

## OUR OEDIPUS BY OWEN M. FISS

ON MAY 23, 2017, STERLING PROFESSOR EMERITUS OF LAW OWEN M. FISS DELIVERED THE FOLLOWING REMARKS DURING THE CELEBRATION HONORING THE DEANSHIP OF ROBERT C. POST '77, WHOSE TENURE BEGAN JULY 1, 2009 AND CAME TO A CLOSE ON JUNE 30, 2017.

**In the early 1990s**, I received a handwritten note from Robert, who was then a professor at Berkeley. The note simply read, “You must have known that this Oedipal moment would one day arrive.” Attached was a draft of a paper of his entitled “Meiklejohn’s Mistake.” The allusion to Oedipus in Robert’s note, referred not, as Freud made so infamous, to a son’s love of his mother, but more appropriately for our purposes, a son’s killing of his father.

As it turned out, Robert’s paper was not so much about Alexander Meiklejohn, but rather the person—me—who had made much of Meiklejohn’s theory of free speech in contemporary, scholarly debates and who also happened to have been one of Robert’s teachers. Robert’s article was perceptive, tightly argued, and elegantly expressed. He was wrong, of course, but I felt the sting and marveled at his erudition and, to be frank, his courage.

Alarmed, I immediately sought the assistance of another of my favorite students, Reva Siegel. She was then on the Berkeley faculty, but during the 1993-94 academic year was visiting Yale—the perfect emissary I thought. Reva promised to speak to Robert on my behalf and assure him that my heart was pure. I can only assume that the promised conversation took place, but, alas, it would be to no avail.



In the late 1990s, Robert published a review of my book, *Liberalism Divided*, that began in this register: “The recent infiltration of First Amendment jurisprudence by modes of analysis derived from equal protection doctrine has been... largely unfortunate.” Then, to drive the knife even deeper, and at close range, Robert delivered at Yale the Ralph Gregory Eliot Lecture on the First Amendment, eventually published in 1996 in the *Yale Law Journal* as “Subsidized Speech.” With this lecture, Robert set his sights on the doctrine I had developed to meet the threat to First Amendment values that I perceived in the campaign of Senator Jesse Helms to deny NEA funding to dissident artists such as Robert Mapplethorpe.

In 2003, Robert joined the Yale faculty. Guided by the precept that it is best to keep your critics close, I warmly embraced this development. Unfortunately, his return to New Haven did not soften his position on me or freedom of speech. His writings on the First Amendment continued unabated, and in them, he elaborated the position originally taken in “Meiklejohn’s Mistake.”

Even worse, during this period our Oedipus grew uneasy with another, very familiar view—to which I emphatically subscribe—that credits the judiciary with launching, sustaining, and even guiding the Second Reconstruction. Robert rejected this so-called “juriscentric perspective” and insisted that the focus should be on “culture” and broad “social movements.” To compound my dismay, it also became clear that Reva, once my loyal agent, had been turned.



I was growing desperate and concluded that only one remedy—the most horrible of all—remained: Robert should be named dean. This, I thought, would require him to put his critical pen to one side and force him to spend his days and evenings conferring with alumni, placating students, raising funds, presiding at endless meetings of the Expanded Governing Board, and making sure that all of the light fixtures in the building were in working order. Robert was appointed dean in 2009, eight years ago, and though the Sterling Law building is still standing, even expanding, the deanship has not had the intended effect on his own scholarly endeavors.

During his deanship, Robert published a number of important articles, and even more remarkably, published three books on freedom of speech. I was especially touched by the fact that he dedicated his 2012 book on academic freedom to me. The dedication, a fragment from Dante, was in Italian, which I do not read. However, an article Robert published in the *Harvard Law Review* in the very same year gave me a sense of what he had in mind. He then wrote: “Owen’s style is divisive and pugnacious. His M.O. is to enter a controversy the way that Clint Eastwood might enter a saloon, clarify the dispute, and adopt a position.”

In stepping down from the deanship, Robert will again be able to devote all of his energies and time to scholarship. This return to scholarship will be a bonanza for the entire world, though I must admit that there is at least one person—his own beloved Clint Eastwood—who approaches this new period with an uncharacteristic measure of trepidation.

Sophocles opens his telling of the Oedipus myth in *medias res*—Oedipus has already killed his father and married his mother. The drama comes from the fact that Oedipus does not yet know what he has done, and the play is a chronicle of Oedipus’s search for the reasons—his own tragic past—why the gods have been so unkind to his kingdom.

Eventually, Oedipus learns of his crimes and when they are revealed, Jocasta, his mother and wife, hangs

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herself. Coming upon this terrible spectacle, Oedipus seizes “the long gold pins holding her robes” and gouges out his eyes. The audience viscerally understands the justice of Oedipus’s self-inflicted punishment, but at the same time appreciates the extraordinary determination and extraordinary courage that it took for Oedipus to cast aside the warnings of others and to persist in his search for the truth about the gods and himself.

The truth our Oedipus has been seeking is not so horrible, and most certainly will not result in any self-punishment—other than the eight years he has served as dean. Still, Robert’s dedication to the discovery of truth—no matter how uncomfortable it might be for him and no matter how painful it might be for his elders—is like that portrayed by Sophocles—equally great and equally admirable.

Robert and I arrived at Yale at the same moment—in the fall of 1974, almost forty-three years ago. Since then, I have known him as a student, as the editor of a law journal article of mine, as a friend, as a colleague, as a dean, and yes, I must admit, as an intellectual adversary. Throughout all this time, Robert has made the most of the right to disagree that properly belongs to every scholar, and his career, much like Oedipus’s struggle, stands as a tribute to his relentless search for the truth, the utter, unqualified truth, and then to live by it. 🍷