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Article 1

Law Regained

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THE LAW REGAINED

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The Death of the Law?,[1] conceived in 1985, and delivered at Cornell the next year, addressed the two intellectual movements that had emerged in the legal academy during the previous decade. Part of the challenge confronting me then was to find a common element in these two movements, one so seemingly different from the other—one proclaiming "law is efficiency," the other that "law is politics," one belonging to the right, the other to the left; one accepting the traditional conception of the scholar's role, the other more radical and disruptive in its challenge. However, the principal thrust of the lecture, perhaps signified by the title itself, was negative, for it turned out that what law and economics and critical legal studies shared in common was a hostile stance toward a conception of law that was confidently embraced by the bar in the 1960s. They rejected what I was prepared to defend—a view of the law as an expression of public values.

What I offer here is an update, an account of what is happening in the academy today, and strangely my mood is more upbeat. The dangers I spoke about before appear less threatening. In part, this is due to the fact that law and economics, and especially that branch of the movement that claims for the law the job of perfecting or mimicking the market, seems to have peaked. None of the excitement and commitment generated by the early work of Richard Posner exists today. There is little interest in the efficiency hypothesis, and its invocation is met with an increasing sense of incredulity. No doubt the influence of economics on legal analysis will persist—some foundations continue to fund the enterprise with extreme luxuriousness; scholars committed to this form of interdisciplinary work remain well entrenched within the academy; and a number of proponents of the efficiency hypothesis, including Posner himself, have been elevated to the bench. But for the most part, the spell

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1 72 CORNELL L. REV. 1 (1986).

seems to have been broken. Rather than attempting to redefine the function or purpose of the law in some global fashion, my hunch is that the economic method will be used, as Bruce Ackerman foresaw,[2] in a more technocratic and modest way. It will be used, for example, to indicate the appropriate decision in cases where the manifest content of the law is to perfect or protect the market (antitrust) or, in a more positivist vein, to explain the behavior of actors who, in fact, operate in well organized markets (the insurance industry).

My reading of critical legal studies is somewhat different. That movement has not peaked and continues to hold its sway within the academy. As far as I can tell, there have been few new faculty recruits, but the student interest in the movement remains strong and intense. This is especially true at Yale, where the peculiar faculty recruitment practices of that institution have made the students feel that they are being kept from something delicious and naughty. But I believe students everywhere feel a special affinity to critical legal studies. In the 1960s, the Warren Court spoke to the idealism of the young and produced a generation of lawyers determined to see the best in the law, but fifteen years of Burger and Rehnquist have left us with a body of doctrine that inspires no one and instead invites, to use Ricoeur's formula,[3] the hermeneutic of suspicion. Critical legal studies preys on this sense of disenchantment—it always has—but I now realize that suspicion can take many forms, not all of which are destructive. In my earlier work I allowed Duncan Kennedy and Roberto Unger to speak for the movement, but as the movement has grown and matured, their views have changed, and even more, their hegemony has ended. Now after ten years, critical legal studies has become more plural and multifaceted, and in the work of such people as Peter Gabel and Frank Michelman, I see not a threat, but an important supplement to the law.

"Law is politics." I have always taken that slogan to be the key to critical legal studies, and based my hostility to the movement on it, but, as Frank Michelman pointed out in a recent lecture in the Cornell series,[4] I may have misunderstood what was intended. For one thing, I assumed that in proclaiming that "law is politics" the proponents of critical legal studies had in mind a rather base form of politics—politics as market behavior, as nothing more than the expression of interest and preferences. In fact, they or at least some

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2 *See* Ackerman, *Law, Economics, and the Problem of Legal Culture*, 1986 DUKE L.J. 929.

3 *See* P. RICOEUR, FREUD AND PHILOSOPHY: AN ESSAY ON INTERPRETATION 26-36 (1970).

4 Michelman, *Bringing the Law to Life: A Plea for Disenchantment*, 74 CORNELL L. REV. 256 (1989).

critical legal studies scholars may have been willing to entertain the possibility of a more noble and idealistic politics, one that is more an expression of public values, or of principle, or of rights, than of private preference. This conception of politics is associated with the classic civic republican tradition that is now being rediscovered and revived by a number of legal scholars. Frank Michelman stands at the forefront of this group of scholars, although he has set for himself the singular task of trying to fuse critical legal studies with civic republicanism.[5]

Of course, my earlier assumption about the kind of politics contemplated by critical legal studies scholars was not based on a perverse desire to reserve for the law all idealistic activity. Rather it stemmed from a reading of Duncan Kennedy's "fundamental contradiction," which, as I understood it, posited within every normative structure two conflicting impulses or forces—the love of others and the fear of others—that pushed in opposite directions and thus rendered every value, right or principle indeterminate and useless as a guide to action or judgment.[6] The "fundamental contradiction" deconstructed every normative structure, be it legal or political, and allowed nothing to remain in its wake besides interest and preference. Whether I was correct in assigning such an important place to Kennedy's idea can be questioned, but, by way of defense, let me say that Michelman himself, in his earlier *Nomos* piece,[7] emphasized the notion of the "fundamental contradiction" and apparently did so for the same reason that I did, namely, to provide a theoretical foundation for the strong version of the indeterminacy thesis (which denies the possibility of right answers, ever).

At this juncture, the position of critical legal studies on these issues is, to understate the matter, unclear. Duncan Kennedy has renounced the "fundamental contradiction"[8] and more recently, the strong indeterminacy thesis itself.[9] Frank Michelman says (in con-

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5 *See* Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986). He also contributed an essay to the symposium of the *Yale Law Journal* on the new republicanism. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

6 *See* Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211-13 (1979).

7 Michelman, *Justification (and Justifiability) of Law in a Contradictory World*, in 28 NOMOS: JUSTIFICATION 71 (J. Pennock & J. Chapman eds. 1986).

8 Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 15-18 (1984).

9 In a phenomenological account of adjudication, Kennedy treats principles not as metaphysically unstable, but as psychological impediments to proper decisions and acknowledges that in certain situations, judges may experience the law as determinate, as a "felt objectivity." Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 560-62 (1986). In his reponse to Warren Lehman's question at the Jurisprudence Section of the American Association of Law Schools in January 1989, Kennedy disavowed the strong indeterminacy thesis altogether.

versation) that he still believes in the "fundamental contradiction" and thus implicitly continues to subscribe to the strong indeterminacy thesis, but if so, it is hard to understand how he could continue to advance a notion of idealistic or, as he puts it, good faith politics. If a determinate judgment, say, about what is right or what is just, is possible in the domain of politics, it is hard to understand why such judgments are not possible in law. If good faith politics are possible, why not good faith law?

In his Cornell lecture, Michelman seems more attracted by Richard Rorty and his pragmatism than by Duncan Kennedy's "fundamental contradiction." Michelman characterizes the idealistic politics he envisions as a *pragmatic* politics.[10] But this turn to Rorty is unlikely to provide the indeterminacy thesis with adequate theoretical support. As Stanley Fish pointed out,[11] what Rorty's pragmatism denies is not the possibility of determinate judgment, but the existence of a transcendant foundation for ethical judgments. As the pragmatists put it, there is nothing "out there," a proposition to which we all could readily agree without calling into question the determinacy of law or challenging in any other way its integrity. The invocation of Rorty can not salvage the indeterminacy thesis from Kennedy's zigs and zags, but it suggests that the thesis is only of secondary importance, a contrivance for supporting the more important and more overarching claim, namely, that "law is politics."

The second error in my earlier work was to assume that the "is" in the slogan "law is politics" was meant to establish an identity between the two spheres while, as Michelman noted in his Cornell lecture and as Peter Gabel suggested in a recent paper,[12] the slogan could, in fact, be understood more modestly, not to proclaim a radical reduction of one sphere to the other, but to underscore the continuity of the two and to remind us of the indispensability of politics to law. Of course, one need not be a member of the critical legal studies conference to understand the continuity between the two spheres, or to remind lawyers of the importance of politics—free standing republicanism of the type propounded by Michael Walzer will suffice.[13] But I see in Frank Michelman's intellectual journey, in

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10 Michelman, *supra* note 4, at 257-58.

11 Fish, *Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 495 (1982).

12 P. Gabel, The Defeat of Michael Dukakis and the Transformative Possibilities of Legal Culture (paper delivered at Legal Theory Workshop, Yale Law School, December 15, 1988) (brief version appeared at 4 TIKKUN 13 (1989)).

13 Walzer, working the other side of the street, put it this way: "Politics is sovereign, but it isn't self-sufficient." Walzer, *Flight from Philosophy*, N.Y. REV. BOOKS, Feb. 2, 1989, at 42, 43 (reviewing B. BARBER, THE CONQUEST OF POLITICS: LIBERAL PHILOSOPHY IN DEMOCRATIC TIMES (1988)). Walzer is another who seems to be in a more conciliatory mood these days. Compare his earlier critique of law in *Democracy and Philosophy*, 9 POL. THEORY 379 (1981).

which an initial fascination with critical legal studies matures into a commitment to civic republicanism, something more than a biographical quirk. Whatever else might be said about critical legal studies, it must be acknowledged that for the past decade it has been the preeminent force in the legal academy underscoring the importance of the political.

I continue to believe that law is a distinct form of human activity, one which, as Ronald Dworkin and others have insisted for some years now, differs from politics, even a highly idealized politics, in important ways. Political actors can and often do make claims of justice, but they need not. A claim that a certain action or policy is good, or in the best interest of the polity, can suffice in the domain of politics. Sometimes it is enough for a politician to give the people what they want simply *because* it is what they want. Judges, on the other hand, have no authority other than to decide what is just, and they obtain the right to do so from the procedural norms that surround their office and limit the exercise of their power. However, to insist on these differences between law and politics is not to deny that there are important connections between the two.

Peter Gabel has suggested one. He came to New Haven in December in a conciliatory mood, hoping to build a new progressive movement within the law. Using Dukakis's defeat in the 1988 election to make his point, Gabel insisted that claims of right can never be effective or appealing unless they are embedded in a larger social vision, as they were during the civil rights era, that golden age of American law.[14] I agree with this view and the underlying aspiration, although I might put the point somewhat differently. I would say that adjudication depends on a social understanding which posits the existence of public values, for without such an understanding, there would be no point to the institution. Adjudication is nothing more or less than a social institution for interpreting and enforcing our public values. I would further acknowledge that the social understanding to which Gabel alluded is not peculiarly the property of lawyers, but properly belongs to the body politic and can thus appropriately be considered "political." True, law itself has an important role to play in generating that social understanding—*Brown v. Board of Education*,[15] for example, both presupposed and advanced the commitment to racial equality that pervaded American society in the early 1960s and that rendered strong exercise of the judicial power legitimate.[16] But there is no reason to make too much of that point. The judiciary is not the only institution

14 *See* P. Gabel, *supra* note 12.
15 347 U.S. 483 (1954).
16 *See* Fiss, *supra* note 1, at 15.

with this special generative power, and in any event, no court, even one headed by Earl Warren, can succeed in generating this social understanding on its own.

On a less abstract level, the law is tied to politics through certain technical features of adjudication, which require the judiciary—as a condition of its legitimacy—to hear from all the aggrieved parties and then publicly to justify its decision. Political activity and organization is often needed to formulate and present claims to the judiciary, to make victims aware of their plight and the possibilities of redress, and to challenge the unsatisfying answers courts sometimes give to the aggrieved, as they did in *Plessy v. Ferguson*[17] or *Bowers v. Hardwick*.[18] Sometimes that political activity proceeds in heated and unruly ways—that too is a lesson of the civil rights era. Courts heard what the people were saying at the lunch counters of Greenville, on the streets of Birmingham, and on the road from Selma to Montgomery, and responded accordingly. Judges knew they had to re-examine what they said before and to make certain that their responses were equal to the felt grievances.

Finally, the emphasis on politics that critical legal studies invites may be a healthy corrective to the natural tendency of many legal academics (myself included) to be court-centered and to ignore the manifold ways—appointments, statutes, constitutional amendments—through which the political process creates the field within which the courts operate. The battle before the Senate Judiciary Committee over the Bork nomination, to take an obvious example, stands as one of the most decisive events to shape the general framework within which courts must act in the years ahead—not simply because it resulted in denying a seat on the Supreme Court to Robert Bork, but because the Committee and the Senate rested their decision on grounds that have important implications for the right to privacy, the First Amendment, key civil rights cases, and for that matter, the entire legacy of the Warren Court.[19] God only knows whether that event is properly classified as "legal" or "political."

Understood in this way, that is, as allowing for a more idealistic politics and recognizing the continuity of the political and the legal without reducing all law to politics, critical legal studies appears less threatening. In its mature elaboration at the hands of people like

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17 163 U.S. 537 (1896).

18 478 U.S. 186 (1986).

19 *See Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, 1987: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987); Morris, *The Grammar of Advice and Consent: Senate Confirmation of Supreme Court Nominees*, 38 DRAKE L. REV. (forthcoming May 1989).

Michelman and Gabel, critical legal studies has lost much of its radical appeal, but at the same time it appears less destructive. There are differences worth discussing (there always are), but it is hard to see the movement endangering the life of the law or anything else. On the contrary, given where American constitutional law stands today, and where it is likely to go, the emphasis on politics and its idealistic possibilities might just be what we need.

This shift in critical legal studies, or in my understanding of that movement, has been accompanied by one other development—the emergence of feminism, which has infused new life into the law and regenerated its idealistic possibilities. In the mid-eighties, at tbe time of my previous lecture, feminism was barely discernible in the legal academy, but in the last three or four years it has emerged as a separate, vibrant intellectual movement in the law, capturing the left and drawing to itself much of the energy and attention that critical legal studies once enjoyed. Feminism has deprived critical legal studies of one important source of its power, and in ways that are not true of critical legal studies, even those factions that propound a more moderate doctrine, feminism has combined the hermeneutic of suspicion with a more thorough-going affirmative vision of the law.

One part of the feminist project, as I understand it, is radically critical. It tries to show that the seemingly "neutral" or "evenhanded" rules of the law, such as the consent doctrine in rape, are not "neutral" or "evenhanded" at all, but rather expressions of the interests or perceptions of those who have, for centuries, been in charge of our legal system, namely, men. Law has served as an instrument of subordination. In attempting to demystify the law, feminism and critical legal studies overlap (although some critical legal studies writers, particularly Morton Horwitz and Mark Tushnet, tend to define, in Marxist fashion, the ruling class more in terms of economics than gender). Indeed, I believe that it was feminist concerns that gave critical legal studies much of its attractiveness and organizational appeal, especially in the late seventies and early eighties, when feminists had not yet achieved an independent voice within the legal academy. Feminism was the implicit agenda of critical legal studies. Commenting on this speculation, Robin West recently noted (also in conversation) that she was struck by the feminist content of Mark Kelman's latest exercise in "trashing"[20]—it was all MacKinnon.

Although critical legal studies and feminism appear to overlap in that both endorse a program of demystification, feminism differs

20 M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

from critical legal studies in two important respects. First, there is an affirmative point to the exercise: The end of critique is not critique, as it is with the most virulent forms of critical legal studies, but rather the achievement of a true and substantive equality for women. This egalitarian commitment not only supplies a motive for the deconstructive exercise, but also places a limit upon it. Given certain demographic facts about the historical constitution of the bar, there may be reason to be suspicious of the law, but in the end only those laws or doctrines that can plausibly be said to be responsible for inequalities will be attacked for embodying hidden biases. So while antidiscrimination laws are as easily embraced within the deconstructive sweep of critical legal studies as are contract and property law, feminism allows a distinction.

Second, feminism's concern with inequality is not confined to the law, but instead embraces all social institutions, including some of the most familiar, such as the family, the market, and various intimate practices and public industries (prostitution and pornography) that treat women as sex objects. Feminism strikes out at subordination in all its forms. Moreover, in this reformist project, feminism contemplates an important role for law. Some seek to use it to assure fairness in the allocative process; others, trying to harvest the gains of the civil rights movement, insist upon a more structural equality.[21] In either case, the feminist claim is not a claim of interest, but one of justice. Feminists believe in rights and the law—a cleansed and uncorrupted law—in a way and to a degree that is not true of the advocates of critical legal studies. *Roe v. Wade*[22] is defended as true and just, not just a matter of perspective or interest.

Granted, there are several themes in the literature that might be taken to indicate an opposite view. One is Catherine MacKinnon's denunciation of objectivity in her *Signs* articles.[23] I take that not, however, to be a theoretical claim—that objectivity in the law is not possible—for any such claim itself would purport to be objective and thus contradictory. It would also undermine her critique of gender hierarchy, for that critique is based on some objective idea of justice or equality. It therefore seems to me that MacKinnon should be read to be making not a theoretical claim about the possibility of objectivity but a more limited historical point, namely, that given the sociological conditions under which our law has been made and interpreted—the almost total exclusion of women from

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21 I discussed this distinction in *Coda*, 38 U. TORONTO L.J. 229, 231-35 (1988).

22 410 U.S. 113 (1973).

23 MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983); MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982).

that process—the claimed objectivity of the law is likely to be a pretense or sham masking the interests of those who made it (men).[24] Although a historically grounded doubt about objectivity is no small matter, it nevertheless admits the possibility of law. To some, law may remain just that, a theoretical possibility, a philosophic chimera, yet in various judicial victories, like *Roe v. Wade* itself, and in the lawyering of Catherine MacKinnon, others can find a theoretical possibility turned into concrete reality. Sensitive to the difference between law and politics and determined to uncover the liberating potential of the law, Catherine MacKinnon and the legal practice she has developed now stand as an inspiration to an entire generation of law students. She has shown them what they can do with the law, not simply as power, but as an especially disciplined kind of power.

Many feminists, including MacKinnon, have stressed the importance of "consciousness raising,"[25] but I find no inconsistency between this notion and the possibility of law and its objective commitments. "Consciousness raising," defined as the coming together of women (and only women) to share and reflect upon their personal experiences, is but an epistemological technique. It is a way of coming to know the truth, or of discovering the hidden biases or oppressiveness of various personal practices or social institutions, including the law. At one point MacKinnon describes consciousness raising as *the* feminist method,[26] but I am skeptical of both its efficacy and centrality to the feminist project, or its efficacy. No persuasive argument has ever been offered to explain why it is the *only* method for discovering the truth, or even an especially promising one, given the strong social constructionist themes in the work of MacKinnon and other feminists, who tend to view everything, including our consciousness, as constructed by powerful social forces. I do not see how a mere sharing of personal experiences can liberate a consciousness that is so socially determined.

Finally, there is the writing of Carol Gilligan.[27] Gilligan does not (and presumably would not dare to) enter the debate about objectivity, but nonetheless introduced into moral deliberations a perspective—the ethic of care—which is to be contrasted with the perspective that emphasizes justice or rights as those ideas have been traditionally understood. Gilligan's work has had tremendous

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24 *See* C. MACKINNON, FEMINISM UNMODIFIED 55 (1987); *see also Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 87 n.34 (1985).

25 MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, *supra* note 23, at 519-20, 543-44.

26 *Id.* at 519-20.

27 C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

influence in the academy and on the feminist movement, and some have read it as a repudiation of the objectivist aspirations of the law—the search for justice. Carrie Menkel-Meadow,[28] for example, has used Gilligan's work as a basis for criticizing adjudication, at least in its standard format. In a way that parallels Kennedy's program of particularized adjudication,[29] Menkel-Meadow argues for alternative dispute resolution mechanisms, which seek not justice but a resolution of differences. This strikes me as a misreading of Gilligan.

Carol Gilligan set out to recover a lost perspective—something that had been ignored or slighted in contemporary moral philosophy (Rawls) and developmental psychology (Kohlberg). Once recovered, the ethic of care should not be seen as a competitive ideal to displace the law or its commitment to justice, but as a supplementary ideal that enrichs and infuses the law. At her most utopian moments—as when she tells the story of the two children, one wanting to play pirates, the other wanting to play neighbors, who hit upon a new game, a third way, that makes them both happy[30]—Gilligan envisions a new practice or institutional arrangement that would synthesize the care and justice perspectives. I read this element in her work not as a repudiation of the law and its commitment to justice and the protection of rights, but as an expression of the hope that the law's commitment to justice can be improved or perfected.

Viewed from this perspective, the emergence of feminism strikes me as an entirely salutary development. Picking up where the civil rights movement left off, feminism infuses new life and energy into the notion of law as public ideal—the kind of life and energy that it enjoyed during the sixties but not since. I realize, however, that given the political power of women, which was dramatically revealed in the struggle over the Bork nomination, perhaps not quite as much stress need be placed on law. Law is important, indeed indispensable, but perhaps not as important and not as indispensable as it was for blacks during the civil rights movement (or as it is today for the movement to secure the rights of gays and lesbians). In this context, then, when the women's movement is *the* movement of the day, there may be no reason to deny the hermeneutic of suspicion in the law, and all the reason in the world to

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28 *See, e.g.*, Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

29 *See* Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, *supra* note 9; Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 646-49 (1982).

30 *See, e.g.*, *Feminist Discourse, Moral Values, and the Law—A Conversation*, *supra* note 24, at 45.

stress the importance of politics, especially of the other-regarding, idealized variety.

"Law is politics," as a technique for achieving those ends, is still too much for me, but I find it less of a concern in a political or social context dominated by the women's, rather than the civil rights movement. An appreciation of the unique political position of women and their power also enables me to understand why those who do, in fact, subscribe to the view that "law is politics" are especially anxious to build collaborative relationships with feminists. It is no accident that when Frank Michelman comes down to the task of explaining what the role of an activist judiciary might be in his republic—I put to one side the question of whether it is "law" or "politics"—he draws heavily on the work of some of the principal figures in the feminist movement, including Drucilla Cornell, Sylvia Law, Bell Hooks, and above all, Martha Minow, and then structures the judiciary's role in terms of giving force to the perspective of those who otherwise might be iguored. "Judges," Michelman explains, "perhaps enjoy a situational advantage over the people at large in listening for voices from the margins."[31] In this turn of his argument, Michelman echoes a theme that dominates contemporary feminist writing and thereby suggests that he not only is trying to combine critical legal studies with civic republicanism, but also has added a third corner to his unusual endeavor: feminism.

In saying this, I do not mean to suggest that critical legal studies has become but a branch of feminism (although anything is possible). Nor do I mean to slight in any way the importance of Michelman's project. From his earliest work on the protection of the poor[32] until the present day, I can think of no scholar whose work has had more of an impact on me and whose work has been more of an inspiration. What it does mean is that today, contrary to what I feared a number of years ago, I can conceive of the possibility of new forms of collaboration among critical legal studies scholars, feminists and those romantics who still have their eyes fixed on the civil rights struggles of the sixties and see the law as embodying public values. Today, I can imagine new forms of peaceful and productive coexistence that, oddly enough, given what happened in the election of 1988, might move Peter Gabel's urgent dream of a progressive revival one step closer to reality.

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31 Michelman, *Law's Republic*, *supra* note 5, at 1537.

32 *See* Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).