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## Foreword: "Do What You Can..."

Susan Low Bloch

*Georgetown University Law Center*, [bloch@law.georgetown.edu](mailto:bloch@law.georgetown.edu)

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## FOREWORD: "DO WHAT YOU CAN . . . ."

SUSAN LOW BLOCH\*

"Do what you can with what you have."<sup>1</sup> That's what Thurgood Marshall preached. That is how he lived. He used what he had to change the world forever.

To us, his law clerks, he was "Judge" or "Boss," never "Mr. Justice Marshall." He called us "knuckleheads." He was unpretentious, taking neither himself (nor us) too seriously.<sup>2</sup> But he took the law and its potential very seriously. He believed, as his mentor Charlie Houston had taught him, that lawyers can and should be social engineers. They have the training, the ability, and the means to make society better. All they need is the desire and dedication. It was Marshall's mission to make sure all lawyers understood and implemented that lesson.

He started with himself. Graduating first in his law school class offered him a variety of opportunities. He chose public service — and never deviated from that choice. Starting as a solo practitioner in his hometown of Baltimore, the segregated city that denied him access to its law school and its restrooms, Thurgood Marshall successfully challenged the segregationist policies of the University of Maryland Law School. Shortly thereafter, he moved to New York to work full-time for the National Association for the Advancement of Colored People (NAACP).

As lead-counsel for the NAACP Legal and Education Fund, Thurgood Marshall masterminded the assault on racial segregation in this country. In a series of Supreme Court victories, Marshall and his colleagues successfully challenged the constitutionality of "whites only" primaries that effectively denied blacks any vote, the practice of segregated public transportation, and the enforcement of racially

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\* Professor of Law, Georgetown University Law Center. Law clerk to Justice Thurgood Marshall, 1976-77. Law clerk to Judge Spottswood Robinson III, 1975-76. J.D., Ph. C., M.A., University of Michigan; B.A., Smith College.

1. When asked how he wished to be remembered, Thurgood Marshall said: "He did what he could with what he had." Ruth Marcus, *Plain-Spoken Marshall Spars with Reporters*, WASH. POST, June 29, 1991, at A1, A10; see also Martha Minow, *Tribute to Justice Marshall*, 105 HARV. L. REV. 66, 76 (1991).

2. For a more in-depth look at a Justice Marshall clerkship, see Susan L. Bloch, *The Privilege of Clerking for Justice Thurgood Marshall*, in JOURNAL OF SUPREME COURT HISTORY: 1992 YEARBOOK OF THE SUPREME COURT HISTORICAL SOCIETY 23 (1992).

restrictive covenants in residential housing. His best known victory, *Brown v. Board of Education*,<sup>3</sup> whose forty-year anniversary is being celebrated this year, finally rejected the hated notion of "separate but equal" and thereby began to move this country away from legal apartheid. By the time he was forty, Marshall had earned the title "Mr. Civil Rights," setting the standard for "public interest" lawyers before the term had even been coined.<sup>4</sup>

President John Kennedy recognized the enormity of Thurgood Marshall's talent and contribution and in 1962 appointed him to the United States Court of Appeals for the Second Circuit, the first African American on that court. Marshall often reminded us of his first day on the job. The court had been experiencing electrical difficulties; as Marshall was walking down the hall, a secretary stopped him and said: "You must be the electrician." "No," said a surprised Marshall, "they would never let one of my kind in THAT union."

After several successful years on the Court of Appeals and then as the first African American Solicitor General of the United States, Marshall was nominated by President Lyndon Johnson to be the first African American on the United States Supreme Court. Confirmation was contentious, as Professor Carter's article indicates,<sup>5</sup> but finally on August 30, 1967, Justice Thurgood Marshall became one of "The Brethren."

In his twenty-four years on the Supreme Court, Marshall insisted that the law serve the cause of equality and justice. He made sure his colleagues remembered that the Constitution was a living document designed to serve all the people. His life experiences were unique and he eagerly and insistently shared them; he would not tolerate ignorance. When the Court upheld the imposition of a fifty dollar filing fee for a bankruptcy petition and minimized the magnitude of the fee, Marshall dissented 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 upon unfounded assumptions about how people live. . . . No one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are.<sup>6</sup>

Noting that sudden illness might wipe out a poor person's savings and that "a pack or two of cigarettes may be . . . a luxury indulged in only rarely," Marshall informed the Court that the "desperately poor almost never go to see a movie," while the majority assumed that it "is an almost weekly activity."<sup>7</sup>

As this dissent illustrates, the Judge reminded everyone that the Court was deciding not simply interesting legal questions but the fate of real people in a real world. With his extensive experience and sensitive insight, he always detected, and

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3. 347 U.S. 483 (1954).

4. Vicki Jackson, *Thurgood Marshall*, 1 J. ON FIGHTING POVERTY 11 (1993).

5. Stephen Carter, *Thurgood Marshall: A Remembrance*, 47 OKLA. L. REV. 5, 7-8 (1994).

6. *United States v. Kras*, 409 U.S. 434, 460 (1973) (Marshall, J., dissenting).

7. *Id.*

made sure his colleagues (and his law clerks) understood, "whose ox was being gored." Characteristically, he did so with humor. As the ultimate raconteur, the Judge regaled us with stories that conveyed more knowledge and wisdom than we had gained in all our collective years.<sup>8</sup> As Justice Byron White recently noted:

Thurgood brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match. Thurgood could tell us the way it was, and he did so convincingly, often embellishing with humorous, sometimes hair-raising, stories straight from his own past. He characteristically would tell us things that we knew but would rather forget; and he told us much that we did not know due to the limitations of our own experience.<sup>9</sup>

The articles in this symposium confirm that Marshall's accomplishments were both significant and varied. His unique experiences before becoming a judge contributed substantially to his greatness as a Justice. As the article by Professor Randall Coyne illustrates, Marshall's adamant and consistent opposition to the death penalty was based on the unique personal knowledge available only to one experienced with defending death row inmates.<sup>10</sup> As Professor Tepker's article observes, Marshall's contribution to the law of equal protection is also incomparable.<sup>11</sup> Marshall had no use for wooden formulas and advocated instead a pragmatic approach that evaluated the realities of the real world. While, as Professor Tepker observes, the Supreme Court has not formally adopted Marshall's suggested "sliding scale" analysis for equal protection cases, Marshall's views clearly influenced some of his brethren and may yet command a majority of the Court.<sup>12</sup> In the articles of Professors Strickland<sup>13</sup> and Scaperlanda,<sup>14</sup> we see Justice Marshall's extraordinary sensitivity to minority rights in the areas not only of race but also of Indian law and alienage, as well as other less-noted areas of discrimination. Marshall's protection of the First Amendment is well known and appropriately celebrated by Professor Krug's interesting discussion of Marshall's sensitive and sustained support for the free speech principles of the First Amendment.<sup>15</sup> Professor Protti notes Marshall's

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8. See, e.g., David Wilkins, *Justice as Narrative: Some Personal Reflections on a Master Storyteller*, 6 HARV. BLACKLETTER J. 68 (1989).

9. Byron White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992); see also Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992); William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23, 25 (1991).

10. Randall Coyne, *Taking the Death Penalty Personally: Justice Thurgood Marshall*, 47 OKLA. L. REV. 35 (1994).

11. Harry F. Tepker, Jr., *Separating Prejudice from Rationality in Equal Protection Cases: A Legacy of Thurgood Marshall*, 47 OKLA. L. REV. 93 (1994).

12. *Id.*

13. Rennard Strickland & William M. Strickland, *A Tale of Two Marshalls: Reflections on Indian Law and Policy, the Cherokee Cases and the Cruel Irony of Supreme Court Victories*, 47 OKLA. L. REV. 111 (1994).

14. Michael Scaperlanda, *Justice Thurgood Marshall and the Legacy of Dissent in Federal Alienage Cases*, 47 OKLA. L. REV. 55 (1994).

15. Peter F. Krug, *Justice Thurgood Marshall and News Media Law: Rules over Standards?*, 47

unusually keen appreciation of libraries, attributing this appreciation in part to his personal experiences with the usefulness of libraries as "an escape hatch" from the "claws of poverty and racism."<sup>16</sup> And Professors Carter<sup>17</sup> and Hill<sup>18</sup> eloquently thank Thurgood Marshall for opening doors for countless people.

As this collection of articles illustrates, Thurgood Marshall will be known and revered for many things — his ability to share his unique experiences with frankness, wit, and warmth; his passion, anger, and tolerance; his loyalty to his family, friends, and colleagues. All of this was Thurgood Marshall. But the part of Justice Marshall that I will most treasure is his unique combination of candor, and impatience, coupled with a valiant optimism. This unusual blend was probably best captured in his reminder to us when the country was euphorically celebrating the bicentennial of the United States Constitution. Marshall alone understood, and was willing to remind us, that the Constitution, while admirable, was fundamentally flawed. With its condonation of slavery, the Constitution was "defective from the start . . . 'We the People' no longer enslave," said Marshall, but the credit belonged not to the Framers who wrote the Constitution in 1787, but to those in the ensuing two hundred years

who refused to acquiesce in outdated notions of "liberty," "justice," and "equality," and who strived to better them. *The true miracle was not the birth of the Constitution, but its life . . . .*

. . . I plan to celebrate the bicentennial of the Constitution as a living document, including the Bill of Rights and the other amendments protecting individual freedoms and human rights.<sup>19</sup>

And he did. Both as advocate and as jurist, Thurgood Marshall dedicated his entire life to advancing the rights of the poor, the unrepresented, and the downtrodden.

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OKLA. L. REV. 13 (1994).

16. Maria Protti, *Thurgood Marshall and the Law Library*, 47 OKLA. L. REV. 75, 75 (1994).

17. Stephen L. Carter, *Thurgood Marshall: A Remembrance*, 47 OKLA. L. REV. 5 (1994).

18. Anita F. Hill, *A Tribute to Thurgood Marshall: A Man Who Broke with Tradition on Issues of Race and Gender*, 47 OKLA. L. REV. 127 (1994).

19. Thurgood Marshall, *Reflections on the Bicentennial of the Constitution*, 101 HARV. L. REV. 1, 5 (1987) (emphasis added).