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Thurgood Marshall: The Lawyer As Judge

Bennett L . Gershman*

Volume 389 of the United States Reports begins with the following terse note:

> The Honorable Thurgood Marshall, Solicitor General, was nominated by President Johnson on June 13, 1967, to be an Associate Justice of this Court; the nomination was confirmed by the Senate on August 30, 1967; he was commissioned on the same date; he took the Constitutional Oath on September 1, 1967, and the Judicial Oath and his seat on October 2, 1967.

So begins the tenure of one of our most revered Justices. When he took the Oath in 1967, it was the twilight of one of the Court's most brilliant periods: the Warren Court's revolution of criminal and racial justice. He was a part of that alliance for two Terms. When a new Court, and new alliances, moved the Court into the dark shadows, he and his closest colleague, William Brennan, Jr., held staunchly to their vision of the Court's historic function "to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon."[1] He remained faithful to that vision to the end when, as a lone figure from those Halcyon days, he would write in his last opinion, not merely for a Court that had marginalized him, but for all of those Americans who continued to revere him: "Power, not rea-

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1. 116 U.S. 616, 636 (1886).

son, is the new currency of this Court's decision making."[2]

Recalling that 1967 Term, his first Term, now a quarter of a century ago, I remember the ambivalence and the excitement I felt, as a young prosecutor, poring over those famous cases: *Terry v. Ohio*,[3] *Bruton v. United States*,[4] *Duncan v. Louisiana*,[5] *Witherspoon v. Illinois*,[6] *Bumper v. North Carolina*,[7] *Gardner v. Broderick*,[8] *Mancusi v. DeForte*,[9] *Mathis v. United States*.[10] What an incredible Term for attorneys practicing criminal law. What an incredible Term for a new Justice joining forces with the great defenders of the Bill of Rights—Warren, Black, Douglas, and Brennan. Those decisions—several easily denominated "landmark"— imposed new burdens on prosecutors and police, generated new standards to protect constitutional rights, and on the whole made the task of law enforcement far more complex. Although we were prosecutors, most of us believed the cases were rightly decided.

My classes study those cases today. To many of my students, the cases must seem like romantic dicta in an increasingly technical constitutional universe. We strive to give the cases a context; we try to communicate our expectations of their potential for creating social justice. We also study two other decisions authored by Justice Marshall that first Term—*Barber v. Page*[11] and *Powell v. Texas*.[12] *Barber*, an evidence case, involved the permissible use of former testimony as an exception to the hearsay rule. The case was not especially challenging, and as the most junior member of the Court, Justice Marshall wrote an uncontroversial opinion for a unanimous Court denying to the prosecutor under the circumstances the use of highly probative evidence. *Powell*, on the other hand, was quite different and much more complicated, and controversial. Justice Marshall

2. 111 S. Ct. 2597, 2619 (1991) (dissenting opinion).
3. 392 U.S. 1 (1968).
4. 391 U.S. 123 (1968).
5. 391 U.S. 145 (1968).
6. 391 U.S. 510 (1968).
7. 391 U.S. 543 (1968).
8. 392 U.S. 273 (1968).
9. 392 U.S. 364 (1968).
10. 391 U.S. 352 (1968).
11. 390 U.S. 719 (1968).
12. 392 U.S. 514 (1968).

wrote a plurality opinion allowing the imposition of criminal punishment for public intoxication of a person who, as a chronic alcoholic, could not control his drinking.

The 1990 Term, Justice Marshall's last on the Court, must have been a profoundly depressing experience for him. I focus particularly on those decisions that continued the trend of the Burger and Rehnquist Courts to limit the protection of individual rights. The Court enlarged police authority to search,[13] arrest,[14] detain,[15] and extract confessions;[16] further restricted the writ of habeas corpus;[17] made it easier for prosecutors to obtain the death penalty,[18] and more difficult for capital defendants to challenge their executions.[19] Justice Marshall's health also was failing, perhaps the most important factor in his decision to retire. He died less than two years later.

I believe that one of Justice Marshall's most enduring qualities was his ability to transcend appellate abstractions, to understand the grim reality of the adversary system, and to appreciate the imbalance of power that often puts criminal defense lawyers, particularly those lawyers appointed to represent indigents, at such a disadvantage against the State. In contrast to so many appellate judges, notably some who have occupied seats on the Court, Justice Marshall had been a trial lawyer most of his professional life. When a claim was raised in a litigation context, he could understand the claim not as a sterile abstraction from a black and white record. When a prosecutor was accused of having suppressed exculpatory evidence, for example, Justice Marshall saw the claim not as a cold appellate point, but as an issue involving a tangible piece of proof which skilled defense counsel could have developed to her client's benefit, and which might have created the kind of doubt that would prevent the jury from returning a guilty verdict.

Justice Marshall understood how to read and analyze a record, and how to evaluate proof, the kinds of skills that might not

13. Florida v. Bostick, 111 S. Ct. 2382 (1991).
14. California v. Hodari, 111 S. Ct. 1547 (1991).
15. County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991).
16. Arizona v. Fulminante, 111 S. Ct. 1246 (1991).
17. McKleskey v. Zant, 111 S. Ct. 1454 (1991).
18. Payne v. Tennessee, 111 S. Ct. 2598 (1991).
19. Coleman v. Thompson, 111 S. Ct. 2546 (1991).

be sufficiently grasped by appellate judges who had never before tried a case. His dissenting opinions in *Moore v. Illinois*,[20] *United States v. Agurs*,[21] and *United States v. Bagley*,[22] are powerful examples of his careful review of the trial record, markedly different from the majority's superficial review, and how, from the perspective of an experienced trial lawyer, he was able to demonstrate convincingly how the withheld evidence was crucial to the jury's evaluation of the case.

Justice Marshall also understood as a lawyer the premise that underlay the prosecutor's disclosure obligation: "It is the State that tries a man, and it is the State that must insure that the trial is fair."[23] He also understood how that principle conflicted with the "sporting event" model of criminal justice, in which the prosecutor, as a zealous advocate for a victimized public, aggressively seeks convictions. Given those contradictory roles, Justice Marshall understood that prosecutors, even those acting in complete good faith, might corrupt the truth-seeking process by overlooking or downgrading potentially favorable evidence. What state interest, Justice Marshall would ask, could justify withholding from a presumptively innocent defendant, whose liberty or even life is at stake, information that is favorable to his defense?[24] Justice Marshall wrote: "The prosecutor's duty is quite straightforward: he must divulge all evidence that reasonably appears favorable to the defendant, erring on the side of disclosure."[25]

Justice Marshall warned that the Court's rule of criminal disclosure would undermine prosecutorial fairness. The Court's standard for disclosure—that the withheld evidence must be sufficiently important, or "material"—legitimizes nondisclosure, he declared, by allowing prosecutors to withhold undeniably exculpatory evidence and then argue retrospectively that the evidence was not "material." [26] The standard also requires prosecutors to predict what impact various pieces of evidence will have

20. 408 U.S. 786 (1972).
21. 427 U.S. 97 (1976).
22. 473 U.S. 667 (1985).
23. Moore v. Illinois, 408 U.S. at 810 (1972) (dissenting opinion).
24. United States v. Bagley, 473 U.S. at 699 (dissenting opinion).
25. Id.
26. Id. at 699-70.

on the trial.[27] Many prosecutors no doubt will err on the side of disclosure. Many others, however, will gamble that the evidence will turn out not to be material.

Justice Marshall recognized that the greatest threat to reliable fact-finding emanates from the prosecutor's unique and decisive role in the adversary system, and his ability to control the adjudication process. A lengthy footnote is not necessary to support the premise with which many persons, hardened by the realities of the criminal justice system, are acutely familiar: that the prosecutor's suppression of favorable evidence is pervasive, frequently willful, and probably accounts for as many miscarriages of justice as any other single factor.

The system of criminal guilt-finding, as we know it today, is a far cry from Justice Marshall's vision of a process that mandates fair dealing by prosecutors. But his practical wisdom, gained as a lawyer who battled in the trenches of justice, will always be accessible to stimulate the conscience of those government officials who care to do the right thing.

27. Id. at 701.