

THE YALE LAW JOURNAL

JOHN G. SIMON

Let Us Count the Ways: A Tribute to Boris Bittker

How do we remember Boris? Let us count the ways. What is salient for some hundreds or thousands is the memory of his inspired teaching, a memory I share from his tax classes fifty-four years ago, including the humor: “I am, at heart,” he said, “a ham.” An even larger audience stands in awe (as I do) of the monumental written output that made Boris the First Lord of American tax scholars. Here, let us count other ways, other Bittker virtues, crudely summed up under the headings of independence and citizenship.

An instinct for independence prompted Boris to operate ahead of the curve in his choice of topics for special attention. For example, he was the first scholar seriously and sequentially to address the federal and state tax treatment of the “third sector”—the terrain of philanthropy and nonprofit organizations. His eight articles in this field included a 1969 essay providing the first thoroughgoing defense of the exemption of churches from federal, state, and local taxation.¹ He continued with an article questioning the effort to “constitutionalize” the Internal Revenue Code by importing civil rights standards into the governance of social clubs; he wrote that “the rights of free association and privacy cannot be reserved for the noblest among us.”² Another essay represented the first comprehensive effort to explain tax exemption for nonprofit groups as something other than a government “subsidy,”³ and a year

-
1. Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285 (1969).
 2. Boris I. Bittker, *Taxes and Civil Rights: “Constitutionalizing” the Internal Revenue Code*, 82 YALE L.J. 51, 86 (1987).
 3. Boris I. Bittker & George K. Radhert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 357 (1976). Some of the same nonsubsidy themes, in the context of charitable contribution deductions, appear in Bittker’s earlier article, *Charitable Contributions: Tax Deductions or Matching Grants*, 28 TAX L. REV. 37 (1972).

later he presented the first serious scholarly critique of the regulatory regime imposed on charitable foundations by the 1969 Tax Reform Act.⁴

Outside of the tax area Boris was also ahead of the curve. He saw, before most of us, what the quest for racial integration, which he shared, might one day bring about in terms of governmental land use policy and the problems that could generate. The result was his 1962 article, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*.⁵ Soon after James Forman delivered the “Black Manifesto” in New York’s Riverside Church, demanding reparations for slavery and segregation,⁶ Boris provided the first full-scale analysis of this issue, in a 1973 book, *The Case for Black Reparations*.⁷ Boris soon regretted the title, which was chosen by his publisher, for his book did not, as some assumed, conclude that the case was a clear one—that reparations should now be paid. Instead, he offered a sympathetic but searching examination of that case, an exploration of what he called “a second American dilemma.”⁸ That dilemma, he said, called for a “national debate on these questions.”⁹ He “sought to open the discussion, not to close it.”¹⁰

While Boris was often ahead of the curve—he often presaged innovation—he was not a fan of *all* innovations; he did not think well of all new curves. Thus, another aspect of Bittkerian independence was his relentless scrutiny of conventional wisdom, either new-fangled or old-fangled. The same independent skepticism that he brought to the “constitutionalizing” of tax policy, to the “subsidy” theory of exemption, and to black reparations also surfaced in his resistance to some of the vogue-ish nostrums in tax reform policy. Two examples: the quest for a “comprehensive tax base” (Boris thought it to be a mirage¹¹) and the concept of a “tax expenditure” budget as a way of unmasking and presumably condemning “subsidies” (conceptually sloppy,

4. Boris I. Bittker, *Should Foundations Be Third-Class Charities?*, in *THE FUTURE OF FOUNDATIONS* 132 (Fritz Heimann ed., 1973).

5. 71 *YALE L.J.* 1387 (1962).

6. James Forman, Manifesto to the White Christian Churches and the Jewish Synagogues in the United States of America and All Other Racist Institutions, Address at the National Black Economic Development Conference (Apr. 26, 1969), in *BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS* app. A (1973).

7. *BITTKER*, *supra* note 6.

8. *Id.* at 136.

9. *Id.* at 137.

10. *Id.*

11. Boris I. Bittker, *A “Comprehensive Tax Base” as a Goal of Income Tax Reform*, 80 *HARV. L. REV.* 925 (1967).

Boris thought, and a practical nightmare¹²). He was also opposed to the easy cant employed by many tax reformers who, for example, hurled the “loophole” epithet as a substitute for analysis. “[T]he time has come,” he wrote in 1973, “for a drastic revision of the rhetoric of tax reform.”¹³ And in his active pro bono life he displayed similar independence. As a trustee of the Natural Resources Defense Council, he cast what I was told was the lone dissenting vote against a board resolution he regarded as more “politically correct” than rational.

Such independence requires energy and vitality, and these were not in short supply. Boris undertook major expeditions to distant places often under difficult conditions—thus, a photography expedition to Algeria at a dangerous time. And he hiked everywhere. Several decades ago, when some of us were pressing him to serve as Dean of Yale Law School, he declined, noting, “I don’t have the energy I once had.” *What?* That was before he did his five-volume income, estate, and gift tax treatise, wrote several other books and at least seventy-five more articles, and completed still other high energy projects. (In truth, Boris really, really did not want to be Dean.) But perhaps the greatest tribute to his vigor was the huge church/state law treatise project he initiated when he was eighty-seven, the first such treatise to be undertaken since the early 1930s and an enterprise involving three law schools, a large cast of senior and junior collaborators, and a multi-year scenario. Parkinson’s intervened, but two weeks before he died, I attended a meeting between Boris and his two senior collaborators from other law schools, where Boris, in his wheel chair and despite his disability, orchestrated this mammoth undertaking and inspired his colleagues. The project, by the way, will go forward.

The independence I have cited was, in Boris’s view, an ingredient of good and effective citizenship. And what a citizen Boris was—in every respect! He was a valorous citizen, seriously wounded under German fire in World War II—although I did not learn of his Purple Heart until I had known him for twenty years. He also displayed civic valor of a different sort. Once, a law school colleague with a grave heart condition wanted to take a wilderness canoe trip, perhaps realizing it would be his last chance. Boris volunteered to go with him on this high risk venture, not knowing what would happen with an infirm partner in a two-person canoe in deep waters. They both survived, but the colleague died of a repeat heart attack soon thereafter.

Boris’s citizenship also took the form of philanthropy. The Litchfield Fund he created and funded (I assume Boris wouldn’t mind this posthumous

12. Boris I. Bittker, *Accounting for Federal “Tax Subsidies” in the National Budget*, 22 NAT’L TAX J. 244 (1969).

13. Boris I. Bittker, *Income Tax “Loopholes” and Political Rhetoric*, 71 MICH. L. REV. 1099 (1973).

“outing”) reflected charitable instincts that were imaginative and eclectic—and timely, such as the gift to Katrina relief he authorized the day before he died. Even more important, there was philanthropy (“love of mankind”) writ large. Boris was an unstinting and selfless source of help to colleagues and friends and to total strangers—and, of course to the members of his family and other dear ones. He provided emotional support in hard times; career advice, professional counsel, and academic guidance in all seasons; and—shouldering the heaviest duty of all—he read, critiqued, and even edited draft manuscripts. I must say that I was the beneficiary of all of these forms of philanthropy, all of it offered with thoughtfulness, humility, and more than a dash of wit—all of it, in both senses of the word, *priceless*.

I am very far from alone in wishing that we had another ten or twenty years of this good and great man. But what we had was simply marvelous.

John G. Simon is Augustus E. Lines Professor Emeritus of Law and Professorial Lecturer in Law, Yale Law School. These remarks were prepared for a memorial service on December 11, 2005, at the Yale Law School.



Imaged with the Permission of Yale Law Journal