violation of speedy justice because of a five year delay between the army's dismissal of murder charges in 1970 and the return of a federal indictment in 1975.[214] Though conceding to several points in Justice Marshall's dissent finding a violation of due process, Stevens concludes that in a case such as this which is very "close" to call, "the interest in allowing the Government to proceed cautiously and deliberately before making a final decision to prosecute for such a serious

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[212]Id. at 2053.

[213]Id. at 2054.

[214]United States v. MacDonald 102 S.Ct. 1497 (1982). MacDonald said that he and his family were attacked by burglars as they slept in Army housing. His pregnant wife and two daughters were brutally murdered.

offense is of decisive importance for me in this case."[215] One could assume that Stevens may have been influenced by the fact that the defendant was not in custody nor were formal charges pending during the interim. This was not the situation in a 1988 case, however.

Where Justices Marshall and Stevens had been on opposite sides in the first two cases, they came together in dissent when the Court decided that a federal judge had abused her authority in dismissing an indictment on the grounds that the prosecutors violated the defendant's right to a speedy trial.[216] Going back to his original premise in Lovasco that appellate judges should rely upon the actual record and vantage point of the trial court judge, Stevens briefly assumes the role of a district court judge and then chastises the Court for putting unrealistic demands upon the judge:

> On the record before us, I do not know whether I would have dismissed counts I and II with prejudice had I been confronted with the issue as a district judge. As a district judge, I would know that a dismissal without prejudice would be a rather meaningless sanction unless, of course, the statutes of limitations had run, in which event the choice between dismissal with and without prejudice would itself be meaningless. I would also know--especially if I had foreknowledge of the opinion announced today--that I could best avoid reversal by adopting a consistent practice of dismissing without prejudice, even though such a practice would undermine the years of labor that have gone into enacting and construing the Speedy Trial Act. I would have assumed, however, that the choice of remedy was one that was committed to my discretion and that if I set forth a sensible explanation for my choice that it would withstand appellate review.[217]

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[215]Id. at 1504.

[216]United States v. Taylor, 108 S.Ct. 2413 (1988).

[217]Id. at 2426. (See supra note 211.)

Stevens concludes that the judge met her statutory responsibilities in giving adequate reasons for the dismissal and fulfilled the letter and spirit of the law as intended by Congress:

> Congress enacted the Speedy Trial Act because of its concern that this Court's previous interpretations of the Sixth Amendment right to a speedy trial had drained the constitutional right of any "real meaning." The Judiciary Committees in both the Senate and the House of Representatives recognized that unless violations of the Act generally required dismissals with prejudice--as was the rule in several States--the Act would be unlikely to accomplish its purposes. As the Court correctly notes, this view was compromised by amendments during the floor debates. The compromise, however, was one that was intended to give district judges discretion to choose the proper remedy based on factors identified in Judge Rothstein's opinion in this case. If that discretion is not broad enough to sustain her decision, as the Court now concludes, the statute is surely nothing more that the "hollow guarantee" that she described.[218]

Stevens' respect for legislative protection of rights of the accused can also be seen in cases involving state statutory law and illustrated in a 1986 opinion.

Like the majority of states, California allows preliminary hearings generally open to the public, but magistrates are permitted to close preliminary hearing and seal preliminary transcripts in order to assure a defendant's fair trial. In a widely-known, multiple murder case a magistrate granted the defendant's requests (unopposed by the State) to close preliminary proceedings and at the end of a 41-day hearing, to seal the transcript. The Press Enterprise Co. objected to the sealing of the transcript and was denied a writ of mandate by all three levels of state court. In a 7-2 decision, The United States Supreme Court reversed the California Supreme Court, objecting to the court's failure to consider the public's First

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[218]Id. at 2427-28 (notes and references to legislative history omitted).

Amendment right of access to public proceedings.[219] Justice Stevens, joined by Rehnquist, were the sole dissenters. Though a discussion of Stevens' First Amendment jurisprudence is beyond the scope of this work, his dissent does provide a glimpse of how he views this issue generally and when it relates to the state criminal process, as well as a review of the Court's public access jurisprudence. Nevertheless, here his focus seems to be to make a distinction between government restraint upon the right to publish information already in press possession, for which government must supply an "objective of the highest order attainable in no less intrusive way," and the right to acquire access to information about the conduct of public affairs, for which denial "must be supported by some legitimate justification that serves the interest of the public office."[220] In his observation, the Court has interpreted the latter right more narrowly, but fails to do so here. He saves his biggest critique for the majority's appeal to "experience and logic" in using its past cases and references to American common law to justify access to pretrial proceedings when these sources clearly involve access to trial proceedings, citing Justice Stewart's analysis of the distinction in his majority opinion for Gannett Co. v. DePasquale.[221] Similarly, he finds weakness in the Court's apparent conclusion that since the present state common law trend is to provide open pretrial hearings, a different approach should be rendered unconstitutional. To him this contradicts the historical respect due to state diversity and ignores the fact that most of the state court decisions

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[219]Press Enterprise Co. v. Superior Court of California for Riverside County, 106 S.Ct. 2735 (1986).

[220]Id. at 2745-46.

[221]Id. at 2748 (quoting Stewart in 99 S.Ct. 2898, 2909-10 [1979][denying press access to pretrial involuntary confession suppression hearing]).

"collected by the Court hold that the right to a public preliminary hearing is personal to the accused," that access can be denied "by a showing of potentially prejudicial publicity equivalent to or less than that required of California," and that the reasoning "is heavily dependent on this Court's cases granting access to criminal proceedings."[222] Rather than likening the California probable cause hearing to a criminal trial deserving of openness, Stevens would liken this hearing "as conducted in California" to a federal grand jury in its determination of probable cause and glibly suggests that if the Court's logic is pressed to its extreme, it could also include accessibility to grand juries! He would agree with the California Supreme Court and apply a different standard in interpreting the access statute:

> The presence of a legitimate reason for closure in this case requires an affirmance. The constitutionally-grounded fair trial interests of the accused if he is bound over for trial, and the reputational interests of the accused if he is not, provide a substantial reason for delaying access to the transcript for at least the short time before trial. By taking its own verbal formulation seriously, the Court reverses--without comment or explanation or any attempt at reconciliation--the holding in Gannett that a "reasonable probability of prejudice" is enough to overcome the First Amendment right of access to a preliminary proceeding. It is unfortunate that the Court neglects this opportunity to fit the result in this case into the body of precedent dealing with access rights generally. I fear today's decision will simply further unsettle the law in this area.[223]

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[222]Id. at 2749, 2749 n.6.

[223]Id. at 2751-52.

Criminal Procedures: Trial and Post-Conviction

Trial Matters

The focus of this section is to study Justice Stevens' responses to criminal trial matters, particularly those related to trial by jury, such as individual and public access to jury trial, jury size and non-unanimous verdicts, assuring the impartiality of a jury, and evaluation of proper jury instructions. Other concerns related to criminal trials addressed by Stevens include prosecutorial use of post-Miranda-silence, the effectiveness of defense counsel, as well as recharging and double jeopardy, and capital sentencing. Relevant to a discussion of court outcomes is the judicial approach taken to resolve questions, especially for those cases which arrive on a writ of habeas corpus and on collateral review, or those cases where the majority uses harmless error analysis. On a number of occasions Stevens articulated what he believes to be proper standards of analyses for post-conviction procedures and some of those opinions will be examined.

Jury Trial Concerns

Despite the fact that more than a majority of all criminal cases in the United States are disposed of before trial, the right to trial by jury and the nature of the American jury continue to be of interest to the contemporary researcher.[224] One such study suggests that the jury

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[224]M. F. Kaplan, How Do People Influence in Jury Deliberation? 2 Behav. Sc. & L. 407 (1984); M. A. Kotler, Reappraising the Jury's Role as Finder of Fact, 20 Ga. L. Rev. 123 (1985); R. S. Kuhlman, C. G. Pontikes, and W. J. Stevens, Jury Trial, Progress, and Democracy, 14 J. Marshall L. Rev. 679 (1981); J. P. Levine, The Legislative Role of Juries, Am. B. Found. Res. J. 605 (1984); C. Nemeth, From the 50's to the 70's: Women in Jury Deliberation, 39 Sociometry 293 (Dec. 1976); P. Rowe, The "Voir Dire" and the Jury, Crim. L. Rev. 226 (1986); S. R. Shapiro, Juries Under Judgment, 13 Human Rights 32 (Fall 1985).

can be seen as citizen participation in policy-making since it renders the general policies of the legislatures and the courts "adaptable to changing conditions and particular values," by means of verdicts (law validation) and acquittals (law nullification); it becomes the "black box" of decision-making using the "input" of facts and law of a case to produce the verdict and/or sentence "output."[225] Any procedural modification in the jury system, then, affects its output; the impact of procedural change can be studied over time.[226] Most changes or modifications regarding the jury system are brought about through legislative enactment or court rule change. However, since 1968 when the United States Supreme Court in Duncan v. Louisiana[227] extended the right to trial by jury to state defendants in serious criminal cases, the federal judiciary and particularly the Burger Court have also been instrumental in "redefining the role of the jury."[228] In several notable cases, decided prior to Stevens'

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[225]G. Jacobsohn, Citizen Participation in Policy-making: the Role of the Jury, JP 73, 81-87 (Fall 1977).

[226]S. Beale, Integrating Statistical Evidence and Legal Theory to Challenge the Selection of Grand and Petit Juries, 46 Law & Contemp. Probs. 269 (Autumn 1983); S. Gillers, Proving the Prejudice of Death-qualified Juries after "Adams v. Texas", 47 U. Pitt. L. Rev. 219 (Fall 1985); J. Jacoby and R. Paternoster, Sentencing Disparity and Jury-Packing: Further Challenges to the Death Penalty, 73 J. Crim. L. 379 (Spring 1982); P. Lermack, No Right Number? Social Science Research and the Jury-Size Cases, 54 N.Y.U. L. Rev. 951 (1979); S. S. Nagel, Deductive Modeling and Determination of Optimum Jury Size and Fraction Required to Convict, Wash. U. L.Q. 933 (1975); D. Suggs and B. D. Sales, Juror Self-Disclosure in the Voir Dire: A Social Science Analysis, 56 Ind. L.J. 245 (Winter 1981); H. Zeisel and S. S. Diamond, Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court, 30 Stan. L. Rev. 491 (1978).

[227]391 U.S. 145, 88 S.Ct. 1444 (1968).

[228]M. S. Schultz, The Jury Redefined: A Review of the Burger Court Decisions, 43 Law & Contemp. Probs. 8 (Autumn 1980).

arrival, the Court ruled that it is unconstitutional for states to deny persons who oppose the death penalty from the jury;[229] that the states need not provide jury trials for those accused of petty offenses unless imprisonment for more than six months is authorized;[230] that a jury of twelve is not required by the Constitution,[231] or that a jury verdict in a non-capital case need not be unanimous as long as the jury represents a cross-section of the community;[232] that due process requires a state judge to interrogate perspective jurors upon the subject of racial prejudice;[233] and that a state may not maintain a jury selection process which systematically excludes women from jury service unless they request it.[234] Several subsequent cases involving the interpretation of the rights associated with trial by jury look to these and earlier cases for guiding principles. It is imperative to give attention to the directions and perspectives of the Court generally and Stevens particularly if one accepts the premise that policy struck at this level ultimately affects the policy-making of trial juries.

In an opinion penned during his first term on the Court, Stevens mustered the support of three colleagues to oppose the majority's determination of the constitutionality of

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[229]Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968).

[230]Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886 (1970).

[231]Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893 (1970).

[232]Apodaca v. Oregon, 406 U.S. 404, 92 S.Ct. 1628 (1972).

[233]Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848 (1973).

[234]Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692 (1975).

Massachusetts's two-tiered court system under which a person is tried first without jury yet is entitled to a de novo jury trial at a second trial level[235] and Justice Blackmun's reliance upon a prior federal case drawing a distinction between the Supreme Court's jurisdiction over the operation of federal and state courts.[236] While the former must comport with Article III, Sec. 2, cl. 3 of the Constitution in providing jury trials to the accused, the latter may set its own specifications for the exercise of the right to jury trial under the Fourteenth Amendment, just as long as the procedure is "fair and not unduly burdensome." Contrary to the Court's reading of the case and the distinction it attempts to make between jury trial guarantees, Stevens urges that the prior holding actually "reflected the Court's appraisal of the value of the right to trial by jury," which the present Court appears to ignore in not addressing why Massachusetts mandates the non-jury proceeding first, thereby, "placing a burden on the exercise of the constitutional right."[237] He goes on to outline the extent of this burden regardless of whether the defendant pleads guilty and then proceeds to a jury trial, or, submits to a non-jury trial and then a jury trial.[238]

When it comes to public access to jury trial proceedings, Stevens tends to agree with the majority in its attempt to make distinctions in cases where First Amendment rights are exerted but may appear to conflict with Sixth Amendment rights. In one such situation, during a

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[235]Ludwig v. Massachusetts, 96 S. Ct. 2781, 2789 (1976) (Stevens, J., dissenting).

[236]Callan v. Wilson, 127 U.S. 540, 8 S.Ct. 1301 (1888).

[237]Ludwig, 96 S.Ct. at 2788.

[238]Id. at 2790-91. See quote infra Chapter Six p. for this description.

rape/murder case, a California newspaper sought transcripts of the venire questioning that had been closed to the public for all but three days on the determination by the trial judge that the defendant's right to a fair trial and the prospective jurors' right to privacy needed to be protected. The Court rejected such closure since it had not been accompanied by "findings adequate to support closure . . . [or] consideration of alternatives to closure."[239] Stevens agrees on the grounds that prior cases have established "that a claim to access cannot succeed unless access makes a positive contribution to [the] process of self-governance," and asserts that, "Here, public access cannot help but improve public understanding of the voir dire process, thereby enabling critical examination of its workings to take place."[240] However, he endorses the Court's concern for the privacy rights of jurors and condones the discretionary use of existing judicial procedures to protect these rights.

Some of the Court's prior decisions on jury size and non- unanimous verdicts left some questions unanswered which were resolved by Ballew v. Georgia,[241] which overturned the conviction of a person found guilty of a state misdemeanor charge by a five- member jury, and

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[239]Press-Enterprise Co. v. Superior Court, 104 S.Ct 819 (1984).

[240]Id. at 828.

[241]98 S.Ct. 1029 (1978). Recalling its reasoning in Williams v. Florida, supra note 231, Justice Blackmun's plurality opinion noted how the Court there had looked to history and the function of the jury to conclude that "12" was an historic accident and that a six person jury was acceptable. In addition, for Ballew, he accepted the results of contemporary empirical evidence on small group decision-making and jury size to conclude that the accused had been put at a disadvantage by being subject to a smaller than six person jury.

a related case, Burch v. Louisiana,[242] wherein the Court concluded that a non-unanimous six person jury verdict in a state criminal trial for a non-petty offense violated the accused's Sixth and Fourteenth Amendment right to trial by jury. Stevens, alone with Justice Blackmun, made up the plurality in Ballew (the other justices wrote concurrences), and he joined the majority in Burch, but Stevens wrote concurring statements for both cases reiterating his objection to state obscenity statutes as applied in the cases.[243] In 1980, a Supreme Court plurality used Brown v. Louisiana[244] to announce that the ruling of Burch was to be given retroactive application. Thus, the Court was willing to uphold state experimentation with juries, but held the line at six person unanimous jury verdicts.

In an attempt to assure the accused an impartial jury, the Court has rendered decisions pertaining to the composition of the venire and to the questions put to potential jurors during voir dire, such as those involving gender, ethnicity and race, or death penalty issues. In 1979, Stevens joined seven of his colleagues in striking down a Missouri statutory provision that automatically exempted from jury service any woman who requested not to serve.[245] In

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[242]99 S.Ct. 1629 (1979). Justice Rehnquist contrasted Louisiana with twenty-four other states that allow six person juries and noted that only Louisiana and Oklahoma allow non-unanimous verdicts.

[243]See infra notes 409-442, and accompanying discussion for Stevens' position regarding the use of criminal statutes to punish certain behaviors.

[244]100 S.Ct. 2214 (1980)(Stevens joined Powell, concurring in the judgment).

[245]Duren v. Missouri, 99 S.Ct. 664 (1979). Acknowledging that the state was unable to show a significant interest in upholding this legal exemption from jury duty, Justice White (for all but Rehnquist) urged that lack of women participants "dilutes the quality of community judgment," and that the under-inclusiveness of this group "of such magnitude and distinctiveness" violated the cross-section requirement. This decision was held retroactive to juries sworn after Taylor v.

three subsequent cases the Court determined: that it was reversible error for a federal trial court in a criminal case to reject the defendant's request that the court's voir dire of prospective jurors inquire into the possibility of racial or ethnic prejudice against the defendant "only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury;"[246] that when viewed in operation, the Kentucky jury system was in violation of the Equal Protection Clause if black veniremen are struck from the jury in a trial of a black defendant on the assumption that they will be biased in favor of the defendant;[247] and that, though a white defendant had standing to object, on fair cross section grounds, to a prosecutor's use of peremptory challenges to exclude blacks from the jury, the Sixth Amendment fair cross section requirement does not prevent either side from exercising its peremptory strikes in order to exclude cognizable racial or other groups from a jury which is finally empaneled.[248] In the first case, Stevens questions the plurality's restrictive interpretation of a 1931 federal case requiring a federal judge to inquire into the possible racial bias of a potential juror if the defendant is a member of a minority group.[249] In his analysis, Stevens suggests that the Court had ignored both the context in

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Lousiana, supra note 234, by Lee v. Missouri 99 S.Ct. 710 (1979)(per curiam)(Rehnquist, W., and Powell, L., dissenting).

[246]Rosales-Lopez v. United States, 101 S.Ct. 1629 (1981). In this case the defendant was of Mexican descent, charged with aiding the smuggling of illegal aliens.

[247]Batson v. Kentucky, 106 S.Ct. 1712 (1986).

[248]Holland v. Illinois, 110 S.Ct. 803 (1990).

[249]Rosales-Lopez, 101 S.Ct. at 1638 (discussing Aldridge v. United States, 283 U.S. 308, 51 S.Ct. 470 [1931]).

which that case had been decided (Chief Justice Hughes majority opinion had cited numerous state court decisions up to that time requiring such questioning), and "the overwhelming majority of Federal Circuit Judges" (including himself in 1973) who, when faced with a minority defendant, have posed such questions.[250] Stevens joined the majority in Batson, but was pressed to offer a defense against charges by Chief Justice Burger that he had taken this position contrary to strong statements he had made in the past criticizing the Court for entertaining a question not present in the certiorari petition.[251] Stevens reaffirmed his usual position as parroted by the Chief Justice, but found "his out" for Batson in noting that in its defense of the Kentucky Supreme Court decision the state had relied upon Equal Protection grounds and amicus curiae briefs filed by both state prosecutors and the U.S. Solicitor General contained similar bases. If that was not good enough, Stevens merely admits that he believes the Court "acts wisely" in resolving an issue that "has been percolating in the courts for years."[252] Four years later, after the arrival of Justices Scalia and Kennedy, Stevens finds himself in the minority in attempting to get the court to apply the principle established in Batson to Holland. In his view, "A jury that is the product of such a racially discriminatory selection process cannot possibly be an "impartial jury" within the meaning of the Sixth Amendment; not only should the petitioner "be permitted to prove that the exclusion of black jurors violated the Equal Protection Clause" . . . but also "be entitled to prove that the State

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[250]Id. at 1640. See United States v. Booker, 480 F.2d 1310, 1310-1311 (CA7 1973)(Stevens, J.).

[251]Batson, supra note 247, 106 S.Ct. at 1729.

[252]Id. at 1730.

violated the fair-cross-section principle of the Sixth Amendment."[253] Taking his argument one step further, he flushes out his reading of the many cases involving the fair-cross-section principle and urges that "the fair-cross-section requirement mandates the use of a neutral selection mechanism" which actually operates "to generate a jury representative of the community.," which is "one that is not arbitrarily skewed for or against any particular group or characteristic."[254]

Because of confusion in both state and lower federal courts, the Court attempted to clarify their earlier ruling in Witherspoon v. Illinois which allowed for the exclusion of prospective jurors from death penalty cases for cause if they stated they could not under any circumstances vote for the imposition of death. Stevens agreed with the Court in its determination that the only grounds for dismissing a veniremen for negative attitudes regarding the death penalty would be if the potential juror convinced the judge through inquiry that their beliefs would ultimately render them incapable of finding facts and applying the law to the case before them,[255] and that a judge cannot excuse a juror, for merely admitting to an antipathy towards the death penalty,[256] but joined the dissenters when the Court further specified that the "Witherspoon excludable" should not be viewed as a distinctive group, the elimination from

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[253]110 S.Ct. at 820, 822.

[254]Id. at 824, 826.

[255]Adams v. Texas, 100 S.Ct. 2521 (1980).

[256]Lockett v. Ohio, 98 S.Ct. 2954 (1978).

the jury of which would be a violation of the cross section requirement of the Sixth Amendment.[257]

Thus, it appears that though generally Stevens indicates confidence in the appraisals of trial court judges, in the above cases he is more reluctant than the Court to rely upon their appraisals for impartiality of veniremen.[258]

Among that which is crucial to the outcome of a jury trial is the content of the judge's instructions to the jury. Writing for the majority at the beginning of his first full term on the bench, Stevens set forth the standards for evaluating error:

> An appraisal of the significance of an error in the instructions to the jury requires a comparison of the instructions which were actually given with those that should have been given. Orderly procedure requires that the respective adversaries' views as to how the jury should be instructed be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error. It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.
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> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," Cupp v. Naughten, 414 U.S., at 147, not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned,'" id., at 146. . . . An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law.[259]

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[257]Lockart v. McCree, 106 S.Ct. 1758 (1986).

[258]See also Patton v. Yount, 104 S.Ct. 2885, 2899 (1984) (Stevens, J., dissenting), infra p. and Chapter Six, p.

[259]Henderson v. Kibbe, 97 S.Ct. 1730 (1977) (notes omitted). Taking into consideration all existing circumstances: that neither party requested a separate causation instruction, that the judge

The following term he was given the opportunity to put these general standards into use. When the majority determined that a state trial judge's "cautionary instruction" to disregard the inference of a defendant's failure to take the stand as evidence of guilt, Stevens registers his objection on Fifth Amendment, self- incrimination grounds: the decision whether the defendant will take the stand is an "absolute right" under the Constitution. "Even if the judge is convinced that the defendant's testimony would exonerate him, and even if he is motivated only by a desire to protect the defendant from the risk of an erroneous conviction, the judge has no power to override counsel's judgment about what is in his client's best interest."[260] This risk that the jury would be swayed by the judge's comments is even greater if the prosecutor has a weak case, so that "telling them to ignore the defendant's silence is like telling them not to think of a white bear." Stevens, unlike the majority, believes that reinforcing the existence of the right (like the phrases from Shakespeare's Julius Caesar reminding the audience that Brutus was an "honorable man" despite the killing of their leader) may not always have a "benign effect," and suggests that the Court follow the ruling of many state courts "that no self-incrimination instruction should be given over the defendant's objection."[261] Yet, looking back to his positions in both Lakeside and Henderson, one term later he draws a line between instructions that affect a constitutional right and those that do

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read to the jury the required statute tracing statutory language, and advised the jury that all elements of the offense must be proven beyond a reasonable doubt, he concluded that omission did not infect the entire trial to result in conviction violating due process.

[260]Lakeside v. Oregon, 98 S.Ct. 1091, 1096 (1978). (Stevens reinforces this view regarding defense strategy with a short concurrence in Carter v. Kentucky, 101 S.Ct. 1112, 1123 [1981]).

[261]Id. at 1099 (notes omitted).

not, in disagreeing with the majority that a state trial court's refusal to give the defendant a requested instruction on the presumption of innocence was violative of the Due Process Clause of the Fourteenth Amendment.[262]

Two cases permitted the Court to apply the principle from Bruton v. United States, a federal case decided by the Warren Court in 1968 holding that "a defendant is deprived of his rights under the Confrontation Clause when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant."[263] In 1979, a plurality reversed a federal circuit court's affirmance of a grant of habeas corpus relief for violation of the Sixth Amendment Confrontation Clause in admission of nontestifying codefendants' interlocking confessions at joint trial.[264] With echoes of his observation of human nature in Lakeside, Stevens in dissent questions his colleagues' assumption that the jury was able to follow the judge's instructions to disregard the confession, reminding the Court that it was this assumption that had been challenged and case law underlying it overruled in Bruton. Mustering the support of big legal guns, he asserts a better approach:

> Rather than falling back on once numerous but now discredited decisions, I prefer to stand by the observations about this sort of question by jurists like Felix Frankfurter, Learned Hand, Wiley Rutledge, Robert Jackson, and Henry Friendly, and scholars like [J.] Wigmore and [E.] Morgan. In my judgment, as I think in theirs, the odds that a jury will obey a command to ignore a codefendant's confession--whether or not the defendant has himself confessed--

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[262]Taylor v. Kentucky, 98 S.Ct. 1930, 1938 (1978)(Stevens, J., dissenting).

[263]391 U.S. 123, 88 S.Ct. 1620 (1968).

[264]Parker v. Randolph, 99 S.Ct. 2132 (1979).

> are no less stacked against the defendant than was the deck of cards that William Douglas used to Robert Wood's, and ultimately to his own, downfall in the game of chance arranged by Woppy Gaddy. In contests like this, the risk that one player may be confused with another is not insubstantial.[265]

Eight years later Justice Scalia spoke for the Court in its determination that the Bruton principle was not violated in a joint trial where the codefendant's confession had been redacted to exclude any reference to the defendant.[266] Joined by Justices Marshall and Brennan in dissent, Stevens points to the "illogical result" of "demean[ing] values protected by the Confrontation Clause": "Even if the jury's indirect inference of the defendant's guilt based on an inadmissible confession is much more devastating to the defendant's case than its inference from a direct reference in the codefendant's confession, the Court requires the exclusion of only the latter statement."[267] Again noting the views of Judge Hand and Justice Frankfurter on this issue, he suggests that the proper analysis for a Bruton question would have required a trial judge to evaluate the incriminating inference on a case-by-case basis, rather than adhere to the line drawn by the Court "between codefendant confessions that expressly name the defendant and those that don't." He leaves stronger comments for the Court's acceptance of the argument that "consistent application" of the Bruton "rationale" would "impose unacceptable burdens on the administration of justice," leading to less of the more economical joint trials. He questions the use of irrelevant statistics" regarding the volume of joint federal

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[265]Id., at 2147-48 (notes omitted; extensive quotes from opinions and legal treatises contained therein).

[266]Richardson v. Marsh, 107 S.Ct. 1702 (1987).

[267]Id. at 1709.

cases that could be affected if the Bruton rationale were applied, indicating that "all of the cases in this Court that involved joint trials conducted after Bruton was decided, in which compliance with the rule of that case was at issue, appear to have originated in state court," observing that "Federal prosecutors seem to have had little difficulty in conducting the literally thousands of joint trials," and suggesting that the Court's "deep-seated fears" of "administrative outrages" of separate trials is "speculation float[ing] unattached to any anchor of reality" giving way to "nothing but a rhetorical flourish."[268] As is customary, Stevens ends with a one-two punch aimed at his out-of-touch colleagues:

> As a practical matter, I cannot believe that there are many defense lawyers who would deliberately pursue this high-risk strategy of "manipulating" their evidence in order to enhance the prejudicial impact of a co-defendant's confession. Moreover, a great many experienced and competent trial judges throughout the Nation are fully capable of managing cases and supervising counsel in order to avoid the problems that seem insurmountable to appellate judges who are sometimes distracted by illogical distinctions and irrelevant statistics.[269]

Three other cases which contained jury instruction questions are more enlightening as a source for Stevens' views on harmless error analysis. In Connecticut v. Johnson the Court affirmed Connecticut Supreme Court reversal of convictions for attempted murder and robbery

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[268]Id. at 1713, 1713 n.7. Ignoring Stevens' main maxim ("On the scales of justice, however, considerations of fairness normally outweigh administrative concerns."), Justice Scalia takes note of this part of the dissent. He speculates that the sheer volume of state cases in comparison to the volume of federal prosecutions could account for the number of state cases on review. He goes on, "There is assuredly no basis to believe that federal prosecutors have been applying the dissent's interpretation of Bruton. Indeed the contrary proposition--as well as the harmfulness of that interpretation to federal law enforcement efforts--is suggested by the fact that the Solicitor General has appeared here as amicus to urge reversal for substantially the reasons we have given." id., at 1708 n.4.

[269]Id. at 1714.

on the grounds that Due Process was violated by jury instructions that every person is conclusively presumed to intend the natural and necessary consequences of his actions;[270] in Rose v. Clark the Court allowed harmless error analysis to be applied to jury instructions that impermissibly shift to the defendant the burden of proof on the mental element of the crime in violation of due process principles;[271] and in Pope v. Illinois the Supreme Court applied harmless error analysis to erroneous jury instructions which asked the jury to find proof of the three elements required for guilt without being properly informed of one of the three elements: to apply the reasonable standard in evaluating an alleged obscene magazine's value.[272] Stevens' approach to these and a few other cases involving the standards to be applied in harmless error analysis will be discussed in this section below.[273]

Other Trial Procedure Concerns

Another procedural area addressed by Stevens almost immediately after his appointment to the Supreme Court was the prosecutor use of post-Miranda silence during trial. In a 6-3 decision the Court ruled that use for impeachment purposes of petitioners' silence at the time of arrest and after they had received Miranda warnings violated the Due Process Clause of the

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[270]103 S.Ct. 969 (1983)(Stevens, J., concurring in judgment).

[271]106 S.Ct. 3101 (1986)(Stevens, J., concurring in judgment).

[272]107 S.Ct. 1918 (1987)(Stevens, J., dissenting).

[273]See infra notes 369-408 and accompanying discussion.

Fourteenth Amendment.[274] In dissent, Stevens urges that on the basis of his reading of the trial transcripts, he is not sure that the thin line of distinction between "permissible comment on credibility and impermissible comment on inference of guilt justifies a reversal of the conviction of the petitioners." Addressing specifics, he says:

> This is a case in which the defendants' silence at the time of their arrest was graphically inconsistent with their trial testimony that they were the unwitting victims of a "frameup" in which the police did not participate. If defendants had been framed, their failure to mention that fact at the time of their arrest is almost inexplicable; for that reason, under accepted rules of evidence, their silence is tantamount to a prior inconsistent statement and admissible for purposes of impeachment.[275]

In two later cases the Court distinguished Doyle in ruling that a defendant's prior silence could be used to impeach him when he testified in his own defense without violating the Fifth and Fourteenth Amendment due process and self-incrimination protections,[276] and that Doyle was not violated where the trial court "explicitly sustained objection to the only prosecutorial question touching upon defendant's post-arrest silence."[277] But the Court did find

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[274]Doyle v. Ohio, 96 S.Ct. 2240 (1976).

[275]Id. at 2252. Though he suggests that perhaps the state may have violated the Fifth Amendment protection against self- incrimination.

[276]Jenkins v. Anderson, 100 S.Ct. 2124 (1980). In his majority opinion Justice Powell made it a point to say that no state was "forced" to use this procedure, and that the formulation of evidentiary rules in this area is primarily a state function. See also Fletcher v. Weir, 102 S.Ct. 1309 (1982)(per curiam) regarding court approval of use of post-arrest silence without Miranda warnings for impeachment purposes.

[277]Greer v. Miller, 107 S.Ct. 3102 (1987). The dissenters (Brennan, joined by Marshall and Blackmun), were dismayed with the Court because it ruled on the question regarding the standard for review which had been "premised on a finding of a Doyle violation." The State had

fundamental unfairness and violation of due process in the use of defendant's post arrest, post-Miranda warnings silence as evidence of his sanity.[278] Stevens' general reaction in these rulings was to reiterate the position he had taken in Doyle: if an accused is not compelled to speak, there is no violation against the Fifth Amendment. He makes a distinction between the accused's silence in the pre-trial context and silence at the trial, and operates under the presumption that comment in the latter context "may deter him from exercising his privilege," whereas, comment regarding the former raises merely a "routine evidentiary question that turns on the probative significance of the evidence.[279] The guiding principle he suggests to determine the fairness of using postarrest silence for impeachment purposes "does not simply depend on whether or not he received Miranda warnings. Rather, it primarily depends on whether it is fair to infer that the defendant was silent because he was asserting his constitutional privilege."[280] However, he would make a distinction in approach to cases presenting a "Doyle violation" depending upon whether they arrive on collateral review or direct appeal.[281]

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conceded the violation but on this Court's review of the issue, it ruled against the respondent without an "opportunity to be heard" on the Doyle question, id. at 3114. Stevens is pleased about the distinction regarding review, see infra, but despite his dissent in Doyle, does not like the way the Court muddied the waters regarding its applicability, id. at 3110-11 (Stevens, J., concurring in judgment).

[278]Wainwright v. Greenfield, 106 S.Ct. 634 (1986)

[279]Jenkins, supra note 276, 100 S.Ct. at 2131-32.

[280]Id. at 2133.

[281]Stevens stipulates:

Despite his misgivings about Doyle, his pattern is to respect the principle of stare decisis, thus in a 1986 majority opinion he sets forth its application to the use of silence "to overcome a defendant's plea of insanity."[282] Looking at the subsequent cases since Doyle, he concludes that the standard to be applied is that "breaching the implied assurance of the Miranda warnings is an affront to the fundamental fairness that the Due Process Clause requires." Thus, regardless of the Florida Attorney General's claim that "an insanity defense should be viewed as an 'affirmative defense,' and that the use of silence to overcome an insanity defense should be viewed as impeachment," use of the silence for either impeachment purposes or to overcome the insanity plea involve the same sequence of events: "the implicit promise, the breach, and the consequent penalty" resulting in fundamental unfairness.[283] But he did give recognition to the Florida Court of Appeals judge who in dissent suggested a number of other ways that proof of rationality could have been achieved by the State without compromising the Fifth Amendment right. The Doyle principle arrived from and has been

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> On direct review, a conviction should be reversed if a defendant can demonstrate that a Doyle error occurred at trial, and the State cannot demonstrate that it is harmless beyond a reasonable doubt. But, in typical collateral attacks [as in Greer] Doyle errors are not so fundamentally unfair that convictions must be reversed whenever the State cannot bear the heavy burden of proving that the error was harmless beyond a reasonable doubt. On the other hand, there may be extraordinary cases in which the Doyle error is so egregious, or is combined with other errors or incidents or prosecutorial misconduct, that the integrity of the process is called into question. In such an event, habeas corpus relief should be afforded.

Greer, supra note 277, 107 S.Ct. at 3110-11 (note omitted). Though he "would agree with the ten Illinois judges and 12 federal judges who have concluded that the rule of the Doyle case was violated" in Greer, and would reverse if the case had come up on direct review, he limits himself to concurring in the judgment because of the views stated above, id.

[282]Greenfield, supra note 278, 106 S.Ct. at 634.

[283]Id. at 639.

primarily applied to state procedure, but Stevens did make it a point to note that in 1975 the Court held that "the use of postarrest, post-Miranda warnings silence was impermissible in federal prosecutions," but that the Court "based its holding on its supervisory power in federal proceedings and left open the constitutional issue."[284]

Stevens wrote three majority opinions and a judgment concurrence related to defense attorney effectiveness, and a majority opinion involving defense attorney conduct and the compulsory process. In these cases the Court held that, based upon evaluation of actual counsel performance, circumstances surrounding a defendant's representation, where original defense counsel had been replaced, did not justify the inference that the defendant had been denied his constitutional right to effective counsel;[285] that the right to assistance of counsel is not violated by an attorney who refuses to cooperate in presenting perjured testimony;[286] that defense attorney's partnership with a lawyer representing his client's coindictee was not a conflict of interest, nor did his failure to present client's family background as mitigating circumstances at the sentencing hearing constitute violations of the Sixth Amendment;[287] that a state trial court order directing petitioner not to consult attorney during a fifteen minute

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[284]Id. at 638 n.5. See also supra note 124, and accompanying text, regarding the federal position on Miranda-like warnings.

[285]United States v. Cronic, 104 S.Ct. 2039 (1984).

[286]Nix v. Whiteside, 106 S.Ct. 988 (1986)(Stevens, J., concurring in judgment).

[287]Burger v. Kemp, 107 S.Ct. 3114 91987).

afternoon recess did not violate Sixth Amendment right to assistance of counsel;[288] and that the trial court's precluding of testimony from a defense witness for a discovery violation is not contrary to the Compulsory Clause nor does it amount to sanction for attorney's alleged misconduct.[289] He was unsuccessful in including Justice Marshall in all, and Justices Brennan and Blackmun in most, of these majority opinions. He makes no distinction between state and federal trials in the applicability of standards for these counsel-related decisions.

Stevens believes that the right to counsel holds a hallowed position in our legal system and this view is evident as the underpinning of the trilogy of majority opinions dealing with effective counsel. But even more important is the preservation of the adversary system and the truth-seeking function it maintains. Because majority opinions are looked upon more as a result of consensus rather than the views of one or a few justices, one cannot attribute as much to the opinion writer, nevertheless, through Stevens' efforts to lay out the approaches to be taken in this area of the law we get an example of how he expects the Court to clarify and apply its rules. Legal discussions have gone beyond the basic assurance of counsel for critical stages in criminal processing to questions concerning counsel effectiveness. In this light, Stevens reiterates that, "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing;" therefore, the right "is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial," and stress is to be placed upon the

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[288]Perry v. Leeke, 109 S.Ct. 594 (1989).

[289]Taylor v. Illinois, 108 S.Ct. 646 (1988).

advocacy not upon the defendant's satisfaction with his attorney's "performance."[290] Recognizing there may be a few situations that the most competent attorney would be rendered ineffective and prejudice may be presumed, in most other situations the actual conduct of the attorney at trial must be evaluated with the presumption that the lawyer was competent and the defendant has "the burden to demonstrate a constitutional violation."[291]

The controlling case giving guidance as to how errors should be evaluated is Strickland v. Washington, decided in 1984, which stated that the "benchmark . . . must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.;" the defendant must show "that counsel's performance was deficient" and that "the deficient performance prejudiced the defense."[292] When confronted with accusations of conflict of interest, Strickland demands a show of actual conflict and an adverse affect upon the outcome of the trial. The conflict of interest cited in Burger v. Kemp came out of a capital case which had gone through numerous reviews. In applying the Strickland standard and concluding the absence of actual conflict, Stevens set forth the court's approach in Kemp:

> Our duty to search for constitutional error with painstaking care is never more exacting that it is in a capital case. Nevertheless, when the lower courts have found that a lawyer has performed his or her solemn duties in such a case at or above the lower boundary of professional competence, both respect for the bar and deference to the shared conclusion of two reviewing courts prevent us from substituting speculation for their considered opinions. The District

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[290]Cronic, supra note 285, 104 S.Ct. at 2045-46.

[291]Id. at 2048, 2046.

[292]104 S.Ct. 2052, 2064 (1984). Stevens joined the majority.

> Court Judge, who presumably is familiar with the legal talents and character of the lawyers who practice at the local bar and who saw and heard the witness testify, is in far better position than we are to evaluate a charge of this kind, and the regional Courts of Appeals are in a far better position than we are to conduct appellate review of these heavily fact-based rulings.[293]

The Court has a different view of the lawyer-client relationship when the defendant takes the stand, however. Out of concern for an impediment to the trial's "truth-seeking function," Stevens asserts for a majority in Perry v. Leeke that when the defendant "assumes the role of a witness, the rules that generally apply to other witnesses--rules that serve the truth-seeking function of the trial--are generally applicable to him as well."[294] Thus, a judge's order forbidding the defense attorney and client to communicate during a 15 minute recess would not violate the defendant's Sixth Amendment right to assistance of counsel because:

> [I]t is simply an empirical predicate of our system of adversary rather than inquisitorial justice that cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney.[295]

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[293]Supra note 287, 107 S.Ct. at 3121. The same reliance on the lower courts' appraisal, and under the Strickland standard respecting "strategic choices" made by "reasonable professional judgment," the majority was led to conclude that the defendant's charge that his attorney's omission at his sentencing hearing of possible mitigating information about his family life and behavior was a strategic choice out of consideration that it would not strengthen his cause against receiving the death penalty.

[294]Supra note 288, 109 S.Ct. at 600-1.

[295]Id. at 601. Geders v. United States, 96 S.Ct. 1330 (1976)(Sixth Amendment counsel assistance violation found where judge had ordered no communication during overnight recess) distinguished.

True to his fetish of tying up loose ends, Stevens stresses that barring such communication is not mandated; allowing communication during very short recess is a matter of discretion among state judges, but not "compelled" by the Federal Constitution. There is a certain irony in this conclusion, since the majority in part justified tackling the question because it is "not only important, but also one that frequently arises," and upon which "varying views" have been expressed in numerous federal and state courts.

One other opinion Stevens penned for the majority involves the right of the defendant to compel witnesses on his behalf and includes comments on the significance of this right and on the attorney-client relationship.[296] He distinguishes the defendant's trial "weapon" of the Compulsory Process Clause from other Sixth Amendment rights "that arise automatically on the initiation of the adversarial process" in that "its availability is dependent entirely on the defendant's initiative," and relies for success upon "deliberate planning and affirmative conduct" which is augmented by the regularized procedures provided by the adversarial system.[297] The impact of not sanctioning with preclusions a violation of discovery rules by defense counsel, which may have resulted in the admission of perjured testimony, could appear to condone willful misconduct. In refuting the argument that a client should not be held responsible for his lawyer's misconduct, Stevens urges that "The adversary process could not function effectively if every tactical decision required client approval," and concludes that "the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of

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[296]Taylor,v. Illinois, supra note 289, 108 S.Ct. at 652.

[297]Id. at 653.

certain witnesses in advance of trial," adding prosaically: "Whenever a lawyer makes use of the sword provided by the Compulsory Process Clause, there is some risk that he may wound his own client."[298]

Stevens rendered a majority opinion and a few concurring and dissenting opinions giving guidance to prosecutors and judges on the resolution of double jeopardy issues. Those coming from federal criminal convictions primarily stem from evaluation of the finality of an initial proceeding and its appealability under federal law,[299] a few state and federal cases involve questions of multiple prosecutions or sentences on a greater charge after a lesser included charge,[300] and two state cases articulate the "manifest necessity" standard.[301]

Stevens' early opinions stemming from federal prosecutions indicate his concern for whether a Double Jeopardy claim exists or is properly before the Court. Under the federal Criminal Appeals Act, 18 U.S.C. sec. 3731, as amended in 1971, the Government is authorized to appeal an order of a district court "dismissing an indictment or information as to any one or

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[298]Id. at 657.

[299]United States v. Martin Linen Supply Co., 97 S.Ct. 1349 (1977)(Stevens, J., concurring in judgment); Sanabria v. United States, 98 S.Ct. 2170 (1978)(Stevens, J., concurring): Richardson v. United States, 104 S.Ct. 3081 (1984)(Stevens, J., dissenting). See also Justices of Boston Municipal Court v. Lydon, 104 S.Ct. 1805 (1984).

[300]Jeffers v. United States, 97 S.Ct. 2207 (1977)(Stevens, J., concurring in judgment); Illinois v. Vitale, 100 S.Ct. 2260 (1980) (Stevens, J., dissenting); Ohio v. Johnson, 104 S.Ct. 2536 (1984)(Stevens, J., dissenting); Garrett v. United States, 105 S.Ct. 2407 (1985)(Stevens, J., dissenting); Montana v. Hall, 107 S.Ct. 1825 (1987)(Stevens dissenting); see also United States v. DiFrancesco, 101 S.Ct. 426 (1980)(Stevens, J., dissenting).

[301]Arizona v. Washington, 98 S.Ct. 824 (1978)(Stevens, J., majority opinion); Oregon v. Kennedy, 102 S.Ct. 2083 (1982)(Stevens, J., concurring in judgment).

more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." Stevens' reading of the "plain meaning" of these words, in addition to the statute's legislative history as to which words were and were not eliminated in Conference Committee, leads him to conclude that "there is no statutory authority for a government appeal from a judgment of acquittal in a criminal case," nor should the statute's reference to "counts" be interpreted to allow appeals from "subunits" of an indictment or "portions" of a count.[302] He is compelled to make the first assertion out of a sense of obligation, saying:

> In view of our special responsibility for supervising the proper functioning of the federal criminal justice system, we should not hesitate to correct a plain mistake involving a technical problem of procedure when there has been no prejudicial reliance on that mistake.[303]

Evidently, he did not think the majority opinion made the unequivocal point of the simple and inclusive meaning of "acquittal" clear enough. When it again appears to him that the Court is ignoring the plain language by allowing the Government to appeal from a portion of a count "provided that the portion establishes a 'discrete basis of liability,'" he repeats a now familiar

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[302]Martin Linen Supply, supra note 299, 97 S.Ct. at 1357 (Double Jeopardy Clause bars appellate review and retrial following a judgment of acquittal under Fed. Rule. Crim. Proc. 29(c) after deadlocked jury discharged and upon timely motion by the defendant); Sanabria, supra note 299, 98 S.Ct. at 2186 (Government appeal from midtrial exclusionary ruling and subsequent acquittal, held barred by Double Jeopardy principles). See also Finch v. United States, 97 S.Ct. 2909 (1977)(per curiam) where six justices determined that Government's appeal from federal district court dismissal of information for failure to state federal offense was barred by Double Jeopardy Clause; Stevens would have preferred that this questioned be resolved after oral argument.

[303]Martin Linen Supply, 97 S.Ct at 1357 n.1. In hindsight, it is interesting to note that Frank H. Easterbrook argued the government's case, and with him on the brief was Solicitor General Robert Bork. The Government had argued that this type of acquittal was appealable, given the timing of the acquittal after jury deliberations on the merits and deadlock.

refrain emphasizing the limited jurisdiction of the federal appeals courts and the preference for interpreting Congressional provisions as to their authorizations rather than their silences, and proceeds to admonish the Court that its "pattern" of late is to read sec. 3731 "in whatever manner would favor a government appeal."[304] But he is similarly hard on defendants when ruling on the timing of their appeals in claiming a Double Jeopardy violation. Stevens dissented from the Court in its determination that a federal district court order denying a motion for a judgment of acquittal on the ground that "the evidence is legally insufficient" is appealable as a final judgment because he believes it is not a "final decision" under 28 U.S.C.1291, "terminating a first jeopardy," which would "constitute a bar to a second trial," nor did the order qualify under case law exceptions as one "collateral to the basic litigation . . . that fully terminated the litigation," such as a denial from a motion to dismiss an indictment.[305] Since the motion actually involved a challenge on the merits of the charges against him, it is not collateral but integral to the litigation; the impact of allowing such appeals would "give defendants 'every incentive . . . not only to delay eventual punishment, but to obtain leverage in plea negotiations,'" as well as cause inefficiency and delays in the

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[304]Sanabria, 98 S.Ct. at 2187. See also United States v. DiFrancesco, 101 S.Ct. 426, 445 (1980), where Stevens questions the Court's finding that the Organized Crime Control Act provision, 18 U.S.C. sec. 3576, permitting government appeal of a sentence imposed on a "dangerous special offender" does not violate the Double Jeopardy Clause. Here the trial judge allegedly misconstrued the statute and did not impose the harsher sentence. Stevens relies upon Justice Harlan's query in North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072 (1969), acknowledging the acceptability of a harsher punishment after retrial for a person who was successful in nullifying his conviction (but questioning the acceptability of the enhancement of a sentence as the result of an appeal by the prosecutor without conviction nullification) to challenge the Court's conclusion in DiFrancesco and to which he believes the Court gives "a rather wooden extrapolation from a rationale that, however it may be 'variously verbalized,' is wholly irrelevant" to the issue, id. at 446.

[305]Richardson, supra note 299, 104 S.Ct. at 3090-91.

administration of justice.[306] Likening this outcome to concerns he expressed in a recent state case resolving a similar issue,[307] he concedes that the defendant would have to endure a second trial, but then the Double Jeopardy claim (contrary to the Court) may be reviewed.

Stevens has also entered the fray in challenging the majority in its determination of the attachment of Double Jeopardy protection against multiple prosecutions. Two piggy-back rulings in the same term seem to contradict, apparently due to the readings of the facts by Justices White and Powell. In the definitive case, Brown v. Ohio, the Court stated that Double Jeopardy generally forbids excessive prosecutions and cumulative punishments for greater and lesser included offenses whatever the sequence and that the test to be applied is "whether one statute requires proof of a fact which the other does not."[308] Stevens was in the majority here, but dissented in a federal case when the Court found an exception to Brown where the defendant was tried and convicted first on the greater charge and then on the lesser in two individual proceedings after he objected to the government's motion to consolidate indictments

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[306]Id. at 3092.

[307]See Justices of Boston, supra note 299, 104 S.Ct. at 1823, which suggests that if the claim regarding insufficiency of evidence is successful at the second-tier trial, as well it may be, the defendant would be acquitted; if not, the Double Jeopardy claim could be pursued. Disrupting the state processes by allowing a federal habeas corpus review before the second tier is much more burdensome and compromises federal-state relations. See infra for further discussion of this case regarding habeas corpus and court jurisdiction. It is also this same Massachusetts two-tier system which he so vehemently criticized in Ludwig v. Massachusetts (supra notes 235-38 and accompanying discussion) that he now says "is not an especially harsh one," id. at 1828.

[308]97 S.Ct. 2221 (1977). Prior conviction for the lesser included offense of joyriding under Ohio statute prohibited subsequent prosecution of defendant for the crime of auto theft.

on two separate but related offenses in accusations involving more than one defendant.[309] Stevens shows his disturbance with the Court when, despite its almost unanimous agreement that the petitioner's right had been violated, it found a double jeopardy waiver in his motion, rather than allowing recognition of the right, because of how the government chose from its options to proceed after the ruling. Thus, he sarcastically quips: "Until today it has never been the function of the defense to give legal advice to the prosecutor."[310] His observation of another emerging Court pattern is instructive. Alluding to a recent ruling not requiring Miranda warnings for the noncustodial, police station questioning of a parolee, he muses:

> It is ironic that, while the State's duty to give advice to an accused is contracting, e.g., Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714, a new requirement is emerging that the accused, in order to preserve a constitutional right, must inform the prosecution about the legal consequences of its acts. Even the desirability of extending Mr. Jeffers' incarceration does not justify this unique decision.[311]

Following this case, Stevens disagrees with other Court determinations finding an exception to Brown. He acknowledged that Brown did allow for exceptions for the government to prosecute on a lesser charge first, and still preserve follow up on the greater charge, when the federal government's conscientious investigation on the greater charge is hindered. However, he would not grant such an exception for prosecution for conspiracy on a "continuing criminal

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[309]Jeffers, supra note 300, 97 S.Ct. at 2220. After the passage of more than fifteen years, one can easily recognize on the brief the names of two individuals who continue to be hardline advocates for the government: William F. Sheehan III arguing the case and Acting Solicitor General Friedman and Assistant Attorney General Thornburgh.

[310]Id., n.5, n.7.

[311]Id. at 2221 (note omitted).

enterprise" (CCE) charge after prosecution for a crime subsequently used as one proof for the CCE case, especially when the prosecution had sufficient evidence before the prosecution of the lesser charge to proceed with the CCE first, or, to eliminate the criminal transactions of the lesser charge from the second prosecution.[312] With another swipe at the majority's apparent crime-fighting stance, he concludes: "In my opinion it is far more important to vindicate [the Double Jeopardy] constitutional principle than to create a new doctrine in order to avoid the risk that a retrial may result in freeing this petitioner after only 19 years of imprisonment."[313]

When it comes to state multiple prosecutions, Stevens has voiced his opposition to the Court's lack of respect for state law, proceedings and judicial interpretations. Thus, state supreme court holdings should be respected where the Illinois court found that under Illinois statute, "failure to reduce speed to avoid a collision was a lesser offense included within the greater offense of killing a person by the reckless 'driving of a motor vehicle," where the Ohio court found a guilty plea to involuntary manslaughter the equivalent to conviction and a bar to a further prosecution for the charge of murder, and where the Montana court relied on an independent state ground to overturn a conviction and forbid retrial because the conviction had been based upon an offense not in existence at the time of the act.[314] In attempting to aid state courts in their determination of "what is or is not a lesser included offense under state

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[312]Garrett, supra note 300, 105 S.Ct. at 2422. He rejected Justice Rehnquist's majority opinion which found the exception in its reading of the facts that the CCE investigation was not completed at the time of indictment.

[313]Id. at 2426.

[314]Illinois v. Vitale, 100 S.Ct. 2260, 2269 (1980)(Stevens, J., dissenting); Ohio v. Johnson, 104 S.Ct. 2536, 2543 (1984)(Stevens, J., dissenting; Montana v. Hall, 107 S.Ct. 1825, 1831 (1987)(Stevens, J., dissenting).

law," Stevens sees the federal Supreme Court's role as "to ensure that the States apply the proper analytic framework insofar as they rely on the Double Jeopardy Clause of the Federal Constitution; second-guessing the integrity of the state justices, who have described in their opinion how they applied Brown and other precedents to the facts of a case, by sending the case back to be reconsidered "simply to assure this Court that it really meant what it plainly said," goes beyond that duty.[315]

Stevens wrote the definitive, but less than unanimous, majority opinion on "manifest necessity." In Arizona v. Washington the Court ruled that Double Jeopardy was not violated "by the declaration of a mistrial by a state trial judge after the defense counsel's improper and highly prejudicial reference during opening argument to prosecutorial misconduct in a previous case"; the Clause "does not require that the judge specifically find manifest necessity or articulate on the record all factors leading to a mistrial declaration, provided the record establishes sufficient justification for such a ruling."[316] Acknowledging the "broad discretion" to be given trial judges in situations such as this where "the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may

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[315]Vitale, 100 S.Ct at 2269. In Stevens' view, this defendant has already waited five years to have this issue resolved only to find out that the Supreme Court requires the state court to determined whether the lesser charge is always a lesser included offense of the greater. If the court determines that it is not, but the state nevertheless uses evidence of failure to reduce speed in the manslaughter prosecution, then the defendant possibly has a Double Jeopardy claim, which in actuality makes the defendant have to go through the second trial--not knowing the basis of the prosecution--before the Double Jeopardy claim can be resolved. Because this litigation has already lasted five years, Stevens believes the defendant deserves to know the basis for the second prosecution and thus a jeopardy ruling by the trial court before trial, id.. at 2270-71.

[316]98 S.Ct. 824 (1978).

have been affected by the improper comment," he would affirm the mistrial ruling without requiring more and concludes:

> Neither party has a right to have his case decided by a jury which may be tainted by bias; in these circumstances, "the public's interest in fair trials designed to end in just judgments" must prevail over the defendant's "valued right" to have his trial concluded before the first jury impaneled.[317]

Another state case exhibited a careful weighing of these same interests. Where a motion for a mistrial was made by the defendant because of prosecutorial conduct, evaluation of the conduct as without "prejudicial error with the intent to provoke a mistrial" led the Court to apply the general rule and find no bar to further prosecution; Stevens concurs only in the judgment because "Instead of explaining why that conclusion is required by settled law," the Court engages in an "objectionable" "exercise in lawmaking" and "gratuitously lops off a portion of the previously recognized exception" to the general rule.[318] He notes that Arizona v. Washington provides the "manifest necessity" exception to the general rule that retrial is barred when a mistrial is declared over the defendant's objection, and that the general rule that the defendant's motion for, or consent to, a mistrial, allows for reprosecution except in cases "in which the prosecutor intended to provoke a mistrial or otherwise engaged in 'overreaching' or 'harassment.'"[319] The Court eliminated the last two exceptions because "they offer virtually no standards for their application," but Stevens urges that just as the Court "has

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[317]Id. at 835-36 (notes omitted).

[318]Oregon v. Kennedy, 102 S.Ct. 2083, 2092 (1982).

[319]Id. at 2093 (referencing United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075 [1976] and United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547 [1971]).

shunned inflexible standards in applying the comparable 'manifest necessity' exception" to the former general rule, "some generality in the formula is a virtue," and suggests:

> The scarcity of cases in which the exception has been invoked counsels against pre-empting the judgment reflected in our decisions than an exception for overreaching or harassment should remain available for the rare case in which it may be needed. We should simply decide this case on its facts . . . and thereby continue to give meaning to the "abstract formula" in the context of actual cases.[320]

Capital Sentencing Issues

The Supreme Court has attempted to refine its positions on capital sentencing matters since it declared Georgia's death penalty statute unconstitutional in 1972[321] and upheld its revised statute in 1976.[322] Justice Stevens has taken an active part in this debate from his first term on the bench. He agreed with the majority in Gregg that the death penalty per se was not unconstitutional, and, joined by Justices Powell and Stewart, he penned two of the four plurality opinions issued with Gregg. In Roberts v. Louisiana the Court struck down the state's death penalty statute because it required the death penalty as a mandatory sentence for certain categories of cases which did not allow for recognition of the possible "diversity of

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[320]Id. at 2095 n. 22, 2097-98 (notes omitted). As he sees it, actual cases have shown prosecutors to put "the defendant through the embarrassment, expense, and ordeal of criminal proceedings even if he cannot obtain a conviction," or "seek to inject enough unfair prejudice into the trial to ensure a conviction but not so much as to cause a reversal of that conviction," id. at 2098. But by the same token, he adds that it would be rather rare for a defendant to make a motion for a mistrial in a case that is going badly for the prosecution because, though it stops proceedings, it would most likely result in a second prosecution.

[321]Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972).

circumstances" or for "the variety of possible offenders" in each case.[323] In Jurek v. Texas, the Texas statute was upheld because it specified categories of aggravating circumstances to be used as a guide to the jury and put focus on particular circumstances of each case.[324] In addressing the role of a Texas jury in assessing the probability of future criminal behavior in its deliberations, Stevens put the feasibility of this requirement in proper perspective by likening it to those tasks "performed countless times a day throughout the American criminal justice system," such as in bail, sentencing and parole determinations.[325] According to Stevens, with proper information, the jury would be equipped to do its job. The following term he issued another plurality opinion, joined again by Stewart and Powell, reversing the capital sentence of a Florida defendant whose sentence had been imposed by the trial judge after he had rejected the jury's recommendation of a life sentence and on the basis of confidential information not disclosed to the defendant or his counsel.[326] After noting that "five members of the Court have now expressly recognized that death is a different kind of punishment than any other which may be imposed in this country" and that to satisfy Due Process, "sentencing is a critical stage of the criminal proceeding at which [the defendant] is entitled to the effective assistance of counsel," he evaluates the State's arguments for confidentiality. He concludes that since the death sentence is different from all other types of

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[323]96 S.Ct. 3001, 3006 (1976).

[324]96 S.Ct. 2950 (1976).

[325]Id. at 2957.

[326]Gardner v. Florida, 107 S.Ct. 1197 (1977).

sentences, that the defendant's interest in "reliability" is heightened; and that Florida's disregard for participation by counsel regarding aggravating and mitigating facts is countered by "[O]ur belief that debate between adversaries is often essential to the truth-seeking function of trials [and] requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases."[327] Stevens wrote for the majority in 1980 that the death penalty may not be imposed through a State scheme that disallowed the jury from considering a verdict of guilt of a lesser included non-capital offense.[328] He observed the "uniqueness" of Alabama law in contrast to the "nearly universal acceptance" by both the federal and state court systems to include such an instruction. He proposed that since "reason rather than caprice or emotion" have been used as the standard to invalidate "procedural rules that tended to diminish the reliability of the sentencing determination," by analogy, the same standard should be applied "to rules that diminish the reliability of the guilt determination."[329] In the majority's estimation, the Alabama process "interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime."[330] In answer to the argument that a judge will also consider mitigating and aggravating circumstances after the

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[327]Id. at 1206.

[328]Beck v. Alabama, 100 S.Ct. 2382 (1980).

[329]Id. at 2390.

[330]Id. at 2392.

jury's determination, the majority concluded that "we are unwilling to presume that a post-trial hearing will always correct whatever mistakes have occurred in the performance of the jury's factfinding function."[331]

In 1983 Stevens wrote for the majority that a Georgia defendant's death sentence need not be reversed on the fact that one of the three aggravating circumstances found by the jury was later deemed to be invalid.[332] It was the Court's view that Georgia's death penalty scheme had been approved in Gregg in part because it "channels" the jury's "exercise of discretion" since in its design a jury was to find at least one valid aggravating circumstance (thereby, narrowing the class of persons eligible for the death penalty) and it provided for review for arbitrariness by a judge; earlier cases had made clear that "[w]hat is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime."[333] By considering all of the circumstances surrounding the case, and relying upon a review by the Georgia Supreme Court that two of the three aggravating circumstances were admittedly valid, the Court found the defendant properly sentenced. However, in a case where a Mississippi defendant was sentenced to death in part on the basis of a New York conviction found to be vacated, the Court unanimously reversed the sentence.[334] Stevens' majority opinion distinguished Zant by noting that "the error here

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[331]Id. at 2394.

[332]Zant v. Stephens, 103 S.Ct. 2733 (1983).

[333]Id. at 2742.

[334]Johnson v. Mississippi, 108 S.Ct. 1981 (1988).

extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise inadmissible. Here the jury was allowed to consider evidence that had been revealed to be materially inaccurate."[335] That same term Stevens wrote for a plurality of four justices that the Eighth and Fourteenth Amendments prohibited the execution of a defendant convicted of first degree murder for an offense committed when he was fifteen years old.[336] The initial basis for the decision relied upon the Court's determination of what were the "evolving standards of decency" under which notions of the death penalty existed; these were gleaned through legislative actions and jury determinations. The Court discovered that the 18 states that have specified a minimum age for execution have chosen the age of sixteen, and that executing younger defendants is inconsistent "with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community."[337] State court statistics showed that only a small number of youth under 16 have received the death penalty in those states that permit youthful execution. In contrasting greater adult and lesser juvenile culpability for crime, "the teenager's capacity for growth, and society's fiduciary responsibility to its children," as well as considering the applicability of the social purposes of the death

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[335]Id. at 1989.

[336]Thompson v. Oklahoma, 108 S.Ct. 2687 (1988).

[337]Id. at 2696.

penalty (such as deterrence), Stevens concluded for the Court that the sentence should be reversed.[338]

Justice Stevens issued 19 concurring and dissenting opinions involving capital punishment issues in cases from Utah, Florida, California, Louisiana, Mississippi, Texas, and Arizona. A few dealt with jurisdictional matters. For example, Stevens agreed with the Court that the mother of the infamous Gary VXK!, as a third party, did not have standing to litigate for a stay of execution for her son since he was deemed competent to waive his right to appeal.[339] In a 1983 decision which Stevens considered intrusive on state action, Stevens dissented from the majority's approval of California's unique, so-called Brigg's Instruction which allows the selective jury instruction regarding the power of the Governor "to commute life without parole sentences."[340] The justification for the instruction, Stevens observed, "has absolutely nothing to do with the defendant's culpability or his capacity for rehabilitation;" and, since the majority ended its opinion by indicating it was not their place to question the wisdom of state judges, he questioned why the Court had not let stand the decision of California judges who had been in agreement with the state judges of 25 other states in condemning the instruction. This led him to only one conclusion about the rationale of his colleagues:

> Nothing more than an interest in facilitating the imposition of the death penalty in California justified this Court's exercise of its discretion to review the judgment of the California Supreme Court. That interest, in my opinion, is not sufficient to warrant this Court's review of the validity of a jury instruction

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[338]Id. at 2698-2700.

[339]VXK v. Utah, 97 S.Ct. 436 (1977).

[340]California v. Ramos, 103 S.Ct. 3446 (1983).

> when the wisdom of giving that instruction is plainly a matter best left to the States.[341]

In another procedural move, the Court denied a Texas applicant's stay of execution "pending filing and disposition of a petition for a writ of certiorari."[342] In discerning which applicants for a stay deserve the Court's attention, Stevens acknowledged that consideration need be given to whether the petition would likely be granted and the hardships on the parties. His position is "to strike the balance in favor of any applicant raising a nonfrivolous challenge to his capital conviction in his first federal habeas proceeding," because "[i]n such a case, the importance of fully informed consideration of the certiorari question predominates over the interests of the State in expeditious execution of its judgment."[343] Not only would such a process facilitate the "evenhanded administration of justice," but also dissuade the state from scheduling an execution before the expiration of the time allowed for the filing of a certiorari petition. The following term Stevens concurred in the judgment of a per curiam opinion where the Court vacated a Louisiana state prisoner's stay of execution because of the insubstantiality of the question raised.[344] Stevens expressed his concern about the

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[341]Id. at 3469.

[342]Autry v. Estelle, 104 S.Ct. 23 (1983).

[343]Id. at 23. Stevens recalled a principle from an earlier Seventh Circuit Court of Appeals opinion: "the preservation of order in our communities will be best ensured by adherence to established and respected procedures. Resort to procedural expediency may facilitate an occasional conviction, but it may also make martyrs of common criminals. Groppi v. Leslie, 436 F2d 331, 336 (CA7 1971)(en banc)(Stevens, J., dissenting).

[344]Maggio v. Williams, 104 S.Ct. 311 (1983).

"propriety" of the prosecutor's argument to the jury during the sentence phase "implying that the verdict was merely a threshold determination that would be corrected by the appellate courts if it were not the proper sentence for this offender" which "encouraged the jury to err on the side of imposing the death sentence in order to 'send a message' . . . ."[345] Nevertheless, he agreed with the Court's "strict standard of review" because this was the defendant's second habeas corpus review and because the issue had been properly before an appeals court in an earlier proceeding.

In the remaining dissenting opinions, Stevens attempted to clarify the main principles from the early death penalty cases and tried to persuade other justices to agree with his interpretation.

Two cases from Florida involved the application of the state's scheme to allow a trial judge to reject the advisory sentence of a jury and impose a different sentence after a three step process involving the proof of an aggravating circumstance beyond a reasonable doubt, the weighing of this factor against any mitigating factors, and the evaluation of the penalty as appropriate for the particular defendant. Despite the fact that in a 1983 Florida case Stevens applied the reaffirmed "reliability" standard from Zant to agree with the Court in its upholding of a death sentence imposed by a sentencing judge in opposition to the jury recommendation of leniency,[346] the following year he corrected himself in noting that the constitutionality of Florida's procedure regarding the judge's power was not at issue, and proceeded to question this power as a threat to due process protection of life as well as to use the case to promote

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[345]Id. at 315-16.

[346]Barclay v. Florida, 103 S.Ct. 3418 (1983).

the role of the jury.[347] Remarking that within the past 12 years, "every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense," Stevens brings forth his conviction that this "expression of the community's outrage" can best be determined by a jury.[348] Using the standard set by Gregg that to evaluate a practice the Court must assess "contemporary values concerning the infliction of a challenged sanction,"[349] he contrasted the uniqueness of Florida's three-part scheme with other state schemes as well as that of Great Britain and concluded that because its design was more of an attempt to comply with Court decisions and less of a response to community values, it deserved different analysis. In his view:

> A legislative choice that is predicated in this sort of misunderstanding is not entitled to the same presumption of validity as one that rests wholly on a legislative assessment of sound policy and community sentiment.[350]

Similarly, although for the most part judges are given the power to impose sentences for most crimes, the imposition of the death penalty has traditionally been given to the jury. Stevens

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[347]Spaziano v. Florida, 104 S.Ct. 3154, 3166 (1984)(Stevens, J., concurring in part and dissenting in part).

[348]Id. at 3166-67. (See Gardner v. Florida, supra note 326, when the count was at five justices.)

[349]Id. at 3168 (quoting Justice Stewart in Gregg v. Georgia, 96 S.Ct. at 2925).

[350]Id. at 3170.

sees this as a protection against the cry of the mob mentality since allowing a "representative cross-section of the community" to make a retributive decision thereby legitimizing the criminal justice system is more acceptable than endorsing the power of the elected judges in Florida's scheme which subjects the accused "to the jeopardy of a death sentence twice" by a judge likely under public pressure to avoid leniency.[351] In his opinion, "If the prosecutor cannot convince a jury that the defendant deserves to die, there is an unjustifiable risk that the imposition of that punishment will not reflect the community's sense of the defendant's 'moral guilt.'"[352] Stevens reiterated his faith in the jury as "spokesman for the community" in an Alabama case decided the following term. In Baldwin v. Alabama the defendant was convicted by a jury of an offense which because of the presence of an aggravating factor required a death penalty; the trial judge could accept or reject the sentence depending upon his weighing of mitigating and aggravating circumstances surrounding the crime.[353] Stevens rejected the Court majority's acceptance of the scheme and was also dismayed with the defection of Powell, Blackmun and Burger from support of the view expressed in his majority opinion in 1980 where seven justices had agreed "that 'it is manifest that the jury's verdict must have a tendency to motivate the judge to impose the same sentence than the jury did'."[354] A jury's sentence becomes "arbitrary and uncertain" rather than a judgment

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[351]Id. at 3170, 3170 n.14, 3173.

[352]Id. at 3177.

[353]Baldwin v. Alabama, 105 S.Ct. 2727 (1985). This part of Alabama's statute had been repealed by the time this case reached the court.

[354]Id at 2739, 2741 (citing Beck v. Alabama, 100 S.Ct. 2382 [1980]).

representing "the jury's view of an 'appropriate' sentence based on full information and the exercise of guided discretion," and gives little guidance to the judge. Consequently, if the judge reverses the jury's sentence, even though he has the heavier burden than the jury in assessing the mitigating and aggravating factors, the public's perception would be that the judge is going against a reasoned jury decision.

Two cases from Texas concerned jury considerations of mitigating factors during the penalty phase of deliberation. Franklin v. Lynaugh involved denial of the defendant's request for jury instructions on his prison behavior record to accompany the judge's Special Issues instruction,[355] and Penry v. Lynaugh discussed execution of the mentally-retarded per se as well as jury instructions regarding mental retardation as a mitigating factor in the sentencing decision.[356] Franklin provided him with an opportunity to elucidate how previous prison conduct is relevant beyond merely as a predictor of future conduct, and also provoked him to enlighten the Court regarding characteristics of the Texas sentencing procedure evaluated in his 1976 Jurek plurality opinion. Concerning the former matter, Stevens said:

> Past conduct often provides insights into a person's character that will invoke a merciful response to a demand for the ultimate punishment even though it may shed no light on what may happen in the future. Evidence of past good behavior in prison is relevant in this respect just as evidence of honorable military service or kindness to those in the defendant's community or regular church attendance. Although it may aid the sentencer in predicting the defendant's future conduct, it also tells the sentencer something about the defendant's personality. Importantly, for example, it may suggest that the conduct of which the defendant stands convicted was not in keeping with his or her usual qualities or traits, a fact that has as much relevance to culpability as to future dangerousness. Further, the evidence of petitioner's past prison

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[355]108 S.Ct. 2320 (1988).

[356]109 S.Ct. 2934 (1989).

> conduct was relevant to show the appropriateness of the alternative punishment of imprisonment for him, another reflection of his character. . . . If mitigating evidence is relevant to the sentencing determination, a defendant has a right to have the jury consider it even if an appellate court may question its weight.[357]

In his view, any other conclusion regarding such mitigating evidence is contrary to a series of recent evidence cases. In his discussion of the Court's treatment of Jurek, he tried to explain the rationale behind the approval of Texas' death penalty scheme, that is, it "defines the offense of capital murder in a manner that narrows the class. . . . Nothing in Jurek implies that the Special Issues could be used to curtail the defendant's right to have the sentencing decision made on the basis of all relevant mitigating evidence. "[358] Since the aim of the Court has been to prevent "arbitrary, capricious and discriminatory decisionmaking," he explained its reasoning one more time:

> In requiring that the discretion of the sentencer in capital sentencing be guided we have never suggested that the sentencer's discretion could be guided by blinding it to relevant evidence. The hallmark of a sentencing scheme that sufficiently guides and directs the sentencer is the presence of procedures that require the jury to consider the circumstances of the crime and the criminal before it recommends sentence." [Jurek] 428 U.S., at 197, 96 S.Ct., at 2936. The requirement that the State not bar the sentencer from considering any mitigating aspect of the offense or the offender only furthers the goal of focusing the sentencer's attention on the defendant and the particular circumstances of the crime.
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> If, as the plurality suggests . . . the Texas scheme limits the sentencer's consideration to only that mitigating evidence that bears on one or more of the Special Issues, then it is constitutionally infirm.[359]

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[357]108 S.Ct. at 2336.

[358]Id. at 2339-40.

[359]Id. at 2340.

Stevens issued a short dissent in Penry agreeing with the Court that disallowing instruction concerning defendant's mental retardation as a mitigating factor in the sentencing phase was a violation against the Eighth Amendment, but he disagreed with its evaluation of competing arguments about the execution of the mentally retarded per se. In his judgment, "that explication--particularly the summary of the arguments advanced in the brief of the American Association on Mental Retardation and other amicus curiae, . . . --compels the conclusion that such executions are unconstitutional."[360]

A highly controversial decision issued by the Court in 1987, which accepted the results of what has become known as the Baldus study indicating possible racial bias in the application of Georgia's death penalty statute to black men convicted of killing a white victim, but rejected its relevance to the particular defendant before the Court, permitted Stevens to reiterate again the approach the Court should take when evaluating the application of death penalty statutes.[361] Procedurally, he maintains that if the scheme provides for a reasoned decision, any appeals court should carefully scrutinize the claimed error before the federal high court receives the case. Thus, before the Court affirmed the Court of Appeals it should have sent the case back for a review of whether McClesky's sentence actually was the product of bias (given that high probability based upon the findings of the Baldus study). Stevens rationale is clear:

> The Court's decision appears to be based on a fear that the acceptance of McClesky's claim would sound the death knell for capital punishment in

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[360]109 S.Ct., at 2963.

[361]McClesky v. Kemp, 107 S.Ct. 1756 (1987).

> 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. . . . But the Court's fear is unfounded. One of the lessons of the Baldus study is that there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If Georgia were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated.[362]

After fifteen years, Stevens was not daunted in his effort to promote fair death sentencing proceedings. A case from Arizona provided another challenge, this time to "stroke" the plurality opinion writer Justice White and to criticize Justice Scalia for his misreading of death penalty case law. In Walton v. Arizona a plurality of the Court approved the state's application of its sentencing scheme which provided that the judge make a finding of aggravating and mitigating circumstances based upon the proof of each, presented respectively by the prosecution and defense attorneys.[363] In the plurality opinion, Justice White held that the Sixth Amendment was not violated by Arizona's scheme which "did not denominate aggravating circumstances 'elements' of offense or permit only jury to determine existence of such circumstances." In dissent, Justice Stevens believed this did amount to a Sixth Amendment violation since it compromised the traditional factfinding role of the jury. Extensively quoting Justice White's 1968 opinion from Duncan v. Louisiana capsulating the history and meaning of the Sixth Amendment and trial by jury as applied to the states through

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[362]Id. at 1806.

[363]110 S.Ct. 3047 (1990).

the Fourteenth Amendment,[364] and then noting how the Court has allowed some states' schemes extending judicial sentencing authority, Stevens harkens that "it is not too late to change our course and follow the wise and inspiring voice that spoke for the Court in Duncan[365] Justice Scalia had not joined the plurality, but wrote his own concurrence which included a rejection of a line of cases he declared he would no longer consider binding precedent because in his view they did not agree with the holding in Furman v. Georgia "which required constraints on the sentencer's discretion to 'impose' the death penalty."[366] Stevens exposed the "flaws" in Justice Scalia's opinion, noting that the cases he rejected "rest on the theory that the risk of arbitrariness condemned in Furman is a function of the size of the class of convicted persons who are eligible for the death penalty."[367] As Stevens understood Furman, once irrelevant factors are eliminated and the class is narrowed, the jury still maintains discretion not to impose the death penalty on those still eligible. After quoting the Georgia Supreme Court's description of the narrowing process as it likened it to a pyramid, and accusing Justice Scalia of "ignor[ing] the difference between the base of the

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[364]Id. at 3088 (quoting Duncan, 391 U.S. 145, 151-52, 155-56, 88 S.Ct. 1444, 1448-49, 1450-51 [1968]).

[365]110 S.Ct., at 3088-89. See also Cabana v. Bullock, 106 S.Ct. 689, 708 (1986)(Stevens, J., dissenting).

[366]Walton, 110 S.Ct. at 3058-68. Case law he rejected included Woodson v. North Carolina, 96 S.Ct. 2978 (1976); Roberts v. Louisiana, 96 S.Ct. 3001 91976); Lockett v. Ohio, 98 S.Ct. 2954 (1978); Godfrey v. Georgia, 100 S.Ct. 1759 (1980), and other like cases.

[367]110 S.Ct. at 3090. He also faults Scalia for overlooking other reasons for rejecting North Carolina and Louisiana's schemes, since the plurality had also included a consideration of "societal consensus" against mandatory penalties based upon jury determinations and legislative enactments indicators. Id. at n.7.

pyramid and its apex.," he presents a stunning conclusion which succinctly sums up his long and unwavering position:

> Perhaps a rule that allows the specific facts of particular cases to make the difference between life and death--a rule that is consistent with the common-law tradition of case-by-case adjudication--provides less certainty than legislative guidelines that mandate the death penalty whenever specified conditions are met. Such guidelines would fit nicely in a Napoleonic Code drafted in accord with the continental approach to the formulation of legal rules. However, this Nation's long experience with mandatory death sentences--a history recounted at length in our opinion in Woodson and entirely ignored by Justice Scalia today--has led us to reject such rules. I remain convinced that the approach adopted by this Court in Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed.2d 793 (1910), Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958), followed by Justice Stewart, Powell and myself in 1976, and thereafter repeatedly endorsed by this Court, is not only wiser, but far more just than the reactionary position espoused by Justice Scalia today.[368]

Obviously, Scalia's position was a frontal attack on the rationale of plurality and majority opinions either penned or joined by Stevens. The inability to sway Justices White, O'Connor, Rehnquist, and now Kennedy and Scalia, to his point of view is evidently very frustrating to Stevens. As in other criminal procedure areas, his attempts to elucidate the analysis of prior cases often falls on deaf judicial ears.

Post-Conviction Matters

Standards used for Court Outcomes: direct appeal, habeas corpus review, collateral attack, harmless error analysis

In a number of cases Stevens concurs with the majority judgment but not with its opinion or dictum because of a disagreement over how to analyze the alleged error in light of its

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[368]Id. at 3092.

nature, and depending upon what route of review it took in getting before the Court. Sometimes a large portion or his whole opinion will be devoted to an explanation of how a case should have been addressed and the impact a present course of analysis will have upon the system. Discussions of a few a these opinions illustrate his positions.

The quest for post-conviction relief can take many forms.[369] Federal and state direct appeals from trial convictions are governed by congressional and state statutes. As can be seen above, issues of appealability depend upon statute interpretation and affect double jeopardy claims, especially those few appeals by the government. Since the Supreme Court "can review only a minute proportion of the appeals and petitions for certiorari where persons in state courts seek to challenge their convictions on federal constitutional grounds," another option is the federal writ of habeas corpus.[370] Until 1963, state prisoners were required to "exhaust all state remedies" before an application for the writ could be granted, but this requirement was modified by Fay v. Noia, which allowed a federal court to grant relief despite the applicant's failure to have pursued a state remedy not available to him at the time he applied (i.e., he had "exhausted all [available] state remedies") and also allowed the court to consider a federal constitutional claim not raised during direct review.[371] Proper application of Fay continues to plague the Court. Because of the increase in claims coming to the Court

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[369]The ensuing descriptions of appeal, writ of habeas corpus and collateral attack rely upon John M. Scheb and John M. Scheb II, Criminal Law and Procedure 585-99 (1989). The information concerning harmless error analysis comes from Kamisar, et al., Modern Criminal Procedure, supra note 124, at 1497-1501 (quoting from LaFave and Israel, Criminal Procedure [1984]).

[370]Scheb and Scheb, at 596. 28 U.S.C. sec. 2254 requires a federal court to entertain a state prisoner's claim that he is being held in "custody in violation of the Constitution or laws of the United States."

[371]372 U.S. 391, 83 S.Ct. 822 (1963).

as the result of the Warren Court decisions in the area of criminal procedure, the Burger Court began to take steps to restrict state petitioner access to the federal writ; Stevens joined the Court in its decision in Stone v. Powell to deny the writ for Fourth Amendment search and seizure challenges if the issues had been fully and fairly determined by the state courts.[372] Besides state writs of habeas corpus, states have devised alternative methods which may be used by a state defendant after taking a direct state appeal. "These procedures, known as collateral review or collateral attack, provide a mechanism to permit review of judgments or sentences imposed in violation of the federal or state constitutions."[373] On review before the United States Supreme Court, the fact that the case arrives after collateral attack may have a bearing on how the issues are addressed, such as in the claim of ineffective counsel.[374] But it is the scope of appellate review that appears to be the source of much contention in recent years. Thus the Court has set upon itself to determine whether the claim before the court is one of plain error (requiring automatic reversal); or harmless non- constitutional error that either deprive the defendant of the benefit of a substantive right (that should be reversed) or one that affects the outcome of the proceeding (may or may not require reversal); or harmless constitutional error (reverse if error is determined to have been harmless beyond a reasonable doubt).[375] The Court first recognized a doctrine of harmless constitutional error in Chapman

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[372]96 S.Ct. 3037 (1976).

[373]Scheb and Scheb, at 598.

[374]See supra notes 292, 293, and accompanying discussion of Strickland v. Washington.

[375]Kamisar et al., supra note 369. Evidently the "outcome- determinative" test has caused the most dissension among both state and federal judges. After an extensive study of the application of this test in American courts, Francis Allen observed:

> Most often the appellate court announces its conclusion of harmless error in language that is terse and cursory. . . . Candor requires it to be reported,

v. California[376], and we find Stevens' reading of its standards sometimes poses a challenge to that of his colleagues. In addressing post-conviction issues, only a few of Stevens' opinions deal with direct appeal issues; the bulk of them treat procedural questions concerning the federal writ of habeas corpus as applied to federal and state petitioners. A few concurrences and dissents illustrate his view of the appropriateness of harmless error analysis. Stevens' approach to each of these mechanisms will be exemplified in the following discussion, beginning with direct appeals.

In one case the Court acknowledged that a federal district court had jurisdiction to entertain Arizona's appeal from a district court judgment of acquittal for a defendant whose state indicted criminal case had been removed to that federal court under 28 U.S.C. sec. 1442, upon interpretation of 28 U.S.C. 1291 that such appeal is authorized by Congress to a state in the event of an adverse judgment if state law confers such power.[377] Stevens agreed with the ruling, but writes separately that this agreement "lends no support to an argument that 18 U.S.C. sec. 3731 or any other federal statute would authorize an appeal by a state

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> however, that in many appellate opinions through the country it is precisely this sense of tension in applying the doctrine that appears lacking. The one factor common to a great number of opinions affirming criminal convictions on harmless error grounds is the staunch belief of the reviewing courts in the guilt of the appellant seeking reversals of their convictions. This belief appears to transcend all variations of formula and all problematic calculations about what juries might have done had the error complained of been avoided.

Francis A. Allen, A Serendipitous Trek Through The Advance Street Jungle: Criminal Justice in the Courts of Review, 70 Iowa L. Rev. 311 (1985). Perhaps one can say that Stevens makes a similar observation about the reasoning of some of his colleagues when it comes to their preference for applying harmless error analysis.

[376]386 U.S. 18, 87 S.Ct. 824 (1967).

[377]Arizona v. Manypenny, 101 S.Ct. 1657 (1981).

prosecutor."[378] Stevens issued two majority opinions addressing appellate counsel issues involving application of Anders v. California which required that before an appointed appellate counsel on first appeal could withdraw from the case because the indigent's appeal was wholly frivolous, he/she first had to include with the request to withdraw "a brief referring to anything on the record that might arguably support the appeal."[379] In one decision the Court determined that a Wisconsin Supreme Court rule requiring a court appointed appellate attorney, upon withdrawal from appeal, to include in the brief "a discussion of why the issue lacks merit," not violative of the client's Sixth and Fourteenth Amendment right to competent counsel.[380] Basically, Stevens sees this requirement comporting with the requirements of Anders, but going just one step further to assist an appellate court to determine whether the claim is frivolous and counsel should be permitted to withdraw. The following year the Court held that an Ohio Court of Appeals erred in allowing appellate counsel to withdraw without adequate documentation in conformity with Anders and in not appointing new counsel for appeal before examining the record and ignoring meritorious claims.[381] Stressing the importance of counsel not only at trial but also in the post trial processes, Stevens concluded for the Court that because the state deprived the appellant of "forceful advocacy" in the later stage, "the presumption of prejudice must extend as well to the denial of counsel on appeal."[382]

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[378]Id. at 1669.

[379]87 S.Ct. 1396, 1400 (1967).

[380]McCoy v. Court of Appeals of Wisconsin, Dist. 1, 108 S.Ct. 1895 (1988).

[381]Penson v. Ohio, 109 S.Ct. 346 (1988).

[382]Id. at 354.

During his first few years on the bench, Stevens wrote a handful of opinions related to questions concerning federal prisoners and habeas corpus. Where the majority spurned the idea that a federal statute's restrictions on the availability to an indigent prisoner of free trial transcripts only if attempting a direct appeal, and not to aid him in preparing a petition for collateral relief, as consistent with the Fifth Amendment, Stevens' dissent took the position that the administration of justice for the federal system would actually be enhanced by the "routine ordering of transcripts at the conclusion of every trial resulting in conviction," since it would have a "minimum impact on the budget," would save time when one is facing appellate deadlines, and would "minimize the danger that the right of the indigent defendant may be lost because of the ineptitude of his appointed counsel."[383] Writing for the Court in three other cases, he delivered the holdings that under sec. 110(g) of the District of Columbia Court Reform and Criminal Procedure Act of 1970 (23 D.D.C. Code sec. 110) it was proper for a federal district court to dismiss a petition for a writ of habeas corpus from a conviction in the Superior Court of the District of Columbia without violating Art I, sec. 9, cl. 2 of the Constitution since the statute, provided for application to begin before the sentencing court, is neither "inadequate or ineffective;[384] that collateral attack is not available when all that is shown is a failure to comply with the formal requirements of a federal procedural rule governing the taking of guilty pleas, since such a violation is neither a constitutional nor a

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[383]United States v. MacCollom, 96 S.Ct. 2086, 2098 (1976).

[384]Swain v. Pressley, 97 S.Ct. 1224 (1976). This reform statute is seen as a parallel to the collateral review process enacted in 1948, 28 U.S.C. 2255, which limited filing of petition in the sentencing court rather than the district court in the district of prisoner confinement. He also rejected Solicitor General Bork and Assistant Attorney General Thornburgh's "broad argument" appealing to constitutional history to decide the "suspension of the writ" argument, preferring a plain reading of the statute.

jurisdictional violation, neither an error resulting in a "complete miscarriage of justice" nor "inconsistent with the rudimentary demands of fair procedure," and could have been raised on direct appeal;[385] and that a federal prisoner's allegation that a post sentencing change in the policies of the U.S. Parole Commission has prolonged his actual imprisonment beyond the period intended by the sentencing judge (three and a half years for a typical ten year sentence) does not support a collateral attack on the original sentence under the federal habeas corpus statute, 28 U.S.C. 2255, since his allegation is not the type of error intended by the statute in that the policy change "did not affect the lawfulness of the court judgment itself--then or now."[386] But we must look to Stevens' opinions from cases generated by state convicted petitioners for articulation of his view of the place of federal habeas corpus in the administration of justice.

Shortly after its decision in Stone, the Court opined that a state petitioner is entitled to relief in a habeas corpus proceeding if it is found that upon the evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.[387] Though concurring in the judgment, Stevens expressed concern over the impact of such a standard upon "the morale and esteem of the State Judiciary" and the real likelihood of finding

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[385]United States v. Timmreck, 99 S.Ct. 2085 (1979). Stevens emphasizes that this case is a strong one to support limitations on collateral relied since it deals with a conviction based on a guilty plea, quoting from his dissent in United States v. Smith, 440 F.2d 521, 528-29 (1971).

[386]United States v. Addonizio, 99 S.Ct. 2235 (1979). He urges that "in our judgment, there is no basis for enlarging the grounds for collateral attack to include claims based not on any objectively ascertainable error but on the frustration of the subjective intent of the sentencing judge." "Whether wisely or not, Congress has decided that the Commission is in the best position to determine when release is appropriate, and in doing so, to moderate the disparities in the sentencing practices of individual judges" id. at 2241-42.

[387]Jackson v. Virginia, 99 S.Ct. 2781 (1979).

error after so many layers of judicial review at both the state and federal levels. Past rationale for justifying collateral review of state proceedings by federal judges had been linked to state judges' lack of expertise on federal law and their "suscept[ability] to political pressures." However, in his view, "State judges are more familiar with the elements of state offenses than are federal judges and should be better able to evaluate sufficiency claims," adding, "of all decisions overturning convictions, the least likely to be unpopular and thus to distort state decisionmaking processes are ones based on the inadequacy of evidence."[388] Thus, such matters should be dealt with in the manner of Stone, foreclosing federal court review. The question whether a Jackson claim may be entertained by a federal court if filed between two trials in a two-tier trial system, was addressed by the Court in 1984 and a majority would bar such a claim.[389] Because "[t]he disruption of orderly state processes attendant to the exercise of federal habeas corpus jurisdiction when state proceedings remain pending weighs strongly, and in [his] view decisively, against the exercise of jurisdiction," Stevens would defer to the state's interest to dispose of the case, confident that if the prosecutor in the second tier knew that the sufficiency of the evidence in the first tier could be reviewed, "the likelihood of a constitutional violation [would be] reduce[d]."[390] Three years after Jackson, Stevens stated his major concerns about "conception of the proper role of the writ of habeas corpus in the

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[388]Id. at 2793, 2794-95.

[389]Justices of Boston Municipal Court v. Lydon, 104 S.Ct. 1805 (1984)(Stevens, J., concurring in part and concurring in the judgment). See supra note 307 and accompanying discussion of the double jeopardy question.

[390]Justices of Boston, 104 S.Ct. at 1827-28.

administration of justice in the United States."[391] He dissented to the majority holding that a federal district court must dismiss a state prisoner's habeas petition if it contained unexhausted, along with exhausted claims, since it appeared to him "the Court assumes that the character of all claims alleged in habeas corpus petitions is the same." As concisely as possible, he attempts to enlighten his legal audience:

> In my opinion claims of constitutional error are not fungible. There are at least four types. The one most frequently encountered is a claim that attaches a constitutional label to a set of facts that does not disclose a violation of any constitutional right. In my opinion, each of the four claims asserted in this case fall in that category. The second class includes constitutional violations that are not of sufficient import in a particular case to justify reversal even on direct appeal, when the evidence is still fresh and a fair retrial could be promptly conducted. Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705; Harrington v. California, 395 U.S. 250, 254, 89 S.Ct. 1726, 1728, 23 L.Ed.2d 284. A third category includes errors that are important enough to require reversal on direct appeal but do not reveal the kind of fundamental unfairness to the accused that will support a collateral attack on a final judgment. See, e.g., Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067. The fourth category includes those errors that are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained. This category cannot be defined precisely; concepts of "fundamental fairness" are not frozen in time. But the kind of error that falls in this category is best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus--that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods. Errors of this kind justify collateral relief no matter how long a judgment may have been final and even though they may not have been preserved properly in the original trial.[392]

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[391]Rose v. Lundy, 102 S.Ct. 1198, 1214 (1982). The petitioner' exhausted claims regarded the denial of a confrontation right because of trial court limitation to defense counsel questioning of the victim and denial of fair trial because of prosecutor comment about his character; the additional unexhausted claims included fair trial denial regarding prosecutor remark during closing argument regarding uncontradicted state evidence and improper jury instructions that every witness if presumed to swear the truth.

[392]Id. at 1216-17 (notes omitted).

If in fact the unexhausted claims have merit, Stevens urges that "postponing relief until another round of review in the state and federal judicial systems has been completed is truly outrageous;" he would "allow district judges to exercise discretion to determine whether the presence of an unexhausted claim in the presence of an exhausted claim . . . makes it inappropriate to consider the merits of a properly pleaded exhausted claim." because the "inflexible, mechanical rule the Court adopts today arbitrarily denies district judges the kind of authority they need to administer their calendars effectively."[393] He stresses the "uniqueness" of the writ as a "fundamental guarantee of liberty"--rather than a means for federal judges to correct error by remand or treat cases as if they were on direct review--and regrets that the misunderstandings have resulted in an excess of petitions to the courts and the necessity for "judicial lawmaking," yielding the "special procedural rules" such as "the doctrine of nonretroactivity, the emerging 'cause and prejudice' doctrine, and today's 'total exhaustion' rule." In his view, "fundamental fairness" should be the standard in granting the writ and "relief should depend primarily on the character of the alleged constitutional violation and not on the procedural history underlying the claim.," for "[w]hen a person's liberty is at stake, however, there surely is no justification for the creation of needless procedural hurdles."[394]

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[393]Id. at 1217.

[394]Id. at 1218-19. See Anderson v. Harless, 103 S.Ct. 276 (1983)(Stevens dissenting to Court's identification of a "technical, procedural error" of inexhaustion; he agrees with the district and appeals courts that case law "requires only that the'substance' of the federal claim (not the form) be 'fairly presented' to the state courts id. at 280. Perhaps Stevens was partially successful in stressing his concerns for federalism as well as court time. In 1987, he wrote a majority opinion for a unanimous court in Granberry v. Greer, 107 S.Ct. 1671, holding that "when state raises nonexhaustion defense for first time in appellate level, appellate court is neither required to dismiss for nonexhaustion nor obligated to regard state's omission as absolute waiver of claim, and, court should determine whether interests of federalism will be better served by addressing merits forthwith or by requiring series of additional state and district court proceedings before

The Court narrowed somewhat the availability of habeas corpus review for state petitioners "absent a knowing and deliberate waiver of the federal constitutional contention" under Fay v. Noia by holding in Wainwright v. Sykes that if the waiver is not timely under state procedural rules and absent a showing of cause and prejudice, review by the federal court is barred; failure to object to his admitted confession during trial, according to Florida procedural rules, "amounted to an independent and adequate procedural ground which would have prevented direct review."[395] Stevens concurred, noting that this application of Fay was common through circuit courts and also because in his view the lack of objection could be viewed as a defense tactic. A few years later, in a footnote to Rose v. Lundy, he would cite "the character of the objection" as the basis for his decision that the claim lacked merit, but if the claim had had merit he would not have barred the claim for "procedural default" nor subject it to "cause and prejudice analysis."[396] He addresses the "independent and adequate state procedural bar" principle from Sykes in Harris v. Reed where the Court determined that procedural default would not bar consideration of a federal claim on habeas corpus review unless the last state court rendering judgment in case clearly and expressly stated that judgment rested on state procedural bar, the so-called Long rule.[397] Stevens explains his apparent turnabout in accepting this standard by noting that the Long ruling expanded the Court's jurisdiction "to review cases in which state courts had overprotected their respective citizens"--a less

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reviewing the merits of the claim."

[395]97 S.Ct. 2497 (1977).

[396]See supra note 391, 102 S.Ct. at 1218 n.17.

[397]109 S.Ct. 1038 (1989)(referring to Michigan v. Long, 103 S.Ct. 3469 [1983]). See Chapter Five for discussion of Long and its progeny.

"justified" "intrusion into state affairs" than where the courts fail to protect rights--but habeas corpus review is different:

> [I]n considering petitions for relief under 28 U.S.C. sec. 2254, the federal courts do not review state court decisions to determine if the States have gone too far in protecting the rights of their citizenry, but rather perform the core function of vindicating federally protected rights. Because the concerns that prevented me from joining the majority opinion in Michigan v. Long are not present in this case, I join the Court's opinion and the judgment.[398]

Stevens' high regard for the federal writ of habeas corpus and its historic significance was the impetus behind his views restricting its use; obviously, his contempt for complex procedural rules and his respect for state courts is evident, as are his conflicts with his brethren. Straightforwardness is also part of his concern when it comes to analysis of error. A few opinions illustrate how he wrestles with harmless analysis from Chapman v. California.

Stevens' general pattern in the early 1980s was to concur in the judgment when the Court applied harmless error analysis to an alleged constitutional error. For example, in Connecticut v. Johnson he is careful to distinguish between "the harmless error rule which may be applied when federal constitutional error has been committed . . . the federal harmless error rule that is applied in federal courts when non-constitutional error occurs . . . or with a State's own harmless error rule applicable to errors of state law."[399] In United States v. Hastings a

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[398]Id. at 1046.

[399]103 S.Ct. 969, 978 n.2 (1983). The state court declined to apply the Chapman test because it found an error in violation of Sandstrom v. Montana, 99 S.Ct. 2450 (1979), prohibits jury instructions that have the effect of relieving the state of its burden of proof regarding intent. The plurality found a jury instruction violating Sandstrom not harmless error generally. In Stevens' view, "federal law does not require a state appellate court to make a harmless error determination; it merely permits the state court to do so in appropriate cases," id. at 978 (notes omitted).

federal prosecutor's closing argument was at issue, claimed to be a threat to self- incrimination rights.[400] Here, Stevens simply concluded that the prosecutor's remarks were "legitimate comment . . . on the weaknesses of the defense case" and not an "improper comment on the defendant's failure to testify" requiring neither harmless error analysis nor references to the appellate court's supervisory power to discipline federal attorneys.[401] Even if he did find the comment improper he would not have applied the analysis because of the time it would require pouring over trial transcripts to determine the comments effect upon the jury deliberation--better suited for the appeals court. Similarly, in Rushen v. Spain the petitioner used a habeas corpus petition to challenge his jury's impartiality and denial of assistance of counsel because of information discovered about a juror after her ex parte conversation with the judge; but the Court in applying harmless error analysis and weighing the state court evaluation, found no error.[402] Stevens recalls his categorization of errors from Lundy and concludes that since the Court was unclear in identifying the nature of the error, it could not find harmless error, "nor can [he] subscribe to the Court's analysis of the harmless error conundrum of its own making."[403] Stevens strongly dissented from the manner by which the Court assumed jurisdiction over a state case and from the Court's application of harmless error analysis to a trial court's denial of the defendant's opportunity to impeach the prosecution's witness for bias

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[400]103 S.Ct. 1974 (1983).

[401]Id. at 1984.

[402]104 S.Ct. 453 (1984).

[403]Id. at 458 n.3, 462.

in violation of the Sixth Amendment Confrontation Clause.[404] But it is from his opinion in Rose v. Clark[405] that we understand Stevens' concern for the impact of the Court's broad approach to harmless constitutional error analysis. Though he agrees that harmless error analysis was applicable, given the facts of this case, he disagrees with Powell's dictum "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis" because it contradicts a plain reading of Chapman, which declared that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[406] Even though the Court "recognizes that harmless error analysis remains inappropriate for certain constitutional violations," he disagrees that this results from "concerns about reliability and accuracy;" he would remind the Court that those certain rights are guarded "because those rights protect important values that are unrelated to the truth-seeking function of the trial." In addition, such a presumption "has a corrosive impact on the administration of criminal justice":

> An automatic application of harmless error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever present and always powerful interest in obtaining a conviction in a particular case. It is particularly striking to compare the Court's apparent willingness to forgive constitutional errors that redound to the prosecutor's benefit with the Court's determination to give

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[404]Delaware v. Van Arsdall, 106 S.Ct. 1431 (1986). See also Chapters Four and Five for discussions of this case.

[405]106 S.Ct. 3101, 3110 (1986)("Jury instructions that impermissibly shifts to defendant the burden of proof on mental element of crime, in violation of due process principle of Sandstrom v. Montana, op. cit., even if defendant contests mental element, is subject to Chapman analysis")(Stevens, J., concurring in judgment).

[406]Id. at 3110.

> conslusive effect to trivial errors that obstruct a defendant's ability to raise meritorious constitutional arguments.[407]

Similarities to his last sentence will find their ways into numerous future footnotes in noting the Court's seeming undounted desire to affirm convictions. Consistent with his views on harmless error, he registers a dissent in 1987 upon the Court's holding that erroneous jury intructions not specifying one of the elements of the crime constituted harmless error based upon application of the principle in Rose v. Clark[408] In his understanding, Rose did not remove intent as an essential element to be found in determining guilt.

Criminal Procedures: Statutes and the Criminal Sanction

On numerous occasions Stevens has expressed his views concerning the improper use of the criminal sanction or the improper application of a criminal statute to certain behavior. In none other area has he been as vocal in this regard than when addressing issues involving obscenity and the limitations on sexual conduct. His position on these matters, as well as on interpretation of two federal mail statutes and on federal and state flag-burning legislation will be discussed here. Some of these opinions illustrate his approach to statutory construction.[409]

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[407]Id. at 3112

[408]Pope v. Illinois, 107 S.Ct. 1918, 1924 (1987). He also objected to the application of the Illinois obscenity statute on First Amendment grounds.

[409]In a whimsical essay linking the Five Canons of Statutory Construction with the arguments put forward challenging Shakespeare as the actual author of the works bearing his name, Stevens indicates his use of all five canons on occasion. (The Shakespeare Canon of Statutory Construction, 140 U. Pa. L. Rev. 1349 [1992] from an April 1991 Max Rosenn Lecture at Wilkes University.) These canons, presented by him in less than legal vernacular, are: "Read the statute." "Read the entire statute." "Put statute in its contemporary legal context." "If you're desperate,

Early in his first full term Stevens set forth his general dissatisfaction with Miller v. California, the seminal case decided in 1963 which was supposed to set forth standards to be applied in guiding a jury determination of what was and was not obscene.[410] In Marks v. United States, he expresses his disdain for the constitutional impermissibility of applying the criminal sanction in this area and gives three reasons:

> First, as the Court's opinion recognizes, this "statute regulates expression and implicates First Amendment values." However distasteful these materials are to some of us, they are nevertheless a form of communication and entertainment acceptable to a substantial segment of society; otherwise, they would have no value in the marketplace. Second, the statute is predicated on the somewhat illogical premise that a person may be prosecuted criminally for providing another with material he has a constitutional right to possess. See Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed. 2d 542. Third, the present constitutional standards, both substantive and procedural, which apply to these prosecutions are so intolerably vague that evenhanded enforcement of the law is a virtual impossibility. Indeed, my brief experience on the Court has persuaded me that grossly disparate treatment of similar offenders is a characteristic of the criminal enforcement of obscenity law.[411]

In this case he was objecting to a federal statute forbidding the transportation of obscene materials. By the following term he had used this rationale from Marks in four other

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consult the legislative history." "Use a little common sense." Stevens periodically quotes Justice Rutledge from his majority opinion Rescue Army v. Municipal Court, 331 U.S. 549, 571, 67 S.Ct. 1409, 1420 (1947) as a model for dealing with statutory construction; Rutledge's concurrence in United States v. Sullivan, 332 U.S. 689, 698, 68 S.Ct. 331, 336 (1948) also provides a guide.

[410]413 U.S. 15, 93 S.Ct. 2607 (1963).

[411]97 S.Ct. 990, 996 (1977)(the Due Process Clause of the Fifth Amendment precludes retroactive application of Miller standards and defendant entitled to jury instruction to acquit unless materials utterly without redeeming social value)(Stevens, J., concurring in part and dissenting in part).

cases.[412] In objecting to the Court's attempt to apply Miller standards in prosecutions under the Comstock Act, he elaborates a bit on the points made in Marks:

> The conclusion that a uniformly administrered national standard is incapable of definition or administration is an insufficient reason for authorizing the federal courts to engage in ad hoc adjudication of criminal cases. Quite the contrary, it is a reason for questioning the suitability of criminal prosecution as the mechanism for regulating the distribution of erotic material . . . the derivation of the relevant community standard for each of our countless communities is necessarily dependent on the perceptions of the individuals who happen to comprise the jury in a given case. . . . Moreover, because the record never discloses the obscenity standards which the jurors actually apply, their decisions in these cases are effectively unreviewable by an appellate court. In the final analysis, the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual jurors' subjective reactions to the materials in question rather than by the predictable application of rules of law.[413]

Not willing to depend upon either fellow citizens or fellow judges to make this determination for him, and mindful of past arguments of what was bad art (but now revered art), he concludes that "In the end we must rely on the capacity of the free market place of ideas to

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[412]Smith v. United States, 97 S.Ct. 1756 (1977)(State law of Iowa, the state within which obscene material were mailed in violation of the federal Comstock Act, 18 U.S.C. sec. 1461 (1873), cannot define the contemporary standards to meet the Miller test for "prurient interest and patently offensiveness")(Stevens, J., dissenting); Splawn v. California, 97 S.Ct. 1987 (1977)("No First Amendment rights violated by a jury instructions which permitted jury, in determining whether film was obsecene, to consider the circumstances of the sale and distribution, particularly whether such circumstances indicated that the film was being commercially exploited for the sake of its purient appeal")(Stevens, J., dissenting); Ward v. Illinois, 97 S.Ct. 2085 (1978)(Illinois statute not unconstitutionally vague in failing to give notice that sado- masochistic materials, which are of the kind that may be proscribed by state law, are of the kind not to be sold in the state, nor overbroad for failure to specify the kinds of conduct the representation and description of would violate statute)(Stevens, J., dissenting); Pinkus v. United States, 98 S.Ct. 1808 (1978)(sensitive persons, but not children, held within "community" by whose standards obscenity is judged; instruction on "prurient appeal to both deviants and average persons," held proper)(Stevens, J., concurring).

[413]Smith, supra, 97 S.Ct. at 1770-1.

distinguish that which is useful or beautiful from what is ugly or worthless."[414] In the state cases, Stevens notes that instead of punishing the film perveyer for his truth in advertising, on the contrary, Stevens suggests that California see the value of this "accurate description" to the "potential viewer;"[415] and that in allowing an Illinois conviction, based upon such a broad statute, to stand on the basis that past Illinois Court interpretations provide adequate notice of what objectionable materials are covered is both unfair and against the specificity requirements of Miller.[416] Illinois law becomes the focus of his frustration again in a 1987 decision in which the Court specified that "the proper" jury inquiry for the third prong of the Miller test "is not whether an ordinary member of any given community would find serious value in the allegedly obscene material, but whether a reasonble person would find such value in the material taken as a whole."[417] Stevens dissented because by the erroneous jury instruction the jury found the the defendant guilty of selling obscene magazines without finding one of the three elements for a judgment of obscenity. Recalling his dissent in Smith on the subjectivity of juror inquiry, and noting the lack of notice to these two part-time bookstore clerks, Stevens concludes that [I]f the legislature cannot define the crime, [the defendants]

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[414]Id. at 1774, 1774 n.24 (elaborating on the marketplace phrase from the Holmes dissent in Abrams v. United States, 250 U.S. 616, 630, 40 S.Ct. 17, 22 [1920]).

[415]Splawn, supra note 412, 97 S.Ct. at 19. See also FW/PBS Inc. v. City of Dallas, 110 S.Ct. 596 (1990) (adult entertainment industry challenging the "facial validity of zoning and licensing ordinance where court allowed challenge on First Amendment grounds, but made a variety of rulings on standing against petitioners), where Stevens' short concurrence includes a negative response to Scalia's suggestion "to resurrect" Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942 (1966), and calls to mind his retort in Splawn regarding "truthful and inoffensive advertising," id. at 617.

[416]Ward, supra note 412, 97 S.Ct. at 2094.

[417]Pope v. Illinois, 107 S.Ct. 1918 (1987).

should not be expected to."[418] He is even less tolerant of the Court's simple majority approval that "delivery of obscene messages to consenting adults may be prosecuted as crime," an offense included in the Indiana Racketeer Influenced and Corrupt Organization Act (RICO) but which the Court evaluates apart from the larger statute.[419] Stevens sees greater implications for justice, and maintains:

> [B]y injecting obscenity offenses into a statutory scheme designed to curtail an entirely different kind of antisocial conduct, it has not only enhanced criminal penalties, but also authorized wide-ranging civil sanctions against both protected and unprotected speech. In my judgment there is a vast difference between the conclusion that a State may proscribe the distribution of obscene magazines and the notion that this legislation can survive constitutional scrutiny.[420]

Since sale of one obscene magazine is a misdemeanor, but two misdemeanors show a "pattern" of racketeering, and if by that pattern one can be viewed to operate an "enterprise," a felony is involved. "Thus, even if only a small fraction of the activities of the enterprise is unlawful, the State may close the entire business, seize its inventory, and bar its owner from engaging in his or her own chosen line of work."[421] Because this statute "allow prosecutors to cast wide nets" in its seizure, it goes beyond the traditional justification of obscenity statute to "safeguard morals" and stifles the "public interest in access to sexually explicit materials" protected under constitutional law; it "arms prosecutors not with scalpels to excise obscene

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[418]Id. at 1930.

[419]Fort Wayne Books, Inc. v. Indiana, 109 S.Ct. 916 (1989).

[420]Id. at 932.

[421]Id. at 933.

portions of an adult bookstore's inventory but with sickels to mow down the entire undesired use."[422]

Dissents in three other cases illustrate Stevens' objections to statutes regulating particular sexual behavior. Upon a close-margin ruling by which a plurality held a California rape statute under which men alone may be criminally liable for act of sexual intercourse was not in violation of the Equal Protection Clause, Stevens argued that the "difference between males and females does not justify this statutory discrimination based entirely on sex."[423] [423]In his judgment, if these natural difference are seen to be "irrelevant," a strict level of scrutiny is required for an equal protection claim. If the primary difference is the the female's risk of pregnancy as a result of the forbidden act, and it is that difference upon which the legislature relies as the "rational explanation "for making the statute applicable to that class," then he sees a violation. For him, "the only acceptable justification for a general rule requiring disparate treatment of the two participants in a joint act must be a legislative judgment that one is more guilty than the other," but since there is no documented support for the assumption that it will always be the male that is the aggressor and the "more guilty party," a "rule that authorizes punishment of only one of two equally guilty wrongdoers violates the essence of the constitutional requirement that the sovereign must govern impartially."[424] Georgia's sodomy

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[422]Id. at 936-37. This ruling has implications beyond Indiana, since Stevens observes that the Attorney General's Commission on Pornography suggested the inclusion of obscenity provisions in RICO statutes and, as of 1989, twenty-six states have provisions similar to Indiana.

[423]M. v. Superior Ct. of Sonoma Cty., 101 S.Ct. 1200, 1218 (1981). Unlike the other three dissenters, Stevens "would have no doubt about the validity of a state law prohibiting all unmarried teenagers from engaging in sexual intercourse," since "The societal interests in reducing the incidents of venereal disease and teenage pregnancy are sufficient, in [his] judgment, to justify a prohibition of conduct that increases the risk of those harms," id.

[424]Id. at 1220-21.

statute fared no better. In a 5-4 decision the Court declared that "homosexuals have no fundamental right under the Due Process Clause of the Fifth and Fourteenth Amendments to engage in sodomy, and that the Georgia statute criminalizing private, consensual sodomy is constitutional, but case law recognizing constitutional right to privacy [in domestic situations] do not confer right of privacy that extends to homosexual sodomy."[425] Stevens takes exception to the Court's exclusion of homosexuals from the privacy decisions as an affront on their liberty. The inability of the state to justify its selective application (to homosexuals) of a statute (applicable to all persons of the state) by some "neutral and legitimate interest" negates its validity.[426] Stevens finds exception to another ruling by the Court concerning an Illinois statute. In Allen v. Illinois, the Court found that "proceedings under Illinois Sexually Dangerous Persons Act which permits prosecutor to seek institutionalization rather than imprisonment of a defendant charged with any of certain sexual offenses are not punitive in purpose and therefore not 'criminal' within the meaning of the Fifth Amendment guarantee against compelled self-incrimination."[427] Though he and the majority begin with the same proposition--that putting a "civil" label on a proceeding cannot change its "character" if it is indeed criminal--they reach a different conclusion after examining this specific proceeding. Stevens says:

> It seems quite clear to me, in view of the consequences of conviction and the heavy reliance on the criminal justice system--for its definition of the prohibited conduct, for the discretion of the prosecutor, for the standard of

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[425]Bowers v. Harwick, 106 S.Ct. 2841 (1986).

[426]Id. at 2858-59. The state prosecutor admitted that in actual operation, there had been selectivity in applying the statute only to certain homosexuals and others.

[427]Allen v. Illinois, 106 S.Ct. 2988 (1986).

> proof, and for the Director of Corrections as custodian--that the proceeding must be considered "criminal" for purposes of the Fifth Amendment.[428]

He maintains that respecting the state "as the final authority on the meaning and purpose of Illinois legislation" in its designation of the statute's goal as "treatment" does not change the "ultimate characterization of the sexually dangerous person proceeding for Fifth Amendment purposes," just as changing the goals of a criminal proceeding from punishment to "treatment" or "rehabilitation" does not change its character for self-incrimination purposes. [429] In the end, "permitting a State to create a shadow criminal law without the fundamental protection of the Fifth Amendment conflicts with the respect for liberty and individual dignity that has long characterized, and that continue to characterize, our free society."[430] For Stevens, the bottom line in Due Process cases is the question of liberty.

Two federal cases, one "overturned" by Congress shortly after it was decided, provide a glimpse of how Stevens approaches statutory construction. Garcia v. United States involved a prosecution under a federal mail statute, 18 U.S.C. sec. 2114, which forbids robbery of a mail carrier and theft of mail.[431] In his dissent Stevens methodically reviews the history and evolution of the statute from its original form in 1792 to its present form, and concludes that "Congress never intended it to apply outside of the postal context." He observes that each time robbery provisions were added throughout the nation's first century it was evident by the

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[428]Id. at 2997.

[429]Id. at 2998

[430]Id. at 3000.

[431]105 S.Ct. 479 (1985)(application of statute held not limited to crimes involving postal money or property, but could extend to undercover Secret Service agent robbed of "flash money").

exact and elaborated language that Congress intended special protection for the mail carriers in the varied situations they would encounter "within the postal setting." Garcia involved prosecution under the Act as amended in 1935, so Stevens took pains to explore its legislative history, quoting from two versions of the bill introduced in 1934, a letter from the Postmaster General requesting the extension of the bill to cover "assaults on custodians of government funds," and the statement of the Committee Chairman as to the purpose of the bill "to extend the protection of the present law to property of the United States in the custody of its postal officials, the same as it now extends protection to mail matter in the custody of its postal officials."[432] Up until 1973 there was no question as to its application, but upon inquiry by a federal prosecutor to Solicitor General Bork whether the statute could be applied "outside the postal context," Stevens quotes from Bork's explanation determining that it covered only "robbery of post offices or postal employees." Finally, he distinguishes the specific application of the law to postal employees as well as the harshness of the sentence from other statutes punishing crimes against government employees as part of a congressional design not to be thwarted by the federal prosecutor.[433] The scope of a federal mail fraud statute, 18 U.S.C. sec. 1341, prohibiting the use of the U.S. mail "to carry out 'any scheme or artifice to defraud,'" was at issue in McNally v. United States.[434] The Court reversed the convictions of two state officials prosecuted under the mail fraud statute for a kickback scheme involving the state's workmen's compensation insurance funds and other willing agents. Stevens' dissent addressed the question whether the statute applied only to tangibles, or whether "it also

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[432]Id. at 485-88.

[433]Id. at 490.

[434]107 S.Ct. 2875 (1987).

included fraudulent schemes to deprive individuals of other rights to which they are entitled," such as "their right to the honest services of their government officials."[435] Stevens then engages in "classical" statutory interpretation by looking at the statute's plain language (which designates using the mails for schemes to defraud, as a means to defraud by gaining something by fraud or disposing something by fraud), Congressional purpose (to regulate the misuse of the mails), past cases interpreting the word "defraud" in analogous statutes contemporaneous to the statute in question, uses of the term by other judges (and their references to dictionary definitions of the time), use of the term in common law, the legislative history of the statute (none showing a different meaning) and the broad design of other 19th Century legislation, as well as Congressional reaction to judicial interpretation (silence). Rejecting the Court's application of lenity, he asserts that though he understands criminal statutes are to be applied narrowly, application of that principle does not mean ignoring Congressional purpose. He is particularly stunned that the Court rejects the "accumulated wisdom of the many distinguished judges who have thoughtfully considered and correctly answered the question this case presents," and wonders aloud on the impact the limitation on prosecution may have. But he saves his strongest comment for last:

> The possibilities that the decision's impact may be mitigated [by Congressional amendment] do not moderate my conviction that the Court has made a serious mistake. Nor do they erase my lingering questions about why a Court that has not been particularly receptive to the rights of criminal defendants in recent years has acted so dramatically to protect the elite class of powerful individuals who will benefit from this decision.[436]

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[435] Id. at 2882.

[436] Id. at 2890-91.

No other decision produced as much controversy in 1989 as the Court ruling that applying the criminal sanction to the burning of the American flag was in violation of the free expression rights of the First Amendment.[437] Congress' attempt to overturn this holding by passing the Flag Protection Act of 1989, 18 U.S.C. sec. 1700, was to no avail, for the following year the Court declared the statute unconstitutional based upon Johnson.[438] Stevens wrote dissents for both of these 5-4 decisions, in an attempt to distinguish what actually was the object of the sanction. In the Texas case Stevens elucidated that the young man was being cited for his act of desecration, the same as if he had spray painted the Lincoln Memorial, plastered the Washington Monument with billboards or extinguished the flame at President Kennedy's grave. But to Stevens the offense was even greater because of the flag's symbolic power as well as the value of the flag as a symbol. He asserts that even if a person had the greatest respect for that which the flag represented--freedom, equal opportunity, religious tolerance, goodwill--but wished to send a message of respect by its destruction, it could still be viewed as a crime of desecration if the actor "knows his undertaking does not lessen the offense taken by some witnesses."[439] He is convinced that seeking an alternative method to present one's views is but a "trivial burden" on free expression rights. Similarly, Congress' statutory prohibition is seen as acceptable since it falls within the category of "methods of expression that may be prohibited" since the "prohibition is supported by a legitimate societal interest unrelated to suppression of the ideas the speaker desires to express,"

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[437]Texas v. Johnson, 109 S.Ct. 2533 (1989). Statute under which defendant was prosecuted forbad desecration of a "venerable object."

[438]United States v. Eichman, 110 S.Ct. 2404 (1990).

[439]Johnson, 109 S.Ct. at 2557.

in this case, the symbolic value of the flag.[440] Similarly, this societal interest outweighs the individual's interest in choosing a particular mode of expression since the impact of "the act of flag burning and the symbolic value of the object being burned" blur. His observation of what has occurred on the national scene over the past thirty years, and most recently with copy-cat flagburners, augments his point:

> The symbolic value of the American flag is not the same as it was yesterday. Events during the last three decades have altered the country's image in the eyes of numerous Americans, and some now have difficulty understanding the message that the flag conveyed to their parents and grandparents--whether born abroad and naturalized or native born. Moreover, the integrity of the symbol has been compromised by those leaders who seem to advocate compulsory worship of the flag even by individuals whom it offends, or who seem to manipulate the symbol of national purpose into a pretext for partisan disputes about meaner ends. And, as I have suggested, the residual value of the symbol after this Court's decision in Texas v. Johnson is surely not the same as it was a year ago.[441]

Despite his respect for stare decisis, he is compelled to yield to his impression of societal interests.[442]

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[440]Eichman, 110 S.Ct. at 2410.

[441]Id. at 2412.

[442]Id. at 2412.

CHAPTER V

FEDERALISM: MICHIGAN V. LONG AND ITS PROGENY

Through the 1983 decision of Michigan v. Long, the Supreme Court extended its jurisdiction to review decisions coming from state appellate courts absent a plain statement of reliance upon state grounds.[1] Numerous commentators joined dissenter Justice John Paul Stevens in criticizing the Court for overreaching and predicted a further disruption of the federal relationship between national and state authority; others applauded the Court as it appeared to offer a means by which state and local criminal justice personnel could gain legitimacy for criminal procedures used within their systems. This chapter will begin to explore the impact of Long upon state court generated cases, in light of some of the concerns of its critics, and will inquire as to (1) how many such cases and in what areas the United States Supreme Court assumed jurisdiction based upon the Long criteria, and (2) whether the rulings in these cases have had a significant or minor intrusion upon the state criminal justice role. The opinions and position (votes) of Stevens will be used respectively (1) to gauge to what extent the Court's rulings have threatened the federal-state relationship, and (2) to chart whether his voting behavior between 1983 and 1990 has been consistent with concerns expressed in his Long dissent.

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[1]436 U.S. 1032, 103 S.Ct. 3469 (1983).

Michigan v. Long and Its Critics

Before the Supreme Court was able to address the procedural question in Michigan v. Long--whether police are restricted from conducting a protective search of the passenger compartment of a vehicle during an investigative detention of a person suspected of criminal activity pursuant to Terry v. Ohio[2]--the justices had to determine whether the Court had jurisdiction to decide the case or whether the state supreme court had rested its judgment upon "adequate and independent state grounds." In fashioning a new rule for such cases, Justice O'Connor said for the majority:

> Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is adequate and independent state ground. It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions. Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement on its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.[3]

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[2]392 U.S. 1, 88 S.Ct. 1869 (1968).

[3]Long, supra, 103 S.Ct. at 3476-77 (emphases added).

She added further:

> Our requirement of a "plain statement" that a decision rests upon adequate and independent state grounds does not in any way authorize the rendering of advisory opinions. Rather, in determining, as we must, whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds ... we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.[4]

Justice Blackmun filed an opinion agreeing with all but this new approach, while Justice Brennan, joined by Justice Marshall, agreed that the court had jurisdiction but dissented from the application of Terry to the search. Justice Stevens' dissent expressed his wariness with the majority's position to reject the traditional approach, that if a state decision rests on adequate state grounds it will be presumed to be independent of federal law unless otherwise indicated, and to accept the new presumption "that adequate state grounds are intended to be dependent upon federal law unless the record plainly shows otherwise."[5] Appealing to the judicial traditions of stare decisis, judicial restraint, and the vindication of federal individual rights, Stevens rejected the Court's intrusion upon cases where a state high court has extended "greater protection to one of its citizens than some other state might provide or, indeed, than this Court might require throughout the country."[6] Stevens urgeed that even the Court's desire to review opinions out of the need for uniformity in federal law does not justify interference with a state court judgment.

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[4]Id. at 3477 (notes omitted; emphases added).

[5]Id. at 3490.

[6]Id. at 3491.

Stevens' comments in Long could be looked upon as part of a trilogy of opinions, including South Dakota v. Neville[7] and Massachusetts v. Upton[8] issued by him within a year; the former primarily addressed to the Court and the latter to the state judiciary. In Neville the Court reversed the holding of the South Dakota Supreme Court which had determined that the admission into evidence of the defendant's refusal to take a blood alcohol test violated the federal and state privilege against self-incrimination. Stevens, in dissent, cited cases going back 100 years which he believed confirmed the principle that, "Given the existence of an adequate state ground, it is established beyond dispute that this Court may not take jurisdiction if the state ground is independent."[9] He continued:

> Unless we have explicit notice that a provision of a State Constitution is intended to be a mere shadow of the comparable provision in the Federal Constitution, it is presumptuous--if not paternalistic--for this Court to make that assumption on its own. No matter how eloquent and persuasive our analysis of the Federal Constitution may be, we cannot simply 'presume' that the highest court of a sovereign State will modify its interpretation of its own law whenever we interpret comparable federal law differently. Even when a state tribunal misconceives federal law, this Court cannot vacate its judgment merely to give it an unsolicited opportunity to reanalyze its own law. If a state-court judgment is premised on an adequate state ground, that ground must be presumed independent unless the state court suggests otherwise.[10]

Consequently, he reminded the Court that in the past on several occasions the Court has vacated a state court decision and remanded for clarification of the basis for the decision

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[7]103 S.Ct. 916, 924 (1983)(Stevens, J., dissenting).

[8]104 S.Ct. 2085, 2089 (1984)(Stevens, J., concurring in judgment).

[9]Neville, supra, 103 S.Ct. at 924.

[10]Id. at 924-25 (notes omitted).

"where an apparent adequate state ground was arguably not independent," and suggested this as a better procedure for the Court if it is not overused.[11]

In Upton the Court reversed the Supreme Judicial Court of Massachusetts by summary disposition, and remanded the case after determining that totality of circumstances was a proper standard for the magistrate's determination of probable cause for the issuance of a warrant upon information from an informant for search of a mobile home for stolen goods. Despite agreement woth the Court's judgment, Stevens chastised the Massachusetts court for dereliction of duty in failing to review the magistrate's action as a possible violation under state law before treating it under federal law--an approach suggested and used by Justice Linde of the Oregon Supreme Court.[12] Recalling some of his earlier judicial efforts to maintain "the proper balance between the respective jurisdictions of state and federal courts," he reminded the state courts of the part they should play in fulfilling the "core of the constitutional relationship between the individual and governmental authority," found in the "truism" of the Ninth Amendment, so that they "do not unnecessarily invite this Court to undertake review of state court judgments."[13] With much fervor, he concluded:

> It must be remembered that for the first century of this Nation's history, the Bill of Rights of the Constitution of the United States was solely a protection for the individual in relation to federal authorities. State Constitutions protected the liberties of the people of the several States from abuse by state authorities. The Bill of Rights is now largely applicable to state authorities and is the ultimate guardian of individual rights. The States in our federal system, however, remain the primary guardian of the liberty of the people. The Massachusetts court, I believe, ignored this fundamental premise

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[11]Id. at 926, 926 n.8.

[12]Upton, supra note 8, 104 S.Ct. at 2089.

[13]Id. at 2090.

> of our constitutional system of government. In doing so, it made an ill-advised entry into the federal domain.[14]

The opinions from Long re-sparked discussion in legal circles that had begun a decade before concerning the "new federalism in criminal procedure"--a phenomenon which had been attributed to attempts by some state court justices to keep alive much of the Warren Court civil liberties protections (appearing to be dashed by the Burger Court) by applying state constitutional law to state generated civil rights cases.[15] Reviews of United States Supreme Court case law preceding Long suggest that the Court was not "anti-defendant," but ruled against certain types of defendants "who were in situations in which 'good' citizens would be unlikely to find themselves," such as those associated with illegal drugs or drunk driving or unsafe abortions.[16] Such rulings were seen to "champion" the "rights" of good citizens" in their fight against lower court decisions favoring bad citizens."[17] Borders observed that the earlier cases "that the court chose to hear despite an adequate state ground usually involved a state decision that expanded individual rights" whereas, "In other cases, the Court avoided the merits of any issue by reading the doctrine broadly and deciding either to dismiss the grant of

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[14]Id. at 2091.

[15]Donald Wilkes Jr., The New Federaliam in Criminal Procedure: State Court Evasion of the Burger Court 62 Ky L.J. 421 (1974); William J. Brennan Jr., The Bill of Rights and the States: The revival of State Constitutions as Guardians of Individual Rights, 1986 N.Y.U. L. Rev. 535; id., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977).

[16]Timothy P. O'Neill, The Good, the Bad, and the Burger Court: Victims' Rights and a New Model of Criminal Review, 75 J. Crim. L. & Criminology 363, 383 (Summer 1984).

[17]Id. at 386.

certiorari as improvidently granted or to remand the case."[18] Such conclusions implicating Burger Court denials of rights claims generally are countered by Spaeth and Collins and Galie, however.[19] Althouse suggests that the judicial motivation behind Long is not so devious and reflects the "federal interests held by the justices" such that in seeking "effectively functioning states" the federal court sees fit to "interfere" in state cases (1) for purposes of seeking uniformity of federal law, in O'Connor's terms, or, (2) for vindication of federal rights, in Stevens' terms.[20] While Miller would see the new Long presumption as a challenge "to allow states to limit Supreme Court jurisdiction,"[21] Collins and Reskin suggest how attorneys might construct the newly-required "plain statements" of state law grounds as patterned after examples of justices from Vermont and Oregon.[22]

It should be noted here that this tug-of-war discussion concerning state and federal court constitutional law goes far beyond the criminal law area. Though numerous journal articles

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[18]Nancy E. Borders, Comments, New Principles Involving the Adequate and Independent State Grounds Doctrine in Federal Jurisdiction, 20 Wake Forest L. Rev. 653, 664 (1984)(notes omitted).

[19]Harold J. Spaeth, Burger Court Review of State Court Civil Liberties Decisions, 68 Judicature 285 (1985); Ronald K. Collins and Peter J. Galie, Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions, 16 Publius 111 (Summer 1986).

[20]A. Althouse, How To Build a Separate Sphere: Federal Courts and State Power, 100 Harv. L. Rev. 1485, 1487 (1987).

[21]Brian Miller, Developing a State Jurisprudence under Michigan v. Long, 12 Am. J. Crim. L. 99, 107 (March 1984).

[22]Ronald K. L. Collins, Plain Statements: The Supreme Court's New Requirement, 70 A.B.A. J. 92 (March 1984); Lauren Rubenstein Reskin, Lawyers Admonished to Use State Constitutions, 72 A.B.A. J. 131 (January 1986).

published since 1983 concern the Long approach,[23] others address the "new federalism" more generally and analyze the "awakening" of state constitutional law jurisprudence,[24] including the area of intragovernmental relations within a state[25] as well as the settling of conflicts between state and federal legislatures.[26] Most revealing are the data which show the growing number of state cases since 1970,[27] but particularly since 1980,[28] which have "championed" civil rights without going to the federal courts. But some state citizens have attempted to

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[23]E.g., see Note, Michigan v. Long: Presumptive Federal Appellate Jurisdiction Over State Cases Containing Ambiguous Grounds of Decision, 69 Iowa L. Rev. 1081 (1984); L. R. Hirshman, Whose Law Is It Anyway? A Reconsideration of Federal Question Jurisdiction Over Cases of Mized State and Federal Law, 60 Ind. L.J. 17 (Winter 1984); Note, Constitutional Law: The New Standard of Independent and Adequate State Grounds--A Presumption of Reviewability, 10 J. Marshall L. Rev. 506 (1985); Note, The Use of Constitutional Provisions in Criminal Defense after Michigan v. Long, 65 Neb. L. Rev. 605 (1986); Shirley S. Abrahamson and Diane S. Gutmann, The New Federalism: State Constitutions and the State Courts, 71 Judicature 88 (August/September 1987); K. J. Arenson, The New Federalism: A Truncation of Civil Liberties, 22 Creighton L. Rev. 1 (1988/89); Ronald K. L. Collins, The Once "New Judicial Federalism" and its Critics, 64 Wash. L. Rev. 5 (1989); L. A. Graglia, State Action: Constitutional Phoenix, 67 Wash. U. L.Q. 77 (Fall 1989).

[24]See Alan G. Tarr and Mary Cornelia Porter, State Supreme Courts in State and Nation (1988); Peter J. Gailie, State Supreme Courts, Judicial Federalism and the Other Constitutions, 71 Judicature 100 (August/September 1987); William J. Brennan Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 1986 N.Y.U. L. Rev. 535; Stanley Mosk, The Emerging Agenda in State Constitutional Rights Law, 496 Annals Am. Acad. Pol. & Soc. Sci. 54 (March 1988).

[25]Elder Witt, State Supreme Courts: Tilting the Balance Toward Change, 1 Governing 30 (August 1988).

[26]John Kincaid, A Proposal to Strengthen Federalism, 62 J. St. Gov't 36 (January/February 1989).

[27]Steven Pressman, Protecting Rights in State Courts, Editorial Research Reports, May 26, 1988, at 274.

[28]Ronald K. L. Collins, et al., State Constitutional Law, Special section to Nat'l L. J., September 29, 1986; Robert F. Utter, State Constitutional Law, the United States Supreme Court and Democratic Accountability, 64 Wash. L. Rev. 19 (January 1989).

counter this judicial activism by amending state constitutions to restrict expansive reading of individual rights clauses in order to assure convictions by lessening the possibility of release of suspects because of procedural errors by criminal justice personnel.[29] Analysis of these matters is beyond the scope of this discussion, however, it is useful to make note of it so as to put the importance of concern for federal-state jurisdiction into perspective.

We shall now turn to Long's progeny.

The Cases "Wrought" by Michigan v. Long

Out of forty cases citing references to Michigan v. Long decided by the United States Supreme Court between 1983 and 1990, four dealt with the Fourth Amendment rule from Long,[30] nine applied the jurisdiction rule of Long to non-criminal, inter-governmental questions,[31] two applied the plain-statement rule to civil cases,[32] and one dissent criticized the Court for not following Long's admonition against advisory opinions.[33] Two cases included opinions based upon Stevens' Long dissent: one critical of the Court's denial of

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[29]Debra Cassens Moss, New Tack for Victims' Rights--Groups Now Target State Constitutions for Amendments, 74 A.B.A. J. 32 (March 1988).

[30]Hudson v. Palmer, 104 S.Ct. 3194 (1984); United States v. Jacobson, 104 S.Ct. 1652 (1984); United States v. Hensley, 105 S.Ct. 675 (1985); Maryland v. Buie, 110 S.Ct. 1093 (1990).

[31]Uhler v. AFL-CIO, 105 S.Ct. 5 (1984); Landreth Timber Co. v. Landreth, 105 S.Ct. 2297 (1985); ILA, AFL-CIO Longshoremen v. Davis, 106 S.Ct. 1904 (1986); R.J. Reynolds Tobacco Co. v. Durham County,107 S.Ct. 499 (1986); Pennsylvania v. Union Gas Co., 109 S.Ct. 2273 (1989); Quinn v. Millsap, 109 S.Ct. 2324 (1989); Jimmy Swaggart Ministries v. Board of Equalization, 110 S.Ct. 688 (1990); McKesson v. Division of Alcoholic Beverages and Tobacco, 110 S.Ct. 2238 (1990); American Trucking Associations, Inc. v. Smith, 110 S.Ct. 2323 (1990).

[32]Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 104 S.Ct. 2267 (1984); Milkovich v. Lorain Journal Co., 110 S.Ct. 2695 (1990).

[33]Clemons v. Mississippi, 110 S.Ct. 1441 (1990).

certiorari to a criminal case,[34] and the other critical of three other justices for writing concurring opinions to the denial while addressing the merits of the case anyway.[35] Twenty-two cases applied the jurisdictional rule of Long to justify the judgments on a variety of criminal procedure cases. It is to the latter group that the following analysis pertains.

In order to answer the query whether the rulings from these cases have intruded upon state criminal justice roles, thereby requiring personnel to be more protective of a defendant's rights, the cases will be examined as to the disposition of constitutional issues and then rated as "more" or "less" intrusive. A Court decision in favor of the defendant's denial of individual rights claim will be seen as more intrusive; a decision in favor of the state's claim will be viewed as less intrusive.

Three of the eleven Fourth Amendment cases extended permission for warrantless searches of vehicles. As a result, the majority approved the warrantless search of a vehicle impounded eight hours earlier and securely stored,[36] of a fully mobile motor home located in a public place,[37] and of the passenger compartment of a vehicle to move papers in order to see the Vehicle Identification Number.[38] While dealing with warrantless seizures in two cases, the Court disapproved of the warrantless arrest of an overnight guest in a private home,[39] but approved of seizure of evidence in a home after police were admitted by a third party they

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[34]James v. Arizona, 105 S.Ct. 398 (1984)(Brennan, W., dissenting).

[35]Colorado v. Nunez, 104 S.Ct. 1257 (1984)(Stevens, J., concurring).

[36]Florida v. Meyers, 104 S.Ct. 1852 (1984).

[37]California v. Carney, 105 S.Ct. 2066 (1985).

[38]New York v. Class, 106 S.Ct. 960 (1986).

[39]Minnesota v. Olson, 110 S.Ct. 1684 (1990).

reasonably believed had authorization.[40] The reasonableness standard was also applied to warrantless searches by public school officials.[41] Regarding searches of outside areas, the Court found no objection to warrantless search of marijuana fields under the "open fields" doctrine[42] and an officer's observation of the interior of a green house from a circling helicopter was not deemed a search requiring a warrant.[43] In two cases interpreting the warrant clause, the Court ruled that the probable cause standard for a warrant application for materials presumed to be protected by the First Amendment is the same as for a warrant generally,[44] and that search of an apartment by mistake on a warrant interpreted by law enforcement as authorizing search of an entire floor premises was not unlawful.[45] The Court also agreed that an "investigatory pursuit" of a person who started running when he saw a police car did not amount to a "seizure."[46] All eleven cases had been on appeal from the respective states and the Court had ruled in the states' favor for all but one of them. These rulings broadened police powers concerning exceptions to the warrant requirement, further restricted students' privacy rights, and made obscenity statutes easier to enforce.

In the four Fifth Amendment cases addressed, two involved the Double Jeopardy Clause and the other two addressed self-incrimination claims. The Court concluded that Ohio's

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[40]Illinois v. Rodriguez, 110 S.Ct. 2793 (1990).

[41]New Jersey v. T.L.O., 105 S.Ct. 733 (1985).

[42]Oliver v. United States/Maine v. Thorton, 104 S.Ct. 1735 (1984).

[43]Florida v. Riley, 109 S.Ct. 693 (1989).

[44]New York v. P. J. Video, Inc. 106 S.Ct. 1610 (1986).

[45]Maryland v. Garrison, 107 S.Ct. 1013 (1987).

[46]Michigan v. Chesternut, 108 S.Ct. 1975 (1988).

prosecution of a defendant on murder and aggravated robbery charges after a court had accepted guilty pleas to two lesser charges was not prohibited by the Double Jeopardy Clause,[47] nor was Montana's trial of a defendant for sexual assault after reversal of his incest conviction on grounds unrelated to guilt or innocence.[48] In another case involving sexual assault, the Court reversed the Connecticut Supreme Court's holding that a defendant's verbal confession to the police should be suppressed because prior to the conversation he had invoked his right to counsel by refusing to make written statements without counsel present.[49] Mixed votes resulted in the decision that the Fifth Amendment's privilege against self-incrimination does not apply to physical evidence such as videotapes that show signs of a suspect's intoxication, but does apply to the suspect's answers to questions by police testing mental alertness.[50] All four cases on appeal from the state were reversed (except for the one issue in Muniz), two showing preference for the prosecution and the others for police procedure.

Two cases applied interpretations of the Sixth Amendment Confrontation Clause. The Court reversed the Delaware Supreme Court's ruling on a murder conviction that the trial judge's blanket prohibition on the defense attorney's ability to cross-examine a state witness for bias was per se error,[51] and subjected it to harmless error analysis. Similarly, the majority said that the Confrontation right was not violated when a defendant is excluded from the

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[47]Ohio v. Johnson, 104 S.Ct. 2536 (1984).

[48]Montana v. Hall, 107 S.Ct. 1825 (1987).

[49]Connecticut v. Barrett, 107 S.Ct. 828 (1987).

[50]Pennsylvania v. Muniz, 110 S.Ct. 2638 (1990).

[51]Delaware v. Van Arsdall, 106 S.Ct. 1431 [1986]).

competency hearing of two child witnesses in a sodomy case.[52] The Court ruled for the state in both cases favoring the role of prosecutor over the trial judge.

In the one case arriving at the Court from a state judgment by petition of the defendant, the Court was able to muster a 5-3 vote to vacate a death sentence because it was imposed in violation of the Eighth Amendment.[53] The prosecutor had told the jury that though they might pass sentence, in actuality it would be the appellate court that would determine its appropriateness. Prosecutor misconduct at the sentencing phase was addressed here.

The Due Process Clause was the basis for two more state generated cases. After granting certiorari to a state prison official, the Court decided that the Clause did not require an administrator to write a prison official's reasons for denying an inmate's witness request at a disciplinary hearing into an administrative record.[54] The other case presented the question of right to counsel in state postconviction proceedings. Concluding that a state prisoner had no equal protection or due process right to appointed counsel, he also had no right to Anders v. California procedures for counsel withdrawal.[55] Thus, two more state criminal justice administrators found support from the federal court to restrict civil rights requests.

Finally, the Court most recently agreed to hear two cases from state prisoners who had exhausted all state remedies and were denied writs of habeas corpus from the federal courts. The Court used one case to extend the "plain statement" requirement of Long to federal habeas

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[52]Kentucky v. Stincer, 107 S.Ct. 2658 (1987).

[53]Caldwell v. Mississippi, 105 S.Ct. 2633 (1985).

[54]Ponte v. Real, 105 S.Ct. 2192 (1985).

[55]Pennsylvania v. Finley, 107 S.Ct. 1990 (1987)(regarding Anders, 386 U.S. 738, 87 S.Ct. 1396 [1967]).

corpus proceedings: "a procedural default does not bar consideration of federal claim on either direct or habeas review unless the last state court rendering judgment in the case 'clearly and expressly' states that the judgment rests on a state procedural bar."[56] In applying this standard to the defendant's claim of ineffective trial counsel, the Court remanded the case back to the lower court for consideration on the merits. However, in a subsequent case, the justices agreed not to apply the Batson v. Kentucky decision retroactively to the petitioner whose habeas case, claiming racial discrimination by the prosecutor's use of peremptory challenges to exclude blacks from the jury, had been suspended pending Batson's outcome.[57] A plurality established an approach whereby "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before new rules are announced", unless they fall within the exceptions of constitutionally protected conduct.[58] These cases illustrate the Court's attempt to further restrict post-conviction relief and to affirm the finality of state court criminal convictions, while at the same time broaden its jurisdiction to review state cases where individual federal rights have been denied.

Discussion

The dispositions of these twenty-two cases clearly reflect the Court's preference for requiring less of the criminal justice system in protecting individual rights. As evidenced in

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[56]Harris v. Reed, 109 S.Ct. 1038, 1043 (1989).

[57]Teague v. Lane, 109 S.Ct. 1060 (1989)(application of Batson, 106 S.Ct. 1712 [1986]).

[58]Id. at 1075.

Figure 3 indicating votes against (-) rather than for (+) the defendant, in nineteen of the twenty-two rulings it can be said that the Court was "less" intrusive of the state criminal justice system roles of the police, the prosecutor, and of public officials. All but one of these nineteen cases arrived at the Court from state petitions rather than from the trial defendant (**). An initial appraisal indicates that Stevens' prediction has come true for these cases: the majority has reversed state supreme courts in cases where individual rights have been extended. Other than New York, Pennsylvania and Maryland, no state is represented here more than once, though East coast states tend to dominate.

It should come as no surprise that the three dissenting justices in Michigan v. Long were the primary dissenters in the nineteen cases decided against the defendant. Justices Marshall (Ml), Brennan (Br) and Stevens (Sv) disagreed with the majority in eighteen, fifteen, and fourteen of the nineteen cases respectively and sided with the defendant in twenty-one, eighteen and seventeen of the twenty-two cases. Justices Blackmun (Bl), White (Wh), O'Connor (OC), and Rehnquist (Re) were part of the majority restricting rights in seventeen, eighteen, nineteen, and nineteen of the nineteen cases respectively, and eighteen, nineteen, nineteen, and twenty-one cases respectively of the twenty-two cases. Because of changes in personnel on the Court during this period, Justice Powell (Po) sided with the state in all fourteen of the cases in which he participated, Justice Kennedy (Ky) favored the state in four out of six cases, Justice Burger (Bu) agreed with state claims in twelve of twelve cases, and Justice Scalia (Sc) sided with the state in eight out of ten cases heard.

Cases	Justices Br	Mi	Sv	Bl	Wh	Pw Ky#	OC	Bu Sc#	Rh	votes + - for agst
4th Amendment Issues										
ME.v. Thornton (Oliver v. U.S.) (1984)	+ wMi	+ DO	+ wMi	-	- CP/J wP	- MO	-	-	-	3---6 (3-1-5)
FL. v. Meyers (1984) (PC)	+ wSv	+ wSv	+ DO	-	-	-	-	-	-	3---6
NJ. v. T.L.O. (1985)	+ DO wSv	+ wSv wBr	+ DO	- CJ	- MO	- CO wWh	-	-	-	3---6 (3-1-5)
CA. v. Carney (1985)	+ wSv	+ wSv	+ DO	-	-	-	-	- MO	-	3---6
NY. v. Class (1986)	+ DO	+ wBr	+ wBr wWh	-	+ DO	- CO wOC	- MO	- wOC wPw	-	4---5
NY. v. P.J. Video (1986)	+ wMi	+ DO	+ wMi	-	-	-	-	-	- MO	3---6
MD. v. Garrison (1987)	+ wBl	+ wBl	- MO	+ DO	-	-	-	-	-	3---6
MI. v. Chesternut (1988)	-	-	-	- MO	-	-# CO wBl	-	-# wK wBl	-	0---9
FL. v. Riley (1989)	+ DO	+ wBr	+ wBr	+ DO	- PO	-	- CJ	-	-	4---5 (4-1-4)
MN. v. Olson (1990)	+	+	+ CO wWh	-	+ MO wSv wWh	+#	+	+#	-	7---2
IL. v. Rodriguez (1990)	+ wMi	+ DO	+ wMi	-	-	-#	-	-# MO	-	3---6

MO Majority Opinion
(PC) Per Curiam
CP Concurring in Part
CJ Concurring in Judgment

PO Plurality Opinion
DO Dissenting Opinion
CO Concurring Opinion

\+ for defendant
\- agst defendant

Figure 3. Supreme Court Justices' votes from decisions (1983-1990) applying jurisdictional standards from Michigan v. Long.

Note: Case results displayed in chronological order of decisions for each amendment, using adaptation of scalogram design horizontally (but not vertically).

Cases	Justices									votes
	Br	Ml	Sv	Bl	Wh	Pw Ky#	OC	Bu Sc#	Rh	+ for	- agst
5th Amendment Issues										
OH. v. Johnson (1984)	+ C/D	+ wSv	+ DO	-	-	-	-	-	- MO	3	6
MT. v. Hall (1987) (PC)	+	+ DO	+ DO	-	-	-	-	-#	-	3	6
CN. v. Barrett (1987)	- CJ	+ wSv	+ DO	-	-	-	-	-#	- MO	2	7 (2-1-6)
PA. v. Muniz main iss. (1990)	- MO	+ DO	-	-	-	-#	-	-#	-	1	8
one iss.	+ MO	+	- wRh	- wRh	- wRh	+#	+	+#	- DO	5	4
6th Amendment Issues										
DE. v. Van Arsdall (1986)	-	+ DO	+ DO	-	- CJ	-	-	-	- MO	2	7 (2-1-6)
KY. v. Stincer (1987)	+ wMl	+ DO	+ wMl	- MO	-	-	-	-#	-	3	6
8th Amendment Issue										
Caldwell v. MI.** (1985)	+	+ MO	+	+	- wRh	NP	+ CP CJ	- wRh	- DO	5	3
Due Process Issues										
Ponte v. Real (1985)	+ wMl	+ DO	- CP wRh	- wSv wRh	-	NP	-	-	- MO	2	6
PA. v. Finley (1987)	+ DO	+ wBr	+ DO	- CJ	-	-	-	-#	- MO	3 (3-1-5)	6
Collateral Review										
Harris v. Reed** (1989)	+	+	+ CO wBl	+ MO	+	-# DO	+ CO wBl	+# wBl wOC	+ wBl wOC	8	1
Teague v. Lane** (1989)	+ DO	+ wBr	- CP CJ	- CP CJ wSv	- CP CJ	-# wOC	- PO	-# wOC	- wOC	2 (2-3-4)	7

MO Majority Opinion
(PC) Per Curiam
CP Concurring in Part
CJ Concurring in Judgment

** on petition from dependent
PO Plurality Opinion
DO Dissenting Opinion
CO Concurring Opinion

\+ for defendant
\- agst defendant

Figure 3. (Continued)

Stevens' Opinions and Federal Intrusion

Because Justice Stevens issued thirteen opinions applying Michigan v. Long standards, eight of which were dissents, selections from these writings will be used to gauge to what extent and in what manner the Court's rulings have threatened the federal-state relationship.

Stevens' has listed four reasons why he objects to the Court's more frequent habit of summarily deciding constitutional issues where state courts of last resort have denied review of a lower court's error in an area where federal law is well settled, or there is no novel question, or the state court is not hostile to federal precedent: (1) state courts should be free to manage their own discretionary docket; (2) such action indicates lack of confidence in state judges to decide constitutional questions; (3) such effort to supervise state judicial systems misuses the federal Court's scarce resources; and (4) review of such decisions puts into question the Court's historical role of vindicating federal rights rather than "vindicating the will of the majority" in its apparent attempt to fight the "never-ending war against crime."[59] He supports this accusation by identifying nineteen cases between 1981 and 1983, all summarily decided on petition by the state prosecutor or warden in their favor.[60] In noting this pattern, Stevens reminds the Court to be more vigilant of its "primary role as the protector of the citizen and not the warden or the prosecutor."[61] Similarly, in a case dealing with student searches by school officials, he further notes that between 1982 and 1985 the Court issued twenty-three Fourth Amendment decisons which granted prosecutors relief from suppression orders, either

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[59]Florida v. Meyers, supra note 36, 104 S.Ct. at 1854-55.

[60]Id. at 1855 n.3.

[61]Id. at 1856.

summarily or after full argument.[62] Though sympathetic to the need for discipline, safety, and order in the school setting, he highlights how the symbolism and values underlying such searches are transmitted to students who may later become future public officials such as policemen and prison guards. His concern is for the rule of protection of privacy as opposed to the exceptions to the warrant requirement.[63]

Stevens is often frustrated when the Court grants review to state cases that reflect conflicts between two branches of state government, such as a supreme court and prison officials[64] or state prosecutors.[65] Stevens has observed a trend in such cases such that once the state court is reversed on grounds of federal rights provisions, the state court reinstates its judgment "under a comparable guarantee contained in the State Constitution."[66] Accordingly, United States Supreme Court opinions in such cases become advisory in nature and show a disrespect for state courts that Long was supposed to remedy.[67]

Stevens dissent' in California v. Carney reiterates some of the same frustrations cited above concerning the Court's grant of certiorari to "cases presenting fact-bound errors of minimal significance," and how such actions have been seen by state prosecutors as a nod to file for certiorari even where state suppression orders have been explicitly based upon state

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[62]New Jersey v. T.L.O., supra note 4, 105 S.Ct. at 760 n.12.

[63]Id. at 766-67.

[64]Ponte v. Real, supra note 54.

[65]Montana v. Hall, supra note 48.

[66]Ponte, 105 S.Ct. at 2199 n.4.

[67]Hall, 107 S.Ct. at 1831.

constitutional law.[68] Stevens' position in Carney is even more illuminating if viewed as a response to Justice O'Connor's majority opinion in Long and its appeal to the goal of uniformity of federal law as justification for the Court's authority over state cases. Stevens regards this mobile home search case as a "novel question" still in its "percolation" stage at the state level. In his view the Court was irrational and premature in deciding a question concerning mobile living quarters before other courts had the opportunity to flush out all possible facets and applicable legal doctrines for such an issue involving the conflict between individual rights and effective law enforcement.[69] He further urges that the majority's condescending approach to resolve the question for state prosecutors insults the intelligence of law enforcement officers in insinuating that unless the federal court distinguishes what is a mobile home, the officers would not be able to make the distinctions, despite the fact that "state vehicle laws already require them to do so."[70]

When the majority extended the "plain statement" requirement of Long to a state supreme court's remedy for a federal constitutional violation in Delaware v. Van Arsdall, Stevens predicts this lack of respect for state courts will be "a recurrent source of friction between the federal and state judiciaries."[71] The Court's seeming dual approach to jurisdiction questions--practicing restraint to accept jurisdiction and then addressing the constitutional issue only when necessary for federal cases, but extending jurisdiction with less discernment to state court

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[68]Supra note 37, 105 S.Ct. at 2072, 2072 n.3.

[69]Id. at 2074-75.

[70]Id. at 2078 n.21.

[71]Supra note 51, 106 S.Ct. at 1442.

cases--reveals to Stevens "a disturbing conception of this Court's role."[72] He sees the Van Arsdall ruling as one that expands the "Court's review of state remedies that over-compensate for violations of federal constitutional rights," whether based upon federal or nonfederal grounds.[73] He believes that such intrusion on what he sees as state court prerogatives promotes lack of mutual trust between the court systems and should be avoided. Recalling earlier remarks from Mcassachusetts v. Upton (1984), he suggests that to avoid intrusion by the federal court, a state supreme court might use the approach put forth by Justice Linde of the Oregon Supreme Court for analyzing an individual rights claim: examine the state constitution first before invoking the federal Fourteenth Amendment to vindicate a civil right.[74] This would facilitate the "independent role of state constitutions and state courts in our federal system" that perhaps had been "atrophied" by use of the Fourteenth Amendment and selective incorporation of the Bill of Rights to affirm individual rights claims.[75] Justice Stevens echoes the concerns expressed in Van Arsdall in a 1990 concurrence of another per curiam opinion in which the Court had spent time discussing whether the defendant had standing to challenge his arrest on federal constitutional grounds.[76] Acknowledging that the Court lacks the "power to prevent state courts from allowing litigants to raise federal questions even though they would not have standing to do so in a federal court," he suggests that the Court should use its power of review "sparingly" and "only in the most unusual case should

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[72]Id. at 1442.

[73]Id. at 1444.

[74]Id. at 1447, 1447 n.10. He notes that four other states "expressly endorsed" these practices, e.g., Arizona, Maryland, New Hampshire and Washington.

[75]Id. at 1449.

[76]Minnesota v. Olson, supra note 39.

the Court volunteer its opinion that a state court has imposed standards upon its own law enforcement officials that are too high."[77]

Finally, Stevens' concurrence in Harris v. Reed, which extended Long's "plain statement" requirement to federal habeas corpus proceedings generated by a state conviction, should be noted since, on its face, it appears to contradict his earlier position in his Long dissent.[78] Stevens distinguishes between his concerns for the Court's review of ambiguous cases or where state courts had overly protected their citizens, and Harris, which "a federal court, in considering a petition for a writ of habeas corpus, must decide whether a state procedural bar constitutes an adequate and independent state ground for denying relief."[79] The former situation presents an unprecedented extension of the Court's jurisdiction, where the latter allows the Court "to perform the core function of vindicating federally protected rights" since "adequate and independent state ground for decision does not dispossess the federal courts of jurisdiction on collateral review."[80]

Discussion

Stevens' words reflect his voting position in the cases heard by the Court through jurisdiction assumed under Michigan v. Long. As Figure 3 further illustrates, Stevens chose to agree with the position of the state supreme court in fifteen of nineteen cases appealed by the state to affirm constitutional rights for state defendants. These votes reflected nine out of

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[77]Id. at 1690-91.

[78]Supra note 56.

[79]Id. 109 S.Ct. at 1045.

[80]Id. at 1046.

eleven Fourth Amendment cases, three out of four Fifth Amendment issues, two of two Sixth Amendment cases, and one of two Due Process questions. In cases petitioned to the Court by state defendants, Stevens agreed to reverse and remand two out of three cases in the petitioner's favor, one on Eighth Amendment grounds and the other vindicating the right to counsel during post-conviction relief. Fourteen of the twenty-two cases had close margins (5-3[1], 4-5[2]), 3-6[11]), and Stevens sided with the defendant in thirteen out of fourteen of these cases (twelve of these thirteen had been appealed by the state).

Justice Stevens was joined by other dissenters in five out of his eight dissenting opinions for the defendant (three by Justice Brennan and five by Justice Marshall). He joined other justices' dissents for the defendant in five cases (two with Justice Brennan, one with Justice White, and four with Justice Marshall). He joined other justices in three majority opinions for the defendants (Justices Blackmun, White and Marshall), and in three majority opinions against the defendant (Justices Rehnquist, Brennan, and Blackmun). He wrote one majority opinion against the defendant (joined by Justices Rehnquist, O'Connor, Burger, Powell, and White), and two concurring opinions while joining Justices White's and Blackmun's majority opinions for the defendant.

In this set of cases it can be said that Justice Stevens was consistent in adhering to the concerns he expressed in the Long dissent, but he apparently has been unable to persuade colleagues other than Justices Brennan and Marshall of the threats to the federal relationship he foresaw as a result of the 1983 rule.

Conclusions

Of the forty cases citing references to Michigan v. Long decided by the Supreme Court between 1983 and 1990, twenty-two applied the jurisdiction rule of Long to justify its

authority to render judgments on a variety of criminal procedure issues, including Fourth Amendment search and seizure, Fifth Amendment self-incrimination and double jeopardy, Sixth Amendment Confrontation Clause, Eighth Amendment death penalty, and Fourteenth Amendment due process rights claims. The decisions broadened police powers concerning exceptions to the warrant requirement and execution of a search warrant, made obscenity statutes easier to enforce, showed preference to prosecutorial discretion by narrowing interpretation of a defendant's double jeopardy and confrontation rights in murder and sexual conduct cases, allowed exceptions to police questioning techniques despite lack of attorney waiver, and lessened disciplinary hearing red tape for prison officials. These Court rulings are seen to produce a "minor" intrusion upon state criminal justice system roles of the police, prosecutors, and other public officials in upholding law and maintaining order since nineteen of the twenty-two decisions were in favor of the state. Alternatively, since eighteen of the nineteen cases had come to the Supreme Court from State petitions requesting reversal of state courts of last resort, one may conclude that the court rulings taken as a whole reflect major intrusion upon the role of state courts to resolve individual rights questions for its citizens.

Justice Stevens criticizes the Court for assuming more jurisdiction over state-generated cases than he believes is appropriate under the Constitution's mandatory limits of Article III, particularly when the Court appears to renege in its primary role of using its finite resources to grant jurisdiction to vindicate individual rights. Generally, he finds no difficulty if a state court, using its own constitution, acknowledges more to its citizens in the exercise of their civil rights than might the federal courts. Further, he objects to the majority's interference in apparent conflicts between two branches of state government when it is not of dire national concern. He also is willing to allow some novel federal questions to "percolate" at the state level for awhile before the Court renders a decision so that the Court has some vantage point

for determining how law enforcement can be effective without threatening individual rights. He predicts friction between state and federal courts since the Court has intruded upon the state supreme court prerogative to design remedies for violations of federal rights by extending federal jurisdiction over such cases. Yet, he does not see intrusion if the federal court requires state courts to provide a plain statement for state cases on collateral review in federal courts.

John Paul Stevens as an individual justice shows consistency with past reasoning in this series of cases stemming from Long in that he would have supported the views of the defendant in fifteen of the nineteen cases. His inability to persuade a majority of the justices to his point of view over seven terms suggests more opportunites for Court activism in reversing state court judgments after gaining jurisdiction by means of the Long rule, especially when state criminal justice personnel are the appellants.

CHAPTER VI

THE ADMINISTRATION OF JUSTICE

The purpose of this chapter is to indicate John Stevens' views of specific institutions and personnel associated with the state and federal administrations of justice. Much of this information will come from dicta. One would expect to be able to ascertain which values Stevens identifies with the criminal justice system and to understand how he sees these values protected or balanced by his judicial approach. This perusal should lead to an illustration of this justice's vision of the social order, that is, how he comprehends the functions of the criminal justice apparatus within the broader context of public administration and society at large. Parts of Chapters Two and Four have described much of Stevens' family ancestry, formal education, professional background and activities set in historic and national contexts. Highlights of crime problems and the activities of criminal justice administration in the Chicago of Stevens' youth as well as his family's personal brush with the administration of justice will begin this chapter in order to suggest an additional frame of reference for his later impressions of the system.

The Chicago Criminal Justice Environment

By the time John Paul Stevens was born in April of 1920, the city had barely recovered from the race riots of the past summer, national prohibition had been in effect for four months and Chicago's vice business was expanding to include bootlegging in its operations. Corruption by city officials and police allowed organized crime to flourish, while competition for territory by more ruthless and younger men resulted in the "beer wars" and climbing

murder rates, culminating in the St. Valentine's Day massacre in 1929.[1] "Crime was an openly acknowledged fact if life in Chicago," and after the 1927 mayoral election, "the city acquired the reputation for being the world center of unlicensed criminal activity."[2] As one scholar elucidates:

> Chicago was a city whose citizens viewed repetitive and even serious violations of the law wit bemused and mild misapprobation. Several types of criminal activity in the city were usually reproduced in every area of the city. On a block-by-block and neighborhood-by-neighborhood level, adolescent groups fought over territory and status. Over larger areas, their older brothers and fathers might have been members of the senior division of a gang or an athletic club, which was an important source of ethnic and geographic identity for its membership but which also increased their collective political and economic leverage. Members of these clubs might also belong to organizations devoted to crime as a business. These were, consequently, in constant conflict with neighboring groups or with the larger syndicate, which might be attempting to expand its territory through and at the expense of smaller, locally organized groups.[3]

Stevens' social studies lessons surely confirmed that Chicago was no stranger to crime and violence. Its history during the nineteenth and early twentieth centuries had included urban riots among western European immigrants and those of English descent, a quadrupling of its murder rate within twenty years after the Civil War,[4] the 1877 railroad riots and 1886 Haymarket riots between police and striking laborers, the bloody Pullman's strike of 1894, and numerous bombings by terrorist groups such as the Italian "black hand." According to

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[1]Samuel Walker, Popular Justice 181 (1980).

[2]Dianne M. Pinderhughes, Race and Ethnicity in Chicago Politics: A Reexamination of Pluralist Theory 178 (1987).

[3]Id.

[4]Charles E. Silberman, Criminal Violence, Criminal Justice 30 (1978).

criminal justice historian Samuel Walker, during the industrial riots the police were "clubbing citizens indiscriminately" and "the machinery of justice punished the striker or union organizer rather than the employer or strikebreaker, regardless of who had committed what act."[5] As for the machinery of justice, the success of members of the working class and ethnic groups (especially the Irish) to gain political power led to their employment in police departments, giving them some control over police procedure and eventually over local courts as well.[6] Chicago employed its first black police officer in 1872; by 1894 there were 23 black police officers.[7] The numbers increased to 83 in 83, and by 1930 blacks made up 2.2 percent of the force.[8] The Chicago police department required no formal training for its recruits until the 1920s and it was not restrained under legal procedures in its street operations. The city's police were not immune to the use of violence "as an accepted norm" among officers and prosecutors; at times policemen on patrol meted out punishment for minor offenses or to young delinquents on the beat, and detectives used the "sweat box" or other physical means as part of the "third degree" during interrogations.[9] In 1848 the Illinois legislature had approved election as the method for the selection of judges, leaving ample opportunity for political machines to gain power over the judiciary. The Chicago Bar Association had been formed in 1874 for comradery as well as to promote higher standards in the legal profession. By 1887 it

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[5]Walker, supra note 1, at 121.

[6]Mark H. Haller, Historical Roots of Police Behavior: Chicago, 1890-1925 10 Law & Soc'y Rev. 303, 305-6, 308 (Winter 1976).

[7]Walker, supra note 1, at 61.

[8]Harold F. Gosnell, Negro Politicians: The Rise of Negro Politics in Chicago 253 (Phoenix ed., 1967)(1935).

[9]Haller, supra note 6, at 318-19.

had begun to look into the credentials of judicial candidates and lend bar support to more qualified contenders; roughly 70% of the judges chosen between 1887 and 1934 had CBA support.[10] Court lore of the time included the trial techniques of the flamboyant attorney Clarence Darrow, who defended anarchists associated with the Haymarket riots and E. V. Debs of the Pullman conflict (and was later to defend murderer Nathan Leopold in 1924). Nevertheless, in 1893 Chicago boasted a criminal arrest rate of one in eleven residents,[11] and by the early 1900s Chicago had over five thousand working prostitutes with revenues exceeding $15 million annually[12] while gambling and other vice syndicates thrived. Between 1913 and 1931, gambling, prostitution and disorderly conduct constituted over 50 percent of all local misdemeanor charges.[13]

By the turn of the century, Progressive ideas for more efficient, reformed and professional government also impacted Chicago. In 1899, Chicago had the distinction of being the site of the first juvenile court, located across the street from Jane Addams Hull House, thanks to the efforts of social reformers and the influence of the Chicago Women's Club and the Chicago Bar Association.[14] In 1906, due to efforts by "elite members of the local bar," the police courts were replaced by the Municipal Court system, which required the justices to be lawyers

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[10]Herbert Jacob, Justice in America: Courts, Lawyers, and the Judicial Process 113 (3d ed., 1978).

[11]Silberman, supra note 4, at 30.

[12]Walker, supra note 1, at 142.

[13]Pinderhughes, supra note 2, at 164.

[14]Silberman, supra note 4, at 420.

and elected for six year terms.[15] "The American Institute of Criminal Law and Criminology emerged from a 1909 conference at Northwestern University Law School and began publishing the Journal of Criminal Law and Criminology in 1910,"[16] and the American Judicature Association was incorporated in Chicago at Northwestern University Law School in 1913. Feeling that the criminal justice system was not looking out for their interests after a robbery incident in 1917, a group of downtown businessmen formed the Chicago Crime Commission in 1919 to act as a permanent watchdog agency, and it became the prototype for other crime commissions throughout the nation.[17] Despite the sparse provision for due process protections and the extensive use of the "third degree" by police, the Commission's first executive complained about the "mollycoddling of the criminal population;" reports issued in 1926 showed a 19.5 percent conviction rate for felony arrestees and three-quarters of those were for a lesser charge.[18] A privately-funded commission initiated by the Illinois Bar Association extensively surveyed the state's law enforcement and correctional operations as well as Chicago's organized crime scene and published its findings in 1929 indicating "a disallusionment with the philosophy of rehabilitation and the institution of parole."[19] Between 1923 and 1927 the reform Democratic mayor William Dever attempted to clean up the city, but after the 1927 election returned a corrupt Republican mayor to power, reformist sentiments for the next election again flourished. On the national scene, Republican Herbert

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[15]Haller, supra note 6, at 309.

[16]Walker, supra note 1, at 130.

[17]Id. at 170.

[18]Silberman, supra note 4, at 231, 353.

[19]Walker, supra note 1, at 172.

Hoover ran on a law and order platform in 1928. The local press, businessmen and other community groups feared that publicity of extensive organized crime activity would affect the much needed monetary success of the 1934 World's Fair, then in its development and promotion stages.[20] It should also be noted that Northwestern University did not have a monopoly on the study of criminology. Members of the University of Chicago Department of Sociology had been doing extensive research on delinquency and the causes of crime, and their findings were given prominence in a section of the 1931 national Wickersham Commission reports.[21] In fact, by the 1950s, Friedman notes that both the University of Chicago and Northwestern University Law Schools were particularly unique in their attempts to integrate the study of law with the social sciences.[22]

Newspaper, radio and newsreel reports of Stevens' early youth would have included the notorious murder case of Bobbie Franks by University of Chicago graduate Nathan Leopold and his accomplice Richard Loeb, prosecution of Sally Rand for "indecent exhibition" at the 1933 Century of Progress Fair, stories of police investigations and the "third degree," the escapades of gangsters and robbers such as Al Capone, John Dillinger, and Bonnie and Clyde, revival of Klu Klux Klan activities in the midwest, the Lindbergh baby kidnapping, and the use of firepower by Chicago police, IRS and later FBI agents to fight crime. Even after the end of Prohibition in 1933, organized crime continued to flourish, especially in gambling (and then within the labor unions), bastioned by its connections with corrupt police and judges.

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[20]Pinderhughes, supra note 2, at 179. John Stevens' father was to manage restaurant concessions in one of its pavilions.

[21]Walker, supra note 1, at 177.

[22]Lawrence M. Friedman, A History of American Law 593-94 (1973). John Stevens taught at both schools during the 1950s and was no doubt familiar with these efforts.

There were other troubling events during this time which put certain perceived civil rights in conflict with law enforcement efforts. With its large German-American and other ethnic populations, Chicago was ripe for a "Palmer raid" during the Red Scare of 1919-1920 as well as FBI investigations for subversive activity beginning in 1936 (prior to America's entrance into World War II), and again in the early 1950s. Knowledge that the Packinghouse Workers Union in the Chicago stockyards was known to have been dominated by communists further aggravated tensions and suspicion among ethnic workers in the 1930s.[23]

In addition to prejudicial attitudes among ethnic groups, and between those of Anglo heritage and the numerous immigrants, Chicago also contended with racial bias. Particularly after the 1919 race riots, animosity between the predominantly ethnic, white police force and blacks began to escolate. Competition between groups for housing and jobs, along with a desire for more educational and recreational facilities had been identified as some of the causes for urban tension which led to the riots, and these needs grew as more blacks migrated from the South. (This same pattern will be repeated prior to the Chicago riots of the 1960s.) At the turn of the century, when 77 percent of Chicago residents were either immigrants or children of immigrants, blacks made up a small segment of the Chicago community. Though there were concentrations of blacks in various neighborhoods, "in 1900 thirty-three of Chicago's thirty-five wards were at least 0.5 percent black."[24] Originally clustered along State Street down to 16th Street, blacks attempted to move further south to 30th and State; some of the white ethnic families began to disperse in and outside of the city to newer housing and schools. Such "white flight" increased after World War II, particularly after red-lining was

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[23]Kermit L. Hall, The Magic Mirror: Law in American History (1989).

[24]Nicholas Lehman, The Origins of the Underclass, 257 The Atlantic 31, 51 (June 1986).

exposed, but during the 1920s and 30s most black and immigrant groups were similarly impoverished.[25] Certain vice actvities had been concentrated in the city's core and it was in those areas that blacks were confined to live. When police conducted periodic raids to reflect the occasional (and highly publicized) reformist efforts by the mayor's office, they often used the black neighborhoods. Consequently, white attitudes associating blacks with criminal lifestyle were perpetuated by this limitation on residency.[26] Blacks had participated in Chicago government positions during both Republican and Democratic mayoral administrations, but their power base began to increase in the 1920s.[27] Up until the 1930s blacks tended to vote for non-reformist Republican candidates. This began to change as their numbers increased in certain wards and they saw (or were shown) the advantages to be received by supporting the newly refined Democratic machine.

The 1919 riot had been precipitated by an incident on the racially segregated beachfront along Lake Michigan. The Stevens' household was on East 58th Street, in the once elegant and old- moneyed Hyde Park area near the former site of the 1893 Columbian Exposition and on the Quadrangle of the University of Chicago campus. The men in Stevens' family--his grandfather, granduncle, uncle and father--were all successful businessmen, having made their marks in Chicago's downtown merchantile, insurance, hotel and banking concerns, and all belonged to the more exclusive country clubs of the day. Since John Paul and his family were of Anglo (actually Norman) origin and not of the working class, had highly educated parents

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[25]Report of the National Advisory Commission on Civil Disorders 244 (1968).

[26]Pinderhughes, supra note 2, at 174.

[27]John R. Schmidt, The Mayor Who Cleaned Up Chicago: A Political Biography of William E. Dever 102 (1989).

and more than adequate schools, spent summers in Lakeside, Michigan and had access to private recreation facilities, one could assume that they were not affected directly by some of this ethnic strife over jobs, housing, education or recreation. Yet, in 1910, the Hyde Park Protective Association (in its reformist zeal to preserve the morals of the community in promoting local prohibition laws)[28] was credited with closing down an integrated, black-run nightclub. It appears that this was actually "part of a larger drive to maintain Hyde Park as a white community," and by 1919, Hyde Park became the sight of an anti-blockbusting bombing campaign.[29] It is also of note that sociologists at the University of Chicago in the 1900s began to establish a reputation for developing and using techiniques to conduct extensive research on Chicago's ethnic and racial social patterns (the so-called "Chicago School" of social theorists), and their findings were part of the conventional wisdom of the time.[30] These included exhaustive social studies of the black experience in Chicago, such as the report of the Chicago Commission on Race Relations (which contained an extensive section on crime and the then current--and somewhat negative--attitudes of police and judges toward black criminal defendants in the 1920s)[31] as well as a seminal work on development of political power among black politicians.[32]

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[28]Haller, supra note 6, at 315.

[29]Pinderhughes, supra note 2, at 35, 146, 279.

[30]Martin Bulmer, The Chicago School of Sociology: Institutionalization, Diversity, and the Rise of Sociological Research (1984).

[31]Chicago Commission on Race Relations, The Negro in Chicago: A Study of Race Relations and a Race Riot 327-56 (1922).

[32]Gosnell, supra note 8.

The connection between politics and the criminal justice apparatus was never more apparent than in the city of Chicago, where local public affairs were controlled by machine politics. The Stevens' men shared the same political affiliation with the Republican Party, a tradition from their beginnings in rural Colchester, Illinois, though none ran for or held political office. In contrast to the ethnic, working class majorities who backed either party (depending upon which machine offered the most advantages to their neighborhood concerns) many businessman-- including John Paul's grandfather, granduncle and father--belonged to the Union League Club, which supported "the perpetuation of Republican party policies."[33] Businessmen tended to back reformist candidates and "emphasized administrative efficiency and protection from crimes against persons and property rather than campaigns against liquor, vice, and gambling violations."[34] It is no wonder that John Paul's father was a member of the Chicago Bar Association (even though he did not practice law) at a time when the CBA screened judicial candidates and pushed for legal reforms. Similarly, since the Stevens' business concerns were in Chicago, they would have benefited from the watchful eyes of the Chicago Crime Commission. It appears that their choice of these and other civic activities reflected their social status and targeted areas where they could best influence public policy yet remain noncontroversial.[35] Despite the "fluid" social structure within this city which had

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[33]Bessie L. Pierce, 3 History of Chicago: 1871-1893 484 (1957).

[34]Pinderhughes, supra note 2, at 173.

[35]Peter B. Clark, The Chicago Big Business as Civic Leader (1959) in City Politics (Banfield and Wilson eds., 1963). Clark maintained that this was the prevailing attitude and behavior of business leaders in Chicago.

developed out of economic necessity, it was typical of the Anglo-American upperclass to see politics "as inferior to business and the professions."[36]

Despite the business prestige of the Stevens family, it was not spared loss, tragedy, or a brush with the criminal law during the Great Depression of the 1930s. In addition to several other business concerns, John Paul's grandfather James William Stevens, his uncle Raymond William Stevens and his father Ernest James Stevens were the founders, major stockholders and chief officers of the Illinois Life Insurance Company, as well as the Hotel LaSalle and Stevens Hotel. They also held prominent positions on the boards of three of the five major Chicago banks, including the Continental Illinois Bank and Trust Company (a major "bankers' bank"), the Central Republic Bank and Trust Company of Illinois, and the Congress Trust and Savings Bank. The solvency of many hotels were threatened by the Depression, but the LaSalle and Stevens remained under family control until mid 1932. Similarly, when the bank closings began to take place in the 1930s, and "life insurance companies were hit particularly hard," Illinois Life appeared to meet its responsibilities[37] (despite deficits in 1930 and 1931) until 1932, when the $150 million company failed and was placed in the hands of receiver, General Abel Davis, by a federal court. The federal Reconstruction Finance Corporation (RFC) shored up the Central Republic and Continental banks; the former was placed in receivership and renamed the City National Bank and Trust, and the latter was saved by a $50 million purchase agreement by which the RFC was given veto power over management positions.[38]

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[36]Lawrence McCaffrey, et al., The Irish in Chicago 148 (1987).

[37]Susan Eastabrook Kennedy, The Banking Crisis of 1933 191 (1973).

The financial strains on the family took their toll. After both hotels were placed in receivership, Ernest stayed on as manager at the Hotel LaSalle and Stevens Hotel for a salary of $3000 a month.[39] However, at eight o'clock, on the evening of Friday, January 27, 1933, Ernest J. Stevens was arrested on a bench warrant charging conspiracy to defraud the insurance company of one million dollars.[40] State's attorney Thomas J. Courtney had requested the warrant earlier that day after a tip from the State Department and the federal attorney that Stevens had "procurred passports" and was planning to leave for Europe the following Monday with his wife and three sons. After appearing before Circuit Court Judge Sullivan, he was released on $10,000 bond. Named as co-conspirators were Ernest's father and brother, but they were not arrested that evening because they had not committed an "overt act."[41] On Monday, January 30, the Cook County Grand Jury handed down three true bills of indictment against the three Stevenses. One charged four counts of conspiracy and two charged embezzlement of $4 million in connection with making dummy loans and issuing dividends on the assets of the Illinois Life Insurance Company for the benefit of the men in order to shore up the two hotels.[42] The grand jury set the bonds at $25,000 each, and the indictments were returned before Chief Justice Prystalski of the Criminal Court the following morning.[43] All three surrendered to the sheriff and posted the bonds.

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[38]Id. See also Jesse H. Jones, Fifty Billion Dollars: My Thirteen Years with the RFC (1951).

[39]Three in Illinois Life Indicted in Crash, N.Y. Times, Jan. 31, 1933, at 14.

[40]Stevens Arrested in Insurance Case, N.Y. Times, Jan. 28, 1933, at 19.

[41]Id.

[42]Three Indicted, supra note 39. Circuit Court of Cook County, Criminal Division, Form #84, Indictment #68027, 68028, 68027.

[43]Three Stevenses Indicted, N.Y. Times, Feb. 3, 1933, at 13.

A hearing on a motion to quash the indictments was to be conducted by Judge Sullivan on Monday, March 20. Instead, the judge announced in court that due to the critical condition of 80-year-old James Stevens, who had suffered a stroke the Saturday before and was now in an apoplectic coma, he would grant a continuance.[44] Three days later Raymond Stevens put a bullet through his head; his death was ruled a suicide by the Lake County coroner on March 24. The 58-year-old executive had been with the insurance company since 1896 and president from 1924 until it went into receivership. His son Raymond Jr. attributed the death to dispondency over the family financial problems as well as the illness of James W.[45] Ironically, Raymond's own and other insurance companies were to pay his wife, as sole beneficiary, a cash sum "above $300,000," which the attorneys for the receiver of Illinois life threatened to lay claim upon for the creditors.[46]

On Thursday, March 30, Ernest Stevens filed a petition with the federal judge overseeing the reorganization of Illinois Life, asking him to stop the negotiations until pressure could be put upon the RFC to act on a $5,000,000 loan promised by an agent prior to September 20, 1932. He contended that despite the Stevens family's agreement and action in meeting specific demands, the RFC had granted only $700,000, causing Illinois Life's inability to forestall failure; he urged that with the loan, and under new state guidelines, the company could resume business without reorganization. Jesse Jones, head of the RFC, casually brushed off Stevens' charges, claiming that many loans had been rejected and that nothing could be

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[44]J.W. Stevens Near Death, N.Y. Times, Mar. 21, 1933, at 4.

[45]R.W. Stevens Dies from a Pistol Shot, N.Y. Times, Mar. 24, 1933, at 38.

[46]$300,000 Insurance for Stevens Widow, N.Y. Times, Mar. 25, 1933, at 22.

done at this point.[47] Nevertheless, the court later acted on a reinsurance contract offered by Iowa's J.S. Kempner & Company, and Illinois LIfe became the Mutual Protective Insurance Company.[48]

In the meantime, amidst all this family strife, young John Paul Stevens became thirteen and began his teen-age years. Through the summer the attorneys prepared for trial. Ernest remained manager of the hotels and was scheduled to manage the English Village Restaurants during Chicago's "Century of Progress" World's Fair.

On September 25, forty-eight year old Ernest Stevens pleaded not guilty to the embezzlement charge and his trial began.[49] According to observers, he appeared smiling and confident throughout the three-week trial. But after five hours of jury deliberations, he was found guilty of embezzlement of $1,308,463 for approving two loans to the hotels on unsecured notes as officer of Illinois Life in 1931. The defense had claimed "that the'intercompany loans' were not a crime, but were matters of bad judgment. Judge Feinburg, in his charge to the jury, ruled that 'good faith' in these loans should be regarded as a complete defense." Nevertheless, the jury chose to agree with the prosecutor; arguments on a motion for a new trial were set for November 14 and the original $25,000 bail was continued.[50] On November 27, Ernest Stevens was sentenced to serve one to ten years in the state penitentiary at Joliet. "Judge Feinburg allowed sixty days for a bill of exceptions and a stay of mittimus for the same length of time," and Stevens was at liberty on $10,000 bond.

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[47]Illinois Life Crash is Blamed on R.F.C., N.Y. Times, Mar. 31, 1933, at 31.

[48]Court to Act on Proposal, N.Y. Times, Apr. 28, 1933, at 26.

[49]Stevens Trial Opens in Chicago, N.Y. Times, Sept. 26, 1933, at 8.

[50]E.J. Stevens Found Guilty of Theft, N.Y. Times, Oct. 15, 1933, at 30.

The state motioned, with leave to reinstate, the charges against James W. Stevens, and the charges against Raymond were abated as a result of his suicide.[51]

The New York Times reported the progress of the Stevens' case in its business section in very perfunctory fashion, as can be seen above, but the local papers introduced the arrest, suicide and conviction in bold, front page headlines and kept the trial prominent throughout the family's ordeal. The Chicago Daily Tribune (currently the Chicago Tribune) was considered the more conservative, Republican-oriented paper of the time and though it did not sensationalize the story, it is a good source for details relevant to procedures followed and for facts and anecdotes surrounding the case. The following excerpts fill in the gaps left by the Times.

Suspicions of wrongdoing at the Illinois Life Insurance Company by the three Stevens gentlemen had prompted both federal and state investigations during 1932 and impending grand jury dates early in 1933. Evidently, Ernest Stevens had been called down to the federal attorney's office on January 27 after the State Department had tipped off both the federal and state's attorneys' offices regarding his application for a passport on which he planned to sail from New York with his family the following Saturday for a six week Mediterranean cruise. Stevens would later tell reporters: "I never ran away from anything and I had no intention of running away from this; I needed a vacation, but intended to be back in June to be ready for the Century of Progress rush at the hotels."[52] Apparently, the federal attorney requested and Stevens agreed to surrender the passport but the state's attorney was not advised. He sent two squad cars, one with the arrest warrant and one without, to search various locations for Ernest

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[51]E.J. Stevens Sentenced, N.Y. Times, Nov. 28, 1933, at 5.

[52]Ask Indictment Tomorrow of Three Stevenses, Chi. Trib., Jan. 29, 1933, at 1A.

Stevens.[53] The officers without warrant appeared at Stevens' home and after answering the bell the maid shut the door in the officers' faces. A second attempt brought another maid, then Stevens' appeared and "remonstrated with vehemence," yelling "Where's your warrant?" . . . "I've let you into my house, but I'm not going to let you take me out of here without a scrap of paper to show your authority." As his wife watched and his sons entertained "chums" upstairs, the officers were offered cigars by "the affable host," but refused. They "manifested discomfort and "stood awkwardly around the room" as telephone calls were made to get the officer with the warrant, to get Stevens' attorney, to acquire bond forms from a neighborhood judge and money from acquaintances, and to call the issuing judge to see if he would approve the bond at his home. Only after all this did Stevens leave his home to go to Judge Sullivan's house and then down to the detective bureau where fingerprinting was waived but the bond was sworn to and signed.[54]

The newspapers reported much of what was expected to be the contents of the three witnesses' testimony before the grand jury including the showing of "fictitious surpluses justifying $1,000,000 in dividends at the end of 1931" (after the value of the insurance building had been boosted three times over a seven year period) "when, in fact, at the close of that year, there was a deficit of $6,822,000."[55] James W. Stevens' nephew, Bert Stookey, son of his sister Elizabeth and former treasurer of the insurance company, was one of the three witnesses called before the grand jury. In later testimony as a prosecution witness against his

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[53]Hold E.J. Stevens for Fraud, Chi. Trib., Jan. 28, 1933, at 1A-2A; Vote to Indict 3 Stevenses on Fraud Charges, Chi. Trib., Jan. 31, 1933, at 3A.

[54]Hold Stevens, supra, at 2A. There must have been a tipoff to photographers because the newspapers had pictures of Stevens being escorted from both his house and the police station.

[55]Ask Indictment, supra note 52.

cousin, Stookey painted a picture of the control wielded by James Stevens and his two sons over the firm's five member finance committee who were unable to vote down any financial policies, transferences of funds, or approval of loans and liens between the three properties.[56]

On Sunday, March 19, it was reported that the three Stevenses had been sued by Gen. Abel Davis, receiver of the defunct insurance company, for almost three million dollars, despite inside information by attorneys that the Stevenses were "flat broke," and that suing them would be "a futile formality."[57] Unbeknownst to all until the next day was the incident of James W. Stevens' stroke.[58] Then, in a bizarre fashion, the Tribune's front page banner headlines of March 24 shouted: R. W. STEVENS ENDS OWN LIFE, dwarfing the other front page stories.[59] Tribune reports that week bordered on the morbid. As descriptions of Raymond's last day, his suicide, his life insurance beneficiaries and funeral were revealed, so also does the city learn that he had been under federal investigation for mail fraud, that his son and an aid had been arrested for assault on a Tribune photographer, that as his father lay comatose the Central Republic Bank and Trust Company attached the elder Stevens' remaining assets, and bailiffs had been sent to the home to seize "two Rolls Royce cars, a Cadillac, and a Lincoln" as well as life insurance policies on himself and former wife Jesse.[60] Most poigniant was an interview with Jesse Smith Stevens done inside her rambling old mansion as

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[56]Tells Jury How Stevens Family Ruled Ill. Life, Chi. Trib., Oct. 3, 1933, sec. 1, at 5.

[57]Stevens Sued for $5,978,985 Ill. Life Loans, Chi. Trib., Mar. 19, 1933, at 4A.

[58]J.W. Stevens is Near Death, Jury is Told, Chi. Trib., Mar. 21, 1933, at 3.

[59]Chi. Trib., Mar. 24, 1933. E.g., "Hitler is made Dictator; Says 'No Kaiser Now'" // "Jews in Heated Rally Vote for Hitler Protest" // "Plan all Night Celebration to Welcome Beer" // "Mortgage Aid Plan Approved by Roosevelt."

[60]R.W. Stevens' Insurance Put at $300,000, Chi. Trib. Mar. 25, 1933, at 6A.

her son was laid to rest.[61] "He . . . and my sons have criticized me for staying on here," she said rocking vigorously, "But I don't mind being among the colored people. Though I remember when the best people in town, Potter Palmer's brother, and many others lived here." . . . "I wonder if anyone will take it away from me now? I don't even know if I own it. I suppose he owns it." After recalling her courtship with James, their married years, the bitter estrangement and the divorce settlement, she showed the interviewer the house and then added some final thoughts:

> I don't know why they wanted to make so much money. When Ernie told me they were going to build the Stevens Hotel, I said I saw no sense in it. Ray was against it, too. But Ernie and his father were set for it. I said "You have the LaSalle, that's enough." But he said they wanted the biggest hotel in the world. They wanted to see their name up in the sky. Well, they saw it. Now maybe they see that I was not so foolish.[62]

Stevens' trial began on Monday, September 25. The defense had only ten peremptory challenges, so it was anticipated that the jury would be "selected quickly," but it was reported that "cautious questioning of veniremen by the defense counsel made a day long proceeding of the jury selection."[63] Jurors were questioned about their financial situations and those who appeared to suffer "losses incurred in deals similar to the crash of the life insurance company

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[61]Virginia Gardner, Ex-Wife Clings to Old Home of the Stevens Family, Chi. Trib., Mar. 26, 1933, at 2A.; R.W. Stevens is Buried; Floral Tributes Large, id.

[62]Ex-Wife Clings, supra.

[63]Insurance Trial of E.J. Stevens to Start Today, Chi. Trib., Sept. 25, 1933, at 2; Complete Jury to Try Stevens in Ill. Life Case, Chi. Trib., Sept. 26, 1933, at 5A. Juxtaposed with this story, was a report on the progress of the city's "crime war" and State Attorney Courtney's orders to prosecutors "to oppose leniency for criminals" by not accepting felony waivers and by opposing probation, but to speed up embezzlement cases for the benefit of those seeking the funds. Deny Leniency, Speed Trials, Courtney Asks, Chi. Trib., Sept. 26, 1933, at 5.

caused many to be excused from jury duty on motions made by the defense." It was observed that during the voir dire, "Stevens looked on without emotion . . . and took no part in the hearing after entering a plea of not guilty." The jurors--all men--were sequestored in a downtown loop hotel. Ironically, it was reported the next day that these twelve jurors, "accepted by the defense because they had few financial dealings and suffered no losses in the market crash of 1929, appeared bewildered . . . by the the intricate financial transactions presented to their view in the opening statements" by the attorneys.[64] State's attorney John O'Hara specifically outlined how he would prove Stevens' fraud while defense attorney Franklin Stransky began his presentation by saying that "[t]he three Stevenses . . . could not by the greatest stretch of the imagination be said to be men of criminal type." He stressed the contributions of the Stevens' families to the progress and growth of the city and blaming the bank failures and extended depression for the plight of their businesses.

The prosecutor's case lasted almost two weeks and consisted of a series of employees, auditors and appraisers brought forward to show that because of his dealings with the finances of the hotels, his deciding votes in loan transactions on the finance committee, his signatures on memorandum approving a series of loans between the hotels and the insurance company, that Ernest Stevens was aware of the businesses' insolvency before 1931.[65] After the state rested its case the defense made a motion to direct the jury to bring in a verdict of not

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[64]Jurors Appear Bewildered in Stevens Trial, Chi. Trib., Sept. 27, 1933, at 10.

[65]State Traces Fund Transfers in Stevens Case, Chi. Trib., Sept. 29, 1933, at 3; Swears E.J. Stevens Clinched Transfers of Insurance Assets, Chi.Trib. Sept. 30, 1933, at 3; Stevens Hotel Valued Below Bond Issues, Chi. Trib., Oct. 5, 1933, at 1; Tells Valuation Set on Stevens Hotel for R.F.C., Chi. Trib., Oct. 6, 1933, at 13; Philip Kinsley, State to Close Case Against Stevens Today, Chi. Trib., Oct. 10, 1933, at 7.

guilty.[66] Mr. Stransky argued before the judge in chambers to grant the motion because the state had not proven Stevens actually had possession of the funds he was alleged to have embezzled and also, that Stevens could not be found guilty of embezzlement of funds as vice president of the insurance company since the transference had been done by the finance committee. The assistant prosecutor answered that it made no difference whether the indictment stated in what capacity Stevens acted, what had been proven is that he had control of the money and that this showed possession under state law. "The question at issue, the judge said, was whether the proof met the charge in the indictment." He took the motion under advisement until the following morning. This was seen as a hopeful sign for the defense, but in denying the motion Judge Feinberg noted the vice president's general fiduciary responsibility not to fraudulently convert funds regardless of what other "cloak or role" he assumed during the transactions.

Ernest Stevens' defense began with the testimony of ex-Governor Louis L. Emmerson "who led a long string of character witnesses" in an apparent strategy to attest to the hotel manager's reputation for integrity and honesty," and to allow hotel experts to show some insight into the profit/loss expectations for large, new hotels, as well as to indicate what impact the repeal of prohibition will have in restoring dancing and banquet clientile to the local hotels from "the 5,000 speakeasies in Chicago."[67] Stevens had remained relatively stoic from the beginning of the trial but at one point, as the various individuals from "church, bar, business, medicine, publishing, insurance, and politics" attested to his character, he bowed his head and

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[66]Philip Kinsley, State's Case Under Fire in Stevens Trial, Chi. Trib., Oct. 11, 1933, at 7.

[67]Ex-Governor Emmerson Witness for Ernest Stevens in Trial, Chi. Trib., Oct. 12, 1933, at 2A.

"seemed affected by the sight of all these friends coming to his aid."[68] Then Stevens himself was called to the stand. At this point Tribune staff writer and award-winning reporter Philip Kinsley had began to cover the trial and he wrote:

> His appearance as the remaining central figure in one of Chicago's great financial dramas was made before a small audience, including his wife, mother-in-law and two of his children. They had to lean forward to catch the low tones at first, as Stevens gulped and mumbled his words, but later, when he had been fully launched upon his story by his attorney, Franklin J. Stransky, he became clear and even emotional with firmness.[69]

He revealed that not only had he put one million dollars of his own money into the construction of the Stevens Hotel in 1925, but in 1931 (while making $72,000 a year salary as managing director of the Hotel) he bought $40,000 more general mortgage bonds to add to the $250,000 he already possessed. He wanted to build the Stevens Hotel, because "I believe in Chicago. I saw in it the greatest city in the world. . . . it was the natural convention center. . . . I still believe in the future of Chicago. I wanted the largest hotel, with the largest banquet hall in the world."[70] During Stevens' direct examination he stressed again and again his lack of intent to defraud his own family, his actual salaried and non-salaried positions in ther three firms and stock holdings, his optimism that the depression would be short-lived, the devastation wrought by the closing of the banks, and his willingness "to assume any responsibility there is for anything that I have done or that the family did." On cross-examination, he urged that the insurance company failed because of the panic of 1932, not

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[68]Stevens Trial to Go to Jury this Afternoon, Chi. Trib. Oct. 14, 1933, at 7A.

[69]Philip Kinsley, Stevens Paints Rosy Business Vision for Jury, Chi. Trib. Oct. 13, 1933, at 1A.

[70]Id. at 18A.

because of the loans made to the hotels from its assets, and, despite the obvious irritation from the prosecutor's repeated references to the Stevens Hotel losses, "Stevens made it emphatic that he never owed the insurance company a cent."[71]

In a two and one half hour closing argument, the defense attorney "depict[ed] the Stevens family as one of the first in Chicago and ascribing the city's present importance to faith in its future shown by such builders as the Stevenses."[72] Appealing to the jury to consider the desperate measures taken by men in high finance as the effects of the Depression took their toll, he stressed that "The accusation against Ernest Stevens was merely the cry of the mob, which has been heard for centuries. When things go wrong we want to crucify somebody." Reminding the jury of Stevens' willingness to to take responsibility for his father and uncle, and that "He would go to the penitentiary and rot rather than cast any aspersion upon his father," he urged that the prosecution "is trying to make an embezzlement out of the loaning of money between two corporations." Assistant prosecutor O'Hara's appeal to the jury countered Stransky's mob theory for state action and gave another version of the cause for the Depression: that the Depression "was brought about by men who, in their greed, committed criminal acts-- men who became financial racketeers," like the Stevens family who knew of the Hotel's insolvency but "who mulcted the insurance company's stockholders right and left and cared not at all so long as their personal greed was satisfied." At the end of the arguments, "Stevens appeared encouraged by Judge Feinberg's instructions to the jury, the salient feature of which was that good faith in making the loans must be regarded as a complete defense." Many lawyers and other observers as well as the defendant himself

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[71]Stevens Trial to Jury, supra note 68.

[72]Jury Convicts Ernest J. Stevens, Chi. Trib., Oct. 15, 1933, at 1A, 8A.

predicted an acquittal, but after a five hour and five minute deliberation, the jury came in with the guilty verdict. Ernest Stevens "appeared astonished by the verdict . . . the task of repressing his emotion was a difficult one," as he gazed stonily at the jurors, as if not comprehending what they had done." His attorney attempted to console him with the words, "You never can tell what a jury will do." But all Stevens wanted to know was, "What do we do next?" Stevens' eldest son Ernest Jr., his wife, and young John Stevens joined their father, "all of whom had refrained from any show of emotion." Back page photographs recorded their faces as the "stunned" Stevens and his family quickly left the criminal court building.[73]

Eventually denied a motion for a new trial and a defense request for an arrest of judgment made on the grounds that "he could not have been guilty because he never had actual possession of the money said to have been embezzled," Ernest Stevens was ordered before the bench in November.[74] He came forward, "nervously rattling a bunch of keys in his coat pocket," and asked to speak. Accordingly, the newspaper reported his statement:

> "I feel, judge," Stevens began, a nervous quaver in his voice, "that it has been assumed from the start that I am guilty, and that it has been up to me to prove that I am innocent. I feel a terrible injustice has been handed to me, I am sorry to say. I have not committed the crime of embezzlement."[75]

The mandatory sentence of one to ten years in the state penitentiary was then imposed. During the 60 days allowed for the bill of exceptions and stay of mittimus, he was at liberty on a $10,000 bond.

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[73]Id. and at 19A.

[74]Ernest Stevens Gets One to Ten Years in Prison, Chi. Trib., Nov. 28, 1933, at 2A.

[75]Id.

A requested search of court records by your author to the office of the Clerk of Court for Cook County, yielded certified copies of the three indictments, and court ledger book entries from January 27 to November 28, 1933.[76] No other entries occur after the November date regarding the case, and it was explained that had any other action been taken on the case that it would have been recorded on the same pages. A certified copy of the penitentiary mittimus form mandated that the defendant be turned over to the Illinois State Department of Public Welfare and then transported to the state penitentiary.[77] A requested search to the Microfilm Center for the Illinois Department of Corrections, yielded no record of an Ernest J. Stevens having served time in the state facilities in the 1930s.[78]

James W. Stevens died in May of 1936. Ernest J. Stevens died in Chicago in his home on E. 58th Street on February 7, 1972 a few days before his 88th birthday. No business associations beyond 1934, nor his conviction, were mentioned in his obituary.[79] The results of a request for a record search to the head of the public relations department at Chicago's Conrad Hilton Hotel (formerly the Stevens Hotel) show James W. Stevens as the hotel's general manager from 1928-1931 and during the receivership from 1931-1938.[80] The U.S.

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[76]Search results by post from John Cusack, Office of Clerk of the Circuit Court of Cook County, Criminal Division, Chicago, Illinois, July, 17, 1992. Certified documentation for cases #68027, #68028, and #68029 notorized by Aurelia Puchinsku, Clerk of Court.

[77]Notorized copy of Form #43, Penitentiary Mittimus, for Ernest Stevens, November 28, 1933. This was part of a new orientation process begun in Illinois in 1933. Prior to this time the prisoner was handed over to the sheriff for immediate transport to the prison.

[78]Search results by post from Bob Caldwell, Illinois Department of Corrections, Springfield, Illinois, October 13, 1992.

[79]Stevens, 87, Ex-Hotel Chief, Dies, Chi. Trib., Feb. 9, 1972, sec. 3, at 12.

[80]Several telephone interviews with Carol Gifford, Conrad Hilton Hotel, between September 1992 and January 1993.

Army used the hotel 1942-1943, Hilton bought it in 1945, and renamed it in 1951. The Colchester Grille is now known as the Buckingham Room. Without a personal interview with John Paul Stevens or members of his family concerning the events of the early 1930s, one cannot discover how this case affected Ernest Stevens or how he spent the second part of his long life. With his many contacts among the city's elite and his expertise in the hotel business, one can assume that his talents were not underutilized. The stigma of the conviction apparently did not hinder John Paul's high school and college opportunities and achievements at the Univerity of Chicago and beyond, nor did it stifle Ernest Jr.'s success as a stockbroker, or Richard's and William's distinquished and outstanding legal and real estate careers in and around the city.

In an ironic twist of fate, on April 21, 1982 (a day after his father's 62nd birthday), Justice Stevens' only (and adopted) son, John Joseph Stevens, allegedly sold an ounce of cocaine for $2,200 to undercover U.S. Drug Enforcement Administration and Chicago police officers.[81] Following other cocaine sale negotiations, which officers hoped would lead to delivery of "larger quantities of the drug," he was arrested on June 8th, "found with his bags packed as if he planned to leave town." He lived in a room behind a drug paraphernalia shop of which he had a "financial interest." His bond was set at $10,000. No further newspaper reports on the status of the case followed the initial news article.

Will any of this background information (in addition to what we know about his formal education, associates and professional experiences) help to explain how Justice Stevens views the criminal justice apparatus? Is it fair to assume that Stevens actually had these early

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[81] Judge's Son Arrested Here in Drug Sale, Free on Bond, Chi. Trib., June 11, 1982, sec. 2 at 9.

impressions of crime problems and responses by criminal justice personnel upon which to draw when contemplating resolution of criminal procedure questions? Could we really know to what extent his family's misfortunes and father's prosecution have factored into how he views the workings of the criminal justice system? A further examination of some of his opinions may confirm these assumptions; a more important result of examination will be a glimpse of Stevens' view of how the criminal justice system fits into the American social structure.

Criminal Justice Apparatus: Personnel and Institutions

The Police

There is no doubt that Justice Stevens respects law enforcement officers generally, and acknowledges the difficulties they encounter in meeting the day-to-day responsibilities placed upon them by a public seeking resolution to crime problems. He indicates an awareness of the many dangers to which they are subject, such as the armed or drunk, violent or drugged criminals, hidden weapons, or individuals lying in wait, as well as the frustrations encountered in preventing crime, gathering evidence, and putting individuals under arrest. However, when search and seizure issues arise, he is compelled by history to put a high value on the intervention of a magistrate's determination for warranted searches and seizures and he requires clear and "objective" guidelines for officers, especially for those conducting unwarranted searches and seizures.[82] One of his concerns appears to be the "overzealous" officer, which he identifies from two of Justice Robert Jackson's opinions which were penned

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[82]Horton v. California, 110 S.Ct. 2301 (1990).

when Stevens served Justice Wiley Rutledge as a law clerk.[83] Such an officer would rely upon his own discretion in determining the reasonableness of a search and not wait to submit the determination to a neutral magistrate. Rather than being hindered by taking the steps toward judicial approval, Stevens urges that officers actually receive confirmation of society's support through the judge for the right to search when criminal activity is a concern.[84] Once a magistrate makes a proper determination of probable cause, Stevens (like Justice Jackson) generally gives officers "latitude for honest mistakes that are made . . . in the dangerous and difficult process of making arrests" and in conducting a search, confident in their "professionalism" in the execution of the warrant.[85]

In attempting to broaden the Court's outlook, he frequently refers to principles concerning the exclusionary rule as articulated by Justice Jackson, which profess to see the rule as a general protection for the privacy of the innocent American citizenry, and not as a protection for "criminal activity."[86] He sees the rule as the means to deter violations of the Fourth Amendment, not to punish individual officers; he believes society should be liable for not overseeing the propriety of an officer's conduct.[87] Thus, he becomes very concerned about

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[83]Johnson v. United States, 333 U.S. 10, 11-15, 68 S.Ct. 367, 368-9 (1948); United States v. Di Re, 332 U.S. 581, 593-95, 68 S.Ct. 222, 228 (1948).

[84]Payton v. New York, 100 S.Ct. 1371 (1980); Michigan v. Summers, 101 S.Ct. 2587, 2589 (1981).

[85]Maryland v. Garrison, 107 S.Ct. 1013, 1018 (1987).

[86]Brinegar v. United States, 338 U.S. 160, 180, 69 S.Ct. 1302, 1313 (1949)(Jackson, R., dissenting); Harris v. United States, 331 U.S. 145, 198, 67 S.Ct. 1098, 1120 (1947)(Jackson, R., dissenting).

[87]United States v. Leon, 104 S.Ct. 3405, 3445 (1984)(Stevens, J., dissenting); Dunaway v. New York, 99 S.Ct. 2248, 2260 (1979)(Stevens, J., concurring).

the impact of a decision upon the future conduct of some law enforcement officers when the Court, in its efforts to help the criminal justice system convict the guilty, allows a modification of the exclusionary rule. Joined by Justices Marshall, Brennan, and Blackmun, he has said:

> First, we should consider the impact of the Court's holding on the leaders of the law enforcement community who have achieved great success in creating the kind of trained, professional officers who deservedly command the respect of the communities they serve. The image of the "keystone cop" whose skills seldom transcended the ham-handed employment of the "third degree" is largely a matter of memory for those of us who lived through the 1920's. 1930's and 1940's. For a congery of reasons, among which unquestionably is the added respect for the constitutional rights of the individual engendered by cases like Miranda v. Arizona and Mapp v. Ohio, the professionalism that has always characterized the Federal Bureau of Investigation is now typical of police forces throughout the land. A rule of law that is predicated on the absurd notion that a police officer does not have the skill required to obtain a valid search warrant in less than 18 or 20 hours, or that fails to deter the authorities from delaying unreasonably their attempt to obtain a warrant after they have entered a home, is demeaning to law enforcement and can only encourage sloppy, undisciplined procedures.
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> Second, the Court's rhetoric cannot disguise the fact that when it not only tolerates but also provides incentives for warrantless and plainly unreasonable and unnecessary intrusions into the home, the resulting erosion of the sanctity of the home is the "price" paid by the innocent and guilty alike.[88]

As an example of Stevens' view of the relationship between state and federal cases, this passage indicates his belief that the activities of federal law enforcement agencies such as the FBI set an example for state agencies, therefore, a lessening of the former's standards will impact those of the latter. It also appears to be a reaffirmation of the value of some of the Warren Court exclusionary rule decisions from a person who grew up at a time and in a city where police professionalism took second place to expediency.

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[88]Segura v. United States, 104 S.Ct. 3380, 3403 (1984)(notes and citations omitted)(Stevens, J., dissenting).

He responds along the same line when faced with questionable police practices associated with interrogation of a individual that yields evidence he believes should be excluded from judicial proceedings. When his colleagues inevitably exclaim how much this court-imposed exclusion "costs" society, he counters with the belief that it is the "procedural shortcuts" taken by the police that brought about the monetary expenditure associated with appeals, not the requirements of the Constitution (doubtful as they appear to be to the other justices).[89] Perhaps this hard position reflects a somewhat realistic view of the nature of police questioning, for Stevens has assumed that police "often interrogate suspects without any reason to believe that their efforts are likely to be successful in the hope that a statement will nevertheless be forthcoming,"[90] and that "much interrogation is exploratory rather than directed at the admission of a fact whose incriminatory import is already known to the officers."[91] This shows recognition that custodial questioning situations may be (and indeed have been) exploited by police.

Unlike some of his colleagues on the bench, Stevens has distinguished law enforcers from the general population, and stressed that "in our representative democracy neither the constabulary nor the military is vested with broad policy-making responsibility. Indeed, each implements the basic policies formulated directly or indirectly by the citizenry." Because of this view, he saw no constitutional objection to placing legal aliens in non-policy-making governmental positions, such as the police.[92]

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[89]Nix v. Williams, 104 S.Ct. 2501, 2516 (1984)(Stevens, J., concurring in the judgment).

[90]Rhode Island v. Innis, 100 S.Ct. 1682, 1695 n.8 (1980)(Stevens, J., dissenting).

[91]Arizona v. Mauro, 107 S.Ct. 1931, 1940 (1987)(Stevens, J., dissenting).

[92]Foley v. Connelie, 98 S.Ct. 1067, 1076 (1978)(Stevens, J., dissenting).

However, out of respect for federalism, as well as recognizing the place of Congress in the national government, he has expressed his concern over the proper distribution of law enforcement power when the federal prosecutor interprets a criminal statute broadly:

> It is Congress, rather than the Executive, that must define the dimensions of the federal law enforcement program. Law enforcement remains, and should remain, the primary responsibility of the several States. Every increase in the power of the federal prosecutor moves us closer to a national police force with its attendant threats to individual liberty. For that reason, I believe [the Court has] a special obligation to make sure that Congress intended to authorize a novel assertion of federal criminal justice.[93]

The Judiciary

Justice Stevens consistently recognizes the federal nature of our governmental design. Early in his Supreme Court tenure he acknowledged the fundamental difference between state and national courts, particularly when it comes to the limited authority of federal judges to issues warrants.[94] In addition, he reveres the separation of powers between Congress and the Supreme Court and has chastised the Court when it allowed federal judges to perform functions absent specific Congressional approval. He has cautioned, "From the beginning of our Nation's history, we have sought to prevent the accretion of arbitrary police powers in the federal courts; that accretion is no less dangerous and unprecedented because the first step appears only minimally intrusive."[95] Where his colleagues may allow a judicial practice if Congress is silent or has not prohibited it, Stevens would restrict federal judicial discretion

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[93]Garcia v. United States, 105 S.Ct. 479, 490 (1985)(Stevens, J., dissenting).

[94]United States v. New York Telephone Company, 98 S.Ct. 364, 375 (1977)(Stevens, J., dissenting).

[95]Id.

unless Congress has authorized it through statute.[96] Alternatively, he has been known to criticize the Court when it allows discretion contrary to congressional mandate of a specific judicial procedure.[97]

Stevens often finds himself in the position of having to remind his colleagues what distinguishes the role of an appellate court from a trial court, and particularly, what distinguishes the role of the Supreme Court from lower federal and state courts. He has maintained that state judges are in a better position than the Supreme Court to review a defendant's record under state review guidelines[98] and to assess the state's police practices;[99] that the supervisory role of the Supreme Court over lower federal courts does not give the Court carte blanche to function as a trial court;[99] and that the Supreme Court should respect case facts as determined by a federal or state trial judge because facts are best determined from his/her vantage point.[100] Thus, despite his speeches heralding the position of life-tenured or appointed judges, he has generally recognized the competency of state judges as well as judges

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[96]United States v. Taylor, 108 S.Ct. 2413, 2424 (1988)(Stevens, J., dissenting).

[97]United States v. Montalvo-Murillo, 110 S.Ct. 2072, 2083 (1990)(Stevens, J., dissenting).

[98]Pennsylvania v. Goldhammer, 106 S.Ct. 353, 354-355 (1985)(Stevens, J., dissenting).

[99]Arizona v. Mauro, 107 S.Ct. 1931, 1938 n.3 (1987)(Stevens, J., dissenting); California v. Beheler, 103 S.Ct. 3517, 3521 (1983)(Stevens, J., dissenting); California v. Prysiok, 101 S.Ct. 2806, 2812 (1981)(Stevens, J., dissenting);

[100]Maryland v. Buie, 110 S.Ct. 1093, 1100 (1990)(Stevens, J., concurring); United States v. Hasting, 103 S.Ct. 1974, 1982 (1983)(Stevens, J., concurring in the judgment).

[101]United States v. Lovasco, 97 S.Ct. 2044, 2053 (1977)(Stevens, J., dissenting); Rhode Island v. Innis, supra note 90, 100 S.Ct. at 1693; Moran v. Burbine, 106 S.Ct. 1135, 1155 (1986)(Stevens, J., dissenting); Wheat v. United States, 108 S.Ct. 1692, 1704 (1988)(Stevens, J., dissenting); Michigan v. Harvey, 110 S.Ct. 1176, 1184 (1990)(Stevens, J., dissenting).

from the District of Columbia, and presumed that "they will correctly resolve constitutional issues."[101]

The principle of stare decisis is a hallmark of our judicial system; Stevens invoked its high position during his Senate confirmation hearings and regularly reminds the majority when it appears to deviate from a past holding without apparent justification.[102] Nevertheless, though he has proposed in both writing and speeches that there is a "life-span" to judge-made rules, he does not shy away from admitting the utility of precedence as a pragmatic judicial tool:

> The doctrine of stare decisis is not a straightjacket that forecloses re-examination of outmoded rules. The doctrine does, however, provide busy judges with a valid reason for refusing to remeasure a delicate balance that has tipped in the same direction every time the conflicting interests have been weighed.[103]

Stevens' call for life tenure rather than retention/election of judges in speeches before the Illinois and Chicago Bar Associations apparently reflects familiarity with the state's past

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[102]Swain v. Pressley, 97 S.Ct. 1224, 1231 (1977).

[103]E.g., Brewer v. Williams, 97 S.Ct. 1232, 1247 (1977) (Stevens, J., concurring); United States v. Gouveia, 104 S.Ct. 2292, 2300 (1984)(Stevens, J., concurring in the judgment); Nix v. Williams, supra note 89, 104 S.Ct. at 2514; United States v. Bagley, 105 S.Ct. 3375, 3398 (1985)(Stevens, J., dissenting); Illinois v. Vitale, 100 S.Ct. 2260, 2268 (1980)(Stevens, J., dissenting); Garrett v. United States, 105 S.Ct. 2407, 2426 (1985)(Stevens, J., dissenting); Wainwright v. Witt, 105 S.Ct. 844, 859 (1985)(Stevens, J., concurring); Press Enterprise Co. v. Superior Court of Cal., 104 S.Ct. 819, 827 (1984)(Stevens, J., concurring in the judgment); Rosales-Lopez v. United States, 101 S.Ct. 1629, 1638 (1981)(Stevens, J., dissenting); Taylor v. Kentucky, 98 S.Ct. 1930, 1938 (1978)(Stevens, J., dissenting); Holland v. Illinois, 110 S.Ct. 803, 820 (1990)(Stevens, J., dissenting); Parker v. Randolph, 99 S.Ct. 2132, 2143 (1979)(Stevens, J., dissenting); Richardson v. Marsh, 107 S.Ct. 1702, 1709 (1987)(Stevens, J., dissenting); Lakeside v. Oregon, 98 S.Ct. 1091, 1096 (1978)(Stevens, J., dissenting); Oregon v. Kennedy, 102 S.Ct. 2083, 2092 (1982)(Stevens, J., concurring in the judgment).

[104]Rose v. Mitchell, 99 S.Ct. 2993, 3020 (1979)(Stevens, J., dissenting).

experiences dealing with the corruption of some of its jurists as well as his desire for the removal of judges from the fray of politics.[104] Stevens' older brother Ernest has said that John Paul disliked judges. When pressed for reasons why, Ernest mischievously indicated that it should be self-explanatory.[105] Perhaps this discontent goes back to the Illinois method of judicial selection and the incidences of judicial corruption well-known in the city's history and folklore, or to his pro bono experiences with habeas corpus cases. Along this line of inquiry, it is significant to add that Stevens sees a role for the federal courts in granting collateral review for certain state cases, especially if an elected judge is involved. For example, in one case questioning the impartiality of a jury on the basis of voir dire testimony, where the defendant was re-tried by the same judge who conducted his first trial, Stevens opined:

> There is a special reason to require independent review in a case that arouses the passions of the local community in which an elected judge is required to preside. Unlike an appointed federal judge with life tenure, an elected judge has reason to be concerned about the community's reaction to his disposition of highly publicized cases. Even in the federal judiciary, some Circuits have determined that it is sound practice to have the retrial of a case assigned to a different judge than the one whose erroneous ruling made another trial necessary; for though the risk that a judge will subconsciously strive to vindicate the result reached at the first trial may be remote, as long as human beings preside at trials, that possibility cannot be ignored entirely.[106]

Speculating that his colleagues agreed to review the Circuit Court's order out of an inability to resist a "desire to 'follow through'-- to do something about an apparent miscarriage of justice," he reminded the Court of "our dedication to the principle that guilt or innocence of a criminal

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[105]See Chapter Two.

[106]Telephone interview with the late Ernest Stevens Jr. (Nov. 10, 1987).

[107]Patton v. Yount, 104 S.Ct. 2885, 2899-90 (1984)(Stevens, J., dissenting).

offense in our society is not to be decided by executive fiat or by popular vote. This is a principle that affords protection for every citizen in the United States."[107]

Stevens is particularly sensitive to the role of the judge in questions concerning the application of death penalty statutes. He has shown concern for assuring judicial objectivity in those schemes where an elected judge has the power to overturn or impose a death sentence after recommendation or imposition by a sentencing jury, and has been critical of his fellow brethren for ignoring human nature and the public pressure exerted upon such judges.[108] As recently as 1990 he observed:

> Although the 18th century English ruler no longer bears upon our judges, today the "voice of higher authority" to which elected judges too often appear to listen is that of the many voters who generally favor capital punishment but who have far less information about a particular trial that the jurors who have sifted patiently through the details of the relevant and admissible evidence. How else do we account for the disturbing propensity of elected judges to impose the death sentence time after time notwithstanding a jury's recommendation of life?[109]

The Attorneys

The basis for Stevens' views concerning the roles of the prosecuting and defense attorneys simply reflects his confidence in the adversarial nature of the American system of justice.

Generally, Stevens is willing to concede a good deal of discretion to the office of prosecutor without ignoring a defendant's Fifth and Sixth Amendment claims for protection

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[108]Id. at 2900 (quoting from Justice Frankfurter's concurrence in Irwin v. Dowd, 366 U.S. 717, 729, 81 S.Ct. 1639, 1646 [1961]).

[109]Spaziano v. Florida, 104 S.Ct. 3154, 3169 (1984)(Stevens, J., concurring in part and dissenting in part); Baldwin v. Alabama, 105 S.Ct. 2727, 2741 (1985)(Stevens, J., dissenting).

[110]Walton v. Arizona, 110 S.Ct. 3047, 3089 n.4 (1990)(Stevens, J., dissenting).

against self-incrimination and for impartial jury trials.[110] He shows familiarity with and approval of regularized prosecutorial functions, confidence in prosecutorial integrity, and a sensitivity to the distinction between the prosecutor's pretrial and trial roles. For instance, speaking for the majority in United States v. Goodwin[111] he acknowledged wider latitude to prosecutors in the pretrial setting when making changes as to what charges to bring since, "to presume that every case is complete at the time an initial charge is filed, however, is to presume that every prosecutor is infallible--an assumption that would ignore the practical restraints imposed by often limited prosecutorial resources."[112] Like the majority of his colleagues, he has accepted the position of and practical need for plea-bargaining in modern criminal justice. He expressed for the Court its decision that one could not presume that a prosecutor acted with vindictiveness if he increases charges after a defendant decides not to render a guilty plea after plea negotiations, and also articulated the distinction between pretrial and trial roles:

> There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized. In contrast, once a trial begins--and certainly by the time a conviction has been obtained--it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging

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[111]United States v. Hasting, supra note 100.

[112]102 S.Ct. 2485 (1982).

[113]Id. at 2493 n.14.

> decision made after an initial trial is completed is much more likely to be improperly motivated that is a pretrial decision.
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> In addition, a defendant before trial is expected to invoke procedural rights that inevitably impose some "burden" on the prosecutor. Defense counsel routinely file pretrial motions. . . . It is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter. The invocation of procedural rights is an integral part of the adversary process in which our criminal justice system operates.
>
> Thus, the timing of the prosecutor's action in this case suggests that a presumption of vindictiveness is not warranted. A prosecutor should remain free before trial to exercise broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct.[113]

Two years later, speaking for a unanimous court that an Arkansas state defendant's acceptance of a prosecutor's proposed plea bargain did not create a constitutional right to have the bargain specifically enforced, Stevens exhorted:

> Thus, because it did not impair the voluntariness or intelligence of his guilty plea, respondent's inability to enforce the prosecutor's offer is without constitutional significance. Neither is the question whether the prosecutor was negligent or otherwise culpable in making and then withdrawing his offer relevant. The Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty. Here respondent was not deprived of his liberty in any fundamentally unfair way. Respondent was fully aware of the likely consequences when he pleaded guilty; it is not unfair to expect him to live with those consequences.[114]

However, when the Court suggested that the prosecutor or his agents could lawfully question the "accused" without presence of counsel after given Miranda rights, Stevens quickly retorted that it should be evident to the Court (and the conflict of interest would certainly be evident to the public) that the prosecutor "is a foe, not a friend," and cannot be expected to be

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[114]Id. at 2492-93.

[115]Mabry v. Johnson, 104 S.Ct. 2543, 2548 (1984)(notes omitted).

seen or be utilized as an "advisor" to a suspect or (especially) a defendant.[115] This would be especially true for post-custodial questioning by agents of the prosecutor--a position Stevens put forth in a 1972 circuit court dissent as applied to federal prosecutors,[116] and a view he again unconvincingly reiterated eighteen years later regarding similar "procedurally irregular" behavior by Michigan prosecutorial agents.[117] Stevens' ability to persuade the Court away from condoning such "unethical forms of trial preparation" by either federal or state prosecutors or their investigators seems even more remote now that Justices Marshall and Brennan have retired from the bench. He also has been unsuccessful in dissuading the Court from its frequent use of summary judgments in upholding the claims filed by state prosecutors and decided by state supreme courts in favor of their point of view against the constitutional rights claims of the defendant, charging that the Court appears to be "primarily concerned with vindicating the will of the majority and less interested in its role as protector of the individual's constitutional rights," contrary to the Court's role as "protector of citizens and not the warden or prosecutor" as intended by the Framers of the Constitution.[118]

Stevens has made observations about the role of the defense attorney in the system of justice, but appears to be most concerned about a person's access to his attorney between the time of arrest and when formal charges are brought, and about the recognition of his/her assumption of innocence. When the Court found no due process violation in a situation where a defense attorney's attempts to communicate with her client being detained at a police station

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[116]Patterson v. Illinois, 108 S.Ct. 2389, 2404 (1988)(Stevens, J., dissenting).

[117]United Sates v. Springer, 460 F. 2d 1344, 1355 (CA7 1972).

[118]Michigan v. Harvey, supra note 101, 110 S.Ct. at 1188, 1188 n.10.

[119]Florida v. Meyers, 104 S.Ct. 1852, 1854 (1984)(Stevens, J., dissenting) and Chapter Five.

were rebuffed by police who told her the client would not be questioned--and then proceeded to question him without the presence of counsel--Stevens put the issue in a much more inclusive and value-laden perspective:

> This case turns on a proper appraisal of the role of the lawyer in our society. If a lawyer is seen as a nettlesome obstacle to the pursuit of wrongdoers--as in an inquisitorial society--then the Court's decision today makes a good deal of sense. If a lawyer is seen as an aid to the understanding and protection of constitutional rights--as in an accusatorial society--then today's decision makes no sense at all. Like the conduct of the police . . . the Court's opinion today serves the goal of insuring that the perpetrator of a vile crime is punished. Like the police . . . as well, however, the Court has trampled on well-established legal principles and flouted the spirit of our accusatorial system of justice.[119]

Speaking for the majority in two opinions, he expressed the Court position on what is an effective defense lawyer:

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries." Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be "of little avail," as this Court has recognized repeatedly. . . . Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." . . . The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial test has been conducted--even if defense counsel may have made demonstrable errors--the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.[120]

and of the lawyer-client relationship in the event of wilful

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[120]Moran v. Burbine, supra note 101, 106 S.Ct. at 1166.

[121]United States v. Cronic, 104 S.Ct. 2039, 2045-46 (1984)(references omitted).

misconduct, such as at the discovery phase:

> The argument that the client should not be held responsible for his lawyer's misconduct strikes at the heart of the attorney-client relationship. Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has--and must have--full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval. . . . In responding to discovery, the client has a duty to be candid and forthcoming with the lawyer, and when the lawyer responds, he or she speaks for the client. Putting to one side the exceptional cases [emphasis added] in which counsel is ineffective, the client must accept the consequences of the lawyer's decision to forego cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial.[121]

Any wilful misconduct is to be considered also for its impact upon "the integrity of the judicial process itself." However, when evaluating the conduct of a defense attorney from a claim petition on collateral review, his approach can be distinguished from the use of court-made contrivances:

> The failure of otherwise competent defense counsel to raise an objection at trial is often a reliable indication that the defendant was not denied fundamental unfairness in the state-court proceedings. The person best qualified to recognize such error is normally a defendant's own lawyer. Thus, in searching for fundamental unfairness in a trial record, I attach great importance to the character of the objection, if any, asserted by the defendant's counsel. But if such error is manifest, I would not wrestle with terms such as 'cause' and 'prejudice' to determine whether habeas corpus relief should be granted.[122]

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[122]Taylor v. Illinois, 108 S.Ct. 646, 657 (1988)(references omitted).

[123]Rose v. Lundy, 102 S.Ct. 1198, 1218 n.17 (1982)(Stevens, J., dissenting).

Commenting on the human condition, Stevens has made a compelling observation about viewing a fact, such as one involving perjury by a witness, from the vantage point of an appellate judge in contrast to that of a practicing lawyer:

> Justice Holmes taught us that a word is but the skin of living thought. A "fact" may also have a life of its own. From the perspective of an appellate judge, after a case has been tried and the evidence has been sifted by another judge, a particular fact may be as clear and certain as a piece of crystal or a small diamond. a trial lawyer, however, must deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel. . . .
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> Nevertheless, beneath the surface of [a] case there are areas of uncertainty . . . . A lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury--as well as judicial review of such apparent certainty--should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked. Similarly, the post-trial review of a lawyer's pre-trial threat to expose perjury that had not yet been committed--and, indeed, may have been prevented by the threat--is by no means the same as review of the way in which such a threat may actually have been carried out. Thus, one [such as a judge] can be convinced . . . that [a] lawyer's actions were a proper way to provide his client with effective representation without confronting the much more difficult questions of what a lawyer must, should, or may do after his client has given testimony that the lawyer does not believe. The answer to such questions may well be colored by the particular circumstances attending the actual event and its aftermath.[123]

The Defendant

An introduction to one of his early dissents reveals a picture of "the accused" in relation to the American system of justice:

> Experience teaches us that most people formally charged with crime are guilty; yet we presume innocence until the trial is over. Experience also justifies the inference that most people who remain silent in the face of serious accusation have something to hide and are therefore probably guilty; yet we

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[124]Nix v. Whiteside, supra note 103, 106 S.Ct. at 1007.

> forbid trial judges or juries to draw that inference. The presumption of innocence and the protections afforded by the Due Process Clause impose a significant cost on the prosecutor who must prove the defendant's guilt beyond a reasonable doubt without the aid of his testimony. That cost is justified by the paramount importance of protecting a small minority of accused persons--those who are actually innocent--from wrongful conviction.[124]

He also put his understanding of a person's non-absolute double jeopardy right into perspective by acknowledging that "we tolerate some incidental infringement upon a defendant's double jeopardy interests for the sake of society's interest in obtaining a verdict of guilt or innocence, when the prosecutor seeks to obtain an advantage by intentionally subverting double jeopardy interests, the balance invariably tips in favor of a bar to reprosecutions."[125]

The Administration of Justice and Society

Overall, Justice Stevens seems to maintain confidence in the American system of criminal justice if its employees consistently follow established procedures. When it appeared to him that members of the Supreme Court had given too much discretion to public servants by relaxing guidelines or "second-ranking" expressed constitutional rights in its effort to assist the system in combatting crime, Stevens expressed his exasperation:

> We could, of course, facilitate the process of administering justice to those who violate the criminal laws by ignoring the commands of the Fourth Amendment--indeed, by ignoring the entire Bill of Rights--but it is the very purpose of a Bill of Rights to identify values that may not be sacrificed to

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[125]Lakeside v. Oregon, supra note 103 at 1096.

[126]Oregon v. Kennedy, supra note 103, 102 S.Ct. at 2095.

> expediency. In a just society those who govern, as well as those who are governed, must obey the law.[126]

Similarly, he understands that on occasion the Court is asked to rule on a case where a procedure followed by criminal justice personnel reflects an intervention method chosen to deal with a social problem perceived by the public to be of grave concern, such as drug trafficking, deaths on the highway by drunk drivers, terrorist activities on public conveyances, or the illegal entry of persons across American borders. He consistently believes that the approach of the Court should be to evaluate the method as to its constitutionality when weighing the interests of the enforcement community against a citizen's freedom interests.[127] He gets frustrated with other Court members when their analysis of such issues "resembles a business decision that measures profits by counting gross receipts and ignoring expenses."[128] If alternative methods less threatening to civil rights could be used (or have been used by other jurisdictions or have been supported by criminal justice professionals) to achieve the same result, he will suggest their adoption.[129] As illustrated in the discussion of law enforcement above, quotes from the opinions of Rutledge and Frankfurter, hallowing the American tradition of protection of individual personal rights, can be found in Stevens' own opinions, particularly when it appears to him that his Court colleagues and/or criminal justice personnel may be stressing the immediate and pragmatic societal goals of crime prevention, detection or

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[127]United States v. Leon, supra note 87, 104 S.Ct. at 3456.

[128]Michigan Dept. of State Police v. Sitz, 110 S.Ct. 2481, 2498 (1990).

[129]Id. at 2495.

[130]E.g., California v. Carney, 105 S.Ct. 2066, 2077 (1985) (Stevens, J., dissenting); Bell v. Wolfish, 99 S.Ct. 1861, 1895 (1979)(Stevens, J., dissenting).

conviction over our hard-fought-over and time-honored constitutional ideals.[130] He accords similar respect in such matters to the words of Justices Holmes[131] and Brandeis.[132]

He has expressed puzzlement when the Court restricts legislatively-approved administrative searches reflecting regulations made for public health and safety when business or commercial premises are involved, yet allows more discretion to criminal justice personnel when searches involve private individuals.[133] This indicates how he sees the workings of the criminal justice system within a larger societal context: condoning the methods chosen by the government to prevent or combat crime or to make an individual accountable for a crime should not put in jeopardy the ordinary citizen's freedom and liberty already threatened by the same criminal element.

Time and time again when faced with a petitioner who claims a denial of a right in the realm of criminal procedure, he has elucidated the challenges that must be faced in balancing the individual right with "countervailing public interests." For instance, in a question involving the Sixth Amendment Compulsory Clause and the use of preclusion to eliminate possible perjured testimony and to sanction the defense for violations of discovery rules, he set the stage for the argument:

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[131]Leis v. Flynt, 99 S.Ct. 698, 708 (1979)(Stevens, J., dissenting); Oregan v. Elstad, 105 S.Ct. 1285, 1321 (1985)(Stevens, J., dissenting); Moran v. Burbine, supra note 103,106 S.Ct. at 1149; United States v. Montalvo-Murillo, 110 S.Ct. 2072, 2081 n.4 (1990)(Stevens, J., dissenting).

[132]United States v. Salerno, 107 S.Ct. 2095, 2113 (1987)(Stevens, J., dissenting); Doe v. United States, 108 S.Ct. 2341, 2353 n.1 (1988)(Stevens, J., dissenting).

[133]Solem v. Stumes, 104 S.Ct. 1338, 1354 (1984)(Stevens, J., dissenting).

[134]Marshall v. Barlow's, 98 S.Ct. 1816, 1832 (1978)(Stevens, J., dissenting).

> It is elementary, of course, that a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor. But the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests. The integrity of the adversary process which depends both on the presentation of reliable evidence and the rejection of unreliable evidence; the interest in fair and efficient administration of justice; and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance.[134]

Stevens shows particular sensitivity to the achievement of standards to assure a fair trial. This includes protection against a biased jury, regardless of how slight the possibility may be, for he has cautioned:

> Much as we wish it were otherwise, we should acknowledge the fact that there are many potential jurors who harbor strong prejudices against all members of certain racial, religious, or ethnic groups for no reason other than hostility to the group as a whole.[135]

and noted that:

> The fact that such prejudice may not be a pervasive influence in the particular community from which the jury is drawn or even in society at large does not make this concern any less serious.[136]

By the same token, he does not wish to go to the far side of the spectrum in the quest to achieve the goal of "a fair cross-section of the community" in jury representation. He has said:

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[135]Taylor v. Illinois, supra note 122, 108 S.Ct. 646 at 655.

[136]Rosales-Lopez v. United States, supra note 103, 101 S.Ct. at 1638.

[137]Id. at n.3.

> The fair-cross-section requirement mandates the use of a neutral selection mechanism [emphasis added] to generate a jury representative of the community. It does not dictate that any particular group or race have representation on the jury. . . . The Constitution does not permit the easy assumption that a community would be fairly represented by a jury selected by proportional representation of different races any more that it does that a community would be represented by a jury composed of quotas of jurors of different classes. . . . In fact, while a racially balanced jury would be representative of the racial groups in a community, the focus on race would likely distort the jury's reflection of other groups in society, characterized by age, sex, ethnicity, religion, education level or economic class. . . . The Sixth Amendment guarantees the accused "an impartial jury not just an impartial jury venire or jury pool. . . . [B]y providing that juries be drawn through fair and neutral selection procedures from a broad cross section of the community, that Amendment insures a jury that will best reflect the views of the community--one that is not arbitrarily skewed for or against any particular group or characteristic.[137]

He is also aware of what may go into a jury decision and has said: "If we presume, as we must, that jurors give their full and vigorous attention to every witness and each item of evidence, the very acts of listening and seeing will sometimes lead them down "the path of inference."[138] Taking his cue from similar positions of Judge Learned Hand and Justice Felix Frankfurter, he has proposed that giving jury instructions to counteract inferences such as asking jurors to excise that part of a codefendant's confession exculpatory to the other defendant,[139] or to presume innocence despite the defendant's silence at trial,[140] may tax the jury's ability to be objective.

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[138]Holland v. Illinois, supra note 103, 110 S.Ct. at 824-26.

[139]Richardson v. Marsh, supra note 103, 107 S.Ct. at 1710.

[140]Id.

[141]Lakeside v. Oregon, supra note 103.

Stevens understands full well the principle that juries provide the "critical link" between the death penalty and community standards. History as well as common sense has convinced him that jurors are far better suited to discern whether the death sentence should be imposed, since it is they who "more accurately reflect the conscience of the community."[141]

He also has reiterated his knowledge of what actually goes on in a criminal trial when real people are involved in the processes. For example, after indicating his lack of support for a two-tier state trial process, he enumerated the burdens that need be overcome by a defendant at the second tier and provided a glimpse of the realities of human nature:

> A second trial of the same case is never the same as the first. Lawyers and witnesses are stale; opportunities for impeachment that may have little or much actual significance are present in the second trial that were not present at the first; a witness may be available at one time but not the other; the tactics on cross-examination, or on the presentation of evidence, in the first trial will be influenced by judgment of what may happen at the second; the strategy in a nonjury trial may be different than in a proceeding before a jury. . . .
>
> Nor does the right to a trial de novo by taking an immediate appeal make the judge's guilty finding and sentence entirely meaningless. Apart from any legal consequences, the finding, and the first judge's sentencing determination may have a greater impact on the second trial judge than the mere return of an indictment. Moreover, if we presume that at least some laymen have some knowledge of the law, we must also recognize the likelihood that some jurors at the second trial will be aware of the first conviction. Such awareness inevitably compromises the defendant's presumption of innocence. Moreover, a judge's instructions cannot adequately avoid this risk of prejudice without creating the additional risk of letting the other jurors know about the first conviction.[142]

He is prone to chide the Court when it appears to him that it deviates from what he has concluded to be the proper analysis of Due Process questions as used by past Court majorities:

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[141]Spaziano v. Florida, supra note 109, 104 S.Ct. at 3176.

[143]Ludwig v. Massachusetts, 96 S.Ct. 2781, 2790-91 (1976)(Stevens, J., dissenting).

application of the "principle that due process requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections."[143] Along that line, he has reaffirmed the extensive freedom a state has in identifying criminal behavior, but maintained that "[o]nce a State defines a criminal offense, the Due Process Clause requires it to prove any component of the prohibited transaction that gives rise to both a special stigma and a special punishment beyond a reasonable doubt."[144] In his view, this means that if a state passes a statute defining a criminal offense, the state cannot turn around and instruct a prosecutor that certain parts of it need not be proven.[145] He is dismayed when the Court grants a writ of habeas corpus for what he considers an intrusion on the Court's limited time "for the sole purpose of correcting a technical, procedural rule," since "[i]t is not appropriate for this Court to expend its scarce resources crafting opinions that correct technical errors in cases of only local importance where the correction in no way promotes the development of the law;" such activity threatens the Court's effectiveness by its inability "in supervising its discretionary docket."[146] More often, Stevens is inclined to criticize the Court when it reneges on its duty to "avoid constitutional issues that need not be resolved" in habeas corpus cases "in order to determine the rights of the parties to the case under consideration."[147]

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[144]Moran v. Burbine, supra note 103, 106 S.Ct. at 1165.

[145]McMillan v. Pennsylvania, 106 S.Ct. 2411, 2422, 2425 (1986)(Stevens, J., dissenting).

[146]Id.

[147]Anderson v. Harless, 103 S.Ct. 276, 280, 280 n.6 (1982) (Stevens, J., dissenting).

[148]E.g., County Court of Ulster Cty. v. Allen, 99 S.Ct. 2213, 2223 (1979)(Stevens, J., dissenting).

Like Justice Marshall, on occasion Stevens will note the impact of a decision upon specific populations. For instance, when the majority approved the use of post-indictment, prosecutorial questioning of a pretrial detainee for impeachment purposes, he warned the Court:

> [T]he Court should not ignore the fact that its holding will inevitably discriminate against defendants who are too indigent to post bond. Those who are not held in custody after the attorney-client relationship has been formed are not exposed to daily contact with the police and therefore have little stake in the rule announced in this case. Because the indigent defendant has only occasional contact with his lawyer but is under the constant control of the prosecutor, it is he whose interests are most affected by the Court's ruling. The Court should at least pause before adopting a rule that can have such an obviously disparate impact on the indigent defendant.[148]

In addition, Stevens conscientiously adheres to Court rules regarding its subject matter jurisdiction, citing the standards articulated by Justice Brandeis in Ashwander v. Valley Authority, (against deciding federal case questions on constitutional grounds when there is an alternative,[149] and Justice Rutledge's majority opinion (from a case on state appeal) maintaining that the Court traditionally does not reach out for constitutional questions when a case can be "disposed of on other grounds for legitimate reasons."[150] Stevens does not regularly stray from his mentor's stricture.[151]

In fact, in a 1986 dissent he identified Brandeis' position as "one of the most respected opinions ever written by a Member of the Court," and Rutledge's view as "one of the most

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[149]Michigan v. Harvey, supra note 101, 110 S.Ct. at 1188 n.11.

[150]297 U.S. 288, 346-47, 56 S.Ct. 466, 482-83 (1936).

[151]Rescue Army v. Municipal Court, 331 U.S. 549, 571, 67 S.Ct. 1409, 1421 (1947).

[152]E.g., Pennsylvania v. Ritchie, 107 S.Ct. 989, 1011 (1987)(Stevens, J., dissenting).

forceful expositions" on the policy of "strict necessity," in an effort to frame his very strong objection to the Court's presumed jurisdiction "to review a state supreme courts remedy for a federal constitutional violation" which he believed "harbors a hidden bias that in turn reveals a disturbing conception of this Court's role."[152] After recollecting the history of the power of the Supreme Court to review state court judgments, he mustered recent scholarly opinion and noted that "although this Court now has the power to review decisions defending federal constitutional rights, the claim of these cases on our docket is secondary to the need to scrutinize judgments disparaging those rights."[153] Recognizing the initiative of some state supreme courts to "consider state constitutional issues in advance of federal ones," as the "analytical approach best suited to facilitating the independent role of state constitutions and state courts in our federal system," and lamenting "the atrophication of state constitutional theory" as "both unnecessary and unfortunate," he forcefully concluded that "State courts remain primarily responsible for reviewing the conduct of their own executive branches, for safeguarding the rights of their citizenry, and for nurturing the jurisprudence of state constitutional rights which is their exclusive province to expound."[154] As illuminated in Chapter Five, Stevens returns again and again to these principles while administering a reprimand to the majority when it overturns state supreme court holdings appearing to afford more rights to a defendant than are recognized under federal constitutional law. A recent (and somewhat caustic) remark showed his frustration: "Apparently the mere possibility of a minor

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[153]Delaware v. Van Arsdall, 106 S.Ct. 1431 1441-43 (1986).

[154]Id. at 1445.

[155]Id. at 1449-50.

burden on law enforcement interests is enough to generate corrective action by this Court."[155]

Likewise, Stevens generally defers to the Congress and state legislatures when upholding and interpreting statutory law citing their distinct roles of lawmaking in our republican structure of government. Such respect bolstered his recognition that Congress' creation of a role for special prosecutors not answerable to the Solicitor General on appellate matters,[156] and that the establishment of a federal Crime Victim's Fund (passed by means of a bill not originating in the House of Representatives)[157] were not unconstitutional, contrary to the views of his colleagues. He also has a keen sense of history and uses it often in coming to grips with statutory construction. This is exemplified by his understanding of pre-1900 statutes:

> Statutes like the Sherman Act, the civil rights legislation, and the mail fraud statute were written in broad general language on the understanding that the courts would have wide latitude in construing them to achieve the remedial purposes that Congress had identified. The wide open spaces in statutes such as these are most appropriately interpreted as implicit delegations of authority to the courts to fill in the gaps in the common law tradition of case by case adjudication.[158]

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[156]Florida v. Wells, 110 S.Ct. 1632, 1639 (1990)(Stevens, J., concurring in the judgment).

[157]United States v. Providence Journal Co., 108 S.Ct. 1502, 1512 (1988)(Stevens, J., dissenting).

[158]United States v. Munoz-Flores, 110 S.Ct. 1964, 1974 (1990)(Stevens, J., concurring in the judgment).

[159]McNally v. United States, 107 S.Ct. 2875, 2888 (1987)(Stevens, J., dissenting).

Summary

Justice Stevens said during his Senate Confirmation Hearings that the business of the Court is to decide the cases as initiated by the litigants, "not to search for issues or to regard itself as a sort of commission to reform the law." This position is predicated upon the premise that law evolves through the Court's responses to such claims, not by "judicial fiat." In that sense he preaches judicial restraint. Nevertheless, once cases come before and are dealt with by the Court, he is very willing to express his views as he sees the issues, the role of the Court, and its proper responses to the cases. He is quite mindful of the various ways the Court must weigh and balance specific issues. In the criminal justice context this includes the identification of society's and of an individual's legitimate interests, which are reflected in the duties and responsibilities of government personnel and procedures, and offset by the presumption of innocence and due process rights of the accused. John Paul Stevens cannot be labeled as either pro- defendant or pro-government because of his approach. As a Supreme Court justice he has attempted to comprehend the positions of the adversaries and to respond with rationale appropriate for a justice in quest of reaching a fair disposition that comports with the constitutional requirements of ordered liberty within the confines of our federal design.

CHAPTER VII

CONCLUSION

The primary focus of this work was to systematically analyze the opinions of Supreme Court Justice John Stevens from select cases dealing with questions concerning federal and state criminal procedures in order to discover and relate how he has participated in the development of legal standards affecting criminal justice issues, in the context of federalism, as these doctrines have unfolded, have been refined, or have become entrenched by the Court over a fifteen term period. The secondary focus was to search out his judicial philosophy and its underpinnings by means of a review of his public statements and non-opinion writings, as well as of his personal biography and socialization, with the expectation that the discovery of Stevens' role orientation would aid in an explanation of his decision-making practices and preferences in the criminal justice context. It was anticipated that added benefits would be to record how Stevens values the personnel and institutions who put into effect and are affected by these decisions as well as deduce his comprehension of the functions of the criminal justice apparatus within the broader context of public administration and society at large.

John Paul Stevens and the Dynamics of the Criminal Process

By design, the administration of justice is to be conducted through a series of regularized steps imposed upon its actors externally by governmental decree. Depiction of the steps in horizontal fashion appears sensible and attainable. Objectivity and professionalism in processing the accused should produce fair and just results. But this work has been predicated upon viewing the context of the criminal procedure more inclusively. To speak of the criminal process in terms of "dynamics" is more appropriate, for it suggests something less mechanistic

and more organic; something subject to change and growth, and to the tugging and pulling of various forces, both internal and external. The overall conclusion is that Stevens' approach is to give equal attention to the real and ideal dimensions of a criminal procedure for each case situation. It is his custom to zero in on the facts and specific issue of each case, and to address the arguments presented. But when rationalizing a remedy, he also recognizes the implications of a decision as it may affect future practitioner conduct and the legitimacy of both the administration of justice and the Court. Overall, in the cases under review, Stevens tended to apply general principles of law similarly to cases arriving from state or federal courts. In evaluating the propriety of specific procedures, he begins from the basic premises that federal entities are limited in jurisdiction and function under constitutional design, but that state law and the actions of its personnel and processes should be respected unless they deny constitutional protections. Thus, he welcomed experimentation and innovation at the state level and criticized premature federal judicial intervention. A secondary conclusion is that John Stevens is distinct from the more ideological justices because he has chosen to assume the role of a "professional judge" and be restrained by the Court's institutional constraints and traditional reasoning techniques. However, individual experiences such as a family criminal trial, schooling, world events, and personal contacts could account for his sensitivity to the impact of a decision upon future accused persons (Everyman). Beyond these general conclusions are numerous findings reflecting the nuances of his approach and his responses to specific areas of criminal procedure. Presentation and discussion of these findings follow.

Discussion of General Findings

By training as a lawyer within the Anglo-American legal system, Stevens is most comfortable with the system's basic tenets supporting regularized procedures as a means to

achieve individual justice. As a practitioner and liberally-educated observer of the human condition, however, he recognizes that this ideal presents many challenges to the personnel who function in the criminal justice system everyday. He professes to understand the pressures they are under, especially the external demands placed upon them by the police, the media, and politicians to arrest, prosecute and convict the criminal element while striving to fulfill their responsibilities efficiently and economically. By the same token, as a Supreme Court justice he has sworn to uphold the Constitution, including the sections framed to protect individual rights. As a practicing lawyer, he dealt with the concerns of individual clients and the single outcome of his/her case, but as a Supreme Court justice his sensitivity to the nuances of each case is coupled with his interest in the national impact of a decision. He wants to make sure that the public and legal circles understand exactly what the court has decided (and not decided, for that matter) as well as what a holding's implications for future like cases might be. If a claim arises from a state court, he tendency has been to defer to state sovereignty. He is discouraged by premature resolution of questions and believes court time is better spent on issues upon which there has been some legal discourse by lower courts and commentators.

To reconcile the ideal with reality, Stevens' solutions tend to be predicated upon the belief that the more procedures are regularized and conducted in a professional manner, the less likely abuse of constitutional rights will take place. "Unfettered discretion" will be superseded by professional judgment and exceptions to a general rule will be needed only for limited situations. Since the Court is faced with individual cases, however, he amply demonstrates how each question needs to be evaluated within the context of its own facts--including consideration of the history, as well as of the evolution or uniqueness of a federal or state process--and with the understanding that the role of the High Court in our federal motif is to

vindicate constitutional rights rather than fight crime. Thus, "regularized" does not mean rigid but allows for flexibility to accommodate variances in procedures from state to state. Appellate attorneys, wary of Stevens' apparent inconsistency in the treatment of cases claiming violations of the same specific procedural right, can be reassured by this counter observation: Stevens is actually consistent in his manner of acknowledging all sides of an issue and bringing arguments forward for national debate. This is not to say that Stevens ignores the plight of crime victims (for he often will note heinousness in a set of facts), but to reiterate his long-held position that the Court is not to be a "roving commission" for legal reform nor an "instrument" of public policy.

Of all the early commentators during Stevens' first few years as a justice, Leonard Orland was most prophetic on how Stevens would continue to approach criminal procedure cases, i.e., by giving importance to the lower court findings and record of facts, and in "molding procedural doctrine" to advance what the justice sees as "judicial economy."[1] Particularly regarding the latter, though he may aggravate his colleagues by rebuking them when they grant certiorari instead of waiting for the "best case" by which to make a ruling on criminal procedure matters, his reason for this criticism is more than merely acceptable: The quality of criminal justice administration is threatened when the Court takes on a case too quickly, for though it may result in the affirmation of a defendant's conviction, it muddies the constitutional waters generally and distorts the role of the Court as defender of Liberty. Premature review of state cases, especially those from pretrial settings, not only disrupts state proceedings, but in the long run could add tremendously to the Court's docket.

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[1]Leonard Orland, John Paul Stevens in 5 The Justices of the Supreme Court: Their Lives and Opinions 149, 159, 161 (L. Friedman and F. L. Israel eds., 1978).

Stevens appears to be bothered by what he would consider negative "cues" that certain Supreme Court decisions give to government officials. Even before, but particularly since, Michigan v. Long he had been concerned with the cue given state prosecutors to challenge State supreme court decisions favorable to the accused, for the Court will probably overturn them. He dose not like the cues given to prisoners filing habeas corpus petitions; the Court may accept the case only to affirm the conviction and require more collateral (but perhaps unnecessary) procedure. He does not like the cues given to law enforcement to push to the limit on searches and seizures for narcotics or to question suspects without meaningful access to an attorney; the Court's record for not finding violations of the exclusionary rule are tilted in the state's favor. He disapproves of cues to prosecutors to withhold evidence during discovery nor to hold detainees without speedy detention hearings. He has listened well to the stories of Justice Marshall and shares his concern for decisions that threaten minority rights or that place a hardship upon indigent defendants. Perhaps Marshall's influence could also account for a slight shift in the way he perceived typical defendants, for he appears not to be as skeptical about them as some of the other brethren. His standard is simple: The crime may be despicable and the defendant obviously guilty, but a judge must put that aside for a moment to evaluate the extent of the constitutional violation. In his view, if a violation is allowed this time, it opens the door to tolerate future government restrictions on personal rights under the aegis of Public Safety.

Findings Regarding Specific Procedural Issues

Since a Supreme Court justice, like the Court itself (despite its discretionary selection power), cannot invent an issue but must wrestle with the realities of actual criminal events and justice administration activities, it is often difficult to make broad generalizations about judicial

approaches. This is especially true for Justice Stevens for the reasons outlined above. It becomes necessary to frame such attempts at generalization within the subject matter before the Court and about which he has chosen (or been chosen) to write opinions.

Almost a quarter of the opinions reviewed dealt with Fourth Amendment issues and many exhibit Stevens' interpretations of the two main clauses of the Amendment which rely heavily upon the importance of a neutral magistrate, British and American history and the abuses the Amendment was designed to correct. He also finds it pertinent to explain the meaning of certain terms and the interests their use was designed to protect. For example, a search affects privacy and a seizure affects possession; a court must decide which of these two interests have been affected and weigh it against the law enforcement interest to gain evidence. He has afforded greater protection to the home, yet is more willing to accept legislative determinations to allow for warrantless searches of conveyances. Early opinions stress the extent of federal law enforcement action pursued in accord with recently-passed legislation; for him, surveillance techniques and warrantless administrative searches were to be judged by the extent of Congressional approval. On the other hand, search and seizure cases have given him the greatest opportunities to object when the Court has taken a case appealed by a state from its highest court, which has afforded the defendant greater protection than required under the federal Constitution, or taken a case still in its "percolation stage." Investigative vehicle stops by "overzealous police" illustrate the former, while unwarranted search of a motor home address the latter. He views this sort of "judicial activism" as both a threat to the balance between state and federal power as well as a faulty sense of seeking uniformity in the law leading to "premature resolution of a novel question." Noticeably, he is quick to administer a reprimand to his colleagues for forgetting, or sidestepping, the deterrence rationale of the

exclusionary rule and for allowing it exception, thereby sending signals undermining already-developed police professionalism.

So-called prophylactic rules stemming from Miranda v. Arizona and other decisions involving preservation of the protection against self-incrimination during police interrogation were the focus of a number of opinions in the pretrial area. Generally, he has become dismayed with the Court's narrowing of what he perceives to be a bright-line rule, its disregard for trial court evaluation of misconduct as well as for the role of attorneys in our accusatorial system, and for its subtle encouragement of deceptive police conduct. In contrast to the Court's lesser concern for a violation of a prophylactic rule, Stevens sees a threat to due process protections and shadows of past in-custody horror stories. He is very sensitive to the realities of the current administration of justice and its extensive use of plea-bargaining, which increases the importance of pre-trial counsel to the individual as well as to the legitimacy of his/her processing absent a fact-finding trial. Where the majority may abhor the higher costs in letting the guilty go free, Stevens finds more fault with officers who blunder and cost the system extended years of appeals. His solution is for the Court to specify when "adversarial" pretrial proceedings begin for purposes of appointing counsel. But Court majorities ignore his remedy. For other pretrial matters, he makes no distinction between federal and state prosecutors in expecting them to meet the discovery standards of Brady v. Maryland not to suppress evidence favorable to the accused, nor does he distinguish between federal and state grand juries in somewhat reluctantly agreeing with the Court that both must abide by the cross-section requirement of the Due Process Clause in its selection of grand jury foremen. The Court's reversal of a trial judge's dismissal of counts on an indictment for violation of the federal Speedy Trial Act and its approval of the provisions of the Bail Reform Act of 1984 allowing for less than strict adherence to the requirements for the timing of a pretrial detention

hearing, prompted criticisms for the Court's improper analysis of the legislation. Stevens' dissents exemplify how, in reckoning with a Congressional statute, he first places it within its historic context and then gives as much attention to what was intentionally left out of the final form as to what was included; the letter and spirit of the law can be acknowledged.

Stevens relies heavily upon the judgment of trial judges in appraising cases for the fairness of trial processes, but does not give judges blanket discretion in all matters. For example, he suggested that it is within the judge's discretion to determine to what extent a juror's privacy is to be protected during the voir dire, but judge's should have less discretion and be more vigilant in maintaining a jury without racial bias; providing a "neutral" jury selection "mechanism" should help them to achieve this goal. Trial judges are in a better position than appellate judges to know and apply state procedural law, to read a jury and determine the existence of grounds for a mistrial, or to evaluate incompetent counsel; the Court should defer to them more often. If federal trial judges misread federal appeals statutes, the Court through its supervisory role over the federal judiciary, should correct such mistakes. Stevens maintains confidence in both federal and state judges to know the law and interpret it properly during jury instructions. His approach is to compare the instructions given with that which should have been given, but to presume that reversal of a decision on instruction grounds will be rare. However, he draws the line on misleading or informal comments by either the judge or the attorneys which affect a constitutional right, while at the same time recognizes the possibility of attorney strategy as the possible explanation for his/her decision to include or not include an instruction. He has distinguished a defendant's pretrial, post-arrest silence from trial silence and noted the ramifications of official comments on either of them during trial for impeachment purposes: comments on the former present more of a threat than comments on the latter because of the stage of the case and the rights being compromised. Trial counsel is

presumed to be competent and the burden is on the defendant to prove otherwise; tactical decisions may not always be successful, but it is a risk that must be accepted by the defendant. Counsel is seen as one of the hallmarks of our legal system and Stevens has attempted to stress the necessity for and importance of counsel in all stages of a criminal case, from pretrial through first appeal, and also for post-conviction remedies. In dealing with double jeopardy matters such as multiple prosecutions, the Court has been clear in setting forth the framework for trial judges; once a judge uses it the Court should not second guess him/her. He has sarcastically rebuked the Court for affirming convictions to avoid retrials in both federal and state cases involving double jeopardy claims in prosecutions for lesser and greater included offenses; the Court's desire to further confine a long-term prison inmate appears to override any concern for double jeopardy protection.

Stevens sees jury trials as the heart of the administration of justice but his picture of the jury takes on different hues. If asked to ignore certain evidence, such as prosecutorial comment or parts of a co-defendant's confession, knowledge of human nature suggests a probability that jurors will not easily disregard. Especially in capital cases, juries are seen to represent the best cross-section of the community for purposes of making the decision whether to impose the death penalty, as long as they operate within structures that "channel" the exercise of discretion in dealing with a narrow class of death-eligible defendants. On the other hand, Stevens has less confidence in jury appraisals in both federal and state prosecutions under obscenity statutes. A jury is seen to be capable of determining guilt beyond a reasonable doubt and weighing aggravating and mitigating circumstances before imposing or recommending a sentence, but only able to exhibit subjective reactions, rather than reflect a consensus on "contemporary community standards," in judging whether materials are obscene.

The Justice appears to have done a flip flop regarding habeas corpus review standards. In early opinions he noted that it was acceptable to restrict Supreme Court review of federal habeas corpus petitions out of respect for state court review, because state judges are in a better position that federal judges to evaluate the claim and because with so many layers of review the likelihood of finding error would be remote. Through the years he has had more to say about the types of errors best treated through a habeas claim and about the Court's propensity to require more state procedures even if a federal district court has used its discretion and resources to entertain the claim. To him, the Court's variety of special procedural rules have become cumbersome. He charges that many of his colleagues have lost sight of the historic purpose of the writ and believes that the "key" to granting review is the "character of the error" not the "procedural history" of the case. Though at first this position may appear contrary to his "respect for the states" argument from Michigan v. Long and its progeny, it must be remembered that his charge there was that the Court was not vindicating rights, but actually wasting its precious time and resources (as well as compromising its role) taking away the exercise of rights already recognized by state courts. Similarly, he tends to "concur in judgment" when the majority apply harmless error analysis and has dissented from its application to prosecutorial conduct, warning the Court of its cues to prosecutors that they can get convictions without fear of reversals.

A few cases reviewed in this study are instructive as examples of how Stevens applies the canons of statutory construction, but even more valuable for what he considers questionable use of the criminal sanction. He denounced both federal and state obscenity statutes as denials of First Amendment communication rights and noted that inclusion of such prohibitions in racketeering statutes further complicated the picture by depriving single shopowners of their livelihood. Restrictions on sexual behavior, such as a rape statute targeted at males and a

sodomy statute applied to the general population but used only against homosexuals, are also objectionable as written. He registered a dissent to the broad application of an old federal theft statute to federal agents because it had been designed to protect mail carriers and also objected to the restriction of the use of a mail fraud statute on what he saw to be the Court's leniency toward white collar criminals. His frontal assaults on the Court's decisions to strike down state and federal statutes penalizing the destruction of the American flag on free speech grounds could be seen as uncharacteristic of his usual approach to rank First Amendment rights on a higher plain than other rights.

Justice Stevens and Public Opinion

How do some of Stevens' positions correlate with the public opinion polls taken during his tenure? Stevens has extolled the virtues of a life-tenured judiciary because it allows judges to be insulated from removal for taking unpopular positions. To what extent may he have needed this protection and how might he have responded to these polls? For those who say criminals have too many rights, his opinions mentioned past abuses refined procedures were designed to eliminate; the Everyman argument is appropriate here. To the charges that courts don't deal harshly enough with criminals and ignore the victim, Stevens would probably respond that each case is unique to its facts which could account for disparity. He would further elaborate that it is the legislature who represents you and if the victim's rights need recognition that would be appropriate as long as it does not compromise the rights of the accused and especially the fact-finding process. He may not be the public's idea of a "more conservative judge," but his acceptance of the Warren Court decisions reflects his knowledge of actual criminal process abuses. Congress answered the public's call for getting tougher on criminals and for speedier justice with the Omnibus Crime Bills, RICO statutes, Bail Reform and Speedy

Trial Acts. When challenges to certain provisions of these statutes emerged, Stevens generally found fault with those parts he believed threatened basic liberties or traditional acceptance of specific procedures. Public support for the death penalty has not wavered much, and Stevens has accepted this expression of community outrage; his concerns reflect the goal of assuring the fairness of the processes used to impose sanctions. But he went beyond polls to statistical and professional studies to tap "community standards" to substantiate his objections to capital punishment for the mentally retarded, youth under sixteen, and defendants convicted through racial bias. His views on the regulation of pornography are in complete contrast to many of those polled. He too gave a favorable rating to the integrity of the FBI at the same time the agency was receiving popular support. His dissent in one of the flag-burning cases, however, shows a more personal concern for how Americans view their symbols and how he views America and the affront to ideals he reveres.

Justice Stevens and His Brethren

Interestingly, the flag-burning cases were among a minority of recent cases in which Stevens did not vote with Justices Marshall or Brennan. Commentators have noted Stevens' shift from the middle of the Court since his arrival in 1976; this is most logically explained as the result of the departure of Justice Stewart, another "middle" justice, with whom Stevens generally agreed most often (along with Justices White and Powell) during his early years on the bench. In the cases reviewed here, he has more frequently defended his views against attack by Justices Burger, Rehnquist, White, O'Connor, and most recently, Scalia. With the departure of Justice Brennan in 1990 and Justice Marshall in 1991, Justices Blackmun and Stevens remain the former middlemen who are now referred to as "liberals" in dealing with matters concerning individual rights. Actually, such labels have become meaningless.

Stevens' performance is consistent with his predictions of how he would act on the Court--as a professional, not as an ideologue.

Justice Stevens, Role Orientation, and Criminal Procedure

In addition to providing his solutions to a variety of procedural questions, analysis of Stevens' criminal procedure opinions have provided ample material to illustrate how his perception of the role of Supreme Court justice manifests itself. The secondary focus of this work was to determine why Stevens' jurisprudence defied ideological labels. It appears that it is his choice of a "professional" role orientation that best explains his moderate position.

One of the basic assumptions underlying this study is that if one can discover the core values held by an individual, one can understand a bit better how or why he/she makes certain decisions. Factors which influence the formation of values, and the historical contexts in which the values operate, must also be accounted for. Such factors may include personal background (family heritage and outstanding events, socialization processes), the intellectual influences from formal and professional education as well as from currents of thought prevailing at the time, and seminal life events. The ethics and expectations, as well as responsibilities, of the subject's chosen profession add another layer to the makeup of an individual. By the time one becomes a judge, he/she arrives with much excess "baggage." But when studying judicial decision-making, the quest for a judicial philosophy underlying these decisions must go beyond identification of the subject's values prior to his/her ascent to the bench and include recognition of the institutional restraints and role orientation of the judge which operate to temper or filter core values. Such a quest must also take into account the political and social environment in which decisions are made as well as the subject matter

under review. In an earlier work, I paralleled the study of a person's life to the composition of a piece of music and then applied it to John Paul Stevens:

> One could liken any person's life to a Bach fugue, with its various tempi, moods and dynamics, intricate rhythm, but particularly, with its structure. The phases of life correspond to the re-entrance of the fugue's theme, each time by a different voice while the other voices continue as support, embellished further in recapitulation, concluding with a final full chord. In the life of Justice John Paul Stevens the fourth voice--his judicial role--has just begun. The other three voices of family influences and social life, formal education, and professional experiences prior to 1971 have already made an entrance. Each was in development as the next voice began, and each helped to embellish the other--sometimes in a subtle way and other times more profoundly.[2]

This analogy still holds, but after the passage of more than ten years and with the discovery of much more revealing material it must receive a new accentuation: the theme of a study of John Stevens should emphasize him as the consummate professional.

In each phase of his life, as he took on the tasks before him, he appeared to attempt to discover what was expected of him and to assume his responsibilities with a great deal of determination to excel. He came from a family of dreamers and achievers, grew up in a stimulating intellectual environment in a dynamic (albeit corrupt) city, went to the best schools and engaged in countless debate, experienced Depression and war and the joys of fatherhood, saw his family's resolve falter but not die, experienced the rewards of hard work and integrity, gained tremendous pleasure from being a lawyer and teacher, and rubbed shoulders with the judicial elite of the mid-twentieth century. Do the values he identifies in his Supreme Court opinions come from these life experiences? Perhaps. But each "profession" he entered--

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[2]Kathleen M. Simon, Justice John Paul Stevens and the Fourth, Fifth, Sixth and Fourteenth Amendments 4 (1980)(unpublished thesis, Appalachian State University).

student, lawyer, teacher, judge--has institutional restraints and the High Court is no exception. A possible proposition is that if Stevens acknowledges the institutional constraints of the Court, as he appears to have done, then his role orientation comes from his acceptance of traditional judicial practices. This is not to say that his other orientations or life experience have no bearing on his expressed views, but that one cannot assume that judicial opinions reflect solely a personal philosophy. Commentators have been unable to pigeon-hole Stevens as either a liberal or conservative, and his voting alignment patterns with the other justices over fifteen years could in part be explained by this bent to handle each case by professional methods rather than to achieve some sort of overall policy goal.

A Model of Judicial Style

If one was to devise a model of Stevens' judicial style, it would consist of means by which to make the judicial tasks more manageable and means by which to decide the controversies before the court. Therefore, if one compared and contrasted his answers to questions posed to him by the Senate Judiciary Committee about the manner in which he would see his judicial tasks, with the manner he professes to judge as reflected in his opinions, one may be able to say that he performs as he said he would under the constraints of the institution. If justices of the Supreme Court operate under restrictions of time and resources, the rule of four in granting certiorari petitions, jurisdictional rules to limit decisions to cases and controversies of national importance but not political questions, the stricture to address only the issues on a petition and not to deliver advisory opinions, and the maintenance of a code of confidentiality,--and Stevens professes to abide by these rules--then he is oriented by means of these constraints. If justices of the Supreme Court are to decide cases with rationale based upon certain criteria, such as British and American tradition and common law, the intent

of the Framers, the assumption of constitutionality, stare decisis, applications of the canons of statutory construction, restrictions on the scope of a decision based upon how it arrived at the Court, respect for the constitutional roles of government branches, and restriction on address limited by which rules of error to apply--and Stevens professes to abide by these rules--then he is oriented by means of these constraints. Hence, he is a professional judge.

But, despite his professed beliefs in recognizing these constraints, he is not mechanistic, and therefore not predictable. One cannot say that because he is restrained he is a "conservative" and treats claims from criminal defendants harshly, nor can one count his votes in favor of defendants' claims and label him a "liberal" (or even a "swing vote"), for this gives a limited view of his actual positions on issues before the Court. Examination of concrete opinions from cases dealing with criminal justice issues shows that an apparent agreement with the petitioner (and with the Court as reflected in his vote) could actually hide a disagreement with his colleagues stemming from a difference in preference for certain reasoning techniques--especially reflected in his many "concurrences in the judgment" among the cases reviewed--but more frequently from his lack of support to grant the original certiorari, from his stand that the Court lacks jurisdiction, or from a desire to limit address to those questions on the petition. A summary of how he operates under institutional constraints and utilizes reasoning techniques substantiates this conclusion.

Justice Stevens and Institutional Constraints

He has criticized his colleagues on a number of occasions for what he considers their "activism." Though use of summary disposition is one means to save time and resources, Stevens has noted that the Court consistently used this device throughout the 1980s as a means to reverse state supreme court judgments unfavorable to the position of the state prosecutors.

He and Justice Brennan started keeping count and Stevens continues the practice to this day. He even made references in opinion footnotes implying his dissatisfaction with the politicization of the office of the United States Attorney General and its use of the federal courts as a vehicle to fight its brand of war on crime. As far as his own "activism" is concerned, his general preference for entertaining a petitioner's claim reflects the institutional goals of restricting court activity to matters of national importance and to the claims on the petition, but he fudges on both for apparently contrary reasons. Sometimes he sees an issue for its national significance and will deal with it even if it was not specified a certain way on the petition. Sometimes as issue coming from a state court is of national importance, but in his view has not "percolated" long enough for the lower courts to flush out its many sides; here he would not have granted review. His variant behavior in dealing with habeas corpus petitioners appears dependent upon whether he recognizes a constitutional violation rather than whether strict procedural rules of exhaustion of remedies have been followed, especially if state procedures are cumbersome and the issue has been flushed out. He has suggested that the Court seems not to place enough emphasis upon the underlying purpose of this writ--that a person's liberty is at stake!

Stevens' reputation for confidentiality is notorious and his general rule not to grant interviews can be frustrating to the researcher--one may wonder if he will leave any personal papers! Yet, he must have some breaking point, for he has said publicly that one is not to deduce animosity among certain justices just because they forcefully express their legal differences in written opinions. (This could also be a way to counter some of the damage done by Woodward and Armstrong's The Brethren.[3]) This private person comes alive on the

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[3]Bob Woodward and Scott Armstrong, The Brethren: Inside the Supreme Court (1979).

bench during oral arguments, however, pointedly asking questions to expose the nuances of the issues in the advocates' briefs he has studied so painstakingly. He takes his professional responsibilities very seriously.

At the Senate Hearings, he gave a reason for why he often published a dissenting opinion while on the Seventh Circuit Court of Appeal--so that the litigants know that their arguments have been understood. He does the same on the High Court. Through this, it appears that his penchant for debate, begun as a young man and nurtured in law school, has not wavered; he has spoken to bar association audiences about the value of legal debate in professional circles and he keeps up with reading in the law journals over the summer to tune in on that debate. His professional training as a lawyer is embellished by his profession on the court.

The idea that the Supreme Court is really "nine little law firms" receives a "twist" from Stevens, possibly due to his professional standards as well as a desire to uphold the code of confidentiality. During his first meeting with new law clerks he is known to say "you are my lawyer," and gives them notice that the judge-clerk relationship is to be treated like the lawyer-client relationship. Otherwise, his rapport with the clerks is along the line of the senior partner/associate. He has great confidence in his clerks and lets them sift through the hundreds of applications for the next crop of law clerks to choose among the best twenty or thirty prospects. Henry Abraham has confirmed that as of 1992, Stevens is the only remaining justice who does not use the law clerk pool as the source for memorandi on certiorari petitions.[4] This holdout in requiring his clerks to review all the petitions has been interpreted by one former clerk to reflect a concern that eight of the nine Supreme Court justices rely upon the consideration of <u>one</u> person as to whether a petition has merit; the chance that a very

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[4]Henry J. Abraham, <u>The Judicial Process</u> 178 (6th ed.)(1992).

important issue can be missed is extremely great. Perhaps this could be viewed as an abdication of Court responsibility, and an example of a means of efficiency which in the long run may not well serve justice. Further, his reluctance to write dissenting opinions for a denial of certiorari--and his criticism of those justice who do--reflect a desire not to give credence to an argument that the court has already dismissed, believing it would lead to confusion for the litigants as well as for those in legal circles.

Stevens and Choices of Rationale

Within the Court's institutional restraints, he shows his independence by making choices from among the legitimate reasoning tools available to him to defend his dissenting or concurring opinions. He may have suggested to his legal audiences that judge-made rules have a life-span, but in the area of criminal justice Stevens appears to give most Warren Court era rulings an extended life. His frustration with the Court is obvious when in his view the majority chip away at rulings from what he considers seminal cases, or if they ignore interpretations applied by past respected jurists, or particularly, if they misread or misinterpret a decision for which he had written the original majority opinion (e.g., United States v. Augurs, Michigan v. Jackson, and Berger v. Kemp as well as Roberts v. Louisiana). Continuity and respect for stare decisis and concern for an accused's loss of constitutional rights undoubtedly motivate him to press his positions in such situations. He indicates his awareness that each time the Court renders a decision, its legitimacy is on the line. When a decision involves the power of other branches of government or the states, the Court's legitimacy is particularly in jeopardy. Stevens' usual pattern is to give deference to these entities and to indicate that the court must be sensitive to protecting its own power by using it wisely but sparingly. The application of criminal statutes affects property, life, and especially

liberty. He is vigilant in applying the canons of statutory construction when such statutes are under Court scrutiny since they represent societal interests, but at the same time he identifies what individual interests may be threatened by the will of the majority. How Stevens weighs the interests is undoubtedly connected to the values he associates with the interests.

Judicial Background and Rationale Choices

Much speculation has been made over the connection between the extent of a Supreme Court justice's concern for individual rights and his/her ethnic background. Rather than viewing the extent of Stevens' concern for personal freedom and liberty as that of a "pragmatist"[5], perhaps it would be well to remember Stevens' Anglo-Protestant roots, as modified by the Stevens family's long-time American residency.

As members of what had become a native "minority" group by the twentieth century in the city of Chicago, the Anglo-Americans had a republican heritage--the nation's culture and institutions--to preserve and promote. This group has been associated with such cultural values as responsibility, rationality, efficiency, moral improvement, industriousness, love of liberty, and a view of politics as "inferior" to business and the professions.[6] Thus, it is not difficult to understand the ease with which Justice Stevens has given deference to British and American history and tradition when dealing with the institutions and processes associated with the criminal justice system. This is not to say that he promotes preservation of a practice merely for preservation's sake, but before he advocates a modification or change for the system, he generally will trace the background of a practice to show its evolution in historic

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[5]Robert J. Sickel, John Paul Stevens and the Constitution: A Search for Balance (1988).

[6]Lawrence McCaffery et al., The Irish in Chicago 148 (1987).

context. Also, considering his family's position in the community, one can understand why Stevens accepts and expects a more non-political role for judges, as distinct from the more political functioning of the executive and legislative branches of government, when he attempts to resolve procedural questions before the Court. It is not a matter of "looking down" on politics as much as it appears to reflect "idealistic" distinctions for these roles as suggested by historical experience and constitutional design.

Would a backward glance at Ernest Stevens' trial for embezzlement, and the circumstances surrounding it, suggest other reasons for Stevens' evaluation of the system? Perhaps Stevens may have entertained some of the following considerations. He may have mused that if someone as respected and as highly regarded as his father, could be subject to the criminal sanction, could not anyone (Everyman)? His father knew judges, very capable lawyers, people with discretionary money because of his wide social circle. He was respectfully treated by the police, which resulted in some relatively unorthodox processing for arrest and bail. He almost made the police uncomfortable with his demand for the arrest warrant. He mustered myriads of witnesses to attest to his character. Would Everyman be able to do this? During the trial the prosecutor bullied the defendant and even called him and his father and late brother "financial racketeers," while the defense attorney chose a jury who had not been financially affected by the fallout from the 1929 stock market crash, who appeared "perplexed" by the intricacies of the witnesses' testimony and who challenged the prosecutor regarding proof of the element of possession. Were these strategies, or incompetencies affecting the truth-seeking function? And what about the defense's closing statement that his client was the victim of "mob justice" and the defendant's statement at his sentencing hearing that he was not a "criminal type" but was presumed guilty and had to prove his innocence? Was this not a scenario from an inquisition rather than from an adversarial process? There is no way to make

absolute connections between the events of 1933 and Stevens' judicial positions, but such queries are thought-provoking. Stevens himself may have inadvertently put the whole ordeal in historic perspective.

During a recent speech at the University of Chicago celebrating the school's one hundredth anniversary and the Bill of Rights' bicentennial, he cleverly linked the city's two world's fairs with the anniversaries and then paralleled the 1930s economic strife and threats against democracy with the events occurring in 1991: "A volatile stockmarket, an everescalating deficit, and disturbing reports of mismanagement of major financial institutions remind us that in 1991--as in 1933--risk is a characteristic of a free economy."[7] Is he saying that his father took a financial risk and lost? Hitler came into the picture and freedoms were denied to nations. Stevens was called upon within the decade to defend against the tyrant. "Be alert when rights are threatened," learns Stevens, and make the processes fair for Everyman.

In addition to the embezzlement trial, one must also consider the timing of Stevens' law school studies and law clerk appointment after military service during World War II as significant in helping to explain his choice of reasoning techniques and rationale for criminal justice decisions. Nazi and fascist practices as well as contrasts between continental and British practices are noted in several opinions interpreting procedural rights penned by Justices Wiley Rutledge, Felix Frankfurter, and (especially) Robert Jackson. Stevens became more familiar with these justices and their views during the Court's 1947-48 term when he clerked for Justice Rutledge. One can speculate that during the clerkship he also must have been privy

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[7]John Paul Stevens, The Bill of Rights: A Century of Progress, 59 Univ. Chi. L. Rev. 13, 16 (Winter 1992)(emphasis added).

to conversations about Justice Jackson's experiences at the Nuremburg trials as well. As illustrated in the discussion of law enforcement above, quotes from these opinions and others like them, hallowing the American tradition of protection of individual personal rights, can be found in Stevens' own opinions, particularly when it appears to him that his Court colleagues and/or criminal justice personnel may be stressing the immediate and pragmatic societal goals of crime prevention, detection or conviction over our hard-fought-over and time-honored constitutional ideals.

Values and Rationale: Procedures and Personnel

What are some of the values Stevens sees reflected in criminal justice processes and in those who function within the system? Particularly in cases dealing with pretrial matters, Stevens' depiction of and concern for Everyman comes through. He asserts that we must correct the mistakes of the government official, who represents society, so that the rights of a particular individual are not compromised, but especially so that in the future any other person in a similarly unfair situation is protected. The possibility that a guilty person might go free is no justification for quashing civil rights as a general rule. The discretion of judges, especially state judges, is to be respected. But this must be tempered by giving judges guidelines by which to make constitutional applications to concrete situations. Elected judges may be prone not to make unpopular choices, but life-tenured judges are more insulated from the threat of removal and are freer to exert what is fairest to the parties involved. Defense attorneys are seen as essential to protect the due process rights of the accused, and prosecutors are given much leeway to in accomplishing their goals to convict. Both types of attorneys are assumed to be competent and often their challenged actions are understood to be part of a legal strategy. The defendant is presumed innocent because ours is an adversarial, not an

inquisitorial system. Jury impartiality must be protected conscientiously and jury instructions must be clear and unambiguous. Long-held acceptance of the meaning of legal terms and the function of processes should be respected, but considerations of contemporaneous application should be evaluated as well.

None of these value-laden statements are that profound or unusual for a person trained in the law and the product of an Anglo-American background, but Stevens' steady pen continuously brings them forward and reminds us of where we've been, where were headed and where we ought to go in fulfilling some of the expectations of our founders while safeguarding the rights of future generations.

The Last Word

After over seventy years of living and over forty years of formally upholding the values underlying the Constitution, one may speculate that perhaps Stevens is getting weary, but then he surprises us with a few words about how he sees the American state of affairs. If he is discouraged, he should listen to his former "friendly rival," Arthur Seder Jr., who predicted to me recently that Stevens is staking out positions "that history will vindicate." He went on to say:

> [W]hile liberal and conservative majorities alternate from time to time, the more liberal decisions tend to set the minimum standard for the next conservative wave. And liberal dissents during periods of conservative majorities tend to be adopted as opinions of the Court upon reascendancy of more liberal majorities. It appears to me, therefore, that Justice Stevens' dissenting opinions are likely to command majorities on the Court at some time in the future, and history will probably regard him as having blazed the trail. . . .

> [T]he views he now espouses will probably come to be regarded as fundamental, middle-of-the-road Supreme Court doctrine when a new generation of justices is in office ten or fifteen years hence.[8]

This is a fitting prophecy for such a remarkable professional.

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As a judge and as a man John Paul Stevens is highly regarded and greatly admired. People who knew him long ago and people who know him now speak about his warmth and sincerity, kindness and forthrightness, humor and love of challenge. However, no comment quite sums up the man as well as the one offered by former law clerk and current law professor Lawrence Marshall, upon introducing Justice Stevens before a Northwestern Law School audience in 1992:

> In an age of cynicism about our nation's leaders and the nation's bar, Justice Stevens stands out as stunning proof that wise and gentle individuals can and do rise to the top. Throughout his career, he has shown time and time again that intellectual rigor and sheer brilliance need not come at the expense of common sense and wisdom; he has shown that an unyielding commitment to the rule of law need not lead a judge to rigid, unfeeling decision-making; and he has shown that power and prominence need not result in aloofness and detachment.[9]

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[8]Letter from Seder to Simon, Feb. 14, 1993, at 1-2.

[9]John Paul Stevens Visits as Trienens Judicial Scholar, 92 The Northwestern Reporter 12, 12-13 (Fall 1992).

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From 1980 to 1983 and 1984 to the present she has been employed as a part- time lecturer in the Department of Political Science/Criminal Justice at Appalachian State University. She resides in Boone with her husband Steve, daughter Patty, and son Joe.