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TRIBUTE TO A CHAMPION: THURGOOD MARSHALL

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[Thurgood Marshall] helped persuade us that the vogue for positivism in jurisprudence — the obsession with what the law is, which leaves no room for a choice between equally acceptable alternatives — must be replaced by a jurisprudence that recognizes human beings as the most distinctive and important feature of the universe which confronts our senses, and that recognizes the function of law as the historic means of guaranteeing that preeminence.¹

We take the occasion of Thurgood Marshall's retirement from the Supreme Court, and from public life, to reflect on his career and accomplishments. We do so to pay tribute to this champion of the rights of minorities, the poor, and others disadvantaged and to express our appreciation for his tireless efforts that have enhanced opportunities and improved the quality of life for so many Americans. In addition, reflection on Marshall's career provides a sorely needed model for public interest-minded law students and lawyers.

The record of his service is well known: civil rights lawyer, director-counsel of the NAACP Legal Defense Fund, federal court of appeals judge, Solicitor General of the United States, and twenty-four years as Supreme Court Justice. Throughout that progression, he achieved many "firsts" for an Afro-American, including the first

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1. Justice William Brennan Address at the Dedication of the Thurgood Marshall Library, University of Maryland (Oct. 9, 1980).

of his race to serve in either of the latter two posts. Although his long tenure on the Court enabled him to participate in many landmark decisions, Marshall's greatest contributions came from his work as an advocate for the NAACP advancing civil rights causes.

Unable because of his race to attend the University of Maryland Law School in his hometown of Baltimore, Marshall enrolled at, and graduated first in his class from, the Howard University Law School. He returned to Baltimore after graduation and was soon thrust into litigation on behalf of the NAACP. He eventually became a staff attorney and litigated a series of victories to equalize salaries paid to black and white teachers in the South.² In 1938, he became special counsel to the association, a position that shortly evolved into director-counsel of the NAACP Legal Defense Fund, Inc. In that capacity, he engineered a nationwide strategy to vindicate the civil rights of Afro-Americans and bring down the "Jim Crow" regimes then in place. His most significant victories, at least prior to 1954, invalidated the "white primaries," which were effectively disenfranchising blacks in the South;³ required admission of Afro-Americans to the previously segregated University of Texas Law School;⁴ and ended the use of racially restrictive covenants in residential home sales.⁵ He then orchestrated the strategy and the litigation that led to the landmark decision in *Brown v. Board of Education*⁶ which, of course, declared unconstitutional the state-sponsored segregation of public schools.

The importance of his NAACP work cannot be exaggerated. Through his leadership, the Association dismantled a governmentally imposed system that ensured the subordination of an entire race in major portions of this country. Down-to-earth, garrulous, and charismatic, he maneuvered the often discordant elements within the civil rights forces. He handled staff, client groups (who were typically very poor and uneducated), opposing lawyers, and judges with vir-

2. *E.g.*, *Alston v. School Bd. of City of Norfolk*, 112 F.2d 992 (4th Cir. 1940).

3. *Smith v. Allwright*, 321 U.S. 649 (1944).

4. *Sweatt v. Painter*, 339 U.S. 629 (1950).

5. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

6. 347 U.S. 483 (1954). See generally RICHARD KLUGER, *SIMPLE JUSTICE* (1975).

tuosity. "He played the role of conductor beautifully," said the sociologist Kenneth Clark, who worked with the NAACP in the desegregation cases. Always exercising common sense, Marshall carefully calculated his opportunities and seized upon them when he was confident of success. He was, according to one commentator, a "blend of militant radical-idealist and wily pragmatist."⁸ Through it all, he maintained an ever-ready sense of humor as well as a genuine caring for the people he served. "He had a terribly deep and real affection for the little people, the people he called the Little Joes," said a lawyer with whom he worked in the late forties, "and the affection was returned. I never saw him put a little person down. . . . He had this enormous ability to relate. He was not only of them he was *with* them."⁹ Randall Kennedy, formerly Marshall's clerk and now a Harvard law professor, has described his parents' tales of "how [black southerners] back in Jim Crow days would say things like, 'Hold on, Thurgood's coming.' He was sort of a messianic figure."¹⁰

He was also relentless and indefatigable, traveling throughout the country to deal with the spectrum of legal and organizational problems affecting Afro-Americans in the forties and fifties. He logged 50,000 miles a year, most of it in the South where his comfort and accommodations were severely strained by "whites only" signs. He darted about not only to address the inequities of segregation laws, but also to defend blacks accused of notorious crimes and facing hostile communities, combat local government or police abuses of Afro-Americans, and rally the troops in the far-flung NAACP branches. Marshall even squeezed between proceedings in the South Carolina desegregation case a six week trip to Korea to investigate complaints from black soldiers stationed there of mistreatment by the military.

Determination and courage marked his work with the NAACP. Indeed, he could not have continued without both. The hostility of

7. KLUGER, *supra* note 6, at 404.

8. *Id.* at 409.

9. *Id.* at 410 (emphasis in original).

10. Quoted in Fred Strasser, *Recalling a Champion of Rights*, NAT'L L.J., July 8, 1991, at 30.

the law, of local judges, and sometimes even of federal appellate courts, as well as recurring setbacks and the retarded pace of officialdom to confront the country's race problem, all required extraordinary perseverance from those who dared to force reforms. It took no small amount of courage to appear in remote courtrooms, often times as the first black lawyer that locals had ever seen, and to present arguments that threatened to shake the foundations of Southern life. Marshall had to deal, too, with real threats of physical violence. On one occasion, he was driving from a rural Tennessee town, where he was representing black defendants accused of assault to commit murder, when a small army of law officials stopped to check his car for possession of liquor. (It was a dry county). After their search produced nothing, they released him, but soon stopped him again. This time, they examined his driver's license, and again, they let him go. On a third stop, they arrested him for drunk driving. Upon driving him back to town for a hearing, the patrol car carrying him pulled off on a side road, but returned to the highway when it was followed by some of Marshall's compatriots. After the local magistrate detected no evidence of alcohol and Marshall was released, he and his fellow travelers switched cars with a local person. When Marshall's original car was driven off in a different direction, the police stopped it again and beat the driver.¹¹ On another occasion, following a hearing in the South Carolina desegregation case, a local man warned Marshall, "If you show your black ass in Clarendon County ever again, you're a dead man."¹²

Besides his other qualities, Marshall was a damn good lawyer. As an advocate, he was fervent, quick on his feet, yet always in command of his emotions and the situation. He argued thirty-two cases before the Supreme Court, winning twenty-nine of them. Al-

11. The incident is described in KLUGER, *supra* note 6, at 281-82.

12. *Id.* at 676. Kluger cites other examples in which Marshall faced the threat of physical abuse. *Id.* at 280-81, 710. Kluger also reports an incident, perhaps true, in which Marshall showed that his courage was edged by his pragmatism. Marshall himself told the story of a stop he made at a small Mississippi town contemplating an overnight stay. He recounted that he was standing on the train platform when a "cold-eyed man with a gun on his hip comes up. 'Niggguh,' he said, 'I thought you oughta know the sun ain't nevah set on a live niggguh in this town.' So I wrapped my constitutional rights in cellophane, tucked 'em in my hip pocket . . . and caught the next train out of there." *Id.* at 279.

ways prepared and forceful, he was by all accounts at his best in the arguments in *Brown*, perhaps the most significant case decided by any court in this century.

His accomplishments as a lawyer came at a personal sacrifice, as well. Not only did his work deny him the pace and relaxation of a normal law practice and keep him from home and family much of the year, but it also failed to pay him very well. The Legal Defense Fund during Marshall's years always operated on a shoestring. In 1951, for example, after thirteen years as the Fund's chief lawyer and in payment for yeoman services, his salary stood at \$8,748.30.¹³ As indicated by financial statements filed by federal judges, Marshall never did accumulate much in the way of assets, and his wealth was always well below that of his brethren on the Supreme Court. Thus, commitment, dedication, and sacrifice characterized Thurgood Marshall's career at the bar.

His tenure on the bench was marked by an ever-increasing sense of duty to file dissenting opinions. Appointed to the Supreme Court by President Johnson in 1967, Marshall fell comfortably into the liberal majority on the Warren Court. But the Court's conservative swing, which began in 1970 and accelerated in recent years, frequently left Marshall on the short end of the vote. His role during most of his Court years, then, was quite different from the leadership position he held with the NAACP and as Solicitor General. Rather, he functioned as a conscience for the Court, as a source of experience and perspective that lay beyond the world inhabited by the other justices. Marshall's opinions repeatedly took up the causes of the little people, examining how the Court's doctrines affected the poor, minorities, and women in ways subtle as well as direct. For example, in *United States v. Kras*,¹⁴ Justice Marshall chastised the insensitivity of the majority's rationale for deciding that destitute individuals could be denied access to bankruptcy court if they could not afford the filing fee. According to the majority, the fee, when paid over several months, would cost petitioners per week "less than

13. *Id.* at 408.

14. 409 U.S. 434 (1973).

the price of a movie and little more than the cost of a pack or two of cigarettes.”¹⁵ Marshall responded:

It may be easy for some people to think that weekly savings of less than \$2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. . . . A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have like attempting to provide some comforts for a gravely ill child, as Kras must do.

It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.¹⁶

Similarly, Marshall’s votes and opinions on abortion evidenced a genuine concern for the opportunities of women and, in particular, for the adverse impact that anti-abortion laws have on minorities and the poor.¹⁷

Marshall brought his experience to bear on other issues. Having lived and observed pervasive and severe discrimination against Afro-Americans over six decades, he clearly spoke with authority when he dissented from the Court’s invalidation of an affirmative action program in *Regents of the University of California v. Bakke*.¹⁸ After canvassing this country’s mistreatment of its blacks, Marshall summarized his position, speaking with the same clarity and common sense that distinguished his work as an NAACP advocate:

[I]t is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. . . . [T]oday’s judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so

15. *Id.* at 449.

16. *Id.* at 460.

17. *See, e.g.*, Marshall’s dissent in *Beal v. Roe*, 432 U.S. 438 (1977), which had upheld a law that did not include nontherapeutic, medically unnecessary abortions within a Medicaid program: “I am appalled at the ethical bankruptcy of those who preach a ‘right to life’ that means [a] bare existence in utter misery for so many poor women and their children.” *Id.* at 456-57.

18. 438 U.S. 265 (1978).

pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.¹⁹

Marshall concluded:

I fear that we have come full circle. After the Civil War our Government started several 'affirmative action' programs. This Court in the *Civil Rights Cases* and *Plessy v. Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown v. Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative action programs. Now, we have this Court again stepping in, this time to stop affirmative action programs of the type [challenged in *Bakke*].²⁰

Marshall's experience as a lawyer defending poor Afro-Americans facing racial prejudice in the criminal justice system influenced him to ultimately conclude that capital punishment is unconstitutional. His practice taught him that juries can be wrong and that their errors occurred with the greatest frequency when the defendant was black. The irrevocable nature of the death penalty fails to account for juries' fallibility.²¹ Marshall also decided that capital punishment was just plain wrong, and he vowed to fight its use to the end. "I'll never give up," he said, echoing the determination he showed decades earlier fighting against racial segregation: "On something like that, you can't give up and you can't compromise. It's so morally correct."²²

19. *Id.* at 400-01.

20. *Id.* at 402 (emphasis in original). Thirteen years later, Marshall's analogy of current Court decisions to the Nineteenth Century Court's undercutting of post-Civil War legislation guaranteeing civil rights in *United States v. Cruikshank*, 92 U.S. 542 (1876), and *The Civil Rights Cases*, 109 U.S. 3 (1883), appears even more apropos in light of recent cases that have once again narrowly constricted federal civil rights statutes. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

21. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 346, 371 (1971) (Marshall, J., concurring):
 Death is irrevocable. Life imprisonment is not. Death, of course, makes rehabilitation impossible. Life imprisonment does not. In short, death has always been viewed as the ultimate sanction In striking down capital punishment, this court does not malign our system of government. On the contrary, it pays homage to it In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute.

22. Ruth Marcus & Al Kamen, *A Voice of Thunder Leaves the Court*, WASH. POST WEEKLY,

Some of Marshall's opinions made substantial doctrinal contributions toward protecting individual rights, although later cases have taken some of the luster off his innovations. One of his early decisions, *Stanley v. Georgia*,²³ fused First Amendment and privacy considerations to prohibit the government from punishing individuals for the mere possession in their homes of obscene materials. "If the First Amendment means anything," Marshall wrote, "it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."²⁴ Later, *Police Department of Chicago v. Mosely*²⁵ articulated the Constitution's hostility to differential treatment of speech based on its content. And in several opinions dissenting or concurring, Marshall urged adoption of his "sliding scale" analysis for applying the Equal Protection Clause. He would gauge the level of judicial scrutiny according to the nature of the classification used by the government and the importance of the affected individual interest.²⁶ Although no majority ever formally subscribed to his analysis, it is actually more descriptive of what the Court has, in fact, done than any formula set forth in any majority opinion. In any event, Marshall's opinions persistently and powerfully vented the positions, needs, and interests of the oppressed, dispossessed, and the disenfranchised.

We will miss that voice, that conscience, speaking on the Court, whether it be through his raucous tones from the bench during oral

July 1-7, 1991, at 6. Marshall wrote in his dissent to *Gregg v. Georgia*, 428 U.S. 227, 231 (1976), that capital punishment is a *per se* violation of the Eighth Amendment's prohibition of "cruel and unusual punishment." He repeatedly and without omission dissented from every case affirming a death sentence or denying *certiorari* in a case in which death sentence had been imposed. *E.g.*, *Payne v. Tennessee*, 111 S. Ct. 2597, 2619 (1991) (Marshall, J., dissenting); *Williams v. Arizona*, 111 S. Ct. 2043, 2043-44 (1991) (Marshall, J., dissenting from denial of *certiorari*).

23. 394 U.S. 557 (1969).

24. *Id.* at 565.

25. 408 U.S. 92 (1972).

26. *E.g.*, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 455 (1985) (concurring opinion); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 317 (1976) (dissenting opinion); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 70 (1973) (dissenting opinion). Rather than using a rigid two- or three-tiered scrutiny, as the Court purports to do, Marshall would take a more flexible approach: The more important the individual interest at stake, and the more the affected class resembles a suspect class, the greater is the burden on the government to justify its classification and its refusal to use less discriminatory means. The result is a "sliding scale" of judicial review.

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argument or through his charged opinions in the U.S. Reports. But at least we can express our appreciation for the persistence, candor, and insight that he gave us for the past sixty years. We also can hope that some among us will strive to emulate it.

