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Citation

David B. Wilkins, Justice as Narrative: Some Personal Reflections on a Master Storyteller, 6 Harv. Blackletter J. 68 (1989).

Published Version

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Justice as Narrative: Some Personal Reflections on A Master Storyteller

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What was it like to clerk for Justice Marshall? Invariably, this is the first question I am asked whenever anyone discovers that I had the honor of working for the Judge (as we always called him). The fact that I am asked this question so often is a testament to Thurgood Marshall's impact on the nation's consciousness. A sterling record of accomplishments dating back over half a century has made Justice Marshall one of the best known legal figures of our times. It is not surprising that those I meet would like to learn more about one so well respected.

After fielding these questions for seven years, however, I have come to realize that more is at stake than idle curiosity about a famous person. Certainly, the questioners are interested in getting a glimpse of the man behind the reputation. But the intensity with which the inquiry is put, particularly by my students, belies the claim that theirs is a simple concern with the lifestyles of the rich and famous.¹ Instead, my students seek information about Thurgood Marshall the man in order to understand better the legacy of Thurgood Marshall the lawyer, public servant, and judge. Because for them, Justice Marshall is more than just famous; he is the embodiment of their highest aspirations for a career in the law. By asking me what it was like to be his law clerk, they seek to discover what this experience taught me about the practical attainment of their own goals for a life devoted to the law.

This is no idle exercise. Young lawyers increasingly find themselves in a cross-fire of conflict and self-doubt.² The noble aspirations of public service and com-

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1. As Justice Marshall would undoubtedly point out, he has never qualified for the former designation! The fact that he consistently devoted his considerable talents to the pursuit of the public interest, as opposed to private gain, is itself an important part of Justice Marshall's legacy.
2. Both the popular and the academic press are filled with reports of uncertainty and dissatisfaction among young lawyers. For example, a 1985 survey by the Young Lawyers Division of the American Bar Association reported that 19 per cent (nearly one-fifth) of attorneys describe themselves as being dissatisfied with their jobs. See ABA Young Lawyers Division Study cited in Holmes, *Structural Causes of Dissatisfaction Among Large-Firm Attorneys: A Feminist Perspective*, 3 INSTITUTE FOR LEGAL STUDIES WORKING PAPERS SERIES 1 (June 1988). Similarly, there are numerous reports of attorneys experiencing conflict between the demands of their work and their own moral beliefs. See generally, SPANGLER, *LAWYERS FOR HIRE* (Yale University Press 1986). While there are certainly reasons to doubt the accuracy of particular measures of dissatisfaction or doubt, see Nelson, *Ideology, Practice, and Professional Autonomy: Social*

mitment to justice that often brought them into the profession seem remote and unobtainable. Their experience in law school raises more questions about the legitimacy of their impending professional role than it answers. Issues of justice and fairness are often treated as peripheral or unimportant. The value of law and lawyering is frequently questioned. This feeling of ambivalence only intensifies after graduation, as professional ideals seem to compete with career advancement and economic rewards for time and attention. Although much ink has been spilled in discussing these problems, neither the profession nor the academy appear to have concrete answers to their concerns.³

And yet towering above it all is Thurgood Marshall. His six decades of public service stand as a constant rebuke to the claim that lawyers have nothing to do with justice. His eloquent statements on behalf of the oppressed and the disenfranchised display neither the confusion nor the paralysis that seems to afflict so much of the profession today. In Thurgood Marshall, my students find an unabashed champion of social justice, and they want to know how he got that way.

So it is with a special feeling of responsibility that I try on these occasions to sum up my year with Thurgood Marshall. I generally speak of many things; chief among them the clarity of his substantive vision of the law and his respect for the art of lawyering so effectively chronicled elsewhere in this volume.⁴ But invariably, I return to the one aspect of the clerkship that provided more joy and true understanding than all of the dissections of legal principles put together: the stories.

Quite simply, as anyone who has spent even a small amount of time with him can attest, Justice Marshall is a master storyteller.⁵ During our year together, it seemed he had a million stories at his fingertips. The stories came in all shapes and sizes. There were grand stories about famous people and historic events. Given that the Judge has participated in more than his share of history this is hardly surprising. But there were many more stories about ordinary people caught in the myriad ironies of everyday life. Regardless of whether the story was about the famous or the familiar, however, it always had a punchline, followed by that laugh. That deep, mellifluous, bubbling, mirthful, bellyfull of a laugh. The laugh that was always on hand to prick the supercilious or console the disconsolate. For every occasion there was a story, and for every story there was a laugh.

When I first started telling my students about the Judge, I always characterized these wonderful stories as an added benefit of the clerkship, disconnected from the main lessons of the struggle for social justice and the creation of legal scholarship. It's not that this characterization seemed accurate; in my heart I knew that the stories were somehow connected to the view of the just society that animated the Judge's jurisprudence. It was only that there seemed no place in the lexicon of "serious" description of judicial analysis to place these incredible reflections on

Values and Client Relationships in the Large Law Firm, 37 STAN. L. REV. 503 (1985) (presenting data suggesting that large-firm lawyers rarely find themselves in conflict with client objectives), it nevertheless seems clear that many young lawyers are, at the very least, ambivalent about their new professional roles.

3. The status and content of lawyer "professionalism" has been much debated in the last few years. See, e.g., American Bar Association Commission on Professionalism, ". . . IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM" (1986); Gordon, *The Independence of Lawyers* 68 B.U.L. REV. 1 (1988) (and sources cited therein). Although many insights are contained in these pages, it is fair to say that despite the lofty titles, no "blueprint" for relieving the anxiety and confusion of young lawyers has yet been conceived.
4. See Fisher, *The Jurisprudence of Justice Marshall*, 6 HARVARD BLACKLETTER J. 131 (substantive vision); and Kennedy and Minow, *Thurgood Marshall and Procedural Law: Lawyers' Lawyer, Judges' Judge*, 6 HARVARD BLACKLETTER J. 95 (1989) (the art of lawyering).
5. See, e.g., Bell, *An Epistolary Exploration for a Thurgood Marshall Biography*, 6 HARVARD BLACKLETTER J. 51 (1989).

the human condition. Recently, however, I have decided that it is the lexicon that should be put aside, not the stories. Justice Marshall's mastery of the art of storytelling is central to our understanding of the man and his accomplishments. Indeed, in this short essay, I will argue that the stories of Justice Marshall provide us with a unique lens through which to view the essential relationship between narrative and the law. By examining Marshall's brilliant ability to create and deploy narrative, we can begin to understand how he has been able to live such an exemplary life in the law.

The argument proceeds in three parts. Part I identifies what I mean by the art of storytelling. Part II relates this art to the creation of legal rules. Finally, Part III briefly sketches the legal lessons to be gleaned from the stories of Justice Marshall.

I. THE ART OF STORYTELLING

The art of storytelling is like the art of speaking prose: we all do it whether we are aware of it or not. In the hands of a master, however, a story becomes more than the mundane rendition of ordinary experience. It becomes an intricate web of past and present, of perception and insight, that can transport us into another time and place while simultaneously allowing us to retain contact with current reality. It can make us laugh or make us cry, but most of all, it can make us see the world differently than we did before. Thus, whether intended or not, every story is a teaching tool about how the world works — and how it should work.

To be a master storyteller requires potent powers of perception and communication.⁶ Above all else, the storyteller must see. He must open his eyes to the myriad fragments of everyday life that occur all around us. This is no easy feat. The sheer volume of experience is often overwhelming. Most of us find it hard enough to focus on putting one foot in front of the other. The richness of life passes by largely unnoticed. Such is the cocoon we weave for ourselves. But not the storyteller. He must take the time to notice the actions of others and to file them away in his memory. And not just the final chapter, the pivotal action, but all of the supporting details that give the story three dimensions on subsequent retelling.

But more is required than simple powers of observation. A storyteller is not a laboratory technician, merely recording the facts and figures of ordinary life. Rather, the storyteller seeks to reveal something about the people behind the actions, to give us some insight into their motives and desires, to frame and enact the drama of the event so that the lesson from the drama will inform and uplift the reader or listener. We must care about the people in the story, at least long enough to find out what happens to them in the end. To establish this connection, we must see them as human beings worthy of our concern. But for this to happen, the storyteller must first be able to identify and understand their humanness. Thus, storytellers must empathize as well as observe. They must feel as well as see.⁷

6. In attempting to catalogue the requirements of effective storytelling, I do not mean to suggest that such artistry can be reduced to a mere listing of attributes and techniques. To the contrary, as the master storyteller in D. M. Thomas' *ARARAT* remarks about his own singular talent:

Every talent is beyond explanation. How does a sculptor see, in a block of Carrara marble, the hidden Jupiter, and bring him to light by chipping away with a hammer and chisel? Why does the poet's idea emerge from his head already set in rhyming quatrains and harmoniously scanned? So, none but the *improvisatore* himself can understand that speed of impression, that close link between his own inspiration and a strange external will. . . . I could not even explain it myself.

D. M. THOMAS, *ARARAT* 58 (Pocket Books, 1983).

7. See generally, Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987).

All of this rich perception of the world would be lost, however, if the storyteller was not also a master of translating this experience into the language of the present. Perhaps the storyteller's greatest gift is the ability to make the past come alive. To transport us back to that prior reality and to make us feel as though we are seeing it with our own eyes. To accomplish this feat of perceptual prestidigitiation clearly requires a mastery of the spoken word. But before words comes construction. Experience does not come pre-packaged. The storyteller must select a beginning and an end, and an organizing theme by which we travel from one to the other. He must choose a vantage point from which the story will be told. And he must sift through the mass of available information to determine what aids understanding and what simply gets in the way. In short, he must take the stuff of ordinary life and turn it into a complete vignette, a morality play in which the issue is presented, understood, and resolved all within the space of our aural attention span.⁸ A space that can be made longer or shorter by rhetorical eloquence, but nevertheless is ultimately finite.

The storyteller thus faces the ultimate challenge in communication. He must take an event of which his audience knows nothing, shape it to fit his purposes, and present it with sufficient brevity and clarity that he does not lose our attention. All of this requires imagination, insight, creativity, and patience. Those who are masters of the craft certainly command our appreciation and respect. Justice Marshall is such a master.

II. STORYTELLING AND JUSTICE

But what does storytelling have to do with justice? Or, to put it differently, how will knowing about Justice Thurgood Marshall's mastery of the art of storytelling help my students understand his life-long struggle on behalf of the poor and oppressed? The answer lies in the simple connection between law and narrative.⁹ At base, law is largely comprised of a series of narratives, stories if you will, through which we define ourselves and our relationship to each other. Each participant in the legal arena — lawyers, judges, legislators — presents his or her own narrative account of the meaning of legal texts. These stories, in turn, form the basis of additional texts (statutes, judicial opinions, legal briefs, etc.) which, in time, create their own narrative history. Thus, understanding the way in which narratives are constructed and employed generates important insights about the meanings that they ultimately advance.

A simple examination of how the law works makes the connection plain. At one level, the "law" is a set of formal prescriptions about what we can and cannot do. The meaning of those prescriptions, however, is largely shaped by their prac-

8. Hayden White succinctly captures the importance of selection and arrangement to a narrative's power:

I have sought to suggest that this value attached to narrativity in the representation of real events arises out of a desire to have real events display the coherence, integrity, fullness, and closure of an image of life that is and can only be imaginary. The notion that sequences of real events possess the formal attributes of the stories we tell about imaginary events could only have its origin in wishes, daydreams, reveries. Does the world really present itself to perception in the form of well-made stories, with central subjects, proper beginnings, middles, and ends, and a coherence that permits us to see "the end" in every beginning? Or does it present itself more in the forms that the annals and chronicle suggest, either as mere sequence without beginning or end or as sequences of beginnings that only terminate and never conclude?

White, *The Value of Narrativity in the Representation of Reality*, in *ON NARRATIVE*, 23 (W. Mitchell ed. 1980, 1981).

9. Much of what follows about the general relationship between law and narrative was influenced by my reading of Cover, *Nomos and Narrative*, 97 *HARV. L. REV.* 4 (1983).

tical application to concrete cases. We know the meaning of "due care" or "good faith" not so much by their intrinsic clarity but by the gradual working out of practical applications over a number of cases. Such is the common law tradition. But the same could be said about a legislative pronouncement. Behind every statute is a story. The legislature that enacted it had a vision of what the law was designed to prevent and how it should accomplish that goal.¹⁰ This vision is in turn based on some understanding of the world and how it works; some story of the past and projection of the future. How much we should be bound by this legislative vision is a matter of considerable debate.¹¹ But whether we accept the original understanding or create our own, the process of interpretation is inextricably tied to the creation of some narrative account that legitimates the very act of law-making itself.

Law is therefore both the product and the producer of narrative. It follows that the ability to tell and understand stories is a prized skill in the legal marketplace. For lawyers, this is obvious. The essence of the lawyer's job is to present his client's story in the most persuasive manner possible. To do so, he must display the same range of perception, empathy, organization, and style that characterizes the master storyteller. So too, a legislator must be able to discover the stories of legislative need and to translate those stories into the language of positive law. Arguably, judges need narrative skills the most, for their task requires a dual aptitude. On one hand, a judge must be able to decode the messages contained in the narratives of both lawyers and legislators. On the other, the judge must translate the story of the case into an opinion that can both resolve the past and guide the future.¹² In each case, however, the lesson is clear: the skills of the storyteller are essential to the work of the law.

III. LESSONS FROM THE MASTER

It is no coincidence, therefore, that Justice Marshall is a master of both storytelling and the law. But what does that teach us about our own lives? How can we translate Marshall's mastery into our own empowerment? To answer these questions, we must return to the source — the stories themselves.

No summary could possibly do justice to Thurgood Marshall's rich repertoire of stories. As with all virtuosos, Justice Marshall is equally comfortable relating stories about the high and the low, the near and the far, the momentous and the everyday. For him, recounting the epic tale of the signing of the Kenyan Constitution was no harder than spinning a yarn about the travails of his law school classmates. Nor is it possible to capture the magistry of even a single story in the space of a few short paragraphs. Not only are my meager reporting skills not remotely up to the task, but the true genius of a Marshall story lies in the subtle blending of timing, facial expressions, gestures, and turn of phrase that simply cannot be reproduced on paper. Nevertheless, to confine the discussion of Marshall's genius to the realm of abstract theory is completely antithetical to the les-

10. There can be, of course, no single vision in such a group context. Rather there are a series of competing visions, which, through the process of legislative compromise, are harmonized for the limited purpose of reaching agreement. This reality only multiplies the number of narratives that are potentially relevant.

11. Justice Marshall himself has frequently criticized a mechanical reliance on "original intent." See e.g., Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) [hereinafter *Bicentennial*].

12. Ronald Dworkin captures this sense of the dual narrative role of judging. Central to his recent jurisprudence is the invitation to think of the judge as one of a group of authors of a collectively written novel. Each author must write the next chapter of the novel with an eye to both what has happened in the preceding chapters, and to what might happen in future chapters. See R. DWORKIN, *LAW'S EMPIRE* 228-38 (1986).

sons to be derived from the stories themselves. Therefore, with great trepidation (and apologies to the master himself), I recount below a much abbreviated version of one of my favorite of the Judge's stories, a story that I believe typifies his approach to storytelling.¹³

Sometime during the reign of "separate but equal," one of the major religious denominations decided to make a charitable donation to help, as the Judge would say, "the poor little Negroes¹⁴ of New York." After much discussion, the church leadership decided that the donation would take the form of giving one of the major Negro churches a piece of land in Manhattan to be used for the construction of a cemetery for people of color; there being as much segregation after death as before. Unfortunately, when the announcement of the gift was made with much fanfare in the New York press, the residents of the all-white neighborhood where the land was located immediately made it clear that they had no intention of allowing the plan to go forward. (As the Judge might say, having successfully protected themselves against having any live Negroes in their neighborhood, they were damned if they would be forced to live next to dead ones!).

To make good on their promise, local residents threw up every conceivable obstacle, both legal and non-legal, to prevent the land from being turned into a cemetery. They went to the zoning board, the city council, and even to the mayor's office to stop the Negro church from obtaining the necessary permits. Each time, the Negro minister and the other church officials tried to persuade the relevant city officials that their project did not pose any threat to the health and welfare of the community. Each time the church succeeded in this task, the neighbors would find another mechanism for challenging the project. Eventually, after several years of fighting, the white community was able to obtain a permanent injunction against the church using the land for its intended purpose. Although defeated by legal means, the church still did not give up hope, but instead resolved to hold on to the land with the faith that in some more enlightened day, the white community would realize the error of its ways and allow the project to go forward.

There the matter stood for several more years: The Negro church periodically trying to get approval for its plans, the white community continuing to exert its veto. One day, however, a white man came to the Negro church to talk to the minister about the land. Thinking that the white community had finally come to its senses, the minister welcomed the caller into his office. In response to the minister's inquiries, the caller quickly made it clear that he was not from the community at all. Rather, he was the representative for a major developer who wanted to buy the church's land. After some brief negotiations, the church agreed to sell the land at a price that not only would allow it to purchase land for a cemetery anywhere in the city, but also pay off the mortgage, repair the building, and generally do just about anything else that it wanted. Bellowing with laughter, the Judge would report that the moral of this story was simple: THANK GOD FOR PREJUDICE!

This wonderful story is typical of a large part of the Judge's repertoire. Specifically, three themes that surface in many Marshall stories are represented here.

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13. While I am confident of the gist of the story, the passage of time and my fading memory have left many of the particulars dim. Therefore, in order to present a complete vignette, I have filled in a few details in the spirit of the narrative. It is my hunch, although one can never know for sure, that the Judge may sometimes do the same. (Special thanks to my co-clerk Virginia Whitner Hoptman, for helping me to recall what is presented).
 14. It is well known that Justice Marshall prefers the term "Negro" to either "Black" or "Afro-American". Given the context, it is only fitting that I honor his preference here.

First, this story, like so many others, revolves around the concerns of everyday life; a Black church trying to find a final resting place for its members. The protagonists of the Judge's stories were often ordinary men and women whom he had run across in one capacity or another. Policemen, court personnel, secretaries, and store clerks play as important a role in as many Marshall stories as crusading attorneys or heads of state. Even those stories primarily about famous people seem to focus on the private, as opposed to the public, aspects of their lives.

Second, this story, like so many others, contains an important aspect of triumph, or at least redemption. While not every character is as fortunate as the church was here, more often than not, the people of Justice Marshall's world overcome obstacles, at least temporarily. This is not to say that the victories are either easy or complete. Often progress is grudging, and the price in pain is high. But nevertheless, the characters do learn and grow, if only to stumble over the next obstacle ahead.

Finally, all of this is surrounded with a special brand of rich irony all his own. Justice Marshall sees the humor in everything, including racism. As narrator, he sometimes laughs with the characters, sometimes at them. Sometimes the laugh is warm and embracing, sometimes cold and biting. But always, he laughs. And he makes you laugh, too. And together, in laughter, you join in the celebration of the utter futility of taking anything in life too seriously.

Each of these themes can be found in the public persona of Justice Marshall. Who else but a master storyteller of the concerns of everyday life could have persuaded a recalcitrant Supreme Court of the daily invidious consequences of *de jure* segregation.¹⁵ Who else but someone who has not lost touch with the common man could so eloquently articulate the yearnings of ordinary men and women for decent housing,¹⁶ a minimum standard of living,¹⁷ quality education,¹⁸ and the myriad other prerequisites for a full and meaningful life? These official narratives are the natural extension of a lifetime of private observation and recreation. In both arenas, he sees, he feels, and he speaks. And we are compelled to listen.

Nor does Justice Marshall ever lose sight of the potential for triumph or redemption, even in the bleakest hour. To be sure his opinions paint the realities of oppression and suffering with vivid sharpness.¹⁹ He does not allow us to shrink from the consequences of our actions.²⁰ But, like the stories, the opinions hold out

15. It was hearing the powerfully narrated story of the stultifying effect of a million ordinary indignities and casual slights, as much as any overarching theory or principle, that persuaded the Supreme Court that separate could never be equal. *See generally* R. KLUGER, *SIMPLE JUSTICE* (1975). Justice Marshall, with his ability to understand and relate everyday experience, was the perfect man to present this narrative to the Court.

16. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

17. *See Fisher, supra* note 4, at 132-33 (summarizing Justice Marshall's multifaceted efforts in this regard).

18. *See San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (Marshall, J., dissenting).

19. *See, e.g., Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 323 (1976) (Marshall, J., dissenting) ("While depriving any government employee of his job is a significant deprivation, it is particularly burdensome when the person deprived is an older citizen. Once terminated, the elderly cannot readily find alternative employment. The lack of work is not only economically damaging, but emotionally and physically draining. Deprived of his status in the community and of the opportunity for meaningful activity, fearful of becoming dependent on others for his support, and lonely in his new-found isolation, the involuntarily retired person is susceptible to physical and emotional ailments as a direct consequence of his enforced idleness.").

20. *See, e.g., Harris v. McRae*, 448 U.S. 297, 338 (1980) (Marshall, J., dissenting) ("The Court's opinion studiously avoids recognizing the undeniable fact that for women eligible for Medicaid — poor women — denial of a Medicaid-funded abortion is equivalent to denial of legal abortion altogether. By definition, these women do not have the money to pay for an abortion themselves. If abortion is medically necessary and a funded abortion is unavailable, they must resort to back-alley butchers, attempt to induce an abortion themselves, or suffer the serious medical consequences of attempting to

the possibility of hope. Every victory is celebrated,²¹ even in the midst of defeat.²² And when there are none to be found, the possibility of future success is not forsaken. Justice Marshall has not abandoned his faith in the possibility of a better world, no matter how much current practice seems to counsel doing so.²³ Perhaps that is why he continues to struggle so valiantly. And to inspire us to do the same.

Finally, no one who has had contact with the public Justice Marshall can fail to detect the rich sense of irony that pervades his entire approach to the law. Whether in conversation,²⁴ from the bench,²⁵ in written opinions,²⁶ or public speeches,²⁷ Justice Marshall never fails to deflate the pretentious, ridicule the fatuous, and otherwise lampoon the powerful whenever possible. In so doing, Marshall is continuing a long tradition of subversion through humor. Those on the outside have often relied on the cloak of laughter to mask their most serious attacks on the status quo.²⁸ And when the sting of indignation and despair becomes too powerful, those without the power to change their condition have often used

carry the fetus to term.") See also, Sullivan, *The Candor of Justice Marshall*, 6 HARV. BLACKLETTER J. 83 (1989).

21. Even in the midst of his stinging castigation of the nation for uncritically celebrating the bicentennial of the constitution, Marshall noted that "[t]he progress [towards racial equality] has been dramatic, and it will continue." Marshall, *Bicentennial*, 101 HARV. L. REV., at 5 (1987). See also, Marshall, *Group Action in the Pursuit of Justice*, 44 N.Y.U. L. REV. 661, 666-667 (1967).
22. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 782 (1974) (Marshall, J., dissenting) ("But however imbedded old ways, however ingrained old prejudices, this Court has not diverted from its appointed task of making 'a living truth' of our constitutional ideal of equal justice under law. After twenty years of small, often difficult steps toward that great end, the Court today takes a giant step backward." (quoting *Cooper v. Aaron*, 358 U.S. 1, 20 (1958))).
23. Marshall's position on the Constitution nicely demonstrates this point. With characteristic irony, Justice Marshall refused to allow the celebration of the 200th anniversary of the Constitution to proceed without some express recognition of the more pernicious aspects of the document. See Marshall, *Bicentennial*, 101 HARV. L. REV. 1 (1987). In the end, however, he embraces a notion of celebration, not of the accomplishments of the past, but of hope for the future. With simplicity, elegance, and above all hope, he concludes "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." *Id.* at 5 (emphasis added).
24. When confronted with law clerks telling him that he *had* to take a certain position in a case, the Judge would always reply that he only *had* to do two things: "Stay Black and die." I often reflect on the wisdom contained in that retort. See also Kaufman, *Thurgood Marshall: A Tribute*, 6 BLACK L.J. 23, 25 (1978) (reporting Marshall's contention that "[t]here is a practical way to find out whether a confession has been coerced: ask, how big was the cop?").
25. I once observed the Judge ask a state attorney general, attempting to justify the death penalty for minors on the basis of the high cost of life imprisonment, whether it wouldn't be cheaper just to shoot the defendant upon arrest, thus saving the state the expense of trial and appellate review.
26. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 708 (1984) (Marshall, J., dissenting) ("Is a 'reasonably competent attorney' a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney?"); *Schnecko v. Bustamonte*, 412 U.S. 218, 288 (1973) (Marshall, J., dissenting) ("of course it would be 'practical' for the police to ignore the commands of the Fourth Amendment, if by practicality we mean that more criminals will be apprehended, even though the constitutional rights of innocent people also go by the board.").
27. In his speech on the Bicentennial, Justice Marshall sarcastically noted that the original conception of the constitution that the celebration sought to venerate was "defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government . . . that we hold as fundamental today." Marshall, *Bicentennial*, 101 HARV. L. REV., at 2.
28. There is a long tradition in African-American culture of using the arts of indirection — including irony, sarcasm, humor, "the dozens," "rap" — to comment on, resist, and vent anger at oppression. See generally, H. GATES, JR., *THE SIGNIFYING MONKEY: A THEORY OF AFRO-AMERICAN LITERARY CRITICISM* (1988). Certainly one of the contemporary masters of these arts is novelist and essayist Ishmael Reed. See, e.g., I. REED, *WRITIN' IS FIGHTIN': THIRTY SEVEN YEARS OF BOXING ON PAPER* (1988); see also, H. GATES, JR., *supra* at ch. 6 (discussing significance of Reed's work).

laughter as a shield to hide their pain.²⁹ In either case, humor is a necessary compliment to a life of struggle. Without it, you will either be crushed by the weight of oppression or swept up in a tide of indifference or self-satisfaction. The rapier wit of Justice Marshall helps keep him, and us, from either fate.³⁰

There is much in each of these understandings for my students to make their own. Each of us has the ability to see and feel the human plight of those around us, particularly those less fortunate than ourselves. We can each take the time to listen to the suffering, to feel the pain, and to translate our understanding into a story that might persuade someone — maybe even ourselves — to make a difference. So too can we each recognize the potential for triumph and redemption in even the most tragic of situations. No one forces us to retreat to the paralysis of hopelessness when confronted with challenge. We all have the option to continue the struggle, knowing that it is only by believing in the possibility of a better world that we can ever hope to bring it into being.³¹ And finally, we can all laugh. And through our laughter find the will to carry on.

But perhaps the greatest lesson of the integration of the storyteller and the Justice lies in its destruction of the artificial barrier between the personal and the political.³² Justice Marshall is living proof that to be effective in the public arena, the commitment to the stories of everyday life must extend to the arena of everyday life. This is a commitment that we all can share. Regardless of our station in life, we can all work to ensure that our private lives conform to our public protestations, and, conversely, that the institutions with which we are associated respond to the reality of our private experience.

Robert Cover said that “[l]aw may be viewed as a system of tension or a bridge linking a concept of reality to an imagined alternative.”³³ That bridge, which is itself built of the stories of ordinary men and women, in turn becomes the living scroll upon which the narrative history of the polity will be written by a million

29. See, for example, the stories by Langston Hughes entitled *Laughing to Keep From Crying*, in L. HUGHES, *THE LANGSTON HUGHES READER* 30 (1958).

30. In possessing this talent, Justice Marshall joins a distinguished group of masters of indirection in the Black tradition. Consider, for example, Langston Hughes' mini-narrative of *The Fun of Being Black* in America:

This racial struggle of ours in America has so many intricate and amusing angles that nobody taking an active part in it can ever be bored. Its very variety from North to South — from Boston where New England Negroes side with New England whites in opposing black southern migration, to Mobile on the Gulf where a Negro dare not oppose anybody — keeps the contest exciting. In the far West a Negro can sometimes eat in a Mexican restaurant but he cannot eat in a Chinese restaurant — so it is fun figuring out just where you can eat. In some towns a colored man can sit in the balcony of a theatre, but in others he has to sit in the last three rows on the left downstairs because the balcony is for whites who smoke. So trying to see a movie in the United States can be for a Negro as intriguing as working a crossword puzzle!

Those of us engaged in this racial struggle in America are like knights on horseback — the Negroes on a white horse and the white folks on a black. Sometimes the race is terrific. But the feel of the wind in your hair as you ride toward democracy is really something! And the air smells so good!

L. HUGHES, *supra* note 29, at 499-500.

31. Thus Professor Roberto Unger has declared: “It is true that we must be realists to become visionaries; but it is also true that those who surrender go blind. The realities we accept are realities we shall never understand.” R. Unger, *What is the Alternative to Rationalism and Historicism in Legal Thought?* (lecture delivered at Yale Law School, November 12, 1987.) (unpublished transcript on file with the author).

32. See, e.g., Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Kennedy, *The Stages of Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982). As long as we are celebrating humor, see David Shapiro's wonderful parody of Kennedy. Shapiro, *The Death of the Up-Down Distinction*, 36 STAN. L. REV. 465 (1984).

33. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 9 (1983).

separate acts of interpretation by lawyers and legislators and judges. Only by constantly keeping our eyes open to the richness of human experience can we hope to make our legal bridge one that leads to a world that validates the very stories that gave it its genesis. A world, in a word, of justice.

The art of the storyteller *is* the art of the judge. For both must ultimately be concerned with justice. And justice requires that our legal narratives respond and be responsive to the real life stories of people. In Justice Thurgood Marshall, we have someone who has mastered both the public and the private art of storytelling. May he go on telling stories — and doing justice — for many years to come.

What is striking is the role legal principles have played throughout America's history in determining the condition of Negroes. They were enslaved by law, emancipated by law, disenfranchised and segregated by law; and, finally, they have begun to win equality by law. Along the way, new constitutional principles have emerged to meet the challenges of a changing society. The progress has been dramatic, and it will continue.

Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 5 (1987).