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## **Boris I. Bittker**

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MICHAEL J. GRAETZ

## Boris I. Bittker

I first met Boris Bittker on January 21, 1977, in Miami. There are only a handful of people whom you remember first meeting. For me, Boris was one. For the past twenty or so years, I have been lucky enough to count him as a friend. He was always Boris to me, never Borie. I was a new friend—too much his junior to be so informal. Our phone would ring. “Mike, it’s Borie,” he would say. “Hello Boris!” I would respond.

The conference where Boris and I met was a gathering of about thirty tax law professors and public finance economists to discuss a paper by the conservative tax economist Norman Ture (whom I later learned Boris had known for more than thirty years from their Army days together). There were four formal commentators. Boris and I were the lawyers; Richard Musgrave and Martin Feldstein were the economists. I was young then and flattered to be included at the table alongside Boris Bittker, whom I knew only through his writing and his colossal reputation. Ture’s paper attacked progressive taxation, all taxes on capital or capital income, and in particular, the double tax on corporate income—all issues that are still hotly debated today.

I began by observing that in our economy, people’s earnings are often not due to their hard work nor necessarily well deserved, but rather are frequently simply due to the bad taste of the American public. I used the overwhelming success of an awful song called *Muskrat Love* by an especially untalented duo, The Captain and Tenille, to illustrate my point. But my comments fell flat. It soon became clear that I had stumbled onto the only room in America in January 1977 where no one had ever heard of the Captain, Tenille, or *Muskrat Love*. Even Boris Bittker was not a student of popular culture. The tax crowd is not a particularly worldly group. Boris’s comments, on the other hand, were crystal clear to the audience. He began by noting that Ture’s paper revealed that he was there representing Norman Ture, Inc. Boris then pointed out that Ture had not incorporated himself to obtain access to the world’s capital markets. Here is what Boris said:

[A] biographical note informs us that Mr. Ture is a corporation, evidently of the one-man variety. I mention this fact only because it suggests that one of the points I would make about the corporate income tax is already well known to Mr. Ture, namely that it can be an opportunity rather than a burden. In fact some of my best friends approach it in the mood of a gourmet who dislikes swiss cheese: discarding the solid matter to get at the holes.<sup>1</sup>

As everyone here knows, Boris Bittker was a pathbreaking scholar of federal tax law. His treatises on taxation cover the entire range of income and estate tax issues. They are found on the shelves of virtually every law and accounting firm in the nation. Boris was also a prolific author of law review articles, many of which had great impact on the key tax policy debates of the past five decades. Boris's scholarship was always sharp, insightful, and elegantly written. It frequently reveals his great sense of humor combined with just a little edge. Boris's work is filled with epigrams:

"[T]he Internal Revenue Code is not what it used to be—and never was."<sup>2</sup>

"Those who remain thrive on uncertainty. In this respect, successful tax lawyers are like surgeons."<sup>3</sup>

"[T]o a fee-maximizing tax professional, the Internal Revenue Code ... is merely a platform waiting for energetic entrepreneurs to construct a superstructure of previously unimaginable complexity."<sup>4</sup>

"Orgiasts do not think, they act."<sup>5</sup> (Boris was obviously an expert on far more than the tax law.)

Lamenting the paucity of analysis of black reparations as a means of achieving greater social justice, Boris, in his 1973 book, *The Case for Black Reparations*, observed, "some white churchmen ... had little to contribute beyond admissions of guilt and endorsements of repentance. Clergymen who probably regarded self-flagellation as a superstitious remnant of medievalism

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1. Boris I. Bittker, *Commentary, in WEALTH REDISTRIBUTION AND THE INCOME TAX: PRINCIPAL PAPER BY NORMAN B. TURE* 65, 65 (Arleen A. Leibowitz ed., 1978).
  2. Boris I. Bittker, *Constitutional Limits on the Taxing Power of the Federal Government*, 41 *TAX LAW.* 3, 11 (1987).
  3. Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent*, 77 *CAL. L. REV.* 235, 250 (1989).
  4. Boris I. Bittker, *James S. Eustice*, 45 *TAX L. REV.* 1, 3 (1989).
  5. Boris I. Bittker, *Book Review*, 32 *WAYNE L. REV.* 1555, 1560 (1986) (reviewing ROBERT JEROME GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW* (1985)).

when practiced in Spain seemed to think it would be a cleansing experience in Scarsdale and Evanston.”<sup>6</sup>

Boris was also fully capable of improving on the epigrams of others. Noting that “Santayana had once credited an ‘accomplished mathematician’ with the observation that ‘all problems are divided into two classes, soluble questions, which are trivial and important questions, which are insoluble,’” Bittker remarked that “a close reading of the epigram reveals that it leaves open the possibility that *some* trivial questions are insoluble.”<sup>7</sup> (This is how Boris concluded a seventy-five page law review article on the taxation of the family.)

When Boris writes, even his footnotes are worth reading. Here is one:

My academic habits were fully formed before the custom of vetting manuscripts with everyone in sight began. Indeed, I entered academic life thinking 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.<sup>8</sup>

My favorite comes from a particularly prescient 1997 article about enemy combatants. In a footnote, Boris noted that “there was no evidence that killing was a major or even a subsidiary goal of the would-be saboteurs,” then went on to elaborate, describing these enemies as “a lumpenproletariat of slovenly and quarrelsome misfits who, if they had eluded capture, might well have blown up themselves rather than their designated targets.”<sup>9</sup>

Much of Boris Bittker’s scholarship is properly regarded as criticism in which he unearths previously invisible but gaping holes in the seminal works of others. The format of Boris’s scholarship that I like most is when he enters a debate with himself, usually, as in his classic piece, *The Case of the Checker-Board Ordinance*, by putting words in the mouths of fictitious judges or other contestants. It is only when Boris has taken both sides of an argument that I am confident he has found a worthy opponent. I am sure Boris felt the same way.

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6. BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* 5 (1973).

7. Boris I. Bittker, *Federal Income Taxation and the Family*, 27 *STAN. L. REV.* 1389, 1463 (1975).

8. Bittker, *supra* note 3, at 235 n.1.

9. Boris I. Bittker, *The World War II German Saboteurs’ Case and Writs of Certiorari Before Judgment by the Court of Appeals: A Tale of Nunc Pro Tunc Jurisdiction*, 14 *CONST. COMMENT.* 431, 431-32 n.1 (1997).

In January 1983, I came to the Yale Law School. When Boris called me, a year or so before I arrived, urging me to accept Yale's offer, he said he was ready for a replacement—that he could no longer work at his typewriter until a half hour before class, teach, and then return to his typewriter for the remainder of the day. So, this was how he had written all those treatises and articles. Boris stopped teaching just as I arrived, but fortunately, he did not give up his typewriter until this year.

Since he passed away in September, images of Boris pass without warning to my mind's eye. Fittingly, they are most often like snapshots. Inappropriately, they are in color—not Boris's preferred black and white—but the colors are muted, mostly browns and grays. Boris usually wore muted colors. Boris's personality, his energy, his generosity, his strength of character, and his solidity supplied the deeper colors.

Sometimes Boris himself does not appear, just the comforting sound of his typewriter, click clacking away on a new book or a short note. Most of the time, I see him in his office across the hall from mine. I stepped inside his open door three or four times a week, often to talk of some political event or other, or more recently, to inquire about how he was doing, typically only to have him divert the conversation to how *my* family, particularly my children, were doing. On these occasions, Boris would inevitably turn slowly away from the book he was reading or from his typing and change his glasses. It was a small gesture—the better to see me, I always thought. Boris was the most self-contained of friends. He never complained. He always wanted to know about you. When I had heard, usually from others, that he had taken a bad fall in Turkey or in Mexico, or had been rushed to the hospital in London, Boris always insisted that he was doing better now. "On the mend," he would always say. And usually, until quite recently, he was.

I often see Boris standing at my desk, delivering a "Bittkergram"—a pithy, critical, often hilarious, typed short comment on an issue of the day. Usually, he ended with, "all this to use as you wish." He would hand these to me without comment, turn, and return to his typewriter across the hall. They were usually signed "faithfully yours" or sometimes "as ever." They always brought a smile to my face.

Boris loved food. He liked nothing better than sitting in a restaurant eating something spicy, surrounded by good company—and always eating dessert. He loved his sweets. Boris would frequently tell—or retell—one of his limitless stories, often of his youth in Rochester. For instance, when he confessed to the policeman who had just stopped him—inadvertently or with bravado, it is hard to be sure—that he had been driving for several years, even though his license had only been issued a few short months earlier. Boris was a raconteur, a storyteller of the first rank. And he knew me to be his perfect audience:

I forgot his stories as soon as they were told, and he knew my laughter when he told them again and again to be fresh and sincere.

But over the years some of the stories stuck, creating even more images of Boris:

*Boris the energetic young boy*—frightening his older cousin Ruth even from his playpen—and, later in the summers on his grandfather's farm, pouring through the Sears Roebuck catalog after he had grown tired of terrorizing the chickens, calves, and kittens.

*Boris the college student*—entering every contest he can find to pick up a few dollars here and there and winning far more than his share of prizes.

*Boris the law student*—living his third year in New York City, and missing more than a few classes.

*Boris the bureaucrat*—working with Gene Rostow in the lend-lease office.

*Boris the soldier*—caught behind enemy lines in War War II, winning a Purple Heart that he never mentioned.

*Boris the new law professor*—not knowing whether to laugh or be angry when he found out that the retroactive raise the Dean has just awarded him was because he had agreed to a salary below the University's minimum.

*Boris the young teacher*—insisting that he was unsuited to teach the “nice” section of tax, claiming that Eli Clark or John Simon would have to do that.

*Boris the intrepid traveler*—leaving home as a young boy in Rochester only to be thrilled as he was returned home in the sidecar of a policeman's motorcycle, and, later in life, always going here and there, living for a year with Anne and their young children in Rome.

*Boris the adventurer*—skating out on a breaking ice flow with Ralph Brown and struggling to get back to safety. (A few years back, I overheard Boris telling Eli Clark over coffee in the law school dining room that he wanted to go parasailing again. “Doesn't he know he is over 80 years old,” I thought. Obviously not.)

*Boris the photographer*—waiting somewhere in the world, camera at the ready, for the perfect light and just the right image to come into focus.

*Boris the father*—bragging about Susan's energy and determination or Danny's music.

*Boris the charmer*—playing the genial host at a dinner party on St. Ronan Street.

Boris Bittker was a confident man. I can honestly say I saw him nervous only once: at a dinner party at his home on St. Ronan early in his courtship of Claude. After he lost his Anne, he so wanted Claude to love and respect him. And he got that wish. And she stood by him and gave him her love and succor until the very end.

Let us be frank. Boris felt imprisoned when he was told that he could not leave Whitney Center. His last year or so was not pleasant. I knew things had changed irrevocably when he handed me back a manuscript of what would become a book dedicated to him with a note saying, “My eighty-seven year old eyes have gone on strike.” Boris had been my favorite reader. No one could match his critical facility for finding holes in an argument that had to be patched, coupled with his generous ability to supply just the right word or sentence to make the point.

But his health was failing him. He hated the way his body was letting him down, and he feared the ongoing debilitation and pain that Parkinson’s promised.

Toward the end of his life, I saw Boris mostly at his bedside. He frequently said that he was ready to go. Fortunately, Boris had some good moments toward the end. He had moved out of the Whitney health unit into a flat he could call his own, and that cheered him greatly. His eyes and his mind came off strike a few weeks before he died for a meeting with his last collaborators on his final treatise on church and state.

The most vivid recent image I have of Boris—one I shall treasure forever—was of him sitting in his wheelchair in the living room of Whitney Center, swaying slowly back and forth, tapping his foot, and beaming as his son Danny played a varied virtuoso hour of saxophone in a crowded room. Danny gave the audience an extraordinary performance, and Boris was so pleased and proud as he accepted congratulations from all who were there—old friends and new. Boris had often said he was ready to go. But he didn’t want to miss that concert.

My hallway seems quiet now. Boris Bittker’s door is closed, and he will not open it again. His desk chair is empty. His typewriter silent. “Weep not,” he would say, were he able. “Shed no tears. Mine was a grand and glorious life, long and well-lived.” Indeed it was. Good bye, Boris. We miss you.

*Michael J. Graetz is Justus S. Hotchkiss Professor of Law, Yale Law School. These remarks were prepared for a memorial service on December 11, 2005, at the Yale Law School.*