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A TRIBUTE TO THURGOOD MARSHALL

PETER N. SIMON*

One hundred African Americans were lynched in 1908, the year Thurgood Marshall was born.¹ African Americans were lynched with impunity, for even slight signs of resistance to white supremacy. Five African Americans were lynched in Gainesville, Florida, after an argument with a white man over a pig; an African American boy was lynched in Bryson, Georgia, for allegedly stealing seventy-five cents from two white boys; African Americans were lynched for “offensive language” and for “insulting a white woman.”²

The message of the violence was not lost on young Marshall. When asked why he never tried to attend a white movie theater when he was growing up, he replied:

[Y]ou just didn't do it. . . . [Y]ou were told in some way every day of your life that you couldn't do it. Say we were cowed, brainwashed, but it never left your mind that you could get your ass killed just trying to go see a goddamned Tarzan movie.³

But throughout his career, Marshall confronted segregation and racism in ways much more dangerous than simply “trying to go see a goddamned Tarzan movie.” This foreword is a tribute, an awed tribute, to Marshall's quiet, day-to-day courage over twenty two years of civil rights litigation, in the face of the constant threat of violence.

As a child, Marshall would have seemed an unlikely candidate for greatness, though the traces of his spirit and his humor were certainly present. Marshall was not a model child:

“We lived on a respectable street,” [Marshall said]. “But behind us there were back alleys where the roughnecks and the tough kids hung out. When it was time for dinner, my mother used

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1. CARL T. ROWAN, *DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL* 28 (1993).

2. *Id.* at 28-32.

3. *Id.* at 66. Marshall did lead a group of African Americans to sit in the whites only portion of a movie theater while he was in college, but this was in Oxford, Pennsylvania, not the South. DEBRA HESS, *THURGOOD MARSHALL: THE FIGHT FOR EQUAL JUSTICE* 26-27 (1990).

to go to the front door and call my oldest brother. Then she'd go to the *back* door and call me.⁴

Marshall, it seemed, was always in trouble in school. He escaped punishment in elementary school because his mother was a teacher in the same school, but his high school principal clamped down on him with an unusually beneficial form of punishment: the principal sent him to a small basement room, with instructions not to emerge until he had memorized a portion of the Constitution.⁵ This was a frequent, almost daily, occurrence, and by the time Marshall left the school, he had virtually memorized the Constitution. In college, Marshall was frequently in trouble and was actually expelled (for hazing freshmen) during his sophomore year.⁶ More serious after readmission, he ultimately graduated with honors.

Marshall had originally planned on becoming a dentist, but he flunked a biology course after getting himself crosswise with the professor. He had always enjoyed debating, so he decided to become a lawyer instead. He applied to the University of Maryland, but was rejected because of his race—a slight which Marshall eventually avenged.

After graduating from Howard Law School, where he was first in his class each year, Marshall opened a private practice in Baltimore. In one of his first cases, Marshall obtained an order requiring the University of Maryland to admit an African American law student. This was the first case in which an educational institution was ordered to admit a student under the Fourteenth Amendment. For Marshall victory was all the sweeter, coming as it did against the very school which had rejected him a few years earlier.

Marshall joined the NAACP legal staff in 1936, and was its legal director from 1938 to 1957. His work for the NAACP constitutes what must be the single most remarkable body of legal work accomplished in this century. His workload was prodigious; it was only slight exaggeration when he said, "Isn't it nice that no one cares which 23 hours of the day I work."⁷ He travelled 50,000 miles a year, engaging in litigation throughout the South. He was the architect and the advocate for landmark cases estab-

4. HESS, *supra* note 3, at 16.

5. ROWAN, *supra* note 1, at 35.

6. HESS, *supra* note 3, at 24.

7. *Id.* at 45.

lishing equal voting rights,⁸ striking racially restrictive covenants,⁹ opening public accommodations,¹⁰ and integrating education at all levels.¹¹ In addition, he represented a large number of African American criminal defendants against racially motivated prosecution, at both the trial and appellate level. He was an accomplished trial attorney, as well as the most successful Supreme Court litigator of the modern era—during his years at the NAACP, he argued thirty two cases before the United States Supreme Court, and won twenty-seven of them.¹²

It is hard for us to imagine the breadth of his involvement. Marshall and his slowly expanding staff were the only significant source of representation in the African American legal struggle for racial justice. In a country of three million square miles, with an African American population of more than twenty million, there was only one “Mr. Civil Rights.”

[An elderly cab driver] explained to me that I was too young to remember what it was like in the old days. He told me that for his generation, rooting for Thurgood Marshall was like rooting for Joe Louis—the heavyweight out to battle and demolish one white hope after another. Marshall was the man to call whenever the racists struck. Marshall, the lawyer, using the white man’s weapons to fight back the white man’s system. Marshall, the symbol. Marshall, the hero.¹³

Marshall was devoted, tireless, and enormously skillful. But even more than that, he was selfless and courageous—courageous in a way that is hard to imagine today.

Marshall was an obvious target. His appearance was striking and distinctive—and well known to hostile southern segregationists.

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

9. See *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Barrows v. Jackson*, 346 U.S. 249 (1953).

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

11. See *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Educ. (I)*, 347 U.S. 483 (1954); *Brown v. Board of Educ. (II)*, 349 U.S. 294 (1955).

12. RANDALL W. BLAND, *PRIVATE PRESSURE ON PUBLIC LAW: THE LEGAL CAREER OF JUSTICE THURGOOD MARSHALL* 24 (1973). Cf. Mark Tushnet, *Lawyer Thurgood Marshall*, 44 *STAN. L.R.* 1277 (1992) (29 victories); Erwin Chemerinsky, *Mr. Civil Rights*, *TRIAL*, Apr. 1993, at 68 (29 victories).

13. Stephen L. Carter, *Living Without the Judge*, 101 *YALE L.J.* 1 (1991). See also ROGER L. GOLDMAN & DAVID GALLEN, *THURGOOD MARSHALL: JUSTICE FOR ALL* 149-50 (1992): “Marshall had . . . garnered such a reputation among blacks that during the [trial of *Smith v. Allwright*] Duke Ellington stopped his tour for a week to sit in the courtroom and watch Marshall in action.”

Marshall was a formidable opponent to white supremacy, his every appearance a brazen challenge to the staunchly defended status quo. Explicit threats to his life were numerous, and each time he went south, there was a very real possibility that he wouldn't return.

On one occasion, Marshall defended twenty-five African Americans in Columbia, South Carolina. Unsafe in Columbia, he commuted back and forth each day from Nashville. One day, Marshall and the person driving with him were stopped by police and surrounded by a "mob": "[T]he mob was a very interesting mob. It was composed equally of state troopers and city police. . . . Then I [Marshall] heard a voice in the back say, 'That's the one! The tall yaller nigger!' So they took me out toward the river. . . ."¹⁴ Marshall was saved only because two friends had been following his car. Fearful of the friends' submachine gun, the police released Marshall. But they left behind a noosed rope, swinging from one of the trees by the river.

On another occasion, a prominent Louisiana segregationist had put out a ten thousand dollar "contract" on "that burr-headed nigger lawyer from New York." When Marshall arrived in Louisiana, the press was waiting for him. Asked about what he had to say about the death threat, Marshall responded, "Hell, I'm not burr-headed."¹⁵

In 1941, Marshall went to the small town of Hugo, Oklahoma, to defend an African American charged with a particularly gruesome triple murder. Elaborate precautions were taken for Marshall's safety, to the extent that he was to sleep in a different, well-guarded home each night.¹⁶ But the precautions were not in place for Marshall's first night in town, so he spent the night in an unguarded house.

I never wanted anyone, I mean anybody, to know that during that first night in Hugo I lay on the bed sweating in fear. I think I remembered every lynching story that I had read about after World War One. I could see my dead body lying in some place where they let white kids out of Sunday School to come and look at me, and rejoice.¹⁷

Through all the threats, despite all the risks, Marshall never flinched. For twenty years, he returned again and again, facing grave danger with every trip.

14. ROWAN, *supra* note 1, at 108-09 (quoting Marshall).

15. *Id.* at 115.

16. BLAND, *supra* note 12, at 27.

17. ROWAN, *supra* note 1, at 107 (quoting Marshall).

The scope of Marshall's achievements during his NAACP years is staggering, and all the more so because they were accomplished under impossible conditions, though Marshall characteristically made light of the difficulties: "Instinctively he plays down his own role, as though it were natural to hide under train seats, or earn \$2400 a year as a lawyer, or write briefs on a manual typewriter balanced, in a moving car, between his knees."¹⁸ But Marshall the man was even more impressive, more inspiring, than the sum of his achievements. He was larger than life; it is hard to believe that so many overflowing qualities could be combined in one person: modesty and humor, consummate skill and intelligence, compassion and morality, open-eyed realism and wide-eyed idealism, dedication, perseverance, selflessness, and perhaps above all else, simple courage. Even as we mourn his loss, we should be grateful that he was given to us, to lead us to a better world, and to inspire us, by his example, to reach a little deeper in ourselves.

18. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L.R. 1217, 1219 (1992). Marshall also downplayed the real dangers he faced:

I don't deserve the credit. The people who dared to stand up, to file lawsuits, were beaten and sometimes murdered after I spoke my piece and took the fastest goddamn train I could find out of the area.

ROWAN, *supra* note 1, at 112-13 (quoting Marshall).

