

Sandra Day O'Connor
Thurgood Marshall: The Influence of a Raconteur³⁶

I was fresh out of Stanford Law School, working as a civilian attorney in the Quartermaster Market Center, the day Thurgood Marshall changed the nation. He had been chipping away at the building blocks of a separatist society long before 1954, of course, but it was through *Brown v. Board of Education* that he compelled us, as a nation, to come to grips with some of the contradictions within ourselves.

Like most of my counterparts who grew up in the Southwest in the 1930s and 1940s, I had not been personally exposed to racial tensions before *Brown*; Arizona did not have a large African American population then, and unlike southern States, it never adopted a *de jure* system of segregation. Although I had spent a year as an eighth grader in a predominately Latino public school in New Mexico, I had no personal sense, as the plaintiff children of Topeka School District did, of being a minority in a society that cared primarily for the majority.

But as I listened that day to Justice Marshall talk eloquently to the media about the social stigmas and lost opportunities suffered by African American children in state-imposed segregated school, my awareness of race-based disparities deepened. I did not, could not, know it then, but the man who would, as a lawyer and jurist, captivate the nation would also, as colleague and friend, profoundly influence me.

Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. 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 ear of a counselor who understood the vulnerabilities of the accused and established

³⁶ 44 STAN. L. REV. 1217, 1217-20 (1992). Justice O'Connor's piece appears in a special issue of the *Stanford Law Review* that includes several interesting and moving tributes to Justice Marshall.

safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice.

At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.

Although I was continually inspired by his historic achievements, I have perhaps been most personally affected by Justice Marshall as raconteur. It was rare during our conference deliberations that he would not share an anecdote, a joke or a story; yet, in my ten years on the bench with him, I cannot recall ever hearing the same "TM" story twice. In my early months as the junior Justice, I looked forward to these tales as welcome diversions from the heavy, often troublesome, task of deciding the complex legal issues before us. But over time, as I heard more clearly what Justice Marshall was saying, I realized that behind most of the anecdotes was a relevant legal point.

I was particularly moved by a story Justice Marshall told during the time the Court was considering a case in which an African American defendant challenged his death sentence as racially biased. Something in the conversation caused his eyebrows to rise characteristically, and with a pregnant pause, to say: "That reminds me of a story." And so it began, this depiction of justice in operation. "You know," he said:

I had an innocent man once. He was accused of raping a white woman. The government told me if he would plead guilty, he'd only get life. I said I couldn't make that decision; I'd have to ask my client. So I told him that if he pleaded guilty, he wouldn't get the death sentence.

He said, "Plead guilty to what?"

I said, "Plead guilty to rape."

He said, "Raping that woman? You gotta be kidding. I won't do it."

That's when I knew I had an innocent man.

When the judge sent the jurors out, he told them that they had three choices: Not guilty, guilty, or guilty with mercy. "You understand those are the three different possible choices," he instructed. But after the jury left, the judge told the people in the courtroom that they were not to move before the bailiff took the defendant away. I said, "What happened to 'not guilty?'" The judge looked at me, and said, "Are you kidding?" Just like that. And he was the "judge."

As he neared the end of his tale, Justice Marshall leaned forward, pointed his finger at no one in particular, and said with his characteristic signal of finalé, "E-e-e-end of the Story. The guy was found guilty and sentenced to death. But he never raped that woman." He paused, flicking his hand. "Oh well," he added, "he was just a Negro."

With the aid of this low-key narrative, Justice Marshall made his own legal position quite clear: in his view the death penalty was not only cruel and unusual punishment in violation of the Eighth Amendment, it had never been, and could never be, administered fairly and free of racial bias. Although I disagreed with Justice Marshall about the constitutional validity of the death penalty, his story made clear what legal briefs often obscure: the impact of legal rules on human lives. Through his story, Justice Marshall reminded us, once again, that the law is not an abstract concept removed from the society it serves, and that judges, as safeguarders of the Constitution, must constantly strive to narrow the gap between the ideal of equal justice and the reality of social inequality.

Justice Marshall's stories served for me another function. Beneath his wit and charm and rambunctiousness, he is an intensely private man; there are sides to him no one but his family will ever know. But over the years, as he shared stories of Klan violence and jury bias, of co-opted judges and dishonest politicians, I have gained an insight, a peephole really, into the character of a man who is at once eternally at peace and perpetually at war.

"S-a-a-a n-d-r-a-a-a," he called out once, "did I ever tell you about the welcome I received in Mississippi?" It was early evening in a small town in Mississippi in the early 1940s and he was waiting to hop the next train to Shreveport. "I was starving," he told me, "so I decided to go over to this restaurant and see if one of the cooks would let me in the back to buy a sandwich. You know, that's how we did things then; the front door was so inconvenient!" Before he could go over, Justice Marshall recounted, "a man of your race holding a pistol sidled up. 'Boy,' he said, 'what are you doing around these parts?' I said, 'I'm waiting to catch the next train.' He said, 'Listen up boy because I'm only gonna tell you this once. The last train through here is at 4 p.m. and you better be on it cuz niggers ain't welcome in these parts after dark.'"

"Guess what," Justice Marshall added, a twinkle creeping into his eye, "I was on that train."

What Justice Marshall did not say, what he had no need to say, was how physically threatening and personally humiliating the situation must have been. Left unspoken, too, was the anger and frustration any grown man must have felt at being called "boy" and run out of

town. It is not surprising, really, that these sentiments were relegated to the backdrop; unlike many national figures, Justice Marshall is not interested in publicizing the risks he has taken or the sacrifices he has made. Instinctively, he downplays his own role, as though it were natural to hide under train seats, or earn \$2,400 a year as a lawyer, or write briefs on a manual typewriter balanced, in a moving car, between his knees. To Justice Marshall, these hardships warrant no comment; they are simply the natural extension of a lifetime credo, of "doing the best you can with what you've got."

But to those of us who have traveled a different road, Justice Marshall's experiences are a source of amazement and inspiration, not only because of what they reveal about him but also because of what they instill in, and ask of, us. I have not encountered prejudice on a sustained basis. But I have experienced gender discrimination enough, such as when law firms would only hire me, a "lady lawyer," as a legal secretary, to understand how one could seek to minimize interaction with those who are intolerant of difference. That Justice Marshall never hid from prejudice but thrust himself, instead, into its midst has been both an encouragement and a challenge to me.

I asked him, once, how he managed to avoid becoming despondent from the injustices he saw. Instead of responding directly, he told me about the time he and his mentor, Charles Hamilton Houston, the vice-dean at Howard Law School, traveled to Loudoun County, Virginia, to help a man on trial for his life. The man, George Crawford, had been indicted by an all-white Grand Jury of murdering a white woman from a well-to-do Virginia family, as well as her white maid. Despite their defense challenge to the exclusion of African Americans from the jury, Crawford was convicted of murder by an all-white jury, and sentenced to life. "You know something is wrong with the government's case," Justice Marshall told me, "when a Negro only gets life for murdering a white woman."

After the trial, Justice Marshall said, the media asked if Crawford planned an appeal based on the exclusion of African Americans from the jury. "Crawford said, 'Mr. Houston, if I have another trial, and I got life this time, could they kill me the next time?' Charlie told him yes. So Crawford told Charlie: 'Tell them the defendant rests.'"

"I still have mixed feelings about that case," Justice Marshall added. "I just don't believe that guy got a fair shake. But what are you going to do?" he asked. "There are only two choices in life: stop and go on. You tell me, what would you pick?"

Even now, I still think about Justice Marshall's backhanded response, wondering how one confronts, as he did, the darkest recesses of human nature—bigotry, hatred, and selfishness—and emerge

wholly intact. Although I probably will never completely understand, part of the answer, I think, lies in his capacity for narration itself. His stories reflect a truly expansive personality, the perspective of a man who immerses himself in human suffering and then translates that suffering in a way that others can bear and understand. The past he relates—doused in humor and sadness, tragedy and triumph—is but a mirror of himself: a man who sees the world exactly as it is and pushes on to make it what it can become. No one could help but be moved by Justice Thurgood Marshall's spirit; no one could avoid being touched by his soul.

As I continue on the bench, a few seats down from where he once sat, I think often of Justice Marshall. I remember the morning we first met and the afternoon he left the bench. I remember the historic law suits he brought and the thoughtful opinions and dissents he wrote. I recall his unwavering commitment to the poor, the accused, and the downtrodden, and his constant, impassioned repudiation of the death penalty. More than that, though, I think of the raconteur himself. Occasionally, at Conference meetings, I still catch myself looking expectantly for his raised brow and his twinkling eye, hoping to hear, just once more, another story that would, by and by, perhaps change the way I see the world.

