

CLE SEMINAR

Race Discrimination in Criminal Law

Hosted at:
Federal Public Defender's Office

Speaker:
AFPD Anthony Bornstein

Portland, Oregon
Live on December 13, 2017
12:00pm to 1:00pm

Medford, Oregon
Via video conference on December 13, 2017
12:00pm to 1:00pm

Eugene, Oregon
Live on December 19, 2017
12:00pm to 1:00pm

Bibliography Related to Race Discrimination in Criminal Law

FPD CLE Presentation

Assistant Federal Public Defender Anthony Bornstein

December 2017

Video and Audio Resources, including documentary films and other productions

1. Bryan Stevenson’s TED Talk: “We Need to Talk About an Injustice.”

https://www.ted.com/talks/bryan_stevenson_we_need_to_talk_about_an_injustice

2. “Slavery By Another Name” (PBS documentary)

From the DVD: “This film documents how for more than 80 years, thousands of African Americans, often guilty of no crime at all, were arrested, compelled to work without pay, repeatedly bought and sold, and coerced to do the bidding of white masters.

<https://www.youtube.com/watch?v=UcCxsLDma2o>.

3. Eyes on the Prize: America in the Civil Rights Years, Episode 12. “A Nation of Law.” 1968-1971. This episode of the award winning documentary *Eyes on the Prize* focuses first on the 1969 killing of Black Panther leader Fred Hampton in Chicago. The second segment covers the 1971 Attica prison uprising and the violent suppression by New York state authorities.

<https://www.youtube.com/watch?v=V1B1bVOOH7I>

Eyes on the Prize: Episode 1. “Awakenings: 1954-1956.” This episode focuses, in part, on the murder of Emmett Till in Mississippi and how it served as one event that spurred the civil rights movement of the 1950s and 60s.

<https://www.youtube.com/watch?v=Ts10IVzUDVw>

4. The Murder of Emmett Till (PBS Documentary)

<https://www.youtube.com/watch?v=MrHrMHtR1Ds>

5. **“Object Anyway.”** This is a podcast, by Radiolab, on the case of *Batson v. Kentucky* and race discrimination in jury selection.

<http://www.radiolab.org/story/radiolab-presents-more-perfect-object-anyway/>.

6. **Video essay on the New York Police Department’s stop & frisk polices**
(approx. 13 minutes)

<https://www.youtube.com/watch?v=7rWtDMPaRD8&version=3&hl=en%5FUS&showinfo=0>

<https://www.thenation.com/article/stopped-and-frisked-being-fking-mutt-video/>

7. **“The Central Park Five”** (Documentary film by Ken & Sarah Burns)

<https://www.youtube.com/watch?v=JUfwUgRwKq4>. Watching the full film requires purchase.

8. **“Thirteenth”** (Netflix documentary).

“The film [by Ava DuVernay] chronicles how the U.S. criminal justice system has been driven by racism from the days of slavery to today’s era of mass incarceration. The film is named for the constitutional amendment that abolished slavery with the exception of punishment.”

<https://www.youtube.com/watch?v=X1yJsaFwqDM>

9. **Philadelphia DA Jack McMahon’s notorious jury selection instructional video. This is a training video from the Philadelphia DA’s office.** McMahon is, (or was) a senior prosecutor in that office. Here, he delivers an “educational” lecture to prosecutors on jury selection. In it, he discusses how to keep African Americans off the jury panel and to circumvent the strictures of *Batson v. Kentucky*. The following links are to the full lecture, as well as a one-minute edited excerpt.

<https://www.youtube.com/watch?v=Ag2I-L3mqsQ>

<https://www.youtube.com/watch?v=f40CZR2Fx2w>

10. “Murder on a Sunday Morning”

Academy Award winning documentary about a Florida criminal case from 2000 in which a black teen charged with murder. This is a terrific film.

<https://www.youtube.com/watch?v=LFLbptkb1eM>

11. “OJ: Made in America”

Award winning documentary, from 2016, for Best Documentary, by Ezra Edelman & Caroline Waterlow. From ESPN’s website: “It is the defining cultural tale of modern America – a saga of race, celebrity, media, violence, and the criminal justice system.” The full film can be watched on Hulu and WatchESPN. The Multnomah County Library has the DVD as well. (In all, it runs 7 hours and 47 minutes. Worth every minute!)

12. “Tulia, Texas”

CBS “60 Minutes” segment, from 2002, with Journalist Ed Bradley, on the miscarriage of justice, in Tulia, Texas. (Approx: 13 minutes).

<https://www.youtube.com/watch?v=dngotPqxz1w>

13. “The Talk: Race in America: “The Talk is a two-hour documentary about the increasingly necessary conversation taking place in homes and communities across the country between parents of color and their children, especially sons, about how to behave if they are ever stopped by the police.” (1 hour, 54 minutes).

<http://www.pbs.org/wnet/the-talk/>

14. “LA 92”

From IMDB: “Twenty-five years after the verdict in the Rodney King trial sparked several days of protests, violence and looting in Los Angeles, filmmakers examine that tumultuous period through rarely seen archival footage.” (Available on Amazon).

15. Time: The Kalief Browder Story. From Wikipedia: This is a six-episode documentary released in 2017. It “recounts the story of Kalief Browder, a Bronx high school student who was imprisoned for three years, two of them in solitary confinement

on Rikers Island without being convicted of a crime. He was accused at 16 of stealing a backpack, and his family was unable to afford his bail, set at \$3000. He committed suicide two years later, in 2015.” This is available on Netflix.

16. Michelle Alexander: “Roots of Today’s Mass Incarceration Crisis Date to Slavery, Jim Crow,” Interview on Democracy Now.

https://www.democracynow.org/appearances/michelle_alexander

17. Juror orientation video on unconscious bias.

This video is shown to prospective jurors called for jury service in the United States District Court for the Western District of Washington.

<http://www.wawd.uscourts.gov/jury/unconscious-bias>

18. The Blood is at the Doorstep.

This is from the film’s website: “On April 30, 2014, Dontre Hamilton, a black, unarmed man diagnosed with schizophrenia, was shot 14 times and killed by a Milwaukee police officer responding to a non-emergency wellness check in a popular downtown park.

“Filmed over the course of three years in the direct aftermath of Dontre's death, this intimate verite documentary follows his family as they struggle to find answers and challenge a criminal justice system stacked against them. Offering a painfully realistic glimpse inside a movement born out of tragedy, this explosive documentary takes a behind the scenes look at one of America’s most pressing social issues.”

<https://www.thebloodisatthedoorstep.tv/>

19. The Website of the Equal Justice Initiative `contains several videos on the subject of racial discrimination in the criminal justice system.

<https://www.eji.org/videos>

20. Representative Barbara Jordan’s speech in the 1974 Judiciary Committee Hearings on the impeachment of the President. This is the one video in this bibliography that does not address racial discrimination in criminal justice. It is included for its status as a stirring historic speech calling for the preservation of constitutional

government, delivered by the first African American woman, from the South, elected to the United States House of Representatives. (Approx. 13 minutes).

<https://www.youtube.com/watch?v=y1lkxXOQtVc>

Articles

There are, of course, an unlimited number of articles on this topic. The following list is primarily comprised of articles that are accessible to readers who are not directly involved in the criminal justice system.

1. Bryan Stevenson, “The Presumption of Guilt.” *The New York Review of Books*, July 13, 2017.

<http://www.nybooks.com/articles/2017/07/13/presumption-of-guilt/>

2. Gilad Edelman, “Why is it so easy for prosecutors to strike black jurors?” *The New Yorker*, June 5, 2015.

https://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors?mbid=nl_060615_Daily&CNDID=32477188&mbid=nl_060615_Daily&CNDID=32477188&spMailingID=7803500&spUserID=ODk4NjY5OTU5NjES1&spJobID=700712590&spReportId=NzAwNzEvNTkwS0

3. *Oregonian* article on the historical origins of Louisiana’s and Oregon’s enactments which authorized non-unanimous jury verdicts.

http://www.oregonlive.com/pacific-northwest-news/index.ssf/2017/09/dirty_secret_of_oregon_jury_sy.html

4. Stephen Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death penalty*, 35 Santa Clara L. Rev. 433 (1995).

https://library.law.yale.edu/sites/default/files/discrimination_death.pdf

5. Rick Jones, “Confronting Racism in the Criminal Justice System: We all have a Duty to Act.” *The Champion*, August 2017

6. Norman Reimer, “Racism in the U.S. Criminal Justice System: An Uncomfortable Truth for All of Us.” *The Champion*, August 2017.

7. Jennifer Gonnerman, “Before the Law,” *The New Yorker*, Oct. 6, 2014. The tragic story of Kalief Browder’s ordeal in the New York criminal justice system.

<https://www.newyorker.com/magazine/2014/10/06/before-the-law>

7. For additional articles, see the Marshall Project’s website, linked below.

Websites

1. The Marshall Project

<https://www.themarshallproject.org/?ref=nav>

The Marshall Project’s website contains regular coverage of issues related to racial discrimination in criminal law.

2. The Equal Justice Initiative. “The Equal Justice Initiative is committed to ending mass incarceration and excessive punishment in the United States, to challenging racial and economic injustice, and to protecting basic human rights for the most vulnerable people in American society.”

<https://www.eji.org/>

3. The Sentencing Project: This link is to the Sentencing Project’s website devoted to racial disparity. The page contains links to significant publications on this topic.

<http://www.sentencingproject.org/issues/racial-disparity/>

4. Southern Center for Human Rights.

<https://www.schr.org/>

5. NACDL’s Website related to Restoration of Rights & Excessive Sentencing.

<https://www.nacdl.org/rightsrestoration/>

<https://www.nacdl.org/ExcessiveSentencing/>

6. American Bar Association’s Racial Justice Improvement Project

https://www.americanbar.org/groups/criminal_justice/racialjustice.html

7. The “Scottsboro Boys” Trials, 1931-1937. (The Famous Trials Website).

<http://famous-trials.com/scottsboboys>

8. PBS Website Related to the Film: “The Central Park Five”

<http://www.pbs.org/kenburns/centralparkfive/watch-videos/#2319385180>

9. Website related to the documentary “Scottsboro: An American Tragedy”

<http://www.pbs.org/wgbh/americanexperience/films/scottsboro/>

10. Website Related to the Film: “The Murder of Emmett Till”

<http://www.pbs.org/wgbh/americanexperience/films/till/>

Books

Those with a more contemporary focus

Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (The New Press: 2012).

David Cole, No Equal Justice: Race and Class in the American Criminal Justice System (The New Press: 1999).

The Ferguson Report: Department of Justice Investigation of the Ferguson Police Department (The New Press: 2015).

Policing the Black Man, Arrest, Prosecution and Imprisonment, Edited by Angela J. Davis (Pantheon Books 2017).

Paul Butler, Chokehold: A Renegade Prosecutor’s Radical Thoughts on How to Disrupt the System (The New Press: 2017).

Alice Goffman, On the Run: Fugitive Life in an American City (Picador: 2014) (“*On the Run* reveals a justice system gone awry” as it highlights “the failures of the War on Crime, as well as a compassionate chronicle of the families caught in the midst of it.” – from the publisher)

Paul Butler, Let’s Get Free: A Hip-Hop Theory of Justice (New Press: 2009)

Bryan Stevenson, Just Mercy: A Story of Justice and Redemption (Spiegel & Grau: 2014) (a memoir that “aggregates and personalizes the struggle against injustice in the story of one activist lawyer.” – from Ted Conover’s NYT review)

Chris Hayes, A Colony in a Nation (W.W. Norton & Co. 2017)

Coates, Ta-Nehisi, Between the World and Me (Spiegel and Grau: 2015)

James Forman Jr., Locking Up Our Own: Crime and Punishment in Black America (Farrar, Straus and Giroux: 2017)

Michael Tonry, Race, Crime and Punishment in America (Oxford University Press: 1995)

On specific cases

Matt Taibbi, I Can’t Breathe: A Killing on Bay Street (Spiegel & Grau: 2017) (on the killing of Eric Garner by the New York City police).

Nate Blakeslee, Tulia: Race, Cocaine, and Corruption in a Small Texas Town (Public Affairs: 2005)

James S. Hirsch, Hurricane: The Miraculous Journey of Rubin Carter (Houghton Mifflin Co. 2000).

Historical Books Related to Criminal Justice Issues, Events and Cases

Mark Curriden and Leroy Phillips, Jr. Contempt of Court: The Turn of the Century Lynching that Launched A Hundred Years of Federalism (Anchor Books: 1999).

Charles Lane, The Day Freedom Died: The Colfax Massacre, The Supreme Court, and The Betrayal of Reconstruction (Holt Paperbacks: 2008).

David M. Oshinsky, “Worse Than Slavery” Parchman Farm and the Ordeal of Jim Crow Justice (The Free Press: 1996)

Douglas A. Blackmon, Slavery By Another Name: the Re-enslavement of Black People in America from the Civil War to World War II (Doubleday: 2008).

Robert Whitaker, On the Laps of Gods: The Red Summer of 1919 and the Struggle for Justice That Remade a Nation (Crown Publishing: 2008) (on the Elaine Arkansas racial massacre in 1919 that led to the Supreme Court case of *Moore v. Dempsey*).

Grif Stockley, Blood in their Eyes (Univ. of Ark. Press: 2001) (also on the Arkansas massacre and the *Moore* case).

Kevin Boyle, Arc of Justice: A Saga of Race, Civil Rights, and Murder in the Jazz Age (Henry Holt & Co. 2004) (on the trial of Ossian Sweet).

Phyllis Vine, One Man’s Castle: Clarence Darrow in Defense of the American Dream (Armistad: 2004) (also on the trial of Ossian Sweet). “One of the most intensely significant of all the horrid stories of Jim Crow gone North.” – David Levering Lewis

James Goodman, Stories of Scottsboro (Vintage Books: 1994).

Dan T. Carter, Scottsboro: A Tragedy of the American South (Louisiana State University Press: 1969 & 1979).

Gilbert King, Devil in the Grove: Thurgood Marshall, The Groveland Boys, and the Dawn of a New America (Harper Collins: 2012).

Juan Williams, Thurgood Marshall: American Revolutionary (Times Books 1998)

Timothy B. Tyson, The Blood of Emmett Till, (Simon & Schuster Paperbacks: 2017).

Heather Ann Thompson, Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy (Pantheon Books 2016)

Jeffrey Haas, The Assassination of Fred Hampton: How the FBI and the Chicago Police Murdered a Black Panther, Lawrence Hill Books: 2010)

Thomas Aiello, Jim Crow’s Last Stand: Nonunanimous Criminal Jury Verdicts in Louisiana (Baton Rouge: Louisiana State University Press: 2015)

Selected books related to Capital Punishment

Edward Lazarus, Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court (Penguin 1999). This book contains an illuminating discussion of the Supreme Court's consideration of death penalty cases, including *McClesky v. Kemp*).

Michael Meltsner: Cruel and Unusual: The Supreme Court and Capital Punishment (Random House: 1973)

Michael Meltsner, Race, Rape and Injustice: Documenting and Challenging Death Penalty Cases in the Civil Rights Era (University of Tennessee Press: 2014)



Federal Criminal Justice Clinic Moves to Dismiss Cases because ATF Discriminated on the Basis of Race

September 24, 2016

The [Federal Criminal Justice Clinic](#) has filed Motions to Dismiss for Racially Selective Law Enforcement in 10 federal criminal cases in Chicago, on behalf of approximately 40 indigent defendants. The Clinic has joined with the Federal Defender Program and Federal CJA Panel attorneys to allege that the ATF unconstitutionally discriminated on the basis of race in targeting almost exclusively people of color for its fake stash house cases, in violation of Equal Protection principles.

The motions rely on a Report by [Professor Jeffrey Fagan](#) that rules out race-neutral explanations for the ATF's decisions, leading to the conclusion that the agency selected the stash house defendants based on their race.

Professor Fagan was the expert in the New York City case where a federal judge found the New York Police Department's stop-and-frisk practices unconstitutional.

The motions' claim of intentional discrimination also rests on evidence that the ATF did not follow its own internal criteria when it targeted Black individuals for this kind of case, but scrupulously followed its criteria in the few instances when it went after White individuals. In addition, there is evidence that non-Black ATF agents expressly recruited Black targets on the basis of race.

The motions and supporting evidence, including Professor Fagan's Report, are available here:

- [Motion to Dismiss and Exhibits in *United States v. Williams*, 12-CR-887](#)



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Judith P. Miller

*Assistant Clinical
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- (filed Sept. 23, 2016) (Castillo, C.J.)
- [Motion to Dismiss and Exhibits in *United States v. Brown*, 12-CR-632](#) (filed Sept. 23, 2016) (Castillo, C.J.)
 - [Motion to Dismiss and Exhibits in *United States v. Elias*, 13-CR-476](#) (filed Sept. 26, 2016) (Leinenweber, J.)
 - [Motion to Dismiss and Exhibits in *United States v. Jackson*, 13-CR-636](#) (Sept. 26, 2016) (Durkin, J)
 - [Motion to Dismiss and Exhibits in *United States v. Paxton*, 13-CR-103](#) (Sept. 26, 2016) (Gettleman, J.)
 - [Motion to Dismiss and Exhibits in *United States v. Alexander*, 11-CR-148](#) (filed Sept. 30, 2016) (St. Eve, J.)
 - [Motion to Dismiss and Exhibits in *United States v. Cousins*, 12-CR-864](#) (filed Oct. 11, 2016) (Feinerman, J.)
 - [Motion to Dismiss and Exhibits in *United States v. Davis*, 13-CR-63](#) (filed Oct. 11, 2016) (Darrah, J.)
 - [Motion to Dismiss and Exhibits in *United States v. DeJesus*, 12-CR-511](#) (filed Oct. 12, 2016) (Zagel, J.)
 - [Motion to Dismiss and Exhibits in *United States v. Davila-Hadley*, 12-CR-713](#) (filed Oct. 12, 2016) (Feinerman, J.)

Expert Report of Professor Jeffrey Fagan

The Clinic's litigation is in the national news:

Brad Heath, "[ATF Drug Stings Targeted Minorities, Report Finds](#)," USA Today (Sept. 23, 2016)

"A new report has found "strong, consistent and statistically significant" evidence that federal gun agents singled out minorities for controversial drug stings in Chicago.

The stings had been a centerpiece of efforts by the Bureau of Alcohol, Tobacco, Firearms and Explosives to target violent crime. Agents lured suspects with the promise of a huge payday for robbing a drug "stash house" that did not actually exist, then left them facing long prison sentences for plotting to resell the imaginary drugs. . . .

ATF agents operating around Chicago have arrested 94 people in the undercover stings since 2006; 91% were either black or Hispanic. . . . The new report, prepared by Columbia Law School professor Jeffrey Fagan, found only a 0.1% chance that agents could have selected so many minorities by chance, even if they were targeting only people with criminal records that suggested they were likely to be part of a robbery crew, as ATF policies require. Those results, Fagan wrote, show that "the ATF is

discriminating on the basis of race” in choosing targets for the stings. . . .

The report was filed alongside motions by a University of Chicago legal clinic to dismiss federal charges in three ATF sting cases because agents intentionally targeted minorities. That request also accuses the agency of violating its internal rules for conducting the sting when agents targeted black and Hispanic suspects, but not when they targeted whites. Defense lawyers in seven other sting cases said they anticipate that similar requests will be filed to drop the charges against their clients as well, an unusually broad challenge to federal law enforcement tactics.”

Thurgood Marshall: The Influence of a Raconteur

Sandra Day O'Connor*

I was fresh out of Stanford Law School, working as a civilian attorney in the Quartermaster Market Center, the day Thurgood Marshall changed the nation. He had been chipping away at the building blocks of a separatist society long before 1954, of course, but it was through *Brown v. Board of Education*¹ that he compelled us, as a nation, to come to grips with some of the contradictions within ourselves.

Like most of my counterparts who grew up in the Southwest in the 1930s and 1940s, I had not been personally exposed to racial tensions before *Brown*; Arizona did not have a large African American population then, and unlike southern States, it never adopted a *de jure* system of segregation. Although I had spent a year as an eighth grader in a predominately Latino public school in New Mexico, I had no personal sense, as the plaintiff children of Topeka School District did, of being a minority in a society that cared primarily for the majority.

But as I listened that day to Justice Marshall talk eloquently to the media about the social stigmas and lost opportunities suffered by African American children in state-imposed segregated school, my awareness of race-based disparities deepened. I did not, could not, know it then, but the man who would, as a lawyer and jurist, captivate the nation would also, as colleague and friend, profoundly influence me.

Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice.

At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.

Although I was continually inspired by his historic achievements, I have perhaps been most personally affected by Justice Marshall as raconteur. It

* Associate Justice, United States Supreme Court.

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

was rare during our conference deliberations that he would not share an anecdote, a joke or a story; yet, in my ten years on the bench with him, I cannot recall ever hearing the same "TM" story twice. In my early months as the junior Justice, I looked forward to these tales as welcome diversions from the heavy, often troublesome, task of deciding the complex legal issues before us. But over time, as I heard more clearly what Justice Marshall was saying, I realized that behind most of the anecdotes was a relevant legal point.

I was particularly moved by a story Justice Marshall told during the time the Court was considering a case in which an African American defendant challenged his death sentence as racially biased. Something in the conversation caused his eyebrows to raise characteristically, and with a pregnant pause, to say: "That reminds me of a story." And so it began, this depiction of justice in operation. "You know," he said:

I had an innocent man once. He was accused of raping a white woman. The government told me if he would plead guilty, he'd only get life. I said I couldn't make that decision; I'd have to ask my client. So I told him that if he pleaded guilty, he wouldn't get the death sentence.

He said, "Plead guilty to what?"

I said, "Plead guilty to rape."

He said, "Raping that woman? You gotta be kidding. I won't do it."

That's when I knew I had an innocent man.

When the judge sent the jurors out, he told them that they had three choices: Not guilty, guilty, or guilty with mercy. "You understand those are the three different possible choices," he instructed. But after the jury left, the judge told the people in the courtroom that they were not to move before the bailiff took the defendant away. I said, "What happened to 'not guilty?'" The judge looked at me, and said, "Are you kidding?" Just like that. And he was the "judge."

As he neared the end of his tale, Justice Marshall leaned forward, pointed his finger at no one in particular, and said with his characteristic signal of finalé, "E-e-e-end of the Story. The guy was found guilty and sentenced to death. But he never raped that woman." He paused, flicking his hand. "Oh well," he added, "he was just a Negro."

With the aid of this low-key narrative, Justice Marshall made his own legal position quite clear: in his view the death penalty was not only cruel and unusual punishment in violation of the Eighth Amendment, it had never been, and could never be, administered fairly and free of racial bias. Although I disagreed with Justice Marshall about the constitutional validity of the death penalty, his story made clear what legal briefs often obscure: the impact of legal rules on human lives. Through his story, Justice Marshall reminded us, once again, that the law is not an abstract concept removed from the society it serves, and that judges, as safeguarders of the Constitution, must constantly strive to narrow the gap between the ideal of equal justice and the reality of social inequality.

Justice Marshall's stories served for me another function. Beneath his

wit and charm and rambunctiousness, he is an intensely private man; there are sides to him no one but his family will ever know. But over the years, as he shared stories of Klan violence and jury bias, of co-opted judges and dishonest politicians, I have gained an insight, a peephole really, into the character of a man who is at once eternally at peace and perpetually at war.

"S-a-a-a-n-d-r-a-a-a," he called out once, "did I ever tell you about the welcome I received in Mississippi?" It was early evening in a small town in Mississippi in the early 1940s and he was waiting to hop the next train to Shreveport. "I was starving," he told me, "so I decided to go over to this restaurant and see if one of the cooks would let me in the back to buy a sandwich. You know, that's how we did things then; the front door was so inconvenient!" Before he could go over, Justice Marshall recounted, "a man of your race holding a pistol sidled up. 'Boy,' he said, 'what are you doing around these parts?' I said, 'I'm waiting to catch the next train.' He said, 'Listen up boy because I'm only gonna tell you this once. The last train through here is at 4 p.m. and you better be on it cuz niggers ain't welcome in these parts after dark.'"

"Guess what," Justice Marshall added, a twinkle creeping into his eye, "I was on that train."

What Justice Marshall did not say, what he had no need to say, was how physically threatening and personally humiliating the situation must have been. Left unspoken, too, was the anger and frustration any grown man must have felt at being called "boy" and run out of town. It is not surprising, really, that these sentiments were relegated to the backdrop; unlike many national figures, Justice Marshall is not interested in publicizing the risks he has taken or the sacrifices he has made. Instinctively, he downplays his own role, as though it were natural to hide under train seats, or earn \$2,400 a year as a lawyer, or write briefs on a manual typewriter balanced, in a moving car, between his knees. To Justice Marshall, these hardships warrant no comment; they are simply the natural extension of a lifetime credo of "doing the best you can with what you've got."

But to those of us who have traveled a different road, Justice Marshall's experiences are a source of amazement and inspiration, not only because of what they reveal about him but also because of what they instill in, and ask of, us. I have not encountered prejudice on a sustained basis. But I have experienced gender discrimination enough, such as when law firms would only hire me, a "lady lawyer," as a legal secretary, to understand how one could seek to minimize interaction with those who are intolerant of difference. That Justice Marshall never hid from prejudice but thrust himself, instead, into its midst has been both an encouragement and a challenge to me.

I asked him, once, how he managed to avoid becoming despondent from the injustices he saw. Instead of responding directly, he told me about the time he and his mentor, Charles Hamilton Houston, the vice-dean at Howard Law School, traveled to Loudoun County, Virginia, to help a man on

trial for his life. The man, George Crawford, had been indicted by an all-white Grand Jury of murdering a white woman from a well-to-do Virginia family, as well as her white maid. Despite their defense challenge to the exclusion of African Americans from the jury, Crawford was convicted of murder by an all-white jury, and sentenced to life. "You know something is wrong with the government's case," Justice Marshall told me, "when a Negro only gets life for murdering a white woman."

After the trial, Justice Marshall said, the media asked if Crawford planned an appeal based on the exclusion of African Americans from the jury. "Crawford said, 'Mr. Houston, if I have another trial, and I got life this time, could they kill me the next time?' Charlie told him yes. So Crawford told Charlie: 'Tell them the defendant rests.'"

"I still have mixed feelings about that case," Justice Marshall added. "I just don't believe that guy got a fair shake. But what are you going to do?" he asked. "There are only two choices in life: stop and go on. You tell me, what would you pick?"

Even now, I still think about Justice Marshall's backhanded response, wondering how one confronts, as he did, the darkest recesses of human nature—bigotry, hatred, and selfishness—and emerge wholly intact. Although I probably will never completely understand, part of the answer, I think, lies in his capacity for narration itself. His stories reflect a truly expansive personality, the perspective of a man who immerses himself in human suffering and then translates that suffering in a way that others can bear and understand. The past he relates—doused in humor and sadness, tragedy and triumph—is but a mirror of himself: a man who sees the world exactly as it is and pushes on to make it what it can become. No one could help but be moved by Justice Thurgood Marshall's spirit; no one could avoid being touched by his soul.

As I continue on the bench, a few seats down from where he once sat, I think often of Justice Marshall. I remember the morning we first met and the afternoon he left the bench. I remember the historic law suits he brought and the thoughtful opinions and dissents he wrote. I recall his unwavering commitment to the poor, the accused, and the downtrodden, and his constant, impassioned repudiation of the death penalty. More than that, though, I think of the raconteur himself. Occasionally, at Conference meetings, I still catch myself looking expectantly for his raised brow and his twinkling eye, hoping to hear, just once more, another story that would, by and by, perhaps change the way I see the world.