

Justice John Paul Stevens and Capital Punishment

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I. INTRODUCTION

The formal announcement in April 2010 of Justice John Paul Stevens's impending retirement¹ elicited a torrent of analyses² and recollections about his career.³ As one of the longest-serving Justices in Supreme Court history,⁴ Stevens gained recognition in

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¹ Robert Barnes & William Branigan, *Justice John Paul Stevens Announces His Retirement from Supreme Court*, WASH. POST, Apr. 10, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/09/AR2010040902312.html>.

² See, e.g., Tony Mauro, *A Legacy of Independence on the Court*, NAT'L L.J., Apr. 12, 2010,

<http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202447880552>; Marcia Coyle, *Criminal Justice Will Never Be the Same*, NAT'L L.J., Apr. 12, 2010, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202447880425>; Linda Greenhouse, Op-Ed., *One Man, Two Courts*, N.Y. TIMES, Apr. 11, 2010, <http://www.nytimes.com/2010/04/11/opinion/11greenhouse.html>.

³ Susan Estrich, Eduardo M. Penalver, Jeffrey L. Fisher, Cliff Sloan, Deborah N. Pearlstein & Joseph Thai, Op-Ed., *My Boss, Justice Stevens*, N.Y. TIMES, Apr. 11, 2010, <http://www.nytimes.com/2010/04/11/opinion/11stevens.html>.

⁴ See Adam Liptak, *The End of an Era, for Court and Nation*, N.Y. TIMES, Apr. 10, 2010, <http://www.nytimes.com/2010/04/10/us/politics/10judge.html> ("In retiring, Justice Stevens has deprived himself of a shot at a couple of records, particularly since his mother lived to 97. He will be about two years short of the record for longest service on the [C]ourt, held by Justice Douglas, and about a year shy of Justice Oliver Wendell Holmes Jr.'s record as the oldest justice.").

his thirty-five terms⁵ on the Court as an influential figure⁶ whose opinions shaped American law.⁷ In evaluating his judicial performance and influence, one important and debated⁸ question is the extent to which Stevens manifested evidence of changing viewpoints.⁹ Social scientists who count and classify Supreme

⁵ Justice Stevens was nominated for the Supreme Court by President Gerald Ford on November 28, 1975, to replace retiring Justice William O. Douglas. The U.S. Senate voted 98-0 to confirm him on December 17, 1975. THE SUPREME COURT AT WORK 206 (Carolyn Goldinger, ed., 1990).

⁶ See, e.g., Joan Biskupic, *Supreme Court Justice Stevens to Retire*, USA TODAY, Apr. 9, 2010, http://www.usatoday.com/news/washington/judicial/2010-04-09-justice-stevens-retire_N.htm (“[Stevens is] an unassuming Chicagoan in bow ties who became a shrewd strategist and liberal leader of the modern Supreme Court”); Jeffrey Rosen, *The Dissenter*, N.Y. TIMES MAG., Sept. 23, 2007, at 650, 653 (N.Y. Ed.), available at <http://www.nytimes.com/2007/09/23/magazine/23stevens-t.html> (“Stevens himself, however, has been notably successful in building majorities by courting his fellow justices His methods for persuasion are intellectual rather than personal”).

⁷ See *Stevens Top Decisions*, NAT’L L.J., Apr. 12, 2010, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202447880386> (listing, *inter alia*, *F.C.C. v. Pacifca Found.*, 438 U.S. 726 (1978) (approving government authority to regulate the use of profane or obscene language on radio broadcasts); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (allowing that peaceful boycott of merchants is protected by First Amendment); *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417 (1984) (finding manufacturer not liable when consumers use product to infringe on copyrights); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding state-mandated moment of silence in schools improper because of its express purpose of facilitating prayer); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (rejecting a state’s efforts to impose term limits on members of Congress); *Clinton v. City of New York*, 524 U.S. 417 (1998) (striking down the Line Item Veto Act); *Kelo v. City of New London*, 545 U.S. 469 (2005) (upholding city taking of private property for private development purpose because it qualifies as “public use”); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (striking down military commission system for trying enemy combatants)).

⁸ Liptak, *supra* note 4 (“There is some truth, backed by evidence in the political science literature, that Justice Stevens moved to the left over time. But there is also support for his view that it was the [C]ourt that moved to the right.”).

⁹ See, e.g., Jeff Bleich, Daniel Powell, Aimee Feinberg & Michelle Friedland, *Justice John Paul Stevens: A Maverick, Liberal, Libertarian, Conservative Statesman on the Court*, 67 OR. ST. B. BULL. 26 (2007), available at <http://www.osbar.org/publications/bulletin/07oct/stevens.html> (“Justices Stevens’ 31-year-odyssey from being a relatively apolitical Republican appointee from the Midwest to the so-called leader of the Supreme Court’s

Court Justices' votes have asserted that Stevens's votes "moved substantially to the left" over the course of his career.¹⁰ In contrast, Stevens suggested that changes in the Court's composition over the years conveyed the impression that he was becoming more liberal:¹¹ "I don't really think I've changed. I think there have been a lot of changes in the Court."¹² Yet Stevens also admitted, "[L]earning on the bench has been one of the most important and rewarding aspects of my own experience over the last thirty-five years," thereby acknowledging the possibility that his understanding of and approach to legal issues did change over time.¹³ Moreover, in a speech delivered shortly after his retirement, Stevens explicitly acknowledged that Justices can change their views about the meaning of the Eighth Amendment's Cruel and Unusual Punishments Clause: "[J]ust as the meaning of the Eighth Amendment itself responds to evolving standards of decency in a maturing society, so also may the views of individual justices become more civilized after 20 years of service on the Court."¹⁴ Stevens's statement did not specifically refer to changes in his own views,¹⁵ but it represents an acknowledgement that such a change was possible.

'liberal' wing and the target of the conservative right is a study in many things: the influence that a single, independent-minded jurist can have on the Court; the popular impulse to simplify and caricature the complicated jurisprudence of a justice; and the Supreme Court's own shifting jurisprudence.").

¹⁰ Lee Epstein, *Who or What Changed?*, BLOG OF LEGAL TIMES (Apr. 11, 2010, 6:51 PM), <http://legaltimes.typepad.com/justicestevens/2010/04/who-or-what-changed.html>.

¹¹ The terms "liberal" and "conservative" in this article are based on the usage in the Supreme Court Judicial Database which defines "liberal" case outcomes as those that are "pro-person accused or convicted of a crime, pro-civil liberties or civil rights claimant, pro-indigent, pro-[Native American], and anti-government in due process and privacy." Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends in the Warren and Burger Courts: Results from the Supreme Court Judicial Data Base Project*, 73 JUDICATURE 103 (1989).

¹² Tony Mauro, *Stevens Retires*, NAT'L L.J., Apr. 12, 2010, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp>.

¹³ John Paul Stevens, *Learning on the Job*, 74 FORDHAM L. REV. 1561, 1567 (2006).

¹⁴ John Paul Stevens, Speech to National Legal Aid & Defender Association, Washington, D.C. (Oct. 6, 2010) (transcript available at <http://www.supremecourt.gov/publicinfo/speeches/speeches.aspx>).

¹⁵ *Id.*

Stevens's viewpoint on capital punishment is an area of particular interest for analyzing changes in his judicial approach. There is a widespread perception that Stevens moved from endorsing the constitutionality of the death penalty in 1976¹⁶ to "renounc[ing] his support for the death penalty"¹⁷ in 2008.¹⁸ As one author observed, Stevens has "show[n] how his experience on the Court ha[s] soured him on the death penalty."¹⁹ In light of the foregoing perception, this article explores the extent to which Stevens's decisions on capital punishment are consistent with his claim about his career in general that: "I don't think that my votes represent a change in my own thinking[;] I'm disagreeing with a change that *others* are making."²⁰

II. PRE-JUDICIAL EXPERIENCE RELEVANT TO CAPITAL PUNISHMENT ISSUES

Supreme Court cases related to capital punishment primarily fall into one of three categories: challenges to the constitutionality of the death penalty, including the application of the punishment to specific subgroups of defendants;²¹ issues concerning proper and fair procedures,²² and claims of ineffective assistance of counsel.²³ Prior to his appointment to the Supreme Court, Stevens had life and career experiences related to each of these categories.

¹⁶ *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

¹⁷ *Greenhouse*, *supra* note 2.

¹⁸ *Baze v. Rees*, 553 U.S. 35, 85-87 (2008) (Stevens, J., concurring).

¹⁹ Jeffrey Toobin, *After Stevens: What Will the Supreme Court Be Like Without Its Liberal Leader?*, THE NEW YORKER, Mar. 22, 2010, at 39, 46, available at http://www.newyorker.com/reporting/2010/03/22/100322fa_fact_toobin.

²⁰ Jeffrey Rosen, *Interview Transcript: Justice John Paul Stevens*, N.Y. TIMES, Apr. 12, 2010, <http://www.nytimes.com/2010/04/12/magazine/12stevens-interview.html>.

²¹ *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005) (constitutionality of death penalty as applied to juvenile offenders).

²² *See, e.g., Pulley v. Harris*, 465 U.S. 37 (1984) (proportionality review for death sentences); *Gardner v. Florida*, 430 U.S. 349 (1977) (consideration of aggravating and mitigating factors).

²³ *See, e.g., Wood v. Allen*, 130 S. Ct. 841 (2010) (alleged failure of defense attorney to gather and present important mitigating evidence).

A. The Death Penalty as a Constitutionally Permissible Punishment

Justices' perceptions about the propriety of the death penalty as a punishment for specific crimes and specific offenders factor prominently into their assessments of the constitutionality of capital punishment.²⁴ Such perceptions inform their judgments about whether a criminal punishment, in the words of Justice Stewart in *Gregg v. Georgia*,²⁵ meets the Eighth Amendment demand that it "be acceptable to contemporary society . . . [and] comports with the basic concept of human dignity."²⁶ The assessment of "human dignity," in particular, calls upon Justices to make their own judgments, from their own perspectives and based on their own experiences, about whether the death penalty is a constitutionally disproportionate punishment for specific offenses.²⁷ Thus Justice Stevens's prior experiences and statements provide evidence about the perceptions that informed his views concerning the constitutionality of capital punishment. Before joining the Supreme Court, Stevens did not have any direct experience addressing the constitutionality of capital punishment, either as a private practice litigator in Chicago²⁸ or as a judge on

²⁴ For example, by declining to establish a per se rule, justices must use their own views about the appropriateness of capital punishment in the line-drawing exercise to determine which participants in felonies will be eligible for the death penalty when a murder is committed by a co-perpetrator during the course of the crime. *See, e.g.*, *Tison v. Arizona*, 481 U.S. 137 (1987) (holding that death penalty may be applied to felony participants who did not kill if they had major participation in the felony and showed "reckless disregard for human life").

²⁵ *Gregg v. Georgia*, 428 U.S. 153 (1976).

²⁶ *Id.* at 182.

²⁷ *See, e.g.*, *Coker v. Georgia*, 433 U.S. 584, 597-98 (1977) ("[T]he Constitution contemplates that, in the end, our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment . . . Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder . . .").

²⁸ *See* KENNETH A. MANASTER, *ILLINOIS JUSTICE: THE SCANDAL OF 1969 AND THE RISE OF JOHN PAUL STEVENS* 38-39 (2001) (explaining that in private practice most of Stevens's cases concerned business matters, and he was regarded as having special expertise in antitrust law).

the U.S. Court of Appeals for the Seventh Circuit.²⁹ However, he did face questions about his views on capital punishment during his 1975 confirmation hearings. Senator Edward Kennedy (D-Mass.) asked Stevens to share his feelings on the death penalty, specifically asking whether he believed capital punishment served as a deterrent to crime.³⁰ Stevens sought to avoid commenting directly on the issue of capital punishment because, in his words: “[T]hat is a matter that will be before the Supreme Court, and I think it would be inappropriate to comment on that.”³¹

Despite declining to comment on legal issues that he might soon address on the Court,³² Stevens made two statements that, in retrospect, revealed elements of his approach to capital punishment. First, when Senator Kennedy specified that his question about capital punishment was a request “only for . . . general views on this issue,”³³ Stevens replied by saying:

I really don't think I should discuss this subject generally, Senator. I don't mean to be unresponsive but in all candor I must say that there have been many times in my experience in the last 5 years [as an appellate judge] where I found that my first reaction to a problem was not the same as the reaction I had when I had the responsibility of [judicial] decisions and I think that if I were to make comments that were not carefully thought through they might be given significance that they really did not merit. I am not trying to be evasive. I am trying to be honest . . . I honestly do not think it is appropriate for me to give you a

²⁹ See CONG. RESEARCH SERV., M-120975, COMPILATION OF REPORTED DECISIONS OF THE 7TH CIRCUIT IN WHICH JUDGE JOHN PAUL STEVENS PARTICIPATED, OCTOBER 14, 1970 – NOVEMBER 25, 1975 (1975).

³⁰ *Nomination of John Paul Stevens to be a Justice of the Supreme Court: Hearings Before the Comm. on the Judiciary*, 94th Cong. 26 (1975) [hereinafter *Hearings*].

³¹ *Id.*

³² Other judicial nominees also decline to answer questions about specific issues. See, e.g., DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 109 (3d ed. 1993) (“Rehnquist was repeatedly asked about his judicial opinions, despite his refusal to discuss them. Nor would he answer questions about how he might handle major issues in the future, saying that impinged on judicial independence.”).

³³ *Hearings*, *supra* note 30, at 26.

philosophical discussion of what I might do if I were a legislator. I do not intend to be a legislator and my policy thoughts are really not what would be controlling when I face the adjudication of these matters later on³⁴

Stevens's response implied that his judicial assessment of capital punishment was not fixed but would be shaped by what he learned as he heard arguments and studied the issue from the bench. Thus, a change in Stevens's opinions on capital punishment over the course of his judicial career would not be inconsistent with his statements at the confirmation hearing.³⁵

Second, in response to a question from Senator John Tunney (D-Calif.) about how he would approach the interpretation of the Eighth Amendment's Cruel and Unusual Punishments Clause,³⁶ Stevens said:

Senator, as I recall the interpretation of the [E]ighth [A]mendment, there are basically two kinds of arguments that are made in support of a claim that punishment is cruel and unusual. One is that the particular punishment is so disproportionate to the particular offense, such as a death sentence for possession of marijuana, that it might seem to be disproportionate and one might apply such an argument. On the other hand, another kind of argument is that in absolute terms, certain kinds of punishment, such as, I think whipping is an example that is given, are considered so barbaric by present-day standards that they would be considered cruel and unusual within the meaning of the amendment. And I would think there is certainly some truth to the notion that one has to consider both the social

³⁴ *Id.* at 26-27.

³⁵ *See supra* notes 30-34 and accompanying text.

³⁶ Senator Tunney: I understand. Assuming that the question is one of cruel and unusual punishment, how does one go about deciding whether punishment is cruel and unusual? Have you thought in those terms? That is, what is the relevance of history or of the framers' thinking or of contemporary moral sentiment or public opinion or political philosophy that is current at the time?

Hearings, supra note 30, at 72.

conditions at the time the amendment was adopted or the intent of the framers and the background in which a particular punishment is being given out today. That is about as much as I can say.³⁷

Although his response does not explicitly endorse giving close attention to proportionality issues in punishment, Stevens acknowledged his awareness of the issue and gave an example—imposing the death penalty for possession of drugs—in which he would likely find the sentence to be disproportionate to the crime.³⁸ Thus, unlike “his great intellectual adversary on the [C]ourt, Antonin Scalia,”³⁹ who has expressed opposition to making proportionality concerns central to the analysis of cruel-and-unusual-punishment claims,⁴⁰ Stevens suggested that proportionality should play a role in assessing the constitutionality of capital punishment. Further, that answer may have provided a clue for predicting Stevens’s support, during his second term, for narrowing capital punishment on proportionality grounds by prohibiting the death penalty in rape cases with adult victims.⁴¹

Moreover, with even greater clarity, his response to Senator Tunney indicated that Stevens accepted the Supreme Court’s interpretive approach to Eighth Amendment issues, which treated the Cruel and Unusual Punishments Clause as “not static . . . [and] draw[ing] its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁴² Indeed, Stevens became the Court’s most outspoken advocate for interpreting the Cruel and Unusual Punishments Clause according to the evolving standards of contemporary society.⁴³

³⁷ *Id.*

³⁸ *Id.*

³⁹ Toobin, *supra* note 19, at 46.

⁴⁰ For non-capital cases, Scalia has argued that “the Eighth Amendment contains no proportionality guarantee,” *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991), and he dissented in *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2665 (2008), against the majority’s conclusion that imposing capital punishment for the crime of child rape violates the Eighth Amendment’s proportionality protections.

⁴¹ *Coker v. Georgia*, 433 U.S. 584 (1977).

⁴² *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

⁴³ *See, e.g., Roper v. Simmons*, 543 U.S. 551, 587 (2005) (Stevens, J., concurring) (using Stevens’s reaffirmation of the “evolving standards of

As a Supreme Court Justice, Stevens generally declined requests for interviews.⁴⁴ However, he became more willing to answer questions from interviewers in the years immediately preceding his retirement.⁴⁵ In several such interviews,⁴⁶ Stevens repeated a story from his life that led him to think deeply about the death penalty.⁴⁷ As a young U.S. Navy officer during the Second World War, Stevens worked in a communications intelligence unit in Hawaii involved in “traffic analysis and in the decryption of

decency” as the basis for Eighth Amendment evaluations of punishments in case concerning the application of the death penalty to juveniles age 17 and younger).

Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court’s interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today. The evolving standards of decency that have driven our construction of this critically important part of the Bill of Rights foreclose any such reading of the Amendment. In the best tradition of the common law, the pace of that evolution is a matter for continuing debate; but that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text. If great lawyers of his day—Alexander Hamilton, for example—were sitting with us today, I would expect them to join Justice KENNEDY’s opinion for the Court. In all events, I do so without hesitation.

Id. (citation omitted).

⁴⁴ In 2007, after Stevens had served on the Supreme Court for more than thirty years, ABC News claimed to have succeeded in persuading him to sit for “his only network TV interview.” Jan Crawford Greenburg, *Exclusive: Supreme Court Justice Stevens Remembers President Ford*, ABC NEWS, Jan. 2, 2007, <http://abcnews.go.com/Nightline/story?id=2765753>. See also Charles Lane, *Heartbreak Hotel*, CHI. MAG., Aug. 2006, <http://www.chicagomag.com/Chicago-Magazine/August-2006/Heartbreak-Hotel/> (“Justice Stevens generally does not give on-the-record interviews, and he made no exception for this article.”).

⁴⁵ See, e.g., Joan Biskupic, *Supreme Court’s Stevens Keeps Cards Close to Robe*, USA TODAY, Oct. 18, 2009, http://www.usatoday.com/news/washington/judicial/2009-10-18-stevens-supreme-court-justice_N.htm.

⁴⁶ Toobin, *supra* note 19, at 43; Rosen, *supra* note 6, at 655; Diane Marie Amann, *John Paul Stevens, Human Rights Judge*, 74 FORDHAM L. REV. 1569, 1582-83 (2006).

⁴⁷ Toobin, *supra* note 19, at 43; Rosen, *supra* note 6, at 655; Amann, *supra* note 46, at 1582-83.

enemy call signs.”⁴⁸ On April 18, 1943, American forces used information from intercepted messages to target Admiral Isoroku Yamamoto’s plane.⁴⁹ Although Stevens had no role in breaking the particular code that led the United States to know about Admiral Yamamoto’s travel plans in the war zone,⁵⁰ he was on duty in Hawaii when his office received the message about the mission’s successful elimination of an important Japanese naval forces commander.⁵¹

In one interview, Stevens said about the experience, “Even at the time, it seemed to me kind of strange that you had a mission to kill a particular individual And it was an individual who was a friend of some of the [U.S.] Navy officers,”⁵² as Yamamoto had studied at Harvard and spent time in the United States in the decades before the war.⁵³ According to Stevens, “The targeting of a particular individual with the intent to kill him was a lot different than killing a soldier in battle and dealing with a statistic In my mind, there is a difference between statistics and sitting on a jury and deciding whether to kill a single person.”⁵⁴

Interviewers who have heard Stevens talk about this wartime experience present it as a matter of enduring significance for his thoughts about the death penalty, describing the episode as “a moral dilemma that had haunted him for decades”⁵⁵ and an “event . . . [that] would stay with him for the rest of his life.”⁵⁶ Another interviewer wrote, “Stevens said that, partly as a result of his World War II experience, he has tried on the [C]ourt to narrow the category of offenders who are eligible for the death penalty and to ensure that it is imposed fairly and accurately.”⁵⁷ Indeed, this wartime experience likely contributed to the sense of uneasiness

⁴⁸ John Paul Stevens, Letter to the Editor, *The Dissenter*, N.Y. TIMES MAG., Nov. 4, 2007, http://query.nytimes.com/gst/fullpage.html?res=9903E0DF153DF937A35752C1A9619C8B63&ref=john_paul_stevens.

⁴⁹ Amann, *supra* note 46, at 1582.

⁵⁰ Stevens, *supra* note 13.

⁵¹ Toobin, *supra* note 19, at 43.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Amann, *supra* note 46, at 1583.

⁵⁵ Toobin, *supra* note 19, at 43.

⁵⁶ Amann, *supra* note 46, at 1582.

⁵⁷ Rosen, *supra* note 6, at 655.

about capital punishment evident in Stevens's opinions throughout his judicial career.⁵⁸

B. Procedural Fairness

Several experiences in Stevens's early life contributed to his role as the Supreme Court's most ardent defender of access to the courts and post-conviction remedies.⁵⁹ Most prominently, when Stevens was a boy, his father, Ernest J. Stevens, faced financial difficulties as the Great Depression devastated the American economy.⁶⁰ The elder Stevens built the world's largest hotel, the Stevens Hotel (now the Chicago Hilton and Towers Hotel).⁶¹ The hotel opened in 1927, but the economic crash of 1929 devastated its prospects for profitability.⁶² To help pay debts and avoid the risk of losing the hotel, Ernest Stevens borrowed money from the Illinois Life Insurance Company, a family-controlled business where he served on the board of directors, and his father, James Stevens, was chairman of the board.⁶³ As the Depression continued, the insurance company failed, and Ernest Stevens, his brother, Raymond,⁶⁴ and their father, were all charged

⁵⁸ Even when endorsing the constitutionality of capital punishment during his first term on the Court, Stevens demonstrated great concern about the existence of fair procedures that would permit defendants to present mitigating evidence and require prosecutors to provide aggravating evidence to justify the ultimate punishment. *See, e.g.,* *Jurek v. Texas*, 428 U.S. 262 (1976) (endorsing the Texas capital punishment system in a plurality opinion announced by Stevens because it included consideration of aggravating and mitigating circumstances); James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 *FORDHAM L. REV.* 1607 (2006) (describing the role of Stevens throughout his career in seeking to narrow the application of the death penalty and improve the fairness of trial procedures).

⁵⁹ *See* Christopher E. Smith, *Justice John Paul Stevens and Prisoners' Rights*, 17 *TEMPLE POL. & CIV. RTS. L. REV.* 83, 97-106 (2007) (discussing life experiences that led Stevens to support prisoners' rights and other rights in the criminal justice process).

⁶⁰ Lane, *supra* note 44.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Raymond Stevens was president of the Illinois Life Insurance Company. *Id.*

with embezzlement.⁶⁵ After prosecutors refused Raymond Stevens's offer to settle his debts by handing over his 24-acre estate, he committed suicide.⁶⁶ The prosecutor did not proceed against James Stevens, who had suffered a stroke, so Justice Stevens's father was the only defendant prosecuted and convicted of the crime after a highly publicized trial.⁶⁷

Through the appeals process, the Illinois Supreme Court overturned the conviction, finding that "[i]n th[e] whole record there [was] not a scintilla of evidence of any concealment or fraud attempted."⁶⁸ The Illinois Supreme Court noted that while it may have been a bad investment for the insurance company to expend its capital on the doomed hotel company, no evidence was ever presented to show that anyone in the Stevens family ever pocketed any money from the transactions or that the transactions were done in any secret manner.⁶⁹ The appellate court concluded that the prosecution never presented evidence to show that "a felonious, fraudulent investment [was] made for the purpose of converting the funds of the lender to the use of the accused,"⁷⁰ a necessary element to sustain a conviction for embezzlement.

At the time the Illinois Supreme Court overturned Stevens's father's conviction, the future Supreme Court Justice was fourteen years old. Stevens has said that his father's case did not shape his general views about the criminal justice system because he never believed that his father would be sent to prison.⁷¹ He remembers his teenage years as normal, busy, and happy, even during the period when his father faced criminal charges.⁷² Stevens has dismissed accounts of the case that describe it as a

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *People v. Stevens*, 193 N.E. 154, 160 (Ill. 1934).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Justice Stevens: An Open Mind On a Changed Court*, NATIONAL PUBLIC RADIO (Oct. 4, 2010),

<http://www.npr.org/templates/transcript/transcript.php?storyId=130198344>

[hereinafter *Open Mind*] (interview by Nina Totenberg with John Paul Stevens).

⁷² Interview with Justice John Paul Stevens, in Washington, D.C. (July 28, 2010) [hereinafter Interview].

traumatic event in his life⁷³ as well as speculation that “his concern for the rights of the accused [may] com[e] from seeing his own father arrested and put on trial by an aggressive prosecutor.”⁷⁴ Yet, as a highly educated legal professional, Stevens must recognize in retrospect that the availability of an appeals process is what saved his father from an unjust conviction. In fact, he acknowledged this awareness when he told one interviewer that the case contributed to the “very important lesson . . . that the criminal justice system can misfire sometimes.”⁷⁵ Thus, despite disavowing any trauma from his father’s case, retrospective awareness of that event may have contributed to the careful attention that Stevens has given to proper, fair procedures in criminal cases, including capital cases.

In addition, Stevens’s experience as a Supreme Court law clerk likely contributed to his concern for procedural fairness. Recently, as scholars have studied Stevens’s experience during the 1947 term as a law clerk to Justice Wiley Rutledge, analyses emerged about “[t]he ways in which a clerkship of a single year may affect not only the future jurisprudence but also the institutional behavior of a clerk turned Justice.”⁷⁶ Justice Rutledge was known as a jurist concerned about “the law in terms of its effects on people . . . [and] doing justice rather than following precedent.”⁷⁷ Stevens clerked for Rutledge during a Supreme Court term with a number of cases questioning the fairness of practices and procedures in the criminal justice system.⁷⁸ One

⁷³ For example, contrary to accounts that described the teenaged Stevens as reacting emotionally in the courtroom when the guilty verdict was announced, see BILL BARNHART & GENE SCHLICKMAN, *JOHN PAUL STEVENS: AN INDEPENDENT LIFE* (2010), he says that he was not present in the courtroom and was not traumatized by the verdict. Interview, *supra* note 72.

⁷⁴ Lane, *supra* note 44.

⁷⁵ Rosen, *supra* note 6, at 654.

⁷⁶ Laura Krugman Ray, *Clerk and Justice: The Ties That Bind John Paul Stevens and Wiley B. Rutledge*, 41 CONN. L. REV. 211, 214-15 (2008).

⁷⁷ *Id.* at 219-20.

⁷⁸ For example, because these cases arose nearly two decades before the Supreme Court mandated warnings and protections for suspects subjected to custodial questioning in *Miranda v. Arizona*, 384 U.S. 436 (1966), issues arose concerning police treatment of teenage suspects from whom confessions were

such case concerned a teenager who spoke no English and was sentenced to life in prison after pleading guilty without representation by an attorney.⁷⁹ Justice Rutledge's opinion drew language directly from a memo written by Stevens to sharply criticize the unfair and impossibly difficult post-conviction procedures in Illinois that effectively prevented appellate courts from hearing colorable claims by convicted offenders.⁸⁰

Stevens's contributions also appeared in one of Rutledge's controversial dissenting opinions, which advocated access to habeas corpus⁸¹ even for Germans residing in the United States who were in custody and facing deportation in the aftermath of World War II.⁸² Stevens's experiences while working closely with Justice Rutledge appear to have contributed to his close attention to issues of fairness in death penalty cases.

In 1969, Stevens came into the public eye through his role as chief investigator for a special commission appointed to investigate alleged misconduct by Illinois Supreme Court justices.⁸³ As a result of the commission's highly publicized hearings, two justices resigned from the Illinois Supreme Court,⁸⁴ and Stevens gained the public visibility that led to his appointment to the U.S. Court of Appeals for the Seventh Circuit, the judgeship that positioned him to be considered for a seat on the U.S. Supreme Court.⁸⁵

The investigation of financial conflicts-of-interest among the Illinois Supreme Court justices began with allegations circulated by Sherman Skolnick, a gadfly crusader against corruption in the courts.⁸⁶ Skolnick, a disabled man of modest means, became a self-taught litigator after witnessing an unsuccessful lawsuit filed by his parents.⁸⁷ As described by one

elicited in isolated questioning sessions, including the risk of harsh treatment. *Haley v. Ohio*, 332 U.S. 596 (1948); *Lee v. Mississippi*, 332 U.S. 742 (1948).

⁷⁹ *Marino v. Ragen*, 332 U.S. 561 (1947).

⁸⁰ *Amann*, *supra* note 46, at 1590.

⁸¹ *Id.* at 1591-92. See also Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L. REV. 99, 115-19 (2006).

⁸² *Ahrens v. Clark*, 335 U.S. 188 (1948).

⁸³ MANASTER, *supra* note 28, at 37.

⁸⁴ *Id.* at 238-41.

⁸⁵ *Id.* at 264-69.

⁸⁶ *Id.* at 3-6.

⁸⁷ *Id.*

author, “Skolnick became obsessed with rooting out the corruption he perceived to be rampant in Illinois government, especially in the judiciary.”⁸⁸ Because Skolnick constantly filed lawsuits and made accusations against public officials, he was the type of person that government officials could easily write off as a misguided crackpot.⁸⁹ In this case, the investigation only moved forward because a few newspaper reporters took an interest in Skolnick’s claims and pursued their own investigations.⁹⁰

The example of Skolnick taught John Paul Stevens about the need for courts to keep means of access open in order to permit people to raise their claims. According to Justice Stevens,

[M]y reaction to so-called pro se petitions—those filed by laylitigants without the assistance of counsel—is also markedly different from that of any of my colleagues My memory of the unexpected merit that we found in the allegations made by Sherman Skolnick has remained a powerful reminder that categorical prohibitions against repetitive filings can create a real risk of injustice [A]t virtually every Court conference I find myself dissenting from three or four orders imposing special burdens on this disfavored class of litigants.⁹¹

From this experience, Stevens became sensitive to the need for judges to listen to claims of those who lack power and prominence. This may have played a role in developing his concern about looking carefully at claims presented by defendants in capital cases and prisoners on death row.

C. The Importance of Defense Counsel

As discussed in the preceding section, Stevens’s experiences as a law clerk for Justice Rutledge during the 1947 term included exposure to cases examining the necessity of opportunities to consult with and be represented by defense

⁸⁸ *Id.* at 4.

⁸⁹ *Id.* at 3-6.

⁹⁰ *Id.*

⁹¹ John Paul Stevens, *Foreword* to MANASTER, *supra* note 28, at xi.

counsel.⁹² These cases were decided at a time when the Supreme Court required the appointment of counsel for indigents only in special circumstances,⁹³ such as when defendants were utterly incapable of representing themselves due to “ignorance, feeble-mindedness, illiteracy, or the like.”⁹⁴ In one case in which Rutledge joined the majority, the Court concluded that representation by counsel was essential to a fair proceeding in order to avoid the use of erroneous records for sentencing.⁹⁵ Rutledge also joined an opinion by Justice Murphy in a habeas corpus case, which declared that when an individual has an “incapacity” to represent himself in court, “the refusal to appoint counsel is a denial of due process of law.”⁹⁶

In another example, Rutledge joined Justice Black’s opinion, which found that a Detroit housewife accused of being a German spy during World War II “was entitled to counsel other than that given her by Government [law enforcement] agents . . . [and] [s]he [was] still entitled to that counsel before her life or her liberty [could] be taken from her.”⁹⁷ And, in a dissent joined by Justices Black, Douglas, and Murphy, Justice Rutledge expressed his dissatisfaction with the then-existing rule that limited the appointment of counsel to indigents determined by trial judges to have a special inability to represent themselves.⁹⁸ In light of Stevens’s role in helping to develop Rutledge’s opinions, which highly valued the essential role of defense counsel in fair criminal

⁹² See *supra* notes 81-90 and accompanying text.

⁹³ The controlling precedent at the time was *Betts v. Brady*, 316 U.S. 455 (1942), in which the Court ruled that the Sixth Amendment did not apply to the states and that there was no due process violation in requiring a defendant to represent himself in court when that defendant “was not helpless, but was a man forty-three years old, of ordinary intelligence and ability to take care of his own interests on the trial of that narrow issue. He had once before been in a criminal court, pleaded guilty to larceny, and served a sentence, and was not wholly unfamiliar with criminal procedure.” *Id.* at 472.

⁹⁴ *Id.* at 463.

⁹⁵ See *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (“In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner.”).

⁹⁶ *Wade v. Mayo*, 334 U.S. 672, 684 (1948).

⁹⁷ *Von Moltke v. Gillies*, 332 U.S. 708, 726 (1948).

⁹⁸ *Gryger v. Burke*, 334 U.S. 728, 732-36 (1948) (Rutledge, J., dissenting).

proceedings, the clerkship experience presumably contributed to Stevens's subsequently expressed concerns about effective assistance of counsel in death penalty cases.⁹⁹

After clerking, Stevens had further experiences that helped him recognize the importance of defense counsel. As an attorney Stevens had personal exposure to abuses in the criminal justice system that could have been prevented through effective representation of defense counsel.¹⁰⁰ In the early 1950s, he accepted a pro bono case in which he represented Arthur LaFrana, a man who had spent more than fifteen years in prison for a homicide that he claimed he did not commit.¹⁰¹ Effective lawyering by Stevens freed LaFrana from prison,¹⁰² and, as is evident from the description of the case by the Illinois Supreme Court, the presence of a defense attorney after LaFrana's arrest may have prevented the abusive police practices that coerced LaFrana into confessing to the crime:

According to defendant's testimony, when he refused to confess the captain hit him repeatedly with fists and with a night stick. His hands were then handcuffed behind him and he was blindfolded. A rope was put in between the handcuffs and he was suspended from a door with his hands behind him and his feet almost off the floor. While

⁹⁹ See, e.g., *Murray v. Giarratano*, 492 U.S. 1, 29 (1989) (Stevens, J., dissenting).

These three critical factors demonstrate that there is a profound difference between capital postconviction litigation and ordinary postconviction litigation in Virginia. The District Court's findings unequivocally support the conclusion that, to obtain an adequate opportunity to present their postconviction claims fairly, death row inmates need greater assistance of counsel than Virginia affords them. Meaningful access, and meaningful judicial review, would be affected in this case only if counsel were appointed, on request, in time to enable examination of the case record, factual investigation, and preparation of a petition containing all meritorious claims, which the same attorney then could litigate to its conclusion.

Id. (citation omitted).

¹⁰⁰ Smith, *supra* note 59, at 98-100.

¹⁰¹ *Id.*

¹⁰² John Paul Stevens, Speech at the Nathaniel L. Nathanson Memorial Lecture at the University of San Diego (Apr. 7, 2004), in *Random Recollections*, 42 SAN DIEGO L. REV. 269, 270 (2005).

he was hanging from the door, he was repeatedly struck until he lapsed into unconsciousness. When he lost consciousness he was taken down from the door and when he regained consciousness he would be hung back up on the door and again questioned and struck. After about fifteen minutes of this treatment he agreed to sign a confession. He was taken downstairs to the captain's office where he signed a confession.¹⁰³

The Illinois Supreme Court found that LaFrana's version of events was corroborated by a newspaper photograph taken the following day showing cuts and bruises on his face and swelling around his eye.¹⁰⁴ In addition, the county physician who examined him at the jail the following week testified that the abrasions on his wrists could have been caused by hanging him over a door but could not have been caused by normal use of handcuffs.¹⁰⁵ According to Stevens, "What I learned from that case no doubt had an impact on my work on the Supreme Court,"¹⁰⁶ including, presumably, his concern about effective assistance of counsel in capital cases.

III. JUSTICE STEVENS AND CAPITAL PUNISHMENT

Justice Stevens arrived at the Supreme Court in late 1975, a pivotal moment in the history of capital punishment litigation.¹⁰⁷ The Court had effectively imposed a national moratorium on capital punishment with its 1972 decision in *Furman v. Georgia*,

¹⁰³ *People v. LaFrana*, 122 N.E.2d 583, 585 (Ill. 1954).

¹⁰⁴ *Id.* at 586.

¹⁰⁵ *See id.* ("The record of his physical examination when he was released from police custody and placed in the county jail on January 11, a week after the confession, shows that he had a black eye and abrasions on both wrists. The county physician who then examined him, and who had been examining numerous prisoners every day for twenty-two years, testified that the injuries to defendant's wrists could have been caused by hanging him over the door, and could not have been caused by the normal use of handcuffs.").

¹⁰⁶ Stevens, *supra* note 102, at 270.

¹⁰⁷ For a history of legal developments affecting capital punishment through the first term that Justice Stevens served on the Supreme Court, *see* LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION & THE DEATH PENALTY* 34-115 (1992).

which declared that the death penalty was being applied in an unconstitutional manner.¹⁰⁸ Because a majority of Justices did not agree that capital punishment was inherently unconstitutional as a violation of the Eighth Amendment, the Court's decision left the door open for states to revise their death penalty statutes in an effort to remedy the due process deficiencies identified by some of the Justices.¹⁰⁹ In April 1975, the Supreme Court heard oral arguments in a case¹¹⁰ concerning North Carolina's new capital punishment statute, but with an ailing and soon-to-retire Justice William O. Douglas hospitalized and missing deliberations, the Justices deadlocked 4-to-4 and decided to reschedule the issue for reargument in the following term.¹¹¹ Thus, Stevens, who replaced Douglas on the Court, began his service at the moment the Court was to consider and decide whether capital punishment could resume.¹¹² In light of the Court's deadlocked vote in its most recent case, some observers perceived him to hold the potential deciding vote on the issue.¹¹³

As the subsequent sections will describe, Stevens began his career on the Court by endorsing the constitutionality of the death penalty but ended his career with a clear renunciation of the ultimate criminal punishment.¹¹⁴ A close examination of his opinions and votes—from his initial endorsement in *Jurek v. Texas*¹¹⁵ in 1976 to his renunciation in *Baze v. Rees*¹¹⁶ in 2008—

¹⁰⁸ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹⁰⁹ WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 4-5 (1991).

¹¹⁰ *Fowler v. North Carolina*, 419 U.S. 963 (1974).

¹¹¹ EPSTEIN & KOBYLKA, *supra* note 107, at 98-99.

¹¹² See, e.g., *Only Four Justices Question Lawyers About Death Penalty*, DESERET NEWS, Apr. 1, 1976, at 2A, available at <http://news.google.com/newspapers?id=axkvAAAAIBAJ&sjid=NlsEAAAAIBAJ&pg=6985.14664> (“The views of Stevens, the newest justice, were not known Since Stewart and Justice Byron White took a mid way position [in *Furman v. Georgia*, 408 U.S. 238 (1972)] their votes are crucial in the current series [of death penalty cases heard by the Supreme Court] as is that of Stevens who succeeded Justice William Douglas.”).

¹¹³ *Id.*

¹¹⁴ Linda Greenhouse, *After a 32-Year Journey, Stevens Renounces Capital Punishment*, N.Y. TIMES, Apr. 18, 2008, <http://www.nytimes.com/2008/04/18/washington/18memo.html>.

¹¹⁵ *Jurek v. Texas*, 428 U.S. 262 (1976).

¹¹⁶ *Baze v. Rees*, 553 U.S. 35 (2008).

lends credence to Stevens's overall description of his changed position as being more significantly associated with changes occurring in the direction of the Court's decisions rather than a fundamental shift in his own viewpoint.¹¹⁷

A. The "Conservative" Years, 1976-1984

For the cases classified under the issue of "capital punishment"¹¹⁸ in the Supreme Court Judicial Database,¹¹⁹ Stevens supported defendants' claims in only twelve of the twenty cases decided from 1976 through 1984.¹²⁰ His percentage of liberal votes¹²¹ in capital punishment cases during this time period was much lower than over the remainder of his career, when he supported defendants in forty-nine of fifty-one cases and his two votes for the government were not substantive repudiations of the individuals' claims concerning the validity of the death penalty.¹²²

¹¹⁷ See *supra* notes 11-21 and accompanying text.

¹¹⁸ These classifications do not capture every case involving capital punishment because some death penalty cases were classified as primarily concerning other legal issues, such as right to counsel. See, e.g., *Murray v. Giarratano*, 492 U.S. 1 (1989) (right to counsel in post-conviction proceedings for death row prisoners); *Wiggins v. Smith*, 539 U.S. 510 (2003) (defense attorneys' responsibilities for investigating and presenting mitigating evidence in capital sentencing proceeding).

¹¹⁹ Harold Spaeth et al., *Supreme Court Judicial Database*, <http://scdb.wustl.edu/index.php> (last visited Sept. 27, 2010).

¹²⁰ Stevens's liberal votes were cast in: *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Gardner v. Florida*, 430 U.S. 349 (1977); *Coker v. Georgia*, 433 U.S. 584 (1977); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Bell v. Ohio*, 438 U.S. 637 (1978); *Godfrey v. Georgia*, 446 U.S. 420 (1979); *Beck v. Alabama*, 477 U.S. 625 (1979); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Enmund v. Florida*, 458 U.S. 782 (1982); *California v. Ramos*, 463 U.S. 992 (1983); *Spaziano v. Florida*, 468 U.S. 447 (1984). His conservative votes were cast in: *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Hopper v. Evans*, 456 U.S. 605 (1982); *Zant v. Stephens*, 465 U.S. 862 (1976); *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Barclay v. Florida*, 463 U.S. 939 (1983); *Pulley v. Harris*, 465 U.S. 37 (1984).

¹²¹ "Liberal" votes are characterized as those supporting individuals' claims and "conservative" votes are those favoring the government in criminal justice cases. See Segal & Spaeth, *supra* note 11, at 103.

¹²² *Oregon v. Guzek*, 546 U.S. 517 (2006) (rejecting unanimously the procedural assertion that a defendant could present evidence of innocence in a sentencing

Several considerations make Stevens's approach to capital punishment in this initial period less conservative than it may appear from his voting record.

First, three of the eight conservative votes during this period came in a set of cases decided on the same day in 1976 that raised closely related issues.¹²³ Each case examined a particular state's newly designed bifurcated proceedings that mandated, either explicitly or implicitly,¹²⁴ consideration of aggravating and mitigating evidence in capital cases.¹²⁵ Had these cases been formally joined together, Stevens would have recorded only one conservative vote instead of three. By comparison, dissenting Justices William Brennan and Thurgood Marshall each wrote a single dissenting opinion directed at all three cases simultaneously.¹²⁶

Moreover, in each of these cases, although Stevens joined with Justices Potter Stewart and Lewis Powell to issue joint

proceeding that was never presented during the trial that determined guilt); *Baze v. Rees*, 553 U.S. 35 (2008) (Stevens, J., concurring) (concurring that lethal injection should not be barred while raising serious concerns about the method of execution and announcing his conclusion that capital punishment was unworkable and unnecessary).

¹²³ *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

¹²⁴ See, e.g., *Jurek*, 428 U.S. at 270, 273-74.

While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty, as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose. . . . [I]n considering whether to impose a death sentence, the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it. It thus appears that, as in Georgia and Florida, the Texas capital sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.

Id.

¹²⁵ *Id.*

¹²⁶ *Gregg*, 428 U.S. at 227 n.1 (Brennan, J., dissenting); *id.* at 231 n.1 (Marshall, J., dissenting).

opinions endorsing the constitutionality of capital punishment, each opinion manifested significant concern about the importance of using fair and careful procedures in death penalty cases.¹²⁷ One such example is *Jurek v. Texas*, the joint opinion announced by and attributed to Stevens.¹²⁸ In the *Jurek* opinion, Stevens emphasized that the Texas statute approved by the Court narrowed the categories of offenders eligible for the death penalty and thereby served the same purpose as requiring a finding of specific aggravating factors in order to impose capital punishment.¹²⁹ He also saw the statute as having the jury “consider whatever evidence of mitigating circumstances the defense can bring before it.”¹³⁰

¹²⁷ See, e.g., *id.* at 206 (1976) (“Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury’s attention on the particularized nature of the crime and the particularized characteristics of the individual defendant.”); *Proffitt v. Florida*, 428 U.S. 242, 252-53 (1976) (“The Florida capital sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida’s appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida”); *Jurek v. Texas*, 428 U.S. 262, 273 (1976) (“It thus appears that, as in Georgia and Florida, the Texas capital sentencing procedure guides and focuses the jury’s objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.”).

¹²⁸ See Greenhouse, *supra* note 114 (“In July 1976, little more than six months after taking his seat, Justice Stevens announced the opinion for the [C]ourt in *Jurek v. Texas* The new justice’s opinion described the crime in vivid detail”). However, one published account asserts that Stevens had a more limited role in the joint opinions:

To draft these majority opinions, a somewhat daunting task, the trio divided the work. Stevens would summarize the facts; Powell would use his dissent from *Furman* to demonstrate that the death penalty did not violate the Eighth Amendment; and Stewart would have the difficult task of explaining the Court’s decision

EPSTEIN & KOBYLKA, *supra* note 107, at 111.

¹²⁹ *Jurek*, 428 U.S. at 270.

¹³⁰ *Id.* at 273.

Thus, in *Jurek*, Stevens instituted procedural safeguards to effectively limit application of the death penalty.

Second, on the same day that the Supreme Court reactivated capital punishment with the decisions in *Gregg v. Georgia*,¹³¹ *Proffitt v. Florida*,¹³² and *Jurek v. Texas*,¹³³ the three-Justice plurality—Stevens, Stewart, and Powell—also led the Court in striking down statutes that mandated the imposition of capital punishment for first-degree murder convictions.¹³⁴ Thus, in spite of his support for capital punishment, over the objection of four dissenters¹³⁵ Stevens also helped to push forward a “commitment to narrowing [the scope of the death penalty] as a way of dealing with flaws in the administration of capital punishment.”¹³⁶

Third, the decision¹³⁷ announced by Stevens concerning the impermissibility of mandatory punishment statutes emphasized his commitment to interpreting the Eighth Amendment according to *Trop v. Dulles*’s¹³⁸ “evolving standards of decency that mark the progress of a maturing society.”¹³⁹ Although Stevens’s ultimate renunciation of capital punishment in 2008 made reference to his learning experiences in dealing with the issue during more than three decades on the Court,¹⁴⁰ his use of the *Trop* standard¹⁴¹

¹³¹ *Gregg*, 428 U.S. at 153.

¹³² *Proffitt v. Florida*, 428 U.S. 242 (1976).

¹³³ *Jurek*, 428 U.S. at 262.

¹³⁴ *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

¹³⁵ Chief Justice Warren Burger and Justices Byron White, Harry Blackmun, and William Rehnquist dissented.

¹³⁶ Liebman & Marshall, *supra* note 58, at 1611.

¹³⁷ *Roberts*, 428 U.S. at 325.

¹³⁸ *Trop v. Dulles*, 356 U.S. 86 (1958).

¹³⁹ *Id.* at 101.

¹⁴⁰ See *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring) (“I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents ‘the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.’”).

¹⁴¹ See, e.g., *id.* at 80 (Stevens, J., concurring) (“[O]ur society has moved away from public and painful retributions towards ever more humane forms of punishment In an attempt to bring executions in line with our evolving standards of decency, we have adopted increasingly less painful methods of execution and then declared previous methods barbaric and archaic. This trend .

indicated that his legal analysis of capital punishment included consideration of evidence of society's "evolving standards."¹⁴² Thus, from his very first encounters with capital punishment issues as a Supreme Court Justice, Stevens adopted an approach that was explicitly open to the possibility that capital punishment could eventually be found to violate the Constitution, even if the Court had earlier found that the punishment comported with constitutional requirements.

During Stevens's next three Supreme Court terms, which constituted his "conservative" era, in the eight cases addressed by the Court he consistently voted in support of defendants' claims, thereby narrowing the scope of capital punishment.¹⁴³ In addition, Stevens wrote the Court's opinion in two of these cases. One case concerned the defendant's opportunity to respond to information considered in the sentencing process,¹⁴⁴ and the other pertained to the capital jury's opportunity to consider the alternative of convicting the defendant for a non-capital, lesser-included offense.¹⁴⁵ Each of the eight cases heard during this time period narrowed the application of the death penalty except for one noteworthy case, *Dobbert v. Florida*,¹⁴⁶ in which Stevens wrote a

. . . actually undermines the very premise on which public approval of the retribution rationale is based.").

¹⁴² *Trop*, 356 U.S. at 101.

¹⁴³ *Gardner v. Florida*, 430 U.S. 349 (1977) (voting to find that a death sentence cannot be based on information in a presentence report that the defense had no opportunity to refute or explain); *Dobbert v. Florida*, 432 U.S. 282, 305 (1977) (Stevens, J., dissenting) (finding a Florida law imposing a death sentence passed after the time of petitioner's offense violated Ex Post Facto clause); *Coker v. Georgia*, 433 U.S. 584 (1977) (declaring imposition of death sentence for rape of an adult woman violates the Eighth Amendment as a disproportionate punishment); *Lockett v. Ohio*, 438 U.S. 586 (1978) (holding that Ohio statute did not permit sufficient consideration of mitigating factors); *Bell v. Ohio*, 438 U.S. 637 (1978) (holding that Ohio death penalty statute did not permit sufficient individualized consideration of the offender and offense); *Godfrey v. Georgia*, 446 U.S. 420 (1980) (finding the language of Georgia statute on aggravating factors was too vague); *Beck v. Alabama*, 447 U.S. 625 (1980) (mandating that capital juries be permitted to consider conviction for a lesser-included offense); *Adams v. Texas*, 448 U.S. 38 (1980) (finding application of Texas rule applied too broadly to exclude potential jurors in capital cases).

¹⁴⁴ *Gardner*, 430 U.S. at 349.

¹⁴⁵ *Beck v. Alabama*, 447 U.S. 625 (1979).

¹⁴⁶ *Dobbert v. Florida*, 432 U.S. 282 (1977).

dissenting opinion on behalf of himself and his ardent abolitionist colleagues, Justices Brennan and Marshall.

With the exception of *Dobbert*, Stevens was a member of the majority in every case during this era, and he consistently sided with Justices Stewart and Powell, his joint-opinion partners from the important 1976 cases.¹⁴⁷ In the 1977 *Dobbert* dissent, Stevens distinguished himself from these partners and demonstrated that, more than all of his colleagues but the abolitionists Brennan and Marshall, he was very concerned about fairness issues in capital punishment cases.

In *Dobbert*, Stevens argued that the application of the Florida death penalty statute violated the Ex Post Facto Clause¹⁴⁸ because the crime occurred several months before the Supreme Court endorsed the constitutionality of Florida's statute and reactivated the state's capital case procedures in *Proffitt v. Florida*.¹⁴⁹ Stevens used strong language to express his disagreement with the majority's endorsement of capital punishment in *Dobbert*:

The Court's "fair warning" test, if it extends beyond this case, would allow government action that is just the opposite of impartial. If that be so, the "fair warning" rationale will defeat the very purpose of the [Ex Post Facto] Clause

. . . .

If I am correct that the Ex Post Facto Clause was intended as a barrier to capricious government action, today's holding is actually perverse. For when human life is at stake, the need to prevent capricious government action is greatest Yet the Court's holding may lead to results that are intolerably arbitrary

I assume that this case will ultimately be regarded as nothing more than an archaic gargoyle. It is nevertheless distressing to witness such demeaning construction of a

¹⁴⁷ See *supra* note 134.

¹⁴⁸ *Dobbert*, 432 U.S. at 305-09 (Stevens, J., dissenting).

¹⁴⁹ *Proffitt v. Florida*, 428 U.S. 242 (1976).

majestic bulwark in the framework of our Constitution . . .

¹⁵⁰

The other five votes cast by Stevens in support of capital punishment came in cases decided from 1982 through 1984.¹⁵¹ During these years, Stevens was not a member of any narrow majorities that upheld capital sentences in closely-contested cases. Instead, he joined all of the Justices except for the abolitionists Brennan and Marshall in three cases¹⁵² and joined six-member majorities in two additional cases.¹⁵³ Although he voted against defendants' claims in these cases,¹⁵⁴ Stevens consistently maintained his strong concerns about the fairness of capital trial and sentencing procedures.

Despite Stevens's voting record on capital punishment issues during his first decade on the Court,¹⁵⁵ two additional developments provided clues that his analytical approach made him highly critical of states' death penalty statutes and practices. First, in every 5-to-4 capital case, Stevens sided with the individual

¹⁵⁰ *Dobbert*, 432 U.S. at 308-11 (Stevens, J., dissenting).

¹⁵¹ *Hopper v. Evans*, 456 U.S. 605 (1982); *Zant v. Stephens*, 462 U.S. 862 (1983); *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Barclay v. Florida*, 463 U.S. 939 (1983); *Pulley v. Harris*, 465 U.S. 37 (1984).

¹⁵² *Hopper*, 456 U.S. at 605; *Zant*, 462 U.S. at 862; *Harris*, 465 U.S. at 37.

¹⁵³ *Barefoot*, 463 U.S. at 880; *Barclay*, 463 U.S. at 939.

¹⁵⁴ *See, e.g., Barclay*, 463 U.S. at 960 (Stevens, J., concurring) (citations omitted):

But in some of its language, the plurality speaks with unnecessary, and somewhat inappropriate, breadth. The Court has never thought it sufficient in a capital case merely to ask whether the state court has been "so unprincipled or arbitrary as to somehow violate the United States Constitution." Nor does a majority of the Court today adopt that standard. A constant theme of our cases—from *Gregg* and *Proffitt* through *Godfrey*, *Eddings*, and most recently *Zant*—has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner. As stated in *Zant*, we have stressed the necessity of "genuinely narrow[ing] the class of persons eligible for the death penalty," and of assuring consistently applied appellate review. Accordingly, my primary purpose is to reemphasize these limiting factors in light of the decisions of the Supreme Court of Florida.

¹⁵⁵ *See supra* notes 123-27 and accompanying text.

rather than the state,¹⁵⁶ demonstrating that he was not an uncertain or inconsistent voter especially susceptible to persuasion by attorneys or colleagues in contentious cases.¹⁵⁷ Second, the 1981 retirement of Justice Potter Stewart, Stevens's ally in all but one capital punishment case,¹⁵⁸ and the appointment of Justice Sandra Day O'Connor later that year,¹⁵⁹ contributed to the beginning of an undesirable shift in the Court's approach to capital punishment cases. Stevens warned that the Court's majority was moving away from the specific concerns about fair procedures that he regarded as at the heart of *Gregg v. Georgia*¹⁶⁰ and the other cases¹⁶¹ that reactivated capital punishment in 1976. In his concurring opinion in *Barclay v. Florida*,¹⁶² Stevens wrote:

Although I agree with the plurality's conclusion, and with much of what is said in its opinion, I think it important to write separately. The plurality acknowledges, of course, the constitutional guarantees that have been emphasized in our cases since *Gregg*. But in some of its language, the plurality speaks with unnecessary, and somewhat inappropriate, breadth. The Court has never thought it sufficient in a capital case merely to ask whether the state court has been "so unprincipled or arbitrary as to somehow violate the United States Constitution." Nor does a majority of the Court today adopt that standard. A constant

¹⁵⁶ *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Eddings v. Oklahoma*, 455 U.S. 104 (1979); *Enmund v. Florida*, 458 U.S. 782 (1982); *California v. Ramos*, 463 U.S. 992 (1983).

¹⁵⁷ In contrast to the consistency of Justice Stevens, Justice Anthony Kennedy developed a reputation for being open to persuasion as the Justices who were more consistently liberal or conservative on a deeply divided Court sought to gain his decisive vote on a variety of issues. Robert Barnes, *Justice Kennedy: The Highly Influential Man in the Middle*, WASH. POST, May 13, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/12/AR2007051201586.html>.

¹⁵⁸ Stevens wrote a dissenting opinion in favor of the individual's claim in *Dobbert v. Florida*, 432 U.S. 282 (1977), while Stewart voted with the majority.

¹⁵⁹ When Justice Stewart retired in 1981, President Ronald Reagan appointed Justice O'Connor as Stewart's replacement. JOAN BISKUPIC, SANDRA DAY O'CONNOR, 72-1 (2005).

¹⁶⁰ *Gregg v. Georgia*, 428 U.S. 153 (1976).

¹⁶¹ *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

¹⁶² *Barclay v. Florida*, 463 U.S. 939 (1983).

theme of our cases—from *Gregg* and *Proffitt* through *Godfrey*, *Eddings*, and most recently *Zant*—has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner. As stated in *Zant*, we have stressed the necessity of “genuinely narrow[ing] the class of persons eligible for the death penalty,” and of assuring consistently applied appellate review. Accordingly, my primary purpose is to reemphasize these limiting factors in light of the decisions of the Supreme Court of Florida.¹⁶³

In light of Justice Stevens’s recent statement that “every judge—with the exception of Justice [Ruth Bader] Ginsburg— . . . who’s been appointed to the [C]ourt since . . . Lewis Powell [in 1971], has been more conservative than his predecessor,”¹⁶⁴ it is not surprising that Stevens may have perceived the Court shifting away from his intense concern about procedural fairness in capital cases. The appointments of Justices O’Connor, Scalia, and Kennedy in the 1980s moved the Court rightward.¹⁶⁵ This movement was especially meaningful because departed Justices Stewart and Powell issued the important joint opinions in *Gregg*, *Proffitt*, and *Jurek* with Justice Stevens.

In the final capital case of his “conservative” era, Stevens strongly distinguished himself from the non-abolitionist Justices by writing the opinion in *Spaziano v. Florida*, which insisted that juries rather than judges make the determination about whether an offender should be sentenced to death.¹⁶⁶ His reasoning was consistent with his ongoing fidelity to the *Trop* standard for assessing “cruel and unusual punishments” according to evolving societal values.¹⁶⁷ More importantly, the opinion separated Stevens from his more conservative colleagues, as well as from Justice Powell, someone with whom he had agreed in all but three

¹⁶³ *Id.* at 959-60 (Stevens, J., concurring) (citations omitted).

¹⁶⁴ Rosen, *supra* note 20.

¹⁶⁵ JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* 14 (1995).

¹⁶⁶ *Spaziano v. Florida*, 468 U.S. 447, 467 (1984) (Stevens, J., concurring in part and dissenting in part).

¹⁶⁷ *See supra* notes 14, 42-43, 137-42 and accompanying text.

capital cases¹⁶⁸ over the course of the preceding decade. Writing on behalf of Justices Marshall and Brennan, Stevens said:

In the 12 years since *Furman v. Georgia*, 408 U.S. 238 (1972), 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. Because it is the one punishment that cannot be prescribed by a rule of law as judges normally understand such rules, but rather is ultimately understood only as an expression of the community's outrage—its sense that an individual has lost his moral entitlement to live—I am convinced that the danger of an excessive response can only be avoided if the decision to impose the death penalty is made by a jury, rather than by a single governmental official. This conviction is consistent with the judgment of history and the current consensus of opinion that juries are better equipped than judges to make capital sentencing decisions. The basic explanation for that consensus lies in the fact that the question whether a sentence of death is excessive in the particular circumstances of any case is one that must be answered by the decisionmaker that is best able to “express the conscience of the community on the ultimate question of life or death.”¹⁶⁹

By the time the Supreme Court issued decisions in capital cases in 1985 and thereafter, Stevens's commitment to fair procedures in death penalty cases distinguished him from all but his most liberal colleagues, Brennan and Marshall. Moreover, Stevens's opinions predicted subsequent disagreements with the Court majority in which he consistently argued in favor of

¹⁶⁸ *Dobbert v. Florida*, 432 U.S. 282 (1977); *Enmund v. Florida*, 458 U.S. 782 (1982); *California v. Ramos*, 463 U.S. 992 (1983).

¹⁶⁹ *Spaziano v. Florida*, 468 U.S. 447, 468-70 (Stevens, J., concurring in part and dissenting in part) (citation omitted).

defendants' claims concerning the fairness of procedures and the need to narrow the applicability of capital punishment.

B. Stevens as Death Penalty Critic: 1985-2010

One of the most striking aspects of Justice Stevens's experience with capital punishment issues in his final twenty-five years on the Court was how few majority opinions concerning capital punishment he was assigned—or how few he assigned to himself when he became the senior Justice among the liberals after Justice Blackmun's retirement in 1994.¹⁷⁰ Based on the classification of cases in the Supreme Court Judicial Database, in his first decade on the Court Stevens was credited with five majority and plurality opinions in death penalty cases.¹⁷¹ In contrast, he only wrote four such opinions¹⁷² in the next twenty-five years, finding himself frequently dissenting against decisions by an increasingly conservative majority. Stevens's opinions from this later period illuminate this point.

In *Baldwin v. Alabama*,¹⁷³ a case that the Center on Wrongful Convictions later labeled as showing strong evidence that the defendant was not the murderer,¹⁷⁴ Stevens wrote a dissenting opinion, which objected to a sentencing process that

¹⁷⁰ See Liptak, *supra* note 4 (“[Stevens] became the senior justice in 1994 with the retirement of Justice Harry A. Blackmun. That position matters. When the chief justice is not in the majority, the senior justice in the majority is given the power to assign the majority opinion.”).

¹⁷¹ *Jurek v. Texas*, 428 U.S. 262 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Gardner v. Florida*, 430 U.S. 349 (1977); *Beck v. Alabama*, 477 U.S. 625 (1979); *Zant v. Stephens*, 462 U.S. 862 (1983).

¹⁷² *Johnson v. Mississippi*, 468 U.S. 578 (1988); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Lankford v. Idaho*, 500 U.S. 110 (1991); *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁷³ *Baldwin v. Alabama*, 472 U.S. 372 (1985).

¹⁷⁴ See Rob Warden, *Brian Baldwin*, NORTHWESTERN UNIVERSITY CENTER ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/wrongfulconvictions/issues/deathpenalty/executinginnocent/albaldwinbsummary.html> (last visited Sept. 26, 2010). In that case, the forensic evidence linked only Baldwin's co-defendant to the murder. *Id.* There was evidence that teenage suspect Baldwin's confession was extracted through a physically coercive interrogation. *Id.* Further, the co-defendant admitted that he alone was responsible for the murder. *Id.* The co-defendant was executed in 1996, and Baldwin was executed in 1999. *Id.*

instructed the jury to impose the death sentence if it found the existence of certain aggravating factors but permitted the judge to make the ultimate decision about the sentence.¹⁷⁵ Stevens reiterated his view that the jury must make capital punishment decisions in non-mandatory schemes.¹⁷⁶ He argued that “it is also unconstitutional to present an elected trial judge, who might otherwise regard the arguments for and against a death sentence as equally balanced, with the burden of rejecting a jury verdict of this kind before he can impose a sentence of life.”¹⁷⁷ Anticipating contemporary criticisms of the susceptibility of elected judges to political pressures and the passions of the local community,¹⁷⁸ Stevens focused on the problem of judges who must face reelection after clashing with local community sentiment:

Judges in Alabama, as in many States, are elected. They are not insulated from community pressure; indeed, responsiveness and accountability to the community provide the justification for an elected judiciary. Although a judge may understand that a mandatory jury sentence of death is, in some sense, meaningless . . . , the community probably does not. A jury sentence of death is likely to be reported and understood as a real sentence of death, as it was in this case.

Whether it “logically” need be so or not, . . . the plain fact is that a judge who later decides to sentence to life in such circumstances is publicly perceived to have rejected the jury’s sentence; indeed, the terms of the statute itself embody that perception. The pressures on a judge that inevitably result should not be ignored. In my view, only the Court’s distance from the realities of an elected state trial bench can explain its declaration that, as a matter of fact, a jury’s mandatory sentence of death will not enter the

¹⁷⁵ *Baldwin*, 472 U.S. at 393 (Stevens, J., dissenting).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 394.

¹⁷⁸ See, e.g., Jennifer Sullivan, *Ex-Justice O’Connor: Electing Judges Puts Courts At Risk*, SEATTLE TIMES, Sept. 15, 2009, http://seattletimes.nwsourc.com/html/politics/2009866692_justice15m.html (discussing retired Justice Sandra Day O’Connor’s arguments about elected judges’ susceptibility to political pressure).

judge's mind when he considers whether to "refuse" or "accept" the jury's sentence.¹⁷⁹

In a 1987 case referred to as "the capital case of the decade,"¹⁸⁰ Justice Stevens expressed his unwillingness to compromise equal protection principles in order to preserve capital punishment. In that case, *McCleskey v. Kemp*,¹⁸¹ a narrow majority on the Supreme Court rejected a systemic challenge to capital punishment based on strong statistical evidence showing Georgia's justice system was infused with racial discrimination in imposing death sentences.¹⁸² Although Court precedent permitted the use of statistical evidence to demonstrate racial discrimination in employment discrimination¹⁸³ and jury selection¹⁸⁴ cases, five Justices said that such evidence could not be used to demonstrate Equal Protection Clause violations in the administration of capital punishment.¹⁸⁵ For some of the Justices, the case appeared to represent a test of priorities. For example, Justice Scalia—unbeknownst to the public at that time¹⁸⁶—acknowledged that the evidence did show racial discrimination¹⁸⁷ but demonstrated his

¹⁷⁹ *Baldwin*, 472 U.S. at 397-98 (Stevens, J., dissenting) (citation omitted).

¹⁸⁰ EPSTEIN & KOBYLKA, *supra* note 107, at 124.

¹⁸¹ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

¹⁸² EPSTEIN & KOBYLKA, *supra* note 107, at 121-27.

¹⁸³ *Bazemore v. Friday*, 478 U.S. 385 (1986).

¹⁸⁴ *Castaneda v. Partida*, 430 U.S. 482 (1977).

¹⁸⁵ *McCleskey*, 481 U.S. at 293-97.

¹⁸⁶ See Christopher E. Smith & Madhavi McCall, *Justice Scalia's Influence on Criminal Justice*, 34 U. TOL. L. REV. 535, 549 (2003) ("Several years after the *McCleskey* decision, Professor Dennis Dorin of the University of North Carolina-Charlotte read memoranda about the case in the late Justice Thurgood Marshall's papers in the Library of Congress. In one memoranda . . . , Scalia acknowledged his recognition of the existence of discrimination within the criminal justice system").

¹⁸⁷ Scalia's memo said:

I disagree with the argument that the inferences that can be drawn from the . . . [statistical] study [of racial discrimination in death penalty cases in Georgia] are weakened by the fact that each jury and trial is unique, or by the large number of variables at issue Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial [ones] is real, acknowledged by the [cases] of the court and ineradicable, I cannot honestly say that all I need is more proof

preference for preserving capital punishment in spite of discrimination by saying that he did “not share the view . . . that an effect of racial factors on sentencing, if it could be shown by sufficiently strong statistical evidence, would require reversal.”¹⁸⁸ By contrast, although Stevens still believed at that time that the death penalty could be administered fairly,¹⁸⁹ he quite clearly demonstrated that the prevention of constitutional violations took precedence over the maintenance of the death penalty as an available punishment:

The Court’s decision appears to be based on a fear that the acceptance of McCleskey’s claim would sound the death knell for capital punishment in Georgia. If society were indeed forced to choose between a racially discriminatory death penalty (one that provides heightened protection against murder “for whites only”) and no death penalty at all, the choice mandated by the Constitution would be plain.¹⁹⁰

In 1988, in *Thompson v. Oklahoma*,¹⁹¹ Stevens wrote a plurality opinion that applied the *Trop* standard of society’s evolving values¹⁹² to declare that states could not impose the death penalty on offenders who committed murders at ages younger than sixteen.¹⁹³ The decision advanced Stevens’s consistent objective

Id. at 550.

¹⁸⁸ *Id.*

¹⁸⁹ See *McCleskey*, 481 U.S. at 367 (Stevens, J., dissenting).

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.

Id.

¹⁹⁰ *Id.*

¹⁹¹ *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

¹⁹² See *supra* notes 14, 42-43, 137-42 and accompanying text.

¹⁹³ According to Stevens:

of narrowing the categories of offenders to which the death penalty would be applicable.¹⁹⁴ It also laid the groundwork for his later success in helping to form a five-member majority¹⁹⁵ in 2005 to forbid the application of capital punishment to offenders who committed their crimes while younger than age eighteen.¹⁹⁶

In an effort to encourage fair procedures, Justice Stevens also set the stage for future influence through his dissenting opinion in *Walton v. Arizona*.¹⁹⁷ Reiterating his emphasis on the importance of the jury for fact-finding and sentencing, Stevens insisted that judges not rely on their own determinations of facts in making sentencing decisions and that relevant factual

When we confine our attention to the 18 States that have expressly established a minimum age in their death penalty statutes, we find that all of them require that the defendant have attained at least the age of 16 at the time of the capital offense. The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent 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.

Thompson, 487 U.S. at 829-30.

¹⁹⁴ See Liebman & Marshall, *supra* note 58, at 1674 (“A critical message of Justice Stevens’s death penalty jurisprudence is that narrowing death eligibility is an important incremental step that remains open to the states and to the Court. Those committed to enhancing the fairness and accuracy of the capital justice system should take this lesson to heart.”).

¹⁹⁵ Justice Stevens “is credited with being particularly influential in *Roper v. Simmons* [543 U.S. 551] (2005), written by Justice Anthony Kennedy, eliminating the death penalty for persons under 18.” Coyle, *supra* note 2. However, Stevens himself downplays the potential effectiveness of any Justice in attempting to influence or change colleagues’ votes. According to Stevens, “You very rarely win votes if there aren’t five votes persuaded after conference. Very rare. Sometimes as you know one of the swing votes is trying to make up his mind on issues, but he usually thinks it through himself. I’m really not much of an advocate after the argument, I have what I have to say, sometimes we have conferences later on and work things out, but more often than not it’s decided right after argument.” Rosen, *supra* note 20.

¹⁹⁶ *Roper v. Simmons*, 543 U.S. 551 (2005).

¹⁹⁷ *Walton v. Arizona*, 497 U.S. 639 (1990).

determinations be made by the jury during trial.¹⁹⁸ Ten years later, Stevens continued this theme in his majority opinion in *Apprendi v. New Jersey*, which forbade judges in non-capital cases from imposing sentence enhancements based on specific facts unless those facts had been found by the jury.¹⁹⁹ Two years later, a majority opinion by Justice Ruth Bader Ginsburg relied on Stevens's opinion in *Apprendi* to overrule the Court's decision in *Walton*, placing into law Stevens's dissenting argument in *Walton* that the jury must bear responsibility for any fact-finding that affects sentencing decisions in capital cases.²⁰⁰

In 1991, in response to the Court's decision in *Payne v. Tennessee*²⁰¹ permitting victim-impact statements at sentencing proceedings, Stevens spoke out against the nature and speed of the majority's movement in a new direction in its treatment of capital punishment. Specifically, he saw the Court's new position as insufficiently concerned with procedural fairness and the prevention of the arbitrariness²⁰² that had led to the Court's

Moreover, *the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established.* Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind. By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned.

Id. at 711 (Stevens, J., dissenting) (quoting Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 10-11 (1989)).

¹⁹⁹ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

²⁰⁰ *Ring v. Arizona*, 536 U.S. 584 (2002).

²⁰¹ *Payne v. Tennessee*, 501 U.S. 808 (1991).

²⁰² For example, Stevens criticized Scalia's viewpoint and its blindness to the risk of arbitrary imposition of capital punishment:

In his concurring opinion today, Justice SCALIA again relies on the popular opinion that has "found voice in a nationwide victims' rights' movement." His view that the exclusion of evidence about "a crime's unanticipated consequences" "significantly harms our criminal justice system," rests on the untenable premise that the strength of that system is to be measured by the number of death sentences that may be returned on the basis of such evidence. Because the word "arbitrary" is not to be found in the constitutional text, he apparently can find no reason to object to the arbitrary imposition of capital punishment.

moratorium on death sentences in *Furman v. Georgia*.²⁰³ The five-member majority in *Payne* abruptly overturned precedents that had been established just two²⁰⁴ and four years²⁰⁵ earlier. Justice Marshall forthrightly attributed that development solely to the change in the Court's composition, as newcomer Justice Souter provided the fifth vote for the majority in his first term filling the former seat of Justice Brennan.²⁰⁶

The *Payne* decision spurred Stevens to take the unusual step of announcing his dissent orally from the bench, one of only twenty-one such dissents that he issued in this manner in his thirty-five-year career on the Supreme Court.²⁰⁷ Indeed, one empirical study of oral dissents found that "given the length of Justice Stevens's career, he has demonstrated a relative unwillingness to read his dissent[s]."²⁰⁸ Thus, Stevens's decision to read the *Payne* dissent aloud in open court demonstrated his especially intense disappointment and concern about the Court's new direction in capital punishment jurisprudence.²⁰⁹ The strong language in the dissenting opinion expressed Stevens's dismay about the majority's disregard for precedent and introduction of emotion, rather than reason, as the basis for imposing death sentences:

Id. at 859 at n.1 (Stevens, J., dissenting) (citations omitted).

²⁰³ *Furman v. Georgia*, 408 U.S. 238 (1972).

²⁰⁴ *So. Carolina v. Gathers*, 490 U.S. 805 (1989).

²⁰⁵ *Booth v. Maryland*, 482 U.S. 496 (1987).

²⁰⁶ According to Justice Marshall's dissenting opinion, "Power, not reason, is the currency of this Court's decisionmaking. . . . Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did." *Payne*, 501 U.S. at 844 (Marshall, J., dissenting).

²⁰⁷ Jill Duffy & Elizabeth Lambert, *Dissents from the Bench: A Compilation of Oral Dissents by U.S. Supreme Court Justices*, 102 LAW LIBR. J. 24, 29 (2010).

²⁰⁸ William D. Blake & Hans J. Hacker, "The Brooding Spirit of the Law": *Supreme Court Justice Reading Dissents from the Bench*, 31 JUST. SYS. J. 1, 7 (2010).

²⁰⁹ See Timothy R. Johnson, Ryan C. Black & Eve M. Ringmuth, *Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench?*, 93 MINN. L. REV. 101, 122 (2009) ("Justices will read opinions from the bench when they care a good deal about the issue and when they want to change the policy set by the majority.").

The novel rule that the Court announces today represents a dramatic departure from the principles that have governed our capital sentencing jurisprudence for decades Our cases provide no support whatsoever for the majority's conclusion that the prosecutor may introduce evidence that sheds no light on the defendant's guilt or moral culpability, and thus serves no purpose other than to encourage jurors to decide in favor of death, rather than life, on the basis of their emotions, rather than their reason.²¹⁰

In his effort to persuade his colleagues to look more closely at fair and proper capital case procedure, Stevens wrote several other opinions during the 1990s. These opinions which advocated such things as the primacy of the jury as decision maker in capital cases²¹¹ and enforcement of careful jury instructions,²¹² included

²¹⁰ Payne v. Tennessee, 501 U.S. at 856 (Stevens, J., dissenting).

²¹¹ See Harris v. Alabama, 513 U.S. 504, 515 (1995) (Stevens, J., dissenting).

Alabama's capital sentencing statute is unique. In Alabama, unlike any other State in the Union, the trial judge has unbridled discretion to sentence the defendant to death—even though a jury has determined that death is an inappropriate penalty, and even though no basis exists for believing that any other reasonable, properly instructed jury would impose a death sentence. Even if I accepted the reasoning of *Spaziano v. Florida*, 468 U.S. 447, 457-65 (1984), which I do not, see *id.*, at 467 (STEVENS, J., concurring in part and dissenting in part), I would conclude that the complete absence of standards to guide the judge's consideration of the jury's verdict renders the statute invalid under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.

Id. at 515-16.

²¹² See Weeks v. Angelone, 528 U.S. 225, 237 (2000) (Stevens, J., dissenting).

The record in this case establishes, not just a “reasonable likelihood” of jury confusion, but a virtual certainty that the jury did not realize that there were two distinct legal bases for concluding that a death sentence was not “justified.” The jurors understood that such a sentence would not be justified unless they found at least one of the two alleged aggravating circumstances. Despite their specific request for enlightenment, however, the judge refused to tell them that *even* if they found one of those circumstances, they did not have a “duty as a jury to issue the death penalty.”

cases in which Stevens was the lone dissenter against the approval of procedures that he regarded as inadequate.²¹³

After years of writing dissents in capital cases, in 2002 Stevens finally shaped the law through a majority opinion. Stevens authored the groundbreaking opinion in *Atkins v. Virginia*,²¹⁴ which narrowed the category of defendants eligible for the death penalty. Stevens declared on behalf of a six-member majority that:

Our independent evaluation of the issue reveals no reason to disagree with the judgment of “the legislatures that have recently addressed the matter” and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our “evolving standards of decency,” we therefore conclude that such punishment is excessive and that the Constitution “places a substantive restriction on the State’s power to take the life” of a mentally retarded offender.²¹⁵

As he did consistently throughout his career in other cases that raised issues under the Eighth Amendment’s Cruel and Unusual Punishments Clause,²¹⁶ in *Atkins*, Stevens applied the

Id. at 238.

²¹³ Stevens was the lone dissenter in *Harris v. Alabama*, 513 U.S. 504, 515 (Stevens, J., dissenting), concerning the need for the jury to be the ultimate decision maker, *see supra* note 211, and in *Hopkins v. Reeves*, 524 U.S. 88, 101 (1998) (Stevens, J., dissenting), in which he argued that “[t]he rationale for Nebraska’s general rule that second-degree murder is not a lesser included offense of felony murder does not, therefore, apply to this case. To be faithful to the teaching of *Beck v. Alabama*, 447 U.S. 625 (1980), the Court should therefore hold that respondent was entitled to the requested [jury] instruction.”

Id. at 102.

²¹⁴ *Atkins v. Virginia*, 536 U.S. 304 (2002).

²¹⁵ *Id.* at 321.

²¹⁶ For example, early in his Supreme Court career in 1978, Stevens explicitly endorsed the Eighth Amendment analysis in Justice White’s dissenting opinion that sought to apply the protections of the Cruel and Unusual Punishments

Trop standard in using evidence, such as examples of legislative enactments,²¹⁷ to conclude that execution of mentally retarded defendants violated society's "evolving standards of decency."²¹⁸ In doing so he advanced his long-time goal of narrowing the application of the capital punishment.²¹⁹

In 2005, in his opinion-assigning role as senior associate Justice, Stevens facilitated the Supreme Court's decision to bar the application of the death penalty to offenders who committed capital offenses while under the age of eighteen.²²⁰ Justice Anthony Kennedy wrote the controversial opinion in *Roper v. Simmons* for the five-member majority after he sided with the Court's four most liberal Justices. Kennedy's alliance with the liberals in *Roper* fit Walter Dellinger's observation that "Stevens

Clause to school children injured by the excessive application of corporal punishment. See *Ingraham v. Wright*, 430 U.S. 651 (1978). Stevens wrote of White's opinion, "Mr. Justice WHITE's analysis of the Eighth Amendment issue is, I believe, unanswerable. I am also persuaded that his analysis of the procedural due process issue is correct." *Id.* at 700 (Stevens, J., dissenting). In that opinion, White had clearly used the standard from *Trop v. Dulles*, 356 U.S. 86 (1958), by saying that "where corporal punishment becomes so severe as to be unacceptable in a civilized society, I can see no reason that it should become any more acceptable just because it is inflicted on children in the public schools." *Ingraham*, 430 U.S. at 692 (White, J., dissenting).

²¹⁷ In 1988, when Congress enacted legislation reinstating the federal death penalty,

it expressly provided that a "sentence of death shall not be carried out upon a person who is mentally retarded." In 1989, Maryland enacted a similar prohibition. It was in that year that we decided *Penry*, and concluded that those two state enactments, "even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus." 492 U.S. at 334. Much has changed since then. Responding to the national attention received by the Bowden execution and our decision in *Penry*, state legislatures across the country began to address the issue. In 1990, Kentucky and Tennessee enacted statutes similar to those in Georgia and Maryland, as did New Mexico in 1991, and Arkansas, Colorado, Washington, Indiana, and Kansas in 1993 and 1994. In 1995, when New York reinstated its death penalty, it emulated the Federal Government by expressly exempting the mentally retarded. Nebraska followed suit in 1998.

Id. at 314.

²¹⁸ *Id.* at 311-12.

²¹⁹ See, generally, Liebman & Marshall, *supra* note 58, at 1632-75.

²²⁰ *Roper v. Simmons*, 543 U.S. 551 (2005).

has controlled the assignment of opinions with great skill Sometimes he has assigned opinions to himself, but more important are the cases in which he gave up the privilege of writing the opinion in landmark cases in order to secure a shaky majority.”²²¹ Presumably, Stevens might otherwise have wished to assign to himself the opportunity to expand the application of the arguments against executing teenagers that he had articulated in 1988 in *Thompson v. Oklahoma*.²²² Other observers have noted that “it’s widely assumed that Stevens had Kennedy’s ear on at least some important issues”²²³ and that “[t]he absence of Stevens’[s] personal touch” in influencing Kennedy would otherwise have led the Court to move to the right in specific cases,²²⁴ including *Thompson*.

Stevens enjoyed one more notable success in narrowing the application of the death penalty in 2008, when he again assigned Kennedy to write on behalf of a five-member majority as the Court forbade the application of the death penalty for the crime of child rape not resulting in the death of the victim.²²⁵ In oral arguments for the case, Stevens used his questions to steer attention toward the legal issues in the case and thereby prevent the attorney for the State of Louisiana from leading the Justices to focus on the victim’s physical injuries, which had actually healed within two weeks of the crime.²²⁶

²²¹ Toobin, *supra* note 19, at 43.

²²² See *supra* notes 197-199 and accompanying text.

²²³ Ross Douthat, *The Further Empowerment of Anthony Kennedy*, N.Y. TIMES OPINION BLOG, (Apr. 12, 2010, 2:23 PM) <http://douthat.blogs.nytimes.com/2010/04/12/the-further-empowerment-of-anthony-kennedy/>.

²²⁴ *Id.*

²²⁵ *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

²²⁶ Greenhouse, *supra* note 114.

During the child rape argument on Wednesday, it was the lawyer for Louisiana who was giving the vivid description of the crime, recounting in grisly anatomic detail the injuries inflicted on an 8-year-old girl by her stepfather, the convicted rapist challenging the state’s death penalty law. As justices and the courtroom audience cringed, the air seemed to leave the room, along with any points the defendant’s lawyer had managed to make in his initial turn at the lectern.

Justice Stevens had remained silent during that first half of the argument, but now he pounced. “Could you clarify?” he began, interrupting the state’s lawyer, Juliet L. Clark. “Were those injuries permanent?”

In capital punishment cases, due to the changing composition of the Court, such successes for Stevens in narrowing the application of the death penalty were rare and possibly fleeting.²²⁷ Instead, he spent most of his energy in such cases resisting the decision-making trends of the Court majority, which became increasingly conservative in the 1980s and early 1990s.²²⁸ This resistance included statements and dissenting opinions that Stevens wrote concerning which cases to accept for hearing. One example was the petition of John Allen Muhammad, the so-called “D.C. sniper,” who terrorized the nation’s capital by planning random shootings that killed ten people in 2002.²²⁹ When the Court declined to grant a stay of execution for Muhammad while Muhammad’s attorneys were still filing challenges to his conviction and sentence, Stevens complained that:

He knew the answer, of course: the record of the case indicated that the girl’s physical injuries had healed in two weeks. His point was to bring the anatomy lesson to an end and refocus the argument on the legal issues. If it was also to throw the state’s lawyer off stride, he succeeded in that as well. Ms. Clark, reluctantly conceding that the injuries had healed, shifted to her legal arguments. Justice Stevens’s mild expression and tone never changed.

Id.

²²⁷ As of 2010, two members of the five-member majorities in *Roper v. Simmons* and *Kennedy v. Louisiana* have retired: Justice Stevens and Justice David Souter. Justice Sonia Sotomayor was appointed to replace Souter in 2009. Charlie Savage, *Sotomayor Sworn In as Supreme Court Justice*, N.Y. TIMES, Aug. 9, 2009, <http://www.nytimes.com/2009/08/09/us/politics/09sotomayor.html>. It is not clear how Sotomayor, a former prosecutor, will decide capital punishment issues. Uncertainty also exists about the views that will be expressed by Justice Elena Kagan, the new Justice appointed by President Obama to replace Justice Stevens. Carl Hulse, *Senate Confirms Kagan as Justice In Partisan Vote*, N.Y. TIMES, Aug. 6, 2010, <http://www.nytimes.com/2010/08/06/us/politics/06kagan.html>. The loss of one vote that supported a precedent established by a minimum winning coalition means that the law can shift 180 degrees and move in the opposite direction when a new Justice votes differently than his or her predecessor.

²²⁸ See *supra* note 172 and accompanying text.

²²⁹ Tracey D. Samuelson, *DC Sniper Execution: Why His Case Moved So Quickly*, CHRISTIAN SCI. MONITOR, Nov. 11, 2009, at 2, available at <http://www.csmonitor.com/USA/Justice/2009/1111/p02s01-usju.html>.

By denying Muhammad's stay application, we have allowed Virginia to truncate our deliberative process on a matter—involving a death row inmate—that demands the most careful attention. This result is particularly unfortunate in light of the limited time Muhammad was given to make his case in the District Court.

I continue to believe that the Court would be wise to adopt a practice of staying all executions scheduled in advance of the completion of our review of a capital defendant's first application for a federal writ of habeas corpus.²³⁰

As illustrated by this quote, Stevens made normative arguments about what the Court ought to do, both with respect to procedural fairness, as in John Muhammad's case, and also with respect to narrowing the applicability of capital punishment.²³¹ In particular, Stevens unsuccessfully argued for the Court to declare that the Cruel and Unusual Punishments Clause is violated when there is excessive delay in post-conviction reviews that leave death row inmates spending decades in solitary confinement anticipating execution.²³² In his final term on the Court, for example, Stevens urged the Court to recognize a constitutional violation in such circumstances:

Petitioner Cecil Johnson, Jr., has been confined to a solitary cell awaiting his execution for nearly 29 years. Johnson bears little, if any, responsibility for this delay I remain steadfast in my view “that executing defendants after such delays is unacceptably cruel,” . . . [as] the delay itself subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement.²³³

²³⁰ Muhammad v. Kelly, 130 S. Ct. 541 (2009) (Statement of Stevens, J.).

²³¹ See Lackey v. Texas, 514 U.S. 1045 (1995) (mem.) (“Petitioner raises the question whether executing a prisoner who has already spent some 17 years on death row violates the Eighth Amendment’s prohibition on cruel and unusual punishment [T]he importance and novelty of the question presented . . . are sufficient to warrant review by this Court . . .”).

²³² *Id.*

²³³ Johnson v. Bredesen, 130 S. Ct. 541 (2009) (Statement of Stevens, J., respecting the denial of certiorari).

Near the end of his career, Stevens was moved once more to read a dissent from the bench in *Uttecht v. Brown*,²³⁴ a strategy that one of his former law clerks saw as a means for “expressing righteous anger.”²³⁵ Linda Greenhouse described it as “an opinion dissenting from a decision that in retrospect appears to have been, for him, the final straw . . . [as the] majority gave state courts great leeway in death penalty trials to remove jurors who express even mild doubt about capital punishment.”²³⁶ Stevens objected strongly to the majority’s further expansion of prosecutors’ and trial judges’ authority to exclude potential jurors who would not apply capital punishment in every possible case.²³⁷ As Stevens wrote in *Uttecht*:

Today, the Court has fundamentally redefined—or maybe just misunderstood—the meaning of “substantially impaired” [with respect to a juror’s ability to consider state law with regard to possible sentences in murder cases], and, in doing so, has gotten it horribly backwards. [The Court] appears to be under the impression that trial courts should be encouraging the inclusion of jurors who will impose the death penalty²³⁸

The concerns that he expressed in this 2007 opinion flowed directly from similar issues he raised in a speech to the American Bar Association, in which he said that “aspects of the process of selecting juries in capital cases are troublesome.”²³⁹ Stevens complained that:

²³⁴ *Uttecht v. Brown*, 551 U.S. 1 (2007).

²³⁵ See Andrew Siegel, *Justice Stevens and the Seattle Schools Case: A Case Study on the Role of Righteous Anger in Constitutional Discourse*, 43 U.C. DAVIS L. REV. 927, 934 (2010) (“What are some of the mechanisms of formalized righteous anger? What does a judge do to signal to people in the know how angry he or she is? (1) Well, one of the things that we have seen recently is the increasing use of oral dissents—dissents from the bench . . .”).

²³⁶ Greenhouse, *supra* note 114.

²³⁷ *Id.*

²³⁸ *Uttecht*, 551 U.S. at 35 (Stevens, J., dissenting).

²³⁹ Justice John Paul Stevens, Address at the American Bar Association Thurgood Marshall Awards Dinner in Chicago, Illinois (Aug. 6, 2005).

[M]any days are spent conducting voir dire examinations in which prosecutors engage in prolonged questioning to determine whether the venire person has moral or religious scruples that would impair her ability to impose the death penalty. Preoccupation with that issue creates an atmosphere in which jurors are likely to assume that their primary task is to determine the penalty for the presumptively guilty defendant. More significantly, because the prosecutor can challenge jurors with qualms about the death penalty, the process creates a risk that a fair cross-section of the community will not be represented on the jury.²⁴⁰

The American Bar Association speech was not merely a precursor to Stevens's oral dissent, which called attention to the bias of juries in capital cases through a distorted jury selection process. The speech also made clear that as early as 2005 Stevens already had come to the conclusion that the processes of the justice system tilted unfairly in favor of sentencing individual murder defendants to death rather than to incarceration. Stevens cited "[t]wo aspects of the sentencing process [that] tip the scales in favor of death."²⁴¹ First, he indicated his belief that using elected state judges to "preside and often make the final life-or-death decision [when they] must stand for re-election creates a subtle bias in favor of death."²⁴² Second, he complained about "the admissibility of victim impact evidence that sheds absolutely no light on either the issue of guilt or innocence, or the moral culpability of the defendant, [and therefore] serves no purpose other than to encourage jurors to decide in favor of death . . . on the basis of their emotions rather than their reason"—the very issue that led to his first oral dissent in a capital case in *Payne v. Tennessee*.²⁴³

As demonstrated by the foregoing discussion, Stevens criticized the capital punishment decisions of the increasingly

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Payne v. Tennessee*, 501 U.S. 801 (1991). See *supra* notes 201-02, 210 and accompanying text.

conservative Court from the early 1980s through the end of his career. Although he had a few opportunities to narrow the applicability of the death penalty when a majority of Justices shared his views,²⁴⁴ he primarily wrote dissents to complain about the majority's inadequate concern for procedural fairness²⁴⁵ and the importance of fairly constituted juries as decision makers.²⁴⁶ These opinions built the road that led to the dramatic final destination:²⁴⁷ Justice Stevens's 2008 opinion in *Baze v. Rees*,²⁴⁸ which renounced capital punishment as the "needless extinction of life with only marginal contributions to any discernible social or public purposes."²⁴⁹ As the next section will discuss, a close analysis of *Baze v. Rees*, in light of Justice Stevens's three decades' worth of opinions, provides the best evidence concerning whether and how his viewpoints changed.

IV. INDEPENDENT JOURNEY OR CHANGING COURT?

John Paul Stevens arrived at the Supreme Court in 1975 with firmly-held beliefs that careful procedures are necessary for fair criminal prosecutions,²⁵⁰ that defendants need high-quality representation by counsel for the adversary system to operate properly,²⁵¹ and that judges must fulfill their responsibility of carefully reviewing claims from all individuals, including those who lack status, power, and public sympathy.²⁵² Stevens had personal experiences that made him think deeply about the death penalty²⁵³ and an approach to analyzing Eighth Amendment issues that made him open to changing the definitions of acceptable criminal punishments.²⁵⁴

²⁴⁴ See *supra* notes 214-28 and accompanying text.

²⁴⁵ See *supra* notes 170-72, 180-200 and accompanying text.

²⁴⁶ See *supra* notes 175-78, 210-11 and accompanying text.

²⁴⁷ See *Greenhouse*, *supra* note 114.

²⁴⁸ *Baze v. Rees*, 553 U.S. 35, 85-87 (2008) (Stevens, J., concurring).

²⁴⁹ *Id.* at 83.

²⁵⁰ See *supra* notes 59-74 and accompanying text.

²⁵¹ See *supra* notes 75-82 and accompanying text.

²⁵² See *supra* notes 86-91 and accompanying text.

²⁵³ See *supra* notes 46-58 and accompanying text.

²⁵⁴ See *supra* notes 37-43 and accompanying text.

After starting his Supreme Court career as a key member of the three-Justice plurality that reactivated capital punishment in 1976, in the words of his biographers, Stevens eventually “brought the long journey of his death penalty logic . . . up to the abolitionist goal line” in 2008.²⁵⁵ Did this reflect an independent journey, as Stevens changed his mind about capital punishment, or did it merely reflect an increasing conservatism of the Court that made him appear to become more liberal?²⁵⁶

In a 2010 interview with National Public Radio’s Nina Totenberg, Stevens identified his 1976 vote to reactivate the death penalty in the *Gregg-Jurek-Proffitt*²⁵⁷ trilogy of cases as the “one vote that [he] would change.”²⁵⁸ This public statement mirrored the 1991 conclusion of Stevens’s colleague, Justice Lewis Powell, who voted with him in those cases.²⁵⁹ Powell had different reasons for looking back with regret at his votes in capital punishment cases.²⁶⁰ He wrote that “[c]apital punishment, though constitutional, is not being enforced. I think it reflects discredit on the law to have a major component of the law that is simply not enforced.”²⁶¹ By contrast, Stevens looked back with regret because of his concerns about biased jury selection processes, risks of discrimination and error, and other issues of fairness.²⁶²

In his responses during the Totenberg interview, Stevens candidly characterized the 1976 *Gregg* trilogy as “an incorrect

²⁵⁵ BARNHART & SCHLICKMAN, *supra* note 73, at 218 (2010).

²⁵⁶ See *supra* notes 8-20 and accompanying text.

²⁵⁷ *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

²⁵⁸ *Open Mind*, *supra* note 71.

²⁵⁹ When Powell’s biographer asked him whether he would, in retrospect, change his vote in any cases, Powell responded by pointing to death penalty cases. Powell noted that he would even change his vote in *Furman v. Georgia*[, 408 U.S. 238 (1972)], saying that he had “come to think that capital punishment should be abolished.” See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994).

²⁶⁰ Powell was concerned that last minute appeals and excessive litigation in death penalty cases kept capital punishment from being implemented and thereby diminished the image of law as an authoritative set of rules that are actually carried out. *Id.* at 446-54.

²⁶¹ *Id.* at 451.

²⁶² See *infra* notes 264-67 and 288.

decision.”²⁶³ Viewed in isolation, this statement could imply that Stevens’s own viewpoints had changed—that what he considered in 1976 to be a proper decision to reactivate the death penalty he now regarded as “incorrect.”²⁶⁴ However, in elaborating on the reasons for his regret about his 1976 vote, Stevens emphasized his view that it was not his opinion, but rather the Supreme Court and its decisions that had changed over the years. As the Court changed, Stevens explained, he lost confidence in the possibility that capital punishment could be implemented fairly:

But what happened over the years is the Court constantly expanded the cases eligible for the death penalty, so that the underlying premise for my vote in those cases has disappeared in a sense.

....

Not only is it a larger universe [of cases eligible for the death penalty], but the procedures have been more prosecution friendly.

....

... So, I really think that the death penalty today is vastly different from the death penalty that we thought we were authorizing. If the procedures had been followed that we expected to be in place, I think I probably would’ve still had the same views.

....

... I think that we did not foresee how it would be interpreted.²⁶⁵

This explanation is consistent with Stevens’s claim that his views did not change at all. Moreover, his reference to the Court’s development of troubling doctrines²⁶⁶ and unfair procedures²⁶⁷

²⁶³ *Open Mind*, *supra* note 71.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ For example, as described by Totenberg, “[V]ictim impact statements were once ruled too incendiary to be permissible, but four years later a more conservative Court reversed that decision. All of this, says Justice Stevens, has changed the nature of the death penalty as he and the Court envisioned it in the 1970s.”). *Id.*

echoed his detailed critique of capital punishment in *Baze v. Rees*.²⁶⁸

In *Baze v. Rees*,²⁶⁹ the Court examined whether Kentucky's lethal injection protocol violated the Eighth Amendment prohibition on cruel and unusual punishment. Chief Justice Roberts's plurality opinion announcing the judgment of the Court found that the petitioners had failed to demonstrate that the lethal injection protocol actually caused the severe pain and suffering claimed to be risks from this procedure.²⁷⁰ Justice Stevens wrote a concurring opinion in which he reluctantly endorsed the Court's judgment as a matter of respect for precedent.²⁷¹ However, Stevens simultaneously presented a thorough critique and renunciation of capital punishment.²⁷² A number of scholars²⁷³ have analyzed Stevens's *Baze* opinion, in which he said that he "relied on [his] own experience in reaching the conclusion that the imposition of the death penalty represents 'the pointless and needless extinction of life.'"²⁷⁴ Stevens used the opinion to describe changes in the Supreme Court's approach to death penalty jurisprudence. In Stevens's view, the Court moved away from the "decisions in 1976 upholding the constitutionality of the death penalty [that] relied heavily on our belief that adequate procedures were in place that would avoid the danger of discriminatory application . . . of arbitrary application . . . , and of excessiveness."²⁷⁵ To Stevens, the Court's decisions had lost sight of the 1976 cases' emphasis on fair procedures. Stevens described

²⁶⁷ For example, in referring to the Court's post-1976 capital decisions, with which he dissented with regards to jury selection and other matters, Stevens said that "it tends to load the dice in favor of the prosecution and against the defendant." *Id.*

²⁶⁸ 553 U.S. 35 (2008).

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Baze v. Rees*, 553 U.S. 35, 71 (2008) (Stevens, J., concurring).

²⁷² *Id.*

²⁷³ See, e.g., Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POL'Y REV. 259 (2009); Elisabeth Semel, *Reflections on Justice John Paul Stevens's Concurring Opinion in Baze v. Rees: A Fifth Gregg Justice Renounces Capital Punishment*, 43 U.C. DAVIS L. REV. 783 (2010).

²⁷⁴ *Baze v. Rees*, 553 U.S. at 71 (Stevens, J., concurring).

²⁷⁵ *Id.* (Stevens, J., concurring).

several of the Court's decisions that raised "special concern[s]"²⁷⁶ for him. These decisions increased the risks of jurors not representing a fair cross-section of the community,²⁷⁷ error from infusion of emotion through victim impact statements,²⁷⁸ racial discrimination,²⁷⁹ and erroneous convictions.²⁸⁰ As to the latter point, Stevens stated forthrightly that "[t]he risk of executing innocent defendants can be entirely eliminated by treating any penalty more severe than life imprisonment without the possibility of parole as constitutionally excessive."²⁸¹ He presented these arguments to support his perception that "[i]ronically, . . . more recent [Supreme Court] cases have endorsed procedures that provide less protections to capital defendants than to ordinary offenders."²⁸²

Stevens's reasoning made plausible the idea that his renunciation of capital punishment was merely a *Furman*-like conclusion²⁸³ that the death penalty, as developed by the increasingly conservative Court majority over the preceding three decades, imposed risks of arbitrariness, discrimination, and error that were unacceptable under his 1976 description of fair procedure.²⁸⁴ In sum, Stevens's arguments in *Baze* reinforce the theory that changes in the Court's composition created the erroneous perception that he had altered his assessment of capital punishment.²⁸⁵

On the other hand, Stevens was not entirely immune to changing his views. Linda Greenhouse used Harry Blackmun's papers in the Library of Congress to trace changes in Stevens's

²⁷⁶ *Id.* at 84.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 85.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 86.

²⁸¹ *Id.*

²⁸² *Id.* at 84.

²⁸³ See MARK CONSTANZA, JUST REVENGE: COSTS AND CONSEQUENCES OF THE DEATH PENALTY 20 (1997) ("Most important, although the *Furman* majority condemned the 'arbitrary and discriminatory' pattern of death sentences, it did not prohibit use of the death penalty in principle. It was merely the *current administration* of capital punishment that was prohibited.").

²⁸⁴ See *supra* notes 123-30 and accompanying text.

²⁸⁵ See *supra* notes 8-15 and accompanying text.

approach to abortion rights cases.²⁸⁶ Social scientists who study patterns in Justices' decision making have concluded that Stevens became more liberal after joining the Court as, over the course of his career, he voted more frequently to support claims by individuals.²⁸⁷ With respect to capital punishment, some observers have claimed that Stevens was increasingly sensitive to Sixth Amendment right to counsel issues during his Supreme Court career, which coincided with his growing criticism of the majority's conservative death penalty decisions.²⁸⁸ Moreover, Stevens himself has said that "I know that I, like most of my colleagues, have continued to participate in a learning process while serving on the bench,"²⁸⁹ thus implying that there had been development and change in his own decision making on at least some issues.

Even more intriguing is a section of Stevens's opinion in *Baze v. Rees* in which he emphasized his "special concern[s]" about arbitrariness, discrimination, and excessiveness.²⁹⁰ For example, in Part II of the opinion, he discussed how the governing institutions of the United States had decided "to retain the death penalty as part of our law . . . [as] the product of habit and inattention rather than an acceptable deliberative process [weighing] the costs and risks of administering that penalty against its identifiable benefits."²⁹¹ He also asserted that policy-makers employ faulty assumptions about the retributive force of the death penalty in order to justify capital punishment.²⁹² Stevens, referring

²⁸⁶ Linda Greenhouse, *Justice John Paul Stevens As Abortion-Rights Strategist*, 43 U.C. DAVIS L. REV. 749 (2010).

²⁸⁷ Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1492, 1505 (2007).

²⁸⁸ See BARNHART & SCHLICKMAN, *supra* note 73, at 217 ("According to [Professor Ellen] Kreitzbert, Stevens's death penalty reasoning began to shift in the 1999 case *Terry Williams v. Taylor*[, 529 U.S. 362 (2000)] when he ruled in favor of a death row inmate who alleged his lawyer had failed to introduce significant mitigating evidence that might defeat a death sentence. Earlier, in 1984 . . . , Stevens had disallowed the so-called ineffective assistance of counsel defense . . .").

²⁸⁹ Stevens, *supra* note 13, at 1562.

²⁹⁰ See *supra* notes 275-82 and accompanying text.

²⁹¹ *Baze v. Rees*, 553 U.S. at 71 (Stevens, J., concurring).

²⁹² *Id.*

to his 1976 joint opinion in *Gregg v. Georgia*,²⁹³ noted that at the beginning of his career a plurality of Justices had stated that punishment will “constitut[e] ‘gratuitous infliction of suffering’ in violation of the Eighth Amendment” if it does not “serve[] a legitimate penological function.”²⁹⁴ He then proceeded to argue that based on available evidence the purported justifications for capital punishment—incapacitation, deterrence, and retribution—do not actually fulfill their purposes.

With respect to incapacitation as a justification, Stevens said that “the recent rise in statutes providing for life imprisonment without the possibility of parole demonstrates that incapacitation is neither a necessary nor a sufficient justification for the death penalty.”²⁹⁵ In addressing deterrence as a justification, he wrote that “despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment.”²⁹⁶

Finally, while acknowledging that retribution “provides the most persuasive arguments for prosecutors seeking the death penalty,”²⁹⁷ Stevens noted that “society ha[d] moved away from public and painful retribution towards ever more humane forms of punishment.”²⁹⁸ This comment referred to the use of lethal injection, which was at the heart of the case in *Baze v. Rees*. For Stevens, this meant that “[s]tate-sanctioned killing is therefore becoming more and more anachronistic,”²⁹⁹ and that “[t]his trend, while appropriate and required by the Eighth Amendmen[t] . . . , actually undermines the very premise on which public approval of the retribution rationale is based.”³⁰⁰

In light of these unfulfilled justifications, Stevens declared that courts and legislatures should reconsider the use of capital

²⁹³ *Gregg v. Georgia*, 428 U.S. 153 (1976).

²⁹⁴ *Baze*, 553 U.S. at 78 (Stevens, J., concurring) (quoting *Gregg*, 428 U.S. at 183 & n.28 (joint opinion of Stewart, Powell, and Stevens, JJ.)).

²⁹⁵ *Id.* (Stevens, J., concurring).

²⁹⁶ *Id.* at 79.

²⁹⁷ *Id.* at 80.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 81.

punishment.³⁰¹ At the end of Part III of the opinion, he brought back these themes and used them as part of a strong pronouncement of his newly-announced opposition to capital punishment:

I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents “the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.”³⁰²

One important aspect of this statement is the implication that based “on [his] own experience,”³⁰³ Justice Stevens actually changed his views on capital punishment.

In Part III of the opinion, in which his critique of the death penalty was based on Supreme Court decisions in recent decades that had reduced procedural fairness and enhanced the risks of arbitrariness, discrimination, and error,³⁰⁴ Stevens could conceivably claim that he was merely adjusting his assessment of capital punishment in light of the Court majority’s move in a conservative direction. In other words, Stevens still believed in the same procedural protections that he supported in 1976, but the Court’s decisions in the past three decades had made it impossible to provide those protections for defendants in capital cases. This discussion reflected Linda Greenhouse’s observation about the case that “capital punishment had become for him, in the [C]ourt’s hands, a promise of fairness unfulfilled.”³⁰⁵

In Part II of the opinion, by contrast, he focused on the underlying justifications for capital punishment and evidence of their ineffectiveness and decreasing relevance. This discussion reflected his consistent adherence to the Eighth Amendment

³⁰¹ *Id.*

³⁰² *Id.* at 86 (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)).

³⁰³ *Id.* at 86.

³⁰⁴ *Id.* at 82-86.

³⁰⁵ Greenhouse, *supra* note 114.

standard from *Trop v. Dulles*³⁰⁶ since Stevens noted how society's evolving values and policy decisions had undercut justifications for capital punishment as "a criminal sanction [that] serves a legitimate penological function."³⁰⁷ His opinion pointed to changes in society that diminished two of the underlying justifications for capital punishment: incapacitation and retribution. Societal changes reduced the incapacitation justification through wider use of life-without-parole sentences and also undercut the retribution rationale as society sought more humane methods of execution.³⁰⁸ This reasoning can be interpreted as evidence that Stevens did not change his views or become more liberal. Rather, Stevens's reasoning is consistent with his career-long adherence to interpreting the Eighth Amendment according to society's evolving values, a viewpoint that he emphatically reinforced in 2005 through his concurring opinion in *Roper v. Simmons*.³⁰⁹ Thus, Stevens likely reached new conclusions about the contemporary inapplicability of incapacitation and retribution as justifications for capital punishment not because he changed his viewpoint but because he remained consistent in his approach to interpreting the Eighth Amendment in accordance with changes in society.

Despite this evidence supporting Stevens's consistency in judicial decision making, there is one lingering example that appears instead to reflect a change in his thinking about capital punishment. In evaluating the deterrence justification for capital punishment, Stevens pointed to "30 years of empirical research"³¹⁰ that refuted claims about the deterrent effects of the death penalty.³¹¹ On this point, he was not talking about changes in the decisions by the increasingly conservative Supreme Court that might lead him to appear increasingly liberal as he reacted against them. Nor was he talking about changes in society's values that would lead him to apply new interpretations of the Eighth Amendment to the issue of capital punishment. Instead, he presented his own research about the ineffectiveness of deterrence

³⁰⁶ See *supra* notes 137-42 and accompanying text.

³⁰⁷ *Baze*, 553 U.S. at 78 (Stevens, J., concurring).

³⁰⁸ *Id.* at 80.

³⁰⁹ See *supra* note 43.

³¹⁰ *Baze*, 553 U.S. at 80 (Stevens, J., concurring).

³¹¹ *Id.* at 86.

and his conclusion that deterrence did not provide an appropriate and sufficient justification for capital punishment.

In 1976, Stevens's joint opinion in *Gregg v. Georgia* acknowledged that "some of the studies suggest[ed] that the death penalty may not function as a significantly greater deterrent than lesser penalties,"³¹² but that there was not yet empirical evidence to support or refute that view.³¹³ Despite that dearth of empirical evidence, the joint opinion in *Gregg* declared that "the death penalty is undoubtedly a significant deterrent"³¹⁴ for some potential murderers, such as those who would be involved in "carefully contemplated murders, such as murder for hire."³¹⁵ By 2008, however, Stevens had changed his mind about that proposition, citing the continuing lack of scientific evidence as the basis for his rejection of the deterrence rationale.³¹⁶ His *Baze* opinion indicated that he was no longer willing to simply assume that some potential murderers would be deterred by the threat of capital punishment. Thus, there is evidence that Stevens changed his viewpoint on capital punishment specifically with regard to the deterrence rationale for the death penalty in his *Baze v. Rees* opinion.

However, this new conclusion about the specific failure of the deterrence justification was not necessarily the linchpin for Stevens's overall renunciation of capital punishment in *Baze*. Rather, the primary basis for his reasoning in *Baze* stemmed from years of seeking to narrow the use of capital punishment and pointing out the conservative majority's inadequate concern for fair procedure. Thus, with the exception of his rejection of the deterrence rationale, Stevens stands on firm ground in asserting that his views on capital punishment merely appear to have changed as he was compelled to respond to changes in the Supreme Court's approach to the subject. In light of his career-long emphasis on fair procedures and narrowly applied punishment, Stevens could readily conclude that the objectives of his career in capital jurisprudence—fair procedure and narrowly

³¹² *Gregg v. Georgia*, 428 U.S. 153, 185 (1976).

³¹³ *Id.*

³¹⁴ *Gregg*, 428 U.S. at 185-86 (1976).

³¹⁵ *Id.* at 186.

³¹⁶ *Baze*, 553 U.S. at 79 (Stevens, J., concurring).

applied punishment—had become impossible to attain under the conception of capital punishment advanced by the conservative majorities of the Rehnquist and Roberts Court eras.

V. CONCLUSION

John Paul Stevens's life experiences led him to think deeply about capital punishment and show great concern throughout his career for thorough judicial review and the protection of constitutional rights in death penalty cases. Much of Stevens's decision making on capital punishment issues can be viewed as the product of these consistent concerns—namely for fair procedures, narrow application of the death penalty, and consistent adherence to the *Trop* standard for interpreting the Eighth Amendment through society's evolving values. His renunciation of capital punishment was largely the product of his reactions and resistance to increasingly conservative Court decisions that reduced the fairness and accuracy of capital case proceedings. However, his opinion in *Baze v. Rees* demonstrates that he did, in fact, change his view on one aspect of capital punishment: the deterrence rationale for the death penalty. Although this change conflicts with Justice Stevens's professed belief that he remained consistent while the Supreme Court changed, it is perfectly consistent with his explicit recognition of the need for judges to learn while serving on the bench.

Justice Stevens profoundly shaped the Supreme Court's debates and decisions concerning capital punishment. He succeeded in his goal of narrowing the applicability of the death penalty through his majority opinion in *Atkins*, which precluded the application of capital punishment to mentally retarded defendants,³¹⁷ and through his assignment to Justice Kennedy of responsibility for the majority opinions that eliminated the death penalty for juveniles under age eighteen³¹⁸ and defendants in child-rape cases.³¹⁹ In many cases, however, his role was only to resist the increasingly conservative Court's efforts to facilitate capital punishment at the expense of careful, fair procedures. His opinion

³¹⁷ *Atkins v. Virginia*, 536 U.S. 304 (2002).

³¹⁸ *Roper v. Simmons*, 543 U.S. 551 (2005).

³¹⁹ *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

in *Baze v. Rees*—highlighting the flaws in both the justifications for capital punishment and the Court’s enhancement of risks for arbitrariness, discrimination, and error—represented a kind of comprehensive final word on the subject from this thoughtful Justice. To date, most commentators have focused on Stevens’s use of the opinion to renounce capital punishment,³²⁰ which he did for three reasons: as a response to the Court’s conservative trend, as a consistent application of his approach to interpreting the Eighth Amendment, and also as a product of changing his mind about whether the death penalty could be supported by the deterrence justification. However, in light of Stevens’s retirement in 2010, the larger question for the country is whether any remaining Justice on the Roberts Court will assume his role as both critic of the conservative Court and conscience for the nation by highlighting unfair procedures and calling attention to the increased risks of injustice.

³²⁰ See Greenhouse, *supra* note 114.