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Bo Burt: In the Whirlwind of His Own Making

Bo Burt was multiple conversations in process, so daring in ideas, so important to so many, so generative of ways of thinking. My vantage point is as a classmate and a friend, fortunate to have interacted with Bo as part of a rich and interesting cohort of (almost entirely) young men augmented by marriages and families. Already ambitious and with dreams of future accomplishment, our class, brought together through chance and skill, would together be reshaped and repositioned through the intense funnel of the Yale Law School. We could not then foresee how our friendships intersecting with major events would affect the arcs of our careers.¹

Now we have hindsight, for all it is worth. Even the fiftieth reunion of our law school class, the Class of 1964, is receding into memory. Increasingly, the stories of our classmates have not only beginnings, but ends. We can see how members, Bo included, negotiated political and cultural changes (Bo starting, after law school, with that most engaged of all federal judges, Chief Judge David Bazelon, and staying true to Bazelon-like principles of involvement). Still, we fight to adjust to the abrupt caesura of a man with such staggering vitality and range of ideas, mindful of how much he brought to meaningful realization in his books, articles, lectures, and those many conversations where he would happily guide those of us lucky enough to be his friends.

Given these many contributions, I focus on what those early Yale and post-Yale years might have meant to Bo, and what course they helped to set. Doing so might help us see again the magic in the fact that we were at *that* Yale Law School, interacting with *those* faculty and *that* extraordinary combination of

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1. One example: when we arrived at the law school, John F. Kennedy was President, and Earl Warren, Chief Justice; when we left, the President was Lyndon B. Johnson, and the kaleidoscope of American law and society had refigured itself. The '60s were beginning as we were leaving in 1964.

fellow law students. It might refresh our sense of racing up and down those New Haven staircases, from Coke Lounge to the library, working through the night in a decidedly predigital age, always in a cauldron of strong personalities, clanging ideas, and wrestling intellects. We get a glimpse of what it meant that we lunched together and launched together. How did our interactions at 127 Wall Street help forge a path? How did that path turn or pivot with our initial ventures after graduation, like Bo's with Chief Judge Bazelon and, just afterwards, Senator Joseph Tydings? How did we function as a group, classmates checking in with each other, collaborating, becoming family friends, often being mutually supportive? Surely, those precious years together engendered ideas and vectors traceable in the lives that unfolded.

A convenient starting place, oddly, is Bo's very last public presentation, preternaturally elegiac, which he gave two weeks before his death. The title was resonant with valedictory, bringing him and us back to our formative student days. The site of his talk was the Sigmund Freud University, the audience scholars of law and mental health, and the subject *The Yale School of Law and Psychoanalysis, from 1963 Onward*. I like the title especially because he describes an epoch defined as starting when we were students. And I like it because it makes the task of eulogizing easier: Bo was given to elegant, subtle, and satisfying self-eulogy.

"Here we were," he wrote in his Vienna talk, "in an intimate seminar room with Anna Freud, the founder of the discipline of child psychoanalysis and the daughter of Sigmund Freud, the founder of the entire enterprise of psychoanalysis." He recounted, somewhat breathlessly, that "[t]his was the beginning for me of a long fascination and engagement with psychoanalytic thought. It was an exhilarating beginning." Of course, Bo's suggestion that we were part of an about-to-be significant moment, if not an already historic one, is nicely typical of how we were acculturated at the law school and thereafter, how we were encouraged to think, and of how things were. His talk resonated with a recollected perception: we were persuaded that what we were doing at the Yale Law School was, or would be, thunderingly consequential—though just how and when that might be was shielded from view. Bo captured that tone of expectation in his talk and captured that fulfillment in his life.

Bo recounted how we were witness to Anna Freud's thinking, as it had evolved in the not quite two decades since World War II. A main feature, Bo recalled, was her concept of "the psychological parent," which followed from the child's need—"purportedly according to psychoanalytic thinking," as Bo gently distilled it—"for a single, physically engaged caretaker."²

2. Bo recognized that Freud was perfecting and testing her thoughts for what would later become *Beyond the Best Interests of the Child*, a book published in 1973 and coauthored with

In the seminar, Freud and her colleagues argued “that this concept of ‘the psychological parent’ should trump any claims to child custody by biological parents who had not been physically engaged with the child, especially [during] infancy.” Something about this gnawed at Bo, as it did for many, both in the seminar and later on. Should there be such a conclusive rule? Could it effectively counter other human impulses? Bo’s Vienna talk indicates how nettled he was, in a constructive and creative way, even during the seminar. The talk celebrates how he and fellow students debated these propositions every week, mentions how he organized rump sessions in Max’s (the law school’s then-dining facility), describes how he and his fellows tried to confront their famous instructor, and also notes how puzzled he was at the calm and authoritative way in which Freud tamped down students’ objections upon their return to the seminar room.

Of course, most of us in the seminar left it at this, satisfied with an engaging and interesting course. But the thing about Bo, as we could come to know from his later thinking and writing, was that he saw the largest, most consequential issues in various human interactions. And he cared deeply about them. The 1963 seminar lingered in his mind, engaging him for the rest of his life.

A half century later, he would bring these worries to a dramatic Viennese conclusion. “I tell you this account of our seminar with Anna Freud,” Bo wrote, “because it illustrates one reason that led, soon after 1963, to the precipitate decline of the intellectual influence of psychoanalytic thinking in America.” Linking our Yale experience to something as substantial as the global fate of an intellectual movement might reflect some Yale-centrism, but why not?

More importantly, what it reveals is that Bo’s writings were often scholarship in the grip of autobiography. To make his major point, Bo faulted what he called “our deferential awe and Miss Freud’s self-confidence, even dogmatism, in providing answers to every puzzling question about human behavior. Miss Freud was polite,” he wrote, “attentive, gracious to us—but she also appeared certain that she could understand the psychological functioning of the individuals we studied.” This certainty and claim to definitive authority, which Bo noticed at a young age, would not only be a flaw in the seminar, but a disaster as an approach to psychoanalysis. As he said in Vienna, breaking from his teacher, “The great intellectual contribution of psychoanalysis is not in its certainty, not in its capacity to answer questions about individuals’ psychological functioning, but in its uncertainty, its capacity to see questions, contradictions and complexities that lie beneath the ordinary surface of rational thinking.”

Joe Goldstein and Albert Solnit. See JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

It is an insight into Bo's life and mind that his talk was a critique of certainty, finality, and authority. His all-encompassing interpretation justified the sweeping title of the remarks. For him, this truly was the story from 1963 onward, "a progression from an authoritarian conception of the analyst's role, in which he was all-knowing and his patient was expected to defer to his superior scientific pronouncements." Bo was able to see this progress, grasp its importance, and help us see it, too.

In the end, a bold and illuminating thesis emerged from that seminar and the ensuing history. Bo, of course, puts it best:

Psychoanalysis never provides the basis for imposing final resolution of conflict on anyone. Psychoanalysis can only build from one tentative hypothesis to another. . . . This is the core proposition that I derive from my career-long effort to understand the possible uses of psychoanalytic thinking in legal analysis—an effort that began with my teachers in New Haven in the early 1960s and continues today.

The Freud seminar was but one example of how our Yale Law School was a site from which the future Bo could and did flourish. I could trace many more consequences of the collegueship, budding scholarship, friendship, and modes of influence that mark that time. I am slightly reluctant to attempt the great leap from the authority and finality of psychoanalysis to the authority and finality of courts and constitutions. But that is just the sort of leap that Bo could make look so effortless, and it provides another way to link parts of his work back again to our time as law students.

On the questionnaire distributed to classmates for our fiftieth reunion, Bo listed Alexander Bickel alongside Joseph Goldstein and Jay Katz as his favorite professors—quite an unusual combination. But common characteristics of our days at the Yale Law School were the many moments we spent with the arguments that Bickel had just put forth in *The Least Dangerous Branch*, published in 1962.³

Indeed Professor Bickel could have been a model for Bo: a living, breathing goad, questioning and simultaneously enhancing the legitimacy of established institutions. Just as every one of Napoleon's soldiers carried a marshal's baton in his knapsack, so did every Yale Law graduate from that era carry forth a piece of Bickel's institutional critique, seized by the questions of power and authority that are in the law professor's normal quiver of concerns. One of his first books, *The Constitution in Conflict*,⁴ might be read as a long address to his

3. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

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

teacher. Bickel was considered bold for assessing the legitimacy of the Supreme Court in *The Least Dangerous Branch*. He stopped before taking on God. Bo did not.

Bo's enormously ambitious and elegant *In the Whirlwind*, his 2012 tour de force through the Hebrew and Christian Bibles, can be read as the ultimate inquiry into finality and authority, inquiries that very well may have begun in Bickel's class. Bo's book is, again, characteristically bold. Its task is no less than to challenge what Bo considered the conflict between standard Biblical exegesis and "the core claim of modern secular Western political theory," namely that "[n]o authority, whether divine or secular, deserves automatic obedience."⁵

Bo was arguing against a conventional account that "the biblical God deserves obedience simply because he is God, not because he is just or righteous as judged by some external standard." Along the way, he plays mercilessly with comparisons between God's authority and that of the Supreme Court, seeking to determine which, if either, is infallible; which, if either, is final; and when. He writes, "The Court rarely admits its weakness and its dependence on voluntarily offered, conscience-based compliance, and it almost never approaches popularly elected officials with the same elaborate display of deference with which Abraham, Moses and Jesus encircled their moral critiques of God."⁶

Long before *In the Whirlwind*, there was *Two Jewish Justices*, which Bo published in 1986.⁷ It is also, in its way, about authority. Bo's cherished classmate, Charlie Halpern, had asked him to give a lecture in honor of Charlie's late father, the distinguished New York Judge Philip Halpern. Charlie asked Bo to speak about the "role of Jews in American law."

What a fruitful challenge that turned out to be! Just as Anna Freud's seminar had sparked a lifelong occupation with psychoanalysis and the law, just as Bickel's fabled classes bred inquiries into judicial authority, Charlie's assignment opened lines of inquiry about Jewish identity and thought that would pervade Bo's marvelously productive years.

The Halpern Lecture also gave Bo additional warrant to couple self-realization with academic inquiry. In *Two Jewish Justices*, the quite personal book that came out of the lecture, Bo presented Frankfurter and Brandeis through the lens of their common religious heritage—common, but significantly distinct in practice, with Brandeis much more publicly associated, for example, with Zionism. This was a profound sociology of law, combining American history, the immigrant experience, and Jewishness and using his two

5. ROBERT A. BURT, *IN THE WHIRLWIND: HUMANITY AND GOD IN CONFLICT 1* (2012).

6. *Id.* at 303.

7. ROBERT A. BURT, *TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND* (1988).

illustrious subjects to detail their decisional consequences. Bo posited a Jewishness of the time that was distinctively associated with outsider status—he used the term homelessness, though today we might use rootlessness. That conception in hand, Bo demonstrated that the two Justices assigned conflicting values to their status and their Jewishness, both in their personal lives and in their conduct as Supreme Court Justices.

Bo's heart was with Brandeis. His depiction of the Justice emphasized characteristics that, of course, were reflected in Bo's own history and values. Brandeis, Bo writes, "tried . . . to carve a different social space for himself that confounded the distinction between insider and outsider." Significantly for Bo, he "did not thereby attempt to become an insider. Nor did he accept the continued existence of the social status of outsider as a thoroughgoing pariah would do. Brandeis implicitly sought instead to dissolve the distinction."

When he saw an "outsider," Brandeis "would strive to interpret this outsider's needs and concerns to the insiders of the day, to dissolve social boundaries by inspiring sympathy and fellow feeling on both sides. His role . . . was to stand at the boundary of insider status and work toward its dissolution." The same can be said, lovingly, of Bo as well.

Two Jewish Justices was perhaps Bo's warmest public embrace of our time at Yale Law School. In the preface, he says that "[w]hen I arrived at the Yale Law School as a student in 1962, I felt somehow that I had found a home."⁸

We were all fortunate to be part of that home, that home that Bo enriched. As the class scribe for a half century, I appreciated what good copy he was. Whenever I needed to demonstrate what a fabulous class we were, I could cite what Bo was doing or had recently accomplished. He was always on the verge of major initiatives, creating a new generation of Latin American constitutional scholars, or shaping professional ethics by taking a batch of obtuse lawyers to Auschwitz and challenging their sensitivities, or lack thereof. He was opening a new field of social science related to neuroscience. He was advising foundations on how to create a world more understanding of the medical-care needs for the aging and at the end of life.

But it was his commitment, his curiosity, his deliberative nature, and his scope of knowledge that truly made not only the Yale Law School but also his

8. The reason he gave was telling, and marks a difference between the Yale Law School of the day and contemporary Oxford and Princeton, Bo's two previous academic roosts: "Though I made no precise count at Yale, it seemed to me that almost half my law school classmates were Jews; and I was startled by this sudden experience of being so much surrounded by Jews in a place other than a synagogue." Later, he was intrigued anew by the demographics of his colleagues, and their influence on the scholarship, when he returned to Yale to teach in 1976. "I discussed this with a few friends," Bo wrote. "All agreed on the relevance of the Jewish talmudic tradition and the special reliance by our parents and grandparents on professional education as a vehicle for assimilation in America."

broader environment a better home to all. To borrow a term from his old teacher, Anna Freud, Bo was a psychological parent; to borrow his language, he was an insider breaking down barriers in Brandeisian terms, and an outsider seeking comfort in Frankfurterian perspective. In the preface to *Whirlwind*, he famously describes his first stilted effort, at his bar mitzvah, exercising his role as a Kohen,⁹ the inherited function as a member of the Jewish priestly class. He considered that he failed at that moment, fraudulently mouthing the words. But Bo *was* a Kohen, of a special sort: a High Priest trying to ply his craft in a secular academic world.

9. Bo opens *In the Whirlwind* with a story about his father and his grandfather, who was a Kohen, or member of the tribe of high priests. "Your grandfather wanted me to be a rabbi," Bo's father said to him. "I failed. But now you've succeeded in achieving grandfather's wishes." Bo demurred, insisting he was merely a law professor. But his father insisted: "I've read what you've written in your law review articles *You are a rabbi.*"