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Taking Kronman and Glendon One Step Further: In Celebration of “Professional Schools”

Laurel Terry*

I. Introduction

Anthony Kronman’s *The Lost Lawyer*¹ opens with a conclusion: “This book is about a crisis in the American legal profession. Its message is that the profession now stands in danger of losing its soul.” The introduction to Part I of Mary Ann Glendon’s *A Nation Under Lawyers*² concludes with a question: “Why are so many lawyers so sad?”

This is pretty strong stuff. Given this language, and the theses of these books, I was surprised that when I had finished these books, I was not depressed. I found myself asking: “Why don’t I feel sad?”

This essay strives to resolve the apparent contradiction between the fact that on the one hand, I recognize many of the problems these books identify, yet on the other hand, I am not ultimately depressed by these books. Part I of this essay begins by providing some background on the theses of the Glendon and Kronman books. Part II sets forth my agreement with Glendon and Kronman with respect to many of the problems in academia, legal practice, and the courts that they describe. Part III explains why, despite my recognition of the problems Glendon and Kronman identify, I ultimately am not discouraged by these books. Part IV sets forth further reflections on the Glendon and Kronman books and my suggestions about steps the academic community

* Professor of Law, The Dickinson School of Law. I wish to thank my colleagues for the lively debate, comments and disagreement which helped me crystallize my thoughts, for which I take full responsibility. I particularly wish to thank Bill Barker, Beth Farmer, Ted Janger and Christine Kellett. I also acknowledge gratefully the assistance of my research assistant Michael Gottlieb.

1. ANTHONY T. KRONMAN, *THE LOST LAWYER* (1993).

2. MARY ANN GLENDON, *A NATION UNDER LAWYERS* (1994).

might take to improve legal education. As this section explains, a logical extension of the Kronman and Glendon books suggests revising the framework the legal community uses to think about and evaluate law schools. Instead of using a *unitary model*, in which all law schools are evaluated under the same criteria, I believe we should adopt a framework which explicitly recognizes *the existence and validity* of two alternative models of law schools, namely the research-institution model and the professional-school or teaching-institution model. Law schools would then be evaluated according to their performance under the criteria applicable to that model. If this dual-model mentality were adopted, one could begin using the term "professional school" with pride, rather than as a pejorative term.

II. Background

Dean Peter Glenn's introduction to this symposium issue has summarized the Glendon and Kronman books. As a preliminary matter, I should state that I accept many of the fundamental premises of the Kronman and Glendon books.³ I value, rather than reject, the ideal of the lawyer-statesman, which Dean Kronman articulates.⁴ And I accept rather than reject Professor Glendon's admonition that we should treasure our common law tradition and avoid having our students receive ideals without technique or technique without ideals.⁵ Kronman and Glendon each took a book to develop their theses; I will not try to defend my judgment here other than to say that much of Kronman's and Glendon's messages made sense to me.⁶ When Kronman articu-

3. See Peter Glenn, *Introduction: Conversations About the State of the Legal Profession*, 100 DICK. L. REV. 477 (1996).

4. KRONMAN, *supra* note 1, at 11-53. Among other things, Kronman asserts two conditions that are necessary for a lawyer-statesman. First, the lawyer's work must require certain powers or capacities whose exercise are valued for their own sake, not just because they produce an independently desirable outcome, even of a morally praiseworthy kind. In other words, the lawyer must enjoy and take pride in the *process* of lawyering, rather than just the outcome achieved. Second, a lawyer-statesman must possess wisdom and judgment, and these characteristics must be part of the lawyer's identity, elements of the lawyer's personality, that bear on who he is as well as what he is. In short, they must be traits of character. See *id.*

5. See GLENDON, *supra* note 2, at 179-98.

6. Glendon and Kronman's books are very rich and very dense. I envision my essay as a snapshot showing some of my reactions to these books and areas in which my experiences and conclusions are either consistent with, or diverge from, those articulated in their books. Given the richness of these books, however, I certainly do not want to suggest

lates the ideal of the lawyer-statesman, who embodies wisdom and character and who derives satisfaction from the process of lawyering, rather than just the result, I believe Kronman captures qualities that many admire in those designated as "great" lawyers; that these qualities are intrinsically worthwhile; and further, that this model captures the qualities to which many students justifiably aspire.⁷ I similarly found myself agreeing with Glendon's defense of the

a blanket agreement with all of the ideas in these books. To fully respond, one would need much more space (as well as a background that I currently do not have). In short, I have attempted to comply with the law review's invitation which asked me to "focus on your experiences in any of the areas addressed in the [Kronman and Glendon] books."

7. See KRONMAN, *supra* note 1, at 11-53. In my view, Dean Kronman's essay in this symposium goes further than his book. His essay, which I first heard at the March 1996 Hofstra Conference entitled *Legal Ethics: The Core Issues*, provides an overview of the Aristotelian and contractarian traditions. Kronman then contrasts the role of the lawyer as envisioned by the contractarians on the one hand, and by Aristotle and the republicans on the other hand. Kronman goes on to analyze the central problems of legal ethics from these competing traditions. In doing so, Kronman indicates his place is with the republicans.

When I read *The Lost Lawyer*, however, I did not see Kronman as going this far. Although Kronman certainly draws upon Aristotelian principles in developing his model of the lawyer-statesman, I did not interpret the book to mean that one must accept the republican view of lawyers in order to value his articulation of the lawyer-statesman.

Kronman describes a contractarian's view of lawyers as follows:

A need therefore arises, even in a strictly contractarian community, for a class of experts, well-versed in the law, who can assist their fellow citizens in navigating the shoals and channels of the legal order. This is the role that lawyers play on a contractarian view of their function. Lawyers help clients pursue their self-interest by providing the legal expertise that clients lack.

Anthony T. Kronman, *The Fault in Legal Ethics*, 100 DICK. L. REV. 489, 495 (1996). I see nothing in this view, however, that is inconsistent with what I understood as Kronman's ideal of the lawyer-statesman: someone who has wisdom and judgment, and who enjoys the process of lawyering, rather than just the outcome. As I read Kronman's statements about contractarians, I thought of Professor Monroe Freedman and his well-known views that a lawyer should not reveal client confidences even in the face of client perjury. I assume that Dean Kronman would say Professor Freedman comes from the contractarian tradition, yet I see nothing inconsistent between Professor Freedman's views and the lawyer-statesman. I think there is a big difference between having wisdom and judgment and believing you should advise your client on the one hand, and ultimately deferring to client autonomy and choice on the other hand.

Similarly, at a recent ethics conference, Professor Susan Koniak expressed disagreement with Kronman insofar as he discourages passion in lawyers. I did not see Kronman's lawyer-statesman as inconsistent with Koniak's passionate lawyer model. That is, I am not sure she would disagree with a model in which lawyers have wisdom and character and enjoy the process of lawyering, as well as the end result. (Thus, even if Dean Kronman's essay in this issue is inconsistent with Professor Koniak's passionate lawyer, because he would not accept the "as well as" language, I did not see that inconsistency in his articulation of the lawyer-statesman.)

vitality and intrinsic validity of our common law tradition.⁸ While I have never ended a class by singing “rowdy dowdy doodle-ee-o,” as Glendon described Professor Llewellyn doing, after reading Glendon’s book, I agree with the spirit of this refrain, which celebrates our legal heritage and certainly wish I had the nerve to end class this way!⁹ But although I agree with much of what Kronman and Glendon say, this essay is not intended as a critique or comprehensive review of their books, but as a reflection about how their observations fit in with my experiences.

III. Recognition and Pessimism

While reading Kronman’s and Glendon’s books, I expected to ultimately feel depressed since I recognized many of the phenomena they described and agreed with their evaluations of these phenomena. Kronman’s and Glendon’s descriptions of the courts, for example, struck a familiar note. Kronman, in particular, identified several factors in the court system that he believed were contributing to the decline of the lawyer-statesman ideal. As I read these sections of his book, I found myself concurring with his descriptions and judgments. Much of what he described were experiences I had had and issues I had thought about both during and after my judicial clerkship and externship. These include: the impact of the heavy caseload on judging;¹⁰ the power afforded to judicial clerks;¹¹ the effect of the size of the judiciary on collegiali-

8. I find Glendon’s book much more difficult to write about because it is much more diffused than Kronman’s book. Whereas Kronman’s book has a central theme around which the book revolves, I found Glendon’s book to have many different ideas since her central theme was the much broader idea of the role of lawyers in the United States. Thus, I do not purport to claim that the sentence to which this footnote refers is a fair summary of Glendon’s book; rather, the sentence to which this footnote refers is one of the threads in Glendon’s book, and the one to which I most strongly reacted. One of my colleagues who had not read Glendon’s book inferred from my summary a defense of the common law, in contrast to a statutory approach. This latter point is certainly not what I intended, nor is this latter issue addressed in Glendon. As is suggested later, this summary is simply meant to capture Glendon’s endorsement of the vitality and worth of our legal tradition.

9. GLENDON, *supra* note 2, at 177-78, 252-53. Karl Llewellyn sang a ballad of his own composition, with this last line, to his “Elements of Law” class at the University of Chicago in the Spring of 1961.

10. See KRONMAN, *supra* note 1, at 320-25; see also GLENDON, *supra* note 2, at 144.

11. See KRONMAN, *supra* note 1, at 330-31, 347-51; see also GLENDON, *supra* note 2, at 145-47. Although I was comfortable with the oversight I was given as a judicial clerk and thought it appropriate, I was troubled by the lack of oversight by other judges to their clerks.

ty;¹² the value of writing an opinion (or bench memo) as a means of testing a conclusion;¹³ and the consequences of managerial judging¹⁴ Although some of his observations did not occur to me while I was clerking, I now agree with the validity of these comments.¹⁵ In short, I both recognized the phenomena in the courts Kronman describes and agreed with his conclusions that these phenomena tend to undermine the values of the lawyer-statesman.

Another institution Kronman and Glendon describe is the large law firm. Both authors conclude that the nature of practice in a large law firm has changed for the worse since the "Golden Era."¹⁶ Kronman and Glendon identify many of the same factors, which they conclude have contributed to the change in the nature of large law firm practice and the ethos of those large firm lawyers.¹⁷ These factors include, among others, the fundamental

12. See KRONMAN, *supra* note 1, at 342-47. Based on my experiences in the Second and Ninth Circuits, I believe that the size of the court can make a difference in collegiality and the way opinions are written. The judges in the Ninth Circuit certainly did not know each other as well as the judges in the Second Circuit. Moreover, my perception was that in the Ninth Circuit, at least some judges were less inclined because of collegiality concerns to issue separate opinions. (My impression thus stands in contrast to Kronman's conclusion on page 342, *supra* note 1.) On the other hand, I also sensed that in the Ninth Circuit the judges didn't necessarily have the level of collegiality and familiarity with one another where they were willing to fight about particular sentences in an opinion, or cites. In other words, their votes were more likely to be "all or nothing" propositions than they were in the Second Circuit, a fact which ultimately does not lead to better opinions, in my view. (It should be noted, however, that I worked in the Ninth Circuit shortly after the appointment of approximately 33% additional judges. My experience may simply reflect the effect on collegiality when a court must absorb a large number of new judges at one time.)

13. See KRONMAN, *supra* note 1, at 320. My endorsement of Kronman's conclusions are based on the benefit I always achieve when I commit my views to writing, rather than any deficiency I observed on the part of the judges I saw. It certainly makes sense to me, however, that judges similarly would find that their thinking processes are refined when they have to commit their thoughts to writing.

14. See generally Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). After litigating in Oregon, I concur that on occasion, a judge's interest in expediency may create a sense that the judge is less neutral than is appropriate or less mindful of the parties' rights and interests than the judge should be.

15. I can now see, for example, how the age and inexperience of the clerks leads to a particular and longer style of opinion-writing. See KRONMAN, *supra* note 1, at 348-50.

16. Kronman and Glendon differ somewhat with respect to the issue of how long this "Golden Era" lasted. Glendon described this era as beginning to disintegrate in the 1960s. See GLENDON, *supra* note 2, at 90; KRONMAN, *supra* note 1, at 50, 283, 354.

17. Both Glendon and Kronman, for example, conclude that most large firm lawyers no longer feel they can afford to tell their clients, "Your proposed conduct is legal, but it is dumb and morally wrong and you shouldn't do it." GLENDON, *supra* note 2, at 35; accord KRONMAN, *supra* note 1, at 283-91. The language they use to discuss this change differs,

shift in the nature of the lawyer-client relationship, including the shift in the type of work handled for clients and the more episodic nature of the client-lawyer relationship; the lack of security for lawyers in firms; the changes in lawyer compensation; and the tremendous number of hours that lawyers in large firms must work. Although Glendon and Kronman emphasize different things in describing how the firms came to be in the state they are in, it is undeniable that their descriptions of the large firm institution are strikingly similar.

These descriptions once again struck a familiar note for me. In January 1982, I joined what was then Oregon's largest firm. Although I did not experience the "Golden Age" of large law firms,¹⁸ I heard enough to make me suspect that my experience in the firm was different than it would have been twenty or thirty years earlier. During my tenure at the firm, there were lawyers who unquestionably fit the lawyer-statesman model.¹⁹ Most of these, however, were the older lawyers. Moreover, during my tenure at the firm, even with respect to the younger lawyers, I sensed a shift in power from the most humanistic lawyers — the lawyer-statesmen if you will — to those who were more money oriented.

In addition to seeing the decline of the lawyer-statesman in my firm, I observed some of the other factors cited by both Kronman and Glendon. For example, even at my junior level, I was aware of the lawyer-shopping that clients did, the importance of corporate counsel, and the episodic nature of many of our relationships. I also experienced the pressure of billing hours, which Kronman and Glendon describe.²⁰ Indeed, billing hours was bad enough, but what I particularly dreaded was the monthly computer printout that

however. Kronman talks in terms of the decline of the lawyer-statesman. *Id.* Glendon talks in terms of the distinction between "traders" and "raiders" and explains why many large firm lawyers are acting like raiders in situations were they formerly acted liked traders. GLENDON, *supra* note 2, at 63-69.

18. See *supra* note 16 discussing the timing of the Golden Age of the law firm.

19. Professor Geoff Hazard once described the "chitchat" and teamwork he experienced when litigating with Manley Strayer, lamenting that "litigation and transaction work these days is often done by assigning discrete segments to various members of a team without such wasteful chitchat." Geoff Hazard, *Ethics*, NAT'L L.J., Nov. 27, 1989, at 13-14. I worked for this same firm and found my experiences with lawyers such as George Fraser and Barnes Ellis to be similar to Professor Hazard's description of his experiences with Manley Strayer. Both of these lawyers are people I would describe as lawyer-statesmen.

20. GLENDON, *supra* note 2, at 29-32; KRONMAN, *supra* note 1, at 300-07.

listed my hours and how they compared to the hours of my fellow associates. This imposed a constant pressure on associates to increase their monthly billable hours so as to avoid being in the bottom fifty percent. (At the same time, I heard the stories of how the partners used to meet at Christmas to set the yearly bill for one of our largest clients.)

I also experienced the exhaustion Glendon described: during law school I read Dostoyevsky in my free time, but when I was in practice I switched to Dick Francis mysteries. In sum, when I read Kronman's and Glendon's analyses of large firm practice, I found that their observations were consistent with my experiences.

Kronman and Glendon also discussed the state of the legal academy. Both described and decried the development in the academy towards "grand theories" that are intended to explain all of law, or at least a particular area of the law.²¹ Kronman, for example, suggests that this use of a grand theory is the unstated orthodoxy of legal scholarship today:

The contempt for prudence that the leading proponents of these two movements [law and economics and critical legal studies] share is an important, though unnoticed, link between them, which their rhetorical battles have largely obscured. Indeed, so powerful is the disdain for the claims of practical wisdom that writers as different as Richard Posner and Roberto Unger share that I am tempted to describe it as the central, if unrecognized, orthodoxy of American legal scholarship today.²²

According to Kronman, one consequence of the focus on grand theories, as opposed to craftsmanship and prudence, is that "[t]he two sides of law teaching — always somewhat in tension but previously viewed as parts of a common endeavor — are today more widely separated and the relationship between them has become one of mistrust."²³ Kronman finds none of the possible

21. Kronman, for example, suggests that in this regard, law schools may be more Langdellian than they realize in that many professors are still searching for the "grand theory" to unify the law. KRONMAN, *supra* note 1, at 169-74. On a related point, Glendon praised the judging of Justices Powell and White, while noting that a writer for *The New Republic* "sneered at [Justice White] for being 'uninterested in a constitutional vision'" and while also noting that "White's offense, to many professional Court watchers, was that he was more interested in getting each decision right than in promoting an agenda." GLENDON, *supra* note 2, at 171; *see generally id.* at 170-72.

22. KRONMAN, *supra* note 1, at 225-26.

23. *Id.* at 268.

responses to this tension satisfactory.²⁴ Glendon similarly laments some of the recent developments in the academy.²⁵

I recognize the phenomena, described by Kronman, from my perspectives as both a professor and a student. As a professor, there are times when I feel inadequate with respect to my scholarship because of my lack of a grand theory. I am similarly uncomfortable, at times, because I want my articles to be useful to lawyers and judges, as opposed to merely engaging in a dialogue with other professors. (This issue of the proper audience for my scholarship is directly related to the nature of that scholarship and whether I address the grand theories.²⁶) Thus, consistent with Kronman's and Glendon's observations, I have found that one must work very hard to maintain a sense of self-confidence and self-worth if one's scholarship does not employ a grand theory, and if one acknowledges writing articles intended to be useful to lawyers

24. Kronman suggests that such a professor has three responses. First, the professor can accept the priority of the prudential attitude that informs much classroom teaching and try to accommodate one's writing to it. But in view of the hiring and promotion practices at many schools, he believes that many academic lawyers would choose to subordinate teaching to writing rather than vice-versa. Second, one can simply admit that teaching rests on prudentialist assumptions that cannot be defended from a theoretical viewpoint and look at teaching as an unpleasant chore. The third perspective affirms the priority of the scholarly point of view, but attempts to import the theory into the classroom. *Id.* at 268.

25. GLENDON, *supra* note 2, at 203-29.

26. I found it interesting that even Glendon and Kronman, who agree on so much, may disagree on the proper audience for scholarship. Kronman asserted, without explanation, that academic lawyers were writing to one another. KRONMAN, *supra* note 1, at 265-69. Glendon acknowledged the possibility that we are writing for lawyers and judges. GLENDON, *supra* note 2, at 205-09. My own view, as set forth in section five of this essay, is that there is room for both models. I think there should be scholarship that is intended primarily to be among and between scholars. I also think it is appropriate, however, to have scholarship from the academy that is both intended to and in fact is useful to the practicing bench and bar and thus to one's students. Compare KRONMAN, *supra* note 1 and GLENDON, *supra* note 2 with Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) and Sanford Levinson, *Judge Edwards' Indictment of "Impractical" Scholars: The Need for a Bill of Particulars*, 91 MICH. L. REV. 2010, 2011 (1993).

and judges.²⁷ In short, the phenomenon at law schools that Kronman and Glendon describe is one I recognized.

Kronman's and Glendon's descriptions of modern law schools also struck a chord of recognition with respect to my experiences as a student. I identified with the student who said: "I was expected to *deconstruct* a body of law before I understood it!"²⁸ I certainly had the experience in law school of thinking that I had not been given the basic information and tools I needed as a prerequisite to applying certain theories. I also have had the experience of hearing professors' descriptions of classes I have taken in which the professor's description of the class did not match my perception of what had happened in the class. I suspect that my experience is not unique and that many students do not get from their courses what the professor thinks they are getting.

Based on my experiences, then, part of me agreed with Kronman's conclusion: "[T]he ideal of the lawyer-statesman has all

27. I do not mean to suggest, however, that "doctrinal" scholarship does not and should not employ theory. Indeed, I believe that while it is worthwhile to talk about what the law is and should be, theory can and should inform this decision and is something that good practitioners and judges will use. The difference I see is the attitude towards theory and how the author expects the theory to be used. Is the author operating as a "scientist," purporting to observe the law from on high, or does the author try to use theory to offer some guidance to the real lawyers and judges who must grapple with that law and theory?

To give two concrete examples: Professor Ted Schneyer from the University of Arizona gave a talk in March 1996 at Hofstra University at a conference entitled *Legal Ethics: The Core Issues*. In his talk, which was entitled *Clienthood*, Professor Schneyer attempted to explain the diverse body of law with which the courts have been grappling regarding the issue of "who is a client." Professor Schneyer's talk and forthcoming paper attempted to develop a theory to explain and evaluate decisions dealing with what it means to have "clienthood." I would label this talk "doctrinal" since it is attempting to come to grips with a specific substantive subject matter area and since it evaluates the doctrines the courts have used and makes recommendations about how the courts should look at these issues. Yet it would be inaccurate to say that this doctrinal research is without theory since the whole point of the paper is to develop a theory of what it means to be a client and why.

Similarly, one of my colleagues, Professor William Barker, has written an article on comparative tax law. When I was explaining my essay to Professor Barker, he initially resisted my thesis that all scholarship need not be grand theory scholarship, noting that theory was always necessary for good lawyering and understanding. I agree whole-heartedly with Professor Barker. In my mind, one of the differences between what I call grand theory scholarship and other scholarship is the audience. I think both Professor Schneyer and Professor Barker intend for their scholarship to be relevant and useful to lawyers and judges. Professor Barker has confirmed this, and Professor Schneyer also indicated this perspective when, in response to a conference questioner who was a practicing lawyer and said Schneyer's comments had been useful, Schneyer responded "Bless you." In contrast to this scholarship, I think there is scholarship in which the author does not particularly care whether the scholarship is useful or relevant to lawyers and judges.

28. GLENDON, *supra* note 2, at 226.

but passed from view. Law teachers no longer respect it. The most prestigious law firms have ceased to cultivate it. And judges can no longer find the time, amid the press of cases, to give its claims their due."²⁹ Moreover, Kronman and Glendon are right; there are many unhappy lawyers.³⁰ When I was in practice, many, if not most, of the lawyers I knew were unhappy. Some actively disliked their practices; others simply disliked their lifestyles.

In sum, I found that Glendon's and Kronman's books described things I had personally experienced. These books had the ring of truth. Thus, as I was reading Kronman and Glendon, I was able to share Kronman's conclusion that the legal profession was in a crisis³¹ and Glendon's conclusion that, even though lawyers are more influential than ever, and are making more money than ever, many lawyers are "feeling bad when [they] should be feeling good."³² Accordingly, since I recognized many of the problems Glendon and Kronman described, and since I agreed with their evaluations of these problems, I was perplexed by the apparent contradiction between my agreement on the one hand and the fact I was not ultimately depressed by these books on the other hand.

IV. Explaining My Optimism (Or How the Whole Was Less Than the Sum of the Parts)

A. *Kronman's and Glendon's Prognoses for the Legal Profession*

Before explaining why I was not ultimately discouraged by these books, notwithstanding my recognition of the problems they described, it is useful to summarize Kronman's and Glendon's own reactions to the crisis in the American legal profession, which they identified. When they look to the future, the Kronman and Glendon books diverge significantly from each other and from my own views. Kronman's prognosis for the future is much darker than Glendon's.

Kronman's dark vision is apparent when one compares his recommendations to lawyers with his evaluation of the impact his recommendations will have. The first step Kronman recommends

29. KRONMAN, *supra* note 1, at 354.

30. See GLENDON, *supra* note 2, at 15, 85, 87-91; see also KRONMAN, *supra* note 1, at 304-07.

31. KRONMAN, *supra* note 1, at 1.

32. GLENDON, *supra* note 2, at 85.

in response to the crisis in the legal profession is for lawyers to embrace the ideal of the lawyer-statesman.³³ To achieve this ideal, Kronman advises lawyers to take pride in and enjoy the *process* of lawyering, rather than just the result. Kronman also advises lawyers to recognize and value the ideal of the lawyer-statesman, who has acquired wisdom and judgment, which qualities have become a part of the lawyer's identity and an element of the lawyer's personality.³⁴

The second step that Kronman advocates taking is for lawyers to acknowledge that they will continue to want their work to serve as a source of satisfaction, rather than as a mere source of income. Kronman says that even as the changing nature of the profession makes it difficult for lawyers to find satisfaction in their work, they should recognize that the Weberian view of the profession, in which lawyers renounce their ambition to be saved through their work, and instead look for salvation in the realm of private life, is falsely optimistic and unrealistic given lawyers' training and ambitions.³⁵

Finally, Kronman advocates taking certain steps according to the type of lawyer one is. If one is a law teacher, that lawyer should attempt to convey to students a feel for the values Kronman articulates in *The Lost Lawyer*.³⁶ If the lawyer is a judge, he or she must make the judicial work more deliberative by writing the opinions personally with only minimal assistance from clerks.³⁷ If a lawyer is in practice, he or she should stay away from large firm practice.³⁸

Having set out a formula for redemption from the crisis, what was Dean Kronman's prognosis? Not very optimistic. With respect to professors, for example, Kronman doubts that his recommendations could become the norm:

But if one asks whether there is at present much reason to hope that this style of teaching will again become dominant in our law schools, I think the answer is probably no. There is

33. KRONMAN, *supra* note 1, at 353-68, 366-67.

34. *See generally* KRONMAN, *supra* note 1.

35. *Id.* at 374. Kronman believes that because of their training and expectations, lawyers will continue to demand fulfillment from their work rather than accept the premise that fulfillment can only be found in one's private life. And Kronman believes that lawyers will continue to demand this fulfillment, even when they know that ideal is unattainable. *Id.* at 372-75.

36. *See infra* text accompanying note 57 for a list of the factors Kronman cites.

37. KRONMAN, *supra* note 1, at 375-76.

38. *Id.* at 379.

much that individuals can do, in their own teaching, to promote the deliberative ideal of the lawyer-statesman. But the currently most influential forms of legal scholarship, with their strong antiprudentalist cast, make it likely, I think, that the main tendency will be in the opposite direction: toward an ever more theoretical style of teaching that encourages a simplifying view of law and the substitution of method for character. The law teacher who stands by the view of the profession that I have set out in this book will in years to come be increasingly isolated from his peers. He will feel more and more like a relic separated from the main current of his time, and if he is to continue doing what (in the formal sense at least) he is free to do, he must learn to do it without the hope that his branch of the profession can be brought to share his old-fashioned views again.³⁹

With respect to students, Kronman doubts that they can provide the momentum for a return to the lawyer-statesman model:

But I have no illusion that the mass of students at our best law schools — where the leaders of the profession are trained and its institutional self-understanding shaped — will turn back toward the kind of practice Justice Jackson described with such feeling and eloquence. The pressures against their doing so are just too great. There is, first of all, the money and prestige of large-firm practice, and the confidence-sapping conformism of student culture itself. Beyond that there is the fact that most of the active recruiting at our best schools is done by the biggest firms from the largest cities; other sorts of careers in private practice simply disappear from view. How many students will find the courage to buck the tide, to forgo the money, to resist the illusion of power and influence, and to seek out other opportunities on their own when the road to large-firm practice lies so conveniently nearby? I suspect not many. For those who do look, the opportunities are there. But the likelihood that the profession as a whole will awaken to the emptiness of its condition and that there will be a resurgence of support, at an institutional level, for the vanishing ideal of the lawyer-statesman seems to me quite low.⁴⁰

Glendon, in contrast, is more optimistic than Kronman with respect to both professors and students. With respect to professors,

39. *Id.* at 376.

40. *Id.* at 380.

Glendon concludes that “[s]till, Kronman’s prognosis seems too gloomy.” She notes that significant numbers of men and women in the nation’s law schools are pleased to profess law and proud to train practicing lawyers.⁴¹ Glendon also appears less troubled by grand theories than does Kronman, commenting that the “difficult cohabitation between theory and practice” has matured into a “fruitful relationship,” citing several examples.⁴² Glendon concludes that it is possible — just barely possible, but still possible — that dynamic traditionalists⁴³ are still a significant presence among the nation’s 6000 or so law professors. Thus, Glendon concludes that it is not unrealistic to think in terms of a counter-reformation in legal education.⁴⁴

Glendon also sees the students as a much stronger potential force for change than does Kronman, concluding “that [a] new postideological mood is already discernible in the law schools. It suggests the possibility that tomorrow’s law students will be rebellious enough to debunk the debunkers, intelligent enough to rediscover the joys of craftsmanship, and bold enough to harness the latent energies of the common law tradition.”⁴⁵

Finally, Glendon seems to be overall much more optimistic about the chances for the legal profession. She concludes that “[b]y all indications, the normally staid legal profession is in the interesting state that students of systems as diverse as the weather, the economy, fluid dynamics, and biological evolution call ‘the edge

41. GLENDON, *supra* note 2, at 244.

42. *Id.*

43. *Id.* at 245. Glendon cites as an example Professor John Langbein at Yale who she describes as “a veritable one-man band of creative theory and practice.”

44. *Id.* at 246-50. Professor Glendon states, for example:

Law professors cannot cure society’s ills, no matter how firmly they believe they know just what to do. But they *can* cure the ills of legal education. One way to begin would be to make our students aware of the rich web of habits and understandings surrounding the stories of the extraordinarily diverse individuals who are part of the common law tradition. That is their rightful inheritance by which they can begin to make sense of their professional environment and to understand themselves as lawyers. We owe our students not only professional training and theoretical sophistication but the deep sustenance afforded by a tradition with great latent energies for self-correction. Only when we succeed at that threefold task will legal education cease to be a “feast without satisfaction.”

Id. at 251.

45. *Id.* at 250.

of chaos.”⁴⁶ She sees this state as one that is “full of potency as well as contingency.”⁴⁷

In the course of defending the vitality and validity of the common law process, Glendon cites the work of Edgar Bodenheimer. Glendon suggests that Bodenheimer’s work may help lawyers articulate and recognize the value and worth of their common law tradition. As Glendon explained:

Bodenheimer had a stunning insight: the Anglo-American legal tradition was an operating model of a form of reasoning that had long been neglected by philosophers. He was in the presence of a living, breathing example of the type of reasoning that is dramatized in the Platonic dialogues and discussed in Aristotle’s *Ethics*. That form of reasoning was embodied not so much in notionally Socratic classroom discussions as in the incremental development of the common law itself. . . .

. . . Over time, though, the recurrent, cumulative, and potentially self-correcting processes of experiencing, understanding, and judging enable us to spot and to overcome some of our own errors and biases, the errors and biases of our culture, and the errors and biases embedded in the data we received from those who have gone before us. The wheel of dialectical reasoning not only turns but also rolls along.⁴⁸

46. GLENDON, *supra* note 2, at 285.

47. *Id.* at 286.

48. *Id.* at 237-39. Given Glendon’s assertion, correct I believe, that few lawyers and academics are aware of Bodenheimer’s work and that Bodenheimer helps lawyers articulate the value and worth of their common law tradition, I have set forth below even more of Glendon’s summary of Bodenheimer’s work:

Dialectical reasoning is not a single form of reasoning, but an integrated set of related mental operations. It builds on practical reason, but subjects common sense to a process of critical examination and evaluation in which logic has its appropriate but auxiliary role. Similar to scientific method, dialectic method attends to available data and experience, forms hypotheses, tests them against concrete particulars, weighs competing hypotheses, and stands ready to repeat the process in the light of new data, experience, or insight. But unlike the method of the natural sciences, dialectical reasoning begins with premises that are doubtful or in dispute. It ends, not with certainty, but with determining which of opposing positions is supported by stronger evidence and more convincing reasons. That is what has made dialectical reasoning so unsatisfying to the many professional philosophers who have chosen to take their bearings from the natural sciences.

Dialectical reasoning’s weakness, then, is that it can never yield the satisfaction of a mathematical proof. But, as Aristotle pointed out long ago, no other form of reasoning is of much use in “the realm of human affairs.” In law and politics, premises *are* uncertain and one *can’t* be sure of being right, but it is crucial to keep trying to reach better rather than worse outcomes. Dialectical

Thus, Glendon's view of the role of students and faculty in support of the common law tradition (and indirectly the lawyer-statesman), together with Bodenheimer's defense of this approach, certainly reveals a more optimistic prognosis than Kronman's view.

In short, having concluded that there was a crisis in the legal profession, Kronman seems to have very little hope that we can recover, whereas Glendon sees the potency in "the edge of chaos" at which the legal profession stands.

B. My Reflections on These Books: Irrelevance and Optimism

So, if Kronman is downright pessimistic about the state of the legal profession, and if Glendon is barely optimistic, why do I feel so good? And, even if I can understand feeling good on a personal, selfish level, why am I not depressed about the state of the legal profession generally?

I think the answer is twofold. First, my emotional response to these books was primarily a reaction to the issues over which I have some control, namely legal education. Second, although I agreed with much of what Glendon and Kronman said about legal education, ultimately I found many of their observations to be irrelevant to my current situation.

Let me begin with the first point. After summarizing this essay to a colleague, I thought "Why *am I not* depressed by these books?" Even if my prognosis with respect to legal education is more optimistic than Kronman's or Glendon's, I don't know that

reasoning is a leaky vessel. But it's what we've got. The life of the law is not logic, but neither is it raw experience. What animates the law is the habit of critical, ongoing, reasoned reflection on the contents of common sense.

Dialectical reasoning, with its constant, recursive self-scrutiny, also provides the common law tradition with a limited capacity to resist, and correct for, bias and arbitrariness. Modest though it may be, that capacity is no small thing. We must concede to Holmes, the Realists, and the critics that the open texture of the evolving common law does permit bias to creep in, and that its reliance on precedent can preserve not only the wisdom but also the sins and ignorance and power relations of the past. We must admit as well that the conclusions we reach are apt to be flawed, due to our own shortcomings and the limitations of those upon whose accomplishments we build. Over time, though, the recurrent, cumulative, and potentially self-correcting processes of experiencing, understanding, and judging enable us to spot and to overcome some of our own errors and biases, the errors and biases of our culture, and the errors and biases embedded in the data we received from those who have gone before us. The wheel of dialectical reasoning not only turns but also rolls along.

I disagree with Glendon and Kronman in their analyses of the state of the courts and the state of large firm practice.

So why don't I feel bad? One reason, of course, may be that I feel much less of a sense of personal responsibility with respect to the institutions of the courts and large law firms than I do with legal education. Thus, I have responded emotionally only to that area for which I have current personal knowledge and responsibility, namely legal education. And, since relatively few of my students practice with large firms, I do not face the dilemma of sending them out to a life that I believe they will not enjoy.

A second reason why Kronman's and Glendon's analyses of the state of the courts and large law firms ultimately may not have depressed me is because I find it quite healthy that lawyers *do* feel sad and that judges *are* bothered by their workloads and manner of judging.⁴⁹ It is true that there are problems in the courts and problems in the large law firms. On the other hand, there were significant problems, albeit different ones, during the "Golden Age."⁵⁰ Before one can respond to problems, one must recognize the *need* for change. Thus, since I recognize the problems Kronman and Glendon describe (and have done so for a while), I think it is healthy that lawyers and judges recognize a problem as well. Furthermore, I am willing to imagine the possibility that these institutions can survive and nurture the lawyer-statesman ideal and our common law tradition, just as I think legal education can do so. I would point out, for example, recent legislative proposals amending the federal courts' jurisdiction, which could have an impact on the courts' caseloads.⁵¹ Another example that may demonstrate at least one court's response to the problem of

49. Glendon, for example, has said, "the mood in the profession has been uneasiness rather than relief, a sense of being in the wrong place and not knowing quite how we got there, of feeling bad when we expected to feel good." *Id.* at 288.

50. Both Glendon and Kronman noted that the Golden Age was not without problems, not the least of which was discrimination. See GLENDON, *supra* note 2, at 7, 26, 42, 67, 69, 74; KRONMAN, *supra* note 1, at 291-95.

51. See 69 FED. PRAC. ADVISORY 1, 4 (Jan. 15, 1996) (reporting on S. 1011, 104th Cong., 1st Sess. (1995) the Federal Courts Improvement Act of 1995, which among other things, would eliminate diversity cases for in-state plaintiffs, and Title VII of H.R. 2076, 104th Cong., 1st Sess. (1995), the Prison Litigation Reform Act, which would curb prisoner litigation in federal courts). While one can agree or disagree with the appropriateness of these actions, it may reflect an ability of the federal courts to respond to some of the problems cited in the Kronman and Glendon books. (As has been noted, however, this solution may just shift the problem from the federal courts to the state courts, which are already overburdened.)

not enough deliberation is the United States Supreme Court's shrinking caseload. It has gone from 184 cases in the 1983-1984 term to 90 cases in the 1995-1996 term.⁵² (Not all courts, however, have this ability to control their own dockets and this shrinkage has its down side, including more conflicts among circuits.)

There may also be changes with respect to big firm culture. Although I am no longer a part of this culture, I would not be the least bit surprised to learn that the *attractiveness* of this culture is changing, if not this culture itself. I think the hours, the cutbacks in training, the lawsuits and judgments against lawyers and their firms, and the lack of security and stability in firms cannot help but have an impact on the attractiveness of these firms. While the law school where I teach traditionally has not sent a tremendous number of students to large firms, today even fewer students than ever even claim to aspire to a large firm practice. Our current dean is a former partner in one of the world's largest firms and seems quite happy about the "former" part. One of my closest friends, who was a fellow judicial clerk, recently left a large firm in which he had a successful practice but no life. I am willing to imagine that the few incidents I have seen are typical of a broader pattern. Thus, I am not as sure as Kronman is that large firm practice will continue to hold its desirability for students and lawyers.⁵³

However, even if the large firms continue to serve as the most prestigious (and profitable) entry-point for new lawyers, a significant number of these lawyers are going to be forced to move on to other jobs. Thus, even if the lawyer-statesman ideal is unattainable in that context, I would not rule out the possibility that in their next jobs, lawyers *can* strive for the role of lawyer-statesman. Furthermore, even if I am wrong, only one-third of lawyers begin their careers with large firms⁵⁴ and, depending on which study you

52. Compare 54 U.S.L.W. 3038 (July 30, 1985) with 65 U.S.L.W. 3100 (Aug. 6, 1996).

53. A major countervailing pressure, however, is money. Entry-level positions in large firms continue to be the most lucrative, which is undoubtedly tempting to students carrying increasingly heavier debt-loads. See Katherine A. Tongue, *Law Degrees on Debt: Today's Law Students Are Graduating with Record Level of Debt*, OR. ST. B. BULL., Nov. 1995, at 9 (noting that over half of the nation's law school graduates have incurred educational debts between \$40,000 and \$79,000); see also Christine K. Schroeder, *In Debt to the Law*, PA. LAW., Jan.-Feb. 1996, at 27.

54. See LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM 76 (Robert MacCrate ed., student ed. 1992) (reporting that approximately 30% of the class of 1990 went into firms with more than 100 lawyers).

accept, somewhere between ten and twenty percent of lawyers practice in large firms.⁵⁵ And thus, even if the lawyer-statesman ideal is dead in the large firm practice, I am not sure it follows that it is dead in all other contexts.

In short, I wasn't depressed by Kronman's and Glendon's observations about the courts and large law firms because I am willing to trust that the courts and practicing lawyers will be able to sort out many of their problems. As a result, I am willing to limit my emotional responses to those critiques directed towards legal education.

Turning to Glendon's and Kronman's critiques of legal education, I was not depressed by their books simply because so much of what they said seems irrelevant to my teaching, my life, and my students. I suspect that Kronman's advice to law professors will sound, to many law professors, like a description of what they are trying to do:

What should a lawyer who insists on honestly confronting this predicament do?

If he is a law teacher, he should attempt to convey to his students some feeling for the values I have defended in this book. At an individual level, this is a reasonable goal to pursue. In contrast to both judges and practitioners, law teachers have a great deal of control over their own work. Generally speaking, they are free to write about what they wish, and have substantial freedom too in defining the content and character of the courses they teach. This means that law teachers who share my point of view will find in the classroom considerable opportunity to act on their beliefs. They will use this freedom to combat the idea that the law becomes interesting or intelligible only when seen from the standpoint of another field; to discredit the claim that one cannot participate in its culture without having first mastered the idiom and techniques of some more rigorous nonlegal discipline, such as philosophy or economics; and, above all, to discourage the belief that behind the surface chaos of the law there are simple organizing structures that it is the chief object of law study to describe in an abstract way.

55. Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Education Debt*, 70 N.Y.U. L. REV. 829, 839 (1995) (citations omitted).

More positively, they will use the freedom of the classroom to stress the importance of individual cases. They will try to show that the analysis of cases is challenging and fun and, though it cannot be reduced to a method, that there are better and worse ways of doing it. They may make use, from time to time, of other disciplines. But if they do, they will be sure to emphasize that the role these disciplines play in the analysis of cases is a subordinate one whose scope is a matter of judgment that the disciplines in question cannot settle on their own. They will insist on the peculiarity of cases, on their idiosyncrasies, and on the complexity of the world — on its factual complexity, but more important, on its moral and spiritual complexity, on the plurality of incommensurable values that fight for recognition in the law as in other spheres of life. They will encourage their students to think of the law as an independent discipline, with demands and satisfactions of its own, and not merely as the action arm of some more comprehensive policy science. Of course they will stress the need for lawyers to serve the public good and will remind their students that they have a responsibility to take an interest in the well-being of the legal system as a whole. But they will also make it clear that they believe no technique is sufficient to fulfill this trust, that wisdom is required too, and that wisdom is a trait of character and not of intellect alone. All of this they will teach their students, sometimes explicitly but more often by the way they approach their subject and what they emphasize in it. The freedom of the classroom gives them an opportunity to make these points, and if the question is whether a teacher who cares about the values affirmed by the ideal of the lawyer-statesman can seize this opportunity and use it to good effect, I am confident that the answer is yes, for I have seen some of my own teachers do it.⁵⁶

56. KRONMAN, *supra* note 1, at 375-76.

Judging by the professors Glendon lauded, I believe that she would not disagree with this advice. Note, for example, her descriptions of the work of Professors Elizabeth Warren, Phillip Areeda, John Langbein and Archibald Cox. GLENDON, *supra* note 2, at 248-53. Glendon seems, however, to articulate a greater role for theory in the classroom than does Kronman, although I am not sure Kronman would disagree with the "theory" sections of Glendon's book. *Compare id.* at 249 ("If we are hopeful, we may anticipate, too, that insights from those disciplines will aid law professors in preparing their students for roles in a society that urgently needs specialists in long-range planning, imaginative problem solving, legislation, regulation, and institutions.") with KRONMAN, *supra* note 1, at 356; *see generally id.* at 354-64.

Kronman's advice comes fairly close to what I aspire to do in the classroom, even if I may not always achieve it. I do not have the perspective that law is only interesting or intelligible when seen from the standpoint of another field, nor do I argue that behind the surface chaos of the law, there are simple organizing structures and that it is the chief object of law study to describe this in an abstract way. (Among other reasons, I do not do this because I have not mastered the idiom and technique of a nonlegal discipline.) I hope that I convey to my students that the analysis of cases can be challenging and fun. I try to stress the peculiarity of cases, including their factual complexity, their moral and spiritual complexity, and the plurality of incommensurable values fighting for recognition in the law. I also try to stress the duty to serve the public good and the fact that good lawyering requires wisdom and judgment and communication, among other things. In other words, I embrace Kronman's advice as a goal to which to aspire.

Furthermore, I believe that I am not alone on my faculty in these aspirations. I believe my colleagues share the ethos that is implicit in Kronman's advice. We are willing to acknowledge that we are training students to become lawyers, many of whom will practice law. We want our students to enjoy the law, and we want them to be good at it.⁵⁷ And, at the risk of sounding immodest, I think we enjoy teaching them and are successful at it.

In short, I ultimately did not find the Kronman and Glendon books depressing because I felt that their critiques of legal education were, to a large extent, irrelevant to my reality; indeed, their aspirations describe the reality I *do* see. Thus, although I could recognize and agree with the parts of the reality Kronman

57. In my view, we are thus trying to inculcate one of the conditions Kronman thought was necessary for the lawyer-statesman, namely that he enjoy the process itself, rather than merely valuing it because it leads to a morally desirable end. Moreover, I think it is possible to inculcate this value even in students who come to law school for lack of anything better to do. Glendon observed that the nature of legal education changed as the nature of the students changed. Among other things, she states: "By the 1970s, law school had become the place for a bright, upper-middle-class liberal arts major to go when he still had no idea of what he wanted to do in life." GLENDON, *supra* note 2, at 201. Glendon's description certainly fits my own decision to attend law school. Despite these reasons for attending law school, I liked law school, I liked law, and I liked lawyering. Thus, while Glendon's observations may be accurate with respect to the changing nature of law students and legal education, I do not think it follows that a law school cannot teach its students to enjoy the *process* of lawyering as an end in itself. In short, I think students can learn these values Kronman describes.

and Glendon describe, somehow the sum of those parts, based on the reality of my experiences, was quite different.

V. Taking Kronman and Glendon One Step Further: In Celebration of the "Teaching Institution" Professional School

So, where do these reflections leave me? In what might seem like a complete switch of gears, I found myself thinking about the law school ranking structure used in the annual *U.S. News and World Report* Graduate Schools issue.⁵⁸ *U.S. News* uses a unitary model for ranking law schools, in which it assumes that it is appropriate to compare all law schools to one another, and that one can ultimately rank them on a continuum from top to bottom.

This unitary model methodology which *U.S. News* uses for evaluation of law schools stands in contrast to the methodology *U.S. News* uses for ranking medical schools. In the same issues in which it ranked law schools along a single continuum, *U.S. News* has distinguished between research-oriented medical schools and other medical schools.⁵⁹ Thus, *U.S. News* implicitly has recognized there are multiple acceptable models of what a medical school should be and has further assumed that it is appropriate to evaluate medical schools differently depending on the school's goal. The ranking of medical schools is thus similar to its ranking of colleges, in which *U.S. News* distinguishes between small liberal arts colleges and large (research) universities, and evaluates them differently.

I submit that: (1) *U.S. News'* use of a unitary evaluation system for law schools reflects the way lawyers, judges, academics and even Kronman and Glendon tend to think about and "rank" law schools; (2) that this unitary evaluation system contributes to part of the problem Kronman and Glendon describe; and (3) that the legal profession generally, and legal education specifically, would be much healthier if we (and *U.S. News*) began to recognize

58. See, e.g., *America's Best Graduate Schools*, U.S. NEWS & WORLD REP., Mar. 18, 1996, at 82.

59. See *id.* at 96 (distinguishing between "research-oriented" medical schools and "primary care" schools). Compare *id.* with *1993 Best Graduate Schools*, U.S. NEWS & WORLD REP., Mar. 22, 1993, at 72-73 (distinguishing between "the top research schools" and "comprehensive schools"). While the methodology for allocating schools in one category or another has changed, and may need work, the point is clear that at least with respect to medical schools, *U.S. News* concluded that it is appropriate to evaluate medical schools differently depending on what the school's goal is and to recognize that there are multiple acceptable models of what a medical school should be.

that as with medical schools and colleges, there are multiple acceptable models of law schools and that it is appropriate to evaluate schools differently depending on the model a law school follows. In short, as this section explains, we should take Glendon and Kronman one step further and begin to celebrate the professional school model of law school, which I will also refer to as the teaching institution model.

Let me address each of these three propositions in turn. With respect to the first assertion — that we use a unitary evaluation system for law schools in this country — I offer no support other than the *U.S. News* article, the lack of protest over the article's *organization*, and my own observations that the legal community assumes that one can discuss law schools on a single continuum.

Secondly, I think using an unitary model method to evaluate law schools contributes to the problems Glendon and Kronman describe because it implicitly devalues the development of the individual student and his or her lawyering skills. The legal community is constantly told that the “profession”-oriented schools come out on the bottom of the continuum of quality evaluation. Glendon, for example, states: “It is commonly believed that second- and third-tier law schools are more profession-oriented than elite law schools, but the fact is that homogenizing forces are at work, with varying degrees of strength, throughout legal education.”⁶⁰ In other words, if a school does not want to be perceived as being second or third rate, there is pressure to avoid acquiring a reputation as a profession-oriented school, which focuses on teaching individual students to become lawyers.

Obviously, historical fact is one reason why “it is commonly believed” that second- and third-tier schools are more profession-oriented than elite law schools. More insidiously, however, I believe that the unitary model of ranking law schools contributes to the belief that *if* a law school is profession-oriented, *then* it must be second or third rate.

Think of the unitary model for evaluating law schools. What is at the bottom of the continuum? I suggest that the answer is “mere trade schools.”⁶¹ Yet, what is a trade school? I suggest

60. GLENDON, *supra* note 2, at 218.

61. Glendon, for example, states:

The movement of legal education into university settings had brought together two sorts of learning that did not sit easily with each other: practical vocational training and the freewheeling pursuit of knowledge. Langdell and his

that it is a school that accomplishes some, but not all, of the goals of a professional school.⁶² Thus, a law school that is evaluated on a single continuum, and that shares some of the same traits as the lowest-ranked institutions, is likely to be rated lower than an institution that shares fewer of those traits. In other words, because of what we have defined as the “evil” to avoid, profession-

followers had foreseen a happy accommodation at a middling level of theory. The better law schools would not be mere *trade schools*, but neither would they be ivory towers. Law professors would serve the profession and the academy alike by historical investigation, systematization, and explication of the law.

Id. at 185 (emphasis added).

62. As stated earlier, a law school that uses a teaching institution or professional school model focuses on the development of the individual student. These students, who are soon to be lawyers, ideally should leave the institution with the following: (1) mastery of a certain body of knowledge; (2) mastery of a certain set of skills; (3) an intellectual curiosity or sense of professional duty, which will cause the new lawyer to remain current; (4) a love of the craft, or sense of professional duty, which will cause the new lawyer to hold him/herself to high professional standards; (5) a sense of the lawyer’s special role in pursuing a just society; (6) a sense of the importance of public service; and (7) familiarity with, or at least knowledge about, the grand theories coupled with the intellectual tools necessary to discern their proper role in legal and professional discourse. (Kronman presumably would include the character traits of judgment and wisdom, although I don’t know that he would think that a student will leave law school having acquired these traits.)

The original title of the essay was *Taking Kronman and Glendon One Step Further: In Celebration of “Trade Schools.”* In early drafts, I deliberately and provocatively embraced the term “trade school” because I think the academy’s almost universal use of this term as a perjorative subtly undermines our acceptance of the teaching institution model.

As used by Glendon, I think the term “trade school” is worthy of its negative connotation. Glendon defines trade schools as those in which students are simply drilled on rules and doctrines that can be swept away by tomorrow’s legislation or decisions. GLENDON, *supra* note 2, at 222. In other words, Glendon defines a trade school as a school that is limited to item 1, above, or at most, items 1 and 2. I can’t imagine a single legal educator or law school, however, that would consciously limit itself to accomplishing items 1 and 2 above. Moreover, I think that in the legal academy, the pejorative “trade school” has unfortunately come to be used *without* the precise definition Glendon uses. *By retaining “trade school” as a pejorative within the academy, we subtly reinforce the idea that focusing on the development of the individual student by teaching doctrine and skills somehow diminishes rather than enhances a law school.* It is my perception that the pejorative “mere trade school” thus reflects a denigration of even those institutions that try to accomplish items 1-7 above, not just items 1 and 2. I would like the legal academy to abandon the term “trade school” as its pejorative because of the spillover effects.

I initially hoped that if I proudly embraced the term “trade school” (and was willing to put my money where my mouth was by having this article title on my CV), it would be a step towards acceptance of an alternative model of law school, focused on the development of the individual student.

I ultimately decided not to embrace the term “trade school,” however, since it has so much baggage (including images of green grocers) and since some people might infer that I am advocating an alternative model in which an institution strives only for item 1, or at most, items 1 and 2. (I am indebted to Ted Janger for helping me articulate our differing views of “trade schools,” which ultimately led me to abandon the term.)

oriented schools are likely to continue to rank lower than research-oriented schools.

Using a single continuum for evaluating legal education thus creates a tension in those legal educators who, on the one hand, want to prepare their students for their profession in the manner Kronman suggested in part IV. B, and who, on the other hand, would naturally prefer not to have to think of themselves as being at the bottom of the continuum of legal education.

So, what would I like to see? I would like the legal academy to recognize and take pride in *multiple models* of legal education. We must learn, for example, to think of the "teaching institution" law school as an *alternative* model to the research institution law school, rather than an example of an institution on the lower end of the law school quality continuum. In other words, we must learn to value the teaching institution law school as a different *kind* of institution, rather than a different *quality* of institution.⁶³

When I suggested to some of my colleagues that we should use alternative models for thinking about law schools, not all were convinced. Some of these colleagues believe the unitary model is the better approach since all law school faculties engage in both teaching and research, although the emphases may differ. They cited examples of institutions that they believe provide excellent scholarship and teaching and asked me to "categorize" such institutions.

On the one hand, I agree that all law schools should have faculty who engage in both scholarship, teaching, and service; this fact may suggest that a unitary model is appropriate. On the other hand, I cannot escape my sense that there is a fundamental difference between law schools that are primarily research institutions and law schools that are primarily teaching institutions. I think different schools ultimately have different priorities and must act on those priorities.

A teaching institution's priority is the personal development of the individual student and future lawyer. This priority will be reflected in numerous ways such as the access of the students to the

63. As an aside, it seems to me that there clearly is a need for law schools modeled on the research institution model and also on the professional or teaching institution model. As to balance, however, I believe that as a practical matter, we need more professional schools than we do research institutions.

faculty, the types of experiences the school provides to the student (which likely are more labor-intensive for full-time tenure-track faculty), the frequency and importance of teaching reviews by colleagues, the opportunity for student feedback on teaching, and the faculty's development of their own or supplemental course materials. In my vision of the teaching institution, faculty engage in scholarship and embrace theory. The orientation of such research and theory, however, may be different than in a research institution. Research and theory are valued, among other reasons, because they support the teaching institution's mission of developing the individual student and future lawyer. Research and theory add value to one's own teaching and add value to the student who is soon to become a lawyer.⁶⁴

In contrast to this teaching institution model, I sense that there *are* research institutions where the focus is just that — research. In other words, these institutions focus not on the personal development of the individual student, but on theory development. They are comparable to the graduate departments of other disciplines. Glendon, for example, cites Owen Fiss who said “law professors are not paid to train lawyers, but to study the law and to teach students what they happen to discover.”⁶⁵ While there may be first-rate teachers at some research institutions who do focus on the personal development of the students into lawyers, research is the priority of the institution. (This research priority may be reflected in areas such as salary, office hours, or tolerance of poor teaching, to name a few.) Ideally, a research institution will be able to offer superb teaching, as well as a faculty engaged in public service. At some point, however, an institution may have to reveal its priorities; it seems undeniable to me that there are institutions — as well there should be — whose priority is research rather than the individual student.

One might argue that while some research institutions are doing a lousy job of teaching, it does not follow that we need alternative models of law schools. While this argument has appeal, I ultimately reject it on both pragmatic and theoretical grounds. On a pragmatic level, I think it unlikely that the legal community will suddenly decide that the “elite” institutions, many of which are research institutions, are doing an inadequate job even if their

64. See *supra* note 27 and accompanying text.

65. GLENDON, *supra* note 2, at 217.

teaching is deficient. I think it is much more likely that the elite institutions will set the standard to which other institutions aspire, and thus increase the likelihood that their strengths are viewed as desirable and their weaknesses are unimportant. Thus, even if I might agree with a unitary model for evaluating law schools in *theory*, in practice I think that if the elite research institutions are not setting the model by which some law schools want to be evaluated, these law schools need an alternative model.

More importantly, however, I am not sure that I *do* believe that there should be a unitary model for evaluating law schools. We live in a world of finite resources, including the number of hours in the day. Teaching and research can be competing priorities and sometimes a school (or faculty member) has to choose between these priorities. Furthermore, because teaching and research are distinct activities, one should evaluate them differently. Thus, while I think all law schools will be balancing teaching, scholarship, and service, I think it makes sense to have different evaluation standards for a school whose priority is teaching than one does for a school whose priority is research.

Some individuals may object to evaluating teaching institutions separately from research institutions because of the difficulty in evaluating teaching. Moreover, I think it is true that as subjective as the evaluation of scholarship may be, it probably is even more difficult to evaluate teaching.

On the other hand, I certainly think one could devise a scheme that evaluated quantifiable factors related to teaching. While these factors would not tell the whole story of a teaching institution's success, they certainly would provide relevant information for a prospective student and would be an attempt to evaluate an institution in accordance with the priorities it had set.

The evaluation of teaching institutions, for example, might take into account factors such as: student-faculty ratios; the average class size for both required and elective courses; the number of hours that faculty members are available outside of class to students; the percentage of students that visit a faculty member outside of class; the number of writing exercises provided to students, including the type of feedback, if any, which is provided, and from whom; the number of live-client clinics; the number of students with externship opportunities; the number of faculty who have developed their own course materials or use supplemental materials of their own; and faculty involvement in co-curricular

activities, such as moot-court programs and law journals. Hence, while the quality of such contacts and the benefits to the students may be difficult to measure, I certainly believe that a school's dedication to the personal development of the student can be measured by looking at the opportunities provided to the students, the identity of those providing such opportunities, and the priority assigned to these issues by the faculty.

If I could convince *U.S. News* to evaluate law school teaching institutions and research institutions separately next year, they would have to decide which institutions to evaluate within each category. One option would be to permit a law school to select the category in which it is ranked. An alternative option would be to rank all law schools according to both sets of criteria (although a listing might only be published for those categories schools indicated). The latter approach seems fairer since some schools may rank very high as both teaching institutions *and* as research institutions.

If my assumption is correct, and some institutions will rank high as both teaching institutions and research institutions, doesn't that undercut my thesis that there should be alternative models? Doesn't that assumption suggest that law schools *can* do it all and that we should hold them accountable for both and use a unitary model for evaluation?

My answer is still no. As stated above, I believe time is a finite resource. Ultimately, each faculty member decides whether his or her priority is teaching or scholarship. If the priority is teaching, for example, that professor will engage in activities because they benefit the student, even though these activities take time from scholarship. Such a professor, for example, might give a midterm, or an extra writing assignment.⁶⁶ If I am correct, then in those institutions that are excellent research institutions and excellent teaching institutions, there may be, in essence, two different sets of faculty: the faculty whose priority is their research, analogous to the faculty in a graduate department; and the faculty

66. Just to be clear, I am not saying that such a teacher will not and should not engage in scholarship. Realistically, however, I think the teaching-oriented professor will do less scholarship than that person would do if his or her priority was *not* teaching and the development of the individual student. Furthermore, I suspect that the scholarship of those whose priority is teaching may differ in tone from other scholarship because the dedicated teacher is more likely to be interested in writing to an audience that includes students, lawyers, and judges.

whose priority is teaching and the personal development of the student.

Although there may be law schools that are both excellent research institutions and excellent teaching institutions, I still advocate the alternative models approach because I do not think we should require all law schools to do both. Doing both well requires strong financial resources and a willingness and ability to tolerate multiple cultures. While it is wonderful if a law school has the resources and can support these different cultures, I think it is also appropriate for a law school to decide that it has finite resources, that it cannot be all things to all people, to identify whether its priority is to be a research institution dedicated to theory development or a teaching institution focusing on the development of the individual student, and then concentrate on doing that well. In other words, while I think some institutions may be able to do it all, I do not think all institutions can do it all.

In sum, although all law schools should and hopefully will combine good scholarship, good teaching, and public service, ultimately each school has to decide what its priorities are: each institution will have to decide whether it is primarily a teaching institution, whose focus and priority is the personal development of the individual student; whether it is a research institution, whose focus and priority is theory development; or whether it grants equal weight to both. I strongly believe that all faculty, including faculty at institutions that are primarily teaching institutions, should be engaged in research. I also strongly believe that we need to have research institutions whose priority is theory development rather than personal development of the students. In my view, however, the fact that we all are combining research, teaching, and scholarship does *not* mean that it is appropriate to use a unitary model of evaluation and that a teaching institution should be evaluated according to how it compares to an elite research institution. I think there clearly is a difference in focus, there clearly is a need and a role for both, and not all institutions have the resources to excel at both.⁶⁷ What all of us in legal education and the profes-

67. I can imagine an argument that the research institutions should not even bother teaching students. I disagree with this argument since I think there would be both student demand and societal need for teaching at the research institution. I would be more inclined to conclude that perhaps not all faculty at a research institution need to teach (although I believe that teaching helps one's research by grounding it, just as one's research informs one's teaching).

sion must do, I believe, is acknowledge the validity of *both* kinds of law schools.

Thus, I would like to see a time in which a law school could proudly announce that it is a “professional” school, rather than shirking from that label. I would like legal educators, the legal profession, and the public to recognize that an alternative model to the research institution exists that is equally valid, and that a different set of criteria should be used to evaluate each model. I would like law schools to publicly announce which primary model they are following so that prospective students have more complete disclosure before making a selection. I would like *U.S. News* next year to evaluate alternative models of law schools, just as it evaluates alternative models of medical schools, and just as it distinguishes between large research universities and small liberal arts colleges. In short, I hope that the Glendon and Kronman books, coming as they do from the “elite” end of the academy, have advanced the day when it is socially acceptable to say that one teaches at a law school that follows a “professional school” model and to be proud of that fact.