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Not with Our Tears

Owen Fiss[†]

He loved to tease me. He knew my heart was pure, but he was amused by the excesses of reason to which I was often drawn. Burke aspired to a workable government. Quixote-like, I wanted something more perfect—a heaven on earth. Burke understood the foolishness of this dream but always tempered his reserve with kindness and made light of our differences.

In the summer of 1963, between my first and second years of law school, I worked at the firm of Covington & Burling in Washington. The work was dreadful. I spent my days scanning invoices for “corn syrup unmixed” to see if I could detect a violation of the Robinson-Patman Act. It was very hard for me to keep going, but soon I noticed that all the earlier memoranda in the file had been initialed by Burke, who, having left the firm in 1960 to become the Assistant Attorney General in charge of the Civil Rights Division, was then at the center of the public life of the nation. So I managed to convince myself to persist, because corn syrup unmixed and all that it implied seemed indispensable training for public lawyers.

The March on Washington took place in August 1963. I had returned to Harvard shortly before to complete my legal studies, but soon, as the civil rights cause took on greater urgency, I found myself uneasy with the career plans I had formulated. History was being made and I wanted to be a part of it. In early November 1963—after the bombing of the Sixteenth Street Baptist Church in Birmingham, and only weeks before the assassination of President Kennedy—I flew from Boston to Washington with the wild idea of presenting myself to Burke Marshall for a job. I went straight to Burke’s office, and asked the secretary guarding his office if he was available. She asked who I was, I explained, and then she said, looking down to the floor to avoid the obvious awkwardness of the situation, that he was not in at the moment. She referred me to his Second Assistant, St. John Barrett, who was kind enough to give me a job application. I filled it out, and went home.

For the next three years, I marked time. I completed my last year at Harvard, clerked, and then in September 1966 began work in earnest at the

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Civil Rights Division. By that time, however, Burke had stepped down as Assistant Attorney General. He was succeeded by his First Assistant, John Doar, an extraordinary figure in his own right. John needed no help from anyone, yet he often turned to Burke for advice. Burke was then working for IBM in New York, and John conferred with him by telephone, often in the evening, always taking notes in a black notebook. Sometimes, as with the formulation of the government's position in *Walker v. City of Birmingham*, I would sit in John's office and listen to one side of the conversation. That case arose from Dr. King's historic campaign in Birmingham during Easter 1963. According to John, Burke thought that the government should stress the caste-like character of the system that Dr. King was protesting. My job, maybe my life's mission, was to elaborate and make more concrete Burke's insight—a task all the more difficult because I had never met the man.

In late 1973, the House Committee on the Judiciary launched an inquiry to determine whether there was a basis for impeaching President Nixon. John Doar was chosen to head the inquiry. I was then a young professor at Chicago. Early one January morning John called and I soon found myself commuting to Washington in between classes, spending sleepless days on end writing briefs and memoranda. A number of other persons from John Doar's staff at the Civil Rights Division pitched in. So did Burke. By that time, Burke was a professor at the Yale Law School, living in Newtown, Connecticut. Now and then John and Burke saw each other in Washington, but for the most part they conferred by phone. John once again took notes in a black notebook. My job was about the same: to make legal sense of Burke's reflections, though this time I felt a little bit more entitled to disagree with him. I always seemed to be out of town when Burke visited the offices of the impeachment inquiry, but John made certain to tell me of Burke's reactions to my ideas. Not all of them, maybe not most, were favorable. I supported Article III of the Bill of Impeachment, which had made the failure of President Nixon to comply with the congressional subpoenas a ground for impeachment, but Burke thought that too was one of my excesses, almost an encroachment on the privilege against self-incrimination. In later years, he often teased me about it.

As I was commuting between Washington and Chicago during the spring of 1974, a call came from the Dean of the Yale Law School, Abe Goldstein, inviting me to New Haven for a day of interviews. Job-seeking has its own set of anxieties, as we all well know, but the ones I was experiencing then were compounded by the fact that the decade-long pursuit was almost over—I was about to meet Burke Marshall. In planning for my visit, I asked the Dean if I might sit in on a class to get a better sense of the students, and he suggested that I visit a seminar that Burke Marshall and Joseph Goldstein were then teaching. The seminar was entitled, in the

true Yale tradition, “The Limits of the Law.” I asked what the seminar was about. The Dean said, also in the great Yale tradition, “I am not sure.” I pressed him. Finally, he speculated, “I think it’s about the legal regulation of science.” At 2:10 p.m., I walked into the seminar, and met Burke Marshall for the first time. He and Joe Goldstein then briefly introduced me to the class. It immediately became clear that this was the last word they intended to say. The trap they had so gleefully set was sprung—I was to conduct a class on the impeachment process then unfolding.

I had to work hard in order to respond to the student questions, and to weave my responses into a coherent account of the conflicts surrounding the impeachment. All my attention was focused on the students. Yet I was acutely aware of the presence of Burke in the classroom—a mythical figure had become a breathing, living person. Burke did not say much—he never did. His initial interview in 1960 with Robert Kennedy, then the Attorney General, was legendary—apparently neither said a word to each other for the longest period, maybe for the entire interview. During the class, Burke preserved a quiet, almost noble reserve, relieved only by an occasional shrug, a knowing smile, or a brief intervention, yet I could almost see in his eyes the qualities of intellect and character that made him all that he was.

Over the next thirty years, I enjoyed the marvel of Burke’s friendship, mostly over lunch, hamburgers at Heidelberg until it became a Thai restaurant, then onto Mory’s; sometimes we even indulged ourselves with a lunch outdoors on the patio of Scoozzi. In all these conversations, there was always time for the personal. Burke spoke about a way of life that was far removed from anything I had experienced—fishing in the West, Christmas vacations in Tortola, summers in Maine, or his love of boating. He often spoke of Violet’s garden and her latest culinary masterpiece. I was then struggling with the teenage years of my daughters, which, quite frankly, seemed to go on forever. He would comfort me by talking about his three daughters, Josie, Catie, and Jane, and their youthful escapades. Told in retrospect, the stories were always imbued with loving amusement, as a way of assuring me that I too would survive.

Law school politics also figured in our lunches. Burke deeply cared about the school, and had clear and strong views about what should be done. Yet he was reluctant to press those views on anyone, including me. Even more remarkably, he steadfastly declined to participate in the debate that often divided the faculty. It was just not his style. He read what was to be read, and explained his views to anyone who asked. Now and then he presented the findings of some committee he chaired, or reported on an appointments candidate. Yet I cannot recall any instance over the last thirty years in which he willingly, let alone eagerly, entered into the faculty fray. He sat quietly and listened. Sometimes we plotted together beforehand, and he assured me, though only indirectly, that he would take the floor. I knew

what he planned to say, but in the end he let the moment pass without a word. After each vote, which invariably allowed the Dean to have his way, Burke, with a sparkle in his eyes, chided me—why me?—because the faculty had acted, so he said, like a bunch of sheep.

Burke took his teaching very seriously. He spent hours preparing for class, writing notes for himself on the assigned reading in a style that fully accorded with the Civil Rights Division tradition—in a black notebook. The case for the day or a student's response was frequently the subject of our lunches. When Burke taught procedure, he was foolish enough to use the teaching material that Bob Cover and I, and later Judith Resnik, were working on—something Bill Eskridge once very charitably described as a procedural mardi gras. Burke, always in control of every technical detail of a case, the lawyer par excellence, was gracious and kind, and turned what must have been utter bewilderment with the material into amusement. Teasing me, he often asked why I had not included in our material the order issued by one of the federal courts in the *Meredith* case, enjoining each and every sheriff in the State of Mississippi from interfering with desegregation. Since I viewed this as an absolutely appropriate exercise of the federal judicial power—certainly not Burke's view—I never had a good answer.

In the early 1980s, Burke and I together with Renata Adler, then a recent graduate of the Law School who had covered the South during the 1960s for the *New Yorker*, embarked on a project that exceeded our collective abilities. We believed that an important part of the truth of the civil rights era lay in the visual images that we so powerfully recalled. Photographs taken during that period memorialized the protests and marches, but they were not readily available to the new generation of lawyers (*Eyes on the Prize* did not yet exist). With the idea of publishing a collection of these photographs, framed by a text, we contacted most of the photographers who had covered the South during the early 1960s, as well as many of the leaders of the civil rights movement, and spent endless hours sifting through one photo archive after another. In all these endeavors, Burke invariably led us to the images that revealed the nobility of those who were claiming their rights: not the turbulence, not the conflict, not the violence, though there was plenty of that in the 1960s, but rather the long, patient lines of black citizens, some quite elderly, outside a polling place, waiting to vote for the very first time in their lives.

This project, even more than our lunches, drew Burke back to the early 1960s, and as our relationship deepened I began to understand more and more the source of his greatness. Burke fully appreciated the radical nature of the change that was afoot in that period, but marveled at the thought that such change could occur both within the law and in response to it. His title for the book we never published was "Revolution by Law." Burke loved the irony: Although law is often thought of as a means of maintaining order and

preserving the status quo, in *Brown v. Board of Education*, he said, it performed another role altogether. Law was the edict of change. The law did not suppress the social activism that so marked the period, but rather sought to protect and channel it as a way of bringing to fruition profound changes in society—changes that the law itself had decreed.

In pointing to this unique, indeed remarkable, role that law played in the civil rights era, Burke was expressing his own very special understanding of law: Law for Burke was no maze of technical regulation, but had a unity and coherence because it was founded on principle. Burke was a man of the world and deeply understood the affairs of state. Yet unlike others who might have possessed this unique gift, Burke stood alone in his devotion to principle. He did not acquiesce or capitulate to practical reality. He was not, to use one of his few terms of disapproval, a fixer, but rather fiercely, relentlessly, almost endlessly, insisted upon adherence to principle. His workable government was always a principled one.

It was Burke's dedication to principle that made him so admired by those who exercised the power of the state, and even by those who took to the streets. There was an aura to his word, universal respect for his judgment because it rested on principle. There were those who disagreed, especially those who fiercely resisted the changes afoot and sought to preserve the Jim Crow system, but all respected his position. Even those who disagreed admired him. His devotion to principle was also manifest in his teaching. He brought his enormous practical experience as a lawyer to the Yale Law School, and then went on to demonstrate by example and word why, even in the face of the most excruciating practical pressures, there was room, indeed a need, for principle. In this way he showed his students and his colleagues how the practice of law could be a noble profession.

Many of us were inclined to claim Burke as our hero. Burke always resisted such expressions of admiration—I would say he even cringed at them. He denied that he was anyone's hero. In so doing Burke may have simply been reflecting his own remarkable and very endearing modesty—he was probably the most modest man I ever knew. Yet there was something more to his reticence. A hero, according to Burke, was someone who does more than one's duty, a person who acts in a way that no one has a right to expect or demand. Burke denied that he ever did any such thing.

The heroes of the civil rights era for Burke were people like Bob Moses, or John Lewis, or the countless individuals who led voter registration drives, sat in on lunch counters, participated in the Freedom Rides, and put their lives on the line during Freedom Summer. They took risks that no one had a right to expect. Burke placed himself in another category altogether. True, he launched voting discrimination suits, used the

power of the nation to protect those who dared to challenge the established order, counseled the President, and shaped the Civil Rights Act of 1964 in decisive ways. But Burke insisted that in all these endeavors he was only doing what was required of him as a lawyer. He did only that which any lawyer should have done. He was doing his duty.

On that account, I give Burke his point. Maybe he was not a hero, but only because he saw the profession of law in such heroic terms. He attributed his remarkable achievements to the profession to which he belonged and through which he acted. It is this vision of law, Burke's vision—law as a principled, almost heroic profession—that enabled him to guide the nation at one of the crossroads of its history. It is this vision of law, Burke's vision, that was the deepest and most enduring lesson that he taught us. We honor the man not with our tears—though there have been plenty of those—but by living the law in a way that properly reflects its principled character.