

What If?: Human Experience and Supreme Court Decision Making on Criminal Justice

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WHAT IF?: HUMAN EXPERIENCE AND SUPREME COURT DECISION MAKING ON CRIMINAL JUSTICE

CHRISTOPHER E. SMITH*

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I. INTRODUCTION

In 2014, the U.S. Supreme Court considered the purported authority of police officers to engage in warrantless examinations of the digital information contained in smartphones carried by arrestees.¹ The issue arose because Supreme Court precedents approved certain searches incident to a lawful arrest to protect the safety of the officer and prevent the destruction of evidence.² In the smartphone case, *Riley v. California*,³ the Court unanimously declared that such warrantless searches are not permitted.⁴ The majority opinion by Chief Justice John Roberts emphasized that “[c]ellphones differ in both a quantitative and qualitative sense from other objects that might be carried on an arrestee’s

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1. *Riley v. California*, 134 S. Ct. 2473, 2480 (2014).

2. *New York v. Belton*, 453 U.S. 454 (1981) (search of the passenger compartment of an automobile after the arrest of a driver); *Chimel v. California*, 395 U.S. 752 (1969) (search of the area around an arrestee inside a home).

3. 134 S. Ct. 2473.

4. *Id.* at 2495.

person”⁵ because of the detailed personal information that such smartphones contain.⁶

In her commentary for the *New York Times* about the Court’s decision, Linda Greenhouse concluded that Justices’ own personal experiences and understanding of the nature of private information contained in smartphones led to support for the decision,⁷ even among Justices who typically side with law enforcement’s arguments in Fourth Amendment cases.⁸ In Greenhouse’s words, “The justices are walking in their own shoes. The ringing cellphone could be theirs—or ours.”⁹ She reached a similar conclusion about the role of Justices’ personal knowledge in guiding decisions¹⁰ with respect to *Bond v. United States*.¹¹ In *Bond*, the majority opinion by Chief Justice William Rehnquist, who typically supported law enforcement interests in criminal procedure cases,¹² invalidated a warrantless external manipulation of a duffel bag in the overhead luggage rack of a bus and thereby excluded from use in evidence the illegal drugs found in the duffel bag.¹³ According to Greenhouse:

I remember puzzling over that decision. In one opinion after another, most written by Chief Justice Rehnquist, the Supreme Court had been allowing the police to write their own ticket when it came to detecting drug trafficking. Why draw the line at a duffel bag on a Greyhound bus?

5. *Id.* at 2478.

6. *Id.*

7. Linda Greenhouse, *The Supreme Court Justices Have Cellphones, Too*, N.Y. TIMES, June 26, 2014, at A27, http://www.nytimes.com/2014/06/26/opinion/linda-greenhouse-the-supreme-court-justices-have-cellphones-too.html?_r=0 [https://web.archive.org/web/20151209080027/http://www.nytimes.com/2014/06/26/opinion/linda-greenhouse-the-supreme-court-justices-have-cellphones-too.html?_r=0].

8. According to the Supreme Court Judicial Database, for example, Justice Alito supported law enforcement interests over individuals’ claims in more than 82% of criminal procedure cases decided by the Court prior to the 2009 Term. Justice Clarence Thomas supported law enforcement interests in more than 79% of such cases. Chief Justice John Roberts and Justice Antonin Scalia showed similar levels of support by supporting individuals’ claims in barely more than one-quarter of criminal procedure decisions in the same time period. LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATE, DECISIONS & DEVELOPMENTS* 561–63 (5th ed. 2012).

9. Greenhouse, *supra* note 7, at A27.

10. *Id.*

11. 529 U.S. 334 (2000).

12. Chief Justice Rehnquist supported law enforcement interests in 83% of criminal procedure cases. EPSTEIN ET AL., *supra* note 8, at 562.

13. *Bond*, 529 U.S. at 336–39.

Eventually, it occurred to me: The justices were passengers, too. Not on buses, for sure, but on Amtrak or the shuttle [flights between New York City and Washington, D.C.], and the notion that anyone with a badge could start randomly feeling up their carry-ons was deeply distasteful.¹⁴

Greenhouse's speculative conclusion that life experience can influence Supreme Court Justices' opinions is supported by recent social science research.¹⁵ Using sophisticated quantitative methods in examining more than 200 federal appellate judges' decisions over a six-year period, researchers found that "across cases involving gender issues, judges who parent daughters as opposed to sons are likely to reach liberal decisions—possibly because having daughters causes judges to learn about women's issues."¹⁶ The effect is not driven by Democratic and liberal judges' oft-noted higher levels of support for equality and civil rights¹⁷ because "[t]he effect . . . is most pronounced among male judges appointed by Republican presidents, like [the late] Chief Justice [William] Rehnquist."¹⁸ As one of the authors of the study observed:

"Justices and judges aren't machines They are human, just like you and me. And just like you and me, they have personal experiences that affect how they view the world.

"Having daughters . . . is just one kind of personal experience, but there could be other things—for example, serving in the military, adopting a child or seeing a law clerk come out as gay. All of these things could affect a Justice's worldview."¹⁹

The foregoing examples highlight the relevance of experience-based knowledge for Supreme Court Justices. This is not to say that Justices

14. Greenhouse, *supra* note 7, at A27.

15. Adam N. Glynn and Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37, 52 (2015).

16. *Id.*

17. See CHRISTOPHER P. BANKS, JUDICIAL POLITICS IN THE D.C. CIRCUIT COURT 104 (1999); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 245–55 (1993); Christopher E. Smith, *Polarization and Change in the Federal Courts: En Banc Decisions in the U.S. Courts of Appeals*, 74 JUDICATURE 133, 137 (1990).

18. Adam Liptak, *Another Factor Said to Sway Judges to Rule for Women's Rights: A Daughter*, N.Y. TIMES, June 17, 2014, at A14, <http://www.nytimes.com/2014/06/17/us/judges-with-daughters-more-often-rule-in-favor-of-womens-rights.html> [<https://web.archive.org/web/20160429004714/http://www.nytimes.com/2014/06/17/us/judges-with-daughters-more-often-rule-in-favor-of-womens-rights.html>].

19. *Id.*

should or do rely solely on their subjective perceptions of the lessons of personal experience²⁰ in guiding their judicial decisions.²¹ Although other factors such as adherence to precedent, Justices' values, and theories of constitutional interpretation also affect judicial decision making,²² the strength and role of these influences vary by Justice and by the particular issue presented to the Court.²³ The analysis in this Article will explore the implications of life experience when, as indicated by the research on appellate judges who have daughters,²⁴ such experiences may serve as an

20. Individuals perceive the nature and implications of their experiences differently, as illustrated by the different approaches to specific legal issues by Justices Thurgood Marshall and Clarence Thomas. Both of these African-American Justices experienced discriminatory treatment while growing up in the segregated societies of Maryland and Georgia, respectively. As described by a biographer:

At age sixteen Thurgood Marshall began a metamorphosis. The teasing, often goofy boy embarked on a journey of experiences that opened his eyes to the painful realities of economic and racial problems crippling most black Americans. With high school behind him he had to find his place in an adult world where legal segregation and poverty plagued black people.

JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 40 (1988).

Marshall's experiences led him to argue for school desegregation and affirmative action as remedies for ongoing discrimination and its continuing consequences in American society. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 387 (1978) (Marshall, J., separate opinion); *Milliken v. Bradley*, 418 U.S. 717, 781 (1974) (Marshall, J., dissenting).

Justice Clarence Thomas experienced racial discrimination growing up in Georgia in the 1950s. Thomas's biographer noted, "The enforced separation of blacks and whites in Savannah added yet another dimension to the racial turmoil of Thomas's early life. Segregation appeared to young Clarence Thomas as a series of invisible stop signs, sharply confining where he traveled and whom he played with." KEN FOSKETT, *JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS* 62 (2004). Yet Thomas's experiences and values led him to criticize reasoning in the landmark school desegregation case of *Brown v. Board of Education* as "rest[ing] on an assumption of black inferiority," *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring), and oppose affirmative action as stigmatizing to African-Americans, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring).

21. Scholars who study the decision making by Supreme Court Justices have identified a variety of factors that affect decisions, including attitudes, precedent, persuasive interactions among the Justices, and Justices' considerations of the audiences for their decisions. LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES* 5–23 (2006).

22. *Id.*

23. *See, e.g.,* Earl M. Maltz, *Introduction to REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC* 5, 5 (Earl M. Maltz ed., 2003) ("Conservative[] [justices] . . . adopt[ed] a formalist approach[:]; they also argued for a jurisprudence based on originalism—the theory that the constitutional text should be seen as having a fixed meaning . . . John Paul Stevens, David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer . . . support[ed] the antiformal approach that marked the jurisprudence of the Warren and Burger era[s] and deploy[ed] that approach in support of many of the same causes espoused by liberal politicians . . .").

24. *See supra* notes 13–17 and accompanying text.

influence that trumps other factors, even for Justices who claim strict obedience to a particular approach to constitutional interpretation, judicial role, or judicial values.²⁵

Given the potential for human experience to influence Supreme Court decisions, an intriguing question to consider is the impact of a *lack* of relevant life experiences on Supreme Court decisions,²⁶ especially in cases for which a single vote going in a different direction might have had a dramatic impact on law and policy.²⁷ Linda Greenhouse has noted, for example, that certain Supreme Court Justices' lack of occupational experience outside of government service may influence their decisions about employment law as they do not understand workplace realities affecting non-lawyers in the private sector.²⁸ Thus the existence of relevant life experiences—or the lack thereof—may have profound impacts, including effects on the Justices' capacity to anticipate consequences of the Court's decisions²⁹ as well as considerations that

25. See, e.g., Liptak, *supra* note 18, at A14.

In a 2003 Supreme Court opinion, Chief Justice William H. Rehnquist suddenly turned into a feminist, denouncing “stereotypes about women’s domestic roles.”

Justice Ginsburg said the chief justice’s “life experience” had played a part in the shift. One of his daughters was a recently divorced mother with a demanding job.

....

It turns out that judges with daughters are more likely to vote in favor of women’s rights than ones with only sons.

Id.

26. See Linda Greenhouse, *Sotomayor: Does Biography Matter, Justices on the Job*, N.Y. TIMES, (July 24, 2013, 9:00 PM), <http://opinionator.blogs.nytimes.com/2013/07/24/justices-on-the-job/> [<https://perma.cc/J3EL-MF9S>].

As far as I can tell from his résumé, Samuel Alito, since his graduation from law school, has never cashed a paycheck that wasn’t issued by the federal government. . . . In federal employment, salaries are set by law and lines of authority are clear to all. But in the private sector, where I’ve spent my career, salaries are often close to state secrets and it can be the least powerful of many bosses who can make an employee’s daily life the most miserable.

Does Justice Alito understand this? Can he? It’s not really that complicated. So maybe this is the real mismatch: the wrong man for the job.

Id.

27. See *id.* Greenhouse’s example of Justice Alito’s lack of experience with private employers concerned his majority opinion in the 5-to-4 decision concerning employment and pay discrimination in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

28. *Id.*

29. See Walter Isaacson, *A Justice Reflects*, DAILY BEAST, (June 29, 2009, 7:18 PM), <http://www.thedailybeast.com/articles/2009/06/29/a-justice-reflects.html> [<https://perma.cc/TNF8-QCML>] (interview in which Justice Sandra Day O’Connor discussed the impact of her

could inform presidents' decisions about which individuals to choose for nomination to the Supreme Court and other federal courts.³⁰

II. HUMAN EXPERIENCE AND JUDICIAL DECISIONS

Justice Sandra Day O'Connor openly acknowledged the impact and importance of life experiences on her judicial decision making.³¹ She said in an interview:

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.

....

It's important for the Supreme Court to have a broader set of life experiences than just people who have served as judges.³²

O'Connor also emphasized the central benefit of life experience and personal understanding in decision making by the Supreme Court: "[Y]ou do have to have an understanding of how some rule you make will apply to people in the real world. I think that there should be an awareness of the real-world consequences of the principles of the law you apply."³³

With respect to several Justices, the connections between life experiences and judicial decision making seem evident.³⁴ For example, Justice Thurgood Marshall's outspokenness on issues of racial discrimination was presumably directly connected to his own experiences growing up as an African-American in a racially segregated and thoroughly discriminatory society.³⁵ In another example, William O. Douglas, who grew up in impoverished circumstances in Washington

practical life experiences on her judicial decisions).

30. For example, President Obama appeared to include consideration of Justice Sonia Sotomayor's life experiences and personal understanding of society in nominating her to the Supreme Court in 2009. See Lani Guinier, *Biography Has Always Mattered*, N.Y. TIMES: ROOM FOR DEBATE, (May 26, 2009, 2:16 PM), <http://roomfordebate.blogs.nytimes.com/2009/05/26/obamas-first-choice-for-the-supreme-court/> [<https://perma.cc/MM6R-3EWK>].

31. Isaacson, *supra* note 29.

32. *Id.*

33. *Id.*

34. See *supra* note 20.

35. *Id.*

State, openly described his skepticism of police based on his personal observations of their treatment of poor people: “[The police] caused a close sifting of loyalties in a young man who felt the roughness of their hand. I knew their victims too intimately to align myself with the police.”³⁶ This human experience, and the skepticism about police that it produced, may help to explain the fact that Douglas had the highest level of support for constitutional rights claims in the criminal justice process among all Justices who have served since 1946.³⁷ For other Justices, however, the impact of life experiences is less obvious and sometimes surprising.³⁸

A. *The Liberalizing Impact of Life Experiences: John Paul Stevens*

The retirement of U.S. Supreme Court Justice John Paul Stevens in 2010³⁹ called increasing attention to the previously little-known connections between his life experiences and his decision making as an Associate Justice.⁴⁰ For example, until the end of his career on the Supreme Court, few people knew that Stevens had provided pro bono representation for convicted offenders in Illinois during the 1950s.⁴¹ Among the cases that Stevens handled as a volunteer attorney was one in which he gained the release of a wrongfully convicted man who had served seventeen years in prison for murder despite his innocence.⁴² The man’s conviction was based on a false confession after being tortured by the Chicago police during an interrogation session.⁴³ In speeches decades

36. WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN* 78 (1974).

37. Douglas supported individuals’ rights claims in 86.5% of cases classified as “Criminal Procedure” in the Supreme Court Judicial Database. EPSTEIN ET AL., *supra* note 8, at 561, 564.

38. *See infra* Part II.

39. Robert Barnes, *Justice Stevens to Step Down*, WASH. POST, Apr. 10, 2010, at A1, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/09/AR2010040902312.html> [https://perma.cc/XFW6-ZM8D].

40. *See, e.g.*, Christopher E. Smith, *Justice John Paul Stevens and Capital Punishment*, 15 BERKELEY J. CRIM. L. 205, 213–14 (2010) (describing Justice Stevens’s World War II experiences that affected his views on capital punishment).

41. John Paul Stevens, *Judicial Activism: Ensuring the Powers and Freedoms Conceived by the Framers for Today’s World*, Address at the Third Annual John Paul Stevens Award Dinner (Sept. 25, 2002) [hereinafter Stevens, *Judicial Activism*], in 16 CHI. B. ASS’N REC., Oct. 2002, at 25. Justice Stevens provided his own description of his experience in his autobiographical post-retirement book structured as a discussion of the five Chief Justices that he had known. *See* JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 78–80 (2011).

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

43. The *La Frana* court stated:

later, Justice Stevens made it clear that the abusive treatment and unjust imprisonment were indelibly etched into his memory.⁴⁴ He said, “I learned that some of those interrogations [by Chicago police] did, in fact, involve brutal and indefensible police conduct,”⁴⁵ and “What I learned from that case has no doubt had an impact on my work on the Supreme Court.”⁴⁶ This experience and personal knowledge, as well as his exposure to similar issues considered by the Supreme Court during the 1947 Term in which he clerked for Justice Wiley Rutledge,⁴⁷ contributed to Stevens’s eventual role as one of the Court’s staunchest defenders of *Miranda* warnings.⁴⁸

Justice Stevens came to the Supreme Court with a public reputation as a Republican who grew up in a wealthy family⁴⁹ and whose legal career was typically summarized as “a lawyer . . . specializing in antitrust cases.”⁵⁰ Justice Stevens wrote two exceptionally strong dissenting opinions supporting constitutional rights for prisoners within his first

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.

44. John Paul Stevens, *Random Recollections*, 42 SAN DIEGO L. REV. 269 (2005); Stevens, *Judicial Activism*, *supra* note 41.

45. Stevens, *Judicial Activism*, *supra* note 41, at 25.

46. Stevens, *supra* note 44, at 270.

47. During the Supreme Court’s 1947 Term, Stevens researched legal issues for Justice Rutledge as the Court decided several cases concerning teenagers who confessed to crimes after being questioned in isolation. In each case, the isolated circumstances of the interrogation, the vulnerability and ignorance of the young defendants, the lack of representation by counsel, and the risk of coercion led Justice Rutledge to join the Justices who challenged the voluntariness of those confessions. See *Lee v. Mississippi*, 332 U.S. 742 (1948); *Haley v. Ohio*, 332 U.S. 596 (1948); *Marino v. Ragen*, 332 U.S. 561 (1947).

48. Christopher E. Smith, *Justice John Paul Stevens: Staunch Defender of Miranda Rights*, 60 DEPAUL L. REV. 99, 102–03 (2010).

49. Christopher E. Smith, *Justice John Paul Stevens and Prisoners’ Rights*, 17 TEMP. POL. & C.R. L. REV. 83, 86–88 (2007).

50. Ward Farnsworth, *Realism, Pragmatism, and John Paul Stevens*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC, *supra* note 23, at 157, 157.

twelve months on the Court.⁵¹ Thus it may have appeared perplexing and difficult to explain why a “moderate”⁵² Republican appointee would immediately assert himself as the foremost advocate of prisoners’ rights⁵³ on a Court that still included consistently liberal Warren Court-era holdovers William Brennan and Thurgood Marshall.⁵⁴ While Justice Stevens’s emphasis on the concept of “liberty” in his judicial philosophy⁵⁵ explains his opinions, in part so too does the later discovery that he had gone into high-security prisons to interview prisoner-clients as part of his pro bono work for the Chicago Bar Association program.⁵⁶ Stevens personally observed prison conditions prior to the reforms that judges pushed prisons to implement in the 1970s and thereafter,⁵⁷ and moreover, he may have been the only Justice in recent history to obtain an intimate, personal glimpse of conditions behind the walls of prisons.⁵⁸ As illustrated by the example of Justice Stevens, as with other Justices whose decisions in specific cases may run counter to initial predictions about the application of their judicial values,⁵⁹ the impact of life experiences can be

51. See *Estelle v. Gamble*, 429 U.S. 97, 108–09 (1976) (Stevens, J., dissenting); *Meachum v. Fano*, 427 U.S. 215, 229 (1976) (Stevens, J., dissenting).

52. Robert D. McFadden, *The President’s Choice*, N.Y. TIMES, Nov. 29, 1975, at 1.

53. *Estelle*, 429 U.S. at 97–98, 108–09. In his dissent, Justice Stevens arguably cast him as the most liberal Justice on prisoners’ rights because he was the lone dissenter against a majority opinion written by Thurgood Marshall that expanded prisoners’ right to medical care, yet Stevens alone among the Justices concluded that the Marshall opinion did not provide enough protection for incarcerated offenders.

54. The aggregate liberal voting records of Justices Brennan and Marshall place them among the Justices who were most frequently supportive of constitutional rights claims presented before the Supreme Court. EPSTEIN ET AL., *supra* note 8, at 561–62.

55. At the end of his career, Justice Stevens discussed at length his emphasis on the concept of liberty and its relationship to the Due Process Clause. *McDonald v. City of Chicago*, 561 U.S. 742, 863–82 (2010) (Stevens, J., dissenting).

56. STEVENS, *supra* note 41, at 78–79.

57. MALCOM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE* 13–17 (1998); STEVENS, *supra* note 41, at 78–79.

58. Interview by Christopher E. Smith with Justice John Paul Stevens, Associate Justice (ret.), U.S. Supreme Court, Washington, D.C. (July 29, 2010) (on file with author).

59. Justice Harry Blackmun was an appointee of Republican President Richard Nixon. He is most famous for writing the controversial majority opinion that effectively legalized abortion in *Roe v. Wade*, 410 U.S. 113 (1973). Prior to the legalization of abortion, one of Blackmun’s daughters had become pregnant as a teenage college student and felt forced to enter into what was ultimately a short-lived marriage. LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* 74–75 (2005). According to Linda Greenhouse, as a result of his daughter’s experience, “Blackmun was painfully familiar with the consequences of unintended pregnancy.” *Id.* at 74. This aspect of Blackmun’s life experience was not revealed until 2004, more than twenty years after the *Roe* decision and five years after the Justice’s death. Cynthia L. Cooper, *Daughter of Justice*

difficult to assess because of limited knowledge about each Justice's experiences.⁶⁰ Information may not be available, if it ever is, until biographers examine the Justices closely at the end of their careers⁶¹ or the Justices reveal information about themselves in their own autobiographies.⁶²

B. Intriguing Questions About the Impact of Life Experiences: Justice Antonin Scalia

Justice Antonin Scalia was well-known as a self-proclaimed "textualist"⁶³ who claimed fidelity to interpreting the Constitution according to its original meaning⁶⁴ as well as advocated for an approach to statutory interpretation that disregards consideration of legislative history.⁶⁵ While his constitutional theory led to a rights-protective interpretation of rights under the Sixth Amendment's Confrontation

Blackmun Goes Public About Roe, WOMEN'S ENEWS.ORG, (Feb. 29, 2004), http://womensenews.org/story/the-nation/040229/daughter-justice-blackmun-goes-public-about-roe#.Uh_4rNIsn3E [https://perma.cc/6RCK-WMGJ].

60. In public speeches, Stevens dropped limited hints about his life experiences and their impact on his judicial decision making. See Stevens, *Judicial Activism*, *supra* note 41 and accompanying text. However, the extent of his influential life experiences related to the criminal justice system did not begin to be revealed until a journalist wrote an article about Stevens's family and childhood just a few years before his retirement from a 35-year career on the Supreme Court. See Charles Lane, *Heartbreak Hotel*, CHI. MAG., Aug. 2006, at 132–35, 194–96, 207.

61. For example, the first biography of Justice Stevens was published in 2010, the year he retired from the Supreme Court. BILL BARNHART & GENE SCHLICKMAN, JOHN PAUL STEVENS: AN INDEPENDENT LIFE (2010); Barnes, *supra* note 39, at A1.

62. Justice Stevens's memoir was published in 2011, the year after he retired from the Supreme Court. STEVENS, *supra* note 41; Barnes, *supra* note 39, at A1.

63. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, 3, 22 (Amy Gutmann ed., 1997) ("The text is the law and it is the text that must be observed."); *id.* at 23–24 ("I am not a strict constructionist, and no one ought to be—though better that, I suppose, than a nontextualist. . . . But a proper textualist, which is to say my kind of textualist, would surely have voted to acquit.").

64. See, e.g., Antonin Scalia, *Foreword to ORIGINALISM: A QUARTER-CENTURY OF DEBATE*, 43 (Steven G. Calabresi ed., 2007) ("Twenty years ago, when I joined the Supreme Court, I was the only originalist among its numbers.").

65. *Id.* at 29–37.

Clause⁶⁶ and certain Fourth Amendment contexts,⁶⁷ he generally took a narrow view of rights in the context of criminal justice.⁶⁸

Despite his claims of fidelity to originalism, Scalia did not consistently apply that approach when interpreting the Constitution.⁶⁹ For example, his influential majority opinion in *Wilson v. Seiter*⁷⁰ made it significantly more difficult for incarcerated offenders to claim that prison conditions violate the Eighth Amendment protection against cruel and unusual punishments.⁷¹ Yet, Scalia relied on manipulative characterizations of precedents rather than originalism.⁷² Indeed, Scalia reportedly strengthened his commitment to actually applying originalism more frequently in criminal justice cases only after being persuaded by Justice Thomas's example during Thomas's first term on the Court in 1991–1992.⁷³

In theory, Scalia's claimed adherence to originalism as guiding his approach to constitutional interpretation should override any temptation to emphasize consideration of human consequences as the primary driver of judicial decisions.⁷⁴ Yet Justice Scalia has also referenced his

66. See *Maryland v. Craig*, 497 U.S. 836 (1990) (Scalia, J., dissenting); *Coy v. Iowa*, 487 U.S. 1012 (1988).

67. See *Maryland v. King*, 133 S. Ct. 1958 (2013) (Scalia, J., dissenting); *Kyllo v. United States*, 533 U.S. 27 (2001).

68. See, e.g., Christopher E. Smith & Madhavi M. McCall, *Antonin Scalia: Outspoken & Influential Originalist*, in *THE REHNQUIST COURT AND CRIMINAL JUSTICE* 169, 169 (Christopher E. Smith, Christina DeJong & Michael A. McCall eds., 2011) (“In criminal justice cases, Justice Scalia’s voting record indicated that he usually opposed the claims of individuals and, instead, favored the interests of police, prosecutors, and corrections officials. . . . Among the Rehnquist Court justices, only Justice Thomas was less likely to support the claims of individuals.”).

69. For example, as noted by Frank B. Cross, even in Scalia’s Second Amendment gun rights opinion, *District of Columbia v. Heller*, 554 U.S. 570 (2008), which “has been lauded as the epitome of contemporary originalism at the Supreme Court[,] . . . Scalia provides in the opinion a laundry list of gun regulations that would be constitutional, but he provides zero originalist basis for these conclusions.” FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* 103–04 (2013) (citation omitted).

70. 501 U.S. 294 (1991).

71. Betsy M. Santini, Comment, *The Curtailment of Prisoners’ Ability to Protect Their Right to Be Free from Cruel and Unusual Punishment: A Post-Wilson Circuit Survey of Prison Conditions Cases*, 2 CORNELL J. L. & PUB. POL’Y 421, 441 (1993).

72. Christopher E. Smith, *The Malleability of Constitutional Doctrine and Its Ironic Impact on Prisoners’ Rights*, 11 B.U. PUB. INT. L. J. 73, 84–87 (2001).

73. JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 115–20 (2007).

74. Justice Scalia said of his fundamental approach to constitutional interpretation, “What I look for in the Constitution is precisely what I look for in a statute: the original

understanding of human experience in ways that seem to indicate a potential influence on his thinking separate from his claimed fidelity to originalism.⁷⁵ For example, a group of retired generals asked Scalia to recuse himself from cases concerning the rights of war-on-terrorism detainees held at Guantanamo Bay, Cuba, after Scalia made a public comment about his U.S. Army officer son's service in Iraq.⁷⁶ In responding to an audience member's question following a speech he gave in Switzerland, Scalia said: "I had a son on that battlefield and they were shooting at my son, and I'm not about to give this man who was captured in a war a full jury trial. I mean it's crazy."⁷⁷ Another example is Scalia's dissenting opinion against the Court's approval in *County of Riverside v. McLaughlin*⁷⁸ of a flexible time period before holding a probable cause hearing for arrestees. He presented sympathetically the story of a student in Charlottesville, Virginia, a place where Scalia previously lived and worked as a law professor,⁷⁹ who was arrested for refusing to pay a cover charge after entering a restaurant.⁸⁰ Another example is found in a Court memo from Scalia to his colleagues that was found in Justice Marshall's papers in the Library of Congress. Scalia declared that he considered racial discrimination in the criminal justice system to be "ineradicable."⁸¹ Scalia's deference to the realities of human behavior may have fed Justice

meaning of the text, not what the original draftsmen intended." Scalia, *supra* note 63, at 38. This is not to say that Scalia never refers to human experiences and consequences in the service of originalism. For example, he presented several reasons that he believed that handguns are contemporary Americans' preferred weapons for self-defense in their homes when he wrote his originalist opinion establishing a personal Second Amendment right to gun ownership in *Heller*, 554 U.S. at 629.

75. See, e.g., *Powers v. Ohio*, 499 U.S. 400, 431 (1991) (Scalia, J., dissenting). Justice Scalia expressed concern about criminals going free and causing further victimization as a result of the Supreme Court's decision mandating increased scrutiny of peremptory challenges in jury selection that may be based on the potential juror's race.

76. JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF ANTONIN SCALIA* 322–23 (2009).

77. Tim Dillon, *Report: Scalia Calls Europe 'Hypocritical' on Gitmo*, USA TODAY, (Mar. 26, 2006, 6:16 PM), http://usatoday30.usatoday.com/news/washington/2006-03-26-scalia-guantanamo_x.htm [https://perma.cc/6CHR-SX42].

78. 500 U.S. 44 (1991).

79. *10 Things You Didn't Know About Antonin Scalia*, U.S. NEWS & WORLD REP. (Oct. 2, 2007, 11:39 AM), <http://www.usnews.com/news/national/articles/2007/10/02/10-things-you-didnt-know-about-justice-antonin-scalia> [https://perma.cc/5HA5-NPHD].

80. *McLaughlin*, 500 U.S. at 70–71.

81. Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia's McCleskey Memorandum*, 45 MERCER L. REV. 1035, 1038 (1994).

Steven's disappointment that his colleagues appeared to conclude that there was no reason to prohibit racial bias and thereby threaten the existence of capital punishment.⁸²

The arrest of Scalia's adult daughter on DUI charges illuminates one particular aspect of Scalia's personal knowledge from life experience.⁸³ It presents intriguing possibilities for contributing to one of Scalia's rights-protective decisions, as well as raising a question about how this particular event, if it had gone differently, might have affected his decision about another case.⁸⁴ On February 12, 2007, Ann Banaszewski, the then-45-year-old daughter of Justice Scalia, was arrested by Wheaton, Illinois, police after officers responded to a report that a female driver with children in her vehicle appeared to be driving while under the influence of alcohol.⁸⁵ The police took the children to the home of a family friend⁸⁶ while Ms. Banaszewski went through the arrest process at the police station on charges of DUI and child endangerment before being released on a recognizance bond.⁸⁷ Three months later, she entered a guilty plea to the drunken driving charge in exchange for prosecutors dropping four other charges, including endangering the life of a child and failing to secure a child younger than eight in a child-restraint system.⁸⁸ Ms. Banaszewski was sentenced to 18 months of court-supervised probation, 140 hours of community service, and counseling sessions in addition to an automatic 6-month driver's license suspension for refusing to take a breath test when stopped by the police.⁸⁹ At the time of her arrest, the deputy police chief acknowledged that the police were well aware that she was Justice Scalia's daughter.⁹⁰ The deputy chief also noted that "the

82. Christopher E. Smith & Madhavi McCall, *Justice Scalia's Influence on Criminal Justice*, 34 TOL. L. REV. 535, 549 (2003).

83. Associated Press, *Supreme Court Justice Scalia's Daughter Pleads Guilty to Drunken Driving*, FOX NEWS (May 31, 2007), <http://www.foxnews.com/story/2007/05/31/supreme-court-justice-scalia-daughter-pleads-guilty-to-drunken-driving/> [<https://perma.cc/XG8N-A7FC>].

84. Angela Rozas, *Daughter of Supreme Court Justice Accused of DUI*, CHI. TRIB. (Metro N.), Feb. 14, 2007, at 3, <http://www.yourbbsucks.com/forum/showthread.php?14546-Scalia-s-Daughter-Arrested-For-DUI-And-Child-Endangerment> [<https://perma.cc/8ABA-HP9Y>].

85. *Id.*

86. *Id.*

87. Dennis Powell, *Scalia's Daughter Arrested*, ABC NEWS (Feb. 14, 2007), http://blogs.abcnews.com/politicalradar/2007/02/scalias_daughte.html [<https://perma.cc/WQX2-7BS9>].

88. Associated Press, *supra* note 83.

89. *Id.*

90. Rozas, *supra* note 84.

department's police officers routinely patrol Banaszewski's neighborhood to ensure her safety, a courtesy the department extends for others associated with law enforcement, the court system or anyone who requests extra patrols."⁹¹

Did Scalia's experience of having a close family member arrested and convicted of DUI have any influence over his vote in *Missouri v. McNeely*?⁹² It is impossible to know the answer to that question, but it is intriguing to consider the possibility.⁹³ In *McNeely*, a driver stopped by police for speeding and weaving across the centerline exhibited bloodshot eyes and slurred speech and also smelled of alcohol on his breath.⁹⁴ The driver declined to submit to a breath test and, when transported to a hospital, refused to consent to a blood test.⁹⁵ An officer instructed a lab technician at the hospital to draw a blood sample without the driver's consent and the results of the test indicated that the driver's blood alcohol level was 0.154%, well above the legal limit of 0.08%.⁹⁶

The case came to the Supreme Court as a Fourth Amendment issue that was described in Justice Sonia Sotomayor's majority opinion in these terms: "The question presented here is whether the natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases."⁹⁷ Sotomayor's opinion rejected the per se exigency rule sought by Missouri and declared that "exigency in this context must be determined case by case based on the totality of the circumstances."⁹⁸ In other words, lacking the consent of the driver, police officers must obtain a warrant, if possible, before imposing an involuntary blood test on a suspected drunk driver.⁹⁹

91. *Id.*

92. 133 S. Ct. 1552 (2013).

93. As illuminated by Linda Greenhouse's comments on the impact of life experiences, any attribution of a causal link between life experiences and specific Justices' decisions is necessarily speculative, *see supra* notes 7–14 and accompanying text, unless a Justice points to the experience himself or herself as an influential event, *see supra* notes 39–46.

94. *McNeely*, 133 S. Ct. at 1556.

95. *Id.* at 1557.

96. *Id.*

97. *Id.* at 1556.

98. *Id.*

99. *See, e.g., id.* at 1565 ("But the general importance of the government's interest [in gathering available evidence about drunk driving suspects] in this area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case.").

An interesting aspect of the decision is that Scalia joined with the Court's most liberal, rights-protective Justices, Justices Ruth Bader Ginsburg and Elena Kagan, in endorsing Sotomayor's entire majority opinion rather than joining the alternative opinions by his usual conservative allies in constitutional decisions.¹⁰⁰ Justice Anthony Kennedy wrote an opinion concurring in part.¹⁰¹ Chief Justice John Roberts wrote an opinion concurring in part and dissenting in part, joined by Justices Stephen Breyer and Samuel Alito,¹⁰² while Scalia's fellow self-proclaimed originalist, Justice Clarence Thomas,¹⁰³ wrote a dissenting opinion.¹⁰⁴

Similar to the suspect in *McNeely*,¹⁰⁵ Justice Scalia's daughter refused to submit to a breath test for blood alcohol content.¹⁰⁶ Based on that event, might Scalia have envisioned that, if his daughter had been stopped in any municipality other than her hometown where the police knew that she was the daughter of a U.S. Supreme Court Justice,¹⁰⁷ she could have been involuntarily subjected to what Sotomayor's opinion described as: "[A] compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's "most personal and deep-rooted expectations of privacy."¹⁰⁸

Although it is impossible to know if or how his daughter's experience may have influenced his thinking about the human consequences of the issue facing the Court in *McNeely*, Scalia's unusual alignment with the

100. See Thomas B. Edsall, *Supreme Injustice: Justice Thomas Is Asserting a Distinct and Cohesive Vision*, N.Y. TIMES (May 6, 2014), http://www.nytimes.com/2014/05/07/opinion/edsall-supreme-injustice.html?_r=0 [<https://perma.cc/TZ3H-NJHN>] (discussing the polarized voting alignments in key cases of "[t]he five very conservative justices who served on the [C]ourt from 2000 to 2013—including four still on the bench, John Roberts, Samuel Alito, Antonin Scalia and Clarence Thomas . . . [and] [t]he six moderate liberals—including four still on the [C]ourt, Stephen Breyer, Ruth Ginsburg, Elena Kagan and Sonia Sotomayor").

101. *McNeely*, 133 S. Ct. at 1568–69 (Kennedy, J., concurring in part).

102. *Id.* at 1569–74 (Roberts, C.J., concurring in part and dissenting in part).

103. See Christopher E. Smith, *Bent on Original Intent*, 82 A.B.A. J. 48, 50 (1996) ("Thomas . . . seeks to restore the democratic equilibrium that, in his view, the Constitution's Framers intended. Thus Thomas' adherence to the text and original intent of the Constitution seeks to limit governmental power . . .").

104. *McNeely*, 133 S. Ct. at 1574–78 (Thomas, J., dissenting).

105. *Id.* at 1557.

106. Associated Press, *supra* note 83.

107. Rozas, *supra* note 84.

108. *McNeely*, 133 S. Ct. at 1558.

most liberal Justices in the decision raises the possibility of an impact from this very specific life experience.

Justice Scalia's experience with his daughter's arrest also raises intriguing questions about how he might have approached and understood the human consequences of *Florence v. Board of Chosen Freeholders*¹⁰⁹ if his daughter had been booked into the jail, as happens to many drunk-driving suspects,¹¹⁰ instead of merely being processed and released¹¹¹ from an affluent suburb's police station.¹¹² In *Florence*, a man was arrested based on a bench warrant that was erroneously maintained in a court database despite the fact that he had already paid the fine on which the warrant was originally based.¹¹³ In the seven days that it took for the mistake to be recognized, he was held in one jail for six days and then transferred for one day to a second jail.¹¹⁴ Upon entering both jails, he was subjected to strip searches and body cavity inspections.¹¹⁵ As described in the Court's opinion, "[p]etitioner alleges he was required to lift his genitals, turn around, and cough in a squatting position as part of the process."¹¹⁶ He filed a lawsuit against the jail authorities on the claim that such intrusive strip searches should only be applied when there is reasonable suspicion, based on the particular detainee or the nature and seriousness of the alleged offense, that the detainee may be concealing weapons or contraband under his clothing or within his body cavities.¹¹⁷ Many such lawsuits have been successfully pursued throughout the country in the past,¹¹⁸ but in a 5-to-4 decision, the Supreme Court rejected the petitioner's argument and ruled that security concerns can justify strip

109. 132 S. Ct. 1510 (2012).

110. See, e.g., Joe Guillen et al., *Detroit Councilman Found Slumped in Car, Arrested*, DET. FREE PRESS, July 1, 2014, at 1A (reporting member of Detroit City Council held overnight in jail after arrested on drunk-driving charge).

111. Powell, *supra* note 87.

112. The median household income for Wheaton, Illinois, in 2014 was \$85,234, while the average for the State of Illinois was only \$56,210. The median home value in Wheaton was \$314,918 compared to \$169,600 for the rest of Illinois. *Wheaton, Illinois*, CITY-DATA.COM, <http://www.city-data.com/city/Wheaton-Illinois.html> [<https://perma.cc/VRM2-7VFM>] (last visited Feb. 2, 2016).

113. *Florence*, 132 S. Ct. at 1514.

114. *Id.*

115. *Id.*

116. *Id.*

117. See *id.* at 1515.

118. Margo Schlanger, *Jail Strip-Search Cases: Patterns and Participants*, 71 LAW & CONTEMP. PROBS. 65, 73-75 (2008).

searches for all jail detainees without any requirement of individualized suspicion.¹¹⁹

Justice Scalia endorsed Justice Kennedy's majority opinion.¹²⁰ Would he have done so if his daughter had been required to strip off her clothes, squat and cough, and endure visual examinations of her body cavities? It is one thing to talk in a general way about the application of intrusive search practices to generic jail detainees, but perhaps quite another to have knowledge of, and a potential visceral reaction to, the heavy-handed treatment of a loved one by officials in the criminal justice system.¹²¹ If Scalia's daughter had been arrested while visiting New Jersey, the setting for the *Florence* case, instead of in her Illinois suburb where she was known as the daughter of a Supreme Court Justice,¹²² her experience might have been quite different.¹²³ This example creates a classic "what if?" scenario for which a change of circumstances might have changed one Justice's knowledge and vote and thereby turned the law in a completely different direction.¹²⁴

C. *Impervious to Life Experience Influence?: Justice Clarence Thomas*

Justice Clarence Thomas is a self-proclaimed originalist¹²⁵ who believes that using the Constitution's original intent for decision making

119. See *Florence*, 132 S. Ct. at 1521–23.

120. *Id.* at 1513.

121. See, e.g., Christopher E. Smith, *What I Learned About Stop-and-Frisk From Watching My Black Son*, ATLANTIC, (Apr. 1, 2014), <http://www.theatlantic.com/national/archive/2014/04/what-i-learned-about-stop-and-frisk-from-watching-my-black-son/359962/> [<https://perma.cc/D7XL-MTPC>] (documenting a father's description of lessons learned and his reaction to his son's improper treatment by police).

122. Rozas, *supra* note 84.

123. The Supreme Court's opinion described uniform, mandatory strip search policies at the jails in New Jersey where the *Florence* petitioner was held. *Florence*, 132 S. Ct. at 1514. Under the Illinois statute, Justice Scalia's daughter should have been protected from a jail strip search unless officers had a reasonable belief that the arrestee was hiding contraband. Juan Perez, Jr., & David Heinzmann, *LaSalle Settles Strip-Search Suits*, CHI. TRIB., Apr. 9, 2014, at 7, http://articles.chicagotribune.com/2014-04-08/news/chi-lasalle-county-strip-inmate-settlement-20140408_1_lasalle-county-dana-holmes-strip-searches [<https://perma.cc/35C3-3T3F>].

124. For example, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the due process-based challenge to Georgia's anti-sodomy law, Justice Lewis Powell's concurring opinion implied that his decisive fifth vote to uphold the statute might have gone in favor of the individual claimant if the claimant had been subjected to criminal punishment under the law or if the claimant's attorneys had challenged the statute under the Eighth Amendment's Cruel and Unusual Punishments Clause. *Id.* at 197–98 (Powell, J., concurring).

125. Clarence Thomas, *How to Read the Constitution*, WALL ST. J., Oct. 20, 2008, at A19, <http://www.wsj.com/articles/SB122445985683948619> [<https://perma.cc/BYG6-CXXL>].

prevents judges from imposing their own values into judicial decisions.¹²⁶ As with Justice Scalia,¹²⁷ Thomas's claimed approach to constitutional interpretation theoretically implies a rejection of any role for human experience because the focus is solely on "try[ing] to discern as best we can what the framers intended."¹²⁸ Indeed, Thomas has written opinions that have drawn criticisms from commentators as especially cruel¹²⁹ and mean¹³⁰ for lacking any empathic understanding of human consequences and practical implications.¹³¹ A *New York Times* editorial labeled Thomas as the "Youngest, Cruellest Justice"¹³² for his first-term dissenting opinion¹³³ that argued there was no basis for any constitutional claim when corrections officers beat a shackled prisoner who reportedly suffered facial bruises, loosened teeth, and a cracked dental plate.¹³⁴ A later opinion labeled as "one of the meanest Supreme Court decisions ever"¹³⁵ concerned a majority opinion that tossed out a multi-million dollar jury verdict favoring a former death row inmate who spent eighteen years behind bars after being wrongly convicted due to prosecutors' misconduct in hiding evidence that supported his claims of innocence.¹³⁶

Ironically, during his confirmation hearings, Thomas had claimed that he would bring to the Supreme Court an empathic understanding of the lives of people drawn into the criminal justice system.¹³⁷ Thomas said

126. Smith, *supra* note 103, at 50.

127. See *supra* note 74 and accompanying text.

128. Thomas, *supra* note 125, at A19.

129. Editorial, *The Youngest, Cruellest Justice*, N.Y. TIMES, Feb. 27, 1992, at A24, <http://www.nytimes.com/1992/02/27/opinion/the-youngest-cruellest-justice.html> [<https://perma.cc/F6L7-HX53>].

130. Dahlia Lithwick, *Cruel but Not Unusual: Clarence Thomas Writes One of the Meanest Supreme Court Decisions Ever*, SLATE.COM (Apr. 1, 2011), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/04/cruel_but_not_unusual.html [<https://perma.cc/63VW-B8RN>].

131. See, e.g., Editorial, *supra* note 129, at A24 ("A second disappointment concerns hope. Justice Thomas rose from poverty and discrimination in Pin Point, Ga., and his nomination won support from prominent people sure he would bring to the Court the understanding bred of hardship."); Lithwick, *supra* note 130 ("Both Thomas and Scalia have produced what can only be described as a master class in human apathy. Their disregard for the facts of Thompson's thrashed life and near-death emerges as a moral flat line.").

132. Editorial, *supra* note 129, at A24.

133. *Hudson v. McMillian*, 503 U.S. 1 (1992) (Thomas, J., dissenting).

134. *Id.* at 4, 18.

135. Lithwick, *supra* note 130.

136. *Connick v. Thompson*, 563 U.S. 51 (2011).

137. *Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court*

during his testimony:

And I believe Senator, that I can make a contribution, that I can bring something different to the Court, that I can walk in the shoes of the people who are affected by what the Court does.

You know, on my current court [the U.S. Court of Appeals for the District of Columbia Circuit] I have occasion to look out the window that faces C Street, and there are converted buses that bring in the criminal defendants to our criminal justice system, busload after busload. And you look out, and you say to yourself, and I say to myself every day, “But for the grace of God, there go I.”

So you feel that you have the same fate, or could have, as those individuals. So I can walk in their shoes, and I can bring something different to the Court.¹³⁸

However, in his role as a Supreme Court Justice, Thomas typically claims that his sole concern is the fulfillment of the Framers’ original intentions.¹³⁹

Despite Thomas’s claimed aspirations to focus solely on original intent,¹⁴⁰ he can reveal cognizance of human consequences for certain contexts and issues, such as opposition to race-based affirmative action,¹⁴¹ about which he apparently has strong personal feelings.¹⁴² For example, Justice Thomas is famous for his silence during the Court’s oral arguments, with the close of the 2013–2014 Term marking eight years since he last asked a question of counsel during arguments.¹⁴³ Thus he

of the United States: Hearings Before the Committee on the Judiciary United States Senate, 102d Cong. 260 (1993) (testimony of J. Clarence Thomas, United States Court of Appeals for the District of Columbia Circuit).

138. *Id.*

139. *See supra* notes 125–28 and accompanying text.

140. *See supra* notes 125–28.

141. *See, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring) (“These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.”).

142. ANDREW PEYTON THOMAS, *CLARENCE THOMAS: A BIOGRAPHY* 268 (2001) (“The downside to racial preferences, he reasoned, remained what it always had been: the presumption that minorities were intellectually inferior. This tradeoff had grated on him since Yale; now he ripped into these ‘obnoxious assumptions’ openly. ‘My friends, I will not concede my intellectual inferiority or my son’s for socio-economic gain. . . . For me, this concession has been, and will always be, too great a price to pay.’”).

143. Jeffrey Toobin, *Clarence Thomas’s Disgraceful Silence*, *NEW YORKER* (Feb. 21, 2014), <http://www.newyorker.com/online/blogs/comment/2014/02/clarence-thomas-disgraceful-silence.html> [<https://perma.cc/W7DG-SX9F>].

surprised his colleagues and observers at the Court in December 2002 when he suddenly interjected¹⁴⁴ with evident personal feeling¹⁴⁵ during an argument about the criminalization of cross-burning.¹⁴⁶ Justice Thomas, who knew the threat of white racists' violence from his youth in the segregated South of the 1950s,¹⁴⁷ spoke about cross-burning as "unlike any symbol in our society"¹⁴⁸ because "[t]here's no other purpose to the cross, no communication, no particular message It was intended to cause fear and to terrorize a population."¹⁴⁹ In another example of an issue for which Thomas focused on human consequences, he wrote an opinion discussing how "[g]angs fill the daily lives of many of our poorest and most vulnerable citizens with terror . . . , often relegating them to the status of prisoners in their own homes."¹⁵⁰ These concerns were consistent with those of political conservatives who often prefer to focus on the harms to crime victims rather than the rights of criminal defendants.¹⁵¹ However, it deviated from his claimed focus on originalism to include consideration of human consequences as part of the justification for a judicial decision.¹⁵²

In light of the examples when Justice Thomas focused on human experience,¹⁵³ there are intriguing "what if" questions that emerge

144. See Linda Greenhouse, *An Intense Attack by Justice Thomas on Cross-Burning*, N.Y. TIMES, Dec. 12, 2002, at A1 ("Justice Thomas speaks in a rich baritone that is all the more striking for being heard only rarely during the court's argument sessions. His intervention, consequently, was as unexpected as the passion with which he expressed his view.").

145. *Id.*

146. *Virginia v. Black*, 538 U.S. 343 (2003).

147. See CLARENCE THOMAS, *MY GRANDFATHER'S SON* 21–22 (2007) ("In the fifties and sixties, blacks steered clear of many parts of Savannah, which clung fiercely to racial segregation for as long as it could. The Ku Klux Klan held a convention there in 1960, and 250 of its white-robed members paraded down the city's main street one Saturday afternoon. No matter how curious you might be about the way white people lived, you didn't go where you didn't belong. That was a recipe for jail, or worse.").

148. See Greenhouse, *supra* note 144, A1.

149. *Id.*

150. *City of Chicago v. Morales*, 527 U.S. 41, 98–99 (1999) (Thomas, J., dissenting).

151. See Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 996–97 (2005) ("To many, nothing about his criminal jurisprudence shows any empathy for criminals. As noted above, however, a core principle of black conservative thought on crime is its advocacy for the severe punishment of criminals and the protection of victims. This is especially true of poor black victims whom black conservatives view as being prisoners in their own homes due to the rapidly deteriorating conditions of their streets and neighborhoods.").

152. See *supra* notes 125–28 and accompanying text.

153. See *supra* notes 143–51 and accompanying text.

because Thomas's nephew, Mark Martin, is serving a thirty-year sentence for drug trafficking in a federal prison.¹⁵⁴ Although this family relationship creates the possibility of personal knowledge about inhumane treatment of prisoners, Thomas's originalist interpretations have made him consistently oppose the recognition of federal constitutional rights for prisoners.¹⁵⁵

Thomas's opinions are very deferential to the claims of prison officials about the need to limit prisoners' rights in order to maintain institutional safety and security.¹⁵⁶ During his first decade on the Supreme Court, Thomas's originalist approach emphasized that the Framers of the Bill of Rights did not intend for the Eighth Amendment to be applied to the treatment and living conditions experienced by convicted offenders in prison.¹⁵⁷ For example, according to Thomas,

[s]urely prison was not a more congenial place in the early years of the Republic than it is today; nor were our judges and commentators so naive as to be unaware of the often harsh conditions of prison life. Rather, they simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment.¹⁵⁸

Thomas's position was criticized on historical grounds¹⁵⁹ because prisons did not develop as institutions for long-term incarceration until the nineteenth century.¹⁶⁰ Therefore, there is no basis for saying what the authors of the Bill of Rights believed about an institution that did not exist at the time of the original amendments' drafting and ratification.¹⁶¹

154. Kevin Merida & Michael A. Fletcher, *Justice's Family Ties Are a Tangle of Race, Poverty and Privilege*, WASH. POST, Apr. 22, 2007, at A1.

155. Christopher E. Smith, *The Changing Supreme Court and Prisoners' Rights*, 44 IND. L. REV. 853, 866–69 (2011).

156. For example, Justice Thomas wrote an opinion, joined only by Justice Scalia, arguing prison officials' expressed concerns about safety and security justified racial and ethnic segregation in the cells of California's prison processing center. The other Justices, who applied standard equal protection analysis, demanded that prison officials actually demonstrate a compelling justification and not merely assert claims about safety. *Johnson v. California*, 543 U.S. 499 (2005).

157. *Hudson v. McMillian*, 503 U.S. 1, 19 (1992) (Thomas, J., dissenting).

158. *Id.*

159. Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 SETON HALL L. REV. 1, 24 (1997).

160. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 77–82 (1993).

161. See, e.g., CHRISTOPHER E. SMITH & JOYCE A. BAUGH, *THE REAL CLARENCE THOMAS: CONFIRMATION VERACITY MEETS PERFORMANCE REALITY* 92 (2000) ("In light

Later, Thomas acknowledged that prisons did not exist as established institutions for punishment in the founding era, and therefore he shifted to a new originalist approach to deny the existence of rights for prisoners.¹⁶² According to Thomas's revised approach, states' laws control what rights, if any, are granted to incarcerated offenders in state prisons.¹⁶³ In Thomas's words, "[w]hether a sentence encompasses the extinction of a constitutional right enjoyed by free persons turns on state law, for it is a State's prerogative to determine how it will punish violations of its law, and this Court awards great deference to such determinations."¹⁶⁴ In the case of the federal prison system where his nephew is incarcerated, Thomas presumably applies the same deferential stance that minimizes the existence of prisoners' rights in favor of policy choices by Congress and officials in the U.S. Bureau of Prisons.¹⁶⁵

The interesting question to consider is whether issues of prisoners' rights would have become sufficiently concrete and personal to trigger Thomas's consideration of human experience if his nephew suffered specific harms as a result of mistreatment by corrections officials.¹⁶⁶ What if Thomas's nephew was beaten by corrections officers while shackled and suffered facial injuries and damaged teeth,¹⁶⁷ the situation in *Hudson v.*

of the history of punishment in early America, Thomas misstates the framers' view on prison conditions in the sense that the framers could not have had view on prisons—an institution that was yet to develop.”).

162. Christopher E. Smith, *Rights Behind Bars: The Distinctive Viewpoint of Justice Clarence Thomas*, 88 U. DET. MERCY L. REV. 829, 846–50 (2011).

163. *Overton v. Bazzetta*, 539 U.S. 126, 139–40 (2003) (Thomas, J., concurring in judgment).

164. *Id.* at 140.

165. While Justice Thomas has endorsed the existence of statutes that permit prisoners to file lawsuits for intentional torts committed by federal prison officials, *Millbrook v. United States*, 133 S. Ct. 1441 (2013), he has resisted the identification of constitutional rights for federal prisoners, e.g., *Farmer v. Brennan*, 511 U.S. 825, 861 (1994) (Thomas, J., concurring in judgment) (“Given my serious doubts concerning the correctness of *Estelle v. Gamble*, 429 U.S. 97 (1976),] in extending the Eighth Amendment to cover challenges to conditions of confinement, I believe the scope of the *Estelle* ‘right’ should be confined as narrowly as possible.”), other than acknowledging that all incarcerated offenders have a due process right of access to the courts that entitles them to mail letters and petitions to judges, see *Lewis v. Casey*, 518 U.S. 343, 381–82 (1996) (“I agree that the Constitution affords prisoners what can be termed a right of access to the courts. That right, rooted in the Due Process Clause and the principle articulated in *Ex parte Hull*, [312 U.S. 546 (1941),] is a right not to be arbitrarily prevented from lodging a claimed violation of a federal right in a federal court.”).

166. Smith, *supra* note 162, at 869–71.

167. Justice Thomas was reportedly outraged when a different nephew, a college student, was punched and tasered by hospital security officers in Louisiana after refusing to put on a hospital gown when he sought treatment at the emergency room, Huma Khan, *Judge Clarence*

*McMillian*¹⁶⁸ for which Thomas rejected a recognition of a rights violation¹⁶⁹ seven years before the nephew was sentenced to prison in 1999? What if Thomas's nephew had been chained shirtless to a post for seven hours in a prison yard without access to toilet facilities or adequate drinking water, as in *Hope v. Pelzer*?¹⁷⁰ In this case, Thomas dissented¹⁷¹ against a declaration that denied officers' qualified immunity because, in the majority's view, such actions clearly violate the Eighth Amendment.¹⁷² What if Thomas's nephew had been among the dozens of prisoners who fell ill in 2014 and caused a Michigan prison to be quarantined "after maggots were discovered along a prison meal line— inches from serving trays"?¹⁷³ The example of the cross-burning case seemed to indicate that personal knowledge could lead Thomas to incorporate considerations of human experience into the analysis of a case.¹⁷⁴ However, it is completely unknown whether Thomas has similar personal knowledge about prisoners' rights issues through his nephew's experience,¹⁷⁵ let alone whether any such victimization of his nephew

Thomas' Nephew Derek Tasered by Hospital Staff, Family Says, ABC NEWS (July 9, 2010), <http://blogs.abcnews.com/thenote/2010/07/judge-clarence-thomas-nephew-derek-tasered-by-hospital-staff-family-says.html> [<https://perma.cc/KDE5-357D>], but there has never been any indication that his imprisoned nephew has faced such treatment, even though other incarcerated offenders have been victimized by improper physical mistreatment, *see, e.g.*, Michael Vasquez & Julie K. Brown, *Miami-Dade Warden Tied to Shower Death of Inmate Is Suspended*, MIAMI HERALD (July 10, 2014), <http://www.miamiherald.com/news/local/community/miami-dade/article1974934.html> [<https://perma.cc/3NTE-MUPY>] (reporting that a mentally ill Florida prisoner died after being locked in a small shower by corrections officers and then sprayed with scalding hot water for two hours).

168. 503 U.S. 1 (1992).

169. *Id.* at 18 (Thomas, J., dissenting).

170. 536 U.S. 730 (2002).

171. *Id.* at 748–64 (Thomas, J., dissenting).

172. According to Justice Stevens's majority opinion, "[a]s the facts are alleged by *Hope*, the Eighth Amendment violation is obvious," *id.* at 738, and "*Hope* . . . was treated in a way antithetical to human dignity—he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous," *id.* at 745.

173. Paul Egan, *Partial Quarantine Ordered at Prison in Jackson as 150 Inmates Fall Ill*, DET. FREE PRESS (July 3, 2014), <https://web.archive.org/web/20140703190505/http://www.freep.com/article/20140703/NEWS06/307030121/prison-food-aramark-maggots-quarantine> [<https://perma.cc/AA2R-TGUS>].

174. *See supra* notes 144–51 and accompanying text.

175. Justice Thomas presumably has had some contact with his imprisoned nephew because Thomas and his wife raised the nephew's son, Merida & Fletcher, *supra* note 154, at A1. However, the nephew is incarcerated in the federal prison system, which has a reputation for having better living conditions than those in many state prisons, Jayne O'Donnell, *State Time or Federal Prison?*, USA TODAY (Mar. 18, 2004), at 3B,

would alter Thomas's well-established and consistent hostility to the recognition of prisoners' rights.¹⁷⁶

III. CONCLUSION

There is clear evidence that Supreme Court Justices can be affected by personal experiences and their understanding of the human consequences of judicial decisions.¹⁷⁷ This is true even for those Justices who claim to follow conscientiously a particular theory of constitutional interpretation that purports to be divorced from outcome-based considerations about human consequences.¹⁷⁸ Although the foregoing discussion focuses on cases concerning the protection of rights in the criminal justice system, human experience can—but will not necessarily¹⁷⁹—also lead to strong crime-control viewpoints advocating a need for limited rights in criminal justice.¹⁸⁰ This may be reflected in

http://usatoday30.usatoday.com/money/companies/2004-03-18-statetime_x.htm [https://perma.cc/DNH7-MGH7], he may not have experienced the kinds of shocking treatment that, if conveyed to his uncle, might affect Justice Thomas's personal understanding of and reaction to the human consequences of prison, *see, e.g.*, Vasquez & Brown, *supra* note 167 (providing examples of prisoners in Florida state prisons dying after being subjected to scalding water and tear gas).

176. Christopher E. Smith, *Brown v. Plata, The Roberts Court, and the Future of Conservative Perspectives on Rights Behind Bars*, 46 AKRON L. REV. 519, 530–34 (2013).

177. *See supra* notes 31–33, 39–44 and accompanying text.

178. *See supra* notes 144–51 and accompanying text.

179. Justices Stephen Breyer, Ruth Bader Ginsburg, and David Souter were all known to have been robbery victims. Aliyah Shahid, *Supreme Court Justice Stephen Breyer's Home Robbed Again*, N.Y. DAILY NEWS (May 18, 2012), <http://www.nydailynews.com/news/politics/supreme-court-justice-stephen-breyer-home-robbed-article-1.1080713> [http://perma.cc/SRE9-RRQB]. Yet all of them were on the rights-supportive liberal side of the spectrum in their voting records regarding constitutional rights claims in criminal justice cases. EPSTEIN ET AL., *supra* note 8, at 561–63.

180. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493, 577–81 (2011) (Alito, J., dissenting).

The prisoner release program carried out a few years earlier in Philadelphia is illustrative. In the early 1990's, federal courts enforced a cap on the number of inmates in the Philadelphia prison system, and thousands of inmates were set free. Although efforts were made to release only those prisoners who were least likely to commit violent crimes, that attempt was spectacularly unsuccessful. During an 18-month period, the Philadelphia police rearrested thousands of these prisoners for committing 9,732 new crimes. Those defendants were charged with 79 murders, 90 rapes, 1,113 assaults, 959 robberies, 701 burglaries, and 2,748 thefts, not to mention thousands of drug offenses.

....

The prisoner release ordered in this case is unprecedented, improvident, and contrary to the PLRA. In largely sustaining the decision below, the majority is gambling with the safety of the people of California. Before putting public safety at

former prosecutor Justice Samuel Alito's concerns about the potential for a drastic increase in violent crime when offender and detainee populations are reduced at correctional facilities.¹⁸¹ In addition, human experience obviously has the potential to affect Supreme Court Justices' decisions for other kinds of issues.¹⁸²

As indicated by the examples of Justices Stevens, Scalia, and Thomas described in this Article, there is reason to expect that human experience could play a pivotal role in Supreme Court decisions, especially in close cases for which the vote of a single Justice may determine the outcome for a divided Court.¹⁸³ As one scholar has noted, "Try as they might to claim judicial independence, Justices are still the products of where they came from and who they were before going onto the bench."¹⁸⁴ Thus, although President Barack Obama endured harsh criticism in 2009¹⁸⁵ for

risk, every reasonable precaution should be taken. The decision below should be reversed, and the case should be remanded for this to be done.

I fear that today's decision, like prior prisoner release orders, will lead to a grim roster of victims. I hope that I am wrong.

Id.

181. *Id.*

182. For example, commentary on the Supreme Court's controversial decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), concerning the Affordable Care Act's mandate for employers to cover contraceptives as part of medical insurance plan, focused on the religious divide among the Justices and speculated about the role of Christianity or Catholicism in the life experiences of the five Justices in the majority as compared to the three Jewish Justices who were among the four dissenters, Samuel G. Freedman, *Among Justices, Considering a Divide Not of Gender or Politics, but of Beliefs*, N.Y. TIMES, July 12, 2014, at A13, http://www.nytimes.com/2014/07/12/us/supreme-court-decisions-in-a-catholic-jewish-context.html?_r=0 [<https://perma.cc/PMY3-VB8Y>]. As Linda Greenhouse noted, the five Justices in the majority had "brushed past the complaint raised by the two non-Christian plaintiffs" in an earlier case challenging the imposition of Christian prayers at city council meetings, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), yet these five Justices displayed "extreme solicitude" to the "religious beliefs of Hobby Lobb[y] [stores'] Evangelical Christian owners." Linda Greenhouse, *Reading Hobby Lobby in Context*, N.Y. TIMES (July 9, 2014), <http://www.nytimes.com/2014/07/10/opinion/linda-greenhouse-reading-hobby-lobby-in-context.html> [<https://perma.cc/WQ5B-CT6H>].

183. It is possible to speculate, for example, that Justice Stevens's experiences as a pro bono attorney who gained the release of a wrongly-convicted offender in the early 1950s who had been physically abused by Chicago police to force his false confession, *see supra* notes 39–46 and accompanying text, played a role early in his Supreme Court career when he cast the decisive fifth vote to identify rights violations in the case of a man who murdered a young child and was then questioned by police outside of the presence of his attorney, *Brewer v. Williams*, 430 U.S. 387 (1977).

184. Freedman, *supra* note 182, at A13.

185. *See, e.g.*, Richard Epstein, *Beware of Empathy*, FORBES (May 5, 2009), <http://www.forbes.com/2009/05/04/supreme-court-justice-opinions-columnists-epstein.html> [ht

indicating that he wanted to appoint a Justice with an empathic understanding of the human contexts and consequences of judicial decisions,¹⁸⁶ such an approach realistically considers an important element that can influence case outcomes.¹⁸⁷ There are risks of unrealistic assumptions about judicial decision making when we pretend that we “want robed robots”¹⁸⁸ who claim to follow only precedents or a particular theory of constitutional interpretation, notwithstanding strong evidence that personal values and human experience play a significant role in judicial decision making.¹⁸⁹ In particular, we may end up with judicial officers whose experiences and understanding of society are so narrow that they cannot realistically understand the contexts of the cases presented to them and the likely consequences of their decisions.¹⁹⁰ As illustrated by the hypothetical question, “What if Justice Scalia’s daughter had been stripped searched and endured a body cavity inspection as part of her arrest for drunken driving?,”¹⁹¹ a Justice’s knowledge—or lack thereof—of actual human consequences, including those that are psychologically humiliating¹⁹² or physically harmful,¹⁹³ could determine the outcomes in close cases that affect the lives of millions of people.¹⁹⁴

[tps://perma.cc/SR7X-WQ8F](https://perma.cc/SR7X-WQ8F)] (“[I]ntellectually there is, I think, no worse way to go about the selection process. Empathy matters in running business, charities and churches. But judges perform different functions. They interpret laws and resolve disputes.”).

186. Peter Baker, *In Court Nominees, In Search for New Justice, Empathy, or at Least ‘Empathy,’ Is Out*, N.Y. TIMES, Apr. 26, 2010, at A12, <http://www.nytimes.com/2010/04/26/us/politics/26memo.html> [<https://perma.cc/6ALS-GY8C>].

187. See *supra* notes 7–19 and accompanying text.

188. Freedman, *supra* note 182, at A13.

189. See Geoffrey R. Stone, *The Behavior of Supreme Court Justices When Their Behavior Counts the Most*, AM. CONST. SOC’Y FOR L. & POL’Y (Sept. 2013), http://www.acslaw.org/sites/default/files/Stone_-_Behavior_of_Justices.pdf [<https://perma.cc/3WWB-HAGG>] (indicating that those Justices who claim to follow judicial restraint or originalism do not actually do so in major cases for which they advance their preferred outcomes, notwithstanding claimed commitments to a particular theory).

190. See *supra* notes 26–30 and accompanying text.

191. See *supra* notes 83–91, 106–21 and accompanying text.

192. See, e.g., Perez & Heinzmann, *supra* note 123, at 7 (“Jail surveillance video shows three male guards and a female guard carrying Holmes into a cell, stripping off her clothes and leaving her naked.”).

193. See, e.g., Grace Schneider, *4 Sue, Cite Stripping at Jail*, LOUISVILLE COURIER-J., June 13, 2014, at A3 (“Walker also reported seeing another man undergo stripping by officers who pulled the man’s feet from under him so that he landed headfirst on the floor and knocked out teeth, the suit says.”).

194. The case that authorized jail strip search policies covering even arrestees about whom there is no suspicion of carrying weapons or contraband hidden in their bodies, *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012), was decided by a 5-to-4 vote with Justice

This should be reason enough to consider individuals' life experiences and awareness of court decisions' societal impacts when evaluating judicial nominees.

Scalia's vote among the decisive votes in the majority. The decision has broad potential impact on the privacy and bodily integrity of numerous Americans because, for example, the FBI reported that 12.2 million arrests were made in 2012. UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2012, FED. BUREAU OF INVESTIGATIONS (Fall 2013), <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/arrestmain.pdf> [<https://perma.cc/YQ3F-6UFP>].