Legal Academy According to Owen Fiss

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05.15.14

Scholars identify two dominant traditions in the Western world: the continental tradition and the common law tradition. Both traditions stem and develop from differing conceptions of what law is and how it "works." They also assume different political views as to what justice and democracy are and how they work. In other essays, I've expand on an idea[1] that I would like to resume here; but this time, I would like to reflect on our own practice within SELA,[2] on its twentieth anniversary. Any event or phenomenon is constructed and understood from where we, as observers, are located. I must confess that I always thought, or chose to think, that SELA was a project that attempted to drive a wedge in the legal culture of Latin America, and that any motivation to carry out this project lay in a deep nonconformity on behalf of scholars–particularly from my generation, but also on behalf of colleagues from previous generations, such as Genaro Carrió[3] or Carlos Nino–with the way in which our legal culture unfolds. We believe that the way in which our judges, law professors, legislators, legal journalists and citizens operate, or the way in which our courts and law schools work, are inconsistent with what law and democracy are and how they work (or should work). Dogmatism in legal education; weak argumentative practices in the community of judges and trial lawyers; lack of substantive

[1] See Roberto P. Saba, *A Community of Interpreters*, JSD *dissertation*, Yale Law School, 2011. See also "Constituciones y Códigos: Un matrimonio dificil," SELA 2007, San Juan, Puerto Rico, 2008. For a digital version, see http://www.law.yale.edu/documents/pdf/sela/RobertoSaba__Spanish_.pdf

[2] Seminario en Latinoamérica de Teoría Constitucional y Política. See http://www.law.yale.edu/intellectuallife/SELA.htm

[3] See Genaro Carrió, "*Don Quijote en el Palacio de Justicia*. (*La Corte Suprema y sus problemas*)," in *La Ley*, 1989, 1131-1132.

discussion in the process of appointing judges; poor deliberation on the interpretation of the constitution; almost nonexistent debate on the constitutionality of provisions in the Civil Code; limited public scrutiny of judicial decisions or dim legal debate in Congressional or Executive deliberations are, for some of us, expressions of misconceptions about what the law and democracy are and how they work (or should work).

Some of our elders, like Carlos Nino, were able to convey these shortcomings in our legal culture to their students and colleagues in Argentina and other countries. Nino's sharp critical analysis of *legal doctrine*[4] or his meticulous reconstruction of the practical reasoning followed by judicial decision-makers[5] are expressions of his view of the weaknesses in our legal practice. Nino did not frame his assessment within a critique of the tenets of continental law. I am entirely responsible for shifting it in that direction, not him. However, his quest to transform Argentine legal academia was founded upon his deep frustration as to how academia was developing. His work on constitutional law was a valiant attempt to make sense of a constitutional practice that was riddled with inconsistencies, perhaps with a view to redirect the moral discussion underlying constitutional legal discourse in Argentina. Some of his disciples have tried to retake those paths in our own essays[6] or by teaching unprecedented courses on comparative law, legal traditions or constitutional theories in our law schools.

[4] Carlos S. Nino, *Consideraciones sobre la dogmática jurídica*, Universidad Autónoma de México, Mexico, 1974. See also, Christian Courtis and Alberto Bovino, "Por una dogmática conscientemente política," in Christian Courtis (ed.), *Desde otra mirada* Eudeba, Buenos Aires, 2001.
[5] Carlos S. Nino, *The Constitution of Deliberative Democracy*, Yale University Press, New Haven, 1995, translated into Spanish by Roberto Saba under the title *La Constitución de la democracia deliberative,* Barcelona, Editorial Gedisa, 1998.
[6] See op. cit. Saba, *A Community of Interpreters*; and Martín Bohmer, *Imagining the State: The Politics of Legal Education in Argentina, USA and Chile*, JSD dissertation, Yale Law School, 2012.

For his part, one of his colleagues paid special attention to Nino's project for transforming Argentine and Latin American legal academy, to the point of making it his own and dedicating to it a significant part of the last twenty years of his academic career. The person to which I am referring is Owen Fiss, close friend of the abovementioned Argentinian professor and *founding father* of SELA in 1995. What made Owen Fiss and many others embark ourselves in this endeavor that is SELA, and its by-products, if not the desire to impact the way in which future generations of lawyers would conceive of and operate with the law to overcome the errors of the past? Nino had experienced first-hand, at Oxford and Yale, the way in which American and English legal academy was developing; as well as how the practice of legal judging was unfolding, particularly in the United States. His belief that institutions such as *Yale Law School* imported a type of legal education that shattered the idleness of his own country led him to encourage many of us to pursue our education at Yale, from where we returned with the conviction, not without a degree of messianism, that we had a mission to rock the boat of legal academy in our country, in the name of the law and a healthy democracy. Upon Carlos Nino's death, Owen Fiss became for many of us a beacon in this immense project, which he structured as an apparently modest yearly meeting of Spanish, Latin American and American professors called SELA. Thus, I believe that by delving into Owen's views about what we should expect from the legal academy and its relationship to the political system, we may better understand what we've been doing at these meetings for the past twenty years and how this endeavor constitutes a substantial part of an ambitious project aimed at pointing our legal and political practice in the right direction.

Jurists, lawyers and democracy

If someone observing SELA had to describe what they see at any of our annual meetings, he or she would probably say that it is an international conference that brings together law professors, mostly from Latin America, and some participants from Spain and the United States. It would be difficult for that observer to make any sort of judgment or draw conclusions that, to the contrary, would be very easy to make or draw at other similar conferences; such as, for instance, the area of specialization of the professors that meet each year or the specific issues discussed at these conferences. I'll come back to these issues later. The point is, however, that this observer would be wrong in his or her most obvious observations. SELA is not a conference. It's something else entirely. It is an academic project with complex rationale and objectives; it is the essential component for building an epistemic community in our region. It is an ambitious, ever-evolving and changing project. It is the product of the patience and meticulous metalwork of all who partake in this wonderful endeavor, although some have had more patience than others and have behaved as master craftsmen in this long process.

I believe it was Bruce Ackerman who once said that any of us should be very happy if we were lucky enough to have one, at least one, interesting and original idea to give to the world. Owen had many more than just one. Of all those ideas, my intention here is not to refer to his influential concept of structural inequality, his democratic theory of freedom of expression, his thoughts on interpretation of the law or even on the role of judges in a constitutional democracy.

I will not dwell on his notion of human rights as social ideals, or his sharp and founded criticism of counterterrorism policies in the Bush and Obama administrations. For the purpose I set out in this paper, I need to focus on Owen's thoughts on teaching and learning law; which is none other than his thoughts on the professional practice of academia, the aims of university teaching, the search for truth and the relationship between our professional practice and the operation of the democratic system. In other words, I will refer to considerations that Owen himself has been weaving together in some of his papers regarding his own academic practice, which also apply to most of us. I will dwell on this topic because I think it can help shed light on what SELA is, its past, and its future, since Owen's ideas have permeated both our collective endeavor as well as all other projects that have been influenced by SELA and Owen's vision. In different texts Owen slips in details about his perspective on what it means to teach law; what lawyering consists of; the work of academics in Law Schools; the intergenerational construction of a practice directed at the search for truth; and the political responsibility of those who work as professors and academics in a constitutional democracy. I will address each of these perspectives as well as how they have influenced SELA and, by way of this seminar, our own practice.

Law

Owen loves *Yale Law School*. He publicly confessed this in front of hundreds of people on May 23, 2011 on School grounds on the graduation day of his students, despite claiming that grown-ups do not publicly confess their love[7]. I was there. On several occasions, he has made

[7] Owen Fiss, speech, "A Confession," May 23, 2011.
http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1021&context=ylsca

reference to the institution in his papers, revealing the characteristics of the institution that, in his view, make it different and maybe even unique. Among all his papers, the most eloquent to this regard is perhaps the one he wrote in honor of Eugene Rostow, titled "*Law according to Yale*"[8]. Owen begins that paper with a blunt premise that reads like a defense against a foreseeable attack: "at Yale we teach law, not political philosophy." The first time I read that statement, I remembered an experience I shared with Martín Böhmer. The year was 1992 and, under the leadership of Carlos S. Nino, we had begun to explore the possibility of organizing a Master's in Law in the City of Buenos Aires that had certain characteristics that were a bit unusual for the context. Some of these characteristics are shared today with SELA, such as that of approaching legal problems from an interdisciplinary perspective, rejecting dogmatism, embracing a critical and analytical approach to the issues at hand, and other similar heresies. We visited several professors who we thought might be interested in our project. In one of the interviews, a prestigious lawyer specializing in administrative law who we tried to get on board asked us who would be teaching Constitutional Law. Martin and I looked at each other as if the answer was so obvious it rendered the question confusing. "Nino, of course," we replied. We were even more surprised when this person responded, "But Nino is not a Constitutional Law professor! He's a philosopher!" In our minds, someone telling us that Nino, the author of the greatest modern constitutional law texts of that time, which was mandatory in law schools throughout most Spanish or Portuguese speaking countries, was not a law professor-and not a Constitutional Law professor, mind you-was simply outrageous. However, this professor's reaction must be understood in a context that may somehow relate to Owen's assertion that Yale teaches law, not

[8] Owen Fiss, "Law according to Yale," in Myers S. McDougal and W. Michael Reisman, eds., *Power and Policy in Quest of Law*, 1985, p. 417. Translated into Spanish by Martín Bohmer under the title "El derecho según Yale," published in Martín Bohmer, ed., *La enseñanza del derecho y el ejercicio de la abogacía*, Gedisa, Barcelona, 1999, p. 25.

political philosophy. What I mean is that what the law *obviously* is to Owen and Nino, and many of us, exceeds the scope of the law to many others. To these critics, who were and still are the mainstream in Latin America, legal issues refer only to the dogmatic study of the letter of the law and the legal procedures of the courts, thus conceiving the law as an isolated discipline from the rest of human knowledge, especially the social sciences. Owen specifically and directly approaches this issue in:

> "the kind of advocacy society allows a lawyer is a limited one. Some of the limits on what a lawyer can do or say on behalf of a client are imposed by criminal statutes, liability rules, or professional cannons; others by personal scruples; and still others by a true understanding of the purpose of the legal system and the role of the lawyer in that system. All of these limits vary from time to time, and from context to context; they cannot be understood without a regard for the teachings of moral philosophy, economics, sociology, history -- and probably theology. (...) Yale faculty includes a large number of people who have completed graduate or professional training programs in economics, philosophy, political science, history, psychoanalysis and sociology -- not, mind you, that any of us perceives the absence of such training as a limitation on our capacity to profess on those subjects (at the moment we all seem to be cultural anthropologists.[9]

Formalism is not unique to the tradition of *civil law*, but the mark of formalism in our legal culture of continental tradition runs as deep, or even deeper, than that in the academic debate in the tradition of U.S. *common law* until the emergence of legal realism in the early twentieth century[10]. This imprint in our tradition has led jurists, judges and lawyers in Argentina, and perhaps even a large part of Latin America, to believe that the law is an autonomous discipline that is disconnected from both the social sciences and philosophy, as well as other disciplines seen by Fiss as essential for identifying the aims and purposes of legal institutions

[9] Fiss, op. cit., "Law according to Yale", p. 419-420.
[10] Brian Z. Tamanaha, *Beyond the Formalist – Realist Divide. The Role of Politics in Judging*, Princeton University Press, Princeton y Oxford, 2010, Parte 1.

and the role of lawyers; such as psychoanalysis, history, mathematics, anthropology, or even theology. Legal training in most of our law schools in the region have isolated and partitioned the law and legal teaching from the rest of human knowledge; perhaps as a result of a conception of law that enables a view of legal practice as limited to knowing and applying the letter of the law, with self-evident meaning that can be identified without any knowledge beyond the pure logic needed to establish correct syllogistic reasoning. I insist that this trend is not unique to the continental tradition, proof of this is found, for example, in Owen's paper "Judging as a Practice,"[11] where he reacts critically to the work of Michael Perry[12] and John Hart Ely[13], whose denial of interpretation and conception of judges as phonographs of the law, comes close to the continental notion that before the plain meaning of the text of the Code, judges should act as the mere mouthpiece of the law.[14] Legal dogmatism, criticized by Nino for assuming that it is possible to dispense with value judgments when assigning meaning to the law,[15] is precisely the method with which most law schools provide future lawyers for solving the complex legal dilemmas they will face in the future; thus failing to consider that the work of unraveling the meaning of the law requires, according to Fiss and Nino, unearthing the values and principles underlying legal text and endowing them with meaning.

[11] "Judging as a practice," in Owen Fiss, *The Law as It Could Be*, New York University Press, New York, 2003, pp. 172-190.
[12] Michael Perry, *The Constitution, the Courts, and Human Rights*, Yale University Press, New Haven,1982.
[13] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press, Cambridge, 1980.
[14] Also see the debate between Owen Fiss and Stanley Fish in "Objectivity and Interpretation," in Owen Fiss, *The Law as It Could Be*, New York University Press, New York, 2003, pp.149-171, and Stanley Fish, "Fish v. Fiss," *Stanford Law Review* July 36, 1984, pp. 1325-1347.
[15] Carlos S. Nino, *Consideraciones sobre la dogmática jurídica*, Universidad Autónoma de México, Mexico, 1974. See also, Christian Courtis and Alberto Bovino, "Por una dogmática conscientemente política," in Christian Courtis (ed.), *Desde otra mirada* Eudeba, Buenos Aires, 2001.

Owen and Nino, Yale and many of our Law Schools, wished and continue to wish to break this isolation and ghettoization of the law, which is not only unfounded but also impossible. In that sense, SELA is a project that has been built on interdisciplinary awareness of the law and its inseparable relationship with sociology, economics, philosophy, political science and even art, literature and cinema.

Lawyering

Owen holds that *Yale Law School* trains lawyers, not academics -or at least not just academics- and says that when he describes *Yale Law School* as an academic institution, he is not referring to the career paths that many of his students take as professors and scholars in the best universities of the United States and the world. Instead, he says that what he is referring to when describing Yale as an academic institution is the kind of education its students receive, which prepares them better than any other for lawyering and consists of blending academic and professional training. A good lawyer, according to this view, is a professional who, in addition to knowing the law, can also inquire into the justification of a legal institution in order to determine the scope of the norm that is under interpretation. In that regard, just as Fiss anticipates criticism of the legal education facilitated at his Law School by sustaining that Yale teaches law, not philosophy, he is again anticipating something, but this time what he is anticipating is the claim that this interdisciplinary and philosophically-aware perspective on legal institutions results in better lawyers, not worse. On the basis of Owen's perspective on what constitutes good lawyering, it is possible to sustain that the projects that are articulated within and developed by

many of our law schools-and that stem from SELA's very own DNA- are aimed at training better lawyers. These are not marginal projects designed by and for academics that are disconnected from the legal profession; instead they are endeavors aimed at promoting a particular view on the best way of educating future professionals. Fiss suggests that the distinction between professional and academic schools does not lie in that the former train lawyers while the latter do not, but instead lies in that academic training contributes in a more complete and comprehensive from in the training of lawyers who will *perform* better in the exercise of their profession than those who did not receive such training. Exposing students to the process through which their teachers, sometimes with their students, sometimes with their colleagues, sometimes by themselves, question, consider, and endeavor to investigate the purposes and appropriate justifications for legal rules and institutions, will better train them in the legal practice of imagining scenarios, testing theories, articulating justifications of their own positions, anticipating the arguments of their colleagues in a lawsuit or drafting rules and contracts. That was the idea behind a very special and positive characteristic of the first SELA meetings: to enable students from different law schools to participate in order for them to experience first-hand the practice of scholarly discussion of the professors responsible for their training as lawyers.[16][17]

This conception of law as a profession whose practice extends beyond the mere dogmatic application of legal texts seems relatively countercultural in a context dominated by a formalistic conception of law that is fed by the presuppositions of the dominant civil tradition in our region. A tradition with its emphasis on the drafting of complete codes that contemplate every possible

[16] Fiss, op. cit., "Law according to Yale", p. 421
[17] Fiss, op. cit., "Law according to Yale", p. 418.

scenario within the reach of the law and are enforced somewhat automatically will be reluctant to training legal professionals in the way defined by Fiss. While many of our law schools are experimenting with more modern and innovative teaching theories or even jurisprudential debates methods, the fact remains that the dominant legal culture in our region, in line with most of the countries of continental tradition, emphasizes on a study of the Codes that involves memorizing their provisions and the absence of classroom discussions on alternative interpretations, justificatory theories or even jurisprudential debates. While it is likely that a very high percentage of SELA participants do not share or identify with these traits of our legal tradition, the fact is that the overwhelming majority of our colleagues continue perceiving the law and training of lawyers under the light of the most rancid formalism.

Anarchy, Community and Academic Citizenship

The conception of law defended by Fiss also feeds his conception of what an academic community ought to be and, particularly, the way in which law school faculty carry out their daily professional activity. In addition, this conception of law and legal academic activity also impacts the range of courses offered by institutions to their students and future lawyers.

For Fiss, a law school is and ought to be an "organized anarchy."[18] It is anarchy because the decision about what each professor will teach is virtually left to his or her absolute discretion, this includes even when they want to teach their courses. (Fiss clarifies, not without irony, that exceptions to these principles are "the rarest moments to the dean and others concerned about

[18] Fiss, op. cit., "Law according to Yale", p. 421.

high matters of state such as accreditation").[19] Owen stresses that academic freedom, in most law schools in the United States, is reserved for the research efforts of their professors, thus recognizing the individualistic aspect of the creative work being carried out. But at Yale that freedom also extends to the classroom. Owen states that: "We believe teaching makes the same demands on our creative capacities as scholarship and even more important, we believe in the essential unity of teaching and scholarship. The classroom is a workshop from which our scholarship springs and to which it returns."[20] Fiss acknowledges that this freedom has a price: there are no classes on Friday afternoons, courses on judicial review are proliferating – although some of them are disguised with names that hide the true subject of the class–or there are no classes on certain subjects, rendering it difficult for students to acquire balanced knowledge on certain topics or furthering their knowledge on particular topics. But Fiss is not worried about this because his conception of the educational experience does not consist of the accumulation of knowledge. In his own words, "[t]he educational experience consists of the exchange of ideas between student and faculty, and the character and quality of that exchange depend on what each participant has to say," in short: it's more a matter of form than substance.[21] Once again, this vision of the educational experience is related to the kind of lawyers envisioned in Owen's mind, whose education is in the hands of law schools. He admits that the courses offered by law schools can generate gaps or voids in the training of future lawyers, but does that really matter? Or is what matters training lawyers that are capable of acting as such even when the scenarios in which they operate and rules that they will apply will change over time? Owen says that what matters most is to satisfy the needs of lawyers who will reach the highlight of their careers in the future, twenty or thirty years after leaving the classroom. In short, who would be best positioned

[19] Fiss, op. cit., "Law according to Yale", p. 421.
[20] Fiss, op. cit., "Law according to Yale", p. 421.
[21] Fiss, op. cit., "Law according to Yale", p. 421.

to fill these gaps with curriculum requirements? The Dean? Or, what according to Fiss is even worse, some committee? For Owen, students operate mostly thanks to the "love a teacher brings to his or her subject and the kind of curiosity that love engenders."[22] In short, for Owen, the solution to the problem of gaps in the law school curriculum is not solves by resigning to the freedom of professors and subjecting them to a central authority, instead the solution is found in the sense of responsibility of professors toward the training that their students must receive, while maintaining the highest possible diversity within the faculty. It is true that these goals are not simple, but filling in all the gaps is not simple either, or may even be impossible.

Owen's project, or that of his beloved Law School, seems very distant for those of us who experience very different realities. In Argentina, the contents of legal education is defined, perhaps as a result of that conception of law that feeds our continental tradition, by a central authority who, in addition, is not the feared Dean or the even more feared a Commission of Professors mentioned by Fiss; instead it is the State, which establishes how lawyers should be trained on the assumption that the educational experience is the accumulation of knowledge and eradication of gaps. Some of our curricula allow a certain percentage of marginal courses whose content depends on the discretion of the facilitating professor and their research agenda, and which provide a certain level of diversity for students. However, the core of courses in our Law Schools consists of compulsory subjects with defined contents. A conception of the law as codified text defines the curriculum of law school and restricts the academic freedom of professors, as well as the educational experience of students, outlining a model which is the opposite of what Fiss would describe as desirable. For our own encouragement, even at that ideal place described by Owen, things are not perfect. This is the fruit of many twists and turns. In

[22] Fiss, op. cit., "Law according to Yale", p. 421.

Yale's own history we can find similar experiences to ours, such as the creation of the *Divisional Program*, which was driven by the desire for students to accumulate or add knowledge to develop expertise. This project consisted of organizing mini-departments that would be responsible for designing courses related to their respective fields, but it was deemed excessively intrusive by professors and today only some remnants of that program have survived.[23]

Once again influenced by Owen's conception on teaching and learning law, SELA is a humble yet ambitious project aimed at creating a space in which that educational freedom and experience are implemented in our region, perhaps with the secret desire that at least part of this project may transpire in our law schools.

But Fiss also reminds us that not everything is anarchy in his ideal Law School model. That anarchy, corresponding to the individualistic aspect of our academic activity, is organized through the communal character of the educational experience. For Owen, the educational project is an enterprise of communal nature and is experienced in all those situations in which we, as professors, are involved in discussing the legal issues over which we lose sleep and which we dwell on over morning coffee, lunch with colleagues, seminars or workshops.[24] Owen focuses on the importance of the latter as a necessary institution within Law Schools. He acknowledges that profound discussions among colleagues are hard to sustain over time. It is precisely this individualism in academic activity that pushes us to focus on our own interests, coupled with the fact that we are always busy, that robs us of the chance to hold deep and serious dialogs with our fellow faculty members. But opportunities such seminars –for example, Yale

[23] See Freilich, "The Divisional Program at Yale: An Experiment for Legal Education in Depth," 21 *Journal of Legal Education* 443 (1969), quoted by Fiss in "Law according to Yale."
[24] Fiss, op. cit., "Law according to Yale", p. 422.

Law School's biweekly *Legal Theory Workshop*– are the ideal and essential platform to discuss the work in preparation. According to Owen, papers "provide the common text that is necessary to provoke and unify serious discussion among colleagues."[25] In addition to being fun, Fiss assures that discussing ideas is a form of continued education, a source of intellectual renewal and growth that forces us to revise our certainties, learn about new developments in our own fields or those that are foreign to us, and helps us combat the narrowness, which is such an easy trap in which to fall in academic life.[26] Once again, SELA, for those who are not yet familiar with it, is a sort of exported Legal Theory Workshop, with all its implications regarding the communal and anarchic nature of the educational experience and constitutes, once more, an attempt to bring that experience into our law schools in Latin America, in which institutions such as these seminars are so rare. I must confess that I was fortunate enough to participate for a few years in what I believe to be the closest thing to those workshops in Buenos Aires: I'm referring to Carlos Nino's Friday workshops. This is no coincidence. There is, to me, an obvious continuity between the ideas of academic activity of Nino and Fiss. Among these ideas are the Legal Theory Workshop and SELA. That continuity is revealed in the conceptions of Nino and Fiss as to how knowledge is constructed and developed in academic activity. In October 2013, at the School of Law of Palermo University we paid tribute to the memory of Carlos Nino by commemorating the twentieth anniversary of his death. At that meeting, to which Owen assisted, Diana Maffía, one of the most lucid Argentine philosophers who was one of Nino's disciples in the Argentine Society of Philosophical Analysis, held that Nino was the only Argentine jurist who "prepared his own succession in a dialogic community, created an epistemic community with a group of young people with very different ideas (conservative liberals, social liberals,

[25] Fiss, op. cit., "Law according to Yale", p. 422.
[26] Fiss, op. cit., "Law according to Yale", p. 423.

communitarians) but similar principles and discussion methods. Nino needed that epistemic community to think and write, and within that community he built human and intellectual bridges. Intellectual because it was nurtured by both analytic and continental philosophy (such as the critical philosophy of the Frankfurt School, or Kantian philosophy, or Hannah Arendt's philosophy), which commonly dialog with each other today, but ignored each other in the 70s and 80s. But he also created a human dialog by traveling and bringing back texts for discussion in his seminars and inviting his counterparts to visit our country and to create an exchange among participating academic groups."[27] This dialogical community project continues to nurture SELA today and underlies Owen's notion of academic activity. For Owen, it is impossible to think and write without being part of this kind of community.

Once again I ask myself, is the absence of institutions and practices like this in our context a causeless event or is there a connection between the culture fostered by our legal tradition and the almost complete lack of interest in this type of collective traditions? Could we establish a link between the tenets of continental tradition and the lack of consideration of the crucial importance of these professional practices? Our conception of law-as text and nothing but text-and legal knowledge-as the accumulation of information-does not require this mutually imparted continued education in spaces for community deliberation. Although it is true that there are plenty of conferences and seminars at our law schools, how many of them really resemble SELA? In how many of our academic meetings do we discuss our papers or jointly walk the path

[27] Diana Maffía gave an oral presentation on that occasion; therefore, I would like to thank her for taking the time to transcribe it via email for this paper. For the notion of academic community to which Maffía is referring, see Luis Villoro, *Creer, saber, conocer*, México, Siglo XXI, 1982. See also Mario Teodoro Ramírez, "Sabiduría y comunidad. Correspondencia entre la epistemologya y la filosofía política de Luis Villoro."

of reflection and criticism? If the answer is "almost none," then the question I think we should ask ourselves is "why not?"

Owen, sustains that "[t]he quality of any academic institution ultimately depends on the depth and range of its faculty, who shape the curriculum of the school and are responsible for its scholarly output, the character of its library, and the kind of students that are attracted to the institution."[28] However, he also adds that just as those who are part of the academic community shape the institution, an institution with its own ideals and profile, such as Yale, shape the character and behaviors of its members. [29] Fiss insists on the communal or community character of the educational experience. In another paper suggestively entitled "Making Coffee and Other Duties of Citizenship," he reflects on the bonds that make a group of teachers a faculty, that make a group of individuals and individualities an academic community. That community, like a political community, embodies values that translate into both rights as well as obligations. But Owen neglects a crucial factor for the formation of communities, perhaps because he takes for granted something that is so difficult to achieve in our countries: that members of a community "reside" within the same geographical space. Leaving metaphors aside, I mean the enormous difficulty of many of our law schools to have a critical mass of full-time faculty (as well as full-time students) that are professionally involved in academia (in the sense of research and teaching). Without this prerequisite, the community cannot exist or its existence is almost impossible; nor will the practices that Fiss considers essential to the educational experience exist; or if they do, it will be within a weak or deficient model.[30]

[28] Fiss, op. cit., "Law according to Yale", p. 420.
[29] Fiss, op. cit., "Law according to Yale", p. 420.
[30] Owen Fiss, "Making coffee and other duties of citizenship", 91 *Yale Law Journal* 224, 1981-1982.

Ultimately, that community to which Owen is referring, also emulating other communities such as the political community, is essentially transgenerational. The academic dialog that Fiss deems vital for the educational experience must transcend between generations and perpetuate in time. In the same way that the law is a practice, so is legal academia, hence the special attention that Owen has always paid to our young. Of course, affection and kinship have played their part, but it extends beyond that. The notion that law is a construction involving primarily lawyers requires that academic institutions – meaning law schools and workshops –are concerned with committing future generations to this infinite practice that is the search for truth and the construction of the law.[31]

Democracy

We are all aware of how much has been written about the purposes of university education. Of course, such an old institution has undergone different historical moments and its objectives have varied in time. In addition, from a descriptive point of view, those objectives can vary, even today, depending on the context in which the university functions. Owen has concentrated on this topic, especially over the last few years, and has directed our attention on the relationship that exists, or ought to exist, from a normative point of view, between modern University and the proper functioning of the democratic regime. However, according to him, this relationship is not limited to an argument of political theory or institutional design, but instead rests on a constitutional argument.

[31] See Owen Fiss, op.cit., "A confession", p. 6.

Owen's influential theory on freedom of speech as a prerequisite for the functioning of democracy as a system of citizen self-governance [32] and his interpretation of the First Amendment of the Constitution of the United States as a clause that protects free speech on the basis of its goal (which, according to Fiss, is to ensure the broadest, most diverse and robust discussion possible, as mandated by the U.S. Supreme Court in *New York Times v. Sullivan)* are both well-known. In 2008, in Buenos Aires, Owen received an honorary doctorate from the School of Law of the Palermo University and on that occasion in Buenos Aires he presented a brief but crucial paper titled "*Las dos caras del estado*" [The two faces of the State][33], where he provided more details of his theory of freedom of expression, this time with special reference to the constitutional obligations of the State before what he called managerial censorship. In 2011, he returned to Buenos Aires and presented an outstanding paper at the University of Buenos Aires which he called "The Democratic Mission of the University"[34]. In that paper, he presented his ideas on academic freedom and the relationship that exists between that freedom and freedom of expression as a prerequisite for democracy, as he's been advocating for decades via his aforementioned works, including his presentation at Palermo University. Many of the ideas expressed in his work on freedom of expression, in which he referred in particular to the exercise of freedom of press, have become the central arguments of his defense of academic freedom, University autonomy from state authority and the obligations of said institutions regarding the quality of democracy. In that sense, Owen tells us that, with no intention of underestimating the important role the press plays in the process of informing the public, he would like to drive our

[32] Owen Fiss, *The Irony of Free Speech*, Harvard University Press, Cambridge, 1996.
[33] Owen Fiss, "Las dos caras del estado", *Revista Jurídica de la Universidad de Palermo…* Also in Owen Fiss, *Democracia y disenso. Una teoría de la libertad de expression*, Buenos Aires, Editorial Ad-Hoc, 2010, pp. 145-157.
[34] Owen Fiss, "The Democratic Mission of the University", inauguration as Doctor Honoris Causa and the first conference in honor of Carlos S. Nino at the University of Buenos Aires, which took place on October 6, 2011. A translation by María Luis Piqué was published under the title "La misión democrática de la Universidad" in *Academia. Revista sobre enseñanza del Derecho*, year 10, Issue 20, 2012, pp. 269-286, Buenos Aires.

attention to "the role the university plays in this educational process and explaining how the principle of academic freedom –which for a long time has protected free university–can be rooted in the Constitution."[35] Fiss assures that all areas of university contribute to the quality and robustness of the democratic debate. The departments of political science, economics, sociology and law, for example, are dedicated to the discovery and dissemination of knowledge related to public policy, to analyzing the proposals of candidates for public office and studying how these policies are implemented by the democratic government. He also recognizes that the departments of philosophy, literature and humanities in general play a fundamental role for the proper functioning of democracy, because they contribute to the formation of the moral and political values that guide decisions in society. He also directs our attention to the contributions of scientific knowledge, and physical and biological sciences to the democratic system of government, allowing individuals to understand themselves and the world around them.[36]

Another key feature of modern universities in democratic contexts is the generation of social leaders. In that sense, Owen assures us that "the knowledge generated by universities constitutes a public resource, a natural treasure, available to all those involved in the public life of the Nation. Similarly, the critical perspective will be inculcated through university education. Not everyone will be able to access it, but the hope is that those who do have access will influence public opinion and become leaders of the Nation."[37]

In short, Owen closes with the thought that "[a]t the heart of the university is speech." Lectures, classes, interviews and articles in the mass or specialized media, student opinions both

[35] Fiss, op. cit., "La misión democrática de la Universidad", p. 270.
[36] Fiss, op. cit., "La misión democrática de la Universidad", p. 270.
[37] Fiss, op. cit., "La misión democrática de la Universidad", p. 272.

inside and outside the classroom, examinations, papers, research by professors and students, are forms of expression that constitute modes of generation and dissemination of knowledge, which Owen calls "core activities of the university," which in his view are protected by the Constitution and principle of academic freedom. Research, communication of results and even student and faculty selection are thus protected by the First Amendment of the Constitution of the United States.[38] The academic freedom that Fiss refers to as "external" operates as a form of protection against anyone who attempts to control the curriculum. Control of university activity would be admissible only in the form of academic discipline standards, but never in the form of government regulation. It is also accurate to say that Owen argues that this protection of academic activity does not prevent *any kind* of government intervention, but does call for strict scrutiny, in the sense that it is assumed that the interference is invalid unless the state demonstrates an urgent interest and the mode of interference is the least intrusive.[39]

In addition to this external academic freedom against undue interference by the government, there is, according to Owen, such a thing as internal academic freedom, which refers to the protection of professors and students from undue interference by university authorities. The latter may wish to silence a member of the university's community for different reasons, such as external pressure upon the university, or may simply disagree with what the professor or student are expressing for political, moral or religious reasons. However, such interferences are inconsistent with the foundations of autonomy that the university requires, as they contradict the very *raison d'être* of the institution.[40] The only legitimate interference by

[38] Fiss, op. cit., "La misión democrática de la Universidad", p. 274.
[39] Fiss, op. cit., "La misión democrática de la Universidad", p. 275.
[40] Here Fiss quotes Robert Post C., *Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State*, 2012. See also Matthew W. Finkin and Robert C. Post, *Para el bien común. Principios de la*

university authorities is that which is based on academic criteria. Internal and external freedom pursues the same goals; are founded on the same principles; and are protected by the First Amendment to the extent that it is interpreted on the basis of protecting a robust democratic debate.[41] Fiss closes his paper by affirming that a free society requires free universities. I would add that those free universities have the duty to commit to the democratic debate. There is no such thing as a robust democratic debate without research or production of knowledge by Universities. That commitment to democracy and politics, read under the brightest possible light, was always present at SELA in the Roundtable on Democracy, which in each edition of our annual meeting is held to better understand and discuss the political realities of our countries. This Roundtable is not a diversion of our academic enterprise, it is not a *break* after five or six exhausting academic panels; that Roundtable represents and exemplifies the commitment of our academic project to democracy in Latin America. I am not sure whether I accurately remember whose idea it was to have the Roundtable, but I have my suspicions as to whose idea it was to actually include it within SELA.[42]

On creases, edges and borders

I am convinced that my education was, and still is, in the hands of those people with whom I share my work and projects and, because of that, I have been very lucky. One of the

libertad académica en Estados Unidos, Colección de Ciencias Jurídicas, Universidad de Palermo, Buenos Aires, 2012.

[41] Fiss, op. cit., "La misión democrática de la Universidad", p. 281.

[42] Fiss, op. cit., "La misión democrática de la Universidad", p. 286.

people to whom I am referring is Martín Böhmer. Among other things, I owe Martín for driving my attention many years ago to a book by Beatriz Sarlo called *Borges: Un escritor en las orillas* [Borges: An Author on the Edges].[43] In that book, Sarlo presents her interpretation of the works of this classical Argentine author and claims that as an author he was at the edge of universal literature, without ceasing to be a local author.[44] To succeed in this complex undertaking, Borges had to reinterpret the past of Argentine literature in way that enabled him to support himself on that literature to produce the works that would place him in the crease of two worlds. This crease can be interpreted as a boundary, but also as a limit, frontier or border; an end or margin of a territory between two spaces; a transition point between two domains.[45] For Sarlo, Borges is at the edge that separates the city, his city, Buenos Aires and the countryside; between the universal, the cosmopolitan and the local. Borges is in the crease and attempts to project himself from there. These creases, like velvet, are double textured and each side feels differently.[46] The passage from one world to the other, according to Sarlo, or Borges, is simpler for a Latin American author whose tradition is faint and light and whose past short and inconsistent. This author's experience will differ from that of European authors, who find great difficulty in breaking away or unraveling their ancient and heavy traditions.[47]

I believe that in the legal world, some of us live in similar creases; particularly in Argentina. However, some of my colleagues in Latin America may feel the same way. The legal tradition under which we usually classify the countries in our region is that of continental law. This implies certain visions on how we understand the law, legal profession, academic activities

[43] Beatriz Sarlo, Beatriz Sarlo, *Borges: Un escritor en las orillas*, Seix Barral, 1993.
[44] Sarlo op. cit., *Borges: Un escritor en las orillas*, p. 47.
[45] Sarlo op. cit., *Borges: Un escritor en las orillas*, p. 47.
[46] Susan Sontag, *The Complete Rolling Stone Interview*, Yale University Press, New Haven, 2013.
[47] Sarlo op. cit., *Borges: Un escritor en las orillas*, p. 76.

and the practice of judging in courts. But that belonging to a cultural civil law tradition is not that clear or pure. Many of our countries, including Argentina, have adopted a constitutional practice and judicial review model that was inspired by the U.S. tradition, with all it entails in terms of how we understand the law, legal profession, academic activities and the practice of judging in courts. The Argentine legal system imported from its birth in the nineteenth century, and even a few years before the adoption of the Civil Code of 1864, a Constitution that holds strong similarities with that of the United States, and an almost identical judicial review modal to that developed by the U.S. Supreme Court in *Marbury v. Madison*.[48] The Argentine Constitution was passed in 1853 and the case of *Sojo*, which emulated *Marbury*, was decided by the Argentine Supreme Court in 1863. For its part, the Civil Code was sanctioned in 1864. In a different work, I stressed, almost theatrically, how this confluence of traditions was embodied in the two great Argentine jurists of the nineteenth century: Juan Bautisa Alberdi, drafter of the Constitution, and Vélez Sarsfield, author of the Civil Code. Early in the second half of that century both of these lawyers had, separately, built the legal system with which they bequeathed us and which continues until today.[49] It is noteworthy that both jurists knew each other, so much so that, after the Constitution and been passed and President Domingo F. Sarmiento had ordered Vélez Sarsfield to draft the Civil Code, the latter submitted his project to Alberdi for his review. After that submission, the jurists exchanged letters in which the draft Code was extensively analyzed and which, in my opinion, represents a symbolic crossing of the legal traditions that came together in the creation of the Argentine legal system: the civilian model and the Madisonian constitutionalism. The Argentine legal system was developed almost entirely in a crease between two cultural traditions and was placed on the border, between two sharp edges, of a diffuse limit

[48] 5 U.S. 137 (1803).
[49] Roberto P. Saba, *A Community of Interpreters*, JSD dissertation *Yale Law School*, 2011.

between two legal cultures. Argentina is not the only example of this. Unlike this more or less collective voluntary choice made in my country in the nineteenth century, Puerto Rico also experiences a similar situation as a result of its colonial relationship to the United States. As I understand it, Puerto Rico's legal system is also at a crease described by Efrén Rivera, in a paper analyzing some ideas of Barak,[50] former president of the Supreme Court of Israel, interestingly also a country at a crease where the civil tradition meets Madisonian constitutionalism.[51] That crease in Argentine legal culture was what made it seem familiar for me and other friends and colleagues of my generation to conduct our graduate studies abroad in a country whose culture is neither civil nor continental tradition, but also not that of British *common law*. Much like Sarlo describes Borges as an author on the edges, one that is difficult to place under any tradition, who can write meaningfully without relying on the literary tradition of the historical past of his country while moving freely through literature without the heavy weight of the literary tradition of, for instance, Europe, Argentine jurists must view the law in and from Argentina. I dare to suggest that Carlos Nino faced this dilemma and perhaps that is why he had to pioneer the difficult task of reconstructing Argentine constitutional practice in order to find his place within that practice. I am referring to his masterpiece on constitutional law. This book's title seems to suggest the attempt of building a bridge between Nino and that professor I mentioned earlier who did not believe him to be an expert on Constitutional Law. The work is called *Fundamentos de Derecho Constitucional* [Fundamentals of Constitutional Law].[52] However, more to the point I am trying to make here is the book's subtitle: *Análisis filosófico, jurídico y politológico de la*

[50] Efrén Rivera Ramos, "The Impact of Public Anglo-American Institutions and Values on the Substantive Civil Law: Comments on Judge Aharon Barak's Keynote Address, in *Tulane Law Review*, Volume 78, Issues 1 and 2, pp. 353 a 361.
[51] Aharon Barak, "Constitutional Human Rights and Private Law", in *Review of Constitutional Studies*, Vol. III, Issue 2, pp. 218-281.
[52] Carlos S. Nino, *Fundamentos de derecho constitucional. Análisis filosófico, jurídico y politológico de la práctica constitucional*, Astrea, Buenos Aires, 1993.

práctica constitucional [Philosophical, legal and political-science analysis of constitutional practice]. Nino accomplished what no other Argentine constitutionalist had achieved before: to make sense of Argentine constitutional practice and thus contribute as a jurists to interpreting the Constitution and laws of his country. Unlike Borges's Funes the Memorious, Nino cut, selected and forgot in order to build his account of Argentine constitutional law, almost emulating the architect of his conception of law as a cathedral built throughout generations.[53] Borges's Funes "had difficulty understanding that the generic symbol for dog could include so many disparate individuals of diverse size and diverse shape; it bothered him that the dog (seen from the side) at three fourteen would be called the same way as the dog (seen from the front) at three fifteen."[54] Funes could remember everything, but he could not think. Thus Borges tells us that "thinking implies forgetting differences, making generalizations and abstractions. In Funes's crowded world there was nothing but nearly immediate details." Literature, so Sarlo tells us-like legal or constitutional theory, I would add-"works with the heterogeneous, cutting, pasting, overlooking, combining operations that Funes is incapable of doing with his perceptions or, therefore, with his memories. For Borges, forgetting is practically a condition for memory and reasoning, because if we forget the particularities, then we can make abstractions."[55]

Just like Argentine jurists inhabit a crease between European legal culture and American constitutional culture, our colleagues in the U.S. also inhabit a crease between their British cultural past and their own constitutional model. However, unlike this author in the South American creases who was forced to push through the challenge of lacking solid and consistent

[53] Carlos S. Nino, *The Constitution of Deliberative Democracy*, Yale University Press, New Haven, 1995, translated into Spanish by Roberto Saba under the title *La Constitución de la democracia deliberative,* Barcelona, Editorial Gedisa, 1998.
[54] Jorge Luis Borges, *Funes el memorioso*, 1942.
[55] Beatriz Sarlo, Beatriz Sarlo, *Borges: Un escritor en las orillas*, Seix Barral, 1993, pp. 66-67.

legal tradition and, at the same time, enduring the unbearable lightness of that same condition, the American jurists pushes through the limitations of an over 200 year-old legal tradition. Owen too inhabits the creases. His curiosity and empathy with the legal developments of our part of the world place him in a different crease and a different edge. He himself admits that when his last book was published in Spanish, *Los mandatos de la justicia* [The Mandates of Justice], his attitude when he came to Buenos Aires after the military dictatorship-which was that of proudly brining to these Southern lands the perspective of a solid and consistent constitutional tradition, particularly in terms of civil rights since the 1960s- was transformed as he humbly learned how our jurists, governments and people had dealt with the difficult task of rising a democratic system and liberal legal system from its ashes. This transformation was subsequently fertilized by what he identifies as embarrassing backwards steps in that tradition in the counterterrorism policies of the Bush and Obama administrations.[56]

The difficulties of inhabiting the creases

Several years ago I presented a paper at SELA that provoked much criticism -mostly from my friends in countries with continental traditions- and very few favorable comments, and that, as is characteristic in SELA, were explicitly explained to the point of almost making me doubt my intuitions and findings. In that paper, I attempted to defend the point that Madisonian constitutionalism and the Civil Code model of continental tradition were supported by tenets that

[56] Owen Fiss, *The Dictates of Justice. Essays on Law and Human Rights*, Republic of Letters, Dordrecht, 2011. Translated into Spanish by Roberto Saba under the title *Los mandatos de la justicia*, Marcial Pons, Madrid, 2013.

differed radically from each other and derived in institutions that also differed radically from each other, leading to serious problems in a hybrid legal system such as that of Argentina, which combines structures, practices and institutions of continental tradition with structures, practices and institutions of Madisonian constitutionalism. I was fortunately able to recover from that traumatic experience and that paper titled "Constituciones y Códigos: Un matrimonio difícil" [Constitutions and Codes: A Difficult Marriage],[57]became the seed of central idea of my JSD dissertation titled *Una comunidad de intérpretes* [A Community of Interpreters].[58] Far from pursuing self-promotional interests, this reference to my own work stems from the belief that my thoughts on the problems that derive from our hybrid legal tradition are applicable to challenges faced by projects like that of SELA, which are heavily influenced by a vision of the law and legal academy such as that of Owen Fiss and which was presented in the first part of this paper. In that sense, I propose that we ask ourselves if SELA, and Owen's vision of our profession (regarding lawyers and legal scholars) relate to a certain conception of law and lawyering which comes from a legal tradition that is not civil law and, consequently, if that divergent cultural belonging hinders SELA in Latin America and condemns SELA to settle for a marginal impact, on the creases, but in the sense of margins as opposed to centers. I will advance my belief that the answer to this question is "no." However, I think this question is worth asking after twenty years of work. I believe it is worth reflecting on this strange, transcultural, legal academic project, inhabiting borders and creases, and asking ourselves whether what makes the existence of this legal community at all possible is that it includes us all on each side of the velvet cloth. If this community exists, with members who are capable of dialog and reflecting upon legal issues year after year, then we must identify what makes us part of that community, what makes us its

[57] Roberto P. Saba, "Constituciones y Códigos: Un matrimonio difícil", SELA 2007, San Juan, Puerto Rico, 2008. For a digital version, see http://www.law.yale.edu/documents/pdf/sela/RobertoSaba__Spanish_.pdf
[58] Roberto P. Saba, *A Community of Interpreters*, JSD dissertation *Yale Law School*, 2011.

citizens. Clearly, like many of us, Owen Fiss believes that community exists, although I must pose some clarifications regarding this assertion. Inhabiting the creases, SELA does not allow just any member into the academic communities of the countries it represents: who are part of the project? What do those of us who participate have in common? Who are *not* part? On the other hand, as an academic project, SELA aspires to influence academia beyond the individual effect it has over its participants. Therefore, is it possible to affirm that SELA responds to a divergent vision on legal academia from that of the continental tradition on how legal academia works or ought to work? I believe so, at least with regards to the mainstream vision on what legal academia means in countries under continental tradition. In fact, SELA has had to overcome several challenge; and succeeded in doing so. First, SELA attempted to combat knowledge compartmentalization, which is so common at our Law Schools and so distant from the interdisciplinarity advocated by Owen, expressing the academic tradition of Yale Law School. This was a conscious goal that was achieved through different strategies ranging from inviting authors to write papers on issues that exceeded their area of expertise, to the selection of topics for each conference that linked the law to other disciplines, such as economics, political science or sociology. Second, SELA had to face, for example, a common trend in our legal tradition of making dogmatic analysis of the law, while prompting us to develop creative arguments. Finally, emulating those workshops on legal theory that Owen considers essential for the continuing education of good lawyers, SELA always sought to organize the discussion around the papers that structure our conversation.

SELA began as a countercultural project; but today, after twenty years, there is nothing countercultural about it. Many of us who are part of this project were marginal players at our institutions or our broader legal communities, but today we have institutional and intellectual leadership responsibilities that obligate us to implement a Borgean or Ninean reconstruction of the past in a way that is functional for the construction of the future in accordance with different rules and visions. The challenge of installing the new without destroying the old, of building new institutions without alienating them or ourselves marks and will continue to mark our local experiences.

In this tribute to Owen Fiss I have decided not to drive my attention –or yours– to the impressive and vast ideas of Fiss, but instead to focus on a part of his work that is not carved in letters but constitutes an extremely ambitious collective project in the transformation of the legal culture of our region, and particularly its academia. If I had any doubt as to the correctness of my choice of subject for this paper, Owen himself would probably tell me I had made a mistake: one afternoon, not so long ago, a group of students met with Fiss at Mory's, a place that, according to Owen, provided an atmosphere that was impossible to achieve in classroom 129. These students asked him about his career and his heretical views on procedural law. Then, one of the students asked, “Professor Fiss, what is your proudest achievement?” Owen paused for a second, maybe, as he himself describes, long enough to start scrolling in his mind’s eye his list of publications, and then he suddenly realized that the answer lay in an entirely different domain. Owen firmly replied: “you, yes you, are my proudest achievement. You [my students] t have been at the center of my professional life. You are the ones for whom I write. You are the ones I have in mind as I sit in the library each morning preparing for class. You are the ones with who I am in

conversation in the still hours of the morning as I lie half awake imagining how the class that is to be held later in the afternoon will unfold. You are the ones I am often thinking about, sometimes even when my children or now my grandchildren pull on my sleeves. You are the ones I count on to realize my deepest dreams and hopes for the law."[59] I am sure that "you" included many of us and SELA itself.

[59] Fiss, *A Confession*, p. 6.