

WHOSE PHRONESIS? WHICH PHRONIMOI?: A RESPONSE TO DEAN KRONMAN ON LAW SCHOOL EDUCATION

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INTRODUCTION

Dean Anthony Kronman of the Yale Law School has produced one of the most widely discussed contemporary critiques of legal practice and, specifically, of legal education.¹ This commentary will focus on Dean Kronman's central notion of practical wisdom.² We begin with a preliminary question: Is there really such an identifiable thing as practical wisdom, as described and elaborated by Kronman? This cannot simply be taken for granted. After all, many of us were at one point convinced of the reality of phlogiston³ or of the aether through which light propagates.⁴ It is also possible that the practically wise person might exist without being readily or reliably detectable. So if we assume that practical wisdom, precisely as Kronman develops the idea, does exist, we should still ask whether a client, a group of persons, or a society can consistently recognize the possession or exercise of genuine practical wisdom by specific persons. We may call this problem that of identifying the *phronimoi*, or those persons who exercise practical wisdom.⁵

Once we have disposed of this preliminary question, we will turn to the law school context specifically. We ask whether, as Kronman argues, the traditional Socratic appellate case

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¹ ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993). For an account resonating at certain points with that of Dean Kronman, see MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994).

² Kronman introduces the idea of practical wisdom in *THE LOST LAWYER* at 15-16.

³ See Jeremy Waldron, *On the Objectivity of Morals: Thoughts on Gilbert's Democratic Individuality*, 80 CAL. L. REV. 1361, 1374 (1992); Rex J. Zedalis, *On First Considering Whether Law Binds*, 69 IND. L.J. 137, 152 n.51 (1993).

⁴ See Zedalis, *supra* note 3, at 153 n.51; Robert M. Gordon, Note, *McLean v. Arkansas Board of Education: Finding the Science in "Creation Science,"* 77 NW. U. L. REV. 374, 396 n.127 (1982); Janice Toran, *'Tis A Gift to Be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352, 352 n.1 (1990).

⁵ See KRONMAN, *supra* note 1, at 176.

method, when well practiced, tends distinctively to promote the development of practical wisdom as specifically envisioned by Kronman. At this point, we then pose our final question. It seems hard to object, in the abstract, to the general idea of practical wisdom. But Kronman develops and elaborates a particular conception of practical wisdom. We might see value in the general idea of practical wisdom without endorsing Kronman's specific account. So we must ask, finally, whether we ought to promote practical wisdom as conceived of by Kronman, in light of any available alternatives.

Let us begin, then, with only a very generalized and incomplete sketch of the meaning of practical wisdom for Kronman. We can add controversy when we later add some further detail. One way to start is by assuming that the practically wise lawyer deliberates and judges well. For Kronman, deliberating and judging well is a dualistic process. Deciding what to do, or how to resolve a case, requires on the one hand a measure of disinterest, dispassion, neutrality, or disengagement.⁶ The practical decisionmaker must not fully embrace or internalize the particular values, perceptions, or interests of any party.⁷ This aspect of practical decisionmaking may be called the moment of detachment. For Kronman, the moment of detachment must, on the other hand, be complemented by imaginative identification, sympathy, and compassion.⁸ This we may call the moment of imaginative empathy.⁹ Kronman observes that "the more developed a person's imagination the wider the range of solutions he can envision to any particular problem"¹⁰

Practical wisdom as a virtue inescapably involves perception and reflection¹¹ as well as knowledge,¹² and takes the form of a stable trait of character.¹³ Kronman in this fashion develops the initial dualism of detachment and imaginative

⁶ See Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 792 (1983).

⁷ See *id.*

⁸ See *id.* See also Anthony T. Kronman, *Practical Wisdom and Professional Character*, 4 SOCIAL PHIL. & POL'Y 203, 221 (1986).

⁹ See KRONMAN, *supra* note 1, at 104-05.

¹⁰ Kronman, *supra* note 8, at 217.

¹¹ See *id.* at 210.

¹² See *id.* at 207.

¹³ See KRONMAN, *supra* note 1, at 15.

empathy.¹⁴ Kronman goes on to suggest that even if we were to assume that all intellectual abilities are equally distributed within a population, this would not imply that practical wisdom is distributed equally among persons. Practical wisdom is “a trait of character and not simply an intellectual skill.”¹⁵ Surely we cannot claim that all character traits, including, for example, bravery or cowardice, are distributed equally among all persons. Kronman holds that “some citizens have a superior ability to discern the public good . . . due to their excellence of judgment”¹⁶

For Kronman, the virtue of practical wisdom is of course not simply innate or merely a function of age. Practical wisdom can, to some degree, be developed through teaching. Kronman argues that in law schools, the appellate case law teaching method, involving the traditional Socratic dialogue, can promote the character trait or virtue of practical wisdom.¹⁷ In fact, “the aim of the Socratic method is to teach practical wisdom”¹⁸ to prospective attorneys. Kronman argues that developing practical wisdom is important, if only because it is risky for an attorney to seek fulfillment through money, power, or even the zealous advocacy of the cause of social justice,¹⁹ while neglecting the professional exercise of practical wisdom.

I. IS THERE REALLY SUCH A THING AS PRACTICAL WISDOM AS DESCRIBED AND ELABORATED BY KRONMAN, AND HOW CAN WE IDENTIFY IT?

One initial problem we must face is that the idea of practical wisdom, and the related broader idea of practical reason, have not had a single, unequivocal meaning from

¹⁴ See *supra* notes 6-10 and accompanying text.

¹⁵ KRONMAN, *supra* note 1, at 35.

¹⁶ *Id.* For an endorsement of Kronman's defense of the existence and recognizability of an unequally distributed, reasonably stable character trait of practical wisdom, see Gail Heriot, *Songs of Experience*, 81 VA. L. REV. 1721, 1729 (1995) (reviewing ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993)).

¹⁷ See Kronman, *supra* note 8, at 227.

¹⁸ *Id.*

¹⁹ See KRONMAN, *supra* note 1, at 365-68. Certainly, a career of unchallenging, routinized, or unduly stressful service of even a worthy social cause may in some respects fall short of intrinsic fulfillment or character development. For discussion of Kronman on this point, see Amy Gutmann, *Can Virtue Be Taught to Lawyers?*, 45 STAN. L. REV. 1759, 1767 (1993); Michael Livingston, *Confessions of an Economist Killer: A Reply to Kronman's "Lost Lawyer,"* 89 NW. U. L. REV. 1592, 1595-96 (1995).

Aristotle's time to our own.²⁰ There is, however, enough of a consensus on some basic elements of Aristotle's influential conception of practical reason to get the discussion underway. Without straying from common sense, Aristotle himself "defines practical wisdom as the virtue by which one deliberates well: i.e., reasons well in a practical way"²¹

For Aristotle, as for Kronman, practical reasonableness is certainly not a matter of mere cleverness, or even of merely finding the right means to a given end, but also of determining the right ends to pursue.²² For Aristotle, practical wisdom "has many complex ties to such notions as ethical virtue, deliberation, the human good, and the mean."²³ In some significant respects, Aristotle's views are not entirely clear. For the philosopher Richard Kraut, Aristotle thinks of practical wisdom as a non-theoretical virtue of thought, a practical-intellectual virtue, or even a skill, but not as a virtue of character such as generosity or courage.²⁴ Others, including

²⁰ The philosopher Sarah Broadie refers to Aristotle's "discussion of practical wisdom (*phronesis*) . . . [as] being densely thicketed with controversy." SARAH BROADIE, *ETHICS WITH ARISTOTLE* 179 (1991). Similarly, "the term 'practical reason' is not unambiguous in [the legal] literature." Steven J. Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747, 747 n.1 (1989) (contribution to a symposium on the work of Joseph Raz). For example, Daniel Farber and Philip Frickey oppose what they recognize to be the equivocal term "practical reason" to what they refer to as "foundationalism," which might in turn be described as something like acontextual, ahistoric monistic universalism. See Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1646 (1987). Vincent Wellman, in contrast, conceives of practical reason, arguably unlike Aristotle, as reasoning from given ends to appropriate means of realizing those ends. See Vincent A. Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45, 46, 88 (1985). As a final example, consider that practical wisdom, and sound practical reasoning in general, is often associated with the idea of calm decisionmaking, but in fact emotion and feeling may lead us to insights we would otherwise have missed. See, e.g., Angela P. Harris & Marjorie M. Shultz, "A(mother) Critique of Pure Reason:" *Toward Civic Virtue in Legal Education*, 45 STAN. L. REV. 1773, 1774 (1993) ("[w]hen strong emotions are considered inappropriate, participants in an intellectual exchange may miss the places where they need to think more deeply"); NANCY SHERMAN, *THE FABRIC OF CHARACTER: ARISTOTLE'S THEORY OF VIRTUE* 45 (1989) ("[w]e notice through feeling what might otherwise go unheeded by a cool and detached intellect").

²¹ BROADIE, *supra* note 20, at 179.

²² See KRONMAN, *supra* note 1, at 54-56; HANS-GEORG GADAMER, *THE IDEA OF THE GOOD IN PLATONIC-ARISTOTELIAN PHILOSOPHY* 165 (P. Christopher Smith trans., 1986).

²³ Richard Kraut, *In Defense of the Grand End*, 103 *ETHICS* 361, 369 (1993). See also THOMAS AQUINAS, *TREATISE ON THE VIRTUES IN SUMMA THEOLOGICA I-II* 78 (John A. Oesterle trans., 1984) (Aquinas as linking "prudence" to the good, along with the secondary virtues of good deliberation, sagacity, and equitable judgment).

²⁴ RICHARD KRAUT, *ARISTOTLE ON THE HUMAN GOOD* 314, 322, 324, 326 (1989).

Kronman, read Aristotle as endorsing a much stronger linkage between practical wisdom and character.²⁵

For our purposes, it suffices to note two points on which Aristotle seems relatively clear. First, for Aristotle, practical wisdom is not simply a matter of an unusual grasp of concrete particular facts in a given historical context, or the ability to apply such particulars. The practically wise person or *phronimos* must also be capable of thinking at a broad, systematic level, in which any relevant universal truths are sought and integrated with the relevant particulars.²⁶ Second, Aristotle believes, controversially, that practical wisdom involves or implies acquiring each and every one of the various moral virtues. This was noted by Sir David Ross, who concisely observed that for Aristotle, "any moral virtue implies practical wisdom and practical wisdom implies all the moral virtues."²⁷

Kronman does not invariably endorse Aristotle, and thereby assume Aristotle's liabilities in all respects, especially on issues of metaphysics.²⁸ But where we doubt Aristotle, we should check to see whether those doubts encompass Kronman's position as well. Kronman, for example, recognizes the

²⁵ See KRONMAN, *supra* note 1, at 41; Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995) (practical wisdom as developed, educated moral character); JOHN M. COOPER, REASON AND HUMAN GOOD IN ARISTOTLE 101 (1986) (Aristotelian *phronesis* as the intellectual excellence supporting excellence of character); TERENCE IRWIN, ARISTOTLE'S FIRST PRINCIPLES 376 (1988) ("[t]he Aristotelian virtue of character lies in a mean determined by reason, and by the reason by which the wise person would determine it"). Because moral virtue determines the principles of wisdom, Aristotle may seem caught in a rather tight circle, with both practical wisdom and virtue being crucially dependent upon each other. See, e.g., ANTHONY KENNY, THE ARISTOTELIAN ETHICS: A STUDY OF THE RELATIONSHIP BETWEEN THE EUDEMIAN AND NICOMACHEAN ETHICS OF ARISTOTLE 180 (1978). If we consider such circularity to be vicious, Aristotle might seek to point to a contemporary consensus or to common sense in support of his approach.

²⁶ See, e.g., KRAUT, *supra* note 24, at 330 (Aristotelian practical wisdom as requiring a knowledge of both universals and particulars); Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714, 717 (1994); Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1454 (1994) (Aristotle's *phronimos* as needing to know "universal truths" and to integrate the universal and the particular).

²⁷ SIR DAVID ROSS, ARISTOTLE 221 (1985) (1923). See also ARISTOTLE, THE ETHICS OF ARISTOTLE book VI, ch. 12, at 189 (J.A.K. Thomson trans., 1955) (translation of the *Nicomachean Ethics*) ("the soul . . . cannot acquire prudence or sagacity unless it has first acquired virtue"); *id.* ch. 13, at 191 n.†; Huigens, *supra* note 26, at 1456 (Aristotle as holding that the virtue of practical wisdom somehow implies, confers, or generates all of the (moral) virtues). Relatedly, Aristotle also holds that the development of the virtue of prudence requires accumulated practical experience, along with age, as opposed to the youth of even "accomplished students." See ARISTOTLE, *supra*, book VI, ch. 8, at 182.

²⁸ See *infra* part III.

arguable circularity in Aristotle's suggestion that if we wish to grasp the nature of good judgment in public affairs, we must seek out and learn from those who have such judgment.²⁹ Kronman refers to good judgment as less like science and more like "aesthetic taste and style."³⁰ But just this sort of analogy raises the specter of the possibility that good political judgment may be as conventional or as subjective as matters of taste and style are often thought to be.³¹ Some may have nagging doubts that the superiority of a famous designer's fashion sense compared to that of a plebian may be not a matter of some mysteriously inarticulable³² sort of fashion wisdom, but may in fact rest on less substantial grounds.

Consider again Aristotle's belief that practical wisdom somehow implies the possession of all of the moral virtues.³³ The price of Kronman's denying this claim would be another divergence between Kronman's approach and that of Aristotle, which tends to undercut whatever value may be had from appealing to the Aristotelian tradition. The price of Kronman's acceptance of this claim, though, would be steeper. Many persons who believe that practical wisdom is real will be inclined to say either that some who are practically wise do not in fact possess all of the moral virtues, or that practical wisdom in company with all the moral virtues is so difficult to attain as to not be worth striving for with any realistic hope of attainment.

But it is also possible to doubt that there is a real virtue of practical wisdom that transcends mere group conventions or mere random statistical artifacts. It is admittedly still possible to care about practical wisdom even if we think of it only as a matter of some group convention. But to lose real or genuinely objective practical wisdom seems more grievous than to lose practical wisdom merely according to the standards of one or more groups to which we may or may not wish to identify. A group's losing practical wisdom from its own group perspective may, from the perspective of another group, involve a gain in practical wisdom by their standards. Why mourn the loss of

²⁹ See KRONMAN, *supra* note 1, at 224.

³⁰ *Id.* at 225.

³¹ See, e.g., *Cohen v. California*, 403 U.S. 15, 25 (1971) ("it is . . . often true that one man's vulgarity is another's lyric").

³² See, e.g., MICHAEL POLANYI, *PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY* 336 (1962).

³³ See *supra* note 27 and accompanying text.

wisdom, by our own current standards, if those standards are not group transcendent?

It is certainly possible to deny that there is a real, relatively stable character trait that can be called practical wisdom and that specially accounts, beyond the roles of luck and all other personal or circumstantial factors, for success in choosing ends, in reasoning from ends to means, and in achieving outcomes. "Practical wisdom" can certainly be named and described, like bodily humours, phlogiston, or the aether. Admittedly, the virtue of practical wisdom does seem more commonsensical and intuitively familiar than many scientific constructs. But common sense also weighs in, to at least some minimal degree, against the reality of practical wisdom in the sense Kronman wishes to use the term. This is actually a difficult inquiry. It is not easy to control for the effects of extraneous factors.

This is no less true of lawyers than of baseball managers. Let us briefly consider the presumably close analogy of practical wisdom among baseball managers. Doubtless no one would want to say that a win-loss record over the course of, say, the preceding year establishes one's degree of practical wisdom as a manager. For one thing, too many other variables come into play, swamping any effects that might be somehow ascribed to practical wisdom or the lack thereof. Perhaps then we should look to win-loss records over a period of, say, five years or so, in an attempt to at least partially wash out those extraneous factors, and to reflect the idea that practical wisdom among managers should as a virtue be stable over time. At least some persons, then, might have the temerity to say that the managers with the best five-year win-loss records, or the most championships, or some variation thereon, are the most practically wise managers. We would be operating here on the assumption that practically wise managers are "good" managers, and that winning and losing games or championships over some relevant time frame, or doing better than those managers with bigger player payrolls, is closely associated with being a good manager.³⁴

³⁴ Doubtless some managers may be asked merely to provide stability in some difficult transition, or to rebuild a franchise with little emphasis on winning in the short term. We may set aside such complications. Surely we would have little interest in baseball's version of practical wisdom unless it involved, at one point or another, a payoff in winning games. We may also note that the statistical phenomenon of regression toward the mean can account for some tendency for an unusually poorly performing team that replaces its manager to do better under its new manager.

But even this presumably more suitable indicator of horsehide phronesis seems problematic. Notoriously, the acclaimed manager-of-the-year can, over the succeeding few years, be discharged for, perhaps, a supposed failure to adapt to changing circumstances. The game is said, at least for a time, to have passed them by. Sometimes, of course, no aspersions are cast on the capabilities of the fired manager. Bad outcomes or bad situations are sometimes said to not be the manager's fault. This may be true of lawyers or policy-makers as well. But while this is indeed sometimes true, it at best impeaches the importance of baseball phronesis. If practical wisdom in a baseball manager cannot at all affect the problems of, say, too many selfish, feuding, unmotivated, uncooperative, distracted, complacent, poorly conditioned, avaricious, technically unskilled, or underperforming players, then perhaps in such cases we should focus our attention on matters other than the possession of practical wisdom.

Of course, it is possible to set aside these qualms and hold that the most statistically successful managers over some time frame—perhaps with differences in payroll, truly unpredictable and unavoidable injuries, and interfering owners controlled for—tend to be those with the most baseball phronesis, even if some of the names at the top or bottom of the list might have seemed counterintuitive.³⁵ When we talk about those successful managers, is it entirely clear, though, that we are

³⁵ Query whether, for example, Tony LaRussa, Tommy Lasorda, George "Sparky" Anderson, or Jim Leyland have, over the immediate past few years, displayed less baseball phronesis, in either absolute or relative terms, than over the preceding few years. Personal conversation suggests support for Gene Mauch in particular as a baseball *phronimos*. Let the record show, however, that Mauch's managerial career, running from 1960 to 1987, involved 1902 wins and 2037 losses, for an overall winning percentage of .483. See JOHN THORNE ET AL., *TOTAL BASEBALL* 2343 (4th ed. 1995). More interestingly, members of the cognoscenti occasionally suggest that Mauch's managerial style may have placed too much emphasis precisely on managerial strategizing itself.

More broadly, we may concede, if not insist, that real baseball aficionados will have no truck with simple statistics, such as win-loss percentages, when more elaborate formulae can be devised. One might, for example, assume that teams that score just as many runs as they give up and who have managers of precisely average skill will tend to win half of their games. One might then ascribe a team's ability to win more than half their games, while scoring no more runs than they surrender, to exceptional managerial ability. But managers of equal ability may have different attitudes toward blowouts, or individual game wins and losses by large margins. And a managerial decision to sacrifice power hitting and exceptional run production in favor of some other aspect of the game might also simply be an unwise decision, even where it enhances the manager's standing according to this allegedly more refined measure.

Doubtless the assertions, rebuttals, and surrebuttals in such cases will be endless. But it is not clear how the interminability of the debate, or the indeterminacy of its outcome, establishes practical wisdom as a stable trait of character.

talking about their character? And when we talk about a supposedly practically wise manager, would we also believe, with Aristotle, that such a manager simply must possess each and every one of the separate virtues related to managing well, let alone all of the moral virtues that might be relevant?³⁶

We may concede that if the more obvious extraneous factors were controlled for, over any length of time some managers would accumulate better records than others. Some would, over a career, win roughly half the time, some more, and some less. But this, by itself, would clearly not suffice to establish the reality of practical wisdom as a stable trait among some managers. Fair coins, we may assume, do not vary in their practical wisdom, or in the ability to come up heads when tossed. But given multiple tosses of each coin, twenty coins will tend to sort themselves out into something like a normal or bell-shaped distribution in terms of numbers of heads accumulated by each coin. Are we sure that patterns of baseball managers' wins or championships would not be explainable on a similar statistical basis, or if not, that factors not related to practical wisdom cannot account for the departures from a chance distribution?

It is possible to argue that in fact, all major league baseball managers possess enormous amounts of baseball practical wisdom and are therefore all at the "top" of the distribution. But baseball fans who believe in practical wisdom do not also normally believe this. More importantly, Kronman certainly does not argue that most lawyers and judges today exhibit great amounts of practical wisdom in the legal sphere, thereby blurring the differences between those with and without practical wisdom. Nor does he argue that no lawyer, judge, or policymaker today displays special practical wisdom.

All in all, our foray into baseball managing, where we would have expected support, at least by analogy, for the idea of the reality of practical wisdom, has instead had more equivocal results. Perhaps "practical wisdom" is actually more like coins' allegedly differential abilities to turn up heads on repeated trials, or perhaps it reflects unrelated factors.

This hesitancy to accept practical wisdom as a real and stable character trait may, however, merely provoke frustration.

³⁶ The reader is at this point invited to recall, or research, appropriate instances from the realm of baseball. In the political sphere, the reader is urged to consider the cases of many of Shakespeare's tragically flawed heroes, or of a number of Richard Nixon's arguably sound foreign policy judgments in light of Watergate.

Are there not clearly persons at the bottom end of the distribution of practical wisdom? Can we not say, for example, of a mass murderer as a citizen, or a virulent racist as a detective, that they possess less practical wisdom than some other persons? Even this remarkably understated assessment might establish the reality of practical wisdom, as well as its identifiability. Let us assume so. We can therefore identify some anti-phronimoi, or those who are low in practical wisdom. But even this may not be of much assistance with respect to Kronman's actual project.

Kronman, after all, is most interested in lawyers and judges who have more practical wisdom than average, not less. And he, or we, must be able to reasonably well identify such persons. But our ability to identify persons who are extremely deficient in practical wisdom does not necessarily imply that we can also identify those who have more practical wisdom than average. There is no guaranteed symmetry here. By analogy, even if we could identify some terribly incompetent artists, that would not mean that our society can equally recognize, or agree on, whether Andy Warhol, Christo, Norman Rockwell, or Roy Lichtenstein possess unusually great artistic ability.

Even if we, or some appropriate person or group, could reasonably well identify one or more persons with great artistic ability, we would still have to worry about possible differences between recognizing great artists and recognizing one or more lawyers who have great practical wisdom. Proceeding again by analogy, let us think about practical wisdom in the making of foreign policy. Notoriously, persons occupying the crucial senior foreign policy posts, along with outside foreign policy specialists, disagree on basic foreign policy ends and means, for a variety of reasons. Disagreement is commonly along multiple dimensions, and the positions endorsed may not fall neatly into only a few categories.

Let us leave the question of practical wisdom among foreign policy makers with a thought experiment. Consider two possible mechanisms of deciding on a basic foreign policy question—whether to intervene militarily in a particular foreign conflict or not. The first mechanism would be to select the approach endorsed by a highly placed senior foreign policy official or specialist, in or out of government, selected at random from the very small pool of such experienced, seasoned decisionmakers. The second mechanism would be to follow a reasonably fairly worded public referendum, or a

broadly and fairly inclusive national public opinion poll on the issue.

Doubtless we can all think of occasions in which we thought that public opinion polls would have called for a misguided foreign policy, at least with the benefit of hindsight. But it is also not difficult to think of occasions on which we thought that an Administration's foreign policy was ill-judged, at least in retrospect. Often enough, the people are ahead of the seasoned decisionmaking experts. Can we say, with any confidence, that popular judgments as to foreign policy would have led to bad outcomes significantly more often than the approach of a particular randomly selected seasoned diplomat? But shouldn't practical wisdom tend, as a rule, to give us better results than decisions not made on the basis of practical wisdom?

We might attempt a similar thought experiment with regard to domestic policy. Here, the public opinion polls admittedly are frequently hair-raising. But then so, commonly, is the officially selected domestic policy. There is admittedly no guarantee that even our official domestic policy reflects the views of those who are really practically wise in such matters, as opposed to unwise but entrenched policymakers. But at some point, many persons will be inclined to admit that deciding which domestic policy option most reflects the virtue of practical wisdom, or deciding who the domestic policy *phronimoi* really are, dissolves into indeterminacy, unresolvable wrangling, and essential contestability. It is thus at best extremely difficult to test for the presence of real practical wisdom in the especially controversial area of domestic policy.

Of course, all this seems rather abstract and unconvincing. Can we not recognize persons who, in accordance with Kronman's depiction, have relatively great capacity for both sympathy and detachment in deliberation?³⁷ No doubt we can. But even a great capacity for sympathy and detachment in practical deliberation does not guarantee practical wisdom. Sympathy and detachment often do not add up to or remotely guarantee good results, even if our reasoning on ends and means seems at the time impeccable. Sympathy and detachment and bad outcomes are all richly compatible.

But over the long haul, are not our odds better if we follow the persons with great sympathy and detachment, and

³⁷ See KRONMAN, *supra* note 1, at 98.

the habituated, ingrained ability to reason well about alternative possible ends and means? Perhaps, but let us close this preliminary section with one last skeptical possibility. The *phronimos* is not our only possible guide in practical-moral affairs. Doubtless we do not want to follow those who simply deliberate poorly. But there are also examples of persons who are not practically wise in the senses of Aristotle or Kronman, but who reach the right result as often. Some persons may be simply and consistently goodhearted, yet incapable of reasoning well about alternative ends and means. Because of their socialization if not their noble savagery, being unkind to anyone, no matter how "different," is for them literally unthinkable. Their moral judgments take the form of consistent, unshakable feelings or intuitions, rather than deliberation, and cannot be articulated and defended with any sophistication by their holder. But their judgments may be no less consistently right or illuminating than anyone else's.³⁸

II. DOES THE WELL-CONDUCTED SOCRATIC CASE METHOD DISTINCTIVELY PROMOTE PRACTICAL WISDOM?

Let us henceforth assume that there is a real and identifiable practical wisdom, as Kronman describes it, that lawyers might potentially exhibit. How, then, might law schools promote practical wisdom within their students? Kronman's emphasis, of course, is on something like the traditional appellate case law method. Kronman argues that "whatever other ends it serves, the case method of law teaching also promotes the character traits of prudence and public-spiritedness"³⁹ The case method, properly utilized, "works simultaneously to strengthen both the student's powers of sympathetic understanding and his ability to suppress all sympathies in favor of a judge's scrupulous neutrality."⁴⁰ Requiring students to arbitrarily assume particular, shifting, and inconsistent roles in advocacy and deliberation may be initially disturbing for some.⁴¹ But through habituation, the

³⁸ We assume at this point that the mere intuitive or trained ability to aptly and consistently apply and even articulate a homespun rule, such as to be courteous to everyone, does not necessarily require practical wisdom in the sense in which Kronman uses the term. And we do not argue that such a person is as fully admirable as a genuinely practically wise person.

³⁹ KRONMAN, *supra* note 1, at 154.

⁴⁰ *Id.* at 113.

⁴¹ *See id.* at 113-14. *See also* Kronman, *supra* note 8, at 228-29. For further intriguing

student may come to develop both her understanding of initially alien and implausible views, and her ability to critically assess all views.⁴² Often, the student eventually recognizes what Kronman refers to as “the incommensurability of values.”⁴³

Kronman’s assessment of the value of the case method in promoting practical wisdom has not gone unchallenged. Professor Anthony Alfieri has, for example, argued that “[t]here is scant evidence . . . that the case method of instruction inculcates the character trait of deliberative wisdom.”⁴⁴ Professor David Luban has urged, even more strongly, that “it is almost perverse to extol the case method of instruction as an instrument for teaching practical judgment.”⁴⁵

Interestingly, Kronman himself recognizes that traditionally, practical wisdom within attorneys was instilled “by a blend of apprenticeship and broad humanistic learning.”⁴⁶ And he also might well view role-playing and simulation exercises, if appropriately conducted, as conducive to practical wisdom even if undertaken outside the traditional appellate case or Socratic context. What should really be said, then, about the value and limitations of the traditional Socratic case method in promoting practical wisdom?

The cases, of course, are themselves usually crudely binary, zero-sum affairs. The student can then be led to construct multiple arguments for perhaps initially alien positions, and then perhaps attempt somehow to weigh those arguments in some sort of balance against a variety of opposing arguments. Alternative factual circumstances can be posed and assessed. Incommensurable values can sooner or later be recognized as

discussion, see Mark Neal Aaronson, *Dark Night of the Soul: A Review of Anthony T. Kronman’s The Lost Lawyer*, 45 HASTINGS L.J. 1379, 1381, 1390 (1994).

⁴² See KRONMAN, *supra* note 1, at 114-15.

⁴³ *Id.* at 115.

⁴⁴ Anthony V. Alfieri, *Denaturalizing the Lawyer-Statesman*, 93 MICH. L. REV. 1204, 1222 (1995) (reviewing ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993)).

⁴⁵ David Luban, Book Review, 105 ETHICS 947, 949 (1995) (reviewing ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION*). See also Richard A. Posner, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society*, NEW REPUBLIC, Oct. 31, 1994, at 40 (book review of Mary Ann Glendon) (“I do not agree that . . . traditional legal education actually strengthens one’s capacity for sympathetic understanding”).

⁴⁶ KRONMAN, *supra* note 1, at 154.

such. Certainly, the attitudes and beliefs of the students can eventually be changed, for good or ill.

Beyond this, it is difficult to do more than speculate about a special linkage between the case method and practical wisdom. One line of speculation would go like this: by itself, immersion in the Socratic case method as described by Kronman does not tend distinctively to generate *phronimoi* in large numbers.⁴⁷ The Socratic case method may well tend to engender a certain sophistication,⁴⁸ and in at least a few cases a sense of relativism or moral skepticism. But this method usually underplays what would seem a crucial contributor to practical wisdom: a wide variety of life experiences across circumstances, cultures, and classes, extended and richly supplemented by broad, cross-disciplinary learning. Now, this is not easy to provide or achieve. But then, neither is practical wisdom.

Let us briefly illustrate why the usual case method must be supplemented with broad life experience and broader learning if it is to specially promote practical wisdom. Consider a Socratic rendition of, for example, the welfare rights case of *Dandridge v. Williams*.⁴⁹ *Dandridge* involves and affects some persons who have lived the entirety of their lives under the grimmest circumstances, in desperate, grinding, stultifying poverty, with the most constricted, claustrophobic of horizons. All the classroom hypothetical permutations, role-playing, perspective shifts, and forensic gymnastics, by themselves, can give us only a dangerous illusion that we have successfully identified with such persons, discovered with even rough accuracy what it is like to live such lives, and sensibly factored those vicarious life experiences into some non-arbitrary case outcome.

The Socratic case method may force students to, for the moment, mentally parachute themselves into a housing project. But if the student's own life experiences and learning in the liberal arts are remote from chronic poverty, the

⁴⁷ It is not clear that, following Aristotle, we can say that our practically wisest students possess all the virtues. See *supra* note 27 and accompanying text.

⁴⁸ Without reading too much into this word's etymology.

⁴⁹ 397 U.S. 471 (1970) (rejecting an equal protection challenge to Maryland's ceiling on monthly welfare benefits even when family size brought a given family below Maryland's own computed "standard of need"). Of course, the Socratic case method often utilizes a succession of contrasting cases, but this would not seem to affect the current argument.

student may be better off merely keeping a respectful distance and a sense of personal ignorance and fallibility, rather than absurdly presuming to have sufficiently grasped what it is like to have always been chronically, desperately poor.

Of course, judges must decide such cases, whether they are in a position to really empathize with either of the primary litigants, or with any other affected persons. It is difficult to calculatedly broaden one's own actual life experiences. And without broadened life experiences, we also have no hope of approaching anything like real neutrality, either. It is difficult to be neutral between what we understand and what we do not understand, even if we imagine that we genuinely understand both parties' positions. This means that we cannot be optimistic about developing and applying practical wisdom in such cases.

Often, then, the best we can do to prepare for such cases is to broadly recognize that other persons and groups have experiences that we are simply not in a position to fully grasp.⁵⁰ To some limited degree, but only to a limited degree, we can bridge the gap by listening to the narratives of such persons, to intermediary journalists, social scientists, and other scholars, and by attending to the truly great novelists.⁵¹ A broad and serious exposure to such readings can sometimes reduce our inclination to crudely universalize our own experiences, with only minor modifications. But even the most authentic or brilliant literature has its limits and can mislead as well as expand our horizons. We can, for example, read *Les Misérables* with rapt attention without really appreciating what starvation, ostracism, or the chronic fear of detection and persecution are genuinely like.

It seems clear that a broader range of experiences and of education are necessary if a lawyer is to be able, in any serious sense, to live out what Kronman considers the characteristic experience of the lawyer: that "nothing human is foreign to

⁵⁰ This, by the way, does not establish moral relativism or moral skepticism, for reasons the elaboration of which would distort this essay unduly. See R. GEORGE WRIGHT, REASON AND OBLIGATION ch. 5 (1994).

⁵¹ On narrativity and the law, see, e.g., Richard Delgado, *Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545 (1995). See also R. GEORGE WRIGHT, DOES THE LAW MORALLY BIND THE POOR? ch. 2 (1996). With respect to cases such as *Dandridge v. Williams*, the reader might begin, perhaps, with a work like ALEX KOTLOWITZ, THERE ARE NO CHILDREN HERE: THE STORY OF TWO BOYS GROWING UP IN THE OTHER AMERICA (1991).

me,"⁵² or to be "exposed to the widest imaginable range of human hopes, follies, and accidents."⁵³ If a lawyer, according to Kronman, has "seen it all,"⁵⁴ it stands to reason that at one point or another, the lawyer must have been exposed to it all, and even a full career in a law firm does not expose one to anything remotely approaching the full range of human experience. In particular, the practice of law hardly guarantees any meaningful exposure to the actual lives of those who cannot afford to pay for legal services, or to those who are minorities or are left at the legal margins of society. There is thus a substantial class bias inherent in generally relying on one's legal experiences.

On these grounds, we would have expected Kronman to ask for more law school exposure to the broad range of the social sciences and humanities.⁵⁵ Aristotle himself recognized the need for the *phronimos* to correct for the distortive effects of cognitive and other biases,⁵⁶ and this seems to require not only experience but interdisciplinary learning as well.⁵⁷ Realistically, the person who seeks practical wisdom may, inevitably, depend on either a wider exposure to interdisciplinary learning, or on a narrower such learning, and it is hard to see the advantage of the latter in cultivating practical wisdom.⁵⁸

An attorney's breadth of learning may well, over time, be of real significance to the attorney's best clients. It may well be that clients would be more inclined to solicit and respect the judgments of their lawyer on ultimate ends, and not just on technical means, if they thought that lawyers had been trained not only in the bivalent adversarialism of most law school classes, or even under the Socratic role-shifting endorsed by

⁵² KRONMAN, *supra* note 1, at 159; Kronman, *supra* note 8, at 231.

⁵³ KRONMAN, *supra* note 1, at 159.

⁵⁴ *Id.*

⁵⁵ *See id.* at 356. *See also* Alfieri, *supra* note 44, at 1223 (discussing Kronman on this point).

⁵⁶ *See, e.g.*, SHERMAN, *supra* note 20, at 35.

⁵⁷ *See, e.g.*, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982).

⁵⁸ Professor Gail Heriot, following John Maynard Keynes, raises the possibility that Kronman's *phronimos* may to some extent rely, in an unrecognized enthrallment, on one or more defunct academic scribblers. *See* Heriot, *supra* note 16, at 1728 n.22. *Cf.* Amy Gutmann, *supra* note 19, at 1770-71 (recommending the teaching of deliberation in law schools in part through teaching "more of the knowledge and understanding that is necessary to make informed judgments about alternative legal strategies").

Kronman, but also to understand as well as possible a wide range of human circumstances, motivations, and perspectives. And it is clear to Kronman that a lawyer's subjective fulfillment may depend, in part, on the breadth of the trust and respect for the attorney's judgment held by the client.⁵⁹

III. OUGHT WE TO PROMOTE PRACTICAL WISDOM AS KRONMAN HIMSELF DESCRIBES AND ELABORATES THE IDEA?

Practical wisdom is, almost by definition, a fine thing. But Kronman is again not interested merely in endorsing the broad idea of practical wisdom. Kronman naturally wishes to propound and endorse a more narrow, particular conception of practical wisdom. We cannot here explore all of the dimensions of Kronman's particular view of the acquisition, nature, and concrete implications of practical wisdom. We will instead merely notice, and briefly refer to, several of the more interesting dimensions of Kronman's approach. These dimensions we may refer to under the headings of conservatism, inegalitarianism, incommensurability, "thin" fraternity, and "thin" metaphysics. Ultimately, we may want to retain the idea of practical wisdom as an ideal of character, but in a version that varies to some degree from that of Dean Kronman.

Kronman's vision of practical wisdom is, on his own description, conservative. In some measure, his conservatism has an historical or temporal focus. The model of the practically wise attorney was thus formerly more viable than it is currently.⁶⁰ This claim, of course, renders Kronman vulnerable to charges of nostalgia and of romanticizing the history of the American legal profession.⁶¹ Kronman could have largely bypassed these criticisms by simply deleting the historical dimension of his argument. He clearly could have argued simply that for contemporary lawyers, a professional life of the fulfilling exercise of practical wisdom is unlikely, whether or not it was ever more likely in the past.

The more significant dimension of Kronman's conservatism is his belief that practical wisdom generally counsels

⁵⁹ See, e.g., KRONMAN, *supra* note 1, at 128-33.

⁶⁰ See *id.* at 2-3. See also Neil Duxbury, *History as Hyperbole*, 15 OX. J. LEGAL STUD. 477, 478 (1995).

⁶¹ See, e.g., Thomas L. Shaffer, Book Review, 41 LOY. L. REV. 387, 394 (1995) (reviewing ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993)).

respect for tradition and slow, measured, incremental change, as opposed to dramatic, totalizing, or radical reform.⁶² For Kronman, the practically wise are normally “attached to existing institutions and inclined to alter them only through a process of slow interstitial adjustment”⁶³ But this is a matter of gradualism, and not of stasis or of wisdom without reflection.⁶⁴

One response to this sort of conservatism is that it poses a false dilemma. We do not, at least in our society, have a real choice between gradual reform and some sort of lurching, radical, discontinuous, totalistic change that is consciously intended and reasonably accurately steered along predicted lines.⁶⁵ Intended change is, at best, slow and gradual. Over a long period of time, such change can cumulatively be large.

The real problem for Kronman’s thesis, though, is not this false dilemma. Instead, it is that in order for a society to achieve consciously intended slow or gradual change, some leaders may have to aim at, and actually intend, more rapid and substantial change. To achieve what is possible, some may have to aim at what is not realistically possible. Otherwise, the momentum for progressive change may be slowed even further or utterly dissipated by a visionless obsession with short-term, transitional costs.

Dr. King’s *Letter From Birmingham Jail*⁶⁶ is valuable not only for its ultimately totalistic vision, but for its convincing response to the recommendations, even from some persons reasonably sympathetic to his goals, that the civil rights struggle be less confrontational and more willing to delay and await a more propitious time. We may reasonably fear that if all those who seek social justice become incrementalists, the

⁶² See, e.g., KRONMAN, *supra* note 1, at 159, 161.

⁶³ Kronman, *supra* note 8, at 225.

⁶⁴ Cf. ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 353 (1988) (criticizing Edmund Burke’s assumption that healthy traditions involve no significant reflection or rational theorizing). For further discussion of Kronman’s conservatism in this respect, see, e.g., Aaronson, *supra* note 41, at 1387; Peter Margulies, *Progressive Lawyering and Lost Traditions*, 73 TEX. L. REV. 1139, 1140-41 (1995) (reviewing ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993)).

⁶⁵ See, e.g., RICHARD DELGADO & JEAN STEFANCIC, *FAILED REVOLUTIONS: SOCIAL REFORM AND THE LIMITS OF LEGAL IMAGINATION* (1994); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 336-43 (1991).

⁶⁶ MARTIN LUTHER KING, JR., *LETTER FROM BIRMINGHAM JAIL* (1994). See also MARTIN LUTHER KING, JR., *WHY WE CAN’T WAIT* (1964). For useful commentary, see, e.g., Derrick Bell, *The Triumph in Challenge*, 54 MD. L. REV. 1691 (1995).

only social changes will, whatever their scope and pace, be unchosen and unintended by those seeking social justice.

It is also worth a moment to reflect briefly on the inegalitarian dimension of Kronman's vision of practical wisdom. Kronman urges straightforwardly that "some citizens have a superior ability to discern the public good . . ." ⁶⁷ and that "this superiority is due to their excellence of judgment," ⁶⁸ which is in turn "a trait of character and not simply an intellectual skill." ⁶⁹

We have already attempted to cast some doubt on the genius/bum distinction among major league baseball managers and will not repeat that discussion here, other than to note that most managers seem to be keenly aware that their status as either a genius or a bum may vary daily or over a period of years. More broadly, there is not much utility in a belief in the unequal distribution of practical wisdom if the relevant parties cannot accurately and reliably identify those with unusual degrees of practical wisdom. Let us not forget the practical wisdom of Thomas Hobbes:

Prudence, is but Experience; which equall time, equally bestowes on all men, in those things they equally apply themselves unto. That which may perhaps make such equality incredible, is but a vain conceit of ones owne wisdom, which almost all men think they have in a greater degree, than the Vulgar [T]here is not ordinarily a greater signe of the equall distribution of any thing, than that every man is contented with his share. ⁷⁰

More disturbing, though, is Kronman's argument that there is a tension, at least in some contexts, between strong egalitarianism and the virtue of practical wisdom. ⁷¹ If we believe in practical wisdom, the relationship between practical wisdom and egalitarianism is, or should be, an utterly central question in social, political, and legal philosophy. Central philosophical problems are usually not quickly resolved, and this essay will make no attempt to establish an exception. We can, however, at least state a countervailing claim: that practical wisdom is intimately linked to strong forms of egalitarianism, in a number of crucial respects.

⁶⁷ KRONMAN, *supra* note 1, at 35.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ THOMAS HOBBS, *THE LEVIATHAN* ch. 13 (Prometheus ed., 1988).

⁷¹ KRONMAN, *supra* note 1, at 367. *See also* Margulies, *supra* note 64, at 1148.

We can again admittedly offer no real support here for linking practical wisdom and strong equality. But let us at least recall that for Kronman, practical wisdom involves habituation not only in detached reflection, but in an unusually powerful capacity to empathize and to sympathize.⁷² It is not particularly difficult for judges and lawyers to empathize and sympathize with people like themselves, or with the socially respected and the well-off more generally. Unusual capacity for empathy and sympathy is instead demonstrated, presumably, in more fully appreciating, and caring about, what it is like to live a life of stark, extreme deprivation or stigmatization. And those we come to sympathize with, we may tend to more deeply respect and provide for.

Kronman may not mean to suggest that strong egalitarianism, even among relatively detached academics or among purer activists, tends to any degree to impair the exercise of practical wisdom.⁷³ Assuming this to be so, we should turn briefly to some concededly hazy further speculation on the possible implications of Kronman's perspective on the incommensurability⁷⁴ of many important choices among legal values.

Kronman clearly believes—along with many who may be more and less conservative than he is⁷⁵—that many apparently important moral, political, and legal choices involve alternatives the value or “weight” of which cannot be placed on a common scale, balanced against one another, or otherwise shown to be, in themselves, rationally preferable on any

⁷² See, e.g., KRONMAN, *supra* note 1, at 98.

⁷³ But see, e.g., *id.* at 49 (discussing the “new civic republicans” as bearing an “antipathy” to the ideas of “judgment” and of “wisdom”).

⁷⁴ For discussion of the problems of incommensurability in a legal context, see, e.g., the contributions of Professors Faigman, Schauer, Waldron, and Gottlieb to Symposium, *When Is a Line as Long as a Rock Is Heavy?: Reconciling Public Values and Private Rights in Constitutional Adjudication*, 45 HASTINGS L.J. 707 (1994); R. George Wright, *Does Free Speech Jurisprudence Rest On a Mistake?: Implications of the Commensurability Debate*, 23 LOY. L.A. L. REV. 763 (1990); Michael J. Perry, *Some Notes on Absolutism, Consequentialism, and Incommensurability*, 79 NW. U. L. REV. 967, 979 (1985).

⁷⁵ Value incommensurability is a major theme of writers as politically disparate as John Finnis and any number of writers associated with liberal or left-egalitarianism, or with the Critical Legal Studies Movement. See, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 115-17 (1980); Margaret J. Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 66 (1993); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441 (1990).

objective, non-arbitrary grounds.⁷⁶ Such alternatives are thus rationally incommensurable.

The problem in such cases, evidently, is that unless a way can be found to rationally decide such cases,⁷⁷ there will be some tendency for persons faced with such dilemmas to adopt not the sort of conservative traditionalism Kronman endorses,⁷⁸ but a form of relativism, subjectivism, or skepticism instead.⁷⁹ Kronman's own approach runs along the following lines:

If we ask . . . what it means for a person who must choose among incommensurable goods to live well, we cannot answer, with the Greeks, that it means to live in accordance with the truth, for if the goods in question really are incommensurable, the truth cannot adjudicate between them For us, living well can only mean living without regret or self-deception in the full light of our predicament.⁸⁰

This requires not just an existential act of will, but the development of character and integrity.⁸¹ And when the problem of incommensurability arises in the political sphere, Kronman offers a parallel answer. Integrity is to individual decisionmaking as "political fraternity" is to collective or public decisionmaking when the choice is among incommensurable values.⁸² Thus "[i]n the political sphere, . . . what makes one judgment wiser than another when the alternatives cannot be measured on any common scale of value is its tendency to promote political fraternity"⁸³

⁷⁶ See, e.g., KRONMAN, *supra* note 1, at 67, 85-93, 97, 104, 117. See also James M. Altman, *Modern Litigators and Lawyer-Statesmen*, 103 YALE L.J. 1031, 1035 (1994) (reviewing ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993)).

⁷⁷ See, e.g., KRONMAN, *supra* note 1, at 85. Of course, a rational choice between incommensurable values can be made if one adheres to a relevant, decisive background rule. Thus, we can rationally decide between, say, increasing utility or keeping a promise if we believe in a broader rule—perhaps that we should respect rationality within persons—that offers an authoritative and determinate resolution of the choice between incommensurable values.

⁷⁸ See, e.g., *id.* at 155, 159.

⁷⁹ See *id.* at 117, 160; see also R. GEORGE WRIGHT, *REASON AND OBLIGATION* ch. 5 (1994).

⁸⁰ KRONMAN, *supra* note 1, at 85. For further discussion, see, e.g., David B. Wilkins, *Practical Wisdom For Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics*, 108 HARV. L. REV. 458, 461 (1994) (reviewing ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS IN THE LEGAL PROFESSION* (1993)).

⁸¹ See KRONMAN, *supra* note 1, at 85-86.

⁸² See *id.* at 97.

⁸³ *Id.*

So on Kronman's view, it is the conditions of integrity within the person and fraternity within the society that may well stand between us and arbitrary decisionmaking. But the specter of arbitrariness may not be readily exorcised by such means. Let us think for a moment about Kronman's conception of political fraternity.

Kronman urges that incommensurable political choices be resolved in favor of promoting sympathetic political fraternity. No doubt political fraternity seems, in the abstract, a fine thing. But, again, Kronman has something rather specific in mind. Kronman's conception of sympathetic political fraternity is, roughly, midway between mere tolerance of those with whom we disagree and a deeper sort of union, identification, or community.⁸⁴ Who counts as an actual or potential member of the political fraternity must of course be worked out, and some extreme views, on Kronman's approach, should not be treated with sympathy.⁸⁵

Endorsing just this conception of political fraternity of course has its obvious attractions. Any "mean" conception of any good thing can aspire to capture most of the benefits of its flanking extremes while minimizing their respective costs. Kronman is doubtless right in an important sense in linking political fraternity to preservation of the polity.⁸⁶ But a polity might well hold together either on the basis of an even richer sense of unity, or on the basis of mere widespread tolerance that falls short of sympathetic fraternity. In order to decide how disastrous it would be to fail to promote political fraternity, we would need to know how far a society can fall from political fraternity before it descends into anything remotely approaching chaos. After all, not every element of division, political or cultural fault line, or change of cultural identity involves the disintegration of that society.⁸⁷

Political fraternity comes in degrees, and increasing or decreasing political fraternity doubtless involves increased or decreased costs in terms of other worthy values.⁸⁸ For any given degree of political fraternity, there may be particular costs in values such as freedom or autonomy, equality, dignity,

⁸⁴ See *id.* at 93-94. See also Aaronson, *supra* note 41, at 1386; Alfieri, *supra* note 44, at 1212; Altman, *supra* note 76, at 1038.

⁸⁵ See KRONMAN, *supra* note 1, at 108.

⁸⁶ See *id.* at 92.

⁸⁷ See, e.g., H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963).

⁸⁸ See KRONMAN, *supra* note 1, at 107.

and cultural or economic development.⁸⁹ These tradeoffs or conflicts may well themselves involve controversial and incommensurable choices. While we might sometimes want to invoke the value of political fraternity to resolve other incommensurable value choices, we will then invariably face problems of incommensurable choices between the value of political fraternity and other possible values. Thus if we wish to adequately address the prospect of relativism or arbitrariness in public decisionmaking, we cannot simply count on the value of increasing political fraternity as a touchstone.

The more intractable problems of incommensurability may well arise even if we do not stray far from the central elements of Kronman's approach. It goes without saying that the development of practical wisdom is important to Kronman. What if there arises a tradeoff between the value of political fraternity and the prevalence of practical wisdom? Is such an incommensurable tradeoff really impossible in principle? Are there no tradeoffs between, say, maximizing the exercise of practical wisdom and spreading or equalizing the exercise of practical wisdom? What about possible conflicts between maximizing the exercise of practical wisdom and maximizing the ability of the public, or some segment thereof, to freely recognize and respond to the exercise of practical wisdom?

Now, Kronman's book is primarily a diagnosis of a condition of the lives of lawyers and judges. It is not supposed to be a treatise in metaethics. But unless we can make more progress in the rational selection from among incommensurable values, the thoughtful lawyer will tend to lead a life of only such fulfillment as can coexist with much arbitrariness and skepticism.⁹⁰

Ultimately, Kronman seems driven to a fairly deep sort of value skepticism that extends beyond being merely reserved or suspicious regarding allegedly universal principles or grand abstractions, at least beyond the value of practical wisdom itself.⁹¹ He clearly recognizes that the case method, for example, can contribute to a degeneration of detachment and sympathy into cynicism, indifference, moral skepticism, and

⁸⁹ See *id.*

⁹⁰ Compare the generally quite sympathetic review by Gail Heriot, *supra* note 58, at 1751 n.96 (querying whether the choice between Kronman's practical wisdom model and that of the scientific reformers is not itself rationally incommensurable).

⁹¹ See *supra* note 80 and accompanying text.

egocentrism.⁹² He wishes to produce what he refers to as “stoics”⁹³ rather than cynics.⁹⁴ In seeking to avoid both metaphysics and an arbitrariness of value judgments, Kronman is in distinguished company.⁹⁵ But there is ultimately no real grounds to suppose that we can go as far as Kronman seems to be committed to in minimizing the role of metaphysics, while continuing, over the long term, to feel “wonder” in the presence of the world, or even of other people.⁹⁶ “Wonder” may require a good deal of metaphysics.

Kronman frankly recognizes that ultimately, he can offer law students and lawyers no “good reasons” to believe, on the basis of only an attenuated metaphysics, that problems of incommensurability will not tend to generate currently unattractive forms of moral relativism and moral skepticism.⁹⁷ Kronman can certainly hold up the model of the judicial attitude⁹⁸ and urge students and lawyers to find certain particular legal lives to be shining and inspiring examples.⁹⁹ But to decline to endorse, for example, John McCloy, Cyrus Vance, or Paul Warnke as the most preferred legal role models¹⁰⁰ need not reflect impudence, ignorance, or lack of appreciation.

⁹² See, e.g., KRONMAN, *supra* note 1, at 117, 160.

⁹³ But compare the Ciceronian Stoic adherence to an unchanging true and natural law, at some remove from Kronman's approach. See, e.g., MARCUS TULLIUS CICERO, *ON THE COMMONWEALTH* 48 (George H. Sabine & Stanley B. Smith trans., 1960) (editors' Introduction).

⁹⁴ See KRONMAN, *supra* note 1, at 118. Cf. Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1605 (1985) (referring, regarding Bickel on Edmund Burke, to the practical wisdom of the judge or statesman “who has been immunized by a ‘mature skepticism’ from the temptations of metaphysical thinking”). For further discussion of Burke by Kronman, see Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1047, 1055 (1990).

⁹⁵ See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* (1993); Richard Rorty, *Postmodernist Bourgeois Liberalism*, 80 J. PHIL. 583 (1983). But cf. ARISTOTLE, *THE ETHICS OF ARISTOTLE* book VI, ch. 5 at 177 (J.A.K. Thomson trans., 1955) (translation of the Nicomachean Ethics) (“[p]ractical wisdom is a rational faculty exercised for the attainment of truth in things that are humanly good and bad”); Hugo Meynell, *On Realism, Relativism, and Putnam*, 35 INT. PHIL. Q. 331, 340 (1995) (“human authenticity, as stringently following evidence wherever it leads, heads toward knowledge of what is really good as well as of what is really true, and towards action in accordance with it”).

⁹⁶ See Kronman, *supra* note 94, at 1605.

⁹⁷ See KRONMAN, *supra* note 1, at 160.

⁹⁸ See *id.* at 118, 160.

⁹⁹ See *id.*

¹⁰⁰ See *id.* at 11-12.

The deeper problem, of course, is not one of disputing over which particular lawyers have manifested practical wisdom, or over who the best lawyers are in the broadest possible sense. The deeper problem is instead exhibited in Kronman's concession that such disputes cannot be solved by recognizable forms of argument.¹⁰¹ Ultimately, Kronman's attenuated metaphysics constricts his options to something like describing the practically wise lawyer, on his particular conception, and then gesturing in the direction of our approving such a model.¹⁰² To the question of why, rationally, we should find one model more inspiring¹⁰³ than another, why lawyers should ever make genuine sacrifices, or why we should retain the idea of inspiration at all, there can be no further response without some rehabilitation of metaphysics. For Kronman, no less than for many others of our era, an unattractive moral skepticism remains the frog grinning up at us from the bottom of the mug.

¹⁰¹ See *id.* at 118, 160.

¹⁰² Compare the emotivism of Charles L. Stevenson and of Allan Gibbard as expressed in CHARLES L. STEVENSON, *ETHICS AND LANGUAGE* (1944) and ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS* (1990).

¹⁰³ See KRONMAN, *supra* note 1, at 160.

