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IMPRUDENCE AND PARTISANSHIP: STARR’S OIC AND THE CLINTON-LEWINSKY AFFAIR

Robert W. Gordon*

INTRODUCTION

The Independent Counsel Act expired on June 30, 1999, largely unmourned. The performance of independent counsels, it was widely said, had shown the prescience of Justice Scalia’s dissent in Morrison v. Olson. The statute gave the counsel’s office no other job than to investigate and prosecute a designated target. The counsel was unconstrained by budget, other tasks compelling a sense of priorities or proportion, competing political concerns, or any time-table to complete his work. He had access to the full terrifying machinery of the criminal process: to subpoena individuals to testify before grand juries; to threaten indictments or grant or withhold immunity; to prosecute witnesses for perjury or false statements if not told what he wanted to hear; and to call upon FBI agents and private investigators without limit and turn them into great armored tanks to run the state’s investigative authority through the lives of targets, witnesses and their families and friends, shattering their privacy and their reputations and bankrupting them with lawyers’ fees. The appointing judges of the Special Division might select as counsel a political enemy of the Administration he was supposed to investigate. If he ran amok the At-

* Johnston Professor of Law, Yale University. I am grateful to Lincoln Caplan, Dennis Curtis, Burke Marshall, Deborah Rhode, Bill Simon and Mark Weiner for very helpful comments on earlier drafts; to Phyllis Plitch for help in finding documents and sources, and especially to Kyle Graham for heroic research assistance.

5. The Act did provide for reimbursement of lawyers’ fees to unindicted targets. See id. § 593(f).

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torney General would risk a "firestorm" of public criticism if she tried to remove him for cause. Yet so concerned was the statute to make him independent that he could operate without any real supervision or check on his abuse of office.

While the statute created a potential monster in the counsel, it also made him a clumsy and ineffectual monster. Functioning outside the regular bureaucracy, he had to start from scratch, assemble a staff, find working quarters, and expensively educate himself in the customs of the country and the facts of his cases. He was politically isolated, often without friends or influence of his own in the capitol, and confronting well-connected targets who had every incentive to resist his investigations and to engineer political and media attacks, against which he could not defend himself without violating grand-jury secrecy. It would take any counsel in such conditions a long time to ferret out anything incriminating, and the longer it took the more opponents could claim he was wasting money to no good purpose. If he brought criminal indictments he was sure to be accused of misusing the criminal process for political ends; but if he failed to indict, and simply publicized wrongdoing in his report, he would be accused of libeling officials without giving them their day in court.

The Act thus gave Independent Counsels ("ICs") every incentive to justify their existence by prolonging their work until they found something on target. They were appointed to investigate and then to prosecute whatever misconduct they found, however trivial, as a crime while being forced to work under conditions likely to cripple their efficiency and legitimacy. Some counsels acted out this script to perfection. Donald Smaltz took three years and $11.9 million to investigate and prosecute former Secretary of Agriculture Mike Espy on thirty counts for receiving, and various food companies for contributing, gifts and favors such as sports tickets totaling at most $35,000. David M. Barrett spent four years and $10 million to investigate and indict former Secretary of Housing and Urban Development Henry Cisneros for making false statements to the FBI about payments he had made to a former mistress in 1989 while he was mayor of San Antonio—not about whether he had made the payments, which he admitted, but the amount that he had paid. Barrett also prosecuted the

6. "Firestorm" was the label the press affixed to the public outcry that followed the "Saturday Night Massacre" of October 20, 1973, President Nixon's dismissal of Archibald Cox, the Watergate Special Prosecutor. See Stanley I. Kutler, The Wars of Watergate 406 (1990).
mistress, Linda Jones (Medlar), who is serving a three and a half year term in federal prison for bank fraud and money laundering: her actual offenses were allowing her sister and brother-in-law to represent that the house their credit helped her buy was their primary residence, and, after the house was sold, accepting rent checks from the house’s new buyer.9 Kenneth Starr, as the world knows, has spent five years and over $40 million looking into Bill and Hillary Clinton’s involvement with Whitewater, a failed real-estate venture connected with a minor savings-and-loan scandal in Arkansas in the early 1980s.10 Apparently Starr has been unable to turn up enough evidence to charge the Clintons with Whitewater wrongdoing; but after leveraging his authority to look into Whitewater into a mandate to investigate Clinton’s denial, in the course of a civil deposition in Paula Jones’s sexual-harassment action against him, of a sexual affair with a White House intern, Monica Lewinsky, he sent a referral to the House of Representatives concluding that Clinton could be impeached for perjury, obstruction of justice, and abuse of power.11 Starr may still prosecute Clinton on the perjury and obstruction charges after the President leaves office. In the course of its pursuit of Clinton, Starr’s Office of Independent Counsel (“OIC”) also brought to bear its investigatory and prosecutorial powers against a host of decidedly minor players in the drama, for offenses including failing to cooperate with the OIC as much as it would wish, telling the OIC what it does not want to hear, and even criticizing the OIC in public.

Many critics—including Starr himself in testimony opposing the Act’s renewal12—have blamed the statute for such prosecutorial excesses. Undoubtedly the Act suffered from structural weaknesses, including some not often mentioned: in particular, that it did not limit the appointment of counsel to cases where high federal officers were accused of serious abuses of their offices, rather than minor misdeeds or behavior taking place before or otherwise unrelated to their performance in federal office. These limitations would have ruled out the appointment of counsels in the Whitewater and Cisneros matters, among others, and probably in the Espy and Clinton-Lewinsky mat-

9. See Jane Mayer, The Lover in Jail, New Yorker, Nov. 30, 1998, at 55, 58-59. The sister and brother-in-law were rewarded for their generosity by having to plead guilty to a felony count. See id. at 59. How such prosecutions are thought to serve to police the integrity of high officials in the performance of their offices is a mystery.


ters as well.

While the statute's weaknesses may help explain, they do not justify the behavior of some of the independent counsels. To the familiar complaint, "the statute made them do it," the response should be, paraphrasing the National Rifle Association: statutes don't bring irresponsible prosecutions, people do. Certainly, the Act gave the counsel enormous discretion. With great discretion, however, comes great responsibility to use it wisely, disinterestedly, judiciously; to ask whether one's actions serve an important public interest and is a legitimate use of the counsel's vast and almost unaccountable power. More specifically, a counsel's discretion needs to be exercised both prudently and objectively.

Prudence requires more than just asking whether, if brought, a criminal case is likely to be won, though surely it requires at least that.\textsuperscript{13} It means asking whether the gains to social order and the interests of justice are likely to be worth the costs, including collateral damage to civilian lives and the expense to the taxpayers. The modern state in our complex regulatory world governs—doubtless far too much—through criminal sanctions.\textsuperscript{14} Some of these are codified in detailed technical regulations that only specialists, if anyone, can be expected to read and understand; others in sections of the criminal code so broad and vague\textsuperscript{15} that their practical meaning is accessible only to insiders who know the conventions of their application as set by case law, enforcement manuals, and other insiders' folklore. Minor law-breaking, much of it inadvertent, is therefore utterly pervasive, and customarily tolerated.

At the same time, the arsenal of investigative and punitive weapons modern prosecutors may deploy against lawbreakers and potential witnesses is devastating in its destructive powers. As these powers have evolved, they have become less accountable. In theory, grand juries and judges provide formal restraints on prosecutorial abuses, but in practice these restraints have atrophied. Grand juries are now entirely creatures of the prosecutor's office. Federal judges have lost the power to check overreaching prosecutors by reducing penalties

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Standards Relating to the Administration of Criminal Justice Standard 3-3.9(a) (1992) ("A prosecutor should not institute, [or] cause to be instituted ... criminal charges in the absence of sufficient admissible evidence to support a conviction.") Likewise, Standard 3-3.9(b) adds that "[t]he prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction." See id. Standard 3-3.9(b).
\item See, e.g., 18 U.S.C. §§ 287, 1001 (1994) (proscribing fraud); id. §§ 1503-1505, 1509-1510 (obstruction of justice); id. § 201 (bribery); id. § 872 (extortion); id. § 873 (blackmail).
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against minor offenders because rigid sentencing guidelines have deprived them of discretion; if a zealous prosecutor can make out a technical case that accepting rent checks on the sale of a house constitutes money laundering under the statute, the judge must impose the prescribed sentence even if she thinks the defendant's behavior innocuous, excusable, or even innocent. Prosecution task forces sweep down into the lives of targets and incidental witnesses, pore over their credit and bank records and their phone bills, interrogate their friends and neighbors and parents and children, peer into their sex lives, reading habits and intimate associations, cultivate informants and plant undercover agents in their clubs and workplaces—often looking less for actual evidence than for leverage to extort information or testimony.

Given the havoc that this arsenal of techniques is likely to work on its targets' careers, finances, families, reputations, and peace of mind, a good prosecutor, like a good general, must ask whether the basic objective of punishing and deterring the alleged criminal conduct involved justifies inflicting such damage; and whether there may be less costly alternatives to prosecution, such as warnings, reprimands, recommendations for more effective preventive legislation and enforcement to handle future cases, the resignations of persons involved, or the sanctions of publicity. The decision to set in motion the processes available, as well as how to use them, has to be commensurate with the gravity of the evil. A prosecutor who thinks he has a roving mandate to direct the heavy weapons of the criminal law against every sort of human behavior that might possibly constitute a crime under the statute book, or who sees himself as a Savonarola bound to extirpate every trace of vice in his jurisdiction, will rapidly become a far worse menace than any but the very worst of criminals. Hardly anybody's record is clear of some technical violation that a creative prosecutor could not work up into a crime, or some embarrassing incident from which such a prosecutor could not manufacture a crime by devising a process in which the person would predictably try to conceal it. Prudence is a mild word, but given broad and far-reaching governance by means of the criminal sanction, administered through officers with enormous discretionary powers, it is the virtue that makes the difference between an orderly liberal state and a terror state.
All prosecutors, not just Independent Counsels, operate under pressures that produce the temptation to use their powers imprudently. To be sure, ordinary prosecutors must operate under constraints of budget and staff, which require them to set priorities and discourage them from overzealous pursuit of too many minor misdeeds. But they are also subject to pressures from which ICs are free. Elected district attorneys are often pressed to find and prosecute suspects in high-profile crimes, which may and often does result in major mistakes from excessive haste and zeal and the all too common pathological refusal to admit error even in the case of gross miscarriages of justice. If the ordinary constraints of budget and staff are not around to enforce prudence on him, the prosecutor must enforce it on himself.

Objectivity requires that the counsel take every precaution possible against becoming partisan, adopting a one-sided view of the evidence against the targets of his investigations. In the American criminal justice system, unlike the European, there is no judge to supervise investigation and indictment. The prosecutor must play the judicial role of

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20. Even counsels appointed under the Independent Counsel Act have shown themselves perfectly capable of this kind of restraint. For example, Jacob Stein, and James McKay, both appointed to investigate Attorney General Meese, and Joseph diGenova, appointed to investigate officials of the Bush Administration who poked into Bill Clinton's passport files during the Presidential election campaign, turned up evidence out of which a zealous prosecutor could probably have fashioned some criminal indictments, but none of these counsel thought the conduct involved was serious enough to justify further pursuit, and eventually closed up shop with a report. See David Johnston, No Charges to Be Filed for Search of Clinton Files, N.Y. Times, Dec. 3, 1994, at A11 (diGenova investigation); Ruth Marcus, Justice Dept. Report Sharply Criticizes Meese, Wash. Post, Jan. 17, 1989, at A1 (McKay investigation); Mary Thornton, Inquiry Ends into Loan, Federal Hiring; Probe Rules Out Prosecution of Meese, Wash. Post, Sept. 21, 1984, at A1 (Stein investigation).
ensuring that the system does not railroad convenient suspects for crimes that popular clamor wants revenged or develop a Javert-like fixation on particular targets. Just as dangerous as the imprudent prosecutor who thinks he must pursue with indictments every apparent lawbreaker who appears in his sights, is the partisan prosecutor who fixes his sights on a demonized target and instructs his staff to find something, anything, they can pin on him, or who allows his office to become the instrument of private or political vendettas or extortion. If a prosecution is to be brought, it should only be after the prosecutor himself has considered the exculpatory evidence and remains convinced of the suspect's guilt, and where prudence indicates the stakes are high enough to justify rolling out the criminal process in the first place. Procedures for checking over-zealousness should include assigning someone in the office, preferably the lead prosecutor himself, the role of skeptic—the lawyer who picks apart the case, puts the case for the defendant, demands to be told why it is worth prosecuting. Objectivity, in the end, is what separates the "political" prosecutor who truckles to the crowd howling for blood, the wealthy and powerful who use his office to persecute opponents, and the political higher-ups looking for easy kills to get the numbers up, from the "professional" prosecutor who uses his political skills to protect his staff from being bulldozed into biased, selective, and overzealous prosecutions.

This judicial component of the prosecutor's role seems often to be misunderstood, even by prosecutors themselves, because American legal culture is suffused by the adversary ideology, or ethic of zealous advocacy. Lawyers sometimes interpret this ethic to mean that the very essence of their role depends on them picking a side, and becoming unabashed aggressive partisans for their position or client. This view is vastly over-broad. Lawyers are constrained to the role of advocates in proceedings such as trials, where a neutral umpire and fact-finder are in fact present to enforce the rules of combat, evaluate the conflicting stories and arguments, and reach a decision. Other settings, where there is no opposing lawyer to correct for their excesses, and no neutral authority to resolve conflicts, may require the lawyer to accept a different role; and sometimes it has to be disinterested, not partisan at all. A prosecutor, after all, has no client other than the

21. A well-known example of such professionalism can be seen in the Manhattan DA's office since Frank Hogan's era.
24. Situations in which lawyers are not supposed to take a one-sided, but instead adopt an impartial, view of facts and law and tell the truth so far as they know it in-
interests of justice, and he has immense powers. An Independent Counsel in particular must be a minister of justice because there are fewer outside constraints on his conduct, and because his appointment starts him off pointed at a specific target. He also has fewer excuses for partisan behavior than an ordinary District Attorney because he does not have to run for re-election or meet quotas for convictions. If his investigation becomes highly politicized, he can expect that he will be reviled almost no matter what he does, and that gives him a kind of freedom.

In this Article I propose to ask how Kenneth Starr's OIC performed under these ethical standards in the Clinton-Lewinsky investigation. The answer I am going to suggest is, very badly. In Part I, I argue that Starr's OIC violated obligations of prudence. I argue that the OIC was imprudent when it failed to act on its opportunity to prevent Clinton from lying in his deposition and Lewinsky from filing a false affidavit in the Jones case; when it expanded its jurisdiction to investigate Clinton's affair with Lewinsky and his attempts to conceal the affair after it ended; when it deployed massively intrusive and disruptive investigative techniques to uncover evidence against Clinton; when it deployed prosecutorial powers against people whose main offense was criticizing the OIC and its tactics; when it refused to consider, or at any rate drastically discounted, the damage its investigations would inflict on witnesses and other innocent and not-so-innocent persons, and to the effective functioning of the Presidency and the business of the country; and finally, when it used the evidence it had gathered as the basis for a referral of impeachment of a sitting President to the Congress. My main argument in this section is that Starr's OIC's response to Clinton's lies in his deposition in the Jones case was massively disproportionate, because it treated relatively minor misconduct as if it were a major crime. I try to demonstrate in some detail that Clinton's lies were of minor importance because they could never have had much impact on the Jones case. I address and critique Starr's contentions that Clinton's lies were nonetheless serious because all lies in official proceedings are serious and lies told by high officials especially serious because they set a bad example. I also discuss and offer a qualified endorsement of the view apparently shared by large majorities of the American people that Clinton's deceptions were partly justified by understandable motives to protect his private

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life from exposure by political opponents. Finally, I contrast the slight importance of the Clinton-Lewinsky affair with the much higher stakes of the Watergate and Iran-Contra investigations.

In Part II, I argue that Starr’s OIC violated obligations of objectivity by pursuing its investigation of Clinton with intense partisanship. The OIC acted in a partisan fashion: when upon learning of his impending false testimony, it seized the opportunity to nail Clinton rather than warning him; when it argued for expanded jurisdiction on apparently pretextual grounds; when it created an additional and apparently gratuitous occasion of criminal jeopardy for Clinton by calling him to testify before a grand jury; when it presented to Congress and the public a consistently one-sided view of facts and law; and when Starr himself became an overt advocate for impeachment in testimony before the House Judiciary Committee.26

26. I am going to put aside for the purposes of this essay the most troubling suggestions of misconduct that have been made, but not proved if they ever will be, against Starr and the OIC. The most serious of these is that lawyers on Starr’s team and the lawyers for Paula Jones, motivated by a shared political malice, colluded to put the President in criminal jeopardy; by setting him up to make statements in a civil deposition that he would suppose he could make without fear of contradiction because Lewinsky’s affidavit would back him up, and then arranging to deploy the unlimited investigative powers of the OIC to prove the statements false, thus laying the foundation for an impeachment inquiry and possible later prosecution for perjury, witness tampering, and obstruction of justice. Circumstantial evidence points to some degree of collusion between the OIC and the Jones lawyers, mediated by the young conservative lawyers working behind the scenes on the Jones case (the “elves”, as they came to be called) and by the mysterious New York publicist, Lucianne Goldberg. But how far these connections led to actual coordination of strategies remains obscure. See, e.g., Renata Adler, The Wages of Fear, L.A. Times, Mar. 14, 1999, at 3 (reviewing Andrew Morton, Monica’s Story (1999)); Joan Didion, Uncovered Washington, N.Y. Rev. of Books, June 24, 1999, at 72 (reviewing Michael Isikoff, Uncovering Clinton (1999)); Susan Schmidt, Tripp’s Tapes: How They Got To Starr Is a Complex Tale, Wash. Post, Oct. 11, 1998, at A1; Don Van Natta, Jr., New Details on When Starr Was Told of Clinton Affair, N.Y. Times, Oct. 10, 1998, at A11; Don Van Natta, Jr. & Jill Abramson, The President’s Trial: The Lawsuit, N.Y. Times, Jan. 24, 1999, at A1.

Let me also put aside some of the other familiar criticisms of Starr and the OIC, not because they are not serious, but because others have explored them at length: Starr’s (undisclosed, at the time he sought expanded jurisdiction) prior consultations with the Jones lawyers and a group of amici supporting them about the case; his associations with ideological opponents of the President and representation of companies with interests adverse to his Administration’s policies; his acceptance (later retracted) of a deanship at Pepperdine Law School funded by Richard Mellon Scaife, an ardent promoter and financier of anti-Clinton investigations and propaganda organs; his staff’s long interrogation of Monica Lewinsky after she had asked for, and they had discouraged her from calling, her lawyer; the OIC’s leaks of grand jury information to the press, and so forth. See Deborah A. Rhode, Conflicts of Commitment: Legal Ethics in the Impeachment Context, 52 Stan. L. Rev. (forthcoming Jan. 2000) (manuscript at 4-20, 61-76, on file with author) [hereinafter Rhode, Conflicts of Commitment], for a comprehensive and judicious review of the ethics of the IC’s conflicts of interest, treatment of witnesses, and other conduct. See also Jane Mayer, How Independent is the Counsel?, New Yorker, Apr. 22, 1996, at 56.
I realize that a lot of people disagree with this assessment. They think Starr and the OIC were just doing their jobs, in the way that professional prosecutors are supposed to do them: that Clinton's deposition testimony and other attempts to conceal his affair were serious offenses that justified the OIC's investigation and impeachment referral; that justified the House Committee in recommending and the House in voting for his impeachment; that would have justified the Senate in removing him from office; and that would justify prosecution after Clinton leaves office. I take those arguments seriously, and will try to address the strongest versions of them that I have found.

I. FAILURES OF PRUDENCE: TREATING A MINOR OFFENSE AS IF IT WERE A MAJOR CRIME

A. Failure To Prevent Possible Crimes

First and perhaps foremost, Starr and his lawyers had a clear opportunity to prevent the President from making false statements in his deposition, and Monica Lewinsky from filing a false affidavit, in Jones v. Clinton. They learned of the Tripp tapes five days before Clinton was scheduled to testify, and before Lewinsky's affidavit denying a sexual relationship with Clinton had been received by the Jones court. To give Clinton a chance to change his testimony, exercise particular caution in giving it, or refuse to answer and take an interlocutory appeal, and to give Lewinsky a chance to withdraw and amend her affidavit, all the OIC had to do was to let her talk to her lawyer, Francis Carter, who surely would have asked her permission to inform his friend Vernon Jordan and Clinton that the OIC knew about the affair. Alternatively Starr could have called the White House directly.

Apparently nobody in the OIC even considered informing the President, but I cannot think of any good reason why they did not. A prosecutor is supposed to prevent crimes, not to facilitate their commission. Instead Starr and his team took every step they could to ensure Clinton would fall into the trap the Jones lawyers set for him. They tried unsuccessfully to have Lewinsky wear a wire to trap Jordan and Clinton into incriminating admissions. During their long inter-

29. The OIC said it was five days, but it may have been much earlier than that.
rogation of Lewinsky, they refused to let her call her lawyer, on the (ridiculous) pretext that Carter was representing her in a civil rather than a criminal matter, but in reality so that word of his peril would not get back to the President. They let her believe that if she talked to anyone, she might be charged with serious crimes. On the other hand, while granting Linda Tripp immunity, they put no restrictions on her cooperation with the Jones lawyers to help them prepare their deposition questions.

The argument that the OIC should have tried to prevent Clinton's false testimony is controversial. I find that when I suggest it to other lawyers, some (mostly of an older generation) think it self-evidently correct, while others think it crazy. But consider this: at the time Starr learned of Clinton's affair with Lewinsky and his impending testimony about it, he was not an interested party but an Independent Counsel with no mandate to do anything about these matters. His investigations of the President were limited to certain matters ("Whitewater," "Travelgate," "Filegate," etc.) over which he had jurisdiction. Starr was a citizen and a highly placed government official. What he learned was that the President was about to blunder into a course of action that would cause serious trouble to himself and his office. A friend to the country and to the Presidency, a citizen interested in preventing what damage he could prevent at little or no cost and trouble, an official with the republic's interest at heart, should have acted to prevent it. He could have done this discreetly and without making visible the role of his office. Starr later solemnly said how profoundly awful it was for a President to lie under oath, and what a bad example it set to the public, and how perjury even in a civil case was serious because it interfered with doing justice to the plaintiff. Of course Clinton made his own decision to lie, and the OIC cannot be held responsible for that decision, but they knew it was going to happen and could easily have stopped it from happening and considerably reduced the damage from a major scandal that distracted the Presidency for over a year.

What would justify a prosecutor, or rather an Independent Counsel, in failing to prevent a crime that he could easily prevent? Usually, the
knowledge that the target was a serious criminal, who was undoubt-
edly guilty of many wicked deeds, but could only be apprehended if
actually caught in the act. The OIC treated Tripp’s tapes as if an in-
formant had told them of a big drug buy about to go down, an ongoing
inchoate crime.\footnote{35. The OIC’s official rationale for intervening in the Lewinsky matter was that,
when they learned from Tripp that Clinton had asked Vernon Jordan to find Lewin-
sky a job, they recalled that Jordan had helped Webster Hubbell find a job after
leaving the administration, and immediately suspected they had found another link in
an ongoing “conspiracy”—i.e. a well-oiled obstruction-of-justice scheme whereby
Jordan would silence witnesses to Clinton’s misdeeds by finding them jobs! This
fragile daisy-chain of inference (were they suggesting that every time Clinton asked
his old pal Jordan, a famous Washington fixer, to find a friend or associate a job that
the purpose must have been to obstruct justice?) served its function of helping the
OIC expand its jurisdiction to cover the Lewinsky matter on the ground that it con-
nected Lewinsky, however tenuously, to their Whitewater inquiry; it then disappeared
from the OIC’s field of vision. Once Lewinsky became the center of their attention,
the OIC forgot about the Jordan job-finding conspiracy. For further discussion of this
point, see \textit{infra} note 221 and accompanying text.} In short, they treated it like a major crime.

B.\textit{ A Major Crime?}

Now we come to the heart of the matter. The justification for the
OIC’s conduct has to be that, by attempting to prevent the plaintiff’s
lawyers and the court in the \textit{Jones} case from learning about his affair
with Monica Lewinsky, Clinton committed a major crime. Nothing
short of a major crime could justify the OIC in not warning Clinton
that his secret was known—indeed in trying urgently to prevent his
being warned—to avert the crime. Nothing less could justify its deci-
sion to launch an unbelievably expensive, coercive, and intrusive in-
vestigation of Clinton’s sex life and the lives of all his aides, staff, con-
fidantes, Secret Service men, lawyers, and friends to disprove his
deposition testimony. Clearly nothing less could justify the OIC’s
making perjury and obstruction of justice in discovery proceedings a
central reason for its referral for impeachment of the President for
“high crimes and misdemeanors.”

The argument that Clinton’s attempt to conceal his affair from the
\textit{Jones} court was a minor offense, if indeed it was a crime at all, and
that the OIC and House Republicans blew it up into something way
out of proportion to its actual gravity is not, I realize, exactly new.
This was the view of large majorities of the American people from the
time that news of the scandal first broke, to the President’s acquittal in
the Senate.\footnote{36. \textit{See, e.g.}, Richard Benedetto, \textit{Mixed Reviews for Clinton Continue, New Poll
Shows}. \textit{USA Today}, Feb. 15, 1999, at 10A (discussing poll results whereby 73% of re-
spondents believed that the idea of formally censuring the president should be
dropped, and 58% saying criminal charges should not be filed once Clinton leaves of-
office); \textit{Clinton Favorability, Job Approval Slip}, \textit{USA Today}, Feb. 17, 1998, at 10A
(52% of poll respondents say Starr should stop his investigation).} The way this view was usually expressed was that all
Clinton did was to lie about sex, which many people are excusably tempted to do. I think this view is approximately right, but want to defend it more rigorously against the counter-view, as expressed by the OIC and the House Republicans: that Clinton’s lying was of momentous public importance because it involved serious violations of law.

1. The Abstract Argument

The OIC’s (and later House managers’) principal argument, repeated many times, was that they had evidence tending to show that Clinton had committed the serious criminal offenses of perjury and obstruction of justice, which are felonies in the statute book and carry heavy penalties—penalties as heavy as the crime of bribery, which the Constitution expressly says is an impeachable offense.37 This argument, relying entirely on its abstraction, was never very convincing—quite aside from the problem that, as the President’s lawyers demonstrated in his impeachment trial, the evidence of his guilt of either offense, on the evidence submitted in the referral, was far from clear. The statutory definitions are so broad as to cover a very wide range of conduct from the relatively trivial to the very wicked. I will focus here on the charge of perjury in the Jones deposition—the charge on which the evidence was clearest and strongest.38

Consider five cases of false statements:

(1) The “gift” that was really a loan: Jane and John want to buy a house. Part of the down payment for the house will be $10,000 that Jane has borrowed from her father, who tells her to repay it “when you can.” Knowing that they must come up with twenty per cent of the purchase price to qualify for the mortgage, they list the $10,000 under “Cash on Deposit” rather than “Other Outstanding Indebtedness” on the application form for a government-backed mortgage loan. They sign the form affirming all the facts on it are true “under penalties of perjury.” They get the mortgage, buy the house, and,  

38. This evidence, of course, was all hearsay, none of which was cross-examined.
39. The OIC, I think, never came close to submitting convincing evidence on its other criminal charges, perjury before the grand jury, obstruction of justice, and abuse of power. In any case, the “justice” that Clinton was alleged to be obstructing was, throughout, the flow of truthful information to the court that was deciding Paula Jones’s case; and then the criminal investigation of whether that information had in fact been truthful. All the subsidiary charges of lying to the grand jury, obstruction, etc. are derivative of the OIC’s basic assertion that the concealment of Clinton’s affair with Lewinsky was a hindrance to the achievement of justice in the Jones case. This point that the grand jury perjury and all the obstruction charges related back to the basic issue of whether important information was blocked from reaching the court trying to resolve the Jones case was stressed in one of the best pieces of legal journalism to analyze the evidence, and one of very few to focus on the critical issue of the concrete harm, if any, Clinton and Lewinsky had threatened to cause to justice for Jones. See Jeffrey Rosen, Material Girl, New Republic, Feb. 8, 1999, at 20.
two years later, repay Jane's father.

(2) **The dubious deduction:** Morton, a lawyer, arranges lunch with Valerie, a lawyer in another firm. He opens the lunch with a discussion of business. After fifteen minutes it becomes clear that Morton's real purpose is to discuss his disintegrating marriage. Morton later claims a tax deduction for the lunch as a business expense. He signs his tax return "under penalties of perjury."

(3) **The parental alibi:** Walter is on trial for robbery. His mother Miriam testifies that Walter was at home all evening on the night of the robbery, though in fact she did not see him that night. The prosecution does not bother to cross-examine Miriam, and Walter is convicted.

(4) **The hidden contraband:** State Police Trooper Krupke stops a motorist for speeding. On a hunch, he searches the car, opens a suitcase in the back, and finds a cache of drugs. At a hearing on the defense's motion to suppress the evidence because the trooper's search was illegal, Krupke testifies that the drugs were in plain view on the back seat when he stopped the car. Neither the prosecutor nor the judge really believes Krupke, but the defendant has a record of many prior arrests, and the court does not want him to escape conviction because of the trooper's flawed search. The court denies the defense's motion to suppress evidence of the drugs.

(5) **The felony frame-up:** Claude is arrested and charged with dealing drugs. Faced with a long prison sentence, he agrees to cooperate with prosecutors by giving up his wholesaler. Under promise of immunity from prosecution, Claude names Humphrey as the kingpin of the drug operation and is the chief witness against him at his trial. Humphrey is convicted. As the result of a reporter's investigation, it is later discovered that Humphrey is completely innocent; that in fact Claude is the leader of the drug ring, and that he framed Humphrey to escape prosecution.

In all five situations someone committed perjury—a false statement of a material fact under oath to a public officer. But as the examples make clear, perjury laws are very elastic. Perjury is a scary name for a heavy felony, but most of the actual perjuries people commit every day are more like the gift that was a loan or the dubious deduction, small offenses against the truth. Perjuries can be trivial lies as well as great ones, lies that cause severe damage and lies that are relatively harmless, lies that many people would think excusable and lies that no one would try to justify. Perjury laws thus delegate to prosecutors a broad discretion to exercise judgment about what is worth pursuing and what is not.

In my examples, all the statements *could* be the basis for a perjury prosecution. But (perhaps surprisingly) none of them is actually likely
to be prosecuted. The couple who called their loan a gift have deceived a lending institution and the government by making themselves look slightly better financial risks than they are; but if in fact they turn out to be good risks and pay their debts, nobody will care. The lawyer who took the dubious deduction has done more harm. Abstractly described, his crime will sound horrendous: Morton conspired with his accountant to defraud the U.S. Treasury and to subvert the integrity of the revenue system. But this crime is so pervasive and common, the crime of millions of other Americans who fudge deductions on their tax returns, that so long as he does not fudge too much, he will rarely be prosecuted if caught; at most he will have to pay back taxes and penalties. The mother who gave her felonious son an alibi lied about the central issue in a criminal case—but in this case no one believed her and everyone understands why a mother might lie to protect her son.

The police perjury case is more troubling. Lies such as Trooper Krupke's undermine the suspects' constitutional protections from arbitrary and invasive police conduct. Yet in many of our criminal courts, such police perjury has become utterly routine. Prosecutors and judges overlook it because they don't want criminals to go free as a result of police blunders. The fifth perjurer, the drug kingpin and bearer of false witness, is most troubling of all, because his is a gross offense that has seriously perverted the interests of justice. Yet in this flawed and compromised real world in which we live, where prosecutors routinely rely on the testimony of witnesses who rat out their associates with every incentive to lie to save themselves from conviction or get a better deal in sentencing or prison conditions, even the framer of an innocent man will often escape prosecution for perjury. Our system of enforcement, especially in drug cases, has in fact institutionalized incentives to commit perjury.

The issue is not whether we want to condone such lies as in my five examples, but rather what justifies wheeling out the terrifying ponderous machinery of the state to prosecute as a felony. Small deceptions in tax returns, even though they add up to billions of lost tax revenues, do not usually qualify. Neither, it seems, does police perjury.


jury in criminal cases, even though it tramples outrageously on the constitutional rights of defendants.\textsuperscript{42} If major lies in criminal cases usually escape prosecution, minor ones on side issues in dismissed civil cases hardly ever make the grade.\textsuperscript{43}

Of course every once in a while, someone does get prosecuted for a minor lie. But almost always, it is because the prosecutor has another agenda—he cannot get the target for the big offense he thinks he has committed, so he settles for the Mickey Mouse charge, the minor perjury. The danger of so broadly defined an offense, which covers all the small deceptions that most people have committed at some time in their lives—especially public officials, who have to fill out a lot of forms under penalties of perjury—as well as really serious perversions of justice, is that it gives a prosecutor enormous power to accuse and convict hapless ordinary people of a felony.

Deceptions, large and small, are awfully common in our public and private lives. Many more of these than most folks might suspect are legally perjuries. The vast majority of technical perjuries are not worth prosecuting. To judge whether deceptions amount to such serious offenses as to justify prosecution as ordinary crimes, much less impeachment as high crimes and misdemeanors, requires evaluation of a false statement in its context.

2. Context: The Paula Jones Suit

When the argument that Clinton’s lies were serious was brought down from the plane of high abstraction, it sounded a lot less impressive. It was usually phrased as something like: by lying under oath and encouraging others to lie, Clinton undermined the integrity of the justice system and the rule of law by trying to destroy the civil rights of the plaintiff in the suit against him.\textsuperscript{44} This argument assumes that the purpose and effect of Clinton’s lying in the deposition and acquiescing in (if not inducing) Lewinsky’s false affidavit, was to frustrate Paula Jones’s suit against him for sexual harassment.

In his referral to Congress, Starr equivocated on whether his evidence supported a claim that Clinton committed perjury in his Jones

\textsuperscript{42} I have certainly never heard a law-and-order politician get agitated over this routine type of perjury.

\textsuperscript{43} See, e.g., Perjury Is Hard to Prosecute; Prosecutors See Many Pitfalls in Trying to Get a Conviction for Perjury, News & Record (Greensboro, N.C.), Sept. 26, 1998, at A8 (assessing Clinton’s behavior in light of everyday perjuries that are never prosecuted).

deposition. He had good reason to equivocate. The perjury statutes require that the false statement be material. In making its case, the OIC persistently equated materiality with the less exacting standards of discoverability, relevance, and admissibility at trial. And it never stopped to analyze the most important question of all: whether Clinton's false statements and Lewinsky's false affidavits denying their affair did or could have done any serious concrete harm to the interests of justice.

To be asked about in discovery, evidence need not even be admissible in or even directly relevant to the case at hand, so long as the question is "reasonably calculated to lead to the discovery of admissible evidence." To be admissible at trial, evidence must be at least minimally relevant, that is, to have some tendency, however slight, to make a fact in issue seem more (or less) probable than it was before the evidence was known. Pure or logical relevance, however, is not enough, since evidence may not be admissible by reason of any of a large number of policies reflected in the rules, such as the policy against hearsay evidence. For present purposes the most important rules of evidence are the balancing test, which calls for exclusion even of relevant evidence if its probative value is outweighed by its tendency to prejudice or confuse the fact-finder or waste time; and the propensity rule, which excludes evidence of a person's prior similar acts if its only purpose is to prove that he or she is the kind of person who tends to commit such acts and may therefore have done so again on the present occasion. Finally, criminal law is not concerned with lies in the abstract, perjury in the air. Conviction for perjury requires connection of the lie to its probable effect on a concrete case, in the form of proof that the lie was capable of doing some actual harm to the just resolution of the case: the jury has to find that the false statement was material to the case, meaning, "capable of influencing" or having "a natural tendency to influence" the outcome, not just to

45. See infra notes 228-29 and accompanying text.
47. See infra notes 232-235 and accompanying text.
49. See Fed. R. Evid. 401.
50. See Fed. R. Evid. 801-806.
51. See Fed. R. Evid. 403.
52. See Fed. R. Evid. 404(a). Thus a man charged with bank robbery may have robbed other banks, but none of these other robberies may be introduced against him simply to show that he is a bank robber by disposition, or the sort of person who robs banks. The evidence has to be relevant to the case in some other way, for example, to show that a common distinctive modus operandi points to the same person as the author of the prior and present crimes, to negative a claim of innocent state of mind ("I didn't know the property was stolen"), or to prove a motive for the present crime or means to commit it. See Fed. R. Evid. 404(b).
"some trifling collateral circumstance, to which no regard is paid." 55

Thus the first problem facing the OIC was that as a practical matter, Clinton's lie about Lewinsky had no effect whatever on Jones's lawsuit. The trial judge removed the Lewinsky issue from the suit at the request of Starr himself, 56 remarking that it was not "essential to the core issues in [the] case;" 57 and then dismissed the case on a motion for summary judgment. Appeal was taken, but the case was settled, and settled moreover after the fact of the Clinton-Lewinsky affair was known.

The response to this was that the materiality of the lie has to be gauged as of the time it was spoken, rather than in light of what transpired later. So was the lie, when spoken, material to the issues in the Jones case? This turns out to be surprisingly difficult to answer, because (i) it's not at all clear what materiality ought to mean as applied to false statements in civil discovery; and (ii) the murky intricacies of Title VII doctrine combined with the sloppy way the courts administer the propensity rule, make it hard to be certain what kind and how much of a defendant's other sexual conduct is admissible in a sexual harassment suit. 58 Even so, it was predictable—to any objective observer as well as to the litigants and their lawyers—from the outset of Jones's case that evidence of a later consensual affair could have little or no effect on the resolution of the case.

I deal with these points in turn.

a. What Is "Material" In Discovery?

The issue of materiality got very confused in the OIC investigation and impeachment proceedings because Clinton's deposition and Lewinsky's affidavit denying their affair were not given at trial, but during discovery in Jones's case. Both the OIC and the House Judiciary Committee special counsel for impeachment, David Schippers, asserted that answers to any questions about any subjects that the trial court has allowed parties to inquire into on discovery are per se material. 59 This seems counter-intuitive, because questions in discovery

55. 4 William Blackstone, Commentaries *138.
56. Starr's request to kick the issue out of the civil suit is in itself a comment on the value the OIC thought the evidence had to Paula Jones's case. The factual predicate to treating Clinton's deposition lies as serious offenses was that they thwarted justice in Jones's case. If that were really so, Starr would be doing more damage than Clinton himself had done to justice for Jones by depriving her of this supposedly valuable Lewinsky evidence. Starr argued that the greater importance of his criminal case justified sacrificing the evidence in the civil case. But the importance of the criminal offense was entirely dependent on the harm, if any, Clinton's lies could do to the plaintiffs in the civil case!
58. See infra note 70 and accompanying text.
59. Schippers argued that if the President's testimony "were not material, the judge ... would never have allowed it," and that "[t]he judge had clearly concluded
need only be reasonably calculated to lead to relevant evidence. The evidence such questions turn up may not even be relevant to the case, much less “capable of influencing” the outcome.

Only a handful of federal cases addresses this issue at all, and the circuits are divided. The Fifth Circuit has adopted the broad position of Schippers and the OIC that any matter raised in a deposition that seems reasonably calculated to lead to the discovery of admissible evidence is also material for the purpose of a subsequent perjury trial.60 The Sixth Circuit has adopted the narrower view that the false statement must not only be discoverable but have a tendency to affect the outcome of the underlying civil action for which the deposition was taken;61 the Second Circuit has suggested that the choice between broad and narrow standards should hinge on the distinctive facts of each case.62 Inspected at closer range, the cases suggest that, whatever the standard, statements in civil discovery are most likely to be held material if they bear on the central matters in litigation.

To support their theory that Clinton’s deposition statements in Jones were material, Schippers and the OIC also cited a court of appeals decision in an ancillary piece of litigation.63 While investigating Lewinsky, Starr caused his grand jury to subpoena testimony and documents from Francis Carter, the lawyer Lewinsky used to prepare her affidavit (the one denying any sexual relationship with Clinton) in the Jones case. Lewinsky submitted the affidavit in support of her motion to quash the Jones court’s subpoena in the hope that she could escape having to give a deposition to the Jones lawyers. When Starr went on a hunt for Carter’s testimony and records about his interactions with his client Lewinsky, Carter tried to quash Starr’s subpoena for that evidence by claiming that nothing in Lewinsky’s affidavit had been material to the outcome of the Jones case. The D.C. Circuit refused to quash Starr’s subpoena for Carter’s records. The court reasoned that Lewinsky’s affidavit had been material to the decision immediately before the Jones court—specifically, whether Lewinsky had to submit to being deposed to the case.64 Thus this case said nothing about the materiality of Clinton’s or Lewinsky’s testimony to the outcome of Jones v. Clinton itself. It did of course speak to the charges that Clinton had “obstructed justice” by encouraging Lewinsky to file a false affidavit. Yet if Lewinsky’s testimony were immaterial to the outcome of the Jones case, and only material to whether the Jones

60. See United States v. Holley, 942 F.2d 916, 923-24 (5th Cir. 1991).
61. See United States v. Adams, 870 F.2d 1140, 1146-48 (6th Cir. 1989); accord United States v. Clark, 918 F.2d 843, 846 (9th Cir. 1990).
62. See United States v. Kross, 14 F.3d 751, 754 (2d Cir. 1994).
63. See In re Sealed Case, 162 F.3d 670 (D.C. Cir. 1998).
64. See id. at 675.
lawyers should have been allowed to obtain that immaterial evidence in discovery, what "justice" of any significance was being obstructed?

The reason this is all so perplexing is that the question that Starr, Schippers, the various federal circuits, and now this Article is asking—how to evaluate the "materiality" of lies in discovery for the purposes of applying the perjury and obstruction statutes—is not one that the legal system ordinarily is asked to answer, simply because criminal prosecution is so very rarely imagined to be an appropriate sanction for civil discovery abuse. The civil procedure rules prescribe a range of sanctions for withholding information from adverse parties. The trial judge in Jones v. Clinton ultimately did impose a contempt sanction on Clinton for lying about Lewinsky: a stinging public condemnation and an order to pay associated costs of his adversaries. Yet even these sanctions—and especially the extreme ones like dismissal or default—are usually only justified if the evidence withheld or concealed can be shown to be really important to helping the other party make its case.

So let us assume that the civil sanctions are generally adequate and appropriate to protect parties against civil discovery abuse, and that criminal sanctions for perjury and obstruction of justice should be reserved for conduct that might predictably influence actual outcomes of legal proceedings.

b. How Might the False Statement Have Affected the Outcome?

We have to begin by asking what conceivable relevance the plaintiffs' deposing of Clinton about his affair with Lewinsky had to the issues in the Jones case. Jones had complained that Governor Clinton had made an unwelcome sexual advance, which she rejected but which caused her great anxiety for some time. The plaintiffs apparently hoped to prove a pattern of Clinton's making advances to women by asking about other women before and after Jones. But evidence that Clinton liked to make advances to women, even if he did it repeatedly, is forbidden character or propensity evidence. The evidence had

65. The tiny sample of reported cases indicates that in at least two of the cases, the reason for the perjury prosecution was to retaliate against plaintiffs who brought civil rights suits against government agencies. See Clark, 918 F.2d at 844; Adams, 870 F.2d at 1141. A third case, Kross, 14 F.3d at 752, was a quasi-criminal proceeding, a civil forfeiture action brought against "Earth People's Park" in Vermont on the ground that the park was used to cultivate marijuana.

66. See Fed. R. Civ. P. 37 (precluding the offending party from using testimony or issues at trial, fining him for contempt, and, in extreme cases, dismissing the offending party's case or entering a default judgment against him).


68. For a general discussion of proportionality in sanctions, see 8A Charles Alan Wright et al., Federal Practice and Procedure § 2284 (2d ed. 1994).

to be relevant in some other way. Well, how? Most of the laundry list of alternative possibilities in Federal Rule of Evidence 404(b), "motivating, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," are inapplicable. The Lewinsky affair could not have given Clinton a motive for harassing Paula Jones five years earlier; identity was not in dispute (nobody claimed it wasn't Clinton in that hotel room), nor were mistake or accident (Clinton did not claim he thought Jones welcomed the pass, rather that he never made it).

The plaintiff presented two dominant theories of the relevance of the Lewinsky evidence to Jones's Title VII claim for sexual harassment. First, a recently enacted partial exception to the propensity rule allows in evidence of other sexual assaults, to show that the defendant may have committed the assault at issue. The problem with this theory was that both the Jones lawyers (who had been briefed by Linda Tripp) and Clinton knew that Clinton had not assaulted Lewinsky, and that their affair was consensual. The more elaborate and apparently favored theory of the Jones lawyers for extending discovery to a whole platoon of "Jane Does" alleged to have had some contact with Clinton, was that they hoped to prove a sort of plan or pattern common to Paula Jones and other employees before and after her: that Clinton rewarded with favors and promotions women who gave in to him, and punished with adverse job consequences women who did not. The idea was that if such a pattern could be demonstrated, it might be evidence either of what Title VII doctrine calls a discriminatory hostile environment in the workplaces where Clinton was boss, or of systemic quid pro quo (favors-for-sex, demerits-for-refusing-sex) harassment. Judge Susan Webber Wright accepted some version of this theory when she allowed discovery relating to women who were state and federal employees in a ten-year period around the Jones incident.

It turned out, when the Jones lawyers responded to Clinton's motion for summary judgment, that they had failed to find such a pattern; indeed the trial judge dismissed the case because the lawyers had no evidence that Jones herself, much less a raft of other virtuous co-

70. See Fed. R. Evid. 415(a). This Rule was enacted as part of the Violence Against Women Act, 18 U.S.C. §§ 2261-2266 (1994). The drafters of this Rule never anticipated that it would be applied to civil sexual harassment cases, but it has come to be so applied. See Jane Harris Aiken, Sexual Character Evidence in Civil Actions: Refining the Propensity Rule, 1997 Wis. L. Rev. 1221, 1236-37.

71. This theory appears in their amended complaint. See Plaintiffs Amended Complaint at 14-15, 17-18, Jones (No. LR-C-94-290).

72. See id.

workers, had suffered any adverse job consequences. They found various women and state troopers telling stories about instances in which, they claimed, people working for Clinton might (whether with his knowledge or not was never clear) have promised rewards to women for keeping quiet about sexual encounters with him, but none at all in which women had suffered or been threatened with any job disadvantage or any other bad things for turning him down. Even if such a pattern had been found, it would have been a stretch to fit Monica Lewinsky into it. She had sex with Clinton, and for her reward was banished from the White House, which is where she really wanted to work. To be sure, jobs were arranged for her in the Defense Department and then, at her request, through Jordan, in the private sector; but these were not quid pro quo for sex, but for ceasing to bother the President and his secretary with her complaints. A fellow-employee perceiving this "pattern" would have to conclude that, if you sleep with the boss, you become an embarrassment to be removed from the premises.

74. See Jones, 990 F. Supp. at 669-76.

75. Jones's argument against summary judgment presented 700 pages of affidavits of various women, state troopers, and others to the effect that after sexual involvement with Clinton, some women were promised help with jobs in exchange for silence, while some were threatened if they did not keep silent. So this was evidence (the reliability of which is dubious, but quite impossible to assess) of favors for keeping silent, and threats of retaliation for not keeping silent about sexual involvement. But none of this had much of anything to do with Paula Jones. Even if her theory was that by rejecting Clinton's advances, she had deprived herself of leverage to extort favors, one could equally argue she had saved herself from being the victim of threats. Approximately 450 of the 700 pages of affidavits are located at [http://www.cnn.com/ALLPOLITICS/1998/resources/jones.case/documents.html]. A fair and thorough summary of this material appears in Eric Pooley, Kiss but Don't Tell, Time, Mar. 23, 1998, at 40.

76. The allegation most damaging to the President's reputation in this filing was the claim of Kathleen Willey, a former Clinton volunteer: that she asked Clinton for a job in 1993, was aggressively kissed and fondled by him, rejected him, and was given a paid job for keeping quiet about the incident. See Plaintiff's Opposition to Defendant Clinton's Motion for Summary Judgment at 78-81, Jones (No. LR-C-94-290). This rejection-followed-by-reward obviously does not fit the Jones plaintiffs' "pattern," indeed if that were Clinton's customary practice, Paula Jones stood to reap job-related benefits from it. If Jones had gone to trial, and the trial court had found Willey's story credible, her testimony might possibly have been admissible under Fed. R. Evid. 415, the exception to the propensity rule for evidence of other sexual assaults. Willey's story, however, immediately became enmeshed in disputes about its credibility, which might have prevented its use at trial.

77. See Andrew Morton, Monica's Story 80 (1999).

78. Starr's referral to Congress found some Title VII implications in this conduct. Starr reported Lewinsky's view that she lost her job at the White House and was unable to return to it because of the affair. But he went on to suggest that the "extraordinary job assistance" was a "benefit to an ex-paramour" that "discriminated" against other employees. See Starr Report, supra note 11, at 205 n.460. It is, to put it mildly, a rather far-fetched extension of the sexual-harassment laws to imagine they cover an employer who, after a consensual affair with an employee, helps her to find another job somewhere else—because this would seem the best way to avoid any fallout from
My even more basic problem with this "plan or scheme" theory is that nobody has explained how Clinton's treatment of another employee in a different workplace five years later could have contributed to a hostile environment or the unpleasant dilemma of having to choose between submitting to sex with the boss or risk losing promising job opportunities for Paula Jones. Would she not have had to have been aware of the "pattern" creating the hostile environment or the quid pro quo expectation for her workplace to have been a discriminatory one for her to work in? If she was not aware of the pattern, and it did not affect her prospects for promotion or conditions of work, how is Clinton's conduct relevant except as evidence of propensity—that he is a guy who makes passes at women? 

Even under the very broad version of the standard for materiality in discovery, that the information sought must be reasonably calculated to lead to relevant evidence, questions about the Lewinsky relationship might not qualify. The Jones lawyers could not have in good faith argued that they did not know what discovery would turn up about Lewinsky (e.g., evidence of unwelcome advances, evidence of the reward-and-punishment "pattern"), because they had learned from Tripp about the affair in excruciating detail, including the key fact that it was consensual.

If the case had gone to trial, it is almost inconceivable that the trial judge would have allowed Jones's counsel to ask Clinton questions about Lewinsky, or to call Lewinsky as a witness because—even before, but especially after, it was clear that the "pattern" had failed to materialize—the evidence seems to have almost zero probative value on any issue in the case. Any tiny relevance it might have would be far outweighed by its tendency to prejudice Clinton by painting him as a habitual womanizer, which is undoubtedly why the plaintiffs' team wanted it in, but for this purpose it is pure—and prohibited—character evidence. Judge Wright said as much in her order granting the OIC's request to prevent Jones's lawyers from doing any more discovery of Lewinsky. I quote from the relevant parts of this order, italicizing the portions that Starr left out of his referral and testimony

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79. I put these questions to my Evidence class in the Spring of 1998 in the hope that somebody could come up with a plausible non-propensity-based theory of the relevance of the Lewinsky evidence to the issues in Jones. Nobody could.

80. It is not generally an adequate objection to a discovery question that the party seeking discovery already has the answer from another source. See 8 Charles Alan Wright et al., Federal Practice and Procedure § 2014 (2d. ed. 1994). But it would be relevant to the objection if the party is asking the question largely for predatory reasons, to harass or embarrass, rather than out of any genuine need for the information. See id. § 2007.
before the House Judiciary Committee:

The Court determined, however, that evidence concerning Ms. Lewinsky was not essential to the core issues in this case and, in fact, that some of this evidence might even be inadmissible as extrinsic evidence under Rule 608(b) of the Federal Rules of Evidence. . . .

[T]he Rule 403 balancing test does in fact apply to Rule 415. For the reasons previously stated, application of that test to the facts of this case compels the conclusion that discovery of the Lewinsky evidence should be disallowed and evidence concerning her excluded from trial.  

Contrary to plaintiff's assertion, this Court did in fact consider the possible nature of the Lewinsky evidence and what it might mean for plaintiff's case in conducting the Rule 403 balancing test. Specifically, this Court assumed that plaintiff was pursuing the Lewinsky matter in order to prove an alleged pattern and practice on the part of the President. The Court further assumed, 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—that he conditioned job benefits on sexual favors and attempted to conceal an alleged sexual relationship. The Court nevertheless concluded that such hypothetical evidence was still nothing more than Rule 404(b) evidence, i.e., evidence of other alleged wrongful acts, and that it was not therefore essential to the core issues in this case of whether plaintiff herself was the victim of quid pro quo sexual harassment, hostile work environment harassment, or intentional infliction of emotional distress . . . .

The trial court, in short, was generously—if, as we have seen, very implausibly—willing to assume that the Lewinsky evidence might fit into either the Rule 415 prior-sexual-assault pattern or the jobs-for-sex pattern, but concluded that even if it did fit in, it was in the end

81. Jones, 993 F. Supp. at 1219. Federal Rule of Evidence 608(b) generally prohibits the use of extrinsic evidence of other specific instances of a witness's conduct to impeach a witness's credibility. Judge Wright seems to be suggesting that if Clinton testified at the trial, were asked about the Lewinsky affair and denied it, no extrinsic evidence (such as Lewinsky's own testimony) could be used to contradict him.

82. Id. at 1222.

83. Id. at 1220.

84. Id. at 1222.
nothing more than collateral character evidence.

Could Clinton have reasonably supposed when the Jones lawyers asked him about Lewinsky, and he denied a sexual relationship, that he was obstructing the plaintiff’s pursuit of justice for her cause? On the contrary, he knew, just as the Jones lawyers knew, that Lewinsky had little or no relevance to Jones’s case, and that he was not withholding anything of real value to them. He knew, as did his lawyers and Jones’s and the trial judge, that the actual purpose of their questions was to get as much dirt as possible on him into the public record and then leak it to the press.85

Again, I’m not defending his decision to lie, though he may well have thought he was in a zone of informal privilege where stretching the truth was defensible.87 The question is, was the lie material when spoken, if not in its effect on the outcome? Not very much, if at all. This was the central weakness in the OIC’s and House’s case for perjury and obstruction: they had to show that Clinton’s lies, and his attempts at (or hopes of) influencing other witnesses like Betty Currie and Monica Lewinsky were designed to frustrate Paula Jones’s pursuit of justice. But Clinton had very little reason to worry about the Lewinsky affair’s effect on the Jones case, which could never have been more than slight. It was exposure of the affair to his family, his friends, his aides, the media and the public that bothered him.

Now I could be mistaken, and some courts might come to different conclusions, in this analysis of the materiality of the Lewinsky evidence. A court might agree with Starr and Schippers that any statement in response to any question that a trial judge has allowed to be asked in civil discovery is material to that proceeding (i.e., discovery itself), regardless of its null or negligible effect on the underlying case. A court might even conceivably have found the Lewinsky evidence relevant and admissible in Jones’s case, though it is very hard to see how. The courts have become notoriously slovenly in their administration of the propensity rule: although supposedly our law recognizes no such thing as pattern evidence making admissible other similar acts, many lawyers believe and act as if it does, and some trial

85. The judge had told the plaintiffs’ lawyers she did not think much of their case, was becoming visibly irritated with their parade of “Jane Does,” and said she was going to strictly limit evidence of “other women” at trial, if the case ever got to trial. See Bob Woodward, Shadow: Five Presidents and The Legacy of Watergate 368 (1999).

86. The OIC’s referral to Congress suggested that if Clinton were afraid of adverse publicity from his answers in discovery in Jones, he could have asked the trial judge for a gag order. See Starr Report, supra note 11, at 5 n.22. This was disingenuous. Clinton and his lawyers knew perfectly well that Jones’s lawyers would contrive to leak any damaging information in the record. The Jones lawyers did in fact use the occasion of their response to Clinton’s motion for summary judgment to make public 700 pages of miscellaneous rumor and hearsay linking Clinton to various women. See supra note 75.

87. See infra Part I.E.
judges go along with them and admit similar-acts evidence anyway, gesturing vaguely in the direction of some sort of “plan or scheme” or “pattern and practice” theory.\textsuperscript{88} Though it is a long stretch, a court could conceivably have decided that Clinton rewarded Lewinsky for sex with him by helping her find a job in the private sector; and that this was evidence that somehow fit into a “common plan or scheme” with the sexual advance to Paula Jones five years earlier, even though the situations seem to have nothing in common except the basic elements of Clinton, a woman in his workplace, and sex.

Was it worth pursuing? The central question for Starr and the OIC, however, was not whether Clinton’s deposition testimony was material enough to make out a technical case for perjury. I think that the legally correct answer to that question is that it depends on how materiality in discovery is defined, but if it is defined as predictably affecting the outcome of the lawsuit: probably not. But suppose I am wrong and enough can be scraped together to turn the color of legal litmus paper. For a prosecutor, the right question remains, not: Can I make out a technical case? But rather: Is it wise and worthwhile to crank up the criminal process to pursue this perjury? If you compare Clinton’s lie to my five hypothetical perjuries, you can see that it is the least serious of them all, because it has the least concrete impact, actual or potential, on anything that might matter to the justice system—less impact than a thousand-dollar overstated deduction on a tax return, less than a thousand-dollar understatement in a customs declaration, and a lot less than police perjury or snitch perjury in a criminal case.

Let me make this point in another way. When Paula Jones sued Clinton for sexual harassment, she told a story of a gross pass he made at her in his hotel room.\textsuperscript{89} In his answer to her complaint, and in discovery, Clinton denied making the pass.\textsuperscript{90} Suppose that Starr and his team thought Clinton was lying in that denial. Suppose they then went to the Attorney General, asked for expanded jurisdiction to pursue possible perjury in the case, and then spent many months and millions of dollars pawing through the life of every witness and examining every scrap of physical evidence that might show that Jones, rather than Clinton, was telling the truth about their encounter. Suppose then they had subpoenaed the President before a grand jury and he had repeated his denials. Finally suppose that the OIC had summa-


\textsuperscript{89} See Plaintiff’s First Amended Complaint at 3-5, Jones (No. LR-C-94-290).

\textsuperscript{90} See Answer of President William Jefferson Clinton to the First Amended Complaint at 1, Jones (No. LR-C-94-290).
rized its evidence that Clinton had lied about the Jones encounter in a referral to Congress on his impeachment.

Just about everyone can see how outrageous this would be. In every civil suit there is a dispute about facts; and quite often the people most interested in the outcome, usually the parties, stretch and distort the truth about what happened. The very purpose of having a trial is to resolve such disputes. The parties tell their different stories, are cross-examined and have their stories confirmed or disputed by other evidence; and the fact-finder decides which story, on balance, seems closer to the truth. For instance, when Paula Jones filed her sexual harassment suit, she claimed that she had suffered adverse consequences to her career as a result of rejecting Clinton's advances. But in fact she had not suffered any such consequences, having received merit pay and promotions on schedule. Her claim, not to put too fine a point on it, seems to have been a lie—and what is more a lie on the central, not peripheral, issue in a case that she herself had brought to extract damages. Did Starr—on record as saying repeatedly that no lie in a judicial proceeding is ever excusable—even think of prosecuting Jones for perjury? Of course not!

If prosecutors started to intervene as a regular matter in civil disputes, using the awesome investigative resources of the criminal process to go after parties they thought might be lying, they would be widely and correctly perceived to be government officials improperly taking sides in disputes that the civil system is set up to resolve. If, to be more specific, Starr had intervened as I just supposed in the Paula Jones case, which was widely recognized to have turned into a political case financed and carried on by the President's political enemies, he probably would have been fired from his post as Independent Counsel. Starr could hardly have helped his cause by arguing that Clinton had lied to a criminal grand jury as well as to a civil court, for what business had he in the first place dragging a civil matter before a criminal grand jury? The only situations that could justify such interventions would be those in which a witness had lied to conceal conduct of grave public importance. Even then, the appropriate method of proceeding for a prosecutor would usually be investigation and indictment of the person for the underlying conduct, not for lying about it in a civil suit.

What Starr actually did, however, was much sillier than my hypothetical. He cranked up the machinery of the criminal process, spent millions of taxpayer dollars, fed a major national scandal, and hauled the President of the United States before a grand jury, in order to catch a civil party in a lie that was not central to Paula Jones's case but

91. I recently asked an experienced trial lawyer how common he thought party perjury is in civil suits; he cheerfully replied, "My experience is, that when there's money on the table, everybody lies."
92. See Plaintiff's First Amended Complaint at 8-9, Jones (No. LR-C-94-290).
so peripheral to it as to be almost completely irrelevant, and which
concerned underlying conduct that is not criminal at all.

My point is not that civil perjury is of no public importance. The
civil justice system is a public mechanism for vindicating rights given
by the law; and the integrity and effectiveness of the system is obvi-
ously damaged by witness perjury. But witness perjury, and especially
party perjury, are a routine, inherent feature of civil as well as crim-
nal litigation. The consequence is that first, as a general rule, only the
most serious perjuries are made the subject of prosecutions and sec-
ond, trial procedure has developed alternative processes for dealing
with the lying witness.

i. Serious Perjuries

To be sure, the background threat of criminal prosecution for per-
jury is one of the inducements to witness truthfulness in civil cases.
But such prosecutions are exceedingly rare, freak cases in the criminal
justice system. When perjury is prosecuted, it's usually because the
prosecutor is using the prosecution to put pressure on or punish an
uncooperative witness, or is throwing in an extra count for a jury to
consider along with more serious counts of criminal conduct; or more
randomly because a trial judge in a civil case has become incensed
with a lying witness and referred a case for criminal prosecution. In
the House impeachment debate, some members made much of a sta-
tistic that 115 defendants were currently in federal custody for per-
jury.\footnote{See Letter from Kathleen Hawk Sawyer, Director, Federal Bureau of Prisons,
to the Honorable Henry J. Hyde, Chairman, Committee on the Judiciary, U.S. House
of Representatives 1 (Dec. 18, 1998), in Impeachment of President William Jefferson
Clinton, The Evidentiary Record Pursuant to S. Res. 16, Volume XXIV, Letter dated
December 18, 1998 from Kathleen H. Sawyer, Director, Federal Bureau of Prisons, to
Chairman Henry J. Hyde regarding offenders currently in prison [sic] for various
statutory offenses, S. Doc. 106-3, at 1 (1999).}

Out of a federal custodial population of approximately
130,000,\footnote{The precise number is 131,680 according to the U.S. Bureau of Prisons'
Weekly Report of July 30, 1999. See Telephone Interview with Scott Wolfson,
spokesperson, U.S. Bureau of Prisons (Oct. 19, 1999).} this gross total is of course close to completely insignifi-
cant.\footnote{In writing his own book about the Clinton-Lewinsky affair, Judge Richard
Posner searched judicial databases since 1992 for civil cases involving sex or domestic
relations, and found only six prosecutions for perjury in all, and only two where other
crimes were not charged as well. See Posner, supra note 17, at 85.} It tells us nothing about how serious these perjuries were, how
many were for civil rather than criminal perjury, or whether the de-
fendants were convicted at the same time for other crimes as well.

The House Judiciary Committee also made an exhibition in its
hearings out of defendants who had been convicted of civil perjury.\footnote{See The Consequences of Perjury and Related Crimes: Hearing Before the
Comm. on the Judiciary, 105th Cong. 6-57 (1998) (statements of Pam Parsons and
Barbara Battalino), reprinted in Impeachment of President William Jefferson Clinton,
Their poster perjurers were Barbara Battalino and Pam Parsons, whose relevance was supposedly that they had both told "lies about sex" in civil proceedings and been criminally convicted for doing so. Dr. Battalino was a VA psychiatrist who was sued by a mental patient for having oral sex with him, and denied under oath that she had done so in an administrative hearing convened to decide whether the government should pay to defend the claim under the Federal Tort Claims Act. Her lie was about the central issue in a case about underlying conduct (patient abuse) that was in itself tortious and in clear violation of medical ethics; and in a proceeding in which she was hoping to enlist the government's resources in her defense. Pam Parsons, a basketball coach, brought a civil suit for libel against Sports Illustrated for writing that she was a lesbian who recruited players in the hope of having sex with them, and was sexually involved with a player. At trial Parsons was asked if she and the player in question had gone to a lesbian bar together, and falsely denied it. Her lie was thus about a fact of central relevance to a claim that she herself had brought to extract damages from a magazine that had, in fact, reported the truth.

These were lies that were relatively important in context, and thus very inapt precedents for the lessons they were supposed to teach. To be sure, people sometimes are prosecuted for some pretty trivial offenses. But that just shows that prosecutors abuse their powers, and is not a good reason for more such prosecutions. It is a sure bet that no other prosecutor in the history of the republic has spent millions on a criminal investigation of an offense like Clinton's, a lie in a civil deposition about a consensual affair that was totally collateral to any issue of importance to the case.

ii. Alternative Methods

The trial process has developed alternative mechanisms to handle the problem of untruthful witnesses. At trial, the main mechanisms are cross-examination and contradicting proof. In discovery, sanc-
tions such as preclusion, contempt, dismissal, and default judgment serve these purposes.\textsuperscript{102}

The oath, incidentally, is relatively unimportant among these mechanisms, at least where the witness is a party. During the impeachment hearings much was made (especially by Congressman Henry Hyde) of the sanctity and importance of the oath as the guarantor of truthfulness in the common law system of trials.\textsuperscript{103} The common law system, however, has always assumed that party witnesses, because of their interest in the outcome, will often not tell the truth under oath.\textsuperscript{104} That is why for centuries party witnesses were disqualified entirely from testifying in their own causes, in fear that they would peril their souls by taking the oath.\textsuperscript{105} The ban on party testimony was lifted in the nineteenth century after cross-examination replaced the oath as the principal guarantor of witness truth-telling.\textsuperscript{106}

Given the relative insignificance of Clinton's lies to the case at hand, and the ready availability of other procedures to counter or sanction his deceptions, resort to the criminal process to deal with his case appears completely unnecessary and inappropriate. No ordinary prosecutor would have pursued a criminal case against Clinton had he been an ordinary citizen.

C. Setting A Bad Example

Clinton, however, is not an ordinary citizen, but the President; and this was repeatedly stressed in the OIC's referral and the impeach-

\textsuperscript{102} I would not like to have to defend the position that these are always effective mechanisms for producing truth in litigation. The fundamental structural weakness of adversary procedure, as John Langbein has pointed out, is that it leaves the development of facts to the parties' lawyers, charges no official with responsibility for arriving at an as-accurate-as-possible factual record, and leaves the distortions of one side to be corrected by the distortions of the other. See John H. Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823, 825 (1985). Nonetheless, the official premise of our system since the Nineteenth Century has been that the adversary procedure, especially cross-examination, is the best guarantor of factual accuracy.


\textsuperscript{105} See id. at 1200.

\textsuperscript{106} See id. at 1194; see also George Fisher, The Jury's Rise as Lie Detector, 107 Yale L.J. 575, 581 (1997) (chronicling the development of the jury as determiner of credibility in criminal trials).
ment proceedings as an independent and special reason for holding him to account for his behavior in the Jones case.107

These arguments helped to rescue the OIC and the House Republicans from a tricky dilemma that pervaded the whole impeachment process. The pro-impeachment forces relied heavily on the case that the President had committed crimes; indeed the Senate trial was turned into a trial about whether the facts and inferences of Clinton's case satisfied the terms of the federal perjury and obstruction statutes.108 To recommend impeachment, the standard they had to meet was "Treason, Bribery, or other high Crimes and Misdemeanors."109 Yet it was not at all clear that they could actually prove that Clinton had committed any crimes at all. His defenders inconveniently pointed out that conviction required proof beyond a reasonable doubt of such things as intent and materiality; that obstruction of justice required the intent to influence a potential witness; that all the evidence so far was one-sided untested hearsay of witnesses, many of them under threat of prosecution if they did not cooperate. Even Starr was unwilling to assert that the facts that he had gathered would warrant criminal prosecution.110 True, if every possible inference went against Clinton, the evidence might be stretched to make a prima facie case for serious felonies, perjury and obstruction of justice, but only when very abstractly described. When put into context, as we have seen, the crimes deflated back down into offenses no serious prosecutor would prosecute. So how could offenses that might well not be crimes at all, and at most only low crimes, be turned into high crimes? The main strategy was persistent abstraction: repeat over and over again that

107. ""The Presidency is more than an executive responsibility. It is the inspiring symbol of all that is highest in American purpose and ideals."" Starr Report, supra note 11, at 7 (quoting Eugene Lyons, Herbert Hoover: A Biography 337 (1964) (quoting Hoover)); see also Debate, supra note 103, at 55 (statement of Lamar Smith, R-Tex.) (noting the President's special responsibility to take care to not commit any crime, particular one as serious as perjury).


110. He told the House Judiciary Committee:

Before we ever seek an indictment, we engage not only, and I would hope any prosecutor's office would do that, in a very careful assessment of the facts, the elements of the offense and the like. We go through each of the elements. We look at the witnesses and the documentary evidence and the like, and then we have to satisfy, following Justice Department standards, whether it is more likely than not that a fair-minded jury would convict based on these facts, with the witnesses—and we take the witnesses as we find them—beyond a reasonable doubt?

Starr Presentation, supra note 30, at 102.

This is breathtaking. Starr seems to be saying that after many months of investigation and an extensive review of the facts in its referral, the OIC has still reached no conclusion about whether it could successfully prosecute a criminal case! That did not, however, prevent Starr from repeatedly asserting that his evidence clearly pointed to the President's guilt.
perjury and obstruction of justice are never permissible, always serious in every context. But given the extreme breadth of the statutory definitions, the pervasiveness of small violations, and the infrequency of actual prosecutions, abstraction alone could not carry the day.

There had to be some reason that these offenses, relatively minor in the ordinary-citizen context, became noisome when committed by the President. The first part of the argument was hard to dispute. It went: an impeachment is not a criminal case, so a president need not have committed crimes to be removed; noncriminal gross misconduct in office is grounds for removal. In other words, the impeachment proponents started with the proposition that Clinton had committed crimes, but when it was pointed out that these were unproved crimes, and crimes not in any case worth prosecuting, the proponents argued that all these defenses were legalistic technicalities, and that the impeachable conduct was not crime as the law defined it, but simply gross misconduct. The prime argument for gross misconduct was that the President undermined the rule of law he was sworn to enforce by setting a bad example.

This argument is really several different arguments:

(a) The President is the nation's chief law enforcement officer, with a constitutional duty to faithfully execute the laws. Thus a public display by the chief magistrate of his contempt for law by lying under oath does exceptional damage to the rule of law. It sends a message that lawbreaking is all right if you can get away with it and encourages others to lie.

(b) The President is looked up to as a symbol of both moral and legal authority for ordinary citizens and especially for children. His public exhibition of lying, not just in court but to friends, aides, and over television to the American public, betrays that authority and is hence an abuse of office.

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112. As the historian Henry Adams wrote of a different impeachment trial, that of Justice Samuel Chase in 1805:

The Senate became confused between these two views [of impeachment as a legal or political proceeding] and never knew on which theory it acted .... Though calling itself a court of justice, it would not follow strict rules of law. The result was a nondescript court, neither legal nor political, making law and voting misdemeanors for itself as it went, and stumbling from one inconsistency to another.


113. Another argument sometimes made was that the President as Commander-in-Chief must set a high standard of exemplary behavior to the armed forces, and cannot
(c) A more subtle variant of the above arguments is that, while repeat players in the justice system are aware that a lot of perjury is going on and is routinely tolerated and not prosecuted, nonetheless when a conspicuous instance of perjury comes to public attention, the system has to respond with symbolic action demonstrating its intolerance of perjury, in order to affirm the importance of truth-telling and to deter others. To put this another way, a highly visible wrongdoer, no matter how trivial his conduct—and there is nobody more visible than the President—has to become the object of official sanction and condemnation: both for symbolic reasons, to affirm the norm, and for instrumental reasons, to frighten future witnesses out of lying. The public must be led to believe that lying is always and everywhere wrong, even if the reality is that it is pervasive and rarely punished. Paradoxically, to provide a vivid demonstration of the norm that everyone is equal under the law, especially well-known violators have to be treated more severely than anyone else.

These arguments always seemed to me the most forceful ones for treating the President differently from other possible violators of law and social norms. The OIC relied on such arguments heavily in its referral (especially that the chief magistrate “abused power” by lying under oath and to the public) and the House Republicans in debating their bill of impeachment (especially that the President’s conduct set a bad example to the public, particularly children). But I am not persuaded that these considerations do much to refute the case for the imprudence of the OIC’s investigation into the Clinton-Lewinsky matter or its referral of its findings to Congress as a basis for impeachment.

To begin with, Clinton was led into jeopardy on perjury and obstruction charges because he was the defendant in the Jones case, in which he appeared in the capacity of an ordinary citizen. He had tried to postpone the suit on the ground that he was a sitting President, but the Supreme Court decided that claim against him. For his behavior in that civil action, then, as opposed to behavior in his public capacity as President, he had a strong claim that he should be treated no differently from any other litigant.

Next, even after the charge is changed to “setting a bad example,” we still have to ask if the OIC’s actions were reasonably proportioned to the ends to be served. Is setting a bad example of law-abiding, and even moral, behavior a reasonable ground on which to recommend

be seen to be getting away with behavior that in the services might result in a court-martial. This is not very plausible. The military is a separate society, with its own special norms, rules and discipline. The services prohibit adultery, unlike the civilian law of almost all the states; and fraternization between ranks, which has no counterpart in civilian society. Among the military’s gravest crimes is disobedience to orders.

114. See Debate, supra note 103, at 54-55, 185-86.
(for that is what the OIC surely did) impeachment? The argument seemed to make hash out of the "high crimes and misdemeanors" standard, because it turned every violation of every law by the President, regardless of whether it was in his official capacity, and regardless of whether it was serious enough even to merit prosecution, into a "high" crime. The OIC threw into its referral added misbehavior that clearly did not violate any laws, such as the charge that lying to the public was an abuse of power that might be grounds for impeachment.\footnote{116. See Starr Report, \textit{supra} note 11, at 204-10.}

The OIC also adduced as misbehavior rising to the level of impeachable "abuse of power" the President's assertions of privilege that could be, and some of which eventually were, tested in the courts. These charges had some real substance. The OIC was clearly correct that the President asserted most of these claims of privilege simply as delaying tactics, since he tended to back off from them just as they were about to be litigated. It was also probably inappropriate for Clinton to assert Presidential privileges to protect himself from investigation in his personal capacity. But since delaying tactics of this kind are common in adversary litigation, and the courts are available to police them, it defies common sense to suppose that they are grounds for removal from office.

Though Clinton's assertions of executive privilege were mostly inappropriate, I believe he was fully justified in trying to claim a "protective function" privilege to prevent his Secret Service agents from having to give evidence about what they had heard and seen while protecting the President.\footnote{117. See Starr Report, \textit{supra} note 11, at 209.} The agents are extensions of the President's person, with whom he cannot dispense, and his personal privacy is destroyed if he cannot be sure of their discretion. Perhaps such a privilege should give way to a demonstrated compelling need, such as that for eyewitness testimony to criminal conduct, but not simply to a prosecutor's or civil litigant's fishing expedition for potentially relevant evidence. Neither the OIC nor Clinton did any favors to the Presidency by insisting on litigating this privilege in the courts.

As it turned out, even the high partisan House majority found the "abuse of power" charges too much, and wisely dumped them overboard on its way to voting for impeachment.\footnote{118. The House resoundingly defeated this impeachment article by a 148-285 vote. See 144 Cong. Rec. H12042 (daily ed. Dec. 19, 1998).}

How about the symbolic point? The trouble is that the selection of a particular target because of who he is, is likely to backfire, and symbolically enact the opposite of the even-handed commitment to the rule of law—arbitrary and very likely politically motivated prosecution. I expect that most of us would have no objection to a random
audit of civil perjury, something like an IRS random audit of tax returns, in which the DA's office pulled transcripts to identify and then investigate plausible perjurers for purposes of general deterrence. But when the DA singles out a public figure for exemplary punishment for behavior that in most would draw a minor sanction or a pass, the object of the lesson looks like a martyr and the DA a villain. Donald Smaltz prosecuted Secretary Mike Espy on thirty counts for accepting minor gifts to demonstrate that the highest officials must meet the highest standards of rectitude. An admirable purpose, perhaps; yet one supposes that the jury acquitted Espy on all counts precisely because they saw how fanatically imprudent it was to blow up Espy's small-scale sins into major felonies. People are not complete idiots; they are not going to buy a lot of righteous condemnation of a politician for accepting, without any provable quid pro quo, a few football tickets, while all around them they see politicians completely in the pockets of and doing the bidding of lobbyists for wealthy special interests. Prosecutions of visible offenders for small offenses in a world where similar but much graver misconduct is pervasive looks less like righteousness than hypocrisy.

The charge against Clinton for symbolic betrayal of his office by "lying to the public" had similar problems. This one didn't pass the laugh test, for every grown-up in the land could recall one or another of their presidents leaning forward earnestly into the TV cameras and sincerely pitching them whoppers. Against such a well-known background of presidential deceptions, Clinton's trying to keep his sexual affair secret looks like pretty small stuff.

In Clinton's case, the criminal process and impeachment were hardly needed to make the symbolic point that it's wrong to lie. Other sanctions would have served this function. The OIC, knowing that Newsweek was about to break the story of the Tripp tapes and the President's affair, could simply have sent Tripp to peddle her tapes to the papers, leaving Clinton's condemnation, both for the affair and for lying about it, to public opinion. Even without the OIC's involvement, Clinton's behavior and lies about it, because of the media

120. See id.
121. To mention just a few: Lyndon Johnson's lies about enemy attacks in the Gulf of Tonkin and his persistent misrepresentations of the progress and costs of the Vietnam War; Richard Nixon's secret war in Cambodia and his cover-up of White House-sponsored burglaries, illegal wiretaps, and political use of federal agencies to punish enemies; Ronald Reagan's repeated insistence that he did not authorize the trading of arms to Iran for hostages; or George Bush's claims that he was out of the decision-making "loop" in the Iran-Contra affair. These were lies about serious matters of policy rather than personal indiscretions, designed to obstruct democratic decision-making and accountability.
122. See Starr Presentation, supra note 30, at 70.
storm, would have become the most publicly reviled covered-up adulterous affair in history: hardly anybody except Nelson Mandela and Vaclav Havel passed up the chance to say how ghastly it was.

The Congress could have come up with a censure resolution, if it wanted to. If the OIC felt strongly that there was possible perjury, it could have notified the trial judge in the Jones case, or sent Tripp's tapes to the Justice Department, where, had careful thought been given to the matter, it would probably have died. As it happened, Clinton was publicly cited for contempt for lying in the civil case by the presiding judge, Judge Wright, and sanctioned by having to pay some costs to the Jones lawyers. What exactly, one is prompted to ask, did Clinton "get away with?" Even with all this public condemnation of Clinton's lying, Starr wasn't satisfied; he had to make it his business, in order to make a symbolic point. In the end, the symbol his name came to stand for was prosecutorial excess.

How about the argument that it corrupts the morals and law-abiding habits of the American people and their children to view their President making a public display of lying under oath and other bad behavior in the White House? Starr and the OIC have no standing to make this argument. More than anyone else they helped to produce the public scandal of the President's affairs and lies, by investigating them at length, convening a special grand jury to try to trap him into lying again, and publicizing the painful details in their referral. If Starr and his team felt that a President's lying, even on a minor matter in a deposition, was so awful, they could easily as I mentioned earlier have taken steps to prevent it from happening. Once it had happened, they could have let it lie in the murky uncertainty of Clinton's previous denials about other women, or to be exposed by the media and the sanction of public opinion. Instead they were determined to use the machinery of the criminal process to drag the contradicting facts into the light of day, and make as conspicuous an exhibit as they could.

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123. Would it? If the decision had been left to the Attorney General, not an officer famous for fastidiously prudent judgment, almost anything could have happened. A career DOJ professional who treated the case like any ordinary person's case would probably have concluded that false statements in discovery in a civil case with no likely demonstrable impact on that case or the public's business were not worth the time, expense and public disruption that would be needed to pursue them.


125. The American public gave Starr highly unfavorable reviews throughout the Lewinsky investigation. Compare Deborah Tannen, 'Argument Culture' Fuels Clinton Scandal, USA Today, Feb. 5, 1998, at 13A (25%-42% favorable-unfavorable rating), with Richard Benedetto, New Poll Shows Clinton, Democrats Still Maintaining Popularity, USA Today, Sept. 16, 1998, at 12A (Starr's favorable-unfavorable rating at 32%-55%, in contrast to Clinton's 51% favorable, 47% unfavorable marks). In an interview with the ABC news show "20/20," Starr acknowledged that over the preceding months he had been compared with Saddam Hussein, Nero, and Torquemada. See ABC 20/20 (ABC television broadcast, Nov. 25, 1998), available in 1998 WL 5433808.
of the bad example to the nation.

There are lots of things that presidents and other politicians do every week that one would not wish to exhibit, in particular, to children. Politics is a backstairs game of power, not just a public drama of moral edification; its deals, betrayals, opportunistic stratagems and sometimes unsavory compromises are not always fit spectacles for children, any more than is adult bedroom behavior. The complex moral tradeoffs of real life in business, politics, and personal relations cannot be reduced to the terms of a simple categorical morality for children. If you do not want children to be exposed to the realities, do not rip down the curtain.

(d) Starr in his referral stressed an additional argument, which I present for the sake of completeness:

When he took the Oath of Office in 1993 and again in 1997, President Clinton swore that he would “faithfully execute the Office of President, [which entails the constitutional duty to] take Care that the Laws be faithfully executed.” The President gave his testimony in the Jones case under oath and in the presence of a federal judge, a member of a co-equal branch of government; he then testified before a federal grand jury, a body of citizens who had themselves taken an oath to seek the truth.126

This argument makes the case for the gravity of Clinton’s lies by invoking the solemnity of the settings and the ritual of the oaths to stress the symbolic significance of his testimony as ceremonial performance: a taker of two oaths raises his hand before a body of oath-takers (the grand jury) and before a judge who (unlike judges in most discovery depositions) is actually physically present. Now of course the formality of a proceeding does lend weight to a statement made in it and affects the gravity of a lie. But I am not sure this factor deserves all the emphasis Starr gives it. First, Clinton did not appear in the deposition as the head of a branch of government but as an ordinary litigant; he was not charged with “executing the laws” in that capacity but only with the ordinary citizen’s duties of obeying them. Compared to other official settings or ceremonies such as sending messages to Congress or to foreign powers, or claiming rights or privileges of the Presidency before the courts, these proceedings were relatively low on the scale of Presidential occasions—indeed off the scale altogether, unless one thinks the President always acts as a public officer.127 Second, and more importantly, we can grant that the formality of a proceeding is a contextual factor that bears on assessing the gravity of a false statement, but still ask, why should it be the only such factor? Are not the substance of the statement, the seriousness of the conduct it attempts to hide, the harm its utterance may do to

127. For further discussion of this point, see infra note 221 and accompanying text.
others and the public interest, the right the questioner has to an answer, the moral reasons that may mitigate or justify deception—all the factors this Article spells out and that Starr ignores—aspects of context just as or more significant than the ceremonial setting?

D. Zones of Informal Privilege

Large majorities of the American public, as is well known, reacted with disapproval to Starr's investigation. Some clearly disapproved of the OIC's bullying and intrusive tactics, especially when directed against vulnerable and relatively innocent parties; and were plainly not reassured to be told repeatedly that these were all in a professional day's work. The majority's dominant reaction seemed something like: yes, the President was reckless and irresponsible in conducting his affair and lying about it; but this is a matter for social condemnation, not for the criminal process and not for impeachment. In short, they thought as I do that Starr's intervention was imprudent, a response way out of proportion to the harm. In analyzing the harm they put Clinton's lying into context, and found circumstances that softened, if they did not entirely excuse, his deceptions.

Earlier I pointed to aspects of the context that illustrate the relative harmlessness of Clinton's lies in the Jones deposition; that they did not have and could never have had much if any effect on justice being done in the case. Here I want to talk about contextual factors that in common understanding tend to mitigate and sometimes even completely excuse lack of candor, concealment, evasiveness or even outright deception in situations such as the one Clinton found himself in. These factors are not always explicitly recognized by the legal system, though they are certainly taken into account in assessing degrees of moral blame by legal decision-makers with discretion, such as prosecutors, administrative enforcement officers, juries, sentencing judges, parole boards, and those with authority to pardon crimes. Not every proceeding in which a person is asked questions requires that person to give strictly and completely accurate and truthful answers—the truth, the whole truth, and nothing but the truth. If the questioner has no right to any kind of answer, much less a truthful one, like a reporter who asks a public figure in a press conference whether he has been faithful to his wife, the respondent is entitled to tell the questioner it is none of his business, or to put him off with a denial, false or not.

128. See, e.g., CBS News Poll, Aug. 6, 1998 ("Do you think Independent Counsel Kenneth Starr is mostly conducting an impartial investigation to find out if anything illegal occurred, or is mostly conducting a partisan investigation to damage Bill Clinton?" [Responses:] Impartial 31%; Partisan 60%; Don't know/No answer 9%).

129. This general view was echoed in the impeachment debates by several Congressmen, such as Thomas Barrett (D-Wis.), See Debate, supra note 103, at 172-73.

130. This is, of course, contested. Some reporters do claim that they have a right to...
dents believe that ordinary morality gives them some latitude to mislead; and in which disinterested, or at least not rabidly partisan, spectators agree with that position, and thus find their lies or evasions or concealments less culpable than in other contexts. I will call these situations “zones of informal privilege;” “informal” because I am setting aside the cases where the legal system formally recognizes a privilege to withhold information. Some common examples follow.

1. Adversary Relations

When questioner and respondent are explicitly dealing as adversaries, the zone of privilege to conceal or mislead expands. Parties in a state of war disseminate disinformation and use *ruses de guerre*. Parties in business negotiations withhold critical information and speak outright untruths about their bargaining positions or reserve prices (“My principal will not allow me to go a penny above $6 million”). Parties running against one another for office run ads or distribute pamphlets willfully distorting one another’s records. Parties in litigation, even if testifying under oath as in depositions, are regularly instructed by their lawyers to answer only the specific questions asked, volunteer no information, and not to worry if a misleading impression is left as a result of their caution. Lawyers answering discovery requests feel entitled to construe them so narrowly as to defeat their evident purposes, like construing a request for “letters” to exclude e-mails and office memoranda. Lawyers representing clients in proceedings before regulatory or revenue agencies often feel entitled to look for loopholes, or exploit enforcement weaknesses, that totally frustrate the flow of relevant information to regulators.

ask the question and to receive a truthful answer, because they are asking the question as the agents of a public that is entitled to inquire into aspects of the moral character of a politician that are relevant to his fitness for public office. See *infra* note 152 and accompanying text for a discussion of this rationale.

131. An Independent Counsel in a different proceeding has identified political life generally as an arena where there is more-than-usual tolerance for lying:

The career prosecutors and agents in my office . . . are uniformly of the belief that there is more lying, perjury, and obstructive behavior in the investigatory stage of independent counsel cases than in ordinary white collar cases . . . . [O]ne explanation might be that [IC cases] depend on witnesses whose entire existence revolves around the swirl of politics—an environment where it is far too acceptable to put a glib, self-serving spin on responses to critical inquiry than to simply tell the truth.


2. Tit for Tat

This is a special case of adversary relations. The zone of privilege may expand still further if the questions or tactics of the questioner are themselves a violation of the norms of fair play of the adversary relation; if the other team starts playing dirty, yours is entitled to retaliate in kind. Thus, for example, respondents in litigation are likely to legitimately feel that they have fewer obligations of candor to a questioner who is playing dirty hardball, for example, asking questions on cross-examination without a good faith basis for asking them, or solely for the purpose of causing embarrassment or prejudice, or who would wickedly distort their truthful answers to gain a wholly undeserved advantage. Even when an umpire is supposed to enforce the rules of fair play, the umpire may (like many trial judges) be too passive and disengaged to do so; or herself actively be prejudiced in favor of or against one of the parties.

3. Protection of Valuable Secrecy, Privacy, or Relations of Loyalty

Respondents evidently feel more entitled to withhold information, stretch the truth, or even lie when they are protecting forms of intimate life that they believe are precious, and that would be destroyed by public disclosure: national-security secrets, the details of family or sexual life, close friendships and family relations, fraternal bonds with fellow officers, the trust and confidence of informants or sources. Some cultures promote exceptionally solidary ethics of loyalty and secrecy: intelligence communities, corporate executives, organized-crime brotherhoods, certain ethnic and religious groups, and, of course, close families.

4. Protection From Disclosure of Embarrassing Secrets

Everyone has secrets, and so everyone (except hypocrites and moral absolutists) understands why someone might lie to conceal them. Our law of blackmail is premised on the assumption that it is a vile act to threaten to expose such secrets for personal gain. Both in law and ordinary morality, those who lie to conceal embarrassing secrets are understood to be far less morally culpable than those who lie to reap a personal advantage.\(^{133}\)

5. Noble Lies and High-Minded Fiddles

The respondent may sincerely believe that the truth must be with-
held even in official proceedings in order to serve a higher duty or law than that of the tribunal. Less dramatically, the respondent may know or guess that officialdom will probably overlook a lie because it is told to overcome some formal or technical obstacle to realization of a more important purpose. Judicial tolerance for some degree of police perjury is an example of high-minded fiddling—as was judicial tolerance for pervasive witness perjury in divorce proceedings (in the years before “no-fault” divorce) when parties colluded to manufacture evidence of “fault” to obtain consensual divorces.134

Kenneth Starr has resolutely declared that he recognizes no such privileges, and no degrees of gravity in lying before official agencies: “There is no excuse for perjury. Never, never, never,” he told Diane Sawyer in an interview.135 In his Congressional testimony he elaborated:

Individuals in [sexual harassment] cases take an oath to tell the truth, the whole truth and nothing but the truth. And no one is entitled to lie under oath simply because he or she does not like the questions or because he believes the case is frivolous, or that it is financially motivated or politically motivated.136

Perjury is extraordinarily serious business. It is insidious. The courthouse cannot operate if perjury is allowed to either be excused or to be minimized . . . . And it does not matter whether the issue has to do with sexual harassment, or bankruptcy, or the criminal law. It is all dreadfully serious . . . .137

The offense is the despoiling and the attack on the integrity of the judicial system. The response may be on the other side, well, we want to find out what the perjury is about and we will take some perjuries more seriously than others, and that is a view, I will say as a former judge, any judge worth his or her judicial salt would say, “Not in my court.” Witnesses tell the truth. It doesn’t matter what the underlying subject matter is. Once you are in court under oath, you tell the truth.138

Starr’s argument may be fairly described as a categorical, or absolutist, position on truth-telling in official proceedings. It is a remarkable and rather frighteningly statist position, when you think about it. For Starr, the importance of yielding up complete and accurate truth-telling before the official tribunal, or the official inquisitor, always trumps every other imaginable competing moral value. It does not matter how great or trivial the public interest is in knowing the truth, how precious are the values or relations sought to be protected by

136. Starr Presentation, supra note 30, at 18.
137. Id. at 82
138. Id. at 113.
concealing it, or how legitimate or illegitimate the motives of the questioner are for trying to expose it. Yet every great moral tradition I know of recognizes occasions that justify or at least mitigate lies—and not just in the extreme cases, such as the lie to the Gestapo or Nazi People’s Court that you know nothing about the Jewish child you are hiding in your attic, but in many other situations as well.\(^{139}\) It is not, as some conservatives like to argue, “moral relativism” to suggest that the gravity of a lie varies with its context and the right of the questioner to an answer; it’s just moral reasoning, the ability to make distinctions of kind and degree. People who abstractly say and no doubt sincerely believe that everyone should always tell the strict and complete truth in legal proceedings, no matter what the cost, invariably discover exceptions for themselves and their friends when they become the targets of lawsuits or investigations, especially when the questions are being asked by someone they believe is an unprincipled adversary prepared to do as much damage as possible to their lives and their causes by fair means or foul. Starr himself, when asked by the minority counsel and the President’s lawyer in the House impeachment hearings if he or his staff had asked Monica Lewinsky to wear a wire, replied that they had not.\(^{140}\) When asked if his staff had harassed a witness, Julie Hiatt Steele, by checking out possible irregularities in her adoption of a Romanian infant, Starr became very evasive,\(^{141}\) though the question was straightforward and he had every reason to know the answer was “Yes, with an explanation.” If made the target of a perjury prosecution Starr would surely claim that his responses were somehow technically truthful, but there can be little doubt they were intended to mislead.

The Chairman of the House Judiciary Committee, Henry Hyde, was the most stentorian denouncer of the crime of perjury, for its destruction of the sanctity of the oath and the integrity of the rule of law,\(^{142}\) yet (as minority members could not resist pointing out), during the investigation of Iran-Contra in 1987, he had very sensibly said, “[a]ll of us at some time confront conflicts between rights and duties, between


\(^{140}\) See Starr Presentation, supra note 30, at 150-51, 182. His answers may have been literally truthful because the questions were phrased in terms of whether the OIC had asked Lewinsky to wear a wire to entrap Clinton and Jordan. Starr responded that his staff had asked for her “cooperation” at a general level, from which one infers that she may have been asked if she would wear a wire, without mention of specific targets, or else perhaps targets other than Clinton and Jordan. The obvious purpose of the question was to find out what tactics the OIC was prepared to use in order to get something on Clinton.

\(^{141}\) See id. at 174-75.

\(^{142}\) See Debate, supra note 103, at 187.
choices that are evil and less evil, and one hardly exhausts moral imagination by labeling every untruth and every deception an outrage.” He was speaking of occasions on which administration officials, especially Oliver North and John Poindexter, had misled the Congress about their secret activities, both while they were going on and to cover them up afterwards. Hyde’s defense of the perjuries by North and others was, in summary: that they had been given in adversary proceedings, before a Congress that was trying to shut down aid to the Contras while the administration was trying to keep the Contra force alive, and that this policy disagreement entitled officials to a measure of Machiavellian cunning; that the lies were intended to protect covert operations and executive prerogative in foreign affairs from damage by disclosure; that North and others lied as loyal subordinates to protect their chief; and above all, of course, that theirs was a noble lie, because it furthered the cause of freeing the hostages and keeping the hemisphere safe from Communism over the objections of a passive and craven Congress. To Hyde, the context of and motives for false statements evidently mattered tremendously.\textsuperscript{144}

Clinton’s implicit claims of privilege for lying in the Jones deposition resemble in some ways Hyde’s on behalf of North, except that Clinton’s was not so obviously a noble lie on behalf of some higher law or reason of state. His best moral defense is that he was trying to protect embarrassing secrets, a private love-affair, the peace and integrity of his family life, and the effective functioning of his office, from exposure by an unscrupulous opponent who had malicious motives for, and no (or almost no) legitimate interest in, exposing them. The Jones case was at this point being prolonged and financed by ideological opponents of the President, the Rutherford Institute.\textsuperscript{145} As their conduct of the case after Jones’s original team of lawyers resigned demonstrated, they had little interest in Paula Jones personally and probably none at all in vindicating the purposes of the sexual harassment laws. An ordinary plaintiff would have settled or abandoned the case long before; but Rutherford’s support gave the plaintiffs’ allies abundant resources—perhaps not on the scale of an Independent


\textsuperscript{144} It mattered to the jury in Oliver North’s trial as well; despite rulings and instructions from the trial judge that it was irrelevant to North’s guilt that he might have been following President Reagan’s orders, North’s lawyer made his “loyal subordinate” role central to his defense, and the jury probably acquitted him of the serious charges for that reason. See Lawrence E. Walsh, Firewall: The Iran-Contra Conspiracy and Cover-Up 204-06 (1997) [hereinafter Walsh, Firewall].

Counsel's budget, but serious money—with which to hound their target.

These folks were hardball players; their tactic from the start was to locate, interrogate, and seek discovery of as many “Jane Does” as they could possibly find from the President’s past in order to maximize his public humiliation. They developed a list for discovery of 146 witnesses who could shed no direct light on Jones’s case and whose sole relevance was to connect Clinton with other women. So focused were they on pursuing the “other women” connections that they completely neglected their client and her case. They did not review Arkansas employment records to try to find out if other employees had fared better or worse than Jones, or to repair the glaring factual hole in her proof, the lack of any evidence of adverse employment consequences. When they took Clinton’s deposition, they spent virtually their entire time asking questions about other women, rather than the basic facts of their client’s case: they did not even, for instance, take the opportunity to ask Clinton whether he had said anything about Jones to any of her superiors after the hotel room encounter. The trial judge gave them an unconscionable amount of latitude to pursue this strategy—even though she was skeptical of the merits of their case, and the Supreme Court had expressly instructed her that, although a sitting President could be sued in a civil action, he was to be protected against undue interference with his office in discovery.

As I argued above, careful analysis of the minimal possible relevance of the evidence about the Lewinsky affair, balanced against its obviously harassing purpose and potential to ignite a huge scandal under a sitting President, should have induced the judge to exclude questions about Lewinsky or any other women unconnected with Clinton’s “workplace” back in Arkansas. Indeed, combined with the Jones team’s total lack of evidence from the very beginning about any harm suffered to their client’s employment situation or prospects, their predatory discovery tactics would have been good candidates for the imposition of judicial sanctions. Clinton also had a respectable argument that to require his testimony about his consensual sex life without a strong showing of compelling need was an unconstitutional invasion of his privacy. But, as it happened, Judge Wright allowed the questions.

Clinton, faced with the choice of telling a truth that would do enormous damage to his family and to the goals of his Presidency on the one hand, and whose concealment would do little or no harm to any

146. See Rhode, Conflicts of Commitment, supra note 26 (manuscript at 23).
147. Rhode gives a thorough and illuminating account of the conduct of Jones’s Rutherford lawyers and their neglect of their client. See id. (manuscript at 20-27).
149. California law, for example, recognizes such a right to sexual privacy. See Barrenda v. Superior Court, 76 Cal. Rptr. 2d 727 (App. 1998).
plausible public purpose, including fair and accurate resolution of the lawsuit, chose to lie. Since the questioner had malicious motives for asking the question, no legitimate need for the information and hence no right to a truthful answer, because the court was too lax or misinformed to protect Clinton from answering it, and because the stakes for Clinton's privacy were so high, he had a clear moral privilege to refuse to answer the questions, and something very close to a privilege to lie.

Even people who agree with me that a person is ordinarily entitled to defend his sexual privacy, especially against those without a demonstrably compelling need to invade it, might disagree that Clinton had any such privilege. They might argue that a person gives up his right to sexual privacy when he forms a sexual relationship with someone in his workplace, especially a subordinate employee. Such a relation becomes an object of legitimate general public concern because it is ipso facto a form of oppression (given the power differential) or because such relations often give rise to favoritism, retaliation, or just envy, and tend to corrupt workplace norms of meritocracy and efficiency. This argument is overbroad, at least to the extent that it gives anyone and everyone a legitimate claim to expose and challenge the relationship. An oppressed person herself might have standing to complain, and so perhaps might other affected employees; but I cannot see that it is anyone else's business if the relationship is mutually consented to, the parties keep it quiet, and avoid favoritism and retaliation in fact.150

A second argument might be that public officials, and especially presidents, give up all their rights to private life: they are symbols and examples, they live in fishbowls, and all the details even of their private lives have public implications. This argument gets us into the old debate about how much the public is entitled to expect officials to be persons of exemplary personal morality, and how much they are entitled to know, and thus to seek to reveal, of behavior that private persons would have a privilege in most cases to conceal.151 I cannot hope to resolve that argument here, though I do have a position on it: those who, like the press and Starr's OIC in the Clinton-Lewinsky scandal, labor to expose the sexual secrets of public figures, are much more morally blameworthy and politically dangerous than the public figures who try to keep their secrets. Public figures should generally be able to conceal their personal lives from inquiry and scrutiny for at least

150. I would also point out that an intern in a politician's office is in critical respects very different from an employee in a meritocratic career hierarchy. Many interns are beneficiaries of favoritism from the outset, given minor patronage jobs handed out to relatives of friends or political allies or contributors, and casual and transient in their employment.

four reasons. First, public leadership abilities, requiring a strong drive to achieve political power and the Machiavellian talents to deploy it with strategic success, correlate very uncertainly with private virtues, especially conventional sexual morality. Second, the insistence on making public all aspects of private life, and especially sexual conduct of public figures, breeds incentives to political blackmail, discourages qualified candidates from entering public life, and thus drastically restricts the pool of political talent. Third, sexual scandal tends to suck up all the available space for media coverage and public discussion of politics and to distract attention from issues of substance. Finally, even public servants cannot flourish as human beings without a private life, a realm where they can express themselves free of the critical gaze of strangers. We want our leaders to be real people, not strutting and posing empty suits, with their private behavior so invariably family-friendly that it can always be on display.

This is not to argue that a person’s sexual character is irrelevant to his public character: sex is a powerful drive, which presumably affects all of us in important ways. It is tempting to speculate, for example, that a sexually insecure leader may feel compelled to demonstrate his machismo by forcing unnecessary military confrontations; a person of very rigid sexual morality may be dangerously inflexible in negotiating with others; and a person lacking self-restraint in sexual matters may be irresponsibly impulsive in other respects as well. But while I think such relationships between sexual instincts and public conduct are pervasive I do not think they are very predictable; and as this scandal helps to demonstrate, the harms done from finding out too much about people’s sexual behavior are generally much greater than from knowing too little. In short, there have to be sufficiently strong reasons for piercing the curtain of privacy, and a reporter indulging prurient curiosity, or even a prosecutor asserting he has a criminal case to investigate, when the case is a minor violation of a technical or broadly defined offense, is not nearly reason enough.

Yet Clinton did not quite have a privilege to lie in this case, I think, because he had alternatives. If he had told the truth about Lewinsky to his own lawyer, Robert Bennett might have been able to protect him from questions about exiguous “Jane Does” by instructing him to refuse to answer, and then taking an interlocutory appeal; or settling the case much earlier; or, as some people have ingeniously suggested, taking a default judgment on the substantive claim and litigating only damages.

A caution: the last thing I want to do is to exaggerate the justificatory powers of informal privileges. As many of my examples show, a moral reasoner has to handle such claims of privilege with great caution, as if they were highly toxic radioactive material. My own view happens to be that there is far too much lying in our political and business life, and especially in legal contexts, where misplaced adver-
sary ideology and the belief in entitlement to Machiavellian cunning has lured not just parties, but many lawyers also, into thinking that the highest duty of loyalty to a client besieged by regulators and adverse parties is to help them to stonewall and frustrate the legitimate ends of the legal system to compel truthful answers. Excuses like “everyone does it, so we have to do it too, or be losers in the Darwinian struggle,” and “our cause is just, and our opponents slime who would pervert the truth to do us in,” and “our brotherhood and its secrets are a lot more important than satisfying the curiosity of some pissant bureaucrats or plaintiffs,” are the paving-stones that lead a legal system, and a market system, toward corruption and collapse. I have considerable sympathy with the spirit of a comment Starr himself once made: “[A]t what point does a lawyer’s manipulation of the legal system become an obstruction of truth? . . . [The] ‘good lawyer . . . acting as councilor, must urge the client against steps that are likely to impede the quest for truth.” 152

But the “quest for truth” is a means to the ultimate end of the legal system, which is justice; and justice does not require the merciless exposure of all secrets, regardless of the damage done by revealing them. We have to be just as suspicious of the person who refuses to make moral distinctions, who treats all cases of lying as equivalent, who cannot see that lying on trivial matters out of weakness or ordinary instincts of self-protection or to protect a sphere of intimacy from unscrupulous opponents is far more excusable than lying on matters of public moment or for malicious ends in order to bring about serious harm to others. I would say Henry Hyde got his moral priorities skewed. The Iran-Contra defendants thought it was all right to lie to

152. Remarks by Whitewater Independent Counsel Kenneth Starr at Mecklenburg Bar Foundation, Charlotte, North Carolina, Fed. News Serv., June 1, 1998 (quoting Anothony T. Kronman, The Lost Lawyer (1993)). One cannot help wondering how far Starr gives effect to this high-minded principle when the clients are his own. Starr represents, among other clients, the Brown & Williamson tobacco company, whose lawyers in the past have proved to be virtuosi at the art of impeding the quest of regulators and plaintiffs for the truth about their operations. At one point Brown & Williamson went so far as to place all company research on the health effects of tobacco under the supervision of its general counsel’s office in order to facilitate the claim that such research was protected by attorney-client privilege. See Stanton A. Glantz et al., The Cigarette Papers 235-338 (1996). Representing Brown & Williamson and General Motors in litigation, Starr has in fact asserted very broad claims of attorney-client privilege to protect client secrets from discovery. See Rhode, Conflicts of Commitment, supra note 26 (manuscript at 59) (discussing Starr’s invocation of the attorney-client privilege while representing Brown & Williamson); Suzie Larsen & Keith Hammond, Starr Helped GM Cover Up Possible Perjury, The Mojo Wire, Feb. 27, 1998 (visited Oct. 15, 1999) <http://bsd.mojones.com/newswire? gm?index.html> (discussing Starr’s reliance upon attorney-client privilege while representing General Motors in 1994). Does Starr in private counseling urge open-handed disclosure upon these clients and others whom his firm, Kirkland & Ellis, defends in litigation and regulatory proceedings? If he does, he is a rare bird among corporate defense litiga-
Congress and shred documents because they were trying to protect a secret operation and an admired President and their cause was (they believed) just. One can hardly imagine anything more dangerous than accepting a claim that would justify protecting from inquiry a cabal in the government carrying out secret operations under its own view of appropriate foreign policy, in defiance both of the elaborate system of reporting that Congress had set up precisely to forestall such operations and of some express statutory prohibitions, and apparently without supervision by any constitutionally responsible officer. Clinton just wanted his sex life to stay out of the public domain: who would not?

In Clinton's case, the issue for Starr and the OIC was how to respond to his lie. "One should tell the truth in official proceedings" is reasonable enough as a general, if overbroad, rule of thumb for most situations. But what the OIC had to decide is what to do when someone breaks the rule, and "Slap him with a felony prosecution!" is not a sensible answer in every case, or in the vast majority of cases.

E. Hubris: The "Crimes" of Impeding and Disrespecting the OIC

Not unlike other prosecution task forces, Starr's OIC team liberally used its powers to reward those who cooperated with its investigation and to punish those who did not. The OIC would give cooperative witnesses immunity or offer them guilty pleas on generous terms in exchange for testimony. As for witnesses who would not cooperate, especially by providing testimony implicating the Clintons in wrongdoing, the OIC acquired a deservedly ugly reputation for vindictive prosecutions: prosecuting Webster Hubbell three times, having Susan McDougal jailed for eighteen months for civil contempt, and then prosecuting her again (unsuccessfully) for criminal contempt.153

Perhaps the most egregious of these actions was the prosecution (culminating in a hung jury) of Julie Hiatt Steele. Steele—in case any reader has forgotten—was an acquaintance of Kathleen Willey, who claimed to have been sexually assaulted by Clinton and to have told Steele about the experience soon afterwards.154 Called by a reporter, Steele confirmed that Willey had told her about the assault. But later Steele retracted her statement and said that Willey had asked her to make a false statement backing up Willey's story. The OIC indicted Steele because it believed Willey's version rather than Steele's. This prosecution was extraordinary because Steele had no first-hand knowledge of any facts connected with anything Starr's OIC was supposed to be investigating. As evidence, her statements had only a marginal bearing on the credibility of Willey, another completely pe-

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ripheral figure. Starr apparently suspected that the White House had somehow pressured Steele into retraction, which if true might have been dimly relevant to the OIC's theory that the White House had a “pattern” of trying to intimidate and discredit potential accusers; but the OIC found no evidence of this. It is difficult to escape the inference that Starr's office was punishing Steele for undermining the credibility of a woman whose accusations of sexual abuse were making Clinton look bad and hurting him politically.155

Steele was not just prosecuted because she refused to sing the song the OIC wanted to hear. Her other offense was public defiance of the OIC. Her indictment was apparently in part prompted by Steele's and her counsel's public criticism of the OIC's aggressive tactics—which included putting pressure on Steele by investigating her adoption of a Romanian infant.156 She was not singled out. In their investigation of Clinton, Starr and his team came to view anyone who criticized the OIC and even anyone who asserted legal defenses against it as potentially engaging in obstruction of justice. The OIC subpoenaed Sidney Blumenthal, who knew nothing first-hand about the Lewinsky affair except that Clinton had denied it to him, before the grand jury to grill him about negative comments that Blumenthal had made to reporters about Starr and his investigation.157 They had the FBI interrogate at length a citizen who had recommended that the Attorney General of Maryland prosecute Linda Tripp for illegal taping.158 As previously mentioned, Starr in his referral to Congress suggested that Clinton had committed impeachable offenses by asserting executive privilege to prevent testimony by his aides, by asserting a novel “protective function” privilege to prevent testimony by members of the Secret Service, and by refusing six invitations to testify before the grand jury.159

These actions seem imprudent in the extreme. What may account for them is that the OIC had come to think of itself as the Angel of Justice, any hindrance of which, by public attacks or even just ordinary legal tactics, was necessarily an obstruction of justice. This would help explain why the OIC would prosecute a peripheral witness like Steele, though there was no pending proceeding or even a possibility of one to which her statements about what Kathleen Willey had told her might be relevant—much less a proceeding that Starr’s OIC had

155. See id.
156. The OIC's indictment of Steele included, revealingly, a count for perjury before the grand jury for claiming to have told the truth on “Larry King Live.” See Jill Abramson, The Trial of the President: The Grand Jury; Starr Indicts an Ex-Friend of an Accuser of Clinton, N.Y. Times, Jan. 8, 1999, at A16.
159. See Starr Report, supra note 11, at 206-10.
any charter to bring. It would also help explain the summoning of Clinton to a grand jury to testify to facts relevant only to deposition testimony in a dismissed civil case, and the referral of his alleged perjury in that grand jury testimony as a ground for impeachment. What Steele, Clinton and the others were obstructing was the investigation itself.

Starr would not be the first prosecutor to confuse himself with Justice and Truth and to treat “defiance of the prosecutor” as a sort of lèse majesté, an independent category of wrongdoing. But he seems to have been peculiarly prone to this form of hubris.160

F. The Costs of Zeal: Collateral Damage

A prudent prosecutor, I suggested earlier, not only has to take care to focus his weapons on misdeeds serious enough to warrant deploying them, but also has to take account of the costs of his using them and to make sure they do not exceed the potential benefits. In this respect Starr and his associates seem to have run wild, like mercenary gunmen hired to keep order who shoot up the whole town.161 They subpoenaed family members to inform on and put pressure on their children, reporters to inform on their sources, bookstores to inform on their customers’ reading habits; the President’s and Hillary Clinton’s lawyers, closest aides and even their Secret Service guards to reveal the most intimate aspects of their personal lives; the family, closest friends, and ex-lovers of Lewinsky to reveal what she had told them, her psychiatric records and the files from her personal computer.162 At one point they imitated the sleaziest tabloids and Clinton-haters in deploying investigators throughout Arkansas to interview women rumored to have been involved with Clinton and to find out if Hillary

160. In his referral, he created a separate heading under “abuse of power” for statements of Hillary Clinton and others attacking the allegations against Clinton as a “smear.” See id. at 206. In his statement to Congress, Starr listed “the war against [our] office” as one of Clinton’s tactics of diversion and delay of OIC investigation. Starr Presentation, supra note 30, at 27. He seemed particularly aggrieved by the President’s public statements in support of Susan McDougal’s going to jail for contempt rather than provide adverse information on Clinton to the OIC. See id. at 36.

161. Their performance reminded me of one of those high-speed chases in action movies, where a hundred police cars rampage through the streets scattering crowds and smashing rows of parked cars and shop windows, leaving whole blocks burning in order to get at the bad guys. I cannot be the only viewer who winces at scenes like this and wonders: who’s going to pay for all that damage?

162. The “fruits” of these and other labors can be found in the Appendices, supra note 73, and especially the Impeachment of President William Jefferson Clinton, The Evidentiary Record Pursuant to S. Res. 16, vol. IV, pts. 1-3, Supplementary Materials to the Referral from Independent Counsel Kenneth W. Starr, H. Doc. 105-316, S. Doc. 106-3 (1999) [hereinafter Supplementary Materials]. The OIC lawyers did draw the line in one case. They did not interview or subpoena Chelsea Clinton to find out what she knew or to put pressure on her father. But they got to everyone else close to him.
Clinton had a love affair with Vince Foster.\textsuperscript{163} Many of these people, some of them office workers with no resources, had to hire lawyers to protect their interests, especially given the OIC's reputation for vengeful retaliation against "uncooperative" witnesses.\textsuperscript{164}

The other, less tangible cost was the damage the investigation and the resulting impeachment caused to the functioning of the Presidency. Clinton and all his aides had to spend many hours conferring with lawyers and spin doctors and answering press questions about Lewinsky, time that should have gone instead to the country's business. The OIC's insistence on penetrating the President's most intimate circle of aides, government lawyers, and Secret Service protectors with subpoenas has deprived his successors of any assurance of access to confidential advice. Though Clinton showed a remarkable ability to focus on his real job through the scandal and even through the impeachment hearings and trial, the Lewinsky matter obviously distracted him and may have distorted his judgment. To me, it is inconceivable that an independent counsel would have compelled the diversion of so much presidential time and attention while the Cold War was still going on. Only, I would speculate, an OIC staff predisposed to believe that governments, or at any rate governments headed by Democrats, have few valuable functions to perform, would have claimed so much of the chief executive's time and attention for such insubstantial reasons.

I do not at all want to minimize Clinton's role in helping to create, amplify, and sustain the ongoing damage to his administration. His reckless indiscretion, his reflexive and incorrigible evasiveness when trapped in an awkward corner, his habitual lack of candor even when (as I expect will prove to be the case with Whitewater) he has nothing much to hide, have caused a good deal of harm to his family, friends, aides, and supporters and to the aims of his Administration and his historical legacy. I would nonetheless insist that the major share of blame for those harms rests with those who, like the press and the OIC, turned over every stone to bring his secret affair to light. I was among those inclined to think, when the Lewinsky scandal first broke, that he might best serve his country and his party by resigning. But as the OIC investigation escalated into impeachment proceedings, the dangers posed by prosecutorial excess and abuse of the impeachment power came to seem a far greater danger to the republic than Clinton's misbehavior. They showed how easy it might be to harass an administration and try to reverse an election by leveraging civil lawsuits into criminal proceedings and then into grounds for im-


peachment. After all that, I believe, the President’s constitutional obligation was to defend his office against such assaults.

G. Procedural Correctness and Professional Routine

The justification Starr and his team most often put forward for their conduct was that they were going by the book procedurally and by professional custom tactically.\footnote{See Starr Presentation, \textit{supra} note 30, at 58-59.} In the House Judiciary Committee hearings, Starr repeatedly defended the “professional” standards and conduct of his staff.\footnote{See \textit{id.} at 63.} It is clear that many of the things the OIC did that appeared most abusive—interrogating Monica Lewinsky for eleven hours while discouraging her from calling her lawyer, putting pressure on her by threatening to prosecute her mother for unrelated offenses, urging her to wear a wire to trap Clinton and Jordan in a sting operation, threatening witnesses with imprisonment and financial ruin for very minor transgressions if they failed to come across with cooperative testimony, sending investigators to pore over the sexual habits and reading habits of potential witnesses and targets, leaking damaging information about targets to the press—have indeed become part of the Complete Prosecutor’s conventional arsenal in the 1990s. One of the real long-term benefits of the Clinton-Lewinsky scandal has been the illuminating public seminar of 1998, in which the general public got a glimpse for the first time of the tactics that professional law enforcers think justifiable and routinely employ. Many of these tactics are alarming in the extreme, especially the prosecutors’ willingness to disrupt the lives of, and inflict financial ruin upon, mere witnesses, not to mention their blithe reliance on the credibility of testimony extracted from threats to people if they do not come across with what the prosecutors want to hear.

Even by these (extremely loose) professional standards, Starr’s OIC may have been on the zealous side.\footnote{See \textit{infra} Part I.E.} More importantly, a practice that seems manifestly repellent needs a better defense than that professionals consider it routine. If an official puts pressure on a witness by threatening to imprison her mother unless the witness cooperates, he will have to come up with a better reason than, “Oh, we do this all the time.” Professional practices, particularly those generally practiced out of the limelight, and on people with whom the public has no sympathy—the dirty work of society—have a way of becoming coarse and brutal: police sweeps of the streets, the beatings of prisoners, the incarceration of illegal immigrants, the tolerance for everyday police, accomplice and snitch perjury in criminal courts. Prosecutorial tactics have to be evaluated in part by their prudence: if a brutal or coercive or intrusive tactic is used, the means must be proportional to the ends
to be served, and some means, like torture, are never justifiable at all. In this case Starr's OIC used tactics that might conceivably be appropriate for the pursuit of a John Gotti or the Cali cartel kingpin or Carlos the Jackal the master terrorist, but not to the end of hunting down a hapless schmoe with a sexual secret.

Now in one respect they were following professional routine of what has become a dismally familiar kind. The OIC's excesses may be viewed as another of the many pernicious side-effects of the War on Crime, particularly the War on Drugs, which has sent so many young people, mostly black, to prison, for relatively trivial offenses like dealing very small amounts and mere possession; partly out of a Savanarola-like zeal for "zero tolerance" for drug offenses manifested in mandatory minimum sentences and rigid sentencing guidelines, partly out of perverse incentives to boost clearance rates by pursuing easy convictions.\(^{168}\)

Let me repeat, however, that on the central point at issue—whether Clinton's lie in the Jones deposition and his encouragement of Lewinsky to support him in the lie were worth pursuing through the criminal process in the first place—the argument from professional custom works against Starr. It is almost universally agreed that a conventional prosecutor would not have pursued Clinton for his Jones deposition testimony had he been an ordinary citizen.\(^{169}\)

H. A Comparison: Watergate and Iran-Contra

One way to appreciate the extraordinary imprudence of the Starr team's response to the Clinton-Lewinsky scandal is to compare that scandal to previous major scandals. I will touch briefly on Watergate, which is well remembered, and at greater length on the Iran-Contra


\(^{169}\) See, e.g., David E. Rovella, Will he Escape this Time? Perjury Charge a Stretch, Say Nation's DAs, Nat'l LJ., Feb. 9, 1998, at A1 ("Many say that prosecuting the president for perjury in a civil case is unfair since such a charge against an ordinary citizen is... almost unheard of."). See generally Presentation on Behalf of the President: Hearing Before the Comm. on the Judiciary, 105th Cong. 283-322 (1998) (testimony of Thomas P. Sullivan, Richard J. Davis, Edward S.G. Dennis, Jr., Hon. William Weld, and Ronald Noble) (agreeing that prosecutions of witnesses for perjury and obstruction in civil cases, especially when unrelated to central issues in dispute, are rare and generally considered inappropriate use of prosecutorial resources), reprinted in Impeachment of President William Jefferson Clinton, The Evidentiary Record Pursuant to S. Res. 16, vol. X, Transcript of December 8 and 9, 1998, presentation on behalf of the President, including presentation of Charles F.C. Ruff, Hearing Ser. No. 68, 10 S. Doc. 106-3, at 283-322 [hereinafter Presentation on behalf of President]. Even Henry Ruth, the ex-Watergate prosecutor who became one of the strongest advocates for impeaching Clinton, acknowledged that "[p]robably no prosecutor would actually seek out perjury in civil matters, such as the Paula Jones suit." Henry Ruth, What Justice Department Guidelines Say About Perjury, Wall St. J., Jan. 18, 1999, at A19.
affair, whose details have been largely forgotten. The comparisons serve mostly to remind us of the relative magnitude of the danger to Constitutional government of the earlier scandals.

The Watergate affair is chiefly valuable to contrast Nixon’s cover-up of his misdeeds to Clinton’s. To begin with, though the Watergate cover-ups eventually got to be far worse than the original crimes they were covering up, those crimes were not trivial—burglaries, break-ins, illegal wiretaps. The cover-ups enlisted many of the most senior officers of government—the President himself, his two top policy aides, the Attorney General and many others—in a conspiracy to concoct false stories and (most repellently) to find convenient scapegoats on whom to pin the blame. They tried to conscript whole agencies of government into the conspiracy, most famously to get the CIA to instruct the FBI that the “White House horrors” were covert CIA operations and to back off from investigating them. 170 Clinton’s cover-up, on the other hand, was a pathetic, ineffectual one-man show. Rather than conscripting others in a conspiracy, he told nobody about his secret, not Vernon Jordan or Dick Morris, not his wife. The silly fellow did not even tell his own personal lawyer. The OIC’s attempt to evoke Nixon’s cover-up by claiming that Clinton used “government resources and prerogatives . . . to facilitate and conceal the relationship” with Lewinsky 171—his secretary, Betty Currie, the US Ambassador to the United Nations to help Lewinsky find a job, and the government lawyer Bruce Lindsay to help his defense in the Jones case—only underscores the vast differences in scale between them.

An even more instructive contrast is to Iran-Contra. The behavior of Starr’s OIC has provoked comparison with the OIC of Lawrence Walsh, which investigated the Iran-Contra Affair: the role of Reagan Administration officials in arranging the sale of arms to Iran and the use of those sale proceeds and money raised from other countries to help finance and supply the Contra insurgency against the Sandinista government of Nicaragua, and in keeping these operations secret from Congress. 172 Like Starr’s, Walsh’s investigation was drawn-out and expensive: it took almost seven years and cost over $47 million. 173 Many critics of the Walsh OIC then and since have accused it of prosecutorial excess, especially by indicting former Defense Secretary Caspar Weinberger shortly before the 1992 election that President

171. Starr Presentation, supra note 30, at 45.
173. See Miller, supra note 10, at A15.
Bush lost to Governor Clinton. More generally, critics have charged it with what I have been calling imprudence, an inappropriate deployment of the criminal process against officials whose conduct constituted at best only technical violations of law, who believed they were obeying orders and serving their country, and whose main offense was that they interpreted the executive’s legal and Constitutional authority in foreign-policy matters differently from the way Congress did. The shorthand version of this critique (the equivalent, as it were, to the complaint that Starr’s OIC was treating as criminal and impeachable conduct “lying about sex”) was that Walsh’s OIC was “criminalizing policy judgments.”

This was the primary reason that President Bush gave for pardoning Weinberger and the other Iran-Contra defendants.

It is clear enough that the criminal process was a clumsy instrument for dealing with the Iran and Contra affairs. But that is not because the underlying official conduct was too trivial for prosecution; if anything it was too serious. The arms sales to Iran violated a well-established policy against trading for hostages as well as the Arms Export Control Act (though the President could authorize arms transfers if he notified Congressional oversight committees); the aid to the Contras violated other statutes, the Boland Amendments. No statutes made violation of these laws a criminal offense; their violation was an offense against Constitutional order, the requirement that the executive faithfully execute the laws.

Administration lawyers and its defenders in Congress later contrived legal arguments that the President and National Security Council were not covered by any of these laws, including the requirement of notice; but these were (mostly) post hoc defenses: senior officials at the time of the decisions believed they were bound by them, and so President Reagan himself, testifying at the trial of Admiral John Poindexter (the National Security Advisor who, along with his predecessor Robert McFarlane and their energetic NSC staff assistant Lieutenant Colonel Oliver North, took the leading role in directing the operations), said that he had insisted that any help to the Contras be kept within the law. The larger claim made by those who said Walsh was “criminalizing policy differences” was that the actions taken were, at least debatably, within the sphere of the President’s prerogative in foreign and national-security affairs; so that any Congressional restrictions tying his hands were ones he was privileged to

174. The most vociferous critic was Senator Bob Dole. See Walsh, Firewall, supra note 144, at 467-89.
175. Id. at 501 (quoting Richard Perle, Assistant Secretary of Defense under Weinberger).
177. See Walsh, Firewall, supra note 144, at 230.
ignore. These long-running struggles between Congress and the President over foreign-affairs authority should be handled through the political, not the legal, process.

The larger claim was pretty scary, at least to those of us who favor some forms of democratic accountability, even in national-security affairs; but it was no broader than many other claims that have been made for executive prerogative in this century. But there were serious problems with the context in which it was made. The main one was that the President himself did not assert the claim. Although he was happy to float the implication that he had blessed the Iran and Contra plans at their inception, he denied having authorized the way they were carried out. At first he denied any plan to trade arms for hostages at all, but later reluctantly admitted that the Iran operation had turned into such a trade; he denied knowing about or authorizing the diversion of Iranian arms proceeds to the Contra cause; and denied knowing about or authorizing the illegal-under-the-Boland-Amendment Contra aid. So this was not an open Constitutional confrontation between the President and the Congress.

If Reagan had asserted a prerogative to authorize the Iran and Contra operations and conceal their existence from Congress, not only through non-disclosure but through outright lies, he would indeed have invited a political response: impeachment. The Congress had set up an elaborate set of statutory protections (requirements of Presidential “findings” with respect to covert operations and notification of oversight committees), precisely to provide accountability in the executive for such operations. Reagan’s defense was negligent failure to supervise, which, if you thought about it, was in some ways worse. It meant that by inspiring his staff to try to deal with Iran to get the hostages released and to keep the Contra effort alive, then isolating

178. For a description of the major constitutional arguments, see Draper, supra note 172, at 580-98. Congressman Henry Hyde was among the most vocal defenders of unrestrictable Presidential prerogative.

179. This argument parallels the one I urged above that Clinton’s sexual transgressions and public lies about them were best handled through the court of public opinion. If the public were really bothered by his acts, a groundswell of public revulsion would be likely to force his resignation, impeachment, electoral defeat, or just gestures of contrition sufficient to satisfy the public.


181. See Walsh, Firewall, supra note 144, at 228-32; Walsh, Report, supra note 172, at 365-72. President Reagan testified at Poindexter’s trial:

I was convinced that [the many things that were being done] were all being done within the law . . . . I repeat that anything that we could do to be of help [to the Contra effort], but it had to be within the confines of the law, the Boland amendment. And to this day, I assume that that is what [North] was doing.

Walsh, Firewall, supra note 144, at 230.

182. See Draper, supra note 172, at 13-15.

183. See id. at 569-70.
not only himself but his Cabinet heads from the details, he created conditions whereby a junta of zealots on the NSC staff could carry out their own secret foreign policy, against the express opposition of the Secretaries of State and Defense, in violation of express statutory prohibitions and established policies, and unsupervised by any Constitutionally accountable officer. Poindexter’s testimony basically confirmed this picture of what had happened: he said that he knew Reagan would have authorized his and North’s operations, so they felt they were simply carrying out orders, but that they did not inform the President because they wanted to preserve his “deniability.”

Reagan’s willful neglect of his duty to faithfully execute the laws by calling the rogue foreign policy office into operational being, charging it with tasks that would at the very least have to be concealed from Congressional oversight and would probably require violations of existing laws, and walling it off from any effective supervision even within the executive branch, would also have justified opening proceedings for impeaching him. As Harold Koh has pointed out, the Iran-Contra operations fundamentally transgressed what had come to be the shared understandings of the executive and legislative branches of the postwar “National Security Constitution.”

The people involved certainly knew how serious the situation was when the operations were revealed. Secretary of State George Schultz told a senior aide, “I’ve read yr (your) notes on post-revelation (period). Astonishing story; our behavior strong. But to have [the aide’s notes of crucial meetings] up their [sic] on (Capitol) Hill for staff + lawyers to read–devastating for WH (White House). If [Hill’s notes] were to be published . . . . [n]othing like it in history of the Republic.” To head off impeachment proceedings, Reagan’s staff organized an internal inquiry of their own, directed by Attorney General Meese, offered full cooperation with a special commission (the Tower Commission) appointed to look into the affair and with a

184. As Theodore Draper pointed out, this defense lifted the concept of “deniability” out of its usual context of remaining able to deny involvement in covert operations to foreign powers into that of being able to deny them to the American Secretaries of State and Defense, the American Congress, and the American Public. See id. at 559-63.

185. Reagan did not, at least in so many words, offer the Henry Hyde “noble lie in a noble cause” defense of the junta’s operations, that their operations were justified as vital to save the hemisphere from Communism. For some time, however, he tried to give moral and political support to the junta by praising them as patriots, while refusing in legal proceedings to confirm their stories that he had actually authorized their conduct. See id. at 548 (describing President Reagan’s phone call to North after North resigned, calling him “an American hero”); Walsh, Firewall, supra note 144, at 231 (discussing Reagan’s testimony at Poindexter’s trial that Reagan had not authorized diversion of funds to Contras).

186. See Koh, supra note 180, at 101-16.

special inquiry of a Select Joint Committee of Congress, and appointed an Independent Counsel, Lawrence Walsh (a long-time Republican and admirer of President Reagan's). The Meese, Tower, and Congressional inquiries were mainly to find out how this mess had happened and why; the Walsh inquiry was to look into possible criminal conduct.\textsuperscript{188}

Given the context, a crisis over accountability for high policy-making, the criminal process was indeed an awkward instrument. But it turned out not to be useless by any means. Walsh could not prosecute anyone for defying Congressional attempts to direct and oversee foreign policy, or for failing to supervise rogue operations. But he could and did charge many of the principals with some ordinary crimes, chiefly, lying to Congress while the operations were going on, lying to Congress and destroying or concealing evidence during the cover-up, and lying to the OIC investigators.\textsuperscript{189} These prosecutions and the OIC's report helped considerably to clarify the record of what had happened.

It was always more important that the facts of Iran-Contra be brought to light, and the public be educated to what a disaster it was and the officials involved held accountable, than that anyone be sent to jail. This function of exposure and education—a political, rather than a legal, solution—could and should have been performed by Attorney General Meese and the Select Committee of the Congress. Meese, however, saw his function as one of political damage control and protection of the President rather than as independent investigator: he did not try to get to the bottom of the affair, but instead suggested cover stories that were not inconsistent with the known facts and legal theories that would retrospectively validate decisions taken.\textsuperscript{190} The Congressional Select Committee did a much better but still incomplete job. It allowed Oliver North and his counsel, Brendan Sullivan, to take control of the hearings.\textsuperscript{191} Battle-weary from the political polarization of Watergate, and taken by surprise by North's sudden popularity, the Committee was reluctant to probe President Reagan's role. It was willing to accept the half-truth (accepted also by the Tower Commission) that Reagan had been a neglectful manager; and to stop blame at Poindexter and North (in the process, as it turned out, giving them effective immunity from future prosecution), McFarlane and the deceased ex-Director of the CIA, William Casey.\textsuperscript{192}

\textsuperscript{188} For an account of these different investigations, see Walsh, Firewall, \textit{supra} note 144, at 48-71.

\textsuperscript{189} See Walsh, Report, \textit{supra} note 172, at xxiii-xxv (summarizing his OIC's prosecutions).

\textsuperscript{190} See Draper, \textit{supra} note 172, at 499-552.

\textsuperscript{191} See Walsh, Firewall, \textit{supra} note 144, at 115-37.

\textsuperscript{192} See Investigation Committee, \textit{supra} note 143, at 20-22.
Walsh's investigation was much more thorough and ultimately, more revealing. It took much longer than it should have, in large part because its progress was blocked by a thick barrier of fog, evasion, and mendacity. Walsh rather innocently thought he was the government for the purpose of pursuing the investigation. Few people in the Reagan and Bush Administrations thought so; they treated him as an enemy intruder.\textsuperscript{193} Officials were much more likely to supply documents to Iran-Contra investigation targets and defendants than to the OIC.\textsuperscript{194} Many documents were destroyed and memories collapsed while internal investigations were proceeding. Some officials were candid and forthcoming; but most would admit to nothing they had not already committed themselves to on paper or in prior testimony; and obtaining the documents to pry them open further was painfully slow.\textsuperscript{195} Walsh's main contribution was an illuminating report and book about the affairs, which among other things clarifies that President Reagan was a considerably more active and knowledgeable participant in the Iran and Contra operations than the other inquiries had made him out to be.\textsuperscript{196}

Thus the main value of Walsh's criminal inquiry was to clarify the record, which its subpoena and prosecutorial powers enabled it to do. But it remained an awkward process for the purpose. Informants under threat of prosecution can assert privileges, prevent use of previously immunized testimony, and stall through procedural motions; these tactics are all perfectly legitimate, but they do slow things down. What we really needed, and need, for constitutional inquiries like Iran-Contra is a board of inquiry with powers like that of the South African Truth and Reconciliation Commission, to compel candid testimony in return for immunity, whose main purpose is fact-finding and public disclosure, not punishment of wrongdoing.\textsuperscript{197} Such a process would, however, still have to rely on the threat of perjury prosecutions. Secretary Weinberger seriously retarded the pace of Walsh's inquiry by withholding his notes. The notes also revealed that:

\textbf{[C]ontrary to his sworn testimony, Weinberger knew in advance that}

\textsuperscript{193} See Walsh, Firewall, supra note 144, at 68 (discussing the CIA's investigation of its own officials); Walsh, Report, supra note 172, at 441 (identifying problems the OIC encountered when dealing with the Defense Department).
\textsuperscript{194} See Walsh, Report, supra note 172, at 441-42.
\textsuperscript{195} Secretary Weinberger, for example, was asked in 1987 for any notes he had made relevant to Iran-Contra; he turned over a few notes, and in an interview in 1990 denied he had any more. In fact, he had made very extensive notes, which he had ingeniously caused to be buried in the haystack of the unclassified section of his papers at the Library of Congress. The content of these notes contradicted on important points some of the testimony he had previously given. See id. at 412-13.
\textsuperscript{196} See Walsh, Firewall, supra note 144, at 528-29.
U.S. arms were to be shipped to Iran through Israel in November 1985 without congressional notification, in an effort to obtain the release of U.S. hostages, and that Israel expected the United States to replenish the weapons Israel shipped to Iran... [also] that, contrary to his sworn testimony, he knew that Saudi Arabia was secretly providing $25 million in assistance to the contras during a ban on U.S. aid.198

These were two of the very operations that were the central focus of the inquiry. The OIC indicted Weinberger for obstruction and perjury in 1992; but, like the other Iran-Contra defendants, he was pardoned by President Bush after the election—as nice a demonstration as one could ask for that not all perjuries are regarded seriously! Walsh may have made a political mistake by prosecuting Weinberger, especially so close to the 1992 elections, since Weinberger was relatively blameless in the actual operations: he had vigorously opposed the Iran initiative and then been kept (mostly) out of the loop.199 The OIC lost some of its appearance of fairness and legitimacy by pursuing him. But given the main objectives of Walsh’s investigation, to discover what officials had known of the operations and what they had done or failed to do about them, Weinberger’s lies were important ones. And in general, considering the wall of lies, concealment, memory losses, document destruction and passive non-cooperation that blocked his investigation, Walsh was fairly restrained in his decisions to prosecute. Had he shared Kenneth Starr’s belief that no perjury however small is ever acceptable, and each must be pursued to the maximum, he would have brought perhaps ten times as many indictments as he did. Despite understandable skepticism about many of the stories and memory lapses he encountered, he repeatedly gave exculpatory explanations enough weight to suppose a jury might believe them, or described the relative harm done by lies as minimal, and declined to prosecute.200

My main point here is to compare the stakes of Walsh’s OIC investigation with Starr’s. Walsh was out to describe, explain, and fix responsibility for a major constitutional crisis. The Tower Commission and the Select Committee had all made some progress toward this goal, but there were many questions still unanswered when Walsh continued their work. The deal that everyone understood at the time was that these inquiries were substitutes for and meant to foreclose impeachment proceedings. It was of real public importance that before all memories ceased to function and documents were destroyed a

198. Walsh, Report, supra note 172, at 413.
199. See Draper, supra note 172, at 259.
full and accurate documentary and testimonial record be made against which the various competing political claims about the significance of the affair could be tested and the principal actors held accountable to the citizenry and to history. Those engaged in the cover-up were well aware that they were concealing events with momentous implications.

In the case of Clinton's deposition testimony, by contrast, nothing important to the republic turned on whether Clinton was telling the truth about his affair with Lewinsky or not—nothing important to the Jones case while it was pending, and nothing whatever once the case was settled. We could all have gone to our graves suspecting that Clinton probably lied about Lewinsky, as apparently he had about Gennifer Flowers, and not caring much one way or the other. The judgment that hundreds of lives and all the pressing business of the country had to be turned upside down for a year to establish the truth of this petty and banal affair was monumentally imprudent.

I. The Moral and Political Case Against Clinton

My main thesis here is that Clinton's conduct was **legally** trivial, which was all Starr and his OIC had any business to concern themselves with. Many of those who most deplored Clinton's behavior and sought his impeachment were surely not much interested in the strength or weakness of the legal case: they were outraged that he carried on an adulterous affair, with a much younger woman, in an office supposed to provide moral leadership, and that he repeatedly lied about the affair, especially to the public.201 Some of these were cultural conservatives and others affronted by his breach of marriage vows, or political opponents who never accepted the legitimacy of his election; others were simply citizens, troubled by a powerful man's predatory appetite (or uncontrollable weakness) for young women, his habitual slipperiness with the truth, the careless cruelty with which he inflicted the costs of his reckless conduct on his family, friends, aides and supporters. These defects of character and conduct, such critics thought, were more than Bill Clinton's private vices: they spread to and fatally infected President Clinton's public capacity to lead and govern.202

Unlike the legal case against Clinton, the moral and political critique that he had behaved in a way unbecoming to his office had substance. The critics could certainly have mustered the votes for congressional resolutions of censure, but the more extreme among them thought this an inadequate expression of their outrage.203 The fiercer

201. See William J. Bennett, The Death of Outrage: Bill Clinton and the Assault on American Ideals (1998), for a (relatively) carefully argued expression of this point of view.

202. See id. at 42-51.

critics’ problem was that they could not bring the great majority of their fellow citizens to agree that his wrongdoing justified his removal from office. The majority disapproved of both the sexual affair and the lying, but viewed these as largely private matters to be settled within the Clinton marriage, rather than to be the subject of a criminal inquiry and impeachment; and continued to approve of Clinton’s capacities as a chief executive. Many women in particular, while disturbed by Clinton’s conduct, continued to think that on most public issues of special concern to them he remained on balance a more reliable ally than opponents very recently converted to devotion to the sexual-harassment laws. Starr’s referral, whose sexually explicit chronicle of the affair was—perhaps intentionally—designed to inspire an outcry of disgust, instead unexpectedly humanized the participants: Clinton came across not as a cunning seducer and monster of predation but as an awkward and guilt-stricken overgrown adolescent; Lewinsky as a sexually aggressive and experienced but also touchingly insecure young woman. For many people, the intrusiveness of the media and the OIC—their total lack of restraint in pursuing and serving up to prurient appetites every last detail of the sexual scandal—presented a far greater danger to values of decency and morality than the hapless pair at the center of the storm. Some of the more vocal critics, moreover, seemed disabled by their own biographies from the role of moral scold.

So the critics had to try to convert their moral outrage over Clinton’s conduct into more generally acceptable public reasons for his removal. Whether by design or happenstance, Starr became their instrument. He directed his OIC to dig up the facts and supply the arguments (later taken up by the House impeachment managers) whereby the large moral outrage could be shoe-horned into the cramped categories of legal offenses. In the process, predictably, the legal offenses were blown way out of proportion to their actual gravity. That was the result of Starr’s imprudence. And to imprudence, as


204. To cite one of many indications of the majority view, following the House’s vote on impeachment, Clinton’s approval rating climbed to an astonishing 73% in a USA Today/CNN/Gallup poll, a personal high for the president. See Richard Benedetto, Public Likes Clinton More, GOP Less in Wake of Vote, USA Today, Dec. 21, 1998, at 6A.

205. See, e.g., Factors that have kept Clinton alive, USA Today, Feb. 12, 1999, at 2A (discussing poll results that found that 68% of women opposed impeaching Clinton and removing him from office, versus 63% of the population at large).

206. When polled, seven out of ten Americans said they did not want the Starr Report to divulge intrinsically private details of Clinton’s sex life to the public. See Richard Benedetto, Public Emotions: A ‘Psychotic Salad’ on Starr’s Report, USA Today, Sept. 11, 1998, at 3A.

207. For example, the Speaker in office at the beginning of the scandal and the Speaker-Elect who briefly replaced him had their own need for discretion.
the next part will show, Starr and his team added partisanship.

II. FAILURE OF OBJECTIVITY: A PRETENSE OF GOING BY THE BOOK

The account so far given of the OIC conduct is largely one of imprudence: blowing up a little misdeed into a big one, failing to see the all too ordinary humanly excusable motives that lessen its gravity, using a nuclear strike force to pin down a small offender, and failing to count the costs. To explain much of the OIC's conduct, we do not need to suppose Starr and his team were either ideological zealots or partisan politicians, only that they completely lacked any sense of proportion, any capacity for making judgments of degree. In this respect they resembled familiar figures on the legal landscape, formalist bureaucrats for whom a rule is a rule and a breach is a breach, no matter how great or small. They represent an extreme version of a particular view of the "rule of law," a positivist vision in which all law is considered to be rules, rather than expressions of norms or purposes; the rules are to be understood exclusively through literal readings of their written texts and to be applied mechanically even if the results are grotesque; and there are no exceptions or excuses unless these are clearly specified in the rule itself. A low-level official who takes this view of law—like an Occupational Safety and Health Administration inspector who racks up citations for technical rule-violations that in fact pose no real safety problems, a public librarian who rejects a passport as proof of identity because her manual says "birth certificate," or a traffic cop who writes a speeding ticket for going one mile over the speed limit on a deserted street in the early morning—can be a nuisance, but can only do limited damage. An official with lots of discretion, like a judge or prosecutor or senior administrator who becomes a literal-minded positivist is a real menace to society.

The positivist stance—"we're just doing our job, going by the book"—is of course also a convenient posture for professionals trying to operate in an intensely politicized environment. Robert Cover's well-known study of Northern anti-slavery judges in the era of slavery showed how they reconciled their moral views with the demands of their roles under a Constitution that protected slavery by retreating from their traditional view that law was based on broad principles of

morality and escaping into a narrow rule-formalism. Sometimes the stance is admirable as well as convenient, as for example when judges in dictatorial regimes are able to use positivist reasons for releasing prisoners whose detentions and convictions violate the letter of substantive or procedural law.

When Starr and his team were not justifying their decisions and tactics as the customary routine of professional prosecutors, they appealed to the positivist rule-book. Once Tripp had come to them with evidence of possible wrongdoing, they had to act urgently to wire her to entrap Lewinsky; and to seek the Attorney-General's authority to investigate Lewinsky. Once they had the evidence of Lewinsky and her stained dress contradicting Clinton's deposition, they had to summon him to the grand jury. Once all the Lewinsky evidence was in, they had to send an impeachment referral to Congress. Once the referral was submitted, Starr had to defend it to the House. It was their duty; they had no choice.

But there is no such rule-book; they made it up. In making all but one of these decisions (see under D., below), the OIC had virtually unconstrained discretion, which it consistently exercised in one direction, against Clinton. Sometimes the OIC, along with other actors in the impeachment drama, justified its apparently one-sided actions as merely preliminary procedures to some later stage where institutional actors with more authority would make the final and presumably objective decisions. Starr claimed for example that the object of his referral was simply to pass along "substantial and credible information that may constitute grounds for an impeachment" to the House, which could then weigh and evaluate it and see if it merited actual impeachment. (Similarly, several members of the House Judiciary Committee, and still later of the full House, would argue that their job was simply to see if a prima facie case for impeachment had been made, and pass it along to the Senate.) But in fact at each stage, the lawyers stating the supposedly preliminary or prima facie case would argue it as if it were conclusive of guilt. They behaved like trial lawyers who try to turn their opening statements into rousing closing arguments.

214. They were also accused of violating real rule-books. Federal Rule of Criminal Procedure 6(e)(2) forbids leaks of secret grand jury material to the press. The OIC first claimed it had leaked nothing, then admitted leaks for the purpose of countering "misinformation," and finally fired a senior deputy for leaking.
215. See infra Part II.D.
216. See Starr Presentation, supra note 30, at 44.
To see how Starr's OIC went well beyond the commands of the (often purely imaginary) rule-book and aggressively pushed the case for impeachment, let's look at some of the key decisions.

A. Failing to Prevent the Crime

I have already noted one of the most important: When the OIC learned from Tripp's tapes that Clinton had an affair with Lewinsky, they could have warned Clinton and prevented him from giving false deposition testimony. Instead they took steps to ensure Clinton would not be told and (whether or not with active collusion is unclear) that Paula Jones's lawyers would know what questions to ask him.

But plainly, when Tripp approached them, Starr and his office were not thinking objectively or disinterestedly about Clinton at all. The OIC had made him into its adversary. Many observers have supposed that, having failed to find anything else conclusive on him in their work so far, the OIC was anxious to pin something, anything, on a target it had come to think of as a very bad man. This motivation is humanly understandable but completely deplorable, because by depriving them of any sense of proportion, it helped create conditions whereby a small offense was blown up into a big scandal.

B. Obtaining Jurisdiction

They could also have done what most other prosecutors say they would have done, dismissed Tripp and her tapes as irrelevant to their charter, too trivial to bother with as evidence of criminal conduct, and too obviously (like the Jones case itself) the product of the partisan anti-Clinton scandal-mongering machine, and simply sent her away. More neutrally they could simply have referred the evidence to the attention of Judge Wright or the Justice Department. Instead, they went out of their way to expand their jurisdiction to license their investigation of Clinton's affair with Lewinsky.

When Starr applied to the Attorney General to expand his jurisdiction, he needed a theory that would satisfy the Supreme Court's requirement, in the case sustaining the constitutionality of the Independent Counsel Act, that his jurisdiction be "demonstrably related to the factual circumstances that gave rise to the Attorney General's in-

217. See, e.g., Editorial, Prosecutor and Perspective, Oregonian, June 7, 1998, at E4 (arguing that Starr has let his zeal for conviction blind him to the role of his office). Some observers may have drawn their inference of OIC hostility from admissions such as those made by Starr deputy W. Hickman Ewing, Jr., who, when called as a witness in Susan McDougal's trial, testified that he openly questioned the truthfulness of the Clintons' responses to questions posed by Whitewater investigators, though he denied allegations that he had called the President and First Lady "crooks and liars." See Pete Yost, Starr Aide Tells of Questioning Clintons' Credibility, Wash. Post, Mar. 19, 1999, at A10.
vestigation and request for the appointment of the independent counsel.\textsuperscript{218} The theory he came up with was that the Tripp tapes gave some reason to believe that Vernon Jordan might have bribed a witness with a job on Clinton's behalf to ensure her silence, just as the OIC believed (but had not been able to prove) Jordan had done for Webster Hubbell in connection with Whitewater. So the OIC alleged that their inquiry into Lewinsky might reveal a "pattern" of obstruction of justice relevant to the Whitewater case. The order issued by the Special Division expanding the OIC's jurisdiction, however, mentions neither impending perjury nor the (extremely tenuous) theory of a Whitewater-connected Jordan-Hubbell "pattern."\textsuperscript{219} Nor does it mention the President or any other officer covered by the Independent Counsel Act. It authorizes Starr to investigate "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law... in dealing with witnesses, potential witnesses, attorneys, or others concerning the civil case \textit{Jones v. Clinton}."\textsuperscript{220}

The whole business is exceedingly suspicious. It was the OIC's theory of the slender thread connecting Lewinsky to Whitewater through Jordan that allowed the Justice Department and Special Division to agree to expand Starr's jurisdiction on an emergency basis. If that were what Starr were really after he would have focused his investigation on Jordan. To the extent he did so, however, it was not to show the similarity of the Jordan job search for Lewinsky to the Jordan job search for Hubbell; at least there is no sign of such a "pattern" in his referral to Congress. Rather the OIC focused most of its energy on eliciting facts—testimony from an immunized Lewinsky, White House log books, the famous semen-stained dress, Clinton's grand jury testimony—that would contradict Clinton's denial that he had a sexual relationship with Lewinsky. To pursue the Hubbell-Jordan theory, the OIC would not have needed to discover the exact details of the Clinton-Lewinsky affair, only that some sort of sexual relationship had taken place that the President was anxious to conceal. Yet the OIC's referral, as is well known, chronicles every episode of the sexual relationship in obsessive detail. The Hubbell connection, like the rest of the Whitewater business that had been the pretext for expanding jurisdiction, simply vanished from the case, which now recentered on Clinton-Lewinsky.\textsuperscript{221} In retrospect it seems clear that the

\begin{itemize}
\item \textsuperscript{218} Morrison v. Olson, 487 U.S. 654, 679 (1988).
\item \textsuperscript{219} See Order of the Division for the Purpose of Appointing Independent Counsels, Jan. 16, 1998, reprinted in Appendices, \textit{supra} note 73, at 6-7.
\item \textsuperscript{220} Id.
\item \textsuperscript{221} As if to underscore how peripheral the Jordan-Hubbell connection had become to its new focus on Lewinsky, Starr's referral, after mentioning it as one of the bases for requesting expanded jurisdiction, returns just once to the subject, in a section alleging that Clinton lied in his Jones deposition when he said he did not recall whether Jordan had discussed with Lewinsky her involvement in the Jones case. Starr
\end{itemize}
purpose of expanding jurisdiction was to set the scene for Clinton to commit perjury and then nail him for it. Nothing else would seem to account for the extreme urgency with which the OIC sought authority to look into the Lewinsky affair.

C. Calling Clinton to the Grand Jury

The OIC certainly did not have to subpoena the President as a witness before the grand jury in order to pursue its factual investigation. Starr's referral in almost so many words admitted that its purpose in calling the President before the grand jury was to put him in a position where he would have either to admit lying in the Jones deposition or, by denying he had done so, to utter another lie. The option that ordinary witnesses choose on being invited into such a perjury trap is to invoke their Fifth Amendment privilege against self-incrimination. For a public figure, exercising that option has severe political costs, as the OIC well knew. When the questioner has a right to ask the question, it is reasonable to put the respondent to the painful choice of answering or incurring the political costs of invoking the privilege. But Starr had even less right to invade Clinton's sexual privacy than Paula Jones did, since she at least had a speculative theory connecting his conduct to some protected legal interest and the OIC (as I've tried to demonstrate) had none except the abstract, utopian, and curiously selective project of purging the justice system of deceptions, however minor. In allowing Clinton to proceed with his deposition testimony, the prosecutors passively facilitated his committing an offense that might be viewed as a crime. In summoning him to the grand jury, they gratuitously constructed a fresh occasion for a crime—one that, because a criminal grand jury inquiry looks more momentous and formal, would seem more serious than a lie in a civil deposition.

speculates:
At the time of his deposition, moreover, the President was aware of the potential problems in admitting any possible link between those two subjects [Jordan's job search for Lewinsky and her Jones testimony]. A criminal investigation and substantial public attention had focused in 1997 on job assistance and payments made to Webster Hubbell in 1994. The jobs and money paid to Mr. Hubbell by friends and contributors to the President had raised serious questions about whether such assistance was designed to influence Mr. Hubbell's testimony about Madison-related matters. Some of Mr. Hubbell's jobs, moreover, had been arranged by Vernon Jordan, which was likely a further deterrent to the President raising both Ms. Lewinsky's job and her affidavit in connection with Vernon Jordan.

Starr Report, supra note 11, at 189.

This is a fantastic piece of embroidery. It begins by assuming as true Starr's stated reasons for his investigation of Jordan about Lewinsky, that Jordan had helped Hubbell in order to influence his testimony. It then attributes Clinton's claim not to remember talking about Lewinsky's Jones testimony with Jordan to Clinton's fear that this—so far, wholly suppositional—"connection" with Hubbell might be revealed. 222 See Starr Report, supra note 11, at 146-47.
Note that the crime they tried to engineer (and that Clinton artfully—and not completely unsuccessfu...evidently that of preventing a federal grand jury from learning the truth in the course of its investigatory functions. Yet as ex-Watergate prosecutor Richard Ben-Veniste put it to the House Judiciary Committee:

[Let me say that it escapes me as to what the grand jury was properly investigating at that point. . . . The allegations of perjury and obstruction of justice really do not have the kind of substance that one would find if something were actually obstructed or somebody was actually harmed by a perjury.]

The OIC never presented Clinton’s Jones or grand jury testimony to the grand jury for indictment; and never asked the grand jury to pass on the material that was the basis for its referral to Congress. The grand jury, it turned out, had no functions whatever save as Starr’s sounding board, an instrument to put witnesses in jeopardy. If Clinton committed perjury in his grand jury testimony—and again, the OIC would have had a tough time proving that he did—his would have been the most abstract perjury imaginable, perjury in thin air, because it had no connection to anything that this grand jury was actually investigating.

D. Referral To Congress

I also believe—though I’m less confident of this—that after it finished its investigation the OIC did not have to submit a referral to Congress. The IC statute provides that “[a]n Independent Counsel shall advise the House of Representatives of any substantial and credible information which such independent counsel receives . . . that may constitute grounds for an impeachment.”

The command of this section is, to be sure, anything but transparent. Starr apparently interpreted it to set a very low threshold standard, something like: if the IC comes across reliable evidence that the President has done something that someone in the House might argue would justify impeachment, he has to inform the House of it. On this reading “substantial and credible” simply refers to the factual strength of the evidence, and not to its gravity, its political or legal significance. Since some Congressmen throw impeachment proposals around very casually, this would be an awfully loose standard—can we suppose that an IC has the duty to report anything to Congress that, let us say, Representative Bob Barr (R-Ga.) would think impeachable? A contrary interpretation might be that the IC should only consider information “substantial” enough to send to Congress if he may reasonably suppose

that the Senate would be likely to vote by a two-thirds majority to remove the President because of it. But this would require the IC to try to predict a political judgment.

On this issue one has to feel some sympathy with Starr. To be sure, if the purpose of the statute is to create an independent counsel with independent judgment, it's reasonable to suppose that the statute meant to leave to the IC a broad discretion about whether and what to refer to Congress; and thus the responsibility to exercise an independent judgment about whether the conduct constitutes an impeachable offense. Let us however concede to Starr that § 595(c) puts the IC in an awkward position; and that he has a defensible argument that whenever he comes across facts that someone might argue justify impeaching the President, he has to send those facts over to the House. But if the IC is reporting under a very low threshold standard, he should not conduct himself as if he has a sure-fire slam-dunk overwhelming case!

E. What Posture Should The OIC Take in Such Referrals with Respect to Those Facts?

I can see only two possible answers: neutral transmitter; or dispassionate analyst, or some combination of the two. In other words, the

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225. The timing of the referral is another matter, however. Starr's timing raised a lot of eyebrows, with good reason. His OIC, recall, was called into being to continue special counsel Robert Fiske's inquiry into Whitewater. As time went on Starr's team gradually acquired new things to look into: Vince Foster's suicide, the firing of the White House travel staff, the request from the White House for FBI files on political opponents. All of these were matters that potentially implicated the President. So one might have thought that an IC considering when to report to Congress would report on all the matters at once; for if more than one inquiry yielded evidence of impeachable conduct, the House would want to consider all the allegations at the same time. The IC could not expect the House to gear itself up for one impeachment inquiry, and then, months or years later, undertake another. Yet Starr (who had already reported on the Foster matter, and reported what every sane person already believed, and Robert Fiske had also concluded three years earlier, that Foster committed suicide: see David Jackson, Whitewater Counsel Starr Declares Foster Death a Suicide, Dallas Morning News, July 16, 1997, at 3A) presented only one piece of business to the Congress, the Lewinsky matter, and did so on September 9, 1998, two months before the mid-term elections. After the elections, he casually informed the House Judiciary Committee that his OIC had not found any involvement by the President in the Travel Office and FBI files affairs. See Starr Presentation, supra note 30, at 38. He dropped some dark hints about possible wrongdoing by the Clintons in the Whitewater matter, but said his investigation was ongoing, and refused to rule out further impeachment referrals. The Democrats on the House Judiciary Committee were understandably furious about this manner of proceeding. Why had Starr not announced that he had cleared the upper levels of the White House in the travel and FBI affairs before the election? Why was he dropping innuendoes about misdeeds in Whitewater in advance of the conclusion of his investigation and report? Why the rush to send the referral on Lewinsky before the election rather than waiting until all the inquiries were complete? There is no smoking gun here, but one would not have to be a paranoid to infer that the OIC was trying to inflict the maximum possible political damage before the election.
IC might suppose that the decision to impeach is a wholly political one, to which he has no competence to contribute and on which he should remain silent, taking care to supply just the facts that might conceivably be relevant, under some very minimal standard, to support a bill of impeachment. Alternatively, he might suppose that the decision to impeach is at least partly a legal one, in a couple of respects, and therefore within his competence to comment upon and analyze the evidence for its legal implications. First, it requires an interpretation of the Constitution, to which the IC as a learned and independent lawyer of public standing can suggest an influential if not authoritative reading, and a judgment about whether the facts he has found meet that standard. Second, if the IC has evidence that the President might have engaged in criminal conduct, he might take the position that evidence of any crime is per se potentially relevant to any impeachment decision; and provide a legal analysis of what his evidence tends to show as to guilt of that crime. In short, the IC could choose to be a relatively neutral and objective reporter of facts, or a disinterested analyst of the factual, constitutional, and legal issues involved.

Starr chose neither. While insisting that—as was obvious—the ultimate judgment was up to Congress, he became, in his referral and testimony before the House Judiciary Committee, an aggressive advocate for impeachment. He used the authority of his office not just to suggest that he had evidence from which Congress, if it felt so inclined, might make a decision to impeach, but that the evidence really should lead them to that conclusion. He set forth a highly partisan account of the facts and of their legal and Constitutional implications. He seemed to think that his position was that of an adversary, or of a prosecutor presenting a case to a grand jury, rather than that of an independent counsel making a disinterested report of facts and an impartial analysis of law. He made almost no attempt either to identify the weak points of the case or meet the strong counterarguments that could be made against it. To most of the public, his referral was undermined by what seemed its gratuitous and salacious elaboration of sexual details. To many lawyers, it was suspect because of its evident partisanship. His referral and committee testimony were the briefs and oral argument of an advocate—and a very aggressive advocate at that.

Let me just mention a few of the problems with Starr's referral and

226. It was his testimony that prompted the resignation of his ethics advisor, Samuel Dash. See Woodward, supra note 85, at 481.
227. Some of the more salacious details may be found in the Starr Report, supra note 11, at 28-36, 39-40, 44-47, 49-50, 57-60.
228. In a September 1998 USA Today/CNN/Gallup poll, 71% of respondents said that the Starr Report's sexual details should not be released to the public. See Poll: Most Prefer Censure, USA Today, Sept. 11, 1998, at 3A.
statement to the House. There are so many of these—one or two in almost every paragraph—that it would be exhausting to list them all. Fortunately it is not necessary, since many of them were pointed out by the President’s lawyers in rebuttal and in the Senate trial.\(^2\)

Was there perjury? In their more general passages, the referral and statement refer repeatedly to the crime of perjury and comment on what a serious threat it is to the administration of justice. But the referral is careful to avoid the term when it describes the actual evidence: it alleges only that there is “substantial and credible information that President Clinton lied under oath” in his \textit{Jones} deposition and grand jury testimony.\(^3\) The reason for this caution, I would guess, is that Starr did not want to have to address a crucial weak point in his perjury case, the issue of whether the lies were “material.” In fact, Starr does not really address the issue either in the main body of his report or in his testimony.\(^2\) In both, he treats Judge Wright’s order that Clinton’s relationships with women in the workplace were discoverable as equivalent to an authoritative decision that the answers in discovery were material\(^2\)---and this, despite the judge’s removal (at Starr’s request) of the Lewinsky issues from the case on the ground that they were not only not essential to the core issues in the case\(^2\) but would be inadmissible as prejudicial character evidence at


\(^{230}\) \textit{See} Starr Report, \textit{supra} note 11 at 131, 145, 151, 160. In his committee statement, Starr abandoned this caution and freely asserts that the President committed perjury.

\(^{231}\) Unless you count his response to a question from Rep. Bill McCollum, \textit{[W]hen the President lied under oath as you have described it in that Paula Jones case . . . was materiality present?}

Mr. Starr: Materiality is not affected. It is a totally bogus argument to suggest that because the lawsuit is eventually settled or dismissed that an act, let’s call it perjury, we have said, you know, a false statement under oath, that is the way we presented it to you. That is simply and utterly and demonstrably wrong as a matter of law.

Starr Presentation, \textit{supra} note 30, at 89.

I would call this a tantrum rather than an analysis, and note that it responds to a question that has not been asked (Does settlement or dismissal render witness testimony immaterial for purposes of the perjury statutes?) and avoids the actual question: was Clinton’s testimony material? The correct and candid answer would have had to have been something like, “Materiality might or might not be technically present. It depends on how materiality is defined, which is a contested point in the law of perjury; and it depends on how you analyze the relevance of the Lewinsky evidence to the sexual-harassment claim.”

\(^{232}\) \textit{See} Starr Report, \textit{supra} note 11, at 6; Starr Presentation, \textit{supra} note 30, at 18-19.

\(^{233}\) The OIC does address the issue of materiality in the abstract in an obscure
Was there "obstruction of justice"? Starr's avoidance of the term "perjury" to describe Clinton's lies in his referral cannot be explained by the IC's reticence to use words of legal conclusions. Both the referral and statement repeatedly assert (often dispensing with the formulaic "the evidence will show") that Clinton "obstructed justice." The actual evidence they set forth is weak and at best ambiguous on this charge. The most obvious problem with it was to make out Clinton's attempts to find Lewinsky a job as a bribe for her false affidavit in the Jones case, rather than to keep her from bothering the President and his secretary and to assuage Clinton's guilt over the affair; these attempts commenced well before Lewinsky was a likely witness in any proceeding. Clinton evidently hoped Lewinsky would conceal their affair from everyone, including the Jones court, but neither promised any reward nor threatened to withhold one as a quid pro quo for her doing so; and she herself told the OIC that she had independently decided to keep the affair quiet, out of loyalty and affection toward the President and reluctance to aid his enemies rather than in return for promises made or inducements given.234

appendix to Starr's report to Congress. See Appendices, supra note 73, at 275-95. There the OIC slants the analysis to favor the Fifth Circuit's equation of materiality with discoverability, but acknowledges that the law is unsettled and that some courts require proof of potential influence on the outcome of the underlying case. Id. at 282-86; see also supra notes 60-62 and accompanying text. It then, however, goes on to analyze Clinton's deposition statements in Jones as if the trial judge's rulings that Clinton could be asked about Lewinsky were conclusive on the issue of their materiality. The OIC nowhere produces any analysis of its own of the potential relevance of the evidence to the case, much less any analysis under the more exacting standard of materiality requiring some showing of potential effect on the outcome. Instead the OIC misrepresents Judge Wright as having "concluded that Lewinsky-related evidence might be capable of influencing the ultimate decision in the lawsuit." Appendices, supra note 73, pt. I, at 293. But all Judge Wright said was that "evidence of the Lewinsky matter might have been relevant to plaintiff's case"—meaning, in context, nothing more than minimal logical relevance. Jones v. Clinton, 993 F. Supp. 1217, 1222 (E.D. Ark. 1998). All of the trial judge's comments in the hearing before the deposition was taken suggested that any evidence that did not back up the plaintiff's "hostile environment," "quid-pro-quo" or "pattern-of-sexual-assault" theories would be excluded at trial. Her order excluding the Lewinsky evidence from the case concluded that even if it did fit into the "patterns" hypothesized by the plaintiffs it would still be too remote from the plaintiff's own situation to be anything but collateral character evidence and would therefore be excluded under rules 404(a) and 403 of the Federal Rules of Evidence. See supra notes 81-84 and accompanying text.

234. The closest the OIC came to something that might look like actual obstruction or witness tampering was Clinton's desperate rehearsal of his cover story with his secretary, Betty Currie ("You were always there when she was there, right?" "We were never really alone." "Monica came on to me, and I never touched her, right?"), but there was nothing to show Currie was intimidated or even influenced by this rehearsal, or for that matter that she was a likely witness in any proceeding. The OIC also said Clinton obstructed justice when Currie retrieved and hid the gifts he gave Lewinsky, but its evidence suggested that this may have been Lewinsky's idea, and it had no evidence that Clinton had instigated it. The OIC's other obstruction charges, that Clinton had lied to his aides about the affair, and encouraged them to repeat his
To a reader of the OIC's narrative, it is clear that Clinton was worried about discovery in *Jones* not because evidence of the affair would strengthen Jones's case but because his deposition would provide his enemies with a forum to make the affair public and undeniable. It is not at all clear how far he was prepared to press Lewinsky, Currie, Jordan and other witnesses to go in his defense if his conduct and their stories became the subject of serious scrutiny; and hard to credit that he wanted them to put themselves in any real jeopardy out of loyalty to him. A candid referral would have pointed out—as the President's lawyers were eventually to do at length in his Senate trial—the ambiguities and gaps in proof and the potentially exculpatory inferences.

Would Clinton's lies in *Jones* have been worth prosecuting? This is a discretionary legal judgment that the IC is competent (and indeed authorized) to make; but Starr does not make it. He devotes much space to arguing that "perjury" in the abstract is a serious threat to justice, and that lying under oath may not be excused because the answers concern intimate relations whose revelation would be embarrassing, even if the lawsuit is frivolous and politically motivated.235 Hardly anybody, however, was suggesting that Clinton's lies be condoned—though in fact I think there is a plausible case that he was backed into a corner where they were almost justifiable—only that they were not a fit target for criminal investigation or impeachment. Hard-bitten prosecutors came forward to testify that Clinton's Lewinsky deposition was a nothing case, from a prosecutor's point of view.236 Starr does not try to refute this widespread view, or to justify the OIC's conduct. He simply does not discuss this crucial question. His referral rests on the custom of prosecutors, claiming, incredibly, that "the Department of Justice often prosecutes for perjury that occurs during the course of civil proceedings"237—a statement that can only be made accurate by substituting "very rarely" or at the most "occasionally" for "often." One surmises that Starr was unwilling to advance any arguments that these particular lies were a source of grave harm to the interests of justice, because that is very hard to maintain. Instead, his argument had to be, and was, that gradations were irrelevant, that all false statements under oath however slight erode the legal system and therefore deserve maximum penalties. That position, as I have tried to argue here at length, is indefensible. It elevates truth-telling in official proceedings above all conceivable competing values that might soften or excuse evasions. It would subject to risk of felony convictions many millions of taxpayers, litigants, government

lies to grand juries, were never more than frivolous: these "witnesses" had no first hand knowledge of any facts other than the stories Clinton was telling them, which were the same stories he was telling his wife and the public.

235. See Starr Presentation, supra note 30, at 18.
236. See Presentation on behalf of President, supra note 169, at 283-322.
237. See Appendices, supra note 73, at 271.
job and loan applicants, or tourists making customs declarations, who shade and stretch the truth. It would occupy all the time and budgets that prosecutors have available to prosecute perjury in their jurisdictions, including that of their own favorite witnesses, police officers, and informers, for providing the convenient testimony that helps make their cases. The aspiration of equal and total punishment for all perjuries is utopian. The attempt to enforce it would be morally blind and totalitarian.

Was the conduct impeachable? Starr, as I have said, could simply have reported the facts he had (though much more impartially than he did!) and said, “It’s not my job to say whether all this adds up to impeachable conduct; all I can say is that some of you may think so.” The referral argues that the evidence it sets forth is serious enough to justify impeachment. But it does not really argue the matter of the appropriate Constitutional standard, implying that such matters are outside the IC’s province and best left to Congress. Starr could have left it at that. But once he undertook, as he did, his own analysis of whether the evidence justified impeachment, he was obliged to perform it even-handedly. He did nothing of the kind. By the time he appeared before the House Judiciary Committee, Starr had abandoned the pose that he was simply presenting evidence that the House might conceivably construe as grounds for impeachment. His statement had become his “J’Accuse!” On the facts he had become a passionate advocate making a closing argument, listing ten categories of misconduct in which, he now conclusively asserted, Clinton had engaged. On the legal standard he now took an emphatic position that this misconduct justified impeachment under the Constitution. He quoted members of Congress in support of his position. Yet the position is one-sided and highly questionable.

Starr’s position, recall, is that offenses that meet (or, well, sort of maybe almost meet) the statute book’s definitions of serious felonies (perjury and obstruction of justice) are ipso facto crimes that justify impeachment. The Constitution specifies “Treason, Bribery, or other high Crimes and Misdemeanors”; Starr argues that perjury and obstruction are (approximately) equivalent to bribery, since they also subvert justice. Even conduct that is not criminal at all, such as lying to one’s aides and in public, and asserting legal privileges that slow down an investigation, are impeachable offenses when the President commits them, because the President should set a good example of respect for law—and for law enforcers, especially the OIC.

This position seems to me, as it does to most other constitutional and historical scholars, to run sharply against the grain of historical

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understandings of the purposes of impeachment, the little experience we have with presidential impeachments and near-impeachments (the Andrew Johnson and Richard Nixon cases), and a constitutional structure that relies primarily on elections to select and de-select Presidents and reserves impeachment for great offenses against the state. If the President's primary misbehavior is conduct that would not be prosecuted as an ordinary crime, and also is not a grave abuse of his public office which poses a serious danger to the state, it is hard to see how it can qualify as a "high Crime." As for deceiving the public, no president one can think of would have been able to resist impeachment under such a standard, which would put the president's continued service in office entirely at the whim of Congress, even if as in Clinton's case he retains the public's confidence in his capacity to perform his public duties. My point here however is not to re-argue the endlessly argued case for and against impeachment; I will stipulate, though I do not actually believe it, that "there may be something to" Starr's position. Yet whether or not it had much validity, it was very much debatable, and indeed being actively debated. Starr took an extreme position in the debate, a position that had some supporters but was against the great weight of informed lawyers', historians', and political scientists' opinion, without ever fairly stating the arguments against his views or even trying to meet them. If the Independent Counsel were going to take any position on impeachment—and nothing in his charter forced him to do so—he should have fully and fairly presented the factual and legal case from all sides, or at least from a disinterested perspective.

In his testimony Starr tried repeatedly to qualify the partisanship of his presentation of the case by saying that his conclusions simply reflected the "judgment" of the OIC professionals, and that the House was, of course, free to draw different conclusions and arrive at a different judgment. But the OIC did not, in fact, do the job they were supposed to do of giving the House the resources to consider an alternative judgment—the plausible alternative inferences from the facts, the plausible alternative interpretations of criminal and constitutional law.

What was it that drove Starr into the role of partisan advocate? Some have speculated that it was the OIC staff, ideological Clinton-haters and organized-crime-fighters used to dealing with very bad guys, who took advantage of their comparative experience as professional prosecutors to urge their boss to extreme positions. Yet apparently it was Starr himself who overrode some of his senior staff in

242. Some of this speculation may have been bolstered by 20/20's profile of Starr, in which Robert Bittman, one of Starr's deputies, called the Independent Counsel "ignorant" with regard to prosecutorial tactics. See ABC 20/20 (ABC television broadcast, Nov. 23, 1998), available in 1998 WL 5433808.
some of the OIC's most questionable decisions, such as pushing for sexual detail in the referral and prosecuting Julie Steele. Others suspect that Starr is fundamentally a Puritan who was really revolted by the President's sexual conduct, but, lacking a legitimate legal outlet to express that revulsion, channeled it to inflate Clinton's minor-league misdeeds into high crimes or misdemeanors. Undoubtedly, the unrelenting drumfire of attacks from the White House and its supporters on Starr and his office hardened Starr's conviction that his quarry was a monster of duplicity, and he and his staff martyrs in a noble cause. Some of the OIC's conduct can be explained by that epidemic disease afflicting American lawyers, misplaced adversariness, the belief that in every forum the lawyer must take a position, argue it one-sidedly, and do his utmost to "win," even when in fact his only client is the interests of justice. That might explain why Starr's referral is such an advocate's brief—the lawyers just were not socialized to write any other way.

Yet the most frightening and (I suspect) most plausible possibility, ironically, is that Starr thought he was being disinterested, that all the evidence pointed to Clinton's guilt as charged, and the law to the conclusion that he must be removed from office; so that Starr in his own mind was not being an advocate, but simply objectively reporting the facts as he and his "professional" staff had found and weighed them. On this reading Starr himself was taken in by the public image he liked to cultivate—and before his IC days enjoyed a reputation for deserving—as a mild, non-ideological, non-zealous, impartial lawyer, able Solicitor General, and moderate candidate for a Supreme Court appointment, a model of moral rectitude who would be incapable of injudicious conduct. Having fallen victim to his own hubris, he interpreted all challenges to his authority as assaults upon justice itself.

III. AN ADDENDUM: JUDGE POSNER'S VIEWS

Shortly after this Article was submitted to the editors, Judge Richard A. Posner published his book, An Affair of State: The Investigation, Impeachment, and Trial of President Clinton. The comments of so eminent an intelligence on this affair are bound to carry exceptional interest and weight. Posner's book is much broader in scope than my Article, but in places our separate projects overlap; so I thought it might be useful to add this short account of our points of agreement.

243. See Woodward, supra note 85, at 453, 503. Woodward's information about these decisions evidently comes from OIC staff members anxious to distance themselves from the OIC's most egregiously dubious conduct, so its reliability is not foolproof.

244. Some extreme variants of his opinion are discussed in Morton M. Kondracke, Liberal Intellectuals Go Over the Top on Clinton Scandal, Roll Call, Oct. 19, 1998, at 6.

245. See Posner, supra note 17.
agreement and disagreement.

As one could have predicted, Posner’s book is sparkling, lucid, often deeply perceptive, with patches of analysis far more powerful than anything else I have seen in print so far on the Clinton-Lewinsky scandal. His chapter on “Morality, Private and Public” is a shrewd treatise on the relevance of private character to public leadership. Posner deftly sorts out the arguments that Clinton’s conduct with Lewinsky may or may not have affected his capacity to hold office. He makes an interesting case that Clinton’s continuing to evade a blunt acknowledgement of the affair after news of it became public was a failure of “moral courage;” that a President has an exemplary duty to avoid scandals that reduce the President’s effectiveness; that Clinton’s worst fault was his exhibition of disrespect for his office; and that his maneuvers to keep the affair secret exhibited judgment “so atrocious as to shake one’s confidence in his executive competence.”

But Posner also gives generous credit to the arguments that Clinton has redeemed his private faults by being a pretty good President, that he is endowed with private virtues outside the sexual realm, and that many people in modern democracies do not generally expect or require exceptional private virtue in their leaders anyway.

On specific conclusions Posner and I agree at many points. He thinks the Supreme Court was imprudent and naive to let a civil suit about sex proceed against a sitting President; that when the Court decided the Independent Counsel Act was constitutional it didn’t really consider that an investigation of the President might throw the whole country “out of whack.” He argues that no public benefit accrued from exposure of Clinton’s affair with Lewinsky, and that its effect was to divert the attention of the Presidency from important business.

Posner and I also agree that it is extremely unlikely that an ordinary

246. The book is also, alas, disfigured by gratuitously nasty and often unwarranted swipes at rival public intellectuals, especially liberal academics, the favorite target of much of Posner’s recent work. True, academics are not generally at their best when commenting on current events; they tend to be drawn as much as anyone else into polarizing polemics and to exaggerate and caricature to score political points. Nonetheless in this controversy there was no shortage of academics with sensible and illuminating things to say: just for a short list, Bruce Ackerman, Akhil Amar, Samuel H. Beer, Gerard Lynch, Jeffrey Rosen, Arthur M. Schlesinger, Jr., Cass Sunstein, and H. Richard Uviller.
247. See Posner, supra note 17, at 133-69.
248. See id. at 157-59.
249. Id. at 161.
250. See id. at 160-69.
251. See id. at 227.
252. See id. at 224.
253. See id. at 13, 149. “It was important to the nation’s welfare neither that Paula Jones be able to press her marginal sexual harassment case . . . nor that Clinton’s affair with Monica Lewinsky be made public.” Id. at 149.
prosecutor would have pursued an ordinary citizen for Clinton's conduct in the *Jones* case. He searched judicial databases since 1992 for civil cases involving sex or domestic relations, and found only six prosecutions for perjury in all, and only two where other crimes were not charged as well. Yet he also argues that the evidence gathered by Starr's OIC demonstrates that Clinton committed perjury and obstructed justice; and that these were "serious crimes" that required investigation (if not by Starr, then some other special counsel) and might even have possibly justified impeachment. How does he explain these conclusions?

Were Clinton's lies in *Jones* "material" to the case? Posner says yes, "though only just," but the analysis is cursory and unsatisfactory. He argues that Clinton's "willingness to be fellated by a subordinate [Lewinsky] made Jones's charge [that Clinton had solicited her for fellatio] more credible." In my world, evidence that a man has willingly accepted one woman's sexual advances to him is not particularly probative on whether he has made unwelcome advances to another.

Were the lies worth pursuing? This—the issue of whether Starr's OIC exercised appropriate prosecutorial discretion—is the more important question. Posner certainly sees the issue, for he ably sums up many of the reasons that an ordinary prosecutor would not have pursued the case. The ones he stresses are that an ordinary prosecutor would not have had the budget to "drop so marginal and difficult to prove a criminal charge as perjury in a civil deposition," and that an elected prosecutor, "[p]olitically sensitive ... usually avoids prosecuting people for esoteric crimes, as obstruction of justice arising out of a sexual affair might be thought to be." He adds:

> It is the combination of the political and budgetary constraints of prosecutors that makes our vague and broad criminal statutes tolerable; and their breadth and vagueness in turn stop up the loopholes through which serious criminals might otherwise escape justice. The form of the laws and the incentive structure of prosecutors constitute a system that the independent counsel law shatters.

That is well said, except for one big omission. Posner pictures prosecutors here as robot-like creatures of "incentive" systems—budgets, politics, statutes. This is in striking contrast to the much richer psychology of his chapter on Presidential character, which uses terms like "moral courage" and "capacity for moral growth" and quotes Shakespeare and St. Augustine. My view is of course that the crucial virtue of a prosecutor, the virtue that makes the difference

254. See id. at 85.
255. Id. at 49-50.
256. True, the later episode shows he is a man who likes sex, specifically oral sex. That is not what you would call a markedly distinguishing characteristic.
257. Id. at 84.
258. Id.
virtue of a prosecutor, the virtue that makes the difference between a liberal state and a terror state, is prudence, the capacity to make judgements of degree, to distinguish grave infractions of an overbroad and vague statute from trivial ones; and that it was this virtue that Starr’s OIC lacked.

Posner is willing to attribute to “many members of the general public” the judgment to “evaluate obstruction of justice in more nuanced terms,” that is, to consider such things as whether serious injustice was done by the obstruction, whether the cause obstructed had merit or was politically contrived, and whether understandable motives to protect privacy mitigated the offense. But he does not seem to think prosecutors think in these “nuanced” ways because of the “legal professional’s tendency to think of obedience to law as a good of transcendent value.” Posner adds, however, that prosecutors have their own nuances; they tend to prosecute the “barefaced lie” and to pass on “shamefaced lies” such as “I don’t remember:”

The effect of perjury law... is thus to nudge witnesses away from the barefaced and toward the shamefaced end of the perjury spectrum .... [In effect] not so much by deterring perjury as by altering its form from the more to the less difficult to see through.

All together these ideas make up a strange picture of prosecutorial ethics. Prosecutors think of “obedience to law as a good of transcendent value.” But they are willing to sacrifice that value in a second for some expedient reason—limits of budget or political concerns, or the convenience of using dubious police or snitch testimony to get a conviction. They will go after a “barefaced” lie and give a pass to a “shamedfaced” one. But the one thing they will not do (in this account) is to exercise prudential judgment about the gravity of the offense: to distinguish between a lie about something important and something unimportant; to ask if the lie actually interfered or was likely to interfere with the doing of justice or otherwise helped to conceal something that was in the public interest to reveal. This seems to me a very confused set of priorities, and, based simply on personal knowledge of several prosecutors, I just do not believe that good prosecutors share it. If they do, we are all in deep trouble.

Posner’s stronger case that Clinton’s lies mattered enough to be worth prosecuting has more to do with their effect on the public relations or symbolic theatre of the justice system than with any actual injustice they may have caused. He argues that once it was brought to light that a prominent public official had lied and obstructed justice in such ways as Starr’s evidence suggested that Clinton had done, his “transgressions” could not be “easily overlooked. Failure to prose-

259. See id. at 146.
260. Id.
261. Id. at 147.
cute would send a signal that the legal system smiles at obstructing justice."\textsuperscript{262}

Sorry, but I am not persuaded. For one thing, Starr himself has not been willing to say that Clinton’s conduct should be prosecuted, and has in fact probably decided not to prosecute. For another, a prosecutor could easily justify not prosecuting on this occasion to the members of the public who share the “nuanced” judgment that even if Clinton’s behavior could be made to fit the definitions in the statute book, it was not serious obstruction or perjury, and was mitigated by informal privileges. But the root problem with Posner’s analysis as a justification of Starr’s exercise of his discretion is that Starr himself was the producer of the horrific visibility of Clinton’s transgressions, such as they were. If Starr had not spent $7 million investigating the case and summoning Clinton before the grand jury, there would have been no brazen, unignorable public flouting of the law to condemn. As Posner himself puts it:

Maybe a prosecutor ... would have thought it enough to alert the judge in the Paula Jones case to Clinton’s misconduct. Judge Wright could have entered an order defaulting Clinton or administered some other civil sanction if she found he had lied at his deposition. The matter would have stopped there, with no grand jury investigation to provide opportunity and temptation for additional perjury.\textsuperscript{263}

My view exactly.

Was Starr’s OIC partisan? In his general conclusions Posner is very indulgent towards Starr and his team, tending to give them the benefit of the doubt on most of the issues where their judgment and tactics have been questioned. At the same time, he adds some extra details to the case against them. He shows that much of the sexual detail in Starr’s referral was indeed gratuitous, totally unnecessary to making out their case for perjury, thus giving rise to the inference (or at least “speculation”) that Starr’s “intention ... was to destroy Clinton.”\textsuperscript{264} If it was, Posner thinks, “it was a natural response to the campaign of vilification that Clinton’s supporters ... had mounted against Starr. But we expect better from our prosecutors.”\textsuperscript{265} Posner also criticizes the “mountain of ‘evidence’ assembled by the [OIC]” and then dumped into the public domain as “an astonishing farrago of scandal, hearsay, innuendo, libel, trivia, irrelevance, mindless repetition, catty comments about people’s looks, and embarrassing details of private life.”\textsuperscript{266} He comments:

One can imagine a murder or espionage case in which this kind of painstaking inquiry would be necessary.... But there is something

\textsuperscript{262} Id. at 86.
\textsuperscript{263} Id. at 85 (footnote omitted).
\textsuperscript{264} Id. at 81.
\textsuperscript{265} Id.
\textsuperscript{266} Id. at 88 (citations omitted).
a little crazy about turning the White House upside down in order to pin down the details of Clinton’s extramarital sexual activities so that Paula Jones might have a shot at winning her long-shot suit for redress for an offensive but essentially harmless advance made (maybe) by Clinton before he became President.  

Again, I could not agree more.

Given the views just quoted, it is a real surprise to find Posner firmly endorse Starr’s decision to call up all his reserves to “nail” Clinton for obstructing justice in Paula Jones’s case.

They had been frustrated by Webster Hubbell’s refusal (as they thought) to cooperate with them; now they saw what seemed to be the explanation, a kind of underground railroad running from the government in Washington to Revlon in New York along which Clinton and Vernon Jordan whisked potential witnesses against Clinton out of reach of investigators.

One would have supposed from Posner’s sardonic description of the “underground railroad” theory that he has recognized it for what it plainly is—a pretext (and an incredibly flimsy one at that) for hooking up the Clinton-Lewinsky tender to the OIC’s stalled Whitewater train. But no! He takes it at face value, or at least with a straight face, says it was a “natural inference from what was known when Tripp first approached Starr that Clinton and Jordan were engaged in a pattern of obstructing justice in matters already under investigation,” and concludes that “Starr thus was”—a “thus” leaping many chasms of inference—“duty-bound to bring the contents of Tripp’s tapes to the attention of the Attorney General, and she was duty-bound to advise the Special Division to appoint someone to investigate the suspicious Presidential conduct that the tapes suggested, though it need not have been Starr.”

But were they duty bound to turn the government and the country upside down for months to get to the bottom of the matter? Or was their duty rather to advise Clinton to change his testimony or keep silent in the Jones deposition? And even if not that, was it not their

267. Id. at 91. Posner wonders why anyone “summoned before the grand jury who was not a target or even a subject of the Independent Counsel’s investigation bothered to hire a lawyer,” and speculates the reason may have been that Clinton wanted them to have lawyers to protect not themselves but him. Id. at 72-73 (footnote omitted). But nobody who had observed the Starr OIC’s re-enactment of General Sherman’s March through Georgia in Arkansas and later in the White House could have failed to notice that the OIC had an unpleasant habit of turning witnesses into targets or subjects when not told what it wanted to hear.

268. “[T]ypical hardball prosecutorial methods,” Posner calls them with evident relish. See id. at 69.

269. Id. at 69-70.

270. Id. at 70.

271. Posner mentions that the IC could have warned Clinton before his deposition, and that by not doing so it “may have been trying to ‘set up’ the President to commit
duty to weigh the possible benefits of pursuing the matter (exposure of an affair that would vindicate the legal system’s abstract interest in witness truth-telling, or at least an appearance of such an interest; but would not contribute much if anything to justice for Jones) against the costs (adding fuel to a major scandal, helping discredit the Presidency and distract the President, racking up enormous investigative costs and lawyers’ fees and wreaking havoc with a lot of innocent lives)?

Yes, it would have taken some fortitude for Starr or the Attorney General to explain why they had not acted on the tapes, but not that much. All they had to say was, “The matter was outside our jurisdiction; Ms. Tripp seemed to be pursuing a private vendetta; it is not customary for prosecutors to intervene in a civil case, especially a case brought with the apparent motive of embarrassing a political enemy; the decision to impose sanctions for discovery abuse was one for the trial judge in the Jones case to make if she thought they were justified; and in our judgment the possible offenses involved were in any case too minor to warrant the expensive and disruptive investigations that would be needed to establish the truth.” Posner here seems to adopt the view of the legal system as a runaway train with nobody at the controls exercising any judgment or discretion—whereas in fact there were people at the controls, Starr and his team, all pretending they were on a runaway train. In this piece of his argument Judge Richard Posner, the Prince of Cost-Benefit Calculus, seems to have fallen asleep at the switch.

Posner is similarly charitable in dealing with Starr’s referral. He says it was one-sided because the evidence was one-sided, and that Starr was not an “advocate” for impeachment. If all Posner means is that Starr was justified in concluding from the evidence he had assembled that some Congressmen might think it “substantial and credible” evidence of impeachable offenses, he is right. Starr however omitted to present the counter-case that it might also not justify impeachment, depending on how one analyzed the evidence and the impeachment standard; and arguably, as an “independent” counsel, he should have done so. Whether or not he should have done so, it is clear that he had no business becoming—as he undoubtedly did—an outright advocate for impeachment in his testimony before the House Judiciary Committee, which Posner does not mention in this connection.

and suborn perjury; and it may have been doing this in direct or indirect cooperation with Paula Jones's lawyers.” Id. at 78. He adds: “[T]o conduct a sting operation against the President of the United States, in concert with the President’s partisan enemies, is certainly questionable as a matter of sound enforcement policy.” Id. Posner goes on to say that such a sting is not a “legal defense against prosecution,” and of course he’s right about that, though juries may well consider it an exculpatory factor if they become aware of it.

272. See id. at 79.
Posner dismisses outright the theory that Starr’s motive for pursuing Clinton so aggressively was sexual puritanism. He does think Starr may have been affronted and his resolve to nail Clinton strengthened by the campaign of vilification waged against him and his office by Clinton’s supporters; this seems plausible to me as well. Posner does not pay much attention to what I think are other likely explanations: that some lawyers on Starr’s team were in league or maybe just in sympathy with Clinton’s political enemies; and others were suffering from misplaced adversariness, transferring attitudes and practices learned in the prosecution of organized crime to the very different context of minor crimes in a civil context created for political reasons.

In a couple of respects reading Posner has caused me to revise my opinions of the case. His analysis of the obstruction count suggests that the OIC lawyers made out a stronger case for the evidence against Clinton on obstruction than my Article gives them credit for. He has also suggested some plausible additional reasons (his “duty to avoid scandal” and “disrespect for office” theories) for thinking Clinton’s private vices might be of public moment. But on the whole—especially if one looks at the details of Posner’s argument rather than at conclusions that are sometimes rather askew to those details—Posner’s re-analysis of the case mostly reinforces my view that the OIC’s behavior presented a much greater menace to justice and the rule of law than Clinton’s did. Posner himself in a characteristically bravura passage echoes these concerns:

The machinery of federal criminal investigation and prosecution, with its grand juries, wiretaps, DNA tests, bulldog prosecutors, pre-trial detention, broad definition of conspiracy, heavy sentences (the threat of which can be and is used to turn criminals into informants against their accomplices), and army of FBI agents, is very powerful; there is a fear that fed enough time and money, it can nail anybody. There is some truth to this, since there are literally thousands of federal criminal laws, many of them at once broad, vague, obscure and underenforced, and since Americans tend not to be docile and obedient. If every American had an independent counsel on his tail, we would live in a police state.273

**CONCLUSION**

The ideal of the rule of law becomes a menace if it is construed to mean that every criminal statute must be pressed to the utmost against every offender. Law enforcement requires discretion, which must be exercised prudently and objectively. The Independent Counsel created by the Independent Counsel Act was given great discretion. It was predictable that the license given by the Act might tempt counsel

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273. Id. at 87.

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to abuse that discretion. Some counsels avoided that temptation. In
their decisions to investigate President Clinton’s statements in a civil
case about his relationship with Monica Lewinsky and to recommend
that Congress impeach him for obstructing justice in that case, Ken-
neth Starr and his office did not.