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## Tribute to the Scholarship of Frank Michelman: Meditations on Mentoring and the Scholar as Mentor

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## TRIBUTE TO THE SCHOLARSHIP OF FRANK MICHELMAN: MEDITATIONS ON MENTORING AND THE SCHOLAR AS MENTOR

Tamara R. Piety\*

At the outset I should confess that I feel under-qualified to appear amidst this group. Moreover, I initially felt at a loss as to what to say. I teach Evidence and Civil Procedure. And while Professor Michelman has written a great deal on a wide range of topics, so far as I know, Evidence has not been one of them. (Although I *could* have missed something. When my research assistant, who I sent out to get a list of everything Frank Michelman had written, came back with five diskettes full of what he called “The Greatest Hits,” the magnitude of this task began to take shape for me. Point being, if he wrote something on Evidence, I may have missed it.<sup>1</sup>) Reviewing the list of publications, their number and heft, I began to feel I would be hard pressed to digest this body of work and come up with something meaningful to say in the allotted time. Clearly another approach was called for.

So I called, as I have in every similar crisis, my “Mentor in Miami,” Michael Fischl. Michael is my former professor, and he was instrumental in convincing me to pursue a teaching career (thus sentencing himself to a lifetime of crisis calls like this). I explained the situation to him and asked if he had any ideas. Well, as usual, he did. He suggested that I contact several people amongst our mutual friends who had written about or in reaction to Michelman’s work and ask *them* for some ideas. That is what I did. And though they all had *different* ideas about

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\* Assistant Professor, University of Tulsa College of Law; J.D., University of Miami (1991); LL.M., Harvard Law School (2000). Thanks to Paul Finkelman and Dean Marty Belsky for inviting me and making it possible for me to attend. Thanks also to Michael Fischl, Pierre Schlag, Steve Winter, Pat Gudridge, Marietta Auer, Lisa Iglesias, Gerald Torres, and Marnie Mahoney for sharing their thoughts on Frank Michelman’s work with me and their suggestions for possible topics, and to my research assistant Michael Esmond for (once again) providing outstanding assistance. Also, I should note that without the support of Linda Lacey and Marguerite Chapman I would not be here. Finally, thank you to Frank Michelman for making it better.

1. In this I am in good company. In an article on the rhetoric of the Supreme Court, Mark Tushnet’s *sole* “thank you” is directed to “Frank Michelman for comments *and for directing me to some of his writings that I had overlooked.*” Mark Tushnet, “*Shut Up He Explained,*” 95 Nw. U. L. Rev. 907, 907 n. \*\* (2001) (emphasis added). Indeed, one of the other offerings to this symposium deals with one of Michelman’s pieces that the author feels has been too often overlooked. See Margaret Jane Radin, *Property and Precision*, 39 Tulsa L. Rev. 639 (2004). This speaks to the quality as well as the quantity of Michelman’s work.

what might be a good topic, they all had one thing in common—something that was to prove to supply the topic for this piece.

Each one described Frank Michelman as a person who is incredibly generous as a scholar. In one way or another each described him as someone who has never ceased to participate in the scholarly debate, not merely by endless defense of a position once staked out, but with real openness. Frank Michelman's approach to his work and to problems of law is characterized by a willingness to reconsider, to wrestle with new theories rather than simply defend old ones, even though it would have been easy to do the latter. What people told me, and what was revealed in his work, is that Michelman constantly reaches out and communicates with new people as they emerge, testing their ideas and pushing them on their conclusions.<sup>2</sup> He has engaged others in meaningful dialog and sometimes has even supported persons who have been fairly critical of his own work. It struck me as I gathered these comments that Michelman has been a sort of scholarly mentor to many people he did not necessarily know personally, an idea that seems somewhat at odds with the conventional idea of mentoring since, as traditionally conceived, mentoring usually involves something of a personal relationship.

But this sort of mentoring clearly did not depend upon such relationships, although it did not preclude them either. However, Michelman's engagement in others' work *is* personal. After all, what can be more personal than to take someone's work seriously? Moreover, given his own status, by simply noticing others' work and taking it as seriously as he does, Michelman brings it to other people's attention. Such notice stands as an unspoken assertion: "You should take a look at this." And, for the people I spoke with, because Frank had taken notice of their work, other people did, with the predictable consequences for the careers of these scholars thus singled out.

Of course this kind of generosity is not unknown.<sup>3</sup> But it isn't that common either. However, the more I thought about it, the more I thought it *ought* to be because this sort of unceasing engagement and study stands as the embodiment of the most ideal conceptions of what it means to be a scholar. If one views scholarly work as participation in a series of conversations that extends across lifetimes and particular circumstances—conversations in which the participants try to capture

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2. The following is just a small sampling of examples of this practice. See e.g. Frank I. Michelman, *Faith and Obligation, or What Makes Sandy Sweat?*, 38 *Tulsa L. Rev.* 651 (2003) [hereinafter Michelman, *Faith and Obligation*] (discussing the scholarship of Sanford Levinson); Frank I. Michelman, *Relative Constraint and Public Reason: What Is "The Work We Expect of Law"?*, 67 *Brook. L. Rev.* 963 (2002) (dealing with Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind* (U. Chi. Press 2001)); Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath*, 69 *Fordham L. Rev.* 1893 (2001) (discussing work of William Forbath); Frank I. Michelman, *Modus Vivendi Postmodernus? On Just Interpretations and the Thinning of Justice*, 21 *Cardozo L. Rev.* 1945 (2000) (book review of Michel Rosenfeld's *Just Interpretations: Law between Ethics and Politics* (U. Cal. Press 1998)); Frank I. Michelman, *Populist Natural Law (Reflections on Tushnet's "Thin Constitution")*, 34 *U. Rich. L. Rev.* 461 (2000) (reviewing work of Mark Tushnet). As I say, this is just a small sliver from the last couple of years. The several participants of this symposium, however, offer examples of their own.

3. See e.g. David M. Rabban, *Gerald Gunther: Generous Mentor*, 55 *Stan. L. Rev.* 669, 670-71 (2002) (describing Professor Gunther's citation of the author's unpublished seminar paper).

some little bit of truth about the world—then surely this sort of engagement is the very essence of what it means to be a scholar.<sup>4</sup> And so, since this is a symposium about scholarship, I thought I would talk some about mentoring and how the best conceptions of the scholar seem unavoidably to involve some sense of mentoring, given that we work with each other to such a large degree.<sup>5</sup>

While “what makes for good scholarship” is a highly contentious question,<sup>6</sup> I think it is fair to say that most of us would agree that a good scholar must possess the following: comprehensive knowledge of the field and its canon and the intelligence and curiosity to push beyond its boundaries. So what does “scholar-as-mentor” add to that description? Well, perhaps nothing if we define “scholar” to include this concept of mentoring as I will describe it below. But I would argue that not every scholar’s work includes this component. However, I claim that the best of it does. Frank Michelman’s work and his way of approaching the work of others stands as a testament to what is the best conception of the scholar. Inextricably intertwined with this best vision is the role of scholar-as-mentor. It is an inevitable product of real engagement with others’ work.

Moreover, as I will explore below, mentoring, even in what may appear its most detached form, contains something of the intimate, of the passionate—another ingredient that is perhaps overlooked when thinking of scholarship but without which scholarship is uninspiring and probably, ultimately, ineffective. At its highest form, scholarship does involve a passion—a passion for ideas, for possibilities, a refusal to surrender to despair even as you look unblinkingly at the verities of the world. This too is, I think, reflected in Michelman’s work, and I suspect that we can attribute some of that quality to the man who was undoubtedly a mentor for Michelman and who reflected this same intellectual engagement mixed with pragmatism, passion tempered with caution, compassion, and courtliness. I am, of course, referring to *his* former boss, the late Justice William J. Brennan, Jr., perhaps the best mentor anyone could have had and the focus of the tiny point at which my path intersected with Michelman’s.

But I get ahead of myself. In order to explore these ideas generally and Michelman specifically, I want to first examine the idea of mentoring and some of the reasons I think it is in shorter supply than we might want. However, a few caveats are in order. This is *not* meant as a comprehensive review of mentoring and the art of mentoring, a subject upon which there is an extensive literature,

4. I am completely aware that this description involves some normative commitments with which some may quarrel. However, I tried to make the description broad and vague enough to capture most conceptions of the work. Besides, as I have argued elsewhere, I am inclined to view even work that purports to disclaim normativity to be informed by it. See Tamara R. Piety, *Smoking in Bed*, 57 U. Miami L. Rev. 827 (2003) (discussing Pierre Schlag, *The Enchantment of Reason* (Duke U. Press 1998)). For similar claims, see Mark V. Tushnet, *The Left Critique of Normativity: A Comment*, 90 Mich. L. Rev. 2325 (1992) and Margaret Jane Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. Pa. L. Rev. 1019 (1991).

5. Indeed, I think we all (in the best of worlds) have a responsibility to “mentor” even our peers by reading and commenting on their work, even as they mentor us by returning the favor. For there is very little that is improved by culturing in the dark (fine wine perhaps being the exception that proves the rule?).

6. See e.g. Deborah L. Rhode, *Legal Scholarship*, 115 Harv. L. Rev. 1327 (2002).

ranging from textbooks in Managerial Science and Human Resources to the fluffiest of self-help books for the general public.<sup>7</sup> Also, because I am not Michelman's colleague, except in the very broadest sense, and not a contemporary, I am not able to provide as many examples as my fellow participants might, and, I am sure, not the *best* examples, of my thesis here. However, I do feel confident that while many who know Frank better than I will say *they* could have done a better job, none will fail to recognize the man they know in this description.

#### I. WHAT IS A "MENTOR"?

Whatever a mentor is, everyone seems to feel it is a good thing to have. There are hundreds, maybe thousands of books explaining the principles of mentoring, how it can be formalized, how to be your own mentor, what mentoring consists of, etc. Bar associations have formal mentoring programs. Law schools set up mentoring programs, of which the Inns of Court is one notable example. Typically these programs are directed at mentoring law students into the mysteries of practice.<sup>8</sup> Moreover, the word "mentor" seems to overlap with several other words suggesting similar roles: "coach," "sponsor," "supporter," "guide," "role model," and so forth. Nevertheless, although there is overlap, I think the word "mentor" rather uniquely connotes an intimate relationship that may or may not exist with any of these other relationships but that seems definitional in the term "mentor." This is supported, at least in the legal profession, by some lawyers' descriptions of what a mentor is or should be. In one survey of a group of lawyers, when asked, "What do mentors do?" [the respondents] listed 57 activities or roles that mentors should be proficient in, ranging from teaching, caring, explaining and consoling to dispensing wisdom and giving a vision of the future.<sup>9</sup>

If a mentor is a sort of Obi-Wan Kenobi-type figure, a "gray hair" full of wisdom and comfort for the protégé, then who wouldn't want that? And that is the picture that the word "mentor" seems to conjure up for many: someone full of wisdom who will take you under her wing, so to speak, "show you the ropes" and cushion (even if only slightly) some of the blows your errors might otherwise cause you to suffer. It is hard to imagine that there is anything to dislike about that. In fact, the *only* thing that seems undesirable about it is its connotation of privilege, the sense that not everyone has the advantage (or worse, is "worthy" of?) a mentor. Perhaps it is for this reason that formal mentoring programs are ubiquitous.

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7. To get some idea of the extent of this literature just put the word "mentor" or "mentoring" into Google or some other Internet search engine.

8. In fact, there are some ways in which clinical programs represent an attempt at such mentoring insofar as they are routinely described as intended to help students make the transition to actual practice, to teach them skills not taught in traditional law school classes, etc. See e.g. William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 Akron L. Rev. 463 (1995). Indeed, if the clinical professor is a species of practice mentor, then Quigley's article is an attempt to provide mentoring for the mentor.

9. Annette Friend, *Associate Development and Recruitment: Mentoring Programs Offer Efficient Training*, 8 L. Firm Partn. & Benefits Rpt. 5, 5 (July 2002).

Virtually every organization appears to have some sort of “mentoring” program, whether formal or informal, or titled under a moniker with a similar meaning, such as role model, sponsor, supporter, coach, and the like. Part of the impetus for the creation of formal programs appears to have been the enormous influx of women into the workplace. One of the complaints lodged by women was that they had difficulty succeeding because they lacked mentors. The charge was that talk of “mentoring” was really just a reference to “the old boys network” because people tended to mentor those whom they saw as like themselves in some crucial way. And women weren’t like men, or so the argument went.<sup>10</sup> This would tend to restrict the category of potential mentees to white men.<sup>11</sup> A formal program represents one attempt to overcome this problem.

But formal programs are obviously not always successful.<sup>12</sup> And the descriptions of what mentoring should involve in order to *be* successful are notable for their vagueness and suggest discomfort about “boundaries” that mirror those of other professionally intimate relationships, such as between therapist and client.<sup>13</sup> The connotation that the relationship of mentor and mentee is an intimate one may be partially explicable by its roots. However, those same roots may help to explain why we appear to be not entirely comfortable with the idea of mentoring as an intimate activity and appear to want to purge it, at least in some instances, of that characteristic of intimacy in favor of something more objective, less suffused with particularity.

Mentor is the name of the character in Homer’s *Odyssey* to whose care Odysseus leaves his son Telemachus. “Mentor’s role was to support and guide Telemachus, raising him to become the strong young man that Odysseus envisioned.”<sup>14</sup> Later, when Odysseus still had not returned and Telemachus was upset by the behavior of his mother’s suitors, the goddess Athena took the form of Mentor in order to advise Telemachus. “Through this disguise, Athena was able to use the trust and familiarity of the relationship between Telemachus and

10. Another problem is raised by the situation in which a man offers to mentor a woman with whom he actually wants or expects a sexual relationship. This is clearly part of the problem of intimacy in mentoring—keeping straight the sort of “mentoring” each party has in mind, given disparate power and all that implies. I do not address this issue here, but I by no means want to minimize the seriousness of the problem or its impact on the legitimacy, or otherwise, of mentoring in fact, or the term “mentor.” However, it would represent far too large a digression to address this subject adequately here, as would the similar issue of disparities in mentoring on the basis of race which I also touch on below. See *infra* n. 11.

11. See generally e.g. Pamela J. Smith, *Failing to Mentor Sapphire: The Actionability of Blocking Black Women from Initiating Mentoring Relationships*, 10 UCLA Women’s L.J. 373 (2000); Lani Guinier, Michelle Fine & Jane Balin, *Becoming Gentlemen: Women, Law School, and Institutional Change* (Beacon Press 1997) (citing the need for more and better mentoring of women, in particular women of color, in law school and the profession).

12. Perhaps this is because the formality of such programs is at odds with the intimacy that, as I suggest below, is a hallmark of mentoring. For myself, none of the formal programs I have been associated with have resulted in any significant mentoring relationships. For example, although I have been assigned a mentor in Law & Society and have exchanged friendly communications with him, none of these communications could be called “mentoring” exchanges.

13. See e.g. Annette Friend, *Mentors: Trusted Counselors*, 25 Leg. Times 30 (May 20, 2002); *supra* n. 10.

14. Friend, *supra* n. 13, at 30.

Mentor to motivate the younger man and inspire him to attempt and accomplish great things.”<sup>15</sup> In other words, the intimacy of the relationship between Mentor and Telemachus gave Athena’s advice credibility that as herself she could not hope to have.

Here is a hint of the mixed feelings that may be conjured up by the associations of mentoring with intimacy. Athena was deceiving Telemachus.<sup>16</sup> And she was doing so by playing on a relationship in which he believed he could let down his guard because he had reason to believe he could trust Mentor.

Trust is an intimate act. It exposes the one who trusts to harm. And it is easy to see how a mentee can have his trust abused by a mentor.<sup>17</sup> What is less obvious (I think) is that the relationship calls for trust on the part of the mentor as well. This is because the mentor, who is not a goddess, is exposing her views, her “truths,” to the mentee in ways that might prove dangerous to the mentor if the trust is abused. This sort of trust is difficult to call up on demand in the context of a formal program. And not solely because of the malignant forces of racism and sexism, although those are clearly contributors to mentoring distortions to the extent that people may feel drawn to create such intimate relationships only with people for whom they feel some fellowship or attraction—whether because they find their ideas, etc. appealing, or because they find the potential protégé sufficiently “like” themselves to want to engage in a species of reproduction of one’s own fame and outlook.<sup>18</sup> Rather, it is simply that trust is a difficult and precious thing and something which people are all too often unwilling to extend for any number of reasons, both base and noble. This is no less true in scholarship than in any other endeavor.

Still, trust seems an integral part of the process of mentoring, and I think it can be played out in several ways which I shall divide into two aspects for purposes of this paper, aspects that do not conform precisely to a public/private dichotomy, but have some resemblance to it. I shall call these two aspects “the Sacred” and “the Profane.” And because I want to end with the former, a rather more elevated aspect of mentoring, I shall begin here with what I call “the Profane.”

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15. *Id.*

16. Greek mythology suggests that the Greeks would have no reason to list “trustworthiness” among the qualities possessed by the gods. This may explain why Athena apparently didn’t think it would be effective to simply appear to Telemachus as herself and give him advice. At a minimum, he needed to *trust* her in order for him to follow her advice. (Of course, trust alone may not be enough, but it seems a minimum requirement.)

17. See *supra* n. 10 (describing why this is particularly so in cases of sexual harassment).

18. For example, it has been argued that Oliver Wendell Holmes consciously chose as his clerks young men whom he judged would be best positioned to cultivate and perpetuate an elevated view of him for posterity and that some of the requirements he imposed on them that intruded into their intimate lives, requirements such as that his clerks not be married, were calculated to create an intimacy and a gratitude that would facilitate this goal of instilling loyalty and thus perpetuating a particular reputation. See I. Scott Messinger, *The Judge as Mentor: Oliver Wendell Holmes, Jr., and His Law Clerks*, 11 Yale J.L. & Humanities 119 (1999).

## II. THE PROFANE: MENTOR AS GUIDE TO PERDITION?

In the movie *Devil's Advocate*, Al Pacino plays mentor to a young attorney played by Keanu Reeves.<sup>19</sup> At first, it appears that Pacino is simply a mentor in the ways of the world, showing the neophyte what “really counts.” As the movie progresses, it emerges that Pacino is actually the Devil and is in the process of trying to seduce Reeves’s character into losing his soul. How often is this vision of the mentor as false prophet, leading the helpless young person astray, played out? The bad mentor is as much a part of the cultural narrative as the good mentor. Still, there may be an element of the loss of innocence even with the best mentor, because even the good mentor, maybe *especially* the good mentor, looks unblinkingly at the world as it is and tries to steer us around its more obvious traps for the unwary and the uninitiated. And we *want* our mentors to teach us what we need to know. But we fear to trust. And sometimes we don’t want to know what they want to tell us. Sometimes what is revealed is shocking. And it is important here to distinguish between the message and the messenger—that is, not to taint the mentor because of the news she bears.

And in law, as in life, there is a lot of bad news. There is a lot of stuff in the law that we don’t talk about directly, if at all. (However, I am going to talk about some of it now.) I am sure it is so in every profession. But perhaps it is the absolutism, the scornful tone that brooks no opposition, and so forth which informs *some* pronouncements that makes it so difficult to bear in law. One of my favorites is the solemn intonation of “harmless error” because a jury instruction that any rational person can see was of no effect (or worse, had the opposite effect of the intended effect) was given.<sup>20</sup> We have had empirical studies,<sup>21</sup> we have had judges, indeed Justices of the Supreme Court, acknowledge that juries are unlikely to be able to perform the mental gymnastics required to use a prior conviction only for the purpose of deciding the defendant’s credibility but not to conclude that he is a “crimey”<sup>22</sup> kind of guy who is better off behind bars.<sup>23</sup> Nevertheless, the instruction is routinely given, and its presence officially represents the “cure” for what would otherwise be an undeniably harmful element injected into the proceeding.<sup>24</sup>

19. *Devil's Advocate* (Warner Bros. 1997) (motion picture).

20. For example, where a criminal defendant testifies and is impeached with his prior criminal record under Federal Rule of Evidence 609, the jury is instructed not to consider the prior record for purposes of judging whether or not he committed the offense for which he is on trial, but only for purposes of evaluating his credibility as a witness.

21. See e.g. Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 L. & Hum. Behav. 37 (1985).

22. This was Fischl’s phrase in teaching Evidence and one that I’ve used ever since when teaching character evidence and Federal Rule of Evidence 404.

23. Justice Jackson wrote, “The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction.” *Krulewitch v. U.S.*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (citation omitted).

24. For a trenchant criticism of this practice, see H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. Pa. L. Rev. 845, 869 (1982) (“[N]o one can believe in actual compliance with instructions of this sort.”). For a more recent criticism, see Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!/?] Analysis and a Proposed*



Harmful, that is, for the defendant. For while there is nothing like a uniformity of “harms” falling on one side of the ledger, there is a certain predictability. Thus, one of my judges said to me at one point, “You know what the secret is to being a successful appellate lawyer?” “No,” I answered with some eagerness to know the answer. “Represent the appellee!” He was also wont to remark that the most powerful person in government in the United States is a federal district court judge because he (she) doesn’t have to get anyone to agree with him (her). As my career progressed, I was able to see the wisdom and the truth of this information. It pays to know whom you’re dealing with. Still, none of this is the most pleasant information.

Still, much of a mentor’s job is to inform the neophyte attorney of such dangerous truths, however unpleasant they may be. Thus, you, the new attorney, will learn from either the mentor or hard experience the exact value of “the law” at motion calendar at 8:15 a.m. in judge “so-and-so’s” chambers, with dozens of attorneys before you and dozens behind you and with five minutes (maybe) to make your case. In this context, it may come as no shock at all to you when the judge listens to the first part of your carefully prepared argument and then says, “Counsel, you are very probably right, but I’m going to rule against you. Denied.” “But, but . . .” you sputter, and then you pack your kit and go into the hallway where, if you are lucky, the partner who allowed you to “argue” the motion will commiserate with you and say “good job.” (If you are not lucky, the partner may read you the proverbial riot act there in the corridors of power in front of all your colleagues.) It could be worse; you could hear, as I have, in open court, “Counsel, I don’t *care* what the law is!” It is enough to put you off altogether to the possibility that the work matters, that justice can be done, and so forth. However, once again, here is where a mentor, a good mentor if you’re lucky, will acknowledge these things, look straight at them, but nevertheless show you by example and in practice the value of doing it right for its own sake, for *your* own sake, and for the client’s sake. The point is, sometimes these efforts pay off, and sometimes they don’t. But without someone to model the losses for you as well as the gains, it may be difficult to muster the effort to care.

It is important to note here that by revealing opinions about what will work with whom—which judge can be trusted and which cannot, which attorney can be trusted and which cannot—the mentor is herself taking a fairly grave risk. This is dangerous stuff. Still, where would many of us have been had it not been for someone who was willing to take the risk to tell us the “secrets” that would be so much harder on us were it left only to chance? The fact that the stuff they must (sometimes) regretfully impart is a reflection of “the world” rather than the “ideal” of practice does not detract from the very real way in which it is part of what *is* ideal—that is, trust itself—that trust may exist and that people may meet

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*Overhaul*, 38 UCLA L. Rev. 637, 667 (1991) (“[J]urors tend to disregard the instruction because it is virtually incoherent.”).

as strangers and nevertheless learn to trust one another.<sup>25</sup> Although the ideal is not commonly met with, neither is it absent from the real world.

And here I move from the profane in practice to the divine in scholarship. But before I make this transition let me emphasize that I do not think that academia is free from the sort of potential for disillusionment and disappointment described above in practice. Not at all. But you know how *that* plays itself out, what these areas are and perhaps even have reviewed them in your mind as you read the foregoing. But now I wish to speak not of the disappointment, but of evidence of the possible, of the realness of the good.

### III. THE SACRED: SHEPHERD AND GARDENER?

In contrast to the brutal encounters with harsh reality described above, what can so dispassionate an activity as scholarship have in common with this? How does scholarship require such trust or expose the practitioner to such perils? The experienced will perhaps chuckle inwardly at this statement, recalling some battle royale at a past professional conference. And even here there is the profane, degraded version of scholarship as self-promotion rather than idea or communication promotion.<sup>26</sup> Thus, we have a cottage industry developing that attempts to evaluate the quality of scholarship by “objective” criteria, carefully measuring the status of the journal in which a citation occurred or a piece is published as a reliable placeholder for its “merit” and so forth.<sup>27</sup> And as before, there are traps for the unwary which a mentor can steer the new scholar around. For who could have guessed, based on their value in other scholarly endeavors, that the untenured professor is better served focusing on law review articles than on books, and on doctrinal pieces rather than pieces requiring empirical research?<sup>28</sup> Scholarship and academia is also “the world,” however much it may offer shelter from some of the harsher aspects of what we call the “outside world.”

But here, as is true of the supposed hurly-burly of practice, the ideal practice of scholarship involves much more trust and open-handedness than is necessarily found in actuality. In this regard, it would be difficult to imagine someone who more fully embodies this ideal than Frank Michelman.

Very often the scholar is conceived of as the person who cares about ideas for their own sake, because the ideas matter. And in legal scholarship in

25. I think that in large measure it is a lack of trust which leads to what is complained of in these times: a regrettable decline in civility.

26. Although, to be fair, how easy is it to distinguish between the idea and the scholar? For myself, I find most attractive that work which allows me some glimpse into the personality and person who is doing the writing. And, I appear to be completely unable to avoid injecting something of myself and my commitments into everything I write.

27. One of these efforts I find particularly chilling in its disregard of any criteria for publishing or hiring, other than “productivity” as measured by publications and citations, is the comparison of the productivity of outside hires to “inbred” hires, to the latter’s disadvantage. See Theodore Eisenberg & Martin T. Wells, *Inbreeding in Law School Hiring: Assessing the Performance of Faculty Hired from Within*, 29 J. Leg. Stud. 369 (2000).

28. Some of these “truisms” appear to be changing, and, of course, there are always exceptions to the rule. However, in my experience (which is a totally unscientific sample) these appear to be pieces of advice which are still routinely given.

particular, this has a particularly strong resonance because it is the nature of law itself to require answers, to propose resolutions. It is this distinction that I think cannot be overemphasized in comparing the historian's task to the lawyer's, even the scholar of the law. If the scholarship of law is infused with normativity that perhaps overshoots the possible in the search for "the truth" as it might be viewed from other perspectives, that may be because law is not solely an academic exercise.<sup>29</sup> Thus, its academic practitioners can be forgiven for their attachment to seeing their work as potentially having real impacts for real people's lives. Indeed, I think we should *hope* that legal scholars' work is infused with recognition of the ways in which the resolution of these matters, which we discuss and dissect, have real and concrete consequences for real people. More, we might hope that the scholar brings to the work a certain passion, a human feeling (or feeling for humans, dare I say compassion?) that tempers intellectual rigor with pragmatic appreciation for the "situation sense." Circumstances alter cases. These are all qualities that can be found in Michelman's work. But there is still more. In Michelman's work we find a civility of tone, a generosity, evidence of real engagement with the substance, and a willingness to search for grounds of similarities and points of agreement.

Civility is not merely being polite, keeping a civil tone as it were. Rather, in Michelman's work the civility seems borne of an assumption that others share the seriousness with which he approaches his topic. There is an assumption of goodwill that seems to take some doing to break. Thus, at a gathering in honor of Justice Brennan, Michelman referred to Chief Judge Posner as someone he can count on "to keep disagreement alive."<sup>30</sup> This is a gentle but pointed nudge.

Michelman's is also a civility that presupposes that mere disagreement could not strip his interlocutor of human dignity, let alone the dignity dictated by the discourse. And it seems this translates into a search for a common ground. For example, in the *Columbia Law Review*, Susan Rose-Ackerman published a fairly pointed critique of Michelman's interpretation of takings jurisprudence.<sup>31</sup> And although some of her observations, in other hands, might have generated a fairly blistering reply, Michelman begins his response by noting that he and Rose-Ackerman are actually not so far apart.<sup>32</sup> He points out the ways in which he finds her proposals unlikely to be practical or to be adopted, while nevertheless suggesting that "if *courts* were to produce, over a series of adjudications, a constitutional takings jurisprudence closely resembling Rose-Ackerman's own sketch . . . that . . . would represent a triumph of judicial situated judgment and

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29. See generally e.g. Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 *Fordham L. Rev.* 87 (1997).

30. Frank I. Michelman, *Reason, Passion & the Progress of Law: Remembering and Advancing the Constitutional Vision of Justice William J. Brennan: Welcome Address*, 33 *Harv. Civ. Rights-Civ. Libs. L. Rev.* 317, 319 (1998).

31. Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 *Colum. L. Rev.* 1697 (1988).

32. Frank Michelman, *A Reply to Susan Rose-Ackerman*, 88 *Colum. L. Rev.* 1712, 1712 (1988).

practical reason over judicial high formality.”<sup>33</sup> Such civility, of course, ensures that disagreement can flourish, can even be pursued, without ending the conversation. After all, the scholarly conversation cannot continue if people are shouting one another down.

But civility does not displace a relish for the debate, as evidenced in both of these exchanges and countless others where Michelman has participated as one of several eminent commentators, or, even more likely, as the focus (not to say target) of engagement. And from all that one can glean from the paper record, it is an engagement which he relishes. It is this area, as in others, that we see him engaging the work of Pierre Schlag and Steve Winter, scholars who, among others, had launched a critique of normativity that Michelman believed worthy of response and lively exchange. This is what Schlag had to say when I contacted him:

Michelman is an extraordinarily (I mean that literally) decent human being. The reason both Steve [Winter] and I know him is that he took an interest in our work and started communicating with us. This is something he does routinely—trying to figure out what the “new” generation is up to, and helping them along. He is extremely generous both in intellect and time.<sup>34</sup>

I think it is fair to say that not everyone would have reacted to the critiques launched by, for example, Pierre, with the sort of response that would generate that sort of comment.

Indeed, we do not have to look too far to find some examples, such as the blistering attacks launched on critical legal studies (CLS) in some quarters.<sup>35</sup> And, here again, we find Michelman not only co-authoring a piece with Duncan Kennedy,<sup>36</sup> but offering a defense for the intellectual legitimacy of the process of critique itself, a defense of the assertion often associated with CLS that law is politics.<sup>37</sup> Similarly, we see him citing Roberto Unger in a piece on Brennan.<sup>38</sup>

As I mentioned before, however, Michelman’s engagement is not solely in paper form, but, as Schlag noted, takes the form of additional communications and exchanges. He cites those whom he has encouraged. And this attention from senior to junior is perhaps the greatest honor that one can pay a new person. (I would say “young,” but not everyone new is “young”!) Such exchanges, the genuine exchange of ideas, indeed even vigorous debate, are scholarship’s lifeblood. They surely must be. And in this regard, Michelman not only provides a form of scholarly mentoring in terms of support, but he also serves as a role

33. *Id.* Note the reference to “practical reason.”

34. E-mail from Pierre Schlag, Byron White Prof. Const. L., U. Colo. Sch. L., to Tamara Piety, Asst. Prof. L., U. Tulsa College L. (July 4, 2003) (copy on file with *Tulsa Law Review*).

35. See e.g. Richard Michael Fischl, *The Question that Killed Critical Legal Studies*, 17 L. & Soc. Inquiry 779 (1992) (citing examples).

36. Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 Hofstra L. Rev. 711 (1980).

37. See Frank Michelman, *Bringing the Law to Life: A Plea for Disenchantment*, 74 Cornell L. Rev. 256, 256-57 (1989).

38. Frank I. Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.’s Constitutional Thought*, 77 Va. L. Rev. 1261, 1264 & n. 15 (1991).

model. His actions say implicitly, “This is what you do if you care about the work, if you think the law matters.”

However, that sense of a shared scholarly endeavor is not only reflected in a top down way, but also as a willingness to collaborate, to support through reading and commenting on others’ work. The thank you’s to Michelman in others’ works are numerous.<sup>39</sup> Everyone in this symposium offers a prior example. Direct collaboration also marks Frank’s work. Thus, as noted above, he has collaborated on articles with Duncan Kennedy<sup>40</sup> and with Margaret Jane Radin.<sup>41</sup> And while co-authorship in the legal academy is certainly not unknown, there are those who would counsel that it is something to be avoided. That this sort of view proved no obstacle to Michelman’s participation is, again, a testament to his vision of scholarship as a shared endeavor, his willingness to share *in fact*.

That willingness to share, to collaborate, and to engage in exchange reflects a generosity of spirit that apparently leads Michelman to often say “yes,” at least whenever he can, when he is asked to participate in symposia, conferences, and the like. The sheer number of symposia in which he has participated suggests this. We here at Tulsa can attest to that generosity since he has participated in another of these symposia prior to the one we now hold in his honor.<sup>42</sup>

However, none of that should imply, and I’m sure it does not to anyone familiar with the work, that Michelman is not capable of a towering rebuke to those (most often unidentified personally) who might, for instance, “cheapen[] . . . the rhetorics of property, conscience, and compact”<sup>43</sup>—referring to proposed legislation representing a giveaway to specific monied interests in the form of an automatic takings payment masquerading as a protection of property rights.

Finally, I think we can say that Michelman’s work seems infused with a passion for the subject, for the work itself, taking it seriously. Indeed, in all the aspects I’ve discussed, the passion for the subject, the recognition of the humanity of the other and of the impact of the law in the real world, the pragmatism and idealism, the rigorous insistence on intellectual honesty and honest admission of law’s limitations, the relishing of a debate, but willingness to use strong language when strong language is called for, we may be reminded of someone else close to Michelman. Of course, I mean the late Justice Brennan.

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39. There are too many to cite here. But a couple of recent ones are the following: Stephen M. Feldman, *The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism*, 81 *Geo. L.J.* 2243, 2243 (1993) (“I especially thank Frank Michelman for his provocative questions as well as his interest in and comments on this article.”); David A. Westbrook, *Administrative Takings: A Realist Perspective on the Practice and Theory of Regulatory Takings Cases*, 74 *Notre Dame L. Rev.* 717, 717 (1999) (“I am again indebted to my teacher Frank Michelman, this time for providing scholarly (in all the best senses) advice on a number of questions, usually at short notice.”).

40. See *supra* n. 36 and accompanying text.

41. Radin & Michelman, *supra* n. 4.

42. See Michelman, *Faith and Obligation*, *supra* n. 2.

43. Frank I. Michelman, *A Skeptical View of “Property Rights” Legislation*, 6 *Fordham Envtl. L.J.* 409, 420 (1995).

## IV. THE BEST OF MENTORS

As a clerk to Associate Justice Brennan, Michelman surely would have been in an intimate position with the Justice. And the work of Justice Brennan was, as so ably described by Michelman in his book and in numerous articles, infused with the same qualities which I identify in Michelman's. And here, at last, is my point of intersection with Michelman. In 1991, it was my good fortune to be chosen as one of ten students at the University of Miami to participate in a special class, a seminar on constitutional law, with then-retired Associate Justice William J. Brennan, Jr. The seminar was moderated by Professor Pat Gudridge, then associate dean, and also involved the participation of Laurence Tribe, Owen Fiss, and, yes, Frank Michelman. It was a magical experience. There are many impressions that remain and far, far too many that are lost—perhaps because it engendered the sort of intense excitement that makes it hard to focus on any one piece because so much is happening. I am sure Michelman does not remember me. But I remember him.

And I remember feeling jealous of all those like Michelman who had the opportunity, through their clerkships, to experience in a much more intense way what we in the class got a little taste of. I was later fortunate enough to have the experience of being a clerk, so I know the intimate nature of the work of a clerk. "What must it have been like," I thought, "to stand in that relationship to Justice Brennan?" A judge can be the very best of mentors, and who could be a better mentor than a Supreme Court Justice, a Justice who was, undeniably, one of the greatest who ever lived? Surely it was an important feature of Michelman's development as a legal scholar, informing his sensibility because, as I have noted above, the mentor also serves as a model to the mentee.

Now I think it must be said that it cannot always be the case that this mentoring is effective or that every mentee takes what the mentor offers. But in Frank Michelman's case, it certainly seems that all of the qualities that he attributes to Brennan in his tributes to him—the probing and restless intellect,<sup>44</sup> the enthusiasm,<sup>45</sup> the pragmatism,<sup>46</sup> the compassion for the all the participants in the legal system: litigants and lawyers alike,<sup>47</sup> the generosity<sup>48</sup> and the sense of

44. See Michelman, *supra* n. 38, at 1269 (referring to Justice Brennan's "attraction to the idea of the endless contestability of just about every social-normative constraint").

45. Frank I. Michelman, *In Memoriam: William J. Brennan, Jr.*, 111 Harv. L. Rev. 37, 40 (1997) (referring to Justice Brennan's "verve").

46. See *e.g.* Michelman, *supra* n. 38, at 1262-63. Michelman wrote:

Certainly Justice Brennan's materials are not all given to ringing political declamation. One also finds in them the labored doctrinalism, the indirection and multifariousness (not to say opportunism) of argument, the backing and the filling, that one expects to find in the work of a judge trying sanely and sincerely to "do law" in an irretrievably (if tacitly) politicized collegial setting.

*Id.*

47. See *e.g.* Michelman, *supra* n. 45, at 39-40 (giving an account of Brennan's treatment of the lawyers (one of whom was Thurgood Marshall) in an in-chambers hearing in the early weeks of Michelman's clerkship with Brennan). Michelman noted:

mission,<sup>49</sup> and, not least of all, the passion<sup>50</sup>—these qualities for which Michelman lauds Brennan are reflected in Michelman's *own* work. For example, Michelman has at least twice (as reflected by published commentaries), and undoubtedly more often than that, not remained content to merely set out in law review articles his vision of what the law is or should be,<sup>51</sup> but has testified to congressional committees in aid of attempting to influence the law's real operation.<sup>52</sup> He has been lauded as "having the courage of his convictions"<sup>53</sup> and being "relentless in pursuing the implications of his starting premises."<sup>54</sup>

However much argument the presence of these qualities in Michelman's work might generate as to whether it is *due* to Brennan's influence versus representing Michelman's own preexisting temperament and inclinations, it was perhaps no accident that Brennan hired Michelman to be his clerk. One is tempted to say that he recognized a kindred spirit. But surely, too, there was an element here of a desire to shape the younger man's sensibilities and understanding. At the least, there was clearly an affinity, an interaction between the Justice and his clerk. In the class in which I was a participant in Miami, I got a small taste of the person, the lawyer, and the judge that Justice Brennan was and the mentor he could be. And I recognize that person in Michelman's tributes to him. But it strikes me that perhaps the greatest tribute of all that Michelman has paid Brennan has not been in those tributes explicitly drawn, but rather in the way he has conducted his own life and scholarly career, one that we honor here for all these extraordinary qualities and one that has generated the outpourings of respect, admiration, and affection that I heard in the course of this project. Surely, that is the tribute which would please the late Justice most of all. For myself, I am greatly honored to have been allowed to participate in paying tribute in turn.

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When the moment arrived, I was surprised to see the Boss himself trudging out to the hallway to usher the lawyers into his inner office, where fellow clerk Roy Schotland and I composed a small gallery at the back of the room. Pulling off his own coat and hanging it over the back of his chair, Justice Brennan motioned the visitors to do likewise. To the man from New Rochelle: "Oh is it [your first visit to the Court]? Did you bring any family along? How about a tour later on? We'll set it up." To both lawyers: "Sit down, sit down, make yourselves comfortable. We're going to be informal here. Can I get you some tea?"

*Id.* at 39.

48. *See id.* at 40.

49. *See id.*

50. *See Michelman, supra* n. 38, at 1269 (citing Brennan's "unique insistence on the indispensability of passion, of sympathy, to moral reason and the just exercise of power . . .").

51. *See generally e.g.* Frank I. Michelman, *Why Voting?*, 34 *Loy. L.A. L. Rev.* 985 (2001); Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 *Iowa L. Rev.* 1319 (1987); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 *Harv. L. Rev.* 4 (1986); Frank I. Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 *Harv. L. Rev.* 7 (1969).

52. *See e.g.* Frank I. Michelman, *Testimony before the Senate Committee on Environment and Public Works, June 27, 1995*, 49 *Wash. U. J. Urb. & Contemp. L.* 1 (1996); Frank Michelman, *Cong. Test., Hearings Regarding the Nomination of Clarence Thomas to the Supreme Court* (Sen. Jud. Comm., Sept. 16, 1991) (available at <<http://cti.itc.virginia.edu/~ybf2u/Thomas-Hill/0916a17.html>>).

53. Don Herzog, *Up from Individualism*, 86 *Cal. L. Rev.* 459, 459 (1998).

54. *Id.*