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Political Ill-Health Coverage: Professional-Ethical Questions Regarding News Reporting of Leaders' Ailments

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While reporting on Presidential health has increased of late, there has been very little discussion of the professional-ethical issues involved from the perspective of the journalist, especially when such medical information is not disclosed voluntarily and/or the public official is someone other than the President. Within the general issue of press freedom vs. the right to privacy, and in light of relevant laws, judicial rulings, legal scholarship, and especially journalistic professional ethics, this essay raises and discusses several questions that reporters should take into account when considering whether to publish unauthorized medical information about public officials: 1) do officials have any right to medical privacy? 2) if so, before, during, and/or after tenure? 3) what is the significance of false vs. non-disclosure by the official? 4) are there limits to informed speculation? 5) what types and degree of ill health justify reporting? 6) regarding what level of elected and/or appointed officials? Other ancillary questions are noted as well: means of newsgathering; obsolescence of news item; extenuating circumstances justifying not publishing such news; low IQ as a health problem; who is to be considered a journalist; appropriate sanctions for going over the line. The article's conclusion explains why the issue of ill health reporting of public officials will become even more problematic in the coming years.

Introduction

The world has come a long way since Woodrow Wilson served out the last year of his Presidency while almost totally incapacitated from stroke with only a very few aware of his condition (Crispell & Gomez, 1988, pp. 13–74). In the age of television, when our leaders are expected to appear periodically before the nation and are far more open to media scrutiny, such a state of affairs today is inconceivable (Bloom, 1996, p. 84).

Despite several historical studies outlining Presidential illness and its effects, and the rare short discussion (usually by medical practitioners, e.g., Bloom, 1976; Kucharski, 1978; Scaletter, 1984) of a few journalistic aspects related to the issue, no published study has comprehensively examined the questions from the reporters' perspective of what,

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when, and how to cover leadership ill health.[1] This article will attempt to do so, by addressing a host of questions: in what political circumstances, regarding what type and degree of physical and mental illness, and through what means, should a journalist report information/speculation regarding the past, present, and future ill health of American high-level elected and appointed officials?

The purpose of this essay is to engender thought and further debate, while providing some definite answers.[2] Its central, underlying principle is that journalists have the legal, ethical and professional right and obligation to disclose health information of important people carrying out public functions, but such reportage must be preceded by a close investigation and nuanced understanding of relevant factors. "[E]thically sound conclusions can emerge only when various privacy situations are faced in all their complexities" (Christians, Rotzoll, & Fackler, 1998, p. 111). This article will focus on such issues that journalists encounter in reporting on public officials' ill health.

Notwithstanding increasingly wider coverage since the 1970s, American journalists still do not pursue the issue with the same industry as other news subjects such as financial or sexual impropriety. The lack of serious debate during the 2000 election campaign regarding Richard Cheney's history of heart ailments or George W. Bush's heavy drinking bouts earlier in life are recent examples of media circumspection on the issue of ill health of public officials.[3] Moreover, 20th-century presidential history is instructive: 15 of the past 20 presidents suffered from a serious illness and/or disability during their term(s) of office. Most presidents did not reach their generation's life expectancy (Preston, 1995).

Still, the consequences of such illness and/or non-disclosure nonetheless are worth noting briefly (Post & Robins, 1993): (a) reduced capacity to lead and rule or to meet national crises head on; (b) impaired decision making during crucial treaty negotiations; (c) financial panic and political instability due to different political positions held by the next-in-line; (d) despite the 25th Amendment, lack of clarity in deciding when an incapacitated leader is once again fit (Abrams, 1999), e.g., the first few days after Reagan's colon cancer operation (Crispell & Gomez, 1988, pp. 234–236; Post & Robins, 1993, pp. 172–177); (e) a succession crisis when the leader passes away without adequately providing for proper succession (for instance, no Vice President in the Fifth Republic to succeed Pompidou). And these are the effects of *physical* ailments; the consequences of mental illness can be even worse, extending to mass murder and genocide (Stalin, Amin, etc.). It should be noted that the consequences of non-disclosure are not always detrimental, but in the vast majority of cases the outcome of non-disclosure is dire indeed.

Privacy vs. Newsworthiness/The Public Interest: Law and Ethics

Reporting presidential illness can be viewed from two related but different perspectives: legal and professional/ethical. While a few statutory and juridical lacunae exist, the picture is relatively clear regarding American journalists' legal ability to publish "private" information about public officials. The ethical situation, though, is far murkier.

From a constitutional perspective, the "right to privacy" is a relatively new concept. Certainly it does not exist in the U.S. Constitution or in any of the later Amendments. Thus, in any clash between privacy rights and freedom of the press, the latter has the upper hand in America because of its explicit grounding in the First Amendment and more than 200 years of seniority. By contrast, invasion of privacy by journalists[4] has been a juridical issue only from 1940 onwards (*Sidis v. F-R Pub. Corp.*, 1940), when the court ruled that journalists have the right to report anything of arguable interest to their readers

except for the few things explicitly barred by law, e.g., sedition, libel, etc. Indeed, other than the pioneering article "The Right to Privacy" by Warren and Brandeis that explicitly excluded information that "is of public or general interest" (1890, p. 214), it was not until Prosser (1960)[5] that privacy law was first systematically categorized.

Further strengthening the journalist's position is a series of defamation cases (*N.Y. Times v. Sullivan*, 1964; *Time, Inc. v. Hill*, 1967; *Hustler Magazine v. Falwell*, 1988) in which the courts placed heavy obstacles in the way of a public personality trying to sue the press. Even if published defamations were *false*, one had to prove "knowing or reckless falsity," what the layman would call gross professional negligence. Regarding the issue of privacy, therefore, with the exception of commercial exploitation of a public person's name (*Dietemann v. Time*, 1971) publication of a *true* statement would probably gain virtually total judicial immunity as long as the victim is a public figure.[6] The more "public" the individual, the narrower the scope of what can be deemed private (*Gertz v. Robert Welch, Inc.*, 1974), as long as the report itself is not false (*Cantrell v. Forest City Publishing Co.*, 1974). While U.S. courts have not as yet offered absolute protection to the press in publishing the truth, they have consistently ruled on an ad hoc basis in the media's favor against privacy-based claims (*Landmark Communications, Inc. v. Virginia*, 1978; *Butterworth v. Smith*, 1990).

Privacy, however, is only one side of the coin; "newsworthiness" marks the other side. As Kalven notes (1966, p. 336), the courts' general approach is "the simple contention that whatever is in the news media is by definition newsworthy, that the press in the nature of things be the final arbiter of newsworthiness," for it is the press that has to stand on the front line of public opinion daily in selling its wares. As Zimmerman (1983) notes, the courts seem to be taking a value-neutral stance regarding professional journalistic standards, under the assumption that the argument of press "pandering" to the public's basest tastes has no place in the law, for that would be a class-based judgment regarding the value of different types of information.

Does all this mean that a journalist reporting on a public person's illness is *guaranteed* constitutional protection? Formally, no; practically, yes. There is no judicial case in the American record where the courts decided whether a news item including unsolicited medical information regarding a senior public official fell within the First Amendment's rights of freedom of the press. However, based on two other cases of privacy disclosure, assuming the medical information was legally obtained the American courts would defend press disclosure: "If a newspaper *lawfully* obtains truthful information about a matter of *public significance* then state officials may not constitutionally punish publication of the information absent a need to further a *state interest of the highest order*" (*Smith v. Daily Mail Publishing*, 1979; italics not in the original). "The press may not be held liable for publishing illegally intercepted information as long as the subject is one of 'public importance' and the press itself did not participate in the interception" (Greenhouse, 2001, p. A1).

Moreover, in the U.S. only three percent of privacy invasion cases end in a victory for the plaintiff, very few involving medical information, and many do not involve publication (Bezanson, 1992, note 115). Thus, significant financial damage to the news organization as a result of disclosing public officials' medical problems cannot be a serious consideration in the present American judicial or journalistic context.

This does not mean that *ethically* such reporting *should* occur at all times, even in legally permissible situations. Answers to questions of journalistic ethics are harder to derive, especially regarding a subject, personal health reporting, that is not mentioned in the major American journalistic codes of conduct in contrast to sexual, financial, racial, and other sensitive issue areas: American Society of Newspaper Editors (1975); Society

of Professional Journalists (SPJ) (1996); Radio-Television News Directors Association (2000); Associated Press Managing Editors (APME) (1995); and the National Press Photographers Association (2000). Indeed, a measure of the lack of even indirect guidance can be seen in one interesting paragraph—ambiguous and almost self-contradictory—in the "Minimize Harm" section of the SPJ's Code of Ethics: "Journalists should... [r]ecognize that private people have a greater right to control information about themselves than do public officials and others who seek power, influence or attention. Only an overriding public need can justify intrusion into anyone's privacy" (1996, p. 2).

In sum, many questions still remain that have not been fully addressed by the law, judicial rulings, or even journalistic codes of practice. As the APME Code of Ethics notes: "No statement of principles can prescribe decisions governing every situation. Common sense and good judgment are required in applying ethical principles to newspaper realities" (1995, p. 1). These questions and situations are the focus of the remainder of this essay in an attempt to go beyond "common sense."

Questions That Journalists Face

A) Who Makes the Determination? Philosophy vs. Utility

From a democratic perspective, does the President—or any elected public official—have the right to conceal private medical information from the public? After all, demos-kratos means that the people are sovereign, so that at least in theory they have the right to full disclosure of their public *servants'* capabilities.

To quote Madison: "a popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps both" (as quoted in Dienes, Levine, & Lind, 1997, pp. 8–9). The point is made more strongly by legal philosopher Thomas Emerson: "It might well be argued...that the positive demands of the First Amendment would require the government to make public certain types of information necessary for public decision making" (1970, p. 673), and certainly barring that, the press should find and disclose such information—perhaps even as a First Amendment *duty* to the public, and not just as an inherent press "right".[7]

However, functional-utility (consequentialist) considerations are important as well: if we insist that our elected officials provide complete medical histories, might not far fewer good candidates enter public service? Perhaps enabling our leaders to preserve some privacy is a small price to pay for ensuring that some of the best and the brightest enter the political realm (Gavison, 1984, p. 370).

This latter argument is a serious one. It would even be ultimately persuasive were it not for two facts. American federal law requires all Presidential candidates to disclose their *financial* holdings in order to be eligible for federal monies. Why should personal finances be considered less sacrosanct than medical information (Bloom, 1996, p. 95)? Moreover, where Presidential candidates are asked and some even willing to answer the question "boxers or briefs?" it seems ridiculous to argue that mandatory or potential media disclosure of personal medical information is a factor in preventing someone from running for high office. Those who cherish their privacy will not join the political fray; once having entered, they should be fully aware that the political waters demand some deep diving into their personal life.

Finally, as Dr. Lawrence Altman (the *New York Times* physican-reporter) has noted after twenty years of increasing medical disclosure by American *presidential* candidates: "The public as an employer has come to expect timely information about the health of

a candidate just as shareholders do about the health of a top corporate executive" (2000, p. A43). If the social *norm* of medical disclosure for anyone in a leadership position, political or economic, has solidified, not only does the requirement become less socially objectionable from the leader's standpoint but de facto turns into a de-stigmatized "requirement" of office.

American courts have reinforced this approach, ruling on several occasions that it is no invasion of privacy to communicate a private matter to a worker's employer (Prosser, 1960, note 94). This holds true as well for medical information reported by a physician hired by an employer to check the workers' health (*Webb v. TD*, 1997). In short, on the level of general principle and democratic theory, journalists can approach the issue of health disclosure with a clear legal and philosophical imprimatur.

B) Before, During and/or After Term in Office?

Almost all the historical studies focus on the question of presidential ill health while in office. On the other hand, the theoretical/legal analyses of the issue tend to emphasize the election campaign. Is there a difference between reporting on the illness of a *candidate* for office as opposed to a leader already *holding* office? And what should be the rule after the leader *leaves* office?

One could posit that an election period demands more openness because that it is when the *people* are asked to make a decision—thus in need of maximum information for rendering the "right" political verdict. During the term of office, however, as long as the President is not seriously incapacitated perhaps only those with a "need to know" should be apprised. In the American case, this includes the Vice President and Cabinet members, as mandated by the 25th Amendment to the Constitution. Obviously, once they decide that the President is incapacitated, the public should be apprised of the reason for the temporary or permanent transfer of power, but if the decision was to leave the President in power then the public, at least in theory, could be kept in the dark.

The case of President Eisenhower (prior to ratification of the 25th amendment) is instructive. On Sept. 24, 1955 he suffered a massive heart attack, causing one of the steepest stock market declines in American history. This lends some support to those who call for less than full disclosure during a leader's tenure. In any case, Eisenhower's press secretary James Hagerty was explicit in his description of the President's condition (Bloom, 1996, p. 85). However, during the ensuing election campaign when Eisenhower suffered an attack of Crohn's disease, "the President's doctors did not tell reporters as much as they well might have" (Ferrell, 1992, p. 122), specifically denying that the ileum bypass operation in any way affected his life expectancy when medical opinion even then knew otherwise (*ibid.*).

What could account for such inconsistency? Political expediency. There is little political damage in being open about one's illness while in office, given that the public has no means to do anything about it. But Eisenhower obviously felt that the collateral damage of publicizing a *candidate*'s illness can be immense, for in such a circumstance the "punishment" can be swift and total: losing the election. From the journalist's perspective, however, the situation is reversed. If the damage (or means of its prevention) is far greater during an election campaign than when a leader is in office, then the burden of journalistic responsibility is lighter regarding an incumbent leader than for a candidate for office whose political career can be terminated by such disclosure (as was Eagleton's in 1972). This is not to say that the reporter should not publish information about a candidate because of its possible devastating effect on the candidacy (or alternatively not report illness of an incumbent because of its non-effect on a serving leader), but rather

it points out that the level of professionalism (balance, objectivity, second source, etc.) required in the former case is greater than in the latter.

One final point regarding political candidates for office. In the U.S., open records laws in the states and the court's interpretation of them (e.g. *Ohio ex Rel. Plain Dealer Publishing Co. v. City of Cleveland*, 1996) usually permit public perusal of factual information furnished by applicants for employment in public service (including medical records, depending on criteria to be discussed later). If this holds true for public employees, it would seem that at least morally (in a democratic values sense) a journalist would be on firm ground in disclosing the factual past of a candidate for much higher office.

What of the post-rule period? After the former official's death, there is little question that this does not constitute invasion of privacy, for as Prosser noted: "there is no common law right of action for a publication concerning one who is already dead" (1960, p. 408; see his note 205 for supporting cases). If the former official is still alive, one could argue that there is no need to report on an earlier (even continuing) illness after leaving office because of the greatly reduced "public interest" in the matter. But if this is so, why do we find far more reporting of medical problems afterwards? The immediate answer is the same one mentioned a moment ago: lack of political price to pay. But while this is factually correct insofar as the leader is concerned, it hardly constitutes a justification from the reporter's perspective. Is there greater moral or professional justification in reporting such material when it no longer has the same "public interest" compared to when the public interest is high? The answer is self-evident: precisely the reverse is true. Journalistic responsibility demands more coverage when it is least "convenient" to the official in question.

This is not to suggest that post-term reporting of a former official's illness is useless. In general, "the news purpose of a disclosed private fact . . .is not necessarily limited to publication of information about the subject . . . . [O]ften the disclosure . . .serves an elucidating, illustrative, and larger educational purpose" (Bezanson, 1992, p. 1164; *Commonwealth v. Wiseman*, 1969). Reporting serious illness, even when no longer politically relevant, would show the public how important is the issue of leadership health disclosure for national security and welfare. An example of this is ex-President Reagan's announcement in 1994 that he was in the early stage of Alzheimer's (Bloom, 1996, p. 93). Such a pronouncement had at least one important effect–bringing home to the American people just how critical Presidential health reporting can be in "real time."

C) Non-Disclosure vs. False Disclosure: Is There a Difference?

Is there a difference from the journalist's perspective between a leader refusing to divulge private health information and disclosing such information in a false or misleading fashion?

One way of looking at this is that if the leader publicly acquiesces in playing the game of full disclosure but does so by lying to the public, any claim to privacy is thereby abrogated by the very act of prevarication. This is equivalent to arguing that breaking the rules of the game is legitimate when the other side does so first. In most areas of life we do not accept this because there exist institutional forces of law (e.g., police, courts) to right the first wrong. However, here the "wrong" is not criminal but rather moral-political. The sole recourse to redress such a wrong is also "political," but only the press is fully capable of calling attention to the public lie[8] and fomenting enough public pressure to politically (or constitutionally) punish the leader and/or those involved in the lie. Analogously, one could argue that just as polygraph tests used in hiring decisions for

public employment have been deemed open records subject to public disclosure (*Ohio ex rel. Lorain J. Co. v. Lorain*, 1993), so too should a candidate's medical condition disclosure by a newsperson be considered fair play, especially if that reporter's "polygraph" discovers an untruth.

Once again, a distinction could be made between an election campaign and tenure in office. In the former, a possible strong argument in favor of reporting private medical information (in response to misleading, untruthful medical disclosure) is the principle underlying "false and misleading advertising" (*Friedman v. Rogers*, 1979): if society doesn't accept false or seriously misleading advertising for products/services, why should we countenance this in the public/political sphere? Any and all invasion of a candidate's medical privacy seems to be a light enough penalty for the candidate for attempting to pull the wool over the public's eye.

Moreover, there exists another justification for journalistic investigation and invasion of medical privacy when the candidate misleads the public—the ancillary problem of the candidate's flawed moral character. We demand that our leaders not lie baldly to the public. Suffice it to say that the public has the right to hear about such lies and make its own judgment as to whether there are any extenuating circumstances and whether the leader should be punished politically (at the polls or through impeachment). The journalist, therefore, has a duty to intrude upon an official's medical privacy in such a situation, for not only did the official open the Pandora's box but in the process also let out a particularly noxious "devil."

But what if the candidate merely refuses to disclose personal medical data? Here the dilemma for the journalist is greater. On the one hand, one can well argue that the public should simply be allowed to weigh such non-disclosure among the candidate's other pluses and minuses. In short, one could say that it's the candidate's (and the public's) problem. On the other hand, though, we do not take very kindly to a car manufacturer that hides design or structural flaws from potential customers. As Posner asserts: "At some point nondisclosure becomes fraud" (1984, p. 336). Would a court find someone guilty—or would the public consider it an ethical transgression—if someone divulged such a "corporate secret"? It would be even harder to legally or morally "indict" someone reporting (even against the candidate's wishes) that the country's potential steering wheel is medically flawed, for as Posner argues: "each of us should be allowed to protect ourselves from disadvantageous transactions by ferreting out concealed facts about other individuals that are material to their implicit or explicit self-representations" (1984, p. 338).

What about officials serving in office? Can their prevarication regarding illness or serious medical condition provide sufficient moral justification for the journalist to invade their privacy? I believe that here too some distinction should be made between two different circumstances. The first is when the journalist discovers that the public official was aware of the medical problem while running for office and yet lied about it. This is certainly equivalent to a candidate lying about the problem and the journalist should not think twice about reporting the facts. There isn't any "statute of limitations" on political mendacity, and winning an election under false pretences should not grant immunity to the political perpetrator. Theoretically, one could argue that such reportage would undercut the legitimacy of the leader, thereby weakening the body politic, but such an argument is untenable because then any national leader's misdeed could not be reported–precisely the situation that a free press is designed to avoid.

If the medical condition appeared only after the election and the leader denies or lies about it, the main press justification for reporting medical news of this sort becomes the above "flawed moral character" argument. There is no conceivable way

that the journalist can prove the leader's lie without citing chapter and verse (from documents or other unimpeachable evidence) as to the real medical condition. In other words, even if the illness is not overly serious, the immorality of deceiving the public is probably reason enough for the media to perform their duty and air out the medical data for all to see.

The final category is one in which the person is ill but manages to hide it so that there is no need to lie explicitly or baldly mislead (except insofar as not initiating information about one's ill health can be considered "misleading" the public). In most cases where the leader is incapacitated or seriously handicapped, the illness will become apparent to the journalists soon enough. What we can demand is that the press dutifully report what is self-evident and ask some hard questions about the leader's (lack of) functioning. However, if the official can function publicly in adequate fashion (answering reporters' questions in lucid fashion, etc.), then most probably they are functioning adequately within the corridors of power as well. Nevertheless, in such a "public" context journalists should have no compunctions about aggressive reporting ("the President seemed to be in pain . . ."), for there is no element of "privacy" when the leader is operating in the public eye or even behind the scenes in an official capacity.

D) What are the Limits of Informed Speculation?

Is there a journalistic obligation or right to raise pointed questions in print about the medical condition of a senior public official? In other words, barring any hard evidence—just behavioral (e.g., drop in workload) or external/physical (e.g., suddenly pallid skin)—can it be considered an invasion of medical privacy to raise doubts as to the leader's present fitness?

From an ethical perspective, this issue is both easier and harder on the journalist. It is easier in that there is no rummaging around in private records, ferreting out protected information. The journalist is merely using that which exists in the public sphere: visual and aural evidence of possible medical problems and/or behavioral dysfunction. A newer wrinkle on this—in the near future, possibly a major ethical dilemma—is what exists in the "cyber sphere", through what is called "data mining," whereby huge amounts of personal (not necessarily "confidential") data are retrieved from sundry sources on the internet—store purchases, services received, travel and leisure consumption, food intake, public records (birth, school, police records), etc. Through statistical analysis a personal "profile" is built that can tell us more about individuals than they are aware of themselves!

Is this different than any other subject where a reporter has a good "nose" for what's happening and shares that assessment with the audience, perhaps as a result of solid "legwork"? Probably not. On the other hand, ill health touches on a person's most private information. By speculating about possible ailments, the reporter/commentator is essentially forcing the official to respond ("no comment" is tantamount to "where there's smoke, there's fire"), i.e. the reportorial act *indirectly* becomes an invasion of privacy.

There is also an auxiliary question here: even if the leader is obviously not ill at the moment, is it ethical to raise doubts about that person's medical future? To take an extreme example, a 65 year-old leader (or candidate) is very obese, smokes two packs of cigarettes a day, polishes off a six-pack of beer every weekend, and is a fast food junkie who disdains fruits and vegetables. Should the journalist raise issues about the possible consequences, even to the extent of asking (and investigating) what is the actuarial probability of living out the term of office? It is hard to see how reporters would not be considered derelict if

they *didn't* present the public with a prognosis in such a dangerous situation, but this obviously also constitutes a "slippery slope" precedent for less critical prying.

The answer to the first question may be found in the second: it is incumbent on the journalist to first assess—usually through expert medical opinion—the "gravity" and the "import" of the external evidence, i.e., the relative *conclusiveness* of the evidence and the *serious implications* of the data. First, if the evidence tends to lead in only one direction, then there is a stronger foundation upon which to raise the issue. On matters as sensitive as this, good journalism should be a matter of probability and not mere possibility. Second, and much more important, are the medical implications of the evidence.

E) Type, Degree, and Prognosis of the "Illness": Do They Make a Difference?

From a journalistic perspective, is there a difference between a leader's *physical* ailments and *psychological* ones? In either case, should a newsperson report on such illness regardless of its seriousness? Moreover, does it make a difference whether medical science is able to ameliorate/cure the illness or not? And finally, what is to be considered a medical or psychological "condition" for our purposes?

These four related questions involve matters that are immensely complex. One particularly problematic meta-medical issue is that it is no longer clear that one can easily (if at all) distinguish between "purely psychological" problems and physical ones, as there seems to be a physiological basis (either biological or genetic) for most mental disease (Post, 1983). Certainly the contemporary trend is to treat many heretofore "psychological" problems with effective drugs, despite neurobiology still being in its infancy. Nevertheless, this discussion will assume the still generally accepted dichotomy between the two.

To begin with, one must distinguish between an ailment's seriousness and to what extent it affects the individual's ability to function. A hypothetical example: two weeks before a presidential election[9] a reporter discovers two things. First, the Democratic candidate is incapacitated with an extremely painful ruptured disc in her lower back. For all intents and purposes this is totally debilitating, but through a relatively safe operation the condition can be completely cured—but only by putting her in immobilized traction for half a year. Second, coincidentally, the Republican candidate was just diagnosed as being in the very earliest stage of Parkinson's disease. There is a double prognosis: given new medicines on the market, the disease's progress most likely can be slowed down significantly so that during the next four years he will be able to function normally for all intents and purposes; on the other hand, there is a virtual certainty that he will die within ten years.

Which is the more "serious," i.e., life-threatening, illness? Without doubt the Republican candidate's. Which illness disqualifies the candidate from standing for election? Certainly, that of the Democratic candidate. Which of the two should the journalist report? There seems to be little doubt that the Democratic candidate's condition must be reported immediately, for a physically incapacitated President can't adequately lead the country over several months. As to the Republican candidate (assuming that he and his staff are unwilling to disclose the illness), it is not completely clear that this must be reported to the public, given the absence of any substantial national policymaking ramifications.

Thus, in answer to our first question, serious *psychological* problems almost always affect decision making *immediately*, whereas serious *physical* illness may not necessarily have much immediate impact on the patient (unless the treatments are very enervating, e.g., chemotherapy) or painful or time-consuming (e.g., kidney dialysis). True, any serious

physical illness is bound to have some psychological effect on the patient, but given the highest level of ongoing care that a national leader is given, in addition to the exhilaration of power and non-stop (worthwhile) workload, we can expect that such a person will be minimally affected (if at all) from a psychological standpoint.

Moreover, mental illness strikes at the leader precisely where health is most needed: the brain. Physical illness, on the other hand, insofar as it does not impair mental functioning or entail total physical incapacitation, is almost irrelevant to modern leadership (e.g., FDR until his last term of office). Even worse, mental illness is a far more amorphous matter for the medical practitioner—or the patient—to characterize and define, e.g., George Washington.[10] As Gavison notes, "mental health is one of the least well-defined concepts in the literature" (1984, p. 364). Thus, it is not always clear that there is a problem or to what extent it affects the patient's decision-making capabilities, but the list of possibilities is long and very troubling: reduced intellectual capacity, stereotyped responses to stimuli, impaired judgment, uncontrolled emotional reactions, reversion to early personality traits, wide fluctuations in mental capacity (Post and Robins, 1993, pp. 18–19). Physical illness, on the other hand, is far more palpable and today almost always relatively easily diagnosed so that we know with a high degree of certainty what it is we are dealing with and medically can act accordingly.

Do we thus conclude that a journalist has a greater, or at least the same, obligation to report on a leader's mental illness as compared to a physical ailment? The immediate answer would be a resounding yes, were it not for two problems: 1) the problem of *stigma*; 2) the *professional responsibility* to be precise and balanced.

The problem of *stigma* is a serious one despite and because of its elusiveness and social relativity. Most societies tend to ascribe far greater stigma to "mental" than "physical" illness. This does not mean that the person is to "blame" in any moral sense for the mental illness but rather that it strikes at the very essence of what makes us human as opposed to animal: high level cognition. One proof is the Eagleton Affair in 1972 when massive public pressure caused the Democratic Vice Presidential candidate to resign from the ticket after it was learned that he had undergone electroshock therapy for depression years earlier. No similar pressure was brought to bear earlier or later when candidates admitted to all sorts of *physical* illnesses. Thus, reporting on mental illness demands of the journalist even greater thought and care than for serious physical illness because of the almost irreparable damage to reputation such reporting will almost certainly cause.

Regarding *professional responsibility*, the very amorphousness of mental illness leaves everyone on slippery ground. What is there to report: that a leader is seeing a psychiatrist? For what particular illness when the patient and/or the doctor are not sure themselves? That the prognosis is what—when no one knows the true nature of the problem, its extent or its duration? Thus, journalists with general information of this sort find themselves in a bind: on the one hand, there is a need to inform the public; on the other, it is difficult to be precise because of the inherent uncertainty involved.

Does a "red line" exist regarding "seriousness"/functioning? Between a chronic ingrown toenail and total paralysis or mental incapacity due to severe stroke lies a huge middle expanse of possible illnesses and medical conditions with varying levels of seriousness and impact on the patient. The less the ailment influences the leader's ability to function, the less reason there is to report on the condition. Here it is important to distinguish between "impairment" and "disability" (Post & Robins, 1993, p. 204). The former relates only to the disease itself, whereas the latter is related more to the nature of the job. For example, severe constipation might well impair a President but is not likely to be professionally disabling. Thus, from the perspective of the journalist's decision to

publicize, the central criterion is not the illness per se (impairment) but its effect on the patient's ability to carry out the duties of office (disability). Curable, localized basal skin cancer may well have *less* justification for intrusive coverage than ongoing, incapacitating migraine headaches.

Regarding the question of medical treatment, from the journalist's perspective it is mostly irrelevant whether or not a cure exists (however, see next paragraph). Once again, what counts is the impact of the illness on the patient and its duration (both the illness and the impact), and not whether there exists a treatment or whether the ailment is curable. Put another way, quality of life (medium term) is far more important for our purposes than (long term) quantity of lifespan.

However, there are two aspects of the treatment that must be taken into account. First, the possibility that lack of effective treatment, even if the disease is not incapacitating, could disturb the general mental disposition of the person affected. More significant is the problem of *iatrogenic* illness, i.e., illness produced by the treatment itself (Post & Robins, 1993, chap. 3), e.g., hypertensive drugs can cause depression; insulin reactions can lead to confusion and fatigue, etc. Thus, before deciding to "bury" a story journalists must ensure that the treatment is not worse than the cure from the standpoint of the leader's functioning.

Finally, how is the journalist to decide what is an "illness" and what not? The terminology used in the news item will be highly dependent on whether the experts feel they are dealing with sickness—not to mention the influence on the audience of such a news item.

A good example of this question's complexity is the road "homosexuality" has traversed in and out of the AMA's list of officially classified illnesses. As Bezanson notes: "Today's society is far too diverse, personal values are too pluralistic" (1992, p. 1162) to support a monistic approach to privacy disclosure. New Yorkers might consider a specific form of behavior "offbeat", whereas Alabamans could see it as the height of psychological sickness and depravity (the problem of "community standards": *Miller v. California*, 1973). Given that we are dealing with a leader of the whole nation, the journalistic question cannot be merely based on local, community standards—"the customs, mores, or ordinary views of the community" (*Herald Co. v. Ann Arbor Public Schools*, 1997)—or even on local legal convention. If one of the considerations to publish or not involves the amount of injury to the leader's reputation, the journalist must then take into account the totality of national norms in assessing the balance between public benefit (publishing) and personal price (damage to political reputation).

F) Which Public Officials?

Should a journalist feel restricted in reporting important medical information regarding only the individual at the top of the governmental pyramid?

The first aspect to be considered is whether such invasion of medical privacy by a journalist should be undertaken only regarding *elected* officials or appointees as well. One could argue that only elected officials are directly beholden to the public and thus only they must be completely open about anything that could remotely affect their functioning. Appointed officials are technically and formally beholden to those who appoint them, so that if there is an obligation to disclose personal medical data, it is sufficient to do so behind closed doors for the eyes only of the elected official nominally in charge of the appointment (and/or of ongoing supervision).

Such an approach is formally appealing, but cannot be decisive. American law clearly offers a large measure of newsman's privilege on the issue of invasion of

privacy when dealing with a "public personage" (*Cason v. Baskin*, 1947). Among others, the generic term "public official" extends the governmental hierarchy down to a level as low as local sheriff (*Martin v. Dorton*, 1951), as part of a long list of those who fall in this category (Prosser, 1960, pp. 410–411). The courts have used three alternate reasons for this wide-ranging definition and privilege: 1) they have sought publicity by injecting themselves into such a public role; 2) their affairs have already become public; 3) the Constitution guarantees the press the right to inform the public about those who have become a legitimate matter of public interest (Prosser, 1960, p. 411).

The question, then, is one of situational ethics: whether such information was known to those in charge at the time of the appointment and, in the case where the medical condition antedated the appointment, whether they know about it now, and in either situation, whether medical opinion was appropriately taken into account in deciding whether the officer should be appointed to/continue in office. If the answer to any of these questions is "no," then the journalist certainly has a prima facie ethical case for publishing, if only to point out the turpitude of the officer in not reporting to superiors, or the negligence of the elected officials in charge for not doing their duty (consulting with a medical professional, etc.) after being informed. If the answer is "yes," then it is hard to see what purpose can be served by publication given that the situation is under medical and political control.

However, whether one agrees or not with the above, there exists still another journalistic consideration. Is the reportorial net to be spread over all public officials or only those with a certain standing or type of job?

As millions of people are in public service, any blanket approval of such intrusive journalism would amount to a wholesale weakening of the right to medical privacy. Just because we have decided on the principle of a matter does not necessarily mean that it should be universally applicable. Is the local dogcatcher a legitimate "victim" in most circumstances?

Despite *Martin v. Dorton* (1951) and *Hull v. Curtis Publishing* (1956) that dealt with the limits of privacy invasion of lower level officials, the legal question is not totally resolved, and certainly the ethical one remains. From a legal standpoint, the above cases granted reportorial privilege regarding behavior of public officials in the course of carrying out their duty. This is not a legal carte blanche to report on *anything* regarding that individual. It is important to recall that Justice Douglas's general pronouncement that "such privacy as a person normally has ceases when his life has ceased to be private" (Emerson, 1970, p. 555) was offered in a minority *dissenting* opinion (*Time, Inc. v. Hill*, 1967). And again, even were the law to allow such open-ended privacy invasion, this says nothing about its ethical propriety.

Assuming that the courts were to decide that medical privacy demands a higher journalistic threshold than other sorts of more "public" information, it seems that there are two ways of looking at the question: to define the "official" by seniority in the governmental hierarchy, e.g., member of the Cabinet, chairs of legislative committees, etc.; and to weigh the "sensitivity" of the position.

There is one advantage to the first approach: it is easy and clean. Were we able to decide on a specific hierarchical level—for example, all positions recognized by law as political appointees—the journalist would have an easy time of it in deciding whom to investigate. Prosser notes "when a mere member of the armed forces is in question, the line is drawn at his military service, and those things that more or less directly bear on it" (1960, pp. 417–418; his source is *Stryker v. Republic Pictures Corp.*, 1951). However, such a formalistic approach misses an important point: the possible deleterious effect—and

its extent—on society of an official whose illness seriously impacts decision-making, and not the formal position that the official holds.

Obviously, there are many senior positions of great national sensitivity: armed forces chief of staff, chairman of the Federal Reserve Bank, heads of the CIA and FBI, ambassadors, White House chief of staff and the President's personal secretary, head of the IRS. Should they also be open to reportorial scrutiny and media disclosure of medical problems?

It is almost impossible to answer this question in the negative for one fundamental reason. For many professions, contemporary American law requires workers to undergo job-related medical and/or personality/psychological testing, if the employer requires this. This may occur before hiring and periodically afterwards for any type of job, but especially if the task has public sensitivity: control tower operators, jet pilots, nuclear reactor workers, army personnel, and so on (on the other hand, public officials—certainly those elected—who have positions of responsibility, are not similarly required by law!). However, a journalist who reports on their ill health status is standing on firm ethical ground given that we have legislated mandatory medical checkups for certain workers with even less impact on life and limb, broadly speaking.

In short, the judicial principle of "public interest" is paramount here. Of course, the lesser the person's responsibility, the greater burden of proof on the journalist to show that the official in question is in a position of significant public sensitivity. Such differentiation is in line with the court's ruling regarding Exemption 6 ("Personal Privacy") of the Government in the Sunshine Act (regarding opening federal agency hearings regarding personnel, to the general public), offering "greater protection to...low-level government employees, than to government officials with executive responsibilities" (*Common Cause v. NRC*, 1982, p. 938). When an agency conducts a job performance evaluation, the law distinguishes between public employees and government officials, with the latter having to take place in a meeting open to the public (Dienes et al. 1997, p. 338). This does not mean that discussion of medical matters must be disclosed in such circumstances. While the Sunshine Law clearly *allows* for exempting a public worker's health condition from being publicly debated, in most cases such an exemption is not *mandated* and such disclosure is permitted (*ibid.*, pp. 314, 340). What, then, is the general principle? There is to be no "clearly unwarranted invasion of personal privacy" (*U.S.C.* § 552b(c)(6)) (1976).

The word "unwarranted" is the key here, for it clearly suggests that one's position should be a secondary criterion to public influence and impact. The individual in charge of the Center for Disease Control in Atlanta sits far lower on the government's organizational chart than the Under Secretary for Central American Affairs. A mistake of the latter can cause embarrassment; an error of the former can lead to catastrophe. The journalist must take into account such factors when considering whose medical privacy to invade in accordance with the court's own balancing approach to the issue, regarding the Freedom of Information Act: "If a protected privacy interest exists, it is assessed and weighed against the public interest in disclosure" (Dienes et al. 1997, pp. 365, 406).

Overall, then, American law seems to make some interesting distinctions. First, as noted, it enables the authorities to protect medical privacy but does not mandate that they must. Second, it places far more stringent standards on the disclosure of specific individuals' medical *records* and far less on the public *discussion* of their medical problems during open hearings. At the least, this offers a definitive positive answer to the earlier question regarding a journalist's speculative discussion of an official's perceived ill health. It also reinforces the warning that when disclosing actual, private

medical information, much care must be given to the cost-benefit "balancing" that the courts use themselves.

Ancillary Questions for Future Discussion

Beyond the above series of issues, other serious, ancillary ones remain for future analysis:

1) What means of health newsgathering are legitimate? While *legally* publication is protected in almost situations (*Cox Broadcasting Corp. v. Cohn*, 1975; *The Florida Star v. B.J.F.*, 1989), is it *ethical* for journalists to obtain and subsequently report such important information: (a) accidentally (Scaletter, 1984, p. 2811); (b) through data mining; (c) under false pretenses (*Ault v. Hustler Magazine, Inc.*, 1987 and 1988; *W.D.I.A. Corp. v. McGraw-Hill, Inc.*, 1995); (d) in underhanded or "unscrupulous" fashion (*Desnick v. American Broadcasting Cos.*, 1995, p. 1355), e.g., diverting and testing urine (Davis, 2000) or checking garbage (*California v. Greenwood*, 1988); (e) through a breach of professional ethics, e.g., a medical professional divulges a patient's illness; or (f) outright theft of confidential data.
2) How far back should a journalist dig for medical data? Is there an "ethical statute of limitations" on personal health information (*Melvin v. Reid*, 1931; Prosser, 1960, pp. 396, 418–419)? For instance, if a candidate for high office suffered from depression as a teenager (a relatively common phenomenon) and is now aged fifty without any sign of depression for the past thirty years, is it journalistically legitimate to report on such "old news"? If a person had leukemia at age twenty-five and has been in remission for the past twenty years, is this a matter that the public needs to know?
3) Do extenuating circumstances exist that could lead a journalist to decide against publishing serious news of ill health? One possible example: in a time of war or national crisis, reporting on a leader's incapacity (or serious medical difficulties) could give succor to the enemy, cause internal political turmoil, and/or significantly lower public morale.
4) Should "mental weakness," i.e., low intelligence, be considered ill health? An intellectual handicap could be (in part) a result of a medical problem (e.g., lack of sufficient nutrients in the womb; genetic defect; mild stroke; etc.). In any case, regardless of whether one views this as a *medical* privacy issue, the question still remains: is it an invasion of privacy to report on a (potential) leader's IQ?
5) Who is a "journalist"? Especially if we accept Justice Stewart's differentiation between free speech rights of common citizens and journalists (Stewart, 1975; Lang, 1975), this becomes a real question. In the age of desktop publishing and the Internet, where anyone can be a "journalist" and publisher, should we ethically, judicially, or statutorily enable equal leeway to disclose private medical information for professional and amateur journalists alike?
6) What is appropriate punishment in situations of unacceptable disclosure of private health information? a) public, moral condemnation (Marshall, 1975, p. 254); b) censure by the journalist's professional association; c) removal from the news beat or even loss of job; d) civil damages (Ellis, 1979); or e) criminal punishment (Dienes et al. 1997, pp. 498–520).
7) How should the information be presented? As Gavison notes: "journalism is crude, and may not do justice to the situation exposed" (1984, p. 376). While this is a general question of journalism, the personal sensitivity and public importance of our present subject lends it even greater immediacy: level of detail, degree of source corroboration, editorial prominence, right of reply, etc.

Towards the Future: Why the Problem Will Get Worse

If the democratic world has muddled through for decades without any clear policy (or even much detailed discussion) on this issue, why start dealing with its myriad complexities now? Above and beyond the fact that avoidance of the issue is unhealthy for the body politic in any case, much greater trouble lies ahead in the near future (probably within twenty years) when this issue will become far more problematic for society as a whole and for journalism in particular—for two reasons.

First, the Internet. Despite our best technical efforts to protect data privacy as well as expanded legislation providing legal safeguards (Pear, 2000), the potential for obtaining and disclosing private medical information is obviously getting greater with everything becoming computerized and, theoretically, obtainable on-line (Garfinkel, 2000). Even before the development of the World Wide Web, the U.S. Institute of Medicine identified thirty-three representative users of patient records in health care facilities and over fifty primary and secondary uses of these records (Dick and Steen, 1991, p. 32ff)—a very large number indeed. Again, it is not just the journalist who will have an easier time finding data but almost anyone else interested in leaking such information to the media. Moreover, another study found that over half of all doctors discuss confidential information at parties (Furrow et al., 1995, p. 241). Thus, in an era where "the promises of the information age... brings... the rapid disintegration of an already weakened right to privacy" (Gandy, Jr. & Simmons, 1986, p. 155), drawing the line between the illegal or the ethically impermissible on the one hand and the acceptable or the legal on the other becomes a pressing need.

Second, and far more substantial, is the new science of genomics. We are fast approaching the day when genetic analysis will enable us to predict, with a reasonable degree of probability, what diseases will attack a person (and approximately when). This will add a heretofore unknown element to politicians' medical reports—not what they have suffered (or are suffering) from, but what they may suffer from in the *future*! The problem, of course, is that we will be dealing in probabilities and not certainties (Annas & Elias, 1992; Annas, 1995a). The question for the media and by extension the public, in such a situation, becomes acute: must information of that sort be disclosed—and how does one report it?

Still worse, in the near future one won't even need to obtain medical records in order to find out what ails (or will ail) the leader. A strand of Presidential hair or drop of sweat is quite sufficient to enable full DNA testing. The Secret Service already removes from public places any glass or utensil that the President holds, in order to prevent foreign agents from performing DNA testing on the basis of "personal residue" left behind!

Annas (1995b) argues that candidates, along with the public, should place all such information completely off limits, as such prognostications reflect public fears of death and disability rather than future leadership functioning. The problem with his approach is twofold. First, it assumes that genetic testing will be able to render only the grossest of predictions as to an individual's medical future, but what happens if and when such genetic prognoses are relatively precise? Indeed, regarding certain illnesses we are already there. For example, a preserved DNA sample of Hubert Humphrey from 1967 recently showed a bladder cancer *p*-53 mutation (he died of cancer in 1976) (Kaku, 1998, p. 247). Had modern techniques been available then and his condition reported upon, Humphrey might well have taken himself out of the 1968 Presidential race or been pressured to do so. Second, even assuming that genetic results offer only probabilistic, diagnostic predictions, why is this any different than the situation today? We do not seek

medical disclosure for the sake of titillation or historical curiosity but rather (among other things) as a possible indication of a future problem while the person is in power (or running for office). Genetic testing, even without complete predictive exactitude, merely extends our ability to do what Americans today consider acceptable and even normative.

True, in the longer term, the problem may well disappear as genetics will enable us to cure—and most probably also prevent—most human diseases. Thus, by the second half of the 21st century we will come full circle and return to the political journalism situation of the first half of the 20th century—non-coverage—with the crucial difference that there will be no real need public need for medical disclosure. Until then, however, we would do well to address the multifarious issue in more forthright manner—for the betterment of professional journalism, the democratic process and the ultimate health of the nation.

Notes

1. Media Ethics books also tend to give this issue short shrift. To take but two examples: *Media Ethics* (1998) by Christians et al. does not discuss the dilemmas involved in reporting ill health. Neither does Kieran (1998) regarding the British Press.
2. Space limitations place several other aspects beyond this essay's purview: 1) the historical evolution of U.S. "presidential" illness reporting (Annas, 1995b; Bloom, 1996; Crispell & Gomez, 1988; Ferrell, 1992; Post & Robins, 1993); 2) the reasons for the relative dearth of VIP health reporting in America and elsewhere (one possible answer, among several: the usual "conspiracy of silence" surrounding the leader with regard to illness); 3) the many philosophical arguments in favor or opposed to the "right of privacy" in general (Marshall, 1975; Schoeman, 1984; Thomson, 1984); 4) precisely defining the various types of "privacy" (Parker, 1974; Prosser, 1960—see note 5 below); 5) the situation overseas—Spiro's astute essay (1971) on "comparative privacy" between European countries and the U.S. clearly shows that marked differences exist in the way privacy is practiced in daily political and social life—with Europeans usually behaving in a *more* private fashion than Americans. In practice, Presidential health reporting is far more prevalent in the United States than elsewhere. See too, Roberts and Gregor (1971).
3. Another relatively recent example: Paul Tsongas' declaration during the 1992 Presidential campaign that he had beaten his non-Hodgkins lymphoma, when in fact it was incurable. The press did not "press" him on the issue. He died shortly *before* his term of office would have ended had he won election.
4. The first case to recognize both a "right of privacy" and "legitimate public interest," but not in the press context, was *Pavesich v. New England Life Insurance Co.* (1905).
5. There exist four recognized forms of privacy tort: *intrusion* (physical invasion of one's private space); *false light* (publicity which presents a false picture of the person); *appropriation* (taking the commercial or property value of one's identity); and *disclosure* (revealing private facts and information) (Barron & Dienes, 2000, 141–145). The following discussion will focus on the latter exclusively as most germane to the issue at hand.
6. The courts tend to be far less lenient when dealing with privacy intrusion of an ordinary citizen (*Daily Times Democrat v. Graham*, 1964; *Shulman v. Group W Productions*, 1997; *Anderson v. Fisher Broadcasting*, 1986).
7. Such a duty can be inferred from the inclusion of the press as an extended "agent" of the public within the First Amendment (*Saxbe v. Washington Post Co.*, 1974; *Richmond Newspapers, Inc. v. Virginia*, 1980).
8. "... the President [Wilson] is able-minded and able-bodied ... he is giving splendid attention to the affairs of state"—when in fact he was in a wheelchair, in a depressed, semi-paralyzed state (Crispell & Gomez, 1988, pp. 73–74).
9. A similar scenario can be offered for a leader in office, e.g., half a year before the end of term the President's doctors diagnose incipient Alzheimer's, with only very minor memory loss predicted for the ensuing six months vs. another situation where the President has a terribly enervating case of severe mononucleosis that will disappear in six months.
10. At the end of his first term, Washington already felt that he was losing some mental faculties, and wondered whether he should stand for reelection. He did, his mind continued getting feebler, but luckily for the infant Republic, only after leaving office did the first President suffer serious dementia (Post & Robins, 1993, p. xi).

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