

2010

## Kronman on the conservatism of lawyers

Stephen Ellmann

SATURDAY, APRIL 10, 2010

## Kronman on the conservatism of lawyers

Writing in 1993, Anthony Kronman maintains in *The Lost Lawyer* that "[t]he conservatism of lawyers is a further feature of their professional character and belongs, along with the others I have mentioned [in particular, "prudence and public-spiritedness"], to the ensemble of dispositional attitudes that the lawyer-statesman ideal endorses." (155)

Is it a fact that lawyers are conservative? Probably there is survey research information on this question, but I'm not burdened by knowing it. My own guess would be that professions such as medicine or engineering are more conservative than law. I'd also guess that if we controlled for income we would find lawyers rather more liberal than many of their socioeconomic peers.

But even if my speculations are correct, they wouldn't refute Kronman's belief that conservatism is a feature of lawyers' professional character. Conservatism no doubt is shaped by many forces, personal and professional. Perhaps there are many professions whose practice and norms tend to foster conservatism. Perhaps, too, those who have entered the legal profession, even if they are more liberal than those in other professions, are also more conservative than they themselves would have been had they chosen other careers.

But it seems clear that time has already somewhat dated Kronman's account. He goes on to say that the use of the case method of education in law schools, with its focus on perceiving the logic of each litigant's claims and on adopting the disinterested perspective of the judge (see 113), "tends inevitably to promote a certain skepticism regarding the power of abstract ideas and to encourage a kind of pragmatic gradualism that constitutes the core of one familiar species of legal and political conservatism." (155) But that species of conservative is now considerably less familiar (see, e.g., Sarah Palin), and in fact the past twenty years have seen the rise of a specifically legal form of conservatism that seems far from skeptical about such abstract ideas as the scope of executive power (see the Federalist Society). The kind of actual conservatism that has grown up in the law seems out of kilter with the inherent conservatism that Kronman posited.

Again, these contemporary developments do not refute Kronman's thesis, for it might be said that the rise of "abstract" conservatism among lawyers is itself a symptom of the "lost" professional virtues with which Kronman's book is concerned. But I want to offer what I hope is a more fundamental reason why this picture is unpersuasive.

It seems to me that as a statement of the ideals of the American legal profession, Kronman's particular portrayal of the lawyer-statesman somewhat misses the mark. Kronman begins his book by saying that what has been lost in the American legal profession today is "the belief that the outstanding lawyer -- the one who serves as a model for the rest -- is not simply an accomplished technician but a person of prudence or practical wisdom as well." (2) For me, that has a ring of truth to it. So do the examples Kronman cites, such as Abraham Lincoln and Earl Warren.

But here is what Kronman says the case method in law schools contributes to the development of the virtues of prudence or practical wisdom: "[W]hat the case method really robs [students] of is their faith in large ideas, and what it puts in place of this faith is a form of skepticism -- the tendency to look with suspicion on broad generalizations, to search for the qualifying exception to every abstraction, to insist on the importance of details. Students who become skeptics in this sense are likely, in time, to find complexity more congenial than simplicity, and though their skepticism may at first extend only to the usefulness of abstractions in the law, there will be a natural tendency for their doubts to grow into a generalized pragmatism that views with suspicion any political program inspired by their old faith in the power of ideas." (159)

To me, this description simply does not grasp the essence of Abraham Lincoln or Earl Warren. To be sure, Kronman is not saying that we should abandon trying to distinguish rights from wrongs, or acting on the distinction. He writes, for instance, that "[r]ecognizing the moral imperative for change, the lawyer who embraces this ideal [of the lawyer-statesman] will nevertheless prefer to move slowly and by small degrees." Again, this characterization seems to miss something crucial about

Lincoln, who did not shrink from a Civil War, and Warren, whose landmark judgment in Brown v. Board of Education hypothesizes a nonexistent state of material equality between segregated white and black schools in order to say that, as a matter of sheer constitutional principle, segregation is inherently unequal and unconstitutional.

In a way what is most startling, however, is what the lawyer-statesman ideal, understood as intrinsically conservative, does not honor. John Adams and Thomas Jefferson, revolutionaries, must stand outside this ideal. I think that Kronman would say that the virtues required for revolutions are different from those required for a society that does not seek its own death and rebirth. There's force to that, but it overstates the difference between stability and change. Passionate leadership against injustice is an integral part of everyday life in the United States, and in a broad sense our stability consists in our capacity to make the values of these passionate reformers part of the ever-changing fabric of the country. And a major part of what lawyers pride themselves on is their passionate commitment to justice, even in opposition to entrenched and powerful authority.

In short, it seems to me that Kronman's valuation of the conservative lawyer-statesman misses part of what is admirable, and admired about lawyers -- their engagement in passionate calls for justice and change. My own feeling is that Lincoln embodied both in a single extraordinary heart. Perhaps few lawyers or people can accomplish such a synthesis as well as he did. But I would say that the ideal of the lawyer-statesman is not the harmonizer of others' passions, but the person who both feels passion and understands how to make his or her ideals real in a world where many others, inevitably and profoundly, see the world differently. Doing that takes prudence and practical judgment, and I think Kronman is right to identify these values and to focus on how to elicit them. But they are not all that lawyers need.

---