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# Tributes

## “To Feel the Great Forces”: The Times of Burke Marshall

Patricia M. Wald<sup>†</sup>

Just about this time in October 1948, forty-seven years ago, a motley crew of legal neophytes, the class of 1951, gathered at Yale Law School to be “oriented” into the mystique of our profession. I use the word “motley” advisedly because we ran the gamut from combat-weary veterans of World War II—some, heroes at an early age—to innocent young things like myself whose longest journey to that time had been the bus ride from upstate Connecticut to New Haven. Temporarily buried in the mid-alphabet “M’s” (I was Miss McGowan then), but still gender-prominent as one of ten women in the class, I was frankly terrified. All around me appeared articulate, worldly, sophisticated, omniscient classmates possessed of supreme confidence, noble bearing, vast knowledge about how the legal system worked and who were its chief prophets, which professors were allied with which causes, who graded hard and easy. Cosmopolitan upperclassmen like Charlie Wright, Mike Seymour, Bayless Manning, Frank Wosencraft, and Jay Topkis roamed the halls, effortlessly crossing and crisscrossing between the smoke-filled student lounge, professors’ aeries, classrooms, and the *Law Journal* offices. Near despair, I noticed a slight and nervous young man seated near me in the M’s. He appeared at least as cowed as I—his voice was low and tremulous; he spoke only when spoken to. As the term progressed and the terrible moments multiplied when one of us was called upon by Fleming James, the Darth Vader of Torts, or J.W. Moore, the Pontiff of Federal Procedure, this outsider became my secret support, my O’Henry painted leaf on the brick wall. As long as he did not fall from the tree, neither would I. What he did say in class was on point, focused, pithy, unembroidered by allusion or attempted wit. And he bore

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<sup>†</sup> Judge, U.S. Court of Appeals for the District of Columbia Circuit. This Tribute and the two that follow it are based on remarks given at the presentation of the Law School’s Medal of Merit to Burke Marshall on Oct. 7, 1995.

no trace of contact with the anointed circle of the wise and all-knowing. The facade, of course, was torn away at the end of the first semester when Burke Marshall was unmasked as a class leader, eventually a *Law Journal* officer and a sage and authoritative presence in the Law School. But by then he had already served his prime function for me—an illusory but necessary brake against a dreaded fall into the abyss below.

Fast-forward a decade. Washington-based Yale lawyers from the early '50s are busy with their law firms, their suburban school boards, their kids. The Marshalls—Burke and Violet and their three daughters—live a few blocks away in Chevy Chase from the rapidly multiplying Walds; we share pediatricians, the YLS Alumni Association, and some embryonic attempts to integrate the local public pool. Burke has established a reputation as an eminent antitrust expert. And then one day in early 1961 we pick up the *Washington Post* and with some astonishment see that our newly elected President, John F. Kennedy, has chosen Burke Marshall as head of the Civil Rights Division at Justice.

Victor Navasky's account of the critical interview between Burke and Robert Kennedy in his book *Kennedy Justice*—however accurate—sounds plausible. Describing the successful young Covington partner as “reticent” and “frail-looking,” he recounts that Marshall at the end assumed he would be offered the Antitrust spot, if indeed he were offered anything at all. The interview was reportedly a disaster—neither man said a word for ten minutes, after which Burke told his wife, “I blew it,” and Kennedy confided to an associate, “I have nothing in common with that man.”<sup>1</sup>

But, according to then-Deputy Attorney General Byron White, Burke was exactly what the new administration wanted, not “a committed civil rights activist . . . set on using law as a social instrument.” Instead, ““We thought it would be more interesting to get a first-class lawyer who would do the job in a technically proficient way that would be defensible in court—that Southerners would not think of as a vendetta, but as an even-handed application of the law.”<sup>2</sup>

The Senate quickly confirmed Burke, after making sure that he had no affiliation whatsoever with the NAACP or any other civil rights organizations (though they fretted a bit about a contribution to the ACLU). He freely admitted under somewhat anemic questioning that he had no experience in the civil rights field and no plans or agenda to carry forward into his new job. He described his future duties like this: “We will present a case when we think a case is justified, and the court will either decide it for or against the

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1. VICTOR S. NAVASKY, *KENNEDY JUSTICE* 161–62 (1971).

2. *Id.* at 162.

Government. If it decides for the Government, it will order relief."<sup>3</sup> Over and out. He had thirty-one lawyers at his disposal.

That, of course, was not the way things were destined to work out between 1961 and 1965—five pivotal years for the civil rights movement, convulsive ones for the nation; years in which Burke Marshall stood tall in the vanguard of the country's long overdue push to make the right to vote real for black Americans. No chronicle of those tumultuous times—Richard Reeves's *President Kennedy*,<sup>4</sup> Taylor Branch's *Parting the Waters*,<sup>5</sup> Navasky's *Kennedy Justice*,<sup>6</sup> Jack Bass's *Taming the Storm*,<sup>7</sup> PBS's award-winning *Eyes on the Prize*<sup>8</sup>—fails to document his central role in planning the strategies; negotiating with the players, Martin Luther King, Governors Barnett and Wallace; arguing the appeals before Frank Johnson, Minor Wisdom, and the other "unlikely heroes"<sup>9</sup> on the Fifth Circuit bench (not a one of whom would be a sure bet for confirmation—or even nomination—today); and parsing the constitutional basis for the Civil Rights Act of 1964. He had alongside, it is true, a magnificent DOJ team—Byron White, John Douglas, Louis Oberdorfer, John Nolan, John Siegenthaler, John Doar, Steve Pollak, not everyone from Yale, but most—under the direction of Attorney General Robert Kennedy, a man who, in the words of columnist Joe Kraft, "got everybody to play above their heads."<sup>10</sup> But, on the other hand, it is easy to forget, in Doar's words, the "really incredible lack of experience all of us had, from the Attorney General on down."<sup>11</sup>

It must be difficult for those of you not of our generation to understand or appreciate the savagery, the intensity of the opposition in the early '60s to according blacks the right to vote, a right formally accorded them by the Fourteenth Amendment nearly a century before. With Robert Kennedy's pronouncement that the Justice Department would enforce basic suffrage, a hellish defiance broke loose. Southern registrars routinely rejected black applicants for failing literacy tests, failing to fill out complex forms correctly, failing to pay poll taxes. It often took months to notify an applicant if he or she had passed the voting test; registration offices were closed except for a few days a month; the names of all newly registered voters were published so as

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3. *Nomination of Burke Marshall to Be an Assistant Attorney General: Hearings Before the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. 5 (1961) (statement of Burke Marshall).

4. RICHARD REEVES, *PRESIDENT KENNEDY: PROFILE OF POWER* (1993).

5. TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63* (1988).

6. NAVASKY, *supra* note 1.

7. JACK BASS, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS* (1993).

8. *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965* (Blackside, Inc. & PBS Video 1986-87).

9. JACK BASS, *UNLIKELY HEROES: THE DRAMATIC STORY OF THE JUDGES OF THE FIFTH CIRCUIT WHO TRANSLATED THE BROWN DECISION INTO A REVOLUTION FOR EQUALITY* (1981).

10. NAVASKY, *supra* note 1, at 182.

11. BASS, *supra* note 7, at 150.

to expose them to private vigilantism, harassment, and intimidation; prospective voters were required to "interpret" arcane tax provisions in the state or U.S. constitutions.

For civil rights leaders, fuming under such treatment, the time had come to stand and fight. In rapid succession came the Freedom Riders, buses full of white and black riders traversing state borders to defy the segregated canons of the deep South, the violence-ridden integration of the University of Mississippi by James Meredith, the Birmingham sit-ins and boycott of segregating merchants, the bombing deaths of little black girls at a Birmingham Sunday School, the March on Selma with Bull Connor's police dogs and firehoses loosed on demonstrators, and finally the "I Have a Dream" March on Washington. These events had little to do with tidily filed civil rights complaints entered onto federal court dockets for the wise disposition of thoughtful and diligent judges. These were blood-and-guts battles for human bodies and souls. In a 1983 retrospective, the *New Republic* commented about those years:

It is hard to remember, but the role of the Department of Justice as an activist participant in the affairs of government began with Robert F. Kennedy. No longer just the office of the "President's lawyer," the Department under RFK became a place where active justice could be furthered, the rights of Americans vindicated, and the priorities of social policy tested and then reenforced.<sup>12</sup>

According to Navasky, the speculation was that Burke was originally picked by Robert Kennedy for his "quiet style, his caution and precision that won [Kennedy's] respect and total confidence in his judgment."<sup>13</sup> But, Navasky points out, the irony was that Burke

spent the bulk of his time and made his greatest contribution in a distinctly extra-legal capacity. For Marshall was the field general, the executive officer of the extraordinary Kennedy corps of problem-solvers, the free-lance pragmatists who were dispatched across the land on *ad hoc* assignments. Technical lawyering turned out to be only a small part of the job.<sup>14</sup>

And, as it turned out, his decisions were not universally hailed. Burke was, we are told, the "conservative voice" in the administration ranks, raising states' rights and the tolerable contours of federalism as a legitimate concern in decisions whether and when to send in the troops, to federalize the National Guard, to move in court for contempt against intransigent Southern governors.

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12. *R.F.K. Remembered*, NEW REPUBLIC, June 27, 1983, at 4, 4.

13. NAVASKY, *supra* note 1, at 162.

14. *Id.*

He worried—some thought unduly—about the long-run implications of the federal government taking over local law responsibility. He pointed out repeatedly, “They [the locals] are going to be there when we leave.” Yet he was in the middle of the decisionmaking process when 400 deputy marshals were dispatched to Montgomery to protect the Freedom Riders; when backup troops were mobilized for the integration of Ole Miss; and when a critical decision was made not to use police dogs as crowd control devices for the March on Washington. Still it was not enough for some civil rights activists, and eventually the stakes escalated for Burke, too. After the small children were bombed at their Sunday School, President Kennedy, with Burke’s counsel, began the historic process that led to the passage of the Civil Rights Act of 1964. Burke was close by when the President drew his famous line in the sand:

If an American, because his skin is dark, cannot eat lunch in a restaurant open to the public, if he cannot send his children to the best public school available, if he cannot vote for the public officials who represent him, *if, in short, he cannot enjoy the full and free life which all of us want*, then who among us would be content to have the color of his skin changed *and stand in his place*. Who among us would then be content with the counsels of patience or delay.<sup>15</sup>

Only a month earlier, when the President had called the Alabama National Guard into federal service in response to the Birmingham bombings, Burke had reportedly commented, “‘He’s gambling his presidency on this one.’”<sup>16</sup> The roulette wheel continued to spin.

One account of Burke’s activities during this period is particularly illustrative—his negotiations to end the boycott by local black citizens of the white-owned segregated businesses in Birmingham:

There had been lunch-counter sit-ins, followed by protest marches, followed by Easter Sunday kneel-ins. There had been court injunctions, police dogs, cattle prods and the arrest of Martin Luther King, Jr., and thousands of other forms of harassment. By the time Burke Marshall arrived, thousands of Negroes were in the streets (over half of them children).

. . . .  
Marshall arrived and his technique was appropriate. He talked and talked and talked and talked. He reminded the whites of the minimal demands of the blacks—the right to have a cup of coffee, the right to token jobs, amnesty for the demonstrators. He warned King against trying to provoke outside troops, arguing that the solution had to

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15. President John F. Kennedy, Jr., Radio and Television Report to the American People on Civil Rights, 1963 PUB. PAPERS 468, 469 (June 11, 1963).

16. Richard Reeves, *Clinton's Big Gamble*, SACRAMENTO BEE, Sept. 25, 1993, at B6.

come from within. And he warned local business leaders that failure to arrive at a solution was, among other things, bad for business.

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 . . . "I don't know what would have happened if it hadn't been for Burke," says one who was on the scene. "King would have been killed and we would have had either a civil war or hundreds of thousands of troops down here. That could have happened."<sup>17</sup>

In 1965, after he had served briefly under President Lyndon Johnson and Attorney General Nick Katzenbach, Burke left the Civil Rights Division, which would be led successively by two other Yalies, John Douglas and Steve Pollak, and still later in President Carter's administration by Drew Days—the Yale line of succession (in Democratic administrations) broken only by the controversial withdrawal of Lani Guinier's nomination in 1993. Thirty years later, Burke told a seminar reflecting on the accomplishments and significance of that tumultuous period:

When I came to the Civil Rights Division and when I worked with some of you, our mission was clear. It makes things easy if you have a very clear mission. Our mission was clearly to dismantle the system [of voting discrimination] that Judge Wisdom described in his *Louisiana* decision. . . . What we came to do, in the years that I was there, went far beyond that because we got deeply involved in what Judge Wisdom called the job of "making *Brown* sink in."

...  
 Now it seems to me that the Civil Rights Division has to redefine its mission because its mission is diffused by the diversity of interests and diversity of problems that it has to deal with . . . .

. . . [There] are people that are untouched by all the statutes that the Civil Rights Division has at its disposal to try to deal with racial problems of this country. They are the people in the inner cities that are growing up without educational hope; without economic hope; without law hope, just in terms of crime and crime abatement; without any escape so that it appears to go on generation after generation. There are millions of Americans who are identified both by economic class and by race and are left out and left behind.<sup>18</sup>

After leaving the Civil Rights Division, Burke went to IBM for several years as a corporate executive. But even in those years he never really left the public service. He joined issue on a wider battleground. He became the chair of the board of the newly created Vera Institute of Justice, a private organization devoted to working with local governments on the most intractable problems of our violence-ridden cities, including policing, court

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17. NAVASKY, *supra* note 1, at 218–19.

18. *Symposium: The Department of Justice and the Civil Rights Act of 1964*, 26 PAC. L.J. 765, 809–10 (1995).

administration, corrections, and low-cost housing. Herb Sturz, who helped found Vera and was for almost two decades its Executive Director writes:

No one I can think of could have brought Vera more credibility. Whenever Burke's name was mentioned there was instant respect. . . . The benefit of every doubt went Vera's way. Vera was the happy beneficiary of Burke's caring, wisdom and innate decency.

Burke, by force of example, makes people around him behave better than they otherwise might.<sup>19</sup>

During his double-decade tenure as chair of Vera from 1965 to 1986, Burke accomplished small miracles. Starting with a few dedicated staffers and a couple of donated rooms in a walk-up off Sixth Avenue (Dan Freed and I were among those early workers), the Institute pioneered the first bail reform project in the country, releasing nondangerous pretrial defendants with community ties who could not afford bail bonds. Within a few years there were sixty projects across the country replicating the Manhattan Bail Project. In 1966, when President Johnson signed the Bail Reform Act, he personally credited Vera's work as its source. There were other successes: diversion programs with treatment for narcotics addicts; the Bowery Project offering medical and counseling services as an alternative to the streets for 20,000 homeless alcoholics; community-policing programs that previewed national initiatives two decades later; a flagship Victim Service program for protecting and counseling victims of urban crime; community-service sentencing experiments; and low-cost housing projects.

Since its beginnings in the 1960s, Vera has spawned ten nonprofit private reform organizations, and now has a staff of 235. Burke stepped down from the chair several years ago, but remains an active board member and has recently accepted the chair of its latest spinoff, the Center for Employment Opportunities. The Center provides job training and employment to 1200 prisoners coming off of parole and out of prison onto the streets of New York City every year. Like Burke—sparse, low-profile, and infinitely flexible—Vera has endured and contributed for thirty-five years to making the governmental systems that so vitally affect ordinary people's lives “play above their heads.”

When Burke left the Civil Rights Division there were infinite battles unfinished or not yet joined. When he left Vera's chair, the tangible and important projects he had snaked through the Byzantine labyrinths of city bureaucracies had still not stemmed the tides of poverty, immigration, racism, and crime that overwhelm our cities. But he left a lasting mark on both terrains. Someone said about him: He had a “genius at getting adversaries to

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19. Letter from Herbert Sturz to the Honorable Patricia M. Wald (Sept. 13, 1995) (on file with author).



translate lofty slogans into five- or six-point demands which could be mediated, arbitrated, negotiated.”<sup>20</sup>

In the 1970s, Burke returned to Yale Law School. With typical understatement, he had been approached as a candidate for Dean, declined, and came on as a Deputy Dean, stayed a simple professor (if there is such a thing at YLS). In Joe Goldstein’s words (who came to New Haven with Burke as a law student from the same U.S. Army service in Japan, and has remained his lifelong friend), Burke brought to Yale an “integrity,” an “authenticity” that over the years has made him a “rock and a magnet” to the Yale students.<sup>21</sup> YLS students saw in their midst not merely someone who made history but someone who worried about it afterwards, and was still striving for honorable principles to draw on in those terrible moments of crisis that endlessly characterize public life. Burke hasn’t sought the limelight and his modesty has never dimmed. As one of his colleagues reports, students in or out of his classes know his door is open and they freely knock.

And quite predictably he still struggles with the future of our public law and the tenets that drive our government servants. In the post-Watergate era, he wrote about the problem of “compelling obedience by public lawyers to the rule of law”;<sup>22</sup> he underscored with a *mea culpa*, his own knowledge in the ’60s of dubious searches and wiretappings, asking: “If it is not up to public lawyers—and perhaps to the legal profession as a whole—to implement such rules through their advice and their representation of clients, then on what segment of society, or what other distinguishable group, does that burden fall?”<sup>23</sup> He continued to meditate on the proper boundaries of federalism, and to voice opposition to post-Watergate proposals to limit the Department of Justice’s function to law enforcement and to divorce it from policymaking: “The core of the Department’s work, [he said,] in all its Divisions, is . . . deeply and inextricably interwoven with the policy decisions and directions of the President and his administration.”<sup>24</sup> Watching the Department’s role over the years, I think Burke had it right.

When you are into middle age—and beyond—it often seems as though you and those who have been important to you have lived many lives, been many different people at different times, some no longer recognizable or even remembered with clarity. It is audacious for most of us to hope that even one of our lives will leave its mark on the history of our times. If it happens, we are profoundly grateful to fate even if the mark is known only to ourselves or an intimate few. (Washington and the political life of America is full of single-

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20. NAVASKY, *supra* note 1, at 196.

21. Conversation with Prof. Joseph Goldstein, Professor of Law, Yale Law School (Sept. 20, 1995).

22. Burke Marshall, *The Control of the Public Lawyer*, in *LAW AND THE AMERICAN FUTURE* 167, 168 (Murray L. Schwartz ed., 1976).

23. *Id.* at 170.

24. *Id.* at 177.

performance actors soon forgotten.) And when the blazing opportunities come early in life, it is the emblem of true merit to fashion a fine, steady, contributory after-life. That is the feat that Burke Marshall has accomplished so admirably in his decades at Vera and here at Yale—with, we all hope, more to come. He has, in Holmes's words, rendered

the best service that we can do for our country and for ourselves: To see so far as one may, and to feel, the great forces that are behind every detail . . . to hammer out as compact and solid [a] piece of work as one can, to try to make it first rate, and to leave it unadvertised.<sup>25</sup>

That is why it is such a privilege for me, his nervous and naive classmate of old, to share the honor of presenting Yale Law School's Medal of Merit to him today.

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25. Oliver Wendell Holmes, *The Class of '61*, in 3 *THE COLLECTED WORKS OF JUSTICE HOLMES* 504, 504 (Sheldon M. Novick ed., 1995).

