Washington and Lee Law Review

Volume 42 | Issue 1 Article 3

Winter 1-1-1985

A Letter to Professor Burt

Milner S. Ball

A LETTER TO PROFESSOR BURT

MILNER S. BALL*

Dear Bo,

I am indebted to you for your paper and for the larger project of which it is a part.

Richard Rorty argues that it is a sufficient aim for philosophy to keep a conversation going.[1] You have been arguing that it is a sufficient aim for courts to keep a conversation going—between family members,[2] between physicians and patients,[3] between those with power and those without.[4]

I am especially grateful for that turn taken in the published portions of your argument where you direct concern to the handicapped and the severely ill or comatose. You remind us of our and the courts' obligation to keep a conversation going with these untimely born and untimely dead, thereby enriching their humanity and ours.

Your present lecture confronts the courts' humanizing responsibility for dialogue in a context in which the two sides are massive, irreconcilably antagonistic forces. Given such circumstances, you say provocatively, the Court is not to act pacifically.

Democratic theory proscribes the imposition of a solution unacceptable to one of the sides. Robust argumentation between the adversaries must be allowed to run its course until persuasion and the willingness to be persuaded have achieved a voluntary settlement. The Court must not prematurely draw disputes to a close. Indeed, you argue, when there is no dispute but the hush is owing to the forced order imposed by one antagonist, the Court should precipitate conflict. The Court is to detonate a controlled nuclear reaction of political conversation by driving together the two halves of a social critical mass.

In *Dred Scott*, the Court wrongly proclaimed peace where diametrically opposed sides had only entered upon preliminary skirmishes; an untimely cease-fire could not and should not hold. In *Brown*, the Court rightly opened a hole in the wall of apartheid so that whites could no longer avoid human, confrontational conversion with blacks. It thereby rightly set massive, more-or-less contained conflict in motion toward a democratically legitimate settlement, that is, one which was not imposed by the Court or the winning side.

This is heady stuff. Your working the thesis clean in the larger project is cause for great anticipation and proleptic celebration. In what follows I

---

* Caldwell Professor of Constitutional Law, Law, University of Georgia.

1. R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 378 (1979).
2. Burt, *The Constitutionalization of the Family*, 1979 SUP. CT. REV. 329.
3. R. BURT, TAKING CARE OF STRANGERS 1-200 (1979).
4. Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L. J. 455 (1984).

attempt to get up some questions about your paper. I do so in order to pay you tribute—paying in the coinage of the Burtian realm, which is to say in the form of dialogue.

I. YOUR POSITION

You hope to state standards that will guide judges in the face of the unknowable future. History judges the Court's *Dred Scott* decision to be wrong. But you wonder what could have been said to the Court at that time, in that context, before the judgment of history was accessible. You ask if there were not guiding legal principles. Are we left with no more than the capacity for subsequent, general condemnation of the judges' and their society's racism?

You effectively demonstrate the contextual coherence of *Dred Scott*. You thereby deny to yourself and to us the luxury of moral and prudential superiority as a ground for dismissing what the Court did. You show us that there, but for the grace of God, go we and our own Court. You next propose to coin a principle whose negative face is drawn from *Dred Scott* and whose positive face is drawn from *Brown*. You begin with the notion that democracy, in theory and in fact, rests upon the equality of the participants. You then proceed this way:

Where the participants are diametrically opposed, the political bond of recognized equality is stretched thin. The community may be held together by no more than the dispute itself. Acrimonious and robust though the conflict may be, it remains a process of argument in which reasons and powerful emotions are directed across the battle lines. But such ordnance is an appeal from one side to the other. It can only acknowledge, in spite of itself, the reality and humanity of the adversary to whom the appeal is addressed. Each acknowledges that the other must be and can be persuaded. There is always the promise of a willingness to be persuaded. If one side gains control of the legislative machinery and seeks to impose its will by law, the Court voids the effort and sends the temporarily victorious party back to the reactivated front lines. When the Court understands its role as peacemaker rather than as conflict enhancer—and the Court did and does so view its role—then it is likely to pose a threat to the fundamentals of democracy. So long as there is a dispute among citizens each side must acknowledge the other. There is hope of movement and the promise of compromise. To award or to allow victory to one side, thus ending the dispute, is to terminate the only process by which adversaries may become persuaded of their own error or of the legitimacy or necessity of the other's position. At least nullification, secession, and excommunication are held at bay. *Dred Scott* was wrong because it ended a public conversation; *Brown* was right because it started one.

Have I understood you correctly? Is this your principle: The Court is to be a stimulus rather than an endstop to conversation? If dialogue is underway, keep it going; if dialogue is broken off, get it going. Argument is all.

If I have it right, then this is a fascinating principle. It may work; or you may well convince me that it works. In the meantime, almost persuaded, I have three questions.

II. QUESTION ONE: NO VALUE JUDGMENTS?

You wish to avoid the relativity of historically-determined morality and moral hierarchy. If the real wrong of *Dred Scott* is its racism and nothing more, then, you believe, criticism of the opinion is as context-bound as the opinion itself, and we can state no principled guide for the Court.

I do not yet see how your proposal avoids entailing value judgments of the kind that you evidently think disqualify a standard. Let me focus on a single point: how is a court in the future to know which arrangements to undo? If *Brown* was right because it dismantled a regime of white dominance over blacks, what were the critical indicia of that regime that we can give judges to take with them as field guides for identifying other settlements in the future that demand to be voided? Is it not the case that either all arrangements are to be unsettled or that choices about which arrangements to unsettle depend upon values?

I assume that we are not to say that all arrangements are to be unwound. Our politics, like our marriages, is a series of temporary armistices of contending wills. Unless all are to be voided, there must be some principle of selection. But what is that principle?

Is it one of process? That is, do we look at the activity preceding consummation and determine whether there had been sufficiently extended, lively and open foreplay? I do not think that you make or want to make a processural argument. Such arguments are either poor disguises for underlying substantive choices or (and) fail to explain unacceptable results produced by acceptable processes.[5]

If you are not making an argument about the pre-bargain process, are you making an argument about post-bargain satisfaction? Again I think not. When a party has agreed to a compromise but is dissatisfied with the results and is unwilling to live with them, a further elaboration of standards for bargain escape (some of them substantive) will be necessary. In any event, the squawk-factor is not a preferred device to trigger the defeat of a bargain: it rewards the irrascible and penalizes the ironic as well as those so thoroughly oppressed as to be silent.

It must be that you are calling for judgments about the arrangements themselves. How can these judgments be anything other than substantive choices? How can the substance be anything other than historically determined? How else arrive at a distinction between a compromise to be honored and an imposed peace to be repudiated?

---

5. *Cf.* Ball, *Don't Die Don Quixote: A Response and Alternative to Tushnet, Bobbitt, and the Revised Texas Version of Constitutional Law*, 59 TEX. L. REV. 787, 794-800 (arguments against Ely's process theory).

In the process of applauding *Brown*, you say that the Court was faced with a situation in which defeat had already been inflicted upon blacks by the institution of racial segregation. But why cannot the same tack be taken with *Dred Scott*? Was not the real situation that a defeat had already been inflicted upon blacks by the institution of slavery? Is not the failing of *Dred Scott* that the Court did not overturn this already-inflicted defeat but chose instead to find constitutional validation for it? Taney was wrong because he assured the Southern states that they could be both slave-holding and members of the Union. It is not that *Dred Scott* pre-empted a conversation whereas *Brown* precipitated one. Rather, *Dred Scott* said yes to the oppression of blacks and *Brown* said no.[6]

You are unwilling to accept this anatomy as your explanation, for you want to construct an explanatory, guiding principle free of context-bound moral sentiment. You are content to urge that judges should not act on the racist premises that Taney embraced, but you believe that such a "principle alone is insufficient to form a satisfactory guide for future judicial conduct."[7] Why? Because it requires making substantive, moral choices, all of which will always appear arbitrary? How does your role-of-the-Court-as-conversation-promoting principle avoid making substantive, moral choices in electing which arrangements to unsettle? What do you fear? That, absent a historically antiseptic principle, the Court is exposed as moral arbiter and unwise guide? That the American enterprise is discovered to be as much now as from the beginning the bearer of "a contradiction at the moral center"?

You note the curious relief of critics who can find condemnations of the *Dred Scott* opinion that allow them to continue revering the Supreme Court. Are you giving us a sophisticated version of that same irony taken to a higher level? Condemning their Taney Court so as to revere our Warren Court? Condemning the last century so as to affirm the higher ground achieved by moral evolution in this one, thus revering the American enterprise? Condemning one principle so as to salvage the sanctity of principle-making? Hating sinners but loving the sin?

The case you make for the coherence of *Dred Scott* is impressive. The flaw you find in it is a wrong view of the judicial role. You observe that the same view of the judicial role still prevails. That being so, is not systemic evil more dreadfully pervasive than you are letting on? One such precedent as *Dred Scott* is indeed enough. But I am convinced by your argument that we still have the capacity for and do in fact make such precedents. I am unconvinced that legal principle will alter cases.

I find no relief in your reading of *Brown*. Your argument depends upon

---

6. In what sense is it correct to describe the losers in *Dred Scott* as "enslaved"? The losers were representing the cause of the victimized slaves. It was not any immediate self-interest of theirs that was in issue. For them to lose was not to enslave them but to continue the very real slavery of the blacks whose cause they advocated. Is an attorney enslaved when he loses a case for a client?

7. Burt, *What Was Wrong With* Dred Scott, *What's Right About* Brown, 42 WASH. & LEE L. REV., 3-4 (1985).

establishing that *Brown* precipitated a conversation. That would be the only way, in your view, to distinguish it satisfactorily from *Dred Scott*. (Otherwise we are left with the—to you unsatisfactory—distinction resting upon the historically retrospective judgment condemning the racism of Taney, his Court, and his society.) Nevertheless, how much of your own reading of *Brown* is itself an exercise in retrospect?

To begin with, if you were to bring to bear upon the text of the *Brown* opinion the same canons of interpretation that you use on *Dred Scott*, might you not conclude that *Brown* was as textually weak as *Dred Scott* was strong? Furthermore, I do not find it possible to distill from the text of *Brown* a principled commitment to conversation rather than, as in *Dred Scott*, to peace-making. Indeed, you elsewhere remind us that the author and architect of the *Brown* opinions himself viewed them in peace-making terms.[8] In the present paper you remind us that Justice Black regarded *Brown* as peace-making but not peace-making enough: had the Court been less equivocal and more adamantly defeat-imposing on whites, desegregation would have been more readily accepted.[9] Are you reading subsequent events and interpretations back into *Brown*?

The same gnawing doubt generated by the text is nourished by my recollection of the immediate aftermath of *Brown*. You construe as a strength and a confirmation of the conversation principle the Court's failure to utter a definitive resolution and its decision to remand the issue to the district courts. You say that this maneuver had the effect of creating "visible, orderly public forums" for debate.

Brown still strikes me, in this aspect, as a case of judicial chicken. I mean that in the sense in which Justice Black averred that the Court spoke equivocally, in an uncertain voice. Whites were left in doubt about whether their defeat had been declared. The aftermath of *Brown* should have been a mopping-up exercise and a fixing of the terms of surrender, district by district. Instead, what happened was that the battle had to be fought all over again, district by district. Instead of creating orderly forums for debate, the Court put blacks to the vulnerability of demonstrating in the streets and district courts at risk. The effect, that is to say, was neither peace nor ordered conversation but unnecessarily prolonged suffering.

Your notion of the Court's obligation to create public dialogue surely leads us in the right direction. I do not question that proposition. What I do question is whether this "principle" is free of historically shaped value judgments and whether antiseptic principles, if they could be found, are good or necessary. The value judgment of *Dred Scott* was wrong. Taney, his colleagues and his society could and should have judged otherwise. Is it our vocation to search for some other, timeless, legal principle—the unicorn of jurisprudence? Or is it our vocation to critique the value judgments that are made, to examine the larger, determining contexts of these judgments,

---

8. Burt, *supra* note 4, at 464 n.39 (quoting Chief Justice Warren).

9. Burt, *supra* note 7, at 25.

and to recount those substantive narratives that are the matrix for just judgment?

III. Question Two: Is Democratic Principle Sufficient?

You are preoccupied with a fundamental dilemma: "When one group (or even one person) cannot submit to the will of others without suffering what it (or he) regards as an excessive and intolerable defeat, then that defeat cannot be justified in democratic principle."[10] Your theory of the judicial role is your resolution of the dilemma. On the one hand, you say that the Court is not to violate democratic principle by either granting or permitting the unacceptable defeat of one party to a dispute. On the other hand, you find in this limitation the potential democratic strength of the judiciary. You note that the Court can only generate public conversation. But you go on to observe that public conversation is exactly the way—the only way consistent with the democratic principle of equality—whereby antagonists can change the terms of their dispute by persuading and being persuaded.

My questions are practical: Is there such conversation? If so, can it effect the necessary changes of heart? I am unsure about the existence of the conversation you dream about. What troubles me more than diametric opposition is the clash of paradigms or universes of discourse where there is not only no agreement but no disagreement, no common ground, no shared assumption about what counts as either legitimate question or legitimate answer, no possibility for conversation because no will for it. Such a state of affairs is not a Hobbesian or Kafkaesque fiction. The all too frequent reality is that there is no dispute for the Court to prolong and no possibility for one—unless the Court weighs in heavily and authoritatively on the side of the victims and gives them an imposed victory. In this event, the losers who were formerly dominant will be forced to treat the adversaries seriously as human beings. That, more or less, is what happened with *Brown*, except that, as Justice Black observed, the Court botched the authoritative declaration of victory. Even so, when the Court does act decisively, conversation cannot be assured; it is always a close question, and was after *Brown*, whether it is their old selves or the Court that the losers will throw off.

If I surrender my hesistance and agree to the hypothetical possibility of conversation such as you describe, I am still left without doubt about its efficacy. Let us assume that democratic principle and equality theory take hold. I, an insider, develop the consciousness of an outsider. I recognize my vulnerability. What result?

Is it not probable that the result will be anxiety, that I will become afraid and so undertake to defend myself against (or try to oppress) my neighbor with renewed vigor? If I am convinced of my vulnerability, my equality with the other, what will cause me to choose dialogue over defense?

---

10. *Id.* at 20.

Does not history teach the danger of exposing vulnerability? Has vulnerability not produced both the Ku Klux Klan[11] and the nuclear arms race?

When we get down to it, and there is diametric opposition, what is there in democratic principle or the theory of equality to encourage belief that antagonists will, on their own motion, change the terms of their dispute? Are you not talking about a change of heart among antagonists, the kind of change that allows one to find the other more compelling than his own fear, anxiety, and hate? Democracy and equality have no capacity to supply this prerequisite choice of the power of love in preference to the love of power.

Absent a change of heart, what is necessary, again, is an authoritative intervention on behalf of the victims, an unequivocal utterance about what is good and bad. When we need it most, however, a decisive closing is least likely to be settled upon us by the Court. More likely, we are given *Dred Scott* and the attempted legitimation of the intolerable. I suppose that doing nothing, allowing slavery to continue, is to be preferred to constitutionally validating it. But there cannot be both slave-holding and human community. Effective pronouncements to this effect do not require the guidance of a theory of the judicial role nearly so much as they require clear, frequent exposition of the story of justice.

Let me raise a related, subsidiary issue. Is it necessary to view adamantine peace-seeking opinions by the Court as antithetical to public dialogue? Could not your theory accommodate judicially imposed victories? Assume a bleak situation—slavery before the Civil War. If the Court had found slavery constitutionally invalid—i.e., the reverse of *Dred Scott*—would this have been to shut down public conversation? Might it not depend, if only a little, upon the delivery of the opinion?

I realize that I enter my utopian mode when I begin talking as though opinions count. I know it to be possible that the Court might just as well issue scratch paper as opinions, and that only the Court's actions count. If it does the right thing, the Court's actions will make their own appeal. I know this is possible. But let's assume the other possibility, that the opinions have meaning.

Might judicial opinions have a role to play within public conversation? Might that role be performed by opinions that make magisterial, constitutive determinations (on behalf of the victims)? Might they do so by the manner of their appeal to the reader? Might they, for all their authoritative tone, remain opinions and so depend for their future upon the reader's assent? If a decision is right and the opinion works, then it is itself an exemplary exercise in dialogue. Dialogue, as James Boyd White observes, "is not a competition to see who can reduce the other to his will, but a process of

---

11. *See, e.g.*, W. CAMPBELL, BROTHER TO A DRAGONFLY 241-50 (1977).

12. White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849, 870 (1983).

mutual discovery by mutual refutation."[12] Accordingly, one "accepts refutation gladly, for it reduces the divisions and disharmonies within the self...."[13] In the judicial process, might losers (the powerful whose oppression of the weak has been declared constitutionally invalid) accept persuasive, certain refutation by the Court because it reduces the divisions and disharmonies within the body politic?

The Court reaches an authoritative decision, a decision that has been placed out of the reach of the parties by their hostility. The Court resolves the impasse. It declares a victor. It enters the dialogue. It appeals to the losing party. The life of the Court depends upon the persuasive power of its appeal, its capacity to win the loser over to engagement with the Court in an ongoing enterprise. Why are dispute-resolving opinions and continued public conversation mutually exclusive?

IV. Question Three: A New Jurisprudential Paradigm?

Are you a closet radical? Is not your understanding of the Court's role revolutionary in the sense that it does not fit within the received theories of law? The old Norse word that gave us our word "law" is often translated "settlement." The law as settlement, as dispute-terminating, as determinant of peace, has worked its way deep into our consciousness. Now you want us to think of law as unsettling, as dynamic, as an engine of dialogue.

You are not alone in this endeavor. I and others have our own nonstandard dreams of law. They bear some relationship to the one taking shape in your writing. That there is a growing number of such experiments confirms my belief that something is afoot.

My own conclusion is that elaborating a conception of courts as activators rather than terminators of conflict will burst the bonds of the existing jurisprudential order. I think that an attempt to keep within the limits of the standard jurisprudential forms will produce internal contradictions and anomalies within your theory.

I opened my letter to you with a reference to Richard Rorty's proposal that it is a sufficient aim for philosophy to keep a conversation going. Although this notion seems modest enough, you will remember that its context is a radical revision of the very nature and aims of philosophy.

Your own proposal about conversation as a sufficient aim of the courts also appears modest. But is it not, too, a shaking of the foundations? Does not its proper context have radical dimensions?

How can we think about courts promoting conflict without thinking about law as something entirely different than order (as in "law-and-order"), entirely different than rule and principles, entirely different than the static images we at present have for it? How can we think about law in fresh terms without attention to new political and human realities of which law forms a

13. *Id.*

part? In short, are not the larger dimensions of your enterprise paradigmatic revisions of jurisprudence and self-perception?

The judgment of history is not available to judges in the present. Nevertheless, maybe we ought not try to fashion guides for them other than those of the story of the past and the story of origins. If we keep pretending that there are neutral principles, we may prevent judges and ourselves from coming to terms with our responsibility.

Is not the future our creation? If we and our judges are not "to toss dice toward the prospect of historic vindication," neither are we to take refuge behind principles. How it all turns out depends upon us. We do now condemn *Dred Scott*. Taney's error, however, was not that he failed to discern what we would think and which side we would come down on. We do not judge him for a poor reading of tea leaves. He is justly condemned for refusing the responsibility to create with us a future of human flourishing. To have acted otherwise would have required of him not a different principle but a different heart. For us to act otherwise will require the same. To such a conclusion reflection on your paper has driven me. That is why I find your work to be ultimately radical.

* * *

I have wanted to express my gratitude for your labors and also to authenticate my thanks by some demonstration of it. You will therefore understand my questions as acts of support and not of antagonism. My good wishes for your success in your worthy enterprise are genuine. Nonetheless, I also confess to ulterior motives. I think success will mean that you have worked your way through to the necessity for a new jurisprudence. And, then, if we utopians of the legal world unite ...?