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THURGOOD MARSHALL

DANIEL POLLITT*

“His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. . . . His was the mouth of a man who knew the anguish of the silenced and gave them a voice.”

Sandra Day O'Connor¹

Thurgood Marshall died on January 25, 1993, at the age of eighty-four. Like Frederick Douglass before him, he “visioned a world where none is lonely, none hunted, none alien.”² In his words, “he did what he could with what he had,”³ and that was more, much more, than aplenty. The thousands of mourners who braved a bitter winter chill to pay tribute at his coffin attest to that.⁴ He ranks in the struggles for liberty and justice with the giants in Supreme Court history: Earl Warren, Bill Brennan, Frank Murphy, Wiley Rutledge, Hugo Black and Bill Douglas. His life is a reminder of the great promises of equality in our Constitution. This article is dedicated to his memory.

Marshall was born in Baltimore in 1908, just a scant twelve years after the Supreme Court held in *Plessy v. Ferguson*⁵ that it was permissible to segregate black citizens from white citizens in places of public accommodation as long as the separate facilities were “equal.”⁶ In the year of his birth, the Supreme Court held that it was permissible for Kentucky to prohibit the voluntary integration of black and

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1. MEMORIAL ADDRESSES AND TRIBUTES IN THE CONGRESS OF THE UNITED STATES ON THE LIFE AND CONTRIBUTIONS OF JUSTICE THURGOOD MARSHALL, 153, House Document, 103-244 103d Cong. 2d Sess. (U.S. Gov't Printing Office 1994) (quoting *Thurgood Marshall*, WASH. POST, January 26, 1993).

2. *Id.* at 33 (quoting the tribute of Hon. Bernard Sanders of Vermont who quoted from ROBERT C. HAYDEN, FREDERICK DOUGLASS: “When freedom is finally won, when it is more than the gaudy mumbo jumbo of politicians, this man, this Douglass, this former slave, this Negro beaten to his knees, exiled, visioning a world where none is lonely, none hunted, alien, this man, superb in love and logic, this man shall be remembered.”).

3. *Id.* at 5 (quoting the tribute of Hon. Timothy Roemer of Indiana).

4. *Id.* at 154 (quoting Felicity Barringer, *Thousands Bid Farewell to Marshall*, N.Y. TIMES, Jan. 28, 1993).

5. 163 U.S. 537 (1896).

6. MEMORIAL ADDRESSES, *supra* note 1, 140 (quoting Linda Greenhouse, *Ex-Justice Marshall Dies at 84*, N.Y. TIMES, Jan. 25, 1993 citing remarks of Yale Law professor Paul Gewertz, a former law clerk for Marshall. “He grew up in a ruthlessly discriminatory world — a world in which segregation of the races was pervasive and taken for granted, where lynchings were common, where the black man’s inherent inferiority was proclaimed widely and wantonly.” *Id.*

white students at a private college,⁷ and there were eighty-nine recorded lynchings.⁸

The Baltimore of his youth was a "Jim Crow" town.⁹ It was a town where blacks attended "colored schools" run by a white superintendent who openly said, "Negroes don't deserve swimming pools." It was a town where not a single downtown department store was open to blacks; a town where not a single restroom for blacks could be found downtown.¹⁰ Marshall worked as a waiter at a time when black waiters were generally called "George," sometimes "boy."¹¹ Segregation was the law and the practice of the land.

In a farewell news conference in 1991, Marshall was asked if African-Americans were "free at last." He replied with a parable: a Pullman porter once told Marshall that "he had been in every city in this country and had never been in any city where he had to put his hand up in front of his face to find out he was a Negro."¹² No wonder Marshall urged his colleagues on the Supreme Court to look at the letter of the law, of course, but to keep in mind the soul of the nation.¹³

Marshall's roots go back to a great-grandfather, kidnapped in the Congo and sold as a slave to a plantation on the eastern shore of Maryland. His paternal grandfather enlisted in the Union Army during the Civil War and chose the name "Thoroughgood."¹⁴ Marshall was named after this grandfather, but early on he shortened it to "Thurgood." His mother was a teacher, and his father was a steward at the all-white Gibson Island Club on the Chesapeake Bay.¹⁵ In his high school years, Marshall worked as a delivery boy after class and worked his way through college by waiting on tables.¹⁶

7. *Berea v. Kentucky*, 211 U.S. 45 (1908).

8. MEMORIAL ADDRESSES, *supra* note 1, 198 (quoting *Thurgood Marshall*, BLACK LETTER JOURNAL, Spring, 1989).

9. "Jim Crow" makes reference to the character in a nineteenth century minstrel song. The term became synonymous with "the systematic practice of discriminating against and suppressing black people." THE AM. HERITAGE DICTIONARY (Second College Edition, 1985).

10. MEMORIAL ADDRESSES, *supra* note 1, 174 (quoting Juan Williams, *Marshall's Law*, WASH. POST, Jan. 7, 1990).

11. *Id.* at 170 (quoting Roger Wilkins, *Thurgood and Me*, MOTHER JONES MAGAZINE (Nov.-Dec. 1991)).

12. *Id.* at 73 (quoting the eulogy of Senator Joseph Lieberman of Connecticut), *See also* MEMORIAL ADDRESSES, *supra* note 1, 151 (quoting Joan Biskupic, *Thurgood Marshall, Retired Justice, Dies*, WASH. POST, Jan. 25, 1993).

13. *Id.* at 61 (quoting the eulogy made by Senator George Mitchell of Maine whose concluding remarks included the words of Justice Sandra Day O'Connor).

14. *Id.* at 130 (quoting the eulogy given by Lucien Blackwell of Pennsylvania).

15. *Id.* at 148 (quoting Joan Biskupic, *Thurgood Marshall, Retired Justice, Dies*, WASH. POST, Jan. 25, 1993).

16. *Id.*

Marshall was a latebloomer. He was a “cutup” at Douglas High School. When the students misbehaved, they were banished to the basement until they memorized a paragraph of the Constitution. By the time he graduated, Marshall could recite it all, forward and backward.¹⁷

Marshall went on to Lincoln University in Pennsylvania, bent on becoming a dentist. A failing grade in biology put an end to that dream. He continued his “hell raising” and was suspended because of fraternity pranks.¹⁸

Lincoln, a college for black males, was founded by a Presbyterian minister and staffed by an all-white faculty with Princeton credentials.¹⁹ Marshall, along with two-thirds of his schoolmates, voted to keep it that way. His mother had taught him to go along to get along in a segregated society. Classmates Cab Calloway and Langston Hughes kept up the drum beat for integration. They argued with Marshall that his support of an all-white faculty evidenced a belief in his own inferiority. The debate precipitated a radical shift in Marshall’s thinking. When the issue came up a second time, Marshall voted for integration. He took an interest in his studies, earned a place on the debate team, and graduated with honors.²⁰

Then it was off to law school at Howard University in the nation’s capital since the University of Maryland in Baltimore did not admit blacks. He commuted each school day to save living expenses.²¹ At Howard he came under the sway of Dean Charles H. Houston who epitomized how a dedicated teacher can make a difference, even change a life. Houston drummed into a generation of students a mission of justice and racial equality. He taught that law should be an instrument of liberation. He told the students they must acquire legal knowledge and skills and put them to use as social engineers. The secret, Houston said, was hard work.²²

Marshall took this to heart. He studied hard and graduated at the top of his class. He caught the eye of Dean Houston, who decided

17. *Id.* at 143 (quoting Linda Greenhouse, *Ex-Justice Thurgood Marshall Dies at 84*, N.Y. TIMES, January 25, 1993). “Instead of making us copy out stuff on the blackboard after school when we misbehaved, our teacher sent us down into the basement to learn parts of the Constitution. I made my way through every paragraph.” *Id.* “In three years I knew the whole thing by heart.” *Id.* at 148 (quoting Joan Biskupic, *Thurgood Marshall, Retired Justice, Dies*, WASH. POST, January 15, 1993).

18. *Id.* at 174 (quoting Juan Williams, *Marshall’s Law*, WASH. POST, January 7, 1990).

19. *Id.* at 210 (quoting FRANK MAGILL, GREAT LIVES FROM HISTORY: THURGOOD MARSHALL).

20. *Id.* at 175 (quoting Juan Williams, *Marshall’s Law*, WASH. POST, January 7, 1990).

21. *Id.* at 21 (quoting Linda Greenhouse, *Ex-Justice Thurgood Marshall Dies at 84*, N.Y. TIMES, Jan. 25, 1990). He could not afford housing at the school and his mother pawned her wedding and engagement rings to pay the tuition. *Id.*

22. *Id.*

practical experience might round out Marshall's academic education. Houston took his star pupil on a trip through the segregated south. Barred from most motels and restaurants because of their race, they stayed overnight with local black lawyers and ate from bags of fruit they carried along the way. Returning home to Washington, Houston asked Marshall to assist in the trial of George Crawford, a black man charged with murdering a white man in Loudoun County, Virginia. Crawford was convicted but given a life sentence. "We won," said Marshall. "Anytime a Negro charged with killing a white man in Loudoun County, Virginia, gets off with life imprisonment, it's a victory. Normally, they were hanging them in those days."²³

With this practical apprenticeship behind him, Marshall went home to Baltimore and opened an office. His mother sacrificed her living room rug to make the office presentable.²⁴ One of his earlier victories was on behalf of Donald Murray who was denied admission to the University of Maryland Law School because of his race. The University offered Murray a scholarship to attend an out-of-state school and argued that this was sufficient under *Plessy's* "separate but equal" doctrine. Marshall argued first that the option to leave the state for a legal education was not "equal" to a legal education at home. At a higher level, he stressed that "what is at stake here is more than the rights of my client; it is the moral commitment stated in our country's creed."²⁵

Marshall spent the next three years representing the powerless and the poor blacks of Baltimore and was soon one thousand dollars in debt.²⁶ His repeated contacts with black defendants charged with capital crimes convinced him that the death penalty was immoral in principle and discriminatory in application. For the local NAACP, he negotiated with white store owners to hire blacks, and he worked with John L. Lewis to unionize black and white steelworkers in Baltimore.²⁷

Dean Houston, who had left Howard Law School to head the NAACP legal department, kept track of his star pupil and in 1936 invited Marshall to join him as special assistant at an annual salary of \$2,600.²⁸ Two years later Houston turned the legal reins of the organization over to Marshall. For the next twenty years, Marshall lived out

23. *Id.* at 176 (quoting Juan Williams, *Marshall's Law*, WASH. POST, Jan. 7, 1990).

24. *Id.*

25. *Pearson v. Murray*, 182 A. 540 (Md. 1936).

26. MEMORIAL ADDRESSES, *supra* note 1, 144 (quoting Linda Greenhouse, *Ex-Justice Thurgood Marshall Dies at 84*, N.Y. TIMES, Jan. 25, 1993).

27. *Id.* at 172 (quoting Juan Williams, *Marshall's Law*, WASH. POST, Jan. 7, 1990).

28. *Id.* at 144 (quoting Linda Greenhouse, *Ex-Justice Thurgood Marshall Dies at 84*, N.Y. TIMES, Jan. 25, 1993).

of a suitcase, traveling the dusty southern roads from courthouse to courthouse, knocking holes in the walls of segregation.²⁹

This was not easy, nor was Marshall free from physical danger. Once Marshall defended two black men accused of shooting a policeman. The incident in question started with a disagreement about a radio. After a physical altercation with a white storekeeper over the cost of repairing that radio, a black youth fled to the black section of town. A mob gathered and gave chase. Shots were fired into homes, shots were fired back. A policeman was hit. One defendant was acquitted, the other was convicted.

After the trial, Marshall wanted to unwind over a drink and sought out the local bootlegger who told him he had sold his last two bottles to the judge. Leaving town, Marshall was stopped by the police, who were irate that one of the defendants was acquitted. Marshall was arrested on a trumped-up charge of, ironically, drunk driving. Marshall was taken to the judge, who cleared him. Marshall hurried on to Nashville, the next city where trial was scheduled, seriously in need of a drink.³⁰

On another occasion, Marshall was in Dallas to challenge the exclusion of blacks from jury duty. Marshall learned that the Dallas Police Chief had given orders to leave him alone, for the Chief personally wanted the pleasure of assaulting Marshall. Marshall called the governor who assigned a State trooper to stand guard. This was fortunate because, leaving the courthouse, Marshall came face to face with the Chief. The Chief went for his gun, the State trooper intervened, and Marshall scurried around the corner to safety.³¹

The risks and discomforts paid off in a string of Supreme Court victories: decisions holding that it was illegal to exclude blacks (or any other racial group) from jury service,³² that it was illegal to force black passengers to ride in the back of an interstate bus³³ or to sit in segregated bus station facilities,³⁴ and that it was illegal to exclude blacks from participation in the Texas primary elections.³⁵

In 1948, Marshall persuaded the Supreme Court to outlaw judicial enforcement of "restrictive covenants," private agreements whereby owners of property bind themselves not to sell or lease to a person of

29. *Id.* at 137 (quoting Martin Weil & Stephanie Griffith, *Marshall Transformed Nation in the Courts*, WASH. POST, Jan. 15, 1993). "It was hard even for a black man to find a place to sleep or buy a meal." *Id.*

30. *Id.* at 139 (quoting Linda Greenhouse, *Ex-Justice Thurgood Marshall Dies at 84*, N.Y. TIMES, Jan. 25, 1993).

31. *Id.* at 178 (quoting Juan Williams, *Marshall's Law*, WASHINGTON POST, Jan. 7, 1990).

32. *Patton v. Mississippi*, 332 U.S. 463 (1947).

33. *Morgan v. Virginia*, 328 U.S. 373 (1946).

34. *Boynton v. Virginia*, 364 U.S. 454 (1960).

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

a designated race or color.³⁶ These covenants were used widely against blacks, Jews, American Indians, and almost any and all minorities. It was estimated that eighty percent of the property of Chicago was restricted this way.

Marshall's greatest triumph was in ending the "separate but equal" doctrine in public education. The assault began in graduate education.³⁷ With these victories in place, Marshall aimed his guns at compulsory segregation in public schools where the facilities for "colored" and "white" schools were supposedly equal. He argued in this brief that:

These infant appellants are asserting the most important claims that can be put forward by children. The claim to their full measure of the chance to learn and to grow and the inseparably connected, but even more important claim to be treated as entire citizens of the society into which they have been born.³⁸

A unanimous Court, in an opinion by Chief Justice Warren, agreed that in the field of public education "the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."³⁹ Chief Justice Warren recognized that the case before the Court raised the most significant issue of law in that generation and went to the very soul of the nation. He wrote: "To separate black children from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."⁴⁰

The suit Marshall filed against segregated education was a suit filed as well against a complete social fabric.⁴¹ It raised issues of justice, fairness and access to a broad range of human experience. "White only" signs came down not only in public schools, but in publicly owned facilities across the nation, including courtrooms, golf courses and even state-owned liquor stores.

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

37. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (Missouri could not send qualified black applicants to out-of-state law schools); *Sipuel v. Board of Regents of Oklahoma*, 332 U.S. 631 (1948) (Oklahoma could not deny blacks admission to the state law school if it was available to whites); *Sweatt v. Painter*, 339 U.S. 629 (1950) (Texas could not relegate black students to a "black" law school qualitatively inferior to the "white" law school); *McLaurin v. Oklahoma State Regents*, 339 U.S. 63 (1950) (Oklahoma could not relegate a graduate student, once admitted, to the "colored" sections of classrooms, libraries and cafeterias).

38. MEMORIAL ADDRESSES, *supra* note 1, 83 (quoted by Senator John Glenn of Ohio).

39. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954).

40. *Id.* at 494.

41. MEMORIAL ADDRESSES, *supra* note 1, 205 (quoting an address given by Thurgood Marshall at the Law Day Luncheon, University of Miami, Apr. 27, 1966). "What crumbled was not merely a network of legal rules; it was a whole social system bent on keeping the Negroes in a position of inferiority, a social system which relied on and was inspired by Jim Crow law." *Id.*

In 1961 President Kennedy appointed Marshall to the United States Court of Appeals for the Second Circuit sitting in New York and Connecticut. Like most things in Marshall's life, this did not come easy. Attorney General Robert Kennedy fought the idea because of the "political cost" of getting Marshall confirmed. Nonetheless, President Kennedy sent Marshall's name to the Senate Judiciary Committee for its "advice and consent." James Eastland of Mississippi chaired the committee and refused to schedule hearings on the nomination for eight months. Finally, a deal was struck. Eastland instructed the Attorney General to tell the President that Eastland would "give him the nigger" if Kennedy would nominate Harold Cox, a Mississippi segregationist, to a district court seat. Kennedy nominated Cox, and Marshall was confirmed by the Senate.⁴²

On the Court of Appeals Marshall had the opportunity to relearn the law of commerce, business, taxation, and labor relations. He continued to protect the rights of criminal defendants, holding, for example, that waivers of the right to counsel must be deliberate and intentional,⁴³ that the Fifth Amendment double jeopardy prohibition is applicable to the states,⁴⁴ and that the *Mapp v. Ohio* decision excluding the use of illegally obtained evidence should be applied retroactively.⁴⁵

In 1965 President Johnson appointed Marshall to serve as the first African-American Solicitor General representing interests and concerns of the United States before the Supreme Court in cases of all kinds. Once again he had the opportunity to litigate the cause of civil rights. He convinced the Supreme Court that the murder of the three civil rights workers in Mississippi was a federal case,⁴⁶ that suspects taken into police custody must be informed of their rights to an attorney,⁴⁷ and that the Virginia poll tax unlawfully discriminated against the poor.⁴⁸

In 1967 President Johnson nominated Marshall to be the first African-American to serve on the Supreme Court. Marshall was eminently qualified. He had litigated innumerable cases in both state and federal courts, at trial and appellate levels. He had served as a judge on the United States Court of Appeals. He had represented the gov-

42. MEMORIAL ADDRESSES, *supra* note 1, 181 (quoting Juan Williams, *Marshall's Law*, WASH. POST, Jan. 7, 1990).

43. *United States v. Lavelle*, 306 F.2d 216 (2d Cir. 1962).

44. *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844 (2d Cir. 1965).

45. *United States ex rel. Angelet v. Fay*, 333 F.2d 12 (2d Cir. 1964) (Marshall, J., dissenting).

46. *United States v. Price*, 383 U.S. 787 (1966).

47. *Miranda v. Arizona*, 384 U.S. 436 (1966).

48. *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

ernment as the Solicitor General. He had argued and won twenty-nine cases in the Supreme Court.⁴⁹ But still he ran into problems.

Four Senators on the Judiciary Committee fought his nomination: Strom Thurmond of South Carolina, James Eastland of Mississippi, John McClellan of Arkansas, and Sam Ervin of North Carolina. When Marshall finally was confirmed by a vote of sixty-nine to eleven, President Johnson called to congratulate him and added, "I never went through so much hell."⁵⁰

During his twenty-four years on the bench, Marshall kept up the good fight for liberty and justice, even when, with newer appointments, the odds progressively got worse and the victories fewer. His opinions grace the law school texts and are well worth mentioning here. As Marshall put it, "Law can change things for the better and even changes the heart of men, but law has an educational function also."⁵¹

Marshall spent the better part of his NAACP years fighting against the segregated school systems in the south. He continued this fight for integrated education as a Supreme Court Justice. When the majority held that a federal court lacked authority to order the busing of black school children in Detroit into the neighboring white suburban areas, Marshall dissented with the dire prediction that "unless our children begin to learn together, there is little hope that our people will ever learn to live together."⁵²

In *San Antonio v. Rodriguez*,⁵³ the majority held that it was permissible for Texas to use local property taxes to finance public education, even though children in poor school districts had far fewer educational dollars than children in neighboring wealthy districts. Marshall dissented: "The rights of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination."⁵⁴

The Court in the famous *Bakke* case held that the medical school at the University of California at Davis denied equal protection of the

49. By the time that President Johnson appointed him, Marshall had argued thirty-two cases before the Supreme Court and had won twenty-nine of them, fourteen as a private lawyer for the NAACP, eighteen of them as the Solicitor General. MEMORIAL ADDRESSES, *supra* note 1, 142 (quoting Linda Greenhouse, *Ex-Justice Thurgood Marshall Dies at 84*, N.Y. TIMES, Jan. 25, 1993).

50. MEMORIAL ADDRESSES, *supra* note 1, 162 (quoting Linda Greenhouse, *Ex-Justice Thurgood Marshall Dies at 84*, N.Y. TIMES, Jan. 25, 1993). Johnson later said that placing Marshall on the Supreme Court was "the right thing to do, the right time to do it, the right man and the right place." *Id.*

51. *Id.*

52. *Milliken v. Bradley*, 418 U.S. 717, 783 (1974).

53. 411 U.S. 1 (1973).

54. *Id.* at 71 (Marshall, J., dissenting).

white applicants when it set aside places for qualified minority applicants who scored lower on the standardized tests than did the white applicants who were rejected. Marshall wrote an impassioned dissent:

It 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. In declining to so hold, today'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 American to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so 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 inferior by 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 made it into the melting pot.⁵⁵

Marshall favored the so-called "set aside" programs to ensure that minorities, long shunted aside, could get a piece of the economic action. He wrote a special concurring opinion when the Court affirmed the authority of Congress to "set aside" a portion of the government construction business to minorities because:

By upholding this race-conscious remedy, the Court accords Congress the authority necessary to undertake the task of moving our society toward a state of meaningful equality of opportunity, not an abstract version of equality in which the effects of past discrimination would be forever frozen into our social fabric. I applaud this result.⁵⁶

Marshall championed the rights of all of society's rejects, including the poor. In *United States v. Kras*,⁵⁷ the Court held that it was permissible to charge a fee of fifty dollars to file bankruptcy. Kras was too poor to go bankrupt, but the majority reasoned that the fee could be paid over time in amounts "less than the price of a movie, and a little more than the cost of a pack or two of cigarettes."⁵⁸ Marshall, in his dissent, reminded the majority that "over 800,000 families in the Nation had annual incomes of less than \$1000 or \$19.23 a week" and that the desperately poor almost never go to see a movie. "They have more important things to do with the little money they have — like attempting to provide comfort to a gravely ill child, as Kras must." He

55. *University of California Regents v. Bakke*, 438 U.S. 265, 400-01 (1977) (Marshall, J., dissenting).

56. *Fullilove v. Klutznick*, 448 U.S. 448, 522 (1980).

57. 409 U.S. 434 (1973).

58. *Id.* at 449.

scolded the majority that "it is disgraceful for an interpretation of the Constitution to be premised on unfounded assumptions about how people live."⁵⁹

Marshall defended the right of a poor person to marry, even though he was behind in child support payments. In *Zablocki v. Redhail*,⁶⁰ he wrote for the Court that Wisconsin could not deny a marriage license to an applicant because he had not met his support obligations. "The State," he said, "already has numerous other means for exacting compliance with support obligations, means that are at least as effective as the instant statute and yet do not impinge upon the right to marry."⁶¹

Marshall defended the rights of the mentally retarded. In *City of Cleburne v. Cleburne Living Center*,⁶² the Court reversed the city's denial of a special use permit for a group home for the mentally retarded. It applied a "rational relation" standard, insisting that the mentally retarded did not constitute a class needing special protection of the law. Marshall agreed with the end result of the case but vehemently disagreed with the reasoning. He wrote that a "heightened scrutiny" of laws implicating the mentally retarded is necessary because:

The mentally retarded have been subject to a lengthy and tragic history of segregation and discrimination that can only be called grotesque. . . . A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed, paralleled the worst excesses of Jim Crow. . . .⁶³ For the retarded, just as for Negroes and women, much has changed in recent years, but much remains the same: outdated statutes are still on the books, and irrational fears or ignorance, traceable to the prolonged social and cultural isolation of the retarded, continue to stymie recognition of the dignity and individuality of retarded people.⁶⁴

Marshall was quick to protect the rights of women with unwanted pregnancies. In *Beal v. Doe*,⁶⁵ he disagreed with the majority's holding that the federal Medicaid program permitted states to refuse to fund non-therapeutic abortions. In a separate dissent,⁶⁶ Marshall wrote that "nonwhite women obtain abortions at nearly twice the rate of white women" and are statistically more dependent on Medicaid for this health care.⁶⁷ He wrote that "at some point a showing that

59. *Id.* at 459 (Marshall, J., dissenting).

60. 434 U.S. 374 (1978).

61. *Id.* at 389.

62. 473 U.S. 432 (1985).

63. *Id.* at 461.

64. *Id.* at 467.

65. 432 U.S. 438 (1977).

66. *Id.* at 454 (Marshall, J., dissenting).

67. *Id.* at 459-60 (Marshall, J., dissenting).

state action has a devastating impact on the lives of minority racial groups must be relevant.”⁶⁸

In *Harris v. McRae*,⁶⁹ the majority of the Court upheld the Hyde Amendment, denying public funding for abortions even when medically necessary. Marshall dissented because the decision “represents a cruel blow to the most powerless members of our society.”⁷⁰ He added:

If abortion is medically necessary and a funded abortion is unavailable, they must resort to back-alley butchers, attempt to induce an abortion themselves by crude and dangerous methods, or suffer the serious medical consequences of attempting to carry the fetus to term. . . . The predictable result of the Hyde Amendment will be a significant increase in the number of poor women who will die or suffer significant health damage because of an inability of procuring necessary medical service.⁷¹

Finally, in *H.L. v. Matheson*,⁷² he disagreed with the majority’s holding that Utah could require doctors to notify the parents of a minor prior to performing an abortion. He reminded his colleagues that not every family conforms to their ideal images, and “parental consultation hardly seems a legitimate state purpose where . . . a hostile or abusive parental response is assured, or where the minor’s fears of such a response deter her from the abortion she desires.”⁷³

Marshall felt strongly the need to protect the common citizen against abuse by those in authority. In a case strikingly reminiscent of *A Man for All Seasons*,⁷⁴ an undercover police officer obtained a job as a handyman and chauffeur with a man named Baldwin. For the next six months, he lived in Baldwin’s house, seeking evidence of cocaine use. The Court’s view was that one takes a knowing risk when one invites someone into his home. Based on this reasoning, the Court refused to examine the federal court of appeal’s determination that there was no Fourth Amendment protection against this type of secret police intrusion.⁷⁵ Marshall dissented.⁷⁶ He wrote that the Fourth Amendment protection should not depend on this legal fiction. “When we hire a babysitter, housekeeper, or invite a neighbor into

68. *Id.* at 460 (Marshall, J., dissenting).

69. 448 U.S. 297 (1980).

70. *Id.* at 338 (Marshall, J., dissenting).

71. *Id.*

72. 450 U.S. 398 (1981).

73. *Id.* at 446 (Marshall, J., dissenting).

74. *A Man for All Seasons* is a modern play written by Robert Bolt about the life of Sir Thomas More (1478-1535). The title phrase comes from a passage written about More by Robert Whittinton, an English writer who was a contemporary of More: “And as time requireth, a man of marvelous mirth and pastimes, and sometimes of as sad a gravity; a man for all seasons.”

75. *United States v. Baldwin*, 621 F.2d 251 (6th Cir. 1980).

76. *Baldwin v. United States*, 450 U.S. 1045 (1981).

our homes, we should not be required to anticipate, constitutionally, that this person might be a government agent sent on a secret spy mission."⁷⁷

Marshall dissented in another Fourth Amendment case, *Florida v. Bostick*.⁷⁸ The police made a sweep of a bus going north from Miami. They asked for permission to search all of the luggage and found drugs in Bostick's bags. The Court found no violation of the Fourth Amendment, no "unreasonable search and seizure" because of Bostick's consent to the search. Marshall opposed these "dragnet-style sweeps" and wrote: "It is exactly because this 'choice' is no 'choice' at all that the police engage in this technique."⁷⁹

Long remembered will be Marshall's holding in *Stanley v. Georgia*⁸⁰ indicating his concern for the First Amendment's freedom of speech, and the Fourth Amendment's privacy of the home. Police officers searched Stanley's home for bookmaking evidence. They didn't find any, but they did come across some obscene films. Stanley was convicted of possessing obscene materials and appealed. Marshall wrote the opinion reversing the conviction. He wrote that private possession of obscene material by an adult may not be made criminal, for "[i]f the First Amendment means anything, 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."⁸¹

There is no better proof of Marshall's belief in the Bill of Rights than his dissent in *United States v. Salerno*,⁸² where the majority upheld a "pre-trial detention" law. The federal statute, in Marshall's words, "declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes at any time in the future."⁸³ He argued that the statute violated both the Eighth Amendment right to bail and the presumption of innocence embedded in the Fifth Amendment Due Process Clause.⁸⁴ Such statutes, he concluded, "are consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state."⁸⁵

77. *Id.* at

78. 501 U.S. 429 (1991).

79. *Id.* at 450.

80. 397 U.S. 557 (1969).

81. *Id.* at 565.

82. 481 U.S. 739 (1987).

83. *Id.* at 755 (Marshall, J., dissenting).

84. *Id.* at 762 (Marshall, J., dissenting).

85. *Id.* at 755 (Marshall, J., dissenting).

Marshall long lamented the failure of the Court to insist that those charged with capital offenses be assured “competent” assistance of counsel. Typically, he dissented in *Strickland v. Washington*⁸⁶ with these words:

The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree. Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer.⁸⁷

He thought that not only able counsel but other experts, as well, should be made available to indigents on trial. In *Ake v. Oklahoma*,⁸⁸ Marshall wrote for the majority that an indigent defendant who made a preliminary showing that his sanity at the time of the offense was likely to be an issue at trial was entitled to have the assistance of a psychiatrist in presenting his case.⁸⁹

When North Carolina argued that it would be too costly to provide prisoners with access to the courts (with law libraries and lawyers), Marshall responded: “The cost of protecting a constitutional right cannot justify its total denial.”⁹⁰

Marshall might well be best remembered for his staunch opposition to the death penalty in whatever form and for whatever reason. In *Furman v. Georgia*,⁹¹ he wrote a sixty page concurring opinion which included the following passage:

In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve a major milestone in the long road up from barbarism.⁹²

Four years later the Supreme Court reached a different conclusion, this time upholding the death penalty.⁹³ Marshall wrote a poignant dissent, noting that he had earlier concluded that the death penalty is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments:

That continues to be my view. . . . I have no intention of retracing the long and tedious journey that led to my conclusion in *Furman*.⁹⁴ The

86. 466 U.S. 668 (1984).

87. *Id.* at 711 (Marshall, J., dissenting).

88. 470 U.S. 68 (1985).

89. *Id.* at 69.

90. *Bounds v. Smith*, 430 U.S. 817, 825 (1977).

91. 408 U.S. 238 (1972).

92. *Id.* at 370-71 (Marshall, J., concurring).

93. *Gregg v. Georgia*, 428 U.S. 153 (1976).

94. *Id.* at 231 (Marshall, J., dissenting).

mere fact that the community demands the murderer's life in return for evil he has done cannot sustain the death penalty. . . .⁹⁵ To be sustained under the Eighth Amendment, the death penalty must "comport with the basic concept of human dignity at the core of the Amendment". . . . Under these standards, the taking of life "because the wrongdoer deserves it" surely must fall, for such a punishment has at its very basis the total denial of the wrongdoer's dignity and worth.⁹⁶

These cases indicate that the life of a Supreme Court Justice is not an easy one. But the twinkle never left Marshall's eye. Wherever he went, he had a story for almost every occasion, often at his own expense. At one Supreme Court conference he told colleagues a story about a little boy who asked for his autograph and gave him eight cards to sign. "Why eight?" Marshall asked. "'Cause," the boy replied, "eight of yours gets me one of Willie Mays."⁹⁷

Presidents are anxious to fill the Supreme Court vacancies with persons they admire and, as a result, keep a close eye on the health of the sitting Justices. In 1970, Marshall was in the Bethesda Naval Hospital with pneumonia. A doctor told him that President Nixon had asked for his medical reports. Marshall told the doctor he could send the medical records to Nixon, but only with two words written on the outside of the folder: "Not Yet."⁹⁸

There were many erroneous reports of Marshall's death. On one such occasion, Chief Justice Warren Burger called, urging Mrs. Marshall to stay calm. "I am calm," she replied, "because he's sitting right here having his dinner."⁹⁹ To the repeated questions about his intent to retire, the stock answer was: "I have a lifetime appointment and I intend to serve it. I expect to die at 110, shot by a jealous husband."¹⁰⁰ When he did retire at age 83 and was asked what was wrong, he replied: "I'm old."¹⁰¹

His humor was sometimes biting. When it was suggested that the Court participate in the Bicentennial of the Constitution with a ceremonial return to Philadelphia, Marshall said somebody had better get him short pants and a tray so he could serve the coffee, because that is surely what he would have been doing in 1787.¹⁰²

95. *Id.* at 228 (Marshall, J., dissenting).

96. *Id.* at 240 (Marshall, J., dissenting).

97. MEMORIAL ADDRESSES, *supra* note 1, 162 (quoting Stuart Taylor, Jr., *Glimpses of Thurgood Marshall*, THE AM. LAW., March, 1993).

98. *Id.* at 184 (quoting Juan Williams, *Marshall's Law*, WASH. POST, Jan. 7, 1990).

99. *Id.* at 185.

100. *Id.*

101. *Id.* at 61 (quoting the eulogy given by Senator George Mitchell of Maine).

102. *Id.*

Marshall was repelled by the lavish praise heaped on the original Constitution by President Reagan, Chief Justice Burger, and many others. Almost alone, Marshall denounced its perpetuation of slavery and the disenfranchisement of women. He told a bar association that the government of the framers "was defective from the start, requiring several amendments, a civil war and momentous social transformation to attain respect for the individual freedoms and human rights that we hold as fundamental today."¹⁰³

The effects of the framers' compromise on slavery, he continued, "have remained for generations. They arose from the contradiction between guaranteeing liberty and justice for all, and denying both to Negroes." He concluded that:

In this bicentennial year we may not all participate in the festivities with flag-waving fervor. Some may more quietly commemorate the suffering, struggle and sacrifice that has triumphed over much of what was wrong with the original document, and observe the anniversary with hopes not realized and promises not fulfilled.¹⁰⁴

At his funeral, Reverend Nathan Baxter had this to say:

Justice Marshall lived a full and faithful life. He fought the good fight. He finished his course Just after his eighty-fourth birthday he had these words to say, which we must all, I believe, hold close to our hearts. He said this: "The battle for racial and economic justice is not yet won. Indeed it has barely, barely begun. The legal system can force open doors and sometimes knock down the walls, but it cannot build bridges. That job," he said, "belongs to me, and to you, to all of us. That job belongs to me and you." But then he said this: "Take a chance, take a chance, won't you, and knock down the fences that divide, tear apart the wall that imprisons, reach, for freedom lies just on the other side." Bless you, my Justice. May light perpetual shine upon you.¹⁰⁵

103. Stuart Taylor, Jr., *Marshall Sounds Critical Note on Bicentennial*, N.Y. TIMES, May 7, 1987, at A1.

104. *Id.* at B18.

105. MEMORIAL ADDRESSES, *supra* note 1, 100.