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Connecting to What Matters: Remembering Bo Burt

Bo Burt was gentle and passionate; supportive and forceful; larger than life and committed to improving death and dying. I am honored to be here, and to join Linda, Anne and Jessica, and all the families of Bo as we pay tribute to him and mourn together.

I was not officially his student in law school. Instead, I was his student for life. As a reader of his work, as a member of the extended family of law clerks of Judge David Bazelon, as a fellow board member for the Bazelon Center for Mental Health, and as a friend, I learned from him. His students, colleagues, family, and friends are not the only ones diminished by his passing. All who learn from paradox should feel his loss. The same is true for all who think we human beings are at our best when grappling with the hardest problems. I always think of him with his sleeves rolled up – literally and figuratively – ready to wrestle, gently yet persistently, with directly engaging tough questions.

Bo asked: what is the dark side of benevolence? This was on his mind when we first met; he was writing what became the book, *Taking Care of Strangers*.¹ I read the manuscript and discovered a searching and often agonized voice. He did not spare the reader details about physical and emotional pain. I had never encountered legal scholarship like this. The text is passionate, vivid, and indifferent to the lines so often separating law, psychology, ethics, and meaning. In that book, Bo looked hard at what happens between doctors and patients. He found too often hypocrisy and abuse.

He concluded, “[B]oth physicians and patients equally need protection to assure that the benevolent intentions each brings to their mutual encounter with illness and death are not transformed, however unintentionally, into their destructive counterparts.”² With his distinctive psychoanalytic lens, Bo interpreted Stanley Milgram’s studies to exemplify his own conclusion: by

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1. ROBERT A. BURT, *TAKING CARE OF STRANGERS* (1979).

2. *Id.* at vii.

treating relations between people as if they were objects of science, people can “lose common empathetic identifications with one another and engage in brutally hurtful conduct.”³

Some years later, he asked: why do great judicial efforts to pursue justice fail? Why did *Brown v. Board of Education* fail to end racial hierarchy in law and practice? Bo located at least part of the problem in the Court’s replication of the very relationship of domination and subordination it meant to undo. He explained, the Court squandered opportunities “for promoting relations based on mutual respect for equality among social adversaries.”⁴ Progress could come only when the Court stops this pattern and opens “the previously coerced conclusion of this warfare embodied in the race segregation regime and requiring that some new settlement be reached that would adequately honor the equal status of both parties.”⁵ He embraced the constitutional stance of Abraham Lincoln, questioning judicial supremacy in constitutional interpretation.⁶ Here, he drew on psychological and political insights, finding in egalitarian authority not only a desirable set of relationships, but relations more meaningful and more workable than relations of hierarchy and control.⁷ He argued that we must see and dive into the conflicting experiences of unity and conflict.⁸

Earlier this year, Bo questioned how tolerance can work if it depends on keeping one’s differences private. Bo commented on President George Washington’s letter to the Hebrew Congregation in Newport, Rhode Island. President Washington offered a vision of tolerance for religious difference not as an indulgence but as a governmental guarantee.⁹ Bo found precursors of

3. *Id.* at 89.

4. ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 309 (1992).

5. *Id.* at 293.

6. *Id.* at 3.

7. *Id.* at 365-75.

8. *Id.* at 30.

9. Washington wrote the letter after a visit to Newport, Rhode Island, where he was greeted by community leaders, including Moses Seixas, one of the officials of Yeshuat Israel, the first Jewish congregation in Newport. Seixas addressed President Washington with this statement:

Deprived as we heretofore have been of the invaluable rights of free Citizens, we now (with a deep sense of gratitude to the Almighty disposer of all events) behold a Government, erected by the Majesty of the People—a Government, which to bigotry gives no sanction, to persecution no assistance—but generously affording to All liberty of conscience, and immunities of Citizenship: deeming every one, of whatever Nation, tongue, or language, equal parts of the great governmental Machine.

current conflicts between religious freedoms and protections for people who identify as lesbian, gay, bisexual, or trans. Empathetically imagining views not his own, he wrote, “[I]f opponents can claim nothing more than a privacy right, then they may not seek public endorsement of their religious objections to same-sex marriage.”¹⁰ He warned that retreating into private corners does not work if diverse groups are all to enjoy equal respect and exercise equal ownership of the society. But the alternative may be polarized controversies, with irresolvable clashes of intolerant views. Rather than suggesting a legal or political solution, Bo called for personal efforts at self-control by people on all sides of disputes. He wrote, “In a society equally owned by everyone, all disputants (no matter how convinced they may be of the superior morality or justice of their positions) must refrain from pursuing complete and conclusive victory over their opponents.”¹¹ Perhaps he learned something about this from decades as a law professor.

Bo’s questions reached into his own Jewish identity and how to make sense of what is particular and what is universal in human experience.¹² Looking at Justice Felix Frankfurter, he delved into the double-experience of being an insider and an outsider.¹³ He brought his knowledge of psychology, history, and Jewish and Christian texts to bear on profound questions about the relationships between God and human beings.¹⁴

Over the course of many years, Bo asked questions about death. He asked how to prepare for it. He asked how to reduce the pain of it. He focused not just on the dying but also on those left behind, including family and friends

Letter from Moses Seixas, Warden, Yeshuat Israel, to President Washington (Aug. 17, 1790) in 6 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, JULY-NOVEMBER 1790, 286, 286 n.1 (Dorothy Twohig et. al. eds., 1986). The original copy of Washington’s letter is held at the synagogue. See Letter from President Washington to the Hebrew Congregation of Newport (Aug. 21, 1790), <http://www.tourosynagogue.org/history-learning/tsf-intro-menu/slom-scholarship/86-washington-letter> [<https://perma.cc/9AQX-QQP8>].

10. Robert A. Burt, *Between Toleration and Rights: Echoes of the George Washington Letter in Contemporary Legal Debates*, in FACING HISTORY AND OURSELVES, WASHINGTON’S REBUKE TO BIGOTRY: REFLECTIONS ON OUR FIRST PRESIDENT’S FAMOUS 1790 LETTER TO THE HEBREW CONGREGATION IN NEWPORT, RHODE ISLAND 173, 177 (Adam Strom et al. eds., 2015).

11. *Id.*

12. ROBERT A. BURT, TWO JEWISH JUSTICES 3 (1988).

13. *Id.* at 56.

14. ROBERT A. BURT, IN THE WHIRLWIND, at xi-xii, 347-48 (2012) [hereinafter BURT, IN THE WHIRLWIND].

and also the health-care providers.¹⁵ He asked how society and professions should regulate physician-assisted suicide, abortion, and capital punishment.¹⁶

Given Bo's penchant for dialogue, it is fitting to look at responses to this work. Dr. Timothy Quill disagreed with some of Bo's analysis, but he commended Bo for "remind[ing] us that irrational forces come into play in all end-of-life practices and that we deny them at peril to our patients and our profession." An anonymous reviewer on the Amazon site wrote:

As an ordained minister, I found that I am able to speak on a much higher level, being able to eliminate the typical reactionary responses we are typical of hearing in this country surrounding the ethics of death. Particularly, for me as it relates to the issue of abortion, has the book been a god-send. Burt has systematically outlined the historical attitudes and public mores surrounding abortion by locating the moment the controversies began. Like most things in society at-large, there are competing interests for every aspect of life. Someone always wants to be in control. I will refrain from giving away too much so that you will be as intrigued as I while reading a couple years ago.¹⁷

Another reviewer offered comments that apply not just here but also to much of Bo's work: "This book challenges its readers to think deeply about topics that most people would rather not confront at all."¹⁸ This comment captures well Bo's emphasis on investing as much reason and self-control as we can while we learn to live with what we cannot understand.¹⁹

Bo pursued his questions as a scholar and teacher and also as an advocate. Through the Open Society's Project on Death in America, he worked hard to change the medical and cultural treatments of death in the United States.²⁰ He worked for access to palliative care and changes in the training of health-care providers.²¹

15. ROBERT A. BURT, *DEATH IS THAT MAN TAKING NAMES: INTERSECTIONS OF MEDICINE, LAW, AND CULTURE* (2004) [hereinafter BURT, *DEATH IS THAT MAN TAKING NAMES*].

16. *Id.*

17. TheProfessor, Review of *Death Is That Man Taking Names: Intersections of Medicine, Law, and Culture*, AMAZON (Sept. 25, 2006), <http://www.amazon.com/Death-That-Taking-Names-Intersections/dp/0520243242> [<https://perma.cc/A7U8-3A7C>].

18. William J. Winslade, *Death Is That Man Taking Names*, 78 BULL. HIST. MED. 925, 925-926 (2004) (book review).

19. *DEATH IS THAT MAN TAKING NAMES*, *supra* note 15, at 182-84.

20. Kathleen Foley, *The Open Society Remembers "Bo" Burt*, OPEN SOC'Y FOUND. (Aug. 19, 2015), <http://www.opensocietyfoundations.org/voices/open-society-foundationsremember-bo-burt> [<https://perma.cc/DSK7-G9A6>].

21. *Id.*

He also worked on behalf of persons with mental disabilities. As an engaged trustee for the Bazelon Center for Mental Health Law, he urged the staff to face, not avoid tensions, conflicts, and complexity. He probed possible avenues for reforming laws and bureaucracies while never losing sight of the human beings on all sides of the issues. Once we traveled together to advance the case for more funding for mental health law advocacy. Bo was passionate and persuasive. We secured the funding. Rud Turnbull, fellow board member, wrote Linda in August, “It was one of the highlights of my personal life (as father of a man with several disabilities) and professional career . . . to have known Bo. . . . He was extraordinarily sensitive about other people, thoughtful in responding to their points of view, careful in his role as trustee and chair of the board to assure that the Center did not waver from its core mission when tempted by funding sources to do so, and grateful to each of the members of the Center’s staff, including especially the support staff.”²²

Bo pressed questions about authority with uncanny attention to psychodynamics. He explored the relationship between sons and fathers and between people and their ideas of God.²³ He had no questions, though, in his devotion to his families—his Yale Law School colleagues and students, his fellow travelers working to change death and dying and to transform rights and treatment of persons with mental disabilities, his colleagues pursuing justice all over the world, and above all, his wife and his daughters. He lit up when he talked about Linda, Anne, and Jessica. I think he could face the hardest, darkest questions because he loved and was loved so deeply. I venture this speculation because it is the kind of insight Bo offered over and over again: connecting the personal and the intellectual, the private and the public, unity and conflict, particular and universal, endings and beginnings—and life and death. Missing arguments and discussions with him, I will try hard to see the other side as he would. I will try to bridge the unbridgeable, to embrace paradox and struggle, and to resist temptations to look away from what is right, what is painful, and what is most human.

22. Letter from H. Rutherford Turbull, III to Linda Burt and Daughters (Aug. 10, 2013) (on file with author).

23. BURT, *IN THE WHIRLWIND*, *supra* note 14, at 343-44, 347-48.