

# THE YALE LAW JOURNAL

OWEN M. FISS

## The Odd Couple

In June 1988, Bo traveled to Santiago, Chile. The trip was sponsored by the Fulbright Commission and its stated purpose was to celebrate the two hundredth anniversary of the United States Constitution. Bo was accompanied by Abner Mikva, then a judge on the D.C. Circuit and by William Van Alstyne, a law professor at Duke. In a series of public lectures, Bo described the marvels of our Constitution, though he did so in a way that boldly and bravely discredited the orthodoxy that had long nurtured the dictatorship of General Augusto Pinochet.

Later that year, the Chilean people were asked, as their constitution required, to decide if they wanted the General to continue in office. Miracle of miracles, in spite of the all-encompassing power of the dictatorship, the noes won, and then to compound the miracle, Pinochet actually stepped down.

In paying tribute to a dear friend, the temptation is great to attribute the collapse of the Pinochet regime to Bo's eloquent defense of democracy. But that would be too much, even for me. I mention Bo's trip to Santiago because it marked the beginning of a new phase in our relationship—a phase that lasted for more than twenty-five years and ended only this past August on his death.

Bo and I had known each other for ages. We met in Washington in the mid-1960s. Bo had just finished a clerkship with Chief Judge David Bazelon, famous for his rulings on the insanity defense, and he had just begun to work for Senator Joseph Tydings, a leading sponsor of the measure that would eventually become the Civil Rights Act of 1968. I had come to Washington for a clerkship, and when that was over I joined the Civil Rights Division of the Department of Justice. The matchmaker was Peter Strauss, a classmate of Bo's who had clerked for Chief Judge Bazelon with him.

In the early months of 1968, Bo told me that he had just accepted a teaching position at the University of Chicago. I then confessed that I was about to leave the Justice Department and was considering the possibility of

---

**AUTHOR.** Sterling Professor Emeritus of Law, Yale University.

teaching. The next thing I knew, presumably thanks to a helping hand from Bo, the Dean of the Chicago law faculty was knocking on my door. So, we both began teaching law at Chicago in the summer of 1968.

Chicago turned out to be too much for Bo. After two years, he left and joined the University of Michigan faculty. For quite different reasons—I loved the high pressure and competitive atmosphere of Chicago—I left the school in 1974 to join the Yale faculty. In 1976, Bo joined me in New Haven, and we were colleagues here at Yale until his death. We read drafts of each other's works and spent countless hours participating in the public events of the school, most notably the Legal Theory Workshop. For years, we were also members of an informal discussion group that met off campus once a month. We even taught seminars together—one on the rights of the mentally disabled, the other on the death penalty.

In the late 1970s, soon after Bo joined the Yale faculty, we both became actively engaged in supporting an amendment, originally sponsored by a group of gay and lesbian students, that would change the regulations governing the Law School's career placement services. The amendment denied the use of those services to any employer who discriminated on the basis of sexual orientation. As a result, the Department of Defense was barred from participating in the job interviews scheduled by the Law School, even after the Department's policies shifted from one of outright exclusion of gays and lesbians to one of "Don't Ask, Don't Tell."

In 2001, the Bush Administration threatened to terminate all federal financial assistance to the University if the Law School kept this policy in place. Tony Kronman, then the Dean of the Law School, appointed Bo to chair a faculty committee to formulate a response. Bo counseled resistance. Soon after it became clear that the University, in the person of Rick Levin, the President, was of another mind altogether, a lawsuit was launched by the law faculty to enjoin the Secretary of Defense from carrying out his threat.

More than forty members of the faculty, all acting in their individual capacities, joined the suit as plaintiffs. We were as diverse, outspoken, and quarrelsome a group as any. Order, or at least the appearance of order, was maintained by our lawyer, Paul Dodyk of Cravath, and even more importantly, by a steering committee consisting of Harold Koh, Kenji Yoshino, myself, and of course Bo. Bo chaired the committee and acted as our spokesman. In deference to Bo's leadership, this hard fought lawsuit would become known as *Burt v. Rumsfeld*.

Although the day-to-day management of this lawsuit allowed me to work closely with Bo, our most extensive collaboration had begun much earlier, stemming from a shared interest in Latin America that even predated Bo's 1988 journey to Santiago. In June of 1985, I had taken a trip to Buenos Aires to witness the historic human rights trials then in progress. There I met Carlos

Nino, an analytic philosopher who was an architect of Argentina's transition to democracy. Nino, in turn, began to visit the Yale Law School. Very quickly, he and Bo became good friends, and the three of us soon formulated a plan to bring Raúl Alfonsín, the President of Argentina, to campus for a Chubb Fellowship—though I must admit that in saying this I'm using the word "bring" rather loosely.

The welcoming party was to consist of Bo, myself, and Bob Thompson, then the Master of Timothy Dwight College and the Director of the Chubb Fellowship program. Bob drove. We arrived at the Hartford airport early and were shown to a lounge that had a clear view of the runway where the Argentine military transport was to arrive. The three of us got into an extended discussion, probably about tango (a subject of special academic interest to Bob and a subject of great personal interest to Bo, who loved to dance).

After a while one of us glanced out of the window, only to notice that the Argentine transport had already landed and that a caravan flanked by Secret Service vans had started its trip down I-91. Frantically, we ran to Bob's car, raced down the highway, abandoned his car at the corner of Temple and Wall, and hurried to the front door of Timothy Dwight to welcome—breathlessly—the President of Argentina.

Although President Alfonsín's visit and the friendship with Carlos Nino had piqued Bo's interest in Latin America, the dramatic visit to Santiago in June 1988 turned what might have been passing curiosity into a firm commitment—a new chapter in our friendship was opened. Shortly after the visit to Santiago, Bo and I developed a student exchange program known as Linkages. Soon after the death of Carlos Nino in 1994, we launched SELA (the Seminario en Latinoamérica de Teoría Constitucional y Política)—a never-ending faculty seminar that brought over 125 scholars from Yale and the entire region together each year for a discussion of issues relating to democratic values and human rights. Through SELA and the network that it created and sustained, Bo and I mentored a new generation of Latin American scholars.

Although the leadership of these programs is now in the brilliant hands of Daniel Markovits, for two decades, Bo and I were at the helm, and that responsibility drew us even closer. We always had a good excuse to knock on each other's door or to call one another on the phone as we confronted one crisis or another. We also had occasion to travel together to Latin America, sometimes to check in on our students, sometimes to participate in the SELA proceedings, and sometimes to give lectures or attend conferences at the various law schools we had brought within the orbit of Yale's Latin America programs.

As a result of these trips, we spent hours and hours with each other in conversation—now no more. There were the car rides to the airport; the wait for flights, many of which were cancelled or delayed; and the flights

themselves, which to Santiago or Buenos Aires, or even Mexico City seemed to go on forever. We also often found ourselves alone after a dinner or a lecture, when we explored the city in which we were, sometimes walking aimlessly, sometimes with the purpose of getting to our hotel. We exchanged our impressions of the place and the people we met, and occasionally even found the strength to discuss the ideas presented in the lecture we had just heard.

On occasion these endless conversations extended to the personal—our children and wives. This was inevitable, since Anne and Jessica were the same age as my children and Linda and Irene were friends. Conversations about personal matters were especially appropriate since the directors of SELA, in their infinite wisdom, managed to change the date of the annual meeting from August to June to coincide with the weekend of Bo and Linda's wedding anniversary. Once, in a moment of weakness, the higher powers excused Bo from attending SELA so he could celebrate his anniversary with Linda—their fiftieth.

Despite these shared experiences, we were constantly reminded of the differences between us: height, an issue that sadly always seemed to bother Bo; Bo's affinity for facial hair, which in one period resulted in a moustache and in another a full beard; and differences in our dress. I always wore the standard issue for our generation—a dress shirt, tie, and blazer—even on the long overnight flights to South America. Once in a while, I would get really wild and wear a blue shirt, but for the most part it was white. Bo, on the other hand, always bristled at the academic uniform. In his early years of teaching, Bo wore a bowtie, handmade by Linda; he eventually settled on the open shirt with a gorgeous, colorful knit sweater, also made by Linda.

In June 2000, Bo and I traveled together to Buenos Aires for the presentation of the Spanish translation of his book, *The Constitution in Conflict*. Bo's luggage was lost, but not mine. At the formal presentation at the University of Buenos Aires I appeared as I usually did, while Bo wore the clothes in which he had traveled and, in fact, slept.

Bo told the story of this event many times, searching for an explanation why his luggage was lost and mine not. In telling this story, he often spoke with a touch of resentment, though I knew in my heart of hearts that he was quite pleased with how things turned out. He just loved the contrast in our appearances and the opportunity to appear in the august Sala Roja at the University of Buenos Aires without a tie or jacket.

There was also a difference in our education. We both graduated from law school in June 1964. Bo was a graduate of Yale, and loved the Law School. I was a graduate of Harvard. I have come to love Yale as my own, but I have always suspected that Bo attributed many of my eccentricities to my time in Cambridge.

Monroe Price has been the perennial Secretary of Bo's Law School Class. Once, in the 1990s, Monroe and I were at a conference together in Budapest, and, over the course of a long bus ride, I described my late-in-life attachment to Yale. On the spot, and with his customary flair, Monroe conferred on me an honorary membership in the Yale Law School Class of 1964.

In the end, Monroe's strategy did not work. Soon after the trip to Budapest, Bo and I were strolling through the streets of Buenos Aires after a lecture, and for some strange reason I yet again found myself proclaiming my love for Yale. What other institution in all the world, I said, would so generously support all our endeavors in Latin America—so ambitious, so unprecedented, and so expensive? Bo looked at me quizzically and then changed the subject. He knew that he was the elder son.

There was also a difference in our approach to religion. We were both Jewish, and proud of our heritage, but Bo engaged in ceremonies and rituals that had, over the years, ceased to be part of my life. He had served on the Board of the Slifka Center for Jewish Life at Yale, and once chaired it.

Bo made religion and his Jewish identity a subject of scholarly inquiry. In his early years, he published a book on Louis Brandeis and Felix Frankfurter entitled *Two Jewish Justices*. Over the last decade or two, Bo taught a seminar with Rabbi James Ponet and more recently with Paul Schwaber on the *Book of Job*. Spurred by that seminar, in 2012 Bo published *In the Whirlwind: God and Humanity in Conflict*, in which he sought to extract a political theory from the Bible.

In the preface to *In the Whirlwind*, Bo tells how, growing up, his father had wanted him to become a rabbi. Years later, Bo's father announced how proud he was of his son's professional accomplishments. At that point, Bo saw the need to explain that he was a law professor, not a rabbi. To which his father responded, "I've read what you've written in your law review articles. You are a rabbi."

There was, finally, an important difference in our outlook on legal issues, particularly on the role of the judiciary. Often drawing on psychoanalytic theory, Bo thought that the judge should be the handmaiden of what he called an "egalitarian conversation." The judge might have to use the power at his or her disposal to jump-start the conversation or to bring into the conversation those who have been systematically excluded from it. The judge might even have to enhance the position of some of the participants in the conversation, so that their voices could be heard and their grievances taken seriously. Yet according to Bo, the judge must never dictate the outcome: the warring parties must work it out for themselves.

I, on the other hand, have always saddled the judiciary with a much more grandiose, perhaps impossible, task: not just to facilitate and enhance a conversation, but rather to discover what justice requires, and then, even if the

world must be turned upside down, to make certain that the dictates of justice become a living truth.

In March 1965, shortly before Bo and I met one another, a play opened on Broadway that would prove emblematic of our relationship. That play, written by Neil Simon, was entitled, *The Odd Couple*. It was a big hit, later becoming a successful movie, and still later, an endless television series—somewhere, I imagine, the reruns are still being broadcast.

The play is about two friends—Oscar Madison and Felix Ungar—who through the force of circumstance suddenly become roommates. At the start of the play, Felix's wife had just thrown him out, while Oscar's wife had left months before. The action begins when Felix moves into Oscar's spacious Westside apartment. Friends they are, but the differences are sharp, and the bickering never ending. Oscar is a slob; Felix is fastidious. Oscar is eager for new adventures; Felix longs for his wife and is forever feeling sorry for himself.

With just the right touch of comic sarcasm, Oscar—played by the inimitable Walter Matthau—repeatedly complains about how Felix has taken over his life and rearranged the apartment. Oscar resents the changes and blames Felix for the collapse of a weekly poker game and even more for the disastrous conclusion of a dinner party with two sisters who lived upstairs.

The play concludes when the sisters invite Felix to move in with them, and Felix hastily accepts their invitation. The audience knows full well, however, that this arrangement is only temporary. The two roommates, tied by the bonds of friendship, will soon be back together. As the curtain comes down, Neil Simon asks us to imagine the possibility of a deep and enduring friendship, even love, in the face of difference.

At the core of the relationship between Bo and myself was a shared commitment to equal justice through law. In searching for a shorthand to describe our approaches to law, Bo once said that I believed in *Brown I* and that he believed in *Brown II*. In saying this, Bo intended not to underscore a difference but rather our agreement on basic values—the profound affirmation of equality that *Brown* represents.

Although this agreement on an issue of fundamental principle lies at the heart of a lifelong friendship, it should not obscure the differences that existed between us. As with Oscar and Felix, we were very different—in appearance, in manner, in schooling, in our views about religion and about psychoanalysis, and in how we sought to achieve equal justice. We were, indeed, an odd couple. We never argued, nor even bickered, but we often disagreed.

Bo and I were keenly aware of our differences and, even more importantly, we respected these differences and managed to turn them into the timbres of our friendship. These differences gave us reason to seek each other out and to get the benefit of the other's views. These differences added surprise and often

joyful dimensions to our common ventures. These differences provided a standard by which we measured ourselves.

I never dared to speak for Bo, and I will not now. My hunch, however, is that he was bemused, sometimes even intrigued, by my longing for certainty and desire for absolutes. But I can surely speak for myself, and now confess that whenever I felt I had discovered what justice requires, I thought of Bo and wondered whether I had grasped all of the complexities and subtleties of the situation at hand. I did that for almost fifty years, and will continue doing so. Sadly, the last curtain has fallen on our play, but in my mind's eye, and in my heart, the reruns will continue, forever.