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Individualism and Anti-Individualism in the Work of Owen Fiss

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Earlier speakers have reminded us of the central place that *Brown v. Board of Education*¹ occupies in Owen's thought and scholarship, and I'm reminded of something that happened several years ago that I hope Owen won't mind my sharing with you.

Owen and I had agreed to teach a seminar together whose title was to be "The Death of the Law," or rather "The Death of the Law?" with a question mark at the end. I preferred the title without the question mark. Owen said he would accept the title only with the question mark. The question mark reflected Owen's doubts about any claims to the early demise of the law. So you can see that the course, from the outset, was a compromise.

Having settled on the title, the next task was to compose a description for the law school bulletin so that students signing up for the course would know what they were getting into. Owen, in his characteristically generous way, invited me to take first crack at it and said that I should draft a description; then, he would look it over and send it on to the registrar.

So, I wrote a description for the course. I was in a dark mood, intellectually speaking, plagued by doubts about the sustainability of the law's claim to authority. I was more impressed than Owen by the effect of various nihilistic attacks on the law, and in general, then as now, not as impressed as Owen by the capacity of reason to generate, out of its own resources, an answer to the hardest questions of life or law. So, the death part of the title was my inspiration, against which the question mark was meant to be a gesture of resistance.

I wrote a description of the course that expressed those sentiments and sent it to Owen. It came back, not edited but replaced, with a description that had been composed afresh from the start. The new description read, as I recall, something like this: "There was a shining moment in American life, called *Brown v. Board of Education*.² *Brown* affirms our deepest values and commitments and lives still. Only if we

* Dean, and Edward J. Phelps Professor of Law, Yale University. This is an edited transcript of the Dean's remarks at the Symposium.

1. 347 U.S. 483 (1954).

2. *Id.*

can stay the course will we prevail.” End of description. I called Owen, and said, “Well, I see you’ve edited my version,” and he acknowledged that he had. I pointed out that we could go back and forth for a long time exchanging course descriptions and suggested that we just submit his version. Owen, again in his characteristically generous fashion said, “That sounds fine to me.” I insisted only on making one small change at the very end of the description. I insisted that we add the following sentence: “Taught by O. Fiss and A. Kronman, who joins in the course but not its description.” The most amazing thing about this incident is that the registrar permitted us to publish the course description with my dissent, and I think it remains the only course description in the history of the Yale Law School Bulletin with a dissenting opinion built into it. You can just imagine what the course itself was like.

I would like to devote my time this afternoon to exploring what some might think is a tension in Owen’s scholarly work between his abiding and heartfelt commitment to the value of individuality, individual conscience, and the very closely related idea of individual responsibility, on the one hand, and his remarkably consistent assault on the adequacy of individualism as a theoretical basis for understanding the structure of legal and social institutions on the other.

That Owen has a profound commitment to the principle of individuality, of individual self-discovery and self-expression, cannot be doubted. The central and defining drama in Owen Fiss’s moral universe is the drama of the lonely individual wrestling with the claims of conscience — confronted with a challenge, a case of awesome complexity and weightiness, struggling against all odds to do the right thing. That is, for Owen Fiss, the drama of moral life. It is exemplified, in an especially vivid way, in the figure of the hero judge, who makes an appearance early in Owen’s scholarly work and continues to play a crucial role throughout. But it is not only the judge who exemplifies this drama. Whether as teachers, politicians, or citizens — in whatever role we happen to find ourselves and constrained by whatever practical necessities — we all feel the claims of conscience and the call of responsibility. For all of us, the great challenge of moral life is to live up to these claims and to act on this call in a responsible way — to be selves, worthy of being called individuals.

And yet, consistently throughout his intellectual career, Owen has found one attitude or practice after another defective on account of its (in his view) indefensible commitment to the principle of individualism. Owen is the champion of individual conscience, one of its great celebrants, and yet he is also one of our fiercest critics of individualism as a

way of understanding the law's main institutions and our political and social life.

Let me quickly illustrate this second aspect of Owen's thinking by referring to three famous arguments that he has advanced, each of which has already been mentioned in the course of our discussions here today. To see the common theme that connects them, it may be helpful to review all three again, quickly and in sequence.

First, there is Owen's famous argument that the Fourteenth Amendment ought not to be understood in terms of what he calls "a principle of nondiscrimination," whose primary goal is to ensure that individuals are treated in a fair and nondiscriminatory way and that they are given, as individuals, an equal chance to make their way in the world on the strength of their own talents and abilities. Rather, Owen argues, the Fourteenth Amendment and its great principle of equality ought to be understood in terms of what he calls "the principle of nonsubordination," whose goal is to prevent the formation of, or to dissolve, the caste-like hierarchy that Owen believes exists in this country, and that causes certain groups to be permanently disadvantaged. The focus ought to be, Owen argues very forcefully, not on individuals but on groups and on the remedies that are required to dissolve their group-wide subordination.

This shift from the individualistic principle of nondiscrimination to the group-wide principle of nonsubordination leads Owen, among other things, to take the position that he does in the debate over affirmative action. In that debate, Owen is most decidedly not with the individualists, who see in programs of affirmative action an unacceptable wrong to the individuals excluded from the places that are being filled with the beneficiaries of these programs. He sees the issue instead in group-wide terms — in black and white, so to speak. The individualistic wrongs, which the libertarian critics of affirmative action emphasize, do not register with Owen, and in his view of equality ought properly not to register since, on that view, the right way of thinking about the protections afforded by the Fourteenth Amendment is in terms of groups not individuals.

A second and equally well-known example of Owen's criticism of individualism as a philosophy of law and life is his spirited defense of the new form of litigation and the novel use of remedies (especially the injunction), which, following Owen's usage, we now call "structural litigation" and "structural remedies." In the classical view of litigation, espoused by Lon Fuller in his famous posthumous *Harvard Law Review*

article, *The Forms of Adjudication*,³ the processes of law are understood in essentially individualistic terms. A makes a promise to B, A runs over B in the street, A hits B over the head with a hammer and has to make compensation or pay a penalty for his wrong. Lon Fuller's view of the legal world was very much an individualistic one, and it shaped his conception of the processes of law and of the remedies the law has at its disposal to cure the wrongs that A does B.

This view may have been defensible, Owen argues, in a simpler world where most interactions of the kind that the law took notice of were of an individualistic sort. But today, we inhabit vast, complex institutions, and they mediate our relations to one another. For Owen, this is the hallmark of modern life — the phenomenon that Paul Kahn refers to as bureaucratization. If the law and its apparatus — our courts and judges, the procedures they follow, the remedies they have at their disposal — are to be adequate to our bureaucratized condition, they must, Owen argues, take this structural dimension of modern life into account. They must not be blinded by an archaic individualism that no longer reflects the way we live today.

The modern world is characterized by aggregation and institutionalization, by collective experience and large institutions, which often seem to us just a part of the natural backdrop of life. To secure real justice under these conditions, the institutional framework of our lives must itself be directly taken into account, and then reformed and refashioned, which requires a shift in orientation in every phase of the judicial process — from the way in which lawsuits are formed and administered to the remedies that are deployed to cure the structural wrong which the lawsuit has brought to light — a shift, one might say, from a world of individualized corrective justice to a world of institutionalized distributive repair.

A third illustration of Owen's consistent anti-individualism is his work on the First Amendment. He insists, in particular, that the crucial question for the doctrine of free speech today is not whether the cantankerous street corner orator ought to be permitted to express his unpopular views, but whether, and how, the great concentrations of power in government and in the media distort our capacity for free expression — distort it so badly as to turn the right of free expression into a paper right, worth little if anything in practical terms. Here too, Owen argues, we are to take the ideal of free speech seriously under the institutionalized conditions of modern political and communicative life. We must learn to think structurally. We must shift our attention from the lonely individual as our dominant image of what free speech is all about, and

3. Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

learn to think organizationally and institutionally — in short, anti-individualistically.

Now how does one reconcile this side of Owen's work — what I have called his consistent opposition to individualistic theories and attitudes — with his profound attachment to the struggle of individual conscience as a moral idea, to the moral drama of the lonely man or woman in the judge's or politician's chambers, or in the professor's office or the voting booth, struggling with ail of his or her might to do the right thing, as intensely individualized a conception of moral responsibility as one can imagine? How do we put these two things together?

Perhaps they can be fit together in the following way. To promote the conditions of an authentic individuality under modern American conditions, one might argue, we must think non-individually. In part, that is because in the United States, for accidental historical reasons, we find ourselves burdened today with a caste or caste-like system of subordination that must be taken into account and addressed directly, if the ultimate moral goal of individual liberation is to be achieved. More generally, as inhabitants of the modern world, with its pervasive structures and institutions, we must think structurally and institutionally if we are to vindicate the idea of individual liberty in serious terms. We must be realistic about the world we inhabit, either as Americans who have inherited a system of subordination, or as citizens of the modern world who find ourselves living amid sprawling, impersonal, and bureaucratic institutions. If we pursue a program that we believe to be in service to the highest moral good of individual liberation but that ignores these uniquely American and pervasively modern conditions, we will fail, because we will have not pursued a program that is adapted to the world we inhabit.

So we must be realistic. But the point of being realistic, in the end, is to do a better job of reshaping the world so as to open a wider space for that drama of conscience that lies at the center of Owen's vision of moral life. In sum, one might say that Owen's anti-individualism is in service to his individualism. Owen is simply pointing out that the means to the moral goal of individualism require us to turn our attention away from individuals as such and look instead at the structural characteristics of the world they inhabit. This seems to me a plausible account of Owen's position, and in any case a sensible way of fitting these two aspects of his thought together.

I would like to conclude by offering one or two further comments that suggest, perhaps, a deeper way in which Owen's moral individualism is, if not in the end self-contradictory, at least marked by an irony of a special and distinctive kind. The point I want to make can be brought

out most easily by reflecting for a moment on the nature and source of Owen's deep suspicion about the capitalist system of production. Capitalism is the most individualistic form of economic organization ever devised. On many occasions, Owen has expressed his deep anxieties about the moral adequacy of this form of economic organization. In part, Owen's anxieties reflect his belief that the individual freedom that capitalism promotes produces, as an unintended and unattractive byproduct, a large degree of social injustice — a misdistribution of resources that does not fit even a minimal conception of fairness. One reason to be morally worried about capitalism, therefore, is that it produces an unjust distribution of the necessary and good things in the world.

But there is, I think, a deeper source to Owen's anxiety about capitalist enterprise, one that derives from the fact that capitalism is based upon the pursuit of self-interest. While Owen doesn't find this contemptible (I have known Owen to satisfy a preference of his own from time to time), he surely does not see in the capitalist's self-centered pursuit of his or her own preferences, the grandeur of devotion to public values — values that are larger and more durable than one's own self, that for Owen are alone capable of giving direction and purpose and meaning to life. The self-centered individualism of the capitalist system, an individualism that invites each of us to place ourselves at the center of things, is incapable of yielding the sense of meaning and purpose that only a commitment to things larger than one's self — to public values that lie beyond the horizon of mere self-interest — can supply. So it isn't only the injustice of capitalism that for Owen is distasteful or damning, but also its selfishness, its smallness of spirit, its inadequacy as a source of moral fulfillment.

I might have made the same point by referring to Owen's attack on that species of legal nihilism that he associated at one point in his career with the critical legal studies movement, or at least with certain extreme versions of it. In Owen's view, the great fault with the legal nihilists was their self-absorption. They taught, in a different way of course, a species of philosophical solipsism that refused to recognize the existence, let alone the gravity and moral force, of any transcendent norms or guiding ideals beyond the self, ideals that might constrain the free play of the moral and intellectual imagination. Against these philosophies of self-absorption — capitalism on the one hand, and legal nihilism on the other — what does Owen offer? Truth and justice — the morally redeeming public values that lie beyond anything we can create by ourselves, or anything that might conceivably fall within the horizon

of the self and its gratifications, and without which, in his view, life would be empty of meaning and purpose.

If Owen is right and his moral anxieties about capitalism and the critical legal studies movement are well-founded, then one arrives at the following view: Nothing on Earth is as valuable or worthy of our respect as an individual struggling to live responsibly, in accordance with the dictates of conscience. The only way to succeed in that struggle is to give oneself over to those higher, transcendent norms of truth and justice that lie beyond the self, to put self-sacrifice in the place of self-absorption — to live up to the demands of the ethic of individualism by acknowledging that there are higher and better things than one's individual self. To be a self, worthy of the values that word implies, one must, according to this view, give oneself up to justice and truth, becoming an individual by ceasing to be one. I have called this view ironic. It may just be the truth.