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The Second Driker Forum for Excellence in the Law

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THE SECOND DRIKER FORUM FOR EXCELLENCE IN THE LAW

September 29, 1994
Wayne State University Law School

Speakers:

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Dean, Yale Law School
Author, The Lost Lawyer: Failing Ideals of the Legal Profession

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United States District Judge for the Eastern District of Michigan

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Moderator: JAMES K. ROBINSON
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†This forum discussion was transcribed verbatim from a video recording. Members of The Wayne Law Review edited the transcript to enhance reader comprehension. In order to retain the spirit and essence of the discussion, the editors made only minor stylistic and grammatical modifications.
DEAN ROBINSON: We want to welcome all of you to *The Second Driker Forum for Excellence in the Law*. I’m Jim Robinson, the Dean of Wayne State University Law School. This forum was established and made possible through the generosity of the law firm of Barris, Sott, Denn & Driker to advance the cause of excellence in the law and to honor one of our law school’s most distinguished graduates, Eugene Driker. Gene is a 1961 graduate of the law school, was editor in chief of the law review, and we think it’s quite appropriate that this forum be held in his name. The Barris, Sott firm has been very generous to the law school and we are grateful to them for supporting this program and other activities at the law school. Today’s topic is the title of Dean Kronman’s book, *The Lost Lawyer: Failing Ideals of the Legal Profession*. In the book Dean Kronman describes the lawyer-statesman ideal, an ideal which he tells us sustained the legal profession in America for nearly two centuries and gave it moral depth. The ideal of the lawyer-statesman involves a set of values that prizes good judgment above technical competence and encourages a public-spirited devotion to the law. Such a lawyer is a person possessed of prudence and practical judgment and wisdom. We have been blessed in the state of Michigan with a number of lawyer-statesmen over the years, and I think it’s appropriate that we hold this forum in the name of someone I consider to be a lawyer-statesman, Eugene Driker.

Today’s forum brings together an all-star cast: the dean of Yale Law School, the president of the American Bar Association, the Chief Judge of the United States Court of Appeals for the Sixth Circuit, the United States Attorney for the Eastern District of Michigan, a new United States District Judge for the Eastern District of Michigan and a professor at Wayne State University Law School. Each of your programs describes biographical information about each of our participants in greater detail, and I’ll be saying a few words before each of them speak.

Dean Kronman’s book is a book about a crisis in the American legal profession. Its sober message is that the profession now stands in danger of losing its soul, and it is our purpose today to explore that assertion. We ask, “Is there hope to save the profession’s soul?
Can we reinvent the ethos of the profession so that the yearning of lawyers to be engaged in a lifelong endeavor with purpose and with satisfaction and fulfillment can be met?"

The book comes at a time when the law schools of this country, the judiciary, and the profession itself are engaged in a significant self-examination, and it is appropriate that we should explore this issue in the setting of a law school. I think our panelists are uniquely qualified to address these important issues, and for those of you who would like more on the topic, we’ve made arrangements through the publisher of Dean Kronman’s book for a twenty percent discount for those who would like to acquire it. Those forms will be available at the back of the room after the program, and you’re encouraged to do that if you like.

When I read the book, it struck me that it reminded me of a colloquy that I saw in the PBS series *The Power of Myth*, the discussion between Bill Moyers and Joseph Campbell. Joseph Campbell taught for years at Sarah Lawrence College and was one of the country’s leading authorities on mythology. The lawyer-statesman ideal in many ways is a mythological ideal, something that we seek to strive for and attain for many members of the profession. Campbell described why myths are important to us, and he said mythology teaches you what’s behind literature and the arts. It teaches you about your own life. It’s a great, exciting life-nourishing subject. When a judge walks into a room and everybody stands up, you’re not standing up to that guy, you’re standing up to the robe that he’s wearing and the role that he’s going to play. What makes him worthy of that role is his integrity as a representative of the principles of that role and not of some group of individual prejudices of his or her own. What you’re standing up to is a mythological character. Campbell was asked by Moyers what happens to a society when its myths begin to disappear? Campbell said, “It’s a mess.” On this immediate level of life and structure, myth offers life models. But the models have to be appropriate to the time in which you are living, and our time has changed so fast that what was proper fifty years ago is not proper today. The moral order has to catch-up with the moral necessities of actual life and
time here and now. I think the lawyer-statesman ideal that Dean Kronman describes is a worthy one, an aspirational one. The question is: "Can we revive the ideal, is it lost forever, or can we reinvent a worthy substitute for it to give sustenance to our profession?" We are very pleased to have with us today to address this issue, first, the dean of Yale Law School, Anthony Kronman.

DEAN KRONMAN: Let me begin by first expressing my heartfelt gratitude to Dean Robinson and the other panel participants this afternoon for gathering to discuss my book. It is truly the most gratifying form of flattery for an author to have his or her ideas taken seriously, even if seriously means being sharply criticized and roundly rebuked. I don't think that an author is entitled, in the end, to anything more than having his or her ideas discussed. I'd like to have them all agreed to and accepted, but that's probably too much to ask. In any event, it is a genuine treat for me to have the panel gathered here and all of you gathered here today to discuss a subject which is of utmost importance to me and about which I have been thinking now steadily for ten years or so.

I want in fifteen or twenty minutes to try to give you a quick summary of some of the main themes of my book. But I thought I ought, perhaps, to begin by telling you what my motive was in writing it. I was prompted to write The Lost Lawyer because I came to believe in the course of my own work as a law teacher that the legal profession in America today is in a state of deep crisis, a crisis that I came to think of as a crisis of the soul, a crisis of professional identity. That belief, which motivated me to undertake the project in the first place, deepened and became, if anything, more secure in my own mind as I wrote the book and came to understand the interdependence of all of the elements that had contributed in one way or another to bringing this crisis about.

I wrote the book to diagnose the crisis, to persuade others of its magnitude and seriousness. But I also wrote the book out of a profound belief that the ethical, spiritual, and moral traditions of our profession have a durability that will allow us, those of us at the end of the century who find ourselves caught in this crisis, to
look back to these traditional ideals and to find guidance and support and strength in them as we try to work our way out of the professional culdesac in which I think we’ve arrived.

My own personal sense of a crisis in the profession grew for me with two perceptions that became increasingly strong in my own mind, as I said, ten years ago. The first was the perception that many of my own students who had graduated from Yale and gone on to practice law, in some form or other, were leading unhappy professional lives. A number of my former students came back to me and said, “You know, I haven’t been having a lot of fun since I graduated. It’s not what I expected. The work really isn’t engaging. I’m at sea. I don’t know where I want to go. Things haven’t worked out as I’d expected them to.” Gradually it began to dawn on me that it wasn’t all candy and roses after graduation day. In fact, for many of my best students it was disappointment and unhappiness and regret. That disturbed me as a teacher, and I began to wonder what my own responsibility or culpability in this was; and how, in any case, I could with good conscience, go on turning out lawyers who were so unhappy when it came to beginning their professional life. The second perception was my growing awareness of a gulf or a gap, a schism, between the academic part of the legal profession, America’s law schools on the one hand, and the practicing branch of the profession on the other, the practicing bar. I was struck by the unhappiness of my students’ lives and by a growing distance between my own work, my own home institution, my law school, and the world of practice out there, and I began to reflect on these two things and to wonder what it was that explained them.

Let me start with the first of them, unhappiness in the practice of law. Most of my students, most of Jim’s students and Kate’s students, most law students around the country are, I think, honorable people. Indeed I think the overall level of honorableness among law students is probably higher than average in the citizenry as a whole. Law students tend to be civic-minded, concerned about the public good, not always and in every respect, but to a significant degree. I think they stand out as a group, America’s law
students, in this regard. Most law students, like most people, want to lead lives of material comfort and style, and they hope to find jobs that will enable them to do that as well as to promote the public good in some fashion or other. But in addition to all of those things they want something else too. My students, and I think law students everywhere, want a measure of satisfaction in the doing of the work itself. They want their jobs to be intrinsically satisfying. They want the practice of law to be an activity that has its own rewards, independently of the revenue that it produces or the social good that it contributes to. They want the job itself to be pleasurable and intrinsically fulfilling. They want to work in a craft. That’s what my students want. That’s what I think they’ve always wanted. As I began to reflect on the sources of their unhappiness, I thought, well, if they’re more unhappy today than they’ve been in the past, it must be because something’s happened in their working environment that prevents them from achieving the measure of intrinsic satisfaction in the doing of the work that they expect and hope to experience. Most of my students go to large metropolitan law firms after they graduate from law school, to firms of let’s say fifty lawyers or more. Everyone knows that the country’s large firms have changed dramatically in scope and character over the last twenty-five years. For one thing they’ve just ballooned in size. There are now law firms in each of the country’s main cities of 200, 300, in some cases 400 or 500 lawyers, and the 100 person firm is no longer a rarity at all.

As I began to look at these firms more closely and to inspect their internal culture, I came to a couple of conclusions. One was that the nature of the work that lawyers in these firms do has changed in ways that make it more difficult for the young lawyers coming into them to find a significant measure of intrinsic satisfaction in the doing of the work itself. Why is that? Well, I think it’s for the following basic reason. If you ask practicing lawyers what it is they respect in their outstanding peers, in the other lawyers that they would pick out as models of professional accomplishment or excellence, the one word you hear, that I heard in any case when I put this question to them over and over again,
is "judgment." It's a lawyer's judgment which is the essential thing. It's not know-how; that's important. It's not technical book learning; that's important too. It's not office management; a measure of that's awfully valuable. But the thing that really counts, that is of the essence, is judgment or as some said good common sense or practical wisdom or prudence. I think by these terms my respondents really meant, more or less, the same thing.

Now what's happened in America's large firms in the last two or three decades is that the nature of the work has changed in ways that make it harder and harder for lawyers, young lawyers in particular but lawyers at all ranks in the hierarchy, to cultivate and then to display this all-important, if vaguely defined, quality that I'm calling judgment or prudence. I believe that it is in the exercise, the cultivation and exercise of this capacity, that the true source of satisfaction in the doing of the craft itself consists. It is in the acquisition of judgment and its exercise on behalf of one's clients that the sense of oneself as an accomplished craftsman rests. And so as the opportunities and occasions for the development and expression of judgment began to shrink in these firms as a result of their growth in size, their internal bureaucratization, the division of legal labor into ever finer narrower specialties, the loss, the collapse of the traditional long-term relationship between firm and outside client and its replacement with episodic one-on-one transactional encounters that had no life beyond the moment of the deal, all of that created a situation in which occasions for the development and exercise of judgment began to shrink. And so it was no wonder, if that's what makes the craft pleasurable or makes it a craft at all, that work in these firms should have become less and less satisfying to the young people going into them. This tendency was aggravated by another fact: America's large firms have become explicitly, candidly, without shame in the last twenty years unembarrassedly commercialistic in their outlook and practice. The bottom line has become the only line for them, and the older ethos of craftsmanship which was nourished and reinforced in a very deliberate and careful way by lawyers in these firms a half century ago has disappeared, and has been replaced by
an ethos of moneymaking which puts the exclusive stress mark on the number of billable hours that you put in and the number of dollars those billable hours produce.

Well, once you have a culture like that, of course, little is left in the mythology, to use Jim Robinson's terminology, there's little left in the mythology of the firm to underscore, to emphasize, to reinforce the value of craft as opposed to the extrinsic importance of moneymaking.

At this point I shifted my focus and began to reflect on the second of the two perceptions which had started me down the track that eventually resulted in this book. You'll recall that was my sense of a growing rift between the law schools and the practicing bar. I won't retrace in any detail the train of thought that led me to my conclusions, but I'll give you the conclusions themselves in brief form. Looking back over the last century of American legal thought, of American jurisprudence, it seemed to me that I could distinguish two different traditions within that discipline, very broadly understood. One I came to call the scientific tradition and the other the prudentialist tradition.

The scientific tradition of legal thought in America and elsewhere has always stressed the idea that the study of law is a scientific enterprise. The law can be analyzed and comprehended in a complete and detailed and perfectly lucid way: that the law is as much a proper object of scientific inquiry as the stars or plants and other living things as Judge Posner once observed some years back. This tradition, the scientific tradition in American legal thought, has a long and very distinguished history. It has its roots in the seventeenth century writings of Thomas Hobbs. Christopher Columbus Langdell, the inventor of the case method of study, was himself of this school, and there were representatives of the scientific approach among the so-called legal realists who burst on the scene in the 1930s and transformed our understanding of what legal scholarship should be.

The other strain, the other tradition, takes a very different view about the nature of law and the appropriate way to study it. The prudentialist tradition starts from the contrary conviction that the
law is a muddy, complex, practical discipline, bits and pieces of which may be intelligible now and then, but which can never in the nature of the case be understood all the way down in the comprehensive and complete way that the legal scientists have claimed. What's needed in the practice of law, and therefore what's needed in anyone who wants to study the practice of law in an accurate and appropriate way, isn't scientific knowledge but prudence and judgment—"situation sense" as Karl Llewellyn described it.

So we have these two traditions: the scientific and the prudentialist. They define themselves antagonistically. The scientists say every time someone invokes prudence or practical wisdom or judgment, that's a smoke screen through which the inquiring scientists should look to see what lies, what discernable, statable truths lie behind it and can be put in propositional form. To which the prudentialist responds it is a philosopher's dream or nightmare to think that the law can be put on a scientific footing. It is and always will be a pragmatic discipline which requires pragmatic skills.

Two traditions mutually antagonistic, each with its representatives in the movement known as legal realism, and each of which has its contemporary representatives and defenders. But if you look at what has happened in the last twenty or thirty years in American legal scholarship, you can sum it all up by saying, I believe, that the scientific approach has triumphed completely over its time-honored adversary which has been largely vanquished from the field. That's a bit extreme and maybe I'll have a chance to modify the claim a bit later on this afternoon, but I think for purposes of my presentation now it is best that you see the point in its sharpest and clearest form. The scientific tradition, to put it bluntly, has won out, has cleared the field. The two intellectual movements in American law teaching which have had the greatest influence over the last quarter century—the law in economics movement and critical legal studies—as different as they may be in other respects, share a deep attraction to the scientific ideal and a deep antipathy to prudentialism. Sharing that together, although
constantly quarreling with one another, they have broadcast within the academic world a mood of optimism about the possibility of scientific victory and a mood of skepticism and scornful distrust regarding the traditional values of prudence or practical judgment. So that students coming to law school these days are taught that prudence is deserving of no respect, that it's always a mask, a disguise to be looked through by the sharp-eyed scientist. Prudence has acquired a very bad name in legal academic circles.

Putting these two thoughts together, I come to the following conclusion. In the academic world, prudence has become disfavored for the reasons I've just explained. In the practical world, in the world of the practicing lawyer, the achievement and exercise of prudence has become increasingly difficult on account of the transformed character of law practice itself. To these two thoughts I then added a third, which I'll mention but not go into in any detail, and that's that something similar or at least complimentary has been happening within the adjudicative branch of the legal profession as well, in the part of the profession that we call courts and judges. The activity of judging, at least at the appellate level, has been transformed in the last twenty to twenty-five years from a deliberative activity into a managerial activity, and our judges have become office managers whose principal function is to oversee as editors, essentially, the work of their subordinate clerks. Judging as it once was has disappeared – is in danger of extinction. It is on the way to being replaced by another more bureaucratic activity from which prudence or practical wisdom is, if not entirely absent, at least in a much diminished place. So I now have, I hope you can see, a three-cornered hypothesis: judgment, prudence, practical wisdom is on the run in each of the three branches or sectors of the legal profession I've mentioned. In the legal academy, it has been brought under a cloud of suspicion by the triumph of the scientific tradition in legal thought. In the practicing bar, the changing character of work itself has tended to squeeze prudence out as an important or needed capacity. And finally in our courts, the incredible increase in the case load which our appellate courts have to carry has forced their growth in size and numbers and their
internal bureaucratization to deal with the case load. So it is an understandable reaction, but by doing so in turn in that sphere too, it has diminished the role and the significance of prudence or practical wisdom.

Now why is all of this important? It’s important, I think, because once upon a time not too long ago, our collective professional ideals were to a significant degree centered around a notion of craftsmanship in which the idea of judgment played a very important role. What does it mean to be a lawyer? Each of us entering the profession, or in the profession, has to ask that question. And it’s probably healthy to continue asking it at periodic intervals along the way. What does it mean? What identity do I have as a lawyer? If all you can say in response to that is, “Well I’m awfully good at making money on my client’s account,” that’s not, I think for many, going to be in the end a satisfying answer. There has to be something about the work we do which is immediately and intrinsically gratifying. And the answer that we’ve always given, which suggests the way in which it is, is the law’s a craft. To learn the law and to practice it is not just to learn a bunch of technical rules and then to apply them in mechanical fashion. It is to become a seasoned, practically wise practitioner of a craft. But that older conception which I call in my book the conception of the lawyer-statesman, because the exercise of judgment is so obviously central to state craft and I think state craft is so central to law practice and all of its forms – that older ideal which once gave us an answer to the questions “what makes us lawyers?” “what holds us together?” “what’s the key to our professional identity?” – that older constellation of values has been disrupted and undercut by the threefold development that I’ve just described.

What’s to replace it? Well, that’s a question. There are no compelling candidates on the horizon, so what we’re left with is a void in our own self-understanding, in our professional identity. Once we had a secure self-conception and I think an attractive and indeed I would even say noble self-conception, but that has been shattered, and nothing has yet emerged to replace it in a satisfying way. It is that sense of having lost our traditional moorings and not
having the confidence that there is a successor ideal or mythology in view. It is that sense of being in between, of being at sea, that gives rise to the crisis of which I spoke before. I’m going to come to a close in just one second here, but since I’ve used the word judgment now repeatedly in my remarks and given it such weight in what I’ve said, I thought I ought to amplify very briefly what I mean by that term. I have to say that it is the most difficult concept that I’ve wrestled with. Though I wrote a book about it, I felt in the end – and I’m being candid with you about this – I felt in the end that I hadn’t touched the nerve of it. That I’d skirted around the question but not put my finger on it. And it may be, in the end, that it isn’t something which is easily capturable in theory, being itself a non-theoretical, pre-theoretical or post-theoretical virtue. The virtue of sound judgment may not be the kind of thing that a theory can ever adequately capture or express. But I tried in the book.

I want to mention just two conclusions that I came to in my own reflections about the nature of this vague but all-important capacity that I call judgment. One is that whatever it is and however it is to be understood, it isn’t just an intellectual skill. Having good judgment is something more than, different than, just being clever or quick. Being a quick study, having a bright mind, is important and is a virtue in the practice of law as in many other things; but having good judgment is more than that. It involves, it implicates other parts of a person’s being than the intellectual ones alone. What other parts? Well I would say primarily the affective parts, the parts that have to do with feelings and emotions as opposed to thoughts. Indeed, I would go further and say that when we point to someone and say he or she is a person of good judgment, we’re making a comment not just about how their mind works, but how their character is put together, what their whole personality is like, and how they feel under different conditions and in various circumstances. We’re making a remark about the whole person.

So, the first thing that I would stress about judgment is that it is a trait of character, and by character I mean a quality that
includes intellectual elements but affective elements too. The second and last thing that I would say about judgment is that whatever else it is, it consists in, among other things, the capacity to do two very contrary sorts of things at once. It requires the person who has it to engage intimately, passionately, personally with the other individual on whose behalf they’re exercising their judgment. In the case of a lawyer, the lawyer’s client. It requires the lawyer in the exercise of his or her judgment to put himself in the client’s shoes and to see things from the client’s point of view, to feel the client’s fears and hopes and dreams. But at the same time it requires the lawyer to do something quite the opposite: to keep the client at arm’s length, to keep the client’s interests at a distance, not to be swept away by the passions which have swept the client away in whatever direction, to be cool and distant and deliberative. If you’re not that, you’re hardly in a position to give the client the benefit of your reflective advice. If you can’t get into the client’s shoes, you won’t see what counts, what matters to the client — and if you can’t do that, how can you really be an adviser and a friend? But if you get into those shoes so completely that you become the client yourself, how can you give advice of a cool and independent sort? So you’ve got to step on the gas and step on the brake. You’ve got to be enthusiastically engaged, sympathetically involved, and you’ve got to be distant and aloof. And you’ve got somehow to develop the knack for doing those things at the very same time.

Well, that sounds like an impossible task, but if it will increase your confidence in the score, I can tell you I have seen it done, and often, by people whose judgment I trust. And when I say whose judgment I trust, what I mean is, they have somehow developed a capacity to combine these different affective moods.

Now, where does all of this leave me? It leaves me with the following conclusion. As a profession we have a rich mythological tradition which celebrates the importance of a character ideal that I deeply revere myself, but an ideal which developments in various sectors of the law have put under deep, deep attack in the last twenty years. The challenge now is for us to think to ask ourselves whether the old ideal can be revived or is so torn into tatters that
it is hopelessly gone; to ask ourselves whether the forces that have brought about its demise are so deep and so systematic that no effort, however well-intentioned and well-organized, can reverse these trends; and to ask ourselves finally, if it is in shreds, what will we find to put in its place? Is there a successor ideal to which we can look to restore our sense of professional identity and wholeness and a value in our work? Or at the end of the day are we left with the diminished view that we are money makers and good at that and occasionally clear our consciences with an hour of pro bono work, but the work we do day in and day out has lost its gusto and pleasure and satisfaction for us? Well, I’ve written a downbeat book, I’ll admit that, but I find myself in a position now where it is my institutional responsibility to be upbeat, and I plan from this moment forward to be exactly that. So together we, the group on stage and you in the audience, have to engage – and I believe this deeply – in a collective effort to find ourselves again and to find the path of our great profession. Thank you very much.

DEAN ROBINSON: In an ABA publication entitled The State of the Profession, it was not too long ago reported that sixty percent of male lawyers and fifty-four percent of female lawyers said they don’t have a mentor who is interested in their career. This sad development and other changes alluded to by Dean Kronman in his book and here today no doubt have contributed to many of the problems that worry all of us these days. In 1969, I joined the Miller, Canfield firm as a new associate. I had the good fortune of finding a mentor – something that young lawyers don’t find these days as readily. My mentor taught me that the law is a calling, not a business. That a lawyer has a responsibility to serve the public interest, to engage in pro-bono activities and to work for the betterment of the legal profession. We were encouraged to do that in the late sixties and early seventies at the major law firms of this country. My mentor is our next speaker. The president of the American Bar Association, George Bushnell, is also of-counsel to the Detroit firm of Miller, Canfield, Paddock & Stone. He’s a graduate of Amherst College and the University of Michigan Law
School. I read with amusement that the Washington Post recently dubbed him a “liberal curmudgeon.” I can think of no better practitioner to address the current state of the legal profession and its prospects for the future in light of the challenges set out by Dean Kronman than George Bushnell.

GEORGE BUSHNELL: Thank you very much Dean Robinson. My distinguished colleagues, panel and ladies and gentlemen, before I do anything else I do want to apologize to the assembled multitude. I’m going to have to split at about 4:15. This job that I currently have with the American Bar Association has great “bennies” attached to it, and one of them is an invitation to attend the opening of the courts in London – something that I have never before done and never again will have an opportunity to do – when the courts, on the first of October, all of the courts, open in full ceremonial form in Westminster Abbey – be robed, bejeweled, bewigged. I can hardly wait for the show. But I’ve got a flight out of Metropolitan and have to leave here at 4:15 and for that I do apologize and I apologize to my colleagues for leaving them.

It is most appropriate that the second Driker lecture be concerned with the lawyer-statesman. As the dean has already advised you, this series of lectures – not annual, but from time to time – is established by the Barris, Sott firm in honor of their partner, Gene Driker. There could be no more a person better qualified to meet the definition of lawyer-statesman than Gene Driker. He’s a great lawyer. I’m very proud to be one of his colleagues at our bar, and we are all most fortunate to have him among us in the bar of this state.

I also want to note before I begin to, as the cliche goes, share a few thoughts; to make observation about the value of Dean Kronman’s book. As will become apparent in the few minutes ahead of us, there are some things which the dean has advanced that I take some issue with, and these I hope we can discuss in just a few minutes. But what this topic has done is to raise the question of what has happened to our profession and what is happening to our profession, whether one agrees with the premises or not or whether
one really feels that the database is adequate. Nevertheless, the questions raised are vitally important questions to those of us in the legal profession and those who aspire to join our great profession. And it is very important that we talk about these, and it is likely important that we discuss and we debate as professionals the issues that concern the very essence of what it is to be a lawyer. This is a great benefit that Dean Kronman has given us all.

Now let me talk for a moment about some of the questions that are raised. I want to focus on that part of the dean’s book - principally because Jim Robinson assigned it to me, but also because it is my real interest - that is, the practicing lawyer and questions that he poses, the challenge that he gives us about the lawyer-statesman. We first want to ask, “Is this a myth or is it a fact?” I put it to you that the mythology of lawyer-statesman is probably just that. It is myth. But it is a vitally important myth that we have. It’s been asked over and over again, “Where are today’s heroes?” The answer is, “They’re not dead yet.” Because it is only after the fact that the ordinary actions of individuals take on heroic proportions and become myths. It is when they’ve disappeared from the scene. So, unquestionably, the instances that are cited - the references that are made to John McCloy, for instance; to Cyrus Vance, who has not yet disappeared from the scene, thank goodness - are embellished by the fact that it is behind us and we see this through a very different glass. But the fact remains, and the real fact remains, that these people were encouraged by their firms, by their colleagues, by their educational background, by the very societies in which they lived to go forth and to do service and then to return to their homes and to their firms and to their communities and be accepted back in. And there, I suggest, is one of the things that we have lost. And we’ve lost these for a number of reasons, and particularly is this so when we talk about large firms. And indeed the focus of this discussion today is on large firms. A focus that I want to abandon summarily in just a few minutes. But let’s just take a look at the reasons why there is no longer this culture of support, why there is no longer the willingness to volunteer one of your partners or one of your
associates or one of your colleagues to go forth and serve, why there is no longer a willingness to accept that individual fact into the bosom of the family in which that person had been practicing. Reference has been made already to the fact that firms have increased in size. If you will pardon a personal reference, and since Jim and I were talking about my dear firm Miller, Canfield, Paddock, & Stone, when I joined Miller, Canfield in 1953, I was twenty-three on the letterhead. We were the largest firm in Michigan. We now have 250, plus or minus. Nobody seems to know from one day to the next how many lawyers are really there. And, quite frankly, nobody gives a damn. There's just an awful lot of us.

When that kind of increase in size occurs, people's attitudes change. You simply don't know the person you meet in the elevator, and since you don't know that person you can hardly be supportive of that individual. The loving gentleness of firms has disappeared and we can't expect anything else. But, by virtue of size, the ability of the firm to service the client has increased geometrically. The establishment of divisions and sections and groups all with their own specialty - to provide full service to the client, a broad service to the client - has been a very beneficial thing for the client. At one and the same time the client has become a customer. And, as Dean Kronman alluded to, firms are now hustlers, and they are whoring their products so they can get the one client for the one shot because the client is shopping. And we've lost client loyalty. We've lost loyalty to our colleagues. We've lost the client's loyalty to the firm. We've lost the firm's loyalty to the client. The increased mobility of lawyers has already been referred to. And the one thing of the working day that has been commented on - the number of hours that is required in those environments (I'll come back to that, but let me just flag the phrase "those environments") the length of the working day has been addressed or been spoken about: the number of hours, billable hours that are now required by everybody in the firm. And of course we all slip very quietly over the obvious fact that if you're going to bill more hours than there are in the day, there are some
clients' files that are going to be churned terribly. And we really
don't want to accept that responsibility. And there's the firm
culture in which the commercial aspects of practicing law are really
more visible and more important. With all of this going on, and
with all of these counter-forces at work, it becomes almost
impossible for any firm or any individual - and understandably so
- it becomes impossible to devote a valued person's time to
anything other than bringing in the dollars. Because, unfortunately,
we exist in an atmosphere today that is the result of the last decade
plus an atmosphere of greed. The time when there was no
tomorrow and when everybody was making big and when
everybody was driving BMW's, those days are gone forever. We
don't recognize it, and there is still this pressure to keep it coming.

Now what are we talking about? We're talking about less than
two percent of the practicing bar in this country. We're talking
about a minuscule number of lawyers. We're talking about a
minuscule number of collections of lawyers delivering client
services. But these lawyers, and I'm one of them, are so visible that
what they say and what they do is begun to be believed by all as
representative of the legal profession. It isn't. It is not our
profession - to talk about two percent plus or minus of the lawyers
in this country as being the profession of law. Let me talk to you
a little bit about what the profession of law is right now. There are
many professions of law out there. There are first the firms that I
refer to as multinational firms. The big, big firms with offices in
every capital and across the face of the globe and in every highway
and byway where they think they can make a buck. Prediction:
those firms are going to become more and more under the
examination of governments. And those firms are in for some very
trying times in the years ahead because, as with multinational
corporations, they have become effective influences in the political
relationships of not only nations, but of groups, one to another.

And then there are the big firms. Two hundred lawyers, more
or less. The factory firms that we've just been talking about. Then
there's another kind of profession - those lawyers that are banded
together in a mid-size, smaller firm, usually a local firm or a
regional firm. Then the boutique firms, the ultimate specialists; and they are very different from anything else. Then the small firms, two to five. Those people, those lawyers, are practicing together by sharing space. More often than that they call themselves firms, but it really is a rarity to find an honest-to-God partnership today consisting of two, three or four lawyers. These are mostly space-sharing firms and an entirely different kind of practice, an entirely different kind of culture. There are solo practitioners, the vast number of whom are minorities and women because they can’t get employment any place else. They are out on their own. There are the urban firms, the suburban lawyers, the rural lawyers, the really rural lawyers, and they practice the kind of law that we simply cannot comprehend in a city like Detroit. There are the home office lawyers. More and more and more of those and that kind of culture and that kind of practice and that kind of law and that kind of a profession. And then there are those lawyers whose practice is limited to ethnic communities. And the public service lawyers, the legal aid and defender lawyer, and on, and on, and on. I say to you that each one of these classifications really constitutes a different profession, one separate from the other. And what we all have in common is the license to practice.

They have something else in common, exclusive of the schlocks – and there are schlocks, we’ve just got to recognize that. The best, the very best of all lawyers, are truly lawyer-statesmen because they give to their communities in many different ways. They are not among the councils of the mighty. They don’t appear in the New York Times or the USA Today or the Washington Post, but they contribute to their communities. They’re guidance counselors, they’re problem solvers; they know that they are here for people. That’s what this law is all about. It’s people. They also know – and they know it to the tips of their various toes – that it is our legal system that permits people to work together, to live together, to make society function. And it’s this knowledge, that each one of us as lawyers have, that makes every decent lawyer a lawyer-statesman. They’re not lawyer statesmen in the councils of the mighty, but they are lawyer-statesmen in the communities in which
they live.

Our profession has been betrayed by a few - and I include the ones that we were talking about earlier with a tremendous concern for income, a tremendous concern for clients, the intense competition that exists within the firms, the lack of opportunity to live and breathe outside of the legal environment. We've been betrayed by a few. Our great profession has been betrayed by a few, but not by all. Not by a long shot. The ninety-odd percent of the practitioners are still lawyer-statesmen. The profession has changed. Obviously, the profession has changed in the last twenty to thirty years. And thank God it has. We've got to change with changing times. And the legal system has changed to answer these changes within our society, within our political and economic structures. But what it is to be a lawyer, I say to you, has not changed. I believe that lawyers are not lost, but lawyers are alive and well. Our profession is not lost. Our profession is alive and well. And no rendering of garments and no gnashing of teeth, no matter how well intentioned, can or will change the fact that lawyers are still answering the call and will continue to answer the call to serve the public and to serve the system of laws. I believe in our system. I believe in our lawyers. And those of you who are students here at Wayne are entering a great profession. And, damn it, don't let it down!

DEAN ROBINSON: Given the mega changes in law practice over the past twenty-five years and the shifting emphasis in many law schools during the same period, it's perhaps understandable that the ideal of the lawyer-statesman seems to have lost so much of its authority among practitioners and law professors. As Dean Kronman says in his book, there is another branch of the legal profession that is, or is supposed to be, free from the conflicts that afflict the profession and the academy and is more likely, or one would think more likely, to provide an environment hospitable to the values embodied in the figure of the lawyer-statesman. And that is, of course, the judicial branch. How is the lawyer-statesman ideal faring with the courts? We have a distinguished jurist with us this
afternoon to address that issue. The Chief Judge of the United States Court of Appeals for the Sixth Circuit, Gil Merritt. Judge Merritt was appointed in 1977. He has an undergraduate degree from Yale, his law degree from Vanderbilt Law School, and a master of laws degree from Harvard. Prior to his appointment to the Sixth Circuit, he was in private practice in Nashville. He served as the United States Attorney for the Middle District of Tennessee. He also taught for seventeen years as an adjunct faculty member at Vanderbilt Law School. And last week, the Chief Justice of the United States named Judge Merritt as his deputy – his second-in-command of policy and administration for the federal judiciary. As such, he is the chair for the United States Judicial Conference Executive Committee. I am pleased to present the Honorable Gilbert Merritt.

JUDGE MERRITT: I'm glad to be here with quite a large number of old friends, judges and others. When I came in, just a few moments ago, Judge Avern Cohn immediately attacked me about cameras in the courtroom, and I can guarantee you that since Avern Cohn and John Feikens are here we don't have to worry about the question and answer session. It is also good to be here with Dean Kronman. He is a marvelous legal philosopher. I read parts of his book twice. All of it once. He has written a wonderful, provocative book about the legal profession, the judiciary, the profession, the practicing lawyers and legal scholarship. I recommend it very strongly to you and to all of those who are interested in the legal profession. It is really a marvelous book. I have had my three law clerks, two of whom are from Yale, get the book and begin to read it. The beauty of the book is not so much in the conclusions, but more in the train of reasoning given. I recommend that you read it for that reason. You cannot well describe a fine poem, and for that same reason it is difficult to, in a short compass, describe this book.

But it, in my view, doesn't tell the whole story about the legal profession. It is an insider's view of the current psyche of the legal profession and a philosopher's view of the current moral quality, as seen from inside the profession. And, although the happiness and
the self-worth - or feeling of self-worth - of lawyers may have declined in the last several years for the reasons given in the book by Dean Kronman, there is an equally important insight about the profession that seems to me implicit within the book, but not fully articulated or expressed. There is another perspective, and that perspective is kind of an outside perspective, or an outsider's perspective - a public perspective about the legal profession; the legal profession as an institution, not so much what we feel as individual members. The legal profession as an institution, lawyers, judges and legal scholars are more important, it seems to me, now to our communities, our states, the nation, and indeed in the world of nations than ever before. The profession plays a much larger role, a much more vital role, in communities and nations than ever before. As the malaise of the profession has increased, so has the importance of the profession to society. And the cause of both increases may be the same.

Let's compare the profession at the turn of the last century, almost now a century ago. Let's compare it to the profession today. Let me take the federal judiciary as a small but illustrated example of the change. Now there are almost 30,000 federal judicial employees. Almost 1,500 judges, including bankruptcy judges and magistrate judges. The rest are employees, clerks and probation officers who play many other roles, but who are a very vital part of this judicial bureaucracy. In 1900 there were about 100 federal judges and about 200 employees - one percent of what we have now. Now, to take my own court, the Sixth Circuit, the Sixth Circuit now decides about 3,000 cases a year. In 1900 it decided seventy-five, one percent of what we have now. There were no public law cases in 1900, except for very few criminal cases. It was all private litigation. No section 1983 and other actions against governments and public officials. No welfare and discrimination, or civil rights or constitutional civil liberties cases. Looking at the profession, not just the judiciary; looking at the legal profession in 1900, there were only about ten percent of the almost 900,000 lawyers we have today, and many of them farmed on the side or ran stores or were in some kind of business like that.
What has happened to cause this vast change? In understanding that, we may begin to understand a new mythology or the seeds, the embryo, from which a new mythology perhaps could be built. What has happened is, to use a shorthand phrase, the proliferation of law – the rise of the administrative state. New labor, antitrust, securities, banking, transportation, communications, health, welfare, environmental, civil rights, pension, tort, criminal and many, many other fields of law have been created and have exploded since that time. Regulation, legal liability, legal rights, privileges, duties and immunities have exploded. At the turn of the century, there was one lawyer for about every 1,500 people. Now there is a lawyer for approximately every 300 in our society. And this phenomenon of the proliferation of law is by no means limited to the United States. The world is rapidly adopting some version of the legal system of the United States. In the last fifty years since World War II, more than fifty nations have adopted or are now in the process of adopting or trying to adopt our doctrine of judicial review, our doctrine of judicial enforcement of constitutional rights. They have adopted or are attempting to adopt a legal system that aspires to the rule of law and requires an independent, powerful judiciary and an independent, powerful legal profession. These nations are training and encouraging lawyers by the thousands. I see no way that this trend will be reversed, and I think it is not a bad trend but a good one. The proliferation of law of all kinds in this century reflects the pace of change in our society in science, technology, medicine, engineering, transportation, communications, you name it and many other fields. It will continue, no doubt.

Our society and other nations are so much more dependent on law now as a means of social control and as the expression of social values than we were in times past. We could discuss why – let's leave it to one side for the moment. Because of the increased complexity of our society – the many fields of law, the dynamic change that is occurring in our country and around the world – the future will require more specialization – not less; more international lawyers of all types, more health lawyers, more
government lawyers, more in-house corporate lawyers and, God forbid, more judges. Litigation across national boundaries – NAFTA-type litigation, European community-type litigation – will rise. Lawyers are more specialized, working longer hours and charging higher fees because there is so much more law and regulation to administer. Lawyers may be unpopular, they may be unhappy, they may be overly specialized and overly commercialized and have less feeling of self-worth, but the profession is stronger and more important than ever. There is no chance that lawyers are going to go the way of buggy manufacturers or going to have to downsize like defense contractors. The individual lawyer-statesman may or may not in some sense be a relic of the past, but the world will continue to put itself more and more in the hands of law and the legal profession.

DEAN ROBINSON: Just to show that the panelists can bob and weave, Dean Kronman and I decided it made a little more sense to hear from our three other panelists before he has a few words, and we thought it was important to open the session for comments and questions. And so, Denise, we’re going to go right to you next. And with that we are pleased to say that this is the last day that Judge Denise Page Hood is going to be a Wayne County Circuit Judge because tomorrow she will sworn in as our newest United States District Judge for the Eastern District of Michigan. She brings a very interesting perspective to today’s program. She not only is the most recent appointment by President Clinton to this district to be sworn in, she served as a Wayne County Circuit judge, a judge of the Recorders Court for the City of Detroit, a judge of the 36th District Court and she also brings a perspective from the organized bar, being the immediate past president of the Detroit Bar Association. She is a graduate of Columbia Law School. I’d like to present the Honorable Denise Page Hood, Judge Hood.

JUDGE HOOD: I want to begin by thanking Dean Robinson for asking me to participate in this program with lots of distinguished lawyers and judges and to the firm of Mr. Driker for supporting
this event, which I think is giving us a unique opportunity to be reflective about our profession in a way that, in the busy fervor of life, we are perhaps not as reflective as we should be. And I’d also like to thank Dean Kronman for giving me a book where in the first chapter foreword, he says it’s perfectly alright for me to go and read the ending out of order, and that I could come back and read the meat and any other part of it that I wanted to at any point. Usually the authors don’t give me that opportunity, and I feel a lot of guilt reading the end first then going back to see if the book is really any good. So I appreciate that. And lest any of you think that I’ve left you out, I am going to have a public swearing in October, so you haven’t missed it.

I do want to respond to a couple of things in the book, and I’m going to jump around and change hats a little bit. One of the things that I did want to respond to was something that Judge Merritt said: that is there is increasingly more business for the courts. I think that is true and I think that all of us are responding to that. One of the things that *The Lost Lawyer* speaks to is the kind of commercialization of law firms and the fact that they are driven by things like billable hours. In the chapter involving the judiciary, he talks about the judge as a manager – about the managerial judge. And if law firms are driven nowadays by billable hours, then I think probably judges are driven by what in Michigan we call “time standards,” and in this instance I will be speaking from the state court perspective. That is, that the pressure is on us to manage our dockets, usually individual dockets of some kind, in a way that results in the judicious and expeditious dispensing of justice. And it does, I think, cause lawyers who have become judges to engage in a process that is not necessarily what they’ve designed that they would do.

We come to these positions thinking that we will be engaging in the deliberative process either in a case that results in a trial, or results in some need for us to be involved in the resolution of the case in another way, such as settlement or through some other negotiation that we may directly or indirectly participate in. We are not involved in what we call judging, I think, in the traditional
sense that we have heard it described today. We are, in effect, being
managers of our cases, making sure that the process runs smoothly
and, I think some lawyers think, quickly. And that does take away
from us the ability in some instances to be deliberative. So I think
we have to balance two of the things that I think are at issue here:
the ability of the judge to engage in the deliberative process when
it is called for, and then to judge the allocation of the time that the
judge will spend on any one case or the processing of many cases.
I think that causes us to act outside of some of our training, which
is part of what causes us to be a profession. I think partly we are a
profession because, although we do different things, we have the
same training and we approach problems in a similar way. But in
my training, I don’t think I was exactly trained to be a manager in
the way that I was called upon to manage when I had an individual
docket. And so I do think that impacts the way that we go about
doing our work.

Some of the other interesting issues in the book are the concept
of the lawyer acting as a advocate for the client and the lawyer
acting as the officer of the court, and the balancing, on the part of
the lawyer; the ability to do those two things and how those two
things are sometimes at odds. And how the ability of the lawyer to
act as an advocate has changed over time, especially in the situation
where you have the lawyer acting in a transactional setting,
meaning “I have this case for this one time,” as opposed to having
a client that I’ve been advising and having a lot of contact with all
along. So you have a dichotomy there that is greater than it used to
be in the days before the modernization of the courts. I know that
when lawyers come to court I call upon them to do something as
an officer of the court that from time to time has the ability to put
them in a situation that might appear to them, I think, at first blush
to be at odds with their duties to their clients as an advocate. And
I think that’s an important issue that’s raised and spoken to in the
book which will interest everyone.

The other hat I’d like to put on is that of my bar association. I
think we’ve talked a lot about what it takes and what it is to be a
lawyer-statesman, and whether or not that ideal is outdated. And
I suppose that I agree with those who have said that it is not necessarily outdated and it has not disappeared from the profession. There are still many men and women who act in a capacity like that. I think there are several issues that prevent all lawyers from acting in that capacity. Several of them you’ve heard. One is specialization, where you do very specific kinds of things for your client and you’re not called to be engaged in a number of things that bring you into contact with the rest of the profession. There are some of us who go day-to-day and we don’t see very many other lawyers who do anything different than we do. I think that limits our ability to know what is going on in the profession and to act in a way that brings us together as a cohesive group. I think that is where the organized bar associations have a duty to lawyers in enhancing the profession, the cohesiveness of the profession and its identity. Because I think part of what we’re talking about here is whether or not in fact we’re lost and don’t know who we are, or whether or not we are just different than we used to be and cohesive in a different way.

In that sense I think the bar association is an opportunity for those lawyers who are public spirited to have an opportunity to engage in something that perhaps enhances their professional life in a way that it is not enhanced in their day to day work. For instance, I know probably most of you have exciting cases all of the time. But sometimes I have some pretty run of the mill cases. And I think probably when I’m on my sixth pro-con of the afternoon, it is not particularly a stimulating environment. No one is really excited about what is going to happen in this case because most of the issues have been decided and do not cause me to engage in alot of deliberative process or to do anything that’s more than merely a rote action on my part. There are certain specific things I need to know and make a record of and some questions I’m going to ask. And in that setting, as probably all of you know from your daily lives, there are things that are not very interesting that happen - not that divorces aren’t interesting, but there are things that tend to be routine. And in that setting, I think it is hard to have a lofty feeling about what you’re doing or to be, and the word I think
Dean Kronman uses is, happy about your profession. It may be something that you’re glad that you’re doing and that you’re making a living doing, but it isn’t particularly a fulfilling, of-the-moment experience. I think that engaging in bar activities that enhance the work that you do and make it easier on a day-to-day basis, and also give you an opportunity to engage in pro-bono or public service activities, is something that enhances your profession that gets to be a part of your job if you choose to do that. And I think that is very important because as law firms get bigger, I think the opportunity for people who have been engaged in organized bar activities to enhance the profession gets further away from young people who are new lawyers and don’t have those opportunities to interact and see that they were involved. And where that kind of mentoring situation breaks down, the bar has the opportunity to involve those lawyers in a way where they get those experiences. So I think that we need to take initiative on our own to encourage younger lawyers to engage in some activities beyond what they do at the office.

With respect to that, I want to jump back to my lawyer hat. In the judiciary section, one thing that is talked about is the increased use of support staff to engage in what is inferred to be judicial decision-making because of the press of the courts with their caseload. In the one sense, it is an extreme danger if the judge is not making the decision himself or herself. On the other hand, it is doing exactly what we’re hoping we would do in the profession, which is to guide younger lawyers into learning how to think in a different way or to think in a more mature way by people who have been in practice for long periods of time or who have been in the judiciary for a long period of time after practice. And I think that even though we have used those people to support the decision-making process, the judges have not completely given up the deliberative process in making those kinds of decisions.

I’d like us to be a little forward thinking that maybe the lawyer-statesman is not an ideal that is lost, but that it is an ideal that is among us, but maybe not for all of us. And that in our profession we are going to reflect the changes that occur not only in the
profession and the law as it grows bigger, but also the changes in the general community and our global communities. And that what we have to keep at the forefront are some of the ideas that Dean Kronman speaks about, those being that we should be working for the public good and the enhancement of our profession. I think that it is true that more and more people have relied on us to resolve all kinds of disputes, disputes that those of us think rightly belong in the courts and some that people aren’t sure belong in the courts, everything from deciding contract actions and disputes that have traditionally come through the courts to taking on things that are really moral dilemmas in our society, such as genetic engineering and assisted suicide. We’ve also been called upon to resolve social ills, like what do we do with young people who are committing crimes. And so the burden on the profession, in many instances, is much greater than what it has been in the past. And so is the expectation. I only hope that, if we do not settle on an ideal that all of us could buy into, we could settle on some ideals about what the profession is among us and uphold those as valuable and enhancing to our communities. Thank you.

DEAN ROBINSON: Our next speaker is currently serving, by appointment of the President, as the United States Attorney for the Eastern District of Michigan. Before his appointment, Saul Green served as corporation counsel for Wayne County. He is a graduate of the University of Michigan, both undergraduate and law school, and we hold that against him here. Saul has been very active on bar activities over his distinguished career as a lawyer. In recent years, I have worked with Saul in connection with the State Bar of Michigan’s Special Committee on Under-Represented Groups. Some of you may recall that in the March 1994 issue of the State Bar Journal, Saul wrote an article entitled Access to the Academy: The Absence of Minority Faculty at Michigan’s Law Schools. He has had a distinguished career and brings a unique perspective to today’s topic. I present to you the United States Attorney for the Eastern District of Michigan, Saul Green.
SAUL GREEN: Dean Robinson, thank you very much. Thank you for the invitation to come and participate in this panel. I want to say thank you to the panelists. We had an opportunity before getting started to have lunch and spend some time together and it's been good to exchange views on this topic. I found Dean Kronman's book to be very enlightening. It's been helpful to me in thinking through some of the choices I've made and why. I have spent twenty-two years in public service, and oftentimes, you think about why you do what you do and what it is that has made it compelling or enjoyable. And through that twenty-two years, I have tried to do that at times and I found Dean Kronman's book again to be very helpful.

The perspective I think that I would like to talk to you about is that of public service. In addition to talking about it as an alternative – as perhaps one of those areas in which the ideal of the lawyer-statesman can be preserved or resuscitated, I would also like to talk about the concept of the lawyer-statesman for just a few minutes.

My perspective is one of a 1972 law graduate, twenty-two years in public service. The beginning of my career and now, where I presently am working, are the same place. From 1973 to 1976, I served as an Assistant United States Attorney in the Eastern District of Michigan. I can say that over this twenty year period, there has been a radical change in that office, at least in my views on how that office functions or how it is made up. And I think those changes have a lot to do with a lot of what has been discussed today, the changes in the profession itself.

I talked about the year of my graduation because, as Dean Kronman suggests in his book, the ideal of the lawyer-statesman perhaps started to decline within the last thirty years. As much as I recognized, both as a law student and as a lawyer, that lawyer-statesmen are the legal giants in our community, I never really heard it advocated as a concept. I never thought through it as a concept until reading Dean Kronman's book. In thinking about it, I thought about what it was that impressed me and impressed others with those persons who would reach that stature. And it was
not only their accomplishments as lawyers, their accomplishments
in the courtroom, but it was also all the contexts in which you saw
them, the different issues that they addressed not only as lawyers
but in their communities and the type of issues that they advocated
for. Clearly they were interested in and concerned with issues
beyond the technical application of the law.

But I also want to make sure that we understand that to the
degree we are arguing that it is an ideal, an ideal that the profession
aspired to. I don't want to over-glorify that, because to the degree
that there was a significant cadre of lawyers who were functioning
as our lawyer-statesmen, there were issues that did go unaddressed
during the glorious days of the lawyer-statesman. We have to look
at the societal issues that pervaded us - issues that the profession
really only started to address in the last thirty years. I'm talking
about issues such as racial discrimination, gender discrimination,
lack of access to the profession. To Dean Kronman's credit, he talks
about that in the book as one of the areas in which perhaps the
lawyer-statesman was not as effective as he or she should have been.

But putting aside those failings, those concerns, I have to start
with the concept - that I believe in the concept, I like the concept,
the idea, as Dean Kronman describes, of a devoted citizen who cares
about the public good and is prepared to sacrifice his own well-
being for it, unlike those who use the law merely to advance their
private ends. I sincerely believe that if we are going to address many
of our societal problems and many of the problems that our clients
face, we are going to have to do it with a combination of not just
being technically proficient in the law but also with the issue of
good judgment and prudence in applying the law.

A word about the issue of public service and the change in the
profession. I agree with many of the descriptions in Dean
Kronman's book with regard to how the profession has changed,
and I believe what has resulted from that is that public service in
many respects has benefitted. Because what has happened is, in
more and more cases, people are looking for alternatives. They are
looking for an environment in which they can show their public
spiritedness, in which there is time for the deliberative process, in
which there is time to establish relationships with clients and to work with them continually in developing a rapport, in which your judgment can be applied.

Back in the 1973 to the 1976 period when I was at the U.S. Attorney’s Office, the makeup of the office was radically different and the time we put in there was different. We were from a varied background. Most people came and stayed maybe three or four years, and then they moved on. In many respects, it was considered kind of a stepping stone to private practice and maybe to the big firm. That has changed radically in Detroit and in U.S. Attorneys’ offices all across the country. What is happening is that people are staying for longer and longer periods, and as opposed to people coming to the office and then moving into private practice, what we are seeing more and more of is private practitioners applying and coming to the U.S. Attorney’s office. I reviewed over the last six months not only hires that I made but hires that were made by my predecessor. A substantial number of them are people who were in private practice, many of them in the big firms, but again, who have decided to come to public service. And I think that the reasons for that are again some of the issues that we have discussed today.

Dean Kronman talks about the lawyer-client relationship and how that has changed, how specialization has made it much less intimate, much less of an opportunity to exercise judgment and apply your judgment and prudence. In a public service setting, particularly the U.S. Attorney’s Office, I think it is just the opposite. There you are serving your clients, the agencies that you represent, constantly on an ongoing basis. The whole function, often that is prosecutorial discretion, that you have to apply on a day-to-day basis relates to the exercise of judgment and discretion. So again it’s a radically different environment that I think many people are looking to.

The work day: we all have heard about the various stories, the various scenarios where you hear 2,000 hours a year, you hear 2,500, I think you know 3,000 maybe even floating around. As you calculate, you can’t even figure out how that is humanly possible to
accomplish. Regardless of what the accurate figure is, again the environment in public service, the environment at our office, is different. By six o’clock most lights are off, office doors are closed. But it does not mean that we are not involved in significant, stimulating case work; rather, there is the opportunity for what I think is a full life that has become very appealing to many persons.

And then there is the economics of the issue. Clearly, salary does not drive the people who come to public service. There is no question that we earn significantly less then our counterparts, particularly those in the large firms. But despite that, you see more and more people wanting to make that move. I have seen people who have taken substantial pay cuts to come into the area of public service. And I think that a lot of that again has to do with the ability to exercise the discretion, the ideals that Dean Kronman talks about that you’re still able to do in that setting. You’re able to exercise a sense of public spiritedness, whether it is from the perspective that you can affect your society by getting the bad guys, you feel a connection to the work that I think is much different. Also, I think that you are able to exercise the full range of your craft. As I’ve interviewed people who have been in the private sector and they talk about their experience, it is not unusual for a person to be in a litigation section and have been there for three or four years, and the most they have done is motion work or discovery. Whereas again, in the situation within the public sector, you’re going to be much more quickly able to have a full range of applying your skills and your craft. So I think that all of these things are driving people to look to alternatives, and as a result of looking to those alternatives, I think that the public sector has been a real beneficiary.

So I think that the change in practice is real. And I don’t know if it’s been precipitated by the decline in the ideal of the lawyer-statesman, or whether the change in law schools, firms and courts has caused the change in the lawyer-statesman – whether the lawyers are different because of that. But I believe the changes are real, and I think that the public service is benefiting and that public service has become a very, very viable alternative.
I consider myself fortunate to have been able spend twenty-two years of my practice in an environment in which expressions of concern for public-spiritedness could be attended to. I encourage all of you, those who are still trying to make your decisions, the law students, to think about it as an alternative. Thank you very much.

DEAN ROBINSON: Dean Kronman leaned over and said, “if he thinks that the line at the U.S. Attorney’s office is long now, wait until after all these students hear what he has to say about going home at six o’clock, and the like.”

Our next speaker is a member of the faculty of Wayne State University Law School, Professor Kathryn Heidt, a graduate of Pennsylvania State University, Cleveland Marshall Law School, and with a masters degree from Yale Law School. She is actively engaged in practical legal scholarship of great value to the bench and bar. Her recently published book, Environmental Obligations in Bankruptcy, is an important contribution to a cutting edge area of the law, important to lawyers and judges. Her experience as a practitioner and law professor, from a law school which I like to think is a law school that prides itself on training future lawyers for the legal profession, gives her an important perspective on Dean Kronman’s observations about the law schools. His book tells us that the ideal of the lawyer-statesman has lost much of its appeal to academic lawyers, that the ideal is at present in decline in our law schools, that our law schools have done much to undermine the lawyer-statesman ideal by bringing the value of practical wisdom into intellectual disrepute. He refers to this as a crisis in legal education. To address that important issue is Professor Kathryn Heidt.

KATHRYN HEIDT: Dean Kronman’s book contributes to part of an ongoing dialogue about lawyering and legal education. He offers a critique and he proposes some solutions to a perceived trend away from human values in lawyering and legal education. I would like to address three points today.

First, I question whether the mythical notion of the lawyer-
statesman, which I’d prefer to call the lawyer-statesperson but I’ll
use Tony’s term, ever existed and whether it’s relevant today.
Second, I’m not convinced that the law school curriculum has gone
astray or at least is threatened to the extent that Tony Kronman
thinks it is by law and economics. Third, to the extent, however,
that we do decide to take some corrective action in the law schools,
I’m not persuaded that a return to the case method is the
appropriate way to introduce broad-based humanitarianism that
Kronman advocates in his ideal about good judgment and
prudentialism.

First, like some of the other speakers, I have reservations about
the ideal of the lawyer-statesman. We live in a world that is very
different from the world of 100 years ago, or even 30 years ago.
Not only has the legal community changed to include people that
it historically excluded, but the society that demands the lawyer’s
craft has changed dramatically. But I’ll have to leave these points
aside for now because I would like to address Dean Kronman’s
critique of legal education and move on to my second and third
points. I will assume, therefore, that the ideal of the lawyer-
statesman, a person with great judgment or practical wisdom, is an
ideal that we should value and one that we should continue to
encourage and to emulate.

In recent years, legal scholarship and legal teaching have come
under attack. Some say it’s not practical enough. We graduate
students who, according to some judges and some law firms or
lawyers, are not prepared to practice law. Critics charge that our
scholarship, at least at the elite schools, is of little value to judges
and lawyers. Dean Kronman looks at legal education from a
slightly different perspective. He seeks to understand what forces
in legal education advance and what forces inhibit attaining
judgment or practical wisdom that leads to the lawyer-statesman
ideal.

I would like to address two aspects of his work regarding legal
education. First, I would like to address the argument that the
scientific movement in law, that he mentioned earlier, specifically
law and economics, has not really been so bad, that it has not done
so much to undermine prudence and the pursuit of practical wisdom in legal education. Second, I would like to address his proposed solution that we as law teachers return to the case method.

According to Dean Kronman, law and economics is hostile to the concept of prudence and has done more to harm practical wisdom and the lawyer-statesman ideal than practically any other movement in contemporary legal scholarship. Critical legal studies runs a close second. Dean Kronman, I think, overstates his case. He has created a strawman, I prefer to call it a strawperson. He argues that law and economics is the cause of the downfall, or one cause of the downfall, of the lawyer-statesman ideal in legal education. He begins by setting out the two assumptions of law and economics: First, that resources are scarce. And second, that human act is rational if the goal is to eliminate waste. Law and economics is a comprehensive theory that has both a descriptive and a prescriptive or normative component. It postulates a single value – efficiency – and it holds itself out to be an exact science. It assumes that everything can be quantified and that there is some calculation, that we can then make, to come up with the right answer about a particular problem. The strong view of this theory is that the minimization of waste should be the only goal in decision-making. The weak view is that waste minimization is simply one of many factors that we might consider. The obvious problem with the strong view is that it is anti-prudentialist because it focuses on only one value. Prudentialism, leading to good judgment, implies pluralism. Thus, according to Kronman, law and economics is hostile to prudentialism and to the lawyer-statesman ideal. Dean Kronman does note that there are some who see law and economics as part of a prudentialist approach, for example Richard Posner. But, Dean Kronman fears, he has two fears, really, about accepting law and economics as part of a prudentialist approach. First, the problem that Kronman sees is that once you let law students hear about law and economics, that’s all they’ll want to hear about. It’s kind of like the domino effect; once you open up the law and economics door, law professors and law students will get hold of it,
they’ll think they have some special knowledge that the uninitiated
don’t have, they’ll take the special knowledge and use it to solve
problems to the exclusion of other values. His second fear is kind
of like Jonah swallowing the whale, instead of like the other way
around. Once you have let law and economics in or exist, it will
become more refined. There will be greater perfection and greater
precision in the methodology and therefore it will “expand at the
expense of practical wisdom.” Thus, Kronman sees no place in the
exercise of judgment or in prudentialism to even consider economic
analysis. He would rather keep it out.

Kronman’s fears really could be said about any theory. There
is nothing peculiar to law and economics. We could say the same
thing about feminist theory. Dean Kronman might say that
feminism is different from economics because economists pretend
to be scientists, but we need only look at the state of the economy
to figure out that is not true. Besides which, any theory attempts to
be specific, attempts to be scientific in its methodology even if it
doesn’t call itself science, it tries to be precise.

As an empirical matter, I’ve been a lawyer since the late 1970’s,
and law and economics has been around for at least as long as I’ve
been a lawyer. I have not seen it taking over any law schools, firms,
or courts, and I’d like to hear from Dean Kronman, specifically,
which schools are threatened and which ones should be placed on
the endangered species list. I can think of only one and I won’t
mention the name of it. The system has to allow for all kinds of
input. To lead to good judgment we need to leave room for
dialogue. What is Dean Kronman suggesting then? Is he suggesting
that we ban law and economics from schools?

Let me just give an example that might help point out the
intolerance of the law and economics example that Dean Kronman
uses in his book. Assume that in the next batch of resumes that we
get on a law school hiring committee, we find that there is a
follower of Mother Theresa who is looking for a teaching job. And
she has a particular view about law and legal education; let’s
exaggerate her position for just a moment. Let’s say she calls her
view the “law and compassionate self sacrifice view.” This
postulates first, that self sacrifice is the only value by which the past
development of law can be understood – the descriptive side. The
second is that self sacrifice is the only value pursuant to which the
future development of the law should proceed – the normative
thesis. Should we begin to fear the altruists altogether? Should we
fear that as they refine their analyses and methodology that
altruism “will expand at the expense of practical wisdom.” Under
Kronman’s view, Mother Theresa’s follower would pose as great a
threat to prudentialism as would Richard Posner because it focuses
on a single value. Does Mother Theresa have nothing to offer us?
I think she has something to offer us. We would welcome debate
about what altruism has to offer. She represents one side of a
multifaceted debate.

To sum up, in our society we test theories by putting them
forth and letting them be attacked. Dean Kronman would
seemingly keep law and economics from being tested. Theories do
fall by the wayside, but they should be given their chance. I would
suggest instead that at least law and economics has given us
efficiency, which is just one of the many values that we as a society
and we as lawyers, judges, law students, and law professors use to
make choices. Law and economics is a part of the large debate that
is our society. We should not fear the debate but should welcome
into it all ideas, all models, and even Richard Posner and Mother
Theresa.

Dean Kronman has a suggestion with respect to where we move
on from here in terms of law teaching. At the end of the book he
appeals to teachers to return to the case method. To understand
why he does this we need to understand his argument that the case
method promotes the development of practical wisdom, or good
judgment, and thus promotes the ideal of the lawyer-statesman.
Everyone here knows something about legal education. You might
be in the middle of it right now yourself. You might have gone
through it or some of us like myself may have returned to it to
teach. So, we have an idea of what the case method is all about.

The case method teaches law students by having them read
appellate cases. It teaches them the subject matter. But it also does
more than teach just a subject. It teaches students how to think about and analyze particular problems. Dean Kronman argues that the case method is uniquely situated to develop practical wisdom. The case method teaches students to see both sides of an issue. In the class a student might be called on to defend or put forth one side’s argument and it could be either side. So the student has to be familiar with both sides of the argument. The student also could be called upon to act as judge and play an impartial role in deciding a case. The student then has to have an idea about all of the arguments that can be made in the case. What the case method does then, is to force the students to think about all sides of the issue. Whatever preconceived notions students had about a subject before they came to law school, they now are forced to see other points of view. This process is called “losing one’s soul.” And Dean Kronman notes that some students find this process of losing one’s soul disconcerting because they no longer have the same commitments that they had before they came to law school. I would like to note that in some cases the process can be enlightening.

The process of exploring all sides of the argument as well as playing the impartial judge is one step on the path of gaining good judgment or practical wisdom which is at the core of being a good lawyer-statesman. However, teaching via the case method is too narrow a view of law teaching today. The goal of practical wisdom is equally well served by statutory courses and by practical courses. And I’ll take them just briefly one at a time.

The law is increasingly statutory, and so in law school we see more and more statutory courses. I don’t believe that most of the statutory courses can be effectively taught by using the case method, by reading cases. In teaching a statutory course the statute itself has to be the very focus of the course. Other factors such as legislative history, administrative interpretations, and social policy often play a far more important role than cases in interpreting that statute; if for no other reason than there might not be any cases if the statute happens to be new.

Dean Kronman says that the case method allows the students to explore both sides of the argument. A statutory course in which the
statute is explored through the use of problems and hypotheticals is even a better medium for allowing students to explore all sides of an issue. In the case method, the cases usually contain most of the arguments that the students have to think about. Maybe they can make up a few, but a lot of the arguments are laid out in the cases. When students are confronted with a statute and a problem, however, they must rely on their own ability to create appropriate arguments. In the case of an ambiguous statute, which is when statutory analysis is really pushed to the limit, students are forced to examine every possible argument from legislative history, to policy, to common sense.

With respect to practical courses, we see law schools offering more and more practical courses. These range from trial advocacy, to courses in negotiation, to clinical courses. Even Yale, I will note, has a clinic. The courses don’t use the case method, but, that doesn’t mean that they don’t teach practical wisdom. They do lead to the development of practical wisdom. For example, I teach a course in business negotiations. The students throughout the semester engage in a series of negotiations and one of the things that they have to do before any particular negotiation is to sit down and to plan. And part of their planning is not only figuring out what they want, but it is anticipating and figuring out what the other side wants. And not only figuring out what the side wants, but figuring out what arguments the other side will make to support its position. So the student has again got to consider every side of the picture before he or she goes into that negotiation. Similarly, she has got to think about her own position in detail to be able to defend it to the other side. Practical courses provide an opportunity to be both involved and also detached. Your opponent or your adversary is right across the table. As Dean Kronman said earlier, there is a sense that lawyers need to develop of when to step on the gas and when to put on the brake. A course like negotiation is the perfect opportunity to allow students to do that.

These developments have led to the decrease in the use of the case method at a lot of law schools. Dean Kronman doesn’t address either one in his book. They are both important developments. In
my view I think they are both worthwhile developments. Since the courses encourage the development of practical wisdom, I would suggest that Dean Kronman consider listing them on his “to do” list for future law teachers.

Finally, to conclude, I’d like to note that Dean Kronman predicts that those who do cling to the case method will find themselves more and more in the minority. He predicts that those who follow grand theories like law and economics and some of the other more recent theories will become more of the majority. I’m not so pessimistic. First, even scholars who engage in theoretical scholarship often teach traditional courses using traditional methods. J.J. White at the University of Michigan pointed this out when he identified several of his young colleagues who, although they were engaged in some very theoretical scholarship, taught their traditional courses in a very traditional manner. Second, to the extent that statutory and practical courses continue to grow, the teaching methods used in those courses have at least as much to offer as the case method. Dean Kronman has written a provocative book. There is something in it for every lawyer, every law student, every judge, everyone who is thinking about going to law school, and probably everyone who has left the profession. What I think will be interesting, given his call to return to the case method for law teachers, will be to see what happens at the Yale Law School. Thank you.

DEAN ROBINSON: Well, I think we should ask Tony for a few remarks and then open up the floor. Dean Kronman, a lot of people have been shooting at some of this. Maybe a few general comments, and then I’d like to encourage comments from the audience.

DEAN KRONMAN: You have all been extremely patient sitting for over two hours. I want to give you your due too, so I’m going to try to be as brief as I possibly can and just pick out of this storm of comments and suggestions and observations, mostly friendly — some appropriately critical — of those, some helpful. All I would like to do, if I could, is incorporate by reference, but that would be
the easy way out.

Let me just respond very briefly to a couple of the points that were made by the previous speakers. As we went along I started jotting notes down to myself on a piece of paper and I only had one piece of paper to work with. And I've ended up with an illegible hieroglyphic so I'm not sure I'll be able to make any sense out of this, but I'll try.

First of all, with respect to Mr. Bushnell's comments, he is absolutely right to say that the large firms I focused on in my book and in my remarks earlier this afternoon represent only a tiny sliver of the profession. I think he said two percent of all practicing lawyers work in firms of fifty or more. The vast majority of lawyers are spread out across the country in groupings of much smaller size, and that's true. But as I think he acknowledged in his comments, these large firms have played traditionally and continue to play today a disproportionately influential role in the life of the profession generally, in shaping its ideals and leading its main institutions like the American Bar Association, in giving the profession its direction. And so it really is appropriate, I think, in asking if there has been a change in the profession's outlook and ideals, to start with these firms and their evolving character, because changes there, though it's only one little tiny corner of the profession measured numerically, have numeric effects which spread in a magnifying and accelerating way through the profession as a whole. I can make this point very graphically, I think, by reminding you that even though The American Lawyer is mostly about lawyers and lawyering in these large firms, it is read very widely from coast to coast and has had a transformative effect on the way people throughout the profession think of themselves and their work. I do want to endorse, however, very strongly one point that Mr. Bushnell made. And that is that lawyer-statesmanship as an excellence is, in my view of it, not restricted to any particular sphere or branch of the profession. It is found in the humblest corners (and indeed I am inclined to say more often there than in the elevated ones); and I recognize that in the small law offices working in their small home towns or local neighborhoods,
prudence is often at work and indeed more directly and helpfully so than in some of the country’s most prestigious and largest firms. If one were to be held up as a model to the other, I would be inclined to say that the order of reverence should be just the reverse of what it is today.

Secondly, I respond to Judge Merritt’s very useful distinction between what he called an internal point of view – the point of view which is concerned principally with the self perception of lawyers with themselves and their work, their own role satisfaction, the happiness of lawyers, their fulfillment and so on and so forth – and an external point of view which looks not so much at the issue of how lawyers are doing in their own eyes and how they feel about themselves, but rather from the standpoint of the external social order which the law and lawyers serve. Having drawn that distinction, Judge Merritt points out that if it is true, as I suggested, internally, we’re in a state of crisis undergoing a crisis of identity, of professional identity. Externally, the law has never been more needed by, and more valuably helpful to, the rest of the world, that great law-demanding, law-consuming public of non-professionals out there, than it is today. He attributes that fact to what he calls the proliferation of law – the spreading of legal norms and law-making activities into every aspect of our lives. What he calls the proliferation of law is perhaps the outstanding phenomenon of the American twentieth century, I would say. This is something that has remarkably transformed our lives, private lives and public lives, in untold ways. So the phenomenon that he points to is surely a fact of life for us. But I wondered as he was talking whether it doesn’t remain true that, in the end, the lawyer’s great skill, (this is the point that I want to come back to when I make a few comments in response to Professor Heidt’s observations), I wonder whether it isn’t true at the end of the day with all of the statutes we have and the new regulatory schemes and the “law-ification” of the world, whether it isn’t true that lawyers still are concerned primarily with cases, that is to say, with individual predicaments that arise at some friction point where the law that we have, however extensive and complex and detailed it’s
become, rubs up against individual lives. That’s where cases come from, and it’s with cases that lawyers have traditionally been concerned and I think still are today. It is just that the cases now go under the heading of a 1983 action, or a social security problem, or a RICO prosecution rather than the old common forms of action. But it’s still the case that is the point of entry into the legal system for a working lawyer. And isn’t it true that when dealing with cases, with the individual puzzles and predicaments that we call cases, that prudence is still absolutely required? So I suppose I would accept Judge Merritt’s characterization, but demur with respect to its implications for my main thesis. Yes, he’s right: the world has been juridified, lawified to a remarkable degree, but still the lawyer’s work is the work of case law and case litigation; and in the case it is still prudence that is most called for.

Judge Hood made a number of very valuable suggestions and I want to touch on only one and raise a doubt about something she said. Judge Hood emphasized the importance of bar association work and issued a plea for greater involvement on the part of lawyers generally in the work of the organized bar. I would add my own signature to the plea and endorse everything she said in that respect but raise the following question. Have the great consolidating institutions of our profession – the organized bar, national and local, the American Law Institute, the Commission on Uniform Laws, and other institutions of that kind – have they continued to play and do they still play today in our profession the organizing, gathering role which I think they traditionally played in the past? Some, I think, will say they do. I have my doubts. I think about the ALI, for example, which is still doing important work in a number of different directions, but I think it has ceased to be the organizing focal institution that it once was, gathering judges and lawyers and law professors together with the common goal of law improvement. Of course that is what its mission statement still says, but I don’t know that it continues to play with the same vitality that gathering role. So the plea I think is well taken and, as I say, I subscribe to it wholeheartedly. But I wonder if the organized bar is the answer to the dilemma that I described
in my book.

Mr. Green. Again, there are four of five things I would like to comment on, but I want to restrict myself just to one. It is of course terribly important not to sanctify the past, not to find in it or even to go looking in it for a holy picture of perfect people who did everything right and suffered from none of the failings that we suffer from today. This is wrong in two respects. It is wrong first of all and most fundamentally because people are people and have always had their human mix of failings and achievements. They have always been good or bad and mostly in-between. The quality of the human material in our profession has not changed over the last fifty years. It is only the organizing ideals — the mythology — that has changed. I want to underscore that point.

Secondly, it is wrong to glorify our particular past, our professional past, because there is much in it to be ashamed of. We have taken immense strides forward in the last thirty years, in which we can all take collective pride, in the direction of an opener and more accessible profession. When you look at the old, great firms of thirty and forty years ago, they were exclusionists. They were xenophobic. There were no women in them. Jews and Gentile were separated strictly along firm lines. Catholics had a tough time finding a position, and African-Americans were nowhere to be seen. That is not a world I'm proud of, or at least that part of that world is not something I'm proud of. The problem, the difficulty, is this: That was a world that had some wonderful things and some terrible things. The terrible things we've done a moderately good job of extricating — not completely. We shouldn't rest, but we've done a pretty good job of getting the worst elements of that world removed. But we've thrown the baby out with the bath water. The ethos of craftsmanship which sustained those firms and gave them a kind of professional depth and richness which their counterparts today lack, that's going by the boards as well, and we now have a world that is fairer, more accessible, less discriminatory, more open, to everyone, but in which everyone who is now welcome to come in finds what?: unhappiness, unfulfillment at the end of the day, work that doesn't yield much in the way of human
Finally, in response to Professor Heidt’s counter-thrust in defense of law and economics, I would say the following two or three things. First of all, with respect to Mother Theresa, I hate to find myself in the position of saying anything uncharitable about her, but I will say this: It is the mark of any uncompromising theory that it claims to find or to see in the world only one good thing and everything else is just an aversion of that or a way station to its achievement. Economists call the one good thing utility or wealth or whatever. Mother Theresa, in Professor Heidt’s characterization of her, calls it self-sacrifice or altruism. This kind of single-mindedness is the enemy of the attitude which, for me, is the heart and soul of practical wisdom, namely a recognition and acceptance of the fact that the human world is a world of plural strivings and values which can never be satisfactorily reduced to a single point or described without intellectual and personal loss in terms of a single overriding good. And so, I would have to be as suspicious about the Theresian program as I am about the Posnarian. To that extent Professor Heidt’s absolutely right and I would just say that if she thinks that she has put me on the spot by pointing that out, I’m prepared to accept what she says about it with all of the consequences that follow from it.

The law and economics movement: what’s right and what’s wrong about the law and economics movement? What’s right about it, and this has been the secret of its immense success, is that it has been, in the most cobwebby areas of law, a – (I was going to say a “breath”), a gust of fresh air which has swept things clean and allowed lawyers and law teachers to think and talk about torts and contracts and property and on, and on, and on, with a concision and clarity that centuries of encrusted common law learning and statutory law have made very, very difficult. The law and economics movement was and continues to be an enormous enlivening force in American legal thought and, I would say, today continues and remains the single most influential jurisprudential school in this country. I was in Italy this spring for a sabbatical
leave, and everyone – every Italian law professor that I met who asked about the state of things in America – began by inquiring about law and economics: Is it really as pervasive and powerful as it seems from this side of the Atlantic? And I had to assure my Italian friends that it was a bit of an optical illusion, but in fact their intuitions about this were correct. Law and economics is a powerfully dominant force, partly because it has such charm. Law students are befuddled. Law teachers are even more befuddled, and there is nothing like a clarifying thought to give you relief. But once you have it in hand, it is a great temptation to grasp it firmly and use it as a stick to beat down every unclarity that you run into. And that way, I’m afraid, lies dogmatism. Professor Heidt genially invites us to imagine a law professor who does a little bit of law and economics but manages to practice prudence too, who sees the tools of law and economics as only one of several in an armory much more extensive than that. And so you do a little bit of this, and then you do a little bit of that, and so on, and so forth.

The problem with that is that law and economics, like any strong theory, like the Theresian theory, too, has a built-in imperial instinct. It wants to conquer the world. I don’t blame my law and economics friends for this. It is an unavoidable consequence of having a strong view of the world, of having a strong theory. If you think it is a good theory, you’re likely to think that it explains more than it actually can and to try to persuade people that it does. And so it spreads out and it spreads into the classroom. And what happens is that the fascination with the case as the focus of concern begins to weaken and eventually to disappear. What I mean by that is this: economists are interested in cases in one sense. They look to cases to find examples to illustrate their theoretical views.

But the order of interest for an economist, or a Theresian or anyone else who holds a strong theory, the order of interest is: it’s the theory that really matters. It’s the theory that is the important thing. The case has illustrative value and may be of significance if it leads to a revision in the theory, but its importance is entirely secondary and subsidiary so far as the theory is concerned. The case is there to serve the theory, and not the other way around. That’s
the economists' view toward cases.

The lawyers' attitude towards cases, I think, is just the reverse. The lawyer is interested in cases first and foremost and in theories only secondarily to the extent that they can help here in some marginal way in clarifying the case at hand. If this bit of clarification is inconsistent with that bit of clarification over there, well, that's important perhaps, but not as important as working through this case.

Lawyers look at economics from the standpoint of cases. Economists look at cases from the standpoint of economics. And I think it is tremendously important that law students be encouraged to adopt the case-centered attitude rather than the theory-centered in part because it's what they'll need in their professional life, and in part because it is so hard to hold on to that case-centered view and so tempting to find refuge in a grand theory which makes everything neat and clear and final.

Having responded to Professor Heidt in such a combative way, let me, on a conciliatory note, say this in conclusion. The case method for me does not mean just appellate opinions in casebooks published by Foundation and West and Little Brown. It means particular disputes, particularized problems as opposed to generalities, abstractions, large theories. So if you want to substitute hypotheticals or detailed problem sets for actual live cases, perhaps I should say dead cases entombed in casebooks, that is fine with me, and in many cases the problem set may be a more suitable vehicle for teaching a particular branch of law. But it is essential in any case that the focus be on the particular. When you teach the UCC, when I taught the UCC, when I teach the Bankruptcy Code now – immensely complex statutes – the way into the statutes for me is always through the case. And it is with the complexity of the case that I am particularly interested and want my students to become interested, too. So if Professor Heidt is prepared to accept and extend the definition of the case method to include those various other approaches and not to see them as alternatives to it, I think that she and I have no disagreement at all, although I suspect that we still do and I am papering over the differences.
But let me stop papering and let you have your turn. You have been really patient, indeed. And I also want to thank everyone else on the panel this afternoon who spoke for their comments, for the thoughtfulness of their remarks, and in particular, for the time they have taken pondering the issues raised by my book. It is deeply meaningful and gratifying to me that they have, and I really owe them a large debt.

DEAN ROBINSON: I agree. You have all been very patient, but I think it has been very enlightening as well. So I am worried about missing the break, but I (a) was worried about losing the crowd and (b) want to get in as much as possible. I would like to encourage at this point, those of you who would like to, to approach the microphones on either side of the stage.

QUESTION FROM AUDIENCE MEMBER, THE HONORABLE AVERN COHN, UNITED STATES DISTRICT JUDGE: I don’t want to disappoint my chief judge.

DEAN ROBINSON: Or your dean and former partner.

JUDGE COHN: I want to ask: do you think, on the whole, that the legal profession better served the community before Brown v. Board of Education, or after?

DEAN KRONMAN: Brown v. Board of Education is the most important decision of the century. It has transformed our world in ways that, to my mind, are unambiguously better. I have no doubt about that at all and I can’t imagine frankly that anyone reasonably could today. Brown v. Board of Education opens the way to literally dozens of reconstructions in different aspects of our public and private life. And I would say to the extent that the legal profession was complicitous in the regime that prevailed before Brown, and has been supportive of the regime that Brown helped to put in place, the profession itself and the service that it renders to the community at large have been, to use the phrase I used a minute
ago, unambiguously improved by the decision. So I have no quarrel with that at all and, in fact, it is entirely consistent with the point I was emphasizing a couple of minutes ago.

The legal profession and American society generally have been opened up in the last twenty-five, thirty, forty years in ways that I find worthy of pride and applause. When I recommend the rescue and revival of an old-fashioned ideal, I would like to be very careful to keep only that part of the vanished, old world that I regard as morally praiseworthy. But I do not think that we have to take it all in a lump, so to speak, that if you subscribe to the ideals that I propose, that you have to embrace *Plessy v. Ferguson*. Or, vice versa, that if you think that *Brown* was the good and wise and courageous judgment that it was, that prudence goes by the board. We’ve got to be able to have our cake and eat it too, in this regard. We must. Otherwise, we will be giving up, either way, something that is of too great of value to us individually and professionally.

JUDGE COHN: Do you think you can cut the baby in two?

DEAN KRONMAN: I don’t see any connection at all between the elimination of the bars to entry which has opened up the country’s large law firms to women and African-Americans and Jews and Catholics and other groups once excluded. I don’t see any connection at all between that opening up and the transformation of the work process itself in ways that have led to the corruption of the lawyer-statesman ideal. They have happened simultaneously, but just because they’ve happened at the same time doesn’t mean that they’re causally connected.

DEAN ROBINSON: We’ll give Judge Merritt a brief response, and then on to the next question.

JUDGE MERRITT: It seems to me that *Brown v. Board of Education* and Dean Kronman’s moral philosophy about lawyers grow out of the same philosophical tradition, same enlightenment tradition, Aristotelian tradition, and are not inconsistent at all but rather, to
the extent they are related, go together. So it looks like, Avern [Judge Cohn], you've got to be reversed again.

JUDGE COHN: I believe that I should quote as an exemplar of the lawyer-statesman, whom he urges us to emulate, John W. Davis, who represented the state of South Carolina in Brown v. Board of Education and waived his fee and got a silver platter instead. I request a reversal in a petition for an en banc hearing, but not in front of the Sixth Circuit.

QUESTION FROM THE AUDIENCE: Could the dean please comment on what effect, if any, lawyer advertising has had on his lawyer-statesman concept.

DEAN KRONMAN: We were talking about this at lunch before coming over this afternoon. It's not a question I've thought about, but my instinctive reaction is to think that the lowering of the bar on professional advertising by lawyers has been a marginal contributor to the developments that I'm talking about in the book. The pervasive structural changes in the market for legal services I think is a much more important factor here. To be concrete, the fact that so many companies and corporations that previously looked to outside counsel to do the bulk of their legal work have taken a lot of it in-house now, and have large legal departments of their own to handle much of the routine and sometimes not-so-routine business that the companies generate. That has changed the relationship between corporate client and private firm in ways that have contributed powerfully to the transformation of the work experience itself in the outside firms.

Lawyer advertising: I personally find it distasteful. I have as much an aesthetic reaction to it as anything else, but I appreciate the point that many have made that this is a patrician response and, after all, different strata within the bar depend on advertising to differing degrees, and why in the world should it be forbidden if it is not really, radically, unprofessional. And, I am inclined to accept that. I don't regard this as a major factor.
FOLLOW-UP QUESTION: Do you think that it is a consequence of this decline or this metamorphosis, or is it just merely symptomatic?

DEAN KRONMAN: I suppose as a spirit of commercialism spreads abroad in the profession, it becomes easier for those who say "look, this is a business like any other, and like any other we ought to be able to have our chance to make our case to the public through newspapers and television spots." That argument takes on greater weight and plausibility.

But who is really responsible for the commercialization of the profession itself and for the creation of this climate of opinion? I think it is by and large the law firms and the legal media, *The American Lawyer* and other publications, the large firms which editorially played a leading ethical role but now have become the purveyors of bottom-line-ism, which makes it easier for everyone, up and down the line, to take the same view and to behave accordingly.

DEAN ROBINSON: Next question.

QUESTION FROM THE AUDIENCE: I am neither an academician nor a judge nor a public servant. I practice law in the City of Detroit. I have for almost twenty-seven years. I practice in the area of civil litigation primarily on behalf of defendants. Frankly, Dean Kronman’s remarks couldn’t be more true at least in regards to my profession and in my small slice of the profession. Judgment in my profession has been downgraded to the point of being useless. It is bottom line. The bottom line is now what is important to insurance companies. In the two or three hours that I’ve been here, I’ve probably lost six or seven billable hours.

DEAN KRONMAN: You can charge them to Dean Robinson.

FOLLOW-UP QUESTION: The other comment that I wanted to make, and then I do have a question, is to Professor Heidt. Here is some
real economics for you. If those applications appeared on the desk of the vast majority of the law firms in the City of Detroit, they would all be thrown away because there are no jobs. If you’re not in the top ten in your class in this area, every one of these students is going to have a difficult time finding work regardless of what you believe and regardless of what you think. I think that is also a symptom that we have to deal with.

And I think that, to get back to what Jim talked about earlier, this feeling of mentoring, what President Bushnell talked about in terms of nurturing coming back, of getting some feeling back, I think we need an association for lawyers. I’m not talking about an association that has some public good elements in it, the American Bar, the Michigan Bar. One of the reasons why we have eighty-five sub-bars in the state of Michigan is because they all provide some service that nobody else provides. I think that’s symptomatic, that lawyers are looking for leadership among themselves in regards to their own profession. I asked Tom Kienbaum, who is president-elect of the state bar. “When are we going to have a state bar president who is going to have the year of the lawyer?” Last year, we had the year of the child, and the year before that it was the year of the woman or whatever. When are we going to have the year of the lawyer when somebody does something for the lawyers and the lawyers’ work conditions and the lawyers’ having to deal with these problems?

DEAN ROBINSON: Does anyone else want to step forward? We have a couple of minutes left.

QUESTION FROM THE AUDIENCE: I'm a 1959 graduate of Wayne State University Law School and spent fifteen years in elective politics and the last few years as mayor of a large midwestern city, so I’ve lost my ability to talk as a lawyer. But one of the things I thought you were going to address here more today, and the dean started out on it, was the personal dilemma that many lawyers find themselves in, and that is the unhappiness with the work. If you look at the ABA surveys, they indicate an alarming increase in the
rate of chemical addiction among lawyers, particularly younger lawyers. That indicates to me that something is radically wrong. I don’t think you can necessarily blame that on society as a whole.

Let me jump to the side for a moment. In the last several years, what I’ve been doing is ADR as a mediator. The very worst cases I have as a mediator, and particularly in domestic cases, are where one of the parties is a lawyer, because they seem to have lost the ability, if they ever had it, to look inside themselves and decide what’s right. Lawyers when they are parties to a case continually bring up case law and positions and use that ability – their argumentative ability – to try to berate the other side without ever being able to take a step aside and say, “What’s really right here?”

I’m finding the increased use of mediators. By the way, the public is demanding more of it now because they would like a solution. They would like the ability to go into a room and come out with an answer to some of their problems without being absolutely enmeshed in case law, which by the way, I respect. But they want a solution now, and they want a solution now so that they both can leave this room with something rather than waiting five years or ten years without it ultimately being resolved. So I felt that you came up to what I came here for and then danced away from it. And maybe it’s because the problem is just too painful to look at from a personal perspective.

JUDGE MERRITT: One thing that should be pointed out is that the cynicism, pessimism, disenchantment, unhappiness of many lawyers in the legal profession is reflected by doctors, ministers, and other professionals in their professions. So, it’s not just the lawyers. That tells you something about what the unhappiness is. And when you look at the polls about the trust that people have in lawyers, public officials, judges, those polls reflect that the confidence is way down. That seems to me a part of the same general malaise. That’s not to say that the ideal of the lawyer-statesman or prudential wisdom is not true. It is to say that much of it is. We’re in a cycle, and these cycles rise and fall. In the 1960s, we had much more confidence and much more idealism expressed, less cynicism it
seems, than now. And you have to take that into effect in judging where we are.

DEAN ROBINSON: We have today been addressing a question of critical importance to the future of our profession. And while the resolution of this question is important to all of us here today, it is perhaps the most important to the law students who are here, those future leaders of the legal profession. Will the profession continue to be a calling or merely another commercial enterprise? It seems to me it’s clear from our discussion today that there’s a great deal to worry about in the legal profession, in our law schools, our law firms, and our courts. But it also seems to me the fact that so many of you came out today, and we were able to assemble this distinguished panel to discuss this question in a spirited discussion, makes it clear that there are many of us in this room who are not yet ready to give up on the legal profession. It’s a great profession, and I certainly think that there is a good deal that can be done by current and future lawyers.

I want to thank our distinguished panel for coming together today to discuss this important issue. You do honor to Wayne State University Law School by your presence here. And to all of you [in the audience] as well, thank you for coming to the Driker Forum for Excellence in the Law.