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Privacy and the Public Official: Talking About Sex as a Dilemma for Democracy

Anita L. Allen*

Introduction

In the United States, concealing the intimate details of one's private life from strangers has grown increasingly difficult. The public demand for personal information is unrelenting. Yielding to market and societal demands for personal information, Americans slowly seem to be losing both their taste for and expectation of privacy.¹ This thesis is well illustrated by the plight of high-ranking public officials. The spate of humiliating public confessions that characterized the 1990s suggests that public servants' desire for privacy is being cooled by both the knowledge that the rewards of voluntary self-disclosure are great and the realization that what takes place in private, unless dull and routine, is likely to become public knowledge anyway. The expectation of privacy is diminishing with the knowledge that political enemies, journalists, paparazzi photographers, and intimate associates have strong incentives to disclose potentially embarrassing private facts. These incentives include power, money, celebrity, notoriety, and revenge. The invasion-of-privacy torts spawned by the patrician genius of Samuel Warren and Louis Brandeis are supposed to deter highly offensive intrusion and public disclosure of private facts,² but they are of little practical value to public figures and public officials.

Opinion is divided, but some commentators have argued that public officials and public figures knowingly sacrifice their privacy when they pursue public office or step into the limelight.³ In exchange for public scrutiny, officials receive prestige and financial compensation not enjoyed by typical citizens. What officials do is unquestionably newsworthy, but is all of what they do of equal news value? Commentators have insisted that the public has a right to know about officials' personal lives if the way they handle sexual and familial intimacy interferes with the discharge of their public duties or raises doubts about their judgment and character.⁴ Lawyers commonly defend

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¹ See generally Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 728-30 (1999) (proposing that market, social, and political behavior in the final decades of the twentieth century led to the rapid erosion of expectations of and taste for personal privacy).

² See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 216 (1890) ("Some things all men alike are entitled to keep from popular curiosity, whether in public life or not . . .").

³ See, e.g., Ralph Gregory Elliot, *The Private Lives of Public Servants: What Is the Public Entitled to Know?*, 27 CONN. L. REV. 821, 826-27 (1995) (arguing that "government is founded on the informed consent of the governed . . . and [citizens] are entitled to all data necessary to inform their consent," so candidates must accept the opening of their private lives to scrutiny).

⁴ See *id.* at 826-29; William A. Galston, *The Limits of Privacy: Culture, Law, and Public Office*, 67 GEO. WASH. L. REV. 1197, 1200-02 (1999).

those in government and in the private sector who are willing to investigate officials' sexual conduct, insisting that the investigators are acting in the public interest by rooting out civil and criminal offenses. Lawyers also defend journalistic investigations of private lives and publication of private information as privileged under the common law or the First Amendment of the Constitution.⁵

Ordinary citizens who want privacy can take steps to avoid attention. Certain forms of self-help, however, are not available to public officials who want privacy. The practical realities of public life render attempts by public officials to retreat from view or shield themselves in litigation armor as unseemly. Even voicing disapproval of intrusion and publicity can be politically dangerous. A couple of years ago, I participated in a panel discussion about privacy and public life. The panel included a member of Congress from a prominent political family, and during the discussion he made the familiar statement that as a public official, he has a responsibility to open his financial and family life to public scrutiny. After the panel, away from the microphones, the young congressman revealed that he actually deeply resented the loss of privacy that accompanied his role as a celebrity public servant, but his congressional staff warned him of the political consequences of saying so in public.

The assertion that people who enter public life have diminished spiritual, psychological, or moral needs for privacy compared with ordinary people seems only that—an assertion. It is an assertion that does not clearly follow from valid concerns about public trust and accountability.⁶ In other words, the notion that public officials should be denied privacy does not follow from the premise that the public should trust and expect accountability of public officials. Indeed, many people disapproved of Independent Counsel Kenneth W. Starr's investigation of President William Jefferson Clinton's rela-

⁵ Cf. RODNEY A. SMOLLA, *SUING THE PRESS* (1986) (analyzing the increase in libel suits in America and the effect of such suits on First Amendment rights); John L. Diamond, *Rethinking Media Liability for Defamation of Public Figures*, 5 CORNELL J.L. & PUB. POL'Y 289, 299-303, 309-14 (1996) (arguing for lowering the culpability standard in exchange for lowering the maximum damage liability); Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782 (1986) (questioning whether actual malice standard applied to public officials is optimal rule); Lyrrisa B. Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 234-47 (1998) (advocating strengthening the intrusion tort to provide greater protection of privacy, but also arguing for the creation of a narrow newsgathering privilege); Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683 (1996) (arguing for greater media accountability in publication of private facts cases by shifting burden to media to prove newsworthiness as a defense or an assertion of privilege); Lyrrisa C. Barnett, Note, *Intrusion and the Investigative Reporter*, 71 TEX. L. REV. 433, 437 (1992) (proposing a qualified privilege for the investigation of "work-related activities of those engaged in public business" but not for "pry[ing] into individuals' private lives"). *But cf.* Frederick Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699, 704-17 (1991) (arguing that revealing certain truths is not always socially beneficial).

⁶ Cf. Anita L. Allen, *Lying to Protect Privacy*, 44 VILL. L. REV. 161, 182-86 (1999) (defending the right of public officials to use deception to protect their private lives). We might also ask: why, if civility norms are the social foundations of privacy, extreme incivility should be morally permissible in the case of the community's officials? Cf. Robert C. Post, *The Social Foundations of Privacy*, 77 CAL. L. REV. 957, 959-64 (1989) (arguing that the invasion of privacy torts protect rules of civility that "constitute both individuals and community").

tionship with Monica S. Lewinsky because he probed more deeply into their sex lives than the public's concern about trust and accountability required. The privacy implications of the investigation discredited both the Independent Counsel's report⁷ and the impeachment proceedings in Congress.⁸

This article argues that we need to understand better the kinds and extent of privacy that are consistent with public responsibilities and considers how, if at all in the present context of moral pluralism, those privacy interests can be protected. Although financial and medical privacy are important, this article focuses on the especially difficult case of the sexual privacy of public officials and those who aspire to become public officials. As this article explains, attention to sexual misconduct is a requirement of good democratic self-government, but there are limits to how much we, as a polity, can and should talk about sex.

I. *The Sexual Virtue Requirement*

Along with sobriety and other, less worrisome moral virtues,⁹ a certain standard of sexual virtue is fast becoming a de facto requirement of high public office. The new standard for national officeholders prescribes sexual "propriety" and proscribes "impropriety," defined as conduct which, if disclosed, would result in a loss of favor with a significant element of the general public. Propriety neither mandates celibacy of men and women in public life nor requires postponing sex or cohabitation until marriage, as it required years ago. The new standard does, of course, despise illegal sexual conduct, including sexual harassment in the workplace, sex with minors, and solicitation of prostitution. Moreover, the new standard favors heterosexuals because many people believe homosexual conduct is inherently improper.¹⁰

Although no longer a crime, adultery clearly violates the sexual virtue rule because it is improper. The privatization of responsibility that has char-

7 KENNETH W. STARR, REFERRAL FROM INDEPENDENT COUNSEL KENNETH W. STARR IN CONFORMITY WITH THE REQUIREMENTS OF TITLE 28, UNITED STATES CODE, SECTION 595(c), H.R. DOC. NO. 105-310 (1998).

8 See *Celebrities Call Starr a Fanatic and Inquisitor*, N.Y. TIMES, Sept. 26, 1998, at A11; Michael Grunwald, *New Attitudes Toward Private Lives: Personal Becomes More Public, and Not Just for Politicians*, WASH. POST, Sept. 14, 1998, at A10; Anthony Lewis, *Back to a Republican System*, N.Y. TIMES, July 6, 1999, at A17.

9 The virtue deficit has not been restricted to Democrats and "baby-boomers." More than 225 Reagan appointees faced ethical or criminal charges, see SHELLEY ROSS, *FALL FROM GRACE: SEX, SCANDAL, AND CORRUPTION IN AMERICAN POLITICS FROM 1702 TO THE PRESENT* 269 (1988), and that was just the beginning. Ethics violations and investigations continued unabated during the Bush and Clinton presidencies. See Marilyn W. Thompson, *Federal Ethics: A Long Way to Go*, WASH. POST, Oct. 8, 1994, at A3; see also Adam Nagourney, *Dole Accuses Clinton of Devaluing Presidency*, N.Y. TIMES, Oct. 16, 1996, at A15 (noting that by 1996, over 30 Clinton aides had been "investigated, fired or forced to resign"). Notably, former House Speaker Newt Gingrich, a Republican from Georgia, was investigated and fined for ethics violations. See Eric Pianin, *Combative Gingrich Is Cheered at Home: Speaker Blames Lawyer, Media, Liberal Establishment for Ethics Penalty*, WASH. POST, Jan. 26, 1997, at A1.

10 Cf. Andrew Sullivan, *Going Down Screaming*, N.Y. TIMES, Oct. 11, 1998, § 6 (Magazine), at 46 (attacking "new conservatives'" counterattack on adultery and homosexual legitimacy). See generally WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* (1996) (discussing modern views of homosexual conduct).

acterized public policy since the earliest days of the Reagan presidency has turned the idealized nuclear family into the powerfully symbolic fulcrum of national prosperity and well-being. (It is “symbolic” because the nation’s recent prosperity coincides with a remarkably high rate of non-marriage, delayed marriage, divorce, single-parenting, and gay co-habitation.)¹¹ Adultery violates the sexual virtue standard because marital infidelity is thought to be a moral crime against the cornerstone of the family—the marital vow. Deception, lies, and cover-ups concerning adultery are compound violations of the sexual virtue rule. In fact, some people seem to think that lying about putative sexual misconduct to protect privacy is as evil as engaging in sexual misconduct in the first place. They say that if one makes a mistake, one should be man or woman enough to admit it.

Sex scandals—complete with raw, lurid tales of sex and lies about sex—have affected both major political parties and every branch of the federal government during the past twenty years. The lives of judges, members of Congress, and presidents have been tainted by sex-related scandal. According to the usual justification for playing the sexual morality card, a history of improper sex is allegedly a good indication of bad character and bad judgment. Political leadership requires good character and judgment, we are told, and public trust in government depends on them.¹² So appealing are these arguments that some of us who would rather not hear another word about anyone’s bad marriage and non-criminal sexual practices believe that it is our duty to hang tough and listen anyway, as a matter of civic responsibility.

The politics of sexual virtue is complex. Sexual virtue requirements for public office always have existed. For instance, being openly gay or divorced once would have ruined a person’s chances for national office. To some extent, the *appearance* of sexual virtue once sufficed for participation in national politics, allowing a sexually promiscuous man such as John F. Kennedy to occupy the White House.¹³ Although knowledge of President Kennedy’s

¹¹ See generally U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1998, at 111-12, 451, 456-58 (118th ed. 1998) (indicating a decrease in marriage rates, increase in median age at which people first marry, and increase in disposable personal income and gross domestic product in recent decades); Frank F. Furstenberg, *The Future of Marriage*, AM. DEMOGRAPHICS, June 1996, at 34 (noting increases in delayed marrying and single-parent families since 1960); Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683, 685-87 (1992) (noting that divorce, single-parent families, and unmarried heterosexual, gay, and lesbian couples are commonplace).

¹² Cf. SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 165-81 (1978) (suggesting that those who hold government positions “be held to the highest standards” in regard to lying, because the inevitable exposure of lies uttered in good faith for the public good leads to great damage to the public’s trust of government); Elliot, *supra* note 3, at 828-29 (arguing that an official’s private actions that are not directly relevant to his policy-making or policy-implementing decisions are “of legitimate concern to the public for whatever inferences the public chooses to draw as to his character and judgment”). *But cf.* Allen, *supra* note 6, at 182-86 (discussing extent to which trust in government is a justification for limiting personal privacy of officials).

¹³ See WESLEY O. HAGOOD, PRESIDENTIAL SEX: FROM THE FOUNDING FATHERS TO BILL CLINTON 135-80 (1998); SEYMOUR M. HERSH, THE DARK SIDE OF CAMELOT (1997); Ross, *supra* note 9, at 198-201. These books illuminate the gap between private reality and public persona in the politics of the presidency.

egregious habit of adultery would have influenced the American people's view of him, the people were not told.¹⁴ Instead, the journalists and government employees who knew about Kennedy's lifestyle kept quiet.¹⁵ The norms of investigation and disclosure changed between the Kennedy presidency and the Clinton presidency, however, making White House swims with naked beauties or oral sex in the Oval Office harder to keep secret.¹⁶

In the aftermath of the Clinton-Lewinsky scandal, *actual* sexual virtue, rather than merely the *appearance* of sexual virtue, may be required. An actual-virtue requirement is a major problem for leaders who came of age before 1970, when marital infidelity and secrecy about marital infidelity were tolerated as prerogatives of successful men. By today's new standard, these men have wayward, improper pasts that political opponents, mainstream journalists, scorned lovers and others can legitimately, if controversially, bring to light to assist the public in evaluating the individual's competence, character, and credibility. Laches and statutes of limitations apply to neither former murderers nor former adulterers. The sexual virtue bar is so high that it scarcely helps men with tarnished pasts to point out that a radical change in mores has occurred since their decades-old trysts or that they have reconciled with their wronged spouses.

Experience in the nation's capital suggests that officials accused of adultery, sexual harassment, solicitation of prostitution, or sex with teenagers eventually will have to face their opponents. This is not an entirely bad situation because conduct with real victims merits real punishment. The consolation for the accused is that if the putative misconduct is limited to past, consensual, adult, heterosexual adultery, one's political party may mount a defense. Loyal supporters of the accused offender might argue, for example, that his or her recent conduct has improved or that the ability to admit his or her private error to the public and to suffer the consequences is evidence of exemplary character and judgment. Nevertheless, it goes almost without saying that politicians cannot afford to defend colleagues who have sex with minors or who sexually harass co-workers, thanks to the President Bill Clinton/Paula Jones, Justice Clarence Thomas/Anita Hill, and Senator Bob Packwood/Jane Does debacles.¹⁷ Anyone who wants to survive as a ranking

¹⁴ See HAGOOD, *supra* note 13, at 143-44.

¹⁵ See *id.* at 138-39, 150-51, 178; ROSS, *supra* note 9, at 191.

¹⁶ See HAGOOD, *supra* note 13, at 151, 157.

¹⁷ In 1998, President Clinton settled a lawsuit brought by Paula Jones, alleging that the President made improper sexual advances towards her when he was Governor of Arkansas and she was a state employee. Professor Anita Hill's allegations of sexual harassment nearly prevented Justice Clarence Thomas from being appointed to the Supreme Court: opponents accused Thomas of an obsessive interest in viewing and discussing pornography. Republican Senator Robert Packwood of Oregon left Congress after a long investigation revealed habitual sexual harassment and financial improprieties. See Francis X. Clines, *The Senate, Embarrassed and Proud of It*, N.Y. TIMES, Sept. 10, 1995, § 4, at A1; see also Katharine Q. Seelye, *Packwood Complaints Have a Nervous Senate Hearing Echoes of Anita Hill*, N.Y. TIMES, July 24, 1995, at A9 (reporting on the pressure within the Senate to conduct public hearings on Senator Packwood's alleged sexual and financial misconduct); Michael Wines, *Ascendancy of Scandal to High Political Drama*, N.Y. TIMES, Nov. 4, 1993, at A12 (reporting that because of the increase in sexual and financial scandals involving politicians in recent years, such scandals are no longer viewed as extraordinary).

government official today had better be either sexually chaste or lucky enough to have discreet intimates, a tolerant constituency, and nerves of steel.

Public servants need the sexual privacy that we know they are unlikely to get, particularly once they are suspected of "improper" intimacy or a glamorous liaison. Officials' need for privacy stems from universal feelings of passion, desire, and a need for unself-conscious expression. Although it would be hard to prove to a mathematical certainty that officials need privacy, the burden of proof should not rest on those who ascribe to public servants a need freely ascribed to other people. To the contrary, the burden should fall on those who assert that officials are different and do not need privacy.

Admittedly, public officials' own reckless behavior can give credence to the suggestion that they are a breed apart, people without the usual need for genuine privacy and intimacy. President Clinton is the obvious case of such recklessness: if one really needs and yearns for sexual privacy, would one conduct an affair with a young intern under the watchful eye of White House staff while attempting to defend oneself in a sexual harassment suit and while being investigated by an Independent Counsel? President Clinton, like the rest of us, needed to have a private sex life. Regrettably, however, Clinton exhibited a taste for risky extramarital sexual conduct that is hard to satisfy while serving in the highly visible roles of Governor and President. His flawed conduct might not have come to light thirty years ago. Public servants' own lack of judgment is often fatal to sexual privacy today. Also fatal are other people's disclosures of secrets, sometimes prompted by profit, sometimes by concerns about public trust and the discernment of character.

High-ranking public officials are among the most likely victims of egregious intrusion and unwanted publicity. For example, when the Senate considered Judge Robert Bork's nomination to the Supreme Court, someone obtained copies of Bork's video store records detailing the films he had rented.¹⁸ Congress swiftly passed a federal law prohibiting unauthorized disclosure of video rental records.¹⁹ Ironically, our privacy-deficient officials are in the best position to design, promote, and implement public policies sensitive to the many assaults against privacy.²⁰ Our elected officials and top bureaucrats should focus on getting us and our government to take valuable forms of privacy more seriously.²¹ A robust democratic community is little helped by preference-falsifying leaders who are afraid to undertake aggressive campaigns to promote sexual privacy.²² Our leaders, however, fear the consequences of taking up the torch for sexual privacy. Specifically, they fear that the public will suspect that they have something shameful to hide or that

18 See Susan Baer, *Lewinsky Books a Privacy Issue*, BALTIMORE SUN, Apr. 9, 1998, at 19A (comparing outcry over subpoena of Lewinsky's book purchase records to the outrage generated by a newspaper's publication of Bork's video rental records).

19 See Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (1994); Baer, *supra* note 18.

20 See Allen, *supra* note 1, at 749.

21 See *id.* at 755-57.

22 See generally TIMUR KURAN, *PRIVATE TRUTH, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION* (1995) (concluding that preference falsification leads to the suppression and distortion of public discourse, an integral part of a democratic polity).

they will tumble down from their shaky perches on political Olympus like so many Gary Harts.²³

Republican Senator Robert Packwood of Oregon tumbled down after years of fighting off charges of making uninvited sexual advances to women. In 1995 he resigned from Congress, brought down by a ten-volume report documenting "sordid, grossly embarrassing sexual and official misconduct."²⁴ The nation was "treated" to evidence from Packwood's own diary, which detailed his financial and sexual misdeeds and described his "sense of 'Christian duty' to propose sex" to seemingly lonely women.²⁵ Although we do not need elected representatives like Packwood any longer, public life nevertheless is enriched by leaders representing a diverse range of sexual values and experiences that express personality, build character, and make us wiser. For all the scandal that enveloped their lives, Barney Frank and Newt Gingrich contributed something of value to our national Congress.

II. Why We Talk About Sex

The American public is bombarded with real and imaginary sex on television, on the radio, in films, in magazines, in newspapers, in popular music, and on the internet. Commentators have raised concerns about the overall level of public attention given to sex in contemporary life. Although it seems too high, my primary concern is the level of attention given to the sex lives of high-ranking public officials. These two concerns are probably related, however, because the very changes in mores that have made public discussion and display of sex more acceptable and profitable appear to have also ended past eras' sense of reserve about investigating and judging the sex lives of public officials. Yet, in theory, a nation that enjoyed an otherwise optimal level of public attention to sex might develop a preoccupation with the sexual conduct of persons in public life.

To clarify this point, it may be useful to analyze why the sexual conduct of persons, public or private, ever becomes a matter of public discussion in our society. Why do we talk about or care about people's sex lives? A person's sexual conduct can become a matter of general discussion because it is: (1) criminal; (2) illegal, though not a crime; (3) improper, though not illegal; (4) entertaining; or (5) an interesting combination of all of the above.

First, private sexual activity can become a matter of public discussion if the sexual conduct in question is criminal. Sexual conduct can be tantamount to criminal battery, rape, or malicious disease transmission; it can be fornication, adultery, homosexuality, sodomy, prostitution, lewdness, or obscenity; it can be incest or bestiality. Criminal prosecutions are matters of public offense and prosecution, and criminal sexual offenses are discussed and "discussible sex."

²³ See Carolyn Barta, *Private Lives May Remain in Public Light: Scandal Makes Personal Scrutiny a Permanent Fixture in Politics, Experts Say*, DALLAS MORNING NEWS, Feb. 13, 1999, at 1A (describing Hart scandal).

²⁴ Clines, *supra* note 17.

²⁵ *Id.*

Second, private sexual behavior can become publicly discussed sex because it violates laws other than criminal laws. Alienation-of-affection, breach of promise, civil battery, and sexual harassment are examples of (past and present) sex-related non-criminal law offenses.

Third, sex can become a matter of public discussion because it is deemed improper, that is, because it violates social norms or expectations that are not criminal or civil wrongs. A very old person taking a much younger partner, a professor dating an undergraduate student, and a man marrying his ex-wife's adopted daughter are all troubling relationships that may offend our sensibilities. Society has come a long way since the marriage of Sammy Davis, Jr. and May Britt was a scandal, but for those who disapprove, interracial sex is still improper.²⁶

Fourth, sex can become the focus of public discussion because it is entertaining, that is, because it is amusing, interesting, or even arousing. Reports of sex between celebrities, for instance, can be interesting. Certain kinds of sex acts are interesting because they are bizarre. Moreover, discussing sex can feel good and titillate; it can be erotic or arousing. This is one reason why talking about sex in professional and employment settings is problematic, even in the context of presidential impeachment. We are not supposed to get aroused at work.

Fifth, sexual conduct can become a matter of general discussion because it is some combination of criminal, civilly wrong, improper and entertaining. At the peak of his career when, as they say, "he could have had any woman he wanted," police caught the handsome white film star Hugh Grant having sex with a black prostitute.²⁷ The public talked about the Hugh Grant incident because it involved a crime, a glamorous celebrity, and a social impropriety. When former NBC sportscaster Marv Albert pled guilty to assaulting a former lover whom he repeatedly bit,²⁸ the public talked about the court case because he was a seemingly normal media personality accused of bizarre sexual conduct.

In certain settings and to a certain degree, people like to talk about sex, and it is important for them to be free to do so. Any notion that the discussion of sex must be confined to a sacred private domain and can never be the subject of public discussion cannot endure. Moreover, although some sex talk and publicity about other people is gratuitously invasive, revealing serious crimes and hypocrisy seem to be good justifications for publicizing secreted private lives. Illegal sex between teenage pages and members of Congress merits public disclosure and action, however embarrassing to the

²⁶ See Matthew Gilbert, *Familiar Faces Taint "Rat" Tales*, BOSTON GLOBE, Aug. 21, 1998, at D1 (noting that public protests over interracial marriage led to the postponement of the wedding of black actor Sammy Davis, Jr. and Swedish actress May Britt until after the presidential election of John F. Kennedy, who was supported by Davis's friend, entertainer Frank Sinatra).

²⁷ See Betsy Sharkey, *When Stars Need a Little Forgiveness*, N.Y. TIMES, Dec. 6, 1998, § 2, at 15.

²⁸ See Howard Kurtz, *Reporter Hersh Hit Hard by Friendly Fire*, WASH. POST, Nov. 17, 1997, at C1 (noting Marv Albert and Hugh Grant scandals). Accused of biting an ex-lover, Albert was cleared of misdemeanor assault charges to which he had pled guilty. See *Albert's Record Is Cleared*, N.Y. TIMES, Oct. 9, 1998, at D7.

offending congressmen.²⁹ If President Thomas Jefferson took the public position that blacks were morally inferior and unfit for the society of whites, but was having an intimate relationship with his black slave Sally Hemings, his hypocrisy merited disclosure.³⁰ A gay politician who condemns homosexuality as immoral and advocates restrictions on gays should be "outed."³¹ Likewise, aggressively anti-philandering philanderers should be outed. This view led Anne Manning, a former Gingrich campaign worker, to tell *Vanity Fair* that she had an adulterous affair with Gingrich during his first marriage.³² Manning said she came forward "because when Gingrich 'talks about family values and acts righteous . . . it just gets my back up.'"³³

Although many public officials guard their private lives from the prying eyes of the public, some individuals intentionally call attention to their secret sex lives. Individuals may have varied motives for self-disclosure. An official can be motivated solely by the belief that he or she will soon be found out by others. Such strategic considerations help to explain why Democratic Representative Barney Frank of Massachusetts, who already had stated publicly in 1987 that he was a homosexual,³⁴ announced that he had paid a male prostitute for sex and then hired the prostitute to become his \$20,000 per year personal aide.³⁵ Representative Frank's admission came after a Washington newspaper published a story in which former Frank aide Steven L. Gobie claimed that he had run a prostitution service from Frank's Capitol Hill townhouse. In 1990, the House voted to reprimand Frank for ethics violations tied to Gobie. The House found that Frank improperly used the power of his office not only to fix thirty-three of Gobie's parking tickets, but also to attempt to shorten Gobie's probation for sex and drug convictions.³⁶

Self-disclosure is not always a matter of damage or spin control. Former Republican Senator from Kansas and presidential candidate Robert Dole called attention to his erection disorder to promote public awareness about the medical condition. Dole revealed on CNN's *Larry King Live* that he had participated in the medical trials of the new impotence drug Viagra and

²⁹ See Steven V. Roberts, *House Censures Crane and Studds for Sexual Relations with Pages*, N.Y. TIMES, July 21, 1983, at A1.

³⁰ See Dinitia Smith & Nicholas Wade, *DNA Test Finds Evidence of Jefferson Child by Slave*, N.Y. TIMES, Nov. 1, 1998, at A1.

³¹ Cf. David H. Pollack, Comment, *Forced Out of the Closet: Sexual Orientation and the Legal Dilemma of "Outing"*, 46 U. MIAMI L. REV. 711, 715-16 (1992) (noting various justifications for outing); Mathieu J. Shapiro, Note, *When Is a Conflict Really a Conflict? Outing and the Law*, 36 B.C. L. REV. 587, 609 (1995) (discussing outing campaign of Michelangelo Signorile, who primarily targeted "powerful gay figures who either used their power to hurt gay people or declined to use their power to help gay people").

³² See Gail Sheehy, *The Inner Quest of Newt Gingrich*, VANITY FAIR, Sept. 1995, at 147, 154.

³³ Margaret Carlson, *Newt's Bad Old Days*, TIME, Aug. 21, 1995, at 30, 30.

³⁴ See Michael Oreskes, *Barney Frank's Public and Private Lives: Lonely Struggle for Co-existence*, N.Y. TIMES, Sept. 15, 1989, at A14.

³⁵ See Michael Wines, *Inquiry on Frank Is Likely in House*, N.Y. TIMES, Aug. 27, 1989, § 6, at 21.

³⁶ See Richard L. Berke, *House, 408 to 18, Reprimands Rep. Frank for Ethics Violations*, N.Y. TIMES, July 27, 1990, at A1.

wholeheartedly endorsed it.³⁷ On the one hand, the public did not need to know that Senator Dole suffers from erectile dysfunction. On the other hand, his disclosure called attention to an unduly embarrassing, widespread condition and the availability of a new treatment. President Dwight D. Eisenhower's impotence was a secret that was revealed only when his romantic attachment, Kay Summersby, wrote a book describing their several failed attempts at sexual intercourse.³⁸ How did we get from Eisenhower's pathetic secret to Dole's cheery ad campaign?

III. A History of When and How Officials' Sex Lives Became "Discussible"

At one time, family, friends, employees, and the press adhered to an unwritten code of privacy. Under the old code, the sexual intimacies of public officials and celebrities were concealed as secrets and confidences. President Franklin D. Roosevelt's long-time affair with Lucy Mercer was known to many, but not publicized or publicly acknowledged in the press.³⁹ First Lady Eleanor Roosevelt's suspected infidelities, both heterosexual and homosexual, were safeguarded secrets as well.⁴⁰ Presidents John F. Kennedy and Lyndon B. Johnson exploited the code of privacy and enjoyed robust extramarital sex lives as President.⁴¹ It is worth considering how differently President Kennedy's assassination would have seemed if those of us who lived outside the Washington Beltway in 1963 had known the nature of his personal conduct in office. As recently as a few years ago, I saw a film clip of Marilyn Monroe's infamous, sexy rendition of "Happy Birthday, Mr. President" without suspecting that Monroe and President Kennedy had been lovers. Nor did I suspect that Monroe and Robert Kennedy were lovers; that the first lady had refused to attend her husband's birthday party because she knew Monroe would be there; or that Monroe's performance in a deliberately-selected, see-through dress into which she literally had been sewn fueled the fears of John and Robert Kennedy that the mentally unstable film star would reveal her secret affairs with the President and his sibling Attorney General.⁴²

This code of shielding the private sexual conduct of officials from public view was not always and consistently followed in the United States. It was,

³⁷ See Dan Barry, *An Indelicate Question Doesn't Rattle this Dole*, N.Y. TIMES, May 9, 1998, at B4.

³⁸ See KAY SUMMERSBY MORGAN, *PAST FORGETTING: MY LOVE AFFAIR WITH DWIGHT D. EISENHOWER* (1977), cited in ROSS, *supra* note 9, at 187-90; see also HAGOOD, *supra* note 13, at 129-31, 134.

³⁹ See 1 BLANCHE WIESEN COOK, *ELEANOR ROOSEVELT, 1884-1933*, at 224 (1992); DORIS KEARNS GOODWIN, *NO ORDINARY TIME: FRANKLIN AND ELEANOR ROOSEVELT: THE HOME FRONT IN WORLD WAR II*, at 517-18 (1994); see also HAGOOD, *supra* note 13, at 262; ROSS, *supra* note 9, at 172-73, 178-79.

⁴⁰ See COOK, *supra* note 39, at 477-80; GOODWIN, *supra* note 39, at 219-25; HAGOOD, *supra* note 13, at 117-18; ROSS, *supra* note 9, at 174-79.

⁴¹ See HAGOOD, *supra* note 13, at 135-39, 181-82; HERSH, *supra* note 13, at 10-11, 222, 242-46; ROSS, *supra* note 9, at 198, 209-10.

⁴² See HAGOOD, *supra* note 13, at 169-71; BARBARA LEAMING, *MARILYN MONROE* 403, 409, 411-12, 421 (1998).

however, a distinct feature of public life from World War II until the 1970s—the era of civil rights, feminism, the sexual revolution, the war in Vietnam, and general skepticism about the uses and abuses of government power. The turning point may have been in 1974 when the police came across the battered and intoxicated duo of Representative Wilbur Mills, a Democrat from Arkansas, and ex-stripper Mrs. Eduardo Battistella (a.k.a. Fanne Foxe, the Argentine Firecracker) brawling near the Tidal Basin in Washington, D.C. Until that unlucky night, facts about the sex lives of presidents and other prominent men and women in government generally were not considered news fit to print in the mainstream press. The statement Wilbur Mills issued three days after his suicidal companion was safely fished out of the Tidal Basin with two black eyes was clearly that of a man accustomed to getting away with dodging questions about his “improper” personal life. He did not expect to have to answer the many questions raised by his absurd, insincere explanation of what happened that night. Numerous witnesses linked Mills to a lavish social life centered around strip clubs, but Mills’s public statement described the ex-stripper Battistella as a friend of the family. Amazingly, he blamed his wife’s inability to accompany him that evening because of a broken foot as the main reason for the regrettable appearance of impropriety.⁴³

Wilbur Mills’s egregious misconduct (and the fact that he was caught) helped to put an end to the era in which public officials could expect discretion concerning the intimate details of their sex lives, even when those lives included fornication, adultery, promiscuity, substance abuse, and children born out of wedlock.

The Wilbur Mills incident, however, was only the beginning of this new era of disclosure. In 1976, the post-Vietnam, post-Watergate press published the claim of Elizabeth Ray that she was on the payroll of Democratic Representative Wayne Hays of Ohio for the purpose of serving as his mistress.⁴⁴ The press also published stories revealing that two congressmen had sexual relationships with seventeen-year-old House of Representatives pages in 1973 and 1980. Because minors were involved, it was right for the House to censure formally the two congressmen in question, Representatives Daniel B. Crane, a Republican from Illinois, and Gerry Studds, a Democrat from Massachusetts, in 1983.⁴⁵ Sexual misconduct was not new to the news when the media caught presidential candidate Gary Hart, a married man, with Donna Rice on his lap aboard the good ship *Monkey Business*.⁴⁶ Against this background, Democratic Representative Mel Reynolds of Illinois could not reasonably expect sex with a teenage campaign volunteer to remain a secret; he eventually was convicted of sexual assault and attempts to thwart the investigation.⁴⁷

⁴³ See Stephen Green & Margot Hornblower, *Mills Admits Being Present During Tidal Basin Scuffle*, WASH. POST, Oct. 11, 1974, at A1.

⁴⁴ See Marion Clark & Rudy Maxa, *Closed-Session Romance on the Hill: Rep. Wayne Hays' \$14,000-a-Year Clerk Says She's His Mistress*, WASH. POST, May 23, 1976, at A1.

⁴⁵ See Roberts, *supra* note 29.

⁴⁶ See Barta, *supra* note 23.

⁴⁷ See *Congressman Convicted of Sexual Assault*, N.Y. TIMES, Aug. 23, 1995, at A14;

The ban on open discussion of sex eventually yielded to a standard of permissible public discussion of sex. Discussion started as euphemistic, eventually became explicit, and now is often graphic. To take an example from popular culture, couples on the television game show, *The Newlywed Game*, in the 1960s were coyly asked about "making whoopee." The contestants on the show in the 1990s, however, were asked outright about having sex. The new openness could be explained partly by the "sexual revolution" of the 1960s and 1970s, of which radical feminism was but an element. The sexual revolution was a sweeping rejection of traditional sexual morality and gender roles, embracing birth control, abortions, premarital sex, and non-marital cohabitation. Sex came out of the closet and into the street. Women left the kitchen and went to the office. Consensual adult sex outside of marriage gained acceptance, but because of the women's rights movement and feminism, sexual exploitation and sexual harassment declined in acceptance and eventually became illegal. In the early 1980s, the country began to embrace "family values" some felt were lost in the 1960s and 1970s.

Although the rhetoric of "family values" took hold during the Reagan and Bush presidencies, it was impossible to stop all of the cultural momentum of the sexual revolution that was redefining the family. Therefore, a sexually tolerant American culture obsessed with sex and sexy products appears to be coexisting with an intolerant American culture obsessed with ideals of sexual propriety. This schizophrenic dichotomy explains why, in the name of sexual propriety and the rule of law, congressional Republicans tried, but failed, to get away with removing President Clinton from office in the most pornographic, lawless, public sex scandal in American history. We want our sex, and we want sexual propriety. But can we have both?

IV. Democratic Deliberations, Democratic Leadership

The United States is in the grip of a serious problem of pluralism and democracy, reflected in the dilemmas it faces concerning sex and public life. We are asked by the new standard of sexual virtue to evaluate the sexual conduct of our public officials, and to deliberate about our evaluations with fellow citizens. Feminists concerned with the lack of public scrutiny of domestic abuse and sexual exploitation in the workplace have joined the call for higher standards of accountability for what was once defined as private life. Proponents of communitarian and republican conceptions of democratic community, as Professor Tuttle illustrates, call for the rejection of a sharp divide between private lives and public virtues.⁴⁸ Forming and remaining a community may require that the sexual lifestyles of our public officials be appropriate topics for public scrutiny. Civic republicans argue that if we are

Michael Wines, *House's Top Democrats Say Reynolds Faces Expulsion if He Doesn't Resign*, N.Y. TIMES, Aug. 25, 1995, at A14.

⁴⁸ See Robert W. Tuttle, *Reviving Privacy?*, 67 GEO. WASH. L. REV. 1183, 1192-93, 1196 (1999). See generally MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT* (1996) (defending "civic republicanism" against "procedural liberalism"). Sandel proposes that the right to privacy be understood not as a right of what Professor Tuttle might call "expressive choice" but as a right to fulfill personal roles that make demands on us by virtue of our traditions and identities. See *id.* at 3-24, 91-119.

to avoid becoming disenchanted with and alienated from our democracy, we must be permitted to demand leaders who exemplify our substantive constitutive values.

On a national level, however, there are two reasons we cannot easily engage each other on the topic of sexual morality: we are embarrassed, and we are in radical disagreement. First, we are embarrassed by talk about sex. In the aftermath of the sexual revolution, Americans are fairly comfortable discussing sex with some close friends. It is even possible to discuss or allude to the sex lives of public personalities when civility rules bar explicit language. For instance, it was easy to debate the moral significance of President Jimmy Carter's adulterous thoughts,⁴⁹ Democratic Senator from Virginia Chuck Robb's assignation with Miss U.S.A. Tai Collins in a Manhattan hotel room,⁵⁰ and former Washington, D.C. Mayor Marion Barry's videotaped drug-laced affair.⁵¹ In each case, however, the precise sexual conduct at issue remained unclear.

The Clinton-Lewinsky affair escalated into an impeachment trial of the President, making it an affair that ought to have been discussed. Because we knew more about the affair than many of us would have liked to have known, however, it was not fully discussible.⁵² It is one thing to talk and joke about Hugh Grant and Marv Albert among friends; it is something else to discuss the removal of a President from office for perjury, obstruction of justice, and sex with a subordinate, when doing so requires close attention to the details of sexual expression. A male law student in his twenties told me he deliberately avoided reading the Starr Report because he thought it was none of his business. A public document issued by a public official about the President of the United States was none of his business? The details about the President and Ms. Lewinsky made public by Kenneth Starr are the kinds of subjects parents probably would not want to discuss with their children. They are also the kinds of matters one might be reluctant to discuss in law school, at work with colleagues of the opposite sex, at church, or at polite social gatherings.⁵³ We do not want to be accused of sexual harassment or bad manners, and we certainly do not want to risk becoming sexually aroused in inappropriate settings.

Second, we disagree about sex. We disagree for many reasons, including our age, regional, religious, and ethnic diversity. We disagree about what kinds of sexual conduct should be criminal; we disagree about what kinds of conduct should be a basis of civil liability; we disagree about reasonable social expectations; we disagree about what is interesting; we disagree about

⁴⁹ See Eleanor Randolph, *A Clean, Germ-Free Candidate*, N.Y. TIMES, Oct. 17, 1998, at A14 (quoting President Carter admitting, "I've looked on a lot of women with lust" and "I've committed adultery in my heart many times").

⁵⁰ See Marjorie Williams, *No Sex, Please! We're in Washington*, WASH. POST, Sept. 22, 1991, Magazine, at 15.

⁵¹ See *id.*

⁵² See Martha T. Moore, *For Mature Audiences Only*, USA TODAY, Dec. 31, 1998, at 3A (discussing the squeamishness of the public, media, and journalists about the use of explicit sexual terms, including "oral sex," found in the Independent Counsel's report to Congress).

⁵³ See Roxanne Roberts, *YUCK!: The Scandal That's Taken the Romance Out of Sex*, WASH. POST, Aug. 14, 1998, at D1.

when sex should be raised in public; and we disagree about how explicitly certain sexual conduct should be discussed. These are disagreements about law, morality, and etiquette. These disagreements incorporate, but transcend, the so-called “cultural wars.” These disagreements are so deep that we may be unable to work through them in the interest of civil public discourse and collective governance.

The problem of discussing sex in a deliberative democracy predated the Independent Counsel’s investigation into President Clinton and the ill-fated impeachment trial. But the public response to the notorious Starr Report, the House impeachment proceedings, and the Senate trial well illustrates dimensions of the problem. It illustrates both conversation-stopping disagreement and embarrassment. Whether the impeachment and trial of a President seemed to be only or mainly about a sex scandal depended upon one’s attitudes about the regulation of sexual conduct and the “discussibility” of graphic sex. If one believes that lying about sex to protect the privacy of one’s consensual sexual activities is justified, one probably disapproved of the discretion exercised by the Attorney General, the Independent Counsel, and members of Congress. If one believes the oath of office taken by the President and the integrity of the grand jury system require blunt truth about sexual privacy under any and all circumstances, one probably approved of the efforts to oust Clinton.

Collectively scrutinizing the sex lives of public officials with frankness and civility is prohibitively difficult and, some would argue, counterproductive. In an article recounting adultery committed by Martin Luther King, Jr., Franklin D. Roosevelt, and John F. Kennedy, Anthony Lewis concluded that “straying from the straight and narrow does not disable one as a statesman, a general or a civil rights leader.”⁵⁴ He argued that we surely are not better off now that “prurient interest in the sex lives of politicians” is out of Pandora’s box.⁵⁵ Some of the more “intelligent, sensitive Americans” will no longer aspire to office, and the natural tendency to lie to protect one’s sexual privacy will be exploited easily by enemies.⁵⁶

In response to Lewis, feminists might argue that we must take the bad with the good. Unleashing prurient interest in the sex lives of politicians was a necessary evil as we pursued the laudable goal of combating sexual harassment and other forms of gender oppression. Now that the national understanding of sexually offensive conduct has improved, many feminists are seeking a new public/private balance that vests the government with the power to deter and punish sex-related offenses while otherwise leaving consenting adults alone. Feminists who refused to support Republicans seeking to oust President Clinton believed the Republicans “got” the importance of prosecuting sexual harassment but “forgot” the importance of limiting government intrusion into the sex lives of consenting adults.⁵⁷

⁵⁴ Anthony Lewis, *Sex and Leadership*, N.Y. TIMES, Feb. 23, 1998, at A19.

⁵⁵ *Id.*

⁵⁶ *See id.*

⁵⁷ *Cf.* Mary McNamara, *Make that Ms. Partner*, L.A. TIMES, Mar. 3, 1999, at E1 (noting that Gloria Steinem’s editorial in *The New York Times*, which argued that President Clinton’s

Communitarians and civic republicans—and again, I place Professor Tuttle in their camps—would also take issue with Lewis. For them, conformity to collectively recognized standards of sexual virtue is among the legitimate expectations of public office; it is of no consequence that a nation might end up with a merely competent leader (a Dan Quayle) rather than a gifted leader (a Franklin Roosevelt). In the view of communitarians, the merely competent person may be the leader who best reflects our publicly announced, shared values and who therefore best inspires and leads us.

I share Lewis's concern that the new purity regime may diminish the quality of our leaders. The specific concern I have is that self-righteous individuals may believe they have a political vocation solely because they satisfy superficial criteria of moral virtue and look good on television, rather than because they have real vision and commitment. To these concerns, I would add that unrelenting attention to and investigation of ordinary sexual immorality distracts officials from their core policymaking responsibilities. The intelligent, sensitive minds we do manage to attract into public service are wasted on speeches and reports about their colleagues' sex lives.

This concern cuts two ways, revealing a point of disagreement I have with Lewis. Although I agree with Lewis that great and popular leadership by sexual rogues has been commonplace in American history, I believe that leaders, such as Presidents Clinton and Kennedy, would have been even greater were they not so busy managing complicated, covert sex lives. Sexual affairs may represent lost opportunities for great leaders to become truly superb. Although there are costs to the new sexual virtue standard, a benefit of the standard is that it may deter the kinds of sexual conduct that waste our leaders' talents and that others can exploit politically. With fewer sex scandals, government might become more efficient, open, and participatory. I say "could" because we just do not know what government by sexual saints in all three branches might look like. We have not yet experienced it. Perhaps scandals of other sorts might erupt to fill the vacuum. Indeed, if sex were no longer a political issue because the men and women in public life were leading "proper" sex lives, I fear politicians would seize upon other personal matters—such as problem children or the use of prescription mental health drugs by family members—to cast the shadow of unfitness on their political foes. But then, some politicians have turned public attention to such personal matters already. For instance, former Democratic presidential candidate Michael Dukakis of Massachusetts was embarrassed by efforts to probe his wife Kitty's mental health history.⁵⁸ We need to tackle the sexual privacy problem for people in the public eye, but sexual privacy is not the only kind of privacy about which we must worry.

Defenders of sexual virtue in public life are not without a point. Elected officials really should be the kind of people whose vices—sexual or otherwise—do not amount to abuse of power, corruption, and injustice. In these

relationship with Monica Lewinsky was not sexual harassment because it was obviously consensual, drew protest).

⁵⁸ See Paul Sullivan, *Kitty Dukakis Crashes Car*. BOSTON HERALD, Aug. 5, 1996, at 5 (noting that "[i]n the past, Kitty Dukakis has been admitted to treatment facilities for alcohol and drug abuse," including ingestion of rubbing alcohol).

respects, their conduct must not jeopardize public trust in government. Leaders should be, and should appear to be, of good moral character. But can strong political leaders be moral? Citing the example of President Jimmy Carter, Richard L. Berke argues that too much virtue can be a flaw in a leader.⁵⁹ Berke suggests that to reach the highest offices of government, “a person, no matter how upright in public, has to be a master at the inherently devious game of politics.”⁶⁰ Sex need not have a role in that “devious” game, yet during John F. Kennedy’s Camelot years in the White House, access to the President was often limited to those who could also be trusted to remain silent about his licentiousness.⁶¹

In summation, I believe the quality of our democratic government is diminished if: (1) potentially good leaders refuse to serve because they fear destruction of their private lives;⁶² (2) leaders expend their time and energy pursuing, and concealing, countless sexual affairs; (3) leaders dedicate public institutions and financial resources to investigating and prosecuting sexual “improprieties” that are not—or should not be—crimes; and (4) the general public is asked to evaluate, but cannot talk about, the sex lives of public officials because of fundamental disagreements about the content of law, morality, and etiquette.

There is a final reason sexual virtue is a problematic area for public action: the problem of unclean hands. Controversial sexual conduct and misconduct are so commonplace that the fingers of shame inevitably are pointed by men and women who themselves, by their own standards of judgment, have cause for shame. Republican Newt Gingrich of Georgia, the former Speaker of the House who was fined by his colleagues for ethics violations, married his high school math teacher when he was nineteen. Gingrich announced that he was filing for divorce while she was suffering from uterine cancer, and even discussed the terms of the divorce while she was recovering from surgery.⁶³ When confronted about Anne Manning’s claim that she had sex with him while he was married to his first wife, Gingrich had no comment.⁶⁴ As the House faced the possibility of impeachment hearings in September 1998, Republican Representative Dan Burton of Indiana, the conservative chairman of the House Government Reform and Oversight Committee, which investigated President Clinton’s campaign finances, was forced to admit that he had conducted an extramarital affair and had fathered an out-of-wedlock child.⁶⁵ Republican Representative Helen Chenoweth of Idaho admitted a six-year affair with a married man, but only after

⁵⁹ See Richard L. Berke, *The Good Leader: In Presidents, Virtues Can Be Flaws (and Vice Versa)*, N.Y. TIMES, Sept. 27, 1998, § 4, at 1.

⁶⁰ *Id.*

⁶¹ See generally HAGOOD, *supra* note 13, at 135-80; HERSH, *supra* note 13, at 10-11, 23-25, 120, 222-46; ROSS, *supra* note 9, at 191-93, 198-201.

⁶² Cf. George McGovern, ‘Trashing’ Candidates, N.Y. TIMES, May 11, 1983, at A23 (discussing the intense scrutiny and “trashing” of front-running presidential candidates by the media).

⁶³ See Carlson, *supra* note 33, at 30; Sheehy, *supra* note 32, at 219.

⁶⁴ See Carlson, *supra* note 33, at 30; Liz Leyden, *Gingrich: Vanity Unfair*, WASH. POST, Aug. 11, 1995, at F3.

⁶⁵ See *Rep. Burton Admits He Fathered Son in an Affair*, N.Y. TIMES, Sept. 5, 1998, at A9.

her public denouncement of President Bill Clinton's morals angered her ex-lover's wife into outing her.⁶⁶ Illinois Republican Representative Henry Hyde's past affair with a married woman came to light as he prepared to chair the House Judiciary Committee's impeachment hearings. Hyde, who was in his forties at the time of the affair, now dismisses it as a "youthful indiscretion."⁶⁷ Gingrich's replacement as House Speaker, Louisiana Republican Representative Robert Livingston, resigned during the pendency of the House impeachment debate after admitting that he also had engaged in marital infidelity.⁶⁸

V. Conformity and Other Solutions

A newspaper headline last year suggested that British Prime Minister Tony Blair's government was being run by a "gay mafia," after three top officials revealed under pressure that they were indeed gay.⁶⁹ Without scandal, however, the mistress and out-of-wedlock daughter of former President Francois Mitterrand of France joined his widow and sons at his graveside to mourn his passing.⁷⁰ The United States is more like England. Some of us wish we lived in France.

There is no elegant solution to the current dilemma of needing to talk about sex but being unable to talk about it well. There is some chance that, bruised by the escalation of the Clinton-Lewinsky affair into a doomed Senate impeachment trial, our country will begin a process of voluntary self-correction, shifting the balance toward greater respect for the privacy of public officials and aspiring officials. We are unlikely to return to the extremes of yesteryear when President Kennedy's habitual romps with prostitutes went unreported. But we may advance to the point when our presidents and politics are not unduly pornographic and good leaders are not forced to resign from office over ancient marital infidelities.

Securing sexual privacy for public officials seems to me a worthy objective, but achieving it is no easy matter. I am drawn to the sexual privacy principle (which cannot be absolute) and therefore to the problem of specifying the extent to which sexual conduct may be publicly investigated, disclosed, discussed, and prosecuted in particular cases. Professor Galston's suggestion that sexual virtue is an appropriate matter for public inquiry at the very least when it relates directly to fitness for office is an attractive starting point.⁷¹ His effort to specify the working criteria of relevance to fitness for

⁶⁶ See Sam Howe Verhovek, *Clinton Foe Admits Affair with Married Man*, N.Y. TIMES, Sept. 11, 1998, at A20.

⁶⁷ David Stout, *Hyde Acknowledges "Indiscretion" Following Report of an Affair*, N.Y. TIMES, Sept. 17, 1998, at A27.

⁶⁸ See Katharine Q. Seelye, *Livingston Urges Clinton to Follow Suit*, N.Y. TIMES, Dec. 20, 1998, at A1.

⁶⁹ See *It Began with Parris*, GUARDIAN (London), Nov. 16, 1998, at 4 (discussing furor over *Sun* newspaper's posing the question, "[I]s there a gay mafia running Britain?," and related articles).

⁷⁰ See Craig R. Whitney, *Extended Family in Mourning*, N.Y. TIMES, Jan. 14, 1996, § 4, at 2.

⁷¹ See Galston, *supra* note 4, at 1200.

office is as promising as such an effort can be. The events of recent years, however, suggest that there will be disagreement about proposed criteria of fitness for office and about fair application of the criteria.

It seems clear, therefore, that from now on public officials must work hard to create subjectively meaningful private lives and to protect their own privacy while at the same time acting on Galston's assumption that "every aspect of their lives may become widely known."⁷² Some officials will do just that. Many public officials will create and protect privacy by studied conformity, i.e., leading lives that do not require extraordinary concealment. They will marry, be faithful, have children by their spouses, and so on. A few in public life will opt to protect privacy by open non-conformity. They will live their lives as they please, but they will do so openly, so that outsiders cannot sensationalize what would otherwise be secrets and lies. A few public officials will opt for intelligent forms of secret non-conformity. They will experience sexual freedom, but only among well-chosen close friends and lovers on whose loyalty and confidence they can count, even when relationships sour. And then there will be the few who will be reckless with their sexual privacy, repeating the mistakes President Clinton was accused of making with Paula Jones and Monica Lewinsky. When the reckless are exposed, they can try the "no-comment denial" or admit impropriety and try to move on.⁷³

⁷² *Id.* at 1203.

⁷³ See, e.g., *Bush Angrily Denies a Report of an Affair*, N.Y. TIMES, Aug. 12, 1992, at A14. Like father like son. Presidential candidate and Texas Governor George W. Bush handled rumors of cocaine use by refusing to comment beyond condemning the press for intrusiveness. See Ken Bode, *To Tell the Truth*, NEW REPUBLIC, Sept. 13 & 20, 1999, at 13, 13.