

LECTURE

LIVING GREATLY IN THE LAW: TRADITIONAL IDEALS FOR THE ELECTRONIC AGE

*Hon. Jeff Brown**

Dean Baynes, faculty and students, fellow alumni, and friends of the University of Houston Law Center, thank you for coming out this afternoon to honor Judge Sondock, to support the Law Center, and, most generously, to hear whether I have anything to say worth listening to. I am honored to be the fourth speaker this year in the Judge Ruby Kless Sondock Jurist-in-Residence lectureship series. I'm especially honored and humbled when I think about the first three lecturers this year—Chief Judge Robert Katzmann of the Second Circuit, my good friend and former colleague Judge George Hanks, and one of my judicial heroes, Judge Lee Rosenthal. As well as the two lecturers who will follow me next semester, my friend Judge Gray Miller and Chief Judge Roger Gregory of the Fourth Circuit. Hats off to the Law Center for putting together this valuable and innovative lectureship, and sincere thanks for inviting me to be a part of such of an impressive line-up.

I said Judge Rosenthal is one of my judicial heroes. Another one is Judge Sondock. As most of you are well aware I'm sure, Judge Sondock was the first woman on the state district court bench here in Harris County and was also the first woman to hold a permanent seat on the Supreme Court of Texas. One of my favorite stories concerns the only three women to precede her as members of the Court, though they were only temporary appointees. The year before Judge Sondock was born, Governor

* Justice of the Texas Supreme Court.

Pat Neff appointed three women lawyers to hear a single case from which all three male members of the Court had recused themselves. It's the only time, so far, that a state supreme court has been made up entirely of women, and it was just a few years after women won the right to vote and about thirty years *before* they were regularly seated on juries.

But Judge Sondock was a full-fledged member of the Court, appointed by Governor Bill Clements to fill a vacancy caused by the death of Justice James Denton. And as she did when she was a student here at the Law Center, the valedictorian of her class, as a lawyer practicing here in Houston, and as a trial judge, Ruby distinguished herself during her time on the Supreme Court. A wise and widely respected jurist when she was on the bench, she remains in high demand as a well-regarded and effective mediator. I have long considered myself blessed to know her and to be a beneficiary of both her friendship and her wise counsel. I also feel a special kinship to Judge Sondock. Not only do we both hail from the same law school, but the seat I occupy on the Supreme Court is Place 6—the same seat that Judge Sondock held when she was on the Court.

A quick aside here: Judge Sondock celebrated a milestone birthday earlier this year. But the day I was originally scheduled to give this speech, back in April, was a significant birthday for one of her colleagues on the Supreme Court. It was former Chief Justice Jack Pope's 103rd birthday. Judge Pope was an outstanding jurist, but if I understand my Texas political history correctly, he owes Judge Sondock a debt of gratitude for his time as chief justice of the Court. Judge Pope was Governor Clements' second choice for chief. His first choice, Judge Sondock, turned him down so that she could return to Houston. So she might've been not just the first woman on the Court, but the first woman chief justice, too.

Judge Sondock is part of a proud tradition of Law Center alumni on the Supreme Court of Texas. She was the second UH Law grad on the Court. The first was Jim Wallace who served on the Court from 1981–1988. Arriving after Judge Sondock was Raul Gonzalez, also appointed by Governor Clements, and was the first Hispanic justice on the Court. Justice Gonzalez was on the Court when I clerked there and I've always had a lot of respect for him. He served on the Court for fourteen years, from 1984–1998. Eugene Cook, a UH Law grad who was a member of the Court from 1988–1992, was the principal architect of the Texas Lawyer's Creed, a beautifully written and influential declaration of professionalism and civility issued in 1989 by the Texas Court of Criminal Appeals and the Texas Supreme Court.

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JURIST-IN-RESIDENCE

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Law Center alumnus Mike Schneider served on the Court from 2001–2004 before serving as a United States District Judge in Tyler. I interned for Judge Schneider while I was in law school and he was a state district judge here in Houston. And yours truly is the sixth UH Law product to reach the Court. I know I've got big shoes to fill and I'm working hard to live up to the tradition.

It's always good to be back at the Law Center. Many of my favorite professors are still teaching here. Those among the current faculty from whom I took classes include Ragazzo, Chandler, Weaver, Janicke, Joyce, Mixon, Dow, and Palmer. It's always good to see them and to meet and get to know some of the current crop of students. Just this afternoon I spoke to a torts class taught by Professor Joyce, from whom I took an American legal history seminar when I was at the Law Center. And I also visited Professor Knake's professional responsibility class. If it weren't for all the students' laptops, which we didn't have in 1992, it would've felt just like it did twenty-four years ago.

In 2014, I was honored to give the commencement address to the Law Center's graduating class. A book that I touched on in those remarks is at the heart of the message I will share here today. But I want to start with something a little different.

Since long before the dawn of the Industrial Revolution, workers have feared that their jobs would be taken over by machines. In the fourth century B.C., Aristotle speculated in Book I of his *Politics* that if machines became sufficiently advanced, there would be no more need for human labor. It hasn't happened yet, but it turns out that Aristotle was on to something.

Technological advancement's assault on the workingman has been with us throughout history, despite valiant efforts to slow it down. The Roman emperor Vespasian once refused an invention that would've enabled low-cost transportation of heavy goods, saying he must allow his poor haulers to earn their bread.

Likewise, Queen Elizabeth I declined to issue a patent for a labor-saving knitting machine because it might cause unemployment among textile workers. So the inventor of that device took his innovation to France where it met the same fate, and then returned to England only to have it turned down by Elizabeth's successor, King James. Ironically, King James is perhaps best known today for the Bible translation he authorized which became ubiquitous thanks only to one of the greatest technological innovations of Western Europe, the printing press.

But within a century of King James' reign, an increasingly influential strand of mercantilist thought was taking hold, especially in England. Beginning in the early eighteenth century, workers could no longer rely on support from governmental authority against the perceived threat of technological advancements on their livelihood. In the nineteenth century, thinkers such as Karl Marx began warning that technology was destined to bring about mass unemployment. And in the 1930s, famed British economist John Maynard Keynes gave the phenomenon a name: "technological unemployment."

We live with it still today. Gartner, an information technology research and advisory firm, predicts that one-third of jobs will be replaced by software, robots, and smart machines by 2025.¹ Ray Kurzweil, director of engineering at Google, anticipates that by 2029 robots will have reached human levels of intelligence.² Ryan Calo, a law professor at the University of Washington who specializes in robotics—yes, you heard that right, a law professor with an expertise in robotics—notes that historically we thought that what robots would be used for would be limited to the three Ds: tasks that are dangerous, dirty, and dull.³ But their range has been extended.

There are BakeBot robots that can make fresh cookies, hospitals employ medical robots to assist their physicians, and there's a robot named Baxter that can beat any human at the vertical checkers game "Connect Four"⁴ and another named Watson that famously defeated human Jeopardy champions at that wide-ranging trivia game. "Financial and sports reporters, online marketers, surgeons, anesthesiologists, and financial analysts are already in danger of being replaced by robots."⁵

Experts are calling this movement the "Second Machine Age," as it is comparable to what we saw 200 years ago with the invention of the steam engine and the machine age that ensued. The machines of the Industrial Revolution overcame the limitations of human muscle, while the robots and

1. Patrick Thibodeau, *One in Three Jobs Will Be Taken by Software or Robots by 2025*, COMPUTER WORLD (Oct. 6, 2014, 12:37 PM), <http://www.computerworld.com/article/2691607/one-in-three-jobs-will-be-taken-by-software-or-robots-by-2025.html> [<https://perma.cc/XSH3-RSUK>].

2. Cadie Thomson, *Computers Will Be Like Humans by 2029: Google's Ray Kurzweil*, CNBC (June 11, 2014, 4:18 PM), <http://www.cnbc.com/2014/06/11/computers-will-be-like-humans-by-2029-googles-ray-kurzweil.html> [<https://perma.cc/7CTG-L63E>].

3. Kathleen Elkin, *Experts Predict Robots will take over 30% of Our Jobs by 2025—and White-Collar Jobs Aren't Immune*, BUS. INSIDER (May 1, 2015, 11:15 AM), <http://www.businessinsider.com/experts-predict-that-one-third-of-jobs-will-be-replaced-by-robots-2015-5> [<https://perma.cc/3VLB-GN3C>].

4. *Id.*

5. *Id.*

artificial intelligence of today are overcoming the limitations of our individual minds.⁶

And that's what brings us to the law. Attorneys don't make anything with our hands. We don't sell anything tangible. What we employ in the practice of our profession is our brains, our specially trained and honed intellects. We rent them out, really, to our clients. We serve our clients by using our minds on their behalf. That's what kept us immune from the ill effects of the Industrial Revolution. Machines driven by steam and diesel fuel couldn't replace the human mind. But with the dawn of artificial intelligence, the Industrial Revolution has finally reached us. It started innocently enough—with the demise of paper. I imagine mine was one of the last law-school classes to actually learn how to Shepardize cases using Shepardizing's namesake—Shepard's Citations. We also learned how to do research with books instead of Lexis or Westlaw. Now it's pretty much malpractice to do research the old-fashioned way. Email and lawyers who can do their own word-processing has cut the need for legal secretaries. Electronic legal-research databases have killed off the position of law-firm librarian. And e-filing has even replaced the courthouse runner. But until recently, what lawyers do, and bill for, could not be replicated electronically. But that's not so true anymore.

If you Google the phrase “technology replacing lawyers,” you get an uncomfortably large number of hits. Here are titles of some of the articles I came across: “The Latest in Technology Will Make Lawyers Obsolete,”⁷ “Will Powerful Technology Replace Lawyers?,”⁸ “The End of Lawyers. Period.,”⁹ “Robots Replacing Lawyers a ‘Near Certainty,’”¹⁰ “Machines vs. Lawyers,”¹¹ “How to Replace Lawyers with Legal Artificial Intelligence,”¹² “Can

6. *Id.*

7. Mark Wilson, *The Latest in Technology Will Make Lawyers Obsolete*, FINDLAW BLOG (Jan. 6, 2015, 11:39 AM), <http://blogs.findlaw.com/technologist/2015/01/the-latest-in-technology-will-make-lawyers-obsolete.html> [<https://perma.cc/4F3N-5Q9P>].

8. Joyce Cutler, *Will Powerful Technology Replace Lawyers?*, BLOOMBERG L. (May 1, 2015), <https://bol.bna.com/will-powerful-technology-replace-lawyers/> [<https://perma.cc/5M3W-Y2HW>].

9. D. Casey Flaherty, *The End of Lawyers. Period.*, ABA J. (Mar. 3, 2016, 8:30 AM), http://www.abajournal.com/legalrebels/article/the_end_of_lawyers_period/ [<https://perma.cc/WE42-QTHW>].

10. Miklos Bolza, *Robots Replacing Lawyers a ‘Near Certainty*, AUSTL. LAW. (Feb. 22, 2016), <http://www.australasianlawyer.com.au/news/robots-replacing-lawyers-a-near-certainty-212164.aspx> [<https://perma.cc/46Q7-SHFJ>].

11. John O. McGinnis, *Machines vs. Lawyers*, CITY J. (2014) <http://www.city-journal.org/html/machines-v-lawyers-13639.html> [<https://perma.cc/7SMW-FYFL>].

12. Andrea Ferrante, *How to Replace Lawyers with Legal Artificial Intelligence*, FUTURIST HUB (Apr. 20, 2016), <http://www.31december2099.com/2016/04/20/replace-lawyers-legal-artificial-intelligence/> [<https://perma.cc/XA9C-ZHH9>].

Computers Replace Lawyers? A Silicon Valley Firm Says Yes,”¹³ “Will Do-It-Yourself Legal Tech Replace Lawyers?,”¹⁴ “Here Come the Robot Lawyers,”¹⁵ and, perhaps most ominously, “Will Robots Steal Your Job? Software Could Kill Lawyers. Why That’s Good for Everyone Else.”¹⁶ There’s an article about a 19-year-old kid who created a robot lawyer that has appealed \$3 million worth of parking tickets.¹⁷ About the only hopeful article I came across is entitled “Maybe Lawyers Can’t be Uber-ized.”¹⁸

The innovation in this area is coming fast and furious. Let’s take a quick look at just three examples. The first concerns discovery—something near and dear to every litigator’s heart.

The discovery process is all about cognition, the ability of people to look at endless bails of info and separate the wheat from the chaff. For many years, it was also extremely profitable for law firms, which billed hundreds of dollars an hour for associates to glance at thousands upon thousands (if not millions) of documents, and note whether they might have some passing relevance to the case at hand.¹⁹

My first few months at Baker Botts in Houston was filled with document review on a huge case for Houston Lighting & Power Company—boxes and boxes of documents and hours and hours of time. I had shown up fresh from my clerkship on the Supreme Court in Austin—ready to grapple with the great common-law questions of our time—and I was shown to a “war

13. Sudhin Thanawala, *Can Computers Replace Lawyers? A Silicon Valley Company Says Yes*, CHRISTIAN SCI. MONITOR (July 12, 2015), <http://www.csmonitor.com/Business/2015/0712/Can-computers-replace-lawyers-A-Silcon-Valley-company-says-yes> [https://perma.cc/XZ2T-DFCG].

14. Norman Rozenberg, *Will Do-It-Yourself Legal Tech Replace Lawyers?*, TECH PAGE ONE, <http://www.techpageone.co.uk/business-uk-en/will-diy-legal-tech-replace-lawyers/> [https://perma.cc/FB6W-T8MW].

15. James O’Toole, *Here Come the Robot Lawyers*, CNN TECH (Mar. 28, 2014, 7:16 AM), <http://money.cnn.com/2014/03/28/technology/innovation/robot-lawyers/> [https://perma.cc/PZ9F-9-QW5N].

16. Farhad Manjoo, *Will Robots Steal Your Job? Software Could Kill Lawyers. Why That’s Good for Everyone Else*, SLATE (Sept. 29, 2011, 2:42 AM), http://www.slate.com/articles/technology/robot_invasion/2011/09/will_robots_steal_your_job_5.html [https://perma.cc/U3BE-RSMM].

17. Leanna Garfield, *A 19-Year-Old Made a Free Robot Lawyer That Has Appealed \$3 Million in Parking Tickets*, BUS. INSIDER: TECH INSIDER (Feb. 18, 2016, 10:17 AM), <http://www.businessinsider.com/joshua-browder-bot-for-parking-tickets-2016-2> [https://perma.cc/2K2R-HKQ4].

18. Carolyn Elephant, *Maybe Lawyers Can’t Be Uber-ized*, MY SHINGLE, (Mar. 8, 2016), <http://myshingle.com/2016/03/articles/future-of-law/maybe-lawyers-cant-uber-ized/> [https://perma.cc/G7NH-DEPN].

19. Jordan Weissmann, *iLawyer: What Happens When Computers Replace Attorneys?*, ATLANTIC (June 19, 2012), <http://www.theatlantic.com/business/archive/2012/06/ilawyer-what-happens-when-computers-replace-attorneys/258688/> [https://perma.cc/AP9W-XNPJ].

room” filled with paper and other bright-eyed associates just like myself.

Now, those days are pretty much dead and gone, thanks to cost-conscious clients and legal-temp agencies which rent out attorneys at cut rates to do the grunt work.²⁰ And “[s]ome firms are still struggling to replace the profits they’ve lost as a result.”²¹

But then came “the rise of the machines—or, more precisely, the search engines. For a while now, attorneys have employed manual keyword searches to sort through the gigabytes of information involved in these cases.”²² Document review moved out of war rooms to computer screens. But it didn’t stop there.

Today, more and more firms

are beginning to use a technology known as “predictive coding,” which essentially automates the process at one-tenth the cost. Recently, a magistrate judge in a major Virginia employment-discrimination suit ruled that the defense could use predictive coding to sort through their own data, despite objections by the plaintiffs who worried it might not pick up all the relevant documents. . . . In truth, however, researchers have found predictive coding to be as accurate, if not more so, than the attorneys its replacing.²³

Several studies have shown that predictive coding actually outperforms human reviewers.

A widely cited 2011 article in the *Richmond Journal of Law and Technology* analyzed research on document review and found that humans unearthed an average of about 60% of relevant documents, while predictive coding identified an average of 77%. The research also showed that predictive coding was more precise, flagging fewer irrelevant documents than humans did.²⁴

So there is now software that’s smarter and more efficient at these document reviews than a human with a J.D.²⁵ Not only that, but if the Virginia case is any indication, “it’s finally being given sanction by the courts, which would have the power to stop such a new technology in its tracks if they chose.”²⁶

Here’s another example. Daniel Katz, a law professor at Michigan State, is “among the vanguard of legal researchers

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

working to bring empiricism and artificial intelligence into law.”²⁷ Katz is working on something he calls “quantitative legal prediction.” The idea is that technology can help clients make decisions that they have historically turned to lawyers to advise them about. “A fairly simple model, incorporating Supreme Court decision making from previous rulings,” has already proven that it can outperform legal experts in predicting the Court’s decisions over the course of a single term.²⁸ Similar technology is being marketed by a new company, Lex Machina, to forecast outcomes in patent litigation.²⁹ According to law professor John O. McGinnis at Northwestern, big data is helping companies “decide when to litigate, when to settle, and how to manage litigation costs.”³⁰

And here’s a third example—“that most pedestrian of legal tasks”: drafting contracts.³¹ Over the course of a career, an attorney might draw up thousands of contracts, “many of which contain numbingly similar bits of language.”³² But today, several legal-technology companies have created programs that build these documents automatically. “These pieces of software work a bit like TurboTax, asking a series of questions and using branching logic to delve deeper into specific areas.”³³ Matt Kesner, the chief information officer of the “pioneering Silicon Valley law firm” Fenwick & West, brags that “document-creation programs save its clients time and money.”³⁴ The firm has even

developed a system that automatically creates the documents that startups need when incorporating. It reduced the average time we were spending from about 20 to 40 hours of billable time down to a handful of hours,” Kesner says. “In cases with even extensive documents, we can cut the time of document creation from days and weeks to hours.”³⁵

Farhad Manjoo, a technology writer for the New York Times, put it this way: “Language processing, grappling with complex logic, making predictions about situations involving several variables—computers are getting better at all of this stuff.”³⁶

27. See Manjoo, *supra* note 16.

28. See McGinnis, *supra* note 11.

29. *Id.*

30. *Id.*

31. See Manjoo, *supra* note 16.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

Legal technology “will always be imperfect, providing likelihoods rather than certainties. Yet it doesn’t need to be perfect—it can displace lawyers simply by making better predictions than [we] do. Lawyers are very vulnerable on this front. After all, computers have far greater power to evaluate data”³⁷—and they are not burdened with the emotional and psychological imperfections that human lawyers must struggle to overcome. Studies have shown that lawyers’ overconfidence, driven by egos that machines don’t have, often leads attorneys to give poor advice.³⁸ And some experts believe the rise of legal technology will exacerbate the decline of the jury trial. The thought is that “[l]egal analytics will reduce the number of cases that go to trial by providing better estimates of cases’ value. Cases will settle earlier, and trial lawyers will have less to do.”³⁹

Discovering information, finding precedents, drafting documents and briefs, and predicting the outcomes of lawsuits—these tasks encompass the bulk of legal practice. And for that reason, the rise of machine intelligence can’t help but disrupt and transform the legal profession.

But even though technology has changed and will continue to change the legal profession, and will almost certainly mean that we have the need for fewer lawyers, change is never all bad. Advances in legal technology have the potential to bring better outcomes to clients more quickly and less expensively, and can make legal representation more accessible to a wider swath of society.

The question is not how do we stop these changes. We can’t. The question is how do we respond to them. Making sure that our law schools turn out technologically savvy legal professionals is certainly imperative. And a lot of old dogs are going to have learn new tricks. Indeed, much of this new technology won’t replace lawyers as much as it will provide us with new and more sophisticated tools to do the job we’ve been doing all along, provided that we embrace it and learn how to use it.

But my thesis today is not that we can live greatly in the law by figuring out the best way to employ the newest and fastest techno-widget. It’s that if the legal profession is going to survive these changes, we need to not just learn what we don’t yet know, but we must remember and put back into practice what we’ve neglected and forgotten.

37. See McGinnis, *supra* note 11.

38. *Id.*

39. *Id.*

In 1993, while I was still in law school, Anthony Kronman of Yale Law School published a book called *The Lost Lawyer*.⁴⁰ And no book I've read, with the possible exceptions of the Gospel according to Saint John and *Lonesome Dove* by Larry McMurtry, has had such a profound effect on me. In it, Kronman describes a spiritual crisis affecting the American legal profession which, if anything, has only grown worse in the last twenty-three years since the book was published. It's the decline of an ideal Kronman calls "the lawyer-statesman," a set of values and traits of character that prizes good judgment above technical expertise and that encourages a public-spirited devotion to the law:

[It's] an older set of values that until quite recently played a vital role in defining the aspirations of American lawyers. At the very center of these values was the belief that the outstanding lawyer—the one who serves as a model for the rest—is not simply an accomplished technician but a person of prudence or practical wisdom as well. It is of course rewarding to become technically proficient in the law. But earlier generations of American lawyers conceived their highest goal to be the attainment of a wisdom that lies beyond technique—a wisdom about human beings and their tangled affairs that anyone who wishes to provide real deliberative counsel must possess. They understood this wisdom to be a trait of character that one acquires only by becoming a person of good judgment, and not just an expert in the law. To those who shared this view it seemed obvious that a lawyer's life could be deeply fulfilling. For the character-virtue of practical wisdom is a central human excellence that has an intrinsic value of its own. So long as the cultivation and exercise of this virtue remained an important professional ideal, lawyers could therefore be confident that their work had intrinsic value too. . . .

[Kronman gave] this ideal an old-fashioned name to stress its roots in the past and the air of obsolescence that now surrounds it. . . . [He] call[s] it the ideal of the lawyer-statesman. It's an ideal that has had distinguished representatives in every age of American law.⁴¹

Kronman holds Lincoln up as an example:

In the years before the Civil War, as he struggled to find a way to save the Union and democracy too, Lincoln had no formula to guide him. He possessed no technical knowledge that could tell him where the solution to America's dilemma lay. He had only his wisdom to rely on—his prudent sense of

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

41. *Id.* at 2–3.

where the balance between principle and expediency must be struck.⁴²

The lawyer that this ideal presents is, to begin with, a devoted citizen.⁴³ Lawyer statesmen care about the public good and are prepared to sacrifice their own well-being for it, “unlike those who use the law merely to advance their private ends. The spirit of citizenship that sets the lawyer-statesman apart from the purely self-interested practitioner of law can to that extent be understood in motivational terms.”⁴⁴ But it’s not only their motives that make lawyer-statesmen better citizens than most.⁴⁵ They are distinguished, too, by their “special talent for discovering where the public good lies and for fashioning those arrangements needed to secure it.”⁴⁶ Lawyer-statesmen are leaders in the realm of public life, and other citizens look to them for guidance and advice, as do their private clients.⁴⁷

The help that others seek from lawyer statesmen, moreover, is not just instrumental.⁴⁸

A lawyer whose only responsibility is to prepare the way for ends that others have already set can never be anything but a deferential servant. [A machine, one might even say.] The lawyer-statesman is not a servant in this sense. Whether acting as the representative of private interests or as a counselor in matters of state, one important part of what [the lawyer-statesman] does is to offer advice about ends. An essential aspect of [the lawyer-statesmen’s] work, as [they] and others see it, is to help those on whose behalf [the lawyer-statesman] is deliberating come to a better understanding of their own ambitions, interests, and ideals and to guide their choice among alternative goals.⁴⁹

But the capacity to do this is not one that all lawyers, or any group of human beings, possess equally.⁵⁰

Some deliberate about ends more wisely than others. The lawyer-statesman is distinguished by the exceptional wisdom [they] display[] in this regard. [They] excel[] at the art of deliberation as others excel at writing, singing, or chess. The lawyer-statesman is a paragon of judgment, and

42. *Id.* at 3.

43. *Id.* at 14.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 14–15.

48. *Id.* at 15.

49. *Id.*

50. *Id.*

others look to [them] for leadership on account of [their] extraordinary deliberative power.⁵¹

And in today's skill-focused approach to legal education, it's important to remember that this ideal is "more than a clever knack or skill."⁵² "It is, most fundamentally, a trait of character."⁵³ And by character Kronman means

an ensemble of settled dispositions—of habitual feelings and desires. To have a character of a certain sort is to possess a set of such dispositions that is identifiable and distinct. The nineteenth century model of the lawyer-statesman portrayed him as a person with a character in just this sense. Thus in addition to whatever intellectual abilities he might possess, the lawyer-statesman was pictured by writers of the period as having certain temperamental qualities as well: as being, for example, more calm or cautious than most people and better able to sympathize with a wide range of conflicting points of view. Like other practitioners, of course, the lawyer-statesman was assumed to possess a stock of specialized professional knowledge, of esoteric legal know-how. But those nineteenth century writers who held him up as a model for the profession meant to do more than affirm that the possession of such knowledge is a good. They meant also to hold up as good, and therefore worth striving to attain, the temperamental traits that define the lawyer-statesman's special character.⁵⁴

First among these temperamental traits was that of prudence or practical wisdom, which even today we see as an attribute of character.⁵⁵

When we attribute good judgment to a person, we imply more than the possession of broad knowledge and a quick intelligence. We mean also to suggest that [such persons] show[] a certain calmness in their deliberations, together with a balanced sympathy toward the various concerns of which their situation (or the situation of their client) requires that [they] take account. These are qualities of feeling as much as of thought. They are qualities of character, and the role they play in the trait we call good judgment is an essentially important one. Thus even today the claim that someone has good judgment is understood to be a claim about [that person's] character and not merely breadth

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 16.

of . . . learning or the brilliance of . . . mind. The classical portrait of the lawyer-statesman as a person of good judgment carried a similar implication, and when those who eulogized him praised his practical wisdom, they meant to praise more than just his learned understanding of the law's arcane requirements. They meant also to commend his character and to suggest that the lawyer-statesman's professional standing is as much to be explained by who he is as what he knows. They meant to praise him for his virtue and not just his expertise.⁵⁶

In its nineteenth century heyday, the ideal of the lawyer-statesman was one of character.⁵⁷

This meant that as one moved toward it, one became not just an accomplished technician, but a distinctive and estimable type of human being—a person of practical wisdom. And that was an ennobling thought, even for those who fell short of the ideal or found they had only limited opportunities in their own work to exercise the deliberative virtues that the lawyer-statesman exhibited to an exemplary degree. The ideal of the lawyer-statesman encouraged this thought, and by so doing affirmed the self-worth of lawyers as a group in a way that makes the durability of this ideal as a model of professional excellence easier to understand.⁵⁸

So how do we get back to this ideal? Kronman doubts the profession as a whole can ever restore the sense of identity it once had.⁵⁹ But if it's to happen, it won't be by "some new set of refined intellectual techniques."⁶⁰ The crucial factor, Kronman says, "is resolve: the ability to make and stand by a commitment to serve the public good."⁶¹

[U]nless the practice of law is tempered by a concern for the public good, it can never be anything but an amoral tool for the satisfaction of private needs. [Kronman argues that] the level of public-spiritedness within the profession is today dismally low and needs to be increased. Lawyers should spend more time on law reform and the *pro bono* representation of worthy causes and clients. Whether they will or not is largely a question . . . of courage and resolve.⁶²

56. *Id.* at 16.

57. *Id.*

58. *Id.* at 16–17.

59. *Id.* at 7, 380–81.

60. *Id.* at 365.

61. *Id.*

62. *Id.*

Kronman lays a lot of the blame for the demise of the lawyer-statesman ideal at the feet of law schools and big law firms. Law schools, he argues, have promoted the idea that law is a science rather than a deliberative endeavor.⁶³ And they have discounted the value of practical wisdom as not sufficiently egalitarian, he even calls it “an embarrassed virtue,” merely because some people are better at it than others.⁶⁴ The big law firms, Kronman notes, used to produce a steady stream of lawyer-statesmen.⁶⁵ “Many of our leading diplomats, negotiators, cabinet officers, and political advisers have been drawn from their ranks, and countless other lawyers in these firms have spent some part of their careers in public service.”⁶⁶ Lawyers from big firms “played a significant role in shaping New Deal policy. They led the country’s war efforts against Germany and Japan. They were the principal architects of the new world order that followed. They managed the Kennedy administration’s campaign for civil rights.”⁶⁷ And, as Kronman puts it, “they led the country into Vietnam and out again.”⁶⁸ But the increase in size of these firms, a more detailed division of labor into specialties and sub-specialties, and shift toward transactional relationships with clients, have tended to narrow the professional experience of their lawyers. So has the lengthened workday. Lawyers at the big firms don’t have the opportunities lawyers once had to have a deliberative relationship with their clients—they now get hired to handle this isolated deal or that individual piece of litigation. And their ability to contribute to the betterment of their communities is hampered by the demand to bill more and more hours.

But if law schools and the big law firms are where we have gone astray, they are also the institutions that can bring back the lawyer-statesman ideal. Perhaps law schools can take a fresh approach and teach expressly and deliberately about the value of deliberation and practical wisdom. At the very least, they could make Kronman’s book required reading. And perhaps law firms can renew the encouragement of civic-mindedness in their lawyers. Again, as Kronman argues, it’s a matter of resolve.

In the 1700s, Edmund Burke famously mourned the replacement of the Age of Chivalry by “that of sophisters,

63. See generally *id.* at 165–270.

64. See *id.* at 51.

65. *Id.* at 273.

66. *Id.*

67. *Id.*

68. *Id.*

calculators, and economists.” And by mourning the replacement of the lawyer-statesman with artificial intelligence and Watson the Jeopardy-playing robot, I suppose we are proving that there really is nothing new under the sun. But I think we can take encouragement from that fact. Ours is not a new fight—it’s just our turn to take up the cause.

At the beginning of his book, Kronman quotes Michael Oakeshott, an English philosopher and political theorist, who said “There is nothing to encourage us to believe that what has captured current fancy is the most valuable part of our inheritance, or that the better survives more readily than the worse. And nothing survives in this world which is not cared for by human beings.” We, of course, are the human beings in whose care has been placed not just the law and its profession, but the orderly well-being of society itself. No amoral computer can replace us in that regard, no unfeeling machine can take on that responsibility. We need to face that challenge deliberately as men and women of the law. And God help us if we falter.

Kronman ends his book saying that he hopes the next generation of lawyers “will begin the work of rebuilding” the lawyer-statesman ideal.⁶⁹ That may happen, he says, though he worries that it will not. “But even if it does not,” he says, “those who see the ideal and seize the opportunity to realize it in their own work will 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.”⁷⁰

In a lecture called “The Profession of the Law” which he gave at Harvard in 1886, Oliver Wendell Holmes uttered these famous words: “I say—and I say no longer with any doubt—that a man may live greatly in the law as well as elsewhere; that there as well as elsewhere . . . he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable.” If we will take up the cause, those words are as true today as they were 130 years ago.

Thanks to this fine law school for the invitation to come here today, and thanks to all of you for your kind attention this afternoon, and for your devotion to this still noble profession.

69. *Id.* at 381.

70. *Id.*