

on such issues, however, clearly sharpened the debate and often limited the sweep of a decision adverse to the position of the minority litigant.<sup>38</sup> A significant amount of Marshall's contribution has undoubtedly been made in the conference room,<sup>39</sup> although we may never know how much. Once, Marshall sharply answered one reporter who had asked him if he would discuss his deliberations in conference: "No, of course not. . . . Oh, I can tell you this, it was in the Conference Room, and anything said and done in the Conference Room remains there."<sup>40</sup>

Scholars and commentators should begin to judge Justice Marshall the Younger, who sat on the Supreme Court for twenty-four years, by the same criteria used to evaluate the judicial ability and contribution of Marshall the Older. Marshall's friends, including those of us who were fortunate to have been "touched by his fire"<sup>41</sup> in our youth, have every confidence that Marshall the Younger will rank highly when measured against such universal standards.

Please permit me one personal word directed to Justice Thurgood Marshall himself: You have performed your task with great style and in a way that has made the law a grander calling. Thanks so much for greatly improving the quality of our laws, the vision of our country, and the hope that the youth may yet enjoy the blessings of liberty without the burdens of unfair restrictions imposed by the color of their skin, their gender, or their poverty. As with the discovery of Ecclesiasticus, you have given us an additional inheritance.

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### Owen Fiss\*

Thurgood Marshall is a fabulous cook. In 1965 he invited me and my wife to his apartment on Amsterdam Avenue in New York and made a crab gumbo, okra and all, that I remember to this day. I was told that I had his grandmother to thank. With a loving irreverence that was fully deserved, she greeted his decision in the late 1920s to study law by insisting that he also learn to cook, so that he always could be sure of a job. Given the racism rampant in Baltimore, or for that matter, in America at that time, no one could possibly have imagined that Thurgood Marshall would someday have

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<sup>38</sup> See, e.g., *Crosan*, 488 U.S. at 528 (Marshall, J., dissenting); *City of Memphis v. Greene*, 451 U.S. 100, 135 (1981) (Marshall, J., dissenting).

<sup>39</sup> See Brennan, *supra* note 8, at 396.

<sup>40</sup> News Conference, Supreme Court Associate Justice Thurgood Marshall, Fed. News Serv. (June 28, 1991), available in LEXIS, Nexis Library, Fednew File.

<sup>41</sup> Cf. TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR., 1861-1864 (Mark D.W. Howe ed., 1946).

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the greatest legal career of the twentieth century: chief counsel for the petitioners in *Brown v. Board of Education*,<sup>1</sup> judge on the Court of Appeals, Solicitor General of the United States, and finally, Supreme Court Justice.

On many occasions the Justice assured his friends that he would never retire from the Supreme Court and that he intended to continue for the full term of his office, which he reminded us was for life. "I expect to die at 110, shot by a jealous husband," he quickly added.<sup>2</sup> Those familiar with his bravado, and who saw the toll of age, were not surprised by the decision to retire, for he was then eighty-three and had served on the Court for twenty-four years. But most others were shocked and also saddened by his retirement, for it seemed to spell the end, the very end, of an era.

In truth, that era had ended some twenty years ago, when Earl Warren, Hugo Black, William Douglas, and Abe Fortas stepped down and were replaced by Presidents Nixon and Ford with Justices who had a markedly different outlook. The Reagan appointees only made matters worse. Justice Marshall's retirement did not cause a shift in the balance of power on the Court, but it came a year after the retirement of his beloved friend and colleague, William Brennan, the only other Justice remaining from the coalition that moved and shaped the Court during the Warren era. Moreover, because Marshall was the lawyer responsible for the initial victory in *Brown*, his decision to withdraw from public life confirmed in a bold and dramatic way the troubled state of the Warren Court legacy.

In the chambers of the Supreme Court today, *Brown* and all that Marshall fought for stands in jeopardy. Although that case has not been overruled and probably never will be, it has been drained of its generative power. Rather than serving as an axiom and an inspiration, as it did in the 1960s, *Brown* is now tolerated as an exception to be cabined and limited. In almost all of the major school desegregation cases of the last two decades, from *Milliken v. Bradley*<sup>3</sup> in 1974 to *Board of Education v. Dowell*<sup>4</sup> in 1991, Justice Marshall was on the losing side and rightly complained that the majority had betrayed *Brown*. This complaint has not been confined to school cases, but has extended to all manner of cases involving the Bill of Rights and the Civil War Amendments. The ruling coalition seems determined to deny the idealistic possibilities of the law so exalted by *Brown*.

Outside the Supreme Court, the situation is somewhat different, for many in the academy and the profession still take their bearings

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<sup>1</sup> 347 U.S. 483 (1954).

<sup>2</sup> Juan Williams, *Marshall's Law*, WASH. POST, Jan. 7, 1990 (magazine), at 12, 19.

<sup>3</sup> 418 U.S. 717 (1974).

<sup>4</sup> 111 S. Ct. 630 (1991).

from *Brown* and the other efforts of the Warren Court to actualize the nation's highest ideals. The result is an open and marked hostility between the Court and its primary constituency. Indeed, just the other day, Guido Calabresi, the Dean of the Yale Law School, invited to write this year's Supreme Court *Foreword*, began an article in the *New York Times* on this remarkable note: "I despise the current Supreme Court and find its aggressive, willful, statist behavior disgusting . . . ."<sup>5</sup> Not everyone would agree with these characterizations, but they indicate the degree of estrangement from the Court that now exists in the law schools of the nation and perhaps beyond.

This rift between the Court and the profession started in the 1970s, has grown to striking proportions today — especially given the doubts that have arisen concerning Marshall's successor — and is likely to deepen in the future. Those inclined to oppose the Court face enormous challenges, not the least of which is the temptation to acquiesce and to savor the rewards of professional success. But at moments of weakness, we might well turn to Marshall for instruction. He has produced a body of dissents that reveal the errors of the present majority, but even more important than his words is the life he has lived, for it provides a standard by which we can measure our own. On the day after his retirement, a reporter asked him, "Justice Marshall, how do you want to be remembered?" and with a spontaneity that belongs only to the deepest truths, he answered: "That he did what he could with what he had."<sup>6</sup>

From the beginning, Thurgood Marshall fought for what was right, even when the chances of success were minute and the hardships great. He began the practice of law during the Great Depression, when he opened a one-man law office in Baltimore. Soon he started handling civil rights cases, although there was virtually no law in his favor and, of course, no prospect of a fee. He won a number of important victories, including one against the University of Maryland, and in 1936 he moved on to the national headquarters of the National Association for the Advancement of Colored People (NAACP) in New York. Two years later he became its chief counsel. At the time the NAACP was, to put it charitably, a fledgling organization. It had a shoestring budget and a minuscule staff — one or two lawyers and a secretary. Marshall once confessed that after a number of years he received a raise, but spent the entire amount — such as it was — on a single lunch at Luchows. Things improved for the NAACP after Marshall's victory in *Brown* and the subsequent confrontation with Governor Faubus in Little Rock, Arkansas. But for Marshall, the struggle continued.

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<sup>5</sup> Guido Calabresi, *What Clarence Thomas Knows*, N.Y. TIMES, July 28, 1991, § 4, at 15.

<sup>6</sup> *Excerpts from Marshall News Conference*, L.A. TIMES, June 29, 1991, at A23.

I clerked for Marshall in 1964–1965, when he was a judge on the Court of Appeals for the Second Circuit, and I witnessed first-hand his extraordinary capacity to stand up for what he believed was right. At that point, the struggle stemmed from the reluctance of his colleagues to implement fully the reforms in criminal procedure being developed by the Warren Court. Unlike the battles of his early years, in these confrontations Marshall could invoke the formal authority of the Supreme Court. But in the early 1960s, the Court was at the center of controversy and criticism; it needed support and had little to confer. His years as Solicitor General and his early years on the Supreme Court, when he sat in the company of his heroes, were something of a respite, for by 1967 the Warren Court had achieved considerable power. But soon the tide shifted.

In 1968 Richard Nixon campaigned for the presidency by attacking the Warren Court, and upon winning, began to make appointments to alter radically the Court's direction. Justice Marshall soon began to feel under siege. In 1970 he was hospitalized with pneumonia, and, as he tells the story, was informed by a doctor one day that President Nixon had been inquiring about his health. Instantly, Marshall instructed the doctor to tell the President, "Not yet." In the end, he proved true to his word, although this resolve meant that he would spend the next twenty years — almost his entire career on the Supreme Court — in battle against the counterrevolution led by Justice, later Chief Justice, Rehnquist.

On the Justice's retirement, one law professor trying to summarize Marshall's years of service on the High Court aptly referred to him as "the Great Dissenter."<sup>7</sup> In his dissents, he continually tried to remind us how far short we have fallen from our ideals. Justice Marshall made a career of protesting the roll-back in school desegregation, the dismantling of procedural protections for the accused, the erection of new barriers to affirmative action, the disregard for free speech, and the reinstatement of the death penalty. On his last day on the bench, Justice Marshall dissented from a Rehnquist decision permitting the admission of victim impact evidence in capital cases, and he concluded his opinion and his career on this worrisome note: "Cast aside today are those condemned to face society's ultimate penalty. Tomorrow's victims may be minorities, women or the indigent."<sup>8</sup>

Sitting in the Supreme Court's exalted offices, one does not need great courage to speak out, only strong convictions and a will to resist. Much more than that, however, was needed when Marshall began his career as a civil rights lawyer. Marshall loved telling stories of those early years — and he retold those stories so often that they must be true. During my clerkship year, I heard many tales of his travels in

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<sup>7</sup> Kathleen M. Sullivan, *Marshall, the Great Dissenter*, N.Y. TIMES, June 29, 1991, at A23.

<sup>8</sup> *Payne v. Tennessee*, 111 S. Ct. 2597, 2625 (1991) (Marshall, J., dissenting).

the South, especially in the late 1930s and 1940s when he criss-crossed the region by car and train, lived out of a suitcase, and confronted the crude and violent racism of the day. He spoke admiringly of the ordinary folk — for example, the plaintiffs in his school suits — who risked their livelihood and sometimes their lives to ensure that justice was done. Now and then, he mentioned a white official — a judge or a sheriff — who at great personal sacrifice did what simple decency required. Usually, the stories ended with a chuckle and a self-effacing twist, in which he pictured himself eagerly running out of town to escape a pistol-whipping or trying to pass himself off as a chauffeur to skirt a threatening crowd.

Even Marshall knew when to move on. Once he recalled this encounter in a small Mississippi town:

I was out there on the train platform, trying to look small, when this cold-eyed man with a gun on his hip came up. "Nigguh," he said, "I thought you oughta know the sun ain't nevah set on a live nigguh in this town." So I wrapped my constitutional rights in cellophane, tucked them in my hip pocket — and caught the next train.

Marshall's modesty in reciting these tales was admirable, but it did not mask the immediacy of the danger he faced. We do not often think that great lawyering requires courage, but it does, and Thurgood Marshall has plenty.

I also marveled at the absence of bitterness or anger in his character. The Justice is a warm and jovial person, always ready to tease. His favorite term of endearment when addressing his law clerks was "knucklehead." Sometimes I was just "boy." Although I am sure that there was, and still is, much in America and on the Court that angered him, Marshall rarely let those feelings surface. He worked steadily and determinedly to forge the law into an effective instrument of reform, but he always listened to his adversaries, pondered the argument, and then stood tall and straight. Justice Black once described Marshall's argument in *Brown* in just these terms and contrasted it with that of John W. Davis — often reputed to be one of the greatest advocates of the century — who lost both his cool and his argument when he crossed swords with Marshall in *Brown*.

None of this is to deny that Marshall was frustrated with the changes in the Court and that he sometimes let an angry sentence slip out. An early example is his dissent in *United States v. Kras*,<sup>9</sup> in which the majority upheld the application of a court filing fee to a poor person and tried to minimize the hardship by insisting that the fee was not much of a burden. The statute provided for the payment of the fee by installments ranging from \$1.28 to \$1.92 a week — calculated by the Court to be "less than the price of a movie and little

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<sup>9</sup> 409 U.S. 434 (1973).

more than the cost of a pack or two of cigarettes."<sup>10</sup> Justice Marshall responded angrily: "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 on unfounded assumptions about how people live."<sup>11</sup> Such slips became more common as the retrenchment of rights became more pronounced. In recent years, he has described the position of the majority as "astonishing," "arrogant," "facile," "myopic," "perfunctory," "impetuous," "dismaying," and "indecent."<sup>12</sup> Once, when a majority of the Court invalidated a modest program of Richmond, Virginia to eradicate the vestiges of past discrimination, he used almost all these adjectives in a single dissent.<sup>13</sup> For the most part, however, these displays of anger were the exception. Thurgood Marshall is a passionate man, but strongly disciplined; as such, he is the epitome of the law.

As might be expected of someone who spent his life fighting against the odds, the Justice is always determined to find glimmers of hope, even in the darkest hour. A few years ago, he spoke at a reunion of law clerks and reflected on the significance of the confrontation in the Senate over the nomination of Robert Bork. The Justice suggested that the decision of the Senate, rejecting the nomination of a man who had devoted his career to attacking — indeed, mocking — the Warren Court, gave us a reason to be optimistic. "Decency seems to be coming out of the closet," as he put it. Subsequent developments belied this prognosis (I never thought of Marshall as much of a soothsayer), but his resolve to be hopeful remained. "Nothing can shake my faith in my country," he commented on many occasions; "I still firmly believe that right will win out." Thurgood Marshall is a good man, and he often acted as though he were under a moral duty to see the best in people. On some occasions that proved impossible, but then he would quickly let the matter pass.

Throughout his life, Thurgood Marshall was moved and supported by his love of family. His wife, Cissy, is truly a remarkable person, spirited and determined, but always with the warmth that is the Marshall trademark. Every time the Justice said — which was quite often — "Isn't she something," we would all rush to agree. He is equally devoted to his two sons. He certainly was the only judge on

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<sup>10</sup> *Id.* at 449.

<sup>11</sup> *Id.* at 460 (Marshall, J., dissenting).

<sup>12</sup> *See, e.g.,* *Payne v. Tennessee*, 111 S. Ct. 2597, 2623 (1991) (Marshall, J., dissenting) ("This truncation of the Court's duty to stand by its own precedents is astonishing."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 529, 530, 543, 554 (1989) (Marshall, J., dissenting) (characterizing the majority's position as myopic, dismaying, perfunctory, and facile); *Wainwright v. Adams*, 466 U.S. 964, 965-66 (1984) (Marshall, J., dissenting) ("The Court's jurisprudence is increasingly being marked by an indecent desire to rush to judgement in capital cases. . . . [C]aution has been thrown to the winds with an impetuosity and arrogance that is truly astonishing.")

<sup>13</sup> *See Richmond*, 488 U.S. at 528 (Marshall, J., dissenting).

the Second Circuit who drove his children to school each and every day — and enjoyed it. He gets a kick out of the fact that one son, John, is now a Virginia state trooper (or as John put it at a recent law clerk banquet, a “law enforcement officer”). A few days before his retirement, the Justice stepped from behind the bench, took off his robe, walked to the lectern he knew so well, and moved the admission of Thurgood, Jr., his other son. This small ceremony, and Cissy’s presence in the courtroom on the last day he sat, spoke powerfully of the role of his family in his life.

As crucial as his family has been, he has also been sustained by his love of the law — not just its maneuvering, of which he never seemed to tire, but also its redemptive possibilities. For Thurgood Marshall, the law is our last hope. He retired after toiling in the profession for sixty years, but he remains a monument to all that is good in it. As long as there is law, his name will be remembered, and when his story is told, all the world will listen.

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### A. Leon Higginbotham, Jr.\*

To laud Thurgood Marshall *solely* for improving the options of African Americans<sup>1</sup> would be too simplistic a tribute for a person who has touched so many lives. Most Americans, not only African Americans, have benefitted from the extraordinary catalytic and ripple effects of *Brown v. Board of Education*<sup>2</sup> and its thrust for a more equalitarian<sup>3</sup> society. Other victims of systemic discrimination, particularly white women,<sup>4</sup> have probably benefitted far more than blacks from the civil rights revolution of the 1950s and the 1960s and from the related civil rights legislation. One of America’s greatest historians, John Hope Franklin, put Thurgood Marshall’s accomplishments in perspective when he noted that Justice Marshall spoke not only

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\* Judge, United States Court of Appeals for the Third Circuit. I would like to thank Judge Louis H. Pollak, Chief Judge Collins Seitz, and Professor Ronald Noble for their very helpful insights. I also thank the many federal judges who responded so promptly and thoughtfully to my questionnaire. I would also like to acknowledge the assistance of Audrey McFarlane, Eric Tilles, Steve Niven, Mark Greene, Yvonne Look, Kathleen Cleaver, and Jonathan Klaaren.

<sup>1</sup> I use the terms African American, Black, and Negro interchangeably. For a discussion of the problem of what is the proper term, see A. Leon Higginbotham, Jr. & Greer C. Bosworth, “*Rather Than The Free*”: *Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17, 17 n.4 (1991).

<sup>2</sup> 347 U.S. 483 (1954).

<sup>3</sup> I use the term “equalitarian” in lieu of “egalitarian” because of the insights of Judge William H. Hastie in his seminal article. See William H. Hastie, *Toward an Equalitarian Legal Order, 1930-1950*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 18 (1973).

<sup>4</sup> See *infra* pp. 63-64.