From the Ashes of the Lawyer-Statesman Rises the Lawyer-Democrat: Practical Legal Wisdom from the Ground Up

By Steven K. Berenson

Approximately two decades ago, former Yale Law School Dean Anthony Kronman rattled the sensibilities of the legal profession with his widely read, cited, and discussed book, The Lost Lawyer: Failing Ideals of the Legal Profession.1 As the book’s title suggests, Kronman saw nothing short of the loss of the legal profession’s very soul at stake in a number of trends and developments in the legal academy, law firms, and courts that he detailed at great length in the book. Kronman proposed that unrelenting change in the legal profession imperiled the lawyer’s consummate role as a “lawyer-statesman” who applied “practical wisdom” to both client representation and advancement of the public good. This article proposes that although permanent change in the law practice environment may well have consigned Kronman’s lawyer-statesman to history, a new lawyer archetype, what I am calling the “lawyer-democrat”, is in position to develop and dispense the practical wisdom that Kronman so highly valued.

Kronman’s Theory and the Notion of Practical Wisdom

At the time of Kronman’s book, he was not alone in his bleak assessment of the current state and likely future of the legal profession. Indeed, the book was often mentioned together with similarly detailed studies by other prominent members of the legal profession2 and the legal

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academy warning of a crisis in the profession. Taken together, the materials made a powerful case for a profession in decline.

While the other critiques focused on conditions external to lawyers themselves, Kronman’s critique was much more inwardly focused. Indeed, his critique focused on the loss of a value that he contends is at the very heart of what legal practice is – the value of practical wisdom. In the case of legal practice, Kronman equates practical wisdom with what he describes as “the common law tradition,” the idea that the law should develop on a case-by-case basis, rather than through rigid adherence to grand theories or general principles. The common lawyer believes that “the chief business of the law is the prudent resolution of individual cases.”

Because every case is different from every other one, with a potentially infinite variety of particular facts and circumstances, the resolution of individual cases, particularly difficult ones, resists easy application of general legal doctrines in order to resolve disputes. Experts at legal

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5 As Scott Cummings points out, this narrative of professional decline among lawyers was not new in the early 1990s. Indeed, similar arguments had longstanding origins. See Scott L. Cummings, The Politics of Pro Bono, 52 U.C.L.A. L. REV. 1, 3 n.5 (2004). Robert Gordon has labeled this longstanding narrative of lawyer professional decline as the “declension thesis.” Robert W. Gordon, The Independence of Lawyers, 68 B.U. L. REV. 1, 48 (1988).
6 See supra notes 2 & 3.
9 Id. at 21.
10 Id.
practice – those who have attained the virtue of practical wisdom – excel at the task of applying
the law’s general principles to the infinite variety of particulars posed by individual cases.\(^\text{11}\)

Of course, lawyers’ exercise of practical wisdom is most often exercised in the context of
working with and on behalf of clients.\(^\text{12}\) Thus, the ends to be pursued in the context of individual
disputes were those of the client rather than those of the lawyer.\(^\text{13}\) However, successful legal
representation often requires deliberation between lawyers and their clients as to both the ends to
be sought by the clients and the means to be used to achieve those ends.\(^\text{14}\) Success in such
deliberations, in turn, depends on the lawyer possessing the opposing characteristics of sympathy
and detachment.\(^\text{15}\) Sympathy is critical, because unless the lawyer can put herself in the shoes
of the client, she cannot be successful in recommending either means or ends for the
representation that will serve the broader objectives, interests, and goals of the client.\(^\text{16}\)

Detachment, on the other hand, is necessary because too much correspondence between
the views of lawyer and client increases the risk of the lawyer failing to recognize and seize
opportunities for the client, in the same sense that we are all often blind to alternatives where our
own interests are involved.\(^\text{17}\) Additionally, success in resolving individual legal disputes often
requires mediating between incommensurable ends sought by the opposing parties to the

\(^{11}\) Id. Kronman’s account of practical wisdom in legal practice draws heavily from Aristotle’s concept of phronesis,
as expressed in his Nicomachean Ethics, which applies to decision making in both the personal and the political
realms. See, e.g., W. Bradley Wendel, Public Values and Professional Responsibility, 75 Notre Dame L. Rev. 1, 101
(1995). See also, The Lost Lawyer, supra note 1, at 40-44.

\(^{12}\) In The Lost Lawyer, Kronman identified three broad categories of “law jobs,” that of judge, that of counselor, and
that of advocate. Id. at 121-22. Of course, the latter two are engaged in work primarily on behalf of clients.

\(^{13}\) See, e.g., Model Rules of Prof’l Conduct, R. 1.2(a) (2002) [hereinafter, “Model Rule 1.2”].

\(^{14}\) Id. See also The Lost Lawyer, supra note 1, at 128; Stephen L. Pepper, The Lawyer’s Amoral Ethical Role: A

\(^{15}\) The Lost Lawyer, supra note 1, at 130; Wendel, supra note 11, at 101-02. For Kronman’s broader discussion of
the characteristics of sympathy and detachment, see The Lost Lawyer, supra note 1, at 66-74.

\(^{16}\) Id. at 130.

\(^{17}\) Id.
dispute. \(^{18}\) After all, if the ends sought by the disputing parties were easily commensurable, the parties may well have resolved their dispute without the need for the assistance of counsel. Similarly to the point made above, selfish interests may blind parties to opportunities for compromise or for mutual gain.

**The Lawyer-Statesman**

Kronman offered an archetype of the lawyer who has mastered the art of applying practical wisdom to the resolution of legal disputes. He dubbed this professional to be the “lawyer-statesman”. \(^{19}\) Moreover, Kronman asserts that the qualities that allow for the expert deployment of practical wisdom in the context of individual legal disputes are the same qualities required for successful public deliberation on policy problems of broader public interest. \(^{20}\) Thus, the true lawyer-statesman is able to apply the virtue of practical wisdom obtained through participation in individual legal disputes to a broader array of social inquiry areas. Indeed, the true lawyer-statesman has a keen interest in promoting the public good. \(^{21}\) Therefore, in addition to advancing the public interest in competent legal representation of clients, historically lawyer-statesmen frequently took on positions in government and public service, thus applying the practical wisdom obtained through their work as lawyers to broader problems of public policy and governance. \(^{22}\)

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\(^{18}\) See Wendel, *supra* note 11, at 102 (discussing Kronman).

\(^{19}\) *Id.* at 3, 21. Kronman actually borrowed the term from a speech given by former United States Chief Justice William Rehnquist. *Id.* at 11.

\(^{20}\) *Id.* at 43.

\(^{21}\) *Id.* at 14.

\(^{22}\) *Id.* at 11-12. In his review of *The Lost Lawyer*, Harvard Law School Professor David Wilkins points out that “[a]ll of the lawyers Kronman singles out as exemplifying the lawyer-statesman ideal are primarily respected for their work as public officials or judges rather than for what they did while in private practice.” David B. Wilkins, *Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics*, 108 HARV. L. REV. 458, 464-65 (1994). Some of the lawyers identified by Kronman as embodying the lawyer-statesman ideal are Abraham Lincoln, Robert Jackson, and Earl Warren. *The Lost Lawyer*, *supra* note 1, at 3.
It is important to note that in Kronman’s view, practical wisdom is more than a tool that is part of the kit that excellent lawyers bring with them as they attempt to solve legal or public problems. Rather, practical wisdom is a trait of character, and thus something that accompanies lawyers who possess this virtue in all of their professional and public endeavors.\footnote{23} Of course, practical wisdom is not something that is attained by lawyers overnight. Rather, it is developed over time through the continual exercise of lawyerly judgment in application of the case method to both public and private legal matters.\footnote{24} Thus, the exercise of good judgment or practical wisdom eventually becomes a habit for those who possess the trait, “a repetitive pattern of behavior that requires no conscious attention to sustain.”\footnote{25}

*The Lost Lawyer* focused on threats Kronman identified to the lawyer-statesman ideal, and its primary feature, the employment of practical wisdom, coming from three important sites within the legal profession, law schools, law firms, and courts. Kronman looked at these institutions from what I describe as a “top down” perspective.\footnote{26} Thus, he viewed legal education through the lens of elite academic institutions such as Yale Law School,\footnote{27} where Kronman served as Dean and has spent most of his professional career,\footnote{28} Harvard Law School,\footnote{29} and

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\item \footnote{23}{The Lost Lawyer, supra note 1, at 15-16. See also Aaronson, Dark Night, supra note 7, at 1384; Wendel, supra note 11, at 101.}
\item \footnote{24}{The Lost Lawyer, supra note 1, at 41. See also Wendel, supra note 11, at 101-102.}
\item \footnote{25}{Aaronson, Dark Night, supra note 7, at 1385 (quoting The Lost Lawyer, supra note 1, at 75).}
\item \footnote{27}{Kronman primarily references Yale as the place where the legal realism movement in American legal thought “achieved full self-expression.” Id. at 185. See also id. at 199.}
\item \footnote{29}{Harvard Law School’s principal connection to The Lost Lawyer is as the home of Christopher Columbus Langdell, who served as its dean from 1870 to 1895. The Lost Lawyer, supra note 1, at 169. Langdell’s critical importance to Kronman’s thesis is twofold. First, it was against “Langdell’s Geometry of Law[,]” id. at 169, that legal realism trained its sights. Id. at 186. Additionally, Langdell is generally credited with developing the case method for}
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Columbia Law School. He further looked at law firms through the lens of large, elite, corporate law firms. Additionally, his discussion of courts largely focused on the most prestigious courts: federal appellate courts, including the Supreme Court of the United States. Kronman’s focus on the profession’s most elite and prestigious institutions was not entirely misplaced. After all, Kronman was certainly correct in asserting that such institutions exert a disproportionate influence on the legal profession as a whole. And virtually all of the individuals Kronman identifies as examples of the lawyer-statesman ideal were associated with large and prestigious law firms. Further, to the extent a wise author once advised aspiring teaching law, which Kronman lauds for its ability to help to develop practical wisdom in aspiring lawyers. Id. at 128-29. Harvard Law School also served as the center of the critical legal studies (CLS) movement. Id. at 242 (describing the beginning of CLS in 1976 with publications by Harvard Law School Professors Duncan Kennedy, Roberto Unger, and Morton Horwitz). Kronman describes CLS as posing a major threat to the virtue of practical wisdom in law. See infra at notes 54 - 60 and accompanying text. Kronman identifies Columbia as the birthplace of the legal realism movement. Id. at 185. It was also the professional home of Karl Llewellyn, whom Kronman identifies as the founder of the “scientific” branch of legal realism, id. at 196, which Kronman also contends was the precursor to both the law and economics and CLS movements that he decries. Id. at 225.

Id. at 272. Here, unlike the case with law schools, Kronman does not name names. However, many of the lawyer-statesmen that Kronman does identify by name had well known associations with some very well-known firms. For example, Kronman names Henry Stimson, Dean Acheson, John McCloy, Cyrus Vance, Paul Warnke, and Carla Hills as additional examples of lawyer-statesmen (sic). Id. at 11-12. Stimson was a partner at Root and Clark, which was a predecessor to Dewey & LeBoeuf, which recently became the largest law firm ever to file for bankruptcy protection. See LINOWITZ & MAYER, supra note 2, at 48, 78; Peter Lattman, Dewey LeBoeuf Files for Bankruptcy, N.Y. TIMES, May 28, 2012, available at http://dealbook.nytimes.com/2012/05/28/dewey-leboeuf-files-for-bankruptcy/. Acheson and Warnke were partners at Washington D.C. powerhouse Covington and Burling. See John R. Cook, Dean Acheson and International Law, 95 AM. SOC’Y INT’L L. PROC. 118 (2001); Paul Culliton Warnke, AMERICAN NATIONAL BIOGRAPHY ONLINE, available at http://www.anb.org/articles/07/07-00817.html (last visited May 2, 2013); About the Firm, A Brief Historical Note, COVINGTON & BURLING, LLP, http://www.cov.com/about_the_firm/firm_history/ (last visited May 2, 2013). McCloy was a partner of Paul Cravath in a predecessor to Cravath, Swaine & Moore. See American Society of International Law, Luncheon Address, 79 AM. SOC’Y INT’L L. PROC. 94 (1987). Vance was a partner at Simpson, Thather & Bartlett. See Yves Dezalay & Bryant G. Garth, The Confrontation Between the Big Five and Big Law: Turf Battles and Ethical Debates as Contests for Professional Credibility, 29 LAW & SOC. INQUIRY 615, 631 n.15 (2004). And Carla Hills was a partner at Munger, Tolles. See Biography, Carla A. Hills, U.S. DEPARTMENT OF STATE, http://www.state.gov/s/p/fa/tb/185583.htm (last visited May 2, 2013).

See THE LOST LAWYER, supra note 1, at 315-52.

Id. at 272. See also Uhlmann, supra note 4, at 180; Eli Wald, Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Firms, 78 FORDHAM L. REV. 2245, 2251 & n.26 (2010) [hereinafter Wald, Glass Ceilings].

THE LOST LAWYER, supra note 1, at 273. See also note 31, supra.
authors to “write about what you know,” it makes sense that Kronman would focus on the echelon of the profession that his career trajectory most likely brought him into contact with most frequently.

On the other hand, it is also true that the vast majority of lawyers are educated at law schools outside the top 15 or so elite ones, and certainly outside of the handful of truly elite law schools that Kronman focused on in The Lost Lawyer. Additionally, as Kronman himself acknowledged, the vast majority of lawyers practice outside of the large, elite, corporate firms that he focused on, with nearly two-thirds of lawyers in private practice practicing as solo practitioners or in firms of fewer than five lawyers. Further, the vast majority of the country’s judicial business is conducted in state and local trial courts, far from the long marble staircase leading up to the Supreme Court. In the following pages, I will offer a “bottom up” perspective on the issues addressed in The Lost Lawyer, in contrast to Kronman’s “top down” view. It will be from the vantage point of non-elite law schools, small firm and solo practices, and state and local trial courts.

An Alternative, “Bottom-Up” Perspective

Growing to Appreciate Kronman’s Practical Wisdom

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35 DANIEL KIRK, LIBRARY MOUSE 8 (2007).
36 At present there are a total of 202 law schools that are approved by the American Bar Association. See ABA Approved Law Schools, AMERICAN BAR ASSOCIATION, available at http://www.americanbar.org/groups/legal_education/resources/abaApprovedLawSchools.html (last visited March 24, 2014).
37 THE LOST LAWYER, supra note 1, at 273.
At the time it was published, *The Lost Lawyer* generated a great deal of criticism that centered on the question of whether Kronman’s narrow focus on the virtue of practical wisdom was the proper approach by which to critique the legal profession. And while many concluded that Kronman’s focus was unduly narrow, and that a full critique of the legal profession should be informed by other values as well, few questioned the notion that practical wisdom, as identified by Kronman, was at least one important aspect of the legal profession.

I must confess that at the time *The Lost Lawyer* was published, I was not terribly favorably disposed toward Kronman’s views. I considered myself to be at least a disciple of the critical legal studies perspective that Kronman savages in his book. Moreover, my own experiences in legal practice prompted a much more bottom up perspective than the top down perspective Kronman wrote from. However, after two additional decades of teaching law students at non-elite law schools, and working together with students in representing individual low-income clients through a variety of law school clinical programs, I have lost a good deal of faith in the grand theories that Kronman questions in *The Lost Lawyer*, and have gained a much greater appreciation of the value of practical wisdom that he lauds.

**Fundamental Change in the Profession Post-*The Lost Lawyer***

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40 Alfieri, supra note 7, at 1229; Anderson, supra note 39, at 1068-69; Wilkins, supra note 22, at 465-66.

41 See infra, notes 57 - 63 and accompanying text.

Thus, I believe it is worth examining whether, two decades later, Kronman’s pessimistic views regarding the fate of practical wisdom in the legal profession have come to fruition. Of course, any contemporary assessment of the state of the legal profession, and the particular institutions that Kronman focused on, must proceed in consideration of two epic disruptions to the profession that have taken place since Kronman wrote – the economic crisis of 2008, and the revolution in legal technology that has occurred over the last two decades.

By now it is well known that the US economy suffered some of its worst setbacks since the Great Depression during and after the second half of 2008. That year, the US economy lost 3.8 million jobs, the largest decline since the government began recording such statistics in 1940.43 In 2009, the economy lost 4.7 million jobs.44 From 2007 through the first quarter of 2009, American household wealth declined by $17 trillion.45 About $5.6 trillion of this was due to declines in home values.46 By contrast, household debt, which had increased from 2000 through 2007 by $6.8 trillion, remained at roughly the same level.47 By one calculation, assets in retirement accounts lost $2.8 trillion, or about a third of their value, between September 2007 and December 2008.48

Of course, the legal profession did not escape the reverberations of the economic crisis. To the extent that lawyers’ clients suffered significant economic setbacks, it is not surprising that these clients had fewer resources to expend on legal services. Large law firms of the type that

44 Id.
45 Id. at 391.
46 Id.
47 Id.
48 Id.
Kronman focused on were particularly hard hit. Such firms saw large decreases in revenues, laid-off lawyers, reduced salaries, and reduced entry level hiring. Some longstanding and venerable firms did not survive.

Another titanic shift has resulted from advances in technology relating to the work of lawyers that has taken place since the publication of *The Lost Lawyer*. Much of the work that was formerly done by lawyers at large law firms, such as document review, can now be done by relatively few lawyers employing the latest computer programs. And a significant portion of the work that remains to be done by human lawyers has been shipped overseas to countries where the labor costs to perform such work are significantly lower than in the United States.

**An Opportunity for Revival of Practical Wisdom**

It would seem that from Kronman’s top-down perspective, the economic crisis of 2008 and the revolution in legal technology, along with other factors, have only exacerbated the trends that Kronman identified as posing a threat to the centrality of practical wisdom in legal practice at the time he wrote *The Lost Lawyer*. However, from a bottom-up perspective, these same developments and trends appear to have created at least an opportunity for a revival of practical wisdom in law schools, legal practice, and in the courts. Because these settings call for non-elite

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51 Wald, The Great Recession, supra note 50, at 2051 & n.4.
52 Herrera, Lawyer-Entrepreneurs, supra note 38, at 887 & n.5; Wald, The Great Recession, supra note 50, at 2051.
53 See Lattman, supra note 31.
56 Henderson, Blueprint, supra note 55, at 487; Herrera, Lawyer-Entrepreneurs, supra note 38, at 892.
lawyers and law students to interact with ordinary members of the public, rather than other elites, I’ve named the archetype lawyer for this alternative perspective as the lawyer-democrat.57

The State of Practical Wisdom

The following sections look at the state of practical wisdom in the settings that Kronman focused on in *The Lost Lawyer*: law schools, law firms, and courts. They first examine the state of practical wisdom from Kronman’s top-down perspective. They then examine the state of practical wisdom from the bottom up perspective of the lawyer-democratic. Though the view from the first perspective remains bleak, the view from the second perspective is more encouraging for the proponents of practical wisdom in legal practice.

Law Schools

In law schools, Kronman identified two scholarly movements as the primary culprits in what he saw as the movement away from teaching and valuing practical wisdom. These were law and economics and critical legal studies (CLS).58 The two movements, of course, approached their analysis of the law from greatly divergent perspectives, with law and economics primarily identified with those on the conservative/right side of the political spectrum,59 and CLS primarily identified with those on the liberal or even radical/left side of the

57 Ascanio Piomelli utilizes the term democratic lawyering to refer to efforts by lawyers for low income clients to work collaboratively with such clients and their communities to enhance the ability of such clients and their communities to participate meaningfully in efforts to create positive social change. See, e.g., Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 70 FORDHAM L. REV. 1383, 1386 (2009). While I am deeply sympathetic to the vision of legal practice articulated by Piomelli, what I offer for purposes of this article is a more conventional view of lawyering on behalf of low and moderate income clients, i.e., “ordinary” Americans.

58 *The Lost Lawyer*, supra note 1, at 166-67.

political spectrum. What Kronman identified as a common ground of both movements was a deep disdain for the type of case-by-case analysis that he identified as being at the heart of practical wisdom. Instead, both law and economics and CLS engaged in a search for overarching theories of law. Indeed, Kronman drew a direct line from what he described as the scientific branch of legal realism, which emerged in the 1930s, to the law and economics and CLS movements decades later. The common thread, as Kronman described it, was the quest for an overarching theory of legal doctrine, and a contempt for the case-by-case orientation of the common law view connected to practical wisdom by Kronman.

To be sure, there have been significant developments in legal scholarship over the last two decades. Economics has lost its hegemony as the primary extra-legal discipline to be turned to for help in analyzing the law. Continuing a trend that Kronman noted in passing in The Lost Lawyer, the law and economics movement has spawned a wide range of “law and” movements with virtually every academic discipline being deployed to aid the project of legal analysis. Some of the most prominent such movements are law and cultural studies, law and rhetoric, law and psychology, and of course, empirical legal studies, each of which brings research methodologies from the social sciences to bear on questions of law. Indeed, among the most

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60 See, e.g., Eskridge Jr. & Peller, supra note 59, at 709; McClusky, supra note 59, at 1193; Mark V. Tushnet, Critical Legal Studies: A Political History, 100 YALE L.J. 1515, 1516 (1991).
61 THE LOST LAWYER, supra note 1, at 167.
62 Aaronson, Dark Night, supra note 7, at 1393; Heriot, supra note 8, at 1726; Terry, supra note 4, at 653.
63 THE LOST LAWYER, supra note 1, at 168.
64 Id.
65 Id. at 356.
sought-after candidates for entry-level professorships at elite law schools are those who hold PhD’s in such disciplines, as well as Juris Doctor degrees.67

Of course, as a political movement, critical legal studies ceased to exist long before Kronman published The Lost Lawyer.68 But as is the case with law and economics, CLSs has spawned an extremely broad range of offshoots, including critical race theory, LatCrit studies, critical feminist theory, QueerCrit, and ClassCrit. Of course, Kronman’s analysis of CLS would carry over to these offshoots as well. Each displays very little interest in the type of individual case approach that Kronman contends is necessary to the development of practical wisdom.

Kronman is of the view that law professors’ classroom teaching will be influenced by the scholarly perspective they bring to their overall work as academics.74 Thus, to the extent adherents of law and economics and CLS adopted those perspectives’ disdain for case-by-case, common-law analysis, it necessarily had an impact on the way such professors presented case

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70 See, e.g., Steven W. Bender & Francisco Valdes, LatCrit XV Symposium Afterword – At and Beyond Fifteen: Mapping LatCrit Theory, Community, and Praxis, 14 HARV. LATINO L. REV. 397 (2011); Mutua, supra note 69, at 865 n.15 (citing canonical LatCrit writings).
72 See, e.g., Mutua, supra note 69, at 865 n.16 (citing key works in QueerCrit theory); Francisco Valdes, Theorizing “OutCrit” Theories: Coalitional Method and Comparative Jurisprudential Experience – RaceCris, QueerCris, and LatCris, 53 U. MIAMI L. REV. 1265, 1293 (1999).
73 Mutua, supra note 69, at 859.
74 THE LOST LAWYER, supra note 1, at 264.
analysis in the law school classes they taught.\textsuperscript{75} And this, in Kronman’s view, boded ill for the development of practical wisdom in future lawyers.\textsuperscript{76}

Similarly in the present, it necessarily seems to be the case that to the extent the “ideal” law school professor has a PhD in a non-legal discipline, new hires at elite law schools are likely to have even less legal practice experience than was the case in the past.\textsuperscript{77} This trend must have an impact on what gets taught in law school classrooms. The more tenuous the new assistant law professors’ connection to legal practice, the less likely it is that they will teach effectively the kind of case-by-case, common-law analysis Kronman asserts is necessary to development of practical wisdom in lawyers.

**The Push for Practice-Oriented Legal Education**

While the assessment above is bleak in terms of the prospects for serving Kronman’s goal of reviving the prominence of practical wisdom in the legal profession, there has been a countervailing trend, particularly strong at non-elite law schools, that may provide a push in the opposite direction. Indeed, at least dating back to the legal realist period that Kronman views as being so significant, there has been an underlying critique of legal education for failing to prepare adequately law students for the practice of law.\textsuperscript{78} Such critics have pushed to get law schools to provide more practice-oriented education to their students, in addition to the traditional Langdellian case method instruction that Kronman celebrates.

\textsuperscript{75} Id.
\textsuperscript{76} Id.
The MacCrate Report and Its Aftermath

One of the landmark developments in this counter-movement was publication of the “MacCrate Report” in 1992. A work of the American Bar Association’s Section of Legal Education and Admissions to the Bar, the MacCrate Report included a statement of ten fundamental lawyering skills and four professional values that new lawyers “should seek to acquire.” However, rather than identifying a definitive set of lawyering skills and values, the Report’s purpose was to spur a dialogue among various sectors of the profession, including law schools, about the skills and values that are essential to successful law practice, and the means to enhance the development of such skills and values in lawyers. The Report achieved its goal to at least some degree, generating a tremendous amount of discussion both within and outside the legal academy. Further, the Report contributed in a major way to the adoption of certain ABA law school accreditation standards that required law schools to provide more opportunities for their students in terms of professional skills training. In any event, given the McCrate Report’s prominence, the attention it received, and its publication date prior to the publication of The Lost Lawyer, it is surprising that Kronman paid it no attention.

The Emergence of Experiential Learning

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79 Section of Legal Education and Admissions to the Bar, Legal Education and Professional Development – An Educational Continuum, AMERICAN BAR ASSOCIATION 5 (1992) [hereinafter MacCrate Report].
81 Engler, MacCrate, supra note 80, at 113.
82 Engler, MacCrate, supra note 80, at 116-124.
83 Engler, MacCrate, supra note 80, at 145.
84 Aaronson, Dark Night, supra note 7, at 1397.
Another important development in legal education that escaped Kronman’s attention was the rise in clinical legal education.85 When Kronman’s *The Lost Lawyer* was published in 1993, legal clinics were a well-established part of the law school landscape.86 Law clinics put students in the precise role that Kronman lauds the case method for effectively simulating – working directly with real clients on actual cases and problems.87 Clinical representation both encourages and feeds upon the feelings of sympathy for, yet detachment from, clients and their legal issues that Kronman identifies as being critical to the development of practical wisdom.88 For this reason, Kronman’s oversight regarding clinical legal education was surprising.

In any event, the reform movement to make legal education more practice-oriented received a huge boost with the publication of Carnegie Foundation’s study of legal education, *Educating Lawyers*, in 2007.89 Somewhat surprisingly to those who have been highly critical of the case method that Kronman trumpets,90 the Carnegie Report offered a sympathetic view.91

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86 See *supra* note 78.
87 Aaronson, *Dark Night*, supra note 7, at 1397.
90 *The Lost Lawyer*, supra note 1, at 113. Kronman celebrates the case method for inculcating in law students the dispositions of sympathy and detachment that he views as being critical to practical wisdom. Students learn sympathy by putting themselves in the position of the litigants in the appellate cases that are discussed in law school classrooms. However, students also develop detachment from those positions by being forced to argue both sides of cases, and analyze the parties’ positions, as well as the courts’ decision from a variety of points of view. *Id.* Critics of the case method point out that it provides an exceptionally truncated version of law practice for law teachers and students to focus on. By the time cases result in appellate decisions, all of the factual disputes have been resolved, leaving perhaps the most important aspects of litigation practice, namely factual investigation and persuasive advocacy regarding factual disputes outside the scope of classroom discussion. Moreover, even to the extent appellate decisions invite a discussion of the factual issues in a case, appellate judges’ recitations of factual issues in their decisions are often highly selective, with the facts focused upon usually highly slanted toward those that most directly support the appellate judge’s decision. See, e.g., Alfieri, *supra* note 7, at 122-23; Kris Franklin, *Sim City: Teaching “Thinking Like a Lawyer” in Simulation- Based Clinical Courses*, 53 N.Y.L. SCH. L. REV. 861, 862-63 (2008-09); Peter Margulies, *Progressive Lawyering and Lost Traditions*, 73 TEX. L. REV.
However, unlike Kronman, for whom the case method seemed to be both the start and end point of his analysis of appropriate law school pedagogy, the Carnegie Report makes clear that while the case method provides an appropriate starting point for novice legal learners, it is not nearly sufficient in itself to develop either the practice-ready lawyers that the current critique of legal education calls for, or the practical wisdom that Kronman seeks in legal practitioners. Rather, the Carnegie Report calls for a variety of pedagogical approaches that will build upon the doctrinal reasoning and analysis skills developed through the case method and analysis of appellate opinions. For example, the Report calls for increased use of simulation exercises as well as increased clinical legal education experiences for law students. These approaches share the feature of situating law students in the role of attorney, deliberating with clients in the rich and detailed context of an actual or simulated case. These settings call upon the deployment of

92 It would be interesting to know whether Kronman would maintain his commitment to the superiority of the case method of teaching in the face of the arguments of its critics, see, e.g., note 90, supra, as well as the arguments of those who have advocated the superiority of clinical teaching for the purpose of developing judgment and practical wisdom on the part of future lawyers. See, e.g., Aaronson, We Ask You To Consider, supra note 88, at 247; David Luban & Michael Millemann, Good Judgment: Ethics Teaching in Dark Times, 9 GEO. J. LEGAL ETHICS 31, (1994). See also infra notes 138 – 140 and accompanying text. However, Kronman does not appear to have addressed the issue in his subsequent writings.
93 The Carnegie Report, which was published as part of a broader study of professional education more generally, described all of professional education as being comprised of three separate “apprenticeships:” the cognitive apprenticeship, in which students gain substantive knowledge and learn the profession’s “way of thinking”; the practical apprenticeship, in which students learn what competent practitioners in the field actually do; and the apprenticeship of identity, in which students learn the purposes and attitudes that are formed by the values of the profession. Holmquist, supra note 91, at 358-59. While the Report concluded that the case method is fairly effective in serving the first apprenticeship, it found it to be insufficient to serve the next two. Id.
94 See infra notes 97 - 100 and accompanying text.
95 See id.; Maxeiner, supra note 91, at 3-4; Ira Steven Nathenson, Navigating the Unchartered Waters of Teaching Law with Online Simulations, 38 OHIO N.U. L. REV. 535, 545 (2012).
96 Carnegie Report, supra note 89, at 158-60.
the virtue of practical wisdom that Kronman saw as being depleted from the law school curriculum.

Interpreting the Lawyer Job Market Contraction

The critique of legal education for failing to provide sufficient legal practice-oriented training for students has further received a particularly strong boost in light of the economic crisis of 2008, and the revolution in technology mentioned previously. As a result of the contraction of work for law firms and the corresponding reductions in law firm employment, large numbers of recent law school graduates have had difficulty finding jobs in legal practice. One result has been great discontent on the part of such law graduates and even a number of lawsuits filed against law schools claiming the schools defrauded and deceived prospective law students about employment opportunities for the schools’ graduates.

To this writer, recent law school graduates’ employment difficulties seem like a simple application of the laws of supply and demand, with the number of graduates greatly exceeding the number of jobs available in the post-great recession, post-technological revolution legal

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97 See supra notes 43 - 56 and accompanying text.
99 Barnhizer, supra note 98, at 664-65; Herrera, Lawyer-Entrepreneurs, supra note 38, at 889; Segal, Losing Game, supra note 98.
employment market. However, other critics of legal education have linked high levels of unemployment and underemployment among recent graduates to law schools’ failure to train students adequately with regard to the skills that they will need to practice law effectively. In either case, the challenges facing recent law graduates may seem very different depending on whether you view things from the top down, or from the bottom up. Even in the current constricted employment market for new lawyers, graduates from the truly elite law schools that Kronman focused on will still find employment in prominent law firms if they so desire. And they will do so based on the prestige of their schools, and the strength of the students’ pre-law school admission credentials, rather than based upon any perception regarding the quality of training such students receive in law school relevant to the practice of law. By contrast, for students graduating from law schools outside of the very few highly elite law schools that Kronman focused on, it may well be the case that superior practice-oriented training and experience while in law school may give such students “a leg up” in this hyper-competitive job market.


102 See, e.g., David Segal, What They Don’t Teach Law Students: Lawyering, N.Y. TIMES, Nov. 20, 2011 [hereinafter, Segal, What They Don’t Teach].

103 Specifically, Columbia, Harvard, and Yale. See supra notes 27-30 and accompanying text.

104 According to the ABA’s most recent data, 94% of the 2012 graduates from Columbia law school were employed in jobs requiring bar membership 9 months following law school. For Harvard Law School, the figure was 87%, with another 7% employed full-time in “J.D. advantage” positions. For Yale Law School, the figure was 82%, with another 9% employed in full-time J.D. advantage jobs. Of the three schools, Harvard had the highest percentage of unemployed graduates who were actually looking for work, at 2%. Neither Columbia nor Yale reported having any unemployed graduates who were actually looking for work. See Section of Legal Education and Admissions to the Bar, Employment Summary, AMERICAN BAR ASSOCIATION, available at http://employmentsummary.abaquestionnaire.org/ (last visited May 10, 2013).

105 While it certainly makes intuitive sense that law graduates with more developed practice skills will be more employable than their less-well-trained counterparts, there is no actual data that supports this inference. In fact, in a recent blog post, law professor Deborah Jones Merritt pointed out that employment outcomes have been particularly poor for graduates of Washington & Lee Law School, which, as will be discussed shortly (see infra notes
Thus, following the publication of the Carnegie Report, and the recent, post-economic crisis critique of legal education as insufficiently practice-oriented, numerous law schools have revised their curricula to incorporate the types of changes advocated by Carnegie, namely giving law students more of an opportunity to learn in the context of legal practice, giving them the opportunity to enhance the development of practical wisdom, lawyering case by case in the context of real world legal problems. It is worth noting that this movement has not been driven by the elite schools that are the focus of The Lost Lawyer. This movement has been driven by schools further down the US News and World Report rankings. These schools include Washington & Lee University School of Law (W&L), California Western School of Law (Cal Western), and Case Western Reserve University School of Law (Case Western).

Following publication of the Carnegie Report, W&L completely revamped the third year of its law school curriculum. One of its goals in doing so was to differentiate the third year of law school study from the prior two years to a greater extent than was then the case. To the extent that expert learning is a progression, as Carnegie suggests, then it is appropriate to expect a higher level of work from third year students than from students in the previous two years. Another major goal of W&L’s reform was to have students learn in the context of legal practice.
practice to a greater extent than was previously the case.\textsuperscript{110} Thus, the heart of the reform is to have students learn while acting in the role of attorney, whether in a traditional in-house law school clinic, an externship placement, or a simulated lawyering setting.\textsuperscript{111} While doctrinal learning and analysis is still part of the program, all such learning takes place in a legal practice setting, rather than independently, as has traditionally been the case in legal education.\textsuperscript{112} Moreover, the second and third apprentices identified by Carnegie, the practical and the identity apprenticeships,\textsuperscript{113} are emphasized to a greater degree than the first, cognitive apprenticeship.\textsuperscript{114}

Each semester of W&L’s revised third year program begins with a two-week practice “immersion program” designed to “teach students key skills essential for both an office and litigation practice.”\textsuperscript{115} This includes instruction in core lawyering skills such as client interviewing and counseling, negotiation, mediation, arbitration, and understanding financial principles and statements.\textsuperscript{116} The heart of each semester will then be the clinic, externship, or practicum module mentioned above.\textsuperscript{117} Students are also required to participate in a professionalism program, and provide some law related service,\textsuperscript{118} in furtherance of Carnegie’s third apprenticeship. Throughout, students will be required to produce work product along the lines of that actually produced by lawyers,\textsuperscript{119} as opposed to being assessed through traditional law school exams. This furthers the contextual learning provided for by this approach.

\begin{footnotes}
\item[110] Id.
\item[111] Id. at 22-23.
\item[112] Id.
\item[113] See supra note 93.
\item[114] Johnson, Danforth & Millon, supra note 106, at 23.
\item[115] Id.
\item[116] Id.
\item[117] See supra note 111, and accompanying text.
\item[118] Johnson, Danforth & Millon, supra note 106, at 39, Appendix A.
\item[119] Id. at 22.
\end{footnotes}
Cal Western has made a similar move to contextualize legal education in a setting that more closely approximates legal practice than traditional legal education, although it has done so in the second year of law school through its Skills Training for the Ethical and Preventive Practice and career Satisfaction (STEPPS) program. STEPPS was implemented as a replacement for the traditional course in Professional Responsibility or Legal Ethics. Thus, STEPPS incorporates the substantive materials covered in those classes. However, STEPPS also introduces students to practice and other skills and values including interviewing, counseling, drafting, legal research, negotiation, preventive lawyering, professionalism, career satisfaction, business etiquette, and networking.

Like the W&L third year curriculum, STEPPS focuses on learning in context. Thus, in addition to one fairly traditional law school classroom session per week, students are assigned to law offices and meet weekly with the senior lawyers in their firm. (The students are cast in the role of junior associates.) All of the “senior lawyers” are teachers with significant law practice experience. Each semester of the year-long course requires the students to complete two written lawyering projects and two lawyering performances. These take place in the context of simulated cases that form the basis for the work in the students’ law offices.

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120 See generally, Timothy Casey & Kathryn Fehrman, Making Lawyers Out of Law Students: Shifting the Locus of Authority, 20 No. 2 & 3 PERSP: TEACHING LEGAL RES. & WRITING 96, 98 n.14 (2012).
121 Id. at 98.
122 Id.
123 Id.
124 Id.
125 Id. at 99.
126 Id.
127 Id.
128 Id.
129 Id.
STEPPS, like the W&L program, is meant to incorporate the sequential learning process that leads students from novice to more advanced stages of expertise. As a second year course, STEPPS is designed both to build on the school’s first year curriculum and to prepare students for field placement and other clinical lawyering experiences in their third year of school.

Case Western got an early start on law school curriculum reform with its innovative CaseArc program, launched a number of years ago. CaseArc is a four-semester sequence of courses that integrates traditional law school instruction in legal research and writing with other practice skills, doctrinal analysis, and education regarding core professional values. The program culminates in a capstone semester that places students in an in-house clinic, a field placement law office, or a lab course. Beginning in the fall of 2013, Case Western added a number of additional innovations to its program. First, it placed students in the context of a simulated law office in their first semester of law school. Second, the most recent curricular changes dramatically increase the opportunities for students to develop their legal writing skills. Finally, the program now includes a required series of courses on leadership skills taught by faculty from the University’s School of Management.

What the W&L, Cal Western, and Case Western programs share in common, along with other similar curricular innovations at law schools around the country, is the desire to make legal
learning more contextual, and to have students gain the knowledge, skills, and values they will need in order to become successful legal practitioners by acting in the role of attorneys, whether in actual or simulated cases, rather than in the traditional law school classroom. Of course, situating students in the role of attorney, learning law case by case, deliberating with both real and fictitious clients, should serve Kronman’s goal of fostering practical wisdom to an even greater extent than the appellate case method standing alone would, as advocated for in *The Lost Lawyer*.

It is true that even curricular reforms that greatly increase the opportunities for law students to learn in the context of lawyers exercising judgment on behalf of real or simulated clients on a case-by-case basis will not guarantee development of the type of practical wisdom Kronman lauded. From Watergate, to Enron, to the Bush Justice Department’s infamous “torture memos,” to the more recent mortgage foreclosure crisis, we are all too aware of the harms that can be caused by the exercise of superior legal technique and skills divorced from a mature understanding of the broader moral values underlying the legal profession, and a concern for the public good. Thus, the recent wave of curricular reforms will fail to accomplish Kronman’s goals if all that is achieved is better development of legal practice skills such as client interviewing and counseling, fact investigation, and legal drafting. What is also needed is the ability of law teachers to connect skill development of this type to education regarding the broader values of the legal profession.

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137 See supra notes 8-25 and accompanying text. See also Russell G. Pearce, *MacCrate’s Missed Opportunity: The MacCrate Report’s Failure to Advance Professional Values*, 23 PACE L. REV. 575 (2003) (arguing that while the MacCrate report led to increased training in lawyering skills, most of that training failed to connect these skills to the values of the legal profession).
In this regard, a number of law teachers and scholars have made significant strides toward developing a pedagogy that will combine skill development with development of the type of judgment and wisdom that Kronman would contend is necessary to development of the character trait of practical wisdom. Put simply, this approach immerses students in a practice context, whether real or simulated, and then engages in guided critical reflection regarding not only the performance of lawyering skills, but also with regard to the moral and ethical judgments made, in light of a background understanding of the important ethical and moral values that underlie the legal profession. While this of course is not the only method for developing practical wisdom on the part of law students, it does offer the potential for leveraging the current trends in law school curricular reform toward the ends that Kronman seeks.

Of course, as stated earlier, development of practical wisdom is a long-term proposition, and students cannot be expected to achieve such mastery over the short span of a law school career. What is most important, then, is that the habits of self-reflection and learning from one’s own experiences be firmly-enough rooted during the law school years that graduates can continue the process of developing practical wisdom through their experiences over the course of an entire thirty- or forty-year legal practice career.

It is also true that these curricular innovations may serve to exacerbate the tension that Kronman noted between law professors’ teaching and scholarly commitments. Teaching law in context in the manner described here requires a degree of law practice experience, as well as a

138 See, e.g., Aaronson, We Ask You To Consider, supra note 88, at 290; Luban & Millemann, supra note 92, at 32.
140 Mark Aaronson, Thinking Like a Fox: Four Overlapping Domains of Good Lawyering, 9 CLINICAL L. REV. 1, 38 (2002) (hereinafter Aaronson, Thinking Like a Fox).
141 THE LOST LAWYER, supra note 1, at 264.
time commitment that may be at odds with the scholarly commitments of law professors at elite law schools.\textsuperscript{142} For this reason as well, non-elite law schools may be best situated to lead the revival of practical wisdom in legal education that Kronman sought. Teachers at such schools are more likely to have the practice experience necessary to engage in such contextual teaching,\textsuperscript{143} as well as the commitment to prudentialism and the common law approach that Kronman believed to be lacking in elite law professors at the time he wrote \textit{The Lost Lawyer}.

\section*{Law Firms}

\subsection*{Commercialization}

In \textit{The Lost Lawyer}, Dean Kronman also bemoaned what he saw as a failing commitment to the development of practical wisdom in our nation’s largest and most prestigious law firms.\textsuperscript{144} The forces Kronman saw as driving this trend might generally be described in terms of commercialization.\textsuperscript{145} In the past, it was common for a single firm to handle all of the legal work on behalf of a large corporate client.\textsuperscript{146} As a result, the firm’s lawyers became deeply familiar with the work, business practices, and corporate cultures of their clients.\textsuperscript{147} This allowed the lawyers to deliberate deeply with their clients regarding how different legal strategies or

\begin{footnotes}
\footnote{142} See \textit{supra} notes 74 -77 and accompanying text.
\footnote{143} Newton, \textit{supra} note 67, at 127 & n.107 (citing Robert J. Borthwick & Jordan R. Schau, Note, Gatekeepers of the Profession: An Empirical Profile of the Nation’s Law Professors, 25 U. Mich. J.L. Reform 191, 217 & n.71 (1991) (discussing empirical studies showing that more professors from schools ranked below the “top seven” law schools had practice experience, and had more of it, than professors from the “top seven” schools). \textit{See also} Rosenthal, \textit{supra} note 77, at 1612 (stating that the present trend away from hiring law professors with significant practice experience is strongest at law “schools ranked at the top of the academic heap.”).
\footnote{144} \textit{THE LOST LAWYER}, \textit{supra} note 1, at 271-314.
\footnote{146} \textit{THE LOST LAWYER}, \textit{supra} note 1, 283.
\footnote{147} \textit{id.} at 286.
\end{footnotes}
practices might best serve the clients’ objectives, thus fostering development of the type of practical wisdom Kronman celebrates.\footnote{Id. at 286.}

In an effort to cut costs, however, corporate clients increasingly came to spread their legal work around to different firms,\footnote{Id. at 276, 284-85.} thus perhaps giving their litigation work to one firm, their mergers and acquisitions work to another firm, and their securities work to a third firm. Some corporate clients went so far as to bid out all legal work to the lowest bidder, thus resulting in short term engagements with a wide range of lawyers across a wide range of legal issues. Increasingly large and sophisticated in-house corporate legal departments began to perform a lot of corporate clients’ routine legal work that used to be handled by outside counsel.\footnote{Id. at 276, 284.} Such departments also managed the work of and economic relationship with outside counsel, providing an intermediary between the outside lawyers and decision makers at the corporate client. The result is a failure to develop the kind of deep, longstanding attorney-client relationships that provide the conditions for the development of practical wisdom in client representation.

A number of other factors affecting law firms also limited their ability to serve the goal of fostering practical wisdom. Law firms became much larger,\footnote{Id. at 274.} limiting the development of relationships between lawyers within the firms that fostered mentoring of new lawyers. A new focus on the bottom line and increasing billable hours also put strains on senior lawyers’ willingness to spend time on non-remunerative activities such as mentoring. Many law firms moved away from up-or-out partnership tracks,\footnote{Id. at 278-79.} and spent more resources on lateral hiring.\footnote{Id. at 274.}

\footnote{Id. at 276.}
\footnote{Id. at 276, 284-85.}
\footnote{Id. at 276, 284.}
\footnote{Id. at 274.}
\footnote{Id. at 278-79.}
Increased lawyer mobility meant that firms had less of an incentive to mentor and train young lawyers to develop practical wisdom if those lawyers were likely to take that investment to another firm. Another result of the drive for increased earnings was increased specialization by lawyers.\(^{154}\) This narrowing of focus also inhibited developing the breadth of experience necessary to nurture practical wisdom.\(^{155}\)

**Continued Commercialization in the Late Twentieth Century**

Many of the trends identified by Kronman as threatening the development of the lawyer-statesman ideal in large law firms continued unabated in the two decades following publication of *The Lost Lawyer*. Law firm size continued to increase.\(^{156}\) While competition among firms for the most talented lawyers continued to be fierce, firms invested less and less in developing the professional capacities of their lawyers internally.\(^{157}\) Competition between law firms for clients also remained fierce, and broad and longstanding relationships between law firms and clients became rarer and rarer.\(^{158}\) Because of the extreme competition to attract and retain clients, lawyers’ independence from the desires of their clients also decreased significantly.\(^{159}\) The role of in-house counsel as manager of the economic and professional relationship between large firm

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\(^{153}\) Id. at 277.

\(^{154}\) Id. at 275, 288.

\(^{155}\) Id. at 288.


\(^{157}\) Sterling & Reichman, *supra* note 156, at 2294.

\(^{158}\) Id. at *supra* note 156, at 2296; Wald, *Glass Ceilings*, *supra* note 33, at 2259-60.

\(^{159}\) Wald, *Glass Ceilings*, *supra* note 33, at 2271-72.
lawyers and their clients has expanded. Novel Specialization continued to narrow lawyers’ perspectives.

Increased Pressures on the Twentieth Century Large Law Firm Model in the Twenty-First Century

The two major dislocations identified above have only served to exacerbate the trends in large law firms identified by Kronman that threaten the development of practical wisdom. The economic crisis of 2008 put major pressures on law firms that enhanced the forces Kronman identified in 1993. First, the huge reduction in economic activity resulted in less business for law firms. Whole areas of practice virtually ceased to exist. Law firms had to shrink, laying off many lawyers. Competition among law firms for remaining work was fierce, further exacerbating the trends described above. Firms hired fewer and fewer associates. Clients often refused to pay for associate work, a development squarely related to the above-mentioned critique of legal education as failing to prepare new lawyers adequately for the practice of law. Thus, the move to lateral hiring increased, and firms expended fewer and fewer resources on associate development.

The revolution in legal practice technology also contributed to an exacerbation of the trends identified by Kronman. Much of the work that was done by junior large firm lawyers,

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161 *Id.* at 380.
162 See *supra* notes 43 -56 and accompanying text.
163 Sterling & Reichman, *supra* note 156, at 2296.
164 *Id.* at 2297; Wald, *Glass Ceilings*, *supra* note 33, at 2260.
167 Wald, *Glass Ceilings*, *supra* note 33, at 2261.
such as document review and production, can now be performed by computers or has been outsourced to overseas providers.\textsuperscript{168}

One product of these trends has been emergence of an army of unemployed and underemployed lawyers.\textsuperscript{169} This has further led to a perhaps unprecedented degree of discontent within the profession, evidence of which can be found in lawsuits against law schools,\textsuperscript{170} scam bloggers,\textsuperscript{171} and diatribes against law schools and the legal profession in the mainstream press.\textsuperscript{172}

A Silver Lining?

There may be a silver lining, however, relating to one of the great failings of the lawyer-statesman ideal espoused by Kronman. As discussed above, one of the key features of Kronman’s lawyer-statesman ideal was a commitment to the public good and the overall health of the profession.\textsuperscript{173} Yet one area in which the lawyer-statesmen of prior generations, Kronman’s generation, and my generation too often failed badly is in providing access to law for the vast majority of low- and moderate- income Americans. To be sure, many elite lawyers have performed a significant amount of \textit{pro bono publico} service on behalf of needy clients, and it appears that this contribution is increasing.\textsuperscript{174} Yet, this work has still barely made a dent in the justice gap.


\textsuperscript{169} Barnhizer, supra note 98, at 664; Henderson, \textit{Blueprint}, supra note 55, at 470; Henderson, \textit{Three Generations}, supra note 156, at 373; Herrera, supra note 38, at 888; Segal, \textit{Losing Game}, supra note 98.

\textsuperscript{170} Herrera, \textit{Lawyer-Entrepreneurs}, supra note 38, at 889-90; Weiss, supra note 100.

\textsuperscript{171} Barnheizer, supra note 98, at 363.

\textsuperscript{172} Segal, \textit{Losing Game}, supra note 98; Segal, \textit{What they Don’t Teach}, supra note 102.

\textsuperscript{173} See supra notes 20 - 22 and accompanying text.

The term “justice gap” is used loosely to describe the gulf that exists between the need for civil legal assistance on the part of low- and moderate-income persons in America and the legal resources available to provide that assistance.\(^{175}\) Of course, defining the exact size of this gulf with precision is a daunting challenge,\(^{176}\) and one that has not yet completely been surmounted. Yet there is little dispute that a significant gap does exist.\(^{177}\) And though there are more recent and ongoing studies,\(^{178}\) an early estimate by Stanford Law Professor Deborah Rhode that “four-fifths of the civil legal needs of the poor, and two- to three-fifths of the needs of middle income individuals, are unmet,”\(^{179}\) is completely consistent with recent research.

There is at least an opportunity for the current army of unemployed and under-employed lawyers to make their professional way by tapping into this vast unmet need of low and moderate income persons for legal services and to rectify the failure of Kronman’s lawyer-statesmen to serve this population. The types of matters that ordinary people need assistance with – family law, housing, estate planning, consumer law, and small business formation – call for precisely the type of practical wisdom Kronman seeks to revive. In a study of 29 small firm and solo practitioners who service primarily moderate-income clients, William Mitchell Law Professor Ann Juergens found that relationship-building, communication, and collaboration with non-

\(^{175}\) Steven K. Berenson, Preparing Clinical Law Students for Advocacy in Poor People’s Courts, 43 NEW MEXICO L. REV. 363, 373 (2013) [hereinafter Berenson, Poor People’s Courts].
\(^{178}\) Spieler, supra note 176, at 367 & n.4 (citing ongoing studies).
\(^{179}\) Id. at 372 (citing DEBORAH L. RHODE, ACCESS TO JUSTICE 3 (2004)).
lawyers were the keys to success for the lawyers studied. These are precisely the activities in which lawyers, through their work on behalf of actual clients, developed practical wisdom in the vision sketched out by Kronman. Thus, lawyering within the justice gap presents the opportunity for a revival of practical wisdom in legal practice. As mentioned earlier, I refer to these lawyers who work to keep alive Kronman’s vision of practical wisdom by working from the ground up with ordinary clients as lawyer-democrats.

To be sure, there are many impediments to realizing this revival of practical wisdom by lawyering for ordinary clients. First, many lawyers will need to adjust their income expectations. Lawyering for low and moderate-income clients simply does not yield the incomes many law students go to law school seeking. Yet, the drive for the types of incomes that law firm partners enjoyed during the halcyon days of the 1980s and the 2000s, is in large measure what led to the problems that Kronman identified in The Lost Lawyer. Therefore, an adjustment in income expectations may be a net positive.

This question of reduced income expectations is complicated by the reality of the high cost of legal education and increasing law student debt. Will the modest incomes earned by lawyer-democrats be sufficient for them to live well and to manage debt? Law schools need to work to hold down costs, but this goal is in tension with the curricular reforms discussed in the previous section, which tend to be more, rather than less, costly than the traditional legal education model of large classes and passive learning. Loan forgiveness is a major step in the

\[180\] Juergens, supra note 177, at 113.
\[181\] For example, the median income of lawyers in Juergens’ survey was approximately $75,000 per year. Id. at 103.
\[182\] THE LOST LAWYER, supra note 1, at 316-17.
\[183\] Spieler, supra note 176, at 396.
Further public subsidies would be useful, whether in the form of direct support for training lawyers, debt relief, or additional funding for legal services for ordinary persons, perhaps along the lines of England’s judicare system. Further public subsidies, however, are unlikely in the present economic climate. If anything, the task may be to ward off retrenchment of the subsidies already available, through student loan support and debt forgiveness.

Moreover, legal services for ordinary persons are not immune from the forces of commercialization that Kronman decries in the case of large law firms. After all, the economic crisis affected the ability of all consumers to afford legal services, whether at the high or low end of the economic spectrum. Moreover, technological innovations have also taken work away from lawyers for ordinary people as well as from corporate lawyers. Thus, consumers turn to entities like Legal Zoom and Rocket Lawyer to draft simple legal instruments like wills and trusts, and to help them represent themselves in common litigation matters such as divorces and bankruptcy cases. This is all work that was formerly done by small firm and solo practice lawyers.

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186 Spieler, supra note 176, at 398.

187 See supra notes 145 - 155 and accompanying text. See also THE LOST LAWYER, supra note 1, at 298-99.

188 Juergens, supra note 177, at 119; Mansfield & Trubek, supra note 177, at 371-72.
It follows that lawyers will need to be entrepreneurial and concerned with the bottom line in order to succeed in this environment. Still, many lawyers in small firm and solo practice manage to balance the economic demands of their practices, and still deliberate well with their clients on the sort of matters that ordinary consumers of legal services need help with. Indeed, at least one scholar of the profession has forcefully argued that a more overt embrace of the commercial nature of legal practice would lead to more ethical legal practice and a greater amount of delivery of legal services to low income clients than a vision of lawyer professionalism that disdains the business aspects of law practice. Thus, the possibility of a revival of practical wisdom in legal practice, rising from the ground up through the work of lawyer-democrats arguably is more viable than ever.

Courts

With respect to the courts, *The Lost Lawyer* identified changes in the work of judges that resulted in a devaluation of the employment of practical wisdom. Kronman identified judging as a classic locus for the employment of practical wisdom. Almost by definition, judging is a paradigm case of deliberation. Judges apply broad principles of law to specific sets of facts, attempting to resolve individual disputes on a case-by-case basis, where the claims, at least as far as the parties are concerned, seem to be incommensurable. Judging thus squarely calls upon

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190 Juergens, *supra* note 177, at 80.
192 *The Lost Lawyer*, *supra* note 1, at 318-20.
193 *Id.* at 319.
194 *Id.*
the dispositional traits of sympathy and detachment that Kronman views as being so central to practical wisdom.195

As was the case with his meditations on law schools and law firms, Kronman’s point of view of the work of courts is top down, rather than bottom up. Thus, his focus is primarily on federal appellate judges. There, Kronman saw a number of developments tending to move judges away from the value of practical wisdom. One such development had to do with increases in caseloads which both limit the amount of time judges can spend deliberating on any particular case, and encourage the delegation of work to clerks and other staff members, who are less likely to have developed the art of practical wisdom to the same degree as the judges themselves.196 Contemporary judges also must adopt a managerial stance toward processing individual cases, as well as their caseloads as a whole, which again conflicts with the deliberative stance Kronman encouraged.197

As was true with respect to his identification of challenges to the ideal of practical wisdom in law schools and law firms, the challenges Kronman identified to the ideal of practical wisdom in the federal appellate judiciary have only increased during the two decades since the publication of The Lost Lawyer. Caseloads have continued to increase.198 In 1990, shortly before Kronman wrote, the number of appeals filed in the US Courts of Appeals was 40,898. By 2012, that number had increased to 56,624, an increase of nearly 40 percent.199

195 Id.
196 Id. at 325.
197 Id. at 323.
Correspondingly, the number of federal appellate judges has increased only marginally.\textsuperscript{200} Governments of all stripes have faced significant budget crises, and federal courts have correspondingly borne their share of the burden.\textsuperscript{201} There are also a large number of federal judicial vacancies.\textsuperscript{202} None of this bodes well for the employment of practical wisdom in judging.

Here again, however, a bottom-up perspective might lead to a different appraisal of the fate of practical wisdom in courts. Of course, the vast majority of the business of American courts is done in courts of general jurisdiction at the state and local level. These courts, too, have felt the burden of budget cuts and increased caseloads.\textsuperscript{203} Moreover, courts are increasingly the problem solvers of last resort with regard to so many issues inadequately addressed in other parts of society. Additionally, the failure of the legal profession to provide access to lawyers for low- and moderate-income persons has increased the burden on courts. Judges must increasingly adjudicate disputes presented by pro se litigants. Without the involvement of lawyers in these cases, judges must often issue decisions without the aid of a thorough presentation of the relevant

\textsuperscript{200} The number of federal appellate judges increased from 156 in 1990, to 167 in 2010, approximately a 7% increase. Facts and Figures 2010, supra note 199.
\textsuperscript{201} \textit{Federal Judiciary Braces for Broad Impact of Budget Sequestration, U.S. COURTS, available at http://news.uscourts.gov/federal-judiciary-braces-broad-impact-budget-sequestration (last visited March 24, 2014) (“we face a budget crisis that is unprecedented, one that is not likely to end in the near-term.”)}
\textsuperscript{202} \textit{The Vacancy Crisis in the Federal Judiciary: What’s at Stake for Women, NATIONAL WOMEN’S LAW CENTER, available at http://www.nwlc.org/resource/vacancy-crisis-federal-judiciary-whats-stake-women#_edn2 (last visited March 24, 2014) (stating that there is a 10% vacancy rate for authorized federal judicial seats).}
\textsuperscript{203} \textit{See, e.g., InFocus: Judicial Branch Budget Crisis, CALIFORNIA COURTS, available at http://www.courts.ca.gov/partners/courtsbudget.htm#ad-image-0 (last visited March 24, 2014) (“In the last five years, the California judicial branch has been cut $1 billion, a reduction of nearly 65 percent. The California state court system, the largest in the world, serves 38 million people and is struggling to do so in a manner that is fair and just.”)}
evidence and the important legal arguments.\textsuperscript{204} Naturally, this makes judicial decision making significantly harder. Indeed, in certain types of courts, such as consumer, housing, and family courts, the vast majority of litigants appear without lawyers,\textsuperscript{205} thus exacerbating the burden on judges.

Bleak though this circumstance may be, it speaks to an evolving judicial role,\textsuperscript{206} one that calls upon judges to employ enormous reserves of practical wisdom in order to be successful. To the extent that judges receive less effective case presentations by self-represented parties, these judges must rely on their own background knowledge, legal experience, and general experience in making sense of the limited information provided, to issue wise decisions in each matter. Of course, not all judges do this well, and individual instances of injustice are well documented.\textsuperscript{207} Moreover, to the extent that the rising generation of lawyers works to close the justice gap, as is discussed in the prior section, judges will be called upon less frequently to play this non-traditional role in the future. For at least the foreseeable future, judges in local community courts will need to revive Kronman’s value of practical wisdom in order to perform effectively in the current environment facing such courts.

Conclusion

\textsuperscript{204} See generally, Russell Engler, \textit{And Justice for All – Including the Unrepresented Poor: Revisiting the Role of Judges, Mediators, and Clerks}, 67 FORDHAM L. REV. 1987 (1999).

\textsuperscript{205} Id.


\textsuperscript{207} See, e.g., Steven K. Berenson, \textit{The Elkins Legislation: Will California Change Family Law Again?}, 15 CHAPMAN L. REV. 443, 451 (2012) (discussing a California case where a self-represented litigant in a divorce trial was deprived of the opportunity to present any evidence at all due to non-compliance with local trial procedural rules).
From *The Lost Lawyer*’s top down vantage point, trends within the legal profession and the broader economy during the two decades since its publication have justified Professor Kronman’s pessimism regarding the future for his lawyer-statesman ideal and its chief virtue of practical wisdom. A bottom up perspective, however, provides at least some hope for a revival of practical wisdom in legal practice. Non-elite law schools are modifying their curricula to situate student learning within the context of actual cases on behalf of real and simulated clients. Small law firms and solo practitioners are establishing successful practices catering to the individual matters of ordinary persons and small businesses. And judges are addressing the challenges presented by self-represented litigants to develop a jurisprudence based on the application of practical wisdom to the resolution of everyday life disputes.

To be sure, the road to a revival of practical wisdom in legal practice is not smooth. The economics of legal education challenge the ability of law schools to provide multiple deep and rich contextual lawyering experiences for all of their students. Fierce competition and the economics of legal practice within the justice gap will challenge the entrepreneurial skills of lawyers in addition to their traditional lawyering skills. And large numbers of self-represented litigants strain the resources of our already cash-strapped court systems. But despite these challenges, the contours have emerged for a new archetype, the lawyer democrat, to lead the fight to enhance practical wisdom in legal practice in the coming years.