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A New Class of Lawyers: The Therapeutic as Rights Talk

Kenneth Anderson

REVIEW ESSAY

A NEW CLASS OF LAWYERS: THE THERAPEUTIC AS RIGHTS TALK

THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION.
By Anthony T. Kronman. Cambridge: Belknap Press/Harvard University
Press, 1993. Pp. 422. \$37.50 (Hardcover) (Paperback, 1995. \$16.95)

IN AN AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSION-
ALS IN POLITICS AND PUBLIC LIFE. By Steven Brint. Princeton:
Princeton University Press, 1994. Pp. 278. \$29.95 (Hardcover) (Paper-
back, Forthcoming 1996. \$16.95)

THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOC-
RACY. By Christopher Lasch. New York: W.W. Norton, 1995. Pp. 276.
\$22.00 (Hardcover) (Paperback, 1996. \$12.95)

*Reviewed by Kenneth Anderson**

[Professionalism,] “‘[t]he consensus of the competent[,]’ . . .
came into being by reducing the layman to incompetence.”¹

— Christopher Lasch

INTRODUCTION: SEEKING THE CAUSES OF LAWYERLY UNHAPPINESS

It is no great secret that numerous lawyers are unhappy, both with
their lives and with their profession, and it is therefore no great surprise
that numerous books and articles have appeared seeking to analyze the
sources of this unhappiness and to propose its remedy.²

The overall diagnosis of these books is that the legal profession grad-
ually has been losing its sense of “profession,” losing its sense of the law as

* General Counsel to the Open Society Institute and The Soros Foundations, New
York, and Lecturer on law, Columbia Law School; the author joins the faculty of American
University, Washington College of Law in the fall of 1996. Views expressed are solely those
of the author in his private and academic capacity. This Essay is directed with affection to
Richard Anderson, Adam Bresnick, Alexander Cockburn, Mary Ann Glendon, Eileen
Hershenov, Herbert Morris, Aryeh Neier, Paul Piccone, Rosemary Poulos, H. Jefferson
Powell, Lawrence Solum, and Henry Steiner—notwithstanding their nearly certain
disagreement with large parts of it.

1. Christopher Lasch, *The Culture of Narcissism: American Life in an Age of
Diminishing Expectations* 229 (1979) (quoting Thomas L. Haskell, *The Emergence of
Professional Social Science* 236 (1977)).

2. Besides Dean Kronman's book under review here, see Mary Ann Glendon, *A
Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American
Society* (1994).

a "calling," and collapsing into a mere market for skilled "expert" labor. On this analysis, the remedy is often a plea to reinvigorate an ebbing sense of professionalism and to return to an older sense of calling and duty. This reform would return to lawyers, it is supposed, the sense of pride and satisfaction that is so conspicuously absent today. So, for example, Bruce Ackerman warned the Yale Law School graduating class of 1982 that

[m]any will settle for a self-trivializing conception of lawyering [But a]t the center of the doughnut there will be a vast professional hole—what *was* it that I spent most of my waking hours worrying about?

Like it or not, you will get nowhere unless you find more in the law than a lucrative job. You must find it a calling. Most importantly, the law must call upon the highest exercise of your higher selves.³

The purpose of this Essay is to examine this shift from the apparently antiquated, if eminently respectable, ideal of the lawyer as one engaged in a "calling," one who "professes" the law—secular yet carrying priestly overtones—to today's ideal of the market-driven seller of expertise. This Essay does so first by reference to Anthony T. Kronman's plea to return to what he calls the ideal of the "lawyer-statesman" (Kronman, p.3) in *The Lost Lawyer: Failing Ideals of the Legal Profession*. I suggest that Kronman's widely read account of why life in the legal profession has become so dissatisfying for so many ought to be viewed in light of broader changes in American professional life. Accordingly, the Essay turns to sociologist Steven Brint's empirical study of the professions, *In an Age of Experts: The Changing Role of Professionals in Politics and Public Life*.

The Lost Lawyer and *In an Age of Experts* reach many of the same conclusions—one for lawyers specifically and the other for the professions generally. Whether considering Kronman's "lawyer-statesman" or Brint's "social trustee professional," (Brint, p.9) older ideals of professionalism largely have been replaced by the idea of the lawyer or professional as "expert." Here, the "expert" means one who is devoted to purely instrumental technique, without a conception of or commitment to the social "ends" of professional knowledge, except as they are temporarily defined by the market for expert services. The "commodification" of professional services is draining away independent professional judgment as to the social ends of one's expert labor. At least by reference to older ideals, the professions generally, including the legal profession, are being de-professionalized, even as the wealth accruing to them and the specific status that goes with wealth increase.

I do not dispute these conclusions, and they will scarcely surprise anyone who has followed discussion of *The Lost Lawyer* since it appeared three years ago. This Essay does suggest, however, that Kronman's and

3. See Bruce A. Ackerman, Commencement Remarks, Yale L. Rep., Spring-Summer 1982, at 6.

Brint's composite picture stops too soon; it fails to take account of the ways in which professionals, including lawyers, have paradoxically responded to this de-professionalization with what might be called an "excess of professionalism"—the dismaying tendency of some professionals, faced with the thinning-out of the core of professional life, to define their lives wholly (or nearly wholly) by reference to that life. For some professionals, especially in the legal profession, this overbearing identification with professional life seems to be at least partly a consequence of simply working so many hours that they have nothing else in their lives with which to identify.

Moreover, this Essay is skeptical of the conclusion, reached by both Kronman and Brint, that contemporary, market-driven professionals, by contrast to professionals of the earlier ideal, tend to form only weak attachments to the social ends of the profession and simply allow those ends to be defined, from moment to moment and purely instrumentally, by the shifting bidders for their services (Kronman, pp. 287–88). My own, admittedly unscientific, experience of the professional world suggests that a significant number of professionals actually have extraordinarily strong attachments to the social ends of their profession. These attachments may be so strong, in fact, that these professionals are unwilling to put their beliefs to the test of democratic debate—i.e., debate with non-experts—and prefer to present them as the presumed conclusion of expert advice, which can be reasonably disputed only by other experts. Seen in this light, the new, apparently market-driven and relativistic stance of professionals with respect to the social ends of their work that Kronman and Brint both report might actually enable professionals to press forward social ends without the need for a broad debate with those outside the professions.

The proposition that lawyers and other professionals care deeply about the ends of their work is a hypothesis that social scientists like Brint ought to design studies to test. But assuming for argument's sake that this hypothesis (or something like it) is true, then the picture of the professions that might emerge is one of expert management of the masses. In this view, the professional is part of a managerial class with discernible class interests, chief among them being a marriage of social dominance and market mobility. Some part of the unhappiness of professionals that Kronman assigns to their surrender to the market might be better ascribed to the inherent contradictions between professionals' desires for simultaneous social dominance and market mobility—but analysis of these contradictions practically requires analysis of professionals as a *class*. This Essay will therefore invoke the theory of the managerial-bureaucratic "New Class," in order to give class content to the description of the new professional life. Since one striking result of Brint's empirical research in *In an Age of Experts*, however, is to render untenable the predominant American version of the New Class theory (espoused princi-

pally by neoconservative writers⁴) of an opposition between the business class and the intelligentsia, this Essay will rely instead on a quite different version of this theory as espoused by the late cultural critic Christopher Lasch in his final populist attack on contemporary professionals, *The Revolt of the Elites and the Betrayal of Democracy*. In Lasch's critique of social engineering, the New Class asserts its power through an essentially "therapeutic" public discourse that promotes social passivity through consumer narcissism (Lasch, p. 218). It recognizes no sharp distinction between state and capital or public and private sectors, and indeed treats them as fundamentally two aspects of the same thing: monopoly capitalism.

By invoking Lasch, this Essay redescribes the shift in the ideals of professional life as a restless ideological search by New Class professionals—with lawyers in the vanguard—in pursuit of two apparently different but ultimately mutually reinforcing aims. The first agenda is to find a new and invigorating content for the exhausted language of liberal rights. The second is to find a rhetoric by which to transform therapy from private experience into a public, and publicly coercive, discourse—a new language of authoritarian public policy. This Essay will not argue these propositions, but will simply take them by assumption from Lasch in order to pursue the direction in which an argument about the interests of New Class professionals might go.

The result is the justification of a therapeutic authoritarianism at the ideological core of contemporary professionalism, something against which Lasch spent much energy warning. This Essay concludes by echoing that concern, and emphasizing that lawyers form the avant-garde of this New Class because their professional role consists of navigating the divide between public and private (and today, simply of selling expert access to that divide). Insofar as the language of lawyers, rights talk, no longer has a specifically liberal content, it is available to be filled by coercively therapeutic concepts, thus binding lawyers to the authoritarianism of the therapeutic. A consequence of the infusion of the therapeutic into public discourse is that the professions generally have begun to see themselves as therapeutically-based "helping professions." We are all helpers now.

I. A DEFICIT OR AN EXCESS OF PROFESSIONALISM?

A. *The Lost Lawyer*

The Lost Lawyer's unusually wide readership among lawyers during the three years since its publication has a simple explanation. No one who has spent even a few months in a large corporate law firm can fail to recognize Kronman's richly textured description of life there. Kronman analyzes especially well shifting law firm economics and the trend toward law becoming a pure service industry in which the major production fac-

4. See *infra* text accompanying note 32.

tor is the labor of highly fungible associates and, increasingly, highly fungible partners (Kronman, p. 277). Along with his descriptions of the legal academy and the courts—two other areas in which Kronman locates changes in the profession—Kronman's work is without peer in describing a profession that has lost its sense of historical identity.⁵ Thanks to the book's careful, nuanced understanding of the institutions of the legal profession, this positive opinion is shared even by many of those who discount Kronman's polemical aim, to return the profession to its earlier ideals, as ennobling but doomed.

The Lost Lawyer builds this theory of a failing sense of identity within the legal profession by reference to a past ideal of the lawyer, one which was based explicitly on the historically elite status of lawyers. Kronman calls these lawyers of the past "lawyer-statesm[e]n" (Kronman, p. 3). The ideal of the lawyer-statesman was founded on the belief that the profession was, in some sense, a secular calling, with its own *telos*, or its own "ends," to use Kronman's explicitly Aristotelian framework. The *telos* of the legal profession was the attainment of "practical wisdom":

[E]arlier generations of American lawyers conceived their highest goal to be the attainment of a wisdom that lies beyond technique—a wisdom about human beings and their tangled affairs that anyone who wishes to provide real deliberative counsel must possess. They understood this wisdom to be a trait of character that one acquires only by becoming a person of good judgment, and not just an expert in the law So long as the cultivation and exercise of this virtue remained an important professional ideal, lawyers could therefore be confident that their work had intrinsic value too. But in the last generation this ideal has collapsed, and with it the professional self-confidence it once sustained. (Kronman, pp. 2–3.)

This critique, of course, invites the easy sneer that it is merely nostalgia for a past that never was. Kronman shows courage in framing his critique as a forthright, old-fashioned call to repentance, a call to lawyers to return to values that presumably motivated so many of them to "profess" the law in the first place. He wants us to live in a kingdom of "ends," by which he means the social ends (which consist of the overarching *needs* of society, something more than simply a market-driven collection of consumer wants, however exactly one defines them) that the professions originally saw themselves as called upon to serve. His goal is to "make the ideal of the lawyer-statesman fresh and appealing. . . ." (Kronman, p. 4).

The easy sneer of nostalgia must give way, however, to a much more significant critique. If material changes in the market for legal services are as Kronman describes, then his call to lawyers to mend their ways is like preaching to the tide not to come in. Kronman's account of the shifting market for legal services can be seen as the description of a trend

5. I am not alone in praising this aspect of the book. See, e.g., James M. Altman, *Modern Litigators and Lawyer-Statesmen*, 103 Yale L.J. 1031, 1031 (1994).

toward the commodification of legal services, in which uniformity and lowest cost provision (including obtaining services through specialization and division of labor) are the real goals. The result is that the law becomes the mere processing of paperwork, albeit highly technical paperwork, without any conception or attention to the overall ends of the client.⁶ In contrast, the attainment of practical wisdom is characterized by spending many years in premium service work, work that puts one at the heart of the client's thinking and planning on a regular basis. Practical wisdom appears to require a situation in which overall judgment really is what the client needs and pays for, including its reproduction through the training of young lawyers. Kronman convincingly charts the decline of practical wisdom-building. In its place, the commodification of legal services has given rise to "transactional" lawyering in which it is all but impossible to develop relationships that are long and deep enough for practical wisdom to be attained (Kronman, pp. 284-85).

In fact, it may be misguided to expect clients to seek from their lawyers "deliberative counsel" (Kronman, p. 2) or even, frankly, "good judgment," (Kronman, p. 2) if those qualities are meant to be (as Kronman plainly intends) something apart from narrow means-to-ends expertise, and if the development of those qualities requires a deep and steady lawyer-client relationship rather than merely a transaction-to-transaction one.⁷ What clients seek as a commodity, at the lowest price, may be precisely what Kronman asserts as insufficient to sustain a professional identity—being merely an "expert in the law" (Kronman, p. 2). At the same time, transactional lawyering has been driven in no small part by lawyers themselves seeking the higher fees available in deal work, and especially in the takeover work of the 1980s.

Yet, among the several factors driving the commodification of lawyering and its gradual conversion to a pure service business, the most important in my estimation is one identified by Kronman—the rise of the in-house corporate legal department (Kronman, p. 284). As these in-house departments have become more sophisticated in their ability to act as "competition" for their outside counsel and have become attuned to their role as cost-centers in the corporation and hence attuned to becoming cost-cutters, they have pressed law firms to change older practices through such tactics as cost caps, fixed reimbursement policies, and bidding among firms. According to Kronman, in-house legal departments have permanently "altered the nature of the relationship between these

6. The moral attractions Kronman finds in the lawyer-statesman ideal are closely related to Durkheim's aims for professional life. See Emile Durkheim, *Professional Ethics and Civic Morals* 14 (2d ed. 1992).

7. It is possible to claim alternatively, however, and with far fewer dire consequences for the professional identity of lawyers, that clients do indeed seek practical wisdom; they need deliberative counsel, but are not willing to pay for its inculcation and training among young lawyers because that training will not benefit them today and likely will benefit some other firm tomorrow—a variant of the free-rider problem, in other words.

companies and the firms that serve as their outside legal counsel" (Kronman, p. 276). The change is not merely one of practicalities. The decline of Kronman's lawyer-statesman ideal may in large measure be a function of the colonization of law firm culture by corporate culture. Corporate legal departments, which themselves reflect and reproduce a corporate and business (rather than traditional law firm) culture, may impose this vision on outside law firms.⁸

This idea that law firms are being corrupted, or at least significantly restructured by in-house corporate legal departments may seem strange, especially as it is these same firms that have always acted as handmaids to capital. One wonders, for example, what colonization of law firm culture by business could conceivably take place today that was not already present in the Sullivan & Cromwell of William Nelson Cromwell; surely Cromwell schooled the capitalists, not the other way around.⁹ Yet, there is a difference between Cromwell's day and ours; the top-tier lawyers of earlier times understood that they were handmaids *to* capital, not capitalists themselves, and were bound by neither the same culture nor the same economics as capitalism. They could do so in part because, first, legal advice was less costly then, and as an aggregate service, less needed than it is today (law firm economics being partly a function of billing success, or excess, depending on how one sees it). Second, they benefitted from the presumption, however quaint, that the law was indeed a profession and not simply another commodified service industry. They, and their clients, understood the role of handmaid to capital to be a *professional* role—which is the understanding Kronman argues is missing today.

I share Kronman's sense of dismay about this new shift in the direction of the legal profession. Yet, the phenomena *The Lost Lawyer* describes also produce a result that is at least as dismaying, but which is best

8. Consider the variety of pro bono work that one could imagine being taken up by a large law firm today versus that taken up by a large in-house legal department. A number of law firms have rather proudly taken up the challenge, for example, from bar associations to "adopt" a death penalty appeal case. They do so with relative security that this will not damage (and may even enhance) their reputations as *lawyers*, effective advocates, which is after all the "product" that they market. Notwithstanding the pride that some in-house legal departments take in their pro bono work, does it seem likely that a publicity-minded corporation would allow its in-house legal staff to do the same and act as lawyers on behalf of, for example, someone convicted of raping and killing children? I think not, if for no other reason than that the product which a corporation (including its supposedly independent in-house lawyers) seeks to market and protect in the public eye is *not* legal services, but something else, such as soft drinks, tennis shoes, or insurance. See Barbara Franklin, Pro Bono Report Card: In House Lawyers Seem Reluctant to Volunteer, N.Y.L.J., Dec. 5, 1991, at 5 ("[An] obstacle to pro bono recruitment is corporate sensitivity to projects that might harm a company's image. . . ."). Thus, while law firms appear to be moving, as the result of some heavy pressure, in the direction of the business ethos of their in-house counterparts, the in-house lawyers do not seem to be moving in the other direction.

9. See generally Nancy Lisagor & Frank Lipsius, A Law Unto Itself: The Untold Story of the Law Firm Sullivan & Cromwell 27-28 (1988) (summarizing the firm's history, including its close relationships with corporations).

characterized, peculiarly, not as a deficit, but rather as an *excess* of professionalism. Kronman focuses, I think, on the wrong harm.

As Kronman might agree, the commodification of lawyers has meant that consumers of legal services are not willing to pay for practical wisdom or its inculcation; it may also be that law partners, no longer in possession of such a thing as practical wisdom themselves, are hardly willing to pay for its inculcation among the associates they employ. Thus, the trend toward the conversion of lawyering into a purely expertise-based service business results in a "hollowing-out" of the meaning of a professional identity.¹⁰ What Kronman does not see is how this very commodification, which has forced lawyers, among other things, to work longer and longer hours, has among its disastrous results that increasingly "the law" has become the only *personal* identity for its practitioners.¹¹ The professional becomes the personal. Lawyers, partly as a result of having no time for anything else, are, in my experience, increasingly unable to define themselves in terms other than occupational and professional ones. The extraordinary attention to "lifestyle" issues in legal journals, bar association publications, and similar venues seems to me good evidence of this anxiety.¹²

The pressure to bill hours, as Kronman recognizes, is one cause of this tendency for lawyers to define themselves in purely professional terms (Kronman, pp. 300–07). So, also, in a psychological sense, is the dissonance-generating knowledge of the deprofessionalization that *The Lost Lawyer* describes. The more lawyers identify themselves with their profession, the more they need to assure themselves, a trifle anxiously, that it is a profession not driven solely by market forces and having a "weight" of its own; thus the more likely they are to experience unhappiness if they sense, however unarticulated, that it is not. Of course, the fretting of lawyers is no different from that of other professionals in a society where, increasingly, elite status is defined by occupation rather than by property. Nevertheless, lawyers, as opposed to other professionals, may be even more likely to turn the personal into the professional, and vice-versa. Other identities that once tied lawyers, just because they were people like everyone else, to other parts of the community—church

10. Kronman understands this hollowing-out very well. Concluding his discussion of the lengthening of the lawyer's working day, he writes, "the new ideal of success . . . which depicts narrowness of interests and absence of attachments as advantages from a professional point of view, not only differs from the ideal of the lawyer-statesman, but inverts it" (Kronman, p. 307).

11. As Kronman puts it, "[t]he data . . . all point toward the same conclusion: that lawyers in large firms are on average working longer hours than they used to" (Kronman, p. 281).

12. See, e.g., Marjorie M. Schultz, Young Lawyers' Dissatisfaction Contains a Lesson for Law Firms, N.Y.L.J., Nov. 19, 1990, at 47 (discussing professional satisfaction study done by Young Lawyers Division of American Bar Association).

work, school work, volunteerism of many kinds—may decline in importance, for reasons of time if nothing else.¹³

Those lawyers who do volunteer tend to do so in their capacity as lawyers. Yet pro bono legal work is not the same in its effects on the personal, spiritual, and moral identity of a lawyer as volunteer work like coaching little league or teaching Sunday school is in its effects on a person *who also happens to be* a lawyer, precisely because pro bono work never requires that a lawyer go outside a purely professional role. In fact, such pro bono work assures that he or she does not. Little league and Sunday school diversify an individual's identity across a range of fields and connect the individual to a community in a diverse set of roles. Pro bono work, by contrast, reinforces the professionalized nature of identity,¹⁴ notwithstanding that it does have the virtue of drawing the lawyer outside the circle of purely commodified, market-driven work—which is a large part of pro bono work's attraction, particularly to younger lawyers.

Perhaps in response to a collective sense of ennui among lawyers about each of these phenomena—decaying professionalism inside the legal profession because of the commodification of legal services, on the one hand, and the lawyer's sense of not having an identity outside the law, on the other—institutions such as bar associations have responded unsurprisingly by attempting to strengthen professional identity. Unfortunately, it is an approach which may actually do harm to the profession and only generate more unhappiness.

To a certain extent, professional organizations are working on the only front they can. For example, there has been a gradual expansion of the social reach of professional codes of conduct.¹⁵ The result is that,

13. Readers by now must realize that Kronman, and this Review Essay, are concerned with the so-called elite lawyers. There is no doubt that a whole other world of law and lawyers exists in which the ties to community are a real part of professional life. For an excellent treatment and analysis of this divide, see John P. Heinz & Edward O. Lanmann, *Chicago Lawyers: The Social Structure of the Bar* 55–91 (revised 1994) (discussing “presitge order” among sample of Chicago area lawyers).

14. Even volunteering can become overly professionalized. I am familiar with at least one Ivy League law school where doing pro-bono work is a mandatory requirement for graduation. See *Mandatory Pro Bono Program, Rules and Regulations*, Columbia Law School (1995) (on file with the Columbia Law Review).

15. For example, consider the expansion of the reach of the professional codes covering the judiciary that took place in the American Bar Association's late 1980s revision of the ABA Model Code of Judicial Conduct, discussed in Marcia Coyle & Marianne Lavelle, *Judicial Code Revision Nearing Completion*, *Nat'l L.J.*, Jan. 29, 1990, at 5 (describing “[t]he first comprehensive revision . . . including . . . rules on membership in discriminatory private clubs and bias in the courtroom”). Sometimes the expansion of the professional duties of lawyers comes from malpractice threats, as in the trend to increase the range of “lawyers’ duties to non-clients,” seen in the Kaye Scholer settlement with the federal government over the failure of Lincoln Savings, in which the government asserted that the lawyers owed a duty to the public and not just its client, Lincoln Savings. See Gerald Buchwald, *In House Target: Third Parties Are Taking Aim at Corporate Counsel*, *Nat'l L.J.*, Nov. 15, 1993, at S1, S18. See generally Amy R. Mashburn, *A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal*

over time and for too many lawyers, these codes have become the predominant language by which many lawyers, lacking other identities, formulate their own ethics. For too many, the codes run the risk of becoming the language and essence of their *personal* ethics—a kind of Gresham's law,¹⁶ professional ethics driving out personal ethics. This development is perverse not only because professional ethics are not, and were never intended to be (in a world which properly delimits professional life), a sufficient basis for the ethical life, but also because expansion of the professional ethical guidelines assumes that their adherents have no life apart from the profession that would provide another, broader basis for an ethical life. Reliance upon an exclusively, but ever-thinner, professional identity and its ethical culture becomes a self-fulfilling and self-reinforcing prophecy and increases the sense of dissonance and psychological stress.¹⁷

One recent example of this phenomenon within the legal profession is the recent policy statement issued by the American Bar Association which condemns professional conduct reflective of racism and sexism, coupled together with an implication that what constitutes professional life includes practically everything.¹⁸ As social statements go, its content is untroubling and unexceptional. The statement's origin as a proposed amendment to the ABA's Model Rules of Professional Conduct, however, and the ensuing debate over the ultimate extent of its adoption as an enforceable conduct rule are striking. First, there was an assumption among some of its proponents of the totalizing nature of professional life, seeming almost to leave room for nothing else; second, there was an assumption that lawyers would not have, or at any rate could not be presumed to have, other codes of conduct that might guide them apart from

Courts, 8 Geo. J. Legal Ethics 473, 473 (1995) (examining regulation of lawyers' ethics by federal courts).

16. I refer, of course, to the famous law in economics of bad money driving the good out of circulation. See John Kenneth Galbraith, *Money: Whence it Came, Where it Went* 10 (1975).

17. A rich vein of social theory bearing directly on the role of professional ethics in society stems from Durkheim's *Professional Ethics and Civic Morals*. See Durkheim, *supra* note 6. The vision of social restraint that Durkheim hoped would be implicit in the form of professional life that he took as the ideal, compared to the restless mobility of today's professionals, makes for a distressing critique that bears close reading alongside *The Lost Lawyer*. For a thoughtful contemporary exposition of Durkheim's position, especially as it relates to ethics, see Mark S. Cladis, *A Communitarian Defense of Liberalism: Emile Durkheim and Contemporary Social Theory* 136-84 (1992).

18. The statement resolves, *inter alia*, that the ABA: condemns the manifestation by lawyers in the course of their professional activities . . . of bias or prejudice against clients, opposing parties and their counsel, other litigants, witnesses, judges and court personnel, jurors and others, based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status, unless such words or conduct are otherwise permissible as legitimate advocacy on behalf of a client or a cause.

American Bar Association, Resolution Adopted by the House of Delegates (Aug. 9, 1995) (on file with the Columbia Law Review).

those enacted by the ABA.¹⁹ The perceived need to frame this important matter of personal conduct as a potential matter of professional ethics to be enforced by the bar seems to me to be at least some evidence that what is afoot here is less an attempt to regulate professional conduct and ennoble lawyers' characters than an attempt to build class solidarity—the class solidarity of professionals—out of the thin gruel of professional identity.

This excess of a professionalism that is, in its interior, ever thinner should strike Kronman as at least as inimical to his ideal of the lawyer-statesman as the colonization of the legal profession by capital. For it is (and I cannot imagine Kronman would disagree) a wholly necessary condition of the attainment of the virtue of practical wisdom that an individual possess and develop diverse and cross-cutting identities, and especially identities located for some in religion and family and for others, in other parts of civil society that owe nothing to profession. Surely ethical conduct within a profession, too, depends upon the possession of strong identities outside the profession; professional identity is parasitic (in a good sense) on the others. Attempts by lawyers, lacking other sources of identity, to expand the empire of professionalism to cover life at large because nothing else covers their own lives ought to give lawyers pause.

B. *In an Age of Experts*

The shifting function of professionals in general that Steven Brint documents in *In an Age of Experts* tends to validate Kronman's account of the legal profession in particular. The fact that the professions on the whole, and not just the "law," are experiencing a change of role and place in society suggests that an overly lawyer-focused explanation, which Kronman at times provides, is mistaken.

The concept of lawyer-statesman in *The Lost Lawyer* finds its general professional correlate in what Brint calls (now largely displaced) "social trustee professionalism" (Brint, p. 9). Professional life was guided not only by technical expertise, but additionally it "promised to be guided by an appreciation of the important social ends it served. In demanding high levels of self-governance, professionals claimed not only that others were not *technically* equipped to judge them, but also that they could not be *trusted* to judge them" (Brint, p. 7). Brint quotes the British social critic R.H. Tawney, writing in 1948:

[Professionals] may, as in the case of the successful doctor, grow rich; but the meaning of their profession, both for themselves and for the public, is not that they make money, but that they

19. The proposal began with much more force and was eventually toned down. The ABA deliberately chose not to integrate this statement into its Model Rules of Professional Conduct, although it was originally proposed as such by various ABA committees. It is at this point in time merely a policy statement and not part of the ABA's Model Rules of Professional Conduct. Of course, lawyers who engage in conduct unbecoming the profession typically face potential sanctions. See, e.g., Model Code of Professional Responsibility DR1-102(6) (1983).

make health, or safety, or knowledge, or good government, or good law . . . [Professions uphold] as the criterion of success the end for which the profession, whatever it may be, is carried on²⁰

The defining feature of this social trustee professionalism is thus a marriage of technical expertise and social purpose, each individual trait edifying the other. Morally, it was based on authority and not merely on efficiency, and on the perception that it served, understood itself to serve, and constrained its behavior so as to serve one aspect or another of the public welfare.

Over the last thirty years, Brint notes, this idea of the professions “has become increasingly disconnected from functions perceived to be central to the public welfare and more exclusively connected to the idea of ‘expert knowledge’ ” (Brint, p. 8). What has replaced social trustee professionalism is a general analogue to Kronman’s lawyer-statesman giving way to an expert lawyer: “expert professionalism,” or expert knowledge for sale to the highest bidder. Expert professionalism, unlike social trustee professionalism,

needed no sharp distinction from business enterprise, and it required less separation from the idea of pursuing trade for a profit . . . those who claim knowledge-based authority increasingly eschew any claims to representing vital or public interests. From a sociological perspective, expertise is now a resource sold to bidders in the market for skilled labor. (Brint, p. 9, 15.)

This shift in the attitudes of the professional classes, or at least those holding market-ready knowledge, has resulted in what Brint calls a “separation of community orientation and expert authority” (Brint, p. 15). It goes far, he believes and I agree, towards explaining the increasing gap between the (ever-remoter but evermore powerful) expert and the (increasingly resentful) mass of others, who are themselves in the grip, rather than control, of the market.

Both Brint and Kronman emphasize the instrumentalist, transactional, mobile ethos of the contemporary professional, and both stress that these characteristics are consistent with creatures who do not believe themselves to have any grip on “ends,” such as the public welfare espoused by the older social trustee professionalism, except as temporarily and contingently defined by bidders in the market for expert services. Brint goes even further, based upon his empirical research into the attitudes of professionals, and notes that today:

even people in the original fee-for-service professions rarely point to the social importance of their work as justification for social distinction. Instead, they justify differences between themselves and other people by discussing the kinds of skills involved in their work . . . they only rarely remark on the ‘social importance’ of their work . . . ‘I see no reason to think that our

20. Brint, p. 7 (quoting R.H. Tawney, *The Acquisitive Society* 94–95 (1948) (1921)).

work is more important to society than the work of an electrician or an auto mechanic,' said one life scientist, expressing the views of many. There is an appealing note of democratic egalitarianism in this statement, but in the background there is, more importantly, *the triumph of expertise as a basis of distinction that requires no moral vaulting*. (emphasis added) (Brint, p. 10.)

One might therefore think, consistent with *The Lost Lawyer's* sense of lost professionalism and the failure to seek or achieve practical wisdom²¹ that the moral condition of the contemporary professional is essentially relativist, a refusal to take stands on the ends of social policy.²² Expertise, as Brint puts it in his well-wrought phrase, is its own vaulting; it needs no other, and indeed is capable of recognizing no other—except the bidding of the market. Brint notes this simultaneous relativistic refusal to take stands on the moral ends of social policy coupled with the contemporary professional's assertion that expertise is its own authority and source of legitimacy in observing that on social issues

many professionals now have views that are better described as libertarian than liberal. Professionals very frequently want government to stay out of issues involving moral choices, and they even tend to take a stance in favor of community self-determination when it comes to the purposes of education and other socializing institutions. This tells more than is immediately apparent about the character of contemporary professionalism. Very little could be as distant from the spirit of the old professionalism—with its emphasis on community stewardship and cultural authority—as this shift toward libertarian views on issues related to cultural choice and social relations. It is the political hallmark of the rise of a new "expert" stratum with strong interests in marketable knowledge and weaker concerns about the relationship between community and authority. (Brint, p. 15.)²³

Yet, Brint's does not seem to me to be the only interpretation of this data. From my own experience, I would suggest to both Kronman and Brint that the apparently modest instrumentalist claim that professionals

21. Practical wisdom is seemingly, after all, nothing if not the capacity—really, the virtue—to select among and champion particular ends. It may even be, under some circumstances, as John Gray suggested in his interpretation of the moral theory of Isaiah Berlin, the capacity to understand that some ends may be simultaneously good and desirable but incompatible and that therefore there may be no unity of the virtues. See John Gray, *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* 9 (1995). What practical wisdom can never adopt is an attitude of studied, cool indifference as to what those ends are.

22. It should be acknowledged that I am freely glossing over what in fact is one of Brint's most important points: that the professions themselves are enormously riven by differences of attitude toward expertise, community, authority, and social ends. These differences are, in large part, due to "a splintering of the professional stratum in relation to the market value of different forms of 'expert knowledge'" (Brint, p. 11).

23. It should be noted that Brint here uses "libertarianism" in a weak sense, that of merely letting people alone to do as they will in their social practices, and not in a stronger sense that would amount to a true political philosophy of ends.

do not privilege ends masks, for many lawyers and perhaps a wider range of professionals, not a *deficit* of ends, but instead an *excess* of them.²⁴ Many professionals, especially lawyers, in my experience, in fact have such a deep attachment to ends that any discussion of them with those who might disagree is quite literally pointless. The silence of the expert elites about ends can wrongly appear to betoken indifference or a modesty about an attachment to ends. Whereas, I would suggest it may actually stem from a belief that there is no point and no moral need to convince anyone, especially those who might disagree with you, of the virtue of one's ends. The diffidence may be strategic. It is better to be silent as to ends in any form of discourse that would require you to acknowledge other views as equal in stature to your own; it is better to present your own as the *fait accompli*, the necessary conclusion of hierarchically superior, expert knowledge. Knowledge of "right" ends is simply given; everyone else simply "doesn't get it."

One modest example of this strong attachment to ends can be discerned, perhaps, in the attitudes of some labor lawyers representing large corporate clients on discrimination issues—race, sex, age, disability, and so on. It is typical to regard lawyers, in the new "expert" sense, as mere "hired guns" for corporations, pure instrumentalists, with no care about anything except winning for the client.²⁵ But a significant number of the

24. This contrast of deficit and excess of ends is closely linked to the deficit and excess of professionalism I noted earlier in discussing *The Lost Lawyer*. See *supra* text accompanying notes 12–19. In putting forth this thesis, however, I run counter not only to Kronman and Brint but also (apparently surprisingly) to the cultural critic Alasdair MacIntyre. MacIntyre gives a lucid account of this instrumentalist, relativist—what he calls "emotivist"—morality in his book *After Virtue*. More importantly for the analysis here, he gives an account of its social context that bears close comparison to both Kronman and Brint, noting, with respect to emotivism, that, "[a] moral philosophy . . . characteristically presupposes a sociology." Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* 23 (2d. ed. 1984). Still more strikingly for the New Class analysis that this Essay pursues later, see *infra* Part II, he explicitly frames this sociology in the context of the "therapeutic," and he links this apparently wholly instrumentalist morality to the ideology of therapy. See *id.* at 22–35. I am generally highly sympathetic to MacIntyre's critique, in part because of its adoption of New Class theory and its willingness to link it to the concept of the therapeutic. He gets further conceptually than either Kronman or Brint because of his explicit class analysis. Nevertheless, on this particular point, I think MacIntyre's sociology is wrong, or at least incomplete, just as I think Kronman's and Brint's sociologies are wrong, or incomplete. All of them neglect the possibility that an apparent indifference to ends, pure instrumentalism, may mask a strong attachment to them. It is not sufficient to pin all the damage wrought by the New Class solely on its instrumental emotivism as MacIntyre does in order to contrast it to his own Aristotelianism; his own class analysis should lead him to the conclusion that the New Class has strong attachments to ends *that further New Class interests*. I am grateful to H. Jefferson Powell for recalling *After Virtue* to me on this point, and I have profited from Powell's powerful discussion of MacIntyre in his book, H. Jefferson Powell, *The Moral Tradition of American Constitutionalism: A Theological Interpretation* (1993).

25. James Altman makes the point (which will have occurred to many lawyers reading *The Lost Lawyer*) that one severe problem with Kronman's analysis is that it wrongly assumes that the "win at all costs" attitude did not arise until the shift toward the contemporary

lawyers I know in these areas—by no means “social activist” lawyers, but instead top-tier firm lawyers representing senior corporate management²⁶—see themselves as essentially “politically progressive,” advance enforcement agents of the Equal Employment Opportunity Commission who happen to work in the private sector (and command private sector wages). Moreover, they see in this opinion of themselves nothing inconsistent with their responsibilities to the corporation as the client; on the contrary, their vigilance will keep the corporation out of potentially embarrassing and expensive trouble.

The point is that, far from simply seeking to win for their client, they are strongly attached to the ends of the regulations they are hired as experts to manage. Their self-image requires that they see themselves as more than mere hired guns or technical experts; they are eager to see themselves as bringing about their social goal, which is the enforcement and strengthening of these very same regulations. They see themselves as regulators by proxy, acting not as agents of their clients in opposition to the state, but instead more or less *in loco parentis* toward their clients on behalf of the state. Needless to say, they have not discussed this attachment to ends as such with their clients; rather, it is presented as a wholly necessary matter of how to minimize legal risks to the corporation. The prudent strategy for avoiding discrimination or harassment litigation, it turns out, is somehow exactly coincident with these lawyers’ heartfelt political desires.²⁷ But their attachment to their ends is so strong that there is no point, from their perspective, in even discussing it as merely one possible political end among competing political ends. It is better to present it as the necessary outcome of an expert discussion, for who then could challenge it? No one but another expert.

It is not clear to me how widespread this attitude is among lawyers and other professionals, but I think it merits investigation. In my own experience, the professional world is filled not with people who have no fixed beliefs, but with people who have so very, very *many*—but are unwilling to admit to them as such because that would require arguing their merits without the crutch of reporting them as expert opinion. If there is anything to this observation, then contemporary professionalism consists of considerably more than the auction of skilled services in a market. Such strong attachments to social ends lead to a hierarchical and anti-

market-driven, expert lawyer. Altman traces how strongly it was embedded even in the 19th century. See Altman, *supra* note 5, at 1055–60.

26. It will come as no surprise that no one wanted to be identified by name here. It is also a possibility, of course, that these feelings, even if real, simply operate as a way to deny to oneself that one has “sold out” to the large law firm, its prestige and money.

27. It is also true that market forces for expert services might pressure them not to express their preferences as to social ends as such, rather than merely a desire not to subject them to debate.

democratic division between the experts and everyone who lacks the credentials and language to challenge the pronouncements of the experts.²⁸

It is not implausible to characterize this division as a *class* divide between professionals and the rest of society. But this observation brings us to consideration of a theory that can account for it in class terms, the so-called theory of the New Class.

II. THE NEW CLASS, RIGHTS TALK, AND THE THERAPEUTIC

This Part turns from Brint's analysis of the shift of professional life from authority figure to market-driven expert in order to examine a quite different aspect of this argument: Brint's rejection of the implication in some commentary on this phenomenon that professionals in the U.S. are a "class." While I agree with Brint in disagreeing with those, often identified as neoconservatives, who believe that professionals hold political values apart from the rest of the nation,²⁹ I do not join in his rejection of any class analysis of modern professional life. New Class theory can, I believe, help explain the phenomenon Kronman and Brint identify. I then take this idea further to argue that the concept of the "therapeutic," central to the New Class theory of Christopher Lasch, helps explain the special role of lawyers as a "vanguard" within the New Class.

A. *Brint's Critique of Neoconservative New Class Theory*

The initial question, thus, is *which* theory of the New Class?³⁰ The term first appeared in the West as title to Milovan Djilas's classic dissident Marxist analysis of Yugoslav socialism, which proposed that far from moving toward a classless society, socialist societies were evolving a "New Class" of technocratic and bureaucratic rulers, whose rule and legitimacy were based upon expertise and bureaucratic privilege rather than prop-

28. It is true that the older ideal of the social trustee professional felt entitled to have a strong and indeed undemocratic say in the organization of his or her community; the issue is not that social trustee professionalism saw itself as invested with authority. The point, rather is that today's New Class wants to have it both ways—authority within a community, and complete mobility to stand outside that community and command wages available only in a market for expert services that ignores the *fact* of that community. At the end of that process, of course, there is no community, just experts and those they administer, and the market.

29. See *infra* note 32.

30. Obviously, New Class theory is a book length topic, and I do no more here than sketch the essentials necessary to evaluate Lasch's reliance on it, Brint's critique of it, and where, without Kronman mentioning it as such, his expert lawyer might fit within it. The origin of New Class theory is the works of Djilas, Konrád, Szelényi, and other Eastern Europeans who attempted to understand the social group that seemed from the 1950s forward to be asserting dominance, establishing means of reproducing itself, and generally exhibiting the Marxist characteristics of a class but which corresponded to none of the usual Marxist classes—hence the New Class. For a useful introduction to New Class literature, see the bibliography to *Hidden Technocrats: The New Class and New Capitalism* 223–35 (Hansfried Kellner & Frank W. Henberger eds., 1992) [hereinafter *Hidden Technocrats*].

erty in the traditional sense.³¹ But the theory has received its most public American airing in a particular version congenial to conservatives and neoconservatives and popularized by such political writers as Irving Kristol.³² In the neoconservative account, description of the New Class initially follows closely the lines laid down by the original Eastern European thinkers:

This "new class" is not easily defined but may be vaguely described. It consists of a goodly proportion of those college-educated people whose skills and vocations proliferate in a "post-industrial society" (to use Daniel Bell's convenient term). We are talking about scientists, teachers and educational administrators, journalists and others in the communication industries, psychologists, social workers, those lawyers and doctors who make their careers in the expanding public sector, city planners, the staffs of the larger foundations, the upper levels of the government bureaucracy, and so on. It is, by now, a quite numerous class; it is an indispensable class for our kind of society; it is a disproportionately powerful class; it is also an ambitious and frustrated class.³³

New Class theorists such as Kristol added something significant to the theory when it migrated to Western capitalist society—the presumption that this class is fundamentally to be contrasted with the presumably indigenous culture of business and capitalism. Neoconservative New Class theory is a theory of opposition between New Class professionals who, in Kristol's formulation, largely work for government or work as private sector contractors to government or the media, on the one hand, and capitalist business culture, on the other. As Brint puts it, in the view of neoconservative theorists of the New Class, "the main lines of class division have become inverted in advanced societies like the United States, with the most consequential conflicts occurring between articulate, intellectually oriented professionals and property-owning business people, rather than between capital and labor" (Brint, p. 4). Seen in this neoconservative way, the rise of the New Class is really socialism gradually creeping across society, the rise of the public sector, set against its ideological opposite, the business sector.

31. See Milovan Djilas, *The New Class: An Analysis of the Communist System* (Harcourt Brace Jovanovich, Inc. 1985) (1957). The analysis was picked up by a wide range of Eastern European writers to describe socialist conditions. The paradigm was, in its original form, however, a critique of societies that were supposed to be beyond, or moving beyond, both capitalism and class. See, e.g., George Konrád & Ivan Szelényi, *The Intellectuals on the Road to Class Power* (Andrew Arato & Richard E. Allen trans., 1979). The term was popularized as a tool for sociological analysis of Western capitalist societies, and America especially, by such liberal writers as Alvin Gouldner, who peculiarly saw in it possibilities of hope within capitalist society, rather than a form of critique. See Alvin W. Gouldner, *The Future of Intellectuals and the Rise of the New Class* 5-8 (1979).

32. See Irving Kristol, *Neoconservatism: The Autobiography of an Idea* (1995).

33. *Id.* at 207.

The difficulty with this neoconservative version of the theory, however, is that it is not empirically supported. On the contrary, much of *In an Age of Experts* is devoted to empirical research—attitudinal surveys, surveys of written literature, and related sampling techniques—convincingly showing that the supposed gap between New Class professionals as the neoconservatives conceived them and the business classes is largely chimerical. Survey evidence “indicates that even the most liberal segment of professionals—the people who would be counted as members of the ‘new class’ in any version of the theory—are, by and large, far from unconventional in their tastes or decidedly left-of-center in their political views, and they certainly show little opposition to the basic organizing principles of a business civilization” (Brint, p. 19).³⁴

In my estimation Brint is unimpeachable on this issue; at least as far as *attitudes* among professionals go; the much argued division between professionals, intellectuals, and the rest of the supposed New Class and the business classes is not tenable.³⁵ Yet the neoconservative version of the New Class theory is not the only version available. It is perfectly plausible (and indeed more consistent with the theory’s Eastern European antecedents) that the New Class simply has *no* deep divide between the professional classes and the business classes. As Lasch put it in *Culture of Narcissism*:

Neither the regulatory nor the welfare policies of the state rest on “an implacable hatred of private business and free enterprise,” as [Ludwig von] Mises claims. On the contrary, regulation controls competition and stabilizes the market

It is true that a professional elite of doctors, psychiatrists, social scientists, technicians, welfare workers, and civil servants now plays a leading part in the administration of the state and of the “knowledge industry.” But the state and the knowledge in-

34. This attitudinal finding that Brint reports is, it seems to me, consistent with my own experience of, for example, private lawyers attached to the regulatory ends on which they offer expert advice. My example of private firm lawyers thinking of themselves as advance agents of the EEOC, see *supra* at text accompanying notes 26–27, is fundamentally about the world view of lawyers who see no sharp difference between public and private, regulatory sector and business sector, state and capital. The only real difference, for them, is the wage paid for expert knowledge.

35. Brint’s conclusion is broadly borne out by other researchers into the theory of the New Class. See Hansfried Kellner, Foreword in *Hidden Technocrats*, *supra* note 30, at vii, viii (“[B]eyond the continuing conflicts . . . [there is] a *symbiosis in the making* . . . [combining] *both* traits of the old bourgeois culture *and* new culture themes clearly identified with the New Class.”). I stress “attitudes” here because although Brint’s research is impeccable as to the aggregated attitudes of the individuals surveyed, this method has, in my view, severe limitations when applied to institutions and classes. For example, it is not clear that one discovers anything very useful about the federal judiciary as an institution by polling the political opinions of its judges. Nor is it clear that one can determine the existence of a class solely by reference to the attitudes of its putative members; class characteristics, it seems to me, are more than just subjective attitudes measurable by attitudinal surveys but involve objective interests. I doubt, however, that Brint would disagree with this assessment of the limitations of the survey method.

dustry overlap at so many points with the business corporation (which has increasingly concerned itself with every phase of culture), and the new professionals share so many characteristics with the managers of industry, that the professional elite must be regarded not as an independent class but as a branch of modern management.³⁶

The supposed division was therefore one imagined by neoconservatives to advance a political argument masked as a cultural one. The condition of advanced capitalism is instead one of a *merger* of state and capital, public and private, in which the New Class serves as the mediator of the merger. The workers of the New Class are essentially interchangeable as between the public sector and the business world. What matters are not ideological differences between them, nor whether they work in government or in business, but instead differentiations of expertise, and what the market is willing to pay for it. As Hansfried Kellner and Peter L. Berger have characterized it (and in my own experience of the business world, they rather understate matters):

[N]ew Class culture not only finds a haven within the (old class) business world, but even within the hearts and minds of business executives . . . there now exist executives who not only dress and behave in a way that make them resemble New Class academics, but who appear to have internalized important elements of New Class ideology.³⁷

Moreover, with respect to the legal profession, differences between practice areas and subject matter areas of lawyers—corporate finance versus family law, tax law versus criminal law, etc.—mean less, from the standpoint of the *unity* of monopoly capitalism and the state, than their commonalities as *enforcers* of monopoly capitalism.³⁸ The enforcement of private contracts, for these purposes, really is a seamless web with curbing criminal deviance, because monopoly capitalism and the state themselves form a seamless web.³⁹

In the end, Brint is marvelously subtle and *In an Age of Experts* is marvelously empirically documented; I think no researcher into the sociology of the legal profession can afford not to read it carefully. It also has

36. Lasch, *supra* note 1, at 234.

37. Hansfried Kellner & Peter L. Berger, *Life-Style Engineering: Some Theoretical Reflections*, in *Hidden Technocrats*, *supra* note 30, at 1, 21.

38. I do not think it plausible, in other words, for international transactional lawyers—the lawyers paradigmatically closest to “capital”—to assert that *they*, as lawyers, have nothing to do with what this Essay subsequently describes as the law’s professional role in enforcing what I will call “thereapeutic authoritarianism.” The law is a seamless web that unites regulator and regulated of every variety, including crossborder financial transactions.

39. As a consequence, the discussion of deviance and therapy that follows with respect to Herbert Morris, see *infra* text accompanying notes 42–47, is not divorced from the role of lawyers in apparently unrelated areas like finance and pure business. The link is that capital and the state are linked, and lawyers therefore form a unitary profession that unifies enforcement functions across the private-public divide.

a quality of language and appreciation for nuance that puts it in a category far above ordinary social science writing. But while it shows the overlap between the supposedly separate intellectual-professional elites and business elites, it does little to undermine the claim that professional elites, including the lawyers, and also including many in the private as well as public sectors (there being little coherent differentiation) in fact form a class that has a discernible agenda.

This theory of the New Class, which survives Brint's critique because it relies on a merger rather than an opposition of public and private, state and capital, has weighty implications for the legal profession, because lawyers function, uniquely among the professions, as guardians of the public-private divide. Any discussion of this understanding of the lawyerly world must rely, however, on the works of Christopher Lasch and his belief that a "therapeutic ethic" has replaced the "utilitarian ethic" of the nineteenth century in which capitalism became regnant, but that the therapeutic "does not serve the 'class interest' of professionals alone . . . it serves the interests of monopoly capitalism as a whole."⁴⁰ The "therapeutic" is the content of the public discourse of the New Class, whose language, the vehicle of that content, is the language of rights.

B. *The Merger of Rights Talk and the Therapeutic*

Before examining how Lasch's New Class theory fits with Kronman's and Brint's books, it is necessary to understand what Lasch means by the therapeutic and the model of a therapeutic society it imputes. To speak of the therapeutic in a jurisprudential sense—to speak of it as a possible form of public discourse in any sense—may seem strange to many, because at first blush the very concept of the therapeutic would seem to be unremittingly private. After all, therapy is, or once was, based upon the concept of a wholly private space in which patient and therapist would explore, and perhaps remodulate, aspects of personality.⁴¹ The stuff of the therapeutic relationship, bound tightly to fantasy, projection, and desire, is also paradigmatically private.⁴²

40. Lasch, *supra* note 1, at 234.

41. Although I collapse vastly different conceptions of therapy together, it is uncontroversial that these are essentially tethered to the confines of the self, the family, the most personal relationships, all paradigmatic of the "private." The very move, however, toward "therapy as a public discourse," which in shorthand I call "public therapy," has naturally undercut this traditional conception of therapy. Recently, some psychiatrists and psychotherapists have begun to criticize the breakdown of the privacy of the therapeutic relationship, and with it, by implication, the predominance of public therapy. See, e.g., Christopher Bollas & David Sundelson, *The New Informants: The Betrayal of Confidentiality in Psychoanalysis and Psychotherapy* ix (1995).

42. Given the plainly critical tone of this Essay regarding public therapy as a public discourse, I should add that these criticisms are limited to what I argue here happens to therapy as it moves from being a private, non-coercive dialogue with the self, mediated by the therapist, to a public, highly coercive discourse of public management. I am indebted

Yet the public realm, the realm of state and coercion, *could* plausibly be established on therapeutic premises. Nearly thirty years ago, in 1968, a then-young moral philosopher and jurisprudentialist, Herbert Morris, set out to establish what such a therapeutic system would look like and how it would contrast with the alternative of justice and liberal rights.⁴³ The concept of the therapeutic, enacted as a regime of public policy, he noted, would mean that society's normative public institutions—its institutions for defining and curbing deviance—would begin from the premise that deviance fundamentally is, or at least is like, disease.⁴⁴ Disease, including deviance resulting from it, is not ultimately the fault of the deviant individual who nonetheless must be cured of the disease, benignly and for his or her own good, yet if necessary coercively.⁴⁵ Those who cure the deviant individual of his or her disease, even when they use coercive means and even if the deviant person is in denial that it is for his or her own good, are part of the helping professions and caring classes.⁴⁶ They are those who, in the words of Blaise Cendrars, "have appointed themselves spiritual directors of the spinal fluid."⁴⁷ The resulting public discourse establishes the therapeutic as public policy and engages in a language for formulating and justifying such a public policy, which here is called "public therapy."

The key characterization of a regime of public therapy is that if institutions of state coercion are conceived as bestowing a benefit upon the person being controlled, to cure his or her disease—then there is little reason to restrain that coercion; the usual restraints of liberal rights are not only counterproductive to the cure of disease—they make no conceptual sense. As Morris noted, in the therapy regime, "what we receive comes to us through compassion, or through a desire to control us."⁴⁸ Moreover, expertise and deference to expert opinion, rather than some more democratic sense of justice, are at the core of the judgments of a therapeutic regime.

Yet the most profound observation to be drawn from Morris is that although he acknowledged that in practice, regimes of therapy and regimes of punishment and justice could be mixed, conceptually they remain two separate and indeed diametrically opposed forms of social control. Society could go down one or go down the other, but it could not—

to my brother, Richard H. Anderson, M.D., Ph.D., a biologically-oriented psychiatrist, for many conversations on this topic.

43. See Herbert Morris, *Persons and Punishment*, in *On Guilt and Innocence: Essays in Legal Philosophy and Moral Psychology* 31, 31 (1976); see also Philip Rieff, *The Triumph of the Therapeutic: Uses of Faith After Freud* 35–36 (1966) (pointing out that a culture of therapy can be used as a means of mass control).

44. See Morris, *supra* note 42, at 38.

45. See *id.* at 36–38.

46. See *id.* at 42–43.

47. Blaise Cendrars, *Moravagine* 21 (Alan Brown trans., Doubleday & Co. 1970) (1926).

48. Morris, *supra* note 42, at 42.

consistently at least—go down both.⁴⁹ And yet it is plain that go down both roads it did, during the intervening thirty years between *Persons and Punishment* and today. The expansion of rights talk is evident to any lawyer,⁵⁰ but there would seem to be few important features of Philip Rieff's classic mid-sixties warning, *The Triumph of the Therapeutic*, that have not now come to pass.⁵¹

But both roads could be pursued only by transforming the discourse of liberal rights into something radically different. The resulting rights talk, far from a language of individual liberty, instead commingles bureaucracy and therapy. Its function is to provide a discourse by which the New Class, including its constitutive lawyers and helping professions minister, coercively, to a dysfunctional society. The attraction of this societal structure to New Class elites is apparent, because the legitimacy of New Class elites to govern is based fundamentally on expertise, their ability to

49. A frightening example of therapeutic discourse literally seizing the reins of legal policy is Washington state legislation that permits the state to "retain custody of sexual offenders . . . for indefinite periods of time after they have completed prison sentences," through civil commitment proceedings. Editorial, *Seattle Post-Intelligencer*, Jan. 4, 1996, at A12 (unsigned). The law—"Sexually Violent Predator Statute," Wash. Rev. Code § 71.09 (1995)—was held unconstitutional by a federal district court in August 1995 as a violation of due process, *ex post facto*, and double jeopardy clauses of the U.S. Constitution. See *Young v. Weston*, 898 F. Supp. 744, 754 (W.D. Wash. 1995).

50. The literature is voluminous, of course, and scarcely needs citation, but a usefully critical place to begin is Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991). Of course, rights talk may only be illusory, undermined by the growth of public therapy.

51. For example, Rieff claimed that "[o]ur cultural revolution has been made from the top, rather than from the bottom. It is anti-political, a revolution of the rich by which they have lowered the pressure of inherited communal purpose upon themselves." Rieff, *supra* note 43, at 240. Lasch, at least, would agree that this has come about. It might be thought that this analysis of the therapeutic seemingly refers only to left-liberalism in the current political landscape, and not the American right. It certainly is true that Bill Clinton's offers to share everyone's pain is as therapeutic an expression as one could imagine, and it is equally true that Hillary Rodham Clinton's *It Takes a Village: And Other Lessons Children Teach Us* 18 (1996) ("In the pages that follow we will learn ways to come together as a village to support and strengthen one another's families and our own.") is paradigmatic therapeutic authoritarianism. See, e.g., Alexander Cockburn, *Beat the Devil: The Children of Beatrice Webb*, *The Nation*, Feb. 12, 1996, at 9 (arguing that both Clintons evidence a "lust to improve the human condition until it conforms to the wretchedly constricted vision of freedom . . . otherwise known as therapeutic policing"). However, anyone who has read the profile of Newt Gingrich in the *New York Times Magazine* will have immediately understood that the discourse of the therapeutic is by no means limited to left-liberals. See Jason DeParle, *Rant, Listen, Exploit, Learn, Scare, Help, Manipulate, Lead*, *N.Y. Times*, Jan. 28, 1996, § 6 (Magazine), at 34, 48 ("[S]tories of Gingrich as resident House therapist are legion. . ."). Still more important, as a cover story in the *New Republic* pointed out several years ago, both the Clinton White House and Speaker Gingrich are devotees of management guru W. Edwards Deming, a cult figure in management training circles whose ideology of non-ideological expertise makes him virtually a patron saint of New Class ideology. See Leon Wieseltier, *Total Quality Meaning: Notes Toward a Definition of Clintonism*, *New Republic*, July 26, 1993, at 16.

declare that they know best; expertise is by its nature a hierarchical discourse downwards from expert to non-expert—and so, too, is therapy.

Yet this analysis requires an additional large assumption—that liberal rights discourse was available to be colonized, available as a language by which therapy could be taken public. In 1968, Morris likely would have found this astonishing because it would seem to be so thoroughly at odds with the content of liberal rights talk as an expression of liberal autonomy.⁵² It no longer seems astonishing for the reason that today rights talk as a specifically *liberal* discourse is exhausted, drained of content by its endless expansion, and thus a discourse open to be filled by an alternative content, in this case the concept of the therapeutic. I do not propose to argue this matter; this Essay simply agrees with Michael Walzer that “[t]he effort to produce a complete account of justice . . . by multiplying rights soon makes a farce of what it multiplies. To say of whatever we think people ought to have that they have a right to have it is not to say very much.”⁵³ For lawyers, this shift in the content of rights talk, at which they were very adept, the coin of the legal realm, to a therapeutic content should have seemed devastating. In fact, it was not.

52. For a highly influential argument that this kind of public therapy (under a different name) is compatible with liberal autonomy, see Cass R. Sunstein, *Legal Interference With Private Preferences*, 53 U. Chi. L. Rev. 1129 (1986). Put a trifle crudely, Sunstein’s intellectual project consists, it seems to me, of spinning meta-theories largely aimed at arguing why he does not have to argue for his substantive politics, which are privileged and untouchable (by non-experts), but which are roughly whatever happens to be received left-liberal wisdom that month as found in, for example, *The American Prospect*. They are, however, revisable, and in fact are revised all the time by shifts in the culture of expert elites. These subtle cultural changes are then rationalized into expert elite ideology by still more meta-theory and expert discourse, undertaken by people who are expert in meta-discourse, such as Sunstein himself. Sunstein’s project, in other words, is a homologue in political and legal theory to the gap this Essay criticizes between expert-administrators and the administered masses. It amounts to the translation of the *sensibility* of the New Class into the ideological terms that this class finds oddly essential to its *social* interactions. In this sense, the function Sunstein’s work, and writing like it, performs within New Class culture is peculiarly closer to novelistic narrative than the political legal theory that on the surface would seem to be its genre. For the success of his “translations”—the closeness of his ideological reifications to the subjective sensibilities perceived by his New Class readers—Sunstein’s work is highly esteemed; yet in the end it all seems to me mere Class ideology. I am grateful to Ezra Field for raising this point with me.

53. Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* xv (1983). Walzer continues by saying that “[m]en and women do indeed have rights beyond life and liberty, but these do not follow from our common humanity; they follow from shared conceptions of social goods; they are local and particular in character.” *Id.* Obviously, there remains a great deal of controversy about the role of rights, a subject I do not wish to engage beyond the assumption of the exhaustion of rights discourse because of its unlimited expansion. Even Glendon, for example, points out that the Supreme Court surely has not abandoned rights. See Glendon, *supra* note 50, at 89.

III. THE REVOLT OF THE ELITES⁵⁴

Understanding this transformation of rights talk and therapy carries us out of Morris's moral philosophy and into the social theory and cultural criticism pioneered by Lasch. It requires an analysis of a society composed of individuals who are passive objects of administration by means of a therapeutic regime. This therapeutic model cannot on its own terms, however, regard these individuals as fundamentally autonomous and responsible (as classical liberalism would) and instead regards them for what, precisely under such administration, they increasingly turn out to be: infantile and narcissistic consumers of the output of demand-driven capitalism. They cannot help but consume what the "culture industry"—the process by which contingent desires are converted into needs—brings them to desire. This characterization of the state-capitalism-consumer nexus is familiar from the long history of Critical Theory of the Frankfurt School.⁵⁵ Less noticed, however, is that the New Class itself expresses an equally profound narcissism, the narcissism of those who take inordinate and immodest opportunity to admire their own virtue, those who look in the mirror and pronounce themselves good. These two narcissisms, the narcissism of the administered and the narcissism of the administrators, intertwine and reinforce each other, inducing in society an upward spiral of infantilism and paternalism.⁵⁶

One can scarcely speak of cultural narcissism without making reference to the work of the late Christopher Lasch.⁵⁷ He was one of the first

54. Certain portions of the discussion of Lasch and *The Revolt of the Elites* are drawn from Kenneth Anderson, *Heartless World Revisited: Christopher Lasch's Parting Polemic Against the New Class*, *Times Literary Supplement*, Sept. 22, 1995, at 3. I am grateful to comments in the course of that writing from Ferdinand Mount, Adolf Wood, and John Ryle.

55. As good a place as any to begin is *The Essential Frankfurt School Reader* (Andrew Arato & Eike Gebhart eds., 1982), containing essays by, among others, Theodor W. Adorno, Walter Benjamin, Max Horkheimer, and Herbert Marcuse.

56. In fact, the rise of the New Class, and especially lawyers' roles in it, helps explain the political infantilism of those to whom they minister. If writers such as Sunstein are correct about the decline of civic republicanism, then the infantilism is due to the fact that the public sphere is taken over by experts. See Sunstein, *supra* note 52.

57. The most obvious references are to his two most famous books, *The Culture of Narcissism: American Life in An Age of Diminishing Expectations* (1978) and *The Minimal Self: Psychic Survival in Troubled Times* (1984). They are his weakest books, to my mind however; first, because they mistakenly treat the cause, rather than the effect, of the breakdown in contemporary society as being rampant individualism and the liberal ideology of rights. In his later work, Lasch properly identified New Class authoritarianism and statism as the cause of breakdown. Second, these earlier books show Lasch falling into what I would characterize as the trap of "communitarian statism" and the belief that society can be reformed "from above," through law and the state (although space will not permit this Essay to consider Lasch's final reasons for rejecting communitarianism, which he did in *The Revolt of the Elites* (pp. 92–114)). Third, although it is too intricate a subject to take up in this Essay, these books commit Lasch to a Freudianism that, while providing a foundation to explain psychologically the acceptance of the authoritarianism that rightly so troubled him, is simply too psychological and insufficiently connected to material and

theorists to comprehend that the regimes of rights and therapy were intertwining from the sixties forward, and one of the few who understood the unhappy consequences.⁵⁸ Lasch's vision of the New Class has little in common, however, with the neoconservative version undermined by such work as Brint's.⁵⁹ Lasch always understood that a defining characteristic of the New Class is its recognition of the mutability of the line between public and private;⁶⁰ indeed, its inability to take the gap seriously is one of the reasons why it has such difficulty being "liberal" in the classical sense.⁶¹ He therefore did not conceive of the New Class as being opposed to capitalism. As one perceptive conservative reviewer of *The Revolt of the Elites*, Daniel J. Silver, accurately observed, Lasch "identifies free enterprise itself, the restless, relentless force of capitalist markets, as the prime culprit" in weakening the family and small-scale communities that Lasch prized above all and saw as under attack by New Class managers.⁶² For Lasch, the target was always monopoly capitalism no matter how its servants were momentarily dressed, whether as bureaucrats, therapists, managers—or lawyers.

The Revolt of the Elites is thus a collection of essays loosely tied around the theme of the defense of populism and the American lower-middle class that Lasch identified with the populist tradition against the domination of the New Class, whether in the form of capitalist managers or state

economic factors to explain all that he seeks to explain. I admire Lasch's attempt to recapture Freud as a moralist, but it was largely unsuccessful and it is not surprising that Freud practically disappears from Lasch's final works. For a sympathetic examination of the use of Freud throughout Lasch's work, see George Scialabba, "A Whole World of Heroes": Christopher Lasch on Democracy, Dissent, Summer 1995, at 407.

58. Lasch's untimely death from cancer in 1994 at the age of sixty-one, a few days after completing *The Revolt of the Elites* deprived this country of one of its most original and vigorous voices. More than any other of our public intellectuals, Lasch sought to explain and decry the rise of the New Class and the damage its therapeutically-charged administration has wrought upon ordinary families in the United States. See, e.g., William Grimes, Christopher Lasch is Dead at 61; Wrote About America's Malaise, N.Y. Times, Feb. 15, 1994, at A19; Jackson Lears, The Man Who Knew Too Much: The Grim Optimism of Christopher Lasch, The New Republic, Oct. 2, 1995, at 42; Alan Ryan, The Middling Sort: The Revolt of the Elites and the Betrayal of Democracy, London Review of Books, May 25, 1995, at 13 (book review).

59. See *supra* text accompanying note 35.

60. Lasch makes this point explicitly in *The True and Only Heaven* when he discusses the New Class as seen, in turn, by neoconservatives and the American Left, concluding that whether its members are identified as the neoconservatives do as public sector workers, including academics or, as the Left does, as manipulators of finance capital, its members, "in spite of the diversity of their occupations and their political beliefs, have a common outlook," that muddies the line between private and public. Christopher Lasch, *The True and Only Heaven: Progress and its Critics* 527 (1991).

61. "Classical liberalism" can be defined as Webster's Third New International Dictionary 1303 (3d ed. 1981) defines liberalism: "a political philosophy based on belief in progress, the essential goodness of man, and . . . freedom for the individual from arbitrary authority in all spheres of life."

62. Daniel J. Silver, *The Revolt of the Elites and The Betrayal of Democracy*, Am. Spectator, May 1995, at 72, 74 (book review).

bureaucrats. The essays range across a vast subject area of cultural criticism, and are frequently drawn from Lasch's writings in his final years in *Harper's Magazine*, *The New York Review of Books*, and *The New Republic*. They include, for example, an attack on Gloria Steinem's recent confessional writing from the standpoint of a society that no longer has a concept of shame (Lasch, p. 208), a discussion of the uses of religion in the writing of fellow cultural critic Philip Rieff (Lasch, p. 213), an argument for populism over fashionable communitarianism (Lasch, p. 92), and a protracted analysis of the internationalization of the New Class as it extends itself across borders through international finance and global communications (Lasch, pp. 34-35).

Populism is—or was—rooted in a form of material production associated with the petty bourgeoisie. Lasch defended the morality of this class because he saw it as the residual bearer of democratic hopes and dreams against New Class elites that would manage it into passivity and consumerist narcissism. He characterized this morality in another work as nothing special, but as simply amounting to “its appreciation of the moral value of honest work, its respect for competence, its egalitarian opposition to entrenched privilege, its refusal to be impressed by the jargon of experts, its insistence on plain speech and on holding people accountable for their actions.”⁶³

This faith in populism can be criticized on many grounds, not least that it reads suspiciously less like a historically true account of the values of the lower middle class than a Laschian wish list for the overthrow of the New Class. Moreover, it is not clear why anyone should care about this populism, except as nostalgia and elegy, because the whole point of Lasch's analysis in *The Revolt of the Elites* is that it really *is* a sensibility rooted in a social class, produced and reproduced by a material mode of production that no longer exists. Lasch himself acknowledged that this class had been dispossessed of the material basis of its traditions by changes in capitalism itself. This switch was the source of much of Lasch's angry passion against capitalism.

In defending this populist morality, he also made no attempt to deny its unsavory side, the aspects traditionally invoked by liberal (and often lawyer) elites as good reason to destroy it. “It would be foolish,” he wrote, “to deny the characteristic features of popular movements at their worst—racism, anti-Semitism, nativism, anti-intellectualism, and all the other evils so often cited by liberal critics.”⁶⁴ Still, he maintained, “a movement that offers any real hope for the future will have to find much of its moral inspiration in the plebian radicalism of the past and more generally in the indictment of progress, large-scale production, and bureaucracy.”⁶⁵

63. Christopher Lasch, *Liberalism and Civic Virtue*, Telos, Summer 1991 at 57, 68 (1991).

64. Id.

65. Id.

Lasch's opposition to elites was never, however, a rejection of the role of elites in society as such. He insisted, rather, that in order for elites to exercise leadership, they must be rooted in the communities they would lead—they must arise from and continue to live within them. Otherwise leadership would collapse into managerial domination and authoritarianism. Lasch perceived that elites today have largely ceased to have an organic connection to the societies and masses whose fate, especially economic, rests largely in their hands.

Drawing upon and strikingly inverting Jose Ortega y Gasset's famous warning against mass culture in *Revolt of the Masses*,⁶⁶ Lasch urged, in *The Revolt of the Elites*, that the threat today to civilizing traditions:

seems to come from those at the top of the social order, not the masses Today it is the elites . . . those who control the international flow of money and information, preside over philanthropic institutions and institutions of higher learning, manage the instruments of cultural production and thus set the terms of public debate—that have lost faith in the values of the West. . . . Simultaneously arrogant and insecure, the new elites, the professional classes in particular, regard the masses with mingled scorn and apprehension. (Lasch, pp. 25–26, 28.)

The globalization of capital and the internationalization of the elites, moreover, play a special role in the formation of the New Class:

[T]he market in which the new elites operate is now international in scope. Their fortunes are tied to enterprises that operate across national boundaries Their loyalties—if the term itself is not anachronistic in this context—are international rather than regional, national, or local. They have more in common with their counterparts in Brussels or Hong Kong than with the masses of Americans not yet plugged into the network of global communications. (Lasch, pp. 34–35.)

Lasch draws powerfully upon, in a critical way, Robert Reich's description in his *The Work of Nations: Preparing Ourselves for 21st Century Capitalism*⁶⁷ of the internationalized "knowledge class" and "symbolic analysts" to lay out both the contours of this elite and the reason it has lost touch with its organic base:

Robert Reich's category of "symbolic analysts" serves . . . as a useful, empirical, and rather unpretentious description of the new class. These are people, as Reich describes them, who live in a world of abstract concepts and symbols, ranging from stock market quotations to the visual images produced by Hollywood and Madison Avenue, and who specialize in the interpretation and deployment of symbolic information. (Lasch, pp. 35–40.)

66. Jose Ortega y Gasset, *The Revolt of the Masses* (Kenneth Moore ed. & Anthony Kerrigan trans., 1985) (1979).

67. Robert B. Reich, *The Work of Nations: Preparing Ourselves for 21st Century Capitalism* (1991).

But *The Revolt of the Elites* may actually be read as more mournful of the direction elites have taken than angry at them. It indicts the New Class for an unwillingness to lead the communities and masses from which these new, highly educated, upwardly mobile, and ultimately ungrateful elites themselves originally sprang seeking "a way of life that distinguishes [them] from the rest of the population" (Lasch, p. 33). They are in revolt against the burdens of leadership because they require becoming *part of* these communities and would put some restriction on their mobility. It would require that they talk with the masses and not simply to each other as experts. The old elites wanted to be the top of the communities in which they had grown up; whether to lead or dominate, to serve communities or exploit them, at least they understood themselves as having a place in them. The new elites, by contrast, want no connection; they understand that power is elsewhere, money is elsewhere, and mobility is everything; if indeed they have to live somewhere, it will be if at all possible in a wholly private, gated community. Yet simultaneously they want to dominate.

The New Class pushes its mobility to absolute limits, launching itself into what it imagines is a global society conducted in the jet stream, made weightless by the complete mobility of capital, but with devastating consequences for those left behind on the ground. For those who cannot fly, there is first, the administration of life by these same elites and their hirelings, the authoritarian, bureaucratic formations which, to be sure, express themselves alternately in soothingly therapeutic psycho-babble or communitarian slogans of the common good or assertions of new and endless rights and, second, economic insecurity in the midst of being urged to greater self-esteem.

CONCLUSION: LAWYERS AS NEW CLASS GUARDIANS OF THE PUBLIC-PRIVATE DIVIDE

In this unforgiving light, the unhappiness of lawyers looks rather less like professionals experiencing the loss of fulfillment that accompanies losing "ownership" of the social ends of the legal profession, as Kronman would have it, and rather more like the unhappiness of experts who, having established to their own satisfaction the certainty of ends not open for argument by non-experts, wonder why they are not also loved.

While lawyers are not alone among New Class professionals in this unhappiness, they do occupy a special, vanguard place within the class. If, as Lasch's version of New Class theory suggests, the New Class is an elite indifferent as between state and capital, if in its form of class dominance it slides freely back and forth between the public sector and the business sector, then lawyers are the avant garde of the class because to be a lawyer is to interface between the public and the private. Whether one goes to court to secure enforcement by the state of a private contract, to seek the decision of the state in a child custody case, or to quiet title to

real estate, the role of the lawyer is to mediate the public-private divide. Lawyers have thus always been more aware than others of its permeability.

The language of the law mediating that divide is the language of rights. If the content of the language of rights, however, is taken over by something other than liberalism, then the public-private divide will itself be something other than liberal. If the content of rights talk becomes therapeutic, in the "public" sense of this Essay, then lawyers—the law as a *profession*—take on a role in the enforcement of the public policy of therapy because they provide access to that public-private interface in order to make such therapy coercive. Concepts of the therapeutic applied to society as a whole remain just another alternative set of public policy recommendations until, given the form of absolutist and necessitarian rights talk, the formulation and coercive enforcement of this doctrine, which in the public realm is a function of lawyers above any other profession.

This process draws lawyers intimately into the intertwining narcissisms that this Essay has described, the upward spiral of the infantilism of consumers and the paternalism of the New Class. Lawyers are this system's enforcers. Yet it should be recalled that the essence of these narcissisms is not, as is commonly understood, self-love. Narcissists are not, as Jackson Lears put it in a moving obituary essay on Lasch, "pleasure-seekers (indeed, their obsession with pleasure reveal[s] their inability to sustain it); they [are] *people unable to see the boundaries between self and world*, wandering in the hall of mirrors that [is] our image-saturated society."⁶⁸ Whether the narcissism of the managers or the managed, the administrators or the administered, the therapist or the therapees, these narcissisms are the expression of people fundamentally unable—or, in the case of New Class lawyers, unwilling—to distinguish between "self" and "world" or, in other words, between private and public.

When lawyering becomes the means to infuse therapeutic ends into the public and private by privileged access to the dividing line between them, then notwithstanding all its talk of rights, it becomes a profoundly illiberal profession. In one of my own very few conversations with Lasch, in 1991, I put this to him. He responded that he saw lawyers as an essential New Class conduit for the *authoritarianism* of the regime of public therapy. This Essay has, therefore, sought to set out at least the *form* of argument (and no more than that, with large patches of it simply taken by assumption) for what that might mean, in order to ask what happens to lawyers and the law when the dominant paradigm of social control becomes therapeutic but its *language* remains the language of rights.

Beyond that, Lasch said, the issue really was the transformation of rights talk from a liberal discourse (of which he was anyway extremely critical, because of, in his view, its excessively individualist emphasis) into a therapeutic discourse. Yet, he went on, the *specification* of that transformation was something that needed to be examined from within the law

68. Lears, *supra* note 58, at 47 (emphasis added).

and the legal profession; it was a task, he thought, peculiarly appropriate to lawyers and peculiarly difficult for intellectual historians like himself.

So perhaps Kronman ought to look further afield than he does for an answer to the unhappiness of lawyers; perhaps he ought to take a frankly class, and not just market, view of lawyers, and consider their place in a specifically therapeutic society. If he were to do so, he might well conclude that today's lawyers are, if anything, over-professionalized, and unhappy in part because they sense, as others sense, the brittleness of professional identity and its inability alone to sustain the human spirit (although it can sustain the ambitions to make money and to exercise political power in the management of others' hopes and dreams). Brint too, having demolished one version of the New Class thesis, perhaps ought to consider the continued relevance of another, that of the New Class in service to monopoly capital maintaining its grip upon a culture of several narcissisms.

As for Lasch, the issue of the New Class and its lawyers is authoritarianism. In an age when the therapeutic has appropriated rights talk, and with it lawyers, turning it and them into agents of New Class authoritarianism and social control, the real question that needs to be answered is *why* there exists the continued "hegemony within the public culture of an essentially indeterminate and at the same time absolutist discourse of rights."⁶⁹ The answer Lasch gave by the end of his life was that it predominates because, far from being merely a language of individual liberty or even unbridled individual license (as, for example, the communitarians would have us believe) it is today a language of state authority, a language of therapeutic paternalism; those who actually dream of being "liberals," in Morris' sense, will not reclaim rights talk any time soon. Its appropriation is at the core of the process by which the state today controls, as Lasch wrote, "not merely [the individual's] . . . outer but his inner life as well; not merely the public realm but the darkest corners of private life, formerly inaccessible to political domination."⁷⁰

Lawyers are deeply complicit in this colonization of the language of rights by the culture of therapy. They participate because it serves the agenda of a class that, unfamiliar with democracy except as an impediment to its social engineering, is incapable of any form of discourse that is not directed from the top to the bottom. Expertise, particularly in the social sciences, is a language of hierarchy and social control, and lawyers today, as a professional formation within the New Class, deploy the language of rights to the end of making the therapeutic coercive in the public sphere.

It is not a glorious profession because it is not a glorious class, and lawyers are right to be unhappy.

69. John Gray, *Classic Problems*, Times Literary Supplement, Apr. 28, 1995, at 28 (reviewing Terence Ball, *Reappraising Political Theory* (1995)).

70. Christopher Lasch, *Haven in a Heartless World: The Family Besieged* 189 (1977).