1993

For Justice Marshall

Elena Kagan

For Justice Marshall

Elena Kagan*

A few days after Thurgood Marshall's death, I stood for a time at his flag-draped casket, then lying in state at the Supreme Court, and watched the people of Washington celebrate his life and mourn his passing. There would be, the next day, a memorial service for the Justice in the National Cathedral, a grand affair complete with a Bible reading by the Vice President and eulogies by the Chief Justice and other notables. That service would have its moments, but it would not honor Justice Marshall as the ordinary people of Washington did. On the day the Justice's casket lay in state, some 20,000 of them came to the Court and stood in bitter cold for upwards of an hour in a line that snaked down the Supreme Court steps, down the block, around the corner, and down the block again. The Justice's former clerks took turns standing at the casket, acting as a kind of honor guard, as these thousands of people filed by. Passing before me were people of all races, of all classes, of all ages. Many came with children and spoke, as they circuited the casket, of the significance of Justice Marshall's life. Some offered tangible tributes—flowers or letters addressed to Justice Marshall or his family. One left at the side of the casket a yellowed slip opinion of *Brown v. Board of Education*.[1] There never before has been such an outpouring of love and respect for a Supreme Court Justice, and there never will be again. As I stood and watched, I felt (as I will always feel) proud and honored and grateful beyond all measure to have had the chance to work for this hero of American law and this extraordinary man.

I first spoke with Justice Marshall in the summer of 1986, a few months after I had applied to him for a clerkship position. (It seems odd to call him Justice Marshall in these pages. My co-clerks and I called him "Judge" or "Boss" to his face, "TM" behind his back; he called me, to my face and I imagine also behind my back, "Shorty.") He called me one day and, with little in the way of preliminaries, asked me whether I still wanted

* Assistant Professor, University of Chicago Law School; law clerk to Justice Marshall, 1987 Term. A.B. 1981, Princeton University; M. Phil. 1983, Oxford University; J.D. 1986, Harvard Law School.

1. 347 U.S. 483 (1954).

a job in his chambers. I responded that I would love a job. "What's that?" he said, "you already have a job?" I tried, in every way I could, to correct his apparent misperception. I yelled, I shouted, I screamed that I did not have a job, that I wanted a job, that I would be honored to work for him. To all of which he responded: "Well, I don't know, if you already have a job . . . ." Finally, he took pity on me, assured me that he had been in jest, and confirmed that I would have a job in his chambers. He asked me, as I recall, only one further question: whether I thought I would enjoy working on dissents.

So went my introduction to Justice Marshall's (sometimes wicked) sense of humor. He took constant delight in baffling and confusing his clerks, often by saying the utterly ridiculous with an air of such sobriety that he half-convinced us of his sincerity. (There was the time, for example, when he announced sadly that he would have to recuse himself from *Gwaltney of Smithfield v. Chesapeake Bay Foundation*.[2] When we pressed him for a reason, he hemmed and hawed for many minutes, only finally to say: "Because I l-o-o-o-o-v-e their ham." When we laughed, he assumed an attitude of great indignation and began instructing us on proper recusal policy. It was early in the Term; perhaps we may be forgiven for thinking for a moment that, after all, this was not a joke.) He had an endless supply of jokes, not all of them, I must admit, appropriate to print in the pages of a law review. And he was the greatest comic storyteller I have ever heard, or ever expect to hear. This talent, I think, may be impossible to communicate to those never exposed to it. It was a matter of timing (the drawn-out lead-up, the pregnant pause), of vocal intonations and inflections, and most of all of facial expressions (the raised brow, the sparkling eyes, the sidelong glance). Suffice it to say that at least once in the course of every meeting we had with him (and those were frequent), my co-clerks and I would find ourselves holding our sides and gasping for breath, as we struggled to regain our composure.

Thinking back, I'm not sure why we laughed so hard—or rather, I'm not sure why Justice Marshall told his stories so as to make us laugh—because most of the stories really weren't funny. To be sure, some were pure camp. (When Justice Marshall was investigating racial discrimination in the military in Korea, a soldier demanded that he provide a password; the hulking (and, of course, black) Marshall looked down at the soldier and asked, "Do you really think I'm North Korean?" And when assisting in the drafting of the Kenyan Constitution, the Justice was introduced to Prince Philip. "Do you care to hear my opinion of lawyers?" Prince Philip asked in posh British tones, mimicked to great comic effect by Justice Marshall. "Only," Justice Marshall replied—before the two discov-

2. 484 U.S. 49 (1987).

ered mutual ground in a taste for bourbon—"if you care to hear my opinion of princes.") But most of the stories, if told by someone else, would have expressed only sorrow and grimness. They were stories of growing up black in segregated Baltimore, subject to daily humiliation and abuse. They were stories of representing African-American defendants in criminal cases—often capital cases—in which a fair trial was not to be hoped for, let alone expected. (He knew he had an innocent client, Justice Marshall said, when the jury returned a sentence of life imprisonment, rather than execution.) They were stories of the physical danger (the lynch mobs, the bomb-throwers, the police themselves) that the Justice frequently encountered as he traversed the South battling state-imposed segregation. They were stories of prejudice, violence, hatred, fear; only as told by Justice Marshall could they ever have become stories of humor and transcending humanity.

The stories were something more than diversions (though, of course, they were that too). They were a way of showing us that, bright young legal whipper-snappers though we were, we did not know everything; indeed, we knew, when it came to matters of real importance, nothing. They were a way of showing us foreign experiences and worlds, and in doing so, of reorienting our perspectives on even what had seemed most familiar. And they served another function as well: they reminded us, as Justice Marshall thought all lawyers (and certainly all judges) should be reminded, that behind law there are stories—stories of people's lives as shaped by law, stories of people's lives as might be changed by law. Justice Marshall had little use for law as abstraction, divorced from social reality (he muttered under his breath for days about Judge Bork's remark that he wished to serve on the Court because the experience would be "an intellectual feast"); his stories kept us focused on law as a source of human well-being.

That this focus made the Justice no less a "lawyer's lawyer" should be obvious; indeed, I think, quite the opposite. I knew, of course, before I became his clerk that Justice Marshall had been the most important—and probably the greatest—lawyer of the twentieth century. I knew that he had shaped the strategy that led to *Brown v. Board of Education* and other landmark civil rights cases; that he had achieved great renown (indeed, legendary status) as a trial lawyer; that he had won twenty-nine of the thirty-two cases he argued before the Supreme Court. But in my year of clerking, I think I saw what had made him great. Even at the age of eighty, his mind was active and acute, and he was an almost instant study. Above all, though, he had the great lawyer's talent (a talent many judges do not possess) for pinpointing a case's critical fact or core issue. That trait, I think, resulted from his understanding of the pragmatic—of the way in which law worked in practice as well as on the books, of the way in

which law acted on people's lives. If a clerk wished for a year of spinning ever more refined (and ever less plausible) law-school hypotheticals, she might wish for a clerkship other than Justice Marshall's. If she thought it more important for a Justice to understand what was truly going on in a case and to respond to those realities, she belonged in Justice Marshall's chambers.

None of this meant that notions of equity governed Justice Marshall's vote in every case; indeed, he could become quite the formalist at times. During the Term I clerked, the Court heard argument in *Torres v. Oakland Scavenger Co.*[3] There, a number of Hispanic employees had brought suit alleging employment discrimination. The district court dismissed the suit, and the employees' lawyer filed a notice of appeal. The lawyer's secretary, however, inadvertently omitted the name of one plaintiff from the notice. The question for the Court was whether the appellate court had jurisdiction over the party whose name had been omitted; on this question rode the continued existence of the employee's discrimination claim. My co-clerks and I pleaded with Justice Marshall to vote (as Justice Brennan eventually did) that the appellate court could exercise jurisdiction. Justice Marshall refused. As always when he disagreed with us, he pointed to the framed judicial commission hanging on his office wall and asked whose name was on it. (Whenever we told Justice Marshall that he "had to" do something—join an opinion, say—the Justice would look at us coldly and announce: "There are only two things I *have to* do—stay black and die." A smarter group of clerks might have learned to avoid this unfortunate grammatical construction.) The Justice referred in our conversation to his own years of trying civil rights claims. All you could hope for, he remarked, was that a court didn't rule against you for illegitimate reasons; you couldn't hope, and you had no right to expect, that a court would bend the rules in your favor. Indeed, the Justice continued, it was the very existence of rules—along with the judiciary's felt obligation to adhere to them—that best protected unpopular parties. Contrary to some conservative critiques, Justice Marshall believed devoutly—believed in a near-mystical sense—in the rule of law. He had no trouble writing the *Torres* opinion.

Always, though, Justice Marshall believed that one kind of law—the Constitution—was special, and that the courts must interpret it in a special manner. Here, more than anywhere else, Justice Marshall allowed his personal experiences, and the knowledge of suffering and deprivation gained from those experiences, to guide him. Justice Marshall used to tell of a black railroad porter who noted that he had been in every state and every city in the country, but that he had never been anyplace where he had to

3. 487 U.S. 312 (1988).

put his hand in front of his face to know that he was black. Justice Marshall's deepest commitment was to ensuring that the Constitution fulfilled its promise of eradicating such entrenched inequalities—not only for African-Americans, but for all Americans alike.

The case I think Justice Marshall cared about most during the Term I clerked for him was *Kadrmas v. Dickinson Public Schools*.[4] The question in *Kadrmas* was whether a school district had violated the Equal Protection Clause by imposing a fee for school bus service and then refusing to waive the fee for an indigent child who lived sixteen miles from the nearest school. I remember, in our initial discussion of the case, opining to Justice Marshall that it would be difficult to find in favor of the child, Sarita Kadrmas, under equal protection law. After all, I said, indigency was not a suspect class; education was not a fundamental right; thus, a rational basis test should apply, and the school district had a rational basis for the contested action. Justice Marshall (I must digress here) didn't always call me "Shorty"; when I said or did something particularly foolish, he called me (as, I hasten to add, he called all his clerks in such situations) "Knucklehead." The day I first spoke to him about *Kadrmas* was definitely a "Knucklehead" day. (As I recall, my handling of *Kadrmas* earned me that appellation several more times, as Justice Marshall returned to me successive drafts of the dissenting opinion for failing to express—or for failing to express in a properly pungent tone—his understanding of the case.) To Justice Marshall, the notion that government would act so as to deprive poor children of an education—of "an opportunity to improve their status and better their lives"[5]—was anathema. And the notion that the Court would allow such action was even more so; to do this would be to abdicate the judiciary's most important responsibility and its most precious function.

For in Justice Marshall's view, constitutional interpretation demanded, above all else, one thing from the courts: it demanded that the courts show a special solicitude for the despised and disadvantaged. It was the role of the courts, in interpreting the Constitution, to protect the people who went unprotected by every other organ of government—to safeguard the interests of people who had no other champion. The Court existed primarily to fulfill this mission. (Indeed, I think if Justice Marshall had had his way, cases like *Kadrmas* would have been the only cases the Supreme Court heard. He once came back from conference and told us sadly that the other Justices had rejected his proposal for a new Supreme Court rule. "What was the rule, Judge?" we asked. "When one corporate fat cat sues another corporate fat cat," he replied, "this Court shall have no juris-

4. 487 U.S. 450 (1988).

5. *Id.* at 468-69 (Marshall, J., dissenting).

diction.") The nine Justices sat, to put the matter baldly, to ensure that Sarita Kadrmas could go to school each morning. At any rate, this was why they sat in Justice Marshall's vision of the Court and Constitution. And however much some recent Justices have sniped at that vision, it remains a thing of glory.

During the year that marked the bicentennial of the Constitution, Justice Marshall gave a characteristically candid speech. He declared that the Constitution, as originally drafted and conceived, was "defective"; only over the course of 200 years had the nation "attain[ed] the system of constitutional government, and its respect for . . . individual freedoms and human rights, we hold as fundamental today."[6] The Constitution today, the Justice continued, contains a great deal to be proud of. "[B]ut the credit does not belong to the Framers. It belongs to those who refused to acquiesce in outdated notions of 'liberty,' 'justice,' and 'equality,' and who strived to better them."[7] The credit, in other words, belongs to people like Justice Marshall. As the many thousands who waited on the Supreme Court steps well knew, our modern Constitution is his.

6. Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1338 (1987).

7. *Id.* at 1341.