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Lawyers and Virtues: A Review Essay of Mary Ann Glendon’s A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society and Anthony T. Kronman’s The Lost Lawyer: Failing Ideals of the Legal Profession

Robert F. Cochran, Jr.*

The Watergate break-in and its cover-up in the early 1970s convinced the American public that lawyers will do illegal and immoral things for the sake of their clients’ and their own interests. The organized bar responded to Watergate with several steps that were designed to clean up the profession. The ABA adopted a new set of professional rules,1 law schools required students to study professional responsibility, and states required that lawyers pass a special professional responsibility exam. But continued problems in the legal profession have followed this attention to professional rules. In addition to the highly publicized lawyer leadership in the corporate takeover, savings and loan, and Whitewater scandals, observers of the legal profession find among lawyers a growing preoccupation with making money,2 an increase in litigiousness, greater incivility, and more misuse of legal procedure.3 It may be that the problem in the legal profession is not too little attention to rules, but too little attention to character.

This crisis in the legal profession is the subject of recent books by Yale law professor (now dean) Anthony T. Kronman4 and Harvard law professor Mary Ann Glendon.5 Neither Glendon nor Kronman calls for new professional rules. They resist the Enlightenment (and lawyerly) temptation to propose a rule to solve every problem. In very different ways, each calls for a return to an older, more subtle moral tradition—the exercise of virtues.

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1 MODEL RULES OF PROFESSIONAL CONDUCT (1983). For a further discussion of the Model Rules, see infra text accompanying notes 84-102.
3 See Mary Ann Glendon, A Nation Under Lawyers: How The Crisis in the Legal Profession is Transforming American Society 52-59 (1994).
4 Kronman, supra note 2.
5 Glendon, supra note 3.
They are part of a recent, broad-based renewal of attention to virtue ethics in philosophy, legal ethics, and popular culture.

Virtue ethics is an alternative to Enlightenment liberalism’s principles ethics. Advocates of virtue ethics suggest that morality is a matter of exercising virtues or good habits that enable people to reach their fullest potential. Virtues include truthfulness, courage, justice, and mercy. Virtue ethics can be contrasted with principles ethics, which sees the moral life as a matter of applying a complex moral code. The focus of virtue ethics is on being a person of character, rather than making right choices. Principles can be important pointers, but there is no code that answers every moral problem.

Kronman, drawing on Aristotle, focuses almost exclusively on the virtue of practical wisdom or prudence. Practical wisdom is the ability to deliberate well; it is a virtue of both skill and character. Kronman identifies practical wisdom as the key virtue of both lawyers and judges, but a virtue that has been marginalized by the scholarship of law professors, the case load of the judiciary, and structural changes in law firms. Glendon


Virtue ethics has its roots in Greek culture, especially in the writings of Aristotle. MacIntyre describes Aristotle’s concept of a virtue as follows:

Aristotle tries to use the notion of a mean between the more or the less to give a general characterization of the virtues: courage lies between rashness and timidity, justice between doing injustice and suffering injustice, liberality between prodigality and meanness. For each virtue therefore there are two corresponding vices. And what it is to fall into a vice cannot be adequately specified independently of circumstances: the very same action which would in one situation be liberality could in another be prodigality and in a third meanness. Hence judgment has an indispensable role in the life of the virtuous man which it does not and could not have in, for example, the life of the merely law-abiding or rule-abiding man.

MACINTYRE, supra, at 154.

7 See THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 40-92 (1994) (discussing the place of the virtues of friendship, loyalty, justice, mercy, and truthfulness in the lawyer-client relationship); R. Elizabeth Loder, Out From Uncertainty: A Model of the Lawyer-Client Relationship 2 S. CAL. INTERDISCIPLINARY L.J. 89, 126-30 (1993) (exploring the place of virtues in lawyer-client moral discourse); Stephen L. Pepper, Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering 104 YALE L.J. 1545, 1554-87, 1607-08 (1995) (identifying seven distinctions to be drawn when considering whether to give clients advice that might enable them to break the law and concluding that resolution of the most difficult issues requires the exercise of virtues).


9 The father of Enlightenment liberalism’s principles ethics is Immanuel Kant. See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (L. Beck trans., 1959).

10 See, e.g., MEILAENDER, supra note 6, at 7.

11 KRONMAN, supra note 2, at 41 (“Aristotle repeatedly describes [practical wisdom] as a virtue of character, a dispositional habit shaped by training or education. The practically wise person is more than merely clever. He also has ‘the right kind of likes and dislikes.’” (quoting ARISTOTLE, NICOMACHEAN ETHICS, 1179b29-30)).

12 “Law teachers no longer respect [the virtue of practical wisdom]. The most prestigious law firms have ceased to cultivate it. And judges can no longer find the time, amid the press of cases, to give its claims their due.” Id. at 354.
tifies a broader range of virtues that judges, lawyers, and law professors need to rediscover.13

Both books are broad in scope, scholarly, and readable (Kronman's book the more scholarly, Glendon's the more readable). Both provide thoughtful histories of the leaders of the legal profession and their ideas; Glendon has a greater focus on people, Kronman on their ideas. The first part of this Review discusses Kronman's and Glendon's analyses of law professors, judges, and lawyers, with special attention to what virtue ethics might have to say to those in each legal vocation. Part II evaluates Kronman's account of the virtue of practical wisdom and concludes that Kronman deviates from Aristotle's account of this virtue (and that Kronman's account is weaker for it). Part III discusses the strengths of virtue-based ethics for lawyers when compared with the rule-based ethics that the legal profession focuses on today. Finally, Part IV discusses a troubling insight gleaned from virtue ethics: Morals are largely a matter of habit and habits developed from some of the activities of lawyers may place lawyers at moral risk.

I. GLENDON AND KRONMAN ON LAW PROFESSORS, JUDGES, AND LAWYERS

Glendon's and Kronman's books each have sections on law professors, judges, and lawyers. Glendon and Kronman are troubled by trends in each lawyer group. They differ on some issues, but in general, their analysis is complementary.

A. Law Professors and the Common Law Tradition

Kronman and Glendon see the legal academy's neglect of and attacks on the common law tradition14 at the root of many of the problems of the legal profession. Kronman focuses on the place of the virtue of practical wisdom in the common law method. "[H]ard cases require the exercise of practical wisdom: a subtle and discriminating sense of how the (often conflicting) generalities of legal doctrine should be applied in concrete disputes."15

The traditional focus of law school scholarship and teaching was the common law. Law school teachers "conceived the goal of their research to be the clarification of doctrine in a particular field and the improvement of its capacity to deal with a certain range or type of human conflict."16 They

13 Glendon's major focus is on the ways that changes among judges, lawyers, and law professors have undercut democracy and the ability of citizens to develop civic virtues. She says: 
[A new breed of] judges with grandiose visions of judicial authority, practitioners eager to blaze new trails to the nation's crowded courthouses, and legal scholars yearning to be philosopher-kings and -queens [have] become a counterforce... to popular government.

14 The common law is judge-made law, developed as judges decide individual cases, with one eye looking back, attempting to be consistent with prior cases, and another eye looking forward, seeking to create a sensible framework for future cases. Judges have given a host of often confusing justifications for their decisions. See, e.g., id. at 178-80.

15 Kronman, supra note 2, at 21.

16 Id. at 266.
wrote to contribute to the work of judges and practicing lawyers. Through the case method, they taught students to think like lawyers.

Though the work of the traditional law professor centered on the development of the common law, the academy’s view of law as a science has undercut the foundation of the common law. Kronman traces this view of law as science from Thomas Hobbes, through Christopher Langdell and the founding of the case method, through the legal realists, to today’s law and economics and critical legal studies (CLS) movements.

Though the law and economics and CLS movements differ in many respects, Kronman suggests that both are children of scientific realism and have worked to discredit the common law. Both schools suggest that what lawyers and judges say they do is of little importance; both see only a “chaotic mass” of arguments used by lawyers and judges to justify particular rules. They suggest that we must look beneath the “formless and confused” and “practical and particularistic” arguments that lawyers and judges use to find the law’s hidden structure. Both suggest that there is a hidden answer to the problem of governing. Those in the law and economics school judge law by the standard of efficiency. Those in the CLS school judge law by how well it destabilizes unjust social hierarchies.

The problem with these theories is not that they fail to provide insight—law and economics proponents have demonstrated inefficiencies in the law, and CLS proponents have demonstrated ways in which the law reinforces unjust hierarchies. The problem is that such theories are reductionist; they overlook the richness of human goods that the law should (and at its best does) attempt to preserve.

The myopic visions of the CLS and law and economics movements have led to substantial changes in what law professors do. The nuts and bolts work of developing the common law no longer appears important. In law reviews, there has been a substantial growth in “theoretical” essays at

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17 Kronman traces the downfall of the common law tradition to Thomas Hobbes and the early days of the Enlightenment. The Enlightenment treated everything as a science; it divided knowledge into the natural sciences and the social sciences. Kronman, supra note 2, at 175 (“The skill of making, and maintaining, common-wealths consisteth in certain rules, as doth arithmetic and geometry . . . ” (quoting THOMAS HOBBES, LEVIATHAN 136 (Michael Oakeshott ed. 1946)).

18 Langdell, dean of Harvard, developed the case method in the 1870s. He viewed law as a science consisting of “principles and doctrines.” Glendon, supra note 3, at 184. “Written opinions in cases were the legal scientist’s specimens or ‘data.’” Id. Professors sought to identify the principles behind the cases.

19 The legal realism movement, beginning in the 1920s, criticized aspects of Langdell’s view. Jerome Frank showed that the activity of judging is much different from geometry—judges do not merely apply principles to facts, they draw from their experiences to make choices. Kronman, supra note 2, at 186-95 (discussing JEROME FRANK, LAW AND THE MODERN MIND (1930)). But Kronman argues that most realists “continued to embrace [Langdell’s] central goal, that of constructing a systematic theory of law by means of methods acquired not through experience but academic study.” Kronman, supra note 2, at 196. These “scientific realists” sought to reform the law through changes in “the structural arrangement of the legal order as a whole, and not [as under the common law through] the resolution of particular disputes.” Id. at 19.

20 For discussions of the law and economics movement, see Glendon, supra note 3, at 209-10; Kronman, supra note 2, at 225-40.

21 For discussions of the CLS movement, see Glendon, supra note 3, at 210-15; Kronman, supra note 2, at 240-66.

22 Kronman, supra note 2, at 245 (using Duncan Kennedy’s term).

23 Id. at 237-38.

24 See id. at 257.
the expense of "practical" law review articles. Fewer professors have background or interest in practice, and many law professors view practitioner problems as intellectually beneath them. There has also been a growth in advocacy scholarship, some of which scoffs at the idea that there could be a disinterested search for knowledge.

Glendon and Kronman lament the lack of attention to the common law. They provide a much needed and long overdue defense of the common law method. Both defend the common law tradition as a practical method of decisionmaking, which provides an opportunity for change while holding on to established wisdom. Both identify Aristotle's virtue of practical wisdom at the foundation of the common law method. Glendon (citing Edgar Bodenheimer) suggests that the common law method is an example of dialectical reasoning:

Dialectical reasoning is... an integrated set of related mental operations. It builds on practical reason, but subjects common sense to a process of critical examination and evaluation in which logic has its appropriate but auxiliary role. [D]ialectical reasoning begins with premises that are doubtful or in dispute. It ends, not with certainty, but with determining which of opposing positions is supported by stronger evidence and more convincing reasons.

Under the common law method, judges resolve decisions that are before them based on principles that they find in other cases, but they are open to arguments of counsel that those principles should be reevaluated. The common law draws from tradition, but it is open to change:

In law and politics, premises are uncertain and one can't be sure of being right, but it is crucial to keep trying to reach better rather than worse outcomes. The life of the law is not logic, but neither is it raw experience. What animates the law is the habit of critical, ongoing, reasoned reflection on the contents of common sense.


26 Id. at 223.

27 Id. at 206. Kronman's suggestion in 1981 that lawyers are concerned with persuasion, whereas law professors are concerned with truth, seems quaint today. See KRONMAN, supra note 2, at vii.

28 See GLENDON, supra note 3, at 230-35; KRONMAN, supra note 2, at 20-21, 208-09.

29 Traditional law professors have provided little defense of the common law against the attacks of the CLS and law and economics movements. Glendon suggests that traditional professors were unable to present a defense because they taught a method ("how to think like a lawyer") without a conscious theoretical foundation. GLENDON, supra note 3, at 233. CLS founder, Roberto Unger, claimed that in the face of the CLS attack, traditional law professors were "like a priesthood that had lost [its] faith." Id. at 211 (quoting ROBERTO M. UNGER, THE Cirrica LEGAL STUDIES MOVEMENT 119 (1986)). But Glendon's assessment is different:

[Traditional professors] were like a priesthood that had long been preaching to the already, or almost, converted; a priesthood wholly unaccustomed to dealing with sophisticated unbelievers. Nothing in their training, moreover, had equipped them to deal with late-twentieth-century philosophical controversies. Id. at 292.

30 See id. at 237-38; KRONMAN, supra note 2, at 20-21.

31 GLENDON, supra note 3, at 237-38.

32 Id. at 298; see also KRONMAN, supra note 2, at 175-76.
Glendon and Kronman each call law professors to return to traditional scholarly habits. Glendon praises the virtues of “great scholars and teachers of the law.” She quotes Learned Hand’s list of scholarly virtues: “skepticism, tolerance, discrimination, urbanity, some—but not too much—reserve towards change, insistence upon proportion, and, above all, humility before the vast unknown.”

B. Judges and Practical Wisdom

Glendon and Kronman both lament the failure of judges in recent decades to exercise practical wisdom. In some respects, however, they identify very different consequences flowing from the neglect of practical wisdom.

Glendon suggests that there has been a shift from an ideal of “classical” judging to an ideal of “romantic” judging. For Glendon, classical judging was a matter of exercising judicial virtues:

At least until the 1970s, judicial hagiography emphasized impartiality, prudence, practical reason, mastery of craft, persuasiveness, a sense of the legal system as a whole, the ability to preserve principled continuity while adapting the law to changed social and economic conditions—and above all, self-restraint.

Classical judges were “openly resigned to the fact that total objectivity is an unattainable goal,” but they sought to resist their biases. During the 1960s and 1970s, judges began to exercise greater power and a new, romantic judicial ideal emerged. Romantic judges are free “from the constraints of statute, precedent, Constitution, or tradition. [The ideal romantic judge is] bold, creative, compassionate, result-oriented, and liberated from legal technicalities.”

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33 Glendon, supra note 3, at 198 (quoting Learned Hand, Forward to Williston, Life and Law, in The Spirit of Liberty: Papers and Addresses of Learned Hand 140, 142 (Irving Dillard ed., 1955)).

34 Id. at 118.

35 Id. at 128. Cardozo said, “Try as we might, we can never see . . . with any eyes except our own.” Id. at 127 (quoting Benjamin N. Cardozo, The Nature of the Judicial Process 13 (1921)). Glendon says, “a good judge surmounts bias (to the extent she can) . . . through sustained ‘habits of self-discipline.’” Id. at 128 (quoting Felix Frankfurter, Of Law and Men: Papers and Addresses of Felix Frankfurter 40-41 (1956)).

36 Id. at 152. Glendon’s picture of the romantic judge was captured by my law school property professor Thomas Bergin’s description of D.C. Circuit Judge Skelly Wright “swashbuckling through life, righting wrongs as he goes.”

Glendon illustrates her models of judging in a comparison of two Supreme Court opinions, Chief Justice Earl Warren’s majority opinion in Brown v. Board of Education, 347 U.S. 294 (1955) (requiring desegregation of public schools), and Justice Anthony Kennedy’s concurring opinion in Planned Parenthood v. Casey, 505 U.S. 833, 834 (1992) (Kennedy, J., concurring) (retaining the right of a woman to abortion prior to fetal viability). Glendon says that Brown was moored “in constitutional text, structure, and tradition,” whereas “[t]he threads that connect Casey’s reasoning to constitutional text and tradition are slender and wavering.” Glendon, supra note 3, at 115-16. Moreover, in Brown, Chief Justice Warren “demonstrat[ed] to the losing side that their best arguments [had] been understood and fairly considered.” Id. at 115. In Casey, Justice Kennedy presents a “grandiose portrayal of the role of the Supreme Court in American society.” Id. at 115. The justices assert that it is their job to tell the American people what their “constitutional ideals” should be. Id. at 4 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 868 (1992)).

Glendon’s comparison demonstrates that her classical and romantic judges are not what are commonly called conservative and liberal judges. Glendon’s example of classical judging, Brown,
Glendon is concerned with the effects romantic judging can have on citizens exercising civic virtues:

[When judges remove decisions from the democratic arena, they undercut] the normal processes through which citizens build coalitions, develop consensus, hammer out compromises, try out new ideas, learn from mistakes, and try again.

... Political skills atrophy. Men and women cease to take citizenship seriously. Citizens with diverse points of view lose the habit of cooperating to set conditions under which all can flourish. Tolerance suffers as communication declines.\(^{37}\)

Glendon's view of the judiciary is likely to be criticized from quite different directions. Her call for greater judicial restraint is unlikely to be well received among legal academics—activist judges are the kings to whom legal academics serve as a royal priesthood. But Glendon's view of judging is also likely to be criticized by those who would limit judges to following precedent, searching for original intent, and waiting for the legislature.\(^{38}\)

Glendon acknowledges a place for judicial activism. She praises the common law judges who earlier in this century made decisions "adapting traditional property, tort, and contract law to the legal conundrums created by the growth of cities, heavy industry, mass transportation, and instant communications."\(^{39}\) She also praises the constitutional decisions that opened up democracy to groups that were previously excluded.\(^{40}\) Glendon does not suggest that prior decisions are written in stone, nor that the Constitution should be interpreted with an 18th century dictionary. Her judicial heroes, Oliver Wendell Holmes, Benjamin Cardozo, and Learned Hand,\(^{41}\) were willing at times to make bold decisions.

Glendon is aware of the dangers of democracy. Citing Tocqueville, Glendon acknowledges "popular government's tendencies toward present-mindedness, disorder, and majoritarian oppression."\(^{42}\) She, with Tocqueville, hopes that the "civilizing effect [of lawyers] on manners and opinions," will serve as an antidote to those tendencies.\(^{43}\)

The dangers of judicial activism are great, possibly greater than suggested by Glendon. In addition to the danger that judicial activism will remove from citizens the opportunity to exercise and develop civic virtues, there is a danger that judicial activism will result in a disrespect for the law. When citizens see judges openly seizing power on questionable legal bases, the rule of law and the respect for law is weakened; chaos is around the corner. When judges openly become a law unto themselves, we should not be surprised when citizens also ignore the law. Judges seize power at the expense of democracy—at some point citizens will seize it back. At best, citizens may seize power through a politicalization of the judicial appointment process. At worst, they may seize it with the sort of vigilante justice that we increasingly see in American subways and abortion clinics.

\(^{37}\) GLENDON, supra note 3, at 168.


\(^{39}\) GLENDON, supra note 3, at 132.

\(^{40}\) See id. at 7.

\(^{41}\) See id. at 120-35.
Glendon calls for a return to judicial virtues: "impartiality, prudence, practical reason, mastery of craft, persuasiveness, a sense of the legal system as a whole, [principled continuity, and] self-restraint."\(^{42}\) Judicial virtues, like virtue ethics in general, do not give a single principle to which one can look when resolving a case—in some cases judicial virtues might suggest that judicial restraint is justified, in some cases that it is not. As Alasdair MacIntyre says of virtue ethics:

> What it is to fall into a vice cannot be adequately specified independently of circumstances: the very same action which would in one situation be liberality could in another be prodigality and in a third meanness. Hence judgement has an indispensable role in the life of the virtuous man which it does not and could not have in, for example, the life of the merely law-abiding or rule-abiding man.\(^{43}\)

Glendon focuses on the importance of judgment as well. She identifies the loss of "judgment" as a key failing of romantic judges.\(^{44}\)

Kronman is also concerned with the judicial exercise of judgment.\(^{45}\) Glendon and Kronman agree on the importance of the judicial exercise of practical wisdom, but it appears that they disagree, in one important respect, on the results that would flow from its exercise. Whereas Glendon suggests that the exercise of practical wisdom would result in greater judicial restraint, Kronman’s view suggests that practical wisdom would lead to greater judicial activism. Kronman describes practical wisdom as an elitist virtue—a virtue that not all possess,\(^{46}\) practical wisdom as the virtue of "the lawyer-statesman."\(^{47}\) Kronman contrasts his view with that of the neo-republicans, such as Glendon. Neo-republicans argue for the importance of character in public life, and unlike Kronman, they assume that a broad-based civic virtue is possible.\(^{48}\) Though Kronman does not discuss judicial activism, his view of practical wisdom as a virtue of the few suggests that he

\(^{42}\) Id. at 118; see also Lawrence B. Solum, The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection, 61 S. Cal. L. Rev. 1735 (1988).

\(^{43}\) MacIntyre, supra note 6, at 154 (emphasis added).

\(^{44}\) In her discussion of Brown and Casey, Glendon summarizes the differences between the opinions in terms of judgment. See supra note 37. She suggests that in Brown, the Court exercised "judgment"; in Casey the concurring opinion merely asserted power. Glendon, supra note 3, at 115. Justice Kennedy, the author of the Casey concurrence, compared himself to Caesar crossing the Rubicon. Id. at 5, 112 (citing Terry Carter, Crossing the Rubicon, Cal. Law., Oct. 1992, at 39-40).

\(^{45}\) Kronman complains that today’s heavy caseload and the resulting reliance on law clerks prevents judges from engaging in the practical wisdom that is the essence of good judging. See Kronman, supra note 2, at 320-28.

\(^{46}\) Kronman describes his (and Aristotle’s) view of practical wisdom as one of "character-based elitism." Id. at 42.

\(^{47}\) Kronman finds an unequal distribution of the virtue of practical wisdom because:

> [the elementary passions of attraction and disgust] are more pliant in some than in others—more easily shaped into the feelings a person of practical wisdom must possess. Moreover, whatever their original affective endowment, only some people receive the kind of training that is needed to give their passions the appropriate shape.

Id. at 41-42.

\(^{48}\) See id. at 367.
would favor a more activist judiciary and less reliance on democratic majorities than would Glendon. 49

Kronman also suggests that the virtue of practical wisdom will lead judges to resolve disputes over basic norms of personal and political morality in the way that is most likely to promote political fraternity. 50 I will discuss Kronman’s view of practical wisdom and political fraternity in a later section. 51

C. Lawyers, Wise Counsel, and Loyalty

Traditionally, lawyers, at their best, have seen themselves as having a responsibility for justice. At trial, they have been officers of the court, as well as representatives of clients. In the office, they have given clients independent judgment, moral as well as legal. Both Kronman and Glendon lament the loss of the lawyer as wise counselor. 52 In law practice, as well as in judging, Kronman holds up the ideal of the lawyer-statesman and the virtue of practical wisdom:

[E]arlier 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

49 A preference for an activist judiciary is suggested by Kronman’s praise for the concurring opinion in Planned Parenthood v. Casey, 505 U.S. 833 (1992). What was for Glendon the height of judicial arrogance, see supra notes 36 and 44, is for Kronman an example of practical wisdom, “an opinion marked by its judicious search for a middle course and wise balancing of principle and precedent.” See KRONMAN, supra note 2, at 3.

50 KRONMAN, supra note 2, at 97.

51 See infra text accompanying notes 69-87.

52 Glendon quotes Elihu Root: “About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.” GLENDON, supra note 3, at 37 (citing Introduction to THE NEW HIGH PRIESTS: LAWYERS IN POST CIVIL WAR AMERICA 4 (Gerard W. Gawalt ed., 1984)). But neither Glendon nor Kronman mention the serious danger of lawyer paternalism. The focus of both Glendon’s and Kronman’s books is on big corporate firms, where the dangers of lawyer paternalism are not so great—the problem in big firms is more likely to be attorney deference. The danger of lawyer paternalism is greater for lawyers who represent ordinary citizens, clients who are likely to be intimidated in relationships with lawyers. As Richard Wasserstrom put it in his classic essay:

[T]he professional often, if not systematically, interacts with the client in both a manipulative and a paternalistic fashion. . . . [F]rom the professional’s point of view the client is seen and responded to more like an object than a human being, and more like a child than an adult. The professional does not, in short, treat the client like a person; the professional does not accord the client the respect that he or she deserves.


I have argued elsewhere (with Thomas Shaffer) that lawyers should look to Aristotle’s virtue of friendship for guidance in the lawyer-client relationship. Aristotle taught that friendship is a moral relationship; friends are concerned that one another be good. For a look at Aristotle’s view of friendship, see ARISTOTLE, NICOMACHEAN ETHICS 214-44 (Martin Ostwald trans., 1962), discussed in SHAFFER & COCHRAN, supra note 7, at 44-51. We argue not that lawyers can be friends with all their clients, but that the moral relationship of lawyer to client should be like that of friends to the extent possible. The lawyer should neither control nor ignore moral issues, but should involve the client in moral conversation.
provide real deliberative counsel must possess. They understood this wisdom to be a character trait that one acquires only by becoming a person of good judgment, and not just an expert in the law.53

Though Glendon does not use the term “practical wisdom” in relationship to lawyers, she identifies and praises lawyer qualities that are part of practical wisdom: the lawyer’s eye for the issue, feel for common ground, eye to the future, problem solving abilities, tolerance, and recognition of the value of incremental change.54

Kronman suggests that the growing tendency of clients to hire law firms for narrow legal jobs and of lawyers to devote themselves to narrow specialties have reduced opportunities for lawyers to aid clients in the deliberative process.55 Lawyers neither build the long term relationships nor develop the big picture that they need to give deliberative advice. All that they can give clients is technical advice. The problem is compounded because practical wisdom is a skill learned through practice; the reduction in opportunities to exercise it diminishes a lawyer’s opportunity to learn it.56

Other developments within large law firms also undercuts the possibility of deliberative wisdom. Law firms demand increasing numbers of hours from their lawyers. Many lawyers do little more than work, eat, and sleep. Practical wisdom is a dispositional trait that requires one “to entertain the widest possible diversity of points of view, and to explore these in a mood of deepening sympathy, while retaining the spirit of aloofness on which sound judgment also critically depends.”57 For most, developing this ability requires breadth of experience, and the modern practice of law provides little opportunity for broadening one’s experience.

In addition, the increased focus on making money within law firms undercuts the possibility of deliberative wisdom. A generation ago, the culture of law firms suggested that lawyers ought to care about things other than making money—money was to be of secondary importance. The focus on money within firms today undercuts both the sympathy and the detachment that are required for prudent counseling.58

53 Kronman, supra note 2, at 2.
54 Glendon, supra note 3, at 102-08.
55 Kronman, supra note 2, at 290.
56 Id.
57 Id. at 304.
58 Id. at 299.

Glendon also discusses the new focus on making money within law firms. She suggests that the attitude that many lawyers have had that they are above “commercial” activity may be part of the problem:

That careless use of “commercial” as an epithet is mischievous .... [L]awyers’ stubborn refusal to recognize their affinities with other highly skilled, well-educated sellers of services seems to rest either on the arrogant assumption that businesspeople have no ethics or on the dubious proposition that businesspeople invariably place short-term profits ahead of all other considerations. Those cramped concepts of business ethics, however, are widely recognized in the business world as evidence of economic and moral pathology. Unfortunately, lawyers’ disdain for commerce is no mere harmless affectation. As lawyers increasingly admit that law is, among other things, a profit-making business, all too many seem to believe that ethical bets are off.

Glendon, supra note 3, at 70 (footnotes omitted). Glendon holds up one of the great lawyer heroes as a model: “Abraham Lincoln was quite comfortable with the idea that law is a business, and seemed to think that virtue in a lawyer was not much different from common decency in any
II. Incommensurable Values and the Virtue of Practical Wisdom

As previously noted, for Kronman, the central lawyer virtue (and the thing that in the past has made the practice of law meaningful) is the exercise of practical wisdom. Kronman suggests that practical wisdom is a matter of both skill and character. The skill is the ability to identify means that will achieve ends. Kronman identifies two character-related factors that are aspects of practical wisdom: a concern for the civic good and a sympathetic detachment.

Kronman suggests that lawyers learn this civic-mindedness and this sympathetic detachment as part of their training and practice. As lawyers seek to develop convincing arguments, they put themselves (mentally) in the position of civic-minded judges. Kronman argues that lawyers come to think like judges and develop a habit of being civic-minded.

Kronman suggests that law students learn sympathetic detachment in law school through the case method. The study of common law cases forces students to view disputes from the perspective of each side, as well as from the "more neutral and inclusive" perspective of the judge. This strengthens in students the capacity for "sympathetic understanding." They develop a sensitivity to the views of others and learn to adjust competing demands. This gives rise to moral imagination, but Kronman recognizes that there is a cost:

Some students find this experience disturbing and complain that the case method, which makes every position respectable, undermines their sense of integrity and personal self-worth. It is easy to understand why. For the discovery in oneself of a developing capacity to see the point of positions that previously seemed thoughtless or unfair is often accompanied by a corresponding sense of more critical detachment from one's earlier commitments, and this can lead to the feeling of being unmoored with no secure convictions and hence no identity at all.

This experience, which law students sometimes describe, not inappropriately, as the experience of losing one's soul, strongly suggests that the process of legal education does more than impart knowledge and promote new perceptual habits. In addition it works—is meant to work—upon the students' dispositions by strengthening their capacity for sympathetic understanding. The strengthening of this capacity often brings

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59 KRONMAN, supra note 2, at 161.
60 Id. at 160.
61 A weakness in Kronman's argument is that thinking like a judge is likely to have less effect on lawyers than the more common pattern of their work—thinking from the perspective of client financial interests. Generally, lawyers shift from the perspective of client interests to thinking from a judge's perspective briefly and then return to concern for client interests. Even when they think about a case from a judge's perspective, they do so to prepare to convince the judge to decide for their client. Lawyers' civic mindedness more likely comes from virtues that they learn at home, synagogue, and church than as a by-product of their training and roles as advocates.
62 Id. at 112.
63 Id. at 115.
with it the dulling or displacement of earlier convictions and a growing appreciation of the incommensurability of values, changes of attitude that many experience as personally transforming.  

With the recognition of the "incommensurability of values," Kronman suggests that law students will become, at best, stoics, at worst, cynics.  

The most troubling aspect of Kronman's notion of practical wisdom is his suggested means of resolving cases involving "incommensurable values." He says, "what makes one judgment wiser than another when the alternatives cannot be measured on any common scale of value is its tendency to promote political fraternity . . . ." Kronman assumes (without showing) that there is no wisdom with which to choose between the alternatives. Kronman's lawyer-statesman has little to offer when confronted with difficult moral issues.  

One weakness in Kronman's notion of practical wisdom is that he isolates practical wisdom from the other virtues. In this respect, Kronman deviates substantially from Aristotle, on whom Kronman relies in other respects for his understanding of practical wisdom. For Aristotle, the virtue of practical wisdom (often translated "prudence") is inseparable from the exercise of the other virtues; practical wisdom is the ability to put moral virtues to good use. Aristotle said:

Prudence is intimately connected with Moral Virtue, and this with Prudence, inasmuch as the first principles which Prudence employs are determined by the Moral Virtues, and the right standard for the Moral Virtues is determined by Prudence.  

Aristotle also said, "Virtue ensures the rightness of the end we aim at, Prudence ensures the rightness of the means we adopt to gain that end."  

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64 Id. at 114-15.  
65 Id. at 118. However, the dogmatism of Christopher Langdell and the early law teachers and the relativism suggested by Kronman are not the only alternatives. Much depends on the professor's emphasis. When discussing a legal issue with incommensurable positions, a professor can explore different sides of the debate and end with the hope that over time we will grow in our understanding of the issue. The history of some areas of the law shows moral progress. The hope, expressed by Glendon, that the common law will lead to good decisions, is more likely to stimulate moral idealism than Kronman's relativism.  
66 Id. at 97.  
67 Kronman cites Aristotle for the proposition that the wise person does not deliberate about things that are not subject to deliberation. See id. But, seen in context, this is not Aristotle's point. Aristotle says that we do not deliberate about things that we cannot affect. "We deliberate about things that are in our control and are attainable by action . . . ." ARISTOTLE, NICOMACHEAN ETHICS III.iii.6-7.1112a (H. Rackham trans., 1934); see also id. at VI.v.3.1140a. Contrary to Kronman's suggestion, Aristotle explicitly says that deliberation is employed "where the issue is indeterminate." Id. at III.iii.10.1112b.  
68 ARISTOTLE, supra note 67, at X.viii.3.1178a.  
69 Id. at VIxii.6.1144a; see also id. at VI.xiii.7.1145a. For Aristotle, the other virtues are not only the subject of practical wisdom's deliberation, they enable the actor to exercise practical wisdom.  

One aspect of the relationship between prudence and the other virtues may be captured, therefore, by saying that without other virtues like justice, temperance, and courage no true prudence is possible. [P]rudence requires that our action be in accord with the truth of things . . . . We must be just enough to see the proper claims of others, temperate enough that our vision is not clouded by pleasures of the moment, brave enough to adhere to what we see even when it does not work to our benefit. Without
A judge (or legislator or citizen) who sought to resolve a public (or private) issue based on Aristotle's notion of practical wisdom would bring the other virtues to the deliberation. These virtues are likely to lead the judge (or legislator or citizen) to have something to say about what the state should do.

A surprising aspect of Kronman's book is that he has very little to say about the virtue of justice. He dismisses the notion of justice as "intractably controversial."\(^7竞\) Aristotle likely would have acknowledged that the notion of justice is "controversial," but would have disagreed that it is "intractably" so. Whereas Kronman makes practical wisdom the central virtue of the judge or lawyer, Aristotle puts justice at the center of his conception of the virtues, describing it as "the chief of the virtues" and the "perfect virtue."\(^71\) As to judges and justice, Aristotle says, "To go to a judge is to go to justice, for the ideal judge is so to speak justice personified."\(^72\)

Aristotle would also be likely to disagree with Kronman's notion of the incommensurability of values. As philosopher Martha Nussbaum has said, Aristotle "was not only the defender of an ethical theory based on the virtues, but also the defender of a single objective account of the human good, or human flourishing."\(^73\) This is illustrated in Aristotle's arguments concerning the law in *Politics*. Nussbaum summarizes those arguments:

[Aristotle argues that what human beings want and seek is not conformity with the past, it is the good. So our systems of law should make it possible for them to progress beyond the past, when they have agreed that a change is good. (They should not, however, make change too easy, since it is no easy matter to see one's way to the good, and tradition is frequently a sounder guide than current fashion.)

In keeping with these ideas, the *Politics* as a whole presents the beliefs of the many different societies it investigates not as unrelated local norms, but as competing answers to questions of justice and courage (and so on) with which all the societies (being human) are concerned, and in response to which they are all trying to find what is good. Aristotle's analysis of the virtues gives him an appropriate framework for these comparisons, which seem perfectly appropriate inquiries into the ways in which different societies have solved common human problems.

[. . . .]

[Aristotle presents] a sketch for an objective human morality based upon the idea of virtuous action—that is, of appropriate functioning in

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the other virtues, moral knowledge, the insight into proper ends and means of action which prudence provides, cannot be had.

Nussbaum, *supra* note 6, at 33.


Aristotle, *supra* note 67, at V.15.1129b. Aristotle's description of justice is familiar. He divided it into distributive justice—the distribution of the assets of a community based on desert—and corrective justice—the restoration of the status quo when one wrongfully takes from another. *Id.* at V.ii.12-vi.4.1130b-1134a.

Aristotle would have acknowledged that the best we can attain might be a rough sense of justice. "[A] good deliberator in general is a man who can arrive by calculation at the best of the goods attainable by man." *Id.* at VI.vii.6.1141b.

each human sphere. The Aristotelian claim is that, further developed, it will retain virtue morality’s immersed attention to actual human experiences, while gaining the ability to criticize local and traditional moralities in the name of a more exclusive account of the circumstances of human life, and of the needs for human functioning that these circumstances call forth.  

Note the similarity between Aristotle’s notion of the way that law should develop and Mary Ann Glendon’s description of the dialectical reasoning that she finds at the heart of the common law method. Glendon says that when a judge is confronted with a difficult issue, he or she “can’t be sure of being right, but it is crucial to keep trying to reach better rather than worse outcomes.” Neither Aristotle nor Glendon take the position that judges necessarily will (or even that they are likely to) get the answer right. But they assume that there is a good answer for which judges (and citizens) can strive.

Confronted with many of today’s social problems, one might tend to agree with Kronman that discussions of justice are “intractably controversial,” and that the best we can hope for is “political fraternity.” In the present, it often is difficult to identify the good, but from the perspective of history we can see examples of people discovering it. Aristotle taught that we can learn the virtue of “practical wisdom by studying persons to whom we attribute it.” In considering the notion of incommensurable values, political fraternity, and practical wisdom, it may be helpful to consider one of Kronman’s primary examples of the lawyer-statesman, Abraham Lincoln.

Lincoln, of course, was confronted with whether slavery should be outlawed and, if so, where it should be outlawed. In addressing this issue, he was confronted with the incommensurable arguments of slaveowners and abolitionists. For Lincoln, political fraternity was an important value—many admire him for his attempts through political compromise to hold

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74. NUSSBAUM, supra note 6, at 38-39. Hopefully, we are growing in our understanding of justice, and have grown beyond Aristotle, who said that there could be no injustice between slave (a chattel) and owner. ARISTOTLE, supra note 67, at V.vi.8.1134b.

75. See supra text accompanying notes 31-32.

76. GLENDON, supra note 3, at 238; see also KRONMAN, supra note 2, at 175-76.

77. Glendon might also suggest that citizens at the ballot box, rather than judges, should resolve the incommensurable questions that we face. See supra text accompanying notes 34-37.

78. ARISTOTLE, supra note 67, at Book VI.

79. [The lawyer-statesman ideal] has had distinguished representatives in every age of American law. Lincoln, for example, was one. 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 where the balance between principle and expediency must be struck.

KRONMAN, supra note 2, at 3.

As to the issue of democracy vs. judicial activism, Glendon might point out that Lincoln acted as lawyer-statesman in a legislative and executive capacity, at times fighting the work of an activist Supreme Court. See supra text accompanying notes 35-38 (discussing democracy v. judicial activism). In Dred Scott, the Supreme Court held, with no authority in constitutional text, that citizens had a right to hold slaves and that descendants of African slaves could not be citizens. See GLENDON, supra note 3, at 114-16 (citing Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856)). For an account of the fight of Lincoln and others against the Dred Scott decision, see STEPHEN B. OATES, WITH MALICE TOWARD NONE: THE LIFE OF ABRAHAM LINCOLN 143-46 (1977).
the union together prior to the war; he was willing to allow slavery to remain in the states where it existed, believing that, if isolated, it would eventually be abolished through persuasion. But the most widely shared admiration for Lincoln is for his unwillingness to concede the issue of slavery; he was unwilling to allow it to expand into other states, believing that if it expanded, it would eventually be accepted everywhere.

If confronted with the issue of slavery in the mid-1800s, one seeking political fraternity might have gone the route of Stephen A. Douglas, who sought to allow individual states to determine whether they would allow slavery or not, or the route of the U.S. Supreme Court in the Dred Scott decision, which allowed slave owners to choose whether or not to free slaves. But Lincoln brought more than a desire for political fraternity to the great moral issue of his time. He brought a desire for justice and the courage to stand for it. His stand may have cost us political fraternity; it probably led to the Civil War, but most today would agree that he was in the right.

This is not to suggest that moral discernment is easy. There was great disagreement over the issue of slavery in Lincoln's day. I do not know what insight people will have 135 years from now about what seem to be the incommensurable values of our time. But if we make decisions about such issues based on a desire for political fraternity, we will not grow in moral insight. Lincoln did the best that he could to discern the right in light of what he could see at the time. Such insight is an important—possibly the most important—excellence of the lawyer-statesmen.

III. VIRTUES AND THE RULES OF THE PROFESSION

One of the most striking things about Kronman's and Glendon's books on the legal profession is that neither of them calls for the adoption of new professional rules. They call for lawyers to exercise virtues. Their position can be contrasted to the response of the organized bar to the last highly publicized crisis in the legal profession—the one following the Watergate break-in and cover-up. The Watergate disclosures generated a lot of activity on the part of the organized bar that was designed to clean up the legal profession. The American Bar Association adopted a new set of professional rules, law schools required the study of professional responsibility, and states required that lawyers pass a special professional responsibility exam. In this section, I will (1) examine the ways in which the new lawyer rules have increased the regulation of lawyers; (2) suggest that virtues are more important than rules; (3) suggest that the focus on the rules has been at the expense of attention to virtues and, therefore, has been counterproductive, and (4) discuss the possibility of teaching virtues.

80 See Oates, supra note 79, at 41.
81 Id. at 155-58.
82 Id. at 121-39.
83 See supra note 79.
A. The Growing Regulation of the Legal Profession

The American Bar Association on three occasions has established a set of rules for the legal profession. In 1908, the ABA produced the Canons of Professional Ethics; in 1969, the Model Code of Professional Responsibility; and in 1983, the Model Rules of Professional Conduct. Each set of rules has increased the regulation of, and decreased the discretion of, lawyers. This has occurred in three ways. First, there has been a tremendous growth in the volume of rules that regulate lawyers. In a recent compilation of lawyer codes the 1908 Canons occupied 12 pages; the 1969 Model Code, 78 pages; and the 1983 Model Rules, 106 pages.\(^8\)

But the changes have been more than a matter of volume. A second way in which the ABA has imposed greater regulation on lawyers is that the content of the codes has moved from ethical guidance to mandatory rules. The 1908 Canons were almost entirely hortatory. Almost all of the Canons began: “Lawyers should. . . .” The 1969 Code was divided into “Ethical Considerations” which were hortatory in nature (they attempted to define the good lawyer) and “Disciplinary Rules,” the violation of which would subject a lawyer to discipline (they attempted to define the bad lawyer). The Model Code gave the Ethical Considerations priority; within subject areas, the Ethical Considerations were listed before the Disciplinary Rules and they were given more space than the Disciplinary Rules.\(^8\) The 1983 Model Rules dropped the aspirational standards.\(^6\) With a few exceptions,\(^7\) the Model Rules consist entirely of rules with which lawyers must comply. The drafters of the Model Rules gave up on defining the good lawyer; they define only the bad lawyer.

A third way in which the new codes provide greater regulation of lawyers is that they more narrowly confine the discretion of lawyers. For example, consider the rule defining when a lawyer may reveal the intent of a client to cause harm to another. The 1908 Canons had no rule concerning confidentiality; whether to reveal the intent of a client to cause harm to another was left to the lawyer’s ethical judgment (at least as far as the ABA Canons were concerned). The 1969 Code imposed a duty of confidentiality, but provided that a lawyer “may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime.”\(^8\) The 1983 Model Rules provide that a lawyer may reveal confidential information “to prevent the client from committing a criminal act that the law-


\(^{85}\) Of the seventy-eight pages of the 1980 Code in one compilation, approximately forty-four pages were Ethical Considerations and thirty-four were Disciplinary Rules. See \textit{id.}

\(^{86}\) \textit{GLENDON}, \textit{supra} note 3, at 79.

\(^{87}\) There are a few exceptions. Model Rule 2.1 encourages (but does not require) lawyers to counsel clients concerning the non-legal implications of their decisions. \textit{MODEL RULES OF PROFESSIONAL CONDUCT} Rule 2.1 (1983). Model Rule 6.1 encourages lawyers to devote some time to \textit{pro bono} work. \textit{id.} at Rule 6.1.

\(^{88}\) \textit{MODEL CODE OF PROFESSIONAL RESPONSIBILITY} DR 4-101(c)(3) (1980).
yer believes is likely to result in imminent death or substantial bodily harm. . . 

Note that each succeeding code has given less discretion to lawyers. Formerly, a lawyer could reveal the intent of a client to cause any threatened harm. Now, a lawyer may only reveal the intent to commit crimes that are likely to result in imminent death or substantial bodily injury. Lawyers may not disclose crimes likely to cause mere moderate bodily injury, severe psychological harm, or substantial financial loss.

Under the earlier codes, a lawyer whose client expressed the intent to commit a crime of any sort might wrestle with whether to reveal that intent. Such struggle might deal with questions of the seriousness of the client’s intent, the importance of client loyalty, and the level of injury likely to occur to the third party. The lawyer had the option of threatening to disclose the client’s intent. Under the recent codes, however, the lawyer has little discretion.

This recent tendency to limit lawyer discretion is also illustrated in those jurisdictions that attempt to protect the interests of potential client victims. Some jurisdictions have rejected the Model Rule concerning the client’s intent to commit a crime. Florida and Virginia require lawyers to reveal the intent of a client to commit any crime, and another ten jurisdictions require a lawyer to reveal the intent of a client to commit a crime likely to result in death or bodily injury. Some states prohibit lawyers from revealing information, some states require lawyers to reveal information; both groups narrow the discretion of the lawyer.

B. Virtues More Important Than Rules

I will argue in the next section that the narrowing of lawyer discretion undercuts the development of virtues in lawyers. But first, I will suggest that virtues are more important than rules in the practice of law. Tocqueville suggested that in maintaining a democratic republic, law is secondary in importance to the mores and practices of a people. Unless the law is to become incredibly intrusive, it must rely on voluntary moral behavior. Voluntary moral behavior by lawyers may be even more important than voluntary moral behavior on the part of citizens generally, because so much of what lawyers do goes on behind closed doors (including the door of confidentiality). Rules are unlikely to provide an effective threat of sanction when neither lawyer nor client wants to reveal what they do. As a practical matter (as a matter of practical wisdom) we must rely on lawyers to exercise virtues in the law office.

An additional weakness with rules, relative to virtues, is that in many situations, rules require the wrong behavior. Rules can deal with some fact

91 See Glendon, supra note 3, at 274 (quoting Alexis de Tocqueville, Democracy in America 287, 315 (J.P. Mayer ed. & George Lawrence trans., 1969)).
92 For example, Model Rule 1.2(d) provides that lawyers may not encourage clients to engage in illegal conduct. It is unlikely that a client would report a lawyer for such action. In this and many other situations rules will not work very well. See infra text accompanying notes 86-88.
situations, but there often will be variations in facts that call for different answers. Variations in facts will alter what a moral person would do. Drafters of rules, of course, may recognize this and create exceptions to rules (this, in part, explains the tremendous growth in the size of the lawyer codes), but there always will be other circumstances that are not anticipated by drafters.

This problem, of course, is not limited to rules that regulate lawyers. Courts face such problems when they try to establish rules of reasonable care for all sorts of activity. In Pokora v. Wabash Railway Co., Justice Cardozo found that the Supreme Court had made an error seven years earlier in trying to define the duty of someone approaching a train track in a vehicle. Cardozo found that there are too many potential fact variations to make a rule practical. Cardozo required merely that motorists act reasonably when approaching an intersection.

Many problems that confront lawyers are likely to be far more complex than the question of what to do when approaching a railroad intersection. The actions of lawyers are likely to affect many people, including clients, clients' family members, officers of corporations, workers, shareholders, victims of criminal offenses, victims' families, judges, jury members, other attorneys, the public, and future generations. Responsibilities to all of these people may pull the lawyer in different directions. Rules do not work well in cases in which risks of different sorts arise to so many different people.

One such problem is whether a lawyer should give a client legal information that might enable the client to violate the law. Stephen Pepper identifies seven distinctions that a lawyer should consider when determining whether to give a client such information, but he acknowledges that they often will not be determinative. He concludes:

Moral questions are often too complex and multifaceted to lend themselves to rule-bound solutions. But if basic premises, legal rules, and the analysis of relevant factors are not determinative, where does the lawyer turn? . . . What provides her with a moral base from which to engage in dialogue and counseling with the client? The neo-Aristotelian under-

93 I am not suggesting here that there are not right and wrong answers to the questions that lawyers confront, but that factual changes in a situation may change the appropriate answer. Aristotle's teaching on virtues presents the notion that there is an objective moral reality, but that what one should do will vary with the circumstances. As Martha Nussbaum has said:

... [A]ristotelian particularism is fully compatible with Aristotelian objectivity. The fact that a good and virtuous decision is context-sensitive does not imply that it is right only relative to, or inside, a limited context, any more than the fact that a good navigational judgment is sensitive to particular weather conditions shows that it is correct only in a local or relational sense. It is right absolutely, objectively, from anywhere in the human world, to attend to the particular features of one's context; and the person who so attends and who chooses accordingly is making, according to Aristotle, the humanly correct decision, period. If another situation ever should arise with all the same morally relevant features, including contextual features, the same decision would again be absolutely right.

Nussbaum, supra note 6, at 45.

94 292 U.S. 98 (1934).
95 Id. at 106 (limiting Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66 (1927)).
96 See Pepper, supra note 7, at 1554-87.
97 See id. at 1607.
standing of ethics is attractive here, for it appears to provide descriptively accurate answers to such questions. This understanding suggests that both the lawyer's moral intuition and her choices after analytic refinement and education of that intuition will be determined by her character. Moral perception and decision making are determined not primarily by rules or principles, not primarily by cognitively processed analytic choices, but primarily by character. Moral character in turn is made up of habits of moral perception and conduct.98

Another example of a problem that does not lend itself to resolution by rules is whether a lawyer should disclose confidential information. A lawyer learns that her client has beaten a young girl and left her in a coma to die,99 that a corporation is causing pollution that is likely to cause the deaths of several hundred people 50 years from now, that her client intends "to trick an elderly couple into conveying their family farm of forty years to the client,"100 that the opposing party is suffering from a potentially fatal condition of which the opposing party is unaware,101 or that someone is about to be put to death for a crime that the lawyer's client committed. In all these cases, a moral person might conclude that the interests of others justify disclosure of the confidential information, and yet a lawyer who did so would be in violation of the current professional rules. The wise exercise of virtue is likely to lead to better decisions than rigid adherence to rules.

My purpose here is not to propose an answer to the issues that arise in any of these situations—that would be to suggest a rule—but to suggest that any rule will be unlikely to provide a morally satisfactory answer to all of the complex problems that arise. I do not mean to suggest that virtues provide an easy answer to these problems. But virtues do give people (even lawyers) a basis for determining what they should do in complex situations. In these cases, what is needed is prudent consideration of the implications of loyalty, justice, mercy, and truthfulness under the facts the lawyer confronts.

C. Over-Regulation Undercuts Virtues

From a virtues perspective, rules have a place; rules provide minimum standards, and they can teach and reinforce moral behavior. We are formed in the virtues by obedience to sound rules. But over-regulation and over-emphasis on rules can be damaging to virtues in several respects.102

First, in some circumstances, rules may call on lawyers to do things that are wrong. As noted previously, a change in facts may justify a different answer than that provided by rules. A rule may give a lawyer the diffi-

98 Id. at 1607-08.
99 The hypothetical is based on People v. Belge, 372 N.Y.S.2d 798 (Onondaga County Ct. 1975).
102 For a thoughtful discussion of this problem, see Loder, supra note 100. The title of Loder's article suggests a helpful analogy: Tighter Rules of Professional Conduct: Saltwater for Thirst? Id. at 311.
cult choice of breaking the rule or disobeying his or her conscience. In the examples suggested above (the victim that is still breathing, the toxic pollutants, the innocent prisoner scheduled for execution) a lawyer who revealed the confidence would be guilty of a violation of the lawyer's rules. There are enough incentives to keep quiet in such situations. We do not need the threat of bar discipline as an additional incentive for lawyers to disobey their consciences.

Second, rules undercut the development of virtues. When people merely obey a rule, they do not exercise virtues. We learn virtues by exercising them. We prepare to face big moral challenges by facing little moral challenges, just as an athlete prepares to run a marathon by running shorter distances. If we merely obey rules, we not only fail to develop the skill of deciding what is right, our moral sense will atrophy.

Finally, excessive attention to rules (legal or moral) can be at the expense of attention to virtues. The examinations on professional responsibility that states required following Watergate focus entirely on lawyer disciplinary rules and legal malpractice. These exams encourage students to focus their study (and professors to focus their teaching) on the rules. Focus on the rules comes at the expense of a focus on character. It may be that so much attention is paid to the rules that they are becoming the only standards of the profession; they are becoming the norm. If rules of lawyer discipline and malpractice are the only limit on what lawyers and clients do, we are in trouble.

D. Teaching Virtues

I am not suggesting that we do away with or weaken the rules of the profession. With the lack of attention to virtues, the rules may be all that we have. Given the current dominance of the adversary mentality among lawyers, fewer rules might merely provide more room for lawyer advocacy. My suggestion is that we need to look for ways to teach and encourage virtues in lawyers. Lawyers need to see client loyalty as a virtue, but they also need to give weight to the other virtues that come into play in legal representation: truthfulness, justice, and mercy.

The complaint is occasionally raised that students come to law school with their values already established and that law schools cannot teach them ethics. But it is my sense that law students leave law school with different values than those when they entered. They learn values. For example, they leave law school with much more of a rights ethos than that with which they enter law school. The case method, as demonstrated by Kronman, also affects moral values, with both ethical benefits and costs. Law schools teach values; we need to pay more attention to the values that we teach.

Some factors cut against the possibility of teaching virtues to law students and lawyers; others cut in favor of it. The large class that is the typi-

104 See supra notes 62-67 and accompanying text.
cal forum for law school teaching and continuing legal education does not create a good opportunity for teaching virtues. Large classes may be an effective forum for teaching rules, but they are not an effective forum for teaching virtues.

A person learns virtues best in a one-on-one relationship with a mentor, observing the mentor exercising virtues and exercising virtues under the direction of the mentor. Virtues are more likely to be "caught than taught." Not long ago, mentoring was the common method of training young associates in law firms, but as Glendon argues, such training is becoming increasingly uncommon today. In England, the pupilage system offers barristers-in-training an opportunity to learn virtues in the practice of law. They go through a one year pupilage following law study, six months observing the mentor and six months practicing under the supervision of the mentor. In the United States, the growth in clinical legal education in law schools may offer the opportunity for training in virtues, and we should seek more opportunities for such training. But, of course, training in virtues, under the partner-associate, the pupil master-pupil, or the clinical education teacher-student relationship will only be as good as the virtues that are demonstrated and reinforced by the mentor.

A factor that may help in the teaching of virtues is that virtue ethics are consonant with the values that many students learn before they get to law school—the values that most of us learn in our homes, churches, and synagogues. We learn virtues from the stories that we hear as children. With most students, there is a foundation on which law teachers can build.

Proponents of virtue ethics suggest the study of literature as a part of moral education. The current pattern of most professional responsibility classes is to study moral villains—lawyers who have violated the professional or malpractice rules. It might be that professional responsibility courses should focus on stories about lawyer heroes. The Glendon and Kronman books might also be a helpful course of study in professional responsibility courses. They make the case for returning to virtues.

IV. VICES, HABITS, AND THE PRACTICE OF LAW

A final insight from virtue ethics is a troubling one for lawyers, but it may shed some light on the ethical crisis of the profession. Virtue ethics teach that the moral life, both virtues and vices, is largely a matter of habit. As Kronman argues, some of the habits of lawyers develop and reinforce virtues, but it may be that others develop and reinforce vices.

106 See, e.g., Bennett, supra note 8.
107 See, e.g., Kronman, supra note 2, at 385 (citing Martha C. Nussbaum, Love's Knowledge: Essays on Philosophy and Literature 148-67 (1990)).
109 For example, he argues that the habit of viewing things from a judicial perspective leads lawyers to be more civic-minded. See supra note 59 and accompanying text.
One of the underlying assumptions of the adversary system (and the recent lawyer codes) is that lawyers are not responsible for what they do.\textsuperscript{110} Under the adversary system, lawyers do things that intuitively seem to be wrong, things that violate ordinary morality. For example, the practice of law commonly involves some level of deception, much of it allowed (some would say required) by the rules of the profession. Lawyer advocacy classes teach that lawyers should do their utmost to convince juries that they believe in their cause; that lawyers should do what they can to keep out damaging testimony, even if truthful (maybe especially if truthful); that lawyers should do what they can (within the bounds of the law) to keep the other side from gaining access to damaging evidence; that lawyers should make arguments to judges based, not on what they believe the law should be, but on the interpretation of the law that is in the client's interest; and that in negotiations lawyers should lie about their and their clients' true valuation of claims.

There are two justifications for such advocacy. One is instrumental—in litigation, if both sides have aggressive advocates, they will present the best possible case and judges and juries will be able to make wise decisions.\textsuperscript{111} The other is deontological—advocacy protects the autonomy of the client.\textsuperscript{112} My purpose here is not to question whether the advocacy system yields justice and protects autonomy (though I have done so elsewhere).\textsuperscript{113} For present purposes, I will assume that such advocacy is justified. My purpose here is to explore what virtue ethics might say about the effects of such advocacy on a lawyer.

From a virtues perspective, a system such as the adversary system, which requires lawyers to do things that seem intuitively wrong (whether they are wrong or not) carries moral risk. The moral life is largely a matter of habits (good and bad). A lawyer who is deceptive to juries or to opposing lawyers today is likely to be deceptive to clients,\textsuperscript{114} judges, partners, family, and friends tomorrow.

An advocate of a principles ethics approach might argue that the adversary system need not create such a risk. Advocates of principles ethics suggest that the moral life is a matter of choices; there is no reason that a choice to be deceptive today (when the rules justify deception) will affect a choice tomorrow (when the rules do not justify it). As a matter of principles ethics, the advocacy role, and the deception that may accompany it, merely make the moral code more complex—one must learn more exceptions to rules—and a smart lawyer can learn them. But the lesson of virtue ethics is that actions today have an effect on character; virtues and vices are habits. Virtues ethics would recognize that on occasion, ethics is a matter

\textsuperscript{110} See, e.g., Murray Schwartz, \textit{The Professionalism and Accountability of Lawyers}, 66 CAL. L. REV. 669, 673 (1978) ("When acting as an advocate for a client... a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved.").


\textsuperscript{113} See Shaffer & Cochran, supra note 7, at 9-12, 18-29.

\textsuperscript{114} One aspect of the lawyer crisis is what appears to be a fairly common practice of over-billing clients. See, e.g., William G. Ross, \textit{The Ethics of Hourly Billing by Attorneys}, 44 Rutgers L. Rev. 1, 15 (1991).
of making right choices, but generally ethics is a matter of exercising right habits.

This is not to suggest that a lawyer following virtue ethics will never be deceptive. The virtue (habit) of practical wisdom will lead one to do different things in different circumstances. Faithfulness as well as truthfulness is a virtue; confronted with a deceiver, deception might yield a rough approximation of justice. But the insight of virtue ethics is that there are risks; deception can become a way of life.

The ethical issues for lawyers can be demonstrated with an illustration from the life of Dietrich Bonhoeffer, the pacifist Lutheran pastor who joined a plot to kill Adolph Hitler. (Bonhoeffer was executed for his involvement.) While working for the resistance, Bonhoeffer said:

We have learnt the art of deception and of equivocal speech. Experience has made us suspicious of others and prevented us from being open and frank. Bitter conflicts have made us weary and even cynical. Are we still serviceable? It is not the genius that we shall need, not the cynic, not the misanthropist, not the adroit tactician, but honest, straightforward men. Will our spiritual resources prove adequate and our candor with ourselves remorseless enough to enable us to find our way back again to simplicity and straightforwardness?¹¹⁵

Note several things about Bonhoeffer's experience. First, the decision to assist in the plot to kill Hitler put some of the virtues in tension with others. Some virtues would support participation in the plot (justice, mercy toward the oppressed, courage); others would not (truthfulness, mercy toward Hitler). Virtues also often pull an attorney in different directions when faced with decisions during representation. The virtue of practical wisdom enables one to consider all of the virtues in making a decision.

Second, in the section quoted above, Bonhoeffer notices the moral cost to himself and his comrades—he notices that what they do may become a habit. Deception or harming others, even in a good cause, even when it is the best decision, may become a habit. If our work as attorneys calls on us to do what in other circumstances would be wrong, the danger is that it will become a habit. Unlike Bonhoeffer's rigorous Lutheran moral theology, the lawyer codes and most professional responsibility materials give us no sense that danger accompanies the things that they call on lawyers to do.

Third, Bonhoeffer deliberated before his decision (this deliberation itself was, no doubt, a habit). His decision was the result of exercising practical wisdom, not merely the application of a set of rules. Even if we go the wrong way when applying the virtues (and I do not mean to suggest that Bonhoeffer was wrong) the practice of wrestling with the virtues and exercising the virtue of practical wisdom will strengthen us for future problems. Merely obeying rules (e.g., lawyer professional rules) that call on us to do what we sense may be wrong may be especially likely to create bad habits, for we need not wrestle with our decisions. Actions (such as deception) are

¹¹⁵ MEILAENDER, supra note 6, at 10 (quoting DIETRICH BONHOEFFER, PRISONER FOR GOD: LETTERS AND PAPERS FROM PRISON, 27 (1958)).
more likely to become habits when they are taken in obedience to rules than when they are the product of the exercise of virtues.

Finally, because Bonhoeffer recognizes the moral dangers that he and his comrades confront, he is able to ask whether they will be able to overcome those dangers. He asks, "Will our spiritual resources prove adequate and our candor with ourselves remorseless enough?" Lawyers do not often ask such questions in professional responsibility classes and at bar association meetings. It may be that we are unaware of the problem.

V. Conclusion

Kronman and Glendon do not suggest solutions to the problems of the legal profession. They provide thoughtful pictures of the history and the current status of the profession. These books can help us to attain a virtue which Alasdair MacIntyre identifies as "having an adequate sense of the traditions to which one belongs or which confront one." He says:

This virtue is not to be confused with any form of conservative antiquarianism. . . . [A]n adequate sense of tradition manifests itself in a grasp of those future possibilities which the past has made available to the present.116

Kronman and Glendon provide the sort of insight into our legal tradition that may enable us to see the possibilities that are available to us. I commend their books to lawyers and to professional responsibility classes. With their focus on character and virtues, they point us in the right direction.

116 MacIntyre, supra note 6, at 223.