LETTER FROM THE PRESIDENT

March 2001

Dear Friends,

The great word in ethics is *ought*. History is about what *was*. Journalism about what *is*. Futurism about what *will be*. Law about what is *permitted to be*. Ethics is about what *ought to be*.

In the last several months, there have been two supreme illustrations of this point. One has to do with former U.S. president Clinton's last-minute pardons. The other has to do with Napster, the online song swapping service. One is about politics, the other about popular music. But each drives home a key concept: that what's *legal* and what's *ethical* are wholly different things. Those who miss that point refuse to consider what *ought to be.* Instead, they take refuge behind what is *permitted to be*, as though all that mattered were what they had a *right* to do.

That blurring of the legal with the ethical leads to some of the worst confusions of our age. Take Clinton's pardons, particularly of fugitive financiers Marc Rich and Pincus Green. Why did he come to such grief with a few galvanic strokes of the pardon pen?

The Beltway-insider analysis is that Clinton lost his spinning machine when he left the White House. After January 20, he had no publicity pro to craft clever retorts, no praetorian opinion guard to strike back instantly whenever he was attacked, no penumbra of friends to spring to his defense. So the public had to wait four weeks to hear Clinton's own defense of his actions, which finally came in a piece he wrote in *The New York Times* in late February.

This insider analysis leaves no room for the possibility that Clinton had a problem because his actions, while legal, were unethical. Read his own defense, however, and you'll realize there's more here than a failure of spin. There's a collapse of the *ought*. What's been subverted, it seems, are three core moral values: *fairness*, in the miscarriage of justice; *responsibility*, in the appearance of self-dealing, and *respect*, in the assumption that pardons can be purchased. For evidence, you need look no further than Clinton's own words.

1) *Fairness*. What troubles so many Americans in these pardons is the perception of an end run around established judicial practice. As Clinton insists in his explanation, presidents have absolute power to grant pardons without review by others. And while they traditionally seek input about potential pardons from Justice Department officials, they are not required to do so. No doubt about it: Clinton did the *legal* thing in issuing these pardons. But did he do the *right* thing? Does he see the distinction between the formal constraints of law and the inner restraints of ethics? Or does he actually believe the cynical old

aphorism that "if it ain't illegal, it must be ethical"? More important, was he acting fairly—to the nation, to all those who didn't get pardoned, to justice itself?

2) *Responsibility*. Self-dealing, or using public money for private gain, is illegal. But its churlish second cousin—using the influence of public office to extract private benefit—while not illegal, is widely seen to be irresponsible. Clinton asserts there was no quid pro quo, no gifts to his presidential library in return for the pardons—an assertion that both Congress and the Department of Justice are examining closely. He offers as evidence the fact that "other friends and financial supporters sought pardons in cases which, after careful consideration based on the information available to me, I determined I could not grant." What the public seems to be asking here is whether he "could not grant" them because the individuals involved had insufficient wealth to ensure large gifts to his library.
3) *Respect*. The climax of Clinton's defense is a curious piece of logic suggesting that he finds nothing wrong when people of great wealth, however misbegotten its source, repurchase lost respect by doing good works. "Finally, and importantly," Clinton writes, "many present and former high-ranking Israeli officials . . . urged the pardon of Mr. Rich because of his contributions and services to Israeli charitable causes . . . and to the peace process through sponsorship of education and health programs in Gaza and the West Bank." The fact that wealth garnered in illegal or immoral ways can support noble purposes is not new: Look at the source of the money behind some of the largest U.S. charitable foundations. But that Clinton should use that argument to absolve those who amass dirty money suggests a profound failure of the moral imagination. What about those who do something terrible and *don't* get rich? They can't sponsor grand projects. So by his own logic, Clinton would have little interest in setting them free—and this from a man so verbally enthusiastic about breaking class barriers and giving equal respect to all.

What's the lesson here for public officials? People are watching, and they're increasingly doing so through the lens of ethics, not just law. Doing what you are *permitted* to do may satisfy your thirst for wealth, fame, and power. But doing what you *ought* to do reflects your character, determines your legacy, and builds your reputation. Clinton's reputation, it seems, is increasingly being associated with the failure of the ought.

But it's not only single public figures who can fall victim to that failure. What happens when millions of people deliberately overlook the ought to get what they want? That's the story of Napster. Unless you're a pop-culture fan, however, or a technophile, or younger than 25, the story of yet another high-tech startup brought to its knees may leave you cold. "So what?" you may say.

The answer is that the suit against Napster, brought by the recording industry in a federal court in San Francisco, raises a profound ethical issue. The possible collapse of this two-year-old provider of software—which at its peak earlier this year allowed some 65 million users to trade music through the Internet for free—raises a core question about copyright. In a digital age, what ought to be the proper relationship between artists' right to get paid for their work and the public's right to copy and share works of art for their personal use?

To grasp the issue you need to understand how Napster works. Imagine that you—or, more accurately, your teenager daughter—likes listening to pop music CDs. So does her boyfriend. She has a CD with a song he likes. He has one with a song she likes. So they exchange CDs and copy those songs onto each other's computers.

Illegal? Not in the United States. A 1984 ruling by the U.S. Supreme Court found that the use of VCRs to record television programs for noncommercial use in the home violates no law. And the Audio Home Recording Act of 1992 made it clear that you can use a digital audiotape player or other similar gadgets to record digital music for personal, noncommercial use. So there's plenty of precedent for song swapping.

Now suppose these teenagers realize that their half-dozen best friends have good songs, too. So they begin copying those. Along the way, one of them says, "We should do an index of all our CDs, so we know who's got songs we want!"

Smart idea? That's what Napster thought. All Napster is, in fact, is an index married to an interconnection service. It has no music of its own. It merely finds out who among its users has which songs on their hard drives, and then it tells the world how to connect to those computers and download those songs. All it does, in other words, is give you 65 million new friends. Not one of them, as an individual, has apparently done anything illegal by downloading songs. Yet it appears to the court that illegality has been done by violating the copyright of those who created and own the songs.

This raises a fascinating question. Ought something that is right when a few people slowly do it become wrong when millions do it almost instantaneously?

Intuitively, I suspect, we're apt to say, "No, mere numbers shouldn't change the moral arguments here. What's right for one ought to be right for all."

But suppose you launch a Web site that lists the location and the contents of every unlocked locker, car, and dorm room on your college campus. Are you a thief? Hardly. After all, you're merely assembling information. It's not wrong to possess that information. If you notice my door is unlocked, is it illegal to tell someone? And if people use your new index for evil purposes—hey, that's their business. You're just exercising your First Amendment rights.

Or are you? Most of us, I suspect, think this index is a bad idea. Even if it's *legal,* it sure feels *unethical.*

But bright teenagers will holler, "Bad analogy! Stuff is tangible, but music is intangible." Fair point: When I take your stuff, you've lost it, whereas if I copy your song, you've still got it, and so do I.

So try out this one. You make a neat little video and show it to some friends. A music-video broadcasting company hears about it and offers you big bucks to air it first. But

your friends have already put it on the Web. It quickly becomes so popular that the broadcaster calls off the deal, since it's not new any more. You haven't lost any stuff. What you've lost is something far more valuable: your intellectual property. Is that acceptable? Do we want a world in which creative artists cannot make a living because there is no protection for their work and no possibility of revenues from it? Most of us, I suspect, think not.

So it seems there's a legitimate question of scale here. And scale is exactly what the digital age brings to the table. We already understand that fact in connection with privacy debates: What's okay for my lawyer or accountant to know in the privacy of my living room is *not* okay for the whole world to know on the limitless reach of the Web. In the same way, what may be okay for teenagers to swap one-on-one with their friends may not be okay when turned into a global business. Or, put another way, what's legal in private may not be ethical in public.

Why not? Because, at bottom, the issue turns on motives. Over pizza in North Carolina several weeks ago, I talked with a teenager who was a heavy Napster user. He had a personal collection of 1,200 songs on his computer. "Do you ever buy CDs?" I asked. "Not any more," he said smilingly.

The law supports his motivation to build his own library and pay not one cent for it. But what *ought* he do? If he wants to live in a world in which good new music keeps being created, how will that world support its musicians? By taking what's offered for free, has he contributed to a failure of the ought?

That, of course, is a tougher call than Clinton's. Given the choice between paying for something and getting it free, consumers always vote for the latter—whereas, given the temptation to undercut the judicial process for personal gain, public officials often resist. But at bottom the issue is the same. Yes, we can cling to our rights, do what benefits us, and ignore the larger implications. But what sort of world do we want to create? And what ought we do to create it?

Sincerely,

Rushworth M. Kidder

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