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## Our Beleaguered Public World

Anthony T. Kronman

A few weeks ago, I received a letter from a man—not himself a graduate of the Yale Law School—condemning the president's behavior and his manipulative use of the law to conceal it. The letter writer said he held the Yale Law School responsible. The art of evasive hairsplitting, the disrespect for truth, the cynical view of law as a tool with no inherent dignity of its own: all of these, he said, the president must have learned at Yale. What steps was I prepared to take as dean, he asked, to produce graduates of higher ethical quality? It was not the only such letter I have received.

I responded politely but brushed the criticism, and the question, aside. How can the president's law school be held accountable for his failings, even his failings as a lawyer? Most Yale graduates—most graduates of every law school in the country—are morally minded men and women with a strong sense of professional duty. Most of them spend a great deal of time worrying about ethical issues that others ignore. Most lawyers have a deep commitment to the law, and to the civilization it supports, and the spirit of public service is alive amongst them. On the whole, our graduates are honorable men and women, with an unusually resilient idealism and a greater-than-ordinary sensitivity to the moral dilemmas of practical life. We should be proud of these qualities in our graduates and, as their teachers, perhaps even take a little credit for them. We should be at peace in our work, our schools, our selves. Our enterprise is flourishing.

Indeed, one might wonder whether there has ever been a happier time in American legal education. Have we ever had greater resources? Have we ever enjoyed more respect among our colleagues in other departments? Have our schools ever been livelier, or our students better prepared for the study of law? Here and there, perhaps, the past may look a little brighter than the present, and the present is of course imperfect. Each of our schools has room for improvement. Each can be better than it is. But overall we are in great shape, the best we have ever been in. How many of us honestly wish our schools could be as they were ten, or twenty, or fifty years ago? This is the golden age of American law teaching, and we its lucky inhabitants.

These are comforting thoughts, though you may suspect from the vehemence with which I express them, that they give me less comfort than one

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might guess. That is a valid suspicion. My confidence conceals my doubts. For however successful we may be in imparting to our students a durable sense of professional ethics and a commitment to the public good, the public world for which we are preparing them, and in which they are destined to spend their professional lives, is today in disrepair. The events of the last year have brought the extent of this disrepair to light, and cast a shadow over our own academic enterprise, which at the moment may glow with good health but must eventually falter if the public world to which it is so intimately linked becomes too badly deranged. This is the deeper concern that lies behind my letter writer's complaint. It is a concern I share, which perhaps explains why I have not been able to put his letter out of mind.

Let me start with a familiar observation. The law is a public profession. Its values are debated in the language of justice, the language of public reason, and made real through the use of state-sponsored force. Every lawyer is a representative of public order and always speaks on its behalf, even in the most confidential conversation with a client. The world of public things—the *res publica*—is the environment in which lawyers do everything they do, and outside it they have, strictly speaking, no professional existence at all (unlike doctors, who would still have a function to perform even if the public world were abolished—a fact that helps to explain why ancient writers, who placed a supremely high value on civic participation, held doctors in such low esteem). When the public world shrinks, or becomes polluted, the life of our profession is threatened, and our own work as law teachers put in question. At the limit, the disappearance of the public world would put us all out of business.

We are of course far from that limit today, but the only-semifacetious suggestion that politics has become so unattractive that young people will soon have to be drafted into it suggests we may be moving in this direction. Our public world is shrinking, and the spectacle of partisan rancor, of destructive censoriousness on the one side and corrosive dishonesty on the other, that has held our attention for a year, like some massive train wreck from which we cannot avert our eyes, has produced a universal state of exhaustion and disgust, and the widespread judgment that our public life is today in worse shape than at any time in living memory. If that is true—and I believe it is—the danger for lawyers, and for us, is large.

It is natural to ask who is to blame for this. That is always the first question a bad accident produces. My own view, for what it's worth, is that everyone who's had a role to play in the Lewinsky Affair must bear some of the responsibility for it—from Bill Clinton, whose reckless mendacity brought it on, to Ken Starr, whose colossally bad judgment gave it life, to Henry Hyde, whose timidity and partisanship transformed it into a genuine constitutional crisis. This is a debatable view, and we can certainly argue about the relative degrees of responsibility that different actors in the drama should bear. But let us save that argument for another day. The damage is done, and the important thing now is to see what can be learned from it about the character of American public life at the end of the twentieth century.

What the Lewinsky Affair points up, I believe, is the importance of three conditions for a stable and healthy public life: first, a broadly shared understanding of where to draw the line between what is public and what is private; second, a broadly shared understanding of the meaning of the rule of law and, in particular, of the mix of impersonal norms and personal traits needed to achieve it; and third, a broadly shared understanding of the value of institutions, without whose durability and transcendence of self-interest there can be no public life at all.

The Lewinsky Affair shows us how weak these shared understandings have become and underscores the effect their weakening has had on the world of public affairs, the life-world of our profession. To restore them will require more than an act of faith, or exercise of will. The shared understandings on which a healthy public life depends must—if I may put it this way—be reasoned back into existence. Once they have been badly damaged, they can grow again only from reasoned conviction. This is mainly an intellectual task, and here, I believe, we law teachers can make a contribution. We are the legal profession's intellectual specialists. Let us use our specialty to help restore the shared understandings essential to our public world, the only world in which lawyers can survive. This will not be easy, and I have no simple solutions to propose. But I believe that success in this intellectual venture will do more good for our graduates, and for the cause of professionalism generally, than all the declarations of devotion to public service we can muster, and all the novel methods of teaching legal ethics we can invent.

I have named three large topics. In the brief space I have, I can say only a few words about each. First, let me comment on the vanishing line between matters public and private. The philosopher Thomas Nagel has recently reminded us, in an eloquent essay in *Philosophy and Public Affairs*, of the importance of preserving a distinction between these two domains. Only if we all agree that the details of our private lives—and of our sex lives in particular—are to be kept out of the public light, and not made a matter of open discussion, is public life possible at all. The creation of a common civilization depends upon our not knowing too much, or saying too much, about each other's private lives. Without a significant measure of reticence and concealment, we would shock each other senseless. If all our lusts and hatreds were revealed, we could not bear each other's company for a moment; our life in common would collapse. By the same token, the revelation of our most private actions and habits would deprive us of the secret space in which to expose, tentatively and in the company of intimates, our most childish and passionate longings. It would deprive us of the space in which to expose our awkward humanity. If the line between the public and the private were erased, both civility and humanity would perish.

This is conventional liberal wisdom. John Stuart Mill offered a classic statement of it. What has undermined its authority? What has brought us to our current situation, so powerfully exemplified by the Lewinsky Affair, in which the line between the public and the private has for all practical pur-

poses ceased to exist? Several ideas of different sorts, and appealing to different constituencies, have converged to produce this result.

To begin with, there is the Rousseauist fantasy, so appealing to my generation thirty years ago and still powerful today, that the authentic man or woman is the one who is prepared to let it all hang out. To be embarrassed about one's private life, about one's fantasies and desires, is, on this view, to be a slave to convention; freedom begins when we take off our clothes in public. Today this idea has lost much of the force it possessed for its champions in the 1960s. We have grown up, put on our clothes, had children, bought homes, and taken out mortgages. But it survives in the belief that we should not be shocked or embarrassed when someone else lets it all hang out—or has it hung out for him. Only this can explain the widespread acceptance of pornography in contemporary America, and the success of the mainstream culture of soft-core titillation that is its second cousin. Only this can explain the relaxed reception by the viewing public of the media's relentless exposure of the "indiscretions" of our leading public figures—an easy acceptance of sexual matters without which, of course, the media would have no one to whom to pander.

To this idea from the left is joined another of a more conservative kind: the idea that character is what really matters in politics, and that a person's character is all of a piece, so that what an individual does in private reveals traits that bear upon our assessment of his or her public persona. Every sin, on this view, is a political blunder, and the effort to keep the realms of private and public life apart must be fought as an attempt to blind our political judgment.

Yet another idea—familiar to all of us here—has contributed to the effacement of the line between public and private. This is the idea that justice must be understood as a substantive and not merely formal ideal. "The law, in its majesty, forbids the rich as well as the poor from sleeping under bridges at night." We all recognize the sentiment this bitterly ironic maxim expresses. Indeed, most of us accept it. But to accept it is to deny the validity of the distinction between *de jure* and *de facto*. It is to acknowledge that the distribution of material wealth, racial advantage, and gendered power all bear upon the real justice of our public arrangements, whose fairness cannot be assessed in formal terms alone. Once we accept this idea, however, much—perhaps all—of what happens in the realm of private life (all the subtleties of our racial and sexual attitudes, for example) becomes relevant to our public debates about the justice of various laws and institutions. The idea has many expressions. It is the driving force behind the Freedom of Information Act and Catharine MacKinnon's attack on pornography. It has contributed to the acceptance of "hostile work environment" claims in the law of sexual harassment. It is one of the great moral ideas of our time.

Together all these forces have converged to make the line between our public and private lives—a line that is essential to the conventions on which our civilization depends, and also to our ability to escape these conventions—seem wavering and worthless: the decaying byproducts of the flower child's

cult of authenticity; the new emphasis on the importance and wholeness of character; the insistence that the personal *is* the political, a conviction strong enough to overcome even the most resolute commitment to the protection of privacy. Where, amidst all these ideas, shall we find the materials to reconstruct a common understanding as to how the line between public and private shall be drawn and defended? This is our first great challenge.

A second concerns the meaning of the rule of law. No ideal has been invoked more often in the impeachment debate. It is the ideal to which both sides subscribe, and for whose prestige they fight.

The president's critics charge that he lied under oath and thereby violated one of the essential conditions of the rule of law: the requirement that anyone formally sworn to tell the truth in a legal proceeding do so, even if the truth means possible prosecution and certain embarrassment. To let an oath taker be the judge of whether and to what extent his oath shall be respected is to place him above the law; it is to substitute the rule of men for the rule of law. Nothing could be more repugnant to our system of government, the president's accusers insist, or clearer grounds for impeachment.

The president's defenders of course deny that he committed perjury, however incomplete and misleading his testimony may have been. But more significantly, they also seek to capture back from their enemies the immense authority associated with the ideal of the rule of law itself, the flag that constitutes the great prize in this battle. They attempt to do this by arguing for a wider conception of the rule of law, one that includes notions like proportionality and prosecutorial discretion and that condemns the remorseless pursuit of technical infractions by a politically motivated special prosecutor armed with limitless resources as the destruction, not the vindication, of the rule of law. The aim of this defense is to portray the president's attackers, rather than the president himself, as the real threat to our legal system, and their campaign against him, with its politicized use of the law, as the truly dangerous step toward a rule of men.

This debate over the meaning of the rule of law, and the struggle to capture its authority, will continue after the Lewinsky Affair is ended. But both sides miss something important, which we must incorporate into our understanding of the rule of law, whether we conceive it in the narrower way that Henry Hyde does, or more expansively, as the president's supporters urge. The president's attackers and defenders agree that the rule of men is an evil—the supreme evil in a system of government devoted to the rule of law. How can anyone object? The rule of men is tyranny, plain and simple. And yet I cannot help thinking that one of the most remarkable features of this long and tiring Affair has been the complete absence from the field of debate of men and women who, to put it bluntly, possess some measure of personal greatness—men and women of courage and vision, prepared to stand apart and risk self-interest for the sake of a commitment to the rule of law—and I cannot help thinking that their absence from the field has itself been a serious blow to the rule of law.

Everywhere I look I see pettiness and fear. I see smallness of soul. I see it in Henry Hyde's cowardly decision to release the Starr Report before his committee had even begun to deliberate. I see it in the partisan bickering of the committee and the House. I see it in the Starr Report, which has not one single paragraph of greatness in it. And I see it in the president, who may feel himself to be the righteous victim of a witch-hunt, but who has insulted every law-respecting American by cowardly refusing to trust the law to vindicate his cause, however much embarrassment that might produce.

The rule of law requires occasional acts of courage in its defense. It requires occasional acts of self-sacrifice. When Sir Edward Coke addressed James I, and defended the rule of law against the personal authority of kings, he gave us an example we remember four centuries later. The example gives life to the ideal and insures its survival. In this sense, one might say that the rule of law depends upon the acts of men and women, as well as the machinery of justice. It depends upon the quality of their characters and the strength of their souls. This is not an invitation to tyranny. It is not the beginning of the rule of men. It is, in fact, an essential condition of respect for law and fidelity to it. Nothing in the Lewinsky Affair has done more, in my judgment, to compromise the American people's tenacious faith in the rule of law than the pettiness and cowardly self-interest with which this great ideal has been invoked by the president's attackers and defenders alike. The smallness of their actions makes the ideal itself look small. This is a destructive and sad result. Surveying the wreckage of the last year, one is bound to ask not only what norms and practices the rule of law includes, but also what sort of men and women are needed to secure it. That is a second subject on which it would be useful for us to reflect.

Finally, let me say a word about the value of institutions. This is something we seem to have an increasingly difficult time protecting, or even understanding. In our profession, for example, few law firms of any size still command the institutional loyalty they once did, or possess a moral and intellectual culture their members believe worthy of support, if it comes at some material cost to themselves. Almost without exception, these firms have become collectives of convenience, whose lawyers are held together only by self-interest, and come and go without any regard for the cultural life of the institutions through which they are passing. Something similar is happening in the legal academy. The market for law teachers—accelerated by the ratings system in which we all feel trapped like prisoners—now operates with such remorselessness that our faculties have become unstable collectives of convenience too, in which the idea of loyalty to one's school is increasingly viewed either as childish folly or as the self-serving faith of those who have no better opportunities. In the world of law teaching, like that of law practice, institutional loyalty is dying.

This is in fact a general characteristic of our time, and the Lewinsky Affair helps us to see just how weak institutional loyalty has become through the whole range of public life. It is said that things will be different in the Senate, that proceedings there will be conducted with an eye to the long-term interests of the Senate as an institution, with respect for the constitutional ambition

that the Senate be a council of greater deliberateness and disinterest than the House. We shall see. But up to this point, at least, the participants in the drama have all acted with a reckless indifference to the welfare of the institutions they represent, and have left their institutions badly weakened. The presidency is covered in filth. The Office of Special Counsel has lost its legitimacy and may soon be abolished, despite the good reasons for preserving it in a modified form. And the House of Representatives looks like a joke, alternating between calls for independent judgment and responsiveness to the popular will, and incapable of both. In each case this has happened because the people responsible for protecting these institutions have acted from self-interest instead, and consistently placed their own welfare ahead of the integrity of the offices they occupy. They have shown us what becomes of the public world when the value of institutions is no longer recognized in it.

How has this happened? That is a difficult question to answer. I suspect it has something to do with the primacy of economic relations, and of economic thinking, in a post-Cold War world where the epic political battles of the recent past are already nearly forgotten, and the appetites for profit and consumption, unleashed by technology, now dominate the spirit of sacrifice and subordination on which all institutions depend. But whatever the explanation of our current condition, I am completely convinced of two things: first, that there can be no public world without durable institutions, and second, that there can be no institutions without a shared understanding of their value, an understanding sufficiently strong to motive self-sacrifice on their behalf. In the deepest sense, the public world is nothing but a set of institutions, whose transcendence of self-interest expresses the universal human longing to build something larger and more lasting than the transient and isolating appetites of our separate selves. We have not lost this longing. That would be impossible. But we have lost the ability to recognize and honor it, and we now view its expressions with the smirking irony of the sophisticate who has learned to see through every pretense and finds nothing but self-interest at the bottom of every gesture of loyalty and trust.

But now I am speaking rhetorically, and what is needed is an argument. We must fashion an argument clear enough to make the value of institutions rationally compelling again. Nothing else will do. Without such an argument, pleas for institutional loyalty will seem naive or perhaps even dangerous and are bound to be unconvincing. But where shall we find the materials from which to construct the argument that is needed?

Our public life is in disrepair. The Lewinsky Affair has made this plain. To restore it to good health we need to recreate a broadly shared understanding of where to draw the line between public and private things; of how to join the personal trait of courage with the impersonal rule of law; and of why to believe that institutions have value. In each case, this will require patient thought. But thinking is our speciality, it is what we do for a living, and it does not seem implausible to hope that by practicing our special discipline we can make a contribution to the search for answers to these questions, a search in which many others are engaged. This may be the most important contribution we

can make to the restoration of our tattered public world, and because this world is the only one in which law and lawyers can survive, it may be the most important contribution we can make to the legal profession. Professional responsibility demands actions as well as ideas. But at the present moment, when the basic conditions of our public life are surrounded by such confusion, it may be that our first duty is simply to think.