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Remembering Boris

Think back. Boris Bittker's life at the Yale Law School began as an entering student, in September of 1938, sixty-seven years ago, in the closing months of the deanship of Charles E. Clark, just before Dean Clark decamped for the Second Circuit.

When Boris graduated with honors in 1941,[1] he too decamped for the Second Circuit, to clerk for Jerome Frank. A year later, Mr. Bittker went to Washington. Boris was a government lawyer from 1942-1943 and again from 1945-1946. But what was Boris doing from 1943-1945? You won't find out in *Who's Who*. The answer is that Boris was in the Army, in Europe, in combat—where he was wounded. But evidently Boris didn't think it worthy of mention. He was not one to wear his Purple Heart on his sleeve.

In 1946, Boris returned to Yale Law School as an assistant professor. His return was somewhat reluctant. His teachers had voted to "call" (as the academy has been wont to put it) their highly prized student back to his alma mater. Boris didn't want to be rude to his teachers. But he really liked lawyering for the government and thought it reasonably important, and he wasn't at all sure that he would enjoy teaching. So Boris made a deal with Dean Wesley Sturges. He rassled Sturges into giving him a one-year initial appointment instead of the customary three years. And Sturges, to show his

1. Of the 124 graduates, thirteen received the degree cum laude, signifying "*A* averages." "Boris I. Bittker, B.A. Cornell University 1938, of Rochester, New York" was one of the thirteen, as was "Potter Stewart, B.A. Yale University 1937, of Cincinnati, Ohio." *Reports of the Dean and of the Librarian of the School of Law for the Academic Year 1940-1941*, BULL. YALE U., Dec. 1, 1941, at 16-17 [hereinafter *Reports of the Dean*]. Dean Ashbel G. Gulliver noted that "[t]his was an unusually large number of *A* records, as indicated by the fact that, during the ten preceding years, there was an average of approximately five *A* students in the graduating class, and the largest preceding number was eight in the Class of 1939. This is but one indication of the excellent work done by an outstanding class during its entire law school career." *Id.* at 17. Boris was also a co-recipient of "[t]he Benjamin Scharps Prize, for the most meritorious essay done in connection with a law school course." *Id.* at 16.

gratitude, threw in a sweetener: Boris's government salary was $8000. Sturges signed up Boris for $4000, which was only $500 below Yale University's prescribed minimum salary for an assistant professor. Boris really knew how to negotiate.

Assistant Professor Bittker found that he liked teaching—and sensed that his students approved. (We did approve, as did later generations.) Boris decided to stay for a second year. And then another, and another. Until, after thirty-seven years, Sterling Professor Bittker became emeritus—retiring from teaching so that he would have more time for scholarship.

Of the quality and significance of Boris's tax scholarship, the testimony will have to come not from me, but from those qualified to assess it. I will content myself with the submission that Boris's preeminence in tax law has no analog in other fields of law today or for many generations back. Even Arthur Corbin had Samuel Williston to contend with.

Putting tax aside, I will be so bold as to say a word about Boris's forays into another field—constitutional law. When I was a callow junior colleague, wondering what meager chance there was that essays on equal protection or the First Amendment could possibly be deemed tenure-worthy, I rather supposed that Boris regarded constitutional law as fluff—too "soft" for real law-type persons to spend serious time on—although Boris would be much too kind to say so. And then in 1962 there appeared, out of the blue, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*[2]—a dazzling, probing, virtuoso performance. It was as if Louis Armstrong had picked up a cello and turned into Yo-Yo Ma. But Boris, having shown that he could play any instrument, promptly returned to the Internal Revenue Code. A decade later, though, came another major deviation, the challenging inquiry, *The Case for Black Reparations*.[3] Published in 1973, the book grew out of a seminar Boris had offered four years before—a seminar Boris had put together in two weeks, during the Christmas recess in 1968, in response to demands of the Black Law Students Union, in mid-December, that, inter alia, the faculty offer courses "relevant" to the professional endeavors of black lawyers. The opening paragraphs of the book offer a rare view of how teaching and scholarship inform each other in the hands of a master:

2. 71 YALE L.J. 1387 (1962).

3. BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS (1973). For articles linking tax law and constitutional law, see Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285 (1969); and Boris I. Bittker & Kenneth M. Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L.J. 51 (1972).

> At the first meeting of a Yale Law School seminar on "The Role of the Black Lawyer," a black student put this question to me: "Would the courts award damages to my people for the value of their labor during the days of slavery?" I took his question at face value, and answered "No." I knew that proposals to end slavery often included compensation to the slave owner for his lost "property," but that in the case of the slaves the main economic objective was to keep them from becoming public charges in the future, rather than to pay them for work done in the past. I also knew that the post-emancipation call for "forty acres and a mule" was not answered, so that "the bondsman's two hundred and fifty years of unrequited toil," to use Lincoln's phrase, remained unrequited. Against this background, there seemed to me no likelihood that today's courts would hold that a right to compensation had been inherited by the descendants of the emancipated slaves.
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> My answer, however, probably mistook the form of the question for its substance. The student's intent was probably to imply that our system of law is shaped by political and economic power and that it serves those who possess that power, not those who live their lives outside the mainstream of American society. Moreover, in putting this proposition to me, he was probably not interested in an exchange of views in order to refine or modify his own conclusions. More likely, he wanted to decide whether I was an unrealistic believer in legal neutrality or a clear-eyed observer of legal bias.
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> Whatever his purpose and however many levels there were to his question, however, its face value—is or should there be a right to recover for slavery or for the century of segregation that was its aftermath?—seemed weighty to me.[4]

In 1989, six years after Boris had become emeritus, and two hundred years after the coming into force of the Constitution, there appeared *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*.[5] This vital contribution to

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4. BITTKER, *supra* note 3, at 1-2. John Simon points out that, after the book was published, Boris came to regret the title—*The Case for Black Reparations*—since it seemed to imply that the author felt the case for reparations was stronger than the case against, and, therefore, that those seeking reparations should prevail, whereas Boris intended the book—as the book's text makes plain—to be a preliminary canvass of arguments pro and con, which, hopefully, would be a catalyst of a national conversation on problems of large dimension.

5. 77 CAL. L. REV. 235 (1989).

the ongoing great debate on how judges should construe the Constitution was prefaced, in footnote 1, by an "apology" that was vintage Bittker:

> I apologize to my colleagues and fellow workers in the constitutional law vineyard for submitting this Article for publication before vetting it with them. My academic habits were fully formed before the custom of vetting manuscripts with everyone in sight began. Indeed, I entered academic life thinking that only farm animals could be vetted. Thus, subject only to the inalienable defense of invincible ignorance, the author accepts full responsibility for all errors in this Article. On the other hand, should the reader find any merits herein, they need not be credited to the author's colleagues.[6]

In retrospect we can see that the 1989 essay on original intent was the turning point in Boris's scholarly career, the point at which he decided that tax law would have to fend for itself and that he would bend his efforts to fixing the Constitution. Ten years later, in 1999, Boris completed his one-volume treatise on the Commerce Clause—the treatise modestly called (at the instance of the publisher, not the author) *Bittker on the Regulation of Interstate and Foreign Commerce*, a title adroitly conveying the writer's proprietary interest in the subject matter and placing the work on a very select reserve shelf of legal tomes alongside such older works as the Napoleonic Code and Newton's Laws. (Meaning no disrespect for Boris, I find it easier to refer to the work by its handy acronym, BOTROIAFC.) In the preface, Boris wrote:

> When I turned my attention, a decade ago, from federal taxation, which had been my principal academic specialty, to constitutional law, one of my colleagues commented that after my forty years of focusing on the Internal Revenue Code, it was in worse condition than when I started; and he accordingly suggested that I should keep my hands off the Constitution. I have gone ahead anyway, but I hope that I have at least done our national charter no harm.[7]

In this brief memorial tribute I have focused on Boris the teacher-scholar. I have said nothing of his crucial institutional roles—mentor to younger colleagues, Nestor to all. Little wonder that when in 1965 it fell to President Kingman Brewster to select a new Dean—a Dean to succeed Eugene V. Rostow, after Rostow's pathbreaking ten years—Boris was "everyone's first

6. *Id.* at 235 n.1.

7. BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE, at xxiii (1999).

choice."[8] But Boris declined, famously saying, "No, Kingman, I'll be the best Dean Yale Law School never had." He had more important work to do.

Writing in 1941, the year that Boris graduated, Dean Gulliver described a gala dinner in April of that year celebrating the fiftieth anniversary of *The Yale Law Journal*. "There was," according to the Dean, "complete unanimity in the choice as guest of honor for this occasion of Professor Corbin." Corbin, the Dean went on, "has unquestionably contributed more to the forward progress and fine character of this School than any other person."[9] Sixty-five years later it would seem proper to say that Professor Bittker has joined Professor Corbin in the school's firmament.

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The afternoon before Boris's memorial ceremony, a group of Boris's family and friends, led by Boris's children, Susan and Daniel, walked from 445 St. Ronan Street, the Bittker home for so many years, to the Law School. We were retracing Boris's daily walk to work—a walk on which some of us who lived nearby would frequently accompany him. As we neared the Sterling Law Building that afternoon, I was put in mind of walking with Boris on his first day back from a sabbatical in Italy decades ago. Our regular path was multiply impeded. During the previous months, construction had gotten under way on Yale's new science center, and the grassy slopes of yore were scarred with ditches and plastic fencing. Detours were obligatory. Boris was not happy about this callous disregard of his easement. When we at long last reached the school, and Boris was back at his desk, he pulled out a sheet of notepaper and wrote to the President of the University. "Dear Kingman," the letter began, "Who takes care of the University when I am away?"

Boris is again away. It is left to us to take care of this university and this school—and to take care of our country, which this school and this university serve. And we will do this best by taking care of the Constitution and laws to whose betterment Boris devoted his remarkable career.

Louis H. Pollak is United States District Judge, Eastern District of Pennsylvania. Judge Pollak is a 1948 graduate of the Yale Law School; he was a member of the faculty from 1955 to 1974, serving as Dean from 1965 to 1970. *This tribute expands upon remarks presented at a memorial service on December 11, 2005, at the Yale Law School.*

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8. LAURA KALMAN, YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS 61 (2005).

9. *Reports of the Dean*, *supra* note 1, at 14.