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# Owen M. Fiss: The Influence of His Pre-Legal Education

MORTON J. HORWITZ\*

I first met Owen almost exactly 50 years ago at Stuyvesant High School in New York City. We spent many hours during the next four years at a nearby luncheonette, arguing about whether capitalism and democracy were compatible. Our paths somewhat diverged when Owen left for Dartmouth in 1955, but we continued to stay in touch, even during Owen's two years at Oxford, 1959-61.

Later, as I read Owen's scholarly output, I was immediately struck by the close connection of some of his scholarship to the ideas he had already encountered during his pre-legal education. I suspect that no one else (perhaps not even Owen) is in as good a position to sketch the intellectual roots of some of his most important contributions to legal scholarship.

In his recent biography of Winston Churchill, Roy Jenkins illustrated what he called "the frailty of reminiscent memory" with the story of a meeting between Churchill and Marshall Tito of Yugoslavia near the end of the Second World War. Jenkins reported:

Churchill . . . moved into a reminiscent mood, telling Tito how thirty-one years before he had visited the Dalmatian coast in the Admiralty yacht with Asquith and how politics had been mentioned only once "during the forty days on tour."

Then Jenkins added: "[T]he cruise lasted only nineteen days, and . . . Asquith's main complaint had been that Churchill never talked about anything but politics."<sup>1</sup>

Reading this, just as I was drafting this paper, led me, out of an excess of caution, to telephone Owen to check on facts that I was absolutely sure I had remembered correctly. "Owen," I began, "you read Laski and T.H. Green at Oxford, right?" "No," Owen replied, "I read them at Dartmouth." I then asked, "But didn't you do your Oxford paper on G.D.H. Cole?" "No," Owen replied, "that was also at Dartmouth. At Oxford, I wrote on H.L.A. Hart's Rule of Recognition."

So Owen proceeded to tell me about a part of his education that I either had not known or remembered. The gist of the story is that Owen studied these thinkers in his senior year at Dartmouth, not at Oxford.

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1. ROY JENKINS, *CHURCHILL: A BIOGRAPHY* 753 (2001).

His mentor there was H. Gordon Skilling, a Rhodes scholar from Canada, who had studied socialist thought in England, but was soon to be terminated as Dartmouth College made its own contribution to the McCarthy Era.<sup>2</sup> Another influence was Professor Arthur Wilson, later the distinguished biographer of Diderot,<sup>3</sup> with whom Owen wrote his senior thesis on the British Labor Historian G.D.H. Cole.

There are at least two major themes in Owen's work that I believe can easily be traced to his pre-legal education. First is his 1976 *Philosophy and Public Affairs* article on groups, which carries forward the ideas about the social reality as well as autonomy of groups put forth by the so-called English Pluralists, and in particular, Harold Laski and G.D.H. Cole.<sup>4</sup> Second is his work on freedom of expression. In its refusal to accept the classical distinction between positive and negative liberty, Owen's work reveals not only the affirmative influence of T.H. Green but also the negative challenge posed to Owen by Isaiah Berlin's *Two Concepts of Liberty*, which had appeared just two years before Owen studied with Berlin at Oxford.<sup>5</sup>

The 1976 article, *Groups and the Equal Protection Clause*, was written mid-way between two of the Supreme Court's most important decisions on affirmative action, *DeFunis v. Odegaard* (1974)<sup>6</sup> and *Regents of the University of California v. Bakke* (1978).<sup>7</sup> The article was designed to intervene in the debate unleashed by *DeFunis* about the constitutionality of affirmative action for African-Americans. But the article is remembered particularly for its argument that the Equal Protection Clause "recognizes the existence and importance of groups, not just individuals."<sup>8</sup> It has been cited nearly four hundred times in law reviews, not to speak of books or non-legal journals. Owen wrote:

There are natural classes, or social groups, in American society and blacks are such a group. Blacks are viewed as a group; they view themselves as a group; their identity is in large part determined by membership in the group; their social status is linked to the status of the group; and much of our action, institutional and personal, is based

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2. H. Gordon Skilling joined the Dartmouth faculty in 1947. As a Rhodes scholar in England in 1934, Skilling temporarily joined the British Communist Party. At Dartmouth, in the late 1950s, Skilling was denied promotion and briefly lost his green card. He left Dartmouth in 1959 for the University of Toronto, where he founded the Centre for Russian and East European Studies. See H. GORDON SKILLING, *THE EDUCATION OF A CANADIAN: MY LIFE AS A SCHOLAR AND ACTIVIST* (2000).

3. ARTHUR M. WILSON, *DIDEROT* (2000).

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

5. ISAAH BERLIN, *TWO CONCEPTS OF LIBERTY: AN INAUGURAL LECTURE DELIVERED BEFORE THE UNIVERSITY OF OXFORD* (1958).

6. 416 U.S. 312 (1974).

7. 438 U.S. 265 (1978).

8. Fiss, *supra* note 4, at 136.

on these perspectives.<sup>9</sup>

Interestingly, at this point Owen drops a lengthy footnote referring to “an earlier legal literature on groupism,”<sup>10</sup> without ever mentioning either the earlier English literature, which he knew, nor the not-yet-well-recognized work of the American group pluralists Horace Kallen or Felix Cohen.<sup>11</sup>

In 1986, Owen came to the end of a long collaboration with the son of his deceased and beloved former colleague, Harry Kalven, which resulted in publication of Kalven’s *A Worthy Tradition: Freedom of Speech in America*.<sup>12</sup> That year, in the *Iowa Law Review*, Owen announced the imminent publication of the book and declared that the “Worthy Tradition” of free speech that Kalven identified “is flawed in some important respects.”<sup>13</sup> His concerns, he wrote, “first arose in the seventies — one of the few periods when America wondered out loud whether capitalism and democracy were compatible.”<sup>14</sup> This may be another example of Jenkins’ “frailty of reminiscent memory”<sup>15</sup> — I recall that we argued about nothing else in the fifties. But maybe it was not quite “out loud” during the McCarthy Era.

In any event, Owen traced his recent concern with the compatibility of capitalism and democracy, first to the events around Watergate, culminating in the Campaign Reform Act of 1974.<sup>16</sup> These events led him, he said, to realize “how thoroughly economic power had begun to corrupt our politics.”<sup>17</sup> A second influence was the 1977 publication of Charles Lindbloom’s book *Politics and Markets*,<sup>18</sup> which, in Owen’s words, “tried to show, that, contrary to classical democratic theory, politics was not an autonomous sphere of activity, but was indeed shaped and controlled by the dominant economic interests.”<sup>19</sup>

Finally, Owen focused on recent First Amendment decisions in

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9. *Id.* at 148.

10. *Id.* at 149 n.65.

11. For a discussion of Kallen, see JOHN HIGHAM, SEND THESE TO ME: IMMIGRANTS IN URBAN AMERICA 205-15 (1984). For a discussion of Cohen, see DALIA TSUK, ENCOUNTERS WITH PLURALISM: THE LIFE AND THOUGHT OF FELIX S. COHEN (forthcoming); Dalia Tsuk, *Pluralisms: The Indian New Deal as a Model*, 1 MARGINS 393 (2001).

12. HARRY KALVEN, *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (Jamie Kalven ed., 1988).

13. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1406 (1986).

14. *Id.*

15. JENKINS, *supra* note 1, at 753

16. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

17. Fiss, *supra* note 13, at 1406.

18. CHARLES E. LINDBLOOM, *POLITICS AND MARKETS: THE WORLD’S POLITICAL ECONOMIC SYSTEMS* (1977).

19. Fiss, *supra* note 13, at 1406.

which, as he put it, "the Supreme Court was faced with a number of cases that required it to examine the relationship of political and economic power."<sup>20</sup> The cases ranged from challenges to the Fairness Doctrine<sup>21</sup> in broadcasting; to attacks on campaign reform legislation in *Buckley*<sup>22</sup> and *Belloti*;<sup>23</sup> to restrictions on First Amendment rights in *Prune Yard Shopping Center*.<sup>24</sup>

Owen noted that his "first inclination" was to see these decisions as "involving a conflict between liberty and equality."<sup>25</sup> But he concluded that "[o]n reflection . . . the problem seemed deeper and more complicated. I saw that at issue was not simply a conflict between equality and liberty, but also and more importantly, a conflict between two conceptions of liberty. The battle being fought was not just Liberty v. Equality, but Liberty v. Liberty, or to put the point another way, not just between the first amendment and the equal protection clause, but a battle within the first amendment itself."<sup>26</sup>

Both in *Groups and the Equal Protection Clause*<sup>27</sup> and in his work on freedom of expression, Owen has returned to themes that he first encountered in his pre-legal education almost a half century ago.

From the work of Harold Laski and G.D.H. Cole, he learned the English pluralist argument for the autonomy and separate identity of groups. At the beginning of a decade of writing on the subject of sovereignty and groups, Laski declared in the *Harvard Law Review*: "When the history of associations . . . comes to be written, one clear generalization as to its tenour during the nineteenth century will be admitted: the courts have been in practice increasingly compelled to approximate its position to that of an ordinary individual."<sup>28</sup>

Cole, the subject of Owen's senior thesis, put forth a conception of guild socialism organized around self-governing workers' guilds that was designed to counter the centralistic thrust of orthodox Marxism. His work emphasized the social reality of group life, especially epitomized by his history of English trade unions.<sup>29</sup>

From T.H. Green, Owen first learned that nineteenth century Liberalism was locked in an historically anachronistic idea of negative liberty.

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20. *Id.*

21. *Id.* at 1406-07.

22. *Buckley v. Valeo*, 424 U.S. 1 (1976).

23. *First Nat'l Bank v. Belloti*, 435 U.S. 765 (1978).

24. *Prune Yard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

25. Fiss, *supra* note 13, at 1407.

26. *Id.*

27. Fiss, *supra* note 4.

28. Harold J. Laski, *The Personality of Associations*, 29 HARV. L. REV. 404 (1916).

29. G.D.H. COLE, AN INTRODUCTION TO TRADE UNIONISM (1953); G.D.H. COLE, A HISTORY OF SOCIALIST THOUGHT (1953).

He probably read T.H. Green's famous statement in *Liberal Legislation and Freedom of Contract* that "[I]f the ideal of true freedom is the maximum of power for all members of human society alike to make the best of themselves, we are right in refusing to ascribe the glory of freedom to a state in which the apparent elevation of the few is founded on the degradation of the many."<sup>30</sup> With his notion of positive freedom as "that equal development of the faculties of all which is the highest good for all,"<sup>31</sup> Green was attempting to show that it was possible to reform Liberalism from within and thereby to transform it into a system that could legitimate the Welfare State.<sup>32</sup>

The final step in Owen's early intellectual journey was his encounter with the powerful mind and personality of Isaiah Berlin, with whom he studied at Oxford and whose enormously influential essay, *Two Concepts of Liberty*, had recently been published.<sup>33</sup> The gist of Berlin's arguments was that a positive concept of liberty inevitably degenerated into coercive totalitarianism, "forcing people to be free" in that much misinterpreted Rousseauian phrase. It was, in fact, a challenge to everything Owen had learned at Dartmouth. We see his resolution of that conflict twenty-five years later in his *Iowa* piece, in which he emphatically rejects an exclusively negative idea of liberty.<sup>34</sup>

Owen's intellectual journey has many lessons. I do think it illustrates the prominence — indeed, the staying power — in a person's intellectual evolution of important ideas learned for the first time in one's youth. However, it also has an important message for those who study Anglo-American intellectual history. Most of the ideas that Owen encountered in his senior year at Dartmouth were largely unavailable in the intellectual climate of the 1950s. The Princeton historian Carl Schorske has written of the general "intellectual situation" he encountered in America during the 1950s:

In the fields of greatest importance to my concern — literature, politics, art history, philosophy — scholarship in the 1950's was turning away from history as its basis for self-understanding. At the same time, in a parallel movement, the several academic disciplines redefined their intellectual functions in ways that weakened their

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30. 3 T.H. GREEN, *Liberal Legislation and Freedom of Contract*, in *WORKS* 365, 372 (1891). For more discussion of Green's political thought, see JAMES T. KLOPPENBERG, *UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT* 30-34 (1986).

31. *Id.*

32. For more discussion of Green's political thought, see JAMES T. KLOPPENBERG, *UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT* 30-34 (1986).

33. See BERLIN, *supra* note 5.

34. See FISS, *supra* note 13.

social relatedness. Thus, for example, the New Critics in literature, as they came to power in the academy, replaced practitioners of literary historicism who had prevailed in English departments before World War II with scholars committed to an a-temporal, internalistic, formal analysis. In political science, as the New Deal receded, the normative concerns of traditional political philosophy and the pragmatic preoccupation with questions of public policy began to give way to the a-historical and politically neutralizing reign of the behaviorists. In economics, mathematically oriented theorists expanded their dominion at the expense alike of the older, socially minded institutionalists and of policy-oriented Keynesians. Even in such a field as music, a new cerebrality inspired by Schoenberg and Schenker began to erode musicology's historical concerns. Above all in philosophy, a discipline previously marked by a high consciousness of its own historical character and continuity, the analytic school challenged the validity of the traditional questions that had concerned philosophers since antiquity. In the interest of a restricted purer functioning in the areas of language and logic, the new philosophy broke the ties both to history in general and to the discipline's past.<sup>35</sup>

We can take the reception of John Rawls' work as a rough marker for the revival of political philosophy in America. The widening influence of Rawls' work occurred at about the same time as graduate study was finally becoming available in social or political philosophy. Rawls published the complete version of *Justice as Fairness* in 1958.<sup>36</sup> However, it did not appear in collections of essays until the early sixties. His book, *A Theory of Justice*, did not appear until 1971.<sup>37</sup>

Before the late sixties or early seventies, the subject matter of Owen's Dartmouth studies would have been unavailable in most elite American universities. The powerful influence of McCarthyism fed into the rise of an apolitical analytical philosophy to virtually eliminate social and political philosophy from the legitimate subject matter of philosophy. And, of course, Owen reports that the unusual person who actually taught him these things at Dartmouth, his mentor, H. Gordon Skilling, was himself soon to become a victim of McCarthyism.

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35. CARL E. SCHORSKE, *FIN-DE-SIECLE VIENNA: POLITICS AND CULTURE* (1981).

36. John Rawls, *Justice as Fairness*, 67 *PHIL. REV.* 164 (1958).

37. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).