

The Straight Road: A Tribute to Burke Marshall

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Burke Marshall was the kind of man you'd name your son after, a person who was also a personage. Of his many stately deeds, it is the person I remember.

We first met personally in 1977, as I was graduating from law school, and our connection never flagged for over a quarter of a century. As a member of my doctoral committee, he was unobtrusively helpful; as book endorser, generous; as coauthor of Supreme Court briefs, his steady hand was clear, incisive, brilliant without flash. As legal advisor, engaged colleague, and supportive, present friend, he was always there.

Ever present tense, Burke was so much himself, open, curious, informed, a bit guarded. With Burke, you got a lot more than what you saw. He was a kind of radical, an egalitarian personally and politically. What made it possible for him to be who he became under Kennedy was also what made his connection to someone like me possible. He was unassuming and unpretentious. He loved riding to fancy events in my beat-up 1982 Isuzu pickup, previously a delivery vehicle for an auto parts store, and he always asked after its health. He had a quietness that didn't stick out, disappearing into an audience or a hallway, and you got the feeling he liked it that way. From race to sex—on sex he was less visible but no less passionate—from public to private, the person and the personage gave lived meaning to the word integrity.

But what comes back most indelibly is that voice—flinty, gravelly, a bit reedy, ever so slightly patrician—in which he delivered his laconic, epigrammatic, telegraphic views, often with a bit of a barb lurking in there that could be missed, but that it was good not to underread or underestimate, buried under his reserve and so much tact. In that voice, he delivered his one-to-one words-to-meaning ratio. No gossip, all inside

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story. No heavy judgment, all good counsel. Pithy without being terse, he got to the essence of things and people, summing up everyone and everything in—now that I count them—eight words or less.

From twenty-five years of our long-running conversation comes back his personal generosity, the way he never forgot who people really were. “He’s an awfully nice fellow”—this of Ramsey Clark, whom he knew from Justice Department days and I was litigating against at the time. “Terrific stuff”—this of Renata Adler on libel, whom he took me to hear reading and speaking on that work.¹ “She’s the real thing”—this of federal judge Gabrielle Kirk McDonald when she was appointed to the tribunal for the former Yugoslavia. And it was all true.

He was balanced, never overstated. Once, when I was reading Taylor Branch’s wonderful history of the civil rights movement,² I told him, “Burke, there’s quite a lot about you in that book.” “What does he say?” asked Burke. “He says you’re the guy everybody trusted.” Burke took a beat. “Well . . . not everybody.” Describe what was happening to you and Burke would say, “Kitty, that’s awfully nice,” and the sun came out, or “Well, that’s pretty terrible,” and you didn’t feel so crazy for being outraged. And I’ve never run into those people who didn’t trust Burke.

Then there were what I’ve come to think of as haiku by Burke: his ten op-eds in one eight-word sentence. “It was a relief when she stepped down”—this on testimony by someone other than Professor Hill at the Hill-Thomas hearings. “What they need around there is an adult”—this on the search for White House counsel in a recent administration. His legal judgment was unsparing, including of himself. “Well, Kitty, then I did the wrong thing”—this of not filing an amicus brief in *Hudnut*, a case on pornography I worked on, when he learned that the Seventh Circuit opinion was summarily affirmed by the Supreme Court.³ He was pragmatic and unapologetic. “It was for practical reasons at the time”—this from an animated discussion we had in connection with *United States v. Morrison*,⁴ on why, way back then, he had decided to defend Title VII under the Commerce Clause rather than the Equal Protection Clause. He stood his ground without rigidity. “Maybe it was overbroad, but I didn’t think substantially so”—this on losing *R.A.V.*, a case on cross burning in which

1. See RENATA ADLER, RECKLESS DISREGARD: *WESTMORELAND V. CBS ET AL.*, *SHARON V. TIME* (1986).

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

3. See *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986) (mem.).

4. 529 U.S. 598 (2000).

we filed a brief together for the National Black Women's Health Project,⁵ taking a position largely vindicated in *Virginia v. Black* last Term.⁶

Then there was Burke at the end of his rope with years of silent frustration, speaking of successive committee chairs as "each one more disorganized than the last," and of someone I think he would like you to guess, as "not a very trustworthy person."

He was wry, trenchant, and self-deprecatingly funny. As the years went on, and I increasingly asked after his health, one day it dawned on me to inquire after his beloved Violet, who was also, of course, getting on in years. "How's Violet's health?" He took a beat. "Her health problems are something that interferes with her tennis." Ever understated, deflecting attention from himself, he described his hours-long transfusions for the blood disease that took him: "Well, it *is* tedious, but you can read."

After Burke said what he had to say, there wasn't much left that needed saying. Call him out of the blue, he always made time, always sounded happy to hear, and always had the right question—which in my case was, "Where *are* you?" He always wanted to know. One day, toward the end of his life, he called by surprise early one morning. We were soon deep in discussing something political when I looked out the window and saw a bobcat. "Burke, there's a bobcat on the hill!" He took a beat. "What's it *doing*?"

He was such an unobtrusive presence, becoming the context for what is possible in your life. I feel unaccompanied without him.

So goodbye Burke, truth-teller, behind-the-scenes freedom fighter, quiet upright standup guy, self-effacing hero, always-there gentle friend. No more long discussions of cases where your simple questions always turn out to be the most crucial. No more early morning phone calls about the birds outside the window, your favorite pink flowers, or the train trips we dreamed of taking through the English countryside in the spring that you, thankfully, took. No more four-hour lunches with one glass of good red wine where you, old school, always grabbed the check with creative and unanswerable arguments that became a long-running joke: "You can take me out to dinner when you have a job." "It was my idea." "You came all this way." Late last year, I conceded defeat: "You never are going to let me take you out, are you." And so did you: "You can pay some other time." You won that one too.

The example of Burke's life leaves us with the question of whether the values he lived are the values that really are valued here and in public life: uprightness, lack of horn-blowing, smart practicality without opportunism,

5. Brief of Amicus Curiae the National Black Women's Health Project in Support of Respondent, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (No. 90-7675).

6. 123 S. Ct. 1536 (2003).

just-do-it thought-act convergence, principled let-the-chips-fall courage. Are we growing more people like him? I wish I thought so.

What turned out to be the last thing Burke said to me, in that same steady spare voice, is at once a description of his life and a benediction by Burke on life itself, as well as a veritable sonnet by Burkean standards of length: "Keep your mind on where you're headed, and the road will roll out straight in front of you."