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Terms of Endearment and Articles of Impeachment

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ESSAYS

TERMS OF ENDEARMENT AND ARTICLES OF IMPEACHMENT

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> *"With love's light wings did*
> *I o'erperch these walls,*
> *For stony limits cannot hold love out,*
> *And what love can do, that dares love attempt."****

Late in the afternoon of September 9, 1998, Independent Counsel Kenneth W. Starr sent to the United States House of Representatives two

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*** Monica Lewinsky, *Handsome*, WASH. POST, Feb. 14, 1997, § Love Notes, at 44 (expressing St. Valentine's Day sentiments) (quoting WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 2 sc. 2).

duplicate, sealed 18-box sets of "substantial and credible information that President William Jefferson Clinton committed acts that may constitute grounds for an impeachment."[1] Less than two days later the House of Representatives voted to make virtually all of this information public, starting with the Independent Counsel's 445-page Referral.[2]

The effect on the nation was immediate and sensational. As the *New York Times* reported,

> [The Whitewater Independent Counsel's case for possible impeachment of President Clinton was made public today, including] "an avalanche of salacious details" of the President's affair with Monica S. Lewinsky.
>
> In arguing to the House of Representatives that "the President violated his oath of office with repeated acts of perjury and obstruction of justice," [Judge Starr] described in intimate detail Ms. Lewinsky's account of her many meetings with the President, including 10 sexual encounters.
>
> . . . Mr. Starr's relentlessly accusatory 445-page report riveted Washington and permanently changed the terms of the debate over Mr. Clinton's fitness for office. Today, some members of Congress reacted with outrage, and some with revulsion, at the report's torrent of embarrassing details about Mr. Clinton's sexual relationship with a woman less than half his age just outside the Oval Office.[3]

By general consensus, this massive release of embarrassing documentation had dealt a body blow to the Clinton Presidency. It was universally assumed that the very extent and detail of this "salacious" material constituted an immense new problem for President Clinton in his attempts to avoid impeachment.[4]

In this Essay we shall argue exactly the opposite. We shall argue that Mr. Starr's massive and richly detailed documentation, far from damaging Mr. Clinton's legal case, could be seen as the key to his legal and constitutional salvation. Paradoxically, the more Mr. Starr documented and detailed the extent of Mr. Clinton's relationship with Monica Lewinsky,

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1. Referral from Independent Counsel, Kenneth W. Starr, H.R. Doc. No. 105-310, at 1 (1998) *available in* WESTLAW, STARR-DOC database, 1998 WL 614815 (Office. Independent. Counsel) [hereinafter Referral].

2. *See* Bob Woodard, *A President's Isolation*, WASH. POST, June 13, 1999, at A01.

3. John M. Broder & Don Van Natta, Jr., *Testing of a President*, N.Y. TIMES, Sept. 12, 1998, at A1.

4. Even ardent Clinton supporter Maxine Waters, a Democratic Representative from California, denounced the release of "'thousands of pages of hearsay, accusations, gossip and telephone chatter,'" which she further characterized as "'tawdry and trashy.'" R.W. Apple, Jr., *Testing of a President*, N.Y. TIMES, Oct. 9, 1998, at A1.

the more he inadvertently proved that Mr. Clinton's false testimony was not relevant or "material" to the underlying sexual harassment lawsuit, brought by Paula C. Jones, in which that testimony originated. To show this, it will be necessary to consider the factual background of Mr. Clinton's deposition in the Paula Jones case and of his federal grand jury testimony (Part I); then to consider the legal background of perjury and giving false testimony under oath (Part II); and finally to assess and compare the nature of Mr. Clinton's "relationship" with Paula Jones to his "relationship" with Monica Lewinsky (Part III).

In this relatively brief Essay we make two simplifying assumptions: (1) that the charges of perjury and giving false testimony under oath are the *sine qua non* of the case against Mr. Clinton[5] and (2) that weaknesses (even if they are not fatal weaknesses) in the legal case against Mr. Clinton translate into corresponding weaknesses in the constitutional claim that he committed "high Crimes and Misdemeanors" warranting impeachment.

I. FACTUAL BACKGROUND

On December 19, 1998, the U.S. House of Representatives approved two articles of impeachment against President Clinton based almost exclusively on the evidence and arguments of the Starr Referral. The first Article charged the President with providing "perjurious, false and misleading testimony to the grand jury" concerning, inter alia, "the nature and details of his relationship with a subordinate Government employee" and "prior perjurious, false and misleading testimony he gave in a Federal civil rights action brought against him."[6] The second Article charged the President with "obstruction of justice" for attempting to cover up "evidence and testimony related to a Federal civil rights action brought against him in a duly instituted judicial proceeding."[7] The factual background of these charges is as follows.

5. The other principal component of the case against Mr. Clinton, according to the independent prosecutor's Referral, is obstruction of justice. The principal allegations supporting this claim were that Mr. Clinton concealed evidence of his relationship with Ms. Lewinsky from the judge in the *Jones* case, tried to influence Ms. Lewinsky's testimony by helping her obtain a job in New York and suggesting that she lie in the *Jones* litigation, tried to influence Ms. Betty Currie's testimony to the grand jury, and tried to influence the grand jury testimony of his staff by lying to them about the Lewinsky matter. More is said about these allegations later in this Essay.

6. Impeachment of William Jefferson Clinton, President of the United States, H.R. Rep. No. 105-830, pt. 1, at 2 (1998), *available in* WESTLAW, STARR-DOC database, 1999 WL 4876 (F.D.C.H.) [hereinafter Impeachment of the President].

7. *Id.* at 3.

A. *Deposition of January 17, 1998*

Below is the crucial portion of Mr. Clinton's testimony in the *Jones* case:

> Q. Did you have an extramarital sexual affair with Monica Lewinsky?
>
> Clinton: No.
>
> Q. If she told someone that she had a sexual affair with you beginning in November of 1995, would that be a lie?
>
> Clinton: It's certainly not the truth. It would not be the truth.
>
> Q. I think I used the term "sexual affair." And so the record is completely clear, have you ever had sexual relations with Monica Lewinsky, as that term is defined in Deposition Exhibit 1, as modified by the Court?
>
> Bennett: I object because I don't know that he can remember—
>
> J. Wright: Well, it's real short. He can—I will permit the question and you may show the witness definition number one.
>
> Clinton: I have never had sexual relations with Monica Lewinsky. I've never had an affair with her.[8]

If this was supposed to be a "perjury trap," it was laid rather carelessly. It left Mr. Clinton with a number of loopholes regarding definitions of

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8. Deposition of William Jefferson Clinton, Jones v. Clinton 78 (Jan. 17, 1998), available in (last modified Dec. 3, 1998) <http://post.com/wp-srv/politics/special/pjones/docs/clintondep031398.htm> [hereinafter Clinton Deposition]. The term "sexual relations" was defined as follows:

> For the purposes of this deposition, a person engages in "sexual relations" when the person knowingly engages in or causes . . . contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to arouse or gratify the sexual desire of any person . . . . "Contact" means intentional touching, either directly or through clothing.

Id. at Clinton Deposition Exhibit 1.

"sex," which he fully exploited. A tougher cross-examination would have forced Mr. Clinton either to lie about his relationship with Ms. Lewinsky or to admit it.

But perhaps the questions were intended to be ambiguous. Consider the following facts. According to news reports, Mr. Starr's star informant, Linda Tripp, first met with lawyers in the Independent Counsel's office; then, wearing a listening device for Federal agents working with Mr. Starr, she elicited from Monica Lewinsky some key information:

Lewinsky:	. . . Hey, look, for me, I never had sex with him. That's a sexual relationship.
Tripp:	What is—what is the definition of sex?
Lewinsky:	Intercourse.
Tripp:	Oh. Well, yeah. O.K.
Lewinsky:	I never had intercourse. I did not have a sexual relationship.[9]

Finally, "on the eve of Mr. Clinton's deposition in the Jones case, Mrs. Tripp secretly met for hours with lawyers for Ms. Jones and briefed them about Ms. Lewinsky."[10] Presumably, then, everything was in place for the kind of precise, probing, and detailed questioning that could pin down Mr. Clinton by specifically excluding definitional loopholes regarding "sex." But that is not what happened at all. Instead, as soon as Mr. Clinton said something that, under the broadest definition, could be considered false, the inquiry abruptly ended.

Perhaps, in fact, the real fear was that Mr. Clinton would tell the truth. At the very least, it can safely be concluded that determining the exact nature of Mr. Clinton's relationship with Monica Lewinsky was not important to Paula Jones's lawyers. Two distinct theories (each consistent with our argument) could explain this: (1) the Lewinsky matter was

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9. Broder & Van Natta, *supra* note 3, at 34; *see also* Renata Adler, *Decoding the Starr Report*, VANITY FAIR, Dec. 1998, at 116, 122 ("Ms. Tripp . . . had appeared before [the Office of the Independent Counsel] at least twice before . . . . [T]hese contacts . . . suggest[] that the real reason Ms. Tripp was taping, from the first, was this: the Office of the Independent Counsel asked her to.").

10. Broder & Van Natta, *supra* note 3, at 1; *see also* Richard Ben-Veniste, *The Case Against Ken Starr*, N.Y. TIMES, Oct. 23, 1998, at A23 ("Is it plausible that there was no cross-pollination of this information between Mr. Starr's confidants and Ms. Jones's extended legal family? After all, there would be no better way to 'criminalize' the President's improper personal behavior than to have him ambushed in a perjury trap.").

recognized by Jones's lawyers as immaterial; or (2) Jones's lawyers were primarily pursuing a political agenda against Mr. Clinton in his capacity as President.

In any event, shortly thereafter the court in *Jones v. Clinton*[11] (at the request of the Office of the Independent Counsel) halted the civil discovery process concerning Mr. Clinton's relationship with Monica Lewinsky. Even though the court assumed that "plaintiff was pursuing the Lewinsky matter in order to prove an alleged pattern and practice on the part of the President,"[12] and even assuming, "strictly for the sake of argument, that any such evidence would show that the President engaged in the same type of behavior with Ms. Lewinsky that he is alleged to have engaged in with plaintiff,"[13] the court concluded that such evidence "simply is not essential to the *core issues* in this case"[14] and "in fact, that some of this evidence might even be inadmissible."[15] Accordingly, the court disallowed discovery as to Ms. Lewinsky and excluded evidence concerning her from trial. Ultimately, Mr. Clinton's motion for summary judgment was granted and the entire case was dismissed.[16]

B. *Grand Jury Testimony of August 17, 1998*

In his grand jury testimony, President Clinton refused to answer any specific questions of a sexual nature about his relationship with Monica Lewinsky; instead, he read and referred to the following prepared statement:

> When I was alone with Ms. Lewinsky on certain occasions in early 1996 and once in early 1997, I engaged in conduct that was wrong. These encounters did not consist of sexual intercourse; they did not constitute "sexual relations" as I understood that term to be defined at my January 17, 1998, deposition; but they did involve inappropriate intimate contact. These inappropriate encounters ended, at my insistence, in early 1997 . . . .
>
> While I will provide the grand jury whatever other information I can, because of privacy considerations affecting my family, myself, and others, and in an effort to preserve the dignity of the Office I hold, this is all I will say about the

11. 993 F. Supp. 1217 (E.D. Ark. 1998).
12. *Id.* at 1220.
13. *Id.*
14. *Id.* at 1222 (emphasis in the original).
15. *Id.* at 1219.
16. *See* Jones v. Clinton, 990 F. Supp. 657, 662 (E.D. Ark. 1998).

specifics of these particular matters.[17]

Given this approach, it is difficult to understand how Mr. Clinton could have been guilty of perjury or giving false testimony under oath before the grand jury. Reflecting this difficulty, the Starr Referral takes the curious position that his refusal to answer in itself supports those very charges:

> [T]he President refused to answer specific questions before the grand jury about what activity he did engage in (as opposed to what activity he did *not* engage in) . . . . The President's failure in the grand jury to answer specific follow-up questions suggests that he could not supply responses in a consistent or credible manner.[18]

Be that as it may, the proper remedy for refusal to answer specific questions is a contempt citation[19] or an obstruction of justice prosecution,[20] not charges of perjury or false testimony.

Mr. Clinton did engage in extended hypothetical and definitional discussions as to what would or would not constitute sexual relations or fall within his definition of the term "sexual relations." The colloquy mainly emphasized by Mr. Starr is as follows:

> A. You are free to infer that my testimony is that I did not have sexual relations, as I understood this term to be defined.
>
> Q. Including touching her breast, kissing her breast, or touching her genitalia?
>
> A. That's correct.[21]

But, consistent with Mr. Clinton's stated refusal to answer specific questions of a sexual nature, that answer could easily be interpreted as a purely definitional statement: "That's correct: I understood the term 'sexual relations' to include those things." Otherwise, Mr. Clinton could rightfully complain that words were being "put into his mouth."

Putting this point another way, Mr. Starr's reasoning must have been

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17. Grand Jury Testimony of William Jefferson Clinton 8-9 (Aug. 17, 1998), *available in* THE STARR EVIDENCE (1998) [hereinafter Clinton Grand Jury Testimony].

18. Referral, *supra* note 1, at 149; *cf. id.* at 16 ("The President refused to answer questions about the precise nature of his intimate contacts with Ms. Lewinsky.").

19. *See* 28 U.S.C. § 1826(a) (1998) (addressing civil contempt); 18 U.S.C. § 401 (1998) (addressing criminal contempt).

20. *See* 18 U.S.C. § 1503 (1998).

21. Clinton Grand Jury Testimony, *supra* note 17, at 95.

something like the following:

1. Mr. Clinton denies having had "sexual relations."
2. Mr. Clinton concedes that the definition of "sexual relations" includes X, Y, and Z.
3. Mr. Clinton appears to have engaged in X, Y, and Z.
4. Therefore, by implication, Mr. Clinton is falsely denying having engaged in X, Y, and Z.

But even assuming these answers to be material (which we question in the following Parts), Mr. Clinton never *explicitly* denied having engaged in X, Y, and Z. So he can respond simply by quoting the leading U.S. Supreme Court decision on perjury: "[T]he [perjury] statute does not make it a criminal act for a witness to [make a statement] that *implies* any material matter that he does not believe to be true."[22]

Also in the grand jury appearance, both Mr. Clinton and his questioners pondered Jones's lawyers' failure to ask more specific questions about Mr. Clinton's relationship with Monica Lewinsky. One of the prosecutors from the Office of the Independent Counsel speculated as follows:

> Don't you think, sir, that they could have done more damage to you politically, or in whatever context, if they had understood the definition in the same way you did and asked the question directly?[23]

This, of course, implies that truthful answers in the Jones lawsuit would be more damaging than false answers in an impeachment proceeding. The limited questioning in the civil deposition may not have elicited truthful answers, but it did set the "perjury trap" that, despite its (intentional?) ineptness, turned out to be the centerpiece of the impeachment proceedings against President Clinton. As the President himself complained in his grand jury testimony,

> [Jones's lawyers] were perfectly free to ask follow-up questions. On one or two occasions, Mr. Bennett invited them to ask follow-up questions.
>
> It now appears to me they didn't because they were afraid I would give them a truthful answer . . . and they were trying to set me up and trick me.[24]

Mr. Clinton's complaint appears to be well founded; in its leading decision

22. Bronston v. United States, 409 U.S. 352, 357-58 (1973) (emphasis in original).
23. Clinton Grand Jury Testimony, *supra* note 13, at 152.
24. *Id.* at 78-79.

on perjury, the U.S. Supreme Court unanimously declared that "[p]recise questioning," rather than a perjury prosecution, is the proper remedy for imprecise, evasive, or even "intentionally misleading" answers.[25]

II. LEGAL BACKGROUND

The category of impeachable offenses covered by the constitutional language of "Treason, Bribery, or other high Crimes and Misdemeanors"[26] is not coextensive with the category of violations of the criminal law; the term "high" crimes and misdemeanors itself suggests a different constitutional standard.[27] As Professor Charles Black has convincingly argued, a U.S. President who insisted on setting up residence in Saudi Arabia might well deserve to be impeached, even if he or she had broken no laws at all.[28] Conversely, in the impeachment proceedings against President Nixon, an article of impeachment was not drawn up for tax fraud even though "convincing" and "persuasive" evidence of this crime existed, on the theory that this was an essentially private or personal matter.[29] The following analysis of perjury and giving false testimony under oath is thus intended as a contribution to the constitutional discussion of these crimes in the special context of impeachment.[30]

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25. *Bronston*, 409 U.S. at 361-62 ("Precise questioning is imperative as a predicate for the offense of perjury."); *cf. id.* at 360 ("[A] prosecution for perjury is not the sole, or even the primary, safeguard against errant testimony . . . . The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry."); PAUL GRICE, LOGIC AND CONVERSATION, STUDIES IN THE WAY OF WORDS 22 (1991) (analyzing principles of conversational implicature); *but see* United States v. DeZarn, 157 F.3d 1042 (1998).

26. U.S. CONST. art. II, § 4.

27. *See* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS 103-11 (1996); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 293-94 (2d ed. 1988).

28. *See* CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 33-38 (1974). Likewise, "a President might be properly impeached if, as a result of drunkenness, he [or she] recklessly and repeatedly misused executive authority." Law Professors' Letter to the Speaker Opposing Impeachment (Oct. 16, 1998).

29. Robert F. Drinan & Wayne Owens, *An Easy Line to Draw*, N.Y. TIMES, Oct. 1, 1998, at A31. *But see* BLACK, *supra* note 28, at 41-42 (arguing that income-tax fraud undermines government and confidence in government).

This is not to say that a "private" crime could never be so heinous as to warrant impeachment. "Congress might responsibly take the position that an individual who by the law of the land cannot be permitted to remain at large, need not be permitted to remain President." Law Professors' Letter to the Speaker Opposing Impeachment (Oct. 16, 1998) (on file with author) [hereinafter Professors' Letter].

30. It is unclear what Mr. Starr's theory of an impeachable offense was. As evidence that the President failed "to faithfully execute the laws," for example, he cited the following statement made by Mr. Clinton in his August 17, 1998 address to the Nation: "Our country has been distracted by this matter for too long." According to Judge Starr, that was "an implicit plea for Congress to take no action," for which the President should be impeached. Referral, *supra* note 1, at 204.

As a separate ground for impeachment Judge Starr suggested, somewhat implausibly, that Mr.

The Federal statutes contain two provisions meant to punish witnesses who give false testimony. The first is the traditional perjury statute, which states that a felony, punishable by up to five years imprisonment, occurs whenever a person makes a statement under oath about any material matter that the person does not believe to be true.[31] The statute clearly applies not only to grand jury proceedings but also to civil depositions, like the one in the *Jones* case, because statements made in such proceedings are under oath. But the statute does not apply to statements that are not "material" to the matter under investigation.

The Executive Summary of Mr. Starr's Referral does not actually refer to perjury, but rather focuses on a more modern statute, which authorizes the imposition of a penalty of up to five years for all "false material declarations" made in any proceeding before or ancillary to any court or grand jury.[32] This so-called "false testimony" provision is more advantageous to the prosecution than the perjury statute, because, unlike the latter, it does not require corroboration of the falsity.[33] Whereas something more than Ms. Lewinsky's testimony would be needed to prove a perjury charge (for example, semen on a dress), in a false testimony prosecution no such evidence is necessary. But here too, the declaration must be "material."

It is an axiom of evidence law that materiality depends upon the legal doctrine at issue. With respect to his deposition in the *Jones* case, therefore, whether Mr. Clinton's lies about his relationship with Ms. Lewinsky constitute perjury or false testimony depends upon the substantive law of sexual harassment. Although that law is in a continuous state of development, one clear principle can be gleaned from the cases. Sexual contacts that are nonconsensual, or that are technically consensual but nonetheless "unwelcome," presumptively constitute harassment.[34] Conversely, welcome sexual contacts are not harassment, except perhaps when those contacts are "welcomed" because of some benefit (for example, a job) promised by the alleged harasser.

Under no version of the facts proffered by Judge Starr, much less by Mr. Clinton or Ms. Lewinsky, does the Clinton-Lewinsky relationship fit

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Clinton seriously misled Mrs. Clinton, who then "relied on and publicly emphasized the President's denial." *Id.* at 206. Even more ominously, Mrs. Clinton "shifted the focus away from the President, indicated that 'this is a battle' and stated that 'some folks are going to have a lot to answer for' when the facts come out." *Id.*

31. *See* 18 U.S.C. § 1621 (1998).

32. Referral, *supra* note 1, at 132 (referring to 18 U.S.C. § 1623 (1998)).

33. *Cf.* Weiler v. United States, 323 U.S. 606 (1945).

34. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986) ("[T]he fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'").

the definition of harassment.[35] Although this argument will be developed in detail below, simply quoting from Ms. Lewinsky's own deposition before the Senate offers sufficient support for this point:

> . . . I felt that it was important to take the stand [and say] to the Jones people that this was ridiculous, that they were, they were looking at the wrong person to be involved in this. And, in fact, that was true. I know and knew nothing of sexual harassment.[36]

If the supposed victim of harassment herself insists there was no harassment issue, it is difficult to see how Mr. Clinton's denial of that relationship is material to a sexual harassment claim. Adding the fact that the Lewinsky matter took place years after the alleged incident with Ms. Jones, in a completely different context, the connection becomes even more strained.[37]

One might respond that Mr. Clinton was being questioned in a discovery setting, not at trial, and that materiality in the former context is much more broadly defined. The law in this area is somewhat mixed. Several courts have held that information sought during discovery is material for purposes of the perjury statute only if it would have a tendency to affect the outcome of the suit.[38] Even the judge who presided over the

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35. This is true even under some of the broadest and most extreme views as to what constitutes sexual harassment. For example, even under the following list of actions that have been considered evidence of "unwelcomeness," and thus grounds for a sexual harassment claim, Monica Lewinsky would not qualify:

> [S]ilence; a polite "no"; evasive behavior; laughing, smiling, or otherwise attempting to make light of the advance; backing away or withdrawing one's hands but not physically leaving the harasser's presence; maintaining eye contact; changing the subject; accepting a kiss on the cheek or a quick hug; the failure to complain.

Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C.L. REV. 499, 532 (1994).

36. *The President's Trial; From Clinton's Lawyers: 'Her Testimony Exonerated the President,'* N.Y. TIMES, Feb. 7, 1999, at 40.

37. *Cf., e.g.*, Mitchell v. Hutchings, 116 F.R.D. 481, 484 (D. Utah 1987) ("[E]vidence of sexual conduct which is remote in time or place to plaintiff's working environment is irrelevant.").

Indeed, a good argument can be made that, under the general evidentiary ban on propensity evidence, *see, e.g.*, FED. R. EVID. 404(a), no information about other relationships, even ones that are clearly harassing, is admissible in a sexual harassment suit unless the plaintiff is trying to show hostile work environment or employer knowledge of the harassment, neither of which were at issue in *Jones*. Diane Mazur, *Sex and Lies* (in preparation, manuscript on file with authors).

38. *See, e.g.*, United States v. Clark, 918 F.2d 843, 847 (9th Cir. 1990); United States v. Adams, 870 F.2d 1140, 1146-48 (6th Cir. 1989).

discovery proceedings decided in effect that the Lewinsky matter was immaterial in this sense. As Judge Wright concluded in a subsequent Memorandum Opinion and Order, "[T]his case was dismissed on summary judgment as lacking in merit—a decision that would not have changed even had the President been truthful with respect to his relationship with Ms. Lewinsky."[39]

Other courts have concluded, much more generously, that any information that might lead to discovery of admissible evidence is material for perjury purposes.[40] Even under the latter definition, however, the Lewinsky matter is immaterial. As will be shown in the following Part, nothing about the Clinton-Lewinsky affair would have led to anything that might have helped Ms. Jones in her sexual harassment suit against Mr. Clinton.

This conclusion, even if accepted, does not end the inquiry into whether Mr. Clinton's testimony in the *Jones* case constituted a constitutional "high Crime or Misdemeanor." As noted above, the latter phrase is not coextensive with the criminal law and may encompass actions not considered criminal by statute. But if perjury and false testimony charges based on Mr. Clinton's civil deposition were impossible to prove,[41] we should at least hesitate before consigning his false deposition testimony to the category of impeachable offenses.[42]

Perhaps recognizing these difficulties, the House of Representatives did

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39. Jones v. Clinton, 36 F. Supp. 2d 1118, 1131 (E.D. Ark. 1999).

40. *See, e.g.*, United States v. Kross, 14 F.3d 751, 754 (2d Cir. 1994); United States v. Holley, 942 F.2d 916, 924 (5th Cir. 1991).

41. Although materiality is a jury issue, our argument here is that misrepresentation about the Lewinsky affair was, as a matter of law, immaterial; as will be shown in the following Part, no rational jury could decide otherwise. *Cf.* United States v. Gaudin, 115 S. Ct. 2310 (1995).

42. This discussion does not dispose of the obstruction of justice charges. Assuming Mr. Clinton did try to influence witnesses in the manner alleged by the Starr Referral, the relevant statutes may apply. *See supra* note 5; *see also* 18 U.S.C. §§ 1505, 1512 (1998). Here too, however, the case is by no means airtight. First, although the tampering statutes do not have a materiality limitation, a conclusion that the Lewinsky matter is immaterial might influence the factfinder considering tampering charges. It would seem more than a little odd to punish a person for lying to a third party when we cannot punish the same lie told to a judicial body. Second, and more important, these statutes are designed primarily to punish the use of force or intimidation against potential witnesses, which does not appear to apply to Mr. Clinton's actions. Although "misleading . . . with intent to influence" testimony is also penalized under 18 U.S.C. § 1512(b)(1) (1998), courts have been extremely careful in applying this part of the statute. They have made clear, for instance, that it does not apply to coaching a witness (relevant to Mr. Clinton's actions with respect to Ms. Lewinsky and Ms. Currie). *See* United States v. Poppers, 635 F. Supp. 1034 (N.D. Ill. 1986). Courts have also held that the alleged tamperer must have taken specific actions that made clear to the witnesses that they should lie during an official proceeding (relevant to Mr. Clinton's lies to his staff). *See* United States v. Frankhauser, 80 F.3d 641 (1st Cir. 1996); United States v. Kelley, 36 F.3d 1118 (D.C. Cir. 1994); United States v. King, 762 F.2d 232 (2d Cir. 1985); United States v. Griffin, 463 F.2d 177 (10th Cir. 1972).

not forward to the Senate the Article of Impeachment concerning perjury or false testimony in the *Jones* case. However, it did vote to impeach the President with respect to his grand jury testimony. The first Article specifically charged President Clinton with providing "perjurious, false and misleading testimony to the grand jury concerning . . . *prior* perjurious, false and misleading testimony he gave in a Federal civil rights action brought against him."[43]

As the word "prior" emphasizes, one of the main issues before the grand jury was whether Mr. Clinton had committed the crimes of perjury or false testimony in the *Jones* case. To determine that, the grand jurors needed to determine whether, among other things, Mr. Clinton had lied in his deposition, and if so, whether such lies were material to the sexual harassment issues.

Thus, materiality with respect to perjury or false testimony could be accorded much greater scope in the grand jury proceeding than in the *Jones* case. In the former proceeding, not only questions that sought to determine whether sexual harassment occurred, but also questions seeking simply to establish whether Mr. Clinton had lied about his encounters with Ms. Lewinsky could be said to demand material information. And questions about whether Mr. Clinton touched Ms. Lewinsky and, if so, which parts of her he touched, might be said to fall into this latter category.

The problem with this definition of materiality is that it makes any lie in a prior proceeding, regardless of its initial irrelevance, grounds for a perjury prosecution if it is repeated to a grand jury investigating that proceeding. Suppose, for instance, Jones's lawyers had asked Mr. Clinton what the capital of Mongolia is, and that the grand jury, suspecting his answer to that question was perjured, had repeated the same question. Under the broad definition of materiality described above, a second false answer would constitute perjury. Yet it is hard to consider such an answer a worthy basis for a perjury prosecution, precisely because it is hard to see how such a question could have led to anything material in the first proceeding. An immaterial question in a civil deposition should not become material simply by virtue of being repeated by a grand jury, it could be argued, unless the answer would tend to establish *whether or not* it had been material in the first forum.[44]

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43. Impeachment of the President, *supra* note 6, at 2 (emphasis added).

44. Indeed, it might even be questioned whether lying about prior, *material* lying should be considered a "new" crime. If it is, then so is lying about lying about lying, and so forth. Mr. Clinton could be subjected to an endless series of grand jury investigations, each finding perjury in the previous one, even if in every case Mr. Clinton simply repeated verbatim his denial that he had ever lied.

Nonetheless, the House Judiciary Committee explicitly adopted this line of reasoning in its final report on the impeachment of President Clinton: "[T]he Committee has concluded that President

We argued in the previous Part that, given the hypothetical and ambiguous answers Mr. Clinton gave to the grand jury, it may be that nothing false was said. Here the point is that even if Mr. Clinton did lie or contradict himself in front of the grand jury, there are some outer limits on what can plausibly be considered "material" in that setting. Even the House Judiciary Committee that prepared the articles of impeachment against President Clinton seemed to recognize this: "As one of the matters the grand jury was considering was the OIC's investigation of 'whether Monica Lewinsky or others had violated federal law in connection with the *Jones v. Clinton* case,' materiality would be determined by whether the President's affair with Ms. Lewinsky was material to that case."[45] Accordingly, in evaluating whether perjury occurred in the grand jury proceeding, we should not ignore the underlying materiality of Mr. Clinton's testimony in the *Jones* case.

III. MR. CLINTON'S "RELATIONSHIPS"

To understand the argument that questions about Mr. Clinton's relationship with Ms. Lewinsky were immaterial not only to the Jones litigation but also to the grand jury inquiry, an in-depth comparison of Mr. Clinton's respective relationships with both Ms. Jones and Ms. Lewinsky is necessary. Here, the relevant facts are presented. It is left to the reader to decide whether, in the final analysis, Mr. Clinton's lies were material in either the civil or criminal context.[46]

A. *Ms. Paula Jones*

We know very little about Mr. Clinton's "relationship" with Paula Jones; evidently, there is not much to know. As Ms. Jones acknowledges, "the underlying facts are relatively simple."[47]

According to Ms. Jones, she was once invited to a hotel suite by Mr. Clinton in 1991 while Clinton was Governor of Arkansas. Although they "had met for the first time only a few minutes earlier,"[48] Mr. Clinton allegedly

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Clinton made multiple perjurious, false and misleading statements during his deposition in the case of *Jones v. Clinton*. Thus, his assertion before the grand jury that he did not violate the law in the deposition is itself a perjurious, false, and misleading statement . . . ." Impeachment of the President, *supra* note 6, at 39.

45. *Id.*

46. We admit to being less convinced ourselves of the immateriality of the grand jury testimony than of the civil deposition testimony, given the grand jury's broad charge to determine whether Mr. Clinton committed perjury during the civil litigation.

47. Brief for Appellant at i, Jones v. Clinton, (8th Cir. 1998) (No. 98-2161).

48. *Id.* at 34.

> took Mrs. Jones's hand and pulled her toward him. She removed her hand and unmistakably communicated her unwillingness to participate in sexual relations. Undeterred, Mr. Clinton made suggestive remarks to her, including "I love your curves." He attempted to kiss her on the neck, but she would not let him. He placed his hand on her leg and began moving his hand toward her pelvis. She again broke away from him and again made it clear that his advances were unwelcome.[49]

Finally, Mr. Clinton allegedly exposed himself and made sexual advances, which "[Ms. Jones] refused."[50]

The key points about this encounter are usefully summarized in Ms. Jones's appellate brief:

> Mr. Clinton's advances to Mrs. Jones were unwelcome. . . . She never said or did anything to suggest to Mr. Clinton that she was willing to have sex with him. . . . During the time they were together in the hotel suite, she resisted his advances although she was stunned by them and intimidated by who he was.[51]

Ms. Jones alleged that, as a result of this encounter, she was discriminated against by her employment supervisors who, among other things, "fail[ed] to give her flowers on Secretary's Day in 1992, even though all the other women in the office received flowers."[52] Ms. Jones also claimed that she suffered severe emotional distress and asserted that she was still "unable to watch Mr. Clinton on television . . . without experiencing mental anguish."[53]

B. *Ms. Monica Lewinsky*

By comparison, we know a great deal about President Clinton's relationship with Monica Lewinsky. Indeed, thanks in part to Mr. Starr's voluminously detailed Referral, we probably know much more about this relationship than we could ever have wanted to know.

Mr. Clinton's relationship with Monica Lewinsky was dramatically different from the above-described encounter with Paula Jones, and the most dramatic evidence of that difference is provided by the Starr Referral

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49. *Id.* at 22.
50. *Id.*
51. *Id.* at 8.
52. Jones v. Clinton, 990 F. Supp. 657, 665 (E.D. Ark. 1998).
53. *See* Brief for Appellant, *supra* note 47, at i.

itself. For the Lewinsky investigation, "a massive quantity of evidence was available."[54] Moreover, much of that evidence is highly detailed in nature. According to Mr. Starr, "[T]he detail is critical. The detail provides credibility and corroboration."[55] But ultimately the devil is in the details, so to speak, because the more details Mr. Starr piles on, the weaker his case becomes.

This evidence may be categorized as follows: (1) initial encounter; (2) extent of relationship; (3) exchanges of gifts, cards, and messages; (4) emotional attachment ("love"); and (5) partial replacement of Mrs. Clinton.

1. The Initial Encounter

In July of 1995 Monica Lewinsky began work as a White House intern. After one month, she and the President began what she characterized as "intense flirting."[56] At departure ceremonies and other events, "she made eye contact with him, shook hands, and introduced herself."[57] As this continued during the following months, Ms. Lewinsky told various friends that she had "a big crush" on the President.[58]

On November 15, 1995, Ms. Lewinsky and the President talked alone in the Chief of Staff's office. "In the course of flirting with him, she raised her jacket in the back and showed him the straps of her thong underwear, which extended above her pants."[59] Later that evening, Ms. Lewinsky and the President were alone in another office. "She told him that she had a crush on him. He laughed, then asked if she would like to see his private office."[60] Ms. Lewinsky accompanied the President to the private office where, according to her, "[w]e talked briefly and sort of acknowledged that there had been a chemistry that was there before and that we were both attracted to each other and then he asked me if he could kiss me."[61] Ms. Lewinsky said yes, and they kissed. Before returning to her desk, "Ms. Lewinsky wrote down her name and telephone number for the President."[62]

Several hours later that same evening, the President invited Ms. Lewinsky to another rendezvous, and she agreed. Ms. Lewinsky "had an idea" as to why the President wanted to meet with her.[63] Once alone in another office, they kissed, and then had their first sexual encounter.

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54. Referral, *supra* note 1, at 14.
55. *Id.* at 134.
56. *Id.* at 27.
57. *Id.*
58. *Id.* at 27-28.
59. *Id.* at 29.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*

(When asked later "[w]ho actually initiated" sexual contact, Ms. Lewinsky replied: "I did." This was "an approach she trie[d] to repeat at virtually every subsequent opportunity.")[64] Toward the end of this sexual encounter, the President "told Ms. Lewinsky to stop."[65] In her recollection, "I told him that I wanted . . . to complete that. And he said . . . that he needed to wait until he trusted me more."[66]

If the President's relationship with Ms. Lewinsky had ended after this encounter, it would have been at its point of greatest similarity with the Paula Jones encounter. Nevertheless, even at this initial stage, great differences are obvious. The factors summarized in Ms. Jones's appeals brief may usefully be reformulated as follows:

> Mr. Clinton's advances to Ms. Lewinsky were welcome. . . . She said and did a number of things to suggest to Mr. Clinton that she was willing to have sex with him. . . . During the time they were together, she did not resist his advances, nor was she stunned by them or intimidated by who he was.[67]

Thus, even as to this initial stage, Professor Priest cannot be correct in asserting that "[t]he only real difference" between the Lewinsky and Jones encounters "is that Ms. Lewinsky accepted the proposition . . . [and] Ms.

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64. Deposition of Monica S. Lewinsky, Jones v. Clinton, 7-8 (Aug. 26, 1998) *available in* (last visited July 22, 1999) <http://o-zone.starbanner.com/Clinton/> [hereinafter Lewinsky Deposition]; *cf. id.* at 8 ("If I remember correctly [, I started it].").

65. Referral, *supra* note 1, at 29.

66. *Id.* at 29-30 & n.161.

67. Brief for Appellant, *supra* note 47. *See also* Lewinsky Deposition, *supra* note 64, at 31.

> Q. How did it come about? Was that something that you decided to do, or did the President either, through his actions or words, indicate to you that he wanted that?
>
> A. I don't really remember. I mean, it was a mutual . . . it was the course of being intimate. I mean, it was the course of having this kind of a relationship, that you—sometimes he initiated it, sometimes I initiated it.
> . . .
> . . . .
> I mean, it was, it was the passion of the moment. . . . I always felt that we sort of just, we both really went to a, to a whole other place together sexually.
>
> Q. Is it fair to say you were both trying to please each other by doing different things?
>
> A. Yes. Yes.

Id.

Jones refused."[68] One might as well say that "the only real difference" between cashing a check at a bank and attempting to rob it is that the bank accepts your proposition in the first case and refuses it in the second.

2. Extent of Relationship

But of course, the President's relationship with Monica Lewinsky—unlike that with Paula Jones—did not end after a single encounter. Instead, it continued for another two years—up to the time of the President's deposition in the *Jones* case.

During that time-frame the President and Ms. Lewinsky saw each other on numerous occasions; fully ten sexual encounters were documented by the Office of the Independent Counsel.[69] They had approximately fifty telephone conversations, many of a romantic or sexual nature, and most of which were initiated by the President, sometimes well after midnight.[70]

Also during this time "Ms. Lewinsky and the President exchanged numerous gifts."[71] Apparently, she gave him about thirty-eight items, and he gave her about eighteen.[72]

In the Starr Referral, sexual encounters are prominently described, "[b]ut as the above descriptions and the Narrative explain, the nature of the relationship, including the sexual relationship, was far more than that."[73] According to the Referral, "[a]s the relationship developed over time, Ms. Lewinsky grew emotionally attached to President Clinton."[74] And according to Ms. Lewinsky, the President told her that "he spent more time with me than anyone else in the world, aside from his family, friends and staff, which I don't know exactly which category that puts me in."[75]

Each of these aspects of the relationship is analyzed in the following subsections.

3. Exchanges of Gifts, Cards, and Messages

As a separate "ground" for impeachment the Starr Referral states that the President "minimiz[ed] the number of gifts [he] had exchanged" with Monica Lewinsky,[76] and this ground was adopted by the House Judiciary

68. George L. Priest, *Why Clinton Lied*, WALL STREET J., Sept. 23, 1998, at A22.
69. *See* Referral, *supra* note 1, at 133-37.
70. *See id.* at 19-20.
71. *Id.* at 21.
72. *See id.* at 20, 157.
73. *Id.* at 149; *cf. id.* at 18 n.44 ("[T]his relationship . . . was a lot more than that to me.").
74. *Id.* at 18.
75. *Id.* at 20.
76. *Id.* at 151.

Committee.[77]

Normally, however, sexual harassers and their victims do not exchange gifts. Logically, Mr. Clinton should have been "maximizing" the number of gifts he and Ms. Lewinsky exchanged; moreover, the Starr Referral should have been doggedly minimizing those exaggerated or inflated estimates of gifts exchanged, as material falsehoods made under oath.

Instead, the Referral proudly lists as evidence of an impeachable offense the fact that "no one delivered packages . . . as many times as Ms. Lewinsky did. . . . Many of the 30 or so gifts that she gave the President reflected his interests in history, antiques, cigars, and frogs [sic]."[78] Likewise, the House Judiciary Committee solemnly requested from the President the following stipulation:

> 41. As to each, do you admit or deny that you gave the following gifts to Monica Lewinsky at any time in the past?
> a. A lithograph
> b. A hat pin
> c. A large "Black Dog" canvas bag
> d. A large "Rockettes" blanket
> e. A pin of the New York skyline
> f. A box of cherry Chocolates
> g. A pair of novelty sunglasses
> h. A stuffed animal from the "Black Dog"
> i. A marble bear's head
> j. A London pin
> k. A shamrock pin
> l. An Annie Lennox compact disc
> m. Davidoff cigars[79]

And what was this detritus of a disastrous relationship supposed to prove? According to Mr. Starr, "A truthful answer to the questions about gifts at the Jones deposition would have raised further questions about the President's relationship with Monica Lewinsky. The number itself would raise questions about the relationship . . . ."[80] However, we submit that a truthful answer about the many gifts would confirm that the relationship was even farther from one of sexual harassment than the initial encounters

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77. *See The Testing of a President; Possible Counts Presented by Republican Counsel*, N.Y. TIMES, Oct. 6, 1998, at A20.

78. Referral, *supra* note 1, at 158, 21; *cf. id.* at 157 ("[Ms. Lewinsky] almost always brought a gift or two when she visited.").

79. *The 81 Impeachment Questions Sent to Clinton by the Judiciary Panel's Chief*, N.Y. TIMES, Nov. 6, 1998, at A24.

80. Referral, *supra* note 1, at 159.

suggested. Although such an answer *would* be a political or "public relations" disaster, it would have mitigated the President's legal problems.

4. Emotional Attachment ("Love")

The Starr Referral actually devotes a section to "Emotional Attachment," in which it is revealed that the President called Ms. Lewinsky "Sweetie," "Baby," and sometimes even "Dear."[81] During the President's grand jury appearance, Judge Starr's prosecutors were determined to get to the bottom of this:

> Q. She professed her love to you in these cards after the end of the relationship, didn't she?
>
> A. Well—
>
> Q. She said she loved you?
>
> A. . . . [M]ost of these messages were not what you would call over the top. They weren't things that, if you read them, you would say, oh, my goodness, these people are having some sort of sexual affair.
>
> Q. Mr. President, the question—
>
> A. But some of them were quite affectionate.
>
> Q. My question was, did she or did she not profess her love to you in those cards and letters that she sent to you after the relationship ended?
>
> A. Most of them were signed, "Love," you know, "Love, Monica." I don't know that I would consider—I don't believe that in most of these cards and letters she professed her love, but she might well have. I—but, you know, love can mean different things, too . . . .[82]

Lying about a long-term relationship of deep emotional attachment would not be material to a sexual harassment lawsuit. Logic would dictate that Mr. Clinton should agree that his relationship with Ms. Lewinsky was precisely of that sort. And in fact, there is plenty of evidence (all highly embarrassing and politically damaging, of course) to support such a view, most of it obligingly provided by the Starr Referral itself.

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81. *Id.* at 18-19.
82. Clinton Grand Jury Testimony, *supra* note 17, at 47-48.

Monica Lewinsky lends new meaning to the expression "star-struck." Summarizing her for the grand jury, Vernon Jordan recalled, "I was listening to a bobby-soxer who was mesmerized by Frank Sinatra."[83] Mr. Jordan testified that he "felt the need to remind Ms. Lewinsky that the President is the 'leader of the free world.'"[84] In typical fashion, Ms. Lewinsky wrote the President: "I know that what is going on in the world takes precedence, but I don't think what I have asked you for is unreasonable. . . . I need you right now," she explained, "not as [the P]resident, but as a man."[85]

The Referral notes that, as the relationship developed over time, "Ms. Lewinsky grew emotionally attached to President Clinton. She testified: 'I never expected to fall in love with the President. I was surprised that I did.' Ms. Lewinsky told him of her feelings. At times, she believed that he loved her too."[86] Nevertheless, problems eventually began to emerge. In an unsent letter to the President, Ms. Lewinsky wrote that "I was so sure that the weekend after the election you would call me to come visit and you would kiss me passionately and tell me you couldn't wait to have me back. . . . Instead I didn't hear from you for weeks and subsequently your phone calls became less frequent."[87]

This became a familiar refrain in the latter parts of the relationship. Ms. Lewinsky wrote a friend, for example, that "I just don't understand what went wrong, what happened? How could he do this to me . . . now when we could be together?"[88] But around the same time she was still placing a Valentine's Day advertisement for "Handsome" in the *Washington Post*, in hopes that the President "will call and say 'Thank you for my love note. I love you. Will you run away with me?'"[89] Finally, Ms. Lewinsky, "weeping, tried to persuade the President not to end the sexual relationship, but he was unyielding, then and subsequently."[90] And even after the relationship had become front-page news, even after her life had been changed irreparably and she found herself facing serious criminal charges, "Ms. Lewinsky . . . stated repeatedly that she does not want to hurt the

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83. *The Testing of the President: The Overview; Panel Releases Conversations Taped by Tripp*, N.Y. TIMES, Oct. 3, 1998, at A1. Ms. Lewinsky's therapist testified that the President "became Lewinsky's life." Referral, *supra* note 1, at 140.

84. Referral, *supra* note 1, at 94.

85. *Id.* at 85.

86. *Id.* at 18; *cf. id.* at 91 ("When he doesn't put his walls up, it is always heavenly.").

87. *Id.* at 51; *cf. id.* at 64 (Ms. Lewinsky "was often distraught and sometimes in tears over her inability to get in touch with the President.").

88. *Id.* at 51.

89. *Id.* at 56-57 n.419.

90. Referral, *supra* note 1, at 63; *cf. id.* at 74 ("Any normal person would have walked away from this . . . . I can't let go of you.").

President by her testimony."[91]

As for Mr. Clinton, he seems to have been genuinely attached to Ms. Lewinsky from the time he first knew her as a White House intern. After only a few meetings with her he had memorized, and called, both her home and office telephone numbers.[92] According to Ms. Lewinsky, at one point, "I just knew he was in love with me . . . from the way he acted that day . . . just the way he looked at me and touched me, and the things he said, it just—it was so obvious to me."[93] When they were together, "[t]here was always a lot of joking that went on between us. . . . When we were together, it was fun. . . . And I've always felt that he was sort of my sexual soulmate, and that I just felt very connected to him when it came to those kinds of things."[94] When Ms. Lewinsky had to leave her job at the White House, the President told her that "he thought that my being transferred had something to do with him and that he was upset. He said, 'Why do they have to take you away from me?'"[95]

At various points in the relationship the President tried to discontinue it but was apparently unable, or unwilling, to do so. Of one sexual encounter he testified that "I was sick after it was over and I, I was pleased at that time that it had been nearly a year since any inappropriate contact had occurred with Ms. Lewinsky. I promised myself it wasn't going to happen again."[96] It did, though eventually the relationship was restricted to kisses on special occasions such as birthdays and holidays.

But the President had difficulty enforcing even these modified rules. On one occasion, Ms. Lewinsky asked him if they "could share a birthday kiss in honor of [thei]r birthdays."[97] "The President said that that was okay and [that] . . . [they] could kind of bend the rules that day."[98] As the President explained to her, "I'm trying not to do this and I'm trying to be good."[99]

After their sexual relationship had finally ended, Mr. Clinton testified that he tried "to be a friend to Ms. Lewinsky, to be a counselor to her, to give her good advice, and to help her."[100] Even after having to concede that he had engaged in an "inappropriate intimate relationship" with Ms.

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91. *Id.* at 148; *cf. id.* at 74 ("I will never do anything to hurt you. I am simply not that kind of person. Moreover, I love you.").

92. *See id.* at 37.

93. Lewinsky Deposition, *supra* note 64, at 56.

94. *Id.* at 23.

95. Referral, *supra* note 1, at 45.

96. *Id.* at 59; *cf. id.* ("I never should have started it, and I certainly shouldn't have started it back after I resolved not to in 1996.").

97. *Id.* at 71.

98. *Id.*

99. *Id.*; *cf. id.* at 59 ("[H]e said he didn't want to get addicted to me, and he didn't want me to get addicted to him.").

100. *Id.* at 20.

Lewinsky to a federal grand jury (and later that day in an address to the whole Nation), and even as he faced the gravest peril of his entire political career and worried about "say[ing] things which will be forever in the historic annals of the United States,"[101] Mr. Clinton thanked the prosecutors for granting immunity to Ms. Lewinsky and said:

> I, I, I—it breaks my heart that she was ever involved in this. . . .
> . . . She's basically a good girl. She's a good young woman with a good heart and a good mind. I think she is burdened by some unfortunate conditions of her, her upbringing. But she's basically a good person.[102]

5. Partial Replacement of Mrs. Clinton

Interspersed throughout the Referral are sly references to Mrs. Clinton's whereabouts at the time of various trysts between Mr. Clinton and Ms. Lewinsky.[103] These references are doubtless intended as moralistic reminders of Mr. Clinton's infidelity and adultery. But they also inadvertently highlight the extent to which Monica Lewinsky had partially replaced Mrs. Clinton in the President's life; and they make correspondingly less material any false statements made about the Lewinsky relationship in a sexual harassment lawsuit.

As Ms. Lewinsky explained, "He spent more time with me than anyone else in the world, aside from his family, friends and staff, which I don't know exactly which category that put me in."[104] Prior to that, Ms. Lewinsky had written the President that she had to accept his decision to end their sexual relationship.[105] "However, I also cannot ignore what we have shared together. I don't care what you say, but if you were 100% fulfilled in your marriage I never would have seen that raw, intense sexuality that I saw a few times . . . ."[106] The Starr Referral also provides evidence, derived from several sources, that Mr. Clinton suggested to Ms. Lewinsky that he "might be alone"[107] after leaving the White House and

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101. *Id.*

102. Clinton Grand Jury Testimony, *supra* note 17, at 147, 121, 123.

103. *See, e.g.*, Referral, *supra* note 1, at 39 ("Mrs. Clinton was in Athens, Greece."); *id.* ("Mrs. Clinton was in Ireland."); *id.* at 49 ("[T]he President sometimes called from trips when Mrs. Clinton was not accompanying him."); *id.* at 50 ("On those dates, Mrs. Clinton was in Denver (May 21), Prague and Budapest (July 5-6), Las Vegas (October 22), and en route to Bolivia (December 2).").

104. *Id.* at 20.

105. *See id.* at 63 n.476.

106. *Id.*

107. *Id.* at 19.

that she might then "be his wife."[108] Ms. Lewinsky responded that "we'd be a good team," and the President joked about being with her at age seventy-five.[109] Ms. Lewinsky testified that "I left that day sort of emotionally stunned, for I just knew he was in love with me."[110]

In effect, the primary theory concerning the materiality of the Lewinsky relationship illogically emphasizes not its similarity to Ms. Jones's situation, but rather its differences.[111] Mr. Starr states, as a leading ground for impeachment: "Under Ms. Jones's legal theory, women who had sexual relationships with the President received job benefits because of the sexual relationship, but women who resisted the President's sexual advances were denied such benefits."[112] And according to Professor Priest, Ms. Jones's "claims would have had to be analyzed entirely differently if the issue were not whether Ms. Jones were treated badly in some objective sense but whether the efforts to keep Ms. Lewinsky employed established differential treatment based on complying with Mr. Clinton's sexual demands."[113] But the alternatives are not simply "sexual harassment that turns out well" and "sexual harassment that turns out badly"; the relevant distinction here is that between sexual harassment and the complete absence of sexual harassment. As the Starr Referral conclusively proves, Ms. Lewinsky's relationship with the President was based on far more than merely failing to "resist his sexual advances" or dutifully "complying with his sexual demands";[114] moreover, it appears that her involvement with the President was directly responsible for the loss of her job.[115]

Let us suppose that, for purposes of pretrial discovery, Judge Wright

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108. *Id.* at 67.

109. *Id.*

110. *Id.*

111. *See, e.g.*, Brief for Appellant, *supra* note 47, at 46 ("The obvious quid pro quo aspects of the relationship with Ms. Lewinsky are strong evidence of Mr. Clinton's intent to discriminate based on gender and his intent to harass sexually.").

112. Referral, *supra* note 1, at 131; *cf. id.* at 205 n.460 ("[T]he President's actions discriminated against all of those interns and employees who did not receive the same benefit.").

113. Priest, *supra* note 68, at A22.

114. Referral, *supra* note 1, at 58; *see also id.* ("I was pestering him to kiss me, because . . . it had been a long time since we had been alone."); id. at 63 ("Ms. Lewinsky, weeping, tried to persuade the President not to end the sexual relationship."); *id.* n.477 ("Ms. Lewinsky tried to initiate genital contact with the President on August 16, 1997, but he rebuffed her."); *id.* at 71 (Ms. Lewinsky moved to initiate sexual contact "but the President rebuffed her."); *id.* at 143 ("Ms. Lewinsky's statements to some that she did not have intercourse with the President, even though she wanted to do so, enhances the credibility of her statements.").

115. *See id.* at 42-43. Ms. Lewinsky's superiors "proposed to move her out of the White House" because she was "spending too much time around the West Wing." *Id.* at 42. The President "checked on the reason for her transfer" and discovered that it was because "he was paying too much attention to [Ms. Lewinsky] and [she] was paying too much attention to him." *Id.* at 205 n.460.

had issued the following order in the *Jones* case: "The court finds that the plaintiff is entitled to information regarding any individuals with whom the President had sexual relations or proposed or sought to have sexual relations from 1986 to the present." Suppose further that, in his sworn deposition, Mr. Clinton specifically denies having had sexual relations with Mrs. Clinton during that time period. Suppose further that this statement made under oath is false. And suppose, finally, that in subsequent sworn testimony before a federal grand jury, Mr. Clinton acknowledges having had an "intimate relationship" with his wife, but claims that his previous sworn testimony denying sexual relations is still "legally accurate."

Would anyone maintain that any of this false testimony was material to the *Jones* case? And would anyone maintain that any of this false testimony, made under oath, was grounds for impeachment? Of course, Ms. Lewinsky is not Mrs. Clinton, and probably never will be. Yet, as one reads the Starr Referral carefully, and follows the tendency of its cumulative evidence and argument, one is ineluctably led to view Ms. Lewinsky as occupying a position much closer to that of Mrs. Clinton than that of Ms. Jones.

IV. CONCLUSION

It is a long-established principle that presidential impeachment is an appropriate remedy only for "high Crimes and Misdemeanors" of a *public* nature (with the possible exception of private crimes so heinous that the President "cannot be permitted to remain at large").[116] The crux of this Essay's argument is that the President's affair with Monica Lewinsky was a private matter that was not rendered "public" simply because Mr. Clinton lied about it. With its vote against removing the President, the Senate seemed to agree.

It is also interesting to note that neither the House nor the Senate heard directly from any witnesses who were personally acquainted with the facts of the case against President Clinton. Perhaps in the House this had to do with the elections (which resulted in significant losses for the Republicans). In the Senate, the oft-stated reason for dispensing with witnesses was to preserve the "dignity" of the institution. Regardless of the reasons, it is hard to believe such antipathy toward live testimony would have occurred had the allegations involved bribery or treason. The absence of fact witnesses provides another clue as to whether the charges against President Clinton were essentially private or public.

A further indication that Mr. Clinton's lies were not of public import comes from the OIC itself. In its criticism of the President's testimony the

116. *See* Law Professors' Letter, *supra* note 29.

Starr Referral states at one point: "The President's claim seems to be that he maintained a hands-off policy in ongoing sexual encounters with Ms. Lewinsky, which coincidentally happened to permit him to . . . deny 'sexual relations' with her at a deposition occurring a few years in the future."[117] The clear implication is that if, several years ago, Mr. Clinton's actual physical conduct had differed only slightly (so as not to constitute "sexual relations" as defined in the *Jones* case), the entire impeachment case against him would have been moot. So, if Mr. Clinton had simply found it gratifying to stroke Monica Lewinsky's stomach, say, for hours on end, our nation would never have been subjected to the impeachment debate.

This example makes the point that something unimportant (that is, "private") is not converted into something important (that is, "public") just because someone lies about it. (And even if one took the position that lying about anything—no matter how unimportant—is itself always important, that would be a moral position rather than a legal or constitutional one.[118]) A lie that might properly have severe repercussions for Mr. Clinton's personal and "private family life" does not and should not necessarily have the same repercussions elsewhere or automatically constitute an impeachable offense.[119]

"Materiality" in the legal sense is just another word for importance. If Mr. Clinton is asked under oath what the capital of Mongolia is and he answers "Uttar Pradesh," knowing full well that this is utter nonsense, that lie is not material even if Mr. Clinton has some highly personal reasons for wanting to conceal the true identity of the capital of Mongolia. Similarly, if it is not important whether or not Mr. Clinton touched certain specified parts of a woman's body, then it is not material whether or not he lied to that effect in a deposition or before a grand jury. In other words, our nation has been convulsed by an impeachment debate over something that is neither important in the layman's sense nor material in the legal sense.

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117. Referral, *supra* note 1, at 143.

118. *See* MARCEL ECK, LIES AND TRUTH 40 (Bernard Murchland trans., The MacMillan Co. 1970) ("Even though the basis of lying resides in its intentionality, its gravity will vary according to the person lied to and the subject lied about. Not everyone has the same right to the truth and the various forms of lying are not of equal gravity."); *cf.* SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 42-44 (1978) (arguing that the belief that all lies must be ruled out at all costs "obviously goes beyond the realm of ethics and belongs squarely in that of faith"); GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS 31 (1993) ("[M]any loyal actions seem to be motivated solely by an emotional, almost instinctive attachment, untempered by moral reflection about the right thing to do.").

119. *Cf.* Referral, *supra* note 1, at 5 ("All Americans, including the President, are entitled to enjoy a private family life, free from public or governmental scrutiny."); *see also* Michael Ignatieff, *Return of the L-Word?*, N.Y. TIMES, Nov. 8, 1998, at WK 15.