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Owen Fiss and the Aspirational Conception of Law

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I want to begin my comments by mentioning something that became extremely apparent to me as I watched Owen and his many students over the course of this conference. It has to do with what it means to be a "great teacher" — something that is too often overlooked and certainly undertheorized. It is one thing to be a substantial scholar; it is another thing to mentor substantial scholars. The ambition of every great teacher should be to produce students whose achievements exceed his or her own. This can be accomplished only if a teacher — especially one with a substantial body of important work of his or her own, treats his or her methods and ideas as resources for the students, gifts for them to make use of as they see fit — not as a canon or a received wisdom that they are expected to follow, and adhere to, on pain of punishment. The ideas and methods must allow the students to see them as opportunities for growth, permissions to develop their self-conceptions, their understanding of their work, and their understanding of their teacher. If nothing else, this conference displayed that Owen Fiss is a great teacher in precisely this way — and not merely to his students. As a long time colleague of Owen's, I can say that this has been a wonderful thing to experience. Indeed, one can capture this simply enough: Owen is great because he treats his students as colleagues. On the other hand, Owen is Owen, as both George Priest and I can attest, because he is fully capable of treating his colleagues as if they were students: educable and potentially worthy of respect.

One of the most striking features of Owen's legal theory is his insistence that in order to understand the decisions of a court or the character of legal decision making in a certain era, the theorist must begin by ascribing to the relevant court or courts a certain substantive conception of justice as well as an account of the role of the courts in pursuing justice so conceived. We might put this by saying that interpretation begins with a theory of justice and a theory of institutional competence.

The same point can be made in slightly different terms: Interpretation requires a political theory and must be embedded within it. That political theory may be more or less developed, but it requires that one

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attribute to the court a certain view of the point or purpose of law — its ambitions or aspirations, and a theory of the state — in particular an account of the role of the courts in pursuing the aims of law.

The theorist can criticize a court in at least two ways. The best interpretation of the court may attribute to it a theory of justice or a theory of the state that may be a bad or mistaken theory — even if it is the most apt theory to attribute to the court. Alternatively, the theory ascribed to the court might be the best or most plausible theory, but it may have misapplied or misunderstood the role of the courts are to play within it.

But why is ascribing a political theory a necessary condition for interpreting the court or the law? After all, social scientists interpret decisions and a court's behavior without ascribing theories of justice or of the state to the court. Instead, the social scientist evaluates decisions on the basis of what, if anything, in the very nature of our understanding of law requires us to attribute to courts a certain defensible, substantive political philosophy. Surely these are ways of deepening our understanding of the law that do not require the attributing of a political theory to the court. Is there anything in the nature of law that requires that our understanding of it be informed by a political theory of justice and of the state? No one believes that there cannot be a social science of law, nor would anyone deny that social science accounts could be informative or illuminating. Obviously they are. The thought must be that our ability to understand what law is, and how it figures in our individual and collective lives, requires at some point that we ascribe a political theory of justice and of the state to it.

The view that our understanding of what law is and, therefore, our ability to interpret what the law at a particular time and in a particular place is depends on embedding it within a substantive political theory of the point of law is most often associated with Ronald Dworkin, not Owen Fiss. For Dworkin, to understand the law it is necessary to interpret it in its best light. And doing that requires ascribing substantive political virtues to it in the form of a defensible set of aspirations or aims.

The central figure in Dworkin's jurisprudence, of course, is Hercules. Interestingly, one of the familiar if not altogether persuasive objections to Dworkin's jurisprudence is the charge that judges cannot interpret law according to the standard set by Hercules, for Hercules has heroic capacities the average judge lacks. Yet the heroicism of Hercules is not borne of idealism in Dworkin. That is interesting in part because in Owen's work, the image that keeps emerging is of the judge as a heroic figure. Owen's judge is heroic because, like Owen, he is an ide-

alist. Nothing was more plain during this conference than that. Time and again in response to his critics, Owen replied that they were all giving up on the law too quickly. His constant refrain was: *Don't give up on the law so fast.*

For both Dworkin and Fiss, then, the law is partially descriptive and partially aspirational. There is a sense, for both of them, that what the law is is partially a matter of social fact and partially a matter of political justice — a matter of what it ought to be. The question is, why is seeing the law this way essential to our ability to understand the law as an institution central to our personal and collective identities?

I have long since given up on being confident about my interpretations of Dworkin's positions. I don't recall his allowing that anyone has got him just right; so I offer the following as a constructive interpretation of his position. The question is, why must someone understanding what law is see it aspirationally as well as descriptively? If we take Dworkin's analogies to painting and creative writing seriously, his view seems to be that the creators of works of art and literature intend that those who read or see the work interpret in its best light. That is what it means to interpret according to the author's intention; it means in part offering no special weight to what the author takes the meaning of the work to be. The work is something of a social artifact, and the interpretation of it must be social in a certain sense. Each person must see it in terms of a plausible account of its value in the social context. For law, the value associated with the practice must suffice to render plausible, insofar as possible, the claim that the law's use of its coercive powers is justified.

No such view rests at the foundation of Fiss's account. Indeed, I want to suggest the following explanation of Fiss's fundamental commitment to an aspirational conception of law. For Owen, the central idea is that each of us is a participant in a legal practice, and this legal practice has certain features. Among its most important features is that at its core it is coercive; it allows some individuals to use force against others. It allows the possibility of subjugation and discrimination as much as it provides opportunities for autonomous choice and establishes the conditions for the exercise of human freedom.

Given the nature of law as an institution, the first question we need to ask ourselves is this: We conceive of ourselves as moral agents, and we regard others as free and equal and as moral agents as well, so what kinds of practices can we as individuals so conceived allow ourselves to participate in? What kind of legal practice can we imagine ourselves participating in? What legal practice can we imagine that is worthy of our participation? How willing are we to make accommodations on our

own self-conceptions in participating in institutions that constrain the liberty of others, that provide the possibility of repression as much as it provides for the possibility of autonomy and freedom? And, as the heroic judge, the person who Owen is and aspires to be, the law must be seen this way because all such individuals, whatever their political points of view, conceive of themselves, largely speaking, as moral agents who regulate their affairs with others by moral ideals. These ideals impose a conception of law as a regulative ideal. And that ideal is a moral one. A law that fails that test is not one that moral agents, including judges, can rationally participate in. So it is a necessary condition of understanding their behavior as rational that we attribute to them a moral theory of the state and a substantive theory of justice and of the role of courts in pursuing justice. The aspirational view of the law is a necessary condition of seeing law as rational practice among moral agents. This, I claim, is the core of Owen's theory of law and is the framework within which the judge as heroic figure is not merely rationalized but required. It is the thesis that renders idealism both inevitable and modest.