Justice John Paul Stevens: Staunch Defender of Miranda Rights

Christopher E. Smith

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Christopher E. Smith, Justice John Paul Stevens: Staunch Defender of Miranda Rights, 60 DePaul L. Rev. 99 (2010)
Available at: https://via.library.depaul.edu/law-review/vol60/iss1/4

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
INTRODUCTION

As Justice John Paul Stevens reached his milestone ninetieth birthday in 2010, observers anticipated—and Justice Stevens himself confirmed—that he planned to retire from the Supreme Court after nearly thirty-five years of service as an Associate Justice. At the end of his career on the Court, commentators acknowledged his importance and influence in the characterizations that they made about him: “master strategist”; “leader of the [C]ourt’s liberal wing”; “independent-minded jurist”; and “strongest, most articulate voice on the [C]ourt defending the rights of criminal defendants and racial, religious, and other minorities.” The conclusion of Justice Stevens’s career is an appropriate moment to assess his impact on the development of law. This Article evaluates the contributions of Stevens by focusing on the important and controversial issue of Miranda warnings and the Fifth Amendment entitlement of suspects to be informed of their rights prior to custodial questioning.
II. Support for Miranda on the Supreme Court

The Supreme Court’s decision in *Miranda v. Arizona* created tremendous controversy as law enforcement officials and other critics of the Warren Court claimed that the ruling would prevent police and prosecutors from obtaining the incriminating statements that they regarded as essential for securing criminal convictions. Over time, many police officers came to accept their obligation to inform arrested suspects of the rights to remain silent and have access to an attorney during questioning. This acceptance reflected, in part, police officers’ recognition that they could adapt their behavior in ways that still enabled them to constitutionally elicit incriminating statements. For example, officers sometimes ask questions prior to making a formal arrest or pretend to befriend the suspect during interrogation. As the Supreme Court’s composition changed through the arrival of new Justices appointed by Republican presidents from 1969 through the early 1990s, majorities on the Burger and Rehnquist Courts is-

*Miranda* rights when police seek to question suspects already represented by counsel or already formally charged with crimes. See, e.g., *Patterson v. Illinois*, 487 U.S. 285 (1988) (examining whether an indicted suspect interviewed by police outside the presence of defense counsel violates the Sixth Amendment right to counsel).


14. See, e.g., Bradley C. Canon & Charles A. Johnson, *Judicial Policies: Implementation and Impact* 84 (2d ed. 1999) (prior to making an arrest, detectives may invite suspects to the station house or go to suspects’ homes to ask questions because *Miranda* only applies when suspects are in custody and have lost their voluntary freedom of movement); Richard C. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game, 30 Law & Soc'y Rev. 259*, 275 (1996) (“[T]he detective portrays himself as the suspect’s friend and ally, if not the suspect’s advocate, implicitly seeking the suspect’s trust and confidence.”).

sued decisions that gave police greater flexibility concerning when and how they delivered *Miranda* warnings to suspects. As a result, some scholars argue that *Miranda* warnings no longer have much impact on the work of police in investigating criminal cases and questioning suspects.

Despite the diminished impact of *Miranda* warnings, debates continue about whether the Warren Court's decision represents a proper interpretation of the Constitution and whether it endangers the public by impeding investigations, prosecutions, and convictions of dangerous criminal offenders.

Amid more than four decades of such debates, the Supreme Court has repeatedly reexamined, clarified, and modified the *Miranda* requirements in response to adaptive police behavior, new situations, and evolving legal standards.

---

16. See, e.g., New York v. Quarles, 467 U.S. 649, 650 (1984) (declaring that *Miranda* warnings are not immediately required for suspects in custody when an urgent "public safety" situation requires officers to ask questions without taking the time to recite warnings).

17. See, e.g., Duckworth v. Eagan, 492 U.S. 195, 202 (1989) (holding that police officers are not required to recite warnings exactly as specified in the original decision in *Miranda*).

18. See Charles J. Ogletree, Jr., *The Rehnquist Revolution in Criminal Procedure, in The Rehnquist Court: Judicial Activism on the Right* 54, 63 (Herman Schwartz ed., 2002) ("[T]he Court did not need to overrule *Miranda* because it had already eviscerated most of its protections."); Welsh S. White, *Miranda's Waning Protections: Police Interrogation Practices After Dickerson* 99 (2001) ("[T]here is little reason to believe that interrogators will be any less effective in obtaining waivers than they are in eliciting statements. Thus, when these strategies are employed, *Miranda*'s costs to law enforcement are likely to be negligible.").

19. See Joseph D. Grano, *Constitutions, Truth, and the Law* 173–74 (1993) ("Going beyond a mere conclusion that specific police conduct had violated the Constitution, the Court 'legislated' a set of four specific warnings . . . . The Court even conceded that the Constitution did not necessarily require adherence to this particular scheme for protecting Fifth Amendment rights . . . . "). But see Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 101st Cong. 64 (1990) (testimony of David H. Souter, Nominee, United States Supreme Court) ("[T]he point of *Miranda* was to produce a practical means to avoid what seemed to be unduly time consuming and sometimes intractable problems encountered in the Federal courts in dealing with claims that confessions were inadmissible on grounds of their involuntariness."); see also Goodwin Liu, Pamela S. Karlan & Christopher H. Schroeder, *Keeping Faith with the Constitution* (2009).

The [*Miranda*] decision itself is faithful to the Constitution in the way it interprets the document's text and principles to sustain their vitality as our society and institutions change over time. In particular, *Miranda* adapts the Fifth Amendment privilege against self-incrimination to important transformations of the criminal justice system that have occurred since the Founding era.

Id. at 92–93.


21. In one case, police interrogated a suspect without *Miranda* warnings, then delivered warnings and convinced the suspect to repeat the information in an attempt to immunize the interrogation from the exclusionary rule. See Missouri v. Seibert, 542 U.S. 600, 604–07 (2004).
and fundamental challenges to the Warren Court ruling. In these cases, as acknowledged by Justice David Souter in his confirmation hearings, the Supreme Court must "ask very practical questions about how [the Miranda rule] actually works." Thus, the examination of cases raising Miranda issues calls upon the Supreme Court's Justices to apply their personal understandings of human behavior and police practices, as well as their particular orientations toward constitutional interpretation.

As indicated in Table 1 below, Justice John Paul Stevens stands out among the Justices with whom he has served as a staunch defender of Miranda-related Fifth Amendment rights. The Table shows each Justice's percentage of support for individuals as opposed to the government in Miranda cases. Typically, support for individuals is classified as the "liberal" position in criminal justice cases according to analyses by scholars who study Supreme Court decision making. Overall, Justice Stevens was second only to Justice Thurgood Marshall in his percentage of support for individuals in Miranda-issue cases (as demonstrated in the second numeric column).

---

22. See, e.g., Pennsylvania v. Muniz, 496 U.S. 582 (1990) (examining the applicability of Miranda requirements to a police station informational interview of a drunk-driving arrestee).


24. Nomination of David H. Souter, supra note 19, at 64.

25. Miranda-related cases are not unique in calling upon Justices to project their practical assumptions and understandings about people and society into their assessments of constitutional rules. For example, in a stop-and-frisk Fourth Amendment search case in which the majority of Justices assumed that police officers could reasonably suspect the existence of criminal evidence or conduct when a person runs away, Justice Stevens expressed an alternative understanding about human behavior and social context in American society:

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


26. It is widely recognized that in recent decades the members of the Supreme Court have espoused differing approaches to constitutional interpretation, including advocacy of originalism. See Antonin Scalia, Foreword, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 43-45 (Steven G. Calabresi ed., 2007). They have also adopted individual approaches to the concept of "liberty." See generally Stephen Breyer, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

27. The Supreme Court Judicial Database, which is the source of the data and classifications for this table, 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." See Harold J. Spaeth & Jeffrey A. Segal, Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project, 73 JUDICATURE 103, 103 (1989).
Table 1: Comparison of Justices’ Support for Individuals’ Claims in Criminal Procedure Cases and Miranda Fifth Amendment Cases.

<table>
<thead>
<tr>
<th>Justice</th>
<th>Criminal Procedure</th>
<th>Miranda-Issue</th>
<th>Difference in %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marshall</td>
<td>80%</td>
<td>94% [17 cases]</td>
<td>+14</td>
</tr>
<tr>
<td>Stevens</td>
<td>65%</td>
<td>82% [22 cases]</td>
<td>+17</td>
</tr>
<tr>
<td>Brennan</td>
<td>76%</td>
<td>81% [16 cases]</td>
<td>+5</td>
</tr>
<tr>
<td>Blackmun</td>
<td>42%</td>
<td>35% [17 cases]</td>
<td>-7</td>
</tr>
<tr>
<td>Kennedy</td>
<td>30%</td>
<td>33% [9 cases]</td>
<td>+3</td>
</tr>
<tr>
<td>Powell</td>
<td>29%</td>
<td>25% [12 cases]</td>
<td>-4</td>
</tr>
<tr>
<td>Burger</td>
<td>20%</td>
<td>22% [9 cases]</td>
<td>+2</td>
</tr>
<tr>
<td>O’Connor</td>
<td>27%</td>
<td>19% [16 cases]</td>
<td>-8</td>
</tr>
<tr>
<td>White</td>
<td>33%</td>
<td>18% [17 cases]</td>
<td>-15</td>
</tr>
<tr>
<td>Rehnquist</td>
<td>17%</td>
<td>15% [20 cases]</td>
<td>-2</td>
</tr>
<tr>
<td>Scalia</td>
<td>25%</td>
<td>0% [12 cases]</td>
<td>-25</td>
</tr>
</tbody>
</table>

Table 1 also provides a measure of how each Justice’s voting record in Miranda cases compared with his or her overall voting record in criminal procedure cases. The difference between Justices’ overall criminal procedure voting and their Miranda-issue voting may provide a rough indicator of the extent to which they had particularly strong or different viewpoints on this Fifth Amendment issue as compared to other issues in criminal justice. Using this measure, Justice Stevens...


29. The Miranda issue voting records summarize each Justice’s voting during the period of Justice Stevens’s career, from the 1975 Term through the 2009 Term. See Harold Spaeth, Supreme Court Judicial Data Base, http://supremecourtdatabase.org (last visited Mar. 1, 2011). Using the online analysis functions at http://supremecourtdatabase.org/analysis.php, a search identified cases classified as “Miranda warnings” for the Terms 1975 through 2008. The Table represents a manual tabulation of data drawn from the Supreme Court database. Id. The Table includes only those Justices who participated in nine or more Miranda cases during the period of Justice Stevens’s career. The more recent appointees to the Supreme Court (Chief Justice John Roberts, Justice Samuel Alito, and Justice Sonia Sotomayor) participated in fewer Miranda-issue cases. Thus, their vote in a single case could have an overly significant and potentially distorting impact on their percentages, such as when Justices who have only participated in five such cases supported individuals in two cases (forty percent) instead of three cases (sixty percent).

30. Because only four of the eleven Justices presented in the Table have double-digit differences between their criminal procedure cases in general and Miranda cases specifically, this may indicate that there is a particular clarity or consistency in their views about this issue. If all of the Justices had only single-digit differences between the two figures, then one might infer that the Miranda issue is somewhat undifferentiated from other criminal justice issues and the Justices treat the Fifth Amendment right in the same or a similar fashion as other rights issues in the
DEPAUL LAW REVIEW

stands out as a strong supporter of Miranda rights, particularly in light of his level of support for other criminal justice rights. Justice Marshall also was an especially strong supporter. Conversely, Justice White, and especially Justice Scalia, were exceptionally strong opponents of Miranda claims.

Justice White's critical stance on this Fifth Amendment right is not surprising. He wrote a particularly scathing dissenting opinion that harshly condemned the potential consequences of Chief Justice Earl Warren's majority opinion in Miranda. Although Justice Scalia is widely recognized as a critic of certain rights in the criminal justice system, his absolute opposition to Miranda in the cases represented in this Table is striking in light of his support for other constitutional rights of criminal defendants. Presumably, the extent of his opposition is related to the fact that Miranda warnings cannot be justified through the originalist and textualist approaches to constitutional interpretation which he espouses.

Among the consistent supporters of individuals' Miranda claims, the high levels of support demonstrated by Justices Marshall and Brennan seem understandable. Both were members of the Warren Court and part of the dominant majority on the Court during the era in which the Supreme Court had its most liberal composition with respect to criminal justice cases. Indeed, Justice Brennan's support for
Miranda rights can be seen as reflecting his defense of the controversial decision in which he was a member of the five-Justice majority in the original case.\(^{37}\) By contrast, the reasons for Justice Stevens's high level of support for Miranda rights are less apparent, especially when one considers that Justice Stevens was a Republican from an affluent family\(^{38}\) who was appointed to the federal bench first by Republican President Richard Nixon and later elevated to the Supreme Court by Republican President Gerald Ford.\(^{39}\) These background characteristics for Justice Stevens are not generally considered to be predictors of liberal judicial decisions in criminal justice cases.\(^{40}\) Moreover, Justice Stevens's pre-judicial legal career as a private-practice attorney is typically summarized with the description of him as "a specialist in antitrust matters,"\(^{41}\) rather than as a lawyer with interest and experience in cases involving constitutional rights. Yet, as indicated in Table 1, Justice Stevens stands out as an exceptionally staunch defender of Miranda rights.\(^{42}\)

### III. Justice Stevens: Life Experience and Support for Miranda

Scholars who study the Supreme Court attribute Justices' votes and opinions on specific issues to various personal influences and theories of judicial decision making.\(^{43}\) Some scholars make the case for one primary factor, such as underlying attitudes\(^{44}\) or a specific theory of

---

38. See Robert Judd Sickels, John Paul Stevens and the Constitution: The Search for Balance 1 (1988) ("[He was] a Republican, son of a prominent Republican businessman in Chicago, [and] named by Republican presidents to the federal court of appeals and then to the Supreme Court . . . .").
39. Justice Stevens was appointed to the United States Court of Appeals for the Seventh Circuit by President Richard Nixon in 1970 and to the Supreme Court by President Gerald Ford in 1975. The Supreme Court at Work, supra note 3, at 206.
40. By contrast, liberal jurist Justice Brennan was also appointed by a Republican president (Eisenhower) but he was a Democrat, and his father was a labor union organizer and a public official. Kim Isaac Eisler, A Justice for All: William J. Brennan, Jr., and the Decisions that Transformed America 19-20, 89-91 (1993).
42. See Table 1, supra notes 28-29.
43. See generally The Pioneers of Judicial Behavior (Nancy Maveety ed., 2003) (describing the scholars who developed modern theories of judicial decision making).
44. See Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model, at xvi (1993) ("Unlike the legal model, our attitudinal model enables us to systematically explain—validly and reliably—how the Court operates and why the justices behave as they do.").
constitutional interpretation,45 as driving the decision making of Justices. Other analysts recognize that multiple factors may affect judicial decision making,46 such as when Justices' attitudes, interpretive theories, and their awareness of external audiences47 interact with their strategic decisions48 as they confront legal issues. In addition, Justices' life experiences can be seen as an overarching influence that affects the development of attitudes and values, shapes interpretive theories, and defines audiences of importance to individual judicial decisionmakers.49 Supreme Court Justices may themselves acknowledge the impact of life experiences, such as when Justice Sandra Day O'Connor said,

We're all creatures of our upbringing. We bring whatever we are as people to a job like the Supreme Court. We have our life experiences. For example, for me it was growing up on a remote ranch in the West. If something broke, you'd have to fix it yourself. The solution didn't always have to look beautiful, but it had to work. So that made me a little more pragmatic than some other justices. I liked to find solutions that would work. . . .

45. See Christopher E. Smith, Bent on Original Intent, 82 A.B.A.J., Oct. 1996, at 48 ("This does not mean that his opinions are either completely consistent or flawless in their reasoning. But Thomas distinguishes himself by . . . consistently advocating the strict application of key tools for interpreting the Constitution: its text and history.").

46. See Lawrence Baum, The Puzzle of Judicial Behavior 7 (1997) ("Explanations of Supreme Court behavior that treat the justices basically as isolated individuals can be quite useful. But no complete explanation of the justices' behavior could leave aside their interactions with colleagues on the Court.").

47. See Lawrence Baum, Judges and Their Audiences: A Perspective on Judicial Behavior 23 (2006).

I believe that judges' motivation to win the approval of their audiences can explain a good deal about their choices as decision makers, and I seek to demonstrate that explanatory value. But even more important is the value of thinking about judges and their audiences as a means to develop new understandings of judicial behavior.

Ibid.

48. See Thomas H. Hammond, Chris W. Bonneau & Reginald S. Sheehan, Strategic Behavior and Policy Choice on the U.S. Supreme Court 24 (2005) ("Our own model of decision-making by strategically rational justices will demonstrate that the location of the status quo policy has a major impact on what final policy is chosen and on the sizes of the coalitions supporting and opposing this final policy.").

49. Biographers who study Supreme Court Justices often identify ways in which life experiences, including family upbringing and career paths, shape values and worldviews that ultimately guide judicial decision making. See, for example, Joan Biskupic, American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia 31 (2009), which states,

Molded by his Italian roots, yet fully assimilated, the young man with the intellectual father and classical training embraced the world of rules. He found it ballast in the rough seas of changing social values. Legal work offered Scalia, he would later say, an identity tied to precision and reverence for the text.

Ibid.
It's important for the Supreme Court to have a broader set of life experiences than just people who have served as judges. Indeed, Justice Stevens has—more so than other Justices—explicitly acknowledged the impact of life experiences on his performance as a judge, as when he said in a 2010 interview, "I've confessed to many people that I think my personal experience has had an impact on what I've done. . . . Time and time again, not only for myself but for other people on the Court, during discussions of cases you bring up experiences that you are familiar with." When one examines the life experiences of Justice Stevens, the apparent basis for his strong support of Miranda rights emerges from events during his years as a law clerk, attorney, and judge.

A. Personal Knowledge and the Perceived Risk of Police Misbehavior

Chief Justice Warren's majority opinion in Miranda made it clear that protective warnings were required as a means to prevent abusive interrogation practices by the police. The opinion described a then-recent example of the use of violence by police when seeking information and questioning someone in custody:

The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party.

Chief Justice Warren was keenly aware of the risk of abusive police tactics, in part, because his generation had grown into adulthood when the nation’s police departments were typically unprofessional, poorly

52. The Court explained, The difficulty in depicting what transpires at such interrogations stems from the fact that in this country, they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930’s, including the famous Wickersham Report to Congress by a Presidential Commission, it is clear that police violence and the “third degree” flourished at that time. In a series of cases decided by this Court long after these studies, the police resorted to physical brutality—beating, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions. The Commission on Civil Rights in 1961 found much evidence to indicate that “some policemen still resort to physical force to obtain confessions.”
53. Id. at 446 (citing People v. Portelli, 205 N.E.2d 857 (N.Y. 1965)).
trained, and accustomed to exercising coercive authority with near absolute discretion. As a prosecutor in California during the 1920s and 1930s, Warren saw firsthand the problems of unprofessional police mistreating suspects, employing untrustworthy informants, and engaging in corruption.

The other Warren Court Justices who, like Chief Justice Warren, were most supportive of expanded rights each had specific knowledge of the risks of police misbehavior from witnessing this era of non-professional policing. For example, Justice Brennan's biographer described a personal experience of police abuse that caused an enduring memory for the consistent advocate of strong rights and clear limits on police authority:

A turning point in the life of the Brennan family came in 1916 when ten-year-old Bill junior witnessed his father being carried into the house by union brothers, bloodied and beaten by city police after a particularly bitter union battle over the trolley-car drivers. Few events in his childhood affected him more. Police beatings would never be anything abstract to the Brennans.

Similarly, Thurgood Marshall—who courageously defended African-American defendants throughout the South during the 1940s—was arrested under false pretenses by Tennessee police officers intent on delivering him to a lynch mob. Fortunately, the officers, who had already driven Marshall off the road and toward the waiting mob, changed their minds when they realized that witnesses might be able to describe their involvement in Marshall's murder. In yet another

55. See Cray, supra note 11, at 38-41.
56. See Smith, supra note 36, at 35-37.
57. Eisler, supra note 40, at 19.
59. Id. at 54-55 (“Marshall and Looby left Columbia, with Marshall driving. After a few minutes they heard police sirens behind them and pulled over. Three cars of police officers emptied and ordered Marshall and Looby out of the car, so that, as the officers said, they could search for liquor. . . . [T]he search turned up nothing. . . . Looby told Marshall that Looby would take over the driving. . . . [The police] asked to see the driver’s licenses and ‘called out the names.’ When Marshall’s was called, someone in the crowd said, ‘That’s the one.’ Marshall was arrested for driving while drunk, even though he was no longer driving the car. He told them that he had not had a drink in two days. . . . The officers took Marshall in one police car and began to drive down a side road. Looby followed in his car, and, when the officers failed to persuade Looby to stop following them, the cars went to Columbia.”).

Marshall was pushed into the backseat of an unmarked police car.

The police did not want any eyewitnesses. . . . [Looby] watched with growing horror as the car turned off the highway and headed down a dirt road toward the river. Un-
example, William O. Douglas’s autobiography describes his experiences in Yakima, Washington, observing the police mistreat poor people. This led Justice Douglas to write, “I knew their victims too intimately to align myself with the police.”

As indicated by the divided vote in *Miranda* itself, not all Supreme Court Justices from this generation perceived the same risks of police misbehavior. These differing perceptions could stem from less contact with and awareness about unprofessional police, doubts about the propriety or efficacy of particular judicially developed rules aimed at curbing police misconduct, or fidelity to an interpretive approach that did not support these judicially created rules or guidelines.

daunted by their threats, Looby followed the police car. . . . Speaking slowly out of fear, Looby said that he wasn’t leaving until he saw Marshall. . . . [T]o his surprise, the policeman stomped away to talk with others in the car. The police were worried that even if Looby were to leave then, there would be witnesses to the fact that Marshall had not been driven back to town. . . . The policeman got back in the car. To turn around they had to drive closer to the river, and that was when Marshall, from his uncomfortable perch in the backseat, saw an angry group of men waiting by the water. But the police car did not stop.

63. Justice Harlan grew up in “a distinguished, old, upper-class family.” See Wallace Mendelson, *Justice John Marshall Harlan: Non sub Homine . . .*, in THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES 193, 193 (Charles M. Lamb & Stephen C. Halpern eds., 1991). He worked primarily for a Wall Street law firm with some periods of service as a prosecutor after studying at Princeton and Oxford. See THE SUPREME COURT AT WORK, supra note 3, at 198. He may not have had unpleasantly illuminating contacts with the police. Because his father was a member of the Cincinnati City Council and later became mayor of Cincinnati and a justice on the Ohio Supreme Court, Potter Stewart may also have missed gaining personal contact with and skepticism about abusive police practices. See Tinsley E. Yarbrough, *Justice Potter Stewart: Decisional Patterns in Search of Doctrinal Moorings*, in THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES, supra, at 375, 376.
64. In his *Miranda* dissent, for example, Justice White expressed opposition to the propriety of the new rules created in the majority’s decision. See *Miranda*, 384 U.S. at 542 (White, J., dissenting) (“There is, in my view, every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now, under this new version of the Fifth Amendment, either not be tried at all or will be acquitted if the State’s evidence, minus the confession, is put to the test of litigation. I have no desire whatsoever to share the responsibility for any such impact on the present criminal process.”).
65. In the Fourth Amendment context, Justice Harlan’s conception of federalism served as one basis for his opposition to the application of the exclusionary rule to the states. See *Mapp v. Ohio*, 367 U.S. 643, 680 (1960) (Harlan, J., dissenting) (“The preservation of a proper balance between state and federal responsibility in the administration of criminal justice demands patience on the part of those who might like to see things move faster among the States in this respect.”).
How should Justice Stevens be classified with respect to his life experiences and perceptions about the risk of police misconduct? It seems clear that Justice Stevens shares the generational vantage point of the *Miranda* majority members who grew up in the era of unprofessional policing, based in part on his own personal knowledge. Although Justice Stevens was younger than the members of the *Miranda* majority, he grew up in Chicago, which was known for abusive police practices up through the 1980s. In his public speeches, Justice Stevens discussed his knowledge of police brutality in Chicago. In one speech referring to the 1930s in Chicago, Justice Stevens said, "At that time, less prosperous criminals were sometimes treated brutally by Chicago police officers seeking confessions of guilt." This declaration seems directly connected to the underlying concerns of *Miranda*-related cases. In another speech, Justice Stevens spoke of police misconduct in a case in which he represented a convicted offender: "It was a few years after my graduation [from law school], in the course of the pro bono representation of an inmate who had been

66. As indicated in Table 1, supra notes 28–29 and accompanying text, Justice Stevens's strong support for *Miranda* rights is most similar in consistency to the voting records of Justices Marshall and Brennan whose generational life experiences made them skeptical about the risks of abusive police behavior. See supra notes 56–61.


68. Justice Stevens was born in 1920, while the *Miranda* majority members were born in 1886 (Justice Black), 1891 (Chief Justice Warren), 1898 (Justice Douglas), 1906 (Justice Brennan), and 1910 (Justice Fortas). See *The Supreme Court at Work*, supra note 3, at 188, 190, 197, 199, 202, 206.

69. See Jodi Rudoren, *Inquiry Finds Police Abuse, but Says Law Bars Trials*, N.Y. Times, July 20, 2006, at A14 (“Special prosecutors said Wednesday that scores of criminal suspects were routinely brutalized by police officers on the South Side of Chicago in the 1970’s and 1980’s . . . .”). Another article reported more Chicago police brutality:

[S]cores of criminal suspects, many poor and black, have come forward saying they were routinely brutalized by Mr. Burge and the mostly white officers under his command on the South Side in the 1980s.

. . . .

According to the indictment, Mr. Burge "well knew" he had participated in and was aware of "such events involving the abuse or torture of people in custody," including wrapping inmates' heads in plastic to make them feel as if they were suffocating.


70. See Smith, supra note 67, at 99–100.

in prison since 1937, that I learned that some of those interrogations did, in fact, involve brutal and indefensible police conduct." 72

Justice Stevens was referring to People v. La Frana, 73 a case in which he helped free from prison a man who had served seventeen years after being tortured by Chicago police into confessing to a murder that he did not commit. As described by the Illinois Supreme Court, La Frana was hung from a door by his handcuffed wrists and beaten until he lost consciousness. 74 Eventually, he agreed to sign a confession. 75 Justice Stevens referred to his memories of what happened to his client, La Frana, when he said, "What I learned from that case has no doubt had an impact on my work on the Supreme Court." 76 In light of the number of brief references to this case in his speeches, it seems reasonable to presume that La Frana's victimization at the hands of the police is an important, unforgettable memory that Justice Stevens recalled when he confronted cases raising Miranda-related questions about protecting suspects from improper police coercion during questioning.

Although not directly related to Miranda cases, other experiences in his judicial career provided Justice Stevens with an awareness of the risks of abusive police behavior. His knowledge of these risks could very well affect his determination in Miranda-issue cases to impose clear, strong limits on police behavior. For example, during his tenure as a judge on the U.S. Court of Appeals for the Seventh Circuit from 1970 to 1975, 77 then-Judge Stevens wrote an opinion in a highly publicized civil rights lawsuit in which Chicago police officers were accused of intentionally shooting and killing the leaders of the local Black Pan-

73. People v. La Frana, 122 N.E.2d 583 (Ill. 1954).
74. The La Frana court stated,

According to defendant’s testimony, when he refused to confess the captain hit him repeatedly with his 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 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.

Id. at 585.
75. Id.
77. THE SUPREME COURT AT WORK, supra note 3, at 206.
ther Party.\textsuperscript{78} In a predawn raid in 1969, more than a dozen police officers entered the apartment where the Black Panthers were sleeping and fired more than eighty rounds, killing Fred Hampton and Mark Clark, arresting others present at the apartment, and charging them with attempted murder for allegedly firing at the police.\textsuperscript{79} In the civil lawsuit that eventually followed, the U.S. district judge dismissed claims against various defendants, including Mayor Richard Daley, Sr. and the prosecutors who allegedly helped to plan the raid.\textsuperscript{80} On behalf of a unanimous Seventh Circuit panel, the opinion by Judge Stevens reversed the district court decision with respect to several defendants. The court permitted the lawsuit to proceed against the prosecutors and the police officers who investigated the raid, in addition to the fourteen officers who had been at the scene of the raid\textsuperscript{81}—the only defendants who had failed to convince the district court to dismiss the claims against them.\textsuperscript{82} The case concluded nine years later when the government paid a settlement of nearly $2 million to the survivors.\textsuperscript{83} In light of such experiences, it is clear that for Justice Stevens, like Justices Brennan\textsuperscript{84} and Marshall,\textsuperscript{85} the risk of abusive police behavior was real and not merely a remote, hypothetical possibility.

\textbf{B. The Importance of Representation by Counsel and the Adversary System}

A core element of \textit{Miranda} warnings is notice to suspects in custody that they have a right to be represented by counsel during questioning and to have counsel appointed if they cannot afford their own counsel.\textsuperscript{86} This core element presumably had special importance to Justice

\textsuperscript{78.} Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973).
\textsuperscript{81.} \textit{Hampton}, 484 F.2d at 602.
\textsuperscript{82.} \textit{Hampton}, 339 F. Supp. at 700–01.
\textsuperscript{83.} \textit{Cook County Board Approves Settlement for Panther Suit}, N.Y. TIMES, Nov. 3, 1982, at A18.
\textsuperscript{84.} Eisler, \textit{supra} note 40, at 19.
\textsuperscript{85.} Williams, \textit{supra} note 60, at 139–40.
\textsuperscript{86.} The \textit{Miranda} Court stated,

\begin{quote}
Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege [against compelled self-incrimination] we delineate today. \ldots
\end{quote}
Stevens because, in the later years of the Rehnquist Court and early years of the Roberts Court, he "[stood] out among the Justices as perhaps the foremost advocate of the right to counsel." His strong advocacy of representation by legal counsel and the adversary system is evident in many of his opinions, and moreover, he insisted that "[t]he pretrial right to counsel is not ancillary to, or of lesser importance than, the right to rely on counsel at trial."

His unforgettable experience in obtaining freedom for La Frana presumably demonstrated to Justice Stevens the importance of effective legal representation as well as the risks of police abuse. In addition, it is likely that his earlier formative experience as a law clerk for Justice Wiley Rutledge during the Supreme Court's 1947 Term also shaped his views on the importance of the right to counsel.

Custodial questioning and right to counsel issues arose in a number of cases while then-law clerk Stevens was researching legal issues and writing memoranda for Justice Rutledge. Two cases during that Term directly raised Miranda-type situations involving African-American teenagers, one in Ohio and one in Mississippi, whose confessions may have been coerced. Justice Rutledge was a member of the majority in each case as the Supreme Court challenged the voluntariness of the confessions, reversing the lower court decisions that had sustained

In order to fully apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to counsel with an attorney, but also that if he is indigent a lawyer will be appoint to represent him.


87. In earlier years, Justices other than Stevens, such as Brennan and Marshall, sometimes endorsed the broadest views of the protective scope of the right to counsel. See, e.g., Perry v. Leeke, 488 U.S. 272 (1989) (Justices Marshall, Brennan, and Blackmun dissented against a Justice Stevens-authored majority opinion that rejected a Sixth Amendment claim when a trial judge prevented a defendant from consulting with his attorney during a brief recess at the trial); Burger v. Kemp, 483 U.S. 776 (1987) (ineffective assistance of counsel case in which Justices Blackmun, Brennan, Marshall, and Powell dissented against a Stevens-authored majority opinion that rejected the petitioner's claim).


89. See id. at 736–38.


91. See supra notes 66–75 and accompanying text.

92. See 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) ("The example of Justice Rutledge and Justice Stevens offers a particularly intriguing field of study. . . . [I]t nonetheless reveals the 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.").


the convictions. The description by Justice Douglas of the majority’s conclusions in the Ohio case demonstrated that Rutledge and other like-minded Justices during that Term were concerned about the very issues that the Warren Court would address with its bright-line rule in *Miranda* (nearly two decades later):

The age of petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police towards his rights combine to convince us that this was a confession wrung from a child by means which the law should not sanction. Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law. The Fourteenth Amendment prohibits the police from using the private, secret custody of either man or child as a device for wringing confessions from them.

As for the Sixth Amendment right to counsel cases, at that moment in history the right was guided by *Betts v. Brady*, which required appointed counsel for indigent defendants in state cases only when special circumstances prevented them from representing themselves. The Court was still nearly fifteen years away from making a uniform rule requiring appointment of counsel for all indigent defendants facing serious charges, and thus many petitioners brought claims in the 1947 Term when they did not receive the benefit of counsel. Justice Stevens inevitably had intimate exposure to the issues and the lawyers’ briefs as he watched his mentor, Justice Rutledge, consistently support a broader definition of the right to counsel. For example, the Rutledge Papers at the Library of Congress reveal that a memorandum written by Justice Stevens provided key language that Justice Rutledge used to criticize the post-conviction judicial processes in Illinois. The case concerned a teenage Italian immigrant who spoke

---

95. *See Haley*, 332 U.S. at 599 ("We do not think the methods used in obtaining this confession can be squared with that due process of law which the Fourteenth Amendment commands."); *Lee*, 332 U.S. at 745–46 ("[F]oreclosure of the right to complain 'of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void,' . . . would itself be a denial of due process of law." (citation omitted)).
96. *Haley*, 332 U.S. at 600–01.
98. *Id.* at 471–73.
100. *See John M. Ferren, Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge* 352 (2004) ("Beginning in the 1945 Term, Rutledge began what eventually became a campaign to assure criminal defendants a truly effective right to counsel in state as well as federal courts.").
no English and had no attorney but was convicted of murder and given a life sentence.\textsuperscript{102}

In another case during that Term, Justice Rutledge joined the majority opinion that concluded representation by counsel was essential to a fair proceeding in order to avoid the use of erroneous records for sentencing.\textsuperscript{103} He also joined an opinion by Justice Murphy in a habeas corpus case declaring 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."\textsuperscript{104} In another example, Justice Rutledge joined Justice Black's opinion finding 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 [were] taken from her."\textsuperscript{105} And, in a dissent joined by Justices Black, Douglas, and Murphy, Justice Rutledge expressed his dissatisfaction with the then-existing rule that limited the requirement of appointed counsel to indigent defendants who were classified by trial judges as having a special inability to represent themselves in court.\textsuperscript{106} In Justice Rutledge's words,

Perhaps the difference serves only to illustrate how capricious are the results when the right to counsel is made to depend not upon the mandate of the Constitution, but upon the vagaries of whether judges, the same or different, will regard this incident or that in the course of particular criminal proceedings as prejudicial.\textsuperscript{107}

Thus, Justice Stevens clerked for a Justice who dealt with a number of right to counsel issues and who saw representation by counsel as essential to fair proceedings. Moreover, Justice Rutledge advocated broader availability of defense counsel for indigent criminal defendants.

Nearly thirty years later, as a Supreme Court nominee, Stevens spoke with great clarity about his view of the importance of legal representation in criminal justice cases:

Senator [John] Tunney [(D-Calif)]: Do you have anything that you would care to express on the general subject of right to counsel that might help the committee in any future action?

\begin{itemize}
  \item \textsuperscript{102} Marino v. Ragen, 332 U.S. 561, 562 (1947).
  \item \textsuperscript{103} 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.").
  \item \textsuperscript{104} Wade v. Mayo, 334 U.S. 672, 684 (1948).
  \item \textsuperscript{105} Von Moltke v. Gillies, 332 U.S. 708, 726 (1948).
  \item \textsuperscript{106} Gryger v. Burke, 334 U.S. 728, 736 (1948) (Rutledge, J., dissenting).
  \item \textsuperscript{107} Id.
\end{itemize}
Judge Stevens: Yes; I don't hesitate in saying that I think one of the
most important aspects of procedural fairness is availability of coun-
sel to the litigant on either side. I could not overemphasize the im-
portance of the lawyer's role in the adversary process and it is
unquestionably a matter of major importance in all litigation.\textsuperscript{108}

The subsequent judicial opinions written by Justice Stevens rein-
forced this statement from his confirmation testimony. In \textit{Penson v.}
\textit{Ohio},\textsuperscript{109} a Justice Stevens-authored majority opinion found that a con-
victed offender had been denied adequate representation when his at-
torney ignored potentially arguable claims and asserted that there was
no basis for an appeal.\textsuperscript{110} Justice Stevens wrote, "It bears emphasis
that the right to be represented by counsel is among the most funda-
mental rights. We have long recognized that 'lawyers in criminal
courts are necessities, not luxuries.' . . . As a general matter, it is
through counsel that all other rights of the accused are protected."\textsuperscript{111}
He also declared that "[t]he paramount importance of vigorous repre-
sentation follows from the nature of our adversarial system of justice.
This system is premised on the well-tested principle that truth—as
well as fairness—is 'best discovered by powerful statements on both
sides of the question.'"\textsuperscript{112}

In \textit{United States v. Cronic},\textsuperscript{113} a case that established standards for
evaluating ineffective assistance of counsel,\textsuperscript{114} Justice Stevens wrote,

\begin{quotation}
An accused's right to be represented by counsel is a fundamental
component of our criminal justice system. [The presence of law-
yers] is essential because they are the means through which the
rights of the person on trial are secured. Without counsel, the right
to a trial itself would be "of little avail," as this Court has recog-
nized repeatedly. "Of all the rights that an accused person has, the
right to be represented by counsel is by far the most pervasive for it
affects his ability to assert any other rights he may have."\textsuperscript{115}
\end{quotation}

Even outside the realm of criminal justice, Justice Stevens insisted
that representation by counsel was essential in our adversary sys-

\textsuperscript{108} Nomination of John Paul Stevens to be a Justice of the Supreme Court: Hearings Before
the S. Comm. on the Judiciary, 94th Cong. 78 (1975) (testimony of John Paul Stevens, Nominee,
United States Supreme Court).
\textsuperscript{110} Id. at 75.
\textsuperscript{111} Id. at 84 (quoting Gideon v. Wainright, 372 U.S. 335, 344 (1963)).
\textsuperscript{112} Id. (quoting Irving R. Kaufman, Does the Judge Have a Right to Qualified Counsel?, 61
\textsuperscript{114} Id. at 665 ("Respondent can therefore make out a claim of ineffective assistance only by
pointing to specific errors made by trial counsel.").
\textsuperscript{115} Id. at 653–54 (citations omitted).
tem.116 His description of "the function of the independent lawyer as a guardian of our freedom" conveyed his view of the unparalleled importance of attorneys in the American civil justice system.117 He reiterated this point by writing that "the citizen's right to consult with an independent lawyer and to retain that lawyer to speak on his or her behalf is an aspect of liberty that is priceless."118 Beginning with his very first Term on the Court, Justice Stevens espoused an expansive view of liberty as a "cardinal [and] unalienable" natural right.119 By linking representation by counsel with this most important of rights, he demonstrated the strength of his belief in counsel's essential role.

In another example—a case concerning an indigent woman seeking a right to representation when fighting the termination of parental rights—Justice Stevens emphatically reasserted his view.120 He characterized representation by counsel as a matter of "fundamental fairness"121 and as essential to the protection of the "priceless" right to liberty that is safeguarded by the Due Process Clause.122

In my opinion, the reasons supporting the conclusion that the Due Process Clause of the Fourteenth Amendment entitles the defendant in a criminal case to representation by counsel apply with equal force to a case of this kind. The issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits. Accordingly, even if the costs to the State were not relatively insignificant but rather were just as great as the costs of providing prosecutors, judges, and defense counsel to ensure the fairness of criminal proceedings, I would reach the same result in this category of cases. For the value of protecting our liberty from deprivation by the State without due process of law is priceless.123

In seeking new ways to repeatedly assert and emphasize his argument about the supreme importance of representation, Justice Stevens even drew from his original vocational aspiration to become a professor of literature124 by using Shakespeare to highlight the necessity of

117. Id. at 371.
118. Id.
119. See Meachum v. Fano, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting) ("I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights.").
121. Id. at 60.
122. Id.
123. Id. at 59–60.
legal counsel. In referencing the famous line from the play *Henry VI, Part II*, "The first thing we do, let's kill all the lawyers,"125 Justice Stevens explained, "As a careful reading of that text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government."126

IV. STEVENS AS JURIST IN MIRANDA CASES

As indicated by the foregoing discussion, life experiences apparently contributed to Justice Stevens's concerns about the risks of abusive police behavior as well as his strong advocacy for the adversary system and the necessity of counsel for the protection of rights and the preservation of liberty. Justice Stevens has reportedly acknowledged, for example, that his life experiences growing up in Chicago taught him "that the criminal justice system can misfire sometimes."127 Just as his awareness and concern are evident in his Sixth Amendment right to counsel opinions,128 they are also evident in his decisions and opinions concerning *Miranda* issues.

A. Miranda Issues and Judge Stevens on the Seventh Circuit

While serving on the U.S. Court of Appeals for the Seventh Circuit (1970–1975), then-Judge Stevens served on panels that considered *Miranda* and right to counsel issues. These cases indicate that he possessed significant concerns about protecting the rights of suspects questioned while in custody and was more inclined than some of his Seventh Circuit colleagues to find that police officers had violated a suspect's *Miranda* rights.

In *United States v. Springer*,129 a bank robbery suspect challenged the admissibility of his confession because, after an attorney had been


126. Id.


128. See supra notes 108–26 and accompanying text.

appointed to represent him at his preliminary appearance in court, FBI agents questioned him and induced him to sign a waiver of rights without notifying his attorney.\textsuperscript{130} The two-member majority on the Seventh Circuit panel ruled against the defendant, holding that the defendant had failed to "present some facts tending to show that the waiver was not voluntary or knowledgeable."\textsuperscript{131} By contrast, Stevens wrote a dissenting opinion in which he asserted that the FBI agents had violated the principles of the right to counsel during custodial questioning, notwithstanding the existence of a waiver of rights signed by the defendant.\textsuperscript{132} Indeed, while the majority considered the signed waiver "sufficient to raise a presumption of validity and shift the burden of going forward to the accused,"\textsuperscript{133} Stevens regarded that same waiver signed by the defendant without counsel present as evidence that the defendant did not understand that he was waiving his rights.\textsuperscript{134} According to Stevens, "[t]he fact that the agents had the defendant sign a standard waiver of rights form on May 18 after counsel had been appointed provides affirmative evidence that he did not fully grasp the significance of the procedural situation in which he found himself."\textsuperscript{135} Stevens's dissenting opinion strongly asserted his viewpoint about the importance of defense counsel as an essential actor for ensuring the fairness of criminal justice processes:

After counsel had been appointed to represent him, and while he was in custody, the defendant was visited by two agents of the prosecutor. Defense counsel was not present and received no advance notice of their proposed visit. The sole purpose of the visit was to obtain evidence for use at trial. . . .

In a civil context I would consider this behavior unethical and unfair. In a criminal context I regard it as such a departure from "procedural regularity" as to violate the due process clause of the Fifth Amendment. If the evidence of guilt is as strong as the prosecutor contends, such direct communication is all the more offensive because it was unnecessary. If there is doubt about defendant's guilt, it should not be overcome by a procedure such as this.\textsuperscript{136}

In \textit{United States v. Fowler},\textsuperscript{137} Stevens was a member of a Seventh Circuit panel that examined the case of a teenager who was arrested and questioned by a postal inspector at a police station for allegedly

\textsuperscript{130} \textit{Id.} at 1347.
\textsuperscript{131} \textit{Id.} at 1349.
\textsuperscript{132} \textit{Id} at 1354 (Stevens, J., dissenting).
\textsuperscript{133} \textit{Id.} at 1349 (majority opinion).
\textsuperscript{134} \textit{Id.} at 1355 n.3 (Stevens, J., dissenting).
\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{Id.} at 1354–55.
\textsuperscript{137} \textit{United States v. Fowler}, 476 F.2d 1091 (7th Cir. 1973).
burglarizing a post office. Although Stevens did not write the court’s opinion, he was one of the two judges constituting the panel majority that concluded that the teenager had a right to be given *Miranda* warnings under the principles of *In re Gault*. Over the dissent of one panel member, Stevens and his colleague concluded that the youth’s confession should not have been admitted into evidence against him because it appeared that, although he was given warnings, he had not been fully and properly apprised of his *Miranda* rights.

For example, the postal inspector’s trial testimony indicated that he did not warn the teenager that any responses to questions could be used as evidence of guilt. The description of the facts in Judge Kiley’s majority opinion appeared to fit precisely with the concerns that Stevens held about the risk of police abuse and necessity of representation by counsel:

> When his confession was made Fowler was sixteen years of age. So far as the record shows he had not previously been arrested, had not previously been in jail, nor had he ever been interrogated by law enforcement officials. One need only recall his own adolescence to appreciate the impact upon this boy, alone in a jail room, in custody of a postal inspector, being warned of his constitutional rights. . . . In these circumstances it is difficult to accept the notion that defendant fully comprehended what he was being told.

It is especially noteworthy that in this empathetic description of an inexperienced, frightened teenager in the disorienting context of custodial questioning, Judge Kiley quoted the Supreme Court’s decision in *Haley v. Ohio*—a *Miranda*-related case with which then-Judge Stevens was presumably familiar because it was decided by the Court during the 1947 Term when he clerked for Justice Rutledge. In his own opinions and speeches, Justice Stevens has a penchant for citing cases with which he has had direct involvement. Thus, Judge

---

138. *Id.* at 1092.
139. *Id.* at 1093.
140. *In re Gault*, 387 U.S. 1 (1967) (initiating the extension of constitutional rights to juveniles in delinquency cases).
141. *Fowler*, 476 F.2d at 1093.
142. *Id.* at 1092.
143. *Id.* at 1093.
145. *See supra* notes 92–103 and accompanying text.
146. *See sources cited infra* note 170.
147. *See sources cited supra* notes 70–72.
148. For example, in *Michigan v. Harvey*, 494 U.S. 344 (1990), a case concerning the use for impeachment purposes of a statement obtained improperly during custodial police questioning, Justice Stevens’s dissenting opinion cited and quoted, without noting the identity of the author, his own majority opinion in *United States v. Cronic*, 466 U.S. 648 (1984), a case concerning a different legal issue, ineffective assistance of counsel. *Harvey*, 494 U.S. at 357 (Stevens, J., dis-
Kiley's prominent use of the *Haley* case may be evidence of input by then-Judge Stevens into the content of the majority opinion. Stevens wrote the majority opinion for a unanimous Seventh Circuit panel in *United States v. Oliver*.\textsuperscript{149} Oliver was under investigation by the IRS for understating his income on his tax returns.\textsuperscript{150} Having learned that Oliver was present in the Milwaukee Federal Building, IRS agents asked him to come to their offices and proceeded to interview him.\textsuperscript{151} They provided him with a limited warning about his rights, but as Stevens concluded in the opinion, "[T]he warnings did not include advice that Oliver could remain silent or that he could have a lawyer present during the interview."\textsuperscript{152} During the interview, "a person who purported to have a message for [the] defendant from his attorney was not permitted to communicate with [the] defendant . . . ."\textsuperscript{153} The case hinged on the issue of whether Oliver's liberty was significantly restrained during the interview and whether he was obligated to answer questions for purposes of *Miranda*,\textsuperscript{154} as well as the implications of questioning a suspect who was the focus of an ongoing investigation.\textsuperscript{155} Oliver would have lost if the panel had simply declared that he was free to leave but voluntarily chose not to do so. One could conclude that *Miranda* warnings were not required because Oliver had come to the office voluntarily, was not placed under arrest, and was presumed to know, like other citizens of average knowledge and intelligence, that people are entitled to terminate an encounter with law enforcement officers during questioning when not legally

\begin{itemize}
\item \textsuperscript{149} United States v. Oliver, 505 F.2d 301 (7th Cir. 1974).
\item \textsuperscript{150} Id. at 303.
\item \textsuperscript{151} Id.
\item \textsuperscript{152} Id. at 306.
\item \textsuperscript{153} Id. at 304.
\item \textsuperscript{154} See Christopher E. Smith, *Criminal Procedure* 218 (2003) ("The *Miranda* warnings apply only to custodial interrogations. If police officers walk up to someone on the streets and begin asking questions, there is no need to inform the person of his or her rights.").
\item \textsuperscript{155} Oliver, 505 F.2d at 305–06.
\end{itemize}
confined to that location. Instead, Stevens interpreted the factual context and applied the law to conclude that "[t]he incriminating evidence obtained from [Oliver’s] interrogation was inadmissible." According to Stevens,

In this case it is plain that the purpose of the agents' interrogation of the defendant was to develop evidence which would secure his conviction of a crime. The criminal investigation of Oliver had commenced several months before he was questioned, and there was no ambiguity about the agents' mission. No doubt ... Oliver was free to leave at any time, and therefore not strictly in custody. But since the agents were in a position to intercept a message from his attorney, and actually did so, it is appropriate, for the purpose of applying the Miranda test, to characterize the situation as one in which defendant's liberty was significantly restrained.

These three Seventh Circuit cases in which then-Judge Stevens defended Miranda-type rights do not prove that he reflexively or ideologically supported claims by defendants in every context. Indeed, he did not. In the Oliver case, he rejected the defendant's second claim that "his conviction must be reversed because the Fifth Amendment protects him from any compelled disclosure of his illegal activities," which the defendant asserted would occur if he had reported his income accurately in light of evidence that he was involved in narcotics trafficking. In another example from his time on the Seventh Circuit bench, Stevens was the lone dissenter against a decision that found a violation of Rule 11 of the Federal Rules of Criminal Procedure when a defendant was not fully advised that his guilty plea to the specific charge would make him ineligible for parole. However, with respect to his concerns about the risk of improper police conduct

---

156. For example, in Florida v. Bostick, 501 U.S. 429 (1991), Justice O'Connor's majority opinion rejected a defendant's contention that he had not been free to leave when officers were blocking the aisle while asking him questions on an interstate bus. According to O'Connor, Bostick's freedom of movement was restricted by a factor independent of police conduct—i.e., by his being a passenger on a bus. . . . In such a situation, the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter. . . . We have said before that the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." Id. at 436–37 (quoting Michigan v. Chesternut, 486 U.S. 567, 569 (1988)).
157. Oliver, 505 F.2d at 306.
158. Id. at 305–06.
159. Id. at 306–07.
160. United States v. Smith, 440 F.2d 521, 527 (1971) (Stevens, J., dissenting) ("[A] rigid rule that makes a guilty plea vulnerable whenever a trial judge fails to supplement counsel's advice with an enumeration of all significant consequences of the plea is neither necessary to the maintenance of civilized standards of procedure nor desirable.").
while questioning suspects and the importance of defense counsel in
the adversary system, Springer, Fowler, and Oliver show that Justice
Stevens brought with him to the Supreme Court strong viewpoints
about the importance of Miranda rights, cultivated in part during his
time on the Seventh Circuit.

B. Miranda Issues and Justice Stevens on the Supreme Court

Table 1 illustrated the consistency and strength of Justice Stevens’s
support for individuals whose Miranda claims were heard by the Su-
preme Court, but Justice Stevens did not reflexively support indi-
viduals in such cases. Consistent with the preceding discussion of
Seventh Circuit cases, Justice Stevens sided with the government in
some Miranda-related decisions by the Supreme Court. For exam-
ple, in Colorado v. Spring, Justice Stevens joined a majority opinion
that declared, over the dissents of Justices Marshall and Brennan, that
no Miranda violation occurred when federal agents did not inform a
suspect of exactly which crimes would be the subject of questioning
when they informed the suspect of his Miranda rights. In Illinois v.
Perkins, Justice Stevens joined a majority opinion that, over the dis-
sent of Justice Marshall, found no Miranda violation when an under-
cover police officer posing as a jail inmate asked questions of a fellow
inmate that elicited incriminating responses. These examples serve as
reminders of why Justice Stevens is regarded by scholars as a jurist
who looks closely at the facts of individual cases in seeking to serve
the ends of justice, earning him the label of pragmatist rather than
ideologue.

Although Justice Stevens often used his status as the senior Associ-
ate Justice in the majority to make important opinion assignments and

161. See supra notes 28–30 and accompanying text.
162. As indicated in Table 1, Justice Stevens supported individuals in only eighty-two percent
of Fifth Amendment Miranda cases. Id.
163. See supra notes 149–58 and accompanying text.
164. In Doyle v. Ohio, Justice Stevens endorsed prosecutors’ cross-examination questions at
trial that challenged inconsistencies between the defendants’ testimony and their silence after
167. See Ward Farnsworth, Realism, Pragmatism, and John Paul Stevens, in RENquist JUS-
judicial style reflects a preference for complexity, subtlety, and accuracy in individual cases over
predictability, clarity, finality, and cheapness. . . . Stevens is indeed more likely than his col-
leagues to pore over the facts in the record of a case and tie his proposed resolution to them
snugly.”).
perhaps to cultivate the support of wavering Justices,\textsuperscript{168} he only had one opportunity to use that power in a \textit{Miranda} case.\textsuperscript{169} He also wrote one pro-\textit{Miranda} majority opinion that was assigned to him by then-senior Associate Justice William Brennan.\textsuperscript{170} In evaluating the legacy and impact of Justice Stevens on \textit{Miranda}, one must look to Justice Stevens’s votes in support of retaining \textit{Miranda} warnings as an important protection for criminal suspects.\textsuperscript{171} However, relatively few \textit{Miranda}-related cases during Justice Stevens’s career on the Supreme Court produced decisions in support of individuals’ claims because the Burger Court and Rehnquist Court eras saw a shift toward limiting and modifying the rights-enforcing rules of the Warren Court era.\textsuperscript{172} Thus, the legacy of Justice Stevens on Fifth Amendment \textit{Miranda} issues is based largely on his dissenting opinions that defended \textit{Miranda} against the efforts of his conservative colleagues to “whittle away at it or to construe it narrowly.”\textsuperscript{173} These dissenting opinions, while not numerous, enabled Justice Stevens to lay out strong arguments that

\footnotesize{168. The turning point came in 1994, when Blackmun retired and Stevens became the senior Associate Justice on the Court. . . . This part of the job requires political deftness . . . . But he flourished in the role. “Stevens controlled the assignment of opinions with great skill,” Walter Dellinger said. “Sometimes he assigned the 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.” In 2003, Stevens asked O’Connor to write the opinion in \textit{Grutter v. Bollinger}, [538 U.S. 306 (2003)], the University of Michigan Law School case. That same year, Stevens bestowed on Kennedy the opportunity to write \textit{Lawrence v. Texas}, [539 U.S. 558 (2003)], the epochal gay-rights case invalidating bans on consensual sex between adults of the same gender. Jeffrey Toobin, \textit{After Stevens: What Will the Supreme Court Be Like Without Its Liberal Leader?}, \textit{The New Yorker}, Mar. 22, 2010, at 38.

169. In \textit{Missouri v. Seibert}, 542 U.S. 600 (2004), a five-Justice majority declared that police officers cannot intentionally withhold \textit{Miranda} warnings and seek incriminating statements through questioning while planning to subsequently provide warnings and seek to have the statements repeated in order to immunize those statements from the application of the exclusionary rule. Justice Stevens assigned the majority opinion to Justice Souter.


172. \textit{See, e.g., Charles M. Lamb, Chief Justice Warren E. Burger: A Conservative Chief for Conservative Times, in The Burger Court: Political and Judicial Profiles 154} (Charles M. Lamb & Stephen C. Halpern eds., 1991) (“On Fifth Amendment self-incrimination questions, Chief Justice Burger’s tendency to decide for the prosecution was also pronounced. Although he did not actively seek to directly overrule \textit{Miranda v. Arizona} (1966), some of these cases demonstrate his predilection to whittle away at it or to construe it narrowly.”); Ogletree, supra note 18, at 63 (“Under Chief Justice Rehnquist, the Court has evinced a deep skepticism about the validity of the \textit{Miranda} decision itself. It has, for example, virtually eliminated the requirement that the \textit{Miranda} waiver be given knowingly and intelligently.”).

173. Lamb, supra note 172, at 154.
will remain available to potentially influence and guide future judges and Supreme Court Justices.\textsuperscript{174}

In \textit{Rhode Island v. Innis},\textsuperscript{175} the Burger Court majority found no \textit{Miranda} violation when, after giving the suspect the required warnings and hearing the suspect request an attorney, an officer commented to another officer that he hoped no children at a nearby school for the disabled would find the gun discarded by the robber and hurt themselves.\textsuperscript{176} In response to hearing the officer's comment, the suspect stated that he was willing to show the officers where the gun was hidden.\textsuperscript{177} The majority held \textit{Miranda} inapplicable, reasoning that the officer's statement did not constitute interrogation because it was not a question directed at the suspect.\textsuperscript{178} In his dissenting opinion, Justice Stevens strenuously disagreed because he believed that any statements, whether directed at the suspect or exchanged between officers in the suspect's presence, "should be considered interrogation [when they] appear designed to elicit a response from anyone who in fact knew where the gun was located."\textsuperscript{179} Justice Stevens, whose life experiences gave him reason to be wary of the risks of coercion that can emerge from determined police efforts to obtain evidence,\textsuperscript{180} saw the majority's decision as creating an incentive for police officers to undermine the fundamental purpose of \textit{Miranda}:

\begin{quote}
[T]he Court's test creates an incentive for police to ignore a suspect's invocation of his rights in order to make continued attempts to extract information from him. If a suspect does not appear to be susceptible to a particular type of psychological pressure, the police are apparently free to exert that pressure on him despite his request for counsel, so long as they are careful not to punctuate their statements with question marks. . . . The Court thus turns \textit{Miranda}'s unequivocal rule against any interrogation at all into a trap in which unwary suspects may be caught by police deception.\textsuperscript{181}
\end{quote}

In another example, \textit{Moran v. Burbine},\textsuperscript{182} the majority declined to require police officers to inform a suspect that a specific attorney had already notified the police that he was representing the suspect and

\begin{footnotes}
\item[174] See \textsc{Lawrence Baum}, \textit{The Supreme Court} 128 (4th ed. 1992) ("[T]he dissenting opinion may be an appeal to a future Court. Indeed, in several instances a dissenting view on an issue later became the Court's majority position.").
\item[175] Rhode Island v. Innis, 446 U.S. 291 (1980).
\item[176] \textit{Id.} at 295.
\item[177] \textit{Id.}
\item[178] \textit{Id.} at 302.
\item[179] \textit{Id.} at 312 (Stevens, J., dissenting).
\item[180] See supra notes 68–73 and accompanying text.
\end{footnotes}
wanted to be present for any questioning. Indeed, a police officer inaccurately or dishonestly told the attorney that the suspect would not be questioned until the following day. Instead, the police read the suspect his Miranda rights, obtained his waiver of rights, and proceeded to question him without telling him that he was already represented by an attorney. Justice Stevens wrote a lengthy, indignant dissent that castigated the majority for its disregard of the importance of the adversary system and its insensitivity to the risks of improper police behavior when questioning suspects alone, behind closed doors: “Until today, incommunicado questioning has been viewed with the strictest scrutiny by this Court; today, incommunicado questioning is embraced as a societal goal of the highest order that justifies police deception of the shabbiest kind.” Justice Stevens further asserted that “[t]he possible reach of the Court’s opinion is stunning. For the majority seems to suggest that police may deny counsel all access to a client who is being held.”

Justice Stevens made it very clear that the application of the right to counsel did not hinge on technical distinctions about the constitutional source of the right. The right existed in these circumstances whether one viewed it as flowing from the Fifth Amendment when the attorney has not yet met with the suspect, the Sixth Amendment when representation has begun, or the Due Process Clause when an issue of fundamental fairness arises. As Justice Stevens indicated in another opinion, the right to counsel is of paramount “importance [as] one of the core constitutional rights that protects every American citizen from the kind of tyranny that has flourished in other societies.”

Justice Stevens argued for the recognition of a clear rights violation, whether viewed as under one provision of the Constitution or another:

> In my view, as a matter of law, the police deception of [the attorney] was tantamount to deception of [the suspect] himself. It constituted

---

183. *Id.* at 417.
184. *Id.*
185. *Id.* at 417–18.
186. *See id.* at 468 (Stevens, J., dissenting).

This case turns on a proper appraisal of the role of the lawyer in our society. If a lawyer is seen as a nettlesome obstacle to the pursuit of wrongdoers—as in an inquisitorial society—then the Court’s decision today makes a good deal of sense. If a lawyer is seen as an aid to the understanding and protection of constitutional rights—as in an accusatorial society—then today’s decision makes no sense at all.

*Id.*
187. *Id.* at 438–39.
188. *Id.* at 465.
189. *Id.* at 463.
190. *Id.* at 462–63, 466–68.
a violation of [the suspect's] right to have an attorney present during the questioning that began shortly thereafter. The existence of that right is undisputed. Whether the source of that right is the Sixth Amendment, the Fifth Amendment, or a combination of the two is of no special importance, for I do not understand the Court to deny the existence of the right.192

Moreover, Justice Stevens believed in "the principle that due process requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections."193 Thus, he concluded that the police actions also violated the right to due process: "In my judgment, police interference in the attorney-client relationship is the type of governmental misconduct on a matter of central importance to the administration of justice that the Due Process Clause prohibits."194

C. Signs of New Directions at the End of the Stevens Era

Nearly all195 of Justice Stevens's opinions on Miranda issues were written during the 1980s196—the later years of the Burger Court era and the early years of the Rehnquist Court era when a divided Court struggled with how to limit or refine the Warren Court's rights-protecting decisions.197 Unlike his opinions concerning other aspects of constitutional rights in criminal justice such as search and seizure198—for which he wrote a number of opinions rejecting individuals'

---

192. Moran, 475 U.S. at 463 (Stevens, J., dissenting).
193. Id. at 467.
194. Id.
195. The primary exception is Doyle v. Ohio, 426 U.S. 610, 620 (1976), a conservative dissenting opinion written by Justice Stevens for a case that was argued orally when he had been on the Court for only two months. Justice Stevens, writing for Blackmun and Rehnquist, argued that it was permissible for prosecutors to cross-examine defendants at trial concerning inconsistencies between their testimony and their silence after receiving Miranda warnings at the time of arrest.
197. Smith, supra note 36, at 17 ("[T]he Burger Court era initiated the conservatizing process of limiting rights that had been established during the Warren Court... Thus the Burger Court set the stage for an erosion of criminal defendants' rights by the more conservative Rehnquist Court.").
198. See, e.g., Illinois v. Caballes, 543 U.S. 405 (2005) (holding that a drug-sniffing dog's examination of the exterior of a vehicle along a public road did not constitute a search for Fourth Amendment purposes); United States v. Ross, 456 U.S. 798 (1982) (holding that when police officers have probable cause to search an entire vehicle, they can search containers inside vehicles without obtaining a search warrant).
claims—his *Miranda* opinions argued for greater protection of suspects and greater emphasis on the importance of defense counsel.199 More than twenty years later, at the end of his career, Justice Stevens began strenuously asserting his view on *Miranda*-related issues, and these later opinions demonstrated his concerns about the newly emerging trends in the Court to diminish suspects' rights during questioning and undervalue the importance of defense counsel.200

In the 2010 case of *Maryland v. Shatzer*,201 the Court examined the issue of when police can attempt to initiate questioning after a suspect has invoked the right to counsel.202 Under the rule of *Edwards v. Arizona*,203 a 1981 case in which Justice Stevens was a member of the majority, police cannot initiate questioning after a suspect requests counsel, even if they manage to obtain a waiver of rights from the suspect before eliciting incriminating statements.204 In *Shatzer*, the majority opinion by Justice Scalia declared that if there is a break of two weeks or longer in the holding of the suspect for questioning, then police are permitted to initiate questioning and seek a waiver of *Miranda* rights because the *Edwards* invocation of counsel should not be regarded as eternal.205 Justice Stevens wrote an opinion concurring in

---

199. Moran, 475 U.S. at 467 (Stevens, J., dissenting). The one exception concerned the specific situation of a prosecutor asking questions to defendants on the witness stand in order to show inconsistencies in their testimony. See Doyle v. Ohio, 426 U.S. 610, 620 (Stevens, J., dissenting).


202. Id. at 1217–18.


204. Id. at 484.

205. Shatzer, 130 S. Ct. at 1223 ("We think it appropriate to specify a period of time to avoid the consequence that continuation of the *Edwards* presumption 'will not reach the correct result most of the time.' It seems to us that period is 14 days. . . . Confessions obtained after a 2-week
the judgment because he did not believe that the right established by the Edwards precedent mandated suppression of a subsequent statement when there was a two-and-a-half-year break in custody between the invocation of Miranda and the newly initiated questioning, as there was in Shatzer. However, Justice Stevens strongly disagreed with the Court’s fourteen-day-break-in-custody rule because he saw it as “insufficiently sensitive to the concerns that motivated the Edwards line of cases.” In Justice Stevens’s view, the Court’s rule not only undervalued the coercive pressures of custodial questioning outside the presence of counsel, it could actually increase coercive pressure when applied in specific situations:

A 14-day break in custody does not change the fact that custodial interrogation is inherently compelling. It is unlikely to change the fact that a detainee “considers himself unable to deal with the pressures of custodial interrogation without legal assistance.” [Arizona v.] Roberson, 486 U.S., at 683, 108 S. Ct. 2093. And in some instances, a 14-day break may make matters worse “[w]hen a suspect understands his (expressed) wishes to have been ignored” and thus “may well see further objection as futile and confession (true or not) as the only way to end his interrogation.” Davis [v. United States], 512 U.S., at 472–73, 114 S. Ct. 2350 (Souter, J., concurring in judgment).

In a footnote, Justice Stevens seized the opportunity to reiterate his strong views about the essential role that defense counsel must play in protecting the rights of criminal suspects.

break in custody and a waiver of Miranda rights are most unlikely to be compelled, and hence are unreasonably excluded.” (citation omitted)).

206. Id. at 1228 (Stevens, J., concurring).
207. Id. at 1229.
208. Justice Stevens’s strong views about the issue may have been shaped by his role in writing a majority opinion in 1988 that expanded the reach of the Edwards rule to protect suspects from police-initiated questioning about other crimes after the suspects invoked the right to counsel for the crimes for which they had been arrested. See Arizona v. Roberson, 486 U.S. 675, 682–84 (1988).
209. Shatzer, 130 S. Ct. at 1231.
210. Justice Stevens stated,
Indeed, a lawyer has a “unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation.” Fare v. Michael C., 442 U.S. 707, 719, 99 S. Ct. 2560, 61 L.Ed.2d 197 (1979). Counsel can curb an officer’s overbearing conduct, advise a suspect of his rights, and ensure that there is an accurate record of any interrogation. “Because of this special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the Court found that the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege.” Arizona v. Roberson, 486 U.S. 675, 682, n. 4, 108 S. Ct. 2093, 100 L.Ed.2d 704 (1988) (internal quotation marks omitted). Thus, “once the accused has requested counsel,” courts must be especially wary of “coercive form[s] of custodial interrogation.” [Oregon v.] Bradshaw, 462 U.S., at 1051, 103 S. Ct. 2830 (Powell, J., concurring in judgment).
In 2010, the Court also issued its decision in *Florida v. Powell*, a case that directly addressed the required content of *Miranda* warnings. Justice Ginsburg's majority opinion rejected the defendant's claim that the police officer's statements—"[y]ou have a right to talk to a lawyer before answering any of our questions" and "you have a right to use any of these rights at any time you want during this interview"—did not clearly inform him that he had a right to have counsel present *during* questioning. Justice Ginsburg found that these statements satisfied the requirements of *Miranda*. In his dissenting opinion, Justice Stevens complained that the "natural reading of the warning . . . is that [the suspect] only had the right to consult with an attorney before the interrogation began . . . ." To Justice Stevens, "the warning entirely failed to inform [the suspect] of the separate and distinct right 'to have counsel present during any questioning.'" Therefore, as summarized in the words of Justice Stevens, "[T]his is, I believe, the first time the Court has approved a warning which, if given its natural reading, entirely omitted an essential element of a suspect's rights."

A third decision in 2010 further eroded *Miranda* rights. Justice Stevens did not write an opinion, but he was among the four dissenters who endorsed the opinion by Justice Sotomayor that said,

Today's decision turns *Miranda* upside down. Criminal suspects must now unambiguously invoke their right to remain silent—which, counterintuitively, requires them to speak. At the same time, suspects will be legally presumed to have waived their rights even if they have given no clear expression of their intent to do so. Those results, in my view, find no basis in *Miranda* or our subsequent cases and are inconsistent with the fair-trial principles on which those precedents are grounded.

Justice Stevens had seen in 2009 how the Roberts Court majority seemed intent on whittling away aspects of rights for criminal suspects and defendants, as illustrated in its decision in *Montejo v. Louisiana*. *Montejo* reexamined an important precedential opinion by

---

*Id.* at 1230 n.3.
212. *Id.* at 1200 (emphasis added).
213. *Id.* at 1200, 1205.
214. *Id.* at 1211 (Stevens, J., dissenting).
216. *Id.* at 1210–11.
218. *Id.* at 2278 (Sotomayor, J., dissenting)
Justice Stevens twenty-three years earlier in *Michigan v. Jackson*. Although not specifically a Fifth Amendment *Miranda*-issue case, it concerned the closely related context of the Sixth Amendment right to counsel as it arises with respect to police questioning of already-charged defendants. Moreover, references to the *Miranda* warning appeared in the case as Justice Scalia claimed that such warnings provide sufficient protection for already-charged defendants who are deciding whether to waive their Sixth Amendment right to counsel during questioning, an assertion that Justice Stevens vigorously contested.

The path to the *Montejo* decision in 2009 began in 1986 when Justice Stevens wrote the majority opinion in *Jackson*, a decision that Justice Scalia later characterized as "represent[ing] a 'wholesale importation of the *Edwards* rule into the Sixth Amendment.'" The *Jackson* decision concerned the ability of police to initiate questioning under the *Miranda-Edwards-Minnick* line of cases (which is not in doubt), a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given *Miranda* warnings. At that point, not only must the immediate contact end, but "badgering" by later requests is prohibited. If that regime suffices to protect the integrity of "a suspect's voluntary choice not to speak outside his lawyer's presence" before his arraignment, it is hard to see why it would not also suffice to protect that same choice after arraignment.

Instrumentally, the distinct purposes of counsel across the Fifth and Sixth Amendments is best illustrated by framing the Fifth Amendment right as the right to "counsel as protector," and the Sixth Amendment right as the right to "counsel as strategist." In the Fifth Amendment context, the right to counsel gives the suspect an opportunity to defend against attempts by the state to bully and badger the suspect into confessing. In the Sixth Amendment context, however, counsel must weigh the costs and benefits of each move the defendant makes—at every critical stage—and she must strategically manage the flow of information between the state and the accused.

The conclusion that *Miranda* warnings ordinarily provide a sufficient basis for a knowing waiver of the right to counsel rests on the questionable assumption that those warnings make clear to defendants the assistance a lawyer can render during post-indictment interrogation. Because *Miranda* warnings do not hint at the ways in which a lawyer might assist her client during conversations with the police, I remain convinced that the warnings prescribed in *Miranda*, while sufficient to apprise a defendant of his Fifth Amendment right to remain silent, are inadequate to inform an unrepresented, indicted defendant of his Sixth Amendment right to have a lawyer present at all critical stages of a criminal prosecution. The inadequacy of those warnings is even more obvious in the case of a *represented* defendant.

---

222. Under the *Miranda-Edwards-Minnick* line of cases (which is not in doubt), a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given *Miranda* warnings. At that point, not only must the immediate contact end, but "badgering" by later requests is prohibited. If that regime suffices to protect the integrity of "a suspect's voluntary choice not to speak outside his lawyer's presence" before his arraignment, . . . it is hard to see why it would not also suffice to protect that same choice after arraignment. . . .
223. The conclusion that *Miranda* warnings ordinarily provide a sufficient basis for a knowing waiver of the right to counsel rests on the questionable assumption that those warnings make clear to defendants the assistance a lawyer can render during post-indictment interrogation. . . . Because *Miranda* warnings do not hint at the ways in which a lawyer might assist her client during conversations with the police, I remain convinced that the warnings prescribed in *Miranda*, while sufficient to apprise a defendant of his Fifth Amendment right to remain silent, are inadequate to inform an unrepresented, indicted defendant of his Sixth Amendment right to have a lawyer present at all critical stages of a criminal prosecution. The inadequacy of those warnings is even more obvious in the case of a *represented* defendant.
224. *Id.* at 2086 (quoting Texas v. Cobb, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring)).
after the attachment of the Sixth Amendment right to counsel when defendants had already been formally charged and requested attorneys at their arraignments.\textsuperscript{225} Reflecting his strong belief in the importance of the right to counsel\textsuperscript{226} and his sensitivity to the risk of deceptive or coercive police practices,\textsuperscript{227} Justice Stevens concluded that the importance of \textit{Miranda/Edwards} protections clearly continued after an assertion of the right to counsel in preliminary court appearances:

\textit{Edwards} is grounded in the understanding that "the assertion of the right to counsel [is] a significant event," . . . and that "additional safeguards are necessary when the accused asks for counsel." . . . We conclude that the assertion is no less significant, and the need for additional safeguards no less clear, when the request for counsel is made at an arraignment and when the basis for the claim is the Sixth Amendment. We thus hold that, if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of that defendant's right to counsel for that police-initiated interrogation is invalid.\textsuperscript{228}

In subsequent terms, Justice Stevens wrote dissenting opinions to defend the principle that he had articulated in \textit{Jackson} as the Court majority weakened the "bright-line" application of the rule.\textsuperscript{229} For example, in \textit{Patterson v. Illinois},\textsuperscript{230} Justice Stevens dissented from the majority's approval of the introduction of incriminating statements obtained by police in post-indictment questioning of the defendant outside of the presence of counsel. While the majority concluded the defendant had "knowing[ly] and intelligent[ly]" waived his rights after being given \textit{Miranda} warnings,\textsuperscript{231} Justice Stevens, as the strong defender of the adversary process, argued that the actions of police were unethical as well as improper under the Sixth Amendment:\textsuperscript{232}

The Court should not condone unethical forms of trial preparation by prosecutors or their investigators. In civil litigation it is improper for a lawyer to communicate with his or her adversary's client without either notice to opposing counsel or the permission of the court. An attempt to obtain evidence for use at trial by going behind the

\textsuperscript{226} See supra notes 86–126 and accompanying text.
\textsuperscript{227} See supra notes 52–85 and accompanying text.
\textsuperscript{228} Jackson, 475 U.S. at 636 (alteration in original) (citations omitted).
\textsuperscript{229} Justice Scalia characterized the \textit{Jackson} rule as a "bright-line rule," \textit{Montejo}, 129 S. Ct. at 2089, that provides only "marginal benefits" when weighed against the "substantial costs" it imposes on "the truth-seeking process and the criminal justice system." \textit{Id.} at 2091.
\textsuperscript{231} \textit{Id.} at 300.
\textsuperscript{232} See \textit{id.} at 302 ("As our holding in \textit{Michigan v. Jackson}, 475 U.S. 625 (1986), suggests, such a practice would not simply constitute a serious ethical violation, but would rise to the level of an impairment of the Sixth Amendment right to counsel.").
back of one's adversary would be not only a serious breach of professional ethics but also a manifestly unfair form of trial practice. In the criminal context, the same ethical rules apply and, in my opinion, notions of fairness that are at least as demanding should also be enforced.\textsuperscript{233}

In \textit{Michigan v. Harvey},\textsuperscript{234} Justice Stevens objected when the majority permitted the use of incriminating statements for impeachment purposes when such statements were obtained through a post-arraignment police interview with a suspect outside of the presence of defense counsel.\textsuperscript{235} The strength of Justice Stevens's opposition to what he viewed as the erosion and "manipulat[ion]" of the Jackson principle was evident in his characterization of the majority's reasoning as "nothing more than an argument against the rule of law itself."\textsuperscript{236} Drawing upon his longstanding concerns about the risks of deceptive and improper police conduct, Stevens further declared that "[t]he tragedy of today's decision is not merely its denigration of the constitutional right at stake; it also undermines the principle that those who are entrusted with the power of government have the same duty to respect and obey the law as the ordinary citizen."\textsuperscript{237}

Justice Stevens again found himself arguing against the Court's diminution of the right to counsel in \textit{McNeil v. Wisconsin}.\textsuperscript{238} In that case, the police questioned a jailed robbery defendant, who was already represented by a public defender on the robbery charge, about other crimes in a different city.\textsuperscript{239} When the defendant waived his \textit{Miranda} rights and made incriminating statements, the Court permitted those statements to be used against him.\textsuperscript{240} Justice Stevens began his dissenting opinion by forthrightly declaring, "The Court's opinion de
means the importance of right to counsel."\textsuperscript{241} He predicted that the Court's decision would give "leeway [to] . . . the police to file charges selectively in order to preserve opportunities for custodial interrogation"\textsuperscript{242} for separate offenses, even when "the investigations were concurrent and conducted by overlapping personnel."\textsuperscript{243} He reiterated this sensitivity about the risk of deceptive, manipulative law enforce-

\begin{itemize}
\item \textsuperscript{233} \textit{Id.} at 301 (footnote omitted).
\item \textsuperscript{234} \textit{Michigan v. Harvey}, 494 U.S. 344 (1990).
\item \textsuperscript{235} \textit{Id.} at 355 (Stevens, J., dissenting).
\item \textsuperscript{236} \textit{Id.} at 369.
\item \textsuperscript{237} \textit{Id.}
\item \textsuperscript{239} \textit{Id.} at 173–74.
\item \textsuperscript{240} \textit{Id.} at 177–78.
\item \textsuperscript{241} \textit{Id.} at 183 (Stevens, J., dissenting).
\item \textsuperscript{242} \textit{Id.} at 187.
\item \textsuperscript{243} \textit{Id.} at 187–88.
\end{itemize}
ment practices in the opinion when he chastised the majority for its “refusal to acknowledge any ‘danger of ‘subtle compulsion.’””244

The majority’s decision in McNeil also elicited a strong statement from Justice Stevens about the importance of counsel in the adversary system that forms the foundation for truth-seeking and the protection of rights in American judicial processes.245 Justice Stevens was very troubled that “the Court’s decision is explained by its fear that making counsel available to persons held in custody would ‘seriously impede effective law enforcement,’”246 thereby treating the lawyer as a “nettlesome obstacle to the pursuit of wrongdoers.”247 Justice Stevens complained that the Court’s decision “evidences an inability to recognize the difference between an inquisitorial and an adversarial system of justice.”248 What he described as the Court’s “preference for an inquisitorial system of justice” clashed directly with Justice Stevens’s steadfast advocacy for the American tradition of truth-seeking defense lawyers and the adversary system.249 According to Justice Stevens,

Undergirding our entire line of cases requiring the police to follow fair procedures when they interrogate presumptively innocent citizens suspected of criminal wrongdoing is the longstanding recognition that an adversarial system of justice can function effectively only when the adversaries communicate with one another through counsel and when laypersons are protected from overreaching by more experienced and skilled professionals.250

He also quoted his own past argument from Moran:251 “If a lawyer is seen as an aid to the understanding and protection of constitutional rights—as in an accusatorial society—then today’s decision makes no sense at all.”252

After establishing important protections against the questioning of charged defendants outside of the presence of counsel in Jackson253 and then defending that principle against the Court’s expansion of police authority in Patterson,254 Harvey,255 and McNeil,256 Justice Ste-

244. Id. at 189 (citation omitted).
245. Id. at 188.
246. Id. (quoting id. at 180).
247. Id. at 189 (Stevens, J., dissenting) (quoting Moran v. Burbine, 475 U.S. 412, 468 (1986) (Stevens, J., dissenting)).
248. Id.
249. Id.
250. Id. at 188.
251. See supra notes 182–94 and accompanying text; see also Moran, 475 U.S. at 412.
252. McNeil, 501 U.S. at 189 (Stevens, J., dissenting) (quoting Moran, 475 U.S. at 468 (Stevens, J., dissenting)).
253. See supra notes 220–23 and accompanying text.
vons must have been disheartened when, in the middle of oral arguments for Montejo, Justice Alito suddenly made the out-of-the-blue suggestion that the Court should consider overruling Jackson, despite the fact that this prospect had not been raised, briefed, or argued by the parties as an issue in the case. This suggestion led to the unusual circumstance of the Court ordering the parties to submit additional briefs on the issue of whether Justice Stevens’s majority opinion in Jackson should be overruled. The issue divided interested observers and experts as the Obama Administration and eleven states advocated overruling Jackson, while a number of former judges and prosecutors claimed that the Jackson holding had provided a workable, bright-line rule to guide police. Defense attorneys argued that “the protection offered by the [C]ourt in Stevens’ 1986 opinion [in Jackson] is especially important for vulnerable defendants, including the mentally and developmentally disabled, addicts, juveniles, and the poor . . . .” Ultimately, Justice Scalia, the Justice who virtually never supports the protection of Miranda-related rights, wrote for the five-member majority that overruled Jackson. Justice Scalia’s opinion was pointedly critical of Justice Stevens’s majority opinion in Jackson as well as Stevens’s dissenting opinion in Montejo. In the oral announcement of the Court’s decision, Justice Scalia was quite harsh in summarizing his criticisms of Justice Stevens’s Jackson opinion. He said that the opinion was “poorly reasoned, has created no significant reliance interests and . . . is ultimately unworkable.”

256. McNeil, 501 U.S. at 171; see also supra notes 238–52.
258. See Marcia Coyle, As Nominee Is Announced, High Court Issues Police Interrogation Ruling, Two Others, THE NAT’L J. (May 27, 2009), http://www.law.com (“The question of whether Jackson should be overruled was raised by Justice Samuel Alito Jr. during March arguments in Montejo’s case. The high court ordered additional briefing on the issue.”).
259. Id.
261. Id.
262. See Table 1, supra notes 27–30 and accompanying text.
264. Justice Scalia described Jackson as providing “marginal benefits” and being “simply superfluous” and concluded that “there is no reason to retain the rule,” which he indicated was “unworkable.” Id. at 2088–91.
265. Justice Scalia’s majority opinion described Justice Stevens’s dissenting opinion as “[p]roceeding from [a] fanciful premise” and “rest[ing] on a flawed a fortiori.” Id. at 2086–87.
Justice Stevens fired back in his dissenting opinion, accusing the majority of “a misinterpretation of Jackson’s rationale and a gross undervaluation of the rule of stare decisis.”\textsuperscript{267} He asserted that “Jackson protects a fundamental right that the Court now dishonors”\textsuperscript{268} and declared that the majority “flagrantly misrepresent[ed] Jackson’s underlying rationale”\textsuperscript{269} in making an “unwarranted” decision to overrule the precedent.\textsuperscript{270} He also objected to the majority’s overruling of Jackson when the parties had not raised the issue or presented evidence about problems caused by the precedent.\textsuperscript{271}

The depth of Justice Stevens’s concern about and disagreement with the majority’s decision to overrule Jackson was especially evident in his decision to dissent orally from the bench when the Montejo decision was announced,\textsuperscript{272} a relatively rare practice that has been characterized as “a different order of magnitude of dissent.”\textsuperscript{273} Scholars who study oral dissents have concluded that “given the length of Justice Stevens’s career, he has demonstrated a relative unwillingness to read his dissent (Stevens has read only 3.4 percent of all dissents he authored).”\textsuperscript{274} It was only the twenty-first time in his then-thirty-four year career on the Supreme Court that he had announced an oral dissent,\textsuperscript{275} and none of his prior oral dissents had been in Miranda-related or right to counsel cases.\textsuperscript{276} Presumably, Justice Stevens

\textsuperscript{267} Montojo, 129 S. Ct. at 2094.

\textsuperscript{268} Id. at 2096.

\textsuperscript{269} Id.

\textsuperscript{270} Id. at 2101.

\textsuperscript{271} See id. at 2094.

\textsuperscript{272} Coyle, supra note 258.

\textsuperscript{273} See Robert Barnes, Over Ginsburg’s Dissent, Court Limits Bias Suits, WASH. POST, May 30, 2007, (quoting Co-Director of Georgetown University Law Center’s Supreme Court Institute Richard Lazarus).


\textsuperscript{275} Jill Duffy & Elizabeth Lambert, Dissents from the Bench: A Compilation of Oral Dissents by U.S. Supreme Court Justices, 102 LAW LIBR. J. 7, 26–37 (2010).

dissented orally because of his strong objections to the proactive overruling of a precedent that he had personally articulated and strongly defended over a period of more than two decades.277

In his written opinion, Justice Stevens raised concerns about how the majority's "decision can only diminish the public's confidence in the reliability and fairness of our system of justice."278 In his oral dissent, however, he spoke specifically about other undesirable consequences by saying that the Court's "unwise" decision to overrule Jackson "can only have an adverse impact on the law enforcement profession and the rule of law itself."279

In addition, while the written dissent used only a brief footnote to argue that prosecutors—and by extension the police—are ethically obligated through lawyers' rules of professional conduct to refrain from direct contact with defendants who are represented by counsel,280 the oral dissent emphasized this issue. Justice Stevens's oral dissent devoted attention to his view that ethical prosecutors, who he believed constituted the vast majority of prosecutorial officials in the United States, would respect the ethical rules that had required them to act in accordance with the overruled Jackson precedent.281 Thus, he claimed that it was "only the rare unethical prosecutor whose con-
duct [was] endorsed by the Court” when it overruled *Jackson.* Given that Justice Stevens’s life experiences have made him keenly aware of the risks that law enforcement officials will violate rules in their efforts to obtain convictions, it seems possible that he was looking for a way to preserve the *Jackson* rule in practice since it had lost its stature as constitutional law. Justice Stevens’s oral dissent did not emphasize in an elaborate fashion the risks of deceptive conduct by justice system officials as he had done in other written opinions over the years. Instead, Justice Stevens sought to have his oral pronouncement, with national news media reporters in attendance at the Court, instruct prosecutors about their ethical obligation to, in effect, follow the now-overruled *Jackson* principle in order to avoid placing themselves into the undesirable category he had labeled as “the rare unethical prosecutor.”

By stating that the majority decision “can only have an adverse impact on the law enforcement profession and the rule of law itself,” Justice Stevens was effectively telling prosecutors that not only would they violate ethics rules if they stopped following the *Jackson* principle, they would also fundamentally harm their profession and society itself by exploiting the new opportunity to approach and question defendants outside of the presence of defense counsel. Although Justice Stevens attempted to frame the issue for the news media and prosecutors as one involving the professional self-interest of law enforcement officials, it is uncertain whether this message or the underlying ethical obligation of prosecutors will guide police officers’ behavior. Indeed, it is possible that prosecutors will be quite tempted to turn a blind eye to the ethical concerns highlighted by Stevens and willingly benefit from police officers’ new opportunity to question already-charged and represented defendants.

The oral dissent by Justice Stevens is similar to oral dissents in other cases by Justice Ginsburg that were characterized as “‘signifying an increasing frustration’” with the conservative majority on the Roberts Court. The oral dissent may have reflected a recognition by Jus-

---

282. Id.
283. See supra notes 67–77 and accompanying text.
284. Oral dissent of Justice Stevens, supra note 279.
285. Id.
Justice Stevens, as the inevitability of retirement approached, that the Montejo decision could be one of his last opportunities to raise his voice against the diminution of Miranda rights and the right to counsel. In speaking out on these issues, Justice Stevens fulfilled one scholar's view that "[a] Supreme Court Justice who chooses to give personal voice [through oral dissent] . . . is engaging in a public-addressing, publicly accountable and thus commendable part of his or her judicial service." Whether or not the content and emphases in his oral dissent are remembered, its existence is recorded for history as an exclamation point on years of carefully crafted and consistently forceful judicial opinions embodying his exceptional advocacy for Miranda rights. In addition, his dissenting opinion in Montejo and other cases will remain available for future Supreme Court Justices, lower court judges, and legal scholars who will shape the course of constitutional doctrine over time.

V. Conclusion

Justice John Paul Stevens distinguished himself as one of the Supreme Court's foremost defenders of Miranda-related rights. His viewpoint on the importance of Miranda rights was linked to his personal experiences—as a young man who grew up in Chicago, a Supreme Court law clerk, a practicing attorney handling pro bono cases, and a judge on the U.S. Court of Appeals for the Seventh Circuit—that led him to develop both sensitivity to the risks of deceptive and abusive practices by law enforcement officials and strong beliefs about the essential role of defense attorneys in the American adversarial system of justice. Throughout his career on the Supreme Court, he drew from these experiences and beliefs to write opinions that strongly defended the necessity of Miranda rights and clear, strong rules for police and prosecutors to obey. Because of the time period in which he served on the Court, he was forced to use dissenting opinions to defend the importance of Miranda and the right to counsel. This was especially true during the early years of the Rehnquist Court and in his final Terms as a member of the Roberts Court, as the Supreme Court's composition changed through the arrival of Justices who generally favored giving greater discretionary authority and flexi-

288. See Liptak, supra note 51, at 1.
With respect to this area of law, Justice Stevens leaves a legacy of opinions containing strongly argued justifications for the protection of criminal suspects and the proper respect for the important role of defense attorneys. In light of his special role as the defender of *Miranda* and the right to counsel, the retirement of Justice Stevens will cost the nation’s highest Court not only his “mastery of the [C]ourt’s machinery” and its “leader of the [C]ourt’s liberal wing,” but also the strongest, most articulate voice that defended the adversary system of justice, opposed deceptive practices by police, and demonstrated sensitivity to the vulnerability of suspects who are subjected to an array of tactics that can “be confusing to anyone, but would be especially baffling to defendants with mental disabilities and other impairments.”

290. During the Reagan Administration, the elevation of William Rehnquist to Chief Justice and the appointments of Justices O’Connor, Scalia, and Kennedy, see THE SUPREME COURT AT WORK, supra note 3, at 205–08, contributed to the “Supreme Court decisions of the 1980s that loosened the limits on police behavior.” Smith, supra note 54, at 159. Conservative Justices who support the government’s position in criminal justice cases and thereby limit the scope of rights effectively expand officials’ authority and arguably “creat[e] opportunities for criminal justice officials to engage in abusive behavior.” Smith, supra note 36, at 8–9. The voting records of Chief Justice John Roberts and Justice Samuel Alito in criminal justice cases are equally supportive of government authority as those of the Reagan era appointees. See Smith, McCall & McCall, supra note 200, at 271.


292. Liptak, supra note 51, at 1.

293. Id.

294. See, e.g., McNeil v. Wisconsin, 501 U.S. 171, 188 (1991) (Stevens, J., dissenting) (“[A]n adversarial system of justice can function effectively only when the adversaries communicate with one another through counsel and when laypersons are protected from overreaching by more experienced and skilled professionals.”).

295. See, e.g., Moran v. Burbine, 475 U.S. 412, 462, 468 (1986) (“The majority brushes aside the police deception involved in the misinformation of attorney Munson . . . . [T]he police on that June night . . . trampled on well-established legal principles and flouted the spirit of our accusatorial system of justice.”).