THE JUDGE

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One of the first things Mr. Justice Marshall tells his law clerks is not to call him Mr. Justice. He rejects this ostentatous title prefering to be called simply "Judge," the title by which he is uniformly and affectionately known to his law clerks. Although he is one of only nine members of the nation's most important court, "The Judge" is not a man who is comfortable with displays of adulation or self-congratulation. These introductory instructions tell the new law clerk a good deal about the individual for whom he or she will be working for the next year.

This impatience with the ceremonial perquisite of his office has not been accompanied by a similar discomfort with the authority of that office. Throughout his career on the Court, Thurgood Marshall has unhesitatingly used that authority to serve what he understands to be the interests of justice. The Judge insists that legal niceties not be allowed to disguise underlying realities, and that his service of justice not be unduly restrained by the orthodoxy of the academy.

Elsewhere in this issue, the Judge's major opinions in the development of the law are discussed; those opinions show the Judge's willingness to create legal doctrine rather than allow injustice to go unremedied. But the Judge's less well-known opinions, such as his dissents from the denial of certiorari, are equally characteristic. The "cert. dissent," "little noted nor long remembered," is written when a Justice feels compelled to dissociate himself from what has transpired. The Judge, along with Justice Brennan, continues to record his dissent in a brief statement each time the Court allows a sentence of death to stand. During the Term we worked for the Judge, he authored longer cert. dissents in a handful of cases: once when a Black man was convicted of raping a white woman without having been permitted to voir dire the jury concerning race prejudice;[1] once when a poor man was forced to stand trial in jail clothes because he could not afford street attire;[2] once when a defendant was sentenced to ten years in prison for robbery on the flimsiest of evidence;[3] and once when the constitutionality of an ordinance imposing a curfew on persons under sixteen years of age was upheld below.[4] These dissents illustrate the passion for justice with which the Judge approaches every case before the Court, no matter how small.

This is not to say that the Judge ignores either the procedures or the precedents of the law. His greatest personal triumphs were achieved through the law; he is devoted to it in the highest sense. Despite his frequent disagreements

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1. Dukes v. Waitkevitch, 429 U.S. 932 (1976).
2. Karen v. California, 429 U.S. 900 (1976).
3. Freeman v. Zahradnick, 429 U.S. 1111, 1116-20 (1977).
4. Bykofsky v. Middletown, 429 U.S. 964 (1976).

with his present colleagues, he remains dedicated to the Supreme Court as an institution. For the Judge, the Court speaks through the majority. He will subvert neither the will of the majority nor procedural rules, no matter how strong his substantive disagreement. In consultation with the Court, the Judge overruled Justice Douglas' attempt to stay the Cambodian bombing.[5] Last term, despite his personal abhorrence of the death penalty and serious doubts about the procedures that had been followed,[6] he refused to issue a grandstand stay of Gary Gilmore's execution.[7] In the Judge's view, justice can be achieved only through adherence to the law.

For the Judge, there must be a delicate balance between this institutional duty and the competing pull of the legacy of his past. The tension can be seen in his opinions in equal protection cases. There he has evolved a legal theory that is a far more sensitive measure of unequal treatment than the Court's rigid mode of analysis. His theory allows consideration of all relevant social factors in the constitutional decision.[8]

In this way, the Judge has sought to make law responsive to social reality instead of forcing society into the mold established by legal doctrine. And the Judge has a remarkable grasp of that social reality. He had not forgotten the lessons of a quarter century's travel all over the nation in the cause of the poor, the unpopular, and the oppressed. At an opportune moment in an argument, a story from those days will begin. Through these annecdotes, the Judge brings his unique experience and insights to bear on the problems at hand.

This ability to present a view of society unfamiliar to his colleagues and to detect whose ox is being gored in a legal battle is appropriately complemented by the Judge's wonderful sense of humor. No tribute could be complete without mentioning that attribute, which serves him both personally and professionally. One recalls with great fondness the Judge walking arm in arm down the Court's marble corridors with Justice Brennan. The Judge, a great bear of a man, towers over his ever enthusiastic and gregarious friend. Whatever the discussion—the day's lunch menu or the latest threat to a fragile majority coalition—it is sure to be soon punctuated by a burst of humor from one of the Justices. And the two men roar with laughter as they part. The Judge's sense of humor served him well in his earlier role as a leader in the battle for civil rights. No doubt his ability to see the humor and expose the ridiculous aspects of situations still serves that defusing function when the Justices' conferences grow particularly heated.

The Judge's directness, lack of pomposity, strength of conviction, and sense of humor combine to make working for him a particularly pleasurable experience. His willingness to share the knowledge, understanding, and wealth of good stories he has accumulated during a unique career of leadership makes that experience extraordinarily educational as well. As in all close and demanding

5. Schlesinger v. Holtzman, 414 U.S. 1321 (1973). Mr. Justice Marshall's original opinion on the stay application expresses his views on the Court's collegial character particularly well. *See* Holtzman v. Schlesinger, 414 U.S. 1304, 1313-15 (1973).

6. *See* Gilmore v. Utah, 429 U.S. 1012, 1019 (1976) (Marshall, J., dissenting).

7. The N.Y. Times, Jan. 18, 1977, at 21, col. 3.

8. *See, e.g.*, Beal v. Doe, 97 S.Ct. 2394, 2396-98 (Marshall, J., dissenting); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 317 (1976) (Marshall, J., dissenting); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 98 (1972) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519 (1970) (Marshall, J., dissenting).

relationships, there are difficult moments, but at bottom, one sees in the Judge a profound humanity. It is a love of people, all people—all races, faiths and nationalities—that graces both his opinions and his personal relationships.

For the past ten years, this country has benefitted from the Judge's membership on its highest Court. If Providence is as kind to the United States as some have said, we will celebrate his 20th year on the Court ten years hence.