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Why Do Supreme Court Justices Succeed or Fail? Harry Blackmun as an Example

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I. INTRODUCTION

At present, 108 Justices have served on the United States Supreme Court.³ Some have clearly been successes as judges, while a few have clearly not, and a large number are cast into that middle, “satisfactory” or “average,” category. The purpose of this paper is to propose, examine, and evaluate specific factors as determinants of judicial success, and then to consider Justice Harry Blackmun’s place on a continuum of successes and failures.

The paper is divided into three sections. First, it reviews several ideal qualities and examines the results of several surveys of experts, which classify the Justices into categories based on their relative degree of success. Second, this article considers whether success can be predicted, and in answering this question offers several case histories illustrating examples of when judicial success could not be predicted.

Finally, because the purpose of this symposium is to commemorate the release of Justice Blackmun’s papers, this article evaluates Justice Blackmun on the success–failure continuum. Because of his shift in position during his 24 years on the Court, Justice Blackmun is especially of interest. This article further analyzes and proposes explanations for his shift.

II. WHAT CHARACTERISTICS DOES AN IDEAL JUSTICE POSSESS?

A. *Specifications of the Ideal*

Numerous observers have specified the background qualities an ideal Justice should possess.⁴ Henry Abraham identified six core qualities: absolute personal and professional integrity, an agile and lucid mind, “professional expertise and competence, . . . appropriate professional educational background or training,” the capacity to communicate clearly (especially in writ-

1. Professor of Psychology, University of Kansas.

2. Undergraduate student, University of Kansas, Lawrence.

3. BERNARD SWARTZ, *A BOOK OF LEGAL LISTS* 278, 288 (1997).

4. HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON AND CLINTON* 2 (1999); HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 4 (3d ed. 1992).

ing), and “judicial temperament.”⁵ In addition to the above, Sheldon Goldman suggested neutrality, “[g]ood [p]hysical and [m]ental [h]ealth,” and the “[a]bility to [h]andle [j]udicial [p]ower [s]ensibly.”⁶

Blaustein and Murphy, considering the criteria a president should consider in nominating a Justice, have suggested the following: scholarship, analytical powers, writing ability, general knowledge, willingness to work hard and take responsibility, courage, and character.⁷

While each of these makes sense, each is an internal quality. Further, these conceptions do not reflect a view that a Justice might be ideal for one time period but not for another.

The various characteristics described above can be collapsed into abilities, personality traits, and professional experience. Abilities include a certain level of intelligence, an ability to communicate and analytical skill. Personality characteristics are comprised of a willingness to work hard, courage, good mental health, integrity, and the undefined-but-important “judicial temperament.” Professional experience is based upon educational background, training, and neutrality.

In fact, some commentators suggest that prior judicial experience is not relevant to a Justice’s success on the Supreme Court.⁸ Justice Felix Frankfurter, himself a first-time jurist, was the most visible spokesperson for this point of view and concluded, “it would be capricious to attribute acknowledged greatness in the Court’s history either to the fact that a Justice had had judicial experience or that he had been without it.”⁹ Other scholars have echoed this conclusion,¹⁰ with one scholar concluding that great Justices often had no prior judicial experiences.¹¹ An analysis of the ratings of the Justices appointed in the 20th century finds no relationship between experience and greatness. While it is true that Justices Hughes, Warren, and Brandeis did not

5. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS, *supra* note 4, at 1-2; ABRAHAM, JUSTICES AND PRESIDENTS, *supra* note 4, at 4.

6. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS, *supra* note 4, at 1-2.

7. ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES 50-51 (1978) (R. Lawrence Siegel & Claire Rocco contributed to this portion of the survey).

8. Robert C. Bradley, *Who Are the Great Justices and What Criteria Did They Meet?*, in AMERICAN UNIVERSITY STUDIES, GREAT JUSTICES OF THE U.S. SUPREME COURT: RATINGS AND CASE STUDIES 7-9 (William D. Pederson & Norman W. Provizor eds., 1993).

9. Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 784 (1957).

10. See JOHN P. FRANK, MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE 43-47 (1958); Thomas G. Walker & William E. Hulbary, *Selection of Capable Justices: Factors to Consider*, in THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES 52, 66 (Albert P. Blaustein & Roy M. Mersky eds., 1978).

11. See FRANK, *supra* note 10, at 273.

have prior judicial experience, Justices Brennan, Holmes, and Cardozo did.¹² We conclude that other characteristics are much more important than degree of judicial experience.

B. Ratings of Successes and Failures

Another approach to specifying ideal judicial characteristics is to distinguish the effective Justices from the ineffective, and then determine if they differ in identifiable qualities. Over the last 35 years, several surveys have asked scholars to rate the effectiveness or success of the Justices.¹³ In 1970, Blaustein and Mersky asked 65 law school deans and professors of law, history, and political science to evaluate the performance of the first 96 Justices on the Court.¹⁴ The results led to the classification of 12 Justices as “great.”¹⁵ A total of 15 were “near great,”¹⁶ 55 were “average,”¹⁷ six were “below average,”¹⁸ and eight were rated as “failures.”¹⁹ These 96 included both chief Justices and associate Justices,²⁰ although perhaps the criteria for success for the two should be somewhat different.

Shortly before his death, Bernard Schwartz provided his personal take on the ten “best”²¹ and ten “worst”²² Justices. In order, his ten “best” were Justices John Marshall, Holmes, Warren, Story, Brennan, Brandeis, Hughes, Black, Field, and Taney.²³ His “worst” were Justices Moore, Whittaker, Vinson, McReynolds, Peckham, Samuel Chase, Barbour, Salmon P. Chase, But-

12. *Id.* at 43-44; Norman W. Provizer & Joseph D. Vigil, *The Earl of Justice: Warren's Vision for America*, in AMERICAN UNIVERSITY STUDIES, GREAT JUSTICES OF THE U.S. SUPREME COURT: RATINGS AND CASE STUDIES 261, 261-62 (William D. Pederson & Norman W. Provizer eds., 1993).

13. See BLAUSTEIN & MERSKY, *supra* note 7, at 32-54; Bradley, *supra* note 8, at 14.

14. BLAUSTEIN & MERSKY, *supra* note 7, at 34. This survey was reprinted in a book published recently by Bader and Mersky, but does not rate the most recent 12 justices.

15. *Id.* at 37. Those Justices included Marshall, Story, Taney, Brandeis, Stone, Cardozo, Harlan I, Holmes, Hughes, Black, Frankfurter, and Warren. *Id.*

16. *Id.* at 37-38.

17. *Id.* at 38-39.

18. *Id.* at 39.

19. *Id.* at 40. This category included Justices Van Devanter, McReynolds, Burton, Vinson, Butler, Byrnes, Minton, and Whittaker. *Id.*

20. *Id.* at 35-36. This survey was reprinted in a book published recently by Bader and Mersky, but the latter book still does not rate the most recent 12 justices. WILLIAM D. BADER & ROY M. MERSKY, *THE FIRST ONE HUNDRED EIGHT JUSTICES* 25-29 (2004).

21. SWARTZ, *supra* note 3, at 3-26.

22. *Id.* at 28-45.

23. *Id.* at 4.

ler, and Minton.²⁴ The worst cover a multitude of sins, and again reflect both chief Justices (Vinson and Salmon Chase) and associate Justices.²⁵

In 1998, Michael Comiskey reported a comprehensive survey in a paper at the American Political Science Association convention²⁶ and in his 2004 book.²⁷ The study limited the number of Justices to those 52 appointed in the twentieth century, beginning with Holmes and ending with Breyer.²⁸ A total of 128 constitutional scholars, in both political science and law, were asked to rate the Justices on a five-point scale from "excellent" to "failure."²⁹ Of the 52, the scholars rated 11 as "excellent,"³⁰ Justices Holmes and Brandeis were tied for first, followed by Justices Brennan, Harlan II, Cardozo, Black, Warren, Hughes, Stone, Robert Jackson, and Frankfurter.³¹

In each of these surveys, respondents were not given definitions of "great" or "excellent,"³² thus, for most of the studies there is little information which qualities of an ideal Justice were most emphasized or most salient. However, in 1978, Walker and Hulbary did seek to identify those traits that distinguished between types.³³ But they concluded the following:

Our analysis has not uncovered any one trait which clearly distinguishes the capable from the incapable. Nonetheless, certain patterns tend to emerge. On one hand, if we were to develop a profile of an individual with a strong likelihood of becoming an excellent jurist, he would be a person raised in a northeastern urban area as a member of a business-oriented family. His ethnic roots could be traced back to the European continent and he would be Jewish. He would have received his education from high-quality institutions and would have experience in the academic community as a legal scholar. He would have been appointed to the Court at a relatively early age, without prior judicial experience, and serve in that institution for more than twenty-five years. On the other hand, if we were to describe the background of a typical Supreme Court "failure," he would be a man from the midwestern United States, raised in a small town and from a family engaged in farming. His ethnic origins would be Scottish or Irish and he would be affiliated with a

24. *Id.* at 29.

25. *Id.* at 45-46.

26. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS, *supra* note 4, at 372.

27. MICHAEL COMISKEY, SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES 87-103 (2004).

28. *Id.* at 90.

29. *Id.* at 88.

30. *Id.* at 92.

31. *Id.* at 91.

32. *Id.* at 88; BLAUSTEIN & MERSKY, *supra* note 7, at 36; COMISKEY, *supra* note 27, at 88.

33. See generally Walker & Hulbary, *supra* note 10.

“low church” Protestant denomination. He would have attended mediocre educational institutions and his career would have been closely tied to partisan political activities. His appointment to the Court would have occurred during his mid-fifties and he would serve less than five years. These, of course, are general profiles. There are exceptions to every broad generalization, as attested to by the fact that McReynolds served more than a quarter-century and Cardozo but six years. Yet McReynolds is universally rated a “failure” and Cardozo a “great.”³⁴

Blaustein and Murphy completed their book shortly after Warren Burger was appointed Chief Justice; Walker and Hulbary, in an article published in Blaustein and Murphy’s book, wrote, presciently:

Among the most recent five, Chief Justice Burger appears to have the most strikes against him. While his age at appointment (62) and ethnic background (Swiss/German) are similar to those justices who have served well in the past, his family origins (rural, farming), region (Midwestern), religion (Protestant), education (University of Minnesota and St. Paul College of Law), and judicial experience (thirteen years) are factors which, over the history of the Court, have been associated with less than distinguished levels of performance.³⁵

C. Our Conception of Effectiveness

All of the above ratings are based on global impressions, that is, raters were not asked to consider specific determinants of “effectiveness” or “greatness.” However, the purpose of this article is to narrow the definition of judicial effectiveness to a single behavioral quality: the ability to influence. The “ability to influence” has two different aspects. First is the ability to write opinions that are of significance to the country. Accepting the view of the rational-choice theorists that Justices act to achieve public-policy goals,³⁶ to what degree are the goals of individual Justices reflected in the corpus of decisions by the Court? Second is the ability to influence other members of the Court, *i.e.* can the Justice bring others to his or her position? While “persuasiveness” might seem central to this quality, the ability to influence also reflects a number of the ideal qualities listed above, including the ability to

34. *Id.* at 69-70.

35. *Id.* at 71.

36. WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 1 (1964). *See generally* LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 22-55 (1998). Rational-choice theory proposes that judges have long-term policy goals and that their votes reflect strategic considerations, not just their positions on the specific issues of the case.

think clearly, good working habits, a strong intellect, and good mental health. Even among the “great” and “near great,” some Justices were more effective in influencing their colleagues than were others.

While no objective means of assessing influence among the Supreme Court Justices has been applied, a recent article by Choi and Gulati offers a somewhat analogous approach to the evaluation of circuit court judges.³⁷ Under their formula, if a circuit court judge is being considered for promotion to the Supreme Court, his or her opinions should be examined by collecting data that answer the following questions:

- (1) How often are his or her opinions cited in later opinions?³⁸
- (2) What has been the workload of the judge?³⁹
- (3) Have the judge’s opinions been independent of political ideology?⁴⁰

Research needs to be done to examine the extent to which the opinions of those Justices who earlier were lower court judges were treated by other courts.

III. CAN SUCCESS BE PREDICTED?

A Justice’s ability to influence others is determined both by personal qualities and the context, as defined by the spirit and the constituency of the Court. Consider here, two contrasting examples of Justices, both among the most outstanding, with differing ability to influence.

A. Two Disparate Examples

While it may be true that the background of a prospective judge correlates to his or her general effectiveness as a Supreme Court Justice, it is not always the case. Two contrasting examples will illustrate some of the problems with this approach.

1. Felix Frankfurter

If ever there was a newly-appointed Justice who was expected not only to serve effectively, but to lead the Court, it was Felix Frankfurter. Harold Ickes, advisor to Franklin Roosevelt, told the president: “If you appoint

37. Stephen Choi & Mitu Gulati, *A Tournament of Judges*, 92 CAL. L. REV. 299, 316-321 (2004).

38. *Id.* at 306.

39. *Id.* at 309.

40. *Id.* at 310.

Frankfurter, his ability and learning are such that he will dominate the Supreme Court for fifteen or twenty years to come. The result will be that, probably after you are dead, it will still be your Supreme Court.”⁴¹ In addition, both Robert Jackson, then Solicitor General but later a Justice himself, and Harlan Fiske Stone, then an associate Justice, emphasized to the president the extent of Frankfurter’s ability to compete intellectually with the then chief Justice, Charles Evans Hughes.⁴² Archibald MacLeish, the highly-regarded poet, playwright and graduate of Harvard Law School, predicted that, as a Justice, Frankfurter would be a defender of the Bill of Rights because of his passionate and scholarly support of the defendants in the Sacco-Vanzetti case.⁴³ What made Frankfurter so promising? As a young man, Frankfurter had sought out Justices Oliver Wendell Holmes and Louis Brandeis as mentors and had soaked up their tutelage.⁴⁴ As a distinguished law professor at Harvard, Frankfurter had already trained many law students who later became eminent judges themselves.⁴⁵ He secured appointments as Supreme Court law clerks for many of his best students. His interest in liberal causes, exemplified by his vigorous defense of Sacco and Vanzetti, led observers to expect that he would mesh well with the increasingly progressive thrust of a Court dominated by Roosevelt appointees.⁴⁶

Professor Frankfurter was so highly regarded that before he was named to the Court, Chief Justice Harlan Fiske Stone had called upon him to instruct a new Justice, Hugo Black, on the proper way to behave.⁴⁷ “Do you know Black well?” Stone asked Frankfurter early in 1938,⁴⁸ “You might be able to render him great assistance. He needs guidance from someone who is more familiar with the working of the judicial process than he is.”⁴⁹

Frankfurter was not only an eminent law professor – described by editorial writers as “America’s most distinguished legal scholar”⁵⁰ – but he was steeped in Washington politics. While still at Harvard, he became a longtime

41. HAROLD ICKES, *INSIDE THE STRUGGLE 1936-1939*, 540 (1954). While some have said that Franklin Roosevelt did not give adequate attention to the selection of Justices - and he came to name nine to the Court - certainly he knew of Frankfurter’s brilliance and his already-established impact on the government. See, e.g., MELVIN UROFSKY, *FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES* 36-37 (John Cooper, Jr., ed., 1991).

42. A.T. MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW*, 482 (1956).

43. JOSEPH P. LASH, *FROM THE DIARIES OF FELIX FRANKFURTER* 36-37 (1975). Sacco and Vanzetti were two immigrants who were convicted of bank robbery and executed, even though many felt they were innocent.

44. LASH, *supra* note 43, at 7-9.

45. UROFSKY, *supra* note 41, at Preface.

46. See generally UROFSKY, *supra* note 41, at 34-41.

47. *Id.* at 45.

48. *Id.*

49. *Id.*

50. LASH, *supra* note 43, at 64.

behind-the-scenes advisor to Franklin Roosevelt, beginning when the latter was governor of New York and continuing after he was elected president.⁵¹ In his role as informal counsel, he served Roosevelt as teacher and expert on topics extending far beyond narrow legal issues.⁵² When Roosevelt was initially elected president in 1932, Frankfurter provided names of persons who came to staff essential New Deal positions.⁵³ As one biographer pointed out, "In time, scores of his former students and protégés would find their way to Washington, creating a network of influence for Frankfurter that extended into virtually every crevice of the growing bureaucracy."⁵⁴

Always thirsting for new ideas, Frankfurter captivated Roosevelt. The President told an associate: "Felix has more ideas per minute than any man of my acquaintance."⁵⁵ He even arranged for the Harvard professor to live in the White House for much of the summer of 1935,⁵⁶ by that time Frankfurter was acknowledged as "perhaps the single most important non-elected official in [the] national government."⁵⁷ And this was four years before he was appointed to the Supreme Court.⁵⁸

Frankfurter served 23 years on the Court, from 1939 to 1962.⁵⁹ He wrote 247 opinions for the Court, 132 concurring opinions, and 251 dissents.⁶⁰ But he was expected to dominate the Court and he expected to be "its intellectual leader and that the authority he exercised in his seminar at Harvard would be replicated in the conferences of the Brethren."⁶¹ He even told another Justice that "I was appointed to this Court as a professor, so to speak."⁶² However, the Court never realized the impact that Frankfurter's intelligence, energy, experience, and credentials should have warranted.⁶³ While he did lead briefly, his leadership was temporary though significant.⁶⁴

51. H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 104 (1981).

52. *Id.*

53. *Id.* at 103.

54. *Id.*

55. LASH, *supra* note 43, at 46.

56. HIRSCH, *supra* note 51, at 116-17.

57. *Id.* at 99.

58. LASH, *supra* note 43, at 63. It is interesting to note that when his nomination to the Supreme Court finally came, Frankfurter addressed the letter of reply to the President, "Dear Frank." *Id.* at 65.

59. See BLAUSTEIN & MERSKY, *supra* note 7, at 37.

60. *Id.* at 145.

61. LASH, *supra* note 43, at 75.

62. *Id.* at 228.

63. See generally UROFSKY, *supra* note 41. Urofsky is a biographer of Frankfurter who treats his subject objectively.

64. LASH, *supra* note 43, at 68; see *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). These two cases dealt with the legality of compelling school children, specifically member of Jehovah's Witnesses to participate in a salute to the flag. Justice Frank-

Certainly no one would call Justice Frankfurter a failure. Some experts regard his contributions quite highly. While Bernard Schwartz did not include him in his list of the "10 greatest" Justices, he did include him in a small "good but not great" category.⁶⁵ Comiskey's sample of scholars gave him a rating of 3.27, or eleventh highest among the 52 twentieth-century Justices.⁶⁶ His influence on his brethren was less than expected; as Schwartz put it, "Frankfurter seemed altogether different as a Justice than he had been off the bench."⁶⁷

Why so? Biographers have described the image that Justice Frankfurter usually presented as "a vibrant personality: witty, charming, warm, energized, sparkling."⁶⁸ Yet he possessed less desirable qualities and could be resentful, arrogant, and domineering. His diaries reveal passages "full of wrath, contempt [and] superciliousness."⁶⁹ One of his biographers observed that he "could not accept serious, sustained opposition in fields he considered his domain of expertise; he reacted to his opponents with vindictive hostility."⁷⁰

No dearth of speculation exists about why Justice Frankfurter was not a more effective Justice, given his extensive years in the limelight, the depth and breadth of his scholarship, and the massive amount of material written about him. Two reasons stand out. First, Justice Frankfurter failed to adapt to new surroundings on the Court.⁷¹ For the first time in his life, he could not dominate his colleagues by the force of his intellect and his undeniable energy.⁷² One observer wrote: "The Supreme Court . . . was an environment unlike the ones in which Frankfurter had triumphed; he was [forced into] sharing power with strong-willed individuals who had ideas of their own."⁷³

Not only was he now among intellectual equals, but the content of his ideas conflicted with the tides of change.⁷⁴ As one biographer put it, he committed "the same sins for which he, as an academic commentator, had lambasted the conservative judges of the 1920s and 1930s. He remained consistent, but consistency is not always a virtue."⁷⁵

The second reason for Justice Frankfurter's less-than-anticipated level of effectiveness on the Court is related to the first. Throughout his adult life, Justice Frankfurter had relied on ingratiation and flattery to facilitate his in-

further wrote the majority in the first case in 1940, only to see the Court reverse itself three years later in the second opinion.

65. SCHWARTZ, *supra* note 3, at 22-24.

66. COMISKEY, *supra* note 27, at 91.

67. SCHWARTZ, *supra* note 3, at 23.

68. HIRSCH, *supra* note 51, at 4.

69. LASH, *supra* note 43, at Preface.

70. HIRSCH, *supra* note 51, at 5-6.

71. *See id.* at 6.

72. *See id.*

73. *Id.*

74. UROFSKY, *supra* note 41, at 178.

75. *Id.*

fluence.⁷⁶ In his younger days, the recipients of his attention were his mentors Henry Stimson and Oliver Wendell Holmes, Jr.; later, it became Franklin Roosevelt.⁷⁷ A biographer noted, “In their 772 pages of published correspondence, there is an almost unbelievable amount of flattery heaped on the President by Frankfurter. After speeches, he would send telegrams, comparing FDR to Lincoln.”⁷⁸ And, tellingly, although Justice Frankfurter would often criticize the President in his letters to others – saying for example, “I don’t expect heroic action from him” – he never made a single criticism directly to Roosevelt.⁷⁹ Thus Justice Frankfurter’s treatment of the President reflected his general style of insincere flattery and hypocrisy.

However, once appointed to the Court, Justice Frankfurter found flattery ineffective.⁸⁰ He deluged his brethren with suggestions and compliments (and occasionally with criticisms) but his colleagues – strong-willed and competent people such as Justices William O. Douglas, Hugo Black, Charles Evans Hughes, and later, Earl Warren, William Brennan, and John Marshall Harlan, II – perceived themselves as his equals and had no need for help from the former professor.⁸¹ Even Justice Frank Murphy, not known for his legal craftsmanship, came to call Justice Frankfurter’s scholarship “elegant bunk.”⁸² Despite this, Justice Frankfurter continued to play the role of an all-knowing professor to the eight students he saw as in need of elucidation.⁸³

As Justice Frankfurter failed to exert his expected influence, he often turned from effusive flattery to hostile criticism.⁸⁴ One biographer concluded, “He would flatter them as long as they agreed with him, but at the first sign of independent thought he would explode.”⁸⁵ He came to alienate almost all of his colleagues at one time or another. Justice Douglas wrote:

[W]e had become pretty well separated from Frankfurter. This is nothing that happened overnight. . . . Frankfurter had just lost the respect of Black and myself and Murphy We learned that he was utterly dishonest intellectually, that he was very, very devious. None of us had known him very well, but he spent his time going up and down the halls putting poison in everybody’s spring, setting, trying to set one justice against another, going to my office and telling me

76. HIRSCH, *supra* note 51, at 105-06.

77. *See id.* at 106; LASH, *supra* note 43, at 5-6.

78. HIRSCH, *supra* note 51, at 106.

79. LASH, *supra* note 43, at 45.

80. *See also* LASH, *supra* note 43, at 75-76.

81. *See id.* at 76.

82. *Id.*

83. *See id.* at 75-76.

84. UROFSKY, *supra* note 41, at 62-63.

85. *Id.*

what a terrible person Reed was or Black, going to Reed's office telling Reed what a stupid person someone else was, and so on.⁸⁶

Certainly Justice Frankfurter's intellectual style and rigidity were not the only reasons for his failure to lead the Court as Harold Ickes had promised President Roosevelt.⁸⁷ While he shared with Justices Black, Douglas, and others a concern for procedural justice, his philosophy of judicial restraint became increasingly out of touch with the needs of a society that began to change dramatically in the 1940s.⁸⁸ For example, in the landmark case of *Baker v. Carr*, Justice Frankfurter dissented, arguing that there is not "a judicial remedy for every political mischief."⁸⁹ In response, Justice Douglas later wrote:

[W]e began to realize that here was a man who instead of being a friend and a champion of civil liberties was using his position on the Court to line up allies for a constitutional doctrine that we didn't, we couldn't go with. . . . So the explosions in the conferences had become more and more frequent, particularly between him and Black, and between him and me, and we had become more and more suspicious of the good faith of the man, his intellectual honesty.⁹⁰

As noted earlier, some surveys include Justice Frankfurter on the short list of "great" Justices.⁹¹ But do these scholars separate his contributions as a scholar before he became a Justice? Lash has written that "there are Frankfurter admirers who believe that Frankfurter's influence on constitutional law was greater before he went onto the Bench than after and that [his scholarly efforts as a professor] are of more lasting interest than the aggregate of his judicial opinions."⁹² While an admiring and sympathetic biographer, Lash still concluded, "He was not one of the giants of the Court."⁹³

2. William Brennan

In contrast to Justice Frankfurter's nomination and appointment, Eisenhower nominated William Brennan to the Court almost entirely on the basis of political considerations, specifically because he had attributes that would

86. ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 297 (1997) (1994).

87. UROFSKY, *supra* note 41, at 62-63, 178-79.

88. *Id.* at 178.

89. *Baker v. Carr*, 369 U.S. 186, 269-70 (1962) (Frankfurter, J., dissenting).

90. NEWMAN, *supra* note 86, at 297 (ellipses in original).

91. *See supra* text accompanying notes 65-67.

92. LASH, *supra* note 43, at 87.

93. *Id.*

facilitate the President's bid for re-election.⁹⁴ The conventional wisdom about Eisenhower's presidency used to be that he was uninvolved, disengaged, and more concerned about his golf game than the welfare of the country.⁹⁵ But a revisionist view portrays Eisenhower as skillful and politically sophisticated in his actions.⁹⁶ His choice of a Justice to fill Sherman Minton's position reflects the political nature of his thinking.⁹⁷ Early in 1955, well before vacancy even existed, Eisenhower had several criteria in mind for locating a replacement. He expressed the wish to his associates that the next vacancy be given to a Roman Catholic.⁹⁸ Recognizing that the Catholic vote would be important in his 1956 re-election campaign, he asked his attorney general, Herbert Brownell, for "the name of some fine prominent Catholic to nominate to the bench."⁹⁹ Later, as the election race heated up, Eisenhower wanted to communicate to the public the sincerity of his pledge to appoint federal judges in a non-partisan manner.¹⁰⁰ His first two appointments to the Supreme Court, Justices Warren and Harlan, had been Republicans, as were all but a handful of his appointments to the lower courts.¹⁰¹ Therefore, he was interested in a well-qualified Democrat to appoint.¹⁰² Following Justice Warren's appointment, Eisenhower had already instituted a policy of naming nominees with some previous judicial experience.¹⁰³ When Justice Minton resigned two months before election day in 1956, Eisenhower began looking for a Catholic Democrat below the age of 62 with judicial experience in state courts.¹⁰⁴

This was a time before the ease of computer searches, and Attorney General Brownell probably was not aware of just how few persons there were who did fit the criteria. Almost fifty years later, political scientist David Yalof did a systematic search and concluded that, at most, only three people in the country fit Eisenhower's criteria, and two of these would have been flawed nominees.¹⁰⁵ Although Eisenhower did not realize it, the only one who fully possessed all their qualifications was the person they chose, William Brennan, a fifty-year-old justice of the New Jersey Supreme Court.¹⁰⁶

94. See KIM ISAAC EISLER, *A JUSTICE FOR ALL: WILLIAM BRENNAN, JR. AND THE DECISIONS THAT TRANSFORMED AMERICA* 88-89 (1993).

95. See, e.g., FRED I. GREENSTEIN, *THE HIDDEN-HAND PRESIDENCY: EISENHOWER AS LEADER* 7-8, 39-40 (1982).

96. See generally *id.*

97. See EISLER, *supra* note 94, at 88-90.

98. See *id.* at 83-84.

99. DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* 55 (1999).

100. *Id.* at 55-57.

101. *Id.* at 55-56.

102. *Id.* at 56.

103. See *id.* at 55.

104. *Id.* at 58.

105. See generally *id.* at 58-59, 179.

106. See *id.* at 58-59.

Of course, the issue of the Brennan's non-political qualifications was a concern, but Brownell seemed to base his recommendation of the Justice on a speech that Brennan gave at a conference in Washington, D.C.¹⁰⁷ There remains some question whether Brennan's speech was his own or one that Arthur Vanderbilt, the Chief Justice of the New Jersey Supreme Court and his boss, had asked Justice Brennan to give in his stead.¹⁰⁸ At any rate, Justice Brennan was nominated and confirmed, and went on to be one of the most influential and successful Justices in the second half of the twentieth century.

What made Justice Brennan so effective?¹⁰⁹ In the late 1950s and early 1960s, Justice Brennan wrote some of the Court's most influential decisions, including *Baker v. Carr*¹¹⁰ on reapportionment, *Cooper v. Aaron*¹¹¹ on school desegregation, and *New York Times v. Sullivan*¹¹² on First Amendment protections against libel. Writing in 1966, Chief Justice Warren stated, "In the entire history of the Court, it would be difficult to name another Justice who wrote more important opinions in his first ten years than has [Justice Brennan]."¹¹³ Although Justice Brennan was in the liberal majority in these early years, he was not at its extreme.¹¹⁴ His more cautious and moderate approach would pay off later on, especially when other liberal members of the Court were replaced by more conservative Justices.¹¹⁵

Justice Brennan carved a middle path by seeking to avoid absolutes as the bases for his decisions and to achieve a "balancing" of competing interests.¹¹⁶ Thus Justice Brennan was seen, even by adversaries, as more open-minded.¹¹⁷ His personality was perhaps his greatest strength in building coalitions; he was "[f]riendly and buoyant in spirit" and treated everyone with genuine interest and concern.¹¹⁸ Amiable to all, Justice Brennan never used his clout to get his way and appeared modest about his own abilities.¹¹⁹ When

107. *Id.* at 58. The flawed nominees had been Republicans earlier.

108. *Id.* at 58; Stanley Friedelbaum, *Justice William J. Brennan, Jr.: Policy-Making in the Judicial Thicket*, in *THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES* 100, 102 (Charles Lamb & Stephen Halpern eds., 1991).

109. Bernard Schwartz rated him as one of the ten best justices ever. See SCHWARTZ, *supra* note 3, at 4. Comiskey's scholars assigned him a rating of 3.56, behind only Brandeis and Holmes among 20th-century justices. See COMISKEY, *supra* note 27, at 91.

110. 369 U.S. 186 (1962).

111. 358 U.S. 1 (1958).

112. 376 U.S. 254 (1964).

113. Earl Warren, *Mr. Justice Brennan*, 80 HARV. L. REV. 1, 2 (1966).

114. TINSLEY E. YARBROUGH, *THE BURGER COURT: JUSTICES, RULINGS, AND LEGACY* 56-59 (2000).

115. *See id.* at 56-59.

116. *See* EISLER, *supra* note 94, at 186-91.

117. *Id.*

118. Warren, *supra* note 113, at 2.

119. *See id.* at 1-2.

appointed to the Court, he told a friend, "I'm the mule at the Kentucky Derby . . . I don't expect to distinguish myself but I do expect to benefit by the associations."¹²⁰

In addition to possessing a healthy amount of intellectual discipline, Justice Brennan showed a remarkable willingness to consider the opinions of others.¹²¹ He always remained aware of the bottom line and was often quoted as saying that "five votes can do anything around here."¹²² He displayed uncommon willingness to negotiate as well as a skill in revising his drafts to accommodate the comments of his colleagues, including those more conservative than he.¹²³ He would write and revise draft after draft, to incorporate the views of potential dissenters.¹²⁴

Most important, Justice Brennan adapted to change, especially the changing composition of the Court. In 1989, when conservatives dominated the Court, his achievement of a majority decision in *Texas v. Johnson*¹²⁵ is perhaps the most remarkable example of his ability to form successful coalitions. In this flag-burning case, Joey Johnson had been sentenced to a year in prison for his public act of protest during the Republican convention in Dallas in 1984.¹²⁶ Justice Brennan concluded that the conviction of Johnson for burning a flag in political protest was violative of his First Amendment rights to free expression of ideas.¹²⁷ Justice Brennan wrote an opinion that attracted the support of Justices Kennedy and Scalia, in addition to Justices Marshall and Blackmun, the more predictable defenders of free speech.¹²⁸

Justice Brennan used his highly effective interpersonal skills to advance his policy goals. In so doing, he not only achieved fragile majorities in a conservative-dominated Court, but he avoided writing an excessive number of dissents and, whenever possible, he joined in those opinions that were agreed upon by most of his colleagues.¹²⁹ Thus, despite the fact that his choice by the president was almost entirely on political grounds,¹³⁰ Justice Brennan became one of the most effective Justices in the twentieth century.

120. EISLER, *supra* note 94, at 99.

121. *See id.* at 185.

122. BERNARD SCHWARTZ & STEPHAN LESHER, *INSIDE THE WARREN COURT* 224 (1983).

123. *See* EISLER, *supra* note 94, at 185.

124. *See, e.g., id.* at 186-91.

125. 491 U.S. 397 (1989) (5-4 decision).

126. *Id.* at 397.

127. *Id.* at 399.

128. *See id.* at 397. Justices Rehnquist, White, and O'Connor dissented, *id.* at 421-35 (Rehnquist, C.J., dissenting), and even Justice Stevens did so separately, *id.* at 436-39 (Stevens, J., dissenting), but Brennan had his 5-to-4 majority. *Id.* at 397 (majority opinion).

129. *See supra* text accompanying notes 116-24.

130. *See supra* notes 94-108 and accompanying text.

IV. HARRY BLACKMUN AS AN EXAMPLE

We now attempt to evaluate the success of Harry Blackmun, by first considering some factors that might have influenced his effectiveness. Because Blaustein and Mersky proposed that the background of a Justice contributes to the judge's effectiveness, we examine Justice Blackmun's demographic characteristics. Recognizing that some presidents devoted more care to making appointments than others did, we describe the background of the decision to nominate Blackmun.

A. Demographic Predictors

How does Justice Blackmun stack up under Blaustein and Mersky's predictive factors?¹³¹ Harry Blackmun was a Midwesterner, who was born in Illinois and grew up in Minneapolis and St. Paul, Minnesota.¹³² His father explored a variety of business careers, including fruit wholesaler, grocer, hardware store owner, and insurance salesman, and his family was devoutly Methodist (he first met Warren Burger at Sunday School at the age of 4 or 5).¹³³ But he attended Harvard as an undergraduate (on partial scholarship) and Harvard Law School.¹³⁴ When seated on the Court, Justice Blackmun was 61.¹³⁵ A consideration of Blaustein and Mersky's criteria would predict neither a great success nor an abysmal failure on the Court.¹³⁶

B. President as a Predictor

Presidents differ in the quality of their appointments to the Court. President Nixon appointed Harry Blackmun.¹³⁷ Nixon promised to nominate "strict constructionist[s]" who would shift the Court from the then recent Warren Court decisions.¹³⁸ Nixon appointed three other Justices who were confirmed by the Senate – Chief Justice Burger and Justices Powell and Rehnquist.¹³⁹ Justice Blackmun was Nixon's third attempt to fill Justice Fortas's seat upon his resignation.¹⁴⁰

131. BLAUTSTEIN & MERSKY, *supra* note 7, at 50-51.

132. YARBROUGH, *supra* note 114, at 83.

133. *Id.*

134. *Id.* at 85.

135. *See id.* at 83, 86.

136. *See supra* text accompanying note 32.

137. YALOF, *supra* note 99, at 114.

138. *Id.* at 113.

139. COMISKEY, *supra* note 27, at 7-8.

140. Clement Haynsworth and G. Harrold Carswell had been rejected by votes of 55-45 and 51-45, respectively. *Id.* at 8.

One of the few recent Justices not highly active in politics, while Justice Blackmun came to be appointed to the Eighth Circuit Court of Appeals and the Supreme Court by two Republican presidents (the first being Eisenhower, in 1959),¹⁴¹ he supported Democrat Hubert Humphrey in his campaigns for mayor of Minneapolis and the U.S. Senate.¹⁴² His nomination to the Eighth Circuit received the endorsement of Senator Humphrey and Judge Warren Burger, then on the D.C. Circuit Court of Appeals.¹⁴³ According to Justice Blackmun's reminiscences, the essential reason that he was appointed to the Eighth Circuit Court was that his mentor, Judge John Benjamin Sanborn of St. Paul, insisted that he have a say in his successor, or he would not retire.¹⁴⁴

Given the rejection of two previous nominees, Justice Blackmun's nomination received acclaim from Senate liberals even though he was perceived to be very conservative.¹⁴⁵ During Justice Blackmun's confirmation hearings, not a single witness appeared before the Senate Judiciary Committee to oppose him.¹⁴⁶ Civil-rights and labor organizations did not protest his appointment.¹⁴⁷ The hearings lasted only one day, and Justice Blackmun was confirmed by a unanimous vote.¹⁴⁸

V. BLACKMUN'S SHIFT

As noted earlier, a possible reason for Justice Frankfurter's less-than-expected effectiveness on the Court was his failure to adapt to new surroundings.¹⁴⁹ The challenge of adapting to the Supreme Court was hard for Harry Blackmun, too. For example, Wasby called him "unsure of himself" when he

141. YARBROUGH, *supra* note 114, at 85.

142. *Id.*

143. *Id.*

144. Harry Blackmun, *Some Personal Reminiscences and What They Meant for Me*, 29 J. SUP. CT. HIST. 323, 324-25 (2004).

145. COMISKEY, *supra* note 27, at 38; Richard Freidman, *The Transformation in Senate Response to Supreme Court Nominees: From Reconstruction to the Taft Administration and Beyond*, 5 CARDOZO L. REV. 1, 83 (1983).

146. YALOF, *supra* note 99, at 114. Although more recently, commentators have labeled Justice Souter as a "stealth nominee," Justice Blackmun was the first "stealth candidate" after the increase in publicity for presidential appointments beginning in the 1960s and escalating after the failure of President Nixon's "southern strategy" in the late 1960s. Kim I. Eisler, *A Defense of Activism*, 40 N.Y.L. SCH. L. REV. 911, 918 (1996); Stephen Wasby, *Justice Harry A. Blackmun in the Burger Court*, 11 HAMLINE L. REV. 183, 185-86 (1988); see John E. Nowak, *The Rise and Fall of Supreme Court Concern for Racial Minorities*, 36 WM. & MARY L. REV. 345, 352 (1995).

147. *Id.*

148. *Id.* In contrast, a year later, Justice Rehnquist was confirmed by a 68-26 vote. *Id.* at 125.

149. See *supra* notes 71-73 and accompanying text.

began serving as a Justice.¹⁵⁰ In contrast, Justice Blackmun's effectiveness did not wane over the years as Justice Frankfurter's did. Over his 24 years on the Court, Justice Blackmun moved from conservative to liberal.¹⁵¹ For example, in his early decisions regarding First Amendment rights, he either favored a narrow interpretation, or rejected such rights.¹⁵² As Stephen Wasby has noted, "Blackmun's change, if not completely linear, has been clear over time."¹⁵³

The shift in Justice Blackmun's position from relatively conservative to relatively liberal has been analyzed by a number of scholars.¹⁵⁴ Perhaps the most quantitative and succinct method to view Justice Blackmun's shift is by examining the correlation between his votes and those of other Justices over time. For example, in his first full term on the Court, Justice Blackmun voted with Chief Justice Burger in 69 of 72 non-unanimous cases, and for his first four years, Justice Blackmun agreed with Chief Justice Burger in 80% of the cases.¹⁵⁵ However, by the Chief Justice's last term in 1985, the correlation dropped to almost 40%.¹⁵⁶ In contrast, in his initial four years, Justice Blackmun voted the same way as Justices Douglas and Brennan only 40-50% of the time. By 1985 he agreed with these liberal Justices 81% of the time.¹⁵⁷

Along with shifting allegiance to different Justices, Blackmun's dissenting votes increased, to a high of 34 in the 1982 term.¹⁵⁸ As time went on, he became more critical of certain majority opinions written by his conservative colleagues. For example, in response to Justice Rehnquist's opinion in *Toll v. Moreno*,¹⁵⁹ he called the analysis "wholly irrational" and "simplistic to the point of caricature."¹⁶⁰

150. Wasby, *supra* note 146, at 186.

151. See Linda Greenhouse, *Documents Reveal the Evolution of a Justice*, N.Y. TIMES, Mar. 4, 2004, at A1 (describing Justice Blackmun's trajectory from conservative to liberal).

152. See Stephen L. Wasby, *Justice Harry A. Blackmun: Transformation from "Minnesota Twin" to Independent Voice*, in THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES 63, 81 (Charles M. Lamb & Stephen C. Halpern eds., 1991).

153. Wasby, *supra* note 152, at 70.

154. See generally *id.*; Malcolm L. Stewart, Justice Blackmun's Capital Punishment Jurisprudence, 26 HASTINGS CONST. L.Q. 271, 289 (1998); Jeffrey Rosen, Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun: Criticism of Retiring United States Supreme Court Justice, THE NEW REPUBLIC, May 2, 1994, at 13; Wasby, *supra* note 146, at 188.

155. See EARL M. MALTZ, THE CHIEF JUSTICESHIP OF WARREN BURGER: 1969-1986, 276 (2000); Wasby, *supra* note 152, at 68.

156. YARBROUGH, *supra* note 114, at 32.

157. MALTZ, *supra* note 155, at 276.

158. Wasby, *supra* note 146, at 191 (Table 1).

159. 458 U.S. 1 (1982).

160. *Id.* at 20 (Blackmun, J., concurring).

A. Shift in Votes on Death Penalty Cases

Justice Blackmun's position on the death penalty reflects the complexity of the relationship between his attitudes and his votes. At a press conference in April 1970, immediately after he had been nominated to the Supreme Court, Justice Blackmun stated that he was personally opposed to capital punishment.¹⁶¹ However, his early votes did not reflect this avowed personal position.¹⁶² While Justice Blackmun went nearly 13 years before dissenting from a single decision upholding a death sentence, by the end of his tenure he wrote, "I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed."¹⁶³

At the beginning of his time on the Court, Justice Blackmun supported the State's right to use death as a punitive measure.¹⁶⁴ Just five months into his first term, he joined in Justice Harlan's majority opinion in *McGautha v. California*, which proclaimed, "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."¹⁶⁵ A year later in the case of *Furman v. Georgia*, Justice Blackmun offered an important glimpse into his way of thinking.¹⁶⁶ A very difficult case, *Furman* resulted in each of the nine Justices filing a separate opinion.¹⁶⁷ Justice Blackmun's individual dissent reflects his struggle between his personal values and his duty as a judge.¹⁶⁸ He stated that

Our task here, as must so frequently be emphasized and re-emphasized, is to pass upon the constitutionality of legislation that has been enacted and . . . challenged. Th[at] is the sole task for judges. We should not allow our personal preferences as to the

161. Blackmun, *supra* note 144, at 323, 331.

162. See *Furman v. Georgia*, 408 U.S. 238, 465 (1972) (plurality opinion). Justice Blackmun joined several dissenting opinions in upholding imposition of the death penalty. See *id.* at 375-405 (Burger, C.J., dissenting); *id.* at 414-65 (Powell, J., dissenting); *id.* at 465-70 (Rehnquist, J., dissenting). He also dissented separately. See *id.* at 405-14 (Blackmun, J., dissenting). However, this position is in accord with Justice Blackmun's stated belief that, regardless of his personal views, the death penalty was "primarily . . . a matter of legislative prerogative." Blackmun, *supra* note 144, at 331.

163. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

164. See, e.g., *McGautha v. California*, 402 U.S. 183, 207-08 (1971) (plurality opinion) (upholding constitutionality of jury's power to impose death penalty without governing standards).

165. *Id.* at 207.

166. See *Furman*, 408 U.S. at 405-14 (Blackmun, J., dissenting).

167. See generally *id.*

168. See *id.* at 405-14 (Blackmun, J., dissenting).

wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these.¹⁶⁹

A further passage in this dissent reflects the salience of the struggle in Justice Blackmun's mind:

Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood's training and life's experiences, and is not compatible with the philosophical convictions I have been able to develop. It is antagonistic to any sense of "reverence for life." Were I a legislator, I would vote against the death penalty for the policy reasons argued by counsel for the respective petitioners and expressed and adopted in the several opinions filed by the Justices who vote to reverse these judgments.¹⁷⁰

In the 1980s, Justice Blackmun began to find serious problems with the manner in which the judicial system processed capital cases. His dissent in *Barefoot v. Estelle* illustrates Justice Blackmun's concerns.¹⁷¹ In Texas, where the trial took place, a jury could recommend the death penalty if there existed "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."¹⁷² In this case, two psychiatrists had testified at the sentencing hearing that the defendant was likely to commit further criminal acts.¹⁷³ Even the American Psychiatric Association disagreed with the surety of their assessment, stating that "two out of three predictions of long-term future violence made by psychiatrists are wrong."¹⁷⁴ In a strongly-worded dissent, Justice Blackmun condemned the use of faulty information to permit a death sentence.¹⁷⁵ He wrote, "[t]he Court today sanctions admission in a capital sentencing hearing of 'expert' medical testimony so unreliable and unprofessional that it violates the canons of medical ethics."¹⁷⁶

169. *Id.* at 411.

170. *Id.* at 405-06.

171. 463 U.S. 880, 916 (1983) (Blackmun, J., dissenting), *superseded by statute* 28 U.S.C. § 2253(c)(2) (2000).

172. *Id.* at 883-84.

173. *Id.* at 884 (majority opinion).

174. *Id.* at 920 (Blackmun, J., dissenting) (emphasis omitted).

175. *Id.* at 924 n.6.

176. *Id.*

Five years later, in his dissent in *Darden v. Wainwright*,¹⁷⁷ he wrote an even stronger condemnation, stating, "Today's opinion . . . reveals a Court willing to tolerate not only imperfection but a level of fairness and reliability so low it should make conscientious prosecutors cringe."¹⁷⁸ But at this point, in the early 1980s, Justice Blackmun avoided condemning capital punishment generally, while focusing on individual cases.

The final shift in Justice Blackmun's death penalty jurisprudence came in 1991.¹⁷⁹ In his dissent in *Coleman v. Thompson*, he attacked not only the majority opinion but also the system itself, writing:

Even if the majority correctly attributed the relevant state interests, they are, nonetheless, misconceived. The majority appears most concerned with the financial burden that a retrial places on the States. Of course, if the initial trial conformed to the mandate of the Federal Constitution, not even the most probing federal review would necessitate a retrial. Thus, to the extent the State must "pay the price" of retrying a state prisoner, that price is incurred as a direct result of the State's failure scrupulously to honor his federal rights, not as a consequence of unwelcome federal review.¹⁸⁰

He also wrote that:

[T]he Court has managed to transform the duty to protect federal rights into a self-fashioned abdication. Defying the constitutional allocation of sovereign authority, the Court now requires a federal court to scrutinize the state-court judgment with an eye to denying a litigant review of his federal claims rather than enforcing those provisions of the Federal Bill of Rights that secure individual autonomy.¹⁸¹

These are not the words of a man who believes in the application of the death penalty.

In 1994's *Callins v. Collins*,¹⁸² Justice Blackmun gave his final answer to the death penalty question, expressing that:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop proce-

177. 477 U.S. 168 (1986) (5-4 decision).

178. *Id.* at 189 (Blackmun, J., dissenting).

179. See *Coleman v. Thompson*, 501 U.S. 722 (1991), *superseded by statute* 28 U.S.C. 2254(b)(2).

180. *Id.* at 767 (Blackmun, J., dissenting).

181. *Id.* at 761-62.

182. 510 U.S. 1141 (1994) (denial of certiorari).

dural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. . . . The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.¹⁸³

After his strong *Callins* dissent, Justice Blackmun followed the practice started by Justices Marshall and Brennan of issuing a brief statement reiterating his opinion on every capital punishment case.¹⁸⁴ However, Justice Blackmun differed with the other Justices' grounds for condemning the death penalty. While Justices Marshall and Brennan focused on the Eighth Amendment's concern with cruel and unusual punishment,¹⁸⁵ Justice Blackmun disapproved of the number of errors in the legal process.¹⁸⁶ His belief that these errors would lead to the execution of innocent persons led him to his final position.¹⁸⁷

B. *Why the Shift?*

Several scholars have offered opinions for Justice Blackmun's shift in positions. Stephen Wasby suggested that the Chief Justice's taking him for granted diminished Justice Blackmun's allegiance to Burger.¹⁸⁸ He wrote:

183. *Id.* at 1145-46 (Blackmun, J., dissenting from denial to grant certiorari).

184. *See, e.g.,* MacFarland v. Scott, 512 U.S. 1256, 1264 (1994) (Blackmun, J., dissenting from denial to grant certiorari) ("Adhering to my belief that the death penalty cannot be imposed fairly within the constraints of our Constitution, I would grant the petition for certiorari and vacate the death sentence." (citation omitted)); Wader v. California, 512 U.S. 1253, 1253 (1994) (Blackmun, J., dissenting from denial to grant certiorari) ("Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, I would grant certiorari and vacate the death sentence in this case." (citation omitted)).

185. *See, e.g.,* Vickers v. Arizona, 497 U.S. 1033, 1033 (1990) (Marshall, J., with whom Brennan, J., joins, dissenting from denial to grant certiorari).

186. Note that this was before the use of DNA to absolve prisoners on death row.

187. *Id.*

188. Wasby, *supra* note 152, at 70.

Certainly Burger appears not to have been sensitive to his colleague's feelings about the derogatory "Minnesota Twins" label and (particularly) the "Hip Pocket Harry" label, and public perception of Burger's dominance offended Justice Blackmun: "I have a little anger underneath it all. . . . Anger from being categorized over the 12 years I've been here in a way I think never fit."¹⁸⁹

Wasby suggested a second reason for Justice Blackmun's evolution – the nature and amount of opinions assigned to Justice Blackmun by the Chief Justice.¹⁹⁰ In the early years, many of Justice Blackmun's assignments were for unanimous or very one sided cases.¹⁹¹ Burger also gave Justice Blackmun more than his share of tax cases, considered by the Justices to be the "dogs" of the Court.¹⁹² Wasby wrote:

The small number of cases assigned to Blackmun – the proportion of times he was chosen when available to the chief justice was the smallest for any justice during the 1970-1974 and 1977 terms – might have been a function of Blackmun's work habits, but the lack of assignments did help alienate him.¹⁹³

As Justice Blackmun shifted away from being a predictable conservative vote, the Chief Justice reacted by assigning him even fewer opinions.¹⁹⁴ In the 1985 term, of the fourteen cases assigned to Justice Blackmun, four came from Justice Brennan, not the Chief Justice.¹⁹⁵

Other scholars have offered a different explanation, contending, for example, that the shift was preordained. As Yarbrough put it, "the ultimate outlines of Blackmun's jurisprudence were foreshadowed by the moderate record he developed on the circuit bench."¹⁹⁶ Another interpretation focuses on the *Roe v. Wade*¹⁹⁷ decision, and particularly its aftermath, concluding it "heightened [Blackmun's] sensitivity to the plight of the weak and powerless."¹⁹⁸ As his former law clerk Edward Lazarus wrote:

189. *Id.* (quoting John A. Jenkins, *A Candid Talk with Justice Blackmun*, N.Y. TIMES MAGAZINE, February 10, 1983, at 23).

190. *Id.* at 70-71.

191. *Id.* at 70 (stating that many of the opinions were in 8-to-1 and 7-to-2 decisions).

192. *Id.* at 70-71.

193. *Id.* at 70.

194. Wasby, *supra* note 146, at 197.

195. *Id.*

196. YARBROUGH, *supra* note 114, at 86.

197. 410 U.S. 113 (1973) (plurality opinion).

198. YARBROUGH, *supra* note 114, at 88.

I expect there is some truth to the alleged explanatory power of *Roe*. No person could suffer such ugly assaults on his character and intelligence over such a long period without accumulating emotional scar tissue. But I would venture that this was only one side of the psychological calculus. For every brutal insult, for every protestor shadowing Blackmun's public appearances, there was someone, usually a woman, telling the Justice he had saved her life, preserved her family, or allowed her to realize the life she sought for herself. To the extent that the experience of *Roe* moved Blackmun leftward over the years, I would say he was not only pushed by criticism but pulled by a certain kind of praise.¹⁹⁹

There is Justice Blackmun's own take on the shift, that he did not change his jurisprudence, but rather, that the Court did. It is true that in his confirmation hearings in 1971, Justice Blackmun expressed the desire that his opinions would show "in the treatment of little people, what I hope is a sensitivity to their problems."²⁰⁰ It is our position that Justice Blackmun's values remained constant, but the exposure to one case after another caused his votes to move closer to his values.

VI. WHAT CAN WE LEARN FROM BLACKMUN ABOUT DETERMINANTS OF SUCCESS AND FAILURE?

A. Rating the Person Versus Rating the Justice

Although all the ratings described in this paper focus on judicial effectiveness, an evaluation of Justice Blackmun as a person cannot be avoided.²⁰¹ His former law clerk Edward Lazarus called Justice Blackmun "the most empathetic Justice in recent times, and very likely in the history of the Court."²⁰² In interviews with prospective law clerks, Justice Blackmun always "insisted that his was the least desirable clerkship at the Court, in part because his colleagues were more intelligent and better teachers than he."²⁰³ Justice Blackmun knew the Court staff members by name. They saw him as "unusually humble and approachable."²⁰⁴ He breakfasted daily in the Su-

199. EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* 380, n.* (1998).

200. Rosen, *supra* note 154.

201. After all, one can be a highly-regarded justice and still be a less-than-admirable human being, as the recent biography of Justice Douglas by Bruce Murphy documents. See generally BRUCE A. MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* (2003).

202. LAZARUS, *supra* note 199, at 39.

203. *Id.* at 23.

204. Wasby, *supra* note 146, at 187 (quotation omitted).

preme Court public cafeteria with his and other Justices' law clerks, where he was quite visible and approachable.²⁰⁵

But Justice Blackmun also manifested his share of human limitations. Justice Blackmun agonized over decisions and – especially in his early years – wrote slowly and in a plodding style.²⁰⁶ Rosen described him as “finicky to the point of obsessiveness.”²⁰⁷ He went on to say:

Blackmun was, as President Clinton said [at the time of his resignation from the Court], a good and decent and humane man, whose compassion suffused his work and his life. Unlike some of his colleagues, he took his job seriously until the very end, and rather than flitting about to dinners and receptions, he worked long and lonely hours poring over the facts of the most obscure cases and agonizing about the fate of the parties. If Blackmun tended to get mired in trivial details, if many of his opinions seemed legally unsophisticated and overly emotional and if he often appeared to reach the right result for the wrong reasons, nevertheless he cared about the Court and the country with a sincerity that commands respect.²⁰⁸

Even though Justice Blackmun was affected by criticism more than most, he was not reluctant to occasionally castigate his colleagues in his written opinions.²⁰⁹ For example, he called opinions of Justice O'Connor “overstated and inaccurate” and “substitut[ions] for useful constitutional analysis.”²¹⁰ Justice Blackmun went beyond other Justices in his candor about the workings of the Court, some of whom were probably appalled at his observations. For example, he told an interviewer that he frequently voted with Justices Brennan and Marshall “‘to maintain a centrist balance’ and ‘to correct the imbalance Justice O'Connor’s presence creates.’”²¹¹

B. His Strengths and His Weaknesses

Within the Court, Justice Blackmun’s influence was not impressive, as he did not bring other Justices with him.²¹² As Wasby noted, his lack of influence “occurred both when he [wrote] for the majority, as in the badly splintered *Ballew v. Georgia* case on jury size, and when he [wrote] in dis-

205. *Id.*; LAZARUS, *supra* note 199, at 28.

206. Rosen, *supra* note 154, at 13.

207. *Id.*

208. *Id.*

209. Wasby, *supra* note 146, at 193.

210. *Id.* at 194.

211. *Id.* at 190 (quoting John A. Jenkins, A Candid Talk with Justice Blackmun, N.Y. TIMES MAGAZINE, February 10, 1983, at 57).

212. *Id.* at 197.

sent.”²¹³ In addition “most of his concurring opinions [were not] joined by other justices.”²¹⁴

Perhaps the failure to bring others along occurred because Justice Blackmun’s own analysis was sometimes more emotional than logical.²¹⁵ Rosen comments:

But feeling deeply is no substitute for arguing rigorously; and the qualities that made Blackmun an admirable man ultimately condemned him to be an ineffective justice. By reducing so many cases to their human dimensions and refusing to justify his impulses with principled legal arguments, Blackmun showed the dangers of the jurisprudence of sentiment. He committed liberals to the unfortunate and inaccurate proposition that justices must resort to personal sympathy in order to justify liberal results. Although he occupied the seat of Holmes and Cardozo, Blackmun will be remembered in the rank of Frank Murphy, the warmhearted New Dealer who wrote emotional dissents on behalf of the poor and powerless, but whose tendency to let his heart get the better of his head deprived him of lasting influence.²¹⁶

Comparing the dissents by Justices Blackmun and Brennan in *DeShaney v. Winnebago County Department of Social Services*²¹⁷ illustrates this point. In this case, the parents of Joshua DeShaney had divorced within a year after he was born, and the father, Randy DeShaney, was granted custody.²¹⁸ For more than two years, young Joshua was beaten by his father.²¹⁹ In January 1982, social workers became aware of the abuse.²²⁰ His father’s girlfriend brought Joshua to the hospital for treatment, covered with bruises and abrasions.²²¹ His father denied that the injuries were a result of abuse.²²² Two months later the hospital once more treated Joshua for suspicious injuries, but found no proof of abuse.²²³ Several times when county social workers tried to see Joshua at home, his father denied them access.²²⁴ By the age of four Joshua had been beaten so repeatedly and severely that he suffered extensive

213. *Id.*

214. *Id.* at 198.

215. Rosen, *supra* note 154, at 188.

216. *Id.* (emphasis added).

217. 489 U.S. 189 (1989).

218. *Id.* at 191.

219. *Id.* at 192-93.

220. *Id.* at 192.

221. *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 812 F.2d 298, 299 (7th Cir. 1987), *aff’d*, 489 U.S. 189 (1989).

222. *DeShaney*, 489 U.S. at 192.

223. *Id.*; see *DeShaney*, 812 F.2d at 300.

224. *DeShaney*, 489 U.S. at 193.

brain damage and had to be permanently institutionalized.²²⁵ His father was convicted of child abuse.²²⁶ Joshua's mother brought a civil suit against the Department of Social Services (DSS) of Winnebago County, Wisconsin, claiming that the social workers had failed to intervene when they had clear reason to suspect that the boy was in danger.²²⁷ The case focused on two issues: whether this failure to act violated Joshua's Fourteenth Amendment right not to be deprived of life or liberty without due process of law²²⁸ and whether Joshua's mother had a right to sue the State.²²⁹

Justices Blackmun and Brennan sympathized with Joshua's mother's claim but relied on differing analyses to dissent from the majority opinion that the mother did not have the right to sue the state.²³⁰ Justice Brennan applied a logical argument to support his conclusion that the State should be accountable: "[I]naction can be every bit as abusive of power as action . . . oppression can result when a State undertakes a vital duty and then ignores it."²³¹ In contrast, Justice Blackmun avoided a legalistic argument and expressed his opinion in more human terms:

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except . . . "dutifully recorded these incidents in [their] files."²³²

His dissent included the statement that "[This] is a sad commentary upon American life, and constitutional principles," but in his dissent, he did not say why he thought constitutional principles were violated.²³³ While Justice Blackmun's dissent is more frequently quoted, it lacks what Justice Brennan's dissent provides, an effective logical argument why the majority opinion is wrong.

225. *Id.*

226. *Id.* The father served less than two months in prison. J. Randall Patterson, *Intimate Injuries: Are There Constitutional Law Protections From Family Violence*, 15 CAMPBELL L. REV. 1, 5 (1992). But that was not punishment enough to satisfy Joshua's mother, who lived in Wyoming and had not had the opportunity to observe the day-to-day developments. *DeShaney*, 489 U.S. at 193 (stating that Joshua's mother brought suit against Winnebago County, the Department of Social Services (DSS), and various employees of DSS); *DeShaney*, 812 F.2d at 300.

227. *DeShaney*, 489 U.S. at 193.

228. *See id.*

229. *See id.*

230. *See generally id.* at 203-12 (Brennan, J., dissenting); *id.* at 212-13 (Blackmun, J., dissenting).

231. *Id.* at 211-12 (Brennan, J., dissenting).

232. *Id.* at 213 (Blackmun, J., dissenting) (quoting *id.* at 193 (majority opinion)).

233. *Id.*

C. His Place in History

The most recent and comprehensive scholars' ratings of Justices gave Justice Blackmun a rating of 2.66, somewhat above (but not statistically significantly above) the average for all Justices of 2.46, and placing him between the "good" (3) and "fair" (2) categories.²³⁴

In terms of our criterion of the ability to influence, Justice Blackmun also comes out in the middle. *Roe v. Wade* will always be associated with Justice Blackmun, but few others of his opinions were groundbreaking or of major significance. However, he will always be highly regarded by social scientists for his support of, and even reliance on, empirical data and writings by psychologists and psychiatrists in a number of his opinions, including those in *Ballew v. Georgia*²³⁵ on jury size, *Barefoot v. Estelle*²³⁶ on predicting dangerousness, and *Bowers v. Hardwick*²³⁷ on the mental health of homosexual persons. Justice Blackmun should be regarded by scholars as a man who was humble and yet reached the pinnacle of his profession. His impact may not be as large as Justice Brennan's or Justice John Marshall's, but few are. He will be remembered as a good man who became a good Justice through hard work, and who served a quarter century fighting for the little person.

234. COMISKEY, *supra* note 27, at 90, 98.

235. 435 U.S. 223, 224 (1978) (plurality opinion).

236. 463 U.S. 880, 916 (1983) (Blackmun, J., dissenting), *superseded by statute* 28 U.S.C. § 2253(c)(2) (2000).

237. 478 U.S. 186, 203 & n.2 (1986) (5-4 decision) (Blackmun, J., dissenting), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

