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Denaturalizing the Lawyer-Statesman

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THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION. By *Anthony T. Kronman.* Cambridge: Harvard University Press. 1993. Pp. viii, 422. $35.

INTRODUCTION

Anthony Kronman's[1] new book, *The Lost Lawyer: Failing Ideals of the Legal Profession,* is an eloquent and impassioned work of scholarship. It makes an important contribution to the growing body of literature devoted to the study of the legal profession.[2] Indeed, at first sight, it presents claims that carry significant empirical and normative appeal. Yet, this appeal quickly wanes, leaving troubling Aristotelian claims of elite lawyer tradition-bound wisdom in judgment.[3]

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This essay is dedicated to June Nigro and John Alfieri.

1. Dean and Edward J. Phelps Professor of Law, Yale Law School.

2. Recent literature on the legal profession signals a revival of interest in both the theory and the practice of professionalism. *See, e.g.,* Symposium, *Critical Theories and Legal Ethics,* 81 GEO. L.J. 2457 (1993); Symposium, *The Emperor's Old Prose: Reexamining the Language of Law,* 77 CORNELL L. REV. 1233 (1992); Symposium, *The Future of the Legal Profession,* 44 CASE W. RES. L. REV. 333 (1994); *Lawyering Theory Symposium: Thinking Through the Legal Culture,* 37 N.Y.L. SCH. L. REV. 1 (1992); Symposium, *The Many Voices of Clinical Legal Education,* 1 CLINICAL L. REV. 1 (1994); Symposium, *Theoretics of Practice: The Integration of Progressive Thought and Action,* 43 HASTINGS L.J. 717 (1992); Symposium, *The 21st Century Lawyer: Is There a Gap To Be Narrowed?,* 69 WASH. L. REV. 505 (1994); *see also* Symposium, *Civic and Legal Education,* 45 STAN. L. REV. 1525 (1993).

3. Kronman disputes "the claim that practical wisdom is simply a species of intuition." Anthony Kronman, *Practical Wisdom and Professional Character,* 4 SOC. PHIL. & POLY. 203, 209 (1986) [hereinafter Kronman, *Practical Wisdom and Professional Character*]. This claim, he objects, "ignores the fact that the judgments of the practically wise man are arrived at by a process which is reflective and intellectually disciplined in a way that the concept of intuition, as we ordinarily employ it, fails to convey." *Id.* Put simply, "the judgments at which a practically wise man arrives are *thought out.*" *Id.; see also* Anthony T. Kronman, *Living in the Law,* 54 U. CHI. L. REV. 835, 848-49 (1987) (depicting intuition as a "nonreflective" form of comprehension) [hereinafter Kronman, *Living in the Law*]; Anthony T. Kronman, *Paternalism and the Law of Contracts,* 92 YALE L.J. 763, 790 (1983) ("Judgment is skill in deliberation — it is the skill of deliberating well — whereas intuition brings deliberation to an end and is something altogether different from it.").

Kronman accords tradition an authority that holds "inherent and direct" sway over the practice of law.[4] The attitude of traditionalism obliges lawyers to take up the "custodial" work of conserving past ideals in the manner of a "trusteeship."[5] At stake is the ideal of lawyer wisdom manifested in good judgment. The traditionalist understands this ideal — and its preservation — to be essential to professional "meaning and dignity."[6]

Kronman's traditionalist thesis is that the caliber of a lawyer's mind and the virtue of his character determine the quality of his deliberative judgment.[7] The higher the caliber of mind and the greater the virtue of character a lawyer possesses, the more outstanding his judgment. On its face, this proposition seems benign. It becomes pernicious, however, when applied to deify the mind and character of elite private lawyers. Kronman, in defending this proposition, appears to suggest that outstanding judgment is virtually the sole province of white, male, large-firm private lawyers. Furthermore, he intimates that these lawyers constitute a kind of natural aristocracy marked by a superior inheritance of intellectual discipline and moral virtue. This essay considers whether Kronman's defense of elite lawyer deliberative judgment condemns the worthiness of his project.

Kronman's project is redemptive; he seeks to turn back the "apocalyptic" forces of nihilism, commerce, and irresponsibility that have beset the legal profession for more than a century (p. 1). His strategy of deliverance rests upon the recovery of a nineteenth-century artifact: the ideal of the lawyer-statesman.[8] This ideal consists of four elements: practical wisdom, prudentialism, craft, and

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4. *Compare* Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1047-48 (1990) (extending Edmund Burke's defense of traditionalism) *with* David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1057 (1991) (defending a "rationalist inquiry into the justification of traditions").

5. Kronman, *Precedent and Tradition*, *supra* note 4, at 1066-67 (justifying "respect" for the past "because the world of culture that we inherit from it makes us who we are").

6. Kronman, *Living in the Law*, *supra* note 3, at 873.

7. Kronman describes the "phenomenon of judgment" in terms of process: "the process of deliberating about and deciding personal, moral, and political problems." *Id.* at 846.

8. By artifact, I mean "a social construct — a thing — consisting of historically specific ideals and discourses." Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769, 770 (1992) (footnote omitted); *see also* ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 2 (1987) (observing that social theories "whether or not radical in their intentions, see society as an artifact"); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 586 (1983) (discussing the "artifactual character of social life").

Carrie Menkel-Meadow detects a "false 'nostalgia' " in Kronman's nineteenth-century invocation. Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report — Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 623 (1994); *see also* James M. Altman, *Modern Litigators and Lawyer-Statesmen*, 103 YALE L.J. 1031, 1071 (1994) (reviewing KRONMAN, THE LOST LAWYER) ("[T]he lawyer-statesman ideal has not been a credible professional ideal for most litigators for about a century, at least.").

public service. Kronman interweaves these elements throughout the seven chapters of *The Lost Lawyer.*[9] The chapters map both philosophical and sociological paths to the "gloomy conclusion" that the lawyer-statesman ideal is dead (p. 7). Unlike Kronman, I do not mourn the death of the lawyer-statesman. In law, artifactual death is liberating. It spurs new sociolegal configurations and meanings and, thereby, provides an opportunity to reconstruct both the form and the substance of our ideals. Thus, we should not mourn the death of the lawyer-statesman ideal; rather, we should contest its constitutive claims in order to reconstruct the meaning of professionalism.

This essay follows the structure of Kronman's main claims. Part I examines practical wisdom in the context of counseling, advocacy, and judging. Part II analyzes prudentialism in the setting of legal education and scholarship. Part III assesses craft and public service in the circumstances of large-firm corporate law practice.

I. Practical Wisdom

Kronman begins *The Lost Lawyer* with prophetic "urgency" (p. 6). There is, he proclaims, a "crisis" afflicting the American legal profession (p. 1). It is an inward "crisis of morale," pride, and self-confidence, a "collective identity crisis" so grave that it threatens the soul of the profession (pp. 2, 165, 354). He finds evidence of this "spiritual crisis" in the profession's intensifying "doubts about the capacity of a lawyer's life to offer fulfillment."[10] Kronman's threshold assumption is that the practice of law affords, or rather *should* afford, lawyers a source of "intrinsic" human fulfillment[11] and society a supply[12] of wise statesmen.[13] He laments the "demise" of the ideal of the lawyer-statesman realized in the character

9. The first three chapters arise out of lectures Kronman delivered in 1987 at the University of Michigan Law School. P. vii.

10. P. 2. The death of the lawyer-statesman ideal suggests to Kronman that "lawyers will find it harder to believe their work provides intrinsic fulfillment of any kind." P. 3.

11. Kronman's claim of lawyer-driven secular fulfillment rests on historical conjecture. He speculates that "earlier generations of American lawyers conceived their highest goal to be the attainment of a wisdom that lies beyond technique — a wisdom about human beings and their tangled affairs that anyone who wishes to provide real deliberative counsel must possess." P. 2. These generations, he adds, understood "wisdom to be a trait of character that one acquires only by becoming a person of good judgment, and not just an expert in the law." P. 2. On this understanding, "it seemed obvious that a lawyer's life could be deeply fulfilling." P. 2.

12. Pp. 2-3. Curtailing this supply, Kronman exclaims, spells "disaster for the country." P. 3.

13. Kronman's threshold assumption rests on contestable factual premises regarding the need for satisfaction in the public sphere of work and the necessity of elite, professional leadership in the public sphere of politics. The first premise overlooks the satisfaction many reap from the private sphere of work through care-giving. The second premise disregards the merits of a more diverse, populist pool of political leadership.

of "outstanding" lawyers such as Abraham Lincoln, Earl Warren, Robert Jackson, Anthony Kennedy, Sandra Day O'Connor, and David Souter.[14] For these lawyers, law is a noble, "craftlike" activity that infuses professional life with "personal meaning" (pp. 351-52). To Kronman, the "outstanding" quality of a lawyer's character gains expression not only in technical virtuosity, but also in the Aristotelian virtues of practical wisdom and prudence.[15] The character virtues of wisdom and prudence determine the "quality" of a lawyer's "judgment."[16] Good judgment reflects good character.

Without the redemptive powers of character, Kronman declares, lawyers lose faith in the ideal of professional excellence. To restore faith in character and to regain a high standard of professional excellence,[17] he seeks to "rescue" the ideal of the lawyer-statesman from "collapse."[18] For Kronman, the lawyer-statesman represents a "classical figure" marked by "great" wisdom in counseling, "exceptional" powers of advocacy, and an abiding commitment to the public good (pp. 12-13). Kronman culls examples of this figure from the nineteenth-century careers of Daniel Webster, Rufus Choate, John Marshall, Fisher Ames, William Pinkney, and James Kent,[19] as well as from the twentieth-century careers of Dean Acheson, John McCloy, Adlai Stevenson, Cyrus Vance, Paul Warnke, and Carla Hills.[20] These lawyers exemplify the virtues of wisdom, excellence, and civic spirit, possessing a "special talent" of judgment and lead-

14. P. 3. Kronman defends his roster of "outstanding" lawyers by exalting the substance of their judicial opinions in selected cases. But he declines to establish a clear correlation between the quality of lawyer counsel and the soundness of judicial decisionmaking. Further, he neglects to set forth criteria guiding the selection of certain cases over others.

15. Pp. 2, 225. Kronman, *Practical Wisdom and Professional Character, supra* note 3, at 206 (describing practical wisdom as a "central requirement" of the practice of law); *see also* Kronman, *Living in the Law, supra* note 3, at 841 ("To practice law well requires not only a formal knowledge of the law (a knowledge of what the legal realists termed the 'paper' rules or rules 'on the books') but certain qualities of mind and temperament as well.") (footnote omitted).

16. P. 3. Kronman, *Practical Wisdom and Professional Character, supra* note 3, at 208 (positing the "connection between cognition and character").

17. Kronman's confessed aim is to provide a "compelling" account of the lawyer-statesman ideal as a "conception of professional excellence." Pp. 13-14. To do so, he endeavors to articulate the "intellectual premises" of that ideal, reconstructing it "from the bottom up." P. 14.

18. Pp. 5, 354. Historical rescue carries the risk of overbreadth: it may salvage both honorable and "shameful" aspects of the profession. P. 5. Although Kronman admits to the profession's "obviously" shameful history of "racial, religious, and sexual exclusivity," he seems to consign such "failings" to the "past." P. 5. Indeed, for Kronman, the shame of exclusion and the failure of inclusion apparently have been "overcome." P. 5.

19. P. 12. Kronman finds "distinguished representatives" of the lawyer-statesman ideal "in every age of American law." P. 3. *But see* Altman, *supra* note 8, at 1056, 1059 ("By the turn of the century, the republican ideal of the lawyer-statesman existed mostly in lawyers' memories.").

20. Pp. 11-12, 283. Kronman also mentions Lloyd Garrison, Orville Schell, William Rogers, and Henry Stimson. Given this yardstick, no doubt Lloyd Cutler and Abner Mikva deserve mention as well. Both are accomplished private counselors and public servants, and,

ership that coincides with the public good (pp. 12, 14, 49). Although this talent also extends to matters of "private" interest, the principal purpose of such "outstanding" lawyers is to "help" their clients "come to a better understanding of their own ambitions, interests, and ideals and to guide their choice among alternative goals" (p. 15).

The "outstanding" qualities of Kronman's lawyer-statesmen stem from character. Good character, he contends, gives rise to an "excellence of judgment" beyond simple "intellectual skill" (p. 35). Judgment endows "some citizens" with "a superior ability to discern the public good" (p. 35). This superiority, a sign of "human excellence," holds "special meaning for lawyers as a group" (p. 109). Unlike other citizens, they appreciate the value of "connoisseurship."[21]

Connoisseurs, Kronman explains, are persons "devoted" to the attainment of a certain "good" regardless of "form" (p. 139). This dispositional character, a quality expressed in "habitual feelings and desires," shapes professional judgment (p. 15). Good lawyers, Kronman asserts, are connoisseurs of the law; they care for "the good of the law itself" (p. 139). Civic-minded devotion to the law's "well-being" enables lawyers to excel in making accurate predictions of judicial outcomes (p. 139).

Prediction requires foresight. Kronman posits foresight as a character trait of practical wisdom. He defines foresight as "the capacity to see ahead, to anticipate in imagination the consequences and actual experience of following each of the different pathways that one might choose" (p. 86). To be sure, connoisseurs practice more than foresight; they practice an *art.* The lawyer-statesman practices the art of statesmanship.

On Kronman's account, the art of great statesmanship entails two qualities or traits: "love of the public good" and "wisdom in deliberating about it" (p. 54). He locates the "public virtue" of statesmanship in the community leader of "exceptional wisdom and skill" who serves "the good of the community" (pp. 53-54). The statesman's "special virtue" lies in his "extraordinary devotion" to the good of his community and in his "superior capacity for discerning" the nature of that good (p. 54). In essence, statesmanship symbolizes "a kind of skill or excellence at making judgments about the public good" (p. 87).

Kronman discovers the statesman's "excellence" of public, deliberative judgment in "political debates" concerning community

moreover, both are male. Kronman never satisfactorily explains the gendered nature of his professional yardstick.

21. Kronman cites the judgments of a connoisseur "as a benchmark for the opinion of others." P. 139. He takes these judgments "to be more reliable and on the whole to reflect a better and more informed view of the aims of the enterprise in question." P. 139.

ideals, particularly the "best" means to achieve certain ends (pp. 54-55, 61). He views means-based disputes as a "problem of counting" that commands a "calculative" judgment.[22] Good judgment hinges on "the ability to calculate" the "right choice" of means in a situation of conflicting ends and incommensurable values (pp. 56, 58-61). The statesman's "excellence" of deliberative judgment is most vivid in cases in which community identity is in controversy.[23]

The complexity of identity-based political judgments leads Kronman to explore the counterpart of statesmanship in the realm of personal deliberation.[24] Analogizing personal and political styles of deliberation, he detects a "structural resemblance" and "correspondence" in identity-defining choices about individual and community values (pp. 63, 65-66, 88-89). Kronman maintains that "life-defining choice" situations constitute an important class of value dilemmas involving deliberation about incomparable goods (p. 66). He assigns to the human imagination a crucial role in that deliberative inquiry, especially the imaginative ability "to anticipate the costs and benefits of each alternative" (p. 69).

Imagination, Kronman reveals, permits other-directed sympathy (pp. 70-71). The imaginative "elaboration" or "mimicking" of another's value commitments[25] evokes an attitude of "suspended identification" that combines the dispositions of compassion and detachment in a posture "less disinterested" than observation "but more detached than love" (pp. 70-73). Compassion describes the dispositional power of "generating feelings" (p. 74). Detachment denotes the temperamental power of "moderating or confining feelings" (p. 74). Kronman classifies the affective habits of sympathy and detachment as "traits of character" (p. 76). Lawyers endowed with these traits enjoy "enlarged imaginative powers" and "wider access to the realm of surrogate experience" conducive to deliberative judgment.[26] In this sense, deliberation is "bifocal" in nature (p. 72).

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22. P. 55. Kronman comments that "the skill most needed in deliberating about means will be the ability to count costs with accuracy and speed." P. 55.

23. Kronman emphasizes that the excellence of deliberative judgment comes not from the "ability to determine what is right (for there may be no neutral standpoint from which the alternatives can be assessed) or to discover opportunities for compromise (since none may exist)," but from the "ability to advance more reliably than others the good of political fraternity." P. 93.

24. Kronman denotes personal deliberation to mean "reflection in which an individual engages when attempting to define his or her own good and to determine how it may be achieved." P. 62.

25. Mimicking seeks to "anticipate" the experience of casting a choice "by reproducing in oneself in a provisional form the cares and concerns of someone who has already made it and then by asking what it would be like to live that person's life." P. 74.

26. P. 76. Kronman acknowledges that "some feminist writers have argued that there is a closer connection between feeling and judgment than is commonly supposed." P. 166.

Notwithstanding the naturalistic origins of character, Kronman argues that lawyers can "learn" the attitude of "detached compassion"[27] informing the "art of deliberation" through a process of dispositional education in affective "discipline and training."[28] The habitual mixing of the affective dispositions of compassion and detachment produces a kind of "virtuoso of feeling."[29] Because "only some possess" that quality of feeling, however, Kronman confesses that deliberative excellence is irreconcilable with political equality.[30]

Kronman tolerates the elitist and undemocratic import of the deliberative component of practical wisdom in order to fashion a method that attains "a deeper quasi-experiential understanding" of incomparable alternatives.[31] Practical wisdom, he professes, furnishes both a procedural and a substantive method of achieving "excellence in deliberating about ends."[32] Procedurally, it facilitates deliberation about incommensurable values (pp. 86-87). Sub-

27. P. 85. The attitude of detached compassion brings neither regret nor self-deception but "neutrality." Pp. 83-84. To Kronman, the condition of regret "divides a person against himself." P. 79. He dismisses the "strategy of forgetting" as a method to avoid or to combat the "self-condemnation of regret." Pp. 82-83.

28. Pp. 15, 75, 304. The object of learning detached compassion by this process is "to force the person undergoing it to entertain the widest possible diversity of points of view, and to explore these in a mood of deepening sympathy, while retaining the spirit of aloofness on which sound judgment also critically depends." P. 304. Menkel-Meadow calls this process "empathy training." Menkel-Meadow, *supra* note 8, at 620. Although she distinguishes sympathy from empathy, she likewise asserts that the "affective aspects of lawyering can be taught and learned." *Id.* at 606, 620.

29. Pp. 75, 108. The virtuoso experiences the dispositions of sympathy and detachment as "stable features of [his] personality," hence he is "likely to deliberate well, not just on occasion but consistently in different settings." P. 76.

30. Pp. 51, 108. Kronman approves the Aristotelian notions of "superior ability" and "character-based elitism," thus endorsing a theory of "inequality in the capacity for self-rule." P. 42. To Kronman, inequality stems from an inferior deliberative capacity. *See* ARISTOTLE, NICOMACHEAN ETHICS 6K.VI, ch. 9 (J.L. Ackrill & J.O. Urmson eds. & David Ross trans., rev. ed. 1980) (1925) (observing differences in deliberative capacity); *see also* Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy,* 82 CAL. L. REV. 331, 387-88 (1994) (explaining Aristotle's notion of superiority in citizenship); Linda R. Hirshman, *The Book of* "A", 70 TEXAS L. REV. 971, 1007-11 (1992) (discussing Aristotle's vision of social hierarchy and inequality); Martha C. Nussbaum, *Comments,* 66 CHI.-KENT L. REV. 213, 220-22 (1990) (mentioning Aristotle's conception of natural capabilities). *Compare* Martha C. Nussbaum, *Aristotelian Social Democracy,* in LIBERALISM AND THE GOOD 203 (R. Bruce Douglass et al. eds., 1990) (approving elements of the Aristotelian conception of social democracy) *with* Michael Slote, *Law in Virtue Ethics,* 14 LAW & PHIL. 91, 93-94 (1995) (decrying contemporary Aristotelian approaches to political philosophy for their seeming unwillingness or inability "to defend democratic or liberal ideas of justice").

31. P. 74. To acquire this quasi-experiential understanding, Kronman imparts, lawyers "must be able to sustain the conflicting attitudes of compassion and detachment." P. 74.

32. Pp. 86, 161. Kronman's notion of excellence "presupposes specific traits of character" including "the disposition to conserve." P. 161. Out of this disposition, he extracts "a reverence for the variety of irreconcilable human goods and for the genius of unprincipled invention that has made it possible for people to live together despite the incomparability of their conceptions of what is valuable in life." P. 162.

stantively, it achieves the "deeper self-knowledge"[33] and the "self-directed friendship" of integrity, a "substantive good" of "intrinsic worth" (p. 87).

Practical wisdom, Kronman maintains, enables "outstanding" lawyers to render personal and political judgments even when alternative ideals stand incommensurable (p. 97). In the personal sphere, "wise judgment" tends to "promote the condition of integrity" (p. 97). In the political sphere, that judgment works to foster "political fraternity."[34] Here again, the statesman's wisdom or deliberative excellence is both substantive and procedural (pp. 99-100), for he endeavors to build or preserve "fraternity"[35] through the pursuit of "empathic pluralism."[36]

Kronman believes that individuals achieve a condition of political fraternity when they overcome their differences to join in a deliberative debate about the identity and ends of their community (p. 93). To meet this formal condition,[37] community members must

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33. For Kronman, self-knowledge goes beyond informed choice, even though "informed choice is an intrinsic as well as instrumental good." Pp. 68-69. Self-knowledge aims higher, striving to attain a kind of "enlightened understanding." P. 68. At this level, self-knowledge seems to encompass both the "choices or preferences of good individuals" and an "awareness of the good." *See* Edward McGlynn Gaffney, Jr., *In Praise of a Gentle Soul,* 10 J.L. & RELIGION 279, 289 (1993-94) (surveying the work of Thomas Shaffer).

34. P. 97. Kronman adverts to political fraternity as "friendship among citizens." Anthony Kronman, *Aristotle's Idea of Political Fraternity,* 24 AM. J. JURIS. 114, 126 (1979). He states:

> it is the sign of a wise political judgment that it promotes community, not through the construction of a false and unattainable unanimity, but in the only way that human beings with strongly divergent interests are ever likely to achieve it: by strengthening the capacity of each to entertain the views of those with whom he disagrees, a capacity that has traditionally gone under the name of political fraternity.

Kronman, *Living in the Law, supra* note 3, at 861.

35. To Kronman, the statesman "is wise because he deliberates in a certain way, and wise also because his deliberations lead, more reliably than others', to the good of political fraternity." P. 100.

36. Pp. 102, 105. The statesman relies on the art of rhetoric to encourage the "sentiment of fellow-feeling" that builds pluralist community. P. 101. The "performative character" of rhetoric actualizes, through "affective conversion," the empathic relations of brotherhood and community in practice. *Id. See* Kronman, *Aristotle's Idea of Political Fraternity, supra* note 34, at 138 ("The relation of brotherhood therefore provides a peculiarly appropriate foundation upon which to build the hybrid institutions of political fraternity.").

37. David Trubek mentions Kronman's preference for a "formal legal system." David M. Trubek, *Reconstructing Max Weber's Sociology of Law,* 37 STAN. L. REV. 919, 931 (1985) (reviewing ANTHONY T. KRONMAN, MAX WEBER (1983)); *see also* Nancy L. Schwartz, *Max Weber's Philosophy,* 93 YALE L.J. 1386, 1388 (1984) (reviewing KRONMAN, *supra*) ("Kronman wants to argue that one mode of legal thought, formal rationality, is particularly privileged in Weber's system.").

Kronman's early work is replete with references to formal rationality. *See, e.g.,* Thomas H. Jackson & Anthony T. Kronman, *A Plea for the Financing Buyer,* 85 YALE L.J. 1, 37 (1975) (calling for "the fair and uniform application" of Uniform Commercial Code policies intended to protect the financing buyer in commercial transactions); Thomas H. Jackson & Anthony T. Kronman, *Voidable Preferences and Protection of the Expectation Interest,* 60 MINN. L. REV. 971, 982 (1976) (applying "an objective theory of preferences" in bankruptcy to the treatment of security interests in after-acquired property); Anthony T. Kronman, *A*

combine the statesman's deliberative arts of compassion and detachment in a "spirit of affectionate good will" (p. 96). The spirit of "civic friendship" registers political fraternity "midway between tolerance and union," a spirit "every member of a community" may celebrate.[38]

Kronman compares the community value of political fraternity with the individual value of personal integrity.[39] Political fraternity, he contends, establishes "bonds of fellow-feeling" among the members of a community, "bonds based upon their willingness to sympathize with each other's interests and concerns" (p. 96). Those bonds protect communities against the "destructive force" of "identity-defining moments" (p. 96). Political fraternity consequently "preserve[s] communities against disintegration" in the same way that personal integrity "preserves the souls of individuals" through friendship.[40]

Kronman asserts that the values implanted in political fraternity animate the three different "jobs" of practicing lawyers: judging, counseling, and advocacy.[41] Despite the discrete nature of each job, he regards all three as a single intertwined practice of deliberative wisdom and civic-mindedness.[42] Kronman argues that "all

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New Champion for the Will Theory, 91 YALE L.J. 404, 421 (1981) (reviewing CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981)) (noting that the "incentive effects" of a contract rule "will be undermined if the rule is applied in an *ad hoc* and unpredictable manner").

Although these references may pledge Kronman to a system of formal rationality, they do not foreclose a commitment to distributive justice. *See* Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 475 (1980) (defending the use of contract rules to implement distributional goals).

38. Pp. 99-100. Kronman imagines civic friendship arising out of a state of nature in which parties "develop sympathy, affection, or love for one another." Anthony T. Kronman, *Contract Law and the State of Nature*, 1 J.L. ECON. & ORG. 5, 21 (1985).

39. P. 95. Kronman defines personal integrity as "the condition of wholeness that results when the parts of a person's soul are . . . on amicable terms, when one's present attachments are not at war with past ones, or engaged in a subtler context of repression and revenge, despite the irreconcilable differences that set them apart." P. 95.

40. P. 96. Political fraternity, for Kronman, "is thus a preeminent good that in most circumstances exceeds all others in importance." P. 106.

41. Pp. 113-122. *Compare* Menkel-Meadow, *supra* note 8, at 605 n.58 (rebuffing Kronman's vision of professionalism as "nostalgically" litigation-oriented).

42. Pp. 121-22. Altman charges that Kronman "fails to acknowledge that the litigator's partisan role subordinates the judicial point of view, thereby distorting the exercise of practical wisdom." Altman, *supra* note 8, at 1067. Kronman admits that advocacy encourages a kind of instrumental "cynicism" with respect to truth claims. Anthony Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 964 (1981). He traces this cynicism to the influence of "an education in advocacy." *Id.* at 965. Even though he makes no explicit mention of it, Kronman seems to regard the clinical method of legal education as a highly instrumental form of advocacy education. The noninstrumental content of recent clinical and practice-based literature demonstrates that he underestimates the field. *See, e.g.*, Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the*

practicing lawyers must deliberate about their clients' ends and not just about the means for reaching them" (p. 146). Additionally, he contends that all lawyers "must be connoisseurs of judging moved by a concern for the good of the law itself" (p. 146).

To Kronman, lawyers and judges serve differentiated roles "inside a common practice" (p. 135). Like judges, lawyers — both as counselors and as advocates — require an "attitude" of civic-mindedness sufficient to assess "the good of the legal order as a whole"[43] and "the good of the community that the laws establish and affirm."[44] Such an assessment "compels" lawyers to "neutralize" the value of client welfare in deference to the "soundness" of law and legal order (pp. 142, 145). When moral conflicts arise involving competing loyalties to a client and a court of law,[45] the *good* lawyer's public-spirited devotion to the law and legal order prevails.

Kronman holds that civic-minded judgments warrant a particular form of wise deliberation he calls "third-personal deliberation."[46] The starting point of third-personal deliberation is the "imaginative assumption" of a "foreign," that is client,

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Hearing of Mrs. G., 38 BUFF. L. REV. 1 (1990); Anthony V. Alfieri, *The Ethics of Violence: Necessity, Excess, and Opposition*, 94 COLUM. L. REV. 1721 (1994) (book review).

43. P. 141; *see also* Kronman, *Living in the Law*, *supra* note 3, at 870-71 (noting that "an advocate who sees things from the judge's perspective and attends to his concerns will be careful to frame his own arguments so as to emphasize the congruence between his client's interests and the interests of the legal community as a whole").

44. P. 141. Adoption of the judicial attitude of civic-mindedness, Kronman claims, enables lawyers to predict more accurately the behavior of judges. P. 138. This attitude is crucial "where there is no clear doctrinal tendency, or competing precedents of roughly equal weight." P. 137. In these circumstances, "a lawyer has no choice but to decide for himself what the legally correct decision would be and to base his prediction of judicial behavior on the judgment that he reaches." P. 137.

45. P. 146. Kronman's insight that ethical "bounds" allow "a divergence between the client's well-being and that of the law itself" echoes David Wilkins's trenchant observations in his study of legal realism and ethics. P. 144. *See* David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990). Wilkins observes that the legal realist claim of rule indeterminacy "directly challenges" the assertion found in the traditional model of legal ethics that "legal boundaries effectively mediate between a lawyer's private duty to clients and her public commitments to the legal framework." *Id.* at 470. Extending the realist thesis, he argues that "indeterminacy threatens to collapse the distinction between the lawyer's public responsibility to obey the law and her private responsibility to represent her client effectively." *Id.* at 476. Lawyers, according to Wilkins, hold "both the power and the incentive to manipulate the very boundaries that are supposed to provide an independent source of [ethical] constraint." *Id.* at 497.

46. P. 130. The process of "third-personal deliberation" directs a lawyer "to place himself in the client's position by provisionally accepting his ends and then imaginatively considering the consequences of pursuing them, with the same combination of sympathy and detachment the lawyer would employ if he were deliberating on his own account." P. 130. Once a lawyer assumes the client's standpoint, "he proceeds just as if he were attempting to answer a personal question for himself." P. 131. *Compare* Menkel-Meadow, *supra* note 8, at 620 (recommending that "lawyers need to learn to experience 'the other' from the values that the other holds, not those of the lawyer").

stance.[47] That "preliminary act of imagination" encourages lawyer-client "cooperative deliberation," at times even friendship,[48] without sacrificing a lawyer's independent judgment.[49] Kronman applies the notion of third-personal deliberation to the core and periphery of client cases.[50] Lawyers, he notes, handle both sets of cases by emulating the traits of deliberative wisdom and civic-mindedness exhibited by the connoisseur of judging, particularly a devotion to the law's "internal good."[51] Their objective is "to preserve and perfect the community of law" by uniting "professional competence" and "public-spiritedness" (pp. 127, 150-54).

Kronman traces this collective ambition to the case method of law school instruction.[52] He asserts that the case method "nourish[es]" and "promotes" the character traits of deliberative wisdom and public-spiritedness, as well as the ensuing "tendency to take a conservative view of law and politics."[53] He defines the dispositional attitude of conservatism in terms of caution, skepticism, prag-

47. P. 130. To be effective in that assumption, "a lawyer must be able to lose himself in that other person's situation, to see it from within in a way that makes it possible for him not just to name but to appreciate the interests, values, and ambitions that inform it." P. 299.

48. Pp. 130-32. Kronman places friendship "in a mean between sympathy and detachment." P. 132; *see also* Kronman, *Practical Wisdom and Professional Character, supra* note 3, at 225 ("A practically wise counselor, then, is distinguished from a legal technician by his sense of fit and by his capacity to act as a critical friend . . . .").

49. Pp. 130-31. Kronman distinguishes third-personal deliberation from alternative client or lawyer-centered forms of deliberation. He states: "The lawyer's third-personal deliberations yield an independent judgment concerning the soundness of the client's decision, a judgment that is in principle distinguishable both from the client's declared views and the conclusion the lawyer would reach starting from his own personal values instead . . . ." Pp. 130.

50. P. 133. Kronman places in his core category cases involving client impetuosity or self-doubt and cases in which a client's ends conflict or suffer from vagueness. These situations, he notes, "constitute a significant portion of the problems with which lawyers deal, including some of the most interesting and important ones." Pp. 133-34.

51. P. 151. Kronman adds that the "outstanding" advocate also must aspire to be a "connoisseur of cooperation" in private negotiations, for negotiations entail a "communitarian dimension" expressed in the attitude of public-spiritedness and in the creation of "transactional communities." P. 153.

52. Menkel-Meadow points to the deficiencies of the case method in teaching the skills of "legislating, lobbying and administering laws." Menkel-Meadow, *supra* note 8, at 616; *see also* Richard B. Stewart, *Foreword: Lawyers and the Legislative Process,* 10 HARV. J. ON LEGIS. 151, 156-57 (1973) (commenting that law schools "have largely neglected the training of lawyers in legislative roles" due to their "continued emphasis" on the study of judge-made rules and judicial decisions).

For gender and race-grounded critiques of the case method of law school pedagogy, see Kimberlé W. Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education,* 11 NATL. BLACK L.J. 1, 1-10 (1989) (elucidating the "illusion" of racial objectivity and neutrality fostered by the dominant pedagogical norm of "perspectivelessness"); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women,* 40 STAN. L. REV. 1299, 1332-55 (1988) (describing gendered experience of public silencing in the law school classroom).

53. *Compare* pp. 122, 128, 154-55 *with* Duncan Kennedy, *Legal Education as Training for Hierarchy, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 40 (David Kairys ed., 2d ed. 1990) (denouncing legal education as ideological training in the structures of hierarchy); Mary O'Brien & Sheila McIntyre, *Patriarchal Hegemony and Legal Education,* 2 CAN. J.

matism, gradualism, and a cosmopolitan appreciation for the multiplicity and irreconcilability of moral perspectives on the value of human goods.[54] To illustrate this attitude, he cites the conservatism implicit in the culture of judging and the habits of "judiciousness" (p. 318). In the judge's perspective Kronman sees a commitment to tradition and to the good of the law itself.[55] This commitment allows judges to enjoy the "intrinsic pleasure" of deliberation "well done" (p. 319). The bureaucratization of courts,[56] however, transforms the nature and institutional culture of judging, sapping the joy of deliberation (p. 320).

The bureaucratic competition between the virtues of efficiency and wisdom in the adjudicative branch, Kronman complains, reduces "the ancient art of judging into a species of office management" (p. 4). He attributes this transformation to the "enormous number of cases" and "accelerating demands" of adjudication. The demand for adjudication, and the corresponding need to "expand the output of judicial services," exacts "changes in the structure, tempo, and style of adjudication" (pp. 321-23). These changes give rise to a managerial style of judicial decisionmaking "more precipitous and prone to personal bias" (p. 324).

Kronman contends that the bureaucratization of the judiciary and the emergence of a managerial ethos harm the activity of judging by "stifling" the "deliberative imagination."[57] Managerial adjudication, he insists, is "less deliberative in character" and, therefore, less reliant on a judge's "imaginative powers" (p. 326). As a result, judges experience the "enfeeblement" of their imagination.[58] The

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WOMEN & L. 69, 79 (1986) (describing the "authoritative pedagogy" of the classroom as "inhospitable to student criticism or innovative ideas").

54. P. 159. *See* Kronman, *Practical Wisdom and Professional Character, supra* note 3, at 225-26 ("The man of practical wisdom, as we usually conceive him, is a cautious man, attached to existing institutions and inclined to alter them only through a process of slow interstitial adjustment of the sort, for example, that has characterized the development of the common law.").

55. P. 318. Kronman discerns that commitment in the judge's pursuit of "the good of political fraternity." P. 319.

56. Kronman conducts a broader analysis of the bureaucratization of modern political institutions in his study of Max Weber. *Compare* ANTHONY T. KRONMAN, MAX WEBER 37-71, 166-88 (1983) *with* Joan Tronto, *Law and Modernity: The Significance of Max Weber's Sociology of Law*, 63 TEXAS L. REV. 565 (1984) (reviewing KRONMAN, *supra*) (assailing Kronman for seriously misunderstanding Weber's sociology of law).

57. P. 325. By deliberative imagination, Kronman means "the capacity to entertain a point of view defined by interests, attitudes, and values different from one's own without actually endorsing it." Pp. 326. Attaining that quality of imagination "takes time, and even once attained needs continual exercise to remain supple and strong." Pp. 327.

58. P. 326. The "monocularity" of judging, Kronman adds, aggravates the condition of enfeeblement. Pp. 325-28. This deterioration is noteworthy among federal judges who view cases from the "perspective" of a subordinate, such as a clerk or a special master. P. 328. The "prior judgment" implicit in that perspective imposes a "harmonizing order" on conflicting party claims and, thus, reduces the need for deliberation. P. 327.

"economizing strategy" and "commensurating attitude" of managerial judges, manifested in the effort to maximize the good of justice,[59] further weaken the judicial imagination.[60] Judicial statesmanship, Kronman warns, demands the imaginative capacity to accept not only the fact of "human disagreement," but also the tragedy of incommensurable moral and political claims (p. 341). The "tragic" burden of judicial statesmanship carries the "obligation to pursue political fraternity" in the face of incommensurable conflicts (pp. 340-42). Because Kronman's definition of political fraternity privileges the value of tradition as a safeguard against the "forces" of social "disorder," fulfilling that obligation in judging, counseling, or advocacy necessitates "a commitment to order and the status quo" (p. 108).

Kronman's conservative commitment to the political fraternity of the prevailing order implies a "lawyer-centered"[61] vision of deliberative judgment. Only lawyers, indeed only elite large-firm corporate lawyers, possess the mind and character of good judgment. Evidently, clients, third parties, and the public are too easily swayed by base or populist impulses to be entrusted with the heavy burdens of judgment. Endowed with a natural ability to ascertain the public good, Kronman's lawyer-statesmen rise above selfish and popular sentiment independently to pursue wise ends, even when reaching a particular end result demands incommensurable value choices.

Although lawyers experience the necessity of hard choices in their personal decisionmaking, the common fact of incommensurability does not compel the incorporation of personal and professional styles of deliberation in practical legal judgments.[62] To the

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Several judge-administered developments are hastening the decline in deliberation. Kronman cites, for example, the tendency to limit the availability of oral argument and to rely on staff summaries of briefs, as well as the practice of issuing separate or clerk-drafted opinions. Pp. 329-30. The splintering of opinions into a "plurality of voices," Kronman explains, undermines political "order" and "fraternity." Pp. 343-45. Furthermore, the spread of clerk-drafted opinions injects an "immaturity" and an antiprudentialist bias into the deliberative process. Pp. 347, 351.

59. Kronman avers that "the maximand of judging is justice." P. 335.

60. Pp. 337-42. Kronman argues that the economic calculation of justice maximization "obscures the deliberative nature of adjudication and promotes a false understanding of the judge's task and of the capacities needed to do it well." P. 338. Specifically, an economic calculus suggests that party claims may "always be commensurated without recharacterizing them in a way that alters their essential meaning." Pp. 338, 340. Recharacterization becomes more likely, Kronman states, when adjudication shifts "from legal disputes that involve only a struggle for money to those that represent a fight over basic norms of personal and political morality." P. 340. Because this shift uncovers the "underlying" conflict between incommensurable values, recharacterization fails as a mediating strategy of rationalization. P. 340.

61. I borrow the term from David Wilkins. *See* David B. Wilkins, *Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics,* 108 HARV. L. REV. 458, 459 (1994) (reviewing THE LOST LAWYER).

62. *See* Amy Gutmann, *Can Virtue Be Taught to Lawyers?,* 45 STAN. L. REV. 1759, 1768 (1993) (asserting that "practical judgment in legal practice cannot simply be assimilated to practical judgment more generally").

extent that they carry role-differentiated responsibilities, professional judgments *ought* to be different from the personal judgments of private individuals and, moreover, the political judgments of public statesmen.[63] This normative distinction rests on the nature of the autonomy-based professional responsibilities that attach to the lawyer's role both as an advocate and as an officer of the court.

Kronman's dedication to elite lawyer independence permits but does not command a lawyer-centered vision of private or public deliberation. The notion of professional autonomy licenses alternative forms of deliberation: client-centered as well as law-centered. David Wilkins observes, for example, that the lawyer's role of private advocate allows a "collaborative enterprise" of deliberation in which the lawyer and client engage in a "meaningful exchange of information and values."[64] Moreover, Wilkins points out that the lawyer's role of public officer involves a rule-bound, institutional notion of deliberation extrinsic to personal decisionmaking but crucial to public accountability.[65] Nevertheless, Kronman imagines the autonomous lawyer-statesman to be largely free of client and institutional constraints in rendering practical counsel. For Kronman, freedom is contingent on tradition: the lawyer-statesman is free to pursue self-styled moral virtue provided he keeps within the boundaries of traditional ideals.

II. PRUDENTIALISM

Kronman's deference to tradition follows from his "common-law reverence" for the virtues of practical wisdom and prudence.[66] Like the common lawyer, he decries "abstract speculation,"[67] baring a "deep distrust of theory and theoreticians."[68] Unsurprisingly, he derides the law and economics and critical legal studies (CLS) movements for their antagonism toward the concept of prudence embedded in the common law tradition of advocacy and adjudication.[69]

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63. Wilkins makes a similar point. *See* Wilkins, *supra* note 61, at 468.

64. *Id.* at 470-71, 474.

65. *Id.* at 471.

66. P. 21. *See* Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence,* 94 YALE L.J. 1567, 1605 (1985) ("Lawyers in the common law tradition have always regarded prudence in the way Bickel did, as a virtue of an especially important sort, indispensable to the practice of their craft in all its registers, from the counseling and representation of individual clients to the governance of states.").

67. *But see* Peter Margulies, *Progressive Lawyering and Lost Traditions,* 73 TEXAS L. REV. 1139, 1156 (1995) (remarking that Kronman's method "eschews context in favor of abstraction").

68. Pp. 21, 316. For Kronman, deliberative wisdom is found "in a knowledge of particulars" rather than in a "general theory." P. 319.

69. *See also* Owen M. Fiss, *The Death of the Law?,* 72 CORNELL L. REV. 1, 2 (1986) ("But neither [law and economics nor critical legal studies] is willing to take law on its own terms,

Building on Alexander Bickel's political philosophy,[70] Kronman takes prudence to be "a trait or characteristic that is at once an intellectual capacity and a temperamental disposition."[71] In this sense, prudentialism signals a quality of "mind and character."[72] The prudentialist tradition accepts the "plurality" and "incommensurability" of human goods (pp. 238, 247). That acceptance, Kronman indicates, in no way bars judges or lawyers from seeking "to deliberate rationally about the choice" among competing goods (p. 57). The fact of incommensurability simply renders such a choice morally complex. Prudentialists confront the complexity of "moral pluralism"[73] in searching out a "pragmatically tolerable accommodation" among conflicting goods (p. 238). The point is to frame "reasonable solutions" to local, practical problems (p. 266). Similar to practical wisdom, prudence is "a trait of character and not just a cognitive skill" (p. 21).

Kronman links prudentialism to the "moral-educative function" of law school training, especially the case method of instruction (pp. 109, 116). He treats that method "as an instrument for the development of moral imagination" designed to provoke a "bifocality" of sympathies, understandings, and attitudes informed by lawyer partisanship and judicial neutrality (p. 113). The methodological interplay of partisanship and neutrality fashions a "complex exercise in advocacy and detachment" that confers "new perceptual habits" and enhances "empathic understanding" (pp. 113-15).

Kronman expounds that the moral-educative content of the case method provides a counterweight to academic relativism. He extols the "public-spirited stoicism"[74] of the judicial attitude for demonstrating the need for civic-minded, reasoned judgment under conditions of "maximum moral ambiguity" (pp. 117-18). The case method fosters the "transference" of this neutral dispositional trait through student mimicking of the judicial role (p. 119). Kronman ties the crisis in the legal profession to the failed dispositional transference of prudentialism in legal education. Transference, he ob-

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and to accept adjudication as an institutional arrangement in which public officials seek to elaborate and protect the values that we hold in common.").

70. For an overview of Bickel's political philosophy, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (2d ed. 1986); ALEXANDER M. BICKEL, THE MORALITY OF CONSENT (1975); ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

71. Kronman, *Alexander Bickel's Philosophy of Jurisprudence*, *supra* note 66, at 1569.

72. *Id.* at 1614-15.

73. Kronman puts forward an account of pluralism that "sees many different conflicts not all reducible to one titanic struggle and accepts that there is often no proper solution to these conflicts, not even one that can only be intuited." P. 248. Under this account, "neither reason nor intuition" can establish a preeminent ranking of "competing claims." P. 248.

74. Kronman invokes the Roman term *gravitas* to describe this attitude. P. 118.

serves, now tends toward the counterideal of the lawyer-policy scientist (p. 316). Kronman unearths this counterideal in the "culture" of "university training" predominant in the postwar jurisprudential movements of law and economics and critical legal studies (p. 316). He pronounces the law and economics movement the "greatest influence on American academic law in the past quarter-century," much of it "hostile" to the ideal of the lawyer-statesman,[75] and the CLS movement as a secondary but still detrimental influence.[76]

Kronman characterizes the law and economics and CLS movements as "antiprudentialist" in their depreciation of the value of practical wisdom (pp. 167-68). He ascribes that hostility to the "scientific branch" of legal realism.[77] To explicate the aspirations, methodologies, and antiprudentialist spirit of scientific realism, Kronman dissects the Langdellian tendency to invent "a science of law capable of determining with a high degree of precision both what the law is and what it ought to be" (p. 169). He pinpoints this tendency within a well-established tradition of Anglo-American jurisprudence represented by John Austin, Jeremy Bentham, and Thomas Hobbes.[78] That tradition explicitly rejects an experiential, common law model of legal education and professionalism founded on the "practitioner's worldly wisdom" (pp. 174-75, 179).

Kronman gleans criticism of the Langdellian scientific tradition from attacks mounted by Oliver Wendell Holmes and Jerome Frank. He looks favorably upon Holmes's and Frank's efforts to discredit Langdellianism, approving their treatment of adjudication as an independent, experiential, and discretionary process (pp. 189-90). Although he chides Frank's "essentially personal and therapeutic" notions of human responsibility, self-conscious understanding, and enlightenment, Kronman seems to adopt Frank's modernist sense of tragedy[79] and "celebration of mature

75. Kronman condemns the discipline of economics for denying "the phenomenon of moral incommensurability," equating "judgment with calculation," and diminishing the value of character and practical wisdom. P. 167.

76. Pp. 166-67. Kronman finds scientific realism, law and economics, and critical legal studies "linked" together "by a common contempt for the virtue of practical wisdom." P. 169.

77. P. 168. Kronman divides legal realism into scientific and prudentialist branches consistent with their differential analysis of practical wisdom in the study and administration of law.

78. Pp. 174-75. Kronman distinguishes Langdell's attempt to build a science of law inside the implicit logic of the common law from Hobbes's, Austin's, and Bentham's efforts to construct a science of law outside the common law through rational legislative reorganization and codification. Pp. 180-83.

79. On the modernist sense of tragedy in the practice of law, see Anthony V. Alfieri, *Stances*, 77 CORNELL L. REV. 1233, 1241 (1992). Like the judge who accommodates the "hard teaching" of uncertain and inevitably wrong judgments (pp. 193-94), the lawyer crafts-

despair."[80] Kronman also garners criticism of Langdellian scientific orthodoxy from the work of Karl Llewellyn, in spite of the scientific realists' espousal of Llewellyn's original program of devising a nonexperiential "systematic theory of law" (p. 196). Llewellyn's later abandonment of that descriptive program and his return to the common law craft tradition spurs Kronman to engraft the notion of craft upon the Aristotelian idea of practical wisdom.[81] The upshot of that merger is the concept of prudentialism.

Kronman grasps prudentialism as a means to restore confidence in the "reckonability of adjudication" (pp. 213-16). He operates on the premise that adjudication contains internal descriptive and normative constraints that guide the interpretive process.[82] These disciplining constraints — doctrinal rules, traditions of work, habits of thought, and filters of perception — render adjudication "reckonable to a pragmatically significant degree," albeit "not perfectly."[83] Nonetheless, the constraints permit a degree of reckonability sufficient to meet the practical needs of the good lawyer (pp. 218, 220, 223).

Disdainful of practical reason, the law and economics movement displaces the common law craft tradition of the lawyer-statesman with the antiprudentialist ideal of the lawyer-economist. Kronman imputes this displacement to the rationalizing impulse of

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man accommodates the imperfect and inexorably violent translation of a client's story into legal discourse. Alfieri, *supra* at 1241.

80. Pp. 193-94, 210. Martha Nussbaum captures this despair in describing the "difficulty" of establishing "normative commitments" through practical reasoning. *See* Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law,* 107 HARV. L. REV. 714, 715 (1994).

81. Pp. 196-201, 209-25. Llewellyn defines craft in terms of tradition, responsibility, and work. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 214 (1960). The work of the craftsman may stand steady or rise to "high artistry." *Id.* That benchmark of reliability reflects "the existence of some significant body of working know-how, centered on the doing of some perceptible kind of job." *Id.* The "healthy" craft, Llewellyn explains, "elicits ideals, pride, and responsibility in its craftsman." *Id.*

82. Interpretive constraints, Kronman submits, channel judicial discretion. *See* Anthony T. Kronman, *The Problem of Judicial Discretion,* 36 J. LEGAL EDUC. 481, 483 (1986) ("The tradition of thought within which the judge is situated, and within whose horizon he encounters his task, constrains him in the discretionary decisions that he makes.").

83. P. 217. Kronman derives his notion of disciplining constraints from the work of Owen Fiss and Stanley Fish. *Compare, e.g.,* Stanley Fish, *Fish v. Fiss,* 36 STAN. L. REV. 1325, 1339 (1984) (arguing that readers and texts "*are* structures of constraint, at once components of and agents in the larger structure of a field of practices, practices that are the content of whatever 'rules' one might identify as belonging to the enterprise") *with* Owen M. Fiss, *Objectivity and Interpretation,* 34 STAN. L. REV. 739, 744 (1982) (propounding the "idea of disciplining rules, which constrain the interpreter and constitute the standards by which the correctness of the interpretation is to be judged"); *see also* Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature,* 60 TEXAS L. REV. 551, 562 (1982) (contending that "[i]nterpreters are constrained by their tacit awareness of what is possible and not possible to do, what is and is not a reasonable thing to say, what will and will not be heard as evidence, in a given enterprise"); Stanley Fish, *Wrong Again,* 62 TEXAS L. REV. 299, 313 (1983) (discussing the "epistemological necessity" of practice constraints).

descriptive social science. A product of policy science, the lawyer-economist brings an efficiency-based normative standard to the incommensurable conflicts of adjudication (p. 228). This antiprudentialist standard, Kronman protests, mistakes empirical for normative measures of judgment. Efficiency calculations, he continues, fail to make moral conflicts reckonable.[84]

Kronman cites a similar antiprudentialist tendency prevalent in the CLS movement, notably in the early writings of Duncan Kennedy and Roberto Unger (pp. 240-64). He construes this tendency as an extension of the realist effort to overturn the Langdellian idea of an autonomous, compelling, and neutral logic internal to the law. Kronman is sympathetic to that effort, though not to its philosophical "methods and vocabulary."[85] Wary of the antiprudentialist bias of scientific realism, he questions Kennedy's "rationally inarticulable confidence" in "right-minded" intuitive judgments (pp. 247-48). He finds Unger's project of "total criticism" even more alarming.[86]

Kronman perceives in Unger "a devotion to the philosophical rationalization of all legal norms within a comprehensive scheme of values based upon nonlegal principles of a highly abstract sort" (p. 249). That devotion, he explains, lends shape to "a general theory of value capable of settling specific legal controversies in a system-

84. Pp. 234-35. Kronman's prior work shows a receptivity to the deployment of efficiency or utilitarian principles in adjudication. *See, e.g.*, Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143, 1167 (1979) (claiming that "a legal regime that recognizes the validity of after-acquired property clauses is more efficient than one that does not"); Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 9 (1978) (justifying a contract rule of unilateral mistake under a principle of efficiency); Anthony T. Kronman, *The Privacy Exemption to the Freedom of Information Act*, 9 J. LEGAL STUD. 727, 748, 760, 774 (1980) (asserting that privacy claims generally "should be treated more democratically and denied the status of 'trumps' that automatically defeat any competing interest of a 'merely economic' sort"); Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 381 (1978) (approving consideration of "economic sense" in contract law); Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227, 229 (1980) (maintaining that "a combination of utilitarian and voluntarist principles best expresses our moral judgments and best equips us to deal with the dilemmas of moral life").

85. P. 245. Kronman implicitly criticizes the CLS movement for fostering "an indifference to truth" in its scholarship. Kronman, *Foreword: Legal Scholarship and Moral Education*, *supra* note 42, at 964. He states: "there is a profound difference between *skepticism* about particular truth claims — a caution or reserve in accepting the asserted truth of particular propositions, especially those about human social life — and a *cynical carelessness* about the effort to generate such propositions and to establish their validity." *Id.* at 965. Doubtless he would extend that criticism to the postmodern strand of the CLS movement. *See Postmodernism and Law: A Symposium*, 62 U. COLO. L. REV. 439 (1991).

86. *See* ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 2 (1975) ("Total criticism arises from the inability of partial critiques of a system of thought to achieve their objectives and from the desire to deal with the difficulties the partial critiques themselves produce."). Kronman earlier denigrated Unger's claim of "total criticism." *See* Anthony T. Kronman, Book Review, 61 MINN. L. REV. 167, 180, 195, 198 (1976) (reviewing UNGER, *supra*).

atic way" (p. 253). For Kronman, such a general, totalizing theory amounts to "a normative science of law" (p. 253). Because any form of scientific orthodoxy, even a "critical" policy science, conceals an "antiprofessional" bias and a "contempt" for practical expertise, the prudentialist tradition of the common-law practitioner comes under threat.[87] Kronman adduces proof of antiprudentialist contempt in Unger's announcement of a lawyer's duty to "politicize" the law: "to turn low-level disputes that arise against a familiar and unquestioned background into controversies about that background itself" (pp. 263-64). Left unchecked, Kronman cautions, Unger's "self-destructive" program of critical legal science invites "professional suicide," a result that threatens to "abolish the profession" as a whole.[88]

Kronman's embrace of the traditional canons of legal education and the prudentialist tradition of the common law practitioner is weakened by a lack of empirical support. There is scant evidence, for example, that the case method of instruction inculcates the character trait of deliberative wisdom. Instead, because of its overreliance on appellate cases[89] and its insensitivity to differences of gender,[90] race,[91] and sexual orientation,[92] the case method seems to

87. Pp. 249, 261-64. Kronman chastises Unger for his abandonment of the "belief in a distinctive legal expertise" that molds "the lawyer's sense of professional identity." P. 263.

88. Pp. 249, 264, 270. Kronman infers that the politicization of doctrinal disputes explodes "any notion of a separate legal expertise" and, thus, portends "the destruction of the very idea of a legal profession." P. 264.

89. *See, e.g.*, Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 532 (1994) (commenting that appellate cases "offer students little opportunity to develop the skills of the legal counselor").

90. *See* Taunya L. Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137 (1988) (assessing evidence of gender bias in the law school classroom environment, structure, and language); Leslie G. Espinoza, *Multi-Identity: Community and Culture*, 2 VA. J. SOC. POLY. & L. 23, 35 (1994) (noting that women students in the law school classroom "are deprived of the ability to speak in the language that they have been socialized to speak"); Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 J. LEGAL EDUC. 311, 331 (1994) (reporting that "the self-esteem of far more women than of men is lessened by the law school experience itself"); *Cf.* Robert Granfield, *Contextualizing the Different Voice: Women, Occupational Goals, and Legal Education*, 16 LAW & POLY. 1, 19 (1994) (finding that "women may possess multiple identities in law school that are mediated by such contextual factors as occupational goals, race, and social class"); Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621, 640 (1994) (speculating that "there may be more variation among the individuals within a particular gender in their legal behavior, than differences across gender"). *See generally* Suzanne Homer & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1 (1989-1990).

91. *See* Frances L. Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511 (1991) (discussing the integration of race into the core curriculum of legal education).

92. *See* Jane S. Schacter, *Poised at the Threshold: Sexual Orientation, Law, and the Law School Curriculum in the Nineties*, 92 MICH. L. REV. 1910, 1927 (1994) (reviewing LESBIANS, GAY MEN, AND THE LAW (William B. Rubenstein ed., 1993)) (remarking that study of sexual orientation and the law illuminates "the regulation of sexuality and sexual activity more gen-

inhibit the development of wisdom in deliberative judgment. Likewise, there is little evidence that critical legal science deviates from, much less threatens, the tradition of common law practice. Kronman's reproval of Unger's incitement to turn "low-level disputes" into "background" controversies in fact contradicts the settled tradition of law reform litigation invented by common law practitioners.

III. Craft and Public Service

Fearing the reemergence of scientific orthodoxy in the guise of the law and economics and CLS movements, Kronman invokes the traditions of craft and public service. He employs these traditions to show the deficiencies in the ideal of the lawyer-policy scientist. That ideal recommends the "systematic study of the structures and patterns" of law through an interdisciplinary application of a variety of methods borrowed at the outset from "economics, statistics, political science, and philosophy" (p. 355). Kronman asserts "little need" for "multidisciplinary social science" in private practice (p. 356). Moreover, he contends that the ideal of the policy scientist undercuts the "value and distinctiveness of the lawyer's craft" expressed in the traditional techniques of analogy and distinction (pp. 356-57). Further, he argues that the ideal "lacks the depth and human meaning" associated with the concept of character essential to professional identity, pride, and personal meaning (pp. 356, 363).

To Kronman, the good lawyer possesses a distinctive character, expertise, and "special imaginative powers" demonstrated in "the art of handling cases."[93] The good lawyer deploys his expert knowledge of the law — legal rules and interpretive methods — and his imaginative ability to refine the art of well-crafted deliberation for its "own sake," *not* for "instrumental" purposes such "as a means for making money" or of championing a public cause (pp. 300-01, 359-62). Kronman is attracted in this respect to Llewellyn's sense of craft, especially the notion of horse sense: "the ability of those

erally, the relationship between legal rules and gender roles, the role of law in supporting or suppressing difference, and the boundary line between individual and communal rights").

93. Pp. 359-63. For Kronman, law practice is "case-centered." Kronman, *Practical Wisdom and Professional Character, supra* note 3, at 205. The case frames "a kind of prism which refracts the lawyer's more generalized doctrinal knowledge, and when he looks at the law he always does so from the perspective of a case and through the medium of its dense particularities." *Id.* at 204; *see also* Kronman, *Alexander Bickel's Philosophy of Prudence, supra* note 66, at 1612 ("Lawyers are, by professional training, experts in the handling of individual cases and not in the general design of institutions . . . ."). For this reason, Kronman declares, "no one except a lawyer is professionally competent to advise clients about the law." P. 134. *But see* Gerald P. López, Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice 39-41, 55-56 (1992) (insisting that "the lawyer is *not* necessarily better able than the client or others (professional or lay) to serve as representative").

who have mastered an activity to pursue it with subtlety and grace, employing powers of discernment irreducible to rules" (p. 349). The ambition of the lawyer-statesman is to "master" the art of craft in the service of the public good.[94]

Kronman calls for "a public-spirited concern for the good of the law as a whole."[95] This concern requires lawyers to strike a "balance" between the imperatives of commerce or politics and the conflicting aspirations of professional idealism (pp. 316-17). Absent that balance, professional idealism degenerates into mere "pretense and puffery" (p. 317). Kronman commends the republican ideal of the lawyer-engineer for its genuine dedication to public service (p. 22). He portrays that dedication as a "scientific" form of "public-spirited" problem-solving (pp. 18-20). Through civic-minded "scientific law reform," the lawyer-engineer advances the public good.[96] But, for Kronman, public service entails more than the civic-minded deliberation of the common good typical of any "exemplary citizen" or the strategic-minded calculation of political interest expected of a public cause lawyer.[97] Public service demands the character and leadership distinctive of statesmen. The character of the lawyer-statesman rests on the noninstrumental virtue of practical wisdom intrinsic to "a calling or vocation" (pp. 366-68).

Kronman is deeply wedded to the secular "idea of a calling, of salvation through work" (p. 370). Work, he explains, not only ties the individual to the "public world" but exerts a "transformative effect" on the human personality, shaping character and identity (pp. 368-69, 371). Personal fulfillment — the ability to establish a meaningful place in the world — depends in substantial part on the

94. Pp. 316, 350. *See* Kronman, *Living in the Law, supra* note 3, at 842 (asserting that any lawyer who lacks a "public-spirited" view of law practice "is to that extent a professional failure").

95. P. 167. Kronman argues that lawyers bear both the "general obligations" of citizenship and "certain special responsibilities, deriving from their status or position, to preserve and perfect the legal institutions that in our society constitute a very large part of the public order itself." Kronman, *Living the Law, supra* note 3, at 842 (footnote omitted).

96. Pp. 20-21. The lawyer-engineer, Kronman explains, practices a "science of law reform" out of a "general commitment to the public good." Pp. 19-20.

97. Pp. 17, 26-27, 33-35. Kronman contends that an instrumentalist attitude often motivates a public-spirited lawyer's practice. Kronman, *Living in the Law, supra* note 3, at 843. The lawyer, for example, "may see himself merely as the instrument by which some communal good is to be achieved." *Id.* At the same time, Kronman admits, "a public-spirited lawyer may find intrinsic satisfaction in his work if he believes that it not only leads to but actually constitutes an element of the public good." *Id.* at 844. The tension between intrinsic and instrumental practice values transmits "character-forming consequences." *Id.* at 845.

Altman denies this tension, pointing out instead that public interest litigation presents "opportunities to exercise public-spiritedness and practical wisdom" by allowing litigators to "choos[e] clients in terms of their objectives" and to "require their clients to deliberate with them about the moral or political issues raised during representation." Altman, *supra* note 8, at 1069-70; *see also* Margulies, *Progressive Lawyering and Lost Traditions, supra* note 67, at 1158 (claiming that public interest lawyers "dissolve" intrinsic-instrumental dichotomies).

"meaning-giving power" of public institutions and professional work (pp. 369-70). Kronman bemoans the "dramatic narrowing of the possibilities of salvation within the realm of work" sparked by the dissolution of traditional institutions and professional ideals (p. 372). Nevertheless, he is reluctant to give up the "demand for fulfillment" in the work of lawyers (p. 373). He points to the "sheer quantity of time" and the "shifting" public-private spheres of commitment dictated by the practice of law (p. 373). Furthermore, he notes that the idea of law as a calling "continues to be powerfully affirmed" in legal education (p. 374).

Yet, Kronman's call for professional fulfillment creates a double bind. Neither the realist ideal of the lawyer-policy scientist nor the republican ideal of the lawyer-engineer offers acceptable counter-ideals to the lawyer-statesman. At the same time, the historical "standard-bearers" of the lawyer-statesman ideal — large corporate law firms — no longer provide an environment "hospitable" to the disposition of the lawyer-statesman.[98] Kronman exposes "revolutionary" and "irreversible" changes in the institutional structure, culture, and practice of the large corporate law firm.[99] The changes reflect both outward, firm size and geographic diversification, and inward, lawyer specialization and client-firm discontinuity, developments over the past two decades (pp. 274-78). Outwardly, Kronman remarks, an increase in firm size, a greater differentiation of "staffing hierarchies," such as two-track associate systems, part-time associates, and senior attorneys, and an expansion in the public disclosure of compensation practices, including firm revenues, partnership shares, and associate salaries, undermine the internal "stability" and "solidarity" of lawyer-firm "ties" (pp. 278-79). Inwardly, he adds, the growth of specialized knowledge and the shift

98. P. 308. Kronman considers large firms more congenial to women and blacks. Women, he observes, "are joining large firms in numbers that are roughly proportionate to their representation in the pool of qualified applicants" P. 292. Though conceding "occasional instances of overt sexism and allegations of a subtler but more pervasive discrimination in the assignment of work and promotion to partnership," he accumulates "little evidence that large firms still discriminate against women on a systematic basis at the initial hiring stage" Pp. 292-93. Whatever "competitive disadvantage" women suffer, therefore, stems from personal preference, not institutional practice. Pp. 292-93. According to Kronman, the "real challenge" confronting women is neither the gendered definition of job qualifications nor overt and covert patterns of discrimination, but "finding the time and energy to do their jobs in the way and on the terms their firms demand, while also meeting family responsibilities" Pp. 292-93. *But see* Marilyn J. Berger & Kari A. Robinson, *Woman's Ghetto Within the Legal Profession*, 8 WIS. WOMEN'S L.J. 71, 72 (1992-93) ("Women [in the legal profession] are still relegated to secondary status in position and pay.").

Blacks, by comparison, though "still not a significant presence" in large firms, furnish Kronman with evidence of "some signs" of institutional advancement. P. 293. Other people of color, Hispanics and Asians for example, apparently are not in evidence.

99. P. 274. Altman asserts that recent institutional changes "may have further undercut the strength of the lawyer-statesman ideal," but "were not in fact the cause of that ideal's decline or, in turn, of the current dissatisfaction in the American legal profession." Altman, *supra* note 8, at 1034.

to a "transactional" client-firm relationship[100] narrow the opportunities for lawyers to cultivate the "capacity" for ends-oriented judgment needed for third-personal deliberation.[101] To Kronman, the capacity to "synthesize" the considerations relevant to a client's case and to give deliberative advice about "ends" distinguishes the wise counselor from the technocrat.[102]

Kronman's wise counselor displays "a cultivated subtlety of judgment whose possession constitutes a valuable trait of character, as distinct from mere technical skill" (p. 295). That judgment values the practice of law as an "intrinsic good" not as an instrumental enterprise for the pursuit of commercial or public interests (pp. 295-96). The cultural valuation of the noninstrumental rewards and satisfactions of work conforms to a vision of the law as an honorable calling.[103] Modern large-firm corporate law practice, however, frustrates Kronman's vision. Contemporary law firm culture, he observes, is unable to sustain a belief in the virtues of character and craftsmanship that inspire the ideal of the lawyer-statesman (p. 291). Although the "internal culture" of the large-firm appears more "open" and "diversified" in social, economic, and religious terms, this culture suffers under new "commercial" practices, conceived by marketing directors and management consultants, that devalue the "internal goods of craftsmanship" (pp. 280, 293, 301). Lawyers experience these practices concretely, for example, in a longer average work day (pp. 281, 301, 303). Lengthening the work day, Kronman opines, inhibits a lawyer's ability to develop his "powers of judgment" outside the "realm of work," deforming his "interests" and "attachments."[104]

To escape the double bind of failed public and private alternatives, Kronman advises practitioners inspired by the lawyer-states-

100. A transactional relationship stresses the episodic handling of special, exotic, unusual, or exceptional matters by outside counsel trained in subject-matter specialties. Pp. 284-85.

101. Pp. 283-88. Kronman emphasizes practical wisdom as a trait of character acquired "only through the experience of having to make the sorts of decisions that demand it — only through an extended apprenticeship in judgment." P. 290.

102. Pp. 288-90. A transactional law practice "limits the relationship between each client and the firm to a relatively brief episode whose extraordinary nature must often make it difficult to draw, from that encounter alone, a full and balanced picture of the client's needs and aspirations (which institutions too possess)." P. 286. Lacking a descriptively thick and factually concrete deliberative context, "it becomes more difficult to advise a client in any but instrumental terms, and in particular to answer the questions of ultimate ends that extraordinary situations often pose for the client's human representatives" P. 286. Kronman asserts that a lawyer's chief function is to help a client decide what "ends" she should pursue. P. 288.

103. Kronman insists that a noble vision of the law as a calling historically imbued the culture of large-firm practice, encouraging the view that "whatever its instrumental value, the work of lawyers is also inherently rewarding and offers satisfactions that make the doing of it valuable for its own sake." P. 294.

104. Pp. 304, 306-07. *See* Kronman, *Living in the Law, supra* note 3, at 839-40 ("What makes the nakedly instrumental view of law practice . . . so unattractive is that it takes in too much of life, or more exactly, too much of what is important in life.").

man ideal to "stay clear" of large-firm practice and, instead, seek out smaller, "spin-off" firms, in-house corporate law departments, or the "work of the country lawyer" in "small-town or small-city practice" (pp. 378, 380). But, under Kronman's own analysis, such alternative institutional settings fare no better in preserving the lawyer-statesman ideal (p. 308). The in-house corporate law department, while offering a more "contextual" lawyer-client experience, confines the "range and diversity" of that experience and, thus, deprives the in-house lawyer of the "opportunity" to engage in cooperative deliberation regarding the choice of client ends (pp. 309-10). This lack of deliberative opportunity, combined with the economic "vulnerability" that attends "single client" representation,[105] compromises the in-house lawyer's independence and weakens his capacity for deliberative wisdom (pp. 310-11). Similarly, pushed toward specialization and underdiversification, small-to-mid-sized firms flounder in an increasingly competitive commercial market (pp. 312-13).

Kronman concedes these deficiencies. That admission, however, will not solve his double bind. The solution lies in recontextualizing his treatment of professional ideals and practices. In place of context, Kronman posits a dichotomy of intrinsic-instrumental value, separating out the *intrinsic* virtues of character and craftsmanship from the *instrumental* virtues of advocacy and social justice. Next, he universalizes this division under the pretense of neutrality. In the case of race and gender, the division collapses. For women and blacks, intrinsic and instrumental virtues merge in the craftsmanship of handling cases.

Like other subordinated groups, women and blacks invoke "public-spirited reasons for becoming a lawyer."[106] As Amy Gutmann notes, Kronman's intrinsic conception of legal virtue "unnecessarily separates" this spirit of public service from practical judgment.[107] Lawyers motivated by social justice, according to Gutmann, "need not have anything resembling a purely instrumental relation" to their work.[108] Rather, she adds, "legal practice in defense of social justice may also be rewarding in itself, because it too enlists the virtue of practical judgment."[109]

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105. Kronman estimates that "the more a lawyer depends on a given client for material support, the harder it becomes to preserve the distance that every real counselor must keep." P. 311.

106. Gutmann, *supra* note 62, at 1767.

107. *Id.* at 1767.

108. *Id.* at 1768. Gutmann remarks: "In the service of social justice, law at its best enlists the practical judgment of lawyers, and (as we have seen) the exercise of practical judgment by lawyers requires deliberation with clients, the mutual interchange of relevant information, and understanding." *Id.*

109. *Id.*

Echoing this view, David Wilkins cites the intrinsic satisfactions of the work accomplished by the "great lawyers" of the civil rights movement.[110] Paul Finkelman characterizes these "pioneering" black lawyers as social engineers.[111] Situating their work in the "context of social and legal oppression,"[112] Finkelman explains that "for most black lawyers in practice before 1944, there was no clear distinction between the roles of 'social engineer' and a traditional lawyer."[113] The distinction dissolved because blacks, in seeking entry into the legal profession,[114] "thrust themselves into the fight against racism and segregation, regardless of their original intentions."[115] Kronman's inattention to the racial context of handling cases distorts the social reality of black lawyers.

Kronman's decontextualization of practice also distorts his analysis of large-firm corporate lawyers. This is not to say that corporate lawyers no longer wield cultural authority.[116] That authority, however, must be located in the context of historical discrimination against women[117] and blacks.[118] Discrimination taints the intrinsic rewards of corporate law practice. Further, discrimination spawns

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110. Wilkins, *supra* note 61, at 470. For a historical survey of civil rights movement lawyers, see JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994); RICHARD KLUGER, SIMPLE JUSTICE (1976); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987).

111. Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers as Social Engineers,* 47 STAN. L. REV. 161, 178 (1994) (reviewing J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944 (1993)).

112. *Id.* at 165.

113. *Id.* at 180.

114. *See* Joseph Gordon Hylton, *The African-American Lawyer, the First Generation: Virginia as a Case Study,* 56 U. PITT. L. REV. 107, 114 (1994) (explicating the informal barriers blocking the entry of African-Americans into the legal profession during the late nineteenth and early twentieth century).

115. Finkelman, *supra* note 111, at 203 ("In offering legal services to African-Americans, black lawyers gave a disenfranchised group a modicum of power and protection.").

116. *See* Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society,* 44 CASE W. RES. L. REV. 345, 357 (1994) (concluding that "corporate lawyers still have significant cultural authority: they can persuade sophisticated users that they have something valuable to offer").

117. *See* Mark S. Kende, *Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination Against Women Partners,* 46 HASTINGS L.J. 17, 25 (1994) (reporting that "because of discrimination, women lawyers and other professionals hit a glass ceiling and rarely reach leadership positions in their law firms, law schools, or in public life"); Menkel-Meadow, *supra* note 90, at 649 ("Women actors in the legal system continue to report discrimination and the perception of being treated differently from men . . . in the legal system, while men report either lack of consciousness or awareness of discriminatory practices or a belief that the system does operate fairly and neutrally.") (footnote omitted); *cf.* Nelson, *supra* note 116, at 377-78 ("[T]he broad statistics imply that, while men continue to enjoy higher rates of promotion, a substantial number of women are gaining partnership positions.").

118. *See* Menkel-Meadow, *supra* note 90, at 653 ("[T]he bad news is that partnership rates for women and minorities are still lower than their participation and length of time in the profession would predict and women and minorities remain highly segregated in different parts of the profession."); Nelson, *supra* note 116, at 379 ("[W]hile there has been some

institutional problems of family accommodation[119] and personal fragmentation.[120] Carrie Menkel-Meadow attributes these problems to "a clash of cultures" over "demands for more humane and horizontally satisfying work on the one hand and the requirements and exigencies of the economic (and vertical) bottom line on the other."[121] Neglecting context, Kronman overlooks failings in the intrinsic values of a corporate law practice founded on gender and racial hierarchies.

CONCLUSION

Thwarted at an "institutional level," Kronman turns to individual lawyers, exhorting them to honor the ideal of the lawyer-statesman in their careers (pp. 7, 368). Yet, once again, the partisan ethos of instrumentalism betrays him.[122] That betrayal is inevitable, for Kronman's thesis rests on a false dichotomy of intrinsic-instrumental value. Alternative practice ideals and traditions embraced by feminist,[123] critical race,[124] and humanist[125] scholars demonstrate the entrenched, interwoven nature of intrinsic and instrumental val-

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increase in the proportion of minorities in the upper precincts of the profession, it has come very slowly and blacks in particular have not gained substantially.").

119. *See* David L. Chambers, *Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family,* 14 LAW & SOC. INQUIRY 251 (1989) (appraising reported levels of satisfaction among women lawyers balancing family and professional burdens); *cf.* Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics,* 2 VA. J. SOC. POLY. & L. 75, 113 (1994) (mentioning that "in some instances the development of parental or healthcare-giving leaves has occurred because of the activism of some male attorneys, who also seek to spend more time with their families and who seek to humanize their commitments to work").

120. *Compare* Susan S. Grover, *Zoe Baird, Betrayal and Fragmentation,* 2 S. CAL. REV. L. & WOMEN'S STUD. 429 (1993) (addressing the duality and fragmentation of female professionals) *with* Marc Linder, *I Ain't Gonna Work on Zoe's Farm No More: Reply to Susan Grover,* 3 S. CAL. REV. L. & WOMEN'S STUD. 331, 333 (1994) (challenging female strategies of personal-professional integration); *see also* Nelson, *supra* note 116, at 380 ("Qualitative studies reveal that women attorneys still experience complex and risky career choices as they attempt to juggle domestic responsibilities and professional work.").

121. Menkel-Meadow, *supra* note 90, at 623 (footnotes omitted).

122. Altman explains: "[T]he standard conception of the litigator's role since at least the beginning of this century subordinates the defining virtues of the lawyer-statesman ideal, practical wisdom and public-spiritedness, to the partisan goal of victory for the client." Altman, *supra* note 8, at 1034.

123. *See, e.g.,* RUTH COLKER, PREGNANT MEN: PRACTICE, THEORY, AND THE LAW (1994); Marie Ashe, *"Bad Mothers," "Good Lawyers," and "Legal Ethics,"* 81 GEO. L.J. 2533 (1993); Naomi R. Cahn, *Inconsistent Stories,* 81 GEO. L.J. 2475 (1993); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education,* 75 MINN. L. REV. 1599 (1991).

124. *See, e.g.,* LÓPEZ, *supra* note 101, at 11-82; David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers,* 45 STAN. L. REV. 1981 (1993).

125. *See, e.g.,* MILNER S. BALL, THE WORD AND THE LAW (1993); Cunningham, *supra* note 42, at 1331-87; Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers,* 81 GEO. L.J. 2665 (1993); James Boyd White, *Translation as a Mode of Thought,* 77 CORNELL L. REV. 1388 (1992).

ues in lawyering. Practical pursuit of these values entails a complicated process of contextual accommodation Kronman seems unwilling to acknowledge. Instead, he places his faith in an artifact that privileges the mind and character of elite white, male, large-firm private lawyers. Faith in the body of an artifact may earn Kronman personal salvation, but it will not accord the legal profession secular salvation.

Peter Margulies notes that "Kronman's distrust of revolutionary politics leads to his rejection of civic humanist use of narratives as sources of memory for transformative politics or law." Margulies, *Progressive Lawyering and Lost Traditions, supra* note 67, at 1155. Justice O'Connor attests to the power of narratives in lauding Justice Marshall's storytelling "capacity" to translate human "suffering in a way that others can bear and understand." Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur,* 44 STAN. L. REV. 1217, 1220 (1992).