Owen Fiss: Heroism in the Law

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Owen Fiss has been my teacher, my colleague, and my friend for 25 years. There is probably no one in the profession to whom I feel closer. I don't think I am alone in this feeling of admiration, respect, and friendship. In part, this Fissian magnetism can be accounted for in very personal terms. Owen goes out of his way for others, expressing genuine affection and concern. But the respect that Owen draws is based on something bigger: He is a hero of the law.

Owen always has represented the possibility of the ideal within the law, but we can distinguish three different stages of his battle to match the ideal and the real. The progression among those stages is unfortunately a story of the diminishing possibilities for justice within law. As the law has diminished, Owen's personal battle for justice has become all the more heroic.

I. EARLY FISS: ADVANCING THE HEROIC JUDGE

Owen's students have always felt the majesty of the law in his classroom — specifically, the majesty of *Brown v. Board of Education*.[1] Owen asks them to suspend disbelief and to think and act as if the 1960s never quite ended. He has a romantic attitude toward the *Brown* Court — or more accurately, the Court that Justice Brennan built on the legacy of *Brown*. That Court did battle with injustice in America; it seized the possibilities for combat within the law.

Fiss's early work set out to defend judicial heroes: Justices like Brennan and Marshall. He erected a scholarly apparatus that justified their actions and encouraged other judges to follow their lead. His mission was to show that moral heroism was not an illegitimate seizure of power by judges but at the very heart of the law. He was writing for a bench and bar that had still not fully recovered from the judicial scandal of the early New Deal: Judges who set out to be moral heroes could end up deeply embarrassing progressive, democratic politics. The lesson learned from that experience was that judges should be the invisible functionaries of process, certainly not the exponents of a substantive morality.

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

We can better understand early Fiss by comparing his position to that of his colleague and collaborator Robert Cover, who was also fascinated with the role of the judge. Cover's major work, *Justice Accused*,[2] was an examination of the behavior of those antebellum judges who believed slavery to be immoral — a violation of natural law — but nevertheless found themselves administering a legal system that protected slavery. In this conflict between the substantive morality of freedom and the formal requirements of the legal order, judges, for the most part, acted under a role conception of morality: They upheld the law even as they personally believed it to be morally offensive. Cover investigated the mechanisms by which judges dealt with the cognitive dissonance created by the conflict between their commitments to both a morality of freedom and the rule of law. He finds little judicial heroism. Instead, he finds that judges deployed three "responsibility-mitigation mechanisms: (1) Elevation of the formal stakes. . . . (2) Retreat to a mechanistic formalism. (3) Ascription of responsibility elsewhere."[3]

Of course, the judges of the 1960s hardly faced the same moral dilemmas as the antebellum judges. Yet Fiss saw substantive parallels. Modern American society remained a caste society — one in which a particular race occupied the lowest socio-economic class and had done so for the entire history of the republic. Moreover, the caste society of the 20th century was a direct legacy of the slave society of the 19th century. The modern judge, accordingly, faced a form of the same injustice as the 19th-century judge. The legal tools of the 20th century judges, however, differed substantially from those of their ancestors. Judges now had the Equal Protection Clause. The Supreme Court may have done its best to disable that tool in the latter part of the 19th century, but *Brown* was a new beginning. By the time Fiss was writing, twenty years after *Brown*, that beginning was again in jeopardy.

The danger, in Fiss's view, was that the same virtues of judicial craft that limited the antebellum judges would defeat the modern judge. The "responsibility-mitigation mechanisms" were at work again. Judges easily said to themselves that if the elimination of a caste requires a major reconstruction of the society, then that responsibility lies outside of the competencies of the courts. To assume that role could trigger a political reaction that would undermine the confidence in the judiciary required for it to do its ordinary work of dispute resolution. As in the antebellum period, bench and bar worried that the radical pursuit of justice could undermine the rule of law. By the mid-1970s, the Court was

2. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

3. *Id.* at 199.

in retreat; the banner under which it retreated was the "antidiscrimination principle."

In response, Fiss offered a sophisticated understanding of the judicial craft. He knew that the real argument is not one between adherence to the text and controversial interpretive claims. The text of the Equal Protection Clause is so opaque that the modern judge is in much the same position as Cover's judges: "A judge must become a natural lawyer out of default."[4] Fiss continues: "The ethical issue is whether the position of perpetual subordination is going to be brought to an end for our disadvantaged groups."[5] This was just the ethical issue that Cover investigated. As for Cover, the enemies for Fiss were the virtues of the judicial craft itself. Cover's judges were overwhelmed by the internal morality of the craft of law. Fiss, writing in the middle of the desegregation controversy, hoped to subvert the attractions of craft in order to free the judges to do justice.

If the text of the Equal Protection Clause does not carry its meaning on its face, then what Fiss called "mediating principles" are required to apply the text to particular social situations. If judges must interpret, then the real issue is which mediating principles they choose. Of course, a judge cannot simply adopt the mediating principle that expresses his own preferences or those of any other group or individual — even if the group is a majority of the population. The Fissian judge, no less than the Coverian, has to satisfy a role morality that acknowledges the judge's dual obligations: to do justice and to maintain the rule of law. Fiss's end was to show that these two need not be in tension, because the role of the judge under the Equal Protection Clause is to do justice.

The virtues of craft lead judges to choose the anti-discrimination principle as their mediating principle. The appeal of this principle lies in its "value neutrality," its quantitative or mechanical character, its expression of a moral individualism, and its universality. Moreover, it "embodies a conception of equality that roughly corresponds to the conception of equality governing the judicial process. . . . It is natural for the Justices to seize upon the ideal of their craft in setting norms to govern others."[6] Natural as this may be, Fiss takes apart the anti-discrimination principle, showing that its promise to meet the craft virtues is false. It requires a whole range of qualitative judgments; it cannot maintain its individualistic focus; and it cannot be applied universally. Because its promise of mechanical justice falls short, the antidiscrimina-

4. Owen M. Fiss, *Groups and the Equal Protection Clause,* 5 PHIL. & PUB. AFF. 107, 173 (1976).

5. *Id.*

6. *Id.* at 119-20.

tion principle requires the construction of an elaborate secondary apparatus involving judges in more and more complex doctrinal innovations. The doctrinal innovations and the compromises required to deal with the issues of preferential treatment and disparate impact, for example, undermine just those virtues of craft upon which the judges sought to rely.[7] More important, the principle points judges in the wrong direction with respect to the most pressing issues of justice for the most disadvantaged class: African-Americans.

If the virtues of craft offer only a false promise, if judges are compelled to act for justice despite the doctrinal difficulties, then there is little reason for them not to adjust doctrine to action. For Fiss, this meant abandoning the antidiscrimination principle and replacing it with a group-disadvantaging principle. "The injustice of the political process must be corrected, and perhaps as a last resort, that task falls to the judiciary."[8] The judge must take up the task of doing justice where the political process fails the least powerful: "The socioeconomic position of the group supplies an additional reason for the judicial activism and also determines the content of the intervention — improvement of the status of that group."[9] The judicial role is now explicitly redistributive. The judge's role is not only to see that justice is done to the politically disadvantaged, but also to hold up an image of justice to the larger community. The judge not only acts in the name of the people, but if successful, he brings the people to a new understanding of who they are and what justice requires of them.

Fiss is notorious at the Yale Law School for throwing out the Federal Rules of Civil Procedure on the first day of his procedure class. Early Fiss did just that in order to free the judicial landscape for the moral heroes of the bench. The ambition was to free the judges — and those who would judge them — from the false promises of craft; to see clearly the possibilities for justice that fell within the parameters of judicial action; and to urge all of us to take up these judges as our modern heroes.

By 1979, Fiss was willing to generalize this vision of judge as hero, acting to secure justice in the face of the false promises of craft. In his *Harvard Law Review* Foreword,[10] he moves from the Equal Protection

7. Of course, the opposite possibility of eschewing innovation and compromise in these areas remained open, if judges were willing to permit African-Americans to suffer from systemic injustice. Recent doctrine has gone in this direction, abandoning the group rather than the antidiscrimination principle.

8. Fiss, *supra* note 4, at 154.

9. *Id.*

10. Owen M. Fiss, *The Supreme Court, 1978 Term - Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

Clause and its special solicitude for African-Americans to the larger injustices of modernity. The heroic judge will now save us from the moral failings of the bureaucratic state. Again, to do so he must first escape from a false notion of craft. This time, however, that craft ideal is situated in a model of adjudication as dispute resolution, with all of the procedural requirements traditionally characteristic of that function. Judges must free themselves of the belief that their role is to resolve individual disputes. Instead, their role is to "give concrete meaning and application to our constitutional values"[11]; they do this by searching for "what is true, right, or just."[12]

For Fiss, the heroic judge of the desegregation era should have learned two things by the late 1970s. First, the vehicles of repression are more complex than intentional, racial prejudice. They are intertwined in social structure of the modern state, with its totalizing institutions of schools, prisons, hospitals, and bureaucracies.[13] Second, not just minorities, but all citizens can be victims of these institutional structures. Democratic states, no less than authoritarian states, produce the repressive bureaucratic apparatus of modernity. Accordingly, the judge's role cannot be limited to vindicating the rights of minorities; she cannot simply assume that the majority will "take care of itself." The judge's role is of truly heroic dimensions: It is to reconstruct the deeply embedded social institutions that characterize modernity. The judge must make the bureaucracy, and its institutional arrangements, an expression of justice.

Much of Fiss's Harvard essay is concerned with tracing the procedural implications of this vision of the judicial role and defending it against those who are still seduced by the false security of the traditions of judicial craft. In place of the antidiscrimination principle, Fiss now targets the "tailoring principle — the insistence that the remedy must fit the violation."[14] This principle offers just the security of mechanical jurisprudence — limits, objectivity, individualism, and a morality of wrongdoing — that was behind the false appeal of the antidiscrimination principle. The problem remains the same: Justice demands more.

In place of the traditional virtues of judicial craft, Fiss appeals to two other virtues of the judicial function: independence and dialogue. The judge is independent of parties and politics, and he decides on the meaning of constitutional values only after a process in which he must listen to multiple points of view and then offer public reasons to justify

11. *Id.* at 9.

12. *Id.*

13. When Fiss first read *Discipline and Punish*, he was so impressed that he wanted to extend a visiting offer to Foucault — not realizing he was already dead.

14. Fiss, *supra* note 10, at 46.

his conclusions. The judge becomes the representative of, and a primary participant in, a communicative ethics.[15] This process of discourse provides the ground of judicial legitimacy — not a Bickelian theory of consent or an Elyian theory of representation. Fiss's heroic judge stands up to the challenge of Foucault by appealing to the virtues of Habermas.

By 1979, however, Fiss is writing against the judicial grain. He is trying to preserve the ambitions of Justice Brennan in the face of a judicial turn away from the heroic judge of the structural injunction. Fiss acknowledges that this heroic conception "expects a lot from judges — maybe too much."[16] This embattled judge has become, for Fiss, a tragic figure. If he is true to his vision of justice, he risks becoming mere voice, without effect. He will become, in fact, the dissenting voice on the bench. If the judge wants to bring his vision into contact with social reality — including the reality on the bench — he risks compromising with justice. These are the compromises of ordinary politics, but the legitimacy of the judge depends on his independence from politics. The judge can speak the truth, or he can be effective. This is no longer the tension between craft and justice. Rather, it is a conflict within the dimension of justice itself.

Heroism is now a matter of tragedy. This is where the early period of Fiss ends. He cannot decide between the heroic dissenter who stands with justice or the incrementalism of a moderate judge who recognizes the need to compromise with the enemy. That a choice must be made is the tragedy of the law itself, which always faces this dilemma between the promise of justice and the reality of politics.

II. MIDDLE FISS: SCHOLARSHIP AND THE BAND OF BROTHERS

Early Fiss ends with the tragedy of the heroic judge who is bound either to dissent or to compromise. Middle Fiss does not give up on his vision of the heroic judge, working his way through the tragic pathos of the law. He is, however, forced to defend himself against a new and somewhat surprising enemy: a challenge from the Left. Fiss no longer defends justice against craft; now he defends law itself against the "nihilist challenge." The enemy had moved 180 degrees: no longer the traditional ideal of adjudication, but the intellectual challenge of the Critical Legal Studies movement.

From the lurch of American politics to the right, the Left drew the lesson that law cannot be relied on to resolve deep conflicts over values

15. Fiss was not alone in pursuing discursive models of the judicial role. *See, e.g.*, Frank I. Michelman, *The Supreme Court, 1985 Term - Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

16. Fiss, *supra* note 10, at 12.

and interests. The bench reflected nothing more than the conservative trend in American politics. Fiss might claim to express the true meaning of our constitutional values, but he — like everyone else — was really doing nothing more than deploying the rhetoric of law to advance a political position. Adjudication was only another forum for politics.[17] If law was indistinguishable from politics, then the law school could be the forum for a new style of radical politics.

Having worked to free the judge to act as a moral hero within the law, Fiss now confronted the danger that the judge had become too free. The criticism from the Left embraces that freedom and concludes that there can be no real difference between law and politics. A parallel criticism from the Right agrees that, if we accept Fiss's view, there is indeed no distinction to be made.[18] From this, the Right concludes that Fiss must be wrong. The Right would go back to a narrow judicial role — disavowing moral heroism — while the Left would proclaim the end of law — all is politics. The question for middle Fiss was whether he could defend the law against the nihilist challenge without allying himself with just those virtues of craft that had been the target of his own earlier critique.

Fiss responds by turning from the communicative ethics of Habermas to the work on interpretation by Charles Taylor and Clifford Geertz. By 1982, Fiss was speaking of interpretation instead of dialogue as the ground of judicial legitimacy. His defense of judicial heroics is secured not by the virtues of the courtroom dialogue but by the ethos of a professional community. He turns from bench to bar. More specifically, he defends the professional community of legal scholarship, for the scholars are the guardians of the integrity of the law itself.[19]

As the Court turned right, Fiss could no longer argue that procedure and justice formed a natural pair. He needed grounds upon which to criticize the outcome of adjudication, even when there had been no procedural failure. These grounds had to be within the law, if his criticism was not to mimic the Left's general claim that the problem with law is that it is bad politics. He responds to this challenge by developing his

17. Fiss's work on the Fuller Court represents another form of response to the critique of law as only a form of politics. His work argues that the Fuller Court was doing just what law requires: giving meaning to our constitutional value of liberty. By carrying out this historical defense of the Court, Fiss was responding not just to the Critical Legal Studies movement, but also to its academic predecessor, Legal Realism, which had mounted the same charge against law. *See* OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910 (1993).

18. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

19. Not surprisingly, Dworkin, who is pursuing a similar project of interpretation, appeals directly to the virtue of "integrity," and identifies the scholar and the judge in the figure of Hercules.

theory of interpretation. "Adjudication," he now writes, "is interpretation."[20] The relationship between the authoritative text — the Constitution — and the judge is neither one of complete freedom, which would make the judge's task of applying the Constitution political. Nor is it one of complete determinism, which would make adjudication merely mechanical. The Right supports the latter view; the Left, the former. Fiss needs a theory of interpretation that lies between these extremes and thereby preserves the integrity and autonomy of law.

There are two critical elements of Fiss's account of interpretation: disciplining rules and an interpretive community. The interaction between lawyer and text is mediated by the application of disciplining rules. The rules gain their authority and legitimacy by virtue of their place in an interpretive community. In fact, rules and community are two sides of one process. We know what the appropriate rules are by appealing to the practices of an interpretive community; we know the boundaries of that community by appealing to the rules.

For example, there is a good deal of controversy today over the claim that American constitutional law should be open to arguments from comparative law, i.e., foreign constitutional practices should be relevant to interpreting our Constitution. Good arguments can be made for globalization within constitutional interpretation. But these arguments fail in just the way Fiss identifies. Appeals to comparative law are not part of the disciplining rules for interpreting our text. We have no history of such a practice of interpretation, and therefore there is no opening for comparative-law arguments. A lawyer could not fit them within the flow of argument of a brief. Were he to try, a judge would not know what to do with them. Indeed, when such arguments are deployed, they are usually met with silence.

If we ask whether such limits on interpretation are legitimate, we can point to nothing beyond the practices of those who are engaged in constitutional interpretation; we cannot look beyond the legal community to answer the question. The fact is, this is how they do it. Questioning these limits is rather like asking whether the rules of a game should be different. They could be different; it might be a better game if they were different, but the legitimacy of the rules as they currently exist depends on nothing beyond the practice of the players. If we don't like the identification of law with the metaphor of a "game," Fiss suggests that we think of law as a language: The disciplining rules are the grammar. They are what makes it possible to engage in a practice called English or French. Their correctness, however, extends no further than the boundaries of the community whose language it is.

20. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 739 (1982).

Fiss is particularly focused on disciplining rules in his account of constitutional interpretation. As he understands adjudication, all the parties are in a dispute over the meaning of a common text. Each must engage in a process of interpretation. What makes that process one of law — as opposed to politics, morality, or personal preference — is the existence of these disciplining rules, which constrain the possible moves the parties can take. One may, for example, appeal to precedent, but not to a party platform. One may appeal to the drafting history, but not to recent poll results. A statement of law is objectively correct in the same way that a proposition in English is syntactically correct or a move in a game is correct. A judge who tries to "smuggle in" his or her personal preferences — the judge who "makes law" instead of interpreting it — is not doing law at all, and is rightly criticized within the objective standards of the law. So Fiss answers the challenge from the Left: Law is not politics because it operates with a different grammar, a different set of disciplining rules. True, every legal text may require interpretation, but not just any interpretation is possible. There are objective constraints. Simultaneously, he says to conservative academics that the sources of objectivity within the discipline are richer than they had imagined.

Fiss's most telling metaphor in these articles is that of the spiral: "The image I have in mind is that of a judge moving toward judgment along a spiral of norms that increasingly constrain."[21] The text itself may suggest any number of possible readings: e.g., Does "equal" mean neutral? Does neutral mean colorblind? Does colorblind refer to process or to the profile of distribution? And so on. Fiss imagines the judge methodically reaching each of these points of decision — a sort of branch on a decision-tree — appealing to the disciplining rules to resolve the interpretive controversy, and then moving on to the next step. At each step, his decision is constrained by objective rules.

Not only judges engage in this process. Fiss is also describing the process of writing a brief or a scholarly article on an issue of constitutional interpretation. The lawyer/professor speaks to fellow members of the professional community. By following an argument, the community actually legitimates it. This band of brothers now has in its keeping the meaning of the Constitution. Fiss claims possession of the constitutional text, taking it away from the judges and placing it instead within the larger professional community. Judges stand apart from this community in their claim to authority, but authority is "extrinsic to the process of interpretation."[22] A decision can, therefore, be authoritative but wrong.

21. Owen M. Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177, 185 (1985).
22. Fiss, *supra* note 20, at 757.

Wrong not as a matter of political morality, but as a matter of law.

The new hero of the law, accordingly, is not the justice who confronts only tragedy and pathos, but the leader of this band of brothers. The action moves from the courtroom to the law school, and from the judge to the teacher. For the teacher forms the ethos of the next generation of the professional community, and there is no ground of legitimacy outside of this community.

The problem is that it does not quite work. Fiss is able to staunch the flow of legal indeterminacy, but he is not able to accomplish what he needs: a real determinacy. About every complicated case, he cannot defeat the possibility that law allows at least two equal and opposite resolutions. Not only does the band of brothers split into cliques, but it is professionally organized to guarantee that there will always be contrary outcomes equally legitimated within the law. The very practice of writing briefs is the institutional representation of the failure of the disciplining rules to do the ultimate work of choice for us. True, not just anything can be said, but enough can be said to support the conflicting positions of the petitioner and the respondent. We cannot distinguish the winning side of the argument by noting that one strayed from the disciplining rules and the other did not. We cannot say that the majority opinion is a better legal performance than the dissent. This charge is as old as the legal realists' insight that the disciplining rules are so various and point in so many different directions that they could never generate Fiss's decision tree. Even when lawyers completely disagree on outcomes, they recognize that they are all still doing law. We can expect agreement no more in law than in English. Knowing the rules of grammar won't do our work for us. Law seems to leave a large space for politics.

Fiss is developing his theory of interpretation at the same time as Ronald Dworkin, who faces the same problems of indeterminacy — indeed, more so, since he expands the sources of legal interpretation to include moral arguments.[23] Dworkin limits indeterminacy by moving in just the opposite direction from Fiss. In place of Fiss's decision tree, Dworkin appeals to an idea of "fit."[24] We decide among conflicting possible interpretations not by narrowing but by broadening our vision. The correct interpretation is that which can offer the best account of the largest body of existing law. Because Fiss separates authority from interpretation, nothing can serve this constraining function of fit when the disciplining rules produce contradictory outcomes.

In the end, for middle-Fiss, the justice he demands of law is no

23. Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22 (1967).

24. RONALD DWORKIN, LAW'S EMPIRE 230-32 (1986).

more secure than the injustice that the bench continues to produce. Just as the bench has filled with anti-heroes, so the law schools are not exactly filled with the heroic band of brothers. This drives Fiss to look elsewhere for heroism within the law.

He arrives in Argentina, just at the moment of maximum judicial heroism. The trials of the military junta are in process; the people are mobilized to replace a corrupt and abusive military regime with the rule of law, which proclaims as its ideal the realization of justice.

III. FISS ALONE

Not even abroad does the judicial hero last. The Argentine judicial experiment is short-lived and frustrated. The Argentine Supreme Court is packed with political hacks; the Argentine law schools struggle to overcome a legacy of failed professionalism. The band of brothers survives, but it is a very small band indeed — often seeming to consist of Fiss students who have returned to Buenos Aires. The world is as short on heroes of the law as is the United States.

Late Fiss turns from the bench to politics. If justice is not to be found in and through legal procedure, then perhaps it can be found within that larger set of procedures that is democratic politics. Fiss now writes, "What democracy exalts is not simply public choice but rather public choice made with full information and under suitable conditions of reflection."[25] This sounds suspiciously like his earlier appeals to judicial procedure, which also pursued "suitable" reflection after a process that sought "full information."

To rewrite the rules of civil procedure is one thing; to rewrite the rules of democratic deliberation is quite another. The judicially enforced equality of the parties before the bench remains his model of the "suitable conditions of reflection." Most important, this means that political debate must be freed from the control exercised by the distribution of power in civil society. The antisubordination principle takes on a new life. It offers a model for the necessary conditions of a civil society that can support legitimate, democratic decision making. Since democratic decision making is an ideal of liberty, this produces late Fiss's critical insight: The egalitarian impulse should be reconceived as a condition of liberty. To reach this end, the state must be mobilized to intervene on behalf of the powerless, whose voice is not otherwise heard in democratic debate.

Late Fiss articulates a vision of the democratic polity as one founded on the idea that debate must be "uninhibited, robust, and wide

25. OWEN M. FISS, THE IRONY OF FREE SPEECH 23 (1996).

open."[26] The sources of inhibition in an advanced capitalist state are not government policies as much as private power. Constraints lie in the nature of networks, the distribution of capital, the unspoken habits of daily life, and the ideologies of difference that continue to shape the public imagination. Robust debate requires an activist state because only public power can counter the pervasive effects of private power. The state alone is capable of responding to the constraints on public debate that arise from money, patriarchy, racism, and sexism. Liberty, Fiss argues, is as much the responsibility of the state as it is threatened by the state.

Fiss's enemies, however, are only in part the sources of power in civil society. Now he targets the bench, but no longer because it is tied to a narrow understanding of adjudication or because it needs reassurance about its own legitimacy. The contemporary Court has a robust vision of the First Amendment. Indeed, it has a robust vision of justice. It is, however, a libertarian vision. Of course, the Court is not always consistent in following its libertarian vision of justice. But this is the thread that unites the Court's antidiscrimination jurisprudence, to its reluctant affirmation of *Roe*, to its Free Exercise and Establishment Clause cases, to its takings jurisprudence, and finally to its position on freedom of speech. Fiss argues that we need not see a tension between individual liberty and equality in the choices the government confronts, but indeed, the Court does see such a tension and it chooses liberty. The Court understands the state as the threat to individual freedom and locates justice in securing "true private choice." The enemy of true private choice, on its view, is government coercion.

Just as the Court reads equality through the value of individual liberty, late Fiss seeks to refight the lost battles for equality on the ground of liberty. Liberty, too, it turns out, requires active state intervention to secure the conditions within which all can take up the tasks of democratic citizenship. Not surprisingly, those conditions require a more equal distribution of resources among groups. Shifting the ground of the antisubordination ideal from equality to liberty, however, is not likely to bring about a new revelation on the Court.

We have a Court whose vision of justice reflects the increasing inequalities of civil society itself. Surely this is not surprising. Late Fiss may continue to speak the language of law, but he is speaking to a deaf Court and a careless legal establishment. He is not expecting a call from Ashcroft anytime soon. Neither is he expecting the law schools to mobilize on behalf of his vision of justice. He speaks now in his own voice.

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26. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

Late Fiss has become a social critic more than an expounder of the public values embedded in our Constitution. Politics must be saved from law's understanding of justice. In his writings on free speech, he argues for a paradigm shift in the idea of the speaker: no longer the soapbox rhetorician, but the broadcasting company. In truth, however, Fiss's hero is no longer the robed judge on the bench, but the speaker on the soapbox; not the priest, but the prophet in the wilderness. Who is that prophet? Increasingly, the person on the soapbox is Fiss himself.

Late Fiss speaks directly on behalf of the subordinated. He writes on behalf of the forgotten, the poor, and the subjects of discrimination. He takes up the cause of feminism, just as earlier he took up the cause of African-Americans. He asks that we recognize as members of our own communities those left behind in the urban ghettos; he asks that we literally bring them into our own neighborhoods. He writes on behalf of immigrants — legal and illegal — and demands that they be protected from the injustice of subordination. He writes on behalf of those who have suffered the deprivation of human rights throughout the world.

CONCLUSION

For thirty years, Fiss has stood for the same idea of justice: the antisubordination principle. His values were shaped in the Civil Rights Movement, which was a struggle for group justice. That movement was simultaneously political and legal: The claim for group justice was inherently a legal claim because, as Fiss said many times, the end of law is justice. What has changed over the years is the possibility of successfully pursuing this vision of justice in and through the courts.

For early Fiss, adjudication was the field of action. He believed that the bench could be reformed and that a reformed bench would realize the truth that the constitutional order could not tolerate a society riven by caste. For middle Fiss, scholarship was the field in which the justice of law had to be realized. The claim of the scholar to articulate the truth of the Constitution had to be defended. For late Fiss, the battles of bench and the academy are more or less over. Despite the challenge from the Left a generation ago, legal scholarship tends to follow the bench. The antidiscrimination principle reigns on the bench and in the academy.

Constitutional justice has left us with a remarkably unjust society. Our schools and our communities are constitutionally desegregated but remain segregated in fact. In this respect, the public schools are symbolic of the great gap between constitutional law and a just distribution among and across groups in America. Late Fiss steps up on the soapbox

to remind us of the inequalities that remain and the groups that continue to suffer.

Owen Fiss remains a passionate defender of that vision of justice, which characterized the Civil Rights Movement. That movement did achieve some remarkable changes in American society. It achieved them, in part, by mobilizing the courts on behalf of the least well-off groups in American society. But it did not achieve a reconceptualization of the American myth of the individual, of the strong commitment to an ideal of the individual who fights for his freedom against the state, and of the understanding of property and contract as the domain of individual freedom. Redistribution in the name of subordinated groups remains a value outside of the American constellation of liberty and equality. Owen's career so far has shown a remarkably consistent commitment to that alternative understanding of justice. But his own movement from the bench to the academy to the soapbox offers an important lesson in the power of an alternative ideology.

Fissian justice is a powerful vision of equality that calls for revolutionary changes in American political and social life. But law is rarely revolutionary. The real power of the legal system resides in the social imagination that legitimates the ordinary arrangements within which we lead our lives. The course of Owen's path in and through the law reflects the boundaries of this imagination. Over the years, those boundaries have become more secure and his own place further and further removed from the center — until today, when he stands as the prophet outside of the courtroom, calling on us to recognize what might have been and perhaps still might be.