

Recovering the Lost Lawyer

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In his thoroughgoing, insightful study of the changing ideals of the legal profession, *THE LOST LAWYER*, Anthony T. Kronman describes lawyers' evanescent professional identity as that of the "lawyer-statesman." He begins with J. Rehnquist's use of the term to refer to "wise and public-spirited lawyers" who contribute(d) to American political decisionmaking¹—a species exemplified by Thomas Jefferson and Abraham Lincoln² "that, if it has not totally disappeared, is at least disappearing."³ Noting that "few lawyers ever reached the level these hero lawyers occupied,"⁴ Kronman frames the lawyer-statesman as a once-cherished ideal—an authoritative model of professional excellence.

Kronman examines and regrets the loss of the lawyer-statesman ideal, because lawyers' striving to embody this ideal elevated the profession.⁵ Consider the ballet dancer or swimmer striving for perfect form: while one's performance ever may fall short of perfection, wholehearted commitment to its achievement can yield powerful results. As law schools, law firms, and courts lose sight of the lawyer-statesman ideal in favor of different objectives,⁶ Kronman sees us lowering the bar. In the closing chapter of *THE LOST LAWYER*, titled "Honesty and Hope," Kronman confesses that he has little hope that the next generation of lawyers "will begin the work of rebuilding what we have torn apart"⁷; his hope is that some will maintain this ideal and strive "to realize it in their own work,"⁸ thus saving themselves along with their profession's most precious assets.

Economically and culturally, the legal profession has followed the trajectory that Kronman identified twenty years ago. Now, a lawyer who reveres the rarefied

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1. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 11 (1993) (citing William H. Rehnquist, *The Lawyer-Statesman in American History*, 9 HARV. J.L. & PUB. POL'Y 537, 537-57 (1986)) [hereinafter *Lost Lawyer*].

2. William H. Rehnquist, *The Lawyer-Statesman in American History*, 9 HARV. J.L. & PUB. POL'Y 537, 537, 546 (1986).

3. *Id.* at 537.

4. *Lost Lawyer*, *supra* note 1, at 12.

5. *Id.* at 5.

6. *Id.* Prof. Kronman provides a deep analysis of these institutions' turn away from the lawyer-statesman ideal under economic and cultural pressures in Part II.

7. *Id.* at 381.

8. *Id.*

lawyer-statesman ideal may feel alienated by the pressure in her legal education to focus on becoming task-proficient rather than on developing the intellectual and affective skills of deliberation,⁹ and by the bottom-line-driven culture in her law firm that urges her to forget that she is an officer of the court.¹⁰ Her situation is analogous to that of a botanist conserving the seeds of a vanishing orchid in the hope that its ecosystem one day may be restored;¹¹ she may contribute to the appropriate nonprofit organizations, but otherwise be unsure as to how to make the world right except by trying to conform her own practice to this privately held ideal. Her performing as an officer of the court even when such performance seems immaterial or is discouraged may be so exceptional as to be considered heroic.¹² Until lawyers like this and their supporters can reshape the legal profession so that the lawyer-statesman ideal is valued while the profession's newly developing diversity is maintained, the keepers of the ideal will be marginalized.

Just as we cannot and would not want to return to the socioeconomic structure of the nineteenth century, the legal profession cannot be restored in a literal sense to its condition before advances in civil rights for women and minorities,¹³ and before globalization. Like the restoration of a natural ecosystem, the restoration of the social ecosystem in which the lawyer-statesman ideal thrives can only be achieved by moving forward in a way that re-establishes and sustains "those essential . . . characteristics that defined" the professional identity of the lawyer in terms of the endangered ideal.¹⁴

9. *Lost Lawyer*, *supra* note 1, at 15 ("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."); *see also* Rakesh K. Anand, *Resisting Commercialism*, 40 FORDHAM URB. L.J. 369 (2012) ("[A] focus on 'practice-ready' skills is problematic. It is an error to believe that law schools could create a competent practitioner in three years. Except for the most rudimentary matters, the practice of law is far too complex to master in such a short period of time. The knowledge, technical ability, judgment, and cultural competence required to practice successfully, simply at a basic level, takes several years post-graduation to acquire.").

10. Deborah M. Hussey Freeland, *What Is a Lawyer? A Reconstruction of the Lawyer as an Officer of the Court*, 31 ST. LOUIS UNIV. PUB. L. REV. 425, 486-87 (2012) [hereinafter *What Is a Lawyer?*].

11. Kew Royal Botanic Gardens, *Ex-Situ Conservation of Madagascar's Endangered Orchids*, at <http://www.kew.org/science-conservation/research-data/science-directory/projects/ex-situ-conservation-madagascars> (last visited Mar. 20, 2014).

12. Alice Woolley & W. Bradley Wendel, *Legal Ethics and Moral Character*, 23 GEO. J. LEGAL ETHICS 1065 (2010).

13. *Lost Lawyer*, *supra* note 1, at 39 ("[I]t seems possible to save the most attractive features of Aristotle's political philosophy while avoiding his disturbing claim that certain human beings are by nature unfit for politics and ought to be excluded from it. Hardly anyone now accepts this last idea in the strong form in which Aristotle defended it.").

14. Deborah M. Hussey Freeland, *Maieusis Through a Gated Membrane: "Getting the Science Right" in Public Decisionmaking*, 26 STAN. ENVTL. L.J. 373, 430 (2007) (analyzing the analogous meaning of "restoration" under the Comprehensive Everglades Restoration Plan pursuant to the Water Resources Development Act of 2000).

Kronman is heartened by the diversification of the legal profession even as he laments the loss of the lawyer-statesman ideal. This paper argues that the transformation of the legal profession through diversification—and specifically through the inclusion of women—can be conducted in such a way as to instill the core values of the lawyer-statesman ideal in a new generation of lawyers. Part II focuses on the core values of the lawyer-statesman ideal. Part III compares these values with those that are theoretically expected and empirically found to be inculcated through feminine socialization. Part IV indicates how the culture that sustains the lawyer-statesman ideal may be realized in the legal profession through the work of scholars and policymakers to reform the workplace to accommodate both new parents and an aging population, and through the work of young lawyers specifically to reclaim balance in their lives from the billable-hour-driven law firm culture that Kronman describes. Efforts to allow both men and women to participate meaningfully in the domestic sphere, and both senior citizens and young adults to contribute to the workforce, not only promote each person's well being and ability to engage in the community, but also advance each person's development through a broader range of experiences and opportunities to attain the practical wisdom that is at the heart of the lawyer-statesman ideal. Policies that allow both men and women to participate fully at home, in their communities, and in their work do more than promote individual health and development: they offer real hope of restoring the dignity and stature of the legal profession.

I. The Lawyer-Statesman at Heart

In discussing advocacy, Kronman reminds us that “even the most zealous advocate . . . is an officer of the court, a public official expected to share the judge's civic-minded devotion to the law.”¹⁵ Devotion to the public good is a trait of—but does not exhaust—the lawyer's identity as an officer of the court. This Part sketches the qualities at the heart of the lawyer-statesman ideal. As the next Part demonstrates, these qualities are also found at the core of the lawyer's professional identity as an officer of the court.

A. Judgment

Central to Kronman's lawyer-statesman ideal is excellent judgment. Judgment¹⁶ is the critical mental faculty that enables one to form an opinion¹⁷ or belief. This definition suggests that judgment applies to matters of opinion as distinct from matters of fact: if the issue in question is a matter of opinion, then it is “a disputable point” for which no single solution can be shown necessarily

15. *Lost Lawyer*, *supra* note 1, at 153 (internal citation omitted).

16. Oxford English Dictionary Online, *judgment*, n., 8.a (1901). Because the Oxford English Dictionary connects the historical and current definitions of our words and indicates the trajectory of their usage, it seems an apt companion to Kronman's analysis.

17. Oxford English Dictionary Online, *opinion*, n., 1 (3d ed. 2004).

to be correct.¹⁸ Then, solving an algebraic equation requires technical skill but not judgment, whereas the problems of how to care for aging parents¹⁹ or how to prioritize political objectives²⁰ do require judgment—the ability to decide among incommensurable values.²¹ Kronman thus distinguishes judgment from utilitarian calculation among fungible values, pointing out that deeper debates requiring judgment among incommensurable choices might be framed in such a way that decisionmaking appears to require calculation alone.²² This is like framing the classic example of a choice between apples and oranges—which is incommensurable by hypothesis—as a quantitative calculation among fungible fruits. An analogous rhetorical move occurs when a political debate is (mis)framed so that it appears to be entirely resolvable by scientific investigation, whereas its resolution requires not only scientific information but also political choice.²³ Judgment further extends beyond calculation among pre-existing choices to the normative determination of what the options themselves should be.²⁴

B. Deliberation and Character

On Kronman's view, excellent judgment flows from the ability to deliberate well.²⁵ To deliberate is to weigh and consider carefully the pros and cons of a course of action.²⁶ Kronman defines “the excellence of the person who deliberates well” as “practical wisdom,” and following Aristotle, regards practical wisdom as a character trait²⁷—indeed, as a virtue.²⁸ Thus, exceptional skill in deliberation is “fundamentally, a trait of character”²⁹ in that it involves not only technical knowledge and intellectual acumen but also the affective quality of uncommonly good common sense. This synonymy between deliberative skill and practical wisdom comports with our idea of wisdom as “soundness of judgement in the choice of means *and* ends; . . . sound sense, esp[ecially] in *practical* af-

18. *Id.* at 3.b.

19. *Lost Lawyer*, *supra* note 1, at 65.

20. *Id.* at 59.

21. *Id.* at 56.

22. *Id.*

23. Deborah M. Hussey Freeland, *Maieusis Through a Gated Membrane: “Getting the Science Right” in Public Decisionmaking*, 26 STAN. ENVTL. L.J. 373, 455 (2007) (showing that the question of the optimal water-level in a lake depends on the prior value judgment that determines what is to be optimized); Deborah M. Hussey Freeland, *Speaking Science to Law*, 25 GEORGETOWN INT’L ENVTL. L. REV. (2013) (noting that physicist Alvin Weinberg called these “trans-scientific” questions, which “‘science is inadequate [to answer] simply because the issues themselves involve moral and aesthetic judgments: they deal not with what is true but rather with what is valuable.’” (quoting Alvin M. Weinberg, *Science and Trans-Science*, 10 MINERVA 209, 213 (1972))).

24. *Lost Lawyer*, *supra* note 1, at 32-33.

25. *Id.* at 15 (“The lawyer-statesman is a paragon of judgment, and others look to him for leadership on account of his extraordinary deliberative power.”).

26. Oxford English Dictionary Online, *deliberate*, v., 1.a., 2.a,b (1895).

27. *Lost Lawyer*, *supra* note 1, at 41.

28. *Id.* at 52.

29. *Lost Lawyer*, *supra* note 1, at 15.

fairs.”³⁰ Further, the idea that deliberative capacity involves a trait of character finds support in our idea that to be “wise” is to have sound judgment *and* to be “disposed to act accordingly[.]”³¹

Like other character traits, deliberative excellence is shaped through education,³² so that the educated “knows what he ought to care about and actually cares about it.”³³ These proper professional sentiments that are cultivated forms of “[t]he elementary passions of attraction and disgust”³⁴ may be conceived as values. Kronman relates a community’s values to its identity, describing identity in terms of “commitments and goals its members consider basic to their common life.”³⁵ Analogizing the political to the personal, Kronman sees the choices that define personal identity as those that “put in question the deepest commitments that a person has”³⁶ and notes that they are most likely to be made among incommensurable possibilities that cannot be evaluated by a purely logical process. Decision among them involves the production of a value judgment. Kronman urges that even when the values associated with particular outcomes are incommensurable, there is nonetheless a distinct, identity-informing, integrity-promoting value in making a well-informed choice.³⁷

Kronman notes that the case method of legal education is particularly well suited to the task of helping law students to develop skill in deliberation because it places them in the position of the judge, “habituating [them] to the need for reasoned judgment under conditions of maximum moral ambiguity, and . . . giving them practice at rendering such judgments themselves.”³⁸ Professional formation continues through legal practice; accordingly, lawyers “may reasonably expect their professional experience to promote that virtue [of practical wisdom] in more than ordinary measure”³⁹—as long as their practice requires them to provide advice “about the ends a client ought to choose, as opposed to the means for reaching ends already chosen”—that is, to provide deliberative rather than merely technical advice.⁴⁰

30. Oxford English Dictionary Online, *wisdom*, n., 1.a. (1926) (emphasis added).

31. Oxford English Dictionary Online, *wise*, adj., 1.a. (1926).

32. See, e.g., Neil Hamilton & Verna Monson, *Legal Education’s Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student’s Professional Formation (Professionalism)*, 9 U. ST. THOMAS L.J. 325 (2011); Carole Silver et al., *Unpacking the Apprenticeship of Professional Identity and Purpose: Insights from the Law School Survey of Student Engagement*, 17 J. LEGAL WRITING INST. 373 (2011).

33. *Lost Lawyer*, *supra* note 1, at 41.

34. *Id.*

35. *Id.* at 60.

36. *Id.* at 66.

37. *Id.* at 87.

38. *Lost Lawyer*, *supra* note 1, at 117.

39. *Id.* at 52.

40. *Id.* at 290.

C. The Exercise of Independent Professional Judgment Forms the Lawyer's Professional Identity

The exercise of independent professional judgment—the ability of the lawyer-statesman to understand these choices and deliberate among them—depends on an attitude of “sympathetic detachment.”⁴¹ This attitude requires him to have the capacity to suspend his own values and worldview so that he can imagine what the options feel like to others with different values and perspectives. Kronman describes this capacity as one of “imaginative mimicking of commitments that is required to make sense of the experience of other people,” which in turn “demands . . . a certain measure of sympathy or compassion, in the literal sense of ‘feeling with.’”⁴² But this compassion has a limit: the lawyer-statesman stops short of adopting the considered value as his own, instead maintaining a distance from which he can survey all of the various incommensurable values that he must consider.⁴³ This distance also has a limit: if it becomes too great, the other may feel misunderstood or devalued.⁴⁴ The lawyer-statesman’s deliberation among values not his own is called “third-personal deliberation,”⁴⁵ and necessarily results in the lawyer-statesman’s independent assessment of how the other should proceed—not necessarily what the lawyer-statesman himself would do if he were applying his personal values, and not necessarily what the client thinks he should do—but the lawyer-statesman’s independent professional judgment.

The lawyer’s independent professional judgment is at the core of her function as an officer of the court.⁴⁶ Kronman adopts an Aristotelean view in which judgment occurs in the realm between matters that are “governed by necessity”⁴⁷ and those that are “utterly subject to chance.”⁴⁸ In this interstitial realm, though outcomes remain unpredictable, they are nonetheless influenced by our decisions to some extent.⁴⁹ This view of judgment is appropriate to the judge’s task of filling in the gaps between general, one-size-fits-all laws and the specifics of the case before him.⁵⁰ This view of judgment is also appropriate to the lawyer who assists the judge in the administration of justice by considering how the private ends of a client may harmonize with the public ends manifest in the law.⁵¹

In general, at the individual level one’s choices among incommensurable values contribute to that person’s identity.⁵² In particular, the choices that an in-

41. *Id.* at 99.

42. *Id.* at 70.

43. *Lost Lawyer*, *supra* note 1, at 71.

44. *Id.* at 57.

45. *Id.* at 130.

46. *What Is a Lawyer?*, *supra* note 10, at 458.

47. *Lost Lawyer*, *supra* note 1, at 40.

48. *Id.* at 41.

49. *Id.*

50. *What Is a Lawyer?*, *supra* note 10, at 445-47.

51. *Id.* at 458.

52. *Lost Lawyer*, *supra* note 1, at 65.

dividual lawyer makes in deciding how to counsel the client or how to argue to the judge determine that lawyer's own professional identity;⁵³ how the lawyer deploys her independent professional judgment determines whether and how she maintains her professional integrity and in so doing, serves the common good. At the level of the state, through deliberation from a perspective of sympathetic detachment, the statesman helps his community maintain its integrity in the face of decisions among incommensurable values that bring its identity into question, and in so doing serves the common good.⁵⁴ In the intermediate context of the legal profession, the ideal of the lawyer-statesman shaped its values and identity.⁵⁵

II. The Latent Lawyer-Statesman

Analysis of the formation of the lawyer's professional identity as an officer of the court and her socialization to the legal profession resonates with Kronman's analysis of the lawyer-statesman ideal.⁵⁶ This Part maps the lawyer-statesman ideal into the concept of the lawyer as an officer of the court, and demonstrates that their shared features are consonant with empirically described feminine norms. In particular, the values of empathy, self-effacement, fidelity, and an other-regarding perspective, which are inculcated through socialization to a feminine identity, accord with the values of the lawyer-statesman ideal, which are instilled through the use of the case method in law school as well as through the law-firm culture of the fading era that Kronman recalls to us.

A. The Lawyer's Ethos

In the view of the US courts, the lawyer's ethos is her identity as an officer of the court.⁵⁷ This professional identity necessarily entails devotion to the public good, but exactly how this good is accomplished is of particular interest. By taking her oath of office, the lawyer assumes her professional identity and commitments as she pledges to serve the court in the administration of justice.⁵⁸ She performs this service by socializing her clients to the law as a counselor,⁵⁹ and (in litigation) by assisting the judge in his deliberation in procedurally prescribed ways.⁶⁰ This assistance requires the lawyer to effect a translation between the private realm of the client and the public realm of the court, re-presenting a client's matter in a form fit for judicial action.⁶¹

53. *What Is a Lawyer?*, *supra* note 10, at 458 ("At the edge of the law, where rules fall silent, the lawyer searches her professional soul for the ethics and norms of her formative socialization, and as she decides how to perform her job, she further forms herself as a lawyer."); *id.* at 466-67.

54. *Lost Lawyer*, *supra* note 1, at 99.

55. *Id.* at 12.

56. *What Is a Lawyer?*, *supra* note 10.

57. *What Is a Lawyer?*, *supra* note 10, at 428-36.

58. *Id.* at 428, 438-40, 467, 474.

59. *Id.* at 456.

60. *Id.* at 451.

61. *Id.* at 453, 465.

The complex function of legal representation is governed by a maieutic ethic.⁶² The term “maieutic”⁶³ is both Socratic and feminine: maieusis denotes the function of a midwife, and metaphorically describes the action of bracketing or suspending one’s personal values for the sake of helping another to realize and articulate his own. Accordingly, in converting a client’s issues into the matters of a party, the lawyer must bracket her personal interests and serve as a midwife for the law, and for her client’s interests subject to the law:

The [court] officer surveys the [client’s] self-described situation through the lenses of her legal training to identify aspects that could materialize as facts under a law. Using her professional judgment, the officer operates upon the layperson’s story, laying hands upon it, forming it into a proper disposition for the judge’s action. . . . The client would not appear properly before the court but for the professional maieutic work of the lawyer, who herself could not appear in court but for the operation of the court’s authority, which in turn flows from the Constitution.⁶⁴

Thus, only as an officer of the court is the lawyer able to represent a client in the legal system: her public role both provides and constrains her role as an advocate. The lawyer’s function as an officer of the court requires her to use her independent professional judgment in service of the public good.

The resonance between maieusis and Kronman’s sympathetic detachment is clear. Both require the lawyer to “sustain the kind of self-forgetfulness required to deliberate for and with another person on his or her own behalf”;⁶⁵ to “clear an affective space”⁶⁶ like Robert Gordon’s empty stage⁶⁷ on which the lawyer must exercise her independent professional judgment;⁶⁸ to lend her imagination to another (to the interests of the law, and of her client) and develop a deep understanding thereof; and given this understanding, to deliberate in an independent or detached way.⁶⁹

B. Empathy

Kronman notes a kinship between his vision of the lawyer-statesman ideal and the work of feminist writers who argue “that there is a closer connection between feeling and judgment than is commonly supposed—a connection they

62. *Id.* at 438-39.

63. Oxford English Dictionary Online, *maieutic*, adj. and n., A. (3d ed. 2000).

64. *What Is a Lawyer?*, *supra* note 10, at 450.

65. *Lost Lawyer*, *supra* note 1, at 299.

66. *Id.*

67. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 12 (1988).

68. *What Is a Lawyer?*, *supra* note 10, at 458, 481, 487 (“On the empty stage of the lawyer’s negative capability, she crafts the engagement of the public legal system with the private client, and only out of fidelity to the former is she available to the latter.”).

69. *Lost Lawyer*, *supra* note 1, at 72; *What Is a Lawyer?*, *supra* note 10, at 493.

claim any sound view of adjudication must recognize and value.”⁷⁰ While there is a distance between Kronman’s work and theirs,⁷¹ Kronman nonetheless sees good judgment as involving not only “broad knowledge and a quick intelligence,”⁷² but also:

a certain calmness in [the lawyer’s] deliberations, together with a balanced sympathy toward the various concerns of which his situation (or the situation of his client) requires that he take account. These are qualities as much of feeling 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.⁷³

Among the feminist work that Kronman cites is an article by Lynne Henderson on a troubling separation between rational and affective faculties under the concept of legality: fidelity to the rule of law may appear to require only logical reasoning, so that “feeling is denied recognition and legitimacy under the guise of the ‘rationality’ of the Rule of Law.”⁷⁴ Henderson argues that the exclusion of empathy under the rationalist view of legality actually defeats the ability of courts to do justice. Analyzing several cases for empathic narratives, Henderson demonstrates that the US Supreme Court can be and has been informed by these narratives, though on other occasions its empathic understanding is lacking.⁷⁵ She urges that it is proper for empathy to inform judgment, for empathy is “a form of understanding, a phenomenon that encompasses affect as well as cognition in determining meanings . . . that reveals moral problems previously sublimated by pretensions to reductionist rationality, and that provides a bridge to normatively better legal outcomes.”⁷⁶

Henderson points out that “empathy” is a specific, psychological term that features among its closely related basic meanings, “understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other.”⁷⁷ This faculty involves not abandoning one’s sense of self, but instead, momentarily suspending one’s own views to imagine what it is like to be someone else—to “mak[e] another intelligible.”⁷⁸ Empathy as Henderson defines it is a component of Kronman’s sympathetic detachment—which is again, the “imaginative mimicking of commitments that is

70. *Lost Lawyer*, *supra* n.1 at 166 (citation omitted).

71. *Id.*

72. *Id.* at 16.

73. *Id.*

74. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1575 (1987).

75. *Id.* at 1592-93.

76. *Id.* at 1576.

77. *Id.* at 1579. See also MARTIN L. HOFFMAN, *EMPATHY AND MORAL DEVELOPMENT: IMPLICATIONS FOR CARING AND JUSTICE* 4 (2000) (defining empathy as “an affective response more appropriate to another’s situation than [to] one’s own.”).

78. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1581 (1987).

required to make sense of the experience of other people.”⁷⁹ Maieusis, empathy, and sympathetic detachment each requires “feeling with” the other while maintaining a kind of critical distance from which to evaluate the other’s situation. The necessary and necessarily bounded role of empathy in legal work is a subject of current empirical research.⁸⁰

C. Feminine Socialization Instills the Core Values of The Lawyer-Statesman Ideal

Carol Gilligan proposed that girls will have greater empathic skills as adults because of their feminine socialization.⁸¹ Potential links between feminine socialization and empathy have been studied from a variety of disciplinary perspectives.⁸² The results of these studies vary somewhat, in part due to differences in defining, operationalizing, and assessing empathy,⁸³ as well as in the failure to realize the significance of a given variable and control for it. Recent psychological studies are revealing such variables. For example, one finds that an empathic ethic of care tends to be more strongly associated with feminine identity,⁸⁴ though the strength of the correlation varies depending on the situation⁸⁵ and the reasons for care, with males more likely to offer cognitive reasons and females more likely to offer affective reasons.⁸⁶ Further, empathic concern is found to increase with age in girls though the opposite trend is shown in boys; these results may reflect the effects of gender socialization.⁸⁷

79. *Lost Lawyer*, *supra* note 1, at 70.

80. See, e.g., Chalen Westaby, “Feeling Like a Sponge”: *The Emotional Labour Produced by Solicitors in Their Interactions with Clients Seeking Asylum*, 17 INT’L J. OF THE LEGAL PROF. 153, 153 (2010) (“Intense emotional displays of empathy are expected to gain the trust of clients. However, these emotions have to be managed to maintain the perceived professional integrity of the solicitor. This is achieved by concentrating on the legal aspects of the case to present a form of ‘detached concern’.”).

81. CAROL GILLIGAN, IN A DIFFERENT VOICE, xix, 8, 11, 69 (1982).

82. See, e.g., Claudia Strauss, *Is Empathy Gendered and, If [S]o, Why? An Approach from Feminist Psychological Anthropology*, 32 ETHOS 432 (2004); Susan Moler Okin & Rob Reich, *Families and Schools As Compensating Agents in Moral Development for a Multicultural Society*, 28 J. MORAL EDUC. 286-88 (1999) and citations therein.

83. Nancy Eisenberg & Randy Lennon, *Sex Differences in Empathy and Related Capacities*, 94 PSYCHOL. BULL. 100, 101, 123-24 (1983).

84. Mia Silfver & Klaus Helkama, *Empathy, Guilt, and Gender: A Comparison of Two Measures [of Guilt]*, 48 SCANDINAVIAN J. OF PSYCHOLOGY 239, 240 (2007) (“higher correlations between developmental measures of the ethic of care and ego development have been found for women than for men, which suggests that care ethic is more important to women than to men in terms of their identity.” (internal citations omitted)).

85. *Id.* (regarding helping *behavior* interpreted as a consequence of empathic feeling: “men are more likely to help in situations where helping is a ‘heroic act’ In contrast, women were more likely to help when the helping was caring and nurturing for others in more private settings.”).

86. *Id.* at 244.

87. *Id.*

What values are instilled through feminine socialization? Psychologists are developing assessment tools for evaluating conformity to feminine norms, so that the effects of feminine-norm conformity on health and behavior can in turn be studied. For example, a new measure of conformity to feminine norms that is robust to variations across race and ethnicity is composed of the following nine subscales:

Relational (sample item: “I believe that my friendships should be maintained at all costs”),

Sweet and Nice (sample item: “Being nice to others is extremely important”),

~~**Invest in Appearance** (sample item: “I spend more than 30 min[utes] a day doing my hair and make-up”),~~

Domestic (sample item: “It is important to keep your living space clean”),

~~**Romantic Relationship** (sample item: “Having a romantic relationship is essential in life”),~~

Modesty (sample item: “I hate telling people about my accomplishments”),

Sexual Fidelity (sample item: “I would feel guilty if I had a one-night stand”),

~~**Thinness** (sample item: “I would be happier if I was [sic] thinner”), and~~

Care for Children (sample item: “Taking care of children is extremely fulfilling”).⁸⁸

Interestingly, feminist self-identification is negatively correlated with subscale scores for Invest in Appearance, Romantic Relationship, and Thinness (which are accordingly crossed out above).⁸⁹ All but one of the remaining characteristics map neatly into those of both the lawyer-statesman ideal and the officer of the court: the value of self-effacement is reflected in the Modesty measure, that of fidelity in the Sexual Fidelity measure, and that of an other-regarding orientation in the Relational, Sweet and Nice, and Care for Children measures. That these measures are strongly indicative of feminine socialization suggests that feminine socialization succeeds in developing these character traits, which are

88. Mike C. Parent & Bonnie Moradi, *An Abbreviated Tool for Assessing Feminine Norm Conformity: Psychometric Properties of the Conformity to Feminine Norms Inventory-45*, 23 PSYCHOL. ASSESSMENT 958, 960 (2011) (formatting added).

89. Mike C. Parent & Bonnie Moradi, *Confirmatory Factor Analysis of the Conformity to Feminine Norms Inventory and Development of an Abbreviated Version: The CFNI-45*, 34 PSYCHOL. OF WOMEN Q. 97, 99 (2010).

necessary to the lawyer-statesman ideal as well as to the professional identity of the lawyer as an officer of the court (along with the bonus value of tidying up).

Despite the limitations of the research, two pertinent points are clear. First, the feminine socialized (*i.e.*, women) are more likely to be regarded as empathetic by themselves and by others. The effectiveness of socialization in inculcating the value of empathy is apparent, regardless of whether this is a correct perception of actual affective behavior or a misperception influenced by the expectations set up by feminine norms.⁹⁰ It is also clear that the empathic skills essential to excellent deliberation are developed and reinforced through education: moral virtues can and must be fostered.⁹¹ Thus, Kronman's emphasis on the importance of law schools in instilling the character trait of practical wisdom—with the capacity for sympathetic detachment at its heart—is absolutely on the mark. Socialization and moral development continue through one's career;⁹² accordingly, Kronman's concerns about economic and cultural changes in the law firm are similarly well targeted.

III. Recovering the Lost Lawyer

How does one change a culture? People can be persuaded by political debates and decide how to manage economic and social pressures for the common good, as does the statesman Kronman describes.⁹³ Barbara Babcock provides an astonishing example of a “lady lawyer”⁹⁴ striving to engage in statesmanship: Clara Foltz, whose energetic oratory, lobbying, and efforts to join and participate in the legal profession contributed significantly to causing women to be allowed to attend law school⁹⁵ and to become lawyers,⁹⁶ as well as to inventing and cre-

90. Nancy Eisenberg & Randy Lennon, *Sex Differences in Empathy and Related Capacities*, 94 PSYCHOL. BULL. 100, 125 (1983) (“Emotionality and nurturance are both part of the stereotypic feminine role. Thus, it is highly likely that females would be more willing than males to present themselves as being empathic and/or sympathetic, even if there were no real sex difference in responsiveness.” (internal citation omitted)).

Similarly, a recent review article concluded that “[t]aken together, these study results indicate that . . . girls tend . . . to feel more empathy for others,” though the studies of empathy were based on self- and other-reporting. Amanda J. Rose & Karen D. Rudolph, *A Review of Sex Differences in Peer Relationship Processes: Potential Trade-offs for the Emotional and Behavioral Development of Girls and Boys*, 132 PSYCHOL. BULL. 98, 108 (2006).

91. Susan Moler Okin & Rob Reich, *Families and Schools As Compensating Agents in Moral Development for a Multicultural Society*, 28 J. MORAL EDUC. 286-88 (1999).

92. See, e.g., Jeylan T. Mortimer & Jon Lorence, *Work Experience and Occupational Value Socialization: A Longitudinal Study*, 84 AM. J. OF SOC. 1361 (1979).

93. *Lost Lawyer*, *supra* note 1, at 88-93, 97-101 (explaining the statesman's art as that of “building communities from resistant human material”).

94. BARBARA BABCOCK, *WOMAN LAWYER: THE TRIALS OF CLARA FOLTZ* 42 (2011).

95. *Foltz v. Hoge*, 54 Cal. 28 (1879).

96. 1878 Cal. Stat. ch. 1 § 275.

ating the office of the public defender.⁹⁷ In a sense, Foltz managed to own even the feminine traits that were marginalized in her chosen profession,⁹⁸ and then to reify herself as an entity recognizable and even powerful in terms of the then-dominant lawyer-statesman ideal.

Babcock has worked to recover this pioneer woman lawyer to find out what we could learn from her today. Delivering the keynote address at a recent symposium on the future of legal education and the legal profession, Babcock predicted that “in the next thirty to fifty years, the legal profession will return and recognize its ideals of professionalism over profit . . . and it will do it through feminism.”⁹⁹ She outlined first the divergence between feminism and professionalism, in which “women put aside the special concern for each other’s lives that defines feminism and assimilated to a profoundly male model of a lawyer.”¹⁰⁰ Women had changed their lives radically to accommodate the practice of law—an accommodation that remains incomplete, costly, and difficult to this day.

For example, the career-information company Vault.com asked “nearly 17,000” law-firm associates across the United States to rate their law firms, reporting that “the only area in which women’s average ratings were higher than men’s was formal training. Meanwhile, women’s ratings for firm culture, satisfaction, diversity, informal training and mentoring, compensation, business outlook, associate/partner relations, work hours, and transparency lagged behind their male counterparts’.”¹⁰¹ Considering why this is so, Vault reports that:

First, many female associates feel that it is impossible to have a family and make partner—and so they take themselves off the partnership track, even before they have children Here’s what a few sixth-year female associates had to say . . . :

- “There is certainly a belief among women associates that you can either have a family, or be a partner—not both.”
- “A disproportionate number of the female partners are childless. It seems extremely difficult to be a female with a child and make partner. The male partners almost all have children.”

97. BARBARA BABCOCK, *WOMAN LAWYER: THE TRIALS OF CLARA FOLTZ* 317 (2011).

98. *Id.* at 69 (describing how Foltz signaled her femininity even as she claimed a place in a masculine world: “To appear refined while delivering her rough remarks, she dressed in the latest fashion and often made her entrances on a gentleman’s arm.”).

99. Barbara Babcock, Professor Emerita, Stanford Law School, Keynote Address at the Stanford Law & Policy Review Symposium on the Future of Legal Education and the Legal Profession: Women’s Entry into the Profession and the Difference It Makes (Apr. 26, 2013).

100. *Id.*

101. Rachel Marx Boufford, *Why Are Women Lawyers Unhappy?*, <http://www.vault.com/blog/workplace-issues/why-are-women-lawyers-unhappy/> (last visited Mar. 20, 2014).

- “It is a friendly, welcoming atmosphere for people of different races, ethnicities and sexual orientations but I feel as a woman attorney that I should not even try for partnership because it won’t be possible with a child.”¹⁰²

Ending women’s confinement to the domestic sphere¹⁰³ has been a triumph of feminism. But men and women lawyers are depersonalized through a law firm culture that requires such long hours that the lawyer has no time or energy for family nor for the other broadening experiences on which the cultivation of sound judgment depends.¹⁰⁴ Kronman concluded that a law firm culture that values “narrowness of interests and absence of attachments . . . not only differs from the ideal of the lawyer-statesman, but inverts it.”¹⁰⁵

Babcock sets the next task for feminist men and women working together as that of reshaping legal practice to accommodate the lives of women, arguing that this would do much to restore legal professionalism in that the profession has become too much of a business in which all work too hard and long.¹⁰⁶ If work were restructured so that all lawyers could reestablish time for personal, family, community, and civic obligations (such as *pro bono* work), much would be done to establish gender equality as well as to recover the basic values of the lawyer-statesman ideal.

Babcock offers specific suggestions that have the potential to help lawyers recover their personal and professional integrity: to re-establish the weekend as time reserved from work; and to provide viable career paths that enable people to modulate between full-time and part-time work.¹⁰⁷ Labor economist Myra Strober argues that such accommodations are necessary across workplaces generally, and expects that we will make them:

Why don’t we create new structures where people work less than 40 hours a week when they have kids, and then let older people work part-time until they’re 75 or 80? . . . I imagine that if you and I were talking 100 years from now, the situation would be quite different. . . . Jobs are changing all the time, people are living longer, and so we have to change all our structures. And I think we will.¹⁰⁸

102. *Id.*

103. BARBARA BABCOCK, *WOMAN LAWYER: THE TRIALS OF CLARA FOLTZ* 124 (2011) (“*Sphere* was a loaded word, used against the suffragists when they wanted to vote, serve on juries, or be lawyers. Many people, perhaps most, believed that when referring to women, *sphere* should have the work *domestic* in front of it.”).

104. *Lost Lawyer*, *supra* note 1, at 303-04 (pointing out that each additional hour of work per week comes at a greater personal cost than the last, and that breadth of experience is essential to the process of developing practical wisdom).

105. *Id.* at 307.

106. Barbara Babcock, *supra* note 99.

107. *Id.*

108. Myra Strober: *How the Workplace Works—or Doesn’t—for Families*, STANFORD GRADUATE SCHOOL OF BUSINESS (May 31, 2013), <http://www.gsb.stanford.edu/news/headlines/myra-strober->

The law-student organization *Building a Better Legal Profession* echoes this sentiment more pointedly within the context of law firms:

[T]here is no excuse for maintaining policies that have the effect of driving nearly all the women out of the workplace within 10 years of graduation from law school. If the business model of the large law firm is incompatible with the success of women then it must change.¹⁰⁹

A powerful example of grass-roots efforts from the lawyer workforce pushing for cultural change, *Building a Better Legal Profession* began at Stanford Law School in 2007 and quickly spread across the nation.¹¹⁰ The organization's goal is to modify the law-firm culture shaped by the dehumanizing and deprofessionalizing competition to bill more hours¹¹¹ by providing the firms' potential employees with information on the firms' quality-of-life criteria, including "billable hour requirements, diversity, and *pro bono* participation."¹¹² The organization is concerned about "[t]he negative effect of rising hourly requirements on *pro bono* . . . [and] on the promotion and retention of female lawyers."¹¹³

Kronman described 20 years ago the complex interaction of trends that was causing law firm culture to become "deeply inhospitable to the cultivation of deliberative judgment."¹¹⁴ Focusing more narrowly on the effects of billable hours requirements that now far exceed those at the time of Kronman's writing,¹¹⁵ *Building a Better Legal Profession* points out that "working long hours adversely affects an attorney's ability to think critically and creatively and impairs a lawyer's ability to make fully reasoned and sound professional judgments."¹¹⁶ In its effort to shift firms from an "hours culture" to a "quality culture," the organization expressed hope: "[I]f firms genuinely commit to these reforms, we will see

how-workplace-works-families (mentioning the work of psychologist and public policy researcher Laura Carstensen); see also LAURA CARSTENSEN, A LONG BRIGHT FUTURE 80-81 (2009).

109. *Our Issues*, BUILDING A BETTER LEGAL PROFESSION, <http://www.betterlegalprofession.org/issues.php> (last visited Mar. 20, 2014) (noting further that "[J]ust as importantly, both male and female associates are suffering from these short-sighted management efforts to increase profitability. Law firm lawyers have the highest rates of depression and alcoholism and the lowest rates of job satisfaction of any profession.").

110. *About Us*, BUILDING A BETTER LEGAL PROFESSION, <http://www.betterlegalprofession.org/mission.php> (last visited Mar. 20, 2014).

111. *Lost Lawyer*, *supra* note 1, at 307.

112. BUILDING A BETTER LEGAL PROFESSION, *supra* note 110.

113. BUILDING A BETTER LEGAL PROFESSION, *supra* note 109.

114. *Lost Lawyer*, *supra* note 1, at 367.

115. *Our Principles*, BUILDING A BETTER LEGAL PROFESSION, <http://www.betterlegalprofession.org/principles.php> (last visited Mar. 20, 2014) ("[U]p to 3000 hours [are] expected of prospective partners. . . . [T]o start, they can move the partnership target closer to 2200 hours and realize it as matter of internal culture."). Cf. *Lost Lawyer*, *supra* note 1, at 405 n.38 (reporting citations noting billable hours expectations between 2000 and 2200).

116. BUILDING A BETTER LEGAL PROFESSION, *supra* note 115.

progress in *restoring the sense of professionalism* to law that so many attorneys feel is lacking.”¹¹⁷

The phenomena captured in *THE LOST LAWYER* are causing the profession to lose lawyers—especially women lawyers. Both men and women lawyers value and want to recover their personal lives and their professional identity. In a letter sent to the Am Law 100 law firms¹¹⁸ and reported in the media,¹¹⁹ *Building a Better Legal Profession* informed the firms that “[W]e are willing to accept reduced salaries in exchange for better working lives.”¹²⁰ Through the efforts of the next generation of lawyers, the lawyer-statesman ideal that was the ethos of the legal profession in the nineteenth century may be reborn, this time through the work of women and men together to create a professional culture that supports broad experience, attachments, and the development of practical wisdom. Perhaps all is not lost.

117. *Id.* (emphasis added).

118. Financial ranking of law firms by the magazine *The American Lawyer*: see, e.g., *The 2013 Am Law 100*, http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202489912232&The_2013_Am_Law_100 (last visited Mar. 20, 2014).

119. BUILDING A BETTER LEGAL PROFESSION, *supra* note 110.

120. BUILDING A BETTER LEGAL PROFESSION, *supra* note 115.