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Private Lives and Professional Responsibilities? The Relationship of Personal Morality to Lawyering and Professional Ethics

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Essays

Private Lives and Professional Responsibilities? The Relationship of Personal Morality to Lawyering and Professional Ethics

The Philip B. Blank Lecture on Attorney Ethics

Pace Law School, October 19, 2000

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Table of Contents

I. The Problems.....	366
II. Philosophical Solutions	374
III. Practical Solutions: How Should A Lawyer's Private Life or Personal Morality Affect Professional Responsibility?	387

1. Professor of Law, Georgetown University Law Center and Chair, CPR-Georgetown Commission on Ethics and Standards in ADR, Visiting Professor, Harvard Law School, Spring 2001. Thanks to my host, Steven Goldberg and his many fine colleagues at Pace for their hospitality and good (and critical) comments on my lecture, especially my friend Vanessa Merton whose critical counsel I always appreciate. Thanks also to Mrs. Philip Blank for good and caring conversation, for whom I wish the best. Thanks as well to the best research assistant a professor ever had, Meredith Weinberg, who keeps me well blue-booked, corrects my grammar, and most importantly, keeps me in touch with the culture in which we live. Thanks also to my research assistant at Harvard Law School, Hannah Weiss. This article is dedicated to all of us with personal flaws who still seek to work hard to make the world a better place, not the least of whom is our outgoing President. To paraphrase another President (Nixon), I suspect a lot of us will miss not having him "to kick around anymore."

I. The Problems

Consider the following "intrusions" of personal conduct into the public lives of a variety of professionals:

- John Tower's rejection as Secretary of Defense because of alleged drinking and "womanizing"²
- Gary Hart's loss of the Presidential nomination due to dishonesty and deceit about his adulterous affairs;
- President Bill Clinton's impeachment for perjury and obstruction of justice in one sexual harassment case linked to his behavior in a consensual sexual liaison with a White House intern;³
- Senator Packwood's forced resignation from office due to many claims of sexual harassment;⁴
- Mayor Giuliani's televised announcement of his plans to divorce his wife and spend his future with a partner from an adulterous liaison, while recuperating from cancer;
- Posthumous disclosure (widely believed during his lifetime) of President Thomas Jefferson's unmarried sexual (and perhaps loving) relationship with slave Sally Hemings;⁵
- Judge Sol Wachtler's removal from office and incarceration for criminal harassment following termination of an adulterous relationship and for threats made to his former lover and her family;⁶

2. See DEBORAH TANNEN, *THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE* 101 (1998).

3. See generally JEFFREY TOOBIN, *A VAST CONSPIRACY: THE REAL STORY OF THE SEX SCANDAL THAT NEARLY BROUGHT DOWN A PRESIDENT* (1999); RICHARD POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON* 16-19 (1999).

4. See Katharine Q. Seelye, *The Packwood Case: The Overview; Packwood Says He is Quitting as Ethics Panel Gives Evidence*, N.Y. TIMES, Sept. 7, 1995, at A1 (describing Senate Ethics Committee's finding that "the Senator engaged in a pattern of abuse of his position . . . by repeatedly committing sexual misconduct making at least eighteen separate unwanted and unwelcome sexual advances between 1969 and 1990").

5. See FAWN BRODIE, *THOMAS JEFFERSON: AN INTIMATE HISTORY* 29, 31-32, 85, 228-34 (1974); ANNETTE GORDON-REED, *THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY* 1, 40-43, 60-61, 222 (1997). See generally SALLY HEMINGS & THOMAS JEFFERSON: *HISTORY, MEMORY AND CIVIC CULTURE* (Jan Ellen Lewis & Peter S. Onuf eds., 1999).

6. See generally SOL WACHTLER, *AFTER THE MADNESS: A JUDGE'S OWN PRISON MEMOIR* (1997).

- Kelly Flinn's discharge from the United States Air Force following disclosure of her adulterous relationship;⁷
- Withdrawal of nomination of General Ralston for Joint Chief of Staff following disclosure of an earlier adulterous affair;
- Resignations of members of Congress Livingston, Gingrich and public "apology" of Dan Burton, following disclosures of affairs, children born out of wedlock and "hypocrisy,"⁸ exposed by Penthouse publisher Larry Flynt, following Clinton sex scandals;
- Resignation from Congress of Joseph Kennedy, following a scandal involving his pursuit of an annulment of his marriage of twelve years;⁹
- Disclosure of a variety of sexual liaisons between President John F. Kennedy and a number of paramours;¹⁰
- The now common knowledge that President Franklin Roosevelt had an on-going adulterous and loving relationship with his wife's social secretary, both before and after entering the White House;¹¹
- Disclosure of President George W. Bush's arrest and conviction for driving while under the influence of alcohol some years before his candidacy;¹²
- Countless rumors about the sex lives of other United States Presidents;¹³
- The forced resignation of British Secretary of State for War John Profumo, following the disclosure of his adul-

7. See KELLY FLINN, *PROUD TO BE: MY LIFE, THE AIR FORCE, THE CONTROVERSY* (1997).

8. See JUDITH SHKLAR, *ORDINARY VICES* 226-249 (1984).

9. See SHEILA RAUCH KENNEDY, *SHATTERED FAITH: A WOMAN'S STRUGGLE TO STOP THE CATHOLIC CHURCH FROM ANNULING HER MARRIAGE* (1997).

10. See SEYMOUR M. HERSH, *THE DARK SIDE OF CAMELOT* 24, 387 (1997).

11. See BLANCHE COOK, *ELEANOR ROOSEVELT* 6, 9, 217-18, 220, 224, 228-32 (1993).

12. See Jim Yardley, *The 2000 Campaign, The Endorsement; Perot Supports Bush, Citing Character and Texas Record*, N.Y. TIMES, Nov. 3, 2000, at A27.

13. See WESLEY O. HAGOOD, *PRESIDENTIAL SEX: FROM THE FOUNDING FATHERS TO BILL CLINTON* (1995); see, e.g., ARNOLD A. ROGOW, *A FATAL FRIENDSHIP: ALEXANDER HAMILTON AND AARON BURR* 65-68 (1998) (noting claims, substantiated and not, about important founding fathers and cabinet officers such as Alexander Hamilton's affair with his sister-in-law).

terous liaison with “model” Christine Keeler (who was rumored to be consorting with Russian spies);¹⁴

- The failed Cabinet appointments of several appointees, mostly women, such as Zoe Baird and Kimba Wood, for failing to pay social security taxes for childcare workers (otherwise known as “Nanny-gate”);

and from different categories of professionals (academics, writers and scientists):

- the now public affair of Hannah Arendt, Jewish philosopher and her mentor Martin Heidegger, collaborator with the Nazi regime;¹⁵
- Alfred Einstein’s unhappy marriage and divorce from his first wife, Mileva Maric Einstein and his irresponsible family life;¹⁶
- the mutually abusive relationship of Mary McCarthy and Edmund Wilson;¹⁷
- the 15 year affair of married Catholic author, Graham Greene, which inspired his famous novel, *The End of the Affair*;¹⁸
- the strange liaison between feminist legal theorist Catherine MacKinnon and noted womanizer Jeffrey Masson;¹⁹

and finally, in fiction,

14. See generally LORD ALFRED DENNING, JOHN PROFUMO AND CHRISTINE KEELER (London: The Stationery Office ed., 1999) (1963).

15. See generally ELZBIETA ETTINGER, HANNAH ARENDT · MARTIN HEIDEGGER (1995); Seyla Benhabib, *The Personal is Not Political*, BOSTON REVIEW, Oct.-Nov. 1999, at 45.

16. See ANDREA GABOR, *EINSTEIN’S WIFE: WORK AND MARRIAGE IN THE LIVES OF FIVE GREAT TWENTIETH-CENTURY WOMEN* (1995).

17. See, e.g., FRANCES KIERNAN, *SEEING MARY PLAIN: A LIFE OF MARY MCCARTHY* (2000); CLAUDIA ROTH PIERPONT, *PASSIONATE MINDS: WOMEN REWRITING THE WORLD* 266 (2000); Claudia Roth, *Hearts and Minds: The Letters of Hannah Arendt and Mary McCarthy*, NEW YORKER, Mar. 20, 1995, at 97. See generally BETWEEN FRIENDS, *THE CORRESPONDENCE OF HANNAH ARENDT AND MARY MCCARTHY* (1995) (a collection of the letters between Hannah Arendt and Mary McCarthy).

18. See WILLIAM CASH, *THE THIRD WOMAN: THE SECRET PASSION THAT INSPIRED THE END OF THE AFFAIR* 14, 15 (2000).

19. See Dinitia Smith, *Love Is Strange*, N.Y. MAG., Mar. 22, 1993, at 35.

—the adulterous relationship of Hester Prynne and Arthur Dimmesdale, Puritan minister.²⁰

What are we to make of the relationship of personal lives to professional work, responsibility and morality? What is relevant to the consideration of what makes a good lawyer, both for purposes of admitting a new entrant to the bar and for purposes of disciplining, sanctioning or removing a member of the legal profession?²¹ To what extent must legal professionals be judged by different standards than those applied to other professionals²² or from those applied to them in their capacity as ordinary human beings?²³ (This, of course, became a national issue in the recent impeachment controversies as we debated whether President Clinton had special obligations as the nation's chief

20. See NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Penguin 14th ed., 1986); see also Carrie Menkel-Meadow, *The Scarlet Letters of Sex and Gender, Morality and Law, Religion and Work and Individual and Community: From Hester Prynne to Kelly Flinn* (1999) (unpublished manuscript, on file with the author).

21. See generally Deborah Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985); Deborah Rhode, *Moral Character: The Personal and the Political*, 20 LOY. U. CHI. L.J. 1 (1988); Donald Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 TEX. L. REV. 267 (1970); Barrie Althoff, *Big Brother is Watching: Discipline for Private Conduct*, 11 PROF. LAW. 16 (Spring 2000) (discussing views of Barrie Althoff, Chief Disciplinary Counsel for the State of Washington at the 26th National Conference on Professional Responsibility).

22. Lawyers, along with doctors, psychiatrists and now psychologists, are often credited as having the most developed ethical codes, often imitated, replicated and copied by other professions and those seeking professional status. See GERALD P. KOOCHER & PATRICIA KEITH-SPIEGEL, *ETHICS IN PSYCHOLOGY: PROFESSIONAL STANDARDS AND CASES* (2d ed. 1998) (ethical standards as applied to psychiatrists); Lynn Sharp Paine, *Moral Thinking in Management; An Essential Capability*, in *ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES AND REGULATION* 59-74 (Deborah Rhode ed., 2000); ALAN GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 1-7 (1980). See generally Bernard Williams, *Politics and Moral Character*, in *PUBLIC AND PRIVATE MORALITY* 55-74 (Stuart Hampshire ed., 1978); ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES; THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* (1999); JOSEPH L. BADARACCO, JR., *DEFINING MOMENTS: WHEN MANAGERS MUST CHOOSE BETWEEN RIGHT AND RIGHT* (1997) (ethical standards as applied to managers); DAVID MURRAY, *ETHICS IN ORGANIZATIONS* (1997).

23. This is now a "classic" issue in legal ethics. See Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?* GEO. J. LEGAL ETHICS (forthcoming). See generally Gerald Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443 (1999); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. Q. 1-5 (1975).

law enforcer²⁴ or whether his actions were within the private sphere.²⁵) For public officials, there are analogous issues about the appropriate standards for appointment (vetting), confirmation (like "admission" to the bar), removal from office, and indictment or subjection to some other form of discipline. The same lack of clarity about standards (whether it is appropriate to vote against or challenge a political appointment on political or ideological grounds or only on "personal or legal misconduct" grounds) in the public sphere is evident in our varying standards about lawyer discipline.

The scope of inquiry into a lawyer's private life has had an accordion-like existence in American history, opening and closing in relation to larger political and social forces. This existence has been affected by political affiliation,²⁶ changing sexual mores,²⁷ changing social habits,²⁸ evolving concerns about mental and physical health,²⁹ changing boundaries in defini-

24. See, e.g., Deborah Rhode, *Conflicts of Commitment: Legal Ethics in the Impeachment Context*, 52 STAN. L. REV. 269, 270 (2000); Neal Katyal, *The Public and Private Lives of Presidents*, 8 WM. & MARY BILL RTS. J. 677 (2000).

25. See, e.g., Lawrence Fox, *Clinton Sanction: Disbarment*, NAT'L L.J., Oct. 26, 1998, at A25 (discussing the application of Arkansas Rules of Professional Conduct to President Clinton's actions); see also, e.g., Don Van Natta, Jr., *Panel Advises That Clinton Be Disbarred*, N.Y. TIMES, May 23, 2000, at A1; Neil Lewis, *Clinton is Angry and Dispirited Over Disbarment Fight, Friends Say*, N.Y. TIMES, Sept. 10, 2000, § 1, at 22; Southeastern Legal Foundation, *Clinton Legal Ethics Timeline*, available at <http://www.southeasternlegal.org/newsdescrp.asp?R1=43> (visited Oct. 17, 2000).

26. See, e.g., *In re George Anastaplo*, 366 U.S. 82 (1961) (admission to state bar denied because applicant refused to answer questions concerning communist party affiliation); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36 (1961); *Schwartz v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232 (1957); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971). See generally JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976).

27. *Cord v. Gibb*, 254 S.E.2d 71 (Va. 1979) (reversing denial of admission for lack of good character to unmarried co-habitant). See, e.g., Fla. Bd. of Bar Examiners *Re N.R.S.*, 403 So. 2d 1315 (Fla. 1981) (holding that noncommercial, private, and consensual sexual conduct does not disqualify a homosexual applicant from admission to the bar); *Vaughan v. Bd. of Bar Examiners*, 759 P.2d 1026 (Okla. 1988) (where court denied admission to man who was accused of being sexually involved with 14-year-old).

28. See RICHARD A. ZITRIN & CAROL M. LANGFORD, *LEGAL ETHICS IN THE PRACTICE OF LAW: RULES, STATUTES AND COMPARISONS* 629 (1995) (Alcoholism and drug use sanctions and disbarments are more frequent today than in the past).

29. See, e.g., *Texas State Bd. of Law Examiners v. Malloy*, 793 S.W.2d 753, 757, 759-60 (Tex. 1990); *Application of Ronwin*, 555 P.2d 315 (Ariz. 1976) (exam-

tions of "moral turpitude,"³⁰ and the use of "indirect" offenses.³¹ It has also been affected by the more intense scrutiny of some activities that are considered to be relevant to professional practice, such as financial abuses including over-billing clients,³² personal bankruptcy,³³ failure to pay bills, taxes³⁴ or student loans,³⁵ and insider trading.³⁶

American historians have long noted that Americans seem particularly obsessed with the private lives of public figures.³⁷ The democratization of the United States in its early years drew personal scandals into the public realm. For instance, James Callendar's "commissioned" articles on Adams, Jefferson, Hamilton and other national figures were intended to embarrass the subject of the articles and, therefore, to affect voting and reputation.³⁸ Expanded political participation brought "no-holds-

ples of how mental health issues have been handled); *see also* Barr v. Nat'l Conf. of Bar Examiners, 182 F.3d 931 (Table), 1999 CJ C.A.R. 2834 (10th Cir. 1999) (blind applicant); Bartlett v. New York State Bd. Of Law Examiners, 226 F.3d 69 (2nd Cir. 2000) (dyslexia). In more recent years, some applicants to the bar have raised questions about the applicability of the Americans with Disabilities Act and privacy laws to both inquiry into and rulings on these bases. Doe v. Judicial Nominating Comm. for 15th Judicial Circuit of Florida, 905 F.Supp. 1534 (S.D. Fla. 1995) (denying attorney's claim that inquiry into physical and mental health on application form for judicial appointment violated the ADA).

30. The Code of Professional Responsibility focused on acts of moral turpitude (both in convictions for criminal activity and non-conviction offenses). The newer Model Rules focus more on acts and crimes that have some relationship to the practice of law. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4 (2000).

31. Some argue that the "lack of candor," lying or perjury standards, when applied to statements made in admission applications or statements to moral fitness committees, are really a way of "smoking out" undesirable substantive activity, whether political or sexual affiliation. *See e.g., In re Greenberg*, 614 P.2d 832 (Ariz. 1980). Thus, some have argued that those that sought impeachment and conviction of President Clinton cloaked their desire to deal with his sexual misconduct as a trial about perjury and obstruction of justice. *See* TOOBIN, *supra* note 3; Katyal, *supra* note 24, at 684; Robin West, *Sex, Harm and Impeachment* (unpublished manuscript, on file with the *Pace Law Review*).

32. *See generally* Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205 (1999).

33. *See, e.g., In re Anonymous*, 549 N.E.2d 472, 474 (N.Y. 1989).

34. *See In re Shorter*, 570 A.2d 760 (D.C. 1990).

35. Application of Gahan, 279 N.W.2d 826 (Minn. 1979); Application of Taylor, 647 P.2d 462, 456-67 (Or. 1982).

36. Chadwick v. State Bar, 776 P.2d 240 (Cal. 1989).

37. JOYCE APPLEBY, *INHERITING THE REVOLUTION: THE FIRST GENERATION OF AMERICANS* (2000); WILLIAM SAFIRE, *SCANDALMONGER* (2000) (novel about American public leaders).

38. *See* JOSEPH ELLIS, *FOUNDING BROTHERS* 197-198 (2000).

barred conflicts into the larger realm of civil society"³⁹ and deep value conflicts about slavery and the role of religion in early nineteenth century America. This participation, along with such public dispute resolution devices as brawls, open courtrooms and duels,⁴⁰ lessened the distinctions between public and private life. Thus, in the words of one historian, "the boundaries between private and public came to rest upon what was and was not known. The arcana of government no longer formed a protective seal around the public figure."⁴¹ In comparison, France has long tolerated a leader with a second, illegitimate family. The British monarchy survives despite countless acts of infidelity and illegitimacy in the last few centuries; countless British public officials, judges and lawyers engage in all kinds of personal and even financial misdeeds with relative impunity in a wide range of political regimes. Many report that in the last few years, the revival of Puritan sexual morality in the United States was the brunt of many jokes in Europe and elsewhere.⁴²

While many Americans obsessed over private scandals made public, believing Puritanical standards applied, others became concerned about the hypocritical ways in which such standards were enforced. The Kelly Flinn scandal began to unravel the sexism in military enforcement of the "gentleman and officers" code of sexual fidelity.⁴³ Some in the military have questioned whether it made sense for the military to have different standards than civilians about sexual practices and morality.⁴⁴ Somewhat ironically, Congressional prosecutors were found to

39. APPLEBY, *supra* note 37, at 40-41.

40. *See id.* at 41. (An interesting study by Tennessee legislators in the early 1800s revealed that lawyers fought almost 90% of all duels, so the state began to require a disavowal of dueling as a condition for admission to the bar.)

41. *Id.*

42. Jonathan Glancey, *Designs on Havana*, THE GUARDIAN, Jan. 11, 1999, at 10 (describing American infiltration of Cuba, stating "the world of Washington, white American politics and hypocritical puritan moralising seems a universe away").

43. *Adultery Rules*, NAT'L. L.J. June 23, 1997, at A-14; Gideon Kanner, *Flinn's Case Involves More than Simple Adultery*, L.A. DAILY J., June 13, 1997, at 6; Margery Eagen, *Pilot's Ordeal Shows Military's Double Standard*, BOSTON HERALD, May 18, 1998, at A-8.

44. *See* Glancey, *supra* note 42; *see also* Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305 (1998).

be guilty of the same activity, or worse than the President.⁴⁵ Many have asked what business it is of the public's that the Mayor of New York has prostate cancer, has been having an affair and wants to divorce his wife, who seems to prefer to "work on the marriage."⁴⁶ Should public officials and lawyers be held to different standards than ordinary citizens? What are the standards of private and public morality that we should apply to public officials, lawyers and private citizens? Are they the same for all, or should we, indeed, have an accordion-like spectrum or continuum of moral judgments, depending on role or function?

Another example is the John Tower episode. As a legal ethicist and former employment lawyer who always argued that employment discharges had to be "for cause" with some nexus to the job itself, I have long been concerned about the issues of the relation of private life to public office and occupational morality. Here I will share some of my constantly evolving thoughts about the proper standards we should apply, as contrasted with those we have applied, both formally and in our public and private acts of judgment, evaluation and condemnation. Of course; the question of what rules and standards should be used and applied by professional disciplinary authorities may be quite different than the standards we use in voting for a political candidate, choosing a marriage partner or making personal judgments about who is a "good person." I begin by stating that we must acknowledge there may be differences between occupational morality and everyday personal morality. Of course, another good place to start is with the maxim "judge not, lest ye be judged" or with Hillel's admonition to "not judge a person until you have been in his position—you do not under-

45. Most recently it has been revealed that one of the primary actors in Clinton's disbarment proceedings in Arkansas was himself arrested for exposure and fondling (public indecency) in a public park. *Clinton Adversary Held On Charge of Indecency*, N.Y. TIMES, Oct. 5, 2000, at A22; Don Plummer, *Conservative Foundation Leader Quits; Denies Charges; Glavin Says Resignation Would Let Him "Protect My Family" from the Glare of Public Indecency Case*, THE ATLANTA JOURNAL AND CONSTITUTION, Oct. 5, 2000, at 1E (describing how Matthew Glavin, President of the Southeastern Legal Foundation, a conservative advocacy group, has twice been arrested for masturbating and fondling a ranger in a Chattahoochee River National Recreation Area in an area that rangers call a "hot gay cruising area").

46. Clyde Haberman, *Inviting an Invasion of Privacy*, N.Y. TIMES, July 8, 2000, at B1.

stand even yourself until the day of your death.” (If then, I would add as a post-modernist post-script).⁴⁷

Our moral judgments should be variable, dependent on the demands of the profession or occupation, both in its duties and responsibilities to particular clients or constituencies. This suggests that different functions and occupational statuses may call for different standards of judgment, a sort of situational occupational morality. There are two key values in assessing the relationship of personal behavior to professional accountability – some “nexus” of the personal behavior to the professional role (the scope of which is still highly contestable)— and integrity of judgment and enforcement (by which I mean no hypocrisy or selective judgment in the application of standards). I suspect that the latter is an even harder condition to satisfy since so many in public, professional and private life seek to condemn or judge others for what they, or others they “forgive,” have done themselves. I have no easy answer or solution to the question of how we should judge others. However, as someone interested in “moral dialogue,” I believe we learn something by at least honestly discussing the issues.

II. Philosophical Solutions

The idea that those in public life were to be privately unsailable probably dates from Plato’s *Republic*.⁴⁸ There, Plato argued that the ruling guardians of the polity were, in effect, to have no private life apart from their political duties.⁴⁹ Family, domestic concerns, and satisfaction of the needs of the body were considered bad distractions from the use of reason to govern properly.⁵⁰ In Rousseau’s vision, “every citizen will feel himself to be incessantly in the public eye.”⁵¹ For Hegel, interests of the state were considered superior to private life because when an individual was acting in service to the state, private

47. *Matthew* 7.1 (King James); *Pirkei Avos* 2:5 (advice from the Sages in the Mishnah, which explains Judaic laws and customs).

48. PLATO, *THE REPUBLIC* (Benjamin Jowett, trans. 1986).

49. *Id.* at Ch. 5 (“ . . . and they were to have no private expenses; for we intended them to preserve their true character of guardians”).

50. *See id.* (“And as they have nothing but their persons which they can call their own, suits and complaints will have no existence among them. . .”).

51. DENNIS F. THOMPSON, *POLITICAL ETHICS AND PUBLIC OFFICE* 125 (1987).

and public ends were identical.⁵² Marx also saw an interest in maintaining private life as a characteristic of bourgeois class interests.⁵³ It is only the classically liberal political thinkers who saw a role for separate spheres of privacy as part of liberty's promise of autonomy.⁵⁴

Thus, we are left with an historical anomaly. We seem to insist on more privacy in our lives as modern conditions have made the existence of private lives less possible. The possibility of more and closer scrutiny, through press, technology, and proximity, has necessitated more private space. So we can ask whether certain types of professionals, public officials or other workers (teachers, clergy) are entitled to less privacy and should be subjected to more public scrutiny than others. Is it possible to articulate a theory of "universal privacy" or "private morality?" Or, must we establish, what Dennis Thompson has called, "diminished privacy" for public officials based upon their occupations? Let us review what might be the possible justifications for each.

The claims that we must have a universal sphere of personal privacy and a private right of action are deeply rooted in our political theories regarding liberalism, constituted by the values of liberty, autonomy, and individualism. Ultimately, in our most extreme version of liberalism, we are accountable to no one but ourselves (and our own God).⁵⁵ We need a private

52. G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* (T.M. Knox, trans., 1962).

53. See THOMPSON, *supra* note 51, at 125; Karl Marx, *On the Jewish Question* in *MARX-ENGEL READER* (Robert Tucker ed., 2d ed. 1978).

54. See generally JOHN STUART MILL, *ON LIBERTY* (Bobbs-Merrill ed., 1956); See also JEREMY BENTHAM, *POLITICAL TRACTS* (1790); JOHN LOCKE, *OF PROPERTY AND GOVERNMENT* in *THE LIBERTARIAN READER* (David Boaz ed., 1997) (John Stuart Mill, Jeremy Bentham, and John Locke recognized private property and Thomas Jefferson claimed "the pursuit of happiness" as a civic right in the Declaration of Independence).

55. Relational feminists, among others, have suggested that we are also responsible to those we care for and who care for us. See JOAN TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* (1993); CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); ROBIN WEST, *CARING FOR JUSTICE* (1997); Carrie Menkel-Meadow, *What's Gender Got to Do With It?: The Politics and Morality of an Ethic of Care*, 22 N.Y.U. REV. L. & SOC. CHANGE 265 (1996). Indeed, relational feminism has made its way into modern moral dilemmas in two ironic ways. On the one hand, President Clinton's transgressions are between him and his wife and none of our business, but on the other hand, feminists argue that if he treats women, his wife and his daughter, so badly (deceitfully, as well as abusively) how can he be our leader? See Katharine Seelye, *Investigating Clinton: Female Views; On*

sphere for release and relaxation, and thus, the more stressful the job, perhaps the more private release one needs.⁵⁶ Privacy is essential for obtaining good advice, which is why we promise confidentiality in lawyer-client relations, and is necessary to assure that talented people will serve in public office. People holding public office and people who are engaged in certain other stressful jobs, such as policing, teaching, lawyering, and medical care, may be especially in need of private solace, friendship, trust, love and renewal in order to accomplish their jobs.⁵⁷ We all need a place without intrusion or fear of being watched.⁵⁸ It may be that we negotiate private moral codes in smaller units than public life or public morality would allow.⁵⁹ If we do not allow some place where there is a sufficient level of privacy, it is argued that we will not be able to recruit people to accept public jobs. Leaders must be allowed their privacy so that all of us can enjoy our own privacy. Therefore, to observe one's own privacy is to respect that of others as well. It is argued that character itself is best developed within the crucible of private

the Tightrope, Many Democratic Women are Saying Little, N.Y. TIMES, Feb. 2, 1998, at A18. In a form of modern day feminist Machiavellianism, Clinton is defended by many feminists (myself included) because, from a totally utilitarian perspective, he has been better for more women than probably any single previous office holder at his level. Former Senator Packwood, would, of course, make similar claims. See Francis Clines, *The Packwood Case—In the Senate; Recalling a Public Life, Not A Private Scandal*, N.Y. TIMES, Sept. 8, 1995, at D17 (discussing then-Senator Packwood's resignation speech in which he described his early days of advocating for abortion rights for women). Notice the differences in the treatment of the sexual behaviors of Gary Hart and Senator Ted Kennedy. See Anna Quindlen, *Public and Private; Trouble with Teddy*, N.Y. TIMES, Oct. 19, 1991, § 1, at 23.

56. Does this explain why so many effective officeholders have such large appetites, sexual, as well as culinary, physical (sports) or bestial (hunting, fishing, etc.)? Would women in power have different release activities (cooking, shopping, animal and child tending, gardening)?

57. Renewal may not come to all in conventional family life. Thus, some would prefer "wine, women and song" (or drugs, sex and rock'n'roll in modern parlance) to achieve solace and comfort from the stressful work of the day.

58. I suppose even an exhibitionist like Madonna has now reached this stage (desiring privacy at her recent wedding), but what about those people who are available twenty-four hours on their Web pages? See <http://www.Jennycam.com>.

59. People other than Bill and Hillary Clinton have had "open marriages" or unmarried partnerships. Others have informally adopted children and made other group living arrangements and have led happy and productive lives—in some cases very loving and productive lives caring for other people. See BENNETT BERGER, *THE SURVIVAL OF A COUNTERCULTURE: IDEOLOGICAL WORK AND EVERYDAY LIFE AMONG RURAL COMMUNARDS* (1981) (for a history of outsider communal societies within our history).

teaching and learning, that is, within the family or where there is not too much humiliation.⁶⁰ Finally, it is argued that if we allow comment on everything in everyone's lives, we will become a nation of nattering nabobs of trivia and gossip,⁶¹ without paying sufficient attention to the grave issues of our polity.⁶²

So with these claims for a private, personal sphere of action and morality without public judgment, why and when should we ever care about what some professional or public official does in his private life? There are many answers to this question, all giving rise to the demand for some calculus of private-public morality. First, it is argued, by virtue of taking and doing certain jobs, the private person makes him or herself publicly available. His or her private life may be salient to the work. One example of this is an individual's "consent" to be publicly scrutinized for private, as well as public action. Gary Hart's invitation to the press to follow him around and check up on his fidelity, or infidelity as it turned out, is one example. Astronauts in orbit serve as another example. Others define certain jobs, such as that of President of the United States, as being "24/7," i.e., that it is always public.⁶³ Another situation in which there is reduced expectation of privacy is when an action occurs in a public or occupationally salient place. For example, would Bill Clinton's actions have been viewed differently if they had not taken place in the Oval Office? Is sexual harassment in the workplace worse than marital infidelity in a hotel? Does the doctor fondling the nurse in the operating room offend us more

60. *But see* JOAN GOODMAN & HOWARD LESNICK, *THE MORAL STAKE IN EDUCATION* (2001) (criticizing current "character" training in the schools).

61. Of course, many would say we are already there with society's virtual obsession with magazines like *People Magazine*, as well as instant Internet hook-up to any person. *But see* JOHN SABINI & MAURY SILVER, *MORALITIES OF EVERYDAY LIFE* 98-106 (1982) (for an argument that gossip is useful for teaching moral lessons). *See also* PATRICIA M. SPACKS, *GOSSIP* (1985) (for a discussion of the positive values of gossip).

62. The focus on personality in everything from politics to art to choice of professions is considered a symptom of this frailty. Consider how recent or universal this focus on personality really is. Were not all societies obsessed with the private lives of their leaders (Caesar, Henry VIII and Mao to name a few)? "The people want spice and they shall have it, in churches, in theaters and in the newspapers." WILLIAM DEAN HOWELLS, *IN A MODERN INSTANCE* (Penguin Books 1988) (1882) (in a novel portraying the new "crassness" of 19th century journalistic ethics).

63. Katyal, *supra* note 24.

than if he does it someplace else? Does Paul Newman's character, Frank Galvin, drinking in his law office during the day, bother us more than if he drank only alone at night in a bar or at home?⁶⁴

The touchstone of all scrutiny of private life in the occupational sector has always been the relevance or nexus of private action to job performance.⁶⁵ Indeed, that was always my argument in employment discharge cases employing the standard of "just cause,"⁶⁶ and it is more or less the current standard for lawyer misconduct in the Model Rules of Professional Conduct.⁶⁷

It is professional misconduct for a lawyer to:

. . . b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness *as a lawyer* in other respects;

c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;⁶⁸

d) engage in conduct that is prejudicial to the administration of justice.⁶⁹

The rule which requires lawyers to report other lawyer misconduct has also been circumscribed to a nexus with effectiveness in the professional capacity of lawyering in the most recent version of the Model Rules. Model Rule 8.3 states,

"[a] lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that *raises a substantial question as to that lawyer's honesty, trustworthiness or fit-*

64. See *THE VERDICT* (20th Century Fox 1982).

65. *Schwartz v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 239 (1957); see also Judith Lichtenberg, *Sex, Character, Politics and the Press* 7 (1) REPORT FROM THE CENTER FOR PHILOSOPHY AND PUBLIC POLICY 12 (1987).

66. See, e.g., Michael Fabiano, *The Meaning of Just Cause for Termination When an Employer Alleges Misconduct and Employee Denies it*, 44 HASTINGS L.J. 399 (1993).

67. MODEL RULES OF PROF'L CONDUCT R. 8.4 (2000) (emphasis added).

68. In reality, interpretations of this rule in attorney disciplinary proceedings have become increasingly tied to actions related to lawyering. See ABA CENTER FOR PROF'L RESP., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 565-567 (3d ed. 1996); see also Richard Burke, *Truth in Lawyering: An Essay on Lying and Deceit in the Practice of Law*, 38 ARK. L. REV. 2 (1984); John Humbach, *The National Association of Honest Lawyers: An Essay on Honesty, "Lawyer Honesty" and Public Trust in the Legal System*, 20 PACE L. REV. 93 (1999).

69. MODEL RULES OF PROF'L CONDUCT R. 8.4 (2000).

ness as a lawyer in other respects, shall inform the appropriate professional authority."⁷⁰

Such a requirement also suggests that it is particular acts, and not "character" generally, that should be subjected to professional ethical scrutiny. For example, being drunk when due in court should be subject to discipline, but being known as an "alcoholic" who does not drink during working hours and is able to function well during that time should not be subject to discipline. Being known as a womanizer generally should not be a disciplinable matter, but one might be subject to discipline for cavorting with prostitutes who are known to fraternize with the "other side."⁷¹

On the other hand, there are some practical and instrumental difficulties with limiting the scrutiny to acts that appear to have a nexus to professional tasks. How do we evaluate conflicts of interest if we do not know enough about a professional's financial and personal relationships to make an informed judgment? We would likely need more information about discrete "acts" to evaluate some forms of potential professional misconduct. How can we know if a professional is subject to undue influence by others (lovers, family, the Mob, financial supporters, drug suppliers⁷²) or is himself committing an abuse of power, if we do not know the company that he is keeping? Moreover, how can we know if we are being hypocritical about enforcing rules and standards unless we have enough information about everyone we might be disciplining to compare them?

What "acts" are relevant? Should we judge decisions that lawyers, public officials, doctors and other professionals make by scrutinizing only their work or job-related behavior? Or is it appropriate to scrutinize their behaviors in other spheres as

70. MODEL RULES OF PROF'L CONDUCT R. 8.3 (2000) (emphasis added); *see also* Douglas Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175, 188-195 (1999).

71. For allegations about JFK in the White House, *see* HERSH, *supra* note 10; *see also* DENNING, *supra* note 14 (scandal in England).

72. *See* RICHARD REEVES, *PRESIDENT KENNEDY: PROFILE OF POWER* 36, 147, 158, 159 (1993) (consider JFK's relationship to Dr. Max Jacobsen, who allegedly prescribed him drugs, through shots and painkillers for his back condition); *see also* Irvin Molotsky, *Hatch Backs Rehnquist on Medication*, N.Y. TIMES, Aug. 14, 1986, at D22 (for similar allegations with respect to Justice Rehnquist's alleged addiction to painkillers for various medical conditions).

well? For instance, to what extent is past behavior relevant?⁷³ The recent movie *The Contender*⁷⁴ considers how far back one's sexual history may be relevant in determining whether or not one is fit to occupy public office.⁷⁵ Should we consider "acts" that do not technically and directly have an impact on one's ability to perform one's job but may involve other issues that may have an adverse affect on one's ability to function as a public representative (i.e. judges' memberships in restricted and discriminatory clubs⁷⁶ or police membership in the John Birch Society or the Ku Klux Klan).⁷⁷ If certain kinds of professionals are supposed to be "exemplary" role models for the rest of the citizenry (or for children in schools, for example) then is anything "fair game" or are only professionally related characteristics relevant? Leaders in various environments are often called on to be role models for individuals who are dealing with difficult personal and ethical situations (illnesses,⁷⁸ grief, unruly children or relatives,⁷⁹ divorce or marital problems).⁸⁰ Therefore, it is only natural that such public figures might be subject

73. See Jane Gross, *A Killer in Law School: Admirable or Abominable*, N.Y. TIMES, Sept. 13, 1993, at A14 [discussing James Hamm's (a convicted murderer) entry into Arizona State University's law school and musing on his chances of bar admission].

74. ROD LURIE, *THE CONTENDER* (Dreamworks, SKG 2000).

75. See THOMPSON, *supra* note 51, at 136 (consider the different impact of past psychiatric treatment by President Nixon and would-be Vice Presidential candidate Thomas Eagleton).

76. See *id.* at 130 (an issue raised with respect to Griffin Bell's confirmation as the Attorney General—he resigned from his clubs); During Justice Rehnquist's confirmation hearings he was confronted with restrictive covenants on two of his properties which he said he was "unaware of," *id.*; see also *Valid Doubts About Justice Rehnquist*, N.Y. TIMES, Sept. 11, 1986, at A26. Discriminatory club memberships are now prohibited by the Judicial Code of Conduct. CODE OF JUDICIAL CONDUCT Canon 2.C (2000).

77. See THOMPSON, *supra* note 51, at 130-31.

78. Contrast Betty Ford's treatment of drug addiction and breast cancer to Mayor Giuliani's treatment of prostate cancer and adultery. Consider the differences in our social and political culture by looking at Tipper Gore's treatment of depression versus President Nixon's and Tom Eagleton's mental health issues. (Are these different for a wife and putative First Lady than a "real" leader?)

79. Billy Carter and Roger Clinton have been seen as "black sheep" amidst their respective presidential brothers' successes. See Richard Leiby, *'Black Sheep'-Good and Baa-d*, WASH. POST, Feb. 1996, at C2 [reviewing "Black Sheep," a movie in which a man (played by Chris Farley) wrecks his older brother's gubernatorial campaign, "with the abandon of Billy Carter and Roger Clinton combined."] Then again, look at President George Bush's son, Neil, implicated in an S & L fraud (what happened to him?).

to scrutiny beyond their official occupational acts. (Consider the complex role-modeling of Mahatma Ghandi and Martin Luther King, Jr.—exemplary political leaders with slightly problematic personal lives).

Even if we expand ethical and moral scrutiny beyond professional acts, it is not easy to define what we consider “morally good” behavior. Consider the moral rectitude of the way most of the participants in Watergate (especially Richard Nixon) conducted their family lives.⁸¹ In contrast, some cultures consider heightened sexual activity as a sign of virility and strength in a leader.⁸² Would Franklin Roosevelt’s “triumph” over his disability be considered a strength or a weakness in today’s political climate?⁸³

How are we to determine for which private acts we should hold some professionals accountable in their professional life? Is a scholar who writes about the abuse and exploitation of women to be criticized for falling in love with a self-confessed sexual exploiter (MacKinnon and Masson)?⁸⁴ What about a Jewish activist for falling in love with, and later defending, a Nazi sympathizer and/or collaborator (Arendt and Heidegger)?⁸⁵ (Is it

80. See JOE KLEIN, *PRIMARY COLORS* (1996) (consider differences in media and political treatment of Ronald Reagan, Adlai Stevenson, Nelson Rockefeller, Robert Dole, Newt Gingrich and the Clintons); see also Joe Klein, *An American Marriage*, NEW YORKER, February 9, 1998, at 34 (a complex marriage which seems more interesting to me than many others that have characterized our political leaders); see also Maureen Dowd, *Contract with Hypocrisy*, N.Y. TIMES, Jan. 5, 2000, at A21.

81. See ANTHONY SUMMERS, *ARROGANCE OF POWER: THE SECRET WORLD OF RICHARD NIXON* (2000); see also RICHARD NIXON, *THE MEMOIRS OF RICHARD NIXON* (1978).

82. See THOMPSON, *supra* note 51, at 128 (discussing Sukarno in Indonesia), and consider the different characterizations of JFK and Clinton on these dimensions; see, e.g., JOE ESZTERHAS, *AMERICAN RHAPSODY* (2000) (characterizing Clinton); see *id.* at 86 (for a brief discussion on JFK).

83. See Mary McGrory, *FDR Sits Corrected*, WASH. POST, May 1, 1997, at A2 (describing conflict over depiction of FDR in wheelchair at FDR Memorial).

84. My feminist reading group in 1993 spent several hours discussing the question of whether we could ever trust Kitty MacKinnon’s pronouncements on women and sexual exploitation ever again, after the very public article about her “ideal” love affair and announced marriage to confessed sexual exploiter Jeffrey Masson. If you want to follow this complex tale, read the introductions, dedications and acknowledgments to each other’s books in the late 1980s and 1990s of these two prolific authors who claim that they are still “friends.” See Smith, *supra* note 19.

85. Richard Cohen, *Hanna and Martin*, WASH. POST, Oct. 10, 1995, at A13. ETTINGER, *supra* note 15.

only women who have liaisons with ethically challenged individuals?) Do scholars who write about social issues, or are “public intellectuals” telling the rest of us how to live, invite greater moral scrutiny and opprobrium than scientists whose love and sex lives have less obvious connections to their work?⁸⁶ Are artists to be judged by different standards when “adultery makes good literature, if unhappy lives?”⁸⁷ Do private people become publicly accountable when they receive public funds (for example, artists who are supported by government grants and welfare recipients)?⁸⁸ Or, do they only become publicly accountable when their private acts have public significance (see the role of the butler in *The Remains of the Day*)?⁸⁹

Certain professional callings may lead to heightened levels of professional responsibility and scrutiny. The military, for example, has always claimed that its stricter moral code is necessary to insure appropriate discipline. I have always considered Arthur Dimmesdale more “at fault” than Hester Prynne, who was punished more severely, for their adulterous love in *The Scarlet Letter*, (although she was the married one) because of

86. But see GABOR, *supra* note 16 (discussing men who exploited their wives for their work and minds). Also note that scientists have been morally interrogated for the political uses of their science. See MICHAEL FRAYN, COPENHAGEN (2000) (presenting “confrontation” between Niels Bohr and Heisenberg on the uses of nuclear science and atomic bomb technology during World War II).

87. CASH, *supra* note 18, at 14, 18, 27 (exploring the impact of adultery on the writing of great literature and suggesting that deceit and “true feelings” are essential parts of the creative process). Can it be argued that some forms of “disloyalty” are actually functional for some jobs (politics for making compromises with the “enemy”) and dysfunctional for others? (Lawyers, are, at least in theory, supposed to be “loyal” to their clients, if not their spouses.) Do the changing lawyers’ ethical rules, which increasingly permit client “switching” and “screens” to allow one’s partners to represent one’s former adversaries [see MODEL RULES OF PROF’L CONDUCT (Proposed Draft 2000), Rules 1.10, 1.11, 1.12 and 1.18] represent a new toleration of promiscuity in the legal profession?

88. See PATRICIA WILLIAMS, THE ROOSTER’S EGG (1995); Menkel-Meadow, *supra* note 20.

89. KAZUO ISHIGURO, THE REMAINS OF THE DAY (1st Am. ed. 1989). See generally David Luban, *Steven’s Professionalism and Ours*, 38 WM. & MARY L. REV. 297 (1996); Rob Atkinson, *How the Butler was Made to Do It: The Perverted Professionalism of The Remains of the Day*, 105 YALE L.J. 177 (1995); W. Bradley Wendel, *Lawyers and Butlers: The Remains of Amoral Ethics*, 9 GEO. J. LEGAL ETHICS 161 (1995). Ishiguro’s “fictional” account of British “collaboration” with the Nazis, that is most likely based on the “Cliveden set,” a group of British aristocrats, and German diplomats who were weekend guests of Lady Nancy Astor (an American) at her estate at Cliveden. See JAMES FOX, THE LANGHORNE SISTERS (1999).

his hypocritical preachings as a Puritan minister.⁹⁰ Judges have now banned membership in discriminatory organizations because of their realization that the enforcers of the "equal protection" clause should not appear to be violating equality precepts, even in their private lives. There continues to be a debate in many communities whether those who serve that community must reside there as citizens.⁹¹ Journalists who lie are immediately dismissed.⁹²

Philosophers, as well as practical ethicists and professional disciplinarians, have to consider for what period of time blameworthiness should last for those who commit moral transgressions. Should a past felony conviction be a permanent disqualification for admission to the bar, receipt of a medical license, or college admission?⁹³ When are we allowed to forgive and get on with life? At what point can we be satisfied that rehabilitation has occurred? Does the answer to these questions vary for professions with different sets of ethical norms? Must lawyers always be upholders of the law?⁹⁴ (What about those of us who have engaged in political demonstrations leading to arrests, who have "inhaled," who have engaged in premarital or extra-marital sex, have driven through a stop sign or have driven while under the influence, but are exemplary professionals of various kinds?) Should doctors never smoke or drink? Should doctors treat patients while themselves under

90. See Menkel-Meadow, *supra* note 20.

91. See multiple challenges to residency requirements for police, firefighters and lawyers. *Musto v. Redford Township*, 357 N.W.2d 791 (Mich. Ct. App. 1984) (holding residency requirements for police and firefighters violated constitutional right to travel); *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274 (1985) (finding New Hampshire residency requirement for admission to the bar violated privileges and immunities clause); *In Re Griffiths*, 413 U.S. 717 (1973) (discussing citizenship requirements for lawyers).

92. See Howard Kurtz, *Outbreak of Fiction is Alarming News*, WASH. POST, June 29, 1998, at B1 (discussing fabrications and firing of New Republic journalist Stephen Glass as well as of the Boston Globe's columnist Patricia Smith, whose work was submitted by her editors for a Pulitzer Prize).

93. See *Student Who Killed Mother Loses Offer from Harvard: Early Admission Revoked After Reports Emerge*, WASH. POST, Apr. 8, 1995, at A4.

94. Must a moral lawyer agree with all the laws that are passed? (The age old question of distinctions between morality and law). See generally H. L. A. HART, *LAW, LIBERTY AND MORALITY* (1963); LON FULLER, *THE MORALITY OF LAW* (Rev. ed. 1964); THOMAS GREY, *THE LEGAL ENFORCEMENT OF MORALITY: ESSAYS AND MATERIALS IN LAW AND PHILOSOPHY* (1983).

the care of a psychiatrist⁹⁵ or under the influence of prescription anti-depressants? Are some private moral transgressions so universally condemned (such as wife or child abuse, violent crime, drug use, mental health hospitalization) that they should disqualify all guilty parties of ever holding an important occupation, especially when our theories of causation and individual responsibility seem so subject to change (i.e., genetic bases of alcoholism, learned child abuse, etc.)? For what can an individual, in his or her occupation, be held morally accountable from an earlier private transgression?⁹⁶

At another level, moral philosophers have raised important procedural issues, in arguments that sound remarkably like substantive due process,⁹⁷ about the scrutiny of private morality for professional purposes. Do we need to have shared and explicit agreement about the standards by which we judge people for justified opprobrium or discipline? Can we ever have this agreement in such times of rapid social and moral change?⁹⁸ Does the amount of scrutiny we would have to undertake to determine if someone were acting morally offend our sense of appropriateness and privacy? Should we just leave some people alone? When is it appropriate for us to inquire into someone's private life? Vice President Cheney suffered a heart attack after the presidential election.⁹⁹ If we were to take the example of demanding a full medical report on heart patient

95. Note that all psychiatrists must, as a condition of their training, undergo psychiatric evaluation and analysis.

96. Given the vast outpouring of memoir literature we are increasingly hearing more and more details of people's early and flawed lives. See, e.g., MARY KARR, *THE LIAR'S CLUB: A MEMOIR* (1997) (discussing the early and flawed lives of the author and the members of the author's family).

97. See Williams, *supra* note 22; THOMPSON, *supra* note 51.

98. Some would suggest, for example, that women might be more likely permanently to condemn domestic violence and child abuse as being professionally disqualifying (demonstrating lack of trust, loyalty, discipline and physical restraint, all necessary qualities for doctors or lawyers) than would be men or others who still see separate professional and personal "spheres" of conduct. Some have suggested that the commission of physical violence, and, especially domestic violence, demonstrates a "need to control" those who are dependent (such as clients, patients and loved family members) that should be particularly disqualifying for professionals in such intimate relationships of trust and care (Vanessa Merton eloquently raised this issue at the lecture).

99. Thomas B. Edsall, *Cheney Released From Hospital; GOP Vice Presidential Nominee Expects a "Fairly Normal Schedule" Soon*, WASH. POST, Nov. 25, 2000, at A12.

and Vice President Cheney what should we make of Eisenhower's several heart attacks while in office?¹⁰⁰ Reports of medical conditions are no guarantee of ability to perform professional services. If the degree of required disclosure or scrutiny becomes too intense or intrusive, will we prevent talented, potential office holders from seeking certain professional positions? What if we required disclosure of important facts about professionals that might not disqualify them for a job, but which would be used to assess the quality of professional services to be rendered?¹⁰¹ By doing any or all of this, will we all become too distracted to do our jobs?¹⁰²

This set of procedural concerns has led one moral philosopher to articulate a possibly useful standard for considering when and how we should inquire into certain public office holders' private lives: "[t]he more intimate the activity, the more compelling must be the connection with the official's (professional's) position, and conversely, the less intimate, the less compelling the connection has to be."¹⁰³ Thus, inquiries into such matters as with whom one sleeps, what one reads¹⁰⁴ or watches on TV or in the movies,¹⁰⁵ what prescriptions one takes,

100. See Michael Powell, *Feeling No Pain for the Record: Politicians with Medical Problems Guard Their Images' Health First*, WASH. POST, Mar. 6, 2001, at C1.

101. Consider both J. Edgar Hoover's and Roy Cohn's hidden homosexuality as influences on their prosecutorial decisions. How much should a potential lawyer or doctor, being interviewed by a prospective client, have to divulge or "disclose" to a client about their private lives for a client to "freely choose" an appropriate lawyer?

102. Many commentators now agree that the Supreme Court wrongly decided the question of whether the President should be temporarily immune from lawsuits for personal matters while in public office. See generally KATYAL, *supra* note 24; see also *Clinton v. Jones*, 520 U.S. 681, 701-02 (1997).

103. THOMPSON, *supra* note 51, at 132.

104. See Doreen Carvajal, *Book Industry Vows to Fight Two Subpoenas Issued by Starr*, N.Y. TIMES, Apr. 2, 1998, at 20; Karen Alexander, *Are Book Buys Anybody's Business*, LEGAL TIMES, Mar. 30, 1998, at A20 (discussing subpoena issued to Kramerbooks in Washington D.C. to find out if Monica Lewinsky purchased "VOX," a novel about phone sex by Nicholson Baker, which she allegedly gave to President Clinton).

105. See ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 274 (1989) (discussing the questionable media reports regarding Robert Bork's video rentals during his confirmation hearings); see also JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 106-07, 331 (1994) (discussing how the issue of video rentals arose in Justice Clarence Thomas's confirmation hearings, this time via subpoena).

or with whom one consults for solace or psychiatric treatment would be protected, unless there was some compelling connection to one's professional life and our need to judge that connection. Note that this formulation does suggest comparative professional ethics. In my professional ethical judgment, with whom a scholar cavorts (especially another intellectual who will clearly affect that scholar's thinking),¹⁰⁶ may be more relevant than with whom a President cavorts (as long as there are no political implications arising from the cavorting).¹⁰⁷ Standards of judgment should be applied with integrity and equality. What's good for the goose must be good for the gander.¹⁰⁸

106. This is Sandra Harding's version of heightened objectivity in modern epistemology—we need to know how a knowledge producer is situated in the world, demographically, institutionally, culturally and biographically, in order to assess the intellectual validity of claims made. See SANDRA HARDING, *WHOSE SCIENCE? WHOSE KNOWLEDGE?* (1995); SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* (1991).

107. Is this ever possible? Are some offices just always political "24/7"?

108. In my view, the current climate of intense personal scrutiny began (in recent history) with the John Tower confirmation hearing, intense political scrutiny with Watergate and mixed political and personal scrutiny with the Bork confirmation hearings. While I thought it perfectly appropriate to contest Bork's confirmation on the principled grounds of unacceptable ideology for a Supreme Court Justice, as one who worked to defeat that nomination, I fully realized at the time that defeat of Bork on "political" grounds would clearly permit similar attacks on various candidates on the other side of the political spectrum. See, for example, the withdrawal of Lani Guiner's nomination for Assistant Attorney General for Civil Rights (labeled a "quota queen"). These events continue to raise questions about whether standards should differ (I think they should) for appointment to political offices, like Cabinet positions, and judgeships (commanding a higher standard of commitment to some form of "fairness" or, at least, lack of bias) and whether it is appropriate to contest appointments on "principled" political grounds (different commitments to or ideologies about important policy issues) or only on grounds of personal or legal misconduct. The latter remains a particularly unsettled question as we view the most recent round of confirmation hearings for a new administration in which one candidate withdrew for law violations (immigration law issues for Linda Chavez) and another candidate was challenged for his "non-mainstream" political views in the nation's highest legal office (John Ashcroft as Attorney General). Should we look to other standards or "measure" of character such as the admissibility and relevance of 'character' evidence in civil and criminal trials? See *e.g.* FED. R. EVID. 404, 405, 608.

III. Practical Solutions: How Should A Lawyer's Private Life or Personal Morality Affect Professional Responsibilities?

When we consider the practical implications of judgment about personal lives and professional roles there are at least three separate questions to consider:

1. For what should professional regulation be initiated (admissions or discipline)?
2. How should we "judge" other professionals by their personal conduct?
3. How should we judge ourselves or make choices about our own personal lives and activities?

In other places and at other times, legal scholars¹⁰⁹ have analyzed for what conduct bar ethics or admissions committees have acted. I will not rehearse those here, except to say that there is wide variation among states about such issues. These include decisions about what conduct constitutes grounds for rejection of applications for admission to the bar, as well as about sanctions and discipline, including disbarment. Also widely debated is the standard by which an attorney or a judge must report the acts of misconduct by another attorney.¹¹⁰ These acts of officially recognized "misconduct" can be thought of as falling into at least three categories: (1) those which clearly are within the zone of professional misconduct such as violating client confidences and stealing client's funds; (2) those which clearly fall into the "personal conduct" category such as child molestation, commission of some crimes, embezzlement, failure to pay bills, adultery, etc.; and (3) those acts which although "personally" committed, might have some relation to professional competence or job performance, such as drug use, alcohol, stealing from a law firm, tax fraud, bad behavior during one's own di-

109. See generally Rhode, *Moral Character as a Professional Credential*, *supra* note 21; Rhode, *Moral Character: The Personal and the Political*, *supra* note 21; Richmond, *supra* note 70.

110. Recall that the Model Rules changed the reporting requirement (from the Code of Professional Responsibility) to reflect a heightened standard of conduct which "raises a substantial question" about another lawyer's "honesty, trustworthiness or fitness as a lawyer." (MODEL RULES OF PROF'L CONDUCT R. 8.3 cmt. 3). Compare with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (requiring reporting of all violations of ethics code).

voiced proceeding, or failure to pay child support.¹¹¹ Some acts in this last category might fit the old "crime of moral turpitude" standard, now eliminated because of the lack of consensus about the definition of what a crime of moral turpitude is.

The standard of "conduct prejudicial to the administration of justice" might include a lawyer's personal actions that reflect on his ability to perform as an officer of the court, as in the recent case in New York of a lawyer who was sanctioned for arriving late to court.¹¹² This would also include a lawyer who disrupted the court during his own divorce proceeding, and possibly President Clinton's perjury during his deposition.¹¹³

Whether some personal action "has an impact on the job" is likely to be as unclear a standard as "moral turpitude." However, at least it aims to express a nexus between misconduct and job function. Of course, if the "administration of justice" is thrown into the mix, then one could argue that a lawyer must always obey the law because not to obey the law would be to act in derogation of the law's requirements and might be considered by the public to thwart the administration of justice. On the other hand, one might argue, as I would, that a lawyer may be particularly well equipped to break or disregard the law as an act of civil disobedience in an effort to challenge a law that the lawyer is in a particularly good position to know is unjust or operates wrongly.¹¹⁴

111. See Richmond, *supra* note 70, at 190-201 (for cases discussing attorney misconduct).

112. See *U.S. v. Seltzer*, 227 F.3d 36 (2d Cir. 2000).

113. Though it is clear that his lawyers will argue Clinton was not acting as a lawyer when he allegedly lied at his Paula Jones deposition in January of 1998, others have suggested that a lawyer may never act dishonestly, fraudulently or make a misrepresentation, no matter what the role. See Fox, *supra* note 25. Worse for the President, there are comments to the Arkansas Professional Responsibility Code that seem to suggest a public official should be held to a higher standard than a mere lawyer. ARK. RULES OF PROF'L. CONDUCT R. 8.4 ("lawyers holding public office assume legal responsibilities going beyond those of other citizens. . . ."); see also *In Re Lee*, 806 S.W.2d 382, 384 (Ark. 1991); Rhode, *Moral Character as a Professional Credential*, *supra* note 21, at 587 (suggesting that a lawyer who commits perjury, no matter what the context, may be thwarting the legal system and should be disciplined).

114. See William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 223-225 (1996). See generally David Wilkins, *In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 WM. & MARY L. REV. 269 (1996); David Luban, *Legal Ideals and Moral Obligations: A Comment on Simon*, 38 WM. & MARY L. REV. 255 (1996).

When applied outside of the obvious realm of lawyer activity, the ambiguous definitions and scope of lawyer misconduct rules have caused many to question their utility. If the purpose of the rules is to protect the public from lawyers' "harms," then let the public complain when harm is actually done (discipline rather than vague admissions criteria). Predictions in advance of how particular people will behave later is notoriously unreliable, particularly when experts disagree about how predictive and stable "character" is,¹¹⁵ especially in an age of the "post-modern" self.¹¹⁶ President Clinton's behavior, though certainly problematic, demonstrates that some people are actually quite effective at compartmentalizing and being particularly functional and effective in a professional capacity while somewhat dysfunctional in another. Thus, I would argue for a very limited scope of job-relatedness for actual professional misconduct discipline, while admitting that "impeding the administration of justice" gives wide berth to those who want to argue that even some very private acts, when committed by a lawyer, might implicate such a rule. (To think that we thought we were making things easier when we dumped "appearance of impropriety" for a number of issues in the old Code!)¹¹⁷

Historically and empirically, it is now clear that broad definitions of personal misconduct have been used to exclude or expel certain classes of "undesirables" from our profession, like Communists, or those who would not answer questions about their political affiliations, women, minorities, misdemeanants of unrelated crimes, etc. Clearly, questions remain about whether certain kinds of crimes or personal wrongs are so offensive that they might cast doubt on a lawyer's ability to gain the trust of clients and society (heinous crimes, some domestic and other violence, etc.). These are not easy questions, as illus-

115. See, e.g., David Rosenhan, *Moral Character*, 27 STAN. L. REV. 925 (1975).

116. See, e.g., SEYLA BENHABIB, *SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS* (1992); JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1991) (all discussing variability of the modern human "self"). See generally MARY JOE FRUG, *POST-MODERN LEGAL FEMINISM* (1992); DUNCAN KENNEDY, *SEXY DRESSING, ETC.* (1993).

117. MODEL CODE OF PROF'L RESPONSIBILITY Canon 9 (1969).

trated by the controversy about admitting a convicted murderer to the law school of Arizona State University.¹¹⁸

Whether a lawyer can be or should be disciplined for particular conduct or characteristics¹¹⁹ does not fully answer the question of how we judge such individuals. I suspect a great range of views exist about what should have happened in former President Clinton's bar discipline settlement agreement, and an even greater range of views are possible about how we should judge his personal, professional and public official legacy and reputation. Reasonable minds will differ with respect to such judgments, but allow me to defend, in conclusion, why I think some form of moral pluralism and relativism may be in order here. It is clear that we do not have shared community standards about such things as sex, alcohol use or even lying.¹²⁰ A review of lawyer disciplinary cases, as well as the newspapers, reveals the massive social change this country has experienced in recent decades (and certainly since the days of *The Scarlet Letter*). Pre-marital sex is fairly widespread and the Clinton scandals have put various forms of common, but not spoken in public, sexual practices into the popular culture.

118. See Gross, *supra* note 73. Though the subject of that controversy has now graduated from law school, he has not been admitted to the bar because he remains on probation from his release (a life time condition?). The Arizona bar bans admission of anyone on probation for a crime. The law school took its stand (admission to school granted) and now the controversy rests with the Bar. See also, Alex Berenson, *S.E.C. Reaches Settlement in Web-Based 'Pump and Dump' Case*, N.Y. TIMES, Mar. 3, 2000, at C1 (chronicling the Georgetown law students who settled with the SEC after they were found to have orchestrated a 'pump and dump' stock scam and the school's choice not to expel the students, citing future bar admissions problems as something the students would face).

119. Note the unsavory use of Mayor Giuliani's father's criminal history as an effort to affect his reputation at a time it was already reeling from his own personal scandals. See WAYNE BARRETT, *RUDY: AN INVESTIGATIVE BIOGRAPHY OF RUDOLPH GIULIANI* (2000).

120. See SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (2d. ed. 1999) (discussing justified lying). See generally recent reports on the extent of spousal lying in marriage in ELLYN BADER, ET AL., *TELL ME NO LIES: HOW TO FACE THE TRUTH AND BUILD A LOVING MARRIAGE* (2000) (reporting that most married and other emotionally committed couples lie to each other about a wide range of things); see also JOSEPHSON INSTITUTE ON ETHICS, 2000 REPORT CARD ON AMERICAN YOUTH at <http://www.josephsoninstitute.org/Survey2000/survey2000-pressrelease.htm> (visited on October 16, 2000) (reporting that 71% of all high school students report cheating on exams, 92% lied to their parents within the last 12 months and 40% of males and 30% of females have stolen, while 68% say they have hit someone in the past year).

"Don't ask, don't tell" seems to be a marital mantra, even if it is not working with gays in the military. (At least you certainly don't have to tell your professional association anymore about your sexual habits.)¹²¹ Professional policing of functional misconduct is important. However, it is not clear, empirically, if not morally, what personal activity really does affect professional duties. Note that I say this as someone who gleefully consumed Larry Flynt's revelations of the sexcapades of the moral minority in the Republican Party. Perhaps, for some of us, hypocrisy and denial of our own human failings, while we criticize others, is worse than some of the underlying moral transgressions. There is some residual moral utilitarianism in this discussion as well. Clinton and Packwood may have done some bad things to some women (and I am not defending them for that) but on the whole they have done more good for women than many politicians who have gone before. (Perhaps they have loved women too much!)¹²²

Different professions will call forth different occupational moralities. I deplore doctors who drink before operating (though this is a common way for surgeons to deal with the stress of their jobs), psychiatrists who sleep with or exploit their patients and politicians who accept bribes. Maybe certain kinds of public officials do have to tolerate a "diminished privacy" right to suffer our judgments—they did, after all, consent to "go public." But certain professions should also be cut some more moral slack. I want to defend the virtues of "compromise" and seeming lack of principles in some political leaders. Clinton was criticized for this in the early years of his presidency. Machiavelli¹²³ tells us that leaders have their own morality; that it is bad for them to be too committed to their personal

121. See Rhode, *Moral Character as a Professional Credential*, *supra* note 21; see also Douglas Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175, 188-95 (1999) (for a list of things that do need to be reported by practicing attorneys, and not including sexual habits).

122. See MILAN KUNDERA, *THE UNBEARABLE LIGHTNESS OF BEING* (1984) [for a sensitive portrait of a woman-loving philanderer who was a very good doctor (if deceitful person)].

123. See MACHIAVELLI, *THE PRINCE* (Daniel Donno trans., 1981). The morality, or at least political wisdom, of Machiavelli has been somewhat returned to us in stature through such pragmatic philosophers as Isaiah Berlin; see, e.g., ISAIAH BERLIN, *THE SENSE OF REALITY: STUDIES IN IDEAS AND THEIR HISTORY* (Henry

principles. He says this because if they must lead many who do not share their principles, good leaders must find a way to lead the many (perhaps by finding new or compromise principles). Leadership thus requires both exemplary, but also, in a sense, “unprincipled” actions and behavior. Perhaps those who lead such very public and difficult lives should be given some place of private release so they can perform those public functions. Of course, I realize that “bad cases make bad morality.” How many of us have come to defend all sorts of things in the last few years we couldn’t believe we would ever justify?¹²⁴

For me, the other side of this conundrum is that certain kinds of public lives demand more. The public scholar or “public intellectual” who writes about “how to live” perhaps can be criticized for not living “well” or “good,” as difficult as that might seem. Those who write about or study other phenomena, such as science, are not claiming to make statements about how the rest of us *should* live, but those who do tell us how to live should have their ideas tested by measuring how they live their lives.

This leads me to the final dimension of considering the relation of the personal to professional lives—how we act and judge ourselves. Perhaps if Hannah Arendt or Kitty MacKinnon had acknowledged that love (and maybe sex) are the great democratic, cross-class and cross-politics levelers, they might have had to conclude that love, like evil, is “banal,”¹²⁵ or that we sometimes love not-too-wisely or cannot choose our bedfellows for political correctness. This would acknowledge that professionals, lawyers, scholars and all of us are human and that we do not have all the answers to the perfect relationship between personal lives and professional ones because we have not figured out our own relation to these issues ourselves. This is perhaps why Hannah Arendt, in particular, did believe in the separation of her public career and philosophical discourse from

Hardy ed., 1996); see also, *The Romantic Revolution: A Crisis in the History of Modern Thought*, id. at 168-69; *Political Judgment*, id. at 40-53.

124. See Carrie Menkel-Meadow, *Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 *FORDHAM L. REV.* 787 (2000) (signifying the complexity of reasoning and judging from rules and principles rather than stories, cases and examples).

125. See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (Penguin Books 1977).

her private life.¹²⁶ Arendt believed that although philosophers had much to say about ideas, they actually lacked what Machiavelli would call "political worldly wisdom." She believed in the separation of three spheres, the public "political" sphere, the intermediate "social sphere" (the "salon" society of which she was a part, universities, religious groupings, etc.) and the private "household." Yet Arendt also believed that public intellectuals were responsible for their ideas— "words can be actions"¹²⁷— and so the concerns that I have elaborated here about contradictions, ambiguities and inconsistencies in the consideration of private lives to public acts are vividly illustrated by Arendt's life and oeuvre.¹²⁸

"Judge not, that ye be not judged."¹²⁹ Who among us has not committed some private wrong that someone else might not consider a professionally relevant wrong? I am not unhappy that the lines that confuse me are not so easily drawn. I remain endlessly fascinated by the question of what it means to be a good person and lead a good life, as well as to be a good professional. I am certain that Mahatma Ghandi, Franklin Roosevelt, Martin Luther King and Bill Clinton have caused great personal pain to others around them and to themselves, but they have also labored to make the world a better place. In the end, this is how I judge people—both in their personal and in their professional lives. I suspect that when we get to the Pearly Gates, the ledger will have both personal and professional sins and good deeds. I suspect we will be judged by some totality of our contributions to our fellow humans, as well as how honestly we have confronted our own failings, as well as those of others. I do know that none of us are perfect. I suspect that there are few answers for you in this essay, because this age-old question remains timeless, although ever-changing, and I suspect we will continue to ask, "Can a bad person be a good professional?" for many years to come.

126. See Benhabib, *supra* note 15.

127. *Id.* at 46.

128. "Was Arendt simply a woman in love?" *Id.* "The truth is Arendt was never consistent on this score." *Id.* (on the political consequences of Heidegger's philosophy).

129. *Matthew* 7:1 (King James).