

Book Review

Modern Litigators and Lawyer-Statesmen

The Lost Lawyer. By Anthony T. Kronman.* Cambridge: Harvard University Press, 1993. Pp. viii, 422. \$35.00.

James M. Altman[†]

Lawyers need a particular ideal that embodies their skills, qualities, and aspirations—a model to emulate, a standard for judging their own professional development, and a source of pride in being a lawyer. In his provocative new book, *The Lost Lawyer*, Anthony Kronman contends that practicing lawyers, judges, and legal academics are now in the midst of a professional “identity crisis of immense—if largely unacknowledged—proportions” primarily because of the precipitous decline of the once-dominant professional ideal of the lawyer-statesman.¹

The lawyer-statesman is an idealized figure, a lawyer “possessed of great practical wisdom and exceptional persuasive powers, devoted to the public

* Edward J. Phelps Professor of Law, Yale Law School.

† B.A. 1971, J.D. 1975, Yale University. The author is a litigation partner in Robinson Silverman Pearce Aronsohn & Berman, a firm of 110 lawyers in New York City. He would like to thank Christine Wierzba and Stephen Hagan for tracking down arcane sources well beyond the collection of the usual law firm library; Jay Levy-Warren and Steven Shapiro for their insightful comments on an earlier draft of this Review; and, above all, Ellen Schecter, for her writer’s eye, her emotional generosity, and hours of fruitful discussion. The views expressed in this Review are, however, solely the author’s.

1. ANTHONY T. KRONMAN, *THE LOST LAWYER* 354 (1993) [hereinafter *THE LOST LAWYER*]. The use of the term “lawyer-statesman” is not meant to suggest in any respect that female lawyers cannot be lawyer-statesmen. I have used that term to be consistent with its usage in *The Lost Lawyer*, recognizing (but not endorsing) the fact that when the term received its currency there were very few, if any, female lawyers.

good but keenly aware of the limitations of human beings and their political arrangements."² Drawing heavily on Aristotle's moral and political philosophy, Kronman describes the ideal of the lawyer-statesman through philosophical arguments about practical wisdom and civic virtue and their exercise in the three "law jobs"—judge, counselor, and advocate. He argues that excellence in deliberation—practical wisdom—is the cardinal virtue of judges and practicing lawyers.

One of the major themes of *The Lost Lawyer* is that practical wisdom is not a kind of expertise or intellectual skill, but a character trait that depends fundamentally upon acts of imagination and habits of feeling. Kronman maintains that the ideal of the lawyer-statesman traditionally exerted a powerful influence over the self-understanding of lawyers and provided a compelling answer to the question of what makes the practice of law worthwhile precisely because that ideal challenged a lawyer to become a person with certain prized character traits. According to Kronman, the collapse of the lawyer-statesman ideal is a devastating blow to the legal profession as a whole because that ideal sustained the belief of lawyers for almost two centuries that the practice of law is a noble calling.³

2. *Id.* at 12.

3. Those familiar with Kronman and his prior writings will not be surprised by his philosophical approach in *The Lost Lawyer*, nor by his thesis that contemporary American lawyers are, as the title suggests, spiritually lost. Kronman is a sophisticated and long-time student of philosophy, having earned a doctorate in philosophy before attending law school. In a 1981 symposium on the nature and aims of legal scholarship, he questioned what effect the study and practice of legal advocacy has upon the character of law students and practicing lawyers. Anthony T. Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 963-65 (1981). His first book was a philosophical exegesis of Max Weber's sociology of law in which he explored Weber's views about the ever-increasing intellectualization and rationalism of modern life, with its consequent spiritual disenchantment and loss of meaning in the public world. ANTHONY T. KRONMAN, MAX WEBER 166-88 (1983). His major jurisprudential articles leading up to *The Lost Lawyer* return repeatedly to Weber's views. Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1045-47 (1990); Anthony T. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 874-76 (1987); Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1610-11 (1985).

Kronman's earlier efforts presaged his Aristotelian approach to law and, in particular, to practical wisdom. His interpretation of Alexander Bickel's political philosophy focused on Bickel's view that prudence (a common English translation of Aristotle's word for practical wisdom, *phronesis*) is a political and judicial virtue, especially for Supreme Court Justices engaged in the politically sensitive process of judicial review. *Id.* at 1569, 1573-90. In *Living in the Law*, he evaluated various reasons why a person might choose the life of a practicing lawyer, focusing with approval upon the development and exercise of the character trait of practical wisdom. Kronman, *Living in the Law*, *supra*, at 873.

Both articles contemplated further work towards a jurisprudence based on practical wisdom. In the first of those two articles, Kronman expressly recognized the need for a full account of the prudentialist theory of law sketched by Bickel and, in responding preliminarily to four objections to such a theory, Kronman suggested what such a full account might entail. Kronman, *Alexander Bickel's Philosophy of Prudence*, *supra*, at 1608-16. In the second of those two articles, Kronman developed the view of practical wisdom presented in Chapter 2 of *The Lost Lawyer* and argued that the development and exercise of that virtue of character through the practice of law provides good grounds for prospective lawyers to choose a life in the law and for practicing lawyers to believe that their work is worthwhile. Kronman, *Living in the Law*, *supra*, at 846-76. However, at the very end of that article, Kronman questioned whether living such a life in the law is possible given the current institutional realities of the American legal profession. *Id.* at 875-76. Confronting that issue directly, *The Lost Lawyer* represents a continuation of the themes explored in those articles.

Part One of *The Lost Lawyer* seeks to revive the appeal and credibility of the lawyer-statesman ideal, a professional model for lawyers conceived in the image of the *phronimos*, Aristotle's man of practical wisdom. But in Part Two, Kronman contends that because of changes over the last twenty-five or thirty years in each of the three major branches of the American legal profession—law schools, law firms, and courts—the lawyer-statesman ideal and its primary character traits, practical wisdom and public-spiritedness, have become devalued. Thus, the final chapter of *The Lost Lawyer* concludes on a sober note. It is highly unlikely, Kronman acknowledges, that the lawyer-statesman will again become a widely respected professional ideal; but, Kronman hopes, individual lawyers willing to make the requisite sacrifices of wealth, power, and prestige may still “see the ideal and seize the opportunity to realize it in their own work [and] win for themselves a prize of infinite value, like the sailor in a storm who manages, somehow, to save himself and his ship's most precious cargo.”⁴

Published at a time when so many lawyers are dissatisfied with their professional lives⁵ and when there is widespread debate about just what makes the practice of law a profession,⁶ *The Lost Lawyer* challenges members of the American legal profession to take stock of how they live their professional lives and why. That challenge is pointedly addressed to practicing litigators,⁷ because no segment of the practicing bar is subject to greater public disdain than the litigating “hired gun.” Yet the ideal of the lawyer-statesman developed in the early nineteenth century when the leaders of the practicing bar were litigators, not corporate counselors. Indeed, as Kronman acknowledges, many of the original exemplars of that ideal—Daniel Webster and Rufus Choate, for example—were famous litigators.⁸ Thus, the perspective and experience of the practicing litigator is particularly valuable for assessing Kronman's account of the recent decline of the lawyer-statesman ideal.

For practicing litigators, especially those who, like myself, are sympathetic to the Aristotelian tradition within which Kronman conducts his analysis, *The*

4. THE LOST LAWYER, *supra* note 1, at 381.

5. Even though applications to law school remain close to the all-time high, an increasing number of lawyers are dissatisfied with their work. A 1990 National Law Journal poll reported that more than 20% of the lawyers surveyed were either somewhat or very dissatisfied with their careers. *Loving the Law*, USA TODAY, June 29, 1990, at 1A. In 1989, career counselors reported the rate of dissatisfaction may be as high as 50% among big-city lawyers. *More Lawyers Would Rather Do Other Work*, DAILY PROGRESS, Oct. 12, 1989, at D6.

6. See, e.g., ABA COMM'N ON PROFESSIONALISM, “. . . IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986); Committee on the Profession, *Is Professionalism Declining?*, 47 REC. ASS'N B. CITY N.Y. 129 (1992).

7. Throughout this Review the term “litigator” refers to lawyers engaged in representing clients in any type of adversarial civil proceedings. Although the term “advocate” is often used to describe such lawyers, Kronman uses that term more generally to refer to any lawyer who represents a client by communicating on behalf of that client to a third party. THE LOST LAWYER, *supra* note 1, at 122. Thus, in Kronman's terms, an advocate includes lawyers engaged in negotiations on behalf of their clients as well as litigators. This Review adopts Kronman's usage of the term “advocate.”

8. *Id.* at 11-12.

Lost Lawyer raises significant questions: Is the ideal of the lawyer-statesman credible for a modern litigator? If not, why was it credible—if indeed it was—for the great nineteenth-century litigators like Webster and Choate? This Review engages in a dialogue with *The Lost Lawyer* about those questions.

The first part of this Review summarizes Kronman's philosophical portrait of the lawyer-statesman ideal and his sociological analysis of the contemporary conditions of the American legal profession. It emphasizes the portions of *The Lost Lawyer* most relevant to those questions. *The Lost Lawyer* is a complex tapestry of moral and political philosophy, jurisprudence, and sociology of law, ambitious in scope and intricate in design. That summary cannot possibly touch upon all of its topics, nor capture all of its richness and texture.

The second part of this Review considers two questions: Was the lawyer-statesman a widely respected professional ideal for nineteenth-century litigators? How was it possible for them—if indeed it was—to become lawyer-statesmen? Although a republican version of that professional ideal was widely accepted by judges and litigators before the Civil War, particularly by New England Whigs like Webster and Choate, the configuration of politics, law, and culture specific to the antebellum American legal profession eventually dissolved, and with it the influence of that professional ideal, especially for litigators. Thus, while the recent changes in the legal profession that Kronman analyzes in Part Two of *The Lost Lawyer* may have further undercut the strength of the lawyer-statesman ideal, the historical evidence suggests that those changes were not in fact the cause of that ideal's decline or, in turn, of the current dissatisfaction in the American legal profession.

The third part of this Review corroborates that assessment. It demonstrates that the ideal of the lawyer-statesman has not been a credible professional ideal for most modern litigators, though not for the reasons suggested in *The Lost Lawyer*. Rather, the standard conception of the litigator's role since at least the beginning of this century subordinates the defining virtues of the lawyer-statesman ideal, practical wisdom and public-spiritedness, to the partisan goal of victory for the client.

I. KRONMAN'S ACCOUNT OF THE DECLINE OF THE LAWYER-STATESMAN IDEAL

A. *The Lawyer-Statesman Ideal*

Who were lawyer-statesmen? Kronman takes the term "lawyer-statesman" from a speech by Chief Justice Rehnquist,⁹ and presumably Kronman would

9. That speech, given at the University of Chicago Law School on May 6, 1985, has been adapted in William H. Rehnquist, *The Lawyer-Statesman in American History*, 9 HARV. J.L. & PUB. POL'Y 537 (1986).

agree that each of the lawyers whose public lives are described in that speech—Thomas Jefferson, Alexander Hamilton, John Marshall, James Madison, Abraham Lincoln, Stephen Douglas, William Seward, and Salmon Chase—were lawyer-statesmen. Kronman adds the great litigators of the nineteenth century—Webster and Choate, among others—and some corporate lawyers of the twentieth century—Henry Stimson, Dean Acheson, Cyrus Vance, and Carla Hills, for example.¹⁰

The lawyer-statesman is distinguished from other lawyers by two character traits: first, “practical wisdom” or “prudence”—good judgment, particularly about the goals or “ends” of proposed actions, whether they be the goals of a client or of the polity; and second, “public-spiritedness”—a devotion to the public good reflected in an active involvement in public affairs.¹¹

1. *The Statesman’s Practical Wisdom and Public-Spiritedness*

Like Aristotle, Kronman locates the practical wisdom of the statesman in his special talent for leadership and wise counsel about the ends of political action, particularly those political ends that define the community.¹² Unlike Aristotle, however, Kronman adopts the modern view that political ends are irreducibly plural and incommensurable:¹³ political disagreements and conflicts often cannot be resolved by recourse to some mutually agreed-upon standard of measurement or some single, overarching value satisfactory to both sides of a political dispute.¹⁴

In describing practical wisdom, Kronman focuses first on the process by which we deliberate about personal decisions among incommensurable ends, decisions such as “Should I divorce? Should my spouse and I have a child?”

10. THE LOST LAWYER, *supra* note 1, at 11-12. Although many of the exemplars of the lawyer-statesman ideal were judges or held political office at some time during their lives, Kronman clearly views the lawyer-statesman as a professional ideal for practicing lawyers as such:

The ideal of the lawyer-statesman . . . implies more than that prudence and public-spiritedness are traits of a generally admirable kind. In addition it suggests that they are qualities of special importance to lawyers. It suggests that the experience of lawyers promotes these traits, and their professional duties require them, in some regular and important way. The lawyer-statesman ideal points to a connection between the virtues of statesmanship, on the one hand, and the ordinary circumstances of law practice, on the other, and implies that this basic human excellence has special meaning for lawyers as a group. In that sense the figure of the lawyer-statesman may be said to embody not merely a generalized conception of political virtue but a distinctive professional ideal, as the hyphenated term *lawyer-statesman* suggests.

Id. at 109. Throughout this Review the term “lawyer-statesman” refers to a type of practicing lawyer—a lawyer whose legal practice exemplifies (or, in some cases, is intended to exemplify) that professional ideal.

11. *Id.* at 14-16.

12. *Id.* at 55-62, 87-90; ARISTOTLE, NICOMACHEAN ETHICS 152-53, 158-59 (Martin Ostwald trans., 1962) [hereinafter ARISTOTLE, NICOMACHEAN ETHICS] (lines 1140a25-1140b10, 1141b23-35); ARISTOTLE, THE POLITICS OF ARISTOTLE 106 (Ernest Barker trans., 1948) [hereinafter ARISTOTLE, POLITICS] (Book III, Chap. IV, § 17) (describing “prudence” as the only form of goodness peculiar to the ruler).

13. THE LOST LAWYER, *supra* note 1, at 84-85.

14. *Id.* at 57-61.

Should I sacrifice my professional career to stay home with the children?"¹⁵ According to Kronman, we deliberate about such choices by acquiring, through acts of imagination, a surrogate experience of what our life would be like if we were to choose each of the decisional alternatives. We then evaluate those imagined future alternatives from our present standpoint.¹⁶ The range of decisional alternatives we contemplate depends, at least in part, upon the power of our imagination.¹⁷

During deliberation, Kronman holds, we simultaneously combine two contrasting attitudes—sympathy and detachment—toward those acts of imagination.¹⁸ Sympathy is an attitude more committed to a decisional alternative than merely observing one's imagined future self. It entails imagining the feelings, values, and experiences of an imagined future self from the inside, from the point of view of that future self.¹⁹ Detachment is an attitude of distance that keeps one from being "swept along by the tide of feeling that any sympathetic identification with a particular way of life . . . can arouse" so that one can "withdraw to the standpoint of decision."²⁰ This "bifocal" process is not merely intellectual, but crucially depends upon one's emotional capabilities as well:

In deliberating, one seeks to anticipate the experience of making a certain choice, and this can be done only by reproducing in oneself in a provisional form the cares and concerns of someone who has already made it and then by asking what it would be like to live that person's life. Because these concerns are dispositions and not just cognitive beliefs, the attempt to reproduce them in imagination demands a certain capacity for affective mimicry, coupled with the ability to keep the feelings in question at arm's length. The first of

15. *Id.* at 65.

16. *Id.* at 69-74.

17. *Id.* In an earlier article, Kronman celebrated the importance of imagination to the practical wisdom of both the lawyer and the judge:

[I]magination is the root of practical wisdom, and the lawyer who possesses a powerful imagination will not only be able to conceive a wider range of solutions to the problems he confronts, but will be more inclined as well to make those choices that we think of as being judicious or practically wise.

Anthony T. Kronman, *Practical Wisdom and Professional Character*, 4 SOC. PHIL. & POL'Y 203, 225 (1986).

The more developed a judge's imaginative abilities, the broader the range of solutions he can envision to any particular problem; a judge with a strong imagination will quickly see a wide variety of different ways in which the specific case before him might be resolved, each alternative representing a different combination of rules and facts (the rules invoked and the facts emphasized changing from one imaginary solution to the next).

Id. at 219.

18. Kronman's account of deliberation in terms of sympathy and detachment resembles the account of judgment presented in RONALD BEINER, *POLITICAL JUDGMENT* 102-28 (1983). Beiner's analysis is based in part upon Aristotle's views, particularly Aristotle's concepts of practical wisdom and rhetoric. *Id.* at 72-97.

19. THE LOST LAWYER, *supra* note 1, at 70.

20. *Id.* at 72.

these capacities is what I mean by compassion—a power of generating feelings. And the second is what I mean by detachment, a power of moderating or confining feelings instead. Only through the exercise of this second power can a person limit the feelings his compassion stimulates and ensure that during his deliberations they remain tentative and reversible. Both powers thus belong to the economy of our affective life and serve to regulate its forces, though in different, indeed opposite, ways. The person who deliberates well excels at combining these two powers. His distinction therefore cannot be located within the realm of thought alone. Perhaps we should describe such a person as a virtuoso of feeling instead, for if his imagination enables him to understand more than others do, it is in large part because he feels what they cannot.²¹

Kronman emphasizes the emotional nature of sympathy, detachment, and their simultaneous combination. Those who deliberate well have developed through education and practice the capacity to combine the affective attitudes of sympathy and detachment “not just occasionally but as a routine matter and without much conscious thought.”²² For them deliberation has become a habit. This habit of feeling “deeply shapes our perception of who a person is” and “gives him or her a core identity distinct from that of others.”²³ Thus, for Kronman, practical wisdom is a character trait.

The conclusion that practical wisdom is a virtue of character is especially significant to *The Lost Lawyer*'s central argument. Kronman contends that the great appeal of the lawyer-statesmen ideal lay in the greater personal meaning it offered to its adherents precisely because it is a professional ideal—indeed, in his view, the only professional ideal—based upon character virtue.²⁴

21. *Id.* at 74-75.

22. *Id.* at 75.

23. *Id.* at 76.

24. The ideal of the lawyer-statesman “affirm[s] that a lawyer can achieve a level real excellence in his work only by acquiring certain valued traits of character.” *Id.* at 16. Kronman's view of practical wisdom as a virtue of character is very important to his argument that the lawyer-statesman ideal is appealing in itself, *id.* at 368-75, and as compared to the new republican ideal of the public lawyer or the ideal of the scientific law-reformer. *Id.* at 363-68. Yet Kronman's view of practical wisdom as a virtue of character is highly problematic.

First, it is inconsistent with the Aristotelian framework Kronman adopts. Aristotle considered practical wisdom an intellectual virtue, *not* a virtue of character, ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 12, at 31-32, 146-47, 149 (lines 1103a4-10, 1138b35-1139a3, 1139b14-17); *see also* JOHN M. COOPER, REASON AND HUMAN GOOD IN ARISTOTLE 101 (1975), even though Aristotle considered the intellectual virtue of practical wisdom and full moral virtue to be interdependent, ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 12, at 172, 291 (lines 1144b31-32, 1178a15-19).

Second, even if excellence in deliberation about one's own personal life choices is a virtue of character, such deliberation differs in two significant respects from most legal deliberation. As highlighted by the old adage, “a lawyer who represents himself has a fool for a client,” legal deliberation about someone else's choices, a form of third-person deliberation, is less emotionally demanding than first-person deliberation—deliberation about one's own choices. Also, most of the time the subject of a client's legal choices concerns worldly matters rather than personal matters, and no matter how important those worldly matters are to the client, they do not pose as much emotional difficulty for the deliberating lawyer as personal matters. Thus, a lawyer's deliberation about a client's legal matters is doubly removed from the emotional complexities that make practical wisdom about one's own personal life choices so emotionally

Like personal deliberation, political deliberation involves acts of imagination and a combination of the contrasting attitudes of sympathy and detachment. Moreover, Kronman argues, excellence in personal deliberations and excellence in political deliberations have analogous consequences. The person who deliberates well about personal decisions will achieve and maintain personal integrity, "the condition of wholeness that results when the parts of a person's soul are, in Aristotle's phrase, on amicable terms, when his present attachments are not at war with one's past ones, or engaged in a subtler contest of repression and revenge."²⁵ The statesman who deliberates well about political decisions will foster what Kronman calls, again following Aristotle, "political fraternity," an analogous condition of political wholeness in which "the members of a community are joined by bonds of sympathy despite the differences of opinion that set them apart on questions concerning the ends, and hence the identity, of their community."²⁶ The public-spirited statesman, in Kronman's account, pursues a public life in which this sort of political fraternity is widely recognized.²⁷

2. *Judges, Counselors, and Advocates*

Kronman does not specifically describe the practical wisdom and public-spiritedness required in the work of the judge, since the characteristics of judging "are the characteristics of deliberation generally, and the work of adjudication exhibits them all in an especially pure form."²⁸ Like the personally wise individual and the statesman, the judge exercises imagination and the simultaneous combination of sympathy and detachment in deliberating

complicated and so estimable. Compared to the intellectual component of legal deliberation, the emotional component is less significant, and it makes much less sense to emphasize those habits of feeling by considering excellence in legal deliberation as a virtue of character. That probably is why even legal thinkers sympathetic to the ideal of the lawyer-statesman, such as Karl Llewellyn and Louis Brandeis, have considered practical wisdom about legal matters to be an intellectual talent or habit of mind, rather than a virtue of character. See *THE LOST LAWYER*, *supra* note 1, at 24 (discussing Llewellyn's failure to explicate the connection between character and sound judgment); *infra* p. 1058 (noting Brandeis' view of practical wisdom as a trait of mind). But see Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 68 (1980) (describing Aristotelian practical judgment as both "a disposition—a trait of character—and a skill").

Third, Kronman's argument in support of his view that practical wisdom is a virtue of character is unconvincing because it is simply definitional: practical wisdom is a virtue of character because, by definition, character virtues are important habits of feeling and practical wisdom is and depends upon important habits of feeling.

25. *THE LOST LAWYER*, *supra* note 1, at 95.

26. *Id.* at 93.

27. *Id.* at 99-101.

28. *Id.* at 319.

about decisional alternatives.²⁹ A wise judicial decision is “the one that most effectively advances the law’s overall well-being.”³⁰

Unlike the judge, both the counselor and the advocate represent clients. Kronman recognizes that, in addition to their obligations to the courts of which they are officers (and indirectly through those obligations to the law itself), counselors and advocates have competing obligations to their clients. Kronman acknowledges that the commonly held “narrow view,” that counselors and advocates are governed by the preconceived interests and goals of their clients, directly challenges the view implicit in the lawyer-statesman ideal that lawyers regularly engage in deliberation about the ends of their clients’ actions.

In arguing that such a truncated view of the counselor-client relationship is inadequate, Kronman focuses on the counselor’s responses to a client with hazy or conflicting goals and to an impetuous client. If the former comes to a counselor seeking advice of only an instrumental sort—“how can I best achieve my already-determined ends in a certain situation?”—in order to counsel the client effectively, the counselor must deliberate with the client

29. *Id.* Although Kronman intends his general description of deliberation in terms of its imaginative and emotional demands to apply to judicial deliberation as well, judicial deliberation is a particular type of deliberation and Kronman’s failure to provide a specific analysis of its particularities is a significant lacuna in the description of a professional ideal for lawyers based upon practical wisdom.

The only sustained discussion of judicial deliberation in *The Lost Lawyer* is Kronman’s explication of the analysis of appellate decisionmaking in KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960). Kronman views that analysis as “a celebration of the ancient Aristotelian virtue of practical wisdom.” *THE LOST LAWYER*, *supra* note 1, at 225; cf. Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 *VAND. L. REV.* 533 (1992) (locating Llewellyn’s view of statutory interpretation within the practical reason tradition). To the extent that Kronman embraces Llewellyn’s analysis, Kronman makes no attempt specifically to fill the crucial gap he finds in Llewellyn’s analysis, that is, Llewellyn’s failure to focus on the relationship between the judge’s practical wisdom and the judge’s character. *THE LOST LAWYER*, *supra* note 1, at 24. As already noted, Kronman’s view of first-person deliberation about personal choices as a virtue of character does not convincingly demonstrate that third-person deliberation about legal matters, such as judicial deliberation, is a virtue of character. See *supra* note 24.

30. *THE LOST LAWYER*, *supra* note 1, at 138. Kronman also states that judicial decisions should be measured by the degree to which they promote “the integrity or well-being of the legal system as a whole,” *id.* at 118, and “the good of the legal order as a whole, the good of the community that the laws establish and affirm,” *id.* at 141. He neither analyzes nor clearly describes any of these formulations, nor does he specify what he means by the “law,” the “legal system,” or “the legal order.” Thus, he leaves the reader without any clear understanding of his view of the substantive goal of judicial deliberation.

In Part One of *The Lost Lawyer*, Kronman never expressly relates the goal of judicial deliberation to justice. This is striking because Aristotle believed that a shared concept of justice is necessary to the unity of a political community. ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 12, at 231 (lines 1159b26-27, 1160a10-14); ARISTOTLE, *POLITICS*, *supra* note 12, at 6-8 (Book I, Chap. II, §§ 12-16). Although Kronman does consider justice as the commodity to be maximized in his discussion of “managerial judging” in Part Two, *THE LOST LAWYER*, *supra* note 1, at 331-37, it is clear from that discussion that he does not regard the justice manufactured by the judicial bureaucracy as “true” justice. See *infra* note 56. If justice is neither part of nor significantly related to the evaluation of the substantive wisdom of judicial deliberation, then Kronman’s prudentialist theory of law might be criticized for its political conservatism. Kronman acknowledges this but argues that, except in revolutionary situations, political fraternity is a greater good than justice. *THE LOST LAWYER*, *supra* note 1, at 106-08. However, conceiving of the law in terms of the exercise of practical reason does not compel a conservative political approach. See Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 *UCLA L. REV.* 1615, 1649-50 (1987).

about these goals with enough rigor at least to clarify or prioritize them so that the counselor can know what ends his advice should best serve.³¹ In the case of the impetuous client—a passionate lover rewriting a will, for example³²—in order to perform his obligations to the client, the counselor must question the client to make sure that the client's current goals are solidly grounded and, in order to do more than accept the client's word, the counselor must come to an independent evaluation of the client's goals. This requires a lawyer "to place himself in the client's position by provisionally accepting his ends and then imaginatively considering the consequences of pursuing them, with the same combination of sympathy and detachment the lawyer would employ if he were deliberating on his own account."³³ In Kronman's view, these situations of third-person deliberation "are by no means marginal or eccentric in the practice of law but together constitute a significant portion of the problems with which lawyers deal, including some of the most interesting and important ones."³⁴

Similarly, Kronman disputes the prevalent view that litigators are merely "hired guns" for their clients' preformulated private interests and goals. As Kronman describes this view, clients come to a litigator seeking an expert who will be able to predict how the courts will decide issues related to the clients' interests and goals, who will know what arguments in support of those interests and goals will be most successful and, therefore, which arguments to make.³⁵ But, Kronman replies, this narrow view overlooks the fact that litigators and judges are part of a cooperative enterprise, a common practice. In order to perform his role well, a litigator must deliberate about his client's case with the same sympathy and detachment that a judge employs and must share the judge's devotion to the law's overall well-being.³⁶

In short, to be effective, Kronman contends, a litigator must internalize the judicial point of view and deliberate about a client's case, including the client's goals, in terms of the law's broader goals. But, as demonstrated in Part III of this Review, Kronman exaggerates the modern litigator's opportunities for lawyerly statesmanship. The standard conception of the litigator's role

31. THE LOST LAWYER, *supra* note 1, at 128-29.

32. *Id.* at 129.

33. *Id.* at 130.

34. *Id.* at 133-34.

35. Kronman's description of what the client seeks from a litigator does not include the tasks that consume most of a litigator's time and effort—discovering and preparing admissible evidence; proving the relevant facts; and fashioning the rhetorical arguments most likely to succeed. Like many other academic lawyers, Kronman appears to believe that litigators do nothing more than try to predict what judges will do. The prevalence of this belief appears to be due to the fact that most legal scholars look at legal practice from the perspective of the judge rather than the lawyer. See Sanford Levinson, *What Do Lawyers Know (And What Do They Do with Their Knowledge)?*: Comments on Schauer and Moore, 58 S. CAL. L. REV. 441, 453-54 (1985). Kronman's adoption of the judicial perspective leads him to portray inaccurately the litigator's tasks and to overestimate the litigator's opportunities for lawyerly statesmanship. See Part III *infra*.

36. THE LOST LAWYER, *supra* note 1, at 149-53.

prevalent during this century envisions only a superficial exercise of practical wisdom and public-spiritedness. That standard conception strikes at the very heart of the lawyer-statesman ideal.

B. *Contemporary Institutional Realities*

Part Two of *The Lost Lawyer* describes how various changes over the past thirty years in the way law is taught in law schools, practiced in large corporate law firms, and made in the federal courts have tended to discredit the lawyer-statesman ideal and its character virtues. The incompatibility between the current institutional realities of the American legal profession and the ideal of the lawyer-statesman can be read in at least two ways: first, in the manner Kronman expressly presents it, as a cause of the decline and near demise of the lawyer-statesman ideal; and, second, to the extent one adopts the standpoint of the lawyer-statesman ideal, which Kronman clearly does, as an implicit criticism of the current practices of those institutions.

1. *Law School Scholarship*

Kronman's contention that law schools have discredited the lawyer-statesman ideal over the past thirty years is focused exclusively on legal scholarship.³⁷ According to Kronman, the schools of thought that have had the greatest influence during that time—predominantly law and economics, but also critical legal studies—are both “hostile” to the virtue of practical wisdom.³⁸

37. Kronman thus overlooks two elements of the contemporary law school experience that support the lawyer-statesman ideal: (i) the case method of instruction, and (ii) clinical teaching programs.

Kronman himself interprets the case method of instruction as practice in judicial deliberation. *Id.* at 113-21. Presumably he does not discuss the case method of instruction as a countervailing influence in the law schools over the past thirty years because the case method has remained substantially the same since the 1870's, when Christopher Langdell inaugurated it at Harvard Law School. *Id.* at 110, 170; see also JOEL SELIGMAN, *THE HIGH CITADEL* 33-35 (1978).

But clinical teaching programs have become a much more widely accepted part of law school curricula since the late 1960's. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 216 (1983). Clinical law professors are often former or part-time practitioners. They have much greater experience with legal practice than the typical law school professor. The opportunity for law students to perform the tasks of legal practice and to reflect upon their performances with experienced practitioners allows students to develop practical wisdom without the commercial and bureaucratic pressures of the large corporate law firms described later in Part Two of *The Lost Lawyer*. Kronman himself maintains that there is no better way to develop practical wisdom than “through the [actual personal] experience of having to make the sorts of decisions that demand it.” *THE LOST LAWYER*, *supra* note 1, at 290; cf. ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 12, at 160 (lines 1142a12-16) (maintaining that young men do not attain practical wisdom because practical wisdom comes from experience).

38. *THE LOST LAWYER*, *supra* note 1, at 167, 225, 267. Kronman recognizes that “[c]ritical legal studies . . . has a more ambivalent relationship to prudentialism than does law and economics.” *Id.* at 241. He acknowledges that some of the adherents of the critical legal studies movement, such as Robert Gordon and William Simon, support a prudentialist view of law in certain respects, *id.* at 241, and that there are even aspects of Duncan Kennedy's work that seem consistent with that view, *id.* at 247.

The prudentialist view of law follows Aristotle: because it recognizes the contingency and particularity of human conduct and the complexity and apparent inconsistency of precedent, it does not seek universal or certain solutions to legal problems.³⁹ Kronman argues that both law and economics and critical legal studies, by contrast, have adopted a scientific view of the law, mistakenly seeking greater certainty and precision by analyzing all legal issues in terms of one or two overarching measures or principles.⁴⁰ These approaches deny through abstraction a fundamental premise of practical reason, the plurality and incommensurability of human values. In this respect, both are heirs to Langdell's project of "construct[ing] a rational scheme for the arrangement of legal doctrine by analytically unfolding the implications of a few foundational ideas."⁴¹

Legal scholarship's increasing hostility to practical wisdom, Kronman argues, exacerbates the inherent tension between truth-seeking scholarship addressed to the university community and pedagogy aimed at the world of legal practice. Law professors whose scholarship is hostile to practical wisdom are likely to convey that hostility when they prepare their students to become practitioners, either in the dispirited way they teach students the prudential perspective or through course materials reflecting their antiprudentialist scholarly commitments.⁴² In either event, such students encounter hostility to practical wisdom, and therefore to the lawyer-statesman ideal, at the very moment they begin their professional careers.

2. *Large Corporate Law Firms*

Kronman focuses his analysis of current legal practice on one institutional setting, the corporate law firm with more than one hundred lawyers and a predominantly business clientele.⁴³ He claims that because such firms have prestige and power, they exhibit in a particularly clear form the recent changes in legal practice that have affected the profession as a whole, and that they augur things to come in other corners of the profession.⁴⁴ He focuses on them also because, in his view, they have been the standard bearers for the lawyer-statesman ideal during the twentieth century.⁴⁵ Relying heavily on two recent

39. *Id.* at 175-79.

40. *Id.* at 226-30, 245-48, 261-63.

41. *Id.* at 182.

42. *Id.* at 268-69.

43. *Id.* at 273.

44. *Id.* at 272.

45. *Id.* at 273. Kronman's view that the twentieth-century exemplars of the lawyer-statesman ideal are corporate lawyers, such as Dean Acheson and Henry Stimson, reflects an ambiguity in his philosophical portrait of the lawyer-statesman ideal. On the one hand, Kronman presents the lawyer-statesman as a professional ideal for lawyers *qua* lawyers. See *supra* note 10. On the other hand, the particular twentieth-century corporate lawyers he uses as examples exemplify a different version of the lawyer-statesman ideal—lawyers who combined their professional career with statesmanship in political office.

analyses of the large corporate law firm—*Tournament of Lawyers*⁴⁶ and *Partners with Power*⁴⁷—Kronman shows how the corporate law firm has grown increasingly incompatible with the ideal of the lawyer-statesman: lawyers in corporate law firms today have (i) less opportunity to develop and exercise practical wisdom in their work, (ii) less appreciation for the value of practical wisdom, and (iii) less leisure time to cultivate the personal qualities upon which practical wisdom depends.

The increase in subject-matter specialization among lawyers in corporate firms and the fundamental shift in the pattern of client relations from comprehensive, long-lasting retainer relationships to representation on a transaction-by-transaction basis create conditions antithetical to the development and exercise of practice wisdom.⁴⁸ These changes have made it harder for one or two lawyers in a firm to understand and integrate all of a large corporate client's activities into an overall picture so that they are in a position to deliberate together with the corporate client about its ends as well as various strategies for realizing them. This, Kronman observes, has made clients less inclined to call upon their lawyers for advice about their goals.⁴⁹

Internal firm culture has changed as well, replacing the traditional professional focus on providing clients with high quality legal work (while attaining a reasonable level of financial reward) with a more deliberate emphasis on making money.⁵⁰ Marketing directors, headhunters, and the greater availability of commercial information about firms' and lawyers' revenue and profit participation evidence this greater commercialism.⁵¹ Kronman contends that as the corporate law firms' goals have narrowed more and more to increasing profitability, the qualities that large firm culture views as most important for "professional" success have changed: "rain-making" and administrative ability—traits contributing most directly towards running a business—have replaced craftsmanship and practical wisdom—traits related to

Kronman presents no evidence that Acheson or Stimson exhibited a special devotion to the public good in their practice as corporate lawyers. If not, they did not support the professional ideal of the lawyer-statesman described by Kronman, since they did not practice law with the public-spiritedness characteristic of the lawyer-statesman, and their exercise of public-spiritedness in the form of public service was merely an interruption, however laudable, in what they viewed as the technical practice of law. See *infra* note 134.

In fact, there is considerable evidence that large corporate law firms exhibited little devotion to the public good—championing instead the narrow interests of business. See generally JEROLD S. AUERBACH, *UNEQUAL JUSTICE* (1976). Indeed, some lawyers in such firms sought out public service because their private practice did not offer sufficient opportunities to exercise public-spiritedness. Stimson, for example, left a lucrative private practice to become a United States Attorney "because the life of the ordinary New York lawyer is primarily and essentially devoted to the making of money." *Id.* at 26 (quoting HENRY STIMSON & MCGEORGE BUNDY, *ON ACTIVE SERVICE IN PEACE AND WAR* 17 (1947)).

46. MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS* (1991).

47. ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* (1988).

48. *THE LOST LAWYER*, *supra* note 1, at 283-91.

49. *Id.* at 290-91.

50. *Id.* at 295.

51. *Id.* at 280-81.

the practice of a profession.⁵² Consequently, the lawyer-statesman ideal has become devalued.

Finally, the increased length of the work day at corporate law firms contributes, in Kronman's view, to a narrowing of interests and experiences outside the practice of law which is inconsistent with the breadth of experience necessary for the development of practical wisdom.⁵³ Breadth of experience enhances one's powers of sympathetic appreciation, provides more grist for one's imagination, and gives one greater knowledge and information about people and the world—all components in the process of deliberation. Lawyers in corporate law firms have a hard time finding sufficient leisure time to cultivate that breadth of experience.

3. *Federal Courts*

Kronman identifies the caseload crisis as “[t]he most significant fact about our courts today.”⁵⁴ The federal judiciary has responded to this crisis by increasing the number and expanding the role of judicial staff, such as magistrate judges, special masters, monitors, hybrid bodies,⁵⁵ and, especially, law clerks. Judges have become supervisors of a vast judicial bureaucracy designed to produce justice as efficiently as possible.⁵⁶

As Kronman points out, justice cannot be mass produced because judicial duties cannot be delegated without a loss of practical wisdom. For example, when a judge delegates the writing of an opinion to a clerk, the judge does not directly confront the parties' divergent views of the relevant facts and/or the applicable law. Instead of wrestling with the conflict between those divergent views, the judge reviews the clerk's synthesis of the parties' conflicting positions. The judge's imaginative powers and his capacity for sympathy and detachment are not stretched, and they atrophy.⁵⁷

52. *Id.* at 298-99; see also Robert W. Gordon, *Bargaining with the Devil*, 105 HARV. L. REV. 2041, 2051-52 (1992) (reviewing RICHARD D. KAHLENBERG, *BROKEN CONTRACT: A MEMOIR OF HARVARD LAW SCHOOL* (1992)); cf. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 35 & n.106 (noting that law firms with more comfortable market positions are more likely to tolerate goals other than money-making).

53. THE LOST LAWYER, *supra* note 1, at 300-07.

54. *Id.* at 320.

55. See generally James M. Altman, *Implementing a Civil Rights Injunction: A Case Study of NAACP v. Brennan*, 78 COLUM. L. REV. 739, 739-41 (1978).

56. THE LOST LAWYER, *supra* note 1, at 322-25. Kronman offers a positivist definition of justice as merely the implementation of existing law:

Doing justice to the parties that appear before one means honoring the rights and enforcing the duties that the law assigns them; and treating justice as a maximand simply means doing as much of this as can be done with the resources at one's command. . . . Justice is the name we give to the condition that results when these distributional requirements are satisfied

Id. at 335. Kronman does not relate this positivist view of justice to the public good, or political fraternity, or the overall well-being of the legal order.

57. *Id.* at 326.

That clerks, not judges, increasingly have become the authors of judicial opinions has an ironic twist: “the beginner in the craft of judging [is made] the measure of the master’s art.”⁵⁸ Clerks have virtually no experience in the actual practice of law, and the style of their opinions—“[t]he prolixity, the excessive use of footnotes, the jargon, the complicated multipart tests, the endless talk about balancing (which sounds, on the surface at least, so sensibly mature)”⁵⁹—reflects their lack of developed judgment. Although opinions authored by clerks do not necessarily reach the wrong result—presumably conscientious judges prevent that, at least in most cases—they provide a poor model of practical wisdom for the law students and even young lawyers who first learn the judicial point of view from studying reported decisions.

Although Kronman does not mention it, opinions authored by clerks undermine practical wisdom in a more pernicious way: they substitute a clerk’s post hoc justifications for the judge’s actual reasons for decision. Much like the children’s game “telephone,” the addition of another person in the chain of communication between litigators and judges frequently introduces distortion in the dialogue of adjudication. Conscientious litigators may misinterpret the true basis for the judge’s decision and subsequently may rely upon that misinterpretation in that or another case.⁶⁰

Accordingly to Kronman, managerial judges and the clerk culture have had a deleterious effect on the quality and prestige of the practical wisdom available in federal court. Although Kronman does not emphasize it, in a commercial culture such as ours, the very fact that judges are paid so much less than most “successful” practitioners symbolizes just how devalued the exercise of practical wisdom has become.⁶¹

58. *Id.* at 351.

59. *Id.* at 350.

60. My friend and fellow litigator Jay Levy-Warren pointed this out to me, and my own experience confirms it.

61. Kronman’s focus on the courts, in particular the federal courts, *THE LOST LAWYER*, *supra* note 1, at 321, slights one of the more significant responses in recent years to the caseload crisis, the alternate dispute resolution (ADR) movement. Kronman acknowledges the ADR movement, but underestimates its importance. He maintains that courts will retain their position of “dominant importance” so long as judges define the scope of those other methods. *Id.* at 317-18. Kronman mistakes authority (and perhaps conceptual priority) for importance. As ADR methods become more popular, they will achieve a practical importance that may well challenge judges and courts as the primary promulgators of legal judgment. If a clerk culture and justice-factory mentality continue to dominate the courts, and the judiciary no longer symbolizes and exhibits practical wisdom, ADR may become an important haven of the lawyer-statesman ideal.

Consider, for example, arbitration. Arbitrators generally possess experience with the sort of dispute presented. Although the arbitrator’s experience is often referred to in terms of “expertise,” the selection of arbitrators in fact depends more on something close to practical wisdom. A good arbitrator is not only familiar with the ways of the parties and the types of problems they are likely to encounter or actually have encountered, but is also sensitive to the parties’ political needs and institutional concerns. When deciding a case involving parties who are engaged in a long-term relationship, the arbitrator is concerned not only with the result in the particular case before her, but also with the fabric of the relationship between the parties. Her decision is rendered in terms of that relationship as much as in terms of the particular arbitral dispute. This concern for the long-term relationship of the parties resembles the statesman’s devotion to political fraternity.

4. *Kronman's Analysis*

Kronman sees the current dissatisfaction and confusion in the American legal profession as a spiritual crisis resulting from the decline of the lawyer-statesman ideal. That interpretation rests upon, among other things, the factual predicate Kronman attempts to prove in Part Two of *The Lost Lawyer*: that the near demise of the lawyer-statesman ideal is the result of changes in the legal profession over the past twenty-five or thirty years. There is no disputing Kronman's conclusion that today the lawyer-statesman ideal is little more than "a quaint antique,"⁶² but Kronman's sociological analysis is flawed in several respects.

First, Kronman analyzes the decline of the lawyer-statesman ideal indirectly, examining the changes in the legal profession over the past three decades in order to consider what has happened to practical wisdom and public-spiritedness. But, as demonstrated in Parts II and III of this Review, that decline can be analyzed more directly by looking at the social history of that ideal itself. That analysis concludes, contrary to Kronman, that the lawyer-statesman ideal ceased to be an influential professional ideal for litigators by the early years of this century, if not before.

Second, Kronman's analysis is not entirely dispassionate. It emphasizes the changes in the American legal profession since 1960 that support his conclusion, but neglects to mention or unduly minimizes some of the changes during that time that support the lawyer-statesman ideal, such as clinical teaching programs⁶³ and the alternate dispute resolution movement.⁶⁴

Third, Kronman's sociological analysis does not clearly distinguish between two possible reasons why the lawyer-statesman ideal no longer has widespread influence: (i) because members of the legal profession no longer view that ideal as desirable, that is, as embodying values that they consider important; or (ii) because the ideal is no longer possible to attain.⁶⁵ That distinction is significant. If the lawyer-statesman ideal is not viewed as desirable by a broad group of legal professionals, that does not prevent individual lawyers who see its value from pursuing it—like Kronman's sailor on a ship in rough weather. But, if that ideal has lost its influence because it is unattainable, then all lawyers are precluded from pursuing it.⁶⁶

62. *Id.* at 13.

63. *See supra* note 37.

64. *See supra* notes 61.

65. Admittedly, it would not be fair to criticize the lawyer-statesman ideal simply because it is difficult to achieve or because few have achieved it, since ideals always have an aspirational dimension. On the other hand, a professional ideal should bear some relationship to reality, lest it be pure fantasy. To be influential it must be humanly possible to achieve, if not for everyone, then at least for some with greater talents or opportunities.

66. For example, Karl Llewellyn wrote *The Common Law Tradition* to dispel a crisis in confidence among practicing lawyers based upon their mistaken belief that the ideal of legal craftsmanship is unattainable because there is no "reckonability" in the work of our appellate courts. LLEWELLYN, *supra*

Most of the changes in the legal profession that Kronman identifies as having caused the decline of the lawyer-statesman ideal affect only that ideal's desirability, not the possibility of its attainment. For example, the increased hostility towards practical wisdom transmitted by law professors steeped in law and economics or critical legal studies does not prevent practicing lawyers, both experienced practitioners who were never taught that hostility in law school and younger ones who have relativized the influence of their former law professors, from feeling the appeal of the lawyer-statesman ideal and pursuing it in practice. The increased commercialism in corporate law firms may not prevent lawyers from pursuing the lawyer-statesman ideal, but it reduces the value of that effort in others' eyes. The caseload crisis, the rise of managerial judging, and the dominance of the clerk culture in the federal courts does not preclude practitioners from exercising practical wisdom or public-spiritedness, yet those conditions of practice can be frustrating and depressing for both judges⁶⁷ and litigators alike.⁶⁸

II. THE LAWYER-STATESMAN IDEAL AMONG NINETEENTH-CENTURY LITIGATORS

Was the lawyer-statesman a widely respected professional ideal for nineteenth-century litigators? Was it possible for them to litigate as lawyer-statesmen? *The Lost Lawyer* assumes affirmative answers to those two historical questions, but does not attempt to address them in depth.⁶⁹

note 29, at 3-4; THE LOST LAWYER, *supra* note 1, at 211-12.

67. See, e.g., Letter from Harold Baer Jr. to Whitney North Seymour Jr., in Harold Baer Jr., *A View from the Bench*, N.Y. L.J., Sept. 21, 1992, at 2 (describing the "staggering size of the caseload" in the New York State Supreme Court, New York County, as the primary reason for his resignation from the bench and explaining that "the crushing caseload is the enemy of that minimal level of research, reflection and exposition that litigants are entitled to expect of judges").

68. Compromising the quality of justice demoralizes lawyers who toil long hours devoting themselves to a client's cause. For example, on September 9, 1991, I travelled out of town to an appellate court for an oral argument. My case was forty-fifth on a calendar of more than fifty cases. At two-thirty in the afternoon, when my turn to present oral argument finally arrived, imagine the level of interest and attention in my case among the five appellate judges who had not yet even had lunch.

69. The sources which Kronman cites regarding the lawyer-statesman ideal in the nineteenth century do not provide conclusive answers to these questions either. For example, Rehnquist's speech on the lawyer-statesman, Rehnquist, *supra* note 9, is far too sketchy to show that the eight lawyers he identifies developed and exercised practical wisdom and public-spiritedness in and through their practice as lawyers. Of those eight, some—James Madison, for example—practiced law for only a short time, never achieving any professional eminence. *Id.* at 544. Their practice as lawyers hardly could have been an important factor in their development of practical wisdom and public-spiritedness, even assuming that they subsequently were excellent statesmen (in the sense that Kronman uses that term) and not merely famous political officeholders. Nor would their exercise of practical wisdom and public-spiritedness as political statesmen demonstrate that they exercised either in their practice of law. William Seward, for example, was primarily a politician for whom the practice of law was a means to finance his political career. 1 ROBERT T. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS 1819-1947*, at 137-38 (1946). Moreover, even if all eight lawyers were lawyer-statesmen in Kronman's sense, that does not mean that the ideal of the lawyer-statesman was an ideal to which they or many of their lawyer contemporaries subscribed. There is no evidence in the Rehnquist speech that lawyers as a group held themselves accountable to that ideal.

Answering those questions conclusively is beyond the scope of this Review, especially because the details of how nineteenth-century litigators practiced have largely escaped the legal historian's pen.⁷⁰ But, the preliminary answers to those questions sketched in this part of the Review put to question some of Kronman's historical assumptions about nineteenth-century litigators and the fate of the lawyer-statesman ideal.

A. *The Republican Version of the Lawyer-Statesman*

Kronman's ideal of the lawyer-statesman bears great resemblance to the nineteenth-century republican ideal of the lawyer-statesman.⁷¹ That republican ideal grew out of a set of three interconnected intellectual premises closely tied to the Aristotelian tradition: (1) the republican view of politics as deliberation about the public good;⁷² (2) the republican view of law as an expression of the moral sense of the community, with a substantive content concerning the proper goals of human conduct;⁷³ and (3) a morality based upon virtues,

70. Robert W. Gordon, *The Devil and Daniel Webster*, 94 YALE L.J. 445, 445-46 (1984) (reviewing THE PAPERS OF DANIEL WEBSTER (Alfred S. Konefsky & Andrew J. King eds., 1982-83)); cf. AUERBACH, *supra* note 45, at 371-72 (1976) ("Invariably, biographers [of lawyers turned judges or statesmen] relegate lawyering activities to the periphery so that they can concentrate on more conspicuous public events.").

71. Kronman acknowledges the affinity between his description of the lawyer-statesman ideal and the version held by early nineteenth-century republicans. THE LOST LAWYER, *supra* note 1, at 12, 15, 27, 36.

72. In Part One of *The Lost Lawyer*, Kronman describes what he considers the three premises of the classical republican view of politics: (1) "the point of political action is not always to obtain something the actors antecedently want—to satisfy a prepolitical desire—but sometimes to determine, instead, what it is they ought to want, to decide what their interests shall be, and not merely to pursue the ones they already have." (2) "to be considered a justification of any sort at all . . . the argument that each participant offers on behalf of his or her own favored interpretation of the common good must be framed . . . in terms of the interests of the community itself," and (3) "deliberative agreement has intrinsic and not merely instrumental worth." *Id.* at 31-34. The roots of "classical republicanism . . . are to be found in Aristotle." *Id.* at 35-36.

73. Gordon explains that:

[T]he Whig-Federalist lawyers had claimed that their science gave them an authority of virtue and learning that entitled them to declare how people should behave toward one another in a wide range of social situations in which neither they themselves nor the legislature had prescribed express obligations. Their private law, to put this another way, was full of what we would call obligations implied by law, inhering in good custom, precedent, and general considerations of public policy concerning persons of different status in their relations with one another. In the minds of Whig-Federalist lawyers, "principles" of science were entangled with "principles" of conduct.

Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920* [hereinafter Gordon, *Legal Thought*], in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70, 88 (Gerald L. Geison ed., 1983) (emphasis omitted) (footnote omitted); see Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 73 (1987) ("The republican vision . . . defined law as constitutive of culture and as potentially positive and emancipatory. Under the republican view, law could create structures that enabled individuals and communities to fulfill their deepest aspirations."); see also Morton J. Horwitz, *History and Theory*, 96 YALE L.J. 1825, 1831 (1987) (describing republican view of law in similar manner). Rufus Choate's republican view of the law is described *infra* p. 1051. See JEAN V. MATTHEWS, RUFUS CHOATE: THE LAW AND CIVIC VIRTUE 151 (1980).

For a description of such an Aristotelian view of law implicit in the English common law up to the nineteenth century, see Stephen A. Siegel, *The Aristotelian Basis of English Law, 1450-1800*, 56 N.Y.U. L. REV. 18 (1981).

specifically including practical wisdom and public-spiritedness (often called “civic virtue”).⁷⁴ University-educated lawyers of the early nineteenth century were familiar with that Aristotelian moral and political tradition.⁷⁵

While the best known nineteenth-century exemplar of the lawyer-statesman ideal was Daniel Webster,⁷⁶ the most vocal exponent of the lawyer-statesman ideal was Rufus Choate, himself a well respected lawyer-statesman⁷⁷ whose “reputation as a trial wizard surpassed even Webster’s.”⁷⁸ Indeed, Kronman

74. The Aristotelian moral tradition is succinctly described as a morality of virtue in ALASDAIR MACINTYRE, *AFTER VIRTUE* 257 (1984).

Classical republican political theory views the definition of virtue and the education of the citizenry in virtue as a primary function of government. ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 12, at 23, 296-98 (lines 1099b30-32, lines 1179b31-1180a24); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 552, 554-55 (1986). In classical republican political theory, the commonwealth required civic virtue, that is, the subordination of private interest to public good. Since civic virtue was closely allied with private moral virtue, classical republicans were greatly concerned about the character of the citizenry. *Id.* at 553-54, 557. “Wisdom and judgment in both the populace and its representatives was seen as a necessary prerequisite to good government.” *Id.* at 555.

75. For example, Thomas Jefferson’s library contained a number of works by Aristotle. E. MILLICENT SOWERBY, *CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON* (1983). Rufus Choate understood politics in terms of the tradition of civic humanism having its roots in Aristotle’s *Politics*. He conceived of “the enlightened public spirit” that put the public good ahead of private interest or passion in Aristotelian terms as “civic virtue.” MATTHEWS, *supra* note 73, at 82. Moreover, Choate would have understood republican virtue not solely as intellectual in nature, but also, in Aristotelian terms, as involving qualities of character and the emotions. *Id.* at 115. Webster too was familiar with and sympathetic to the Aristotelian tradition, having stated at the Harvard Law School that Aristotle had “‘thought through’ so many of the great problems which form the discipline of social man.” Rufus Choate, *Remarks Before the Circuit Court on the Death of Mr. Webster*, in 1 *WORKS OF RUFUS CHOATE, WITH A MEMOIR OF HIS LIFE* 479, 488 (Samuel G. Brown ed., Boston, Little Brown 1862) [hereinafter *WORKS OF CHOATE*]; see also MATTHEWS, *supra*, at 266 n.77 (“Webster [too] designated virtue by that particularly nineteenth century word ‘character.’”).

76. Many of Webster’s contemporaries viewed him as a lawyer-statesman, although they may well have held differing views as to what a lawyer-statesman was. Choate’s view of him as a lawyer-statesman is described *supra* pp. 1049-51. Supreme Court Justice Joseph Story “affirmed . . . that in the general estimate of his countrymen, as a constitutional lawyer and statesman, [Webster] has no compeer in the present day, save only the excellent Chief Justice [Marshall] of the United States.” Joseph Story, *Statesmen—Their Rareness and Importance. Daniel Webster*, 7 NEW ENG. MAG. 89, 103 (1834). Edward Everett, himself a member of the New England Whig elite, said of Webster: “Every one must feel that, in the case of Mr. Webster, the lawyer and the statesman have contributed materially to form each other.” R. Kent Newmyer, *Daniel Webster as Toqueville’s Lawyer: The Dartmouth College Case Again*, 11 AM. J. LEGAL HIST. 127, 143 (1967) (citing *Memoir of Daniel Webster*, in 1 *THE WRITINGS AND SPEECHES OF DANIEL WEBSTER* 1, 49 (James W. McIntyre ed., 1903)). Newmyer continues:

In the House and Senate and as Secretary of State, knowledge of the law provided him with the arguments, rhetoric, and expertise essential to political action. At the bar his mastery of high policy added depth and persuasiveness to—and sometimes substituted for—his legal arguments. Finally, the relationship of politics and law and the expeditious implementation of it permitted him to bolster his own great ability with the talents of a conservative professional elite and the power of a unified economic class.

Id. at 143.

77. Choate certainly understood himself as a lawyer-statesman. See generally MATTHEWS, *supra* note 73 (describing how Choate and other New England Whig lawyers meshed their legal and political careers). Choate was familiar with Aristotle and viewed himself and Webster as republicans. Rufus Choate, *A Discourse Commemorative of Daniel Webster*, in 1 *WORKS OF CHOATE*, *supra* note 75, at 493, 546. Choate’s view of the lawyer-statesman as a professional ideal is described *infra* p. 1051.

78. Gordon, *The Devil and Daniel Webster*, *supra* note 70, at 451 n.43; see also Roscoe Pound, *The Legal Profession in America*, 19 NOTRE DAME LAW. 334, 343 (1944) (describing Choate as “by general consent the greatest advocate that has been at the bar in this country”). A description of some of Choate’s “trial wizardry” is contained in MATTHEWS, *supra* note 73.

refers to Choate's eulogy of Webster as "a good example" of the "hortatory literature of the early-nineteenth-century bar, . . . suggest[ing] how lawyers of the period wished, at least, to see themselves."⁷⁹ In fact, however, Choate's view of Webster in that eulogy deviates significantly from Kronman's description of the lawyer-statesman.

Choate praised Webster's "practical wisdom"⁸⁰ and his "subordination [of personal ambition] to a principled and beautiful public virtue,"⁸¹ the two defining traits of Kronman's lawyer-statesman. Choate also emphasized Webster's dual eminence: "When he died he was first of American lawyers, and first of American statesmen."⁸² But Choate praised Webster's practical wisdom and public-spiritedness as a political statesman, *not* as a litigator. Whereas Kronman's description of the lawyer-statesman ideal implies that the lawyer's professional role and the statesman's public role are linked by those same two traits, Choate considered Webster's dual eminence to be all the more remarkable precisely because, in his view, law and public statesmanship are "two substantially distinct and unkindred professions"⁸³ which "might have been regarded [as] incompatible excellences."⁸⁴ Indeed, Choate explained that

79. THE LOST LAWYER, *supra* note 1, at 12.

80. Choate, A Discourse Commemorative of Daniel Webster, *supra* note 77, at 526 ("his opinions were . . . practically wise"); *id.* at 533 (his wisdom was "practically useful"); *id.* at 535 (he performed his statesmanship "with a masterly and uniform sagacity and prudence and good sense"); *see also id.* at 524-25 (describing proposed repeal of 1828 protective tariff as a "*matter fit for deliberation*" when "the concrete of things must limit the foolish wantonness of a *priori* theory" and commending Webster's "moral statesmanship" regarding that repeal); *id.* at 554-55 (comparing the clear dictates of principles of conscience to the approximations and compromises of practical statesmanship).

81. *Id.* at 548.

82. *Id.* at 504.

83. *Id.* at 504.

84. *Id.* at 509. It might be argued that Choate's view that law and political statesmanship are distinct practices was merely a rhetorical device to emphasize the extraordinary nature of Webster's double accomplishment. However, Choate's view that law and political statesmanship are two separate professions reflects the facts that (i) by the 1840's "politics had developed into a full-fledged profession with specialized rules of its own—several of which ran counter to deeply cherished legal attitudes and practices," Maxwell Bloomfield, *Law vs. Politics: The Self-Image of the American Bar (1830-1860)*, 12 AM. J. LEGAL HIST. 306, 316 (1968), and (ii) as the law of the new republic grew in size and complexity, legal knowledge became more specialized and it became more difficult to rely exclusively on general learning and natural law principles to practice law effectively. ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 200 (1984).

The careers of both Choate and Webster illustrate the growing separation of law and political statesmanship. In 1844, Choate recognized that mastery as a litigator could no longer be attained without specialization, and he gave up a successful career as a political statesman in order to devote himself to the mastery of his profession. MATTHEWS, *supra* note 73, at 28 ("[A]s the law grew more technical and politics more professional, it became increasingly difficult to be equally competent in both. . . . Choate, in spite of his earlier ambitions to be a 'national man,' chose to be a great lawyer."); Rufus Choate, *Memoir*, in 1 WORKS OF CHOATE, *supra* note 75, at 1, 89 ("I have gone through a week of unusual labor; not wholly unsatisfactorily to myself. I deliberately record my determination to make no more political speeches, and to take no more active part in the election or in practical politics. . . . To my profession, *totis viribus*, I am now dedicated. To my profession of the law and of advocacy, with as large and fair an accompaniment of manly and graceful studies as I can command.").

By 1835, the competing demands of law and politics forced Webster to pledge his primary allegiance to statesmanship. Newmyer, *supra* note 76, at 144-46 & n.69 (1967). On several earlier occasions in the 1830's Webster had been embarrassed because of his lack of adequate preparation for cases and ignorance

Webster kept distinct their different intellectual aspects—"the habits of mind, the forms of reasoning, the nature of the proofs, the style of eloquence"—so that the intellectual habits of the one did not interfere with the practice of the other.⁸⁵

Choate linked the practice of law and statesmanship, however, in his 1845 address at the Harvard Law School: "while lawyers, and because we are lawyers, we are statesman. We are by profession statesmen."⁸⁶ That quotation seems to support Kronman's claim that nineteenth-century lawyers believed in the lawyer-statesman ideal.⁸⁷ But, as suggested by the title of that address, "The Position and Functions of the American Bar, as an Element of Conservatism in the State," the link Choate emphasized between the practice of law and statesmanship is based more on the politically conservative role of legal practice in "preserv[ing] our organic forms, our civil and social order, our public and private justice, our constitutions of government"⁸⁸ than on the regular and important exercise of practical wisdom and public-spiritedness in legal practice. The study and practice of law, Choate maintained, teaches lawyers the importance of constitutional structures to moderate the transient but powerful sentiments of the numerical majority and enables lawyers to protect those structures and to explain their importance to the public.⁸⁹ That same study and practice also imparts a view of the law as containing the increasing wisdom of the ages; it is a "force of moral cohesion" independent of and superior to "the people of any given day."⁹⁰ In Choate's republican view, the law is "the soul of the State."⁹¹

Choate's views put into question Kronman's treatment of the lawyer-statesman as a professional ideal of early nineteenth-century litigators. But those views say little about how antebellum litigators actually practiced law. Did they regularly exercise the practical wisdom and public-spiritedness characteristic of Kronman's lawyer-statesmen ideal?

of technical legal rules. *Id.* at 144-45. As a remedy, and based upon a well-established pattern while representing Dartmouth College and the Second Bank of the United States, *id.* at 131-42, Webster came to rely on the greater technical knowledge of lawyers associated with him in a case or on his friends, including Supreme Court Justice Joseph Story and other federal judges. *Id.* at 145-46.

85. Choate, A Discourse Commemorative of Daniel Webster, *supra* note 77, at 504-06.

86. Rufus Choate, The Position and Functions of the American Bar, as an Element of Conservatism in the State, in 1 WORKS OF CHOATE, *supra* note 75, at 429. Choate made clear that he was *not* talking about the way the practice of law prepared a lawyer to be a statesman or about statesmen who formerly were lawyers or judges. *Id.* at 417.

87. Kronman refers to this address by Choate, among other works, to show the conservatism of lawyers, one of the "ensemble of dispositional attitudes that the lawyer-statesman ideal endorses." THE LOST LAWYER, *supra* note 1, at 155 & n.22.

88. Choate, The Position and Functions of the American Bar, as an Element of Conservatism in the State, *supra* note 86, at 417.

89. *Id.* at 426-30.

90. *Id.* at 436-37.

91. *Id.* at 432. The idea that law was a social cement that helped keep society together was a common republican theme. See R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 234 (1985).

The two early nineteenth-century commentaries on legal ethics suggest a role for litigators which is much more consistent with the lawyer-statesman ideal than the twentieth century's standard conception of the litigator's role. During the early antebellum period, shaped by the Aristotelian intellectual premises described above, litigators considered their obligation to a client to be subordinate to their own conscience and concept of the public good, just as the citizen with civic virtue subordinated private interests to the public good.

David Hoffman's *A Course of Legal Study*, first published in 1817, was a standard manual for prospective lawyers until well after its second edition in 1836.⁹² The second edition contained Hoffman's "Resolutions in Regard to Professional Deportment," the American legal profession's earliest statement of legal ethics.⁹³ The view of the litigator's role in the Resolutions gave considerably greater emphasis to the litigator's own moral views of the client's objectives than the modern standard conception does.

The Resolutions recognize the supreme authority of the litigator's own conscience within the litigator-client relationship:

My client's conscience, and my own, are distinct entities: and though my vocation may sometimes justify my maintaining as facts, or principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privilege of solely judging to what extent to go. In civil cases, if I am satisfied from the evidence that the fact is against my client, he must excuse me if I do not see as he does, and do not press it; and should the principle also be wholly at variance with sound law, it would be dishonorable folly in me to endeavor to incorporate it into the jurisprudence of the country, when, if successful, it would be a gangrene that might bring death to my cause of the succeeding day.⁹⁴

According to the Resolutions, the litigator's conscience not only imposed limits on the partisan advocacy of the client's cause based upon an assessment of its legal merits;⁹⁵ it also determined whether the client's objectives were morally

92. CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 540 (William S. Hein & Co. 1990) (1911); L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 *EMORY L.J.* 909, 912 n.12 (1980).

93. Patterson, *supra* note 92, at 912 n.12. Representing only Hoffman's views regarding certain ethical matters, the Resolutions had no official status and obviously could not be enforced through any formal (or, indeed, informal) means.

94. Resolution XIV, in 2 DAVID HOFFMAN, *A COURSE OF LEGAL STUDY* 755 (Baltimore, Joseph Neal, 2d ed. 1836) (emphasis omitted). Resolution XXXIII adds:

I am resolved to make my own, and not the conscience of others, my sole guide. What is morally wrong, cannot be professionally right, however it may be sanctioned by time or custom. . . . If, therefore, there be among my brethren, any traditional moral errors of practice, they shall be studiously avoided by me

Id. at 765.

95. See Resolution X, in 2 HOFFMAN, *supra* note 94, at 754 ("Should my client be disposed to insist on captious requisitions, or frivolous and vexatious defences, they shall be neither enforced nor countenanced by me. And if still adhered to by him . . . he shall have the option to select other counsel.");

just. For example, even if a statute of limitations or infancy defense had legal merit, the litigator retained the right not to raise it in circumstances where its assertion would be morally unjust.⁹⁶ Hoffman made the litigator's conscience the supreme authority, recognizing that clients, whose individual interests are at stake, are more easily tempted to abandon justice in pursuit of private benefit.⁹⁷

Published in 1854, George Sharswood's *Essay on Professional Ethics* was the American legal profession's second "code" of professional conduct.⁹⁸ It, too, accorded substantial authority to the conscience of the litigator. Although Sharswood exhorted partisanship on the client's behalf,⁹⁹ he made the litigator's duty to initiate a lawsuit on behalf of a client subject to the litigator's own sense of justice: "Counsel have an undoubted right, and are in duty bound, to refuse to be concerned for a plaintiff in the legal pursuit of a demand, which offends his sense of what is just and right."¹⁰⁰ In Sharswood's view, "[n]o man can ever be a truly great lawyer, who is not in every sense of the word, a good man."¹⁰¹

The writings of other antebellum lawyers reflect the views of Hoffman and Sharswood. For example, in 1845 Chief Justice Gibson of the Supreme Court of Pennsylvania rejected the view that a litigator's sole duty was to the client:

It is a popular, but gross mistake, to suppose that a lawyer owes no fidelity to any one except his client; and that the latter is the keeper

Resolution XI, in 2 HOFFMAN, *supra* note 94, at 754 ("If, after duly examining a case, I am persuaded that my client's claim or defense . . . cannot, or rather ought not, to be sustained, I will promptly advise him to abandon it. To press it further in such a case, with the hope of gleaning some advantage by an extorted compromise, would be lending myself to a dishonorable use of legal means, in order to obtain a portion of that, the whole of which I have reason to believe would be denied to him both by law and justice.") (emphasis omitted).

96. "I will never plead the Statute of Limitations, when based on the *mere efflux of time*; for if my client is conscious he owes the debt; and has no other defense than the *legal bar*, he shall never make me a partner in his knavery." Resolution XII, in 2 HOFFMAN, *supra* note 94, at 754. Similarly,

I will never plead, or otherwise avail of the bar of Infancy, against an honest demand. If my client possesses the ability to pay, and has no other legal or moral defence . . . he must seek for other counsel to sustain him in such a defence. . . . [I]n this, as well as in that of limitation . . . I shall claim to be the sole judge . . . of the occasions proper for their use.

Resolution XIII, in 2 HOFFMAN, *supra* note 94, at 754-55 (emphasis omitted).

97. *Id.* at 745-46.

98. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (Philadelphia, T. & J.W. Johnson & Co., 5th ed. 1884). The original title was *A Compend of Lectures on the Aims and Duties of the Profession of Law, Delivered Before the Law Class of the University of Pennsylvania*. *Id.* at 3; see Patterson, *supra* note 92, at 912. Like Hoffman's Resolutions, Sharswood's *Essay* articulated one person's views which were influential but not enforceable.

99. "Entire devotion to the interest of the client, warm zeal in the maintenance and defence of his rights, and the exertion of his utmost learning and ability—these are the higher points, which can only satisfy the truly conscientious practitioner." SHARSWOOD, *supra* note 98, at 78-80.

100. *Id.* at 96. Sharswood distinguished the situation of "a plaintiff in pursuit of an unjust claim" from "a defendant . . . resisting what appears to be a just one." *Id.* at 90. For example, Sharswood held that a defendant who owes a debt should not plead an available statute of limitations defense, but "if he does plead it, the judgment of the court must be in his favor." *Id.* at 83.

101. *Id.* at 168.

of his professional conscience. He is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client; and he violates it when he consciously presses for an unjust judgment. . . . The high and honourable office of a counsel would be degraded to that of a mercenary, were he compelled to do the bidding of his client against the dictates of his conscience.¹⁰²

Sharswood quoted Chief Justice Gibson with approval.¹⁰³

Augustus S. Merrimon, a justice of the North Carolina Supreme Court during the 1880's and 1890's, began his private practice riding the circuit in western North Carolina in the early 1850's.¹⁰⁴ Watching a clever litigator confuse a jury, Merrimon's reaction echoed Hoffman:

I do not consider it the duty of a Lawyer to bewilder a Jury or the Court and lead their minds astray. This is not what a lawyer ought to do, and I consider it highly dishonorable for him to do it. . . . [I]t is not part of the duty of a lawyer to assist a scoundrel at law or in regard to the facts and whenever this is done, the man who does it is to some extent an accomplice A Lawyer, in the true sense of the term, never studies Chikenery and low cunning.¹⁰⁵

In his early writings, David Dudley Field, the author of the Field Codes, also subscribed to the view that a litigator's duty to a client was subject to the litigator's own moral views. In an 1844 article, Field rejected the view that a litigator's sole duty was to serve the client:

[A] more revolting doctrine scarcely ever fell from any man's lips. . . . It assumes that a man has a right to whatever the law will give him, that the law itself is so clear that it cannot be mistaken or perverted, and that he may rightfully avail himself of every defect in an adversary's proof . . . ; three propositions, every one of which is without foundation.¹⁰⁶

After refuting each of those three propositions, Field gave his "comprehensive answer" to the maxim that litigators owe total allegiance to their clients without regard to the justness of the client's objectives: "[T]he law and all its

102. *Rush v. Cavanaugh*, 2 Pa. 187, 189 (1845).

103. SHARSWOOD, *supra* note 98, at 96-97.

104. Augustus S. Merrimon, *The A. S. Merrimon Journal, 1853-1854*, 8 N.C. HIST. REV. 300, 300 & n.1 (A.R. Newsome ed., 1931).

105. *Id.* at 304.

106. David D. Field, *The Study and Practice of Law*, 14 DEMOCRATIC REV. 345 (1844), reprinted in *THE GOLDEN AGE OF AMERICAN LAW* 30, 33 (Charles M. Haar ed., 1965). Field's rejection of that view of the litigator's duty was not uncommon at the time. "In the 1830's and 1840's there were voices within the legal profession on both sides of the question." Michael Schudson, *Public, Private and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEGAL HIST. 191, 206 n.29 (1977).

machinery are means, not ends . . . the purpose of their creation is justice; and, therefore, he who in his zeal for the maintenance of the means, forgets the end, betrays not only an unsound heart, but an unsound understanding.”¹⁰⁷

Five years later, in 1849, New York adopted section 511 of the Field Code, which provided, “[i]t is the duty of an attorney . . . [t]o counsel or maintain such actions, proceedings or defenses, only, as appear to him legal *and just*, except the defense of a person charged with a public offense.”¹⁰⁸ In commenting upon the litigator’s duties under section 511, Field stated that lawyers should not be indifferent to “the moral aspects of the causes they advocate” and that it was error to believe that “a lawyer may properly advocate a bad cause.”¹⁰⁹ Field further argued that any litigator asked to advocate “the bad scheme of an unjust client” should “refrain from pursuing an unjust object.”¹¹⁰

Field’s own scurrilous conduct as an attorney in the 1868 Erie Railroad dispute¹¹¹ underscores the hazard of relying on the words of ethical commentators to determine how litigators actually practiced. Still, antebellum legal commentators’ consistent emphasis on the litigator’s conscience stands in sharp contrast to the standard conception of the litigator’s role during the twentieth century, suggesting that antebellum litigators at least may have aimed to practice law more in accordance with the lawyer-statesman ideal than their modern counterparts.¹¹²

B. *Decline of the Republican Lawyer-Statesman*

Even before the Civil War, changes in intellectual life and American society were undermining the intellectual premises of the lawyer-statesman ideal. During the antebellum period, economic development aggravated regional and class differences and made it much more difficult to maintain a republican view of politics based upon a conception of the public good.¹¹³ As the result of that economic development, by the 1830’s and 1840’s the law had come to be thought of more instrumentally, “as facilitative of individual

107. Field, *supra* note 106, at 34.

108. 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 296-97 (A.P. Sprague ed., New York, D. Appleton & Co., 1884) (emphasis added).

109. *Id.* at 298.

110. *Id.* at 299.

111. Field’s conduct in that litigation is described in GEORGE MARTIN, CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 1870-1970, at 3-15 (1970). Field’s justification for his conduct is described in Schudson, *supra* note 106, at 198-201.

112. Formulating the ethical principles actually operative in early nineteenth-century litigation practice is well beyond the scope of this Review, but such principles certainly are unexplored territory worthy of further study.

113. MATTHEWS, *supra* note 73, at 73-76 (arguing that industrialization splintered the notion of society conceived as a commonwealth, diminishing the concern for the public good in Whig politics). Historians debate precisely when republicanism was supplanted by Enlightenment liberalism, but hardly any believe that republicanism lasted longer than the Civil War. Sherry, *supra* note 74, at 551 n.23.

desires and as simply reflective of the existing organization of economical and political power."¹¹⁴ The classical tradition in intellectual life collapsed around 1830,¹¹⁵ and an Enlightenment morality based upon rules replaced the Aristotelian moral tradition.¹¹⁶

The growth of corporate capitalism during the second half of the nineteenth century coincided with a change in the circumstances of legal practice.¹¹⁷ Among elite lawyers, the corporate counselor supplanted the litigator. Most elite lawyers hitched their star to corporate interests and defined loyalty to their clients as their sole moral obligation.¹¹⁸

By the turn of the century, the republican ideal of the lawyer-statesman existed mostly in lawyers' memories. For progressives, it created the aura of a golden age in comparison to which contemporary law practice appeared overly commercial and unworthy of respect.¹¹⁹ Louis Brandeis' famous 1905 address to the Harvard Ethical Society on "The Opportunity in the Law" reflects that historical perspective and illustrates the progressive's modification of the lawyer-statesman ideal.¹²⁰

114. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 253 (1977).

115. ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE 200-01* (1984). Rufus Choate and other New England Whigs tried to restore civic virtue. See generally MATTHEWS, *supra* note 73.

116. See MACINTYRE, *supra* note 74, at 116-19.

117. See, e.g., JAMES W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 302, 367-74 (1950); David W. Levy, *The Lawyer as Judge: Brandeis' View of the Legal Profession*, 22 OKLA. L. REV. 374, 374-80 (1969).

118. "[B]y the 1870's leading American lawyers were coming to espouse a responsibility to their clients as their primary and even exclusive moral obligation as lawyers." Schudson, *supra* note 106, at 193, quoted in Patterson, *supra* note 92, at 912-13. Schudson notes that the evolution of David Dudley Field's views of a litigator's obligation to the client illustrated "similar shifts in moral outlook [by other lawyers] between 1850 and 1870." Schudson, *supra* note 106, at 207. Patterson argues that the new primacy of the lawyer-client relationship was reflected in the recognition after the Civil War of a new ethical and moral duty of confidentiality beyond the traditional lawyer-client privilege. Patterson, *supra* note 92, at 954-55. According to Patterson, there is no evidence of such an expanded duty of confidentiality in either of the two pre-Civil War ethical commentaries. *Id.* at 914-15.

119. The changes in legal practice, as well as the early twentieth-century criticism of lawyers for forsaking their professional ideals and becoming the mercenary servants of powerful corporate interests, are described in AUERBACH, *supra* note 45, at 31-35, and Levy, *supra* note 117, at 376-80. See also Gordon, *The Independence of Lawyers*, *supra* note 52, at 3-4 (quoting Woodrow Wilson, *The Lawyer and the Community*, in 21 *THE PAPERS OF WOODROW WILSON* 66-67, 69-70 (Arthur S. Link ed., 1976), and Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 6-7 (1934)).

120. LOUIS D. BRANDEIS, *BUSINESS: A PROFESSION* 314 (photo. reprint 1971) (1914). Brandeis gave that speech on May 4, 1905. It was first published in Louis D. Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555 (1905).

Most of the recent legal commentators advocating a professional ideal different from the standard conception emphasize Brandeis' view of lawyers in that speech. DAVID LUBAN, *LAWYERS AND JUSTICE* 169-73 (1988); Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 266 n.48 (1990) [hereinafter Gordon, *Corporate Law Practice*]; Gordon, *The Independence of Lawyers*, *supra* note 52, at 2-3; David Luban, *The Noblesse Oblige Tradition in the Practice of Laws*, 41 VAND. L. REV. 717, 720-27 (1988) [hereinafter Luban, *Noblesse Oblige*]; Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 589 n.3 (1985); William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565, 565-66 n.2 (1985) [hereinafter Simon, *Babbitt v. Brandeis*]; William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 62 n.76 [hereinafter Simon, *Ideology of Advocacy*]. Kronman views Brandeis more ambivalently, finding in his view of lawyering elements of both the lawyer-statesman ideal and the ideal of scientific law reform. THE LOST LAWYER, *supra* note 1, at 23. Brandeis' view of the lawyer-statesman is compared with

Analogizing to an “earlier period” when “[n]early every great lawyer was then a statesman; and nearly every statesman, great or small, was a lawyer,”¹²¹ Brandeis exhorted his audience that lawyers still could play a role as statesmen, even if the subject matter of their statesmanship had changed from politics to economics:

[B]y far the greater part of the work done by lawyers is done not in court, but in advising men on important matters, and mainly in business affairs. . . . The questions which arise are more nearly questions of statesmanship. The relations created call in many instances for the exercise of the highest diplomacy. The magnitude, difficulty and importance of the problems involved are often as great as in the matters of state with which lawyers were formerly frequently associated. The questions appear in a different guise; but they are similar.¹²²

In Brandeis’ view, economic statesmanship consisted of mediating the clashing private economic interests in civil society, rather than deliberating about and devoting oneself to the public good.¹²³ The corporate counselor accomplished such reconciliation, according to Brandeis, by adopting “a position of independence, between the wealthy and the people, prepared to curb the excesses of either.”¹²⁴ Because the large corporations were almost always well-represented, independence often meant becoming the “people’s lawyer,” protecting the masses from the corporations.¹²⁵

In Brandeis’ view, the “habits of mind” developed through “the study and preeminently the practice of law” qualified the lawyer for such statesmanship.¹²⁶ Brandeis’ description of those habits resembles Kronman’s description of practical wisdom:

Kronman’s view at *infra* pp. 1057-59.

121. BRANDEIS, *supra* note 120, at 314.

122. *Id.* at 319-20.

123. Brandeis continued:

Here, consequently, is the great opportunity of the bar. The next generation must witness a continuing and ever-increasing contest between those who have and those who have not. The industrial world is in a state of ferment. . . . The labor movement must necessarily progress; the people’s thought will take shape in action, and it lies with us, with you to whom in part the future belongs, to say on what lines the action is to be expressed; whether it is to be expressed wisely and temperately, or wildly and intemperately; whether it is to be expressed on lines of evolution or on lines of revolution.

Id. at 326-27.

124. *Id.* at 321.

125. *Id.*

126. *Id.* at 327; *see also id.* at 319 (“In guiding these affairs industrial and financial, lawyers are needed, not only because of the legal questions involved, but because the particular mental attributes and attainments which the legal profession develops are demanded in the proper handling of these large financial or industrial affairs.”).

The whole training of the lawyer leads to the development of judgment. . . . He becomes practiced in logic; and yet the use of the reasoning faculties in the study of law is very different from their use, say, in metaphysics. The lawyer's processes of reasoning, his logical conclusions, are being constantly tested by experience. He is running up against facts at every point. Indeed it is a maxim of the law: Out of the facts grows the law; that is, propositions are not considered abstractly, but always with reference to facts.

. . . .

If the lawyer's practice is a general one, his field of observation extends, in course of time, into almost every sphere of business and of life. The facts so gathered ripen his judgment. . . . He not only sees men of all kinds, but knows their deepest secrets; sees them in situations which "try men's souls." He is apt to become a good judge of men.

Then, contrary to what might seem to be the habit of the lawyer's mind, the practice of law tends to make the lawyer judicial in attitude and extremely tolerant. His profession rests upon the postulate that no contested question can be properly decided until both sides are heard. . . . The practice of law creates thus a habit of mind, and leads to attainments which are distinctly different from those developed in most professions or outside of the professions.¹²⁷

Like practical wisdom in Kronman's formulation, judgment in Brandeis' view is crucial to the practice of law; it is developed through broad experience; it relies on facts, not abstract theories; it serves the practical goals of action, not the theoretical goal of knowledge for its own sake; and through its exercise a lawyer develops a kind of "moral cosmopolitanism."¹²⁸ For Brandeis, however, practical wisdom is a "habit of mind," not a virtue of character.¹²⁹

Despite its explicit references to the ideal of the lawyer-statesman, Brandeis' 1905 speech reflects a changed conception of the litigator's role. Recognizing that litigation was no longer the dominant activity of most lawyers,¹³⁰ Brandeis spoke primarily to future corporate counselors. He advised them of the opportunities to perform important public work as economic statesmen if they retained their independence from the powerful corporate interests. But even for Brandeis, one of the most public-spirited

127. *Id.* at 315-17.

128. THE LOST LAWYER, *supra* note 1, at 159.

129. The habits of mind Brandeis described "make the lawyer an embodiment of Aristotelian *phronesis*, "practical wisdom." Luban, *Noblesse Oblige*, *supra* note 120, at 721. For Brandeis though, the lawyer's good judgment is a "special qualit[y] of mind." *Id.* at 725.

130. BRANDEIS, *supra* note 120, at 318-19 ("Of course there is an immense amount of litigation going on; and a great deal of the time of many lawyers is devoted to litigation. But by far the greater part of the work done by lawyers is done not in court, but in advising men on important matters, and mainly in business affairs."); see also Robert T. Swaine, *Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar*, 35 A.B.A. J. 89, 90-91, 169 (1949) (describing the growth of American business and the resultant diversification of legal practice).

lawyers in this century,¹³¹ professional independence was less important for litigators. He viewed their partisanship on behalf of corporate clients as a natural part of the adversary system of adjudication.¹³²

In short, by the turn of the century, the republican version of the lawyer-statesman ideal based upon an Aristotelian view of politics and moral virtues was no longer credible. The lawyer-statesman ideal was still alive, but only in a transmuted form for corporate counselors. Even this progressive version of the ideal was not prevalent, since most of the elite corporate bar was too enamored of the wealth, power, and prestige they derived from their virtually exclusive representation of corporate interests to adopt the professional independence Brandeis advised.¹³³ Other, more public-spirited lawyers for the corporate elite adopted a "schizoid" professional ideal. Pursuant to that ideal, they would represent their corporate clients' narrow interests as lawyers; but when not representing their clients, they would engage in law reform, social reform, or political reform movements; or like Stimson, they would punctuate their private practice with periods of public service in which they acted as public-spirited statesmen.¹³⁴

The changes in the American legal profession since 1960 that are described in Part Two of *The Lost Lawyer* may have made it harder for today's litigators to conform to the lawyer-statesman ideal. But that ideal, at least in the republican version described in Part One of *The Lost Lawyer*, appears to have lost its credibility as a professional ideal for litigators more than a hundred years ago. This casts doubt on Kronman's central thesis that there has been an inward change in professional self-understanding over the

131. Many of Brandeis' reform activities are described in Levy, *supra* note 117, at 390-92.

132. In responding to the ethical question of how a litigator can represent a client with objectives the litigator considers unjust, Brandeis proffered the adversary system excuse:

[T]he lawyer recognizes that in trying a case his prime duty is to present his side to the tribunal fairly and as well as he can. Since the lawyers on the two sides are usually reasonably well matched, the judge or jury may ordinarily be trusted to make such a decision as justice demands.

BRANDEIS, *supra* note 120, at 324.

133. See AUERBACH, *supra* note 45, at 35-39, 133-57.

134. Robert W. Gordon, "*The Ideal and the Actual in the Law*": *Fantasies and Practices of New York City Lawyers, 1870-1910* [hereinafter Gordon, *Ideal and Actual*], in *THE NEW HIGH PRIESTS: LAWYERS IN POST CIVIL-WAR AMERICA* 51 (Gerard W. Gawalt ed., 1984); Gordon, *Legal Thought*, *supra* note 73, at 70; Gordon, *The Independence of Lawyers*, *supra* note 52, at 22-23; Gordon, *Corporate Law Practice*, *supra* note 120, at 267-75; Luban, *Noblesse Oblige*, *supra* note 120, at 719-20.

The dichotomy between the lawyer's professional and personal roles which makes the "schizoid" ideal possible is reflected in the ABA codes of conduct. The Model Code of Professional Responsibility provides:

The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client. . . . [H]e may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any clients.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-17 (1986). It further provides: "[Lawyers] should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients . . ." *Id.* EC 8-1. The Preamble to the Model Rules states, in pertinent part: "As a public citizen, a lawyer should seek improvement of the law [and] the administration of justice . . ." MODEL RULES OF PROFESSIONAL CONDUCT pmb1. (1983).

last three decades or, if there has been such a change, that it resulted from the decline of the lawyer-statesman ideal.

III. THE STANDARD CONCEPTION OF THE MODERN LITIGATOR'S ROLE

A. *The Standard Conception of the Litigator's Role*¹³⁵

The standard conception of the litigator's role has been implicit in each of the American Bar Association's three codes of conduct for lawyers: the 1908 Canons of Professional Ethics ("1908 Canons"); the 1969 Model Code of Professional Responsibility ("Model Code"); and the 1983 Model Rules of Professional Conduct ("Model Rules"). Today, the Model Code and the Model Rules are the dominant codes of professional conduct.¹³⁶ They prescribe the same basic code of conduct for litigators, and their overall thrust is consistent with the 1908 Canons.¹³⁷ Thus, since the beginning of the twentieth century, the ABA codes have provided a relatively constant public conception of the litigator's role.¹³⁸

The standard conception of the litigator's role is defined by two principles. The first is the principle of partisanship: "When acting as an advocate, a lawyer must, within the established constraints upon professional behavior, maximize the likelihood that the client will prevail."¹³⁹ The second is the

135. The phrase "the standard conception of the litigator's role" is an adaptation of "the standard conception of the lawyers' role" discussed in Postema, *supra* note 24, at 73. However, the standard conception of the litigator's role presented in this Review relies heavily upon the analysis in LUBAN, *supra* note 120. Although Luban's analysis is intended to apply to counselors and negotiators as well as litigators, *id.* at 11-12, Luban deliberately focuses his analysis on litigators in the civil justice system, *id.* at 57-58, 66.

136. The Model Code or a variation of it remains in effect in 13 states, while the Model Rules or a variation of them has been adopted in 36 states and the District of Columbia. See ABA/BNA, *LAWYERS' MANUAL ON PROFESSIONAL CONDUCT* 01:3-4 (1992). California is the only state not to have adopted the Model Code, the Model Rules, or a variation of one of them. *Id.*

137. The Model Code is compared to the 1908 Canons in Patterson, *supra* note 92, at 935-47. See also Edward L. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 *ARK. L. REV.* 1, 11 (1970) (explaining that although it differs from the 1908 Canons in some major substantive respects, "by and large the Code could aptly be described as clothing the prior principles in new language and expanding their substance").

138. Possibly because of the standard conception's longevity, possibly because of his view that it "has been substantially weakened by recent criticisms," THE LOST LAWYER, *supra* note 1, at 365, Kronman does no more than mention it in passing in Part Two of *The Lost Lawyer*. Part One of *The Lost Lawyer* does discuss the relationship of the counselor and the advocate to the client, but that discussion does not focus explicitly or at length on the standard conception of the litigator's role. That discussion is considered *infra* pp. 1066-68.

139. LUBAN, *supra* note 120, at 7 (quoting Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 *CAL. L. REV.* 669, 673 (1978) (emphasis omitted)). Schwartz calls this the "principle of professionalism," *id.* at 673, but this Review calls it the "principle of partisanship," following Luban's reasoning that there are alternate conceptions of professionalism. LUBAN, *supra* note 120, at 7 n.6. Indeed, the ideal of the lawyer-statesman is one such alternate conception. Similar formulations of the principle of partisanship are presented in Postema, *supra* note 24, at 73, and Simon, *Ideology of Advocacy*, *supra* note 120, at 36-37.

Model Code Canon 7 expresses the principle of partisanship generally: "A lawyer should represent a client zealously within the bounds of the law." MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1986).

principle of nonaccountability: "When acting as an advocate . . . a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved."¹⁴⁰ Although there is dispute about the extent to which the standard conception of the litigator's role is held by practicing lawyers,¹⁴¹ and although the standard conception is under sustained attack in the legal literature,¹⁴² it still powerfully shapes modern litigators' understanding of their role, especially litigators in the corporate law firm on which Kronman focuses his analysis of legal practice.¹⁴³

Consistent with this Canon, "[a] lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules." *Id.* DR 7-101(A)(1). Moreover, a lawyer "shall not intentionally . . . [p]rejudice or damage his client during the course of the professional relationship." *Id.* DR 7-101(A)(3). The commentary on the Model Rules provides that a "lawyer should . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1983).

Like the subsequent Model Code and Model Rules, the 1908 Canons enshrine the principle of partisanship. "The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied." ABA, Canons of Professional Responsibility, Canon 15 (1908). As stated by Henry Drinker, former Chairman of the ABA Standing Committee on Professional Ethics and Grievances, the litigator's "primary duty" under the 1908 Canons is "to serve and promote" the client's interest. HENRY S. DRINKER, *LEGAL ETHICS* 6 (1953); *see also id.* at 149 (Canons reject Hoffman's views about not asserting statute of limitations and infancy defenses).

140. Schwartz, *supra* note 139, at 673, *quoted in* LUBAN, *supra* note 120, at 7. Others have formulated a similar "principle of neutrality." Postema, *supra* note 24, at 73-74; Simon, *Ideology of Advocacy*, *supra* note 120, at 36.

Model Rule 1.2(b) provides: "A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities." The Model Code contains the same principle. *See supra* note 134. Although the Canons do not themselves articulate the principal of nonaccountability, their interpreters did. *See, e.g.*, DRINKER, *supra* note 139, at 144 & n.30 (a lawyer "is not, however, ultimately responsible for the morals of his client").

141. *See, e.g.*, LUBAN, *supra* note 120, at 12 n.1, 393-403 (discussing assumption that the standard conception is a "reasonably accurate representation of lawyers' ethics as it is understood in the profession's official codes as well as its unofficial mores"); Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 120-29 (1990) (reviewing LUBAN, *supra* note 120) (arguing that the standard conception does not take into account other principles guiding lawyers' professional conduct, but acknowledging that "it is a significant part of the normative world of lawyers"); David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1006-17 (1990) [hereinafter Luban, *Partisanship*] (arguing that even if there is a moral activist tradition among lawyers, the standard conception is still extremely important, especially in large-firm practice, "the true haven of the standard conception"); Rhode, *supra* note 120, at 617 (acknowledging that the principle of partisanship or "adversarial ethos" retains force as "the dominant vision of professional responsibility"). *But see* Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1543 (arguing that the "Standard Conception is really only one, and never a completely dominant, strand of thought in a vague and sometimes contradictory field").

142. Recent works of David Luban, William H. Simon, and others criticize the standard conception of the lawyer's role and argue in favor of a view of lawyering more sensitive to the public good (or justice) and personal morality. *See, e.g.*, LUBAN, *supra* note 120; Luban, *Noblesse Oblige*, *supra* note 120; Postema, *supra* note 24; Rhode, *supra* note 120; Simon, *Babbitt v. Brandeis*, *supra* note 120; William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); Simon, *Ideology of Advocacy*, *supra* note 120; William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984). Some commentators have criticized the standard conception applicable to lawyers engaged in client counseling, but appear to be more accepting of the standard conception as it applies to litigators in adversarial civil proceedings. *See, e.g.*, Gordon, *Corporate Law Practice*, *supra* note 120; Gordon, *The Independence of Lawyers*, *supra* note 52; Schwartz, *supra* note 139.

143. Luban, *Partisanship*, *supra* note 141, at 1016-17.

The very formulation of the principle of partisanship creates a distinction between justice (or, in Kronman's terms, the overall well-being of the legal system), on the one hand, and the client's objectives, on the other. That principle requires the litigator to do everything possible, so long as it is not unlawful or a violation of the pertinent ABA code of conduct, "to maximize the likelihood that the client will prevail." The client's objectives determine what constitutes "prevail[ing]."¹⁴⁴ The principle of partisanship places only the most minimal legal limit, and no normative limit, on the client's objectives.¹⁴⁵ Thus, under the principle of partisanship, it is the litigator's duty to pursue zealously the client's objectives; moral or political concerns are virtually irrelevant.¹⁴⁶

There may be a happy coincidence when the client has objectives that the litigator considers just. Under the principle of partisanship, however, the litigator's zealous representation of the client is required because of the client's objectives, not because of the litigator's public-spiritedness or passion for justice. If the litigator represents a client whose objectives the litigator considers unjust, both the Model Code and the Model Rules permit (but do not require) the litigator to discuss with the client the moral and political value of the client's objectives,¹⁴⁷ but both the Model Code and the Model Rules

144. In a later formulation of the principle of partisanship David Luban replaced the end-phrase "maximize the likelihood that the client will prevail" with "maximize the likelihood that the client's objectives will be attained." *Id.* at 1004. That substitution highlights that under the principle of partisanship the client determines just what constitutes "prevail[ing]."

145. Model Code DR 7-101(B)(2) provides that a lawyer may—and impliedly may not—"[r]efuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal." Model Code DR 7-102(A)(7) provides that fraud and clear illegality define the outer limits of the principle of partisanship: "[A] lawyer shall not [c]ounsel or assist a client in conduct that the lawyer knows to be illegal or fraudulent." See also *id.* EC 7-5. Model Rule 1.2(d) is virtually identical. See also *id.* Rule 1.2(d) cmt.

146. The ABA codes of conduct make an exception to this general rule for criminal prosecutors. Model Code EC 7-13 provides: "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." The comment to Model Rule 3.8 is similar: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."

The principle of partisanship, considered alone, would require the public prosecutor to seek the defendant's conviction, regardless of the justness of the conviction, just as it requires civil litigators to seek victory for the client in litigation, regardless of the justness of the client's objectives. The ABA codes specifically abridge the application of the principle of partisanship to the prosecutor, because, unlike the usual litigator, the prosecutor is supposed to be concerned with the justness of the conviction. The negative implication is that the litigator generally is not supposed to be concerned with the justness of the client's objectives.

147. Model Code EC 7-8 (emphasis added) provides, in relevant part:

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations Advice of a lawyer to his client need not be confined to purely legal considerations In assisting his client to reach a proper decision, it is often *desirable* for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He *may* emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions.

Model Code EC 7-9 (emphasis added) provides that "when an action in the best interest of his client seems to him to be unjust, he *may* ask his client for permission to forego such action." Model Rule 2.1 (emphasis added) provides that "[i]n rendering advice, a lawyer *may* refer not only to law but to other considerations such as moral . . . and political factors, that may be relevant to the client's situation." The comment to Model Rule 2.1 provides: "It is proper for a lawyer to refer to relevant moral and ethical considerations

bestow ultimate authority upon the client to determine whether to pursue objectives that the litigator considers unjust.¹⁴⁸ Under both codes of conduct, if the litigator has moral or political qualms about zealously pursuing the client's objectives, the litigator's only alternative, once representation has begun, is to withdraw from representation.¹⁴⁹ In some circumstances, even that is not possible.¹⁵⁰

B. *The Consequences of the Standard Conception*

1. *Conflict with the Lawyer-Statesman Ideal*

The standard conception of the litigator's role strikes at the heart of the lawyer-statesman ideal. Each of the two principles defining the standard conception strictly circumscribes the litigator's opportunities for developing and exercising public-spiritedness and, to some extent, practical wisdom.

Pursuant to the principle of partisanship, a litigator can only exercise public-spiritedness when the litigator considers the client's preconceived objectives to be just or when the litigator raises concerns about the justness of

in giving advice."

148. Model Code EC 7-8 provides that "in the final analysis, however, the lawyer should always remember that the decision whether to forgo legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself."

Model Rule 1.2(a) is similar: "A lawyer shall abide by a client's decisions concerning the objectives of representation." However, Model Rule 1.2(a) is expressly subject to Model Rule 1.2(c), which allows the litigator to place a limit on the client's objectives if the client agrees: "A lawyer may limit the objectives of the representation if the client consents after consultation." The comment to Model Rule 1.2 states: "The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations."

149. With respect to withdrawal from representation, the Model Code distinguishes nonadjudicatory from litigated matters. "In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice [including the moral judgment and advice] of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment." MODEL CODE EC 7-8. In a matter pending before a tribunal, the same rule applies, *id.* DR 2-110(C)(1)(e), except that permission to withdraw may be subject to the rules of the tribunal, *id.* DR 2-110(A)(1), and, in any event, may not be accomplished until the withdrawing litigator "has taken reasonable steps to avoid foreseeable prejudice to the rights of his client." *Id.* DR 2-110(A)(2); *see also id.* EC 2-32.

The Model Rules are more lenient with respect to withdrawal from litigated matters. Even if the interests of the client are adversely affected, unless prevented by the tribunal, MODEL RULE 1.16(c), a litigator can withdraw if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent," *id.* Rule 1.16(b)(3), before "[t]aking steps to the extent reasonably practicable to protect a client's interest." *id.* Rule 1.16(d).

150. There are circumstances when a litigator's withdrawal is not permitted. *See, e.g.,* MODEL CODE DR 2-110(A)(1) ("If permission for withdrawal from employment is required by the rules of the tribunal, a lawyer shall not withdraw . . . without its permission."); MODEL RULE 1.16(c) ("When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.").

Aside from the special situation of appointment by a tribunal to represent someone, if representation has not yet begun, the litigator is not required to undertake the representation of a particular client. MODEL CODE EC 2-26 ("A lawyer is under no obligation to act as . . . advocate for every person who may wish to become his client . . ."); MODEL RULE 6.2 cmt. ("A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant.").

the client's objectives. Even in the latter situation, however, the client's ultimate authority over the objectives of the representation trumps the litigator's public-spiritedness when, after discussion, the client and the litigator still do not agree about the justness of the client's objectives.

The principle of partisanship may also prevent the litigator from exercising practical wisdom precisely in those circumstances when, in Kronman's view, practical wisdom is most crucial—in deliberation over ends.¹⁵¹ Under both the Model Code and the Model Rules, if the client does not want the litigator to engage in third-person deliberation over the objectives of the representation—and many business people do not¹⁵²—the litigator ultimately has no choice but to abide by the client's wishes.

The principle of nonaccountability also inhibits the litigator's exercise of public-spiritedness and practical wisdom, but less directly, more frequently, and perhaps more significantly. The principle of nonaccountability never enters into a direct conflict with the exercise of the litigator's public-spiritedness or practical wisdom. It undermines the exercise of those virtues more insidiously; it anesthetizes them.

The principle of nonaccountability absolves the litigator of any moral or political responsibility for zealously pursuing and, if successful, securing the client's objectives.¹⁵³ Under both the Model Code and the Model Rules, the litigator has no obligation to make a judgment about the justness of the client's objectives¹⁵⁴ and if the litigator makes such a judgment the litigator is not permitted to make that judgment public.¹⁵⁵ The principle of nonaccountability thus invites the litigator to adopt an attitude of indifference to the justness of the client's objectives.

Two aspects of litigation practice in large corporate firms give that invitation added force. First, the emotional stress of litigation often makes clients unresponsive to questions about the justness of their objectives or even the legal merits of their case. Clients embroiled in a hotly contested lawsuit involving important issues often regard litigation as a war and their lawyers as

151. THE LOST LAWYER, *supra* note 1, at 15, 60, 65, 89-90, 288.

152. *See, e.g., A Businessman's View of Lawyers*, 33 BUS. LAW. 817, 831 (1978) (remarks of Donald P. Kelly, President of Esmark, Inc. during the Annual Section Program of the Section of Corporation, Banking and Business Law at the ABA Annual Meeting of August 9, 1977).

153. By absolving the litigator of any moral or political responsibility for the client's objectives, the principle of nonaccountability makes the principle of partisanship a "protected reason" for the litigator's conduct; that is, it suggests to the litigator that it is unimportant to consider any moral or political limits on the zealous pursuit of the client's objectives. *See* JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 16-18 (1979) (describing protected reasons).

154. *See supra* notes 140, 147-48.

155. Both the Model Code and the Model Rules prohibit a litigator from affirming at trial a personal belief in the justness of the client's objectives. MODEL CODE DR 7-106(C)(4); MODEL RULE 3.4(e). That prohibition supports the principle of nonaccountability by (i) preventing the public from determining what a litigator personally believes about the moral or political status of the client's objectives, and (ii) allowing a litigator to represent a client without believing in the justness of the client's objectives. *See* Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 15 (1951).

gladiators defending their interests and goals. That mind-set makes it emotionally difficult for clients to accept any advice that introduces uncertainty or suggests anything less than total agreement with and confidence in their cause. Clients in that frame of mind often react to any attempt to deliberate about the propriety of their objectives as a form of dissension, and during battle they can endure no dissension, especially from their champion.

Second, the practicalities of making a living in an increasingly competitive legal environment understandably make most litigators want to avoid confrontations with their clients, especially those that are wealthy and powerful. If the litigator considers the client's objectives unjust, the litigator is faced with the potentially unpleasant prospect of a conflict with the client. The principle of partisanship, which gives ultimate authority to the client in resolving that conflict, makes the prospect of discussing that conflict with the client especially unappealing, since the client is authorized to summarily dismiss the litigator's views and the litigator, at that point, cannot protest or take the conflict to a higher tribunal. Most litigators do not want to be seen as morally squeamish, nor do they wish to be put down summarily. Since the litigator can easily avoid that unenviable situation while remaining faithful to role by not undertaking an independent evaluation of the moral or political value of the client's objectives, the principle of nonaccountability, coupled with the principle of partisanship, creates a compelling incentive for the litigator not even to deliberate about the justness of the client's objectives.¹⁵⁶

The likely consequence of the principle of nonaccountability is, then, that litigators will not exercise practical wisdom to determine the justness of their clients' objectives, viewing such issues as "peripheral to their own sense of achievement,"¹⁵⁷ and will not confront a client about the justness of the client's objectives.¹⁵⁸ As a result, the litigator's practical wisdom and public-spiritedness tend to atrophy from disuse.¹⁵⁹

Thus, the standard conception of the litigator's role ultimately makes the litigator captive to the client's moral and political views, absent the litigator's withdrawal from representation. With narrow exceptions, that conception gives the client the ultimate right to decide upon the objectives of representation. If the client is more interested in private gain than the public good and is not

156. Analogously, experienced litigators sometimes deliberately avoid questioning a client too closely about certain facts if they suspect that the client might lie about those facts in later testimony. That way, the litigator will not "know" that the client has given perjured testimony, and the litigator will not have to face the dilemma of either withdrawing from representing the client or suborning perjury.

157. Rhode, *supra* note 120, at 604.

158. Cf. Gordon, *Corporate Law Practice*, *supra* note 120, at 257 ("Corporate counselors whose compliance guidance is likely to run into resistance from their clients tend either not to offer it or rapidly convert the advice into neutral risk-analysis and themselves into adversary advocates.").

159. "When professional action becomes detached from ordinary moral experience, lawyers' sensitivity can atrophy or narrow to fit the constricted universe dictated by role." Rhode, *supra* note 120, at 626 (footnote omitted); see also Postema, *supra* note 24, at 73-81; cf. *THE LOST LAWYER*, *supra* note 1, at 326-27 (weakening of the judge's deliberative imagination results from delegating work to clerks).

interested in engaging in a dialogue with the litigator about desired ends, the principles of partisanship and of nonaccountability leave little room for the litigator's effective deliberation about the ends of a client's actions or for the litigator's active commitment to public-spiritedness.

Kronman's arguments in *The Lost Lawyer* against what he calls the "narrow" view of the lawyer-client relationship do not satisfactorily overcome the threat to the lawyer-statesman ideal posed by the standard conception of the litigator's role.¹⁶⁰ His argument about the impetuous client cogently demonstrates that it is impossible to perform fully one's duty as a litigator without engaging in third-person deliberation about certain clients' ends.¹⁶¹ But the world of legal practice is not always rational. Clients seek out litigators when they have been unable to resolve their problems on their own. They arrive emotionally needy and often in the grip of strong feelings. They may be frightened, angry, hateful, desperate, depressed. Their objectives are sometimes imposed and then fixed by those raw emotions. When that happens, litigators often lack the time, the client's trust, and the emotional mastery to cause the client to overcome those feelings and deliberate about objectives. Thus, clients sometimes act without first satisfying all of the logical preconditions of their actions. Even when a litigator is confronted with an impetuous client and seeks to engage in such deliberation, the client sometimes refuses to examine a hastily made decision and the litigator, however conscientious, is then forced either to implement the client's poorly considered objective or to forgo representation entirely.¹⁶²

Kronman argues that litigators develop practical wisdom and public-spiritedness because they need to internalize the judicial point of view in order to perform their role.¹⁶³ That argument is predicated primarily upon his view that in order to predict a judge's decision or what arguments are most likely to succeed, a litigator must adopt the judicial point of view, including most importantly its public-spirited commitment to the well-being of the legal

160. See *supra* pp. 1039-41.

161. Although Kronman makes this argument in the context of a counselor advising a client, the same argument applies to a litigator dealing with a client who, for example, impetuously wants to sue his long-time business partner.

162. The same problem undermines the broader philosophical attack on the understanding of the attorney-client relationship implicit in the standard conception of the litigator's role in Simon, *Visions of Practice in Legal Thought*, *supra* note 142, at 470-89, and Simon, *Ideology of Advocacy*, *supra* note 120, at 52-59. See also Gordon, *The Independence of Lawyers*, *supra* note 52, at 72-73.

For example, Simon argues that the notion implicit in the standard conception that clients have preconceived determinate interests is conceptually inadequate because "the client's interests are in fact too indeterminate to play the role assigned to them and . . . the client's understanding of his interests is affected by the experience of the representation his interests are supposed to determine." Simon, *Visions of Practice in Legal Thought*, *supra* note 142, at 471 (footnote omitted). But, regardless of these conceptual inadequacies, litigators still contend with clients who, rightly or wrongly, view themselves as "the only authoritative judge of [their] interests." *Id.* at 475. The impetuous client is just one example of such a client.

163. THE LOST LAWYER, *supra* note 1, at 149-50.

system.¹⁶⁴ Although Kronman recognizes that judges and litigators play different roles in the practice of adjudication,¹⁶⁵ he fails to acknowledge that the litigator's partisan role subordinates the judicial point of view, thereby distorting the exercise of practical wisdom and public-spiritedness.

By internally consulting the judicial perspective, the litigator learns what facts and what bodies of law are most likely to lead to a favorable result for the client, and what facts and what bodies of law are most harmful to such a result. But that is just the beginning of the work. The litigator then uses that insight to fashion partisan arguments on behalf of the client. Once those arguments are determined, the litigator sets out to persuade others to agree with them. The litigator emphasizes the favorable facts and law and suppresses, within the bounds of the law, the harmful facts and law. In effect, the litigator makes instrumental use of the internalized judicial perspective, using it solely to achieve the litigator's partisan goal of victory for the client in the adversary process.

For example, consider a litigator's possible strategy for defending a sculptor accused of copyright infringement because he reproduced a statute commissioned by the plaintiff.¹⁶⁶ Assume that after informally investigating the facts, the litigator concludes that a court probably would find that when the sculpture was created his client was the plaintiff's employee, not an independent contractor, and therefore the sculpture was a work-for-hire and his client violated the law. During discovery, the litigator would seek evidence to prove that his client was an independent contractor and, consistent with his discovery obligations, would protect against the unnecessary disclosure of facts supporting a contrary finding. His arguments would emphasize those aspects of the parties' relationship which indicate independent contractor status and would minimize both the probative value and the evidence of those aspects inconsistent with that characterization. His litigation strategy would be built upon his view of what the court would decide if the adjudicated facts were not shaped by his efforts. Ultimately, his strategy's goal would be to present for decision facts more likely to convince the court of the result his client wants.

In a prior article, Kronman recognized that because the litigator is engaged in a rhetorical process in which truth is subordinated to the goal of persuasion, the litigator's attitude towards the truth is best characterized as indifference:

[I]n doing what he does, the advocate is indifferent to the truth

The indifference to truth that all advocacy entails is likely . . . to affect the character of one who practices the craft for a long time and in a studied way. Because it requires its practitioner to think of truth as, at most, an instrumental good, not as something valued for its own

164. *Id.* at 150.

165. *Id.* at 134-35.

166. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), presents similar facts.

sake, advocacy encourages what can only be described as a kind of cynicism regarding efforts to discover and to state the truth¹⁶⁷

Under the standard conception of the litigator's role, each litigator is similarly indifferent to the overall well-being of the legal system as such. Pursuant to the principle of partisanship, the litigator's ultimate goal is to persuade the decisionmaker to decide in the client's favor, and the litigator temporarily and privately adopts the judicial perspective to determine how best to achieve that result, not to engage in deliberation for its own sake or to further justice.¹⁶⁸

Thus, the litigator's practical wisdom and public-spiritedness are superficial, at best. In Aristotelian terms, the litigator's internalization of the judicial perspective does not make the litigator practically wise or public-spirited. For Aristotle, a person is virtuous only when virtuous activity is undertaken for its own sake.¹⁶⁹ The litigator who internalizes the judicial perspective for the ulterior purpose of performing a partisan role on behalf of a client has not exercised practical wisdom or public-spiritedness as such and, consequently, has not developed either virtue of character.

The standard conception of the litigator's role is, then, at war with the lawyer-statesman ideal. Insofar as the standard conception publicly defines the role of the litigator, Kronman's attempt to restore the appeal and credibility of the lawyer-statesman ideal for modern litigators is implausible in many practice situations. Insofar as the standard conception can be enforced, whether through formal disciplinary proceedings or informally through the expectations of clients and other lawyers, that conception limits the litigator's prospects of practicing as a lawyer-statesman.

2. *Prospects for Resolution*

The ideal of the lawyer-statesman envisions a professional role for litigators that is more independent from clients' interests and goals and, consequently, morally and politically richer than the standard conception of the litigator's role. That greater autonomy and richness are part of the intrinsic value of the lawyer-statesman ideal and two of the reasons why a practicing litigator would find it an appealing professional ideal. The standard conception of the litigator's role, on the other hand, can be morally justified, if at all, by the value *vel non* of the adversary system which it serves.¹⁷⁰ But even if that

167. Kronman, *Foreword: Legal Scholarship and Moral Education*, *supra* note 3, at 963-64. In that article Kronman discusses legal advocacy generally, but what he says applies even more strongly to litigation in particular.

168. *Cf.* Curtis, *supra* note 155, at 12 (noting that the litigator lacks an open mind since the litigator is committed to persuading others of the legal merits of the client's cause).

169. ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 12, at 39, 84, 292 (lines 1105a28-33, 1120a23-30, 1178a34-36).

170. *See* LUBAN, *supra* note 120, at 3-160 (arguing that the standard conception of the litigator's role

systemic justification is convincing, the actual professional experience of litigating in accordance with the standard conception remains morally and politically impoverished by comparison.

Thus, from the perspective of the practicing litigator, a change in the standard conception that allows greater moral autonomy would be desirable. But such change seems unlikely in the foreseeable future. The most important change in large corporate law firm practice over the past twenty-five years, increased commercialism, results from and, in turn, feeds two forms of increasingly intense competition: the struggle among law firms for fewer, more cost-conscious, more legally sophisticated corporate clients; and the contest among the ever-growing supply of lawyers for the comparatively smaller number of associate and partner positions, and for higher and higher compensation.¹⁷¹ The more competitive the market for legal services, the less independent from their clients' goals and interests most litigators can be.¹⁷² Since competitive pressure for clients is on the rise, especially among large corporate law firms, it is hard to imagine change in the standard conception that allows litigators significantly greater opportunities to exercise public-spiritedness and practical wisdom.

There is, however, one corner of the legal world—public interest litigation—where the incompatibility between the ideal of the lawyer-statesman and the standard conception of the litigator's role is pragmatically reduced. Since that incompatibility arises when the litigator's moral or political views conflict with the client's interests and goals, the frequency, severity, and intractability of that conflict can be diminished when litigators choose clients who share fundamentally compatible moral and political views. Public interest litigators appear to have enhanced their opportunities to exercise public-spiritedness and practical wisdom by choosing clients in terms of their

is a "role morality" for lawyers engaged in the adversary system distinct from common morality); cf. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060 (1976) (arguing that the standard conception of the lawyer is morally justified by viewing the lawyer as a special purpose friend).

171. This increase in commercialism applies most importantly to practice in the large corporate law firms which, until recently, were not subject to the competitive pressures that sole practitioners and other private law firms have been subject to for years. See Luban, *Noblesse Oblige*, *supra* note 120, at 734-36; Simon, *Babbitt v. Brandeis*, *supra* note 120, at 587 n.53; cf. Gordon, *The Independence of Lawyers*, *supra* note 52, at 24 ("In more recent times [commercialism] has invaded the citadels of the elite bar itself, and now appears to have become the reigning ideology of the managers of the great metropolitan firms."). Simon adds to Kronman's account of competitive pressures the possibility of liability for price-fixing in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and the elimination of the ban on lawyer advertising and solicitation in *Bates v. State Bar*, 433 U.S. 350 (1977). Simon, *Babbitt v. Brandeis*, *supra* note 120, at 583.

This rise in commercialism also reflects changes in society outside the legal profession, such as (i) a rise in the competitive pressure on American business resulting from a changed world economy which, in turn, appears to have caused an increase in litigation among corporations in lieu of informal resolutions of disputes, Luban, *Partisanship*, *supra* note 141, at 1016 & nn.46-47; and (ii) the attitude of greed implicit in Reaganomics and the corporate mergers and acquisitions of the 1980's.

172. Mark J. Osiel, *Lawyers as Monopolists, Aristocrats, and Entrepreneurs*, 103 *HARV. L. REV.* 2009, 2013-18 (1990).

objectives. Moreover, because there is a surfeit of clients seeking civil rights and civil liberties lawyers at affordable rates, public interest litigators, who generally are willing to provide their services at rates well below the fees charged of wealthy corporate clients, have more leverage to require their clients to deliberate with them about the moral or political issues raised during representation. Thus, the practice of public interest litigation suggests that there are certain circumstances in which modern litigators still can be lawyer-statesmen.¹⁷³

IV. CONCLUSION

Several years ago, Bruce Ackerman urged a Yale Law School graduating class to practice law as a calling:

The challenge is to build a life in the here and now—one worthy of ourselves, our fellow citizens and the law itself.

Easier said than done. And many of us will fail in the attempt. Many will settle for a self-trivializing conception of lawyering. While they will spend most of their waking hours within their genteel hierarchies, they will save their ultimate concerns for something else: family, friends, the bassoon, some little cottage in the Maine woods. Even if successful, this kind of life will have no unity to it. There will be great moments, hopefully; but the whole will be less than the sum

173. In what appears to be a significant oversight, Kronman does not identify civil rights litigators, like Thurgood Marshall, or public interest litigators of the 1960's and 1970's as exemplars of the lawyer-statesman ideal. For a discussion of those public interest lawyers as part of a tradition of progressive professionalism akin to the ideal of the lawyer-statesman, see Gordon, *Corporate Law Practice*, *supra* note 120, at 269-70; Luban, *Noblesse Oblige*, *supra* note 120, at 731-34. Luban shows that, like the lawyer-statesman, those public interest litigators were devoted to the public good, but, contrary to the republican lawyer-statesman's devotion to political fraternity, they often did not believe that the public good was furthered by blunting class conflicts. *Id.* at 732-34. Gordon agrees. See Gordon, *Corporate Law Practice*, *supra* note 120, at 269-70.

For a description of the practical wisdom of certain public interest litigators in devising a strategy to attack segregation in the public schools, see MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987). Tushnet describes the genius of Thurgood Marshall as, in particular, his practical wisdom:

Marshall deferred the decision from a time when it would have seriously split the NAACP to a time when the external environment, in politics and legal doctrine, and the internal politics of the organization made it easier for others to agree that what Marshall wanted was in their interest too. Marshall's strength had always resided in his superb judgments about life and law, rather than in his ability to construct a legal argument.

Id. at 136-37. That description of Marshall's practical wisdom echoes Alexander Bickel's analysis of Abraham Lincoln's prudence. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 65-69 (1962). Kronman considers Bickel's analysis to capture a classic instance of practical wisdom. Kronman, *Alexander Bickel's Philosophy of Prudence*, *supra* note 3, at 1581-84; see also *THE LOST LAWYER*, *supra* note 1, at 3, 24-25.

Perhaps Kronman does not consider public interest litigators to be modern exemplars of the lawyer-statesman ideal because of their preference for justice over political fraternity. But, as shown above, Kronman's view of public-spiritedness in terms of political fraternity instead of justice is problematic. See *supra* note 30. Or perhaps Kronman mistakenly views public interest litigators as more like scientific law reformers than Aristotle's *phronimos*. In any event, the example of civil rights and other public interest litigators suggests that large corporate law firms may not be the right place to look for lawyer-statesmen.

of its parts. At the center of the doughnut there will be a vast professional hole—what *was* it that I spent most of my waking hours worrying about?

Like it or not, you will get nowhere unless you find more in the law than a lucrative job. You must find it a calling. Most importantly, the law must call upon the highest exercise of your higher selves.¹⁷⁴

As Ackerman acknowledged, practicing law as a calling has never been easy, but there is a growing sense within the American legal profession that it is harder today than it used to be and that it is getting even harder. Although after the 1980's no lawyer can ever again doubt that the practice of law is big business, there are still some who continue to believe that the law can be more than just a workaday job.

Anthony Kronman is one of them. Adopting the Aristotelian tradition of moral and political philosophy and its concepts of practical wisdom and public-spiritedness, Kronman addresses in *The Lost Lawyer* a question of signal importance to each practicing lawyer, law student, and law professor: What makes the practice of law worthwhile?

Kronman's thoughtful answer is intended to persuade us that it still is possible to live greatly in the law. In Kronman's view, the ideal of the lawyer-statesman does "call upon the highest exercise of [our] higher selves":

The lawyer-statesman ideal is an ideal of character. It calls upon the lawyer who adopts it not just to acquire a set of intellectual skills, but to develop certain character traits as well. It engages his affects along with his intellect and forces him to feel as well as think in certain ways. The lawyer-statesman ideal poses a challenge to the whole person, and this helps to explain why it is capable of offering such deep personal meaning to those who view their professional responsibilities in its light.¹⁷⁵

Kronman's view has its flaws, not the least of which is that the lawyer-statesman ideal has not been a credible professional ideal for most litigators for about a century, at least. But those flaws should not obscure the significant contribution *The Lost Lawyer* makes to our understanding of the current state of the American legal profession. It demonstrates that many contemporary lawyers lack an inspiring professional ideal compatible with the profession's current institutional realities. It also shows that in order to be compelling, a professional ideal for lawyers must satisfactorily answer, among other questions, the underlying moral question that the lawyer-statesman ideal directly addresses—what kind of person does one become as the result of practicing law with dedication over a lifetime?

174. The entirety of Ackerman's commencement address is reprinted at Bruce A. Ackerman, *Commencement Remarks*, YALE L. REP., Spring/Summer 1982, at 6.

175. THE LOST LAWYER, *supra* note 1, at 363.

