

IS IT EVER JUSTIFIABLE FOR AN ELECTED LEADER TO LIE TO THE PUBLIC
TO PROTECT HIS OR HER PRIVACY?

THESIS

Presented to the Graduate Council of
Southwest Texas State University
In Partial Fulfillment of
the Requirements

For the Degree
Political Science
Master of ARTS

By

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San Marcos, Texas
December 2001

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2001

ACKNOWLEDGEMENTS

I wish to thank Dr Ken Ward for his guidance and support during the writing of this thesis. The thesis was submitted to the committee Sept 5, 2001.

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CHAPTER I

INTRODUCTION

On January 26, 1998, President Clinton looked the American public in the eye, via national television, and told us he did not have an affair with White House intern, Monica Lewinsky

“I want to say one thing to the American people I want you to listen to me I’m going to say this again I did not have sexual relations with that woman, Miss Lewinsky”¹

Caught in a lie, President Clinton re-addressed the nation seven months later, on August 17, and confessed that he did in fact have a personal relationship with Ms Lewinsky “I did have a relationship with Miss Lewinsky that was not appropriate In fact, it was wrong” If you saw or heard Clinton’s apology to the American people that night, you likely noted an angry, frustrated edge to his voice and resentment in his eyes and mannerisms It was clear that he didn’t want to be there Only President Clinton knows for certain, but it’s reasonable to assume the seeming insincerity of his message was due to the fact that he did not feel he owed the public an apology He tried to shield a private matter from the public eye Although Clinton’s words said he was wrong, his delivery of them said, “It’s none of your business”

Is it our business? In this case, Clinton’s presumed right to privacy was pitted directly against the public’s presumed right to know Was his lie justifiable? Is it ever justifiable

¹ Robert Fulton, lecture, U S Air Force environmental Symposium, March 2000

for an elected leader to lie to protect his or her privacy? This paper seeks to answer the latter question and then draw a conclusion about the former. I will first establish there is such a thing as a justifiable lie, and that there are a number of tests that may be used on a case-by-case basis to determine justifiability. Next, I will establish that there are some circumstances in which it is justifiable for an elected official to lie to the public. I will then move on to examine lies to protect one's privacy as a category of justifiable lies, first for ordinary citizens and then for elected leaders. My conclusion is that there must be some cases in which such lies are justifiable, and that the tests used to justify lies for elected leaders are fewer and must be applied most stringently and with utmost integrity. Finally, we can consider how this conclusion applies to President Clinton's lie to the public about his conduct with Monica Lewinsky.

For purposes of isolating the question of elected official lying to the public, this paper will disregard the issue of perjury associated with the Clinton-Lewinsky scandal. Lying to the public versus lying within the legal system are two distinct issues, and despite some overlap between them in Clinton's case, this paper will deal strictly with the direct lie to the public.

CHAPTER II

IS IT EVER JUSTIFIABLE TO LIE?

To tackle the first question, whether or not there is such a thing as a justifiable lie, I will define lying and then discuss the importance of truth, common justifications for lying and potential criteria for justifying lying. Finally, I will draw a conclusion regarding the broad issue of justifiable lying, which will in turn provide insight to the question of privacy lies, elected official lies, elected official privacy lies, and ultimately the Clinton lie.

Most people would accept the following simple definition: "A lie is an untrue statement spoken with intent to deceive."² However, it is obvious upon consideration that a lie may be expressed in ways other than words. Deception can occur via discourse or otherwise, including gesture, action or inaction, and even silence.³ The definition

² Jean Piaget states, "to tell a lie is wittingly and intentionally to betray the truth," in *The Moral Judgement of a Child*, trans. Marjorie Gabian (NY: The Free Press, 1965), 140. Kant says a lie is "merely an intentional untruthful declaration to another person," in *The Philosophy of Immanuel Kant*, ed. Lewis White Beck (NY: Garland Publishing, Inc., 1976), 347. Augustine of Hippo and Michel de Montaigne hold that the distinction between truthfulness and deceit refers to the intentions of the liar, according to J. A. Barnes, *A Pack of Lies, Towards a Sociology of Lying* (NY: Cambridge University Press, 1994), 12. St. Thomas Aquinas claims three things must normally occur in lying: (1) falsehood of what is said, (2) will to tell falsehood, and (3) intention to deceive. He explains the key is intention to deceive in *Summa Theologica*, trans. Fathers of the English Dominican Province, Vol. 2 (NY: Benziger Brothers, Inc., 1947), 1664. Hugo Grotius--in *The Rights of War and Peace*, trans. A. C. Campbell (London: M. Walter Dunne Publisher, London, 1901), 301--and Sissela Bok--in *Lying: Moral Choice in Public and Private Life* (NY: Vintage Books, 1989), 6--also agree that lying must include intent to deceive.

³ See Bok, 13; Jeremy Bentham, *The Principles of Morals and Legislation* (NY: Hafner Publishing Co., 1948), 221-22; Dietrich Bonhoeffer, *Ethics*, ed. Eberhard Bethge (NY: The Macmillan Company, 1949), 368-69; and Grotius, 301.

could be complicated further by categorical divisions of lies such as simple falsehoods versus illegal lying⁴, stated lies versus evasion or exaggeration⁵, benevolent versus malicious lies⁶, white lies versus lies in a serious crisis⁷, and many other distinctions⁸. Despite these valid considerations, the simple definition, “A lie is an untrue statement spoken with intent to deceive,” is adequate and appropriate for the purposes of this exploration into the question of justifiable lying.

To begin considering if it is sometimes justifiable to make an untrue statement with intent to deceive, I will need to establish that telling the truth is important. If telling the truth is not important, the issue about lying goes away.

⁴ Bentham (222) divides falsehood by form, into simple falsehoods, forgery, personation and perjury.

⁵ Bok (242) identifies “more marginal forms, such as evasion, euphemism, and exaggeration.”

⁶ Bentham (221-22) says what all lies have in common is that “they consist in some abuse of the faculty of influencing the sentiment of belief in other men.” The difference lies in the intentions of the liar. Barnes (13) explains that there is a distinction between “benevolent and malicious lies, depending on whether the liar intends to enhance the interests of the dupe or to harm them. He points out that good intentions usually are tied to white, social, or altruistic lies, and serious, cruel, blatant, or grave lies occur when the liar intends harm. He added that protective lies may be either benevolent or malicious, as they are constructed to protect another person or the liar.”

⁷ Bok (57) places white lies on a spectrum, at the opposite end of deception from lies in a crisis.

⁸ Augustine outlines eight kinds of lies, from those in the teaching of religion, to lies that harm no one and protect someone from physical defilement (Bok, 250-51). Aquinas (1,665) divides lies three ways--with respect to their nature as lies (boasting vs irony), with respect to their nature as sins (jocose, officious and mischievous lies), and with respect to their relation to some end (mischievous vs jocose vs officious). Instead of categorizing lies, Bonhoeffer simply excludes certain kinds of lies from the definition. He says (368-69), “Since the term lie is quite properly understood as meaning something which is quite simply and utterly wrong, it is perhaps unwise to generalize and extend the use of the term so that it can be applied to every statement which is formally untrue.” He asserts joking lies and lies to deceive the enemy of war are two examples which should not be included in the definition of lie (368-69). Bonhoeffer may have been following the lead of Grotius and many Protestant thinkers after him, who also excluded certain kinds of lies from the definition of lying (Bok, 1). Grotius (1,225) argued that “speaking falsely to those—like thieves—to whom truthfulness is not owed cannot be called lying.”

Telling the truth is important for order in society. If the word of others may be equally false as true, then communication has no value.⁹ Aquinas explains it best when he says, “Since man is a social animal, one man naturally owes another whatever is necessary for the preservation of human society. Now it would be impossible for men to live together, unless they believed one another, as declaring the truth one to another.”¹⁰ Some even go so far as to say telling the truth is *the purpose* of speech.¹¹ While there do not seem to be any studies available to quantify the impact of lying on society, it is clear that a society in which lying was fully condoned and routinely practiced could not function.

Telling the truth has long been considered a virtue, or the morally right thing to do. From Francis Bacon saying there is no pleasure comparable to standing upon the vantage

⁹ Augustine (Bok, xv) says, “When regard for truth has been broken down or even slightly weakened, all things will remain doubtful.” Barnes (3) calls lying “socially destructive.” Bok (18) asserts all communication would be worthless if it weren’t for some essential level of truthfulness in human society. She says (26-27), “Yet trust is a social good to be protected just as much as the air we breathe or the water we drink. When it is damaged, the community as a whole suffers, and when it is destroyed, societies falter and collapse.” Piaget (171) explains that a lie is wrong because it is in conflict with mutual trust and affection. Bernard Haring, *The Law of Christ, Moral Theology for Priests and Laity*, trans. Edwin G. Kaiser (Paramus, NY: The Newman Press, 1966), 563, explains that one of the main factors to the obligation to truthfulness is “the right of the community to absolute trustworthiness of speech.” Hannah Arendt, in “Truth and Politics,” *Philosophy, Politics and Society*, Third Series, ed. Peter Laslett and W.G. Runciman (Oxford: Basil Blackwell, 1978), 105, argues, “No human world will ever be able to survive without men willing to do what Herodotus was the first to undertake consciously, namely . . . to say what is.” Francis Hutcheson, in *A System of Moral Philosophy* (NY: Austus M. Kelley, 1968), 38, says that with an honest heart, “Speech may be the means of the great good in human life.” He also says that if men imagined there was no obligation to veracity and acted accordingly, not only would the pleasure of conversation be destroyed but so would all confidence in narration. Since we often act and derive knowledge in human affairs based on the narration of others, deception “tends to deprive human life of all these advantages from mutual confidence in conversation” (31).

¹⁰ Aquinas, 1,662

¹¹ Augustine in *The Enchiridion* says (Bok 32), “Now it is evident that speech was given to man, not that men might therewith deceive one another, but that one man might make known his thoughts to another.” The goal of speech, according to Haring (559), is “the building up of love in ourselves, in our neighbor, in the community.” Haring adds, “Speech . . . must be community-forming and community-sustaining.” Grotius (263-64) says speech would be useless if not for an obligation of those who speak to those who listen. Those who listen lose liberty of judgement when lies are told to them.

ground of truth, to Kant's absolutist argument that a lie, even if it harms no one, harms mankind generally, great thinkers throughout time have asserted truthfulness is a virtue¹²

Religions have also long emphasized the importance of truth.¹³

¹² Aquinas (1,661) asserts, "To say what is true is a good act and virtue is that which makes its possessor good, or renders his action good" Philosopher Francis Bacon Bacon, in "Of Truth," *The Essays or Counsels Civil and Moral of Francis Bacon*, ed Samuel Harvey Reynolds (Oxford Clarendon Press, 1890), 162, quotes an (un-named) poet saying, "But no pleasure is comparable to the standing upon the vantage ground of truth . . . and to see the errors, and wanderings, and mists, and tempests in the vale below" Haring's (563) second main factor in the obligation to truthfulness is the "value of one's own uprightness" Lying, according to Piaget (171), is a wrong in itself and will remain so if consequences were removed Grotius (298) says lies in daily life "are so direct a violation of all moral principle, both in their nature and consequences, that almost every page of the revealed will of God declares their condemnation" Nicolai Harmann, describing the moral value of truthfulness in his "Moral Values," *Ethics*, Volume II, trans Stanton Coit (NY The Macmillan Company, 1956), 281, says man has the power and bears the responsibility to establish the agreement of one's word with one's thought, or conviction He asserts that truthfulness as a value admits no exceptions The so-called necessary lie is an "anti-value," and, "No end can justify deliberate deception as a means—certainly not in the sense of causing it to cease to be a moral wrong (283)" He (281) further explains that the lie is misuse of good trust, as "everyone assumes involuntarily that one's word is truthful" Aristotle in *Nicomachean Ethics*, trans Martin Ostwald, (NY The Bobbs-Merrill Company, Inc , 1962), 105-6, says, "Falsehood is base in its own right and deserves blame, but truthfulness is noble and deserves praise" Aristotle praises the man who is truthful in speech simply because it is part of his character, and he called speaking the truth the freedom of a great soul (Grotius, 305) Hutcheson (32) writes of the "general law of veracity" Although we are not always obliged to disclose our sentiments, he explains, whenever we use signs that profess to impart our sentiments, we must "use them so as shall impart our real sentiments according to the reasonable interpretation of such signs"

¹³ Buddhists recite five precepts each day, the fourth of which is to abstain from telling lies (Bok, 45) In Western religion, Ps 5 6 says, "The Lord abhors the bloodthirsty and deceitful man" Grotius (298) says Solomon describes a good man as one who holds every false word in detestation, and the Apostle instructs his disciples not to lie to one another Revelations 22 15 says people who practice lies must stay outside the God's city Leviticus 19 11 orders not to lie or defraud Proverbs 30 8 says to remove falsehood and liars from me Louis Jacobs, in *Jewish Values* (Hartford, CT Hartmore House, Inc , 1969), 145, says that in the vast Jewish literature in which the praises of truth are sung, there are references to truthfulness to God, to one's fellow and to oneself Jacobs (149) explains that the Jewish religion "demands of the Jew that he observe the strictest standards of commercial honesty and good faith The Bible forbids all fraudulent dealing" He adds (150), "A man's word is sacred" Haring (560) says scripture condemns lying "categorically and without any reservation" He says the negative precept, to not bear false witness against your neighbor, "obliges always and under all conditions the lie is intrinsically evil and therefore never permitted." Bonhoeffer agrees (238), saying we owe truthfulness to God that must assume a concrete form in the world Grotius asserts (305), "Adherence to truth is one of the duties required of Christians In Dante's *The Divine Comedy. Inferno*, trans Charles S Singleton (Princeton, NJ Princeton University Press, 1940), 3, deceivers are tormented in the eighth circle of hell, lowest of all except for that inhabited by traitors Dante says, "But because fraud is an evil peculiar to man, it more displeases God and therefore the fraudulent are the lower, and more pain assails them Augustine's religious perspective in "Against Lying," *Treatises on Various Subjects*, ed R J Deferrari (NY Fathers of the Church, Catholic University of America Press, 1952), is equivalent in strictness to Kant's moral argument against all lying He says it is not true that sometimes we ought to lie (Bok, 255) He says, in *Enchiridion*, ed Henry Paolucci (Chicago Henry Regnery Company, 1961), to use speech for the purpose of deception is a sin. "Nor are we to suppose that there is any lie that is not a sin, because sometimes it is possible, by telling a lie, to do service

Kant sets forth an absolutist moral argument against lying that, according to Bok,¹⁴ and according to my own findings, is the strongest moral argument we have against all lying. He takes issue with the idea that any benevolent motive or threat to life could excuse a lie. “Truthfulness in statements which cannot be avoided is the formal duty of an individual to everyone, however great may be the disadvantage accruing to himself or another.”¹⁵ Kant explains that a lie, even if it does not wrong any particular individual, always harms mankind generally, “for it vitiates the source of law itself.”¹⁶ He dismisses the idea that we owe the duty of speaking the truth only to those who have right to truth, and he explains that by staying close to the truth, one can’t be responsible for consequences.¹⁷ For instance, as long as no lie is told to the would-be murderer, the murderer bears all the blame. But if one lies to the would-be murderer, the liar becomes responsible for all the bad consequences befalling the victim and everyone else.¹⁸ Put simply, if the lie leads to anything bad, the liar is responsible. Kant’s Categorical

to another (Bok, 32).” Augustine explains that death only kills the body but a lie loses eternal life for the soul. Regarding justifiable lying, he concludes in *The Enchiridion* (29) that among his eight categories of lies they are all sins, some are just more easily pardoned (Bok, 33). It is interesting to note that Augustine does say he is “unable to resist” when someone says, “Look, here is a patient whose life is endangered by a serious illness and whose strength will not hold out any longer if he is told of the death of his dearly beloved only son (Bok, 253, from “Against Lying”).” But he says if we grant that we ought to lie in that circumstance, “bit by bit this evil will grow” and gradually it will become “a mass of wicked lies (Bok, 254, from “Against Lying”).” He says, “since John the Apostle protests that no lie is of the truth. Therefore, it is not true that sometimes we ought to lie (Bok, 255, from “Against Lying”).” Aquinas similarly asserts (1,667) every lie is a sin. “A lie is sinful not only because it injures one’s neighbor, but also on account of its inordinateness. Now it is not allowed to make use of anything inordinate in order to ward off injury or defects from another. Therefore it is not lawful to tell a lie in order to deliver another from any danger whatever.” Additionally, Haring explains (462) that Calvin and the “Reformed Church” are also faithful to the Christian tradition condemning every lie as evil.

¹⁴ Bok, 38

¹⁵ Beck, 347

¹⁶ Ibid

¹⁷ Ibid

Imperative further instructs, “Act only on that maxim whereby thou canst at the same time will that it should become a universal law”¹⁹ Thus, I cannot tell any lie, because if everyone were to tell lies society would be greatly harmed

Consequences of lying are also a consideration when discussing the importance of truth Beyond social implications that were mentioned above, there are consequences to the dupe Grotius explains that falsehood conflicts with the existing and continuing right of liberty of judgment belonging to whom the speech is addressed²⁰ Bok agrees, arguing that deception is coercive and a form of deliberate assault on human beings²¹ She explains, “To the extent that knowledge gives power, to that extent do lies affect the distribution of power, they add to that of the liar, and diminish that of the deceived, altering his choices at different levels”²² Additionally, sometimes there are even consequences for individuals other than the liars and the dupes Bok gives examples of supervisors inflating performance reviews and references writing inflated letters of recommendation The “harmless act of loyalty” injures those who don’t get this kind of assistance²³ Also lies may defame people unjustly²⁴

To tell the truth is important It is important for an individual’s freedom of judgment and to prevent suffering from lies, and it is important to order in society Both religion

¹⁸ Ibid, 348

¹⁹ Bok, 52

²⁰ Grotius, 263

²¹ Bok, 22 and 18 She says (18), “Even Othello, whom few would have dared try to subdue by force, could be brought to destroy himself and Desdemona through falsehood”

²² Bok, 19 Harmann echoes these ideas (282), saying, “A lie injures the deceived person in his life, it leads him astray”

²³ Bok, 68-70

and ethics throughout time have taught us that truth is good and falsehood is bad or wrong or evil. Common sense, combined with research into traditions of thought on the subject, clearly establishes the importance of truth.

Despite the importance of truth, are there conditions in which it is justifiable to lie? Common defenses of lies are for those which serve to avoid harm, produce benefits, are harmless, or are told to a person who has no right to the truth. Human experience and intuition tells us there are instances in which these kinds of lies may be justified. There are many other plausible defenses of lying including utilitarian²⁵ and religious perspectives²⁶, confidentiality²⁷, war²⁸ and when the liar gives warning²⁹. There are even

²⁴ This is among most serious grievances according to Hutcheson (39)

²⁵ The utilitarian tradition is associated with weighing *consequences* of deceptive statements (Bok, 46). It was concerned with what brought about the greatest balance of good over evil (Bok, 48, 275). Bentham explains, "Falsehood, taken by itself, consider it as not being accompanied by any other material circumstances, nor therefore productive of any material effects, can never, upon the principle of utility, constitute any offense at all (Bok, 47)." Hutcheson says (35) in cases where the necessity over-balances the "evils on the other side," one may tell a truth that may be easily misinterpreted. Democritus says, "We must speak the truth, wherever that is the better course (Bok, 266)." Proclus says, "For that which is good is better than the truth (Bok, 266)." Rousseau argues for using "moral utility rather than factual truth" as the standard for judging falsehood (Christopher Kelly, *Rousseau's Exemplary Life, The Confessions as Political Philosophy*, (Ithaca, NY: Cornell University Press, 1987), 16). R.F. Harrod wrote about utilitarianism as it applied to the lie in "Utilitarianism Revised," *Mind*, no. 178 (1936) 45, saying that a "revised utilitarianism" would take into account the consequences, to the tune of Kant, if everyone were to tell lies (Bok, 276). Harrod would allow for the useful lie as the rare exception to truth telling.

²⁶ There is a general principle of the Talmud that where peace demands it lies may be told (Jacobs, 152). Jacobs tells us, a white lie is "when the truth need not be told and where even a false statement is permissible." Further, the Talmud gives three exceptions to the rule of truthfulness: tractate (modesty), bed (marital relations) and hospitality (courtesies), according to Jacobs (151-52). Jacobs says, "Truth is a value which exists for the benefit of society and may, on occasion, be set aside if the well-being of society demands it." Aquinas (1,668) says that every lie is a sin but not every lie is a mortal sin. This allows room for pardon of those that are not mortal sins. A mortal sin is one told with the purpose of injuring God or one's neighbor (1,668). "But if the end intended be not contrary to charity, neither will the lie, considered under this aspect, be a mortal sin, as in the case of a jocose lie or where the good also of one's neighbor is intended (1,668)." Augustine says there are two kinds of lie that are not grievously sinful yet are not devoid of sin: in joking, or for the sake of our neighbor's good (Aquinas, 1,668). Haring tells us (562) Luther departed from the tradition that said all lies are sins. "A good hearty lie for the sake of the good and for the Christian Church, a lie in case of necessity, a useful lie, a serviceable lie would not be against God." Henry Sidgwick, *The Methods of Ethics* (Chicago: The University of Chicago Press, 1962) agrees in reference to lies told in the interests in religion. He says (273-274) "the most important truths of religion cannot be conveyed into the minds of ordinary men, except by being enclosed, as it were, in a shell of fiction." Haring says (562) in Protestant circles, there has been a wide acceptance of the

praises³⁰—as opposed to mere defenses—of lying, asserting that lying is natural and essential³¹, critical to human freedom and pleasure in life³², and sometimes a blessing for

distinction between “ the lie, or withholding of the truth which another has the right to know,” and “ false speech, which is the consciously false utterance in instances when the other party has no right to the truth,” and the latter was considered morally indifferent. Cardinal Newman argues “that men of great rectitude, no matter what their faith, might resort to a lie in extreme circumstances (Bok, 39-40) ” He quoted Samuel Johnson as stating “The General Rule is that truth should never be violated, there must, however, be some exceptions. If for instance, a murderer should ask you which way a man has gone (Bok, 39-40) ” Despite the fact that Buddhists recite daily a precept to abstain from telling lies, certain lies are commonly regarded as not being sins, and thus not going against the precept (Bok, 45)

²⁷ Bok explains (148), “Difficult choices arrive for all those who have promised to keep secret what they have learned from a client, a patient, or a penitent ” She says (149-50) three claims support keeping secrets: First, we have a right to protect from harm flowing from the disclosure of a secret, second, fairness requires respect for privacy, and third, added respect is due to that which one has promised to keep secret

²⁸ Machiavelli believes lying is justified in offensive wars “wise commanders never attempt to win by force what they can win by fraud (Barnes, 164) ” Hutcheson agrees (33), as long as both parties receive and know the custom. Bok says (144) encounters with enemies “where there is a clear element of crisis must allow for deception ” She explains that whenever it is right to resist a threat by force, deception is also appropriate. Grotius (303) advocates lying when ordered. And Harmann (284) reminds that an imprisoned soldier is guilty of high treason if he tells the truth about his country’s tactics

²⁹ Hutcheson (34) asserts that if someone has warned others that on a certain occasion he may not speak the truth, this is a limitation to the general law of veracity

³⁰ T S Elliot in *Four Quarters* said human beings can tolerate only a limited exposure to reality (Barnes, 162). The ancient Greeks admired successful liars, thinking of lying aesthetically or like a sport (Barnes, 2, and George Steiner, *After Babel*, (Oxford: Oxford University Press, 1975), 219). An example in literature is the mutual deception in exchanges between Athene and Odysseus in the *Odyssey* (Steiner, 219). And as Barnes points out (2), “There is no shortage of lies in the tales told by Homer and Hesiod in ancient Greece. Nor was lying always regarded as reprehensible ” For example (2), “Prometheus gained fame not only for stealing the fire of civilization for mankind but also for his skill at confabulation ” In more modern times, the anonymous author of *The Lying Intelligencer*, introducing his newsheet to London, wrote the following “Let not my readers imagine, that I propose writing a panegyric upon the art of lying. It were absurd to recommend to mankind, what is already in such universal esteem. In courts it assumes the name of good breeding, in religion it is called pious fraud, it is mystery in trade, and invention in poetry. In our political contests, it is stilled opposition, liberty, and patriotism (Barnes, 2-3).”

³¹ Piaget says the tendency to tell lies is a natural tendency, “an essential part of a child’s egocentric thought (Barnes, 152) ” Bartholomaeus Ingannevole in the 16th century wrote, “never to lie admits of no imagining which is all that God did give man to distinguish him from the beasts of the field (Barnes, 3) ” Hobbes and psychoanalyst Sandor Ferenczi have also singled out the ability to lie as one of the criteria that distinguish humans from other animals (Barnes, 3). According to Nietzsche, lying is a necessity of life and part of the terrifying and problematic character of existence (Bok, 7). Benjamin Constant wrote, “The moral Principle, ‘It is a duty to tell the truth,’ would make any society impossible if it were taken singly and unconditionally (Bok, 267-68) ” Also, John Locke, although with disapproval, observed that “It is evident how much men love to deceive and be deceived, since rhetoric, that powerful instrument of error and deceit” is so popular (Barnes, 3). Barnes (156) says she is inclined to agree with Eck when he says that to not speak the truth is sometimes a duty, and that a society with all truths bluntly exposed would be like a hell. She (156) gives Eck’s example of advice given to young married couples that they should be “utterly honest” with each other and have no secrets. “This advice is, he says, regarded by marriage counselors as

the dupe³³ Below I will discuss the more commonly defended reasons for lying, in order to show clearly that there must be at least some circumstances in which lying is justifiable

Although an absolute argument against lying has appeal for those looking for cut and dry answers, such an argument is absurd when one asks if it might be justifiable for a German hiding Jewish refugees during the Holocaust. A lie here might mean the difference between life and death for those they protect, as well as themselves. For the same reason, if I am taken prisoner of war and I know things the enemy could use to hurt the people of my nation, I will tell them I know of no such thing. Erasmus said it runs counter to common sense to believe that not even one harmless lie should be told even to save the whole human race.³⁴ Bok explains that force has been thought justifiable in all

advice towards a quick separation.” Jacobs says (152-53), “If absolute truth were always to prevail man could not endure.” He adds, “There are times when truth imperils man’s existence.”

³² Arendt proclaims that “our ability to lie—but not necessarily our ability to tell the truth—belongs among the few obvious, demonstrable data that confirm human freedom (Barnes, 3).” Steiner connects speech, including the capacity to lie, with freedom, saying (234) the “Many has ‘spoken himself free’ of total organic constraint. Language is a constant creation of alternative worlds, and there are no limits to the shaping powers of words.” He explains (220) that “the whole truth and nothing but the truth” is a “fictive ideal” which ignores the fact that all descriptions are partial and that we always speak less than the truth.” He says (235) the capacity to lie is not a pathology of language but one of “the roots of its genius.” Steiner praises (224) use of language for “alterity, for mis-construction, for illusion and play” as the greatest of man’s tools by far. Further, he says (229) “the linguistic capacity to conceal, misinform, leave ambiguous, hypothesize, invent is indispensable to the equilibrium of human consciousness and to the development of man in society.” Bacon makes this claim (6) “Doth any man doubt that if there were taken out of men’s minds vain opinions, flattering hopes, false valuations, imaginations as one would, and the like, but it would leave the minds of a number of men poor shrunken things, full of melancholy and indisposition, and unpleasing to themselves?” He says people have a “natural though corrupt” love of the lie.

³³ Nietzsche says that “the Lie—and *not* the Truth—is divine (Steiner, 222).” He explains, we need lies to vanquish the reality of a “False, cruel, contradictory, misleading, senseless” world in order to live (Bok, 7). American anthropologist Elizabeth Colson points out that “people respond to what they believe others are thinking, it may be fortunate that they do not *know* what the other thinks (Barnes, 162).”

³⁴ Bok, 1

cases of wrongful threat to life--and if force is justifiable, then why not deception³⁵

Arendt also defends lies as “relatively harmless tools in the arsenal of political action” when used as substitutes for force³⁶ Grotius adds to the argument, asserting that nature grants everyone the privilege of self-defense³⁷ He and Henry Sidgwick agree we should be able to lie in cases where we may even kill in defense of ourselves³⁸ It is clear there are some instances in which lies told to avert harm are justified

Lies told to produce benefits may also be justified in some cases³⁹ Machiavelli believes “great things” have been done by those with “little regard for good faith”⁴⁰

While Machiavelli’s teachings can be extreme, we know from human experience that lies are capable of bringing about some good For instance, I might lie to my husband about why we are going to Jane’s house when the real reason is we are having a surprise party for him there In this case my lie produces the benefit of a successful surprise for him

Grotius claims that when a person discovers the intent of the deception to him was to do him a service, “he will not feel it as a grievance, nor can it come under the strict denomination of a lie or falsehood”⁴¹ Another example of this type of lie is when a lie is

³⁵ Bok, 126 She gives the example of a ship transporting fugitives from Nazi Germany asked by a patrolling vessel if any Jews are on board Bok says (45) foremost among circumstances that warrant a lie are those “when innocent lives are at stake, and where only a lie can deflect the danger”

³⁶ Arendt, 105

³⁷ Grotius (291, 303-4) asserts that nature grants to everyone the privilege of self-defense and that a lie is justifiable as the only means of saving the life of an innocent person or “diverting another from the perpetration of some horrid design”

³⁸ Sidgwick, 315

³⁹ Sidgwick says common sense seems to concede that such lying may sometimes be right (316) Xenophon writes, “It is right to deceive our friends, if it is for their good (Bok, 266)”

⁴⁰ Bok, 23 Grotius expresses Machiavellian thought when he says it is permissible to lie when the speaker makes use of a superior right for either his own or for public good Plato seems to have had this in mind when he conceded the right of telling falsehoods to those having authority (Bok, 267)

told to comfort the sick and dying⁴² Also, undercover police officers will “use their cover” in order to do their jobs We can see here at a minimum that a lie to produce benefits may be justified in some instances

A third category of common defenses of lies is for harmless lies⁴³ Philosopher Thomas Hobbes wrote, “Such truth as opposeth no man’s profit, nor pleasure, is to all men welcome”⁴⁴ Contemporary philosopher G J Warnock considers any lie harmless that does not result in the dupe acting to his detriment⁴⁵ Rousseau believed exaggerations of fact are harmless and merely give charm to the truth⁴⁶ Some types of harmless lies may include courtesies, misleading advertising, and games Courtesies

⁴¹ Grotius, 302.

⁴² Grotius, 302; Sidgwick, 316, Hutcheson, 33 Harmann agrees (284), saying just because lying is a moral wrong does not mean there might be some other higher value a physician should not tell a patient the critical state of his health Clement of Alexandria concedes “the use of lying for curative measure,” and Maximus of Tyre says there is no wrong in such deception (Bok, 266)

⁴³ Lies to children might also fall under this category Grotius says, “ since infants and insane persons do not have liberty of judgement, it is impossible for wrong to be done to them in respect to such liberty (Bok, 203) ” Further, he (Grotius, 302) argues that childhood is a period of life “when many useful truths may be taught in the dress of fiction ” Sidgwick (316) agrees that lies told to children on matters upon which they should not know the truth are justifiable Rousseau’s “universal standard of moral usefulness” argues for harmless lying (Kelly, 16) He claims that factual truth “is so unimportant that offenses against it need not be considered lies if the matter involved either is useless or has no effect on anyone’s interest Such violations of truth are not lies--they are fictions Lies are harmful, fictions are not (Kelly, 16) He gives allegories and fables as examples of fictions that are morally useful, wrapping “useful truths in sensible and agreeable forms (Kelly, 243) ” He claims that useful fictions approach the standard of general and abstract truth, which is the “most precious of all goods (Kelly, 17) ” This same position is supported by Plato’s myth of the metals in *The Republic* The myth wraps truth about order in society as Plato sees it into something non-philosophers may be able to accept and understand.

⁴⁴ Arendt, 106

⁴⁵ G J Warnock maintains that it is not necessarily directly damaging for a person to operate self-interestedly on the beliefs of others because, “We all hold from time to time an immense range and variety of false beliefs, and very often are none the worse for doing so (*The Object of Morality*, (London Methuen & Co Ltd, London, 1971), 287) ” He says we are the worse for it only if, as is often not the case, our false belief leads or partly leads us to act in our detriment in some way (287) Warnock still warns, agreeing with Bacon, against the dangers to society when deception becomes anything other than something resorted to on some occasions, saying liars ought not do so “simply *whenever* it suits their book (288, and Bacon, 85) ”

include statements like, “it is a pleasure to meet you,”⁴⁷ with which critics of lying will not take issue. To agree that Jane’s haircut looks nice when asked is another kind of courtesy lie. While we are not tolerant of outright false advertising, misleading advertising—such as a gum commercial that implies you’ll get any guy or gal you want if you chew that brand of gum—is generally considered harmless and acceptable.⁴⁸ Games and other similar circumstances where it is not considered an injury to be deceived are also exceptions to the general idea that lies should not be told.⁴⁹

Finally, lies are commonly defended as justifiable when told to a person who has no right to the truth. Those who intend to use the truth to cause unjust harm, for instance, have no right to the truth.⁵⁰ Those who ask questions that they have no right to ask also have no right to the truth. Bonheoffer relates a case where, “A teacher asks a child in

⁴⁶ Philosopher Jean-Jacques Rousseau dismisses the significance of lies he told when interpreting the significance of facts and adding to facts in *Reveries*, saying the first compromises his openness very little and the second merely gives charm to the truth (Kelly, 242)

⁴⁷ Sidgwick (314-15) says, “Common Sense condemns as over scrupulous the refusal to use them when it is customary to do so.” Hutcheson (32) says expressions of courtesy are limitations to the general law of veracity because they don’t deceive anyone.

⁴⁸ Bok (61) explains that propaganda and misleading advertising are “often dismissed on the same grounds of harmlessness and triviality used for white lies in general.”

⁴⁹ Hutcheson, 32

⁵⁰ Sidgwick (315) says a person’s right to the truth may be forfeited or suspended under certain circumstances. “Just as each man is thought to have a natural right to personal security generally, but not if he is himself attempting to injure others in life and property, so if we may even kill in defense of ourselves and others, it seems strange if we may not lie, if lying will defend us better against a palpable invasion of our rights, and Common Sense does not seem to prohibit this decisively.” Grotius (301-2) only considers a falsehood to be a lie when it conflicts with a right of the person who is lied to (Bok, 37). For instance, a robber has no right to information he tries to extort (Bok, 37). And it is permissible to lie “when the conversation is directed at him who wished to be deceived in this way (Bok, 263).” Bok (37) explains Grotius: “The right in question is that of liberty of judgment, which is implied in all speech, but it can be lost if the listener has evil intentions, or not yet acquired, as in the case of children, or else freely given up, as when two persons agree to deceive one another. Such an argument oversimplifies his thinking, but it is a fact that Grotius helped to bring back into the discourse on lying the notion, common in antiquity but so nearly snuffed out by St. Augustine, that falsehood is at times justifiable. Hutcheson (33) says that there is a limitation to the general law of veracity where men have relinquished claim to truth. For instance, criminals extorting information give up their rights, he says (34).

front of the class whether it is true, that his father often comes home drunk. It is true, but the child denies it.”⁵¹ Bok says, in this category fall also all the illegitimate inquiries regarding political beliefs, sexual practices or religious faith. “In times of persecution,” Bok said, “Honest answers to such inquiries rob people of their freedom, their employment, respect in their communities.”⁵² She explains, “One has a right to protect oneself and others from illegitimate inquiries, whether they come from intruders, from an oppressive government, or from an inquisitorial religious institution. A large part of each person’s life is clearly his to keep secret as he wishes.”⁵³ Here we come close to the heart of the elected leader privacy lie issue—i.e., Clinton’s presumed right to lie to protect his privacy (versus the public’s presumed right to know the truth).

The bottom line is that lying is, contrary to Kant’s argument, justifiable in some circumstances. Kant’s argument holds when considering the value of truth as an isolated value. But it doesn’t adequately answer to the values which come up against truth—ranging from the value of innocent human lives, to that of doing good things for others such as comforting the sick and dying, to the value of accomplishing missions meant to keep order in society (i.e. police work and national security), to avoiding undeserved or unnecessary harm to someone physically or emotionally, to courtesies and pleasantries and their contribution to order in society. It also disregards the injustices which may

⁵¹ Bonhoeffer, 367

⁵² Bok, 150

⁵³ Bok, 150-51

result in cases where lying might be the only defense to prevent someone has no right to the truth⁵⁴

But before we can dive into the question of whether or not lies by elected leaders may be justifiable, we must more completely answer the question, is there such a thing as a justifiable lie, period? The above discussion of kinds of lies commonly thought justifiable make it clear that there must be such a thing as a justifiable lie, but they don't offer any guidance as to when such a lie is justified. Is it justifiable for me to lie *every* time it could produce benefit, or anytime the lie is harmless, or whenever someone asks who has no right to the truth? No, because truth is so important

Our starting point in considering what might make a lie justifiable is to note that lying is usually wrong. If everybody were to lie whenever it suited him or her, there would be a certain loss to order in society. Common sense, our sense of morality, religion, our experience and history tell us lying is usually wrong. However, there are times when lying could hardly seem wrong.

Given that lies are usually wrong but sometimes not wrong, the next step is to figure out how to identify wrong lies versus not wrong lies. Unfortunately, there is no simple moral answer to the question⁵⁵. As Harman explains, situations in which truthfulness takes second place to some other moral value cannot be universalized. He says it is not

⁵⁴ Immanuel Kant, *Critique of Practical Reason and Other Writings in Moral Philosophy*, ed and trans Lewis White Beck (Chicago: University of Chicago Press, 1949), 346-50. Kant put it, to tell the truth is a duty, "but it is a duty only in respect to one who has a right to the truth."

⁵⁵ Sidgwick (317) explains that the rule of Veracity cannot be elevated into a definite moral axiom. "For there is no real agreement as to how far we are bound to impart true beliefs to others and while it is contrary to Common Sense to exact absolute candor under all circumstances, we yet find no self-evident secondary principle, clearly defining when it is not to be exacted." Harman (284) says the question of lying cannot be answered theoretically. "Every attempt of the kind leads either to a one-sided and inflexible rigorism concerning one value at the expense of the rest, or to a fruitless casuistry devoid of all significance—not to mention the danger of opportunism."

possible to escape from such situations, where one has to choose between values, without being guilty. He adds that the solution may be different according to the ethos of each man making the decision.⁵⁶

Any method for justifying lies must allow for the particular case considered. Below I will explain that it is critical in each case to first look for an alternative to lying, and second to consider the moral reasons for or against a lie.⁵⁷ I will then discuss several tests to determine whether or not a lie is justified, and I'll recommend the one that works best when people must make split decisions. Ultimately, however, it will be obvious that consideration of all the tests will be helpful for anyone trying to decide whether or not to lie in a particular case.

One should always first seek alternatives before considering whether or not to lie. Francis Bacon recommends people regulate their conduct so that non-deception is the “*standard* in one’s practical decisions.”⁵⁸ A lie is unwarranted if there are alternatives⁵⁹—such as telling the truth, silence or avoidance, explaining you cannot or will not discuss the issue, etc. Bok offers, “Why tell a flattering lie about someone’s hat rather than a flattering truth about their flowers?”⁶⁰ I might tell my husband we are going to Jane’s because she has invited us for cocktails to celebrate his birthday, thus not lying but not telling about the surprise party either. Determining whether there are truthful alternatives

⁵⁶ Harmann, 284

⁵⁷ These are Bok’s (106) first two steps in justification of lying. Her third and final step, to ask what a public of reasonable persons might say about such lies, is actually only one of the possible tests that might be used to make a choice about lying in a particular instance.

⁵⁸ Bacon, 86

⁵⁹ Here I agree with Bok (Bok, 88)

is difficult because of the hardships they may impose or avert⁶¹ Nevertheless, “only where a lie is a *last resort* can one even begin to consider whether or not it is morally justified”⁶² Note, by last resort, this author means the last appropriate resort, i e , to not say “your welcome” in most cases when someone says “thank you” would be inappropriate whether or not the person is really welcome

Once it is determined there are no acceptable alternatives for the would-be liar, it is time to weigh the moral arguments This is also difficult “There will be disagreement as to how intense, how immediate, how irreversible, and how enduring the risks really involved are”⁶³ Harmann explains a man ought to decide according to his best conscience, “that is, according to his own living sense of the relative height of the respective values, and to take upon himself the consequences, external as well as inward, ultimately the guilt involved in the violation of the one value.”⁶⁴ For example, if the only way I can save a good man’s life is to tell a lie (value of life versus value of truth), then odds are I’ll lie But if the only way I can save a friend \$5 is to lie (value of small benefit to my friend versus value of truth), I will not lie

After considering the moral arguments, if lying is still an option, there are some tests to help determine if it is justifiable in the particular case First, there is the Golden Rule From the perspective of the dupe, is it possible to see alternatives not originally

⁶⁰ Bok, 71.

⁶¹ Bok, 199

⁶² Bok, 31

⁶³ Bok, 119, Bacon (86) explains, the exercise of moral judgement means noticing and weighing of all moral reasons to act. “That your act would inflict wanton damage on some other person would be a moral reason for judging that at least you ought not so to act”

⁶⁴ Harmann, 285

considered⁶⁵ And given the moral reasons for lying in this case, would the dupe agree? Or would it be right for the lied-to to do the same if the situation were reversed?

A second test is the “directed to reasonable persons” test Bok explains that justification requires an audience “it may be directed to God, or a court of law, or one’s own peers, or one’s own conscience, but in ethics it is most appropriately aimed, not at any one individual or audience, but rather at “reasonable persons” in general⁶⁶ We ask, “What would a reasonable person do?” Even better, he can ask a “reasonable person,” “what would you do?”⁶⁷

Bok calls for the “directed to reasonable persons” test to be joined with a “test of publicity” She quotes Seneca writing to friend Lucilius “Nevertheless I am content if you only act as you would act if anyone at all were looking on, because solitude prompts us to all kinds of evil”⁶⁸ The test of publicity was set forth by John Rawls in *A Theory of Justice* It is a formal constraint requiring a moral principle to be capable of public statement and defense.⁶⁹ Bok explains that a test of publicity using a public of reasonable persons would offer three levels of justification. (1) Via conscience or imagined others, (2) Via actual others, by reaching out for advice, and (3) Via consulting persons of different allegiances⁷⁰ The second level helps to bring objectivity and

⁶⁵ Bok (28) explains, one must shift between the perspective of the liar and the lied to

⁶⁶ Bok, 91

⁶⁷ Philosopher Ludwig Wittgenstein agrees that justification consists in appealing to someone independent (Bok, 92).

⁶⁸ Bok, 94.

⁶⁹ Bok, 92, and Rawls, 133 Rawls explained, “[Justification] presumes a clash of views between persons or within one person, and seeks to convince others, or ourselves, of the principles upon which our claims and judgements are founded (Bok, 90)”

sometimes wisdom to moral choices, to eliminate bias. The third level is intended for more difficult cases where the stakes are high and where those giving advice normally are likely to share the same beliefs and assumptions as the asker.⁷¹

Another test is, when it might be appropriate, to consult the dupe. A deceptive policy or practice could be discussed before a particular instance arrives.⁷² I could talk to my husband and pre-arrange that I may, throughout our lifetime, lie to him to get him to go somewhere if there is a pleasant surprise for him when we get there. Then I'm covered for the surprise party whenever it happens.

A final test for determining whether or not it is justifiable to lie in a particular circumstance takes from Kant's Categorical Imperative, "Act only on that maxim whereby thou canst at the same time will that it should become a universal law."⁷³ But where Kant applies this rule to lying in general, saying that lying should not be universal law, I would apply it to the specific case in question. I.e., what would the world be like if everybody told lies to get people to their surprise parties when other alternatives risked ruining the surprise? The world would be just fine. But if everyone lied on resumes, resumes would become useless as tools for hiring (other than to assess creativity). This revised Kantian test—which Kant clearly would not agree with and which I will hereafter

⁷⁰ Bok, 96

⁷¹ Bok 96. According to Bok (93), "Such a test counters the self-deception and bias inherent in the liar's perspective." She argues (100-101) the test has limits. People don't always have the luxury of time to reflect and discuss, and there is not always a good answer "given our limited information, powers of reasoning, and foreknowledge." Bok recommends using the test in advance to consider what to do in situations like the first, where there is no time to apply the test. She also recommends determining ahead of time who will decide, and how, when there is no good answer but a decision must be made. A final limit is that the test of publicity does not work when there is a debate about how "reasonable" the available public actually is.

⁷² Bok, 99

⁷³ Bok, 52

refer to the Velino test--still looks at the big picture, doing as Sidgwick advises, to weigh “the gain of any particular deception against the imperilment of mutual confidence involved in all violation of the truth ”⁷⁴

This final test, the Velino test, accomplishes most of what the Golden Rule, test of reasonable persons and test of publicity accomplish, without going into as much detail. It would be a good test at a time when a decision must be made immediately. Given enough time, all of the tests ought to be considered and used as appropriate to arrive at a good moral decision about whether or not a lie is justified in a specific instance.

Clearly there are cases when these tests will yield an answer that it is justifiable in a particular circumstance to lie. From minor lies, like those to plan a surprise party, to significant lies, like those meant to save innocent lives, to lies told in self-interest that do not harm another's interest, all kinds of lies—when considering the specific case—may pass the justification tests after alternatives are ruled out and moral arguments are weighed. Generally speaking, a lie that has merits that outweigh its potential for harm, and that is used only as a last resort to alternatives, can be justifiable, whatever the subject or weight.

Considering the arguments raised in this paper about the importance of truth along with potential justification for lying, it is impossible to avoid the answer that yes, it is sometimes justified to lie. Given this answer, it will be possible to move on to the questions of whether or not it is justifiable for an elected official to lie to constituents, for

⁷⁴ Sidgwick, 316. R.F. Harrod, in *Mind*, comes close to this final test by arguing that Kantian principle is embodied in utilitarian philosophy. “The test is always—would this action if done by all in similar relevant circumstances lead to the breakdown of some established method of society for securing its ends (Bok, 277)?”

an ordinary citizen to lie to protect his privacy, or for an elected official to lie to the public to protect his privacy

CHAPTER III

IS IT EVER JUSTIFIABLE FOR AN ELECTED LEADER TO LIE TO THE PUBLIC?

The next step toward an answer to the question of whether or not it is ever justifiable for an elected leader to lie to the public to protect his or her privacy is to establish that total honesty is not a job requirement for an elected leader, nor is it always the best course. I will begin by briefly discussing lies by elected leaders in the capacity of a private citizen—meaning lies told to friends and loved ones, not intended for the public. Next, I'll establish that the issue of truth and politics has been with societies throughout time, and how the importance of elected leader honesty is pitted against the importance of government secrecy. My conclusion is that lies told by elected leaders can be justified in some cases.

We know that it is justifiable, in some circumstances, for private citizens to lie. Does this extend to government officials? Certainly we would allow that the Mayor might justifiably lie to his wife in order to throw her a surprise party. In those few circumstances where the lie of an elected leader might only impact or reach others in the same manner as that of a private citizen, the liar may be held to the same justification standards as any other citizen. But when the lie is intended for a public audience, justification becomes an even tougher question.

The issue of truth and politics has been a part of societies throughout time. At least as far back as Plato's day, politicians, philosophers and citizens have grappled with the

question of when and why government lies might be necessary, preferred or in the best interest of the ruled. Plato used the voice of Socrates in *The Republic* to claim a necessity for rulers to lie to the many for the benefit of the republic in its ideal state, to achieve or protect justice in the city. Machiavelli⁷⁵ furthered the timeless discussion of truth and politics with his idea that the end justifies the means. He taught, “Therefore, a prudent ruler ought not to keep faith when by so doing it would be against his interest, and when the reasons which made him bind himself no longer exist.”⁷⁶ In more recent years, a number of U.S. presidents have been known to have lied to the public, either directly or via their staffs. David Gergen, White House advisor to four presidents, said, “In my experience over the past thirty years, every White House—save one [Ford] has on occasion willfully misled or lied to the press.”⁷⁷ The notion in society today that politicians are untrustworthy is commonplace.⁷⁸ Sometimes the lies are told with the best of intentions for the citizens, sometimes they’re told out of perceived necessity in order to

⁷⁵ Francis Bacon, Jean-Jacques Rousseau, Thomas Aquinas, and Aristotle are among the many others who offered justifications and guidelines for governments to lie to “the many.”

⁷⁶ Machiavelli, *The Prince* (NY: Random House, 1950), 136-37. He added, “If men were all good, this precept would not be a good one, but as they are bad, and would not observe their faith with you, so you are not bound to keep faith with them. But it is necessary to be able to disguise this character well, and to be a great feigner and dissembler, and men are so simple and so ready to obey present necessities, that one who deceives will always find those who allow themselves to be deceived.”

⁷⁷ David Gergen, *Eyewitness to Power* (NY: Simon & Schuster, 2000), 140. He said it might not have been the president, but key staff at least. He added, “Nixon had no compunction about lying to the press. Lyndon Johnson had done it to a fare-thee-well, he thought, and rarely paid a price. When Watergate hit, Zeigler [Ron Zeigler, press secretary] was given daily marching orders to make announcements that weren’t true.” Two more great lies in recent U.S. history were the denial that the U.S. was bombing Cambodia, and the cover story of the Bay of Pigs invasion (Bok, 97).

⁷⁸ Kathleen Hall Jamieson, *Everything You Think You Know about Politics And Why You’re Wrong* (NY: Basic Books, 2000), 20. Comedian and social activist Dick Gregory described two major kinds of promises in politics: those made to persons or groups able to deliver the vote, and called patronage, and those made by candidates to the voters, which are most frequently called lies.

accomplish some important objective, and other times they are told simply because it's easier or less embarrassing to tell a lie than the truth

Despite the history of conflict between truth and politics, our society and system of government⁷⁹ places high value on the importance of honesty from our elected leaders⁸⁰ As is the case with any lie a private citizen is caught telling, a lie discovered by the public destroys the credibility of the dishonest elected leader. That credibility is essential to the official's ability to successfully lead and govern the people⁸¹ The problem is not only

⁷⁹ *The Federalist Papers*, ed Mary E Webster, #70, "One Person Holds Executive Authority" (Bellevue, WA Merril Press, 1999), 287, on the subject of "plurality hides faults" and "responsibility" "But one of the strongest objections to both types of plural executives is that it tends to conceal faults and destroy responsibility. There are two types of responsibility moral and legal Therefore, irresponsibility leads to censure and punishment Censure is the more important, especially in an elective office A man in public trust will more often act in such a manner that makes him unworthy of being trusted than in such a manner as to make him subject to legal punishment" With more than one executive, it is harder to detect who is responsible.

⁸⁰ And the issue of honesty has become increasingly important over the history of the United States Janeway (78) wrote, "After Nixon's resignation came the pardon, by Ford, of Nixon It was inevitable that the 1976 campaign would focus on a reaffirmation of morality and character 'I'll never lie to you,' said Jimmy Carter" Gergen (92-93) said Nixon's private war with the press wounded the presidency itself "With Vietnam and Watergate coming back to back, the government's credibility suffered grievously Those two seminal events represent the darkest chapters in twentieth-century relations between press and government, 'making it perfectly clear'—as Nixon liked to say—that a President's capacity to lead rests squarely upon a reputation for openness and candor" Washington Times defense and national security reporter Bill Gertz (*Betrayal How the Clinton Administration Undermined American Security*, (DC Regnery Publishing Inc , 1999), 213) said those who are elected to come in after the Clinton legacy need to have two fundamental characteristics, "honesty and courage" As U S citizens, we are skeptical of what our government tells us and outraged when we learn the government has lied to us Integrity, therefore, is held as an essential quality for our elected leaders As former Senator Alan Simpson once said, "If you have integrity, nothing else matters If you don't have integrity, nothing else matters (Gergen, 346)"

⁸¹ Teddy Roosevelt said, "My power vanishes into thin air the instant my fellow citizens, who are straight and honest, cease to believe that I represent them an fight for what is straight and honest That is all the strength I have (Joseph Lieberman, and Michael D'Orso, *In Praise of Public Life* (NY Simon & Schuster, 2000), 52)" Jerry Ford said, upon taking office, "Truth is the glue (Gergen, 110)" Elizabeth Drew (*The Corruption of American Politics* (NY The Overlook Press, 2000), 162) gave Clinton as an example. "That he told . a bold-faced lie, assured that even if he survived politically his word meant less than ever This was a dangerous state of affairs for a presidency, which might at any moment have to call on the public to do something hard" She added (163) that Clinton's dishonesty about the sex scandal made people suspicious of virtually everything he said or did This phenomenon, of absolute suspicion resulting from substitution of lies for factual truth, was described by Arendt (128) as resembling the effects of brainwashing "It has frequently been noted that the surest result of brainwashing in the long run is a peculiar kind of cynicism, the absolute refusal to believe in the truth of anything, no matter how well it may be established In other words, the result of a consistent and total substitution of lies for factual truth is not that the lie will now be accepted as truth, and truth be defamed as lie, but that the sense by which we take

between our leadership and our citizens, but also between our leadership and the leaders and citizens of other nations.⁸²

In addition to the issue of credibility, our society believes in the peoples' right to know. In a democracy, citizens are stripped of their power when they make decisions based on untruths. Our government cannot truly be "of the people, by the people, for the people," if the people do not know the truth.⁸³ From the election campaign to the end of the elected leader's term, Americans expect honesty from their leaders, in order that citizens can have their fair say in the government of our nation.

our bearings in the real world—and the category of truth versus falsehood is among the mental means to this end—is being destroyed. Also, Bok (142-43) said, "There is growing evidence that the world audiences to which propaganda is directed *are* becoming more distrustful. The sense of being manipulated is stronger, and the trust in one's own government or that of others is shrinking. As a result, citizens of the world over have less confidence that they can influence what governments do."

⁸² "For insofar as problems have to be met jointly—problems, for example, of disarmament, energy, or population—the fact that government information cannot be trusted is crippling," Bok said (143--She added, "Bona fide efforts in the joint interest are thus undercut by the cynicism and sense of powerlessness which result from the knowledge of large-scale deception.") Gergen (346-347) pointed out, trust does not come with the job anymore. "It must be earned," he said; adding, "It is thus vital for a president to be truthful and accountable for his actions and insist that his staff meet the same rigorous standards." He added, it is a necessity to have the trust of the public in order to do the job.

⁸³ Ralph Perry, in *The Moral Economy*, called truthfulness a condition of any "collective undertaking," or democratic institution (Bok, 90). Warnock (84) agreed, saying, "To the extent that trust is undermined, all co-operative undertakings, in which what one person can do or has reason to do is dependent on what others have done, are doing, or are going to do, must tend to break down." The idea that the people have a right to know has long been upheld by the news media industry (Francis E. Rourke, "Secrecy in American Bureaucracy," vol. 72, issue 4 of *Political Science Quarterly* (Dec., 1957), 543), and a free press has been one of the integral components of the notion of liberty on which our government was founded. Hannah Arendt put it, "Freedom of opinion is a farce unless factual information is guaranteed and the facts themselves are not in dispute (Jameson, 61)." Arendt explained (112), "In other words, factual truth informs political thought." The free press is meant to be the peoples' link to factual truth, allowing for individuals to develop informed opinions. "Metaphorically," Arendt (113) said, truth "is the ground on which we stand and the sky that stretches above us." In a democratic society, the right to know begins before leaders are chosen. People cannot vote for the person who will best represent them, if the candidates are not forthright with their positions on the issues that affect the voters. Warnock (84) highlighted the importance of giving honest opinions when he said the following. "I cannot reasonably be expected to go over the edge of a cliff on a rope, for however vital an object, if I cannot trust you to keep hold of the other end of it, there is no sense in my asking you your opinion on some point, if I do not suppose that your answer will actually express your opinion."

Despite the high value placed on honesty of elected leaders, most Americans would grant that the government in some circumstances must exercise some level of secrecy⁸⁴ Even Arendt, who argues strongly for the importance of truth in politics, allows for state secrets.

“To be sure, state secrets have always existed, every government must classify certain information, withhold it from public notice, and who reveals authentic secrets has always been treated as a traitor.”⁸⁵

The need for secrecy has particularly been identified with respect to national security matters⁸⁶ The generally accepted guideline for decisions about what information is releasable in the national security arena, following Freedom of Information Act (FOIA) principles, is to evaluate who benefits from the release of information—the American public, or a potential adversary⁸⁷

Personnel administration in the bureaucracy of our government administration also calls upon the need for secrecy The maintenance of personnel and medical records with private information about individuals necessitates systems and laws, such as the Privacy

⁸⁴ Gergen (346-47) says “The government has a right to remain silent on matters of sensitivity” Rourke explained (“Administrative Secrecy: A Congressional Dilemma,” vol 54, issue 3 of *The American Political Science Review* (Sep., 1960) 684-94), “The truth of the matter is that every major institution or profession in American life finds some measure of privacy useful for the achievement of its special objectives” Rourke (“Secrecy in American Bureaucracy,” 540) credits Max Weber with saying the preoccupation with secrecy is “based in good part upon functional necessity”

⁸⁵ Arendt, 111.

⁸⁶ Weber (Rourke, “Secrecy in American Bureaucracy,” 540) said for governmental organizations’ need for secrecy is especially pronounced in the areas of diplomatic and military operations. Rourke (Ibid, 544) points out that recent years have seen an increase in pressures directed at increasing levels of secrecy “The most visible if not the most important of these factors has of course been the full-scale involvement of the United States in world politics and, more recently, in the cold war with the Soviet Union and its satellites The expanded commitments of the United States in diplomatic and military affairs would alone have brought about a very considerable increase in pressure toward administrative secrecy, but to this development there has been added the fact that advances in modern science and technology have enormously widened the range of subjects that need to be kept safe from disclosure in the interest of maintaining a military or diplomatic advantage”

Act and FOIA, to avoid inappropriate release of information about an individual to the public⁸⁸

There is also an acknowledged need for some level of protection against the release of information regarding internal communications in the government administration. The idea is that an elected leader's staff cannot be free to express their ideas if they fear anything they mention might become tomorrow's news. Executive Privilege allows for some internal secrecy,⁸⁹ and FOIA protects inter-agency or intra-agency memoranda or letters⁹⁰

There is also a need for secrecy to protect the functioning of capitalism in our society. The government comes into possession of countless records of private business firms in the process of enforcing regulatory statutes, and disclosure of trade secrets and financial

⁸⁷ Defense Information School (DINFOS) Public Affairs Officer Course lectures Defense Information School, Ft. George G. Meade, MD, (Jul 1998)

⁸⁸ The publicizing of information on private affairs of individual citizens could lead to serious damage to their economic status or personal reputation without serving any public purpose (Rourke, "Secrecy in American Bureaucracy," 562). Rourke (Ibid, 563) asserted, "In so far as rules requiring secrecy guard against this eventuality, they strengthen rather than compromise the spirit and practice of constitutionalism."

⁸⁹ Rourke said (Ibid, 546), "The traditional view of American Presidents on the subject has been that secrecy regarding internal deliberations is indispensable for the efficient operation of executive agencies." This kind of secrecy can, to an extent, be allowed under the protection of "executive privilege." Malcom Moos ("The Need to Know and the Right to Tell" Emmet John Hughes, *The Ordeal of Power—A Discussion*, vol 79, issue 2 of *Political Science Quarterly* (June, 1964), 173) gave the following explanation of executive privilege: "It is well established that the President can, at his discretion, withhold information of the executive departments. The power has been invoked where (1) the information was deemed to be confidential, (2) disclosure would be incompatible with public interest, or (3) disclosure might seriously imperil the national safety." The internal communications of an administration could be argued, in many cases, to fall under the first category. Moos (173) felt strongly that it at least applied to circumstances when the President is involved personally in relationships with his staff and Cabinet, and through conferences held at the White House.⁸⁹

⁹⁰ The intention of this is to protect working papers, studies and reports being circulated among government personnel as the basis for final decision by the agency. The agency doesn't have to release this information, but it may (DINFOS, Chapter 5, p. 3)

data could be devastating for the private parties concerned⁹¹ FOIA protects trade secrets, reports prepared by federal agencies about the condition of banks, as well as data about oil and gas wells (including location) belonging to private companies⁹² Again, this does not mean the information must be withheld legally, only that it can be

Excessive secrecy, however, is not condoned⁹³ Again, the issue is that citizens cannot make informed decisions if they lack information Additionally, there is concern about potential abuses of secrecy—because the practice exists, it may be used as a shield from public scrutiny and accountability rather than out of legitimate need for secrecy Moos

⁹¹ Rourke, "Secrecy in American Bureaucracy," 545

⁹² Chapter 5, DINFOS Public Affairs Officer Course Handbook, Defense Information School, Ft George G Meade, MD, 1998, 4.

⁹³ Many obstacles are in place to prevent excessive secrecy, namely the U S government system of checks and balances, pressure from academic and scientific communities, the media, and the demand of the people for access to information The legislature is a formidable opponent to executive secrecy Rourke ("Administrative Secrecy," 684) tells us, "By resolution, investigation, and the threat of even more punitive sanctions, Congress has repeatedly asserted its believe that executive officials should not be allowed to withhold documents and testimony at their own discretion " Students of political institutions and scientists are also strong opponents to executive secrecy Rourke (Ibid, 687) explained, disclosure for students of political institutions is "so valuable an aid to effective scholarship " The attack by scientists on the use of executive secrecy has come about since the days of the Cold War According to Rourke (Ibid, 686), "This criticism has its root in the growing involvement of the federal government in scientific research—an involvement that has brought technical development in many fields, particularly atomic energy, under substantial government control " Scientists argue this kind of secrecy is unnecessary, because it tries to conceal matters generally known or easily discovered by scientists working outside the classification system. While they allow that withholding information about weapons developed through modern science may delay the speed of discovery for other nations, they hold that such a secret ultimately would handicap us more than it would withhold from others (Ibid, 686) The media is one of the most powerful opponents to secrecy Rourke explained ("Secrecy in American Bureaucracy," 542), "The American view has traditionally been that the operations of government no less than any other areas of life should be subjected to continuous scrutiny through he searching spotlight of publicity " The media's condemnation of governmental secrecy has been much stronger and persistent than that of the legislature, both due to economic self-interest and dedication to providing all the facts to their audience (Rourke, "Administrative Secrecy, 685) Rourke (Ibid, 691) said secrecy can be a dominant ideal only in an authoritarian community "And in a democratic community it can be tolerated only as an exception to the prevailing rule of publicity," he added Secrecy, he said ("Secrecy in American Bureaucracy," 561) must be held "within the narrowest limits consistent with the safety of such state secrets as must of absolute necessity be concealed from unfriendly foreign eyes " Finally, the citizens of our nation are also opponents to government secrecy Their need to access information in order to make informed decisions is fundamental in a democracy Because the people expect to have access to information in most circumstances, they generally do Politicians and media both are responsive to the people's desire and right to know For

said of executive privilege, “All administrations are tempted to turn to this doctrine in seeking to steer through the tight places. Yet we must know that it can be abused, and that the doctrine must be resorted to sparingly.”⁹⁴

Secrecy is at once considered vital and dangerous to various aspects of our government, usually depending upon the circumstances at hand. Given that a need for some, however limited, level of secrecy exists, the question remains: is it ever justifiable for an elected leader to lie to the public? Clearly, the margin for any kind of “yes” answer to this question will be very narrow, as the margin for justifiable secrecy is narrow itself.

As with any case of trying to justify a lie, a potentially justifiable lie by an elected leader would have to be a last resort that passes the same kinds of tests the lies of private citizens are subject to. But is there something about the nature of a democracy that prohibits elected leaders from lying to the public? Can our government be “of the people, by the people, for the people” if the people are sometimes lied to by those whom they have selected to represent them?

media, getting information to people is their business. For politicians, demonstrations of forthrightness foster the support they need to remain in office.

⁹⁴ Moos, 173. Note, Congress also contributes to executive secrecy in some cases. Many laws contribute to executive secrecy, i.e. laws intended to protect corporate privacy (Rourke, “Administrative Secrecy,” 687). “Since World War II Congressional support for executive secrecy has put great emphasis upon preventing the disclosure of information affecting national security. The Atomic Energy Act of 1946, especially, was an unprecedented attempt at statutory definition of one entire area of information made subject to stringent government control (687).” The Housekeeping Act of 1789 authorizes the heads of executive departments to control the “custody, use and preservation” of their own records (690). This act has been the center of struggle over executive secrecy for many years. In 1958 Representative Moss “introduced a bill to underline the fact that the housekeeping law ‘does not authorize withholding information from the public or limiting the availability of records to the public (691).’” Ultimately it was approved by Congress & signed by the president. “Before it finally became law, however, Representative Moss was obliged to assure his Congressional colleagues that passage of his amendment would not endanger the secrecy of military and diplomatic records, income tax returns, trade secrets received by the government in confidence, FBI reports, or information that could be withheld legitimately under other laws enacted by Congress (691).”

Common sense dictates that there cannot be a blanket prohibition of lies by elected leaders to the public. Take the case of the F-117 shot down by Serbians during the Kosovo conflict in 1999. To protect the pilot and those involved in the rescue mission of the pilot, no chances could be taken that the Serbian leaders would learn that the United States had adequate information, resources and a plan to pull off the mission. If the U.S. President had to respond to a direct question about whether or not the United States planned to attempt a rescue mission, the alternative to lying would be extremely dangerous. Even to answer, "For security reasons, we can't discuss the matter" would imply we had something to keep secret. The right move for the President, to protect the lives of all of the U.S. troops involved, would be to make a statement that either there was no plan "at this time" or to use words to imply we were concerned we would be unable to do so given current information and resources.

It is generally accepted that lies may need to be used in the interest of national security.⁹⁵ When there is no alternative, a lie used instead of force might save lives—our own and of our enemies.⁹⁶

⁹⁵ Arendt (105) called lies "relatively harmless tools in the arsenal of political action" when used as substitutes for force. Machiavelli told us (Barnes, 64), "Wise commanders never attempt to win by force what they can win by fraud." Hutcheson agrees (33), as long as both parties receive and know the custom. However, Hutcheson says, it is never justifiable to lie for agreements and treaties, nor when it applies to serious peace matters. And, he notes, lying is not universally received in war. Bok (144) points out that in a declared war, deception is likely to be expected on all sides. James Marineau said those who prey on society, i.e. assassins, robbers, and armed enemies, do not need to be treated with the honesty due to others (Bok, 138).

⁹⁶ Jacobs (152) explains, there is a general principle of the Talmud, "that where peace demands it a lie may be told." He continues, "The idea behind the above teaching is that though truth is important it must not be made into a fetish. Truth is a value which exists for the benefit of society and may, on occasion, be set aside if the well being of society demands it." Lying can help divert enemy maneuvers, help defeat them, and possibly cut unjust wars short. Bok (135) explained, "In World War II, for instance, the Allies not only kept information concerning the planned invasion of Normandy a secret, they also engaged in an elaborate hoax to make the Germans believe it would come at a different time and place." Of course, like any lie, a lie to the enemy can have its drawbacks (Bok, 141-42). Bok (141-42) explains, there is great margin for error and bias in determining who counts as enemies and whether or not a lie is warranted in the particular circumstance. The lie could also backfire. And because a lie directed at adversaries is often a lie

For many, the allowance for lying for national security matters is the only instance in which it might be justifiable⁹⁷ However, it is feasible to imagine there might be other arenas in which there is potential for justified lies For instance, if the protection of records with private information about citizens and trade secrets about companies is important enough to warrant secrecy, it is possible to imagine cases in which a lie might be the only means to sufficient protection. This likewise might be true regarding questions about internal government communications Again, the margin for justification of a lie would have to be extremely narrow

Given that there are at least some circumstances in which a justifiable lie may be told by an elected leader to the public, it is necessary to consider how the tests used to determine whether or not a lie by a private citizen is justifiable applies to lies told by elected leaders

In the case of lies told by private citizens, I recommended the Velino test be used when pressed for time But when time allows, all of the tests ought to be considered and used as appropriate to arrive at a good moral decision about whether or not a lie is justified in a particular case Below I will consider, test-by-test, whether or not they apply to elected leaders considering whether or not a lie might be justifiable

The first step in trying to justify any lie will always to be too seek an alternative Elected officials can choose from a number of alternatives in any instance, ranging from telling the whole truth, to refusing to speak publicly, to explaining publicly why they are

to friends as well, the costs of a discovered lie are high “The U-2 incident, for example, was intended as a routine lie to cover up for the reconnaissance mission of the pilot,” Bok (141-42) wrote. “It was for enemy consumption But this lie was one of the crucial turning points in the spiraling loss of confidence by U S citizens in the world of their leaders ”⁹⁶

⁹⁷ Gergen (346-47) said, “Those who preach otherwise do violence to democratic principles.”

unable or unwilling to disclose a particular bit of information. In most cases, the latter will prove the most effective when telling the whole truth is not an option.

The second step is to consider the moral reasons for and against the lie. The private citizen might have sometimes faced somewhat cut-and-dry issues—i.e. honesty (and all of its factors such as credibility and the importance of truth as the norm) versus saving lives, honesty versus keeping a surprise party a surprise, and honesty versus causing emotional pain to another person. When the elected leader faces these issues, an added weight goes into the honesty side of the moral argument. Special consideration needs to be given to the issue of the power of the people. Because knowledge is power, and the power in our government is intended to be in the hands of the people, the damage that can be done by a lie from an elected official is tremendous.

After initial consideration of the moral arguments, if lying is still an option, the elected leader can apply tests to help determine if lying is justifiable in a particular case. The Golden Rule test works for an elected leader in the same manner it does for private citizens—“If I were the private citizen, a member of the public I’m considering lying to, and Jane Doe were the leader, would I want Jane Doe to do the same? Or would I feel she would be doing me an injustice?” But the Golden Rule test has its limits, in that the would-be liar might fail to consider how he might feel if he were some private citizen other than himself. For example, the answer to the Golden Rule question may be different for me if I am me (a white, female member of the military) than if I am someone else (say, a Hispanic, male, leader of an environmental activist group). The leader might be inclined to only consider the position of the majority, or the people who voted for him,

but the fact of the matter is that he represents and governs us all, and owes us all his best decision

The “directed to reasonable persons” test on its own has the same qualities and difficulties as the Golden Rule test. But when combined with the test of publicity, it becomes a more effective tool for the elected leader. The first level, via conscience or imagined others, has the same problems as discussed above. But if the second two levels are for some reason not an option, an earnest attempt by a leader with integrity at number one should bring about a just answer. The second level, via actual others by reaching out for advice, should whenever possible, be the minimum requirement for an elected leader, and the third level, via consulting persons of different allegiances and bias, will often be necessary to ensure a just answer is reached.

The “consult the dupe” test is not very applicable to the elected leader. Opinion polls or official votes could be used, but to seek agreement up front from the public about deceptive policies or practices is not a very realistic endeavor. This is especially true because the elected official could not possibly design a plan for how he would handle any situation in which deception was necessary—because each case would have its own unique qualities and requirements. However, an elected leader could draw upon the past experiences of office holders in their position for guidance.

The Velino test, applying Kant’s “Act only on that maxim whereby thou canst at the same time will that it should become a universal law” to the particular lie (versus lying in general), is not as effective for elected leaders as it is for private citizens, again because of the scope of who all the lie can impact when coming from a person of such influence. If we can successfully perceive the ramifications of the lie for people of different

allegiances or bias, then the test can work. It is at least as good as the first level of the combined test “reasonable persons” and “publicity” test.

In summary, at a minimum, the Velino test or the first level of the combined “reasonable persons” and “publicity test” must be applied for an elected leader to draw a conclusion about whether or not a lie might be justified in a particular circumstance. But in every case possible, at least the second level of the combined reasonable/publicity test should be applied, and preferably the third will be accomplished as well to ensure the best possible answer. Because the implications are so tremendous, the leader ought never make the decision on his own unless there is absolutely no alternative.⁹⁸ The conclusion of any of these tests, when applied with utmost integrity, should yield similar results. Applying as many tests as possible serves to identify where a politician’s own bias may have interfered with proper application of one of the tests.

A final test for the elected leader is what Lieberman calls the Front Page Rule. Or as my father put it, “What if my action or words today were to end up on the front page of tomorrow’s newspaper?” Lieberman explains, it’s not whether or not it was legal that counts, but “whether we could answer to the satisfaction of the public why we had taken the action and if we could live with that answer politically and personally.”⁹⁹ Ultimately this is what the elected leader owes the constituents—accountability for decisions and actions. If the elected leader has followed appropriate decision-making technique to justify the lie, the final decision should be able to withstand the Front Page test.

⁹⁸ When Bok (96) talks about the tests/processes involved in justification of a lie, she says it is especially necessary to reach out for advice (instead of just using your own conscience or imagined others) “when those who deceive occupy positions of trust” such as government.

⁹⁹ Lieberman and D’Orso, 52

CHAPTER IV

ARE LIES TO PROTECT PRIVACY JUSTIFIABLE?

Earlier we discussed lies commonly defended as justifiable when told to a person who has no right to the truth. As one example of a person with no right to the truth, we identified “those who ask questions which they have no right to ask.” Bok claimed, in this category fall all illegitimate inquiries regarding political beliefs, sexual practices or religious faith. She said a large part of each person’s life is his to keep secret as he wishes, and she warned honest answers may rob people of their freedom, employment, and respect in their communities.

Do ordinary citizens have a right to privacy, and can this right be used to sustain a moral argument for justifiable lies in certain circumstances? Or, as a value, is privacy held in high enough regard that it can be used to justify certain lies? To begin to answer whether or not privacy can be justification for a lie, a definition of privacy is needed. After discussing the limited legal right to privacy in the United States, I’ll discuss whether or not the boundaries of the right to privacy exist only within those legal limits. I’ll establish that privacy as defined below is at a minimum a strong value in American society and consider the concept of privacy as a right beyond legal boundaries. I’ll then discuss how the right and or value of privacy stacks up against other rights, duties and values before finally drawing a conclusion about whether or not it is ever justifiable for a person to lie to protect his or her privacy.

The term ‘privacy’ falls under what one of my high school teachers called ‘fantasy words.’ Fantasy words are difficult to define, they are concepts with meanings and interpretations that are slightly different for each of us. Typically, our ideas of what they mean come from the understandings of them we gained as children. When I reach back to my childhood for a definition of privacy, I come up with “it’s none of your business.” It’s probably safe to assume an adult definition of privacy will have some of this tone to it.

The dictionary offers no real help—defining privacy as (1) “a being private, seclusion,” (2) “secrecy,” and (3) “one’s private life.” Private is (1) “of or concerning a particular person or group,” and (2) “secret.”¹⁰⁰

In the 1890s, Justice Louis D. Brandeis defined privacy as being let alone.¹⁰¹ The problem with this definition is that being let alone includes much more than the realm of privacy. For instance, a teacher calling on a student to answer a question in class could hardly be considered to be invading the student’s privacy. Likewise, a child tripping another child on a playground isn’t letting the first child alone, but also is not invading any sense of privacy.

Thomas Scanlon wrote in 1975 that any account of privacy would be about freedom from certain kinds of intrusions, especially those involving people observing or overhearing us.¹⁰² He said privacy ranges from “vague and informal understandings,

¹⁰⁰ *Webster’s New World Dictionary*, ed. Victoria Neufeldt (NY: Simon and Schuster, Inc., 1990), 469.

¹⁰¹ More exactly, he defined the *right to privacy* as *the right to be let alone*. Ellen Alderman and Caroline Kennedy, *The Right to Privacy*, (NY: Vintage Books, 1997) xiii.

¹⁰² Thomas Scanlon, “Thomson on Privacy,” vol. 4, issue 4 of *Philosophy and Public Affairs*, (Summer, 1975), 315.

such as those governing the scrutiny of others in public places and the degree to which it is permissible to listen to, watch, and follow them,” to explicit social rules, “e.g. rules against walking uninvited into other people’s rooms, going through other people’s drawers or suitcases, etc.,” to laws such as those against tampering with people’s mail or tapping their telephones¹⁰³ While the boundaries are debatable (i.e. can someone observing me doing jumping jacks at the airport really be invading my privacy? —or have I forfeited privacy by being in the public place?), Scanlon’s examples come closer to what privacy is all about

Political scientist Francis Rourke defined privacy as being free from having private affairs needlessly exposed to public scrutiny”¹⁰⁴ Because his definition of privacy includes its own “fantasy term,” *private affairs*, it still needs some work. If we keep, “being free from having _____ needlessly exposed to public scrutiny,” we have a good starting point. Ellen Alderman and Caroline Kennedy said privacy allows us to keep certain facts to ourselves if we so choose¹⁰⁵ “Certain facts we choose to keep to ourselves” could be what fits inside of Rourke’s definition to make it more accurate

W.A. Parent, in an article in *Philosophy and Public Affairs*, called privacy the “condition of not having undocumented personal knowledge about one possessed by others”¹⁰⁶ The knowledge he speaks of consists in facts about a person that most individuals in a given society do not want widely known about themselves¹⁰⁷ He

¹⁰³ Ibid, p 316

¹⁰⁴ Rourke, “Secrecy in American Bureaucracy,” 540-64

¹⁰⁵ Alderman and Kennedy, xiii.

¹⁰⁶ W.A. Parent, “Privacy, Morality, and the Law,” vol. 12, issue 4 of *Philosophy and Public Affairs*, (Autumn, 1983), 269

¹⁰⁷ Ibid, 269-270

explained that a person's privacy is diminished proportionately to the degree that others possess this kind of knowledge about him. In contemporary America, Parent said, facts about sexual preferences, drinking and drug habits, income, and the state of one's marriage or health belong to the class of personal information. "Ten years from now some of these facts may be part of everyday conversation, if so their disclosures would not diminish individual privacy."¹⁰⁸

In our working definition, "being free from having certain facts we choose to keep to ourselves needlessly exposed to public scrutiny," replacing Rourke's "exposed to public scrutiny" with Parent's "possessed by others" improves the definition. This is because privacy isn't just about how I feel about the public knowing something deeply personal about me—it can also be about one person (my boss, my husband, my mother, my friend) knowing something deeply personal about me.

Could Alderman and Kennedy's description of the zone of privacy as "facts we choose to keep to ourselves" be improved upon by Parent's qualifiers that the facts must be undocumented and about themselves? By "undocumented," Parent refers to the concept that something cannot be private if it is part of a public record. This might be more useful in defining a legal right to privacy, but it doesn't help defining privacy. If I've been arrested for drunken and disorderly behavior, and especially if I was then not convicted, just because it is in a public record does not make it *not* private. There is no need for my next-door neighbor or my grandfather to know this about me. Kennedy and Alderman's "Facts we choose to keep to ourselves" is more inclusive than Parent's concept, because it allows my idea of my zone of privacy to be different from the rest of

¹⁰⁸ Ibid, 270

society's For instance, I might think my religious affiliation a private matter, where the rest of contemporary society may not deem it so Parent's "about themselves" terminology is important, however There are many facts we might choose to keep to ourselves which have nothing to do with our own privacy and do not fall under the definition of privacy "About themselves," however, must be understood to include aspects of one's life that may not be entirely one's own For instance, I may choose to keep it to myself that my mother is an alcoholic While this fact is more specifically about my mother, it is about me in that she is my mother I may consider it a private fact about me that my mother is an alcoholic To account for this, we'll add "or about some aspect of their lives" to "about themselves "

The definition of privacy, then, is "being free from having certain facts we choose to keep to ourselves, about ourselves or some aspect of our lives, needlessly possessed by others " Needlessly must be understood to be a key word in the definition There may be some facts about my life or myself I wish to keep to myself, but someone else might have a legitimate right or need for the information For instance, if I apply for a loan, the bank has a right to know my credit history before lending me the money The private realm can only apply to what is "none of your business "

In the context of the issue at hand, the privacy definition replaces "others" with "the public," meaning the private realm applies to what is none of the public's business When a person does something illegal, it is the public's business It doesn't legally become the public's business until it is a matter of court record, but morally, crime is the public's business We must know about it to contribute to its prevention and control, and to protect ourselves When someone's secret or activity is not a crime or a matter of

official public record, it is none of the public's business, even if the public finds it repugnant

Although privacy is not explicitly mentioned in the U S Constitution or Bill of Rights, various aspects of a right to privacy are upheld--to a limited degree--by U S and state governments. But as Alderman and Kennedy point out about Brandeis' definition of the right to privacy as the right to be let alone, "Coveting an indefinable right is one thing, enforcing it in a court of law is another"¹⁰⁹. They explain, "Different legal doctrine govern the resolution of a given conflict, depending on the area of privacy involved"¹¹⁰. Legal sources for the right to privacy include federal and state Constitutions, statutes and judicial decision. Not all realms of privacy are covered by legal doctrine, and some intrusions are even legally justifiable to allow the press, police, employers or others do their jobs¹¹¹.

Judith Jarvis Thomson put it well when she called the right to privacy "a cluster of rights with disputed boundaries"¹¹². The courts and lawmakers have yet to be able to agree upon a well defined, easily enforced right to privacy. And because the legal right to privacy is up against other very strong legal rights such as a free press, more clarity on the matter is not likely to happen in the near future.

The U S Constitution is one of the various legal sources for the right to privacy. The Fourth Amendment to the U S Constitution establishes the right of people to secure their own persons, house, belongings and papers against unreasonable searches and seizures.

¹⁰⁹ Alderman and Kennedy, xiii

¹¹⁰ Ibid, xiii

¹¹¹ Ibid, xv

As Parent claimed, one can plausibly argue that this amendment presupposes a right to privacy¹¹³ The 14th Amendment further safeguards the rights of citizens by saying, “No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States ” Number 44 of the *Federalist Papers* lauds the Constitutional convention for including Bills of Attainder and ex post facto laws as part of provisions restricting state authority, calling them “this constitutional bulwark in favor of personal security and private rights ”¹¹⁴ While the Constitution and its Bill of Rights set boundaries for the government regarding interference in private affairs, its content does not apply to interference by other citizens or organizations

The federal government also protects privacy of individuals via the Privacy Act of 1974, which governs the handling of private information in records controlled by federal agencies The Act lays out specific rules covering the use and disclosure of personal information, and it specifies that information collected for one purpose may not be used for another purpose without notice to or the consent of the subject of the record¹¹⁵ There may be variations in how the Act, which applies only to living people, is enforced by various government organizations For military members, age, marital status,

¹¹² Judith Jarvis Thomson, “The Right to Privacy,” *Philosophy and Public Affairs*, (Princeton, NJ Princeton University Press, 1975), 312

¹¹³Parent, 287 Also, T V Smith, “The Democratic Process,” *Public Opinion Quarterly* (University of Chicago Press, 1938) said on p 16 “Jefferson also caused to carry over from the Declaration to the constitution certain rights which the personality has in and even against the public order There is the right of privacy in one’s home There is the right of privacy in one’s own head—and heart This little ‘sphere of anarchy’ is the oasis which our democracy has faithfully preserved against the powerful encroachment of social order ”

¹¹⁴ *The Federalist Papers*, #44, “Provisions Restricting State Authority” 176.

¹¹⁵ *A Citizen’s Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records, First Report by The House Committee on Government Operations, Subcommittee on Information, Justice, Transportation, and Agriculture*, 1993 Edition, House Report 103-4, 103rd Congress, 1st Session, Union Calendar No 53, http://www.cpsr.org/cpsr/foia/citizens_guide_to_foia_93.txt

information about dependents, and gender are not normally releasable, unless the balancing test weighs in favor of public interest¹¹⁶ Street addresses and race are not releasable, except in the rare exception where they are relevant and essential in providing facts to the press¹¹⁷ Awards, decorations, duty status (whether on leave, away without leave, in confinement, or away on temporary duty) and information from court-martial proceedings are considered to be a matter of public record and releasable.¹¹⁸ The Act allows for legal recourse on behalf of the individual whose rights are violated, and failure to comply can result in prosecution of federal employees

The FOIA is a disclosure law that mandates that all information in the possession of the government is releasable except for nine specific categories of information that sometimes overlap with Privacy Act information The Act does not require that exempted information be withheld, but it permits it to be withheld¹¹⁹ The overlap between FOIA and Privacy Act information exists in the arena of personnel files and medical files The FOIA also protects some law enforcement information when it could constitute an unwarranted invasion of privacy¹²⁰

The beginnings of a legal right to privacy against private individuals, versus the government, came from Brandeis and Samuel D Warren in 1890 In an article in the *Harvard Law Review*, they defined privacy as the ‘right to be let alone’ and argued that

¹¹⁶ DINFOS Handbook, Chapter 5, p 4

¹¹⁷ Ibid

¹¹⁸ Ibid

¹¹⁹ Ibid, 3

¹²⁰ Ibid

the spiritual or emotional damage caused by an invasion of privacy was just as serious as physical injury and should be compensated through legal action ¹²¹

Courts began to accept the argument in the form of tort law from state to state, but only intermittently and in “hodgepodge fashion”¹²² In 1960, the privacy tort became more prominent following an article by Dean William Prosser arguing that the ‘invasion of privacy’ tort was really four distinct but related torts ¹²³ He drew a line between physical and other intrusions upon the solitude of another (namely intrusions of cognitive nature that result in the acquisition of undocumented personal facts¹²⁴), painting someone in false light, using another’s name or likeness without the other’s consent, and publicizing highly offensive private information about someone which is not of legitimate concern to the public ¹²⁵ While the four privacy torts often overlap with other torts, there are still some harms only covered by these torts ¹²⁶ After the article, invasion of privacy lawsuits became more common ¹²⁷

The fourth of the torts above is known as the private facts tort While a majority of states (at least 36) have recognized the private facts tort in some form, it is in a constant state of conflict with the First Amendment, and at least five states have expressly rejected

¹²¹ Alderman and Kennedy, 154 Samuel Warren and Louis Brandeis, “The Right to Privacy,” *The Harvard Law Review*, 4 (Cambridge, MA: Harvard Law Review Association, 1980), 205-207

¹²² *Ibid*

¹²³ *Ibid*, 155, and Parent, 285

¹²⁴ Parent, 285

¹²⁵ *Ibid*, 155-56

¹²⁶ Alderman and Kennedy, 157

¹²⁷ *Ibid*, 156

it¹²⁸ Support for the private facts tort comes from the idea that the truth, in and of itself, is not always enough to protect the press, and that some information, although truthful, is not newsworthy¹²⁹ According to Kennedy and Alderman, supporters point out that the First Amendment has never been held to be absolute—“Therefore, when a free press comes up against another important right—the right to privacy—a balance must be struck”¹³⁰ This balance is struck by calling upon the plaintiff to prove that the information published about him is not of legitimate concern to the public, i.e. not newsworthy¹³¹ Generally, Kennedy and Alderman explain, courts take a very broad view of the definition of news, which includes “the vast arena known as human interest”¹³² In addition to proving the information is not newsworthy, the plaintiff must prove it was indeed “private,” and the publication of the information must be considered “highly offensive to a reasonable person”¹³³ Critics of the privacy torts argue that when

¹²⁸ Ibid, 166 and 371 Also, on 157, when privacy torts go up against the First Amendment “There is a clash between the right to be let alone and the right to know, a clash between privacy and the press” On 152 First Amendment rights of media make it difficult to win a privacy case Also, Janeway, 102

¹²⁹ Alderman and Kennedy, 166.

¹³⁰ Ibid

¹³¹ Ibid

¹³² Ibid

¹³³ Ibid, 167 “In a split second in 1975, O W Sipple deflected a gun aimed at President Gerald Ford When the *San Francisco Chronicle* uncovered the fact that Sipple was a homosexual, that information, too, became a part of the national story Sipple, whose parents, brothers, and sisters were all unaware of his sexual orientation, sued for invasion of privacy In rejecting Sipple’s claim, the court noted that Sipple was actually prominent in the gay community, openly frequented gay bars, and had been featured in several gay publications Thus, the court held that Sipple’s homosexuality was not a ‘private’ fact In contrast, there is the case of Rikki, a transsexual Rikki was born Ricardo, a male, but at age thirty-three underwent surgery and assumed a new life as a female She enrolled in college and was eventually elected the school’s first female student body president An *Oakland Tribune* reportedly discovered Rikki’s secret, published it The court held that Rikki’s prior sexual identity was a private matter In doing so, the court relied heavily on the extraordinary steps she had taken to conceal her past—lawfully changing her name, as well as changing her driver’s license, social security files and even her high school records (167-168) ” In one case, the N Carolina court of appeals wrote “‘The fact that a plaintiff may have spoken freely to a small, select number of people about a private matter’ does not necessarily make the matter public (169) ” The same case was appealed to the N C Supreme Court, and the court held “that no one could bring a private facts case against the media

the First Amendment is at stake, the kind of ambiguity that exists in right to privacy cases is unacceptable¹³⁴ Only few cases against the press have been successful

The U S Supreme Court has ruled a few times in right to privacy cases, but it has been careful to make it clear that each case is distinct and does not set a precedent to be followed in all right to privacy cases Justice Douglas, writing the majority opinion in *Griswold v. Connecticut* (Supreme Court struck down a law that made it criminal for married couples to use contraceptives), argued that even though the Constitution does not explicitly mention a right to privacy, one can still justifiably infer its existence from examining the penumbras or emanations of various constitutional provisions¹³⁵ Each private facts case that has come before the Court has involved information that was already a part of the public record¹³⁶ The press prevailed in each of these cases, but the Supreme Court confined its ruling to the facts presented, stating, “We do not hold that truthful publication is automatically constitutionally protected”¹³⁷

The legal right to privacy certainly does not encompass a right to privacy as inclusive as a right to “be free from having certain facts we choose to keep to ourselves, about ourselves or some aspect of our lives, needlessly possessed by others” But the boundaries of the law do not necessarily dictate the boundaries or the existence of the

(170) ” Thus N C , private facts tort was outlawed The N C Supreme Court “concluded that the private facts tort is ‘at the very best, constitutionally suspect ’” The Court said NC recognized the tort of “intentional infliction of emotional distress” which could be used for same types of cases—thus no justification “for adopting another tort that punishes the media ‘for the typically American act of broadly proclaiming the truth ’”

¹³⁴ Ibid, p 157

¹³⁵ Parent, 283.

¹³⁶ Ibid, 165 I e 1975 ruled TV couldn’t be sued for broadcast rape victim’s name it got from public court documents; 1977 & 1979 newspapers couldn’t be sued for printing names of juvenile offenders obtained from public officials or public proceedings

¹³⁷ Ibid, p 165

right in the moral realm. Some say the injury from invasion of privacy is often the worst pain people know, and they argue that any right to be free from (physical) harm inflicted upon us by another also includes less tangible injury. Others refer to the harm as mere “hurt feelings” and claim that such injury is the price we must pay for living in a free society.¹³⁸ Can it be said that people have a right to privacy that is independent of the limitations of the legal right?

Unquestionably, privacy is a strong value in contemporary America. People feel they do have a right, to a large extent, to be free from having certain facts they choose to keep to themselves, about themselves or some aspect of their lives, needlessly possessed by others. Most people would agree that to walk in someone’s room, pick the lock to her cedar chest, open it and begin reading her journals hidden there is a violation of the writer’s privacy—whether or not the particular circumstances warranted punishment by law. The only exception people might (*might*) grant is a parent who suspects a child is suicidal—or some other crucial kind of need to know the contents of the journal. We would say the author of the journal still has a right to privacy, but that right takes second place to someone else’s need to know in such exceptional circumstances.

Privacy is such a strong value for a number of reasons. Privacy affects our ability to maintain different sorts of social relationships.¹³⁹ From depth of relationship, i.e. close friend versus acquaintance, to type of relationship, i.e. professional versus personal, the

¹³⁸ Alderman and Kennedy, 157. Also, Scanlon (317) says “We are most likely to say that such invasions violate rights when the norm in question is a law, or at least an explicit and serious social rule. (Perhaps we would also say this when we think that the interest infringed is so important that it ought to be protected by such a law or rule even though it is not.) But when the norm breached is only a relatively vague customary understanding, and the interest in question is relatively trivial, we are more likely to say with Thomson that the agent ‘behaved badly’ but that no right was infringed.”

extent to which we choose to reveal ourselves to others impacts the development and maintenance of those relationships

Likewise, there is a relationship between privacy and power. Parent explains, “If others manage to obtain sensitive personal knowledge about us, they will by that very fact acquire power over us”¹⁴⁰ Parent goes on to describe a definite connection between the potential for harm and invasions of privacy. This is especially easy to envision in the professional world. In a case where two professionals within a company are competing for the same rewards, the revelation of deeply personal information about one of the two could have extreme impact on the outcome of their competition.

Often times the need for privacy rests primarily on our interest in avoiding embarrassment. We desire to duck scrutiny from moral issues on down to the little things, such as the fact that we may snore or sing in the shower. While the level of embarrassment with each audience and each topic may vary, the fact remains—we don’t like to be embarrassed, and invasions of privacy often result in embarrassment.

The driving force for a value of privacy comes from the liberal ideology that America is founded upon. Alderman and Kennedy said, “At America’s birth, we adopted from our English ancestors the belief that a man’s home is his castle and that man is king of that domain and, by extension, the whole of his private life”¹⁴¹. An integral part of the

¹³⁹ James Rachels, “Why Privacy Is Important,” vol. 4, issue 4 of *Philosophy and Public Affairs* (Summer, 1975), 326

¹⁴⁰ Parent, 276. Also Rachels (323-325) outlined a number of interests that may be harmed by invasions of privacy: in competitive situations, in cases where revelation of a private fact would cause embarrassment, medial records (can wreck a marriage or result in loss of job or insurance protection), and credit application (the investigation exposes other information such as sex life, political views, etc., which can cause unfair influence on creditors).

¹⁴¹ Alderman and Kennedy, 152. Also (Kant, Immanuel, *The Science of Right*, trans. W. Hastie, 1970, last accessed Apr. 23, 2000, http://www.knuten.liu.se/~bjoch509/works/kant/science_right.txt “Anything

formation of our government was concern for the right to be secure in our own homes and possessions, “assured that the government cannot come barging in ”¹⁴² Americans believe in the idea of a private sphere in which they are free from scrutiny¹⁴³, and it is this sphere that allows us the independence to develop individually and define ourselves, think creatively, and raise a family according to our own values¹⁴⁴ The liberal, moral principle of respect for persons¹⁴⁵ causes us to allow that certain facts about people are “simply nobody else’s business ”¹⁴⁶

Does this strong value of privacy actually translate to a moral right? The emergence of liberalism in the 16th century brought with it the concept that there are inherent rights—inherent rights that governments, legal systems and society in general ought to safeguard The “rights” centered on the notion that we are all inherently free to do as we wish, except when our actions infringe upon the freedoms of others Kant said, “If, then,

is ‘Mine’ by right, or is rightfully mine, when I am so connected with it, that if any other person should make use of it without my consent, he would do me a lesion or injury (First Part, Private Right)

¹⁴² Parent, 152

¹⁴³ *The Oxford companion to Philosophy*, ed Ted Honderich (NY Oxford University Press, 1995), 487

¹⁴⁴ Ibid, and Alderman and Kennedy, xiii Thomson (303) said, “If we have fairly stringent rights over our property, we have very much more stringent rights over our own persons ”

¹⁴⁵ Parent, 277

¹⁴⁶ Rachels (332) said, “Here, too, I think the answer requires reference to our relationships with people If someone is our doctor, then it is literally his business to keep track of our health, if someone is our employer, then it literally is his business to know what salary we are paid, our financial dealings literally are the business of the people who extend us credit, and so on In general, a fact about ourselves is someone’s business if there are specific social relationships between us which entitles them to know ” Parent (278) said “ privacy is indeed a moral value for persons who also prize freedom and individuality privacy should only be infringed under exigent circumstances and for the most compelling reasons, for example, law enforcement and health care provision ” Parent (276) also said, “ we desire privacy out of a sincere conviction that there are certain facts about us which other people, particularly strangers and casual acquaintances, are not entitled to know This conviction is constitutive of the ‘liberal ethic,’ a conviction centering on the basic thesis that individuals are not to be treated as mere property of the state but instead are to be respected as autonomous, independent beings with unique aims to fulfill ”

my action or my condition generally can coexist with the freedom of another, according to a universal law, any one does me a wrong who hinders me in the performance of this action, or in the maintenance of this condition. For such a hindrance or obstruction cannot coexist with freedom according to universal laws”¹⁴⁷

Ronald Dworkin was another proponent of the idea that our rights are not all spelled out by law. He wrote about the “rights conception of the rule of law,” which supposes societies can be criticized for enactments that do not recognize the “moral rights” people have.¹⁴⁸ He explained this conception denies written law as the exclusive source of rights. “If therefore some case arises as to which the rule book is silent, or if the words in the rule book are subject to competing interpretations, then it is right to ask which of the two possible decisions in the case best fits the background moral rights of the parties”¹⁴⁹ Thus, his belief in unwritten rights was so strong, he deemed they need be considered in legal matters.

Benjamin Constant addressed the specific issue of an inherent right to privacy. Constant talked about a province in life—private life—with which it is thought undesirable, except in the most exceptional circumstances, for public authority to interfere.¹⁵⁰ He joined Locke, Voltaire, Tom Paine, and Mill in assuming “that there is a frontier between public and private life, and that, however small the private sphere may be, within it I can do as I please—live as I like, believe what I want, say what I please—

¹⁴⁷ Kant, *The Science*. Also *The Oxford Companion* (483) says, “Liberals demand a substantial realm of personal freedom which the state should not intrude upon, except to protect others from harm.”

¹⁴⁸ Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), 13.

¹⁴⁹ *Ibid.*, 16

¹⁵⁰ *Oxford Companion*, 486

provided this does not interfere with the similar rights of others, or undermine the order which makes this kind of arrangement possible”¹⁵¹

Arguments against the concept of other-than-legal rights range from the assertion that any list of such rights would be controversial¹⁵² to the position that there is no such thing as a right not granted by law. Dworkin wrote, “But many philosophers doubt that people have any rights that are not bestowed on them by enactments or other official decision, or even that the idea of such rights make sense.” He added, “They doubt particularly that it is sensible to say that people have moral rights when (as the rights conception must concede is often the case) it is controversial within the community what moral rights they have”¹⁵³. One such philosopher, Hegel, wrote, “Law and right are identical in the sense that what is implicitly right is posited law.” He said what is inherently right must be posited as law.¹⁵⁴

Jeremy Bentham, English utilitarian philosopher agreed, holding that “from real law come real rights . . . from imaginary laws come imaginary ones”¹⁵⁵. He said language that looks like it’s describing actual rights is actually only suggesting what rights there ought to be. The French Declaration, according to Bentham, gave reasons why there

¹⁵¹ Ibid, 486. John Stuart Mill’s essay *On Liberty* puts forth utilitarian idea that freedom should only be limited by the ‘harm’ principle. “individuals should be free to do anything which does not harm others, but actions which do harm others may be properly restricted by society (*The Oxford Companion*, 291).”

¹⁵² “It is difficult to find any objective way of determining *what* basic rights people have (*The Oxford Companion*, 291).”

¹⁵³ Dworkin, 13

¹⁵⁴ Hegel, *Philosophy of Right*, trans. T. M. Knox (NY: Oxford U. Press, 1967), 273. He (274) continued, “A man may be indignant if a right which he knows he has is refused him because he cannot prove it. But if I have a right, it must at the same time be a right posited in law. I must be able to explain and prove it, and its validity can only be recognized in society if its rightness in principle is also made posited rightness in law.”

¹⁵⁵ *The Oxford Companion*, 87

ought to be rights, instead of citing existing rights. He said, “A reason for wishing that certain rights were established is not that right, want is not supply, hunger is not bread.”¹⁵⁶

Volumes have been written on the question of the existence of rights outside of legal rights, but, for the purposes of this paper, the answer does not warrant the lengthy discussion it would take to argue a position either way. Given that there is a legal, however limited, right to privacy, and that privacy is held as a strong value in our society, the existence of a moral right to privacy would only serve to enhance an already solid argument for the importance of privacy.

Before moving on to the question of whether privacy is so important that it might be a source of justification for lying, it will be helpful to outline some of the rights and values that privacy can often find itself up against. The California Supreme Court once put it, “the right to know and the right to have others not know are, simplistically considered, irreconcilable.”¹⁵⁷ The right or value of privacy often clashes with law enforcement, an employer’s right to run a business at a profit, the value of free flow of information, the rights of spouses to know things that affect them, the need for doctors to have access to medical histories, the fair request for creditors to have access to credit histories, and more.¹⁵⁸

Two more important challenges to privacy are the public’s right to know, and a free press. Many official government records are by law made available to the public,

¹⁵⁶ Ibid, 87.

¹⁵⁷ Janeway, 102

¹⁵⁸ Some of the items in this list come from Alderman and Kennedy, xv and 337

because it is deemed the public has a right to such access. For instance, if I'm shopping for a home in a particular neighborhood, I have a right to consult city tax records to get a feel for what taxes I might be required to pay. Parent went so far as to say our concept of privacy simply ought not include that which belongs to the public domain.¹⁵⁹ So even though my testimony in court may have revealed private information about myself, Parent would say I ought not consider it private any longer—because it now belongs to the public.

The right to a free press is part of the concept of freedom that is the foundation of the United States of America. It is considered as important today as it was when our nation was founded—and privacy is often up against this all-too-important value. New mass communication has made the privacy/press clash more immediate and personal to ordinary Americans, but still the conflict is nothing new.¹⁶⁰ Alderman and Kennedy offer a good description of the nature of the conflict: “When the media uses its strength to uncover government corruption or lay bare a public lie, it is the country’s watchdog. But when the animal roams into our cherished private sphere, it seems to turn dangerous and predatory.”¹⁶¹

Now it is time to return to the question, is it ever justifiable for a lie to be told to protect one’s privacy? Having established that privacy is not only a limited legal right, but at a minimum a strong value if not an inherent moral right, it seems safe to combine

¹⁵⁹ *Ibid*, 271

¹⁶⁰ Alderman and Kennedy, 152. Also, p. xiii says today “Private individuals join public figures in decrying ‘tabloid journalism’ and complaining that the press can invade lives with impunity.”

¹⁶¹ *Ibid*, 153

this with our earlier discussion of justifiable lying and reach the conclusion that it may sometimes be justifiable to lie to protect ones privacy

As is the case with any other situation in which one might consider lying, one would have to first consider and rule out all of the alternatives, and then consider the moral reasons, including rights and values on both sides of the issue, involved. In most privacy cases, alternatives would likely exist that rule out lying. This is because “it’s none of your business” will often meet the goal of protection of privacy. But when there are no alternatives to lying that will effectively protect privacy, and when protection of privacy in the particular instance is of great importance to the would-be liar, and when people do not have a right to know the private fact, a lie of any magnitude has great potential to be justified. If it seems a lie may be appropriate, every case requires the application of as many tests as are appropriate and possible to determine if it is justifiable.

As we work through the tests, we will have to honestly ask, “Does the person/audience the elected leader is considering lying to have a right to know the truth?” If the answer is no, then it will be easier to find the particular lie justifiable. If the answer is yes, the would-be liar will have to very objectively answer the questions, “does their right to know outweigh my right to, or value of, privacy in this circumstance?” The tests that involve actual consultation with others will be necessary to truly avoid bias when trying to answer this question. It would seem that in almost any case, a legitimate right to know would cancel out a right to privacy¹⁶²

¹⁶² Hutcheson (31) wrote: “Wherever another has a right, perfect or imperfect, to know our sentiments, there even concealing them by silence, as well as all deception by any signs, is criminal. But where others have no such right, an much more where there is just cause of war, so that even violence is lawful, or

CHAPTER V

ARE LIES TO THE PUBLIC TO PROTECT PRIVACY JUSTIFIABLE FOR ELECTED LEADERS?

Lies to protect privacy may pass the tests for justification for private citizens, but the question becomes much tougher when the liar is an elected official. Do elected leaders have a right to be free from having certain facts they choose to keep to themselves, about themselves or some aspect of their lives, needlessly possessed by others? If not a legal right, would an elected leader have a moral right to privacy if the rest of us did? Does the importance of privacy as a value in America extend to elected officials? Does the public's right to know extend to the private lives of elected leaders? With the answer to these questions will come the answer to whether or not it is ever justifiable for an elected leader to lie to protect his or her privacy.

An elected leader has a legal right to a limited realm of the already-limited legal right to privacy held by private citizens. The provisions in the Constitution and Bill of Rights protecting private citizens against unwarranted intrusion by the government, such as illegal searches and seizures, apply to elected leaders like any other citizen. Elected leaders' records are protected by the same Privacy Act that applies to all government

wherever deceiving others may do good, we may deceive them by such use of signs as imports no profession of communicating our sentiments. Such stratagems are justified by all, and may be used toward a friend for any innocent purpose. A studious man may darken his chamber that others may conclude that he is abroad."

employees And in the case of the President of the United States, executive privilege also exists, which can, to a very limited extent, be used in manners that might protect him or her from some invasions of privacy

Elected leaders can only benefit from three out of four of the tort laws¹⁶³, and even for the three of them, whether or not they apply really depends upon the state with jurisdiction They are protected (1) from physical and other intrusions upon their solitude, (2) from being painted in false light, and (3) from having others use their likeness or name (for other than entertainment purposes such as cartoons and television comedy) without their consent

It is not feasible for the fourth tort, known as the private facts tort, to apply to an elected leader, because any court of law would in nearly every instance view the private lives of elected leaders to be newsworthy and therefore appropriate material for our nation's free press Warren and Brandeis, the first to argue that people have a right to privacy, did not extend it in the sense of release of private facts about elected leaders

They wrote the following

“To publish of a modest retiring individual that he suffers from an impediment of his speech or that he cannot spell correctly is an unwarranted . . . infringement upon his privacy, while to state and comment on the same characteristic found in a would-be congressman would not be regarded as beyond the pale of propriety ”¹⁶⁴

Michael Janeway tells us that the Supreme court's decision in *New York Times v. Sullivan* in 1964 affirmed the proposition that under the First Amendment to the Constitution

¹⁶³ See p 43

¹⁶⁴ Parent, 287, in Warren and Brandeis, 205

virtually nothing about a public figure is out of bounds to the press, provided it is not published with knowing or reckless disregard of its falsity ”¹⁶⁵

Since the private facts tort does not protect elected leaders, the next logical question to consider is whether or not an elected leader has an other-than-legal, moral right to privacy. Because this paper does not attempt to claim private individuals do or do not have a moral right to privacy, all that can be done at this point is to discuss whether or not an elected official *would have* an inherent right to privacy *if the rest of us do*.

A moral right, by its very nature, would have to extend to elected officials because it is inherent to all human beings. The “rights” notion that we are all inherently free to do as we wish, except when our actions infringe upon the freedoms of others, plays out no differently for an elected leader. Kant might say, “If the elected leader’s action or condition can generally coexist with the freedom of another, according to a universal law, anyone does the elected leader wrong who hinders him or her in the maintenance of this condition.”

However, many would argue that an elected leader gives up this right when taking office. As White House press reporter Helen Thomas put it, “Now, presidents—and presidential candidates—put their privacy into a blind trust when they take office.”¹⁶⁶ Senator Lieberman says privacy is not only difficult to maintain when holding a public office,¹⁶⁷ but that privacy does not belong to them. “We are public officials, not private citizens,” he said. “Everything we do can become public and therefore have serious

¹⁶⁵ Michael Janeway, *Republic of Denial: Press, Politics, and Public Life* (New Haven, CT: Yale University Press, 1999), 76-77

¹⁶⁶ Helen Thomas, *Front Row at the White House* (NY: Simon & Schuster, 1999), 299

¹⁶⁷ Lieberman and D’Orso, 9

consequences for the community. We are—whether we like it or not—role models. We have voluntarily entered a contract with the voters that is based on trust.”¹⁶⁸ Lieberman said almost any aspect of the present or past, long before entering public life, can be justifiably scrutinized by the public. He said politicians, “in the most acutely direct sense,” are answerable to the public. “They are the people who hired him. They are the people who can fire him.”¹⁶⁹ Those who agree with this line of thinking feel a politician’s private life may be justifiably considered to have bearing on his public life and therefore may be justifiably subject to the same scrutiny as the public life. They hold that politicians have zero right to privacy.

But it has not always been the case that politicians have given up privacy when entering public office. Throughout history, Presidents were able to maintain zones of privacy while in office. From as far back as Jefferson and his slave lover, to Franklin Roosevelt’s romance with Lucy Mercer,¹⁷⁰ to the buzzer system LBJ ordered the secret service to install so agents could warn him his wife was approaching (due to having been caught having sex with a secretary in the oval office),¹⁷¹ the sex lives of presidents were not revealed to the public.

¹⁶⁸ Ibid, 50. They (51) added, “I assume that everything I do in my life—*everything*—could possibly become public and therefore I should not do anything privately that I could not justify publicly.”

¹⁶⁹ Ibid, 10.

¹⁷⁰ Ronald Kessler, *Inside the White House* (NY: Pocket Books, 1996), 2. Also Gergen, (346) says “Consider Franklin Roosevelt, twenty years after he died Americans learned for the first time the Roosevelts did not have a perfect marriage. FDR was a father of five when he had a passionate affair with Lucy Mercer that nearly destroyed his marriage. He broke off the relationship, but it was Lucy, not Eleanor, who was with him on the day of his fatal stroke, and as Dorris Kearns Goodwin points out, Eleanor bore the burden of the affair for over forty years.”

¹⁷¹ Kessler, 1. Author quotes a secret service member here.

Presidents John Kennedy, who reportedly had sex with dozens of women during his time as President,¹⁷² took measures to protect his privacy while a resident of the White House. He had the domestic staff of the White House sign statements that they would neither write nor collaborate with writers on any events or conversations in the White House.¹⁷³ At the same time, the media chose to allow a privacy zone for Kennedy. Robert Pierpoint, formerly of CBS News, said there was much discussion in the White House press corps about how to handle information they were exposed to about Kennedy's private life. "But overall our basic feeling was that we shouldn't touch it because it wasn't our business or the public's business," he said.¹⁷⁴

The phenomenon of elected leaders being stripped of their privacy is a new one, one that seems to have come hand-in-hand with a lack of more substantial political issues for the mass media to cover. Janeway explains this with the following

"Like fog, the vagaries of the new 'image politics' crept in on a culture used to story lines on the order of defeating the Axis powers, saving the peace, waging the Cold War, ending racial segregation, wiping out poverty, exploring outer space, and in the late 1960s and early 1970s, ending the Vietnam War and reforming the system."¹⁷⁵

Janeway points out that after 1968, Congress ceased to legislate daring new reforms, and presidents (with the exception of Reagan tax cuts) to declare war on problems with much more than words.¹⁷⁶ If the parties and issues don't matter, Janeway said, "What

¹⁷² Ibid, 2

¹⁷³ Moos, 176.

¹⁷⁴ Janeway (79-80) said, "It was an ethical problem of concern to us in part because he was fairly blatant about it,"

¹⁷⁵ Ibid, 94

¹⁷⁶ Ibid, 81.

politicians do is perform onstage and offstage”¹⁷⁷ He explained the media’s response with the following

“The more the job description has to do with staged performance and the less it has to do with context, structure, substance, the more the press tends to treat officeholders and candidates as mere actors—‘personalities’ And the more it’s inclined to rate their work according to estimations of how well they manage those personalities”¹⁷⁸

Presidential candidate Gary Hart, as well as Clinton, were among the first to have their private lives deeply scrutinized by the press And Clinton was the first President forced to make a confession of infidelity and the first to have his sex life graphically publicized while in office ¹⁷⁹ Historian Alan Brinkley tells us this kind of scrutiny may be here to stay

“Until a political leader finds an effective counter to ‘the sense of aimlessness and emptiness that afflicts American public life we are likely to continue to judge our leaders by scrutinizing and at times repudiating them on the basis of the one thing they offer us themselves”¹⁸⁰

Given the relative newness of the scrutiny of private lives of elected leaders by the public and the media, it doesn’t follow that the elected leaders have a corresponding moral duty to give up any right to privacy They might be helpless to stop the invasions of privacy, but that helplessness would not cancel out their right to privacy. History shows us such an obligation, to forfeit privacy, does not come inherently with the territory Thus, if there is such a thing as an inherent right to privacy for private citizens, the right extends to elected officials

¹⁷⁷ Ibid

¹⁷⁸ Ibid, 81-82

¹⁷⁹ Gergen, 316-317.

¹⁸⁰ Janeway, 87

Regardless of whether or not the elected leader forfeits any kind of moral right to privacy upon taking office, we still must consider whether the American value of privacy extends to elected leaders, and how that stacks up against the public's right to know. We can use common sense to establish that the American value of privacy applies at least to some aspects of a politician's life. For instance, we would not expect an elected leader to entertain questions from the public about the frequency of his bowel movements, or for that matter, the frequency of his sexual engagements with his wife. We would agree that to walk into the elected leader's private quarters without a search warrant, pick the lock to his cedar chest, open it and begin reading his journals hidden there is a violation of the author's privacy.

Now we'll take a look at the various reasons privacy was valued as a private citizen, and consider how they apply to the elected leader. Privacy for an elected leader, like that of a private citizen, allows him or her to maintain different kinds of social relationships. Where the leader may elect to discuss with a close friend his concerns about his daughter's boyfriend's study habits, his concerns clearly do not belong to the public realm.

The relationship between privacy and power applies as well to an elected leader. While Americans do call for accountability from their elected leaders and thus turn to the media to exert their power as watchdogs, there still remain zones of an elected leader's privacy in which the average American would grant another should not be subject to scrutiny. The fact that an elected leader snores, gets upset when he loses at Scrabble, or likes to play Tarzan and Jane with his wife amounts to power in the hands of the person who would exploit this knowledge to humiliate or damage the elected leader's reputation.

And we Americans would say people should not have that kind of power over our elected leaders because this information is none of this is our business

The interests of Americans to avoid embarrassment and to maintain some kind of private sphere can also be extended to political leaders. An elected leader should not cover an error made in his official capacity to avoid embarrassment, but we don't need to hear that he walked through the screen door (sober). And we allow that the elected leaders shouldn't have to worry about someone choosing to tell us that our elected leader sings off-key in the shower, cries during sad movies or got slapped by his son last night during a family argument. Americans would allow that an elected leader has some kind of private sphere in which they are free from scrutiny. Our elected leaders, like us, need the independence to develop individually, define themselves, think creatively and raise a family. The issue then is, where is the line that defines this private sphere? Does the public's right to know override the right or value of privacy for the elected leader?

We have established that the public in a democracy has a certain right to know about the decisions and actions taken by elected leaders in their official capacity. But the point at which the "official capacity hat" is traded out for the "private capacity hat" is not universally understood or agreed upon.¹⁸¹

Those who argue that the right to know extends into the private lives of elected leaders come from two main schools of thought. The first viewpoint is that the private lives of our elected leaders may reveal fundamental points about the character of the elected

¹⁸¹ Polls and surveys since the mid 1980s have demonstrated that the American people are undecided and unclear about the allowance for privacy for elected leaders. Contradictory findings show public condemnation of an intrusive press, back-to-back with residual support for a watchdog press (Ibid, 103). Janeway (74-75) tells us, surveys have shown well above 50 percent for press scrutiny of political leaders as "worth it because it keeps [them] from doing things that should not be done," and against it by comparable margins for "excessive intrusiveness."

leader that would have bearing on whether or not private citizens would choose to vote for them. The idea is that it is our right to know the whole person who we select to represent us, because that whole person will make decisions, take action, and often times be a role model according to the person he or she really is. Gergen said, “People can reasonably debate how virtuous a public leader must be in private life.”¹⁸² There are many who believe that if a politician has erred in some way in his adult life, this error may be a disqualifier from public life. Gergen gives the example of adultery, saying some people feel, “If his wife can’t trust him, we can’t either.”¹⁸³ Other examples might be health issues, financial irresponsibility, or other moral issues such as abortion—“if she had an abortion herself, how can I believe she’ll stand by her politically neutral position on the abortion issue?”

The other school of thought is that sometimes the private life of an elected leader may have bearing on his ability to sustain the respect necessary to do his job. For instance, Kessler pointed out that people who are not respected won’t be followed.¹⁸⁴ Because often times people working closest to an elected leader are privy to all kinds of information about an elected leader’s private actions or demeanor, there is a risk the leader will not be effective due to lack of respect. Further, if the harmful private information makes its way to the people, as it did with the Clinton case, the elected leader may become even more ineffective due to the loss of respect of his constituents. Kessler said, as Clinton and his staff kept lurching from one gaffe to another, a transformation

¹⁸² Gergen, 346

¹⁸³ Ibid. Also, In January 1992, an ABC/Washington Post poll concluded that 6% of those polled would not vote for a candidate who had committed adultery (Brook, David, *The Seduction of Hillary Rodham* (NY: The Free Press, 1996), 254)

¹⁸⁴ Ronald Kessler, 255

took place in American politics “The President became a nonentity,” and news about the President moved from the front page to inside the papers ¹⁸⁵

In addition to the issue of respect and followership, this school of thought includes the idea that the private person and life sometimes infringes upon job performance. Historian Michael Beschloss wrote a book called *The Crisis Years: Kennedy and Khrushchev, 1960-1963*, which included Kennedy’s private behavior previously unwritten in history ¹⁸⁶. Janeway tells us Beschloss demonstrated the relevance of this information

“Beschloss showed how closely interwoven the two sides of Kennedy’s life were, how obsessive and intrusive on the presidential schedule his sexual liaisons were, that as to liaisons in real time, Kennedy was vulnerable to blackmail, foreign governments, the Mafia and J. Edgar Hoover of the FBI. Additionally, he showed, Kennedy’s amphetamine-based treatments by a café society “Dr. Feel Good” may have affected his diplomacy”¹⁸⁷

Janeway added, “Beschloss’ presentation of the case of Kennedy was one in which the pieces of life did not separate out, public and private. They had to be weighed together to reach a balanced evaluation of his presidency.” Kessler says not every president who engages in extensive deceit in his private life will turn out to be a bad president, but he says trying to formulate distinctions between public and private actions of elected leaders is a meaningless exercise designed to shield presidents from accountability ¹⁸⁸

On the other side of the coin, the arguments against the public having a right to know about the private lives of elected leaders focus on the lack of political relevance of the private life to a reasonable public. Since the private action is not relevant to the

¹⁸⁵ Ibid, 265

¹⁸⁶ Janeway, 80

¹⁸⁷ Ibid

¹⁸⁸ Kessler, 252-53.

performance of the official, and because the reasonable public does not deem it relevant, it can remain private¹⁸⁹ Aspects of private life that have no political relevance for the American people, then, are not ones which the public has a right to know

Gergen said experience suggests that holding public leaders to standards of virtue in private life “sets the bar higher than we need or should expect”¹⁹⁰ Malcom Moos called revelations of private information about presidents a terrible disservice to the presidency and of “highly questionable taste and propriety”¹⁹¹ He explained, “After all, when a decision is made, it must stand on its own bottom History deals with the result, judgement of the man is secondary in importance.”¹⁹² Hillary Clinton, during a CBS *Sixty Minutes* interview in 1992 about allegations of Clinton’s affair with Jennifer Flowers said, “There isn’t a person watching this who would feel comfortable sitting on this couch detailing everything that ever went on in their life or marriage” She added,

¹⁸⁹ Polls supported this idea during the Clinton/Lewinsky issue Patrick Grogan and Chris Garratt reported, “Clinton’s popularity was consistently in the 60s and even 70s percent” (*Introducing American Politics* (NY: Totem Books, 1999), 157 Also, William F Buckley Jr “Forgiving the Unforgivable,” *Let us Talk of Many Things* (Rocklin, CA: Prima Publishing, 2000), 456) said: “What the moral tribunals will say of America’s behavior during the long year since last January is again difficult to predict Perhaps they will say that America showed a great sophistication in separating private conduct from public conduct” Or they might say “That for most Americans, conduct, unless it directly affects them, is no longer evaluated by what were once publicly acknowledged as public standards”) Janeway (91) pointed out that the poll ratings were not exactly in support of the President “Instead,” he said, “it wished that the Clinton sex scandal would cease to upstage the usual mundane news” Dick Morris (*The New Prince* (Los Angeles Renaissance Books, 1999) 120), political strategist, wrote, that polling shows “most of America believes that private matters should remain private” Sex scandals, he said, occupy a particularly low place in the electorate’s esteem Nina Easton *Gang of Five* (NY: Simon & Schuster, 2000) 397 quoted Bill Kristol, rightist publisher of the Weekly Standard, agreeing, “I know, I know His approval rating is sky-high. The American people don’t want to hear about his sex life”

¹⁹⁰ Gergen, 346

¹⁹¹ Moos, 169

¹⁹² *Ibid*, 164

“And I think it’s real dangerous in this country if we don’t have some zone of privacy for everybody ”¹⁹³

On this side of the issue, it is believed that the private life of an elected leader has no bearing on performance. Where Kennedy offers an example of how the private life and the public life may be inseparable, FDR offers the opposite example

“[Joseph P] Lash’s book [*Eleanor and Franklin*, which included posthumous revelations about the personal life of FDR] forced a reestimation of Roosevelt the man, though for some it only underscored the extent to which political leaders should be measured on the basis of his public record rather than on that of his private life. For the revelation did not detract from FDR’s accomplishments as president ”¹⁹⁴

The Clinton political team of 1996, according to Morris, used as a guide the idea that “public values offset private scandal ” Morris explained, by speaking up on issues such as tobacco use, drugs, and education, Clinton regained voter loyalty ¹⁹⁵

Our elected leaders are extended a similar right or value of privacy of private citizens, but the realm of privacy for him or her is narrower, to the extent that citizens have a right and a desire to know about this private realm. As a private citizen, I am entitled to vote for the candidate who I believe will best serve my interests and represent me. My criteria for selection of this candidate might justly include my evaluation of his character as a whole person. This could be because I believe the whole person ultimately does the job and therefore there is a connection between private and public life of my elected leader, it could be because some aspect of my elected leader’s private life may have bearing on his or her position on a contemporary moral issue which I hold very important, it might be because I feel his or her character will affect how successfully he or she interacts with the

¹⁹³ Brock, 255.

¹⁹⁴ Janeway, 78-79

people necessary to work with in order to lead me, or it could be because I simply don't want to find myself ashamed of my leader for something he or she has done or will do as my representative. Whatever my reason, if it comes from motivation to elect the leader who will do the best job, I am entitled to assess the leader as a whole person and to vote accordingly.

But just because I am entitled to vote based on character or information I am privy to about the elected leader does not mean the elected leader has an obligation to reveal matters he holds private to me. He or she can choose not to reveal this information, with the end result being the loss of my vote. When the majority rules, a candidate's choice to discuss his or her private life is simply politics.

How far should the public or news media be able to go to obtain private information about politicians when the politician does not openly reveal his or her private life and character? Legally, the door is open to anything that is not obtained illegally, i.e. breaking and entering. Morally, the answer seems to be that we can dig as deep as we feel the private life impacts the politician's conduct in public and job performance.

Gergen describes this as how journalists used to deal with the ethical dilemma

“When a politician's private life interferes with the way he conducts himself in public, we should draw the line. If he drinks too much, is licentious, uses hard drugs, gambles himself into debt—those go too far. Otherwise, we should show greater tolerance and respect for human foibles.”¹⁹⁶

But again, while we can demand our elected leader answer our questions, he or she is not obligated to do so. He or she can choose to protect the private realm and brave the political consequences.

¹⁹⁵ Morris, 129.

¹⁹⁶ Gergen, 346

The final question, then, before considering how the issue applies to the specific case of Clinton and Lewinsky, is whether or not it might ever be justifiable for an elected leader to lie to the public in defense of his or her privacy. Dick Morris said there is no way to “win” at scandal coverage. “The only way to come out alive is to tell the truth, take the hit, and move on,” he said.¹⁹⁷ This advice is good practical advice for a politician, but it doesn’t answer the moral question at hand.

There are three main types of instances in which an elected leader might be tempted to lie to protect his or her privacy. The first is to preempt the possibility that the public or media might obtain and release the private information. The second is in response to direct questioning about a private matter. The third is as a proactive response to an issue that has been raised to the press, i.e. “rumor control.”

A preemptive lie to prevent the truth from getting out, or to hurt the truth’s credibility if and when it may be released by the media, is the least likely to be justifiable, because the alternative to not say anything will most likely be appropriate. An example of a preemptive lie might be for a single person to say that he is very much in love with a particular woman, when in fact he is a practicing homosexual. The preemptive lie will cast doubt on the truth when the truth gets out. An elected leader can certainly take proactive measures to protect his or her privacy, like Kennedy did when he had his staff sign statements that they would not consult with writers or write themselves. But,

¹⁹⁷ Morris, 126. He (127) wrote: “The key in limiting the damage of a scandal is not to lie. It is rarely the scandal that gets you, it’s the lying. One lie leads to another, and soon what was an embarrassment comes to border on criminal obstruction of justice. Politicians who are wary of taking their medicine when a scandal breaks, and seek to dodge responsibility by not telling the truth are only digging a deeper hole for themselves.”

because alternatives to lying exist, making the lie avoidable, a proactive lie would rarely—or never—be warranted as a measure to protect privacy

When the elected leader is directly asked a question by the public via the media or some other avenue, the answer is more complicated. As Kant put it, to tell the truth is a duty, “but it is a duty only in respect to one who has a right to the truth”¹⁹⁸. We’ve established that the people have a right to vote based on information they are privy to about a politician’s character and private life, and that it is justifiable for them to seek the release information about the elected leader that may be deemed relevant to the leader’s ability to represent them, but we have not said that the people have a *right* to that information. On the contrary, we have said that an elected leader has the right to withhold it. It remains to be decided, does that elected leader’s right to withhold information allow for lying in order to do so?

In most cases, an alternative to lying would work in response to the direct questioning. An elected leader can simply say, “that matter is private, and I do not intend to discuss it.” But in some instances, such a statement would imply guilt. To say that an elected leader cannot justifiably lie to protect his or her privacy in this instance is to say that he or she must then live with the implication of guilt resulting from the use of an alternative to lying.

Whether or not it might be justifiable for the elected leader to lie ultimately depends on the political relevance of the subject in question. If the question is about his or her marital sex life, legal activities of his or her children, bowel movements or other matters that can safely be considered outside the realm of relevance to the political position, lying

might be justifiable if there are no alternatives and the particular circumstance passes the tests that elected leaders must use when justifying lying. If the question has definite relevance to the voter or constituent, including if it pertains to crime committed by the elected leader, then a lie cannot be told. The public's right to know and vote based on this information in this case overrides the elected leader's right or value of privacy. If the subject falls into a gray area, the tests for justification of lying can lead the elected leader to the justifiable answer, after ruling out alternatives and assessing the importance of protecting privacy in that instance, the same way they do for other types of lies. The difference in this case is that in addition to weighing the moral issues, one must first use the tests to make an honest determination of the subjects' relevance to the public.

In a situation where an elected leader feels compelled to respond to rumors that are gaining momentum in the public realm about some aspect of his or her private life, a lie from the elected leader may not be genuinely a lie to protect privacy. It may instead serve a different purpose, for instance, to avoid legal consequences once the door to the private realm is already open. Only the elected leader can know the true motive for the potential lie. If the would-be liar's goal is other than to protect his privacy, the elected leader can choose to not respond, tell the public it's none of their business, answer the public's call for truth, or determine if their non-privacy reason for lying is justifiable. If the goal is to protect privacy, then after ruling out alternatives and determining both the relevance to the public and the importance of privacy in that instance, the elected leader can use the tests to determine if a lie may be justifiable.

¹⁹⁸ Kant, *Critique*, 346-50. Kant still would not allow lying as an option to the person who has no right to the truth (see Ch. 1 discussion of Kant).

CHAPTER VI

CONCLUSION

Can Clinton's lie to the public about his relationship with Monica Lewinski pass the tests for justification as a privacy lie? Only Clinton can know the true answer to this question, because the answer depends on whether or not his lie was genuinely to protect his privacy

A lie at that stage in the scandal could not fully protect his privacy with regard to the particular scandal, although protecting his privacy may have still been his intention Clinton lied to his staff and the public *after* the scandal hit the papers He went on camera and told the nation he did not have sexual relations with "that woman" *after* the news of the scandal had already broke, in response to news reports about the matter Because his privacy had already been intruded upon at this point, his motive may have been not to protect his privacy but to salvage his reputation and prevent further embarrassment for him, his family and our nation (note it likely also was meant to have an impact on ongoing legal proceedings, but the purview of this paper will continue to set aside the issue of the legal proceedings) While lies for these reasons may be justifiable, they do not fit neatly into the category of a lie to protect privacy Furthermore, alternatives, such as stating that the information is not the public's business or stating that yes it happened and I was wrong, could accomplish the same objectives

If we assume the motive of the lie was genuinely to protect his privacy, then the possibility exists that it was justifiable. In Clinton's case, he considered the Clinton-Lewinsky issue to be a matter between him, his wife, his daughter and God. "It's nobody's business but ours," he said.¹⁹⁹ So a lie might be justifiable if deemed so after first determining if he is right that it was nobody's business but his family's, ruling out alternatives, weighing the moral arguments and then finally applying the tests.

If a president having adulterous sexual relations in the oval office with a member of his staff would be relevant to the public, then a lie in this case would not be justifiable. But a reasonable public would not find the issue relevant—one only has to use common sense, look at our history (it was not relevant for former presidents who did the same), and note contemporary political issues (adultery is far from a debated political issue). The fact that the adultery took place in the White House with the President's staff aggravates the issue because it shows poor professional judgment, but the fact remains that a reasonable public would not need this information to cast their votes.

If alternatives existed that would have effectively protected Clinton's privacy, then his lie was not justifiable. Given his circumstances, it is difficult to imagine any alternative that could accomplish that mission. The news was out, and every course of action I can think of other than lying would only contribute to the public's perception that the news was true.

After ruling out alternatives, we weight the moral arguments. In this case the moral arguments are the President's right to (or value of) privacy versus the public's right to vote based on any information available to them about the leader. As we mentioned earlier, the fact that the people are entitled to vote based on personal information they

receive about a candidate does not obligate the candidate to provide the information. The moral arguments here certainly allow for Clinton to choose to protect his privacy and hold that value over the public's value of being informed voters. Since justification for the lie still is possible, we can move on to application of the tests.

The "consult the dupe" test, as mentioned earlier, is not very effective for elected leaders because of the number of dupes—he cannot consult each one of them. He might study opinion polls taken with regard to similar issues, if there were any available, but the results would not be dependable, nor would they be tailored to the particular lie under consideration.

For the Golden Rule test, we ask, "If the President were the private citizen, a member of the public he's considering lying to, and John Doe were the leader, would the President want John Doe to lie to him to protect his privacy regarding extra-marital sexual relations he engaged in at the White House? Or would he feel John Doe would be doing him an injustice?" It is reasonable that the President would think, "No, if I were the private citizen, I wouldn't care. Obviously I'd prefer my elected leader not lie to me, but I'd understand his reasoning for doing so in this case—heck, I'd probably do the same if I were in his shoes. And as a private citizen, it's really none of my business." For the Golden Rule to work, it has to be applied with regard to different types of private citizens, considering race and culture, professional and religious affiliations, and political party. Again, it is reasonable to conclude a lie in his circumstances was justifiable. Putting oneself in so many others' shoes is difficult, which is why this test should be used in conjunction with as many other tests as possible.

¹⁹⁹ Gail Sheehy, *Hillary's Choice* (NY: Random House, 1999), 323

The “directed to reasonable persons” test would yield a similar answer as the Golden Rule test, and it would share the same handicap—that it is difficult to avoid one’s own bias when considering how a reasonable person would respond. Similarly, combining this test with the first level of the test of publicity—“via conscious or imagined others”—yields a similar answer and has the potential to succumb to significant bias. This is also true for the Velino test. If we can successfully perceive the ramifications of the lie for reasonable people of different allegiances or bias, then the test can work. An earnest attempt at applying these four tests by a reasonable leader with integrity should bring about a just conclusion.

Combining the “directed to reasonable persons” test with the second and third levels of the test of publicity is more effective. The second level, “via actual others by reaching out for advice,” is the minimum test that should be used when short on time and resources, and the third level, “via consulting persons of different allegiances and bias,” would yield the most dependable result. Neither of these options would be available, however, before the time to tell the lie, if the President could not turn to people he could trust to keep his secret. Those trusted people would reasonably and likely yield the same answer—that the best and justifiable option (if the goal here is to protect privacy) is to lie—as the person applying the test as long as each person approached the question with integrity. To consult persons of different allegiances and bias is even more difficult before the fact, because they would be much less trustworthy with the information. But it is still reasonable to conclude that a lie would be justified in this case, because reasonable persons of any allegiance or bias would know the lie to be a reasonable and justifiable action.

The simplest test—a shortcut—would be the Front Page Rule. In advance, the President would ask himself, “What if I lie, and then somehow the fact that I lied in this particular case shows up on the front page of tomorrow’s newspaper? Could I answer to the satisfaction of the public why I had lied, and could I live with that answer politically and personally?” We could tell by Clinton’s body language in his second speech mentioned in my introduction that Clinton felt his lie was justifiable—and the fact that he did lie indicates he probably thought he could live with the consequences politically and personally. If he felt his lie was truly justifiable, he would believe he could still look the public, himself and his family in the eye after getting caught in it (lying anyway, not necessarily the action about which he lied). If I were in the same position—and if I were compelled to protect my privacy instead of own up to my actions, I would weigh my desire to protect my privacy against my willingness to defend myself and accept the consequences of getting caught in the lie. The Front Page Rule test isn’t an effective tool on its own for justification of lying, because it cares less about justifiability than about whether or not the action can withstand the publicity, but used along with the other tests it can provide an additional sanity check.

The only way these tests would yield an answer that deems the lie unjustifiable is if the truth behind the lie is relevant to the reasonable voter. But before ever reaching the tests, we have to conclude that the issue was irrelevant (albeit probably very interesting) to the voters and that there were no alternatives. Relevancy to the voters of particular aspects of a politician’s private lives will change with the times and changing political priorities. In Clinton’s case, in today’s times, it is reasonable to conclude that his extra-marital sexual encounters are politically irrelevant. And determining if there are

alternatives depends on the motive of the would-be liar. For many would-be liars, a simple “it’s none of your business” or owning up to the truth might have worked. But if Clinton’s motive was truly to do his utmost to protect his privacy, the choice to lie meets his goal much better than the alternatives.

The bottom line in any case where one might consider lying is to remember that we the people consider *being unjustifiably lied to* intolerable. As the loved one, we would be devastated to know we were unjustifiably lied to, as the boss, there would be consequences for an employee who unjustifiably lied to us, as friends and acquaintances, our good will toward the unjustified liar would turn to ill will, and as constituents, our trust in our leader’s ability to represent us will be damaged. In Clinton’s case, as in any other, the preferred course of action must always be the alternative to lying. But when the alternative is not appropriate, a lie may be justified.

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