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Burton D. Wechsler, Scholar of Struggle

BURTON D. WECHSLER, SCHOLAR OF STRUGGLE

JAMIN B. RASKIN*

Burt, dear man, we have missed you since you retired back in the summer of 1998. Your joyous farewell dinner, attended by hundreds of alumni and friends and relatives, seems a world away now. We didn't know then that we were living in what we might come to regard as the glory days of our lives. We had peace and prosperity. We were making social progress, however slowly. There was a sense of hope in the air in the 1990s. We had you with us every day.

You always warned us how quickly things can slip away: political democracy, human reason, a sense of security, economic possibility for the poor, international peace, our civil liberties. Your younger colleagues, who love you like the spirit of life itself, often thought you alarmist because you could smell danger way off, a century away. But you were right, as always, your bone-sense of history unerring.

What have we seen this century, Burt? A presidential election conducted under the most dubious circumstances. The ultimate winner launched his campaign in the Deep South at the racist Bob Jones University, redoubt of Christian fundamentalism. The obsolete workings of the electoral college turned on a handful of votes in racially polarized Florida where tens of thousands of African-Americans were falsely purged from the voter rolls and hundreds of thousands of former felons were disenfranchised by law. The Florida Supreme Court was quickly supplanted on pedestrian matters of state election law by a grasping and bitterly divided United States Supreme Court where a majority of five Justices, all appointed by presidents of the plaintiff's own political party, stopped the counting of votes in a

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presidential election for the first time in history. If you were with us at school, Burt, you would have shown with your artist's eye for detail how that stolen election in 2000 was a haunting reprise of the 1876 presidential election, another Florida cliff-hanger where, when the dust settled, African-Americans had been sold down the river and your beloved Reconstruction was gone with the wind.

We have no peace now. We have seen the eruption of terrorism on a new scale entirely, driven by appalling religious fanaticism and national hatreds. The World Trade Center is down, the Pentagon was hit: we lost thousands of lives on one day in September of 2001 because of a trust-fund Saudi terrorist and his disgusting Al Qaeda network. The enlightened societies of the world quickly came to our aid: "Nous Sommes Tous Americains," declared *Le Monde* on September 12, 2001.

But today we are more isolated as a nation than ever. The Bush Administration's abandonment of international law and institutions when it suits us—the Kyoto Accords, the International Criminal Court, the world conference on racism—drives the governments of the rest of the world crazy. Our halfheartedness about creating a just peace between the Israelies and the Palestinians, a cause close to your heart, has led to catastrophic violence and despair in the Middle East. And the war drums are beating again now for an attack on the loathsome Saddam Hussein, who you will remember was our guy during the Iran-Iraq war. If thousands of innocent people are to die in the process, it counts for little in the political and strategic calculations of our leaders. As you would always remind me, quoting Randolph Bourne, "War is the health of the state." Today, war is the health of the corporate state, which has little to offer most Americans beyond a collapsing stock market, ceaseless scandals featuring kleptocratic CEOs and an ideologically closed "two party system."

As I write, Burt, there is a killer at large in the Washington area, terrorizing all of us with lethal, rush-hour assaults on people engaged in the business of everyday life.

Washington no longer feels like the same place where you threw uproarious dinner parties for your students and agitated for statehood and the right to vote, a just cause that still languishes in the halls of Congress.

With all of this fear and terror comes loss of liberty. This is a lesson you polished over the years in your celebrated First Amendment Law class, which I have had the blessing to inherit from you. You taught with passionate indignation about the incarceration of antiwar and antidraft protestors during World War I, the scandalous

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imprisonment of Eugene Debs while he was running for president, the internment and dispossession of Japanese-Americans during World War II, the FBI's campaign against Martin Luther King and the Civil Rights Movement, the COINTELPRO program, the persecution and disruption of the antiwar movement in the 1960s and 1970s. You taught us that a vivid historical memory is the working conscience of democracy.

Today, we have an Attorney General whose interest in the Bill of Rights begins and ends with the Second Amendment. He has suggested that those who ask questions about the wisdom of government policy are giving encouragement to our terrorist enemies. The patriotic act of dissent now apparently conflicts with the Patriot Act. The Attorney General has overseen a steady abandonment of those principles you fought for in your life: due process, right to counsel, a presumption of innocence, a rejection of collective guilt and guilt by association, a rejection of racial profiling, freedom of expression and association in public spaces. The movement against the death penalty, of which you were a part, has gained considerable energy because of revelations about innocents on death row. Yet, all of the progress now threatens to slide away.

I am embarrassed, Burt, that things have taken such a dramatic turn for the worse in the world and there seems to be so little that any of us can do to stop it. As a professor, you were never at a loss for organizing strategies and ideas: it was unusual to see you without a petition, a meeting, a fundraiser, a movie, a guest speaker, a project for change. Whether you were fighting for voting rights in the District of Columbia, for a just peace in the Middle East, or for a living wage for immigrant janitors at our university, you showed us every day that a patriot is an activist, an agitator, a skeptic, a rabblouser, a force for immediate change in the world. Not once you told me that "the most important word in the English language is struggle."

Your research, writing, and teaching have indeed revolved around the struggles for civilization and decency in American life. You were drawn irresistibly to Reconstruction, a moment of intense interracial solidarity and political transcendence when the blood of the Civil War was redeemed in the effort to build a just society. And you taught us how Reconstruction was undone by the resurgence of white supremacy and the operation of class power. You taught us about the labor movement's struggle for access to public space and the freedom to express itself against business-dominated government in the 1920s and 1930s. You showed us how freedom of expression was not an

idea that popped out of the heads of academics or Supreme Court justices but the legacy of a workers' movement determined to organize and speak directly to society.

In your work, you have always given honor to the civilizing movements of our own time—the anti-war movement, the Civil Rights Movement, the women's movement, the gay and lesbian movement—and showed us how the very act of struggling for freedom against unjust power is emancipating for participants in the struggle. Like Justice Brandeis, you have always known deep in your soul that there is an intimate relationship between the ends of public life and the means of achieving them. This is why you frequently said that, as an intellectual, you were a Marxist and a Jeffersonian: you believed in class struggle for justice and you believed in individual freedom and institutional democracy as the means of getting there. You had no interest in authoritarian dogmatic politics of the Stalinist variety and no patience for the post-modern flight from rational inquiry, political analysis, and the material world.

In your teaching, you empowered your students to read history and political commentary along with Supreme Court cases and to develop their own conceptual paradigms to analyze and decode judicial decisions. "Develop your own rules!" I once heard you yell at a group of students asking for "the rule." (A brilliant and fastidious outliner yourself, you have always had contempt for commercial outlines.) More than any professor I know, you restored the actual parties of cases—the plaintiffs, the defendants, the people for whom they spoke—to a central place in the story, not only making history a vital part of the study of law, but making the study of law a vital way to understand history. In a seminal case about the right of the Congress of Industrial Organizations to pass out fliers in a public park in the 1930s, you were always able to reconstruct the rich history of the labor movement, the ambivalent politics of the Democratic Party in the twentieth century, the paradoxical dynamics of the big-city political machine in the industrial Northeast, and the transformation of public space and the First Amendment more than a century after the nation began.¹ You took that Federal Courts course, with which so many law professors across America struggle, and turned it into an enormously popular success, a goldmine of insights about the relationship between federal judicial power and "states' rights" racism, corporate domination of state politics and the effort to create a national democratic counterweight to it, and the institutional

1. *Hague v. CIO*, 307 U.S. 496 (1939).

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struggle over justice and who shall have access to it in the United States. You never failed to see how the tensions and conflicts of everyday life were reproduced and altered in the institutions of the legal process.

Even though you lived in the humming world of ideas, magazines, and books, students were always first with you and you were always first with them. On the first day of class, with usually more than a hundred students with whom to contend, you would pull out your camera and take everyone's picture so you could know everyone's name within a few days. You had no pretense of objectivity or neutrality in class, but you were emphatic about democracy and free speech. You said exactly what you thought, usually in brilliant, protracted, and comically profane ways, but you expected and welcomed students to fight with you, to argue, to stand their ground. You never patronized them, you never babied them, and you always listened carefully. I remember watching in astonishment as a first-year law professor when I came to see you teach First Amendment and a student made a point about prior restraints and you said, "You know, I never thought of that and I'm going to have to rethink my position now." You gave your students that rarest thing: intellectual respect. (And it showed when you graded exams since you were a notorious hard-ass.)

Burt, as I write to you from a time of hardening camps in the world, it is inspiring to remember how you lived your life without borders. You learned from your students, you socialized with them, you brought them home for dinner with Fredi and your kids; you talked politics and culture with your colleagues, not just law; you were as likely to be having lunch with law school secretaries, American University undergraduates, or colleagues from other parts of the University as you were to be having it with your many devoted friends on the faculty. You delighted in bringing Palestinian and Jewish students together, in having guest speakers crash your course with a contrary thesis, in having improvised debates in the lounge before thirty students. In all of this there was no artifice at all, for you have always embodied the intellectual's unquenchable love of knowledge and of wisdom, and you have found them in all places, with all people, whatever their age or station in life. You showed us that a great teacher never stops being a great student.

Thinking of the days we had with you here is stirring and nostalgic, but the road that lies ahead for us is a profoundly uncertain one. In many ways, the Washington College of Law has never been better prepared to act as a force for justice in the world: we have a

magnificent new building, a radically expanded faculty, first-class students, a renowned clinic, the Marshall-Brennan Fellows, and an extraordinary Dean. But we are missing you, the heart and soul of the institution, in the last quarter of the last century. Sometimes when I wander out into the hallway after a long afternoon at the computer, I imagine that I will bump into you, like in the old days, and you will lead me into your office for a handful of dried apples, granola and peanuts that you kept stocked in your file cabinet. Yet the hallway is quiet now. Still, in the back of my mind, as I pass your old office, I can hear you growl in your inimitable, loving way, "Hey, kid, you fascist bastard. Get back to work."

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