



2004

# Burke Marshall

Anthony T. Kronman

Follow this and additional works at: <https://digitalcommons.law.yale.edu/ylj>

## Recommended Citation

Anthony T. Kronman, *Burke Marshall*, 113 *YALE L.J.* (2004).

Available at: <https://digitalcommons.law.yale.edu/ylj/vol113/iss4/7>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in *Yale Law Journal* by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact [julian.aiken@yale.edu](mailto:julian.aiken@yale.edu).

# Burke Marshall

Anthony T. Kronman<sup>†</sup>

In the spring of 1974, Burke Marshall and his dear friend Joe Goldstein offered a new course at the Yale Law School. They called their course “The Limits of the Law.” Burke and Joe would teach the course frequently over the next nineteen years, often joined by a third good friend, Aharon Barak, the Attorney General of Israel and later President of his country’s Supreme Court. Over time, the content of the course changed, but its title and theme remained the same, and soon it became a fixture in the curriculum of the Law School.

The theme of the course was the limited power of law to control the forces that lie beyond it: to contain the consequences of scientific research, which follows imperatives of its own; to transform the political and economic realities over which every program of social justice eventually stumbles; and to bind the human heart, whose nobility no law can compel and whose depravity no law can expunge.

The principle of law is a principle of order and fairness. As the domain of law expands, the world becomes a fairer and more orderly place. But the expansion of law is always incomplete. Its ambition for order and fairness can never be perfectly achieved. There will always be forces that resist the law and that remain beyond its powers of control. The law will always have a frontier, along which it confronts passions and habits that challenge its aspiration to fairness and order and that make the world a more violent place than law can either fully subdue or finally accept.

The students who were lucky enough to work with Burke and Joe learned two lessons, neither of which can be found in any casebook.

The first was that we must acknowledge the limits of the law—especially if we have a part to play in its administration. Not to do so is to lapse into a utopianism that is both impractical and dangerously liable to discouragement.

---

<sup>†</sup> Dean and Edward J. Phelps Professor of Law, Yale Law School. This Tribute is an edited version of oral remarks given at a memorial service for Burke Marshall at the New Haven Lawn Club on September 21, 2003.

The second was that we must never give up the dream of law, even as we recognize with wakeful candor the realities that constrain it. A practical utopianism, mindful of the world and its violence but unbroken in spirit, neither deluded nor discouraged, alert to the barriers that block the path of justice but determined, with a steady and hopeful heart, to find a way over or around them: That is what Burke's students learned in his seminar with Joe, and from everything else that he taught them. And it is what they learned from the life Burke lived, a lesson larger than any classroom.

In the way great teachers always do, Burke taught his students what to care about. He taught them to care about justice, and to care about the law as its instrument and expression. Burke made it impossible to be a cynic about the law, to believe that it is just a compromise worked out by competing forces, each seeking some advantage of its own. He forced his students—and his colleagues—to hold on to the idea that law aims at something higher: an equality of treatment that honors our belief in the dignity of the individual and that gives life to the concept of justice. And he made it impossible to be a cynic about the law in another way as well: He made it impossible to reject the law as an instrument too weak to reach the higher end of justice, or a vessel too small to contain it. Burke forced his students—and his colleagues—to keep faith with the law. He forced us to hold on to the idea that with all its imperfections, with all the delays and disappointments that attend its forward motion, the law is still the last, best hope we have of achieving justice here on earth, in the America Burke loved.

I say Burke “forced” his students and colleagues to recognize these things, but anyone who knew Burke must sense how inappropriate this word is to describe anything he did. Burke was the gentlest man I have ever known. He never forced anyone to do anything. Listening to his quiet voice, which seemed at times on the verge of vanishing, I was tempted more than once to say, “Burke, speak up! We can't hear what you're saying.” But it was not in Burke's character to speak up, and he didn't have to. The truth is, we always heard what he was saying. There was more steadiness and power in Burke's voice than in a roomful of orators, of whom there are more than a few on the faculty of the Yale Law School.

Burke's authority had a special source. It derived from the fact that he had himself experienced the limits of the law. Burke had walked along the frontier that divides the law from the violence beyond it. He had shown courage under fire, in service to the law, never flinching, never wavering, patient and resolute, in the hour of crisis and afterwards, steadily down the years. Burke Marshall was a great theoretician of justice. He could debate the subject with an intellectual agility equal to that of any of his colleagues. But that is not what made Burke special. What made Burke special was his courage, a quality he possessed to a unique degree, and one that showed

itself not in flamboyant acts of daring, but in just the opposite way, in a quietly unbendable devotion to the cause of equality under law, which is the cause of law itself. Courage does not always appear in the guise of Achilles, filled with wrath and dressed in armor. Sometimes it looks like Burke Marshall, self-effacing, modest, slightly stooped, frail even, making the largeness of will in which courage consists more striking on account of the physical frame it inhabits.

I have never known a man more courageous than Burke Marshall. But courage is a relative virtue—its worth depends on what one is courageous about. Burke would have been the first to point this out. If he were here today, and heard me call him a courageous man, Burke would, I'm sure, demur, and remind us gently that the important thing is justice, deflecting attention, as he always did, from himself to his ideals. But even if we shift our focus to the idea of justice itself, to the great abstraction that directs the law, we cannot help noticing that Burke Marshall's notion of justice had a personal aspect too, however much he might have wished to distract us from it, or been embarrassed by our dwelling on it.

Some subscribe to the idea of equality for philosophical reasons. They have been argued into belief. Others endorse equality for reasons of political expediency. Under the circumstances, they say, it offers the best chance for peace in human societies made up of men and women so different and disputatious. Burke belonged to neither group. He was an egalitarian from love.

We think of love as a private emotion, but it has its public side too. Love can be felt even for those we know only at a distance, and impersonally, as the members of a group. The name we give this more public form of love is compassion. For the victims of injustice, for the excluded and denied, for those whose humanity fails to register in the eyes of others—others who see them as inferior or unworthy or who fail to see them at all—Burke Marshall felt an immediate compassion that sprang not from philosophical conviction or a judgment of political expediency, but from some anterior goodness in his soul. He felt their wounds directly and made them his own, never with pretension or fanfare, always with dignity and calm, until his own slight frame seemed bent beneath their weight. Burke filled the great phrases of our Constitution with compassion. His compassion gave them life. He knew that the promise of the law must be measured from the point of view of those who stand outside its circle of regard. Son of Exeter and Yale, Covington Partner and IBM General Counsel, Assistant Attorney General of the United States, Professor of Law at Yale, he embraced the hopes of the excluded and bent his powers to insure that the promise of the law be kept to those whose disappointment matters most. He took up their cause as a champion of law, and he did it out of love.

Beyond the limits of the law are violence and disorder. But love lies beyond the limits of the law as well. The law cannot legislate love. It cannot compel compassion. Yet without love the law is a hollow form. It is order without heart. The law demands equality—so insistently that law itself has been defined as the principle of treating equals alike. But to know what equality means we must look beyond the law. We must find, beyond the law, the feeling of fellowship that is the source of all human compassion, of our ability to see ourselves in others, and others in ourselves. Burke Marshall taught us that. He taught us that law is a calling because it serves the imperatives of love, and he showed us how to serve without discouragement, for a lifetime, even when love and law are far apart. Those of us who were lucky enough to have been within Burke's orbit can never forget that lesson, or lose the hope he inspired.