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Introduction: Conversations About the State of the Legal Profession

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Articles

Introduction: Conversations About the State of the Legal Profession

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With this symposium the *Dickinson Law Review* celebrates a century of service to the law and to the legal profession. Born near the close of the nineteenth century, the *Review* examines here some of the issues facing a profession said to be in "crisis" near the close of the twentieth century. It is fitting that the *Review* should celebrate its Centennial by publishing essays about challenges to the profession; the work of the *Review* always has been grounded in the law, as practiced, developed, and taught, exploring doctrine and theory in relation to, and with respect for, the work of judges, lawyers, and law professors.

This symposium issue of the *Review* addresses some of our current professional challenges from a variety of perspectives, with a variety of voices, and with a variety of levels of optimism. The editors of the *Review* suggested to the symposium contributors that they write essays stimulated by two recent books, Yale Law School Dean Anthony T. Kronman's *The Lost Lawyer: Failing Ideals of the Legal Profession*,[1] and Harvard Law Professor Mary Ann Glendon's *A Nation Under Lawyers: How the Crisis in the Legal*

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

Profession is Transforming American Society.[2] Our profession — regularly and almost habitually — describes itself as being in a state of "crisis."[3] Dean Kronman's *The Lost Lawyer* is avowedly "about a crisis in the American legal profession."[4] Professor Glendon's subtitle declares the existence of a "crisis." A profession linked to societal and institutional change inevitably will be challenged by change itself, especially when the society it serves feels the effects of industrialization, depression, war, population growth, and rapid advances in technology and medicine, and when that society regularly debates whether government should provide legal services to society's less fortunate members. Even acknowledging the inevitability of change sometimes erroneously seen as "crisis," it is arguable, as has been suggested by Professors David Luban and Michael Millemann, that the current climate of distress is not merely another cyclical occurrence but instead might be "The Big One,"[5] the crisis that results in genuinely fundamental change.

It has become commonplace that our profession acknowledges significant, negative changes in the practice of law, in lawyers' satisfaction with their professional lives, in relationships between clients and lawyers, in public respect for lawyers, and in professional self-confidence. On the other hand, our profession can justly claim important successes: many of the civil rights and civil liberties victories of this century were ultimately won by lawyers. Although we have a substantial body of unmet legal needs, and although the question of publicly funded legal services is a matter of intense debate, we have made progress in the effort to provide legal services to the poor. Our profession's thoughtful self-consciousness about questions of professional ethics has increased dramatically in the past two decades. During the past quarter century the profession has become considerably more accessible to women and members of ethnic and racial minorities. And, contrary to many complaints and criticisms (some of which are well deserved), the nation's law schools have expanded the nature and improved the quality of legal education. There is much cause for

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

3. *See* Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES 144, 145 (Robert L. Nelson et al. eds., 1992).

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

5. David Luban & Michael Millemann, *Good Judgment: Ethics Teaching and Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 32 (1995).

pride. But there is, nonetheless, a pervasive sense that economic, intellectual, and social change has weakened the legal profession — perhaps irreparably.

Whether the crisis now facing the profession is, to use Luban and Millemann's phrase, "The Big One," will never, of course, be known except in hindsight. It is possible to say now, however, that although we might reasonably visualize the end of the "Big Firms" as we now know them, and the disappearance of some of our law schools and dramatic changes in others, and although we might reasonably predict the loss of the profession's monopoly over some legal services and the end of professional self-regulation as we know it, our complex society always will need the good judgment and skilled assistance of law-trained men and women. Lawyers protect individuals and groups from otherwise unchecked power, they create and nurture effective public and private institutions, and they provide, in the best sense of the word, a conservative perspective to help society manage change. Society needs — and will continue to need — good lawyers. But neither this justified optimism nor recognition of our profession's successes excuses us from the obligation to examine critically the nature of the challenges the profession faces and the changes the profession has both experienced and wrought. Such a critical examination is a useful function of Dean Kronman's and Professor Glendon's books. Conversations about what lawyers, judges, and law professors do and how they think are essential if we are to learn from our present circumstances and move forward to serve society in the next century. This symposium is an effort to stimulate such conversations.

Dean Kronman and Professor Glendon provide parallel sets of observations about the current state of the profession. Both Kronman and Glendon believe that during the past three decades the profession has lost touch with important ideals and values that helped define and ennoble our calling. For Dean Kronman, the lost professional "ideal" is the ideal of the "lawyer-statesman," a person who "excels at the art of deliberation as others excel at writing, singing, or chess. The lawyer-statesman is a paragon of judgment, and others look to him for leadership on account of his extraordinary deliberative power."[6] The qualities that distinguish the lawyer-statesman are traits of character — "settled dispositions"

6. KRONMAN, *supra* note 1, at 15.

and "temperamental qualities."[7] The fundamental characteristic of the lawyer-statesman is the capacity to exercise prudent or "practical wisdom." This, says Kronman, was the ideal or "ennobling thought" that, at least through the mid-twentieth century, stood as the model of professional excellence. Indeed he points to the publication of Karl Llewellyn's *The Common Law Tradition*[8] and Alexander Bickel's, *The Least Dangerous Branch*[9] as offering evidence of the appeal into the 1960s of the lawyer-statesman/prudential ideal.[10]

According to Dean Kronman, however, the ideal has been eroded and perhaps lost because of the effects of anti-prudential bias in the dominant modes of modern academic legal thought, the effects of growth and the commercialization of the practice of law in large firms, and the changing nature of the work of the courts — in which efficiency has replaced wisdom.[11]

Professor Glendon, like Dean Kronman, sees a basic change in our shared understanding or idealization of what it means to be a lawyer, judge, or law teacher, and in our common vision of the rule of law. According to Professor Glendon, during the past thirty years "a significant reordering has been taking place in what lawyers believe, or profess to believe, about law and their own roles in the legal system. A major struggle is under way among competing ideas of what constitutes excellence in a judge, a practitioner, a teacher or scholar of law."[12] And Professor Glendon leaves no doubt that she regrets the loss of faith in the craftsmanship of the common law tradition as described by Karl Llewellyn, a loss that is very similar to the loss of the ideal of prudential or practical wisdom described by Dean Kronman.

Not surprisingly, the arguments of these two books are constructed somewhat similarly. Each book describes dramatic changes in the nature of big firm law practice caused by commercial and economic changes, and each book describes an evolution (or perhaps revolution) in the nature of legal scholarship and (perhaps) law teaching with the effect that the education available to would-be lawyers is either anti-prudential (Kronman) or

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7. *Id.* at 342.
8. KARL LLEWELLYN, THE COMMON LAW TRADITION (1960).
9. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).
10. KRONMAN, *supra* note 1, at 50.
11. *Id.* at 4.
12. GLENDON, *supra* note 2, at 7-8.

insufficiently related to the craft of lawyering and judging (Glendon). And each book expresses real disappointment with the quality of the work of the courts.

Although none of our symposium contributors chose to focus on the Kronman and Glendon critiques of the courts, Kronman's and Glendon's differing critical analyses of the judiciary are among the most interesting arguments in the two books. Professor Glendon's thesis, in a nutshell, is that too many of our judges, both liberal and conservative, have become what she describes as "romantic judges" who have adopted an overly expansive view of the judicial function. She quotes the late J. Skelly Wright on the subject of his appellate opinions expanding landlords' liability for the condition of leased premises: "I didn't like what I saw, and I did what I could to ameliorate, if not eliminate, the injustice involved in the way many of the poor were required to live in the nation's capital. I offer no apology for not following more closely the legal precedents which had cooperated in creating the conditions that I found unjust."[13] Professor Glendon argues that judicial attitude she describes as romantic judging is fundamentally at odds with our conception of the rule of law and is therefore dangerous.

Dean Kronman, whose ideal, the lawyer-statesman, is a paragon of deliberation, not surprisingly looks to the courts as an institution likely to be hospitable to that ideal. He is, however, disappointed with what he finds — a depreciation of the lawyer-statesman deliberative ideal resulting from the pressure of heavy caseloads. Courts, Kronman says, have valued efficiency more than deliberation, have relied too much on staff, including inexperienced law clerks, and have adopted a case-management rather than deliberative state of mind. Dean Kronman sees these developments as transforming the work of judging from "statesmanship to [a function] requiring only administrative skill instead."[14]

Both Dean Kronman and Professor Glendon decry some of the changes in the law schools that have occurred during the past several decades. Dean Kronman describes the history of changes in the dominant modes of academic legal thought that have

13. GLENDON, *supra* note 2, at 161 (quoting Letter from J. Skelly Wright to Professor Edward Rabin, *in* Edward Rabin, *The Revolution in Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 549 (1984)).

14. KRONMAN, *supra* note 1, at 342.

resulted in an anti-prudential bias expressed in legal scholarship and, ultimately, in law school classrooms. The result is that law students are not being exposed to opportunities for learning to value or emulate the skills and dispositions of prudential judgment.

Dean Kronman's description of the changes he regrets is an exceptionally lucid examination of a major portion of the history of American legal thought from Langdell's attempts to justify university legal education on the basis of a scientific theory of the law, through the legal realist movement in this century, to the law and economics and critical legal studies movements of the last twenty years. Dean Kronman argues that both law and economics — which he says is the dominant mode of intellectual thought in American law schools today — and critical legal studies are successors to the scientific approaches to law proposed by Langdell and others. These scientific modes of thought are hostile to the prudential strain of legal realism represented by the later works of Karl Llewellyn. Prudentialism, according to Kronman, has been expelled from our law schools by theorists who are disrespectful of approaches to law that do not lend themselves to highly abstract, theoretical synthesis: "For twenty years, American legal thought has been dominated by two movements inspired by an ideal of legal science that is antagonistic to common-law tradition and to the claims of practical wisdom which that tradition has always honored."[15] And the claims of practical wisdom that are essential to maintain the lawyer-statesman ideal are in danger of being repudiated in the law school classroom:

> It is in the law school classroom that lawyers are introduced to the culture of the profession and here that their professional self-conception first takes shape. If the claims of practical wisdom are repudiated here — which the penetration into the classroom of a neo-Langdellian ideal of scholarship makes increasingly likely — it will be harder to retrieve them later and hence more difficult to understand, let alone embrace, any ideal of professional excellence in which the virtue of prudence occupies a central place.[16]

Professor Glendon begins her critical analysis of changes in legal education by discussing changes in the composition of law school student bodies and faculties during the past three decades.

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15. *Id.* at 267.
16. *Id.* at 269.

Professor Glendon argues that in the late 1960s through the early 1990s law school matriculation became a "default" activity for many college graduates who drifted to law school because they could be admitted, and because attending law school was a socially respectable way of treading water while deciding on a career choice. Professor Glendon suggests that the presence in law schools of so many bright students who were never committed to law as a profession had an important impact on the nature of law school culture.[17] This suggestion, in my judgment, captures the reality that the attitudes, aspirations, and ambitions of law students have a significant impact on the behavior and attitudes of law school faculties and thus on the intellectual climate of the law schools.

Professor Glendon also notes that during the past thirty years an increasing number of people entered the law teaching profession who had earned both law degrees and advanced degrees in other disciplines.[18] Whether or not some of these people were drawn to a career in law teaching because they had made a practical assessment of the job markets in other fields, their appearance in the law teaching market coincided neatly with an effort by law schools to demonstrate the legitimacy of their attachment to research universities by emphasizing their connection to the world of inquiry and critical thinking in disciplines other than law.

Like Dean Kronman, Professor Glendon also notes changes in the nature of academic scholarship. In particular, she points to an increase in what she describes as "advocacy scholarship" which she sees as being antithetical to the objective and dispassionate quest for understanding that is a hallmark of the craft of the common-law tradition and of sound academic inquiry.[19]

In addition to changes in the legal academy that threaten to erode the ideals of the profession, both Dean Kronman and Professor Glendon describe changes in the practice of law during the past quarter century. Both authors focus on the well-documented changes in the nature of the law practice in large law firms.

During the past twenty years, large law firms have dramatically increased in size, and many firms have opened branch offices and become multi-city and, in some cases, multi-national firms.

17. *See* GLENDON, *supra* note 2, at 208-03.
18. *Id.* at 203-04.
19. *Id.* at 208.

Moreover, clients have demonstrated diminishing loyalty to particular law firms. Thus, there is less opportunity for lawyers and firms to become familiar with the businesses, cultures, and personnel of their clients. Dean Kronman notes that lawyers in large law firms today work longer hours than did their counterparts two or three decades ago. But perhaps the most important change in practice, in Dean Kronman's view, is the change in the nature of the work performed by large firm lawyers. Their work has become more specialized in at least two respects: First, there has been an increase in the demand for technical specialization in increasingly narrow fields of law. Second, outside counsel are increasingly being called upon to perform legal services for corporations in connection with "extraordinary matters" rather than for more routine legal work.[20]

With this background Dean Kronman asks whether the large corporate law firm offers a professional environment that supports the lawyer-statesman ideal. Not surprisingly, he answers this question in the negative. The most interesting argument in support of his conclusion is that the more fleeting and limited relationships between corporate clients and their outside counsel do not provide sufficient depth and context to enable lawyers to fulfill an important aspect of the lawyer-statesman ideal: the ability to provide clients with independent advice as to ends rather than means and, indeed, in some instances, to offer preemptive advice. As Dean Kronman points out, "[W]ithout a context of the sort that long, routine acquaintance provides, it becomes more difficult to advise a client in any but instrumental terms and in particular [more difficult] to answer the questions of ultimate ends that extraordinary situations often pose for the client's human representatives . . . ."[21] This argument follows from Dean Kronman's proposition that:

> The most demanding and also most rewarding function that lawyers perform is to help their clients decide what it is they really want, to help them make up their minds as to what their ends should be, a function that differs importantly from the instrumental servicing of preestablished goals. It is this

20. KRONMAN, *supra* note 1, at 283-91.
21. *Id.* at 286.

> enterprise of codeliberation that the lawyer-statesman ideal places at the center of the lawyer's professional life.[22]

Professor Glendon describes changes in large law firm practice that have had the effect of greatly altering the understandings and expectations of large law firm lawyers. There was a time when lawyers joined large law firms with the expectation that good, hard work would yield a reasonable or at least a fair chance for partnership. And partnership itself was considered as the equivalent of academic tenure. Neither associates nor partners were universally expected to generate business, but all were expected to perform high quality legal work. Those few who failed to do so were treated somewhat gently as they were advised (and helped) to seek other opportunities. By the late 1980s, however, economic pressures caused large-scale layoffs of big firm associates. Partners' incomes were reduced; partners were fired. Increases in firm size, law firm mergers, the emergence of the lateral-entry lawyer, and the necessity for attending to the business of the practice changed both the nature of collegiality and methods of training of young lawyers in large firms.

Professor Glendon sees the impact of some of these changes in terms very similar to those expressed by Dean Kronman: "The ideal of the well-rounded generalist, the lawyer sought after for judgment as well as technical skill, became increasingly elusive."[23] Moreover, the notion of the independent professional engaged in a craft and exercising judgment was eroded by the fact that clients became more powerful and thus more autonomous in relation to their lawyers: "Lawyers' ideals of independence, always shaky, also have come under special stress in recent years. Those ideals once meant turning away business under certain circumstances and telling existing clients things they did not want to hear."[24] Moreover, "companies now want . . . from outside lawyers . . . what low-status clients have always desired in highly charged, one-shot situations: zealous representation, rather than co-deliberation."[25]

While these incomplete synopses of the Glendon and Kronman books cannot do justice to the books themselves, I hope it is apparent that these books provide a considerable number of points

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22. *Id.* at 288.
23. GLENDON, *supra* note 2, at 29.
24. *Id.* at 33.
25. *Id.* at 34.

of departure for potentially useful conversations about the state of our profession. One set of topics for conversation are subjects addressed either glancingly or not at all by Kronman and Glendon. For example, neither Dean Kronman nor Professor Glendon describe, as part of the "crisis" of the profession, the mismatch in this country between demand for legal services by individuals, families, and small businesses and the supply of those services.[26] Moreover, neither Kronman nor Glendon deals directly with the impact of technology on the practice of law or with issues raised by the increasing globalization of the economy. Finally, as must be obvious, the point of view of Dean Kronman and Professor Glendon is the point of view of law teachers at elite law schools describing the world of law practice largely from the perspective of the large law firms into which many, if not most, of the law graduates of Yale and Harvard ultimately disappear. There is, however, a great professional world out there beyond the big firms and elite schools in which most lawyers are educated and practice, in which most clients receive services, and in which most judges receive briefs and pleadings. It is by no means clear, even if one accepts the idea that the large law firms are leaders of the profession, that the state of things in the great majority of professional settings is anywhere near as grim as Dean Kronman and Professor Glendon describe. My sense is that the tradition of the lawyer-statesman that Dean Kronman so reveres is in fact alive and well in many parts of the country and in a variety of practice settings. It is far from clear that the problems identified with the large firms or the elite law schools are necessarily the problems afflicting the profession as a whole. This, it seems to me, is a topic for a very interesting series of conversations.

Despite the limitations of their books, Dean Kronman and Professor Glendon provide useful and stimulating views of the profession at the end of the century. The essays in this symposium are important contributions to our conversations about the current state of the profession. Professors Jack Sammons and Mark Galanter engage most directly in the dialogue of Dean Kronman and Professor Glendon. Dean Kronman himself has contributed an essay to this collection in which he expands upon some of the themes of his book and, perhaps, as Professor Laurel Terry points

26. *See* AMERICAN BAR ASS'N, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE (1996).

out here, offers a version of his own ideas that might not entirely have been predicted by a reading of *The Lost Lawyer*. Lawrence Fox, Chair of the American Bar Association Litigation Section, a big firm litigator, and one of our nation's leading thinkers about professional ethics, and Ward Bower, one of the world's leading law practice management consultants, address the challenges faced by large law firms in an increasingly complex world in which the economics of law practice are somewhat problematic, especially when related to our ethical aspirations. Professor Robert Lawry inquires about a specific and very tough issue of legal ethics in the context of the lawyer-statesman paradigm suggested by Dean Kronman. Robert MacCrate, former President of the American Bar Association and one of our profession's most thoughtful leaders, considers here the question of shared responsibility for lawyer education in skills and values. Judge Joseph Belacossa, former Chair of the American Bar Association Section of Legal Education and Admission to the Bar, writes about quality in legal education and practice. Professors Laurel Terry and Marilyn Yarbrough address more directly some questions related to the role of law schools in preserving and promoting the ideals of good law practice. Professor Terry suggests that perhaps we should reconsider the informal and formal ways in which we categorize law schools so that we provide positive recognition to schools that emphasize professional education rather than theoretical research. Professor Yarbrough addresses in a very particular case the question that underlies some of the concerns expressed by Dean Kronman and Professor Glendon about the extent to which law teachers provide models for and explicit explanations of appropriate, thoughtful, and sensitive professional behavior.

The purpose of this symposium is to stimulate conversation between academic lawyers, practicing lawyers, and judges regarding the state of the legal profession. These conversations must be undertaken if we are to understand the nature and dimensions of the challenges we face and develop appropriate responses to these challenges. It is my hope that this symposium will facilitate further discussions about the future of the legal profession and that this *Review* will continue to serve as a vehicle for thoughtful dialogue about the law and our profession.