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## Remarks: Liberty Panel

*Jeffrey Fisher\**

It's a wonderful privilege to be here today, and to spend a day thinking about Justice Stevens and honoring his work. As a law clerk for the Justice during the October 1998 Term, I happened to spend a lot of my time working on criminal cases. This turned out to be a tremendously formative experience for me. And it continues to influence my work both as an academic and as a sometime advocate in criminal procedure and criminal justice cases in the Supreme Court.

In fact, the only thing that has turned out to be unfortunate about the privilege I have had to argue in front of the Court is that this means the only interactions I have had with Justice Stevens in recent years have been in public, across the bench of the Court. Justice Stevens, ever mindful of ethics and appearances, is uncomfortable having conversations with lawyers, including law clerks, who have cases pending before the Court. So I have been limited over the last several years to speaking with Justice Stevens from the podium of the Court.

Of course, getting to argue cases to my old boss is an extraordinary privilege and thrill, and one that I wish every former clerk could experience at least once. I vividly remember my first couple of arguments in the Court. I think every time I was particularly pressed or particularly nervous, I just instinctively turned to Justice Stevens for reassurance. And he always met my glance with a smile, or at least a look of calmness. So, as I said, it's a privilege to come here today to talk about Justice Stevens and his view of liberty in the realm of criminal procedure.

In particular, I'd like to focus on the Sixth Amendment right to jury trial. In 1968, the Supreme Court held in *Duncan v. Louisiana*<sup>1</sup> that the jury trial right applied to the states. Of course, Justice Stevens was not yet on the Court at this time. But the opinion, in rather soaring

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<sup>1</sup> 391 U.S. 145 (1968).

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language, explained why the right to jury trial is so tightly tied to the Constitution's conception of liberty. Among other things, the Court said that the "[right] reflect[s] [the] fundamental decision about the exercise of official power — a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."<sup>2</sup> The Court further explained that the right to jury trial is the fundamental protection against arbitrary rule or oppression from the Government.<sup>3</sup>

During the past several years, the Court has turned its attention like never before to the right to jury trial, to what exactly the right means, and to why it's important. In a line of decisions beginning in 2000 with Justice Stevens's landmark opinion in *Apprendi v. New Jersey*<sup>4</sup> — and continuing with *Ring v. Arizona*,<sup>5</sup> *Blakely v. Washington*,<sup>6</sup> and another Justice Stevens opinion in *United States v. Booker*<sup>7</sup> — the Court has held that the right to jury trial applies to any fact, even if not designated by the legislature as part of the crime, that exposes the defendant to increased punishment.

Much has been written about these cases, and much about the somewhat curious majority in these cases. The core majority in these cases has been a collection of five justices: Justice Stevens, Justice Souter, and Justice Ginsberg, and then on the other side of the bench, so to speak, Justice Scalia and Justice Thomas. Critics and academics have noted that it is unusual to find Justices Scalia and Thomas protecting robust conceptions of the rights of criminal defendants, and they have sought to explain how Justice Scalia's views in particular are influencing this area of law. But today I want to focus on Justice Stevens's particular views with respect to the right to trial by jury, and to suggest that he has a conception of the right that is distinct from Justice Scalia's in very important ways.

Before I do that, I'd like to pause to tell a quick story. While I was a law clerk, whenever the Court held a conference, Justice Stevens would come back to chambers and tell the clerks, while sitting around the table, what had happened. One Friday, he came back and reported that he was going to write the majority opinion in a case and that Justice Scalia was going to write the dissent. We all kind of paused, knowing that Justice Scalia sometimes wrote pointed and aggressive

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<sup>2</sup> *Id.* at 156.

<sup>3</sup> *See id.* at 155.

<sup>4</sup> 530 U.S. 466 (2000).

<sup>5</sup> 536 U.S. 584 (2002).

<sup>6</sup> 542 U.S. 296 (2004).

<sup>7</sup> 543 U.S. 220 (2005).

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dissents. Then, Justice Stevens smiled and, with a little twinkle in his eye, said, “It’s okay, I can take his heat.”

In short, Justices Stevens and Scalia are two people who often have polar opposite viewpoints (both Jamal Greene’s and Linda Greenhouse’s talks attest to that). But they have been on the same side of the Court’s recent jury trial jurisprudence. In fact, they have been the Court’s two leaders in this movement. But today I’d like to suggest that even in this realm, Justices Stevens and Scalia have two very different perspectives. So in addition to giving Justice Stevens — as Linda well put it — credit where credit is due, I’d like to outline his distinct viewpoint in this area and to explain why I think it’s important.<sup>8</sup>

In order to begin describing Justice Stevens’s influence on the evolution of the right to jury trial, let me turn first to the years following *Duncan v. Louisiana*,<sup>9</sup> after Justice Stevens joined the Court. For several years, the Court actually had very little to say concerning the right to jury trial. But as we moved into the 1980s, legislative action began to push uncertainty concerning the scope of the jury trial right to the fore. In particular, legislatures began identifying particular kinds of actions that would ratchet up sentences above ordinary levels of punishment. But legislatures did not treat these actions as ordinary elements of crimes. Instead, legislatures called these things “sentencing factors” that needed to be proved only to judges by a preponderance of the evidence.

The Court’s first real introduction to this problem came in a 1986 case called *McMillan v. Pennsylvania*.<sup>10</sup> In that case, the Pennsylvania legislature had enacted a law stating that whenever a defendant visibly possessed a handgun in the course of committing a felony, the sentencing court was required to impose at least a five-year mandatory minimum sentence. The defendant contended that he had the right to require the jury to find beyond a reasonable doubt that he used a gun, instead of allowing the sentencing court simply to find that fact on its own after trial by a preponderance of the evidence. In an opinion by Chief Justice Rehnquist, the Court rejected the defendant’s claim.

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<sup>8</sup> Rory Little, an academic and former clerk for Justice Stevens, also praised Justice Stevens’s influence in this area and credited him as the driving force behind the Court’s recent decisions. See *The Future of American Sentencing: A National Roundtable on Blakely*, 17 FED. SENT’G REP. 115, 117 (2004) (transcribed remarks). I seek here to add to Rory’s contentions by describing Justice Stevens’s distinctive vision in this area.

<sup>9</sup> 391 U.S. 145 (1968).

<sup>10</sup> 477 U.S. 79 (1986).

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Justice Stevens wrote a solo dissent in that case. I want to read you a few lines from that dissent. Justice Stevens said:

It would demean the importance of the reasonable-doubt standard in the jury trial — indeed, it would demean the constitution itself — if the substance of the standard could be avoided by nothing more than a legislative declaration that prohibited conduct as not an “element” of a crime. A legislative definition of an offense named “assault” could be broad enough to encompass every intentional infliction of harm by one person upon another, but surely the legislature could not provide that only that fact must be proved beyond a reasonable doubt and then specify a range of increased punishments if the prosecution could show by a preponderance of the evidence that the defendant robbed, raped, or killed his victim “during the commission of the offense.”<sup>11</sup>

In this passage, Justice Stevens articulates a vision of the beyond-a-reasonable doubt standard (which, of course, is tied to the jury trial right) that doesn’t simply treat the right as a mechanism that turns on legislative labeling. Rather, Justice Stevens focuses on substance and maintains that the right was necessary as a safeguard against the legislative manipulation.

Four years later the Supreme Court heard another case along these lines, *Walton v. Arizona*.<sup>12</sup> The issue in *Walton* was whether aggravating facts that were necessary to impose the death penalty needed to be found by a jury beyond a reasonable doubt. Here again, the Court — including Justice Scalia — rejected the claim. And here again, Justice Stevens wrote a solo dissent in the case. Justice Stevens implored his colleagues, “Even if the unfortunate decisions [in cases previous to this one] fell just one step short of the stride the Court takes today, it is not too late to change our course and follow the wise and inspiring voice that spoke for the Court in *Duncan v. Louisiana*.”<sup>13</sup>

Just ten years later, in *Apprendi*, Justice Stevens wrote an opinion for five Justices holding exactly what he had told the Court it was not too late to hold in *Walton*, and exactly what he advocated for in *McMillan*. Describing the right to jury trial as one “of surpassing importance,” Justice Stevens declared that the right to jury trial applies to facts — no matter what a legislature calls them — that expose defendants to

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<sup>11</sup> *Id.* at 102 (Stevens, J., dissenting).

<sup>12</sup> 497 U.S. 639 (1990).

<sup>13</sup> *See id.* at 714 (Stevens, J., dissenting).

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greater punishment than could otherwise be imposed.<sup>14</sup> And two years later, the Court dropped the other shoe on *Walton* itself, with no fewer than seven Justices on the court voting to overrule that decision.<sup>15</sup>

It is worth pausing to reflect on this turnaround. Many often praise William Rehnquist for his influence on changing the direction of the Supreme Court. When then-Justice Rehnquist joined the Court, just a few years before Justice Stevens did, people often called him “the lone ranger,” for he was apt to write solo dissents. By the time he became Chief Justice Rehnquist, he was able, to his credit, to put together majorities for many of the views that he had espoused in his early solo dissents. But here we have Justice Stevens doing exactly that. In fact, one might argue that Justice Stevens deserves extra credit for his achievement, because his influence on the Court affected not just new appointees but also caused some, including Justice Scalia, to change their minds. This reflects Justice Stevens’s true power of persuasion.

In 2004 and 2005, the Court brought the reinvigorated right to jury trial to greater fruition in Justice Scalia’s opinion in *Blakely* and Justice Stevens’s opinion in *Booker*, each of which held that the right applies to factual determinations that dictate higher sentences under binding sentencing guidelines regimes.

Now, even though I have been characterizing the Court’s recent articulation of the right to jury trial as a robust one, there is nonetheless a strong criticism that is often voiced in the dissents in these cases, as well as in the press and the academy and among lawyers. That criticism contends that the right to jury trial as it exists even in these newer cases is still not all it claims to be. It’s overly formalistic. Even though the *Apprendi* doctrine is aimed at curbing the effects of legislative drafting, critics say, it remains extraordinarily susceptible to legislative manipulation through mandatory minimum sentences.

The principal case that gives rise to this criticism is one that the Court decided in 2002, *Harris v. United States*.<sup>16</sup> In *Harris*, the Court confronted a mandatory minimum sentence of seven years for brandishing a firearm and considered whether the factual finding necessary to trigger that mandatory minimum was subject to the newly articulated *Apprendi* rule. In other words, the Court considered whether it should overrule *McMillan* during the same Term in which it was in the process of overruling *Walton*. By a 5–4 vote the Court declined to overrule *McMillan*. Justice Scalia joined the majority

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<sup>14</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

<sup>15</sup> *See Ring v. Arizona*, 536 U.S. 584 (2002).

<sup>16</sup> 536 U.S. 545 (2002).

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opinion in that case, declining to extend the jury trial right to findings that trigger mandatory minimum findings, and leaving it applicable only to findings that expose defendants to higher sentences. Justice Stevens joined the dissent, but assigned it to Justice Thomas.

The *Harris* case exposes the differences between Justice Scalia's view of the right to jury trial and Justice Stevens's view of the right. The Scalia view conceptualizes the right to jury trial in separation-of-powers terms. As Justice Scalia put it in *Blakely*, the right is what "ensures [the People's] control in the judiciary."<sup>17</sup> It ensures that a court cannot impose greater punishment than the citizens on the jury have voted to allow. But once the judiciary is authorized by a verdict to impose a given sentence (as in the case before any mandatory minimum ever kicks in), there is nothing to control. Power has been handed over. In short, I'm not sure Justice Scalia would say he's supporting the rights of the accused in these cases as much as he is supporting and advocating a particular vision of a popular check on judicial power. Justice Scalia seems to think that if we assign the decision making power in criminal cases in a particular way that liberty automatically will follow.

Justice Stevens's approach to the right to jury trial is quite different. Justice Stevens's conception of the right to jury trial is primarily a functional one. Let me read one final passage of Justice Stevens's work to you. This is what he says in his dissenting opinion in *McMillan*:

It is true, as the Court points out, that the enhanced punishment is within the range that was authorized for any aggravated assault. That fact does not, however, minimize the significance of a finding of visible possession of a firearm whether attention is focused [either] on the stigmatizing or punitive consequences of that finding . . . . The finding identifies conduct that the legislature specifically intended to prohibit and to punish by a special sanction. In my opinion the constitutional significance of the special sanction cannot be avoided by the cavalier observation that it merely "ups the ante" for the defendant . . . . No matter how culpable [the defendant] may be, the difference between 11½ months [the sentence judge had said would have given him but for the mandatory minimum] and 5 years of incarceration merits a more principled justification than the luck of the draw.<sup>18</sup>

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<sup>17</sup> *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

<sup>18</sup> *McMillan v. Pennsylvania*, 477 U.S. 79, 103-04 (1986) (Stevens, J., dissenting) (citations omitted).

There is no formalism here. Rather, Justice Stevens perceives the right to jury trial as a fundamental protection for the accused. It protects against legislatures, whether purposefully or unintentionally, depriving the defendant of his right to have all critical facts in his case proven to twelve people beyond a reasonable doubt.

What accounts for this distinct vision? Many of us say oftentimes that Justice Stevens is the quintessential common law judge. Common law judges, as opposed to more rule-bound judges such as Justice Scalia, don't simply define and extend rules by their terms irrespective of the consequences, nor do they decline to extend previous decisions simply because the new case requires adjusting a rule itself. For Justice Stevens, liberty is about individuals. It's about protection against arbitrary or oppressive governmental actions. In other words, the right to trial by jury is the right the defendant has to have his peers decide whether or not he is guilty of something and should be punished in a certain way. If the prosecution cannot persuade a jury that a certain allegation should play a pivotal role in the defendant's punishment, then the allegation should not play such a role in his punishment.

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It has been an honor to be here today and to talk about modern cases that have elevated Justice Stevens's early dissents into constitutional law. But in one case, *Harris*, the Court fell one vote short of adopting Justice Stevens's full vision of liberty as encapsulated in the right to jury trial. And so my parting wish for the Justice today would be that the Court adopt his full dissenting opinion in *McMillan* while he is still on the Court.

There's reason to believe this is possible. Concurring in *Harris*, Justice Breyer wrote that he agreed with the "logic" of Justice Stevens's view that *McMillan* is incompatible with *Apprendi*, but Justice Breyer declined to vote with Justice Stevens because he was not yet ready to accept *Apprendi*. So maybe Justice Breyer, or maybe some new Justice, will soon be ready to sign on to the *Apprendi* doctrine and to overrule *Harris*.

Justice Stevens himself has certainly not given up the cause. Earlier this year, in an oral argument involving whether the *Apprendi* doctrine applies to findings of fact necessary to run two sentences consecutive to one another, Justice Stevens interrupted to ask one advocate whether he thought *McMillan* was rightly decided.<sup>19</sup> Before the

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<sup>19</sup> Transcript of Oral Argument at 18, *Oregon v. Ice*, 129 S. Ct. 711 (2009) (No. 07-901).

advocate could answer, Justice Stevens said: "I think it was wrong. I will be perfectly candid and say so. I think it was a very important decision." Wouldn't it be nice if Justice Stevens gets the opportunity to say that in an opinion for the Court before he retires?