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Virtuous Lying: A Critique of Quasi-Categorical Moralism

WILLIAM H. SIMON*

INTRODUCTION

Popular and professional moralists have a tendency to over-condemn lying. This Article is a critique of that tendency and the more general outlook it exemplifies, which I call Quasi-Categorical Moralism. I begin with an illustration from my own experience of morally appropriate lying that is condemned by the legal profession’s ethics norms. I proceed to a critical examination of the arguments against lying in what is perhaps the best known contemporary work on professional ethics — Sissela Bok’s Lying.¹ I then explore the more sympathetic treatment of lying in a broad range of literary and philosophical works typically ignored among popular, professional, and even philosophical moralists.

Although this not an Article primarily about any aspect of the Starr-Clinton scandal, it briefly considers the lying charges in the spectacular recent outburst of Quasi-Categorical Moralism directed at President Clinton. I conclude by suggesting that, at least in the context of the legal profession, the impulse to moral self-restraint that animates Quasi-Categorical Moralism is a more dangerous force than the impulse to moral self-assertion that it deprecates.

I. AN ILLUSTRATION

One Friday in 1980, a man named Jessie Rogers walked into our legal aid office in Boston to complain that he had just been denied “emergency” food stamps by the neighborhood welfare office. He had been released from prison the prior day. The prison authorities had arranged temporary lodging for him in a small room with primitive cooking facilities, given him a little cash, and told him he could receive food stamps on application at the welfare office. A social service agency would assess him for employment the following week.

The prison authorities’ expectation that he would receive food stamps was not unreasonable. Statutes and regulations entitled financially eligible people in Rogers’ residential circumstances to an “over-the-counter” issue of stamps on application if they were in “immediate need.” The application process called for

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¹ SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1978).
various documents, such as proof of residence and a Social Security card, which Rogers had satisfied. He was, however, unable to satisfy one of the demands: he did not have a "picture ID", and neither he nor the welfare worker to whom he applied knew how he could get one in less than five days. Although the regulations stated that documentation requirements should be waived in cases of "immediate need" where there was a reasonable explanation of inability to comply, the worker told Rogers that he could not receive any benefits until he could produce the "picture ID."

On hearing Rogers' story, our paralegal telephoned the welfare worker to argue that Rogers was entitled to a waiver of the ID requirement. While the paralegal waited, the welfare worker went to consult the office director and returned to confirm the office's refusal to provide benefits. When Rogers and the paralegal told me their stories, I called the office. The welfare worker told me that the director had instructed her not to grant benefits without a "picture ID." I asked to speak to the director. The worker, after hesitating suspiciously, said that the director had "left for the day." The paralegal did not believe this: "They're stonewalling. They hate to waive documentation. On Monday, when we finally get to see the director, he'll claim that the worker never told him Mr. Rogers was in immediate need. In the meantime, they'll have had the satisfaction of jerking Mr. Rogers and us around."

I proposed that the paralegal call the office back and, in a secretarial tone, tell the receptionist that Theresa Taylor wished to speak to the director. Theresa Taylor was the welfare department district manager to whom the office director reported. It worked. Within seconds, the office director came on the line. His initially obsequious tone became first irritated and then sheepish as I explained who I was and why his office was clearly obliged to issue stamps immediately to Mr. Rogers. Vindicating our paralegal, the director said with ineptly feigned surprise, "Oh, he's in immediate need! He should have told us that." He finally agreed to yield up the stamps that afternoon.

Getting food stamps for somebody who would go hungry without them is satisfying work, especially when you can do it in ten minutes. I was thus flushed with pride as I related this story to my supervisor and disappointed when he remained impassive as I finished.

"What's the matter?" I asked.
"You realize you violated your professional responsibilities," he said.
"What do you mean?"
"You lied when you said Theresa Taylor was calling. You made a false statement of fact, or had someone do it for you, which is just as bad, and that's a violation of the Code of Professional Responsibility."

II. QUASI-CATEGORICAL MORALISM

My supervisor was arguably right that my lie violated the Model Code of
Professional Responsibility, but, to me, this fact reflected adversely on the Model Code rather than on me, and my supervisor’s disapproval was priggish and naive.

I recently told this story to a class of exceptionally thoughtful law students, intending it as a passing example of the untenability of categorical ethical precepts. Various ethics rules forbid lying, usually without explicit qualification. Yet lying is sometimes clearly the right thing to do. Good lawyers sometimes lie, I said; a lawyer who says he never lies is either not a good lawyer or is lying.

To my surprise, most of the students refused to accept my story as a passing illustration of an obvious point and insisted on a discussion of the ethics of lying (to the point that we never got to what I had intended as the main subject of the class). They were quite troubled by my cavalier generalization, resisted my interpretation of the Food Stamp story, and expressed sympathy for my supervisor’s position. Some of them found my position cynical and conflated it with the views of lawyers who disparage the value of truth and encourage deceptive tactics that advance their clients’ goals without regard to the merits.

Midway into this discussion, my colleague Deborah Rhode, whose class this was, retrieved a copy of Sissela Bok’s book Lying and read some excerpts from it. Despite the book’s fame, none of us except Rhode had read it, and we were impressed both that Bok supported the students’ concerns and that the students had independently articulated Bok’s principal arguments in the earlier discussion.

In this Article I want to elaborate my response to the students’ and Bok’s concerns. I focus primarily on lies intended to mitigate or prevent injustice, such as that in the Food Stamp story, but I will make occasional reference to another category of lies that Bok deals with — paternalistic lies intended to benefit the person deceived by them.

Bok’s and the students’ approach might be called Quasi-Categorical Moralism. The position is not easy to define; it needs to be seen in relation to two other positions. First, there is categorical moralism. A categorical moralist — Kant is the classic modern example — holds that some kinds of activities, including lying, are always wrong. Everyone today ultimately concedes that, unless we resort to eccentric and circular definitions of the activity in question (for example, defining lying as “unjustified” deception), this approach is untenable. We need only refer to the famous hypothetical about whether it is morally permissible to lie to the murderer about the whereabouts of his intended victim — a sanity test flunked by Kant³ — to make this point.

Opposed to the categorical approach is the contextual one, which is mine. We

2. Model Code of Professional Responsibility DR 7–102(A)(4) (“In his representation of a client, a lawyer shall not . . . [knowingly] make a false statement of law or fact.”); DR 1–102(A) (“A lawyer shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”).

should recognize that there are often moral costs to lying and should lie only when these costs are exceeded by the morally relevant benefits. Such costs can be intrinsic as well as consequential; damage to my personal integrity or disrespect for the autonomy of the person I deceive are morally relevant costs. Obviously, the maxim is of limited use until we specify the "morally relevant costs" and their weights, but for that very reason, it ought to be unobjectionable as a starting point.\(^4\)

Yet, Quasi-Categorical Moralism resists the contextual approach strenuously.\(^5\) Indeed, this resistance, more than any alternative formulation, constitutes most of its position. Bok, for example, is vague on prescription. There are three principal elements to her approach.

First, Bok argues that moral judgments about lying are subject to powerful cognitive biases that call for hard presumptions against it. The argument is barely developed, but it is insistently re-asserted as a mainstay of her case.

Second, Bok offers a panoply of references and rhetoric that connote categorical prohibition without actually embracing it. Her book is redolent of nostalgia for the days of Categorical Moralism. It's full of quotations from theorists like Saint Augustine who asserted that lying (along with many other activities including masturbation and usury) is invariably wrong. Then, there are sweeping generalizations like these: "[T]he perspective of the deceived leads us to be wary of all deception."\(^6\) "All want to avoid being deceived by others as much as possible."\(^7\) "Bias skews all judgment, but never more than in the search for good reasons to deceive."\(^8\) Of course, Bok eventually dissociates herself from categorical prohibition and acknowledges qualifications to the quoted generalizations, but only tentatively and reluctantly.

The third principal element of Bok's approach is an ostensibly stricter standard for lying than my "don't lie unless moral benefits seem to outweigh moral costs" precept. Bok holds that "only where a lie is a last resort can one even begin to consider whether it is morally justified."\(^9\) This precept is no less vague than mine, and it could be interpreted to mean the same thing—"last resort" might mean where there's no alternative that's not more morally costly. (However, the idea that you have to make this judgment before you "begin to consider" the problem is somewhat mind-boggling.) The tone of Bok's precept, however, is different. And when we view it in the light of the cognitive bias argument, it may

\(^4\) Approaches generally consistent with my premise are elaborated in DAVID NYBERG, THE VARNISHED TRUTH: TRUTH TELLING AND DECEIVING IN ORDINARY LIFE (1993); J. L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 182–84 (1977); and various works discussed infra Part IV & nn.22, 30, and 32.

\(^5\) In addition to Bok's work, supra note 1, see CHARLES FRIED, RIGHT AND WRONG 54–78 (1978); G.F. WARNOCK, THE OBJECT OF MORALITY 84 (1971).

\(^6\) BOK, supra note 1, at 21 (emphasis in original).

\(^7\) Id. at 23 (emphasis in original).

\(^8\) Id. at 26.

\(^9\) Id. at 31 (emphasis in original).
be substantively different. Perhaps it means that we should require a higher degree of certainty for judgments that support lying than for judgments that support other courses of action. Perhaps it means that any apparent net margin of benefit is not sufficient; the margin must reach some threshold to warrant lying. (It is not enough that the best honest alternative is worse; it has to be a lot worse.)

Bok neither embraces nor disclaims such positions. She never succeeds in finding a resting place between the uninteresting claim that one shouldn’t lie without a moral reason and the untenable claim that, when one has such a reason, it is presumptively trumped by a duty of honesty. The book’s undeniable achievement is thus, not to stake out a position or sustain an argument, but to generate, through rhetoric, reference, and example, a sense of anxiety about lying. This anxiety resonates with a broader and deeper anxiety about moral self-assertion that I think is strong among some of the students I spoke to and in certain quarters of elite professionalism. Although this anxiety can be healthy in some contexts, it can be unhealthy in others, including many of those in which Quasi-Categorical Moralism is most likely to be taken sympathetically. So I want to emphasize the limitations of the arguments, rhetoric, and references that support it.

III. COGNITIVE BIAS ARGUMENTS

Bok claims that we are incompetent to weigh the costs and benefits of lying and that our incompetence takes the form of a pervasive bias in favor of it. The Quasi-Categorical norm against lying is thus designed as a mental brake on a proclivity to see lying as the right thing to do. Bok seems to have two notions of bias — a static and a dynamic one. The static one involves a general tendency to overestimate the benefits and underestimate the costs of lying. The dynamic one involves tendency for the disposition to lie to intensify in the course of the practice of lying — a phenomenon of the sort lawyers call the “slippery slope.”

A. STATIC BIAS

According to Bok, people who contemplate lying “are much more willing . . . to exonerate a well-intentioned lie on their own part; dupes tend to be less sanguine about the good intentions of those who deceive them.” Liars are prone to “benevolent self-evaluation . . . of the lies [they] might tell.” This bias takes the form of tendencies to underestimate the costs of lying. “Liars usually weigh only the immediate harm to others from the lie against the benefits they want to
They thus "ignore or underestimate" two other kinds of harm. The first is "the harm that lying does to the liars themselves," which potentially includes damage to both self-respect and reputation. After the fact, I may think less of myself for having lied. Moreover, if the lie is discovered, my reputation will suffer; others will be less likely to respect and trust me. The second kind of overlooked or underestimated cost is "harm done to the general level of trust and social cooperation." Social life depends on people's ability to rely on each other's veracity. Individual lies have the potential to reduce people's future willingness to trust each other, which threatens cooperation.

Bok gives many examples of unattractive lying, but she offers no evidence that they result from the failure to account adequately for the kinds of costs she points to, as opposed to, say, conscious bad faith. She also makes no effort to situate her claimed bias in a larger picture of psychological process.

It will be helpful to distinguish three sources of bias pertinent to Bok's claim — short-sightedness, selfishness, and identification with clients. It seems likely that there are biases associated with each of these phenomenon, and a recent literature by behavioral psychologists supports and amplifies this intuition. However, neither intuition nor this literature suggests that these biases include one in favor of lying.

1. Short-sightedness

Bok says that we focus excessively on "immediate" costs in deciding whether to lie. She thus implies that part of the problem is short-sightedness. People have a well-documented tendency to focus on especially vivid contingencies (for example, the possibility of dying in a traffic accident) at the expense of relatively mundane ones (for example, the possibility of dying from asthma). They are also prone to give excessive weight to the near, at the expense of the remote, future. In matters such as saving, for example, they often express regret, looking back, that they didn't save more, and looking forward, they often engage in forms of pre-commitment, such as blocked savings accounts, to prevent anticipated tendencies to overindulge in short-term satisfactions.

Bok thinks of the harms to reputation and to the general level of social trust that she believes are underestimated in judgments about lying as the sort of mundane and remote matters disadvantaged by short-sightedness. Her Quasi-

13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id.
Categorical injunction against lying is a kind of pre-commitment, analogous to a blocked savings account, against an anticipated tendency to undervalue honesty. In fact, however, shortsightedness does not imply a bias in favor of lying or warrant the kind of pre-commitment to honesty Bok favors. This is because some of the important benefits of lying also often take relatively mundane and remote forms and hence would be equally vulnerable to under-appreciation by shortsightedness. Moreover, there may be an important counter-tendency, unacknowledged but illustrated by Bok, to overstate the more long-term and intangible costs of lying.

Consider how short-sightedness bias might play out in my Food Stamp story. At the seminar, several students insisted that I had failed to appreciate important costs of my lie, especially my diminished future credibility with the welfare department, and urged something like Bok's "last resort" principle. They thought I had violated the principle and suggested the following alternatives:

1. I could have walked over to the welfare office and searched for some evidence of the director's presence — for example, his car in the parking lot — and then confronted the receptionist with it and a new demand to see him.
2. I could have sought out the real Theresa Taylor, the director's supervisor, and urged her to instruct her subordinate to take my call.
3. I could have lent the client some money of my own to tide him over the weekend and then presented his claim on Monday, when, presumably, the director would have to receive me.

Even assuming that these courses were practicable, they had costs of their own. The first would have entailed a protracted and potentially embarrassing confrontation with the receptionist. The second was likely to subject the director to a humiliating encounter with his supervisor that might entail significant loss of respect and harm to his prospects for promotion. (It would have exposed him as a liar and thus subjected him to the reputational costs that Bok portrays as severe.)

At the same time, the third suggestion entailed a cost that my interlocutors did not perceive but that is important to legal aid lawyers and many of their clients. I would have lost an opportunity to force the director to perform his duty. One aspect of this cost concerns my own credibility as an effective lawyer. This little blitzkrieg victory had a good chance of enhancing the director's view of me as someone not to be messed with when asserting a valid claim. This would be valuable to me personally and to future clients. The third approach — the loan — would have sacrificed this benefit completely, and arguably the first two, even if successful, would have been less effective in this respect. They would be more cumbersome and hence less impressive.

This particular cost to me reveals an ambiguity in the meaning of "credibility." Bok uses "credibility" to connote truthfulness and honesty; hence lying is always a threat to credibility. Credibility-as-honesty is most pertinent with respect to assertions involving statements about existing or past facts, but there is another
important kind of credibility. When we speak about the credibility of a person's statements as to his future intentions we connote honesty, but also something more — the capacity or power to fulfill these intentions. A "credible" threat or promise is not just one that the speaker is sincerely committed to, but also one that she is likely to bring about.

Both credibility-as-honesty and credibility-as-power are important, and they do not necessarily go together. I might have believed plausibly that my lie would enhance my credibility in the latter sense to an extent that would more than compensate for the loss of credibility in the former sense. The director would be less likely to believe my future factual statements, but more likely to credit my commitment to vindicating my client's rights. The lie might make her think me less honest but also more clever and tenacious. Precisely because of the relative aggressiveness of the course I took, it may have had the strongest effect in suggesting to the director that he was less likely to get away with irresponsible behavior in the future.

The effect on the director is not the only relevant consideration. For Bok, credibility is a matter of self-respect as well. And from this perspective also, it would be a mistake to consider only credibility-as-honesty. Credibility-as-power is an important dimension of the sense of self-worth of many lawyers, especially those in practices oriented toward redistributive or reformist values. I took no little pleasure and pride from the sense of power my small victory afforded. Perhaps there was some childishness in this, but as long as my effort was consistent with other values, it seems appropriate to count this pleasure and pride as a benefit of my lie.

These personal costs to me of the alternative courses — reduced credibility-as-power and self-respect — are relatively remote and intangible harms of the sort that Bok suggests short-sightedness should lead us to underweight. My discussion with the students confirms this prediction. However, contrary to Bok's assumptions, these non-immediate harms weighed in favor of lying. So here, short-sightedness bias worked against lying.

Moreover, while Bok assumes a fairly uniform tendency to underestimate reputational costs of lying, she illustrates what I think is a quite common tendency to overestimate them. She speaks as if a lie, once discovered, leads invariably to a general discount in the future willingness to accept the Actor's statements. Thus, in my case, the office director will be less likely to believe anything I say to him in the future. But in fact, the circumstances of the lie will often suggest a far more specific interpretation—that the Actor will lie when she thinks it will save a life or prevent a war or save a marriage. In my case, perhaps

20. An interesting claim made by Nietzsche, quoted as an epigram but not discussed by Bok, supra note 1, at 17, is that the two types of credibility are in powerful tension. I return to this claim infra Part IV.

21. Bok, supra note 1, at 24. "And if [people] find out that he has lied, [the liar] knows that his credibility and the respect for his word have been damaged." Id.
the director would have drawn the following inference (which I think would have been the most correct one): Simon will lie about minor matters collateral to the merits of his client’s claim when the lie frustrates what he believes to be a clear evasion of responsibility by an official in a situation with urgent stakes for the client. Of course, even this effect would involve a cost, but it would be a considerably lower one than Bok’s expansive rhetoric suggests.\footnote{Bok’s rhetoric on the bias issues is sometimes slippery. For example: And it is inevitable that more frequent lies do increase the chance that some will be discovered. At that time, even if the liar has no personal sense of loss of integrity from his deceitful practices, he will surely regret the damage to his credibility which their discovery brings about. \textit{Id.} at 25–26. All we can really say is that the Actor runs a risk of harm from discovery. Bok tries to create a heightened sense of harm with words that connote certainty. It is “inevitable” (that there will be a risk), and regret will “surely” follow (if there is discovery). Her use of “regret” also blurs the distinction between, on the one hand, discontent that things didn’t work out as one had hoped, and on the other, reappraisal of the decision to lie as a bad one \textit{ex ante}. Only the former will “surely” occur, but only the latter is relevant to the bias claim.}

The same points apply to the second category of concern Bok portrays as jeopardized by shortsightedness — “the general level of trust and social cooperation.” Bok speaks as if this those qualities were simply a function of honesty, or at least, always strengthened by honesty, but the Food Stamp story is a counter-example. The alternatives to lying had the disadvantage that they either failed to enforce the client’s right to immediate benefits (the loan) or did so in a way that might have had less of an impact on the director (trying to reach his supervisor or confronting the receptionist). Because it would have vindicated a right, getting the food stamps might have been more satisfying to the client than a loan. And an immediate challenge was likely to have a greater deterrent effect on the director’s future propensity for lawlessness (though whether going to his supervisor would have had a stronger effect than my strategy is debatable). Surely the enforcement of rights such as Mr. Rogers’ are part of the “general level of trust and social cooperation.” Again, the tendency of my interlocutors, entirely consistent with Bok’s conflation of social trust and cooperation with honesty, was to underestimate these interests. The discussion supports Bok’s claim that non-immediate costs may be short-changed, but it shows that these costs don’t cut consistently against lying.

We can also see a recognizable counter-tendency to exaggerate the costs of lying to the “general level of trust and social cooperation,” even when we look only at the honesty dimension of this quality. Just as it is wrong to assume that every discovered lie leads to a general discount in the willingness to accept the Actor’s word, it is wrong to assume that every discovered lie lowers incrementally the general willingness of people to rely on each other’s words. If people understand even an unjustified lie as a response to an unusual situation, it should not significantly affect their sense of general honesty. Yet Quasi-Categorical moralists encourage an entirely irrational tendency to assume that every known lie undermines honesty in general.

\footnote{\textit{Id.} at 25–26. All we can really say is that the Actor runs a risk of harm from discovery. Bok tries to create a heightened sense of harm with words that connote certainty. It is “inevitable” (that there will be a risk), and regret will “surely” follow (if there is discovery). Her use of “regret” also blurs the distinction between, on the one hand, discontent that things didn’t work out as one had hoped, and on the other, reappraisal of the decision to lie as a bad one \textit{ex ante}. Only the former will “surely” occur, but only the latter is relevant to the bias claim.}
Kant provides the extreme example of this tendency. His conclusion that the murderer should be told the truth about his victim's whereabouts was based on an absurd overestimation of the costs of the lie:

> Truthfulness is a duty which must be regarded as the ground of all duties based on contract, and the laws of these duties would be rendered uncertain and useless if even the least exception to them were admitted.\(^2\)

Everyone today recognizes that this is ridiculous. To determine the extent to which a particular lie to prevent murder would lead to lies that would injure legitimate interests is a matter of predictive empiricism, not moral analysis, and the overwhelmingly likely answer is that it wouldn't at all. I will speculate in Part V about why such a smart guy as Kant could have made such a dumb mistake. For the moment, we can take his lapse as an extreme example of a counter-tendency to the one Bok claims, a counter-tendency that survives today in the form of a casual assumption that all discovered lies have some negative impact on the general level of honesty.

2. Selfishness

Another way to understand Bok's bias claim is in terms of selfishness. People "want to be deceived as little as possible" themselves, but they'd like broad latitude to deceive others.\(^2\)\(^4\) If we tell people they are warranted in lying to prevent injustice or spare suffering on the part of the deceived, their selfishness is likely to bias their judgments about injustice and suffering. For anyone who feels in need of substantiation of this primordial intuition, experimental psychologists have recently provided it. For example, when they assign groups of subjects to plaintiff and defendant roles and give everyone the same description of the case, the plaintiff groups consistently evaluate the case much higher than the defendant group.\(^2\)\(^5\)

This intuition, however, is unhelpful to the Quasi-Categorical case against lying because the undoubted bias toward self-interest does not imply a bias in favor of lying. As Bok herself makes clear, self-interest often cuts against lying.

Obviously, self-interest could not explain any tendency to underestimate Bok's first set of costs — harm to reputation and self-respect — since these are costs to the Actor herself. Selfishness should lead lawyers to overestimate the reputational and respect costs of lying and hence should work against it.

For example, Donald Langevoort and Robert Rasmussen have argued that

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\(^2\) Kant, *supra* note 3, at 281. Kant is speaking here about the costs of a social norm authorizing a lie to the murderer, rather than the cost of an individual taking the initiative to lie, but his mistake seems closely analogous to the one we are discussing.

\(^4\) Bok, *supra* note 1, at 23–24.

selfish concern about reputation leads lawyers to encourage clients to moderate their claims or conduct more than disinterested analysis would suggest. If the client takes a more aggressive position, then the lawyer is exposed to more risk, because if the lawyer turns out to be wrong and the client suffers some loss, the lawyer’s mistake is likely to be widely observed. On the other hand, if the client moderates her course, disputes are unlikely to arise and any mistake by the lawyer is less likely to come to light. One might think that the same influence would lead lawyers not to lie for the client when dispassionate analysis would suggest they should. If the lawyer lies, she risks discovery and reputational damage; if she remains passive, no matter how much the client suffers, the lawyer’s exposure is less likely.

As for Bok’s other category of non-immediate harms — damage to the social interest in trust and cooperation — I’ve already pointed out that a tendency to underestimate such costs does not amount to a tendency to underestimate the costs of lying. Unless we arbitrarily conflate the social interest in trust and cooperation with honesty, we have to recognize that lying can sometimes further this social interest, as in my Food Stamp story.

If selfish bias induces unjustified lying, it is most likely through its effect on consideration of the immediate interests of the person deceived by the lie, and not of such remote and abstract interests. Appraising this effect requires that we consider what we mean by selfishness. At a minimum we mean to include explicit material interests, for example, financial gain. If the Actor stands to achieve a clear material benefit from the lie, it seems plausible that his judgment about its justifiability would be biased. However, a presumption against lying based on this minimal notion would be vastly over-broad. In many, perhaps most, situations in which the Actor contemplates a lie to prevent injustice or suffering, she has no clear tangible stake.

If we take a view of self-interest that includes more amorphous interests, then selfish bias seems potentially active in almost any situation. In referring to the “power that lies bring,” Bok refers to an important category of psychological satisfaction. I mentioned that I felt a particular exhilaration and pride from my victory over the welfare director. Successful lies often bring such satisfaction. Lying will usually be the more active course, the one with the most promise to give the Actor the experience of influencing events. For many, self-interest includes a general taste for power (or “will to power” in Nietzsche phrase) that biases judgment in favor of lying.

The problem for Bok’s argument, however, is that other tendencies that pull in

27. Id.
28. Bok, supra note 1, at 23.
the opposite direction seem at least as powerful. Lying involves risks of discovery and reputational loss that, as Bok herself emphasizes, can be large and long lasting. Many people dislike risk. And as Bok would surely agree, lying requires the sacrifice of a spontaneity and transparency in personal relations that many people value. Moreover, many people find the exercise of power upsetting. Thus, the temptations of power are opposed in our culture by the attractions of the quiet life. Many people prefer not to “get involved” or to “mind their own business.” We might view these competing tendencies as a salutary correction to the desire for power, but we might also see them as engendering dysfunctions of their own.

The conventionally asserted moral pathologies of our culture are associated, not only with the kind of a self-assertion Bok fears, but with the kind of self-restraint she promotes. We do not like it that so many people prefer not to participate in politics, don’t intervene to assist victims of crime and injustice, and unreflectively conform to the demands of institutionalized authority. These phenomena suggest that there are competing satisfactions to those of self-assertion, and their effect on moral judgment should run counter to the effects of the satisfactions of self-assertion. If, as Bok suggests, lying is associated with the satisfactions of power, then honesty should be associated with the satisfactions of passivity, and these latter satisfactions should generate countervailing pressures on moral judgment.

In the area of sexual morality, it has long been conventional to recognize that pathology takes the form of repression as often as of license, that bias leads as readily to condemnation as to permission. It is important to extend such insight into other areas of ethics. With lying, we ought to recognize the selfish interests that might potentially bias us in favor of self-restraint, as well as those that push toward self-assertion. Kant’s dismal performance in the murderer hypothetical is the most spectacular instance, but it is by no means unique. 30

3. Client Bias

In the case of professionals, and especially professional advocates such as lawyers, another possible source of bias might be identification with clients.

30. See Fried, supra note 5, at 17–29. Charles Fried’s espousal of “categorical” prohibition of lying arises from his insistence on the priority of “negative” duties (to refrain from harmful acts) over “positive” ones (to prevent harm from the acts of others). There is a plausible intuition here: We do regard pushing someone into the water as more reprehensible than failing to rescue them after they’ve slipped in. This intuition hardly supports giving greater weight to negative duties (and the danger of self-assertion) in the design of our maxims of moral practice. Even if positive duties are generally weaker than negative ones, they are still numerous and important. (It’s still a terrible thing for me to let someone drown if I could save him with minimal risk.) Which type of duty is in greater jeopardy of under-enforcement depends not on their relative abstract priority, but on the dispositions and practices of moral decision-making of the people with whom we are concerned. If people find it harder to comply with their positive duties than their negative ones, then it makes sense to emphasize positive duties in our operating norms. Unlike Fried, Bok recognizes that the issue is sociological rather than analytical, but I think her sociological intuitions are implausible.
Might client bias tend to distort lawyer judgments in favor of lying? Such a bias would not seem relevant to paternalistic lies, where the client is ostensibly the beneficiary as well as the person deceived by the lie. But in the case of lies to prevent injustice, one might speculate that client bias would irrationally predispose lawyers toward judgments that lies benefiting clients were justified. The claim that client bias would lead to a bias toward lying is a little more plausible than the claim than selfish bias leads in this direction, since some of the costs of lawyer lies on behalf of clients are borne by lawyers rather than clients. If the lawyer gets blamed for the lie, the client may escape reputational loss, and in performing the lie, the lawyer may spare the client some of its psychological costs.

On the other hand, while it seems clear that short-sightedness and selfishness biases exist in some form, it is debatable whether there is any client bias. Note that the kind of bias we are hypothesizing—one that predisposes the lawyer to push for the client beyond the limits of social propriety—is not promoted by the profession’s norms. The bar espouses commitment to client interests but only "within the bounds of the law," and it also prescribes distance from the client for the purpose of protecting the lawyer’s capacity to respect social interests. To be sure, there is much evidence of lawyer deviance from professional norms, but nearly all of it is consistent with self-interest. So far, there is little substantiation of a bias that is both deviant and non-self-interested.

Nevertheless, it seems intuitively plausible that lawyers are vulnerable to client bias. Intuition doesn’t take us very far, however, in estimating the range or strength of the bias or how it competes with other biases, such as shortsightedness and selfishness that often cut in different directions. Nor does intuition suggest that client bias operate especially strongly in the area of lying, as opposed to other forms of aggression that might benefit the client. The profession has addressed client bias by trying to foster a dimension of detachment into strategic decision-making. In comparison to Bok’s, this approach seems both more direct — it focuses on the bias itself rather than its anticipated consequences — and more focused — it doesn’t limit its concern to a single kind of aggressive advocacy.

B. DYNAMIC BIAS

Bok’s second bias argument — the dynamic one — is asserted over and over, but never elaborated. “After the first lies,” says Bok, “others come more easily. Psychological barriers wear down; lies seem more necessary, less reprehensible;
the ability to make moral distinctions can coarsen; the liar's perception of his chances of being caught may warp."

A single lie is a "slippery slope" because the practice of lying intensifies our bias in favor of it.

Of course, the fact that a single lie leads to further ones is not a problem unless these incremental lies are on balance bad ones. The experience of lying might increase the disposition to lie by teaching the Actor something about the benefits and costs of lying. Perhaps the Actor lies more because he discovers that his initial lie does not entail dire consequences of the magnitude predicted by moralistic prohibitionists. For example, an initial act of masturbation by an adolescent schooled in Victorian sexual attitudes tends to lead to many more in part because the Actor is pleasantly surprised that his advisors have overstated the costs of such acts.

So, to state an objection to the initial lie, the slippery slope argument must assert that the incremental lies it induces are on balance bad ones. The argument looks like this: Lie A considered on its own might be a good thing, but a person who tells lie A thereby becomes more likely to tell lie B (and perhaps a series of other lies), which is a bad thing. When we consider the costs of Lie B (etc.), permitting Lie A is unacceptable.

The argument remains incomplete. It assumes that we — that is, both the person making the argument and those to whom it is addressed — can confidently determine that, considered on their own, Lie A is good and Lie B is bad. Why then does it predict that one who tells lie A will be more likely to tell Lie B? Presumably the Actors we are worried about lack our own capacity to discriminate between A and B.

This might sound as if the "Slippery Slope" perspective is that of an elite making rules for people of lesser judgment. This is not, however, where Bok is coming from. Such elitism would not sit well with the values of autonomy and reciprocity in which she grounds her objections to lying. The tendencies that lead to the Slippery Slope are tendencies we all share. The norms that Quasi-Categorical moralists propose apply to themselves as well as others; it is in part through examination of their own limitations that they have discovered these tendencies.

So the people whose judgment we distrust are ourselves. Not ourselves now, as we discuss the general maxims by which we should live. Here we can plainly

34. *Id.* at 25.
35. See, e.g., *JOSEPH HELLER, CATCH-22* 121 (Everyman's Library ed. 1995):

Major Major had lied, and it was good. He was really not surprised that it was good, for he had observed that people who did lie were, on the whole, more resourceful and ambitious and successful than people who did not lie. Had he told the truth to the second C.I.D. man, he would have found himself in trouble. Instead he had lied and he was free to continue his work.

*Id.*

36. For helpful explication in a slightly different context (judicial decision-making), see Frederick Schauer, *Slippery Slopes*, 99 *HARV. L. REV.* 31 (1985).
discern the differences between A and B. Rather, we are formulating maxims for ourselves as we can envision us at some hypothetical future point after we have indulged in A. We can foresee that our judgment is likely to undergo a change that, in terms of our current values, would be for the worse.

Bok does not elaborate on this notion, but there are two familiar intuitive models of it. One is drug addiction: the first taste of the addictive substance (A) is good, but it has the effect of intensifying desire for further tastes (B), which are not. (Or as Professor Harold Hill puts it, “Medicinal wine from a teaspoon, then beer from a bottle.”) There may be a physiological dimension to this, but we are more concerned with its effect on judgment, desire, and will. In one relevant interpretation, the powerful, immediate pleasure of the initial taste simultaneously induces a desire for more and distracts one from the more remote and diffuse costs of further tastes.

A variation that seems more analogous to lying focuses on the phenomenon of autocratic political power, as expressed in Lord Acton’s dictum, “Power corrupts.” We’ve noted that Bok suggests that power affords egoistic satisfactions that bias judgment. The “power corrupts” maxim suggests that the bias increases in intensity with the exercise of power in the manner of substance addiction. Again, the effect takes the form of an immediate and intense satisfaction dulling one’s appreciation of more remote and diffuse values. The Actor, perhaps plausibly, views the initial exercise of power (e.g., A: the overthrow of the ineffectual Provisional Government) as a step toward a better society. But holding power affords intoxicating satisfactions that cause her to exaggerate the benefits of the next step (e.g., B: the dissolution of the Constituent Assembly) and underestimate its costs. Additional steps exacerbate the bias. Eventually the immediate personal satisfactions of power overwhelm any sense of public costs and benefits.

In the situations we are most interested in, lying seems desirable because it relieves a threat of injustice. (Or in the paternalistic category, it seems desirable because it relieves the suffering of the Deceived.) Thus, the refusal to lie requires a tolerance of injustice (or suffering). Let’s assume that the Actor’s untutored instincts lead her to believe that on balance the moral cost of the lie would be acceptable because of its contribution to justice. Bok would have her distrust that judgment and impose a disproportionately high burden of justification for the lying option. In situations where the burden isn’t met, the Actor conforms to the honesty norm at the expense of what appears to be an injustice. The slippery slope argument implies that the psychology of this choice is different from that of the lying choice. The honesty choice is experienced as self-restraint rather than self-assertion, and thus does not present the dangers of intoxication and addiction.

37. Merideth Willson, Trouble in River City, from The Music Man (1962).
But as I argued above, self-restraint has its satisfactions as well. If lying can bring the intoxication of power, honesty may bring the satisfactions of the quiet life — a sense of safety, release from emotional and intellectual tension and the demands of improvisation, a sense of personal wholeness and transparency, the anticipated or imagined approval of others committed to Quasi-Categorical Moralism. With self-restraint (honesty), the satisfaction is less intense, but it operates more directly to distance other concerns. Quasi-Categorical Moralism invites us to pre-commit ourselves to an abstract norm of honesty, and this necessarily entails a distancing from the competing norms in particular situations. None of the critics of my conduct in the Food Stamp story thought I should have let the client go hungry over the weekend. Some, however, such as those who urged me to avoid lying by lending him the money myself, would have had me refuse to respond to his sense of entitlement to receive his benefits from the welfare department now.

This experience might well have a slippery slope quality — a progressive numbing of sensitivity to injustice or other relevant competing norms. In order to enjoy the quiet satisfactions of self-restraint, I have to push away concerns about a particular injustice. Every time I do this, I might dull my receptivity to such concerns in the future. At the same time my capacities to handle the strains of self-assertion might progressively atrophy. I may gradually become incapable of perceiving moral costs not identified by a small number of categorical norms.

If the Slippery Slope of moral self-assertion leads to Lord Acton’s “absolute power” (which “corrupts absolutely”), the Slippery Slope of moral self-restraint leads to Hannah Arendt’s “banality of evil.” This, of course, is Arendt’s term for the ethos of the Nazi bureaucrat who privileged the norm of obedience to the dictates of constituted authority over the norms of justice and humanity outraged by the Holocaust. One could readily formulate categorical norms that would require resistance to the Nazis, but in Arendt’s interpretation categorical moralism was part of the problem, not the solution. Resistance depended on independent judgment:

Those few who were still able to tell right from wrong went really only by their own judgments, and they did so freely; there were no rules to be abided by, under which particular cases with which they were confronted could be subsumed. They had to decide each instance as it arose, because no rules existed for the unprecedented.38

I hesitate to invoke the Holocaust. For some, its circumstances are too remote from contemporary America to be relevant; for others, it is a rhetorical trump that preempts reply. However, this is the context in which Arendt made her seminal demonstration that the dangers of moral self-restraint can be as great as those of moral self-assertion. The point here is that there are two Slippery Slopes; which one is more dangerous will vary according to context.

IV. THE VIRTUES OF LYING

You would never know from Bok's book that many respected figures have made serious moral arguments in favor of lying. She gives Nietzsche a few passing references and quotes from Homer's admiring description of Odysseus's trickery, but she makes no attempt to understand either's point of view, and she ignores most other pro-lying moralists.

Her discussion of paternalistic lying is especially notable for the absence of reference to the vast literature that contradicts her claim that "[a]ll want to avoid being deceived by others as much as possible."39 For example, there is Ibsen's Wild Duck, which is dedicated to the proposition that, in Lionel Trilling's words, "truth may be dangerous to life, not every man is worthy to tell or receive it, and the avoidance and concealment of the truth, or even a lie, may have a vital beneficence."40 This theme is especially prominent in modern American drama. Mary Tyrone, Blanche Dubois, and Willy Loman all express strong desires to be lied to and suffer greatly when the truth is forced on them. And for those who prefer less subtlety, there's Nicholas Ray's neurotically romantic western Johnny Guitar:41

JOHNNY [Sterling Hayden]: Tell me something nice.
VIENNA [Joan Crawford]: Sure, what do you want to hear?
JOHNNY: Lie to me. Tell me all these years you've waited.
VIENNA: [without emotion] All these years I've waited.

... 
JOHNNY: Tell me that you love me like I love you.
VIENNA: [without emotion] I love you like you love me.
JOHNNY: Thanks.

If we turn to our principal focus, unwanted lying, we find a prominent, though deviant, strand of 18th and 19th century thought committed to the defense of lying as a form of self-assertion. The authors in this tradition, who include Diderot, Hegel, Nietzsche, and Wilde, rebelled against the categorical and quasi-categorical moralism of the sort Bok carries on.42 Their arguments are subtle and complicated, but some broad themes can be sketched quickly.

First, there is the utility of lying to those who wish to have some transformative

39. BOK, supra note, 1 at 23.
41. JOHNNY GUITAR (Republic Pictures 1954).
influence on the world. Nietzsche calls such people “great men,” which has off-putting implications of grandiosity (not to mention sexism). Although Nietzsche would probably not approve, I think that the point can be made more persuasively with the term “moral activist” and a notion of activism less extreme than Nietzsche’s.\footnote{I have in mind David Luban’s elaboration of the term “moral activist” in his book LAWYERS AND JUSTICE: A PHILOSOPHICAL INQUIRY 160–61, 170–74 (1988).}

The moral activist does not generate her ethics ex nihilo as an act of will. She is a collaborative participant in the moral life of the society. But she recognizes that social norms are indeterminate and in a process of constant elaboration. In my welfare story, for example, indeterminacy arises from the conflict between the norm against lying and the norm of welfare entitlement. The activist views this indeterminacy and incompleteness as both an opportunity and a duty requiring creative intervention. In this, of course, she differs from the categorical moralist, who sees indeterminacy and incompleteness as problems requiring rules that constrain discretion even at the cost of arbitrariness.

I think it is plausible that moral activism, practiced generally and in good faith, would lead to better decisions and consequences. However, the thrust of the literature I’m considering is to defend it as an intrinsically admirable personal quality. The moral activist develops and expresses himself more fully and creatively. Moral activism is a kind of heroism, though a kind accessible to a broad range of people rather than only a small elite. We admire heroism, not just for its accomplishments, but for its daring and ingenuity.

Nietzsche says of his type of activist that he “lies rather than tells the truth . . . because it requires more spirit and will.”\footnote{NIETZSCHE, supra note 42, at 505.} The truth will often be the safe and conventional response; the lie, the more daring and ingenious, and hence from this perspective the more admirable. In my welfare story, loaning the client the money would have been the easiest thing to do; it would have avoided confrontation and respected convention, but we might doubt whether these qualities should count in its favor.\footnote{It may seem preposterous for me to speak of my act of, at best, minor cleverness in terms that connote world-historical figures. But it is precisely my point that these terms, which we often regard as discredited because we associate them with a kind of grandiosity that no longer seems possible or attractive, have relevance to more mundane experience.}

A second theme recommends lying as a defense to exploitation or subordination. Perhaps the most commonly recognized occasion for virtuous lying by lawyers involves bottom lines in negotiation. Your client has authorized you to settle for anything over $100, but you think he’s entitled to $200 and think you can get it. Defending counsel offers $125 and asks: “Would your client accept that?”

There’s a temptation to think that lying can be avoided by prevarication — “We don’t think $125 is fair” or “How could you dream of insulting us with such
a low offer?” Alternatively, you might simply refuse to answer: “You know better than to ask me about my client’s bottom line.”

In many circumstances, however, such answers would be bad. They would be tactically bad, and because they would be tactically bad, they would be ethically bad. Here’s the tactical logic: Defense counsel knows that if my client will not accept $125, there is only one answer to the question that it is in his interest to give — a simple “No.” It is in the client’s interest to convey as convincingly as possible that he will not accept the offer; no other answer conveys this as convincingly as a simple “No”; and a simple “No” is not a difficult answer to think of. Therefore, a thoughtful opposing counsel will take any other answer as a signal that my client is willing to take $125. If a lie is the only way to avoid disclosing the client’s bottom line, then a lie is the ethically correct course if, as will often be the case, first, the client has a legitimate privacy interest in his bottom line, and second, the lie does not harm any legitimate interest of the defendant.46 Telling the truth makes the client unfairly vulnerable.

One can’t say that the party harmed by honesty will always be the one most disadvantaged in a more general sense, or even that there is a strong, general tendency for this to be the case. But we do have descriptions of specific social settings in which deception seems to be an important protective strategy on the part of a subordinated group. For example, many leftist descriptions of the industrial workplace in the late 19th and early 20th century portray workers as able to mitigate the superior power of management by keeping secret or actively misleading with respect to various kinds of information about the production process. The phenomenon of collective “output restriction,” which workers believed essential to a humane workplace and to employment security, depended on deceiving management about workers’ productive capacities. Workers conveyed that their capacities were lower than they were to forestall “speed-ups” and lay-offs.47

The most ambitious claims that link deceit to defense against subordination focus on its psychological aspects. One possible response of an oppressed person is to internalize the oppressor’s perspective and identify personally with her subordinated status. An alternative is to openly reject the situation and rebel. An intermediate course, perhaps less admirable but also less risky than rebellion, is to go through the motions of acquiescence while privately, internally disengaging from them. The subaltern yields to her oppressor the behavioral obsequies the latter demands, but she cultivates a subjective world of independence. Hegel calls

46. I would hesitate to suggest that the lawyer has a duty to lie in these circumstances, since he might compromise his own legitimate reputational interests, but, vis-a-vis, the third party, he should be ethically privileged to lie. See James J. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 AM. B. FouND. RES. J. 926 (discussing lying by lawyers in negotiations and the justifications for it).

47. See MICHAEL BURAWOY, MANUFACTURING CONSENT (1979) (describing an empirical and theoretical study of the capitalist labor process).
this state the "heroism of flattery," and he and many others have seen it as an important advance toward freedom over the more fully acquiescent state.48

In Michel Foucault's work, something like the "heroism of flattery" takes a more active and aggressive form in which subordinated people use their skills of self-presentation to win concessions in intensely personal negotiations of power.49 A similar idea recurs in Ralph Ellison's *Invisible Man*,50 in which the hero encounters at least three role models who espouse mendacity as a tool of resistance for blacks in a racist society. For example, there is Dr. Bledsoe, a Booker T. Washington type who runs the black college. When the hero exposes a naïve white benefactor to a sector of the black community that Dr. Bledsoe seeks to keep hidden, Dr. Bledsoe reproaches him:

"... My God, boy! You're black and living in the South — did you forget how to lie?"
"Lie, sir? Lie to him, lie to a trustee, sir? Me?"
He shook his head with a kind of anguish. "And me thinking I'd picked a boy with a brain," he said. "Didn't you know you were endangering the school?"
"But I was only trying to please him. . . ."
"Please him? And here you are a junior in college! Why, the dumbest black bastard in the cotton patch knows that the only way to please a white man is to tell him a lie! What kind of education are you getting around here? . . ."51

Ellison portrays Dr. Bledsoe as an ignoble figure, and in doing so, affirms Bok's point that lying can entail large costs in terms of personal integrity. But the novel recognizes the benefits of Dr. Bledsoe's strategy as well: He is one of the few African-American characters to achieve worldly success, and his work has helped many Southern blacks make their way into the lower rungs of the professional classes.

A third theme in the case for lying is more aesthetic. Lying enhances the range of the public performances we can give and the relations we can have. Lying thus involves an artistry that is admirable in itself. It also holds the potential for extending understanding. Consider, for example, the many instances in Shakespeare where virtuous people engage in elaborate impersonations. Sometimes, as with Imogen in *Cymbeline*, the goal is to defend against an enemy who would inflict harm if he knew the actor's true identity. Sometimes, as with the Duke in *Measure for Measure*, the impersonation is a sting operation to test

48. See HEVEL, supra note 42, at 306–21 (contrasting the "heroism of service" with the "heroism of flattery" to the advantage of the latter).
51. Id. at 136–37. The other two role models associated with lying are the hero's grandfather, who describes himself as "a spy in the enemy's country" and the charlatan Rinehart. Id. at 15.
someone’s integrity. But it can also be a vehicle of transformative experiences that radically extend the understanding of the Actor and even the Deceived.

For example, Viola in *Twelfth Night* impersonates a man in order to become a confidante of Duke Orsino, whom she loves but who is in love with Olivia. In her male guise, Viola becomes Orsino’s envoy to Olivia to plead his romantic suit. Olivia, however, falls in love with Viola’s male persona. Eventually, the Duke and Viola (now revealed as a woman) end up together, and so do Olivia and Viola’s twin brother. This happy ending is made possible only by the deceptions. Neither the Duke nor Olivia would have been open to the relations they end up in had they not been initially tricked. (And there’s also the suggestion that the deception has made possible the experience of same-sex eroticism.) Impersonation — lying — enables the Actor to cross over boundaries of status and gender to participate in situations and relations that involve both self-discovery and learning about the world.52

The impersonation theme is taken to hyperbolic extreme in Wilde’s *The Importance of Being Earnest*.53 Jack Worthing concocts a roughish cousin, Earnest, who lives in London. He uses Earnest’s need for supervision and assistance as an excuse to his ward to go to London when he desires, and when there assumes the name and character of the fictitious cousin courting Gwendolyn Fairfax. The title is a triple pun. “Earnest” refers to name, a fictitious character, and a personal trait. The play works toward the conclusion that only the first two are important; the last is to be disdained as dull and uncreative. “In matters of grave importance, style, not sincerity, is the vital thing,” says Gwendolyn.54 When Jack learns at the end that he really was christened Earnest in infancy, he complains that “it is a terrible thing for a man to find out suddenly that all his life he has been speaking nothing but the truth.”55

Of course, as Bok acknowledges, conventional morality accepts a certain amount of casual and generally harmless social deception. The Party of Mendacity differs largely in the range of its tolerance and its positive appreciation of this type of activity.

The defense of lying has suffered from association with narcissistic frivolousness (Wilde) or ruthless autocracy (Machiavelli, Nietzsche). So I want to consider a more earthy and modest example: Huck Finn. Few novels are so intensely and explicitly concerned with ethics as *Huckleberry Finn*,56 and few characters are so purposefully and successfully drawn as incarnations of virtue as Huck. Yet Huck lies all the time. Indeed he is a virtuoso of mendacity.

Twain’s narrative contrasts Huck’s intuitive morality of compassion, loyalty,

52. The only Shakespearean liar Sissela Bok mentions is a villain — Iago.
54. Id. at 301.
55. Id. at 313.
56. MARK TWAIN, ADVENTURES OF HUCKLEBERRY FINN (Dover Thrift ed., 1994) (1885). I am grateful to Mike Simon for reminding me of the pertinence of this work.
and reciprocity with an institutionalized morality corrupted by religious formalism and racial exploitation. After slavery, the most prominent moral concern of the book, and of Huck, is lying. The famous first paragraph in which Huck introduces himself as one of the subjects of Twain's previous book, *Tom Sawyer*, notes: "There was things which [Twain] stretched, but mainly he told the truth. That is nothing. I never seen anybody but lied, one time or another, without it was Aunt Polly, or the widow, or maybe Mary."  

These three women are loving and kind-hearted, but morally conventional, and therefore incapable of the kind of heroism Huck casually undertakes.

Before he begins his odyssey, Huck goes to extraordinary lengths to avoid telling a lie. He senses that his Pap has returned and fears he will come after him for his share of the money he and Tom found. He goes to Judge Thatcher and asks him to accept his money as a gift. Judge Thatcher resists, but then sensing the situation, drafts a bill of sale purporting to transfer Huck's property to himself. Huck explains that he has given up his great wealth so "I won't have to tell no lies" to his Pap — surely an impressive application of the "last resort" principle.

But his adventures after he starts down the river consist of a series of situations in which he averts danger to himself and others through flagrant and ingenious deceit. As Lionel Trilling puts it, "He travels incognito, never telling the truth about himself and never twice telling the same lie, for he trusts no one and the lie comforts him even when it is not necessary."  

He lies to several people, beginning with his Pap and concluding with the Phelps family, who threaten harm to him or Jim in order to get away from them. He lies to people who would be unsympathetic if they knew they were assisting a runaway slave to induce them to help. And he does some extraordinary good deeds for strangers in the form of lies. (He gets a boatman to go to the rescue of a thug about to be murdered by fellow gang members by telling him that the person under threat is the town millionaire. He tries to thwart the Duke and the King's efforts to steal the Wilks inheritance by re-hiding the money and then denying he knows where it is.)

Huck is no ordinary liar. He has a genius for it. Twain goes to great lengths to demonstrate Huck’s virtuosity. Four episodes are built around extended scenes of Huck striving brilliantly to sustain a false story in the face of cross-examination and contradicting evidence.  

Huck verbally ducks, bobs, swirls, and weaves. He thickens his story, then modifies it, then rationalizes the modification, then adjusts it to respond to new problems, then sometimes abandons it altogether for a new and equally false one — almost always with ultimate success. These scenes

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57. Id. at 1.
58. BOK, supra note 1, at 12.
60. See TWAIN supra note 56. The four episodes are (my titles): The Grangerfords, at 72-75; St. Petersburg, at 41-46; the Wilkses, at 130-32, 138-40, 166-69, 172-75; and the Phelps, at 190-93, 203-06, 208-13.
illustrate Bok’s strictures about the demands lies create for further lies. Bok writes:

And the strains on [the liar] become greater each time — many have noted that it takes an excellent memory to keep one’s untruths in good repair and disentangled. The sheer energy the liar has to devote to shoring them up is energy the honest man can dispose of freely.\(^6^1\)

While Bok treats such difficulty as reinforcement for her normative inclination against lying, the novel treats it as simply a technical challenge — a matter of purely prudential significance that, when overcome, serves as a measure of Huck’s bravery and ingenuity. Though it may not be what either author had in mind, we can take the triumphs of Twain’s hero as an illustration of Nietzsche’s claim that a “great man . . . rather lies than tells the truth [because] it requires more spirit and will.”\(^6^2\)

The novel, however, suggests an important qualification. Toward the end, Tom deceives both Huck and Jim by speaking of Jim as a slave when he knows that Miss Watson’s will has freed him.\(^6^3\) His purpose is to promote a fantastically elaborate escape plan (inspired by *The Count of Monte Cristo*) that appeals to his yearning for romantic adventure. Huck is appalled when he learns that Tom has subjected them to tremendous anxiety and risk for such a trivial purpose. As in engineering, difficulty should be admired in ethics only to the extent it is necessary to some important end.

The pleasure we take in Huck’s daring and cleverness in these scenes recalls Wilde’s and Diderot’s claims about the contribution of lying to the satisfactions of artistry in the conscious presentation of self. Huck’s exploits illustrate as well Hegel’s portrayal of the potential contribution of deceit to the disengagement of the self from oppressive social circumstances. By lying to those he fears, Huck achieves some privacy and autonomy. He guards his subjective world from them. (I think Trilling has something like this in mind when he says that “the lie comforts him even when it is not necessary.”\(^6^4\))

About two-thirds of the way through his travels, it becomes clear that Huck has abandoned the “last resort” principle for something close to its opposite: “I reckon that a body that ups and tells the truth when he is in a tight place is taking considerable risks.”\(^6^5\) He is now operating on a presumption in favor of lying. Yet, he no sooner recognizes this than he identifies a situation in which the presumption is rebutted: “. . . yet here’s a case where I’m blest if it don’t look to me like the truth is better, and actually safer than a lie.”\(^6^6\) He decides he should

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\(^6^1\) BOK, *supra* note 1, at 25.


\(^6^3\) Twain, *supra* note 56, at 175–213.

\(^6^4\) TRILLING, *supra* note 59.

\(^6^5\) *Id.* at 141.

\(^6^6\) *Id.*
confide in Mary Jane Wilks and does so, without regret.\textsuperscript{67} Although Huck lies often, there is nothing compulsive or even unreflective about his lying.

Here is a vivid denial of Bok’s claims about bias and the slippery slope. All Huck’s Herculean mendacity does not disable him from recognizing a situation in which lying would be wrong or from telling the truth in that situation.\textsuperscript{68} The book is not blind to the costs and dangers of lying. It vividly portrays avaricious, predatory liars — notably the swindlers called the King and the Duke, as well as frivolous, irresponsible liars — notably Tom Sawyer. It also shows that lying can be an important part of the moral practice of an ethically admirable person.

Nietzsche’s discussion of the “great man” continues, “There is a solitude within him that is inaccessible to praise or blame, his own justice that is beyond appeal.”\textsuperscript{69} Huck, with his acute sensitivity to the suffering of those around him and his anguish over his deviations from conventional morality, is not exactly what Nietzsche had in mind, but this sentence seems apt for him.

V. LYING AS A CATEGORY

Recall Kant’s argument that we are bound to tell the truth to the murderer because “the laws [of all duties based on contract] would be rendered uncertain and useless if even the least exception to them were admitted.”\textsuperscript{70} Kant’s mistake here is about categories. Lying, defined as intentional deception, usefully describes a determinate category of behavior. Kant assumes that we are stuck with this category for purposes of moral judgment. We can’t break it down in terms of the distinctions that lead us to resist prohibition in cases like the murderer.

Everyone now recognizes that this is wrong, but I think Bok’s enterprise is dependent on this perspective in various ways. Consider her practice of referring to those who contemplate or engage in lying as “liars.” For example, “Liars usually weigh only the immediate harm to others . . . .”\textsuperscript{71} Since everyone lies on occasion, this term might simply mean “people.” On the other hand, in ordinary discourse, the term “liar” is often reserved for those who lie excessively or inappropriately. Bok’s ambiguous usage associates pejorative connotations with all lying without obliging her to defend them explicitly.

Or again, consider Bok’s assumption that a discovered lie leads people to discount the Actor’s credibility generally. Instead of inferring that the Actor will lie under the circumstances where he lied before (for example, to save a life, or

\textsuperscript{67} Id. at 141–42.

\textsuperscript{68} Huck does tell an irresponsible lie — trying to fool the already anguished Jim into believing that he hallucinated one of Huck’s unexpected absences from the raft. When Jim reproaches him eloquently for it, he recognizes the justice of the reproach: “It made me feel so mean I could almost kissed his foot to get him to take it back.” Id. at 65.

\textsuperscript{69} NIETZSCHE, supra note 29, at 505.

\textsuperscript{70} KANT, supra note 3.

\textsuperscript{71} BOK, supra note 1, at 24.
spare hurt feelings), people will expect that he will just lie. Bok asserts this as a factual matter; this is the way people think, she says. She never considers whether they are justified in thinking this way. Now it happens that academic psychologists have a long tradition of experimental investigation of such notions. In both surveys and experiments, they have tested the idea that a person who tells lie A can thereby be assumed highly likely to tell lie B. They have been repeatedly surprised by the small size of the correlation they have found. As a recent article puts it, "In a century of personality research . . . abundant evidence has documented that individual differences in social behaviors tend to be surprisingly variable across different situations." So if people think as Bok asserts, they are probably irrational to do so, and an irrational practice is a very shaky basis for ethical prescription. By asserting this categorical view uncritically as a factual matter, Bok treats it as support for her anti-lying inclination without actually defending it.

I suspect that moralists like Bok are attracted to lying as a subject of ethics largely because it is relatively susceptible to formulation in the kind of terms they prefer — norms that cabin judgment and restrain self-assertion Quasi-Categorical Moralists like rules that are both determinate and broad. Constraints are determinate when the conduct they refer to can be identified with relatively little effort and controversy. Constraints are broad when they apply to a fairly large range of conduct. Indeterminate constraints are less attractive because they constrain less; they require too much judgment and, because it's hard to get consensus on when they apply, they're harder to enforce. Narrow constraints are less attractive because one needs to formulate and learn too many of them to have a set of norms sufficiently ample to be generally useful. And the more rules you have, the more likely they are to contradict each other.

From this perspective, lying is a potent term because it designates a category of behavior that is both broad and determinate. Consider, for example, the competing value in the Food Stamp story. We might formulate the competing value as "justice." Justice, however, is a comparatively indeterminate term. Although its application in the context of my story may be uncontroversial, its application in a large range of situations would generate controversy. Alternatively, we might characterize the competing value in the Food Stamp story as "wrongful denial of welfare benefits." Now the value seems sufficiently definite, but quite narrow.

Regardless of whether we phrase the question, "Should one lie in order to prevent injustice?" or as, "Should one lie in order to prevent wrongful denial of welfare benefits?", there is no reason to insist that either truth or the competing

72. Walter Mischel & Yuichi Shoda, A Cognitive-Affective System of Personality: Reconceptualizing Situations, Dispositions, Dynamics, and Invariance in Personality Structure, 102 PSYCHOL. REV. 246 (1995). For studies focussed specifically on honesty see Roger V. Burton, Generality of Honesty Reconsidered, 70 PSYCHOL. REV. 481 (1963). Some have interpreted these findings to cast doubt on the idea of a "stable personality," but what they really show is the crudeness of the categories that some psychological studies share with Quasi-Categorical Moralists.
values should be given priority in advance of considering the particulars. But because the competing values do not lend themselves to formulations as maxims that are both broad and definite, there may be a tendency to subordinate them to truth by people temperamentally committed to broad and definite maxims. Truth is not a more basic value than the competitors, but it can be more readily prescribed in a way that looks as the Quasi-Categorical moralist thinks norms ought to look.

Besides being grossly over-inclusive for the purposes of ethics, Bok’s arguments about lying do not go very far toward explaining the harms of the sorts of conduct that she most plausibly condemns. For example, her book appears to have been prompted in part by reaction to the lying by government officials in support of the Vietnam War and in the Watergate cover-up. These lies seem particularly noxious because they were intended to subvert democratic processes of political accountability. The moral grounds asserted for the lies were based on elitist views about the relative abilities of high officials and ordinary citizens to understand the relevant information that seem implausible both because of their incompatibility with widely accepted conceptions of democracy and because they ignore the biasing effect of the officials’ self-interest in maintaining their positions and reputations on their capacities for judgment in the matter. Indeed, the grounds were so weak that many of the officials made no effort to justify their conduct once it was exposed.

Since this time, there has been a series of episodes in which military and intelligence officials have lied to the public and Congress about various activities of their agencies. Without exception these lies seem indefensible. Nevertheless, a critique of these actions restricted to the general costs of lying does not go very far toward explaining why they are so reprehensible. An adequate critique would focus on the harm of the lies to the political process and to values of democracy.

Bok complains that, unlike Classic and Medieval philosophy, modern philosophy has little to say about lying. She doesn’t consider that the reason for this might be that, once one abandons the conflation of behavioral and moral categories in the manner of Kant, lying is not an especially interesting moral category.

VI. PRESIDENT CLINTON AS A LIAR AND AS A DEFENDER OF PRIVACY

As this Article was written, America saw an unparalleled outpouring of Quasi-Categorical Moralism in the Starr-Clinton affair. The scandal implicates all three of the Quasi-Categorical Moralist’s most prominent trip wires — lying, lawbreaking, and adultery. This is not the place for an extended evaluation of any

73. Bok, supra note 1, at xix.
of the charges, so I will limit myself to three aspects of the arguments about lying that tend to complement or confirm the prior analysis.

First, in the anti-Clinton rhetoric on lying, Quasi-Categorical Moralism is invariably signaled by references to children. Most people believe that the facts Clinton lied about, namely intimate consensual sexual conduct, were not a matter of public importance, nor perhaps even of any legitimate interest in the Paula Jones case. The President’s critics rarely take issue with this point. Their main claim is that any lying by the President is bad because the President is a “moral example” or “role model” for children.

A thirty-second television spot aired by the Republicans prior to the 1998 elections featured a conversation between two women that begins, “What did you tell your kids?” “I didn’t know what to say,” came the reply. Then in response to a suggestion that the Congress should move on to other matters, one says, “And say it’s O.K. to lie?”

In a speech that may have done more than any other public statement to encourage a respectful reception for the Starr Report, Senator Joseph Lieberman explained his concerns about the President’s conduct almost exclusively in terms of its effect on children. “[W]e can safely assume that it will be that much more difficult to convince our sons and daughters of the importance of telling the truth when the most powerful man in the nation evades it,” he said.

There seems to be a note of desperation (and demagoguery) in such rhetoric. When someone commits a crime we regard as serious, even one within the routine capacity of children, we rarely focus our indignation on its exemplary effect on children. This theme was not prominent in criticism of the Watergate burglary and cover-up, nor was it nearly so prominent in the criticism of lying by public officials in Iran-Contra and various Congressional investigations of covert activities.

Concern about children is the last refuge of Quasi-Categorical Moralism because we tend to doubt children’s ability to make subtle distinctions. Thus, even when we reject categorical precepts for ourselves, we sometimes urge them on children. This view may underestimate the capacities of children, but even if it is right, it doesn’t support the charges against Clinton. To the extent that we doubt the moral sophistication of children, we expect more from adults. To ask

75. Excerpts from Senator Lieberman’s Talk on President’s Personal Conduct, N.Y. TIMES, Sept. 4, 1998, at A14 [hereinafter Excerpts].
76. My daughter K.C. brought home from school a memo prepared by the editors of Time for Kids on “Talking With Your Kids About the President’s Predicament,” which advises, “You may want to share with your children that no one, not even the President, should lie, and no one should break the law.” Last year, she studied the Montgomery bus boycott, the Birmingham civil rights march, and the lunch-counter sit-ins; no one mentioned that they were illegal. In a few years, she’ll be assigned, Huckleberry Finn — the Vade Mecum of virtuous lying.
adults to govern themselves in accordance with norms accessible to children is to deprive us of the benefits of maturity.

The more plausible response to the limited capacities of children for complex moral judgment is to avoid confronting them unnecessarily with issues that call for such judgment. But the critics thwarted this course. In the very act of lamenting that "I cannot watch the news on television with my ten-year old daughter anymore," Senator Lieberman did everything he could to perpetuate that situation.7

Second, Quasi-Categorical Moralism seems to have suppressed discussion of whether Clinton's lying, illegal or not, might be morally justified, or at least excused, by privacy interests. The inquiry by Paula Jones's lawyers and then the Independent Counsel into Clinton's sex life threatened three sorts of interests. President Clinton has his own interest in the privacy of his intimate sexual life. His family and, especially, Monica Lewinsky had a privacy interest in this information, which Clinton had some responsibility to protect.

And finally, Clinton might be viewed as having a responsibility to the public, and especially, the nation's children, to keep his sex life private. The critics are wrong to suggest that whatever duties the President has as a "role model" extend to sexual conduct. Adults cannot be sexual role models for children because their principal responsibility to children in the realm of sexuality is to keep their sex lives private. Whether or not they were motivated by this consideration, Clinton's lies, if successful, would have prevented the damage to the acculturation of children that people like Senator Lieberman decry (as they compound it). In hindsight, the lies may seem reckless, but the bizarre series of events that resulted in their exposure may not have been reasonably foreseeable at the time. If so, then the lies were supported by the some of the very considerations of cultural harm that the critics invoke.78

I don't claim to have established that these privacy interests vindicate Clinton

77. Excerpts, supra note 75.

78. Even though Clinton was under oath at the time he told some of his lies, it is not clear that these lies were perjury. As Jeffrey Rosen points out, "Historically, American law has been sensitive to distinctions among different kinds of lies, and has refused to punish people for answering questions untruthfully that by any civilized standard should never have been asked in the first place. It's only in the post-Watergate era that almost any misrepresentation to a federal official has become a potential felony." The Perjury Trap, THE NEW YORKER, August 10, 1998, at 28, 29. Even in the post-Watergate era, the federal perjury statute applies only to lies under oath about "material" matters, which the statements about Monica Lewinsky in the Paula Jones deposition may not have been.

Even if the lie was a crime, that would not have precluded it from being justified or excused. Special prosecutor Kenneth Starr recognized this in principle when he gave use immunity to Linda Tripp for her statements about her apparent crime of secretly taping Lewinsky's confidences. See Stephen Labaton, Maryland Officials Defend Investigation of Tripp Tapes, N.Y. TIMES, July 10, 1998, at A10. And as Lars-Erik Nelson points out, neither Starr nor any other prosecutor appears interested in the fact that Paula Jones appears to have perjured herself in her testimony about the consequences for her employment from her encounter with Clinton, The Not Very Grand Inquisitor, N.Y. REV. OF BOOKS, Nov. 5, 1998, at 8, 10.
on the lying charges, just that they haven’t received the serious consideration they merit. The flattening effect of Quasi-Categorical Moralism seems responsible.

Third, the President and his lawyers, though they occasionally advert to privacy, have not pressed the privacy claims with vigor or sophistication. Instead, they’ve resorted to formalistic interpretations of the questions Clinton was asked to claim that “legally” his responses were not lies. They suggest that even intentionally deceptive statements are not lies (or at least perjurious lies) if they are consistent with any interpretation of the question that is not plainly unreasonable. This approach to lying has a long tradition within the legal profession, but it is an ignoble one. It jettisons the moral core of concern about lying — intentional deception — and turns the ethics of deception into a game that rewards opportunism and bad faith.

This narrow, formal notion of lying is encouraged by Quasi-Categorical Moralism in two ways. The literal approach to lying is itself categorical. It defines lying in terms of abstract precepts insensitive to the substantive stakes in the particular context. It is designed to enable us to identify lying without resort to complex judgment. This is very much in the spirit of Quasi-Categorical Moralism.

At the same time, the literal approach tends to narrow the range of conduct considered lying. It thus reduces the very heavy burden of categorical prohibition. Thus, strong prohibition may seem more acceptable when accompanied by the literal definition.

It is a great pleasure to observe that both the Quasi-Categorical attacks of the critics and the Quasi-Categorical defenses of the President have been largely unsuccessful with the public. To the rage and bewilderment of the moralists, the public continues to give Clinton high ratings as a President, and to the disappointment of the President’s advisors, it appears unimpressed, and perhaps even offended, by his legalistic defenses. No doubt the underlying attitudes are complex, but surely there is evidence here of moral sophistication.

VII. DANGERS OF SELF-ASSERTION AND SELF-RESTRAINT: LAWYERS

I’ve suggested that Quasi-Categorical Moralism is driven by anxiety about moral self-assertion and a largely unexamined conviction that the dangers of such self-assertion exceed those of moral self-restraint. My intuition is that this assumption is wrong, or at least, far too broad to be useful. Since it seems most productive to begin thinking about the issue in particular contexts, I offer some speculation about the context I know best, the legal profession.

We should start by distinguishing moral self-assertion from other forms of egoism. Moral self-assertion is action based at least in part on moral conviction.

It is different from bad faith or anomic action — action indifferent to admittedly applicable norms. The distinction is worth making because the type of moral discourse Quasi-Categorical Moralists engage in is only responsive to self-consciously ethical action; it has nothing to say to the bad faith egoist. For the bad faith egoist, we have legal rules and sanctions. We also have arguments about why the egoist should take ethics more seriously than he does, but these arguments are much more general than Bok’s. Bok’s arguments presuppose a commitment to doing the right thing. She is largely concerned with the mistakes people who think of themselves as trying to do the right thing make in figuring out what the right thing is.

So the mere fact that we observe a lot of selfishly motivated unethical behavior should not be taken as evidence of the dangers of moral self-assertion. The unethical behavior we are interested in is the product of ethical reflection (albeit mistaken ethical reflection) and hence, unlike bad faith egoism, susceptible to correction by the arguments and prescriptions of Quasi-Categorical Moralism. Two prominent patterns of lawyer behavior are most often subjected to ethical criticism, and each is associated with a distinctive style of rationalization. First, there is assistance to clients engaged in unlawfully harmful behavior — for example, fraud, pollution, selling dangerous products. Second, there is deliberate deception in the litigation process.

In the first case, the lawyer is likely to say that his acts should be viewed in isolation from the client’s and then argue that, so viewed, the acts are not themselves unlawful. He will characterize his involvement as indirect, and emphasize that the client took the initiative. In the litigation case, the lawyer will insist that his acts be viewed in the context of “the adversary system” and that, so viewed, some tolerance for deception is compatible with the functioning of the system. In both cases, the lawyer will say, “it’s not my job” to consider the values that are jeopardized by his conduct. It’s up to state officials to protect these values, or to the private third parties to look out for their own interest.80

This, of course, is the language of self-restraint. The lawyer experiences, or at least portrays, herself as not asserting her own values, but as passively assisting the client or the system to pursue its goals. To intervene against the client’s interests, or even just to withdraw, is characterized as an illegitimate act of

80. See, e.g., CHARLES DICKENS, BLEAKHOUSE 215 (Oxford ed. 1948) (1853) (discussing the classic characterization of the moral false consciousness of lawyers by Mr. Gridley).

The system! I am told, on all hands, it’s the system. I mustn’t look to individuals. It’s the system. I mustn’t go into Court, and say, ‘My Lord, I beg to know this from you — is this right or wrong? Have you the face to tell me I have received justice, and therefore am dismissed?’ My Lord knows nothing of it. He sits there to administer the system. I mustn’t go to Mr. Tulkinghorn, the solicitor in Lincoln’s Inn Fields, and say to him when he makes me furious by being so cool and satisfied — as they all do, for I know they gain by it while I lose, don’t I? — I mustn’t say to him, ‘I will have something out of some one for my ruin, by fair means or foul.’ He is not responsible. It’s the system.

Id.
self-assertion ("imposing her own values," "playing God," "arrogating power"). What these lawyers need is greater sensitivity to the dangers, and shame, of self-restraint, and greater appreciation for the virtues and legitimacy of action based on independent judgment. Quasi-Categorical Moralism is precisely the wrong medicine.

**CONCLUSION**

In situations where honesty conflicts with other important values, there is no reason to presume that honesty should prevail. To the extent, that Quasi-Categorical Moralism argues otherwise, it is wrong. To the extent that it merely urges sensitivity to the costs of lying, it is not wrong, but its rhetorical influence may be pernicious. This influence is to encourage distrust of independent moral judgment and anxiety about moral self-assertion. There are some contexts in which this may be desirable, but there are many, including most sectors of the legal profession, where it intensifies the dispositions that fuel the most ethically troubling conduct.