

CLINTON'S LITTLE WHITE LIES: THE MATERIALITY REQUIREMENT FOR PERJURY IN CIVIL DISCOVERY

I. WHO CARES?

The Clinton scandal called the nation's attention to the neglected offense of perjury. It would seem that perjury remains a common occurrence in criminal, civil, and administrative proceedings, and yet perjury prosecutions are rare.¹ Perjury prosecutions based on false statements made in civil proceedings appear to be particularly rare—though hardly unprecedented.² It is not surprising, then, that Clinton's supporters repeatedly argued that even if Clinton committed perjury in his deposition for the *Jones v. Clinton*³ suit, it did not constitute an impeachable offense, so we should all just forget about the whole mess and move on.⁴ In other words: *Who cares* if Clinton lied in his deposition concerning his affair with Monica Lewinsky?

Apparently, the House of Representatives did not care—at least not enough to impeach Clinton for it. The House rejected the second article of impeachment presented to it by the Judiciary Committee, which charged that “William Jefferson Clinton, in sworn answers to written questions asked as part of a Federal civil rights action brought against him, willfully provided perjurious, false and misleading testimony in response to questions deemed relevant by a Federal judge”⁵ Nevertheless, Clinton's alleged perjury in his civil deposition remained the tail that wagged the impeachment dog. The first article of impeachment passed by the House accused Clinton of

1. *See infra* Part II.D.

2. *See infra* notes 92-95 and accompanying text.

3. No. LR-C-94-290 (E.D. Ark.)

4. *See, e.g.*, 145 CONG. REC. S194-96 (daily ed. Jan. 14, 1999) (Answer of President William Jefferson Clinton to the Articles of Impeachment).

5. 144 CONG. REC. H11774 (daily ed. Dec. 18, 1998). The second article was rejected by a vote of 229-205. *See* 144 CONG. REC. H12041 (daily ed. Dec. 19, 1998).

lying about lying in his civil deposition, before a federal grand jury convened to investigate allegations of perjury in the *Jones* suit.⁶ The other article passed by the House accused Clinton of engaging in conduct designed to conceal the evidence “related to a Federal civil rights action brought against him in a duly instituted judicial proceeding.”⁷ It remains to be seen whether Independent Counsel Kenneth Starr will indict Clinton for committing perjury in the *Jones* suit.⁸

This Comment explores two interrelated legal issues raised by the Clinton team’s “Who cares?” response to allegations that Clinton perjured himself in the *Jones* suit.

First, the applicable federal perjury statutes—18 U.S.C. §§ 1621 and 1623—contain their own built-in “Who cares?” defense: a defendant cannot be prosecuted for telling *trivial* lies, even if the defendant told such lies under oath and before a judge. Perjury requires false statements that were actually “material” to the underlying proceedings.⁹ However, it is not clear how the requirement of materiality should be applied in the context of civil discovery. The federal circuits are split on the issue.¹⁰ Should every knowingly false answer to questions within the legitimate scope of discovery be deemed material? Or should materiality be construed more narrowly? For example, should materiality depend on whether the false statements could have been admitted into evidence at a subsequent trial and, if so, whether they actually could have affected the outcome of that trial?

Second, and more fundamentally, why should the State care about lies made during the preliminary stages of a private lawsuit, to the point of actually criminalizing such lying? Can the State be expected to police the hundreds of millions of discovery documents produced each year in civil litigation in an effective, efficient, and fair manner? The scope of the materiality requirement, which repre-

6. See 144 CONG. REC. H11774 (daily ed. Dec. 18, 1998).

7. *Id.*

8. See, e.g., Don Van Natta Jr., *Starr is Weighing Whether to Indict Sitting President*, N.Y. TIMES, Jan. 31, 1999, at 1 (suggesting that Starr may indict Clinton for perjury).

9. See 18 U.S.C. §§ 1621(1), 1623(a) (1994).

10. See *infra* Part III.

sents a limitation on perjury liability, should be defined in light of the practical difficulties of criminalizing false statements made in private lawsuits.

This Comment uses the Clinton affair as a vehicle for studying the definition of materiality in prosecutions for perjury based on civil discovery.¹¹ Part II surveys the history, purpose, and prevalence of perjury prosecutions. Part III analyzes the case law on the materiality requirement in the civil discovery context and proposes a narrow standard for materiality in this context. Part III also contends that there are more appropriate tools for policing discovery than perjury prosecutions—in particular, trial courts' sanction and contempt powers and the inherent checks of the adversarial system itself. Part IV applies the approaches to materiality reviewed in Part III to *Jones v. Clinton*, concluding that Clinton's false deposition testimony regarding Monica Lewinsky was not material to the *Jones* suit.

II. THE NEGLECTED OFFENSE OF PERJURY

A. Historical Background on Perjury

The history of perjury is fraught with controversy.¹² A number of eminent legal historians¹³ have concluded that perjury was not a common law crime before the Perjury Statute of 1563.¹⁴ In the

11. It should be noted at the outset that this Comment focuses solely on Clinton's deposition testimony regarding his affair with Monica Lewinsky. For the purposes of this Article, this testimony is assumed to have been knowingly false. This Article does not address the possibility that Clinton's denial of making sexual advances on other women was perjurious. Nor does it address the question of whether Clinton committed perjury before a federal grand jury or was guilty of obstructing justice.

12. See Michael D. Gordon, *The Invention of a Common Law Crime: Perjury and the Elizabethan Courts*, 24 AM. J.L. HIST. 145, 146-51 (1980).

13. See, e.g., 2 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 366 (3d ed. 1923); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 436 (5th ed. 1956); 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 542-43 (Lawyers Literary Club 2d ed. 1959); 3 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 240-50 (London, MacMillan 1883); JAMES B. THAYER, A PRELIMINARY TREATISE OF EVIDENCE AT THE COMMON LAW 17, 100-01 (1898).

14. 5 Eliz., ch. 9 (1563) (Eng.).

words of Pollock and Maitland, “our ancestors perjured themselves with impunity.”¹⁵ While historians have not universally accepted this position,¹⁶ it appears that early English law regarded perjury primarily as a religious offense. It was left to God to punish perjurers.¹⁷

The rather late appearance of the offense of perjury may be attributed, in part, to the emergence of the modern jury trial, based on witness testimony.¹⁸ The Perjury Statute of 1563 punished witnesses who provided false testimony.¹⁹ As Milsom remarked, prior to the Sixteenth Century, “[p]erjury by witnesses . . . could not be a common law offence because witnesses had no formal existence.”²⁰

But such reference to the genesis of the modern jury trial does not fully explain the late appearance of perjury as a common law defense. Oath-taking was also central to the form of proof known as wager of law, or the party oath, which predated trial by witnesses.²¹

15. POLLOCK & MAITLAND, *supra* note 13, at 543.

16. *See, e.g.*, 2 WILLIAM BLACKSTONE, COMMENTARIES *138. *See* Gordon, *supra* note 12, at 146-51 for a discussion of the debate.

17. *See* HENRY CHARLES LEA, THE DUEL AND THE OATH 32 (Edward Peters ed. & Arthur C. Howland trans., Univ. of Pa. Press 1974) (1866) (stating that “the legends are numerous which record how the perjured sinner was stricken down senseless or rendered rigid and motionless in the act of swearing falsely”). The one form of perjury unquestionably recognized at common law was attain—perjury by the jury. Under the writ of attain, a jury’s verdict could be brought before a new jury of twenty-four men; if the new jury disagreed with the first verdict, the first jury would face serious punishment. Thus, unlike modern perjury, attain imposed punishment for innocent and knowing falsehood alike. *See* POLLOCK & MAITLAND, *supra* note 13, at 542. However, attain was not available where the parties “put themselves’ upon a jury” but was limited to assizes, where the jury sat by royal ordinance—and even then, it was only punished in a “casual and incidental fashion.” *Id.* at 541-42. Attain was abolished by the celebrated *Bushel’s Case*, 124 Eng. Rep. 1006 (C.P. 1670) (Eng.).

18. *See* THAYER, *supra* note 13, at 122-36; PLUCKNETT, *supra* note 13, at 435-36; 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 575, at 800-02 (Chadbourn rev. 1979).

19. *See* PLUCKNETT, *supra* note 13, at 436. It should be noted that parties were not competent to testify as witnesses until the nineteenth century. *See* 2 WIGMORE, *supra* note 18, §§ 575, 576, at 804-08, 817-18.

20. S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 366 (1969).

21. *See, e.g.*, LEA, *supra* note 17, at 13-99; Helen Silving, *The Oath: I*, 68 YALE L.J. 1329, 1335-36, 1364 (1959); THAYER, *supra* note 13, at 24-34. Un-

Here, too, it appears that a party was not liable for perjury even if manifest evidence was introduced that the party swore falsely in waging his law.²² For example, Gouldsborough reported that in 1587, the Star Chamber ruled that an individual could not be held for perjury despite falsely waging his law: “although that he make a false oath, yet he shall not therefore be impeached by bill in the Star-chamber; and the reason was, because it is as strong as a tryall.”²³

Similarly, in *Slade’s Case*,²⁴ Lord Coke reported that where the defendant is permitted to wage his law, such as in an action of debt, his oath is final—“*jusjurandum in hoc casu est finis*”—“for the plaintiff is bound thereby, and it is the end of the controversy.”²⁵ Thus, defendants were prevented from waging their law in as many suits as possible—as they were prevented from doing in actions on the case—for “experience proves that men’s consciences grow so large that the respect of their private advantage rather induces men . . . to perjury.”²⁶ Lord Coke bemoaned the fact that “in these days so little consideration is made of an oath,” even though it is a religious act to swear by God.²⁷ In fact, Coke remarked, the party oath is the devil’s current instrument of choice for dragging lost souls down to hell.²⁸ Nevertheless, defendants considered it their “birth-right” to submit their oath in this way—committing perjury with impunity until their day of judgment—and wager of law was not officially put to rest until 1833.²⁹

In the modern era, perjury has been transformed from a crime

der wager of law, “[i]f a defendant on oath and in a set form of words will deny the charge against him, and if he can get a certain number of other persons (compurgators) to back his denial by their oaths, he will win his case.” 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 305 (3d ed. 1922) (footnote omitted).

22. See LEA, *supra* note 17, at 22-24 & n.5; Silving, *supra* note 21, at 1387-88.

23. 75 Eng. Rep. 988 (K.B. 1587); see THAYER, *supra* note 13, at 30.

24. 76 Eng. Rep. 1074 (K.B. 1602).

25. *Id.* at 1079.

26. *Id.* at 1078.

27. *Id.* at 1079.

28. See *id.* at 1078 (“*jurare in propria causa . . . est saepenumero hoc seculo praecipitium diaboli ad detrudendas miserorum animas ad infernum*”) (English paraphrase above).

29. See Silving, *supra* note 21, at 1363.

against God to a crime against the State.³⁰ The courts have described perjury as a serious offense against the judicial process itself. Thus, the Model Penal Code classifies perjury as a “Government Function Offense.”³¹ In *Miles v. State*,³² a case involving a defendant charged with perjury stemming from a civil proceeding, the Criminal Court of Appeals of Oklahoma declaimed:

This case has been advanced on the docket because of its peculiar importance. Perjury corrupts and defiles the stream of justice. Every effort should be used to thwart the slightest temptation to resort to it. All courts should be vigilant, in their endeavors to punish perjury, and those who seek to make use of it as an instrument of fraud. Delay in so doing places a premium on perjury and in the eyes of the public makes a mockery of judicial administration. Let this case stand as a beacon light of expectancy to those who would resort to false swearing as a means of consummating the perfidious objectives of rascality.³³

Extending this sentiment—albeit without the same rhetorical flourish—the Second Circuit has described perjury as a crime against the administration of justice in the abstract. It works its harm even when it does not compromise any particular proceedings:

[t]he purpose of the perjury statute . . . is to keep the process of justice free from the contamination of false testimony. It is for the wrong done to the courts and the administration of justice that punishment is given, not for the effect that any particular testimony might have on the outcome of any given trial.³⁴

Similarly, in *United States v. Holland*,³⁵ the Eleventh Circuit

30. See *id.* at 1382 (“The state increasingly, though imperceptibly, adapted the allegedly ‘religious’ notion of the oath to its own practical needs The state assumed what had been the status of the Divinity and of the Church, as the authority to whom ‘truth’—truth *per se*—is due, regardless of the results of falsehood.”).

31. MODEL PENAL CODE § 241 (1980).

32. 268 P.2d 290 (Okla. Crim. App. 1954).

33. *Id.* at 294.

34. *United States v. Manfredonia*, 414 F.2d 760, 764 (2d Cir. 1969).

35. 22 F.3d 1040 (11th Cir. 1994).

vehemently rejected the notion that “perjury is somehow less serious when made in a civil proceeding” because it “results in incalculable harm to the functioning and integrity of the legal system as well as to private individuals.”³⁶ The court held that the defendant was not entitled to a downward departure under the United States Sentencing Guidelines simply because he committed perjury in civil rather than criminal proceedings.³⁷

The Eleventh Circuit’s dictum that civil perjury is no less serious than criminal perjury—despite the vastly different stakes of the two proceedings—recalls Jeremy Bentham’s critique of the English approach to perjury. Bentham faulted the English legal system for failing to account for the differing degrees of perjury and argued that perjury should be punished according to the “species and degree of *mischief* that in each instance might be expected to result from the violation of the testimonial truth.”³⁸ He imagined two examples of false testimony to illustrate his position: in the first, a witness’ false testimony resulted in his own father’s execution, while in the second, the witness’ false testimony resulted in his neighbor’s wrongful conviction for littering.³⁹ Any criminal system that punishes such crimes equally has failed to achieve proportionality in punishment.

In fact, the United States Sentencing Guidelines address Bentham’s general concerns—but only up to a point. Section 2J1.3, which governs perjury, calls for a three level sentencing increase where the defendant’s perjury “resulted in substantial interference with the administration of justice.”⁴⁰ According to the Guidelines’ Commentary, “substantial interference” includes “premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury . . . or the unnecessary expenditure of substantial governmental or court resources.”⁴¹ However, as a means of curing the defects in the law of perjury that

36. *Id.* at 1047.

37. *See id.* at 1048.

38. 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 368-69 (Fred B. Rothman & Co. 1995) (1827).

39. *See id.* at 367.

40. U.S. SENTENCING GUIDELINES MANUAL § 2J1.3(b)(2) (Nov. 1998) [hereinafter USSG].

41. *Id.*, commentary (n.1).

Bentham condemned, section 2J1.3(b)(2) is overinclusive: it fails to distinguish between perjury that results in criminal conviction or acquittal and perjury that simply wastes the court's time.⁴² Thus, both perjurers in Bentham's example would be eligible for the "substantial interference" enhancement.

Subsection 2J1.3(c) presents another basis for enhancing a perjuror's sentence. This subsection states that a defendant who committed perjury "in respect to" a criminal offense is to be punished as an "accessory after the fact" for that offense.⁴³ However, there are no recorded cases in which this enhancement was imposed on a government witness who committed perjury *against* a criminal defendant—perhaps because it would be conceptually perverse to sentence the defendant as an accessory to a crime that he or she was helping to prosecute.⁴⁴ This time, it would appear that in many situations *neither* of Bentham's hypothetical perjurers would be eligible for the section 2J1.3(c) enhancement. Thus, section 2J1.3(c) is underinclusive.

In contrast, the French punish perjurers more in accordance with the nature of the mischief.⁴⁵ Under French law, perjurers in criminal

42. The Second Circuit has suggested that the court resources consumed by the defendant's perjury trial itself may properly be considered under section 2J1.3(b)(2), although this is probably not enough, standing alone, to justify the three level enhancement. *See* *United States v. DeSalvo*, 26 F.3d 1216, 1223-24 (2d Cir. 1994). This would make subsection (b)(2) even more overinclusive. *But see* *United States v. Duran*, 41 F.3d 540, 546 (9th Cir. 1994) (holding that court may not enhance sentence under 2J1.3(b)(2) because of court time wasted on defendant's perjury trial).

43. USSG § 2J1.3(c)(1) (Nov. 1998). Of course, in no event may a defendant be sentenced to more than the statutory maximum for perjury, which is 5 years under both §§ 1621 and 1623.

44. *See* *United States v. Heater*, 63 F.3d 311, 331 (4th Cir. 1995) (holding that section 2J1.3(c)(1) applies if defendant lied in order to protect himself or to assist another person in avoiding punishment, citing USSG § 2J1.2, commentary. (backg'd) (Nov. 1998), which states that the enhancement was aimed at conduct designed to "avoid punishment for an offense that the defendant has committed or to assist another person to escape punishment for an offense . . ."). *Heater's* reasoning suggests that section 2J1.3(c)(1) does not apply where the defendant was testifying for the government when he or she committed perjury.

45. Similarly, under Biblical law, perjurers were punished according to the *lex talionis*; the same punishment was inflicted on them as they inflicted on

proceedings suffer greater punishment than civil perjurers.⁴⁶ Perjury committed in civil proceedings is subject to two to five years' imprisonment.⁴⁷ Perjury committed in criminal proceedings is subject to five to ten years' imprisonment.⁴⁸ However, if the perjurer testified against a criminal defendant, and the defendant was convicted and sentenced to more than five to ten years' imprisonment, the perjurer is to suffer the same sentence ordained for the criminal defendant.⁴⁹

B. The Materiality Requirement

There is a further problem with the "government function offense" approach to perjury. To punish false testimony without regard "for the effect that any particular testimony might have on the outcome of any given trial,"⁵⁰ as the Second Circuit advocated in *Manfredonia*, risks reading out of the federal perjury statutes an essential element of the offense, namely, materiality.⁵¹ Perjury is not *simply* an offense against the administration of justice. Some judicial lies are not punishable as perjury; only those lies that have the "natural tendency" to affect the outcome of the proceedings constitute perjury.⁵² In other words, perjury requires a *material* false statement.⁵³

In effect, the materiality requirement in modern perjury statutes represents a compromise between two competing conceptions of the nature of the offense. On the one hand, perjury consists in "the abstract jeopardy of judicial security" regardless of its actual effects on a given decision.⁵⁴ On the other hand, perjury is a species of fraud that injures the legal rights of others.⁵⁵ These positions may not be

those they testified falsely against. See *Deuteronomy* 19:18, 19.

46. See CODE PÉNAL [C. PÉN.] arts. 361, 363 (Fr.).

47. See C. PÉN. art. 363.

48. See C. PÉN. art. 361.

49. See *id.*

50. *Manfredonia*, 414 F.2d at 764.

51. See *United States v. Gaudin*, 515 U.S. 506, 509 (1995) (holding that materiality is an essential element of a prosecution under 18 U.S.C. § 1623).

52. *Kungys v. United States*, 485 U.S. 759, 770 (1988).

53. See 70 C.J.S. § 12 (materiality is element of perjury at common law); *Kungys*, 485 U.S. at 769.

54. *Silving*, *supra* note 21, at 1387.

55. See *id.* at 1386-87 (discussing the debate on the nature of perjury among the great German criminal theorists, Feuerbach, Mittermaier and von

fully reconcilable; the consequence of this conflict is inconsistency in the courts' application of the materiality requirement.

From the earliest times in Anglo-American law, the offense of perjury has included a materiality requirement. Lord Coke stated that perjury consists of swearing falsely "in a matter materiall to the issue, or cause in question."⁵⁶ He explained:

For if it be not materiall, then though it be false, yet it is no perjury, because it concerneth not the point in suit, and therefore in effect it is extrajudiciall. Also this act giveth remedy to the party grieved, and if the deposition be not materiall, he cannot be grieved thereby.⁵⁷

The materiality requirement limits perjury liability to situations where the defendant made knowingly false statements that at least had the potential to affect the rights of another. If an individual testifies falsely to an immaterial matter, he has at most committed the offense of false swearing, a simple misdemeanor in the jurisdictions that recognize the offense at all.⁵⁸ As one court noted, false swearing is "designed to promote the policy of discouraging all the falsehoods made under oath, even where there has been no substantial impairment of the administration of justice."⁵⁹ In contrast, perjury only targets false statements that have the capacity to cause such a "substantial impairment of the administration of justice."⁶⁰ Accordingly, perjury is a felony under federal law. The materiality requirement therefore ensures that an individual does not face serious punishment for a "declaration which pertained to a matter of little significance in the context of a judicial proceeding."⁶¹

While there may be strong reasons for somehow sanctioning *all* false testimony given in a judicial proceeding, the nature and extent of the sanction should be determined by the potential for harm posed

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56. 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND *164.

57. *Id.* at ch. 74 § 167.

58. See 70 C.J.S. *Perjury* § 12 (1996) ("Materiality is not an element of the statutory crime of false swearing . . .").

59. *Commonwealth v. Stallard*, 958 S.W.2d 21, 25 (Ky. 1997) (quoting the Official Commentary to Kentucky Revised Statutes Annotated § 523.040, Kentucky's False Swearing statute).

60. *Id.*

61. *United States v. Harvey*, 657 F. Supp. 111, 116 (E.D. Tenn. 1987).

by the defendant's false testimony, as Bentham argued. This brings us to the conception of perjury as fraud. Such a conception is intuitively appealing, for it is much easier to recognize the actual harm done to a particular individual as a result of perjured testimony than it is to discern the "incalculable harm" thereby caused to the administration of justice in the abstract. Thus, throughout the impeachment drama, a number of Republicans argued that President Clinton's false deposition testimony was a serious—in fact, an impeachable—offense precisely because, they claimed, it prejudiced Paula Jones's civil suit. For example, Republican Representative Rogan declared that Clinton's deposition testimony was "designed to defeat Paula Jones' right to pursue her sexual harassment civil rights lawsuit."⁶² Republican Representative Gekas contended that Clinton's conduct amounted to an "attempt to obliterate the Paula Jones civil suit."⁶³ Gekas continued:

That is what it is, not that he committed perjury. So what? It is what the end result of that perjury might be that you should weigh. Skip over the fact that he committed perjury. We all acknowledge that it is said. But now tell me what that does to Paula Jones, or potentially could do to Paula Jones, or to one of you, or to one of your spouses, or to one of the members of your community who wants to have justice done in the courts.⁶⁴

We will examine this claim in Part IV, below.

Sanctions other than criminal punishment are available for judicial lies of little significance, which do not, practically speaking, threaten to harm another party. In fact, fairness and efficiency demand the adoption of a perjury standard that distinguishes between different "grades" of lies. This is borne out by a review of the statistics relating to the prosecution of perjury. Despite the many federal statutes that target false statements, perjury and its false statement cousins remain offenses neglected by prosecutors. The following

62. 145 CONG. REC. S246 (daily ed. Jan. 14, 1999) (statement by Rep. Rogan).

63. 145 CONG. REC. S268 (daily ed. Jan. 15, 1999) (statement of Rep. Gekas).

64. *Id.*

section reviews the facts and figures surrounding the federal false statement statutes.

C. Federal False Statement Statutes

False statements made in civil depositions or interrogatories for federal cases may be prosecuted under either one of two broad perjury statutes: 18 U.S.C. § 1621⁶⁵ or 18 U.S.C. § 1623.⁶⁶ Both sections carry a maximum sentence of five years' imprisonment.⁶⁷

Each offense is defined by the same four elements: an oath, criminal intent, falsity, and materiality. Section 1621 punishes anyone who has (1) "taken an oath before a competent tribunal . . . in any case in which a law of the United States authorizes an oath to be administered" and then (2) "willfully and contrary to such oath states or subscribes" a (3) "material matter" that (4) "he does not believe to be true."⁶⁸ Section 1623 punishes anyone who (1) "under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States" (2) "knowingly" makes or uses any (3) "false" (4) "material" declaration.⁶⁹

The courts have interpreted the materiality requirement in these two statutes identically.⁷⁰ There are, however, a number of important differences between § 1621 and § 1623, but these differences fall outside the scope of this Comment.⁷¹ It is enough to note that Congress enacted § 1623 to "facilitate prosecution of perjury"⁷² by broadening the range of conduct beyond that which § 1621 proscribes.⁷³ Because it is easier to convict a defendant under § 1623,

65. "Perjury generally," 18 U.S.C. § 1621 (1994).

66. "False declarations before grand jury or court," *id.* § 1623.

67. *See id.* §§ 1621, 1623.

68. *Id.* § 1621(1).

69. *Id.* § 1623(a).

70. *See, e.g.,* United States v. Mancuso, 485 F.2d 275, 280 n.15 (2d Cir. 1973); *see also* Michael Jay Kaplan, Annotation, *Determination of Materiality of Allegedly Perjurious Testimony in Prosecution under 18 U.S.C. §§ 1621, 1622*, 22 A.L.R. FED. 379, 386 & n.33 (1975).

71. *See* Kathryn Kavanaugh Baran & Rebecca I. Ruby, *Perjury*, 35 AM. CRIM. L. REV. 1035, 1038-48 (1998), for a discussion of the differences between the two statutes.

72. *Dunn v. United States*, 442 U.S. 100, 107 (1979).

73. *See* Baran & Ruby, *supra* note 71, at 1041.

this Comment focuses on § 1623 prosecutions.

Sections 1621 and 1623 are just two examples among a host of federal statutes criminalizing false statements. For example, it is a federal crime to make false statements in credit applications submitted to financial institutions insured by the FDIC or other federal agencies;⁷⁴ in documents adjusting or canceling farm indebtedness;⁷⁵ in passport applications;⁷⁶ and in immigration and naturalization proceedings.⁷⁷

The broadest—and, perhaps, the most notorious—of these federal false statement statutes is 18 U.S.C. § 1001, “Fraud and False Statements—Statements or entries generally.” This statute prohibits anyone from (a) concealing a material fact, (b) making a materially false statement, or (c) knowingly using a document that contains a materially false statement or entry “in any matter within the jurisdiction of the executive, legislative or judicial branch of the Government of the United States, knowingly and willfully.”⁷⁸

This statute has been characterized as the “flubber of all laws,” because of its “[e]lastic, all-purpose, and fearsome” scope—characteristics that have made it a favorite among independent prosecutors.⁷⁹ Section 1001 enables an aggressive government investigator to manufacture a criminal offense by setting a “perjury trap.”⁸⁰ Suppose the following: A government agent suspects that X has committed a crime, but has only unearthed suspicious—yet non-criminal—conduct by X. The agent then questions X about this suspicious conduct. If X denies having engaged in it, X will be liable

74. See 18 U.S.C. § 1014 (1994 & Supp. II 1997).

75. See *id.* § 1026.

76. See *id.* § 1542.

77. See 8 U.S.C. § 1451(a) (1994).

78. 18 U.S.C. § 1001 (1994 & Supp. II 1997).

79. Paul Glastris, *‘False Statements’: the flubber of all laws*, U.S. NEWS & WORLD REP., Mar. 30, 1998, at 25, 25; see also Jeffrey Rosen, *The Perjury Trap*, NEW YORKER, Aug. 10, 1998, at 28, 30 (discussing the Supreme Court’s recent rejection of the “exculpatory no” defense to prosecution under § 1001, see *infra* note 82).

80. See Rosen, *supra* note 79, at 30-31; Alan C. Miller & Judy Pasternak, *Starr’s Office Let Tripp Give Details to Jones’ Lawyers*, L.A. TIMES, Oct. 11, 1998, at A1 (suggesting that Starr set a perjury trap for Clinton at Clinton’s January 1998 deposition).

for violating 18 U.S.C. § 1001.⁸¹ In effect, the government agent will have “manufactured” a crime simply by questioning X about conduct not itself criminal.⁸² Of course, X may try to disown embarrassing conduct as well as suspicious conduct. Nevertheless, the knowingly false denial of embarrassing behavior to a government agent acting within his or her jurisdiction may be prosecuted under 18 U.S.C. § 1001.⁸³ We should keep in mind the broad reach of § 1001, with its wide grant of discretion to federal investigators, when we consider the proper standard for the materiality limitation on perjury prosecutions in Part III below.

D. Statistical and Anecdotal Background on Perjury Prosecutions

A review of criminal justice statistics suggests that, despite the number of statutes proscribing perjury in all its wondrous and dappled variations, many of our contemporaries perjure themselves with impunity, as well. For example, only 92 of the 60,255 defendants disposed of in U.S. District Courts in 1996 faced perjury as their most serious offense—just 0.15%.⁸⁴ The prosecution rate for perjury cases is also lower than the prosecution rate for federal criminal cases generally. In 1993, 729 persons whose most serious suspected offense was perjury, contempt, or intimidation were the targets of criminal investigations concluded by U.S. attorneys; 322 of these

81. See Rosen, *supra* note 79, at 30-31. In *Brogan v. United States*, 522 U.S. 398 (1998), the Supreme Court held that there is no “exculpatory no” exception to 18 U.S.C. § 1001: the mere false denial to a government agent’s inquiry, where it is material to a matter within the agent’s jurisdiction, violates the statute. See *id.* 408.

82. Justice Ginsburg notes that, although Congress may not have intended it, § 1001 confers “extraordinary authority . . . on prosecutors to manufacture crimes.” *Id.* at 408, 410-12 (Ginsburg, J., concurring) (discussing a similar hypothetical).

83. See Rosen, *supra* note 79, at 31.

84. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1996 450-51 tbl.5.29 (Kathleen Maguire & Ann L. Pastore eds., 1997). It should be noted, however, that unsuccessful criminal defendants who committed perjury at trial face an obstruction of justice sentence enhancement. See USSG § 3C1.1 (Nov. 1998). Thus, the federal perjury statistics reflect the fact that prosecutors need not always charge a criminal defendant with perjury to punish the defendant for his or her false testimony.

suspects were not prosecuted.⁸⁵ This amounts to a 55.8% prosecution rate, compared to the 69.1% prosecution rate for all criminal matters concluded by U.S. attorneys.⁸⁶

Nor do perjurers occupy many cells in federal prisons. Only 58 persons convicted of perjury in 1996 were sentenced to prison.⁸⁷ Between October 1, 1993, and September 30, 1994, 67 prisoners who had been convicted of perjury, contempt or intimidation were released; their median time served was 12 months.⁸⁸ Finally, during this same period, there were only 97 federal prison inmates whose most serious conviction was for perjury, contempt or intimidation.⁸⁹ This figure represents just 0.12% of the 78,265 federal inmates at that time.⁹⁰

The federal government does not provide statistics tracking prosecutions for perjury in civil cases, but anecdotal evidence suggests that they are not particularly common. Prosecutors and defense attorneys across the country have remarked that perjury charges based on testimony given in civil suits are rare.⁹¹ In *United States v. Adams*,⁹² the Sixth Circuit stated that “[t]he record suggests . . . that prosecutions for perjury have not heretofore been instituted [within the Western District of Tennessee] in respect of testimony given in civil proceedings,” and drew from this fact, together with other unusual facts in the case, an inference that the defendant may have been the victim of selective prosecution.⁹³

To be sure, it cannot be said that perjury in civil proceedings is *never* prosecuted.⁹⁴ In fact, some defendants have even been prose-

85. See BUREAU OF JUSTICE STATISTICS, *supra* note 84, at 436-37 tbls.5.15 & 5.16.

86. Overall, 75,176 prosecutions resulted from the 108,854 cases handled by U.S. attorneys. See *id.*

87. See *id.* at 452 tbl.5.30.

88. See BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1994 80 tbl.6.6 (1998).

89. See *id.* at 83 tbl.6.9.

90. See *id.*

91. See David E. Rovella, *Will He Escape This Time? Perjury Charge a Stretch, Say Nation's DAs*, NAT'L L.J., Feb. 9, 1998, at A1; Joel Cohen, *Perjury and Fraud in Civil Proceedings*, N.Y.L.J., Jan. 25, 1994, at 1.

92. 870 F.2d 1140 (6th Cir. 1989).

93. *Id.* at 1145-46.

94. See, e.g., Stephen Gillers, *Civil Case Perjury is Prosecuted*, L.A. DAILY

cuted and convicted for lying about *sex* in a civil suit. For example, a U.S. postal supervisor sued for sexual harassment was recently convicted of perjury after she falsely denied in a deposition that she had sex with a subordinate employee.⁹⁵ She was sentenced to thirteen months' imprisonment.⁹⁶ But this sentence may have been the result of the current politicization of perjury rather than a reflection of the usual fate of parties who lie in civil depositions. At sentencing, the district judge compared the effects of perjury to the damage wrought by termites when they get inside a house, concluding, "[a]nd that's the seriousness of the destruction of . . . our system of justice, our entire society for that matter *And it goes all the way to the highest levels of our government.*"⁹⁷ The defendant was sentenced to thirteen months in prison so that the judge could, as he put it, "demonstrate to others the seriousness of the responsibility of telling the truth in court proceedings."⁹⁸ The defendant was unlucky enough to get caught in political crossfire.

Calls for greater punishment for perjury have, indeed, become politicized in light of the Clinton affair. For example, conservative pundit Arianna Huffington has organized a group called Citizens Against Perjury Proliferation to fight the "dirty little secret of our justice system."⁹⁹ "[P]erjury has become epidemic," Huffington moans, and yet it remains "the least prosecuted crime in the country" after tax evasion.¹⁰⁰ To check this epidemic, Huffington maintains, the perjury allegations against President Clinton should be pursued to the fullest extent.¹⁰¹

Many lawyers agree with Ms. Huffington that perjury in civil

J., Feb. 19, 1998, at 6 (referring to 8 federal appellate cases involving convictions for civil perjury); Ruth Marcus, *Paying the Price for Civil Perjury; Prosecution May Be Unusual, But it Can Mean Prison*, WASH. POST, Mar. 3, 1998, at A4.

95. See Richard A. Serrano, *Other Federal Workers Pay High Price for Perjury*, L.A. TIMES, Oct. 23, 1998, at A1.

96. See *id.*

97. *Id.* (emphasis added).

98. *Id.*

99. Arianna Huffington, *Crusades: Citizens Against Perjury Proliferation* (visited Oct. 8, 1998) <<http://www.ariannaonline.com/crusades/capp.html>>.

100. *Id.*

101. See *id.*

proceedings is indeed “epidemic” and even “customary.”¹⁰² If they are correct, the low incidence of perjury prosecutions stemming from civil suits results from prosecutorial choice rather than the scrupulousness of parties and witnesses. Lying may well be rampant, but prosecutors are unwilling or unable to vigorously pursue criminal charges in such cases.¹⁰³ Perjury referrals might overwhelm prosecutorial resources, already challenged by a heavy caseload.¹⁰⁴ Prosecutors may simply consider perjury committed in civil suits to be less serious than other offenses, unconvinced by the pontifications of appellate courts regarding the “incalculable harm” civil perjurers do to the administration of justice.¹⁰⁵ Finally, government prosecutors might be reluctant to allow disgruntled litigants to draw them into private disputes.¹⁰⁶

If it is true that perjury is rampant—a claim that it is no doubt impossible to prove—then the systematic under-enforcement of perjury undermines the deterrent effect of the offense.¹⁰⁷ A narrow interpretation of materiality would limit the criminal conduct to serious lying; perhaps such a limitation would focus available prosecutorial resources in such a way that enforcement would be more common, promoting deterrence. In any case, even if perjury is not quite as common as some suggest, there are a number of reasons for favoring a narrow interpretation of materiality for civil perjury. These reasons are discussed in the next section, following a review of the case law on the materiality requirement in the context of civil discovery.

102. Stanley S. Arkin, *Criminal Implications of Perjury in Civil Cases*, N.Y.L.J., Apr. 9, 1998, at 3; *see also* Cohen, *supra* note 91 (suggesting that perjury in civil proceedings is common). Of course, it is probably impossible to prove that perjury is as rampant as these commentators suggest.

103. *See* Arkin, *supra* note 102.

104. *See* *People v. Davis*, 647 N.E.2d 977, 983 (Ill. 1995) (Bilandic, C.J., dissenting) (advocating narrow construction of materiality requirement to “avoid a plethora of such criminal prosecutions” based on civil perjury); *see also* Arkin, *supra* note 102; Cohen, *supra* note 91.

105. *United States v. Holland*, 22 F.3d 1040, 1047 (11th Cir. 1994); *see* Arkin, *supra* note 102.

106. *See* *Davis*, 647 N.E.2d at 983 (Bilandic, C.J., dissenting).

107. *See infra* Part III.B.4.

III. JUDICIAL STANDARDS FOR DETERMINING MATERIALITY

As discussed above, perjury is deemed to be a crime against the courts and the administration of justice. At the same time, the materiality requirement imports into the offense a subsidiary concern for the harm at least potentially threatened to an actual party. In effect, then, perjury is a "hybrid" offense; its hybrid nature is reflected in the various ways courts have treated the materiality element. Courts have formulated different definitions of materiality depending on the type of proceeding in which the testimony was presented, and, in the context of civil discovery, they have articulated conflicting definitions of materiality.

In *Kungys v. United States*,¹⁰⁸ the Supreme Court set forth the primary definition of materiality for all federal false statement statutes. A false statement is material if it had "a natural tendency to influence, or was capable of influencing, the decision of" the decisionmaking body to which it was addressed."¹⁰⁹ As numerous courts have noted, a false statement may be material under this definition even if it was addressed to a collateral matter.¹¹⁰ Thus, any misrepresentation regarding a witness's credibility is routinely considered to be material.¹¹¹ Furthermore, as the test itself implies, the false statement need not have actually influenced the decision-maker to be deemed material.¹¹²

An even broader definition of materiality is employed where the defendant is charged with committing perjury before a grand jury. Because of the investigative function of the grand jury, false testimony before a grand jury is deemed to be material if it had the "natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation."¹¹³ Again, the false testimony need not actually have impeded the grand jury's investigation.¹¹⁴

108. 485 U.S. 759 (1988).

109. *Id.* at 770 (quoting *Weinstock v. United States*, 231 F.2d 699, 701 (1956)).

110. See Richard B. Lillich, *The Element of Materiality in the Federal Crime of Perjury*, 35 IND. L.J. 1, 6-8 (1959).

111. See *id.*

112. See Kaplan, *supra* note 70, at 408.

113. *Carroll v. United States*, 16 F.2d 951, 953 (2d Cir. 1927).

114. See *Vitello v. United States*, 425 F.2d 416, 424 (9th Cir. 1970).

This variation of the materiality test was developed in *Carroll v. United States*.¹¹⁵ *Carroll* illustrates how broad a construction some courts give to the materiality requirement. In *Carroll*, the defendant had testified before a grand jury investigating a possible violation of the National Prohibition Act at the defendant's party.¹¹⁶ Newspapers reported that a party guest—one Miss Hawley—had bathed in a bathtub filled with champagne.¹¹⁷ The defendant denied that anyone at any time was in the bathtub; he also testified that he did not know if Miss Hawley was present at the party.¹¹⁸ The jury found that such testimony was false.¹¹⁹ The Second Circuit concluded that Carroll's statements were material: by concealing the fact that someone bathed in the tub, Carroll dissuaded the grand jury from hearing from a witness such as Miss Hawley, who was likely to have valuable information concerning the contents of the bathtub.¹²⁰ Such information was crucial to the grand jury's investigation of Carroll's possible violation of the National Prohibition Act.¹²¹ Hence, even salacious details can be material.

The proper standard for materiality where the perjury charge is based on lies made during civil discovery is disputed. As the Fourth Circuit has recently noted, the traditional *Kungys* definition "does not neatly apply when . . . the defendant is charged with committing perjury during a civil deposition."¹²² A deponent's testimony is not actually addressed to any decision-making body. Much of a deponent's testimony may never reach the fact-finder.¹²³ Furthermore, because of the rules of evidence, much of a deponent's testimony *could never* reach the fact-finder.

For these reasons, the circuits are currently split regarding the

115. 16 F.2d 951 (2d Cir. 1927).

116. *See id.* at 953.

117. *See id.* at 953-54.

118. *See id.* at 952-53.

119. *See id.* at 952.

120. *See id.* at 953-54.

121. *See id.* at 954.

122. *United States v. Wilkinson*, 137 F.3d 214, 225 (4th Cir. 1998).

123. For example, ruling on the scope of discovery in the *Jones v. Clinton* suit, Judge Wright noted that "it is very likely that a good deal of the matters obtained in discovery will not be deemed admissible into evidence. . . ." Order at 7, *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark. filed Dec. 18, 1997).

proper standard for materiality in perjury prosecutions arising from civil discovery. The Second and Fifth Circuits apply a very broad definition of materiality, derived from the grand jury context, while the Sixth and Ninth Circuits apply a somewhat narrower definition.¹²⁴ Each approach is examined in detail below.

*A. The Broad Approach to Materiality in the Civil
Discovery Context*

The Second and Fifth Circuits have adopted a broad definition of materiality when the perjury charge stems from statements made during the course of civil discovery. Essentially, these circuits apply a standard of materiality similar to that used in the grand jury context. A deposition or interrogatory response is material if it “might reasonably be calculated to lead to the discovery of evidence admissible at the trial of the underlying suit.”¹²⁵ This language tracks the language of Federal Rule of Civil Procedure 26(b) (“Rule 26(b)”), which allows discovery of any information that is “reasonably calculated to lead to the discovery of admissible evidence.”¹²⁶ Hence, materiality is equivalent to discoverability. As long as the discovery request falls within the very liberal scope of Rule 26(b)—i.e., as long as the opposing party is entitled to receive an answer to the question—the materiality requirement is satisfied.¹²⁷

The Second Circuit adopted this formulation of materiality in *United States v. Kross*.¹²⁸ In *Kross*, the defendant was convicted of perjury based on statements she made while being deposed in a civil forfeiture action.¹²⁹ Specifically, the defendant falsely denied ever seeing anyone smoke marijuana in the private park that was the sub-

124. See *Wilkinson*, 137 F.3d at 225.

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

126. FED. R. CIV. P. 26(b)(1) (“The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”). See *Kross*, 14 F.3d at 754; *Holley*, 942 F.2d at 924.

127. In fact, this is the principal argument advanced by the Office of the Independent Counsel in contending that Clinton’s deposition testimony was material to the *Jones* suit. See *infra* Part IV.B.1.b.

128. 14 F.3d 751, 754 (2d Cir. 1994).

129. See *id.* at 752-53.

ject of the action.¹³⁰ On appeal, the defendant argued that her deposition testimony was not material for the following reasons: her knowledge of marijuana use in the park could not be imputed to the park's owner;¹³¹ the mere use of marijuana did not constitute the sort of serious narcotics crime required for forfeiture;¹³² and because the drug use of which she was aware occurred more than five years prior to the forfeiture action, it was outside the applicable statute of limitations anyway.¹³³

The Second Circuit rejected these arguments. It held that the defendant's truthful response could conceivably have assisted the government in uncovering additional evidence that the park's owner had guilty knowledge of marijuana cultivation and distribution in the park at a later time.¹³⁴ In other words, the government was entitled to ask the defendant about any marijuana use she had ever witnessed in the park because such questioning was "reasonably calculated to lead to the discovery of admissible evidence."¹³⁵ Therefore, the defendant's statements were material under a broad standard of materiality.

It should be noted, however, that the Second Circuit adopted this broad standard of materiality based on the particular facts of the case.¹³⁶ The court noted that forfeiture actions, while civil in form, require "a nexus between the property and criminal activity."¹³⁷ Thus, the court determined that the definition of materiality used in the criminal grand jury context supplied the appropriate test.¹³⁸ It remains unclear whether the Second Circuit would adopt the broad, grand-jury based definition of materiality where perjury charges are based on statements made in a civil suit between private parties.

The Fifth Circuit approved a broad test for materiality in the civil discovery context in *United States v. Holley*,¹³⁹ where the court

130. *See id.* at 753.

131. *See id.* at 754.

132. *See id.*

133. *See id.* at 755.

134. *See id.*

135. *Id.* at 754 (quoting FED. R. CIV. P. 26(b)(1)).

136. *See id.*

137. *Id.*

138. *See id.*

139. 942 F.2d 916 (5th Cir. 1991).

held that the defendant's false deposition testimony was material to an adversarial bankruptcy action.¹⁴⁰ As in *Kross*, the Fifth Circuit held that the scope of materiality under § 1623 is as broad as the permissible scope of discovery under Rule 26(b).¹⁴¹ For the Fifth Circuit, materiality is the equivalent of discoverability.

Holley had testified falsely about a fraudulent letter of credit that he had issued as chairman of the board of the complainant bank.¹⁴² While the bank's complaint did not list the letter of credit as a specific instance of fraudulent conduct that rendered Holley's debts nondischargeable, the court held that Holley's testimony regarding the letter of credit was material to the bank's complaint.¹⁴³ The bank alleged that Holley committed fraud in three specific credit transactions by allowing loans to be funded without proper approval or application procedures.¹⁴⁴ The letter of credit at issue in the perjury charge was likewise given without proper approval or application procedures. As such, the court stated that it was "directly relevant" to the bank's action and could be used pursuant to Federal Rule of Evidence 404(b)¹⁴⁵ to show the defendant's state of mind regarding his breach of his fiduciary duties.¹⁴⁶ The court went on to note that the letter of credit transaction might have been excludable under Federal Rule of Evidence 403, but that did not affect the materiality of Holley's deposition testimony, given the standard of materiality the court adopted.¹⁴⁷

Kross and *Holley* were preceded by *United States v. Naddeo*,¹⁴⁸

140. *See id.* at 918, 921-22, 925.

141. *See id.* at 924-25.

142. *See id.* at 918-21 n.5, 921-22.

143. *See id.* at 924-25.

144. *See id.* at 924.

145. *See id.* at 925.

146. *See id.* at 925. Federal Rule of Evidence 404(b) states that evidence of other wrongs, acts, etc., while not admissible to prove "the character of a person in order to show action in conformity therewith," may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" FED. R. EVID. 404(b).

147. *See Holley*, 942 F.2d at 925. Federal Rule of Evidence 403 permits a judge to exclude otherwise relevant evidence where its "probative value is substantially outweighed by its prejudicial effect." FED. R. EVID. 403.

148. 336 F. Supp. 238 (N.D. Ohio 1972).

in which a district court held that the investigative nature of discovery requires the same definition of materiality to be used in the civil discovery context as is used in the grand jury context. The court stated that “[t]he test of materiality goes to questions asked, during investigation, on a relevant and material subject. The questions propounded fell within the scope of the Pretrial Order [regarding discovery] and, therefore, in the opinion of the district judge covered an area within the parameters of the complaint.”¹⁴⁹

In setting forth its test for determining the materiality of testimony in civil depositions, the court in *Naddeo* relied on *United States v. Siegel*,¹⁵⁰ in which Judge Learned Hand formulated the broadest of all materiality tests. For Hand, testimony before a grand jury is material if any conceivable answer to the proffered question could have assisted the grand jury in its investigation.¹⁵¹ As long as the question itself was within the scope of the grand jury’s investigation, it would make no difference to Hand whether a truthful answer actually would have led to further fruitful inquiry.¹⁵² In response to the defendant’s argument that a truthful answer to the grand jury would have contributed nothing to its investigation, Judge Hand replied:

The error of the appellants’ position is that they confuse the “materiality” of the question with the “materiality” of the answer, as though it was proof that the question was immaterial, if the answer would have been so. It is, however, at once apparent that this substitutes the opinion of the witness for that of the tribunal as to the “materiality” of the answer. No matter how right the witness might be in believing that the answer would not contribute to the investigation, he was bound to leave that decision to the tribunal. A question is

149. *Id.* at 240. The Office of the Independent Counsel [hereinafter OIC] used similar reasoning in contending that the President’s false deposition testimony regarding Lewinsky was material to the *Jones* suit. The OIC’s principal argument for the materiality of Clinton’s deposition testimony was that Judge Wright had ruled Clinton’s affair with Lewinsky discoverable under Rule 26(b). *See infra* Part IV.B.1.b.

150. 263 F.2d 530 (2d Cir. 1959).

151. *See id.* at 533.

152. *See id.*

“material,” no matter what the answer may be, unless it appears by its terms that the answer cannot be “material.”¹⁵³

For Hand, then, perjury merely required a false response to a material *question*.

As with Hand’s approach in *Siegel*, the test for materiality adopted in *Kross* and *Holley* depends *exclusively* upon the question the defendant had been asked. As long as the question falls within the permissible scope of discovery, as defined by Rule 26(b), the defendant’s response is *automatically* material, even if, in hindsight, a truthful response would have been of no use at all. Clearly, this approach conceives of perjury as a crime against the administration of justice at the most abstract and attenuated level, for the false testimony need not ever have threatened the integrity of the proceedings.

B. *A Critique of the Broad Standard of Materiality*

There are a number of problems with this broad discoverability standard for materiality. In fact, statutory grounds, prior case law, policy considerations, and recent Supreme Court decisions holding that materiality is a jury question, all counsel against it.

1. Statutory arguments against the discoverability standard

The discoverability standard is flatly inconsistent with the statutory language at issue. 18 U.S.C. § 1623 targets anyone who makes a “false material declaration.”¹⁵⁴ Thus, according to the very grammar of the statute, the materiality required for a perjury prosecution is an attribute of the defendant’s response. Therefore, the broad discoverability standard, which looks exclusively to the permissibility of the question and ignores the significance of the defendant’s answer, conflicts with the plain language of the statute.¹⁵⁵

Further, to equate materiality with discoverability for purposes of a § 1623 prosecution would conflict with the materiality requirement of 18 U.S.C. § 1001. Section 1001(a) punishes anyone who,

153. *Id.*

154. 18 U.S.C. § 1623 (1994).

155. See Lillich, *supra* note 110, at 9 (noting that Judge Hand must have overlooked this fact).

in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—(1) falsifies . . . a material fact; (2) makes any materially false . . . statement . . .; or (3) makes or uses any false writing or document knowing the same to contain any materially false . . . statement¹⁵⁶

Section 1001 thus requires *both* a false statement as to a matter “within the jurisdiction” of a government agency *and* a “materially” false statement.¹⁵⁷ If materiality meant nothing more than that the defendant had been asked a permissible question, the materiality requirement repeated in 18 U.S.C. § 1001(a)(1), (2), and (3) would be redundant, for the fact that the defendant was questioned about a matter within the jurisdiction of a government agency establishes that the question was permissible. Therefore, materiality must plainly mean more than a response to a proper question, lest we violate the “cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant.”¹⁵⁸

Moreover, in 1996, Congress revised § 1001 to make explicit the materiality requirement of subsections (a)(2) and (a)(3).¹⁵⁹ Prior to this revision, some circuits—including the Second Circuit—held that 18 U.S.C. § 1001 (a)(2) and (3) did not contain a materiality requirement.¹⁶⁰ This revision suggests that Congress intended for the courts to seriously apply the materiality requirements in the federal false statement statutes containing them.¹⁶¹

156. 18 U.S.C. § 1001(a) (Supp. II 1997).

157. *Id.*

158. *Kungys v. United States*, 485 U.S. 759, 778 (1988). The Court in *Kungys* also expressed a preference for applying a uniform construction to the materiality requirements contained in many of the federal false statement statutes. Thus, the Court rejected a specialized definition of materiality for purposes of 8 U.S.C. § 1451(a), in favor of the standard definition of materiality. *See id.* at 769-70.

159. Prior to the 1996 revision, § 1001 referred to the materiality requirement only in subsection (a)(1). *See* 18 U.S.C. § 1001 (1994).

160. *See, e.g., United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir. 1984); *United States v. Rinaldi*, 393 F.2d 97, 99-100 (2d Cir. 1968).

161. Congress's 1996 revision of 18 U.S.C. § 1001 (a)(2) and (3) to make the materiality requirement explicit belies the OIC's claim that the materiality requirement is a *de minimis* one.

2. Inconsistencies between the discoverability standard and the Supreme Court's approach to materiality in *United States v. Gaudin*¹⁶²

The Supreme Court has likewise reaffirmed the significance of the materiality requirement, holding in *United States v. Gaudin* and *Johnson v. United States*¹⁶³ that materiality is an essential element of the federal offense of perjury. As such, materiality is now a question for the jury.¹⁶⁴ However, it is not clear to what extent—if at all—*Gaudin* changed the legal standard that should be applied to materiality.

Kross and *Holley* were decided prior to the Court's *Gaudin* decision. *Gaudin* itself did not challenge the definition of materiality set forth in *Kungys*,¹⁶⁵ so it may be that *Gaudin* did not disturb the *Kross/Holley* standard of materiality. However, the reasoning

underlying *Gaudin*'s determination that materiality is a jury question is inconsistent, at least in spirit, with the way materiality is approached under *Kross* and *Holley*.

In *Gaudin*, the Court noted that a determination of materiality is well-suited to the jury in that it involves “‘delicate assessments of the inferences a “reasonable [decision-maker]” would draw from a given set of facts and the significance of those inferences to him.’”¹⁶⁶ This approach to materiality is reflected in the jury instructions on the issue approved by the D.C. Circuit. The instructions state that a material declaration is one that concerns “a fact that would be of importance to a reasonable person in making a decision about a particular matter or transaction.”¹⁶⁷ Thus, after *Gaudin*, materiality requires consideration of the common-sense significance of the defendant's testimony in light of the historical facts and legal requirements of the underlying case. In contrast, under *Holley* and *Kross*, materiality requires nothing more than a bare assessment of the trial court's exer-

162. 515 U.S. 506 (1995).

163. *Johnson v. United States*, 520 U.S. 461 (1997).

164. *See Gaudin*, 515 U.S. at 518-19.

165. *See id.* at 509.

166. *Id.* at 512 (quoting *TSC Indust., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976)) (alteration in original).

167. *United States v. Winstead*, 74 F.3d 1313, 1320 (D.C. Cir. 1996).

cise of discretion under Rule 26(b), divorced from the actual, common-sense significance of the deposition testimony at issue.

In *United States v. Akram*,¹⁶⁸ the Seventh Circuit suggested that *Gaudin* does, in fact, justify a substantive departure from the traditional standard used to determine materiality. The court noted in dicta that just because certain testimony is relevant and admissible under the Federal Rules of Evidence does not mean that the testimony is “material” for purposes of § 1623.¹⁶⁹ For example, although Federal Rule of Evidence 608(b) permits cross-examination of a witness concerning specific instances of conduct to establish the witness’s character for truthfulness or untruthfulness, “certain lies on cross-examination might be too trivial to count as being relevant to the question of credibility” under § 1623.¹⁷⁰ In some cases, “the defendant’s credibility is itself a minor consideration and not one capable of influencing the jury’s decision.”¹⁷¹

Interestingly, the court noted that similar reasoning may apply to “other crimes, wrongs, or acts” evidence admitted under Federal Rule of Evidence 404(b): the bare fact of admissibility is not, standing alone, determinative of materiality.¹⁷² *Akram* suggests that an assessment of materiality after *Gaudin* must include consideration of the probative value of the evidence at issue in addition to its admissibility. It remains to be seen whether other courts will follow *Akram*’s lead.

In any event, *Gaudin* is of enormous practical significance to the materiality issue. Now, the jury may exercise its power to “indulge tender mercies even to the point of acquitting the plainly guilty,” as the New York Appellate Division remarked some years ago when it assigned the determination of materiality to the jury under New York law.¹⁷³ Thus, juries may be hesitant to convict a defendant who lied about a discoverable but insignificant matter.

168. 152 F.3d 698 (7th Cir. 1998).

169. *See id.* at 701-02.

170. *Id.* at 702.

171. *Id.*

172. *See id.*

173. *People v. Clemente*, 136 N.Y.S.2d 202, 207 (N.Y. App. Div. 1954).

3. The conflict between the discoverability standard and prior case law

As discussed above, the approach to materiality adopted by *Kross* and *Holley* parallels the approach to materiality advanced by Judge Hand in *United States v. Siegel*. It is therefore notable that Hand's own Second Circuit has retreated from *Siegel*.

In *United States v. Mancuso*,¹⁷⁴ the Second Circuit stated that testimony before a grand jury is only material if "a truthful answer could conceivably have furthered the inquiry."¹⁷⁵ The court recognized that *Siegel* suggested "that materiality exists unless the question, divorced from the context in which it was asked, could not have elicited a material reply," but that "such a view cannot be maintained"¹⁷⁶ In considering materiality, a court must examine "the factual background to determine whether the question had some bearing on a subject that was material to the proceeding, and *whether a truthful answer might possibly have aided the inquiry*."¹⁷⁷ Similarly, the Second Circuit in *United States v. Freedman*¹⁷⁸ stated that "in order for a knowingly false statement to be material . . . it must be shown that a truthful answer would have been of sufficient probative importance to the inquiry so that, *as a minimum, further fruitful investigation would have occurred*."¹⁷⁹

Mancuso and *Freedman* thus focus the materiality inquiry precisely where it belongs: on the relationship between the defendant's *answer* and the underlying objectives of the inquiry.

4. Policy objections to the discoverability standard

The broad materiality standard adopted in *Kross* and *Holley* is unsound from a policy perspective, as well. First, it is not justified from the perspective of deterrence. The broad materiality standard renders virtually any lie criminal. But as noted above, prosecutors are already loath to involve themselves in disputes between private

174. 485 F.2d 275 (2d Cir. 1973).

175. *Id.* at 281 n.17.

176. *Id.*

177. *Id.* (emphasis added).

178. 445 F.2d 1220 (2d Cir. 1971).

179. *Id.* at 1226-27 (emphasis added).

litigants.¹⁸⁰ The fact remains, and is likely to remain for some time, that the vast majority of individuals who lie in civil depositions will never be prosecuted for perjury. The broad materiality standard would seem merely to increase the quantity of technically criminal conduct that is immune from prosecution.¹⁸¹ Thus, this broad standard actually exacerbates the under-enforcement of perjury. Such a pattern of under-enforcement undermines deterrence, which is, of course, one of the central purposes of punishment.¹⁸² In fact, even if the conventional wisdom regarding the frequency of perjury is mistaken, the very *appearance* of under-enforcement undermines deterrence.¹⁸³ In either case, a broad standard of materiality, which renders almost any lie sufficient to support a perjury prosecution *in theory*, is not justified by deterrence theory.

Furthermore, deterrence theory may not justify civil perjury in general, whether it is broadly or more narrowly defined. In fact, the common law recognized the ineffectiveness of perjury prosecutions as a deterrent to lying under oath: parties were incompetent to testify as witnesses in their own cases until the middle of the nineteenth century.¹⁸⁴ Despite the existence of criminal sanctions for false testimony in civil suits, available ever since Parliament passed the first perjury statute in 1563, parties were nevertheless considered to be inherently untrustworthy witnesses.¹⁸⁵ This may suggest that the criminalization of civil perjury is inherently flawed, at least from the

180. See *supra* Part II.D.

181. See FRANKLIN ZIMRING & GORDON HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 158 (1973) (discussing "general immunity," which arises when "a certain type of behavior, although actually prohibited by statute, has not been prosecuted and appears to have been tolerated by the authorities for a period of time, [with the result that] the public may come to believe that the threatening agency does not seriously intend the legal threat").

182. See generally *id.* at 158-72 (discussing correlation between effective enforcement and deterrence); Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 961-62 (1960) (same).

183. See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 117-18 (1995); ZIMRING & HAWKINS, *supra* note 181, at 162, 167-71; Andenaes, *supra* note 182, at 963-64.

184. See 2 WIGMORE, *supra* note 18, §§ 575, 576, at 804-08, 817-18.

185. See *id.*

point of view of deterrence. We shall consider alternatives to criminal sanctions for perjury below; the point here is that there is little deterrence justification for an unenforceably broad definition of perjury.

The discoverability standard is also inconsistent with the other fundamental purpose of punishment, retribution. Central to the retributive view of punishment is the concept of proportionality.¹⁸⁶ Kant's classic formulation of retribution emphasizes the primacy of proportionality:

But what is the mode and measure of Punishment which Public Justice takes as its Principle and Standard? It is just the Principle of Equality, by which the pointer of the Scale of Justice is made to incline no more to the one side than the other. It may be rendered by saying that the undeserved evil which any one commits on another, is to be regarded as perpetrated on himself.¹⁸⁷

Punishing someone for perjury where their truthful testimony could have had no practical impact on a particular proceeding exceeds the bounds of proportionality. The defendant has not caused harm to individual adversaries in such situations. Rather, the defendant suffers punishment for the harm he or she has caused to the judicial system. But how can we measure such a speculative harm? The Eleventh Circuit's characterization of this harm as "incalculable" would seem to be literally true.¹⁸⁸ Therefore, there cannot be any proportionality between the discrete punishment meted out to the defendant and the harm the defendant has caused the judicial system, a harm that cannot be calculated and cannot even be proven. The two evils are incommensurate; thus, the Kantian imperative is frustrated.

Ultimately, the policy supporting the discoverability standard

186. See, e.g., IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 12, 79-81, 85-94 (1989) (stating that one of the five central tenets of the retributive view of punishment is that "[p]unishment ought to be *proportionate* to the offense (the *lex talionis*)"); C.L. TEN, CRIME, GUILT, AND PUNISHMENT 154 (1987).

187. IMMANUEL KANT, THE PHILOSOPHY OF LAW 196 (W. Hastie trans., 1887).

188. United States v. Holland, 22 F.3d 1040, 1047 (11th Cir. 1994).

comes down to the simple notion that “there would appear to be no sufficient reason why a deponent should not be held to his oath”¹⁸⁹ However, this rationale proves too much. As will be discussed in Part III.D below, witnesses may be held to their oaths without being subjected to perjury prosecutions. Moreover, as we have seen, perjury is something more than a crime against the administration of justice, *simpliciter*. The materiality requirement demonstrates that perjury is, at least to a certain extent, also deemed an act of fraud against the legal rights of an opposing party. One should not be punished for perjury if such rights were never endangered in the first place.

For these reasons, a narrow construction of materiality should be employed in perjury prosecutions based on civil discovery. The following section discusses the narrower approaches to materiality in the civil discovery context adopted by the Sixth and Ninth Circuits.

C. Narrower Approaches to Materiality in the Civil Discovery Context

The Sixth and Ninth Circuits have adopted a narrower definition of materiality. Under this approach, the false statement must not only have been properly discoverable, it must also have had the tendency to affect the outcome of the underlying civil suit.¹⁹⁰ This approach better accords with the notion that perjury involves the threat of harm to a particular proceeding and to the rights of a particular party.

The Ninth Circuit articulated this narrower definition of materiality in *United States v. Clark*.¹⁹¹ In *Clark*, the defendants had been charged and convicted under 18 U.S.C. § 1621 as a result of false deposition testimony they provided during the course of their employment discrimination lawsuit against the Oakland Police Department.¹⁹² The defendants claimed that the Department had discriminated against them on the basis of race when it suspended them

189. *United States v. Holley*, 942 F.2d 916, 924 (5th Cir. 1991).

190. *See United States v. Adams*, 870 F.2d 1140, 1148 (6th Cir. 1989); *United States v. Clark*, 918 F.2d 843, 846-47 (9th Cir. 1990), *overruled on other grounds by United States v. Keyes*, 95 F.3d 874, 876-77 (9th Cir. 1996).

191. 918 F.2d 843 (9th Cir. 1990).

192. *See id.* at 844-45.

ostensibly for violating the department's sick leave policy.¹⁹³ In their depositions, they falsely claimed that they had missed work due to illness on a particular occasion and denied that they had ever abused the department's policy.¹⁹⁴ The court held that such false statements were material to the defendants' civil suit, *for a truthful answer could have influenced a jury* in deciding whether the defendants were disciplined for legitimate or discriminatory reasons.¹⁹⁵ Thus, the defendants' testimony was material even under this narrower definition of materiality.

In *United States v. Adams*,¹⁹⁶ the Sixth Circuit addressed the proper standard for the materiality of a false statement made in a civil deposition. The defendant had been convicted of perjury for false statements she made in her deposition during the course of her sex discrimination suit against the Equal Employment Opportunities Commission ("EEOC").¹⁹⁷ The defendant had incorrectly stated in her deposition that the earnings figures she supplied to the EEOC as part of her application for employment came from her actual Schedule C income tax form when, in fact, they came from a Schedule C worksheet.¹⁹⁸ The court stated the test for materiality as "whether a truthful statement might have assisted or influenced the tribunal in its inquiry" and held that the defendant's statement was immaterial.¹⁹⁹ The government failed to establish any "nexus" between the discrimination suit and the defendant's false statement: it would have made no difference to the civil suit whether the earnings figures came from an actual Schedule C or from a Schedule C worksheet.²⁰⁰

As in *Clark*, the court in *Adams* articulated a definition of materiality that is narrower than the mere discoverability standard adopted by the Second and Fifth Circuits. However, the false statement at issue in *Adams* would probably not even meet the standard

193. *See id.* at 844.

194. *See id.* at 845.

195. *See id.* at 846-47.

196. 870 F.2d 1140 (6th Cir. 1989).

197. *See id.* at 1141.

198. *See id.* at 1142.

199. *Id.* at 1147 (citing *United States v. Swift*, 809 F.2d 320, 324 (8th Cir. 1987)).

200. *See id.*

for materiality adopted by the Second and Fifth Circuits. The lack of *any* nexus between the discrimination suit and the source of the defendant's earnings figures would appear to render the deposition questions beyond the scope of Rule 26(b) itself.

As we have seen, it is quite likely that both *Adams* and *Clark* would have been decided the same way under the broad test for materiality adopted by the Second and Fifth Circuits. However, the narrower test formulated by the Sixth and Ninth Circuits would produce divergent results in certain circumstances. In particular, the circuit split would be most pronounced where the defendant's deposition testimony, while properly discoverable, would be inadmissible at trial. After all, testimony that could never reach the ultimate decision-maker could hardly be said to possess the natural capacity to influence that decision-maker.

If the deposition testimony is not admissible at trial because it would be irrelevant under Federal Rule of Evidence 401,²⁰¹ it would not be material under the tests adopted by the Ninth and Sixth Circuits. Under the broad Second and Fifth Circuit approach, however, the testimony's ultimate irrelevance would have no bearing on its materiality, as long as the testimony was given in response to a discovery request that comported with Rule 26(b). It should be recalled, however, that the Fifth Circuit deemed the actual statements at issue in *Holley* to be "directly relevant" to the underlying suit.²⁰²

What if the deponent's testimony would be inadmissible at trial on grounds other than relevancy? For example, what if the deponent's testimony constituted improper character evidence barred by Federal Rule of Evidence 404?²⁰³ Again, it would seem that such testimony, if never admitted, would not possess the capacity to influence the ultimate decision-maker in the case. Thus, under the Sixth and Ninth Circuit approach, the deponent's inadmissible testimony would not be deemed material, while under the Second and Fifth

201. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

202. *United States v. Holley*, 942 F.2d 916, 925 (5th Cir. 1991).

203. "Other acts" evidence is not admissible "to prove the character of a person in order to show action in conformity therewith." FED. R. EVID. 404(b).

Circuit approach, it would be—subject only to Rule 26(b).

It should be noted, however, that a perjury defendant may not object on materiality grounds where his false testimony was *improperly* admitted at trial. The defendant's testimony is not rendered immaterial merely because it *should* have been—but was not—excluded from consideration by the trier of fact under the rules of evidence. Even if a proper, though unsuccessful, objection to the offending question was made, the fact that the defendant's response was capable of influencing the jury, even in an impermissible manner, suffices to establish materiality.²⁰⁴

Where the perjury charge is based on inadmissible statements made during discovery that never reached the ultimate decision-maker, a different rule should apply. Such statements are more akin to inadmissible testimony properly excluded by the trial court. Few cases have addressed the materiality of such testimony—perhaps because most prosecutors would never press charges in such circumstances. However, an interesting case that does address the materiality of inadmissible and properly excluded testimony is *Ford v. State*.²⁰⁵ In *Ford*, the defendant had been a state witness in a prior drug trial.²⁰⁶ In chambers, the defendant was asked if he had ever been court-martialed.²⁰⁷ He falsely responded “no.”²⁰⁸ But because such evidence of the defendant's court-martial could not be admitted

204. See, e.g., *United States v. Rapoport*, 545 F.2d 802, 805 n.8 (2d Cir. 1976) (“A witness at a trial should not be given license to employ false statements which might influence the jury merely because the parties have failed to object to the testimony or the judge erroneously determined that it was admissible.”). This rule traces its pedigree back to a 19th century case. See *Regina v. Phillpotts*, 169 Eng. Rep. 514 (Q.B. 1851).

205. 610 So. 2d 370 (Miss. 1992); cf. *State v. Lake*, 147 S.E. 473, 474-75 (W. Va. 1929) (holding that defendant's false statement as to a relevant but inadmissible matter was immaterial; defendant's false statement had been properly excluded by trial court). But cf. *People v. Davidson*, 227 Cal. App. 2d 331, 335, 38 Cal. Rptr. 660, 662 (1964) (holding that defendant's false statement was material, although it constituted inadmissible hearsay which the trial court had properly excluded, relying on California Penal Code section 122, which states that “[i]t is no defense to a prosecution for perjury that the accused was not competent to give the testimony, deposition, or certificate of which falsehood is alleged,” see CAL. PENAL CODE § 122 (West 1988)).

206. See *Ford*, 610 So. 2d at 371.

207. See *id.*

208. See *id.*

to impeach the defendant's credibility in any event, the court held that the false denial was not material and therefore not perjurious.²⁰⁹

The following section summarizes the approach to materiality advanced in this Comment. A more radical proposal is then considered: leaving perjury in civil discovery for trial courts themselves to sanction.

D. Recommendations

1. A narrow standard of materiality

At the very least, a narrow approach to materiality should be adopted where perjury is based on lies told during civil discovery. The appropriate standard would be whether the deponent's testimony had the capacity to affect the trier of fact in the underlying lawsuit. This means that the deponent's testimony should be relevant to the underlying suit, within the meaning of Federal Rule of Evidence 401, and reasonably likely to be admissible under the other rules of evidence.

This standard of materiality is preferable to the discoverability standard for a number of reasons. First, it gives full force to the language of the federal perjury statutes.²¹⁰ It also limits perjury prosecutions to those lies which a reasonable person would consider to be important in the proceedings in which they were given, consonant with the Supreme Court's approach in *Gaudin*.²¹¹ Finally, it is consistent with a conception of perjury as, in part, a crime against individuals. Thus, punishment for this more limited range of conduct, with its more readily identifiable harm, is in better accord with a retributive view of punishment. Finally, because those false statements that only cause harm to the administration of justice in the abstract are not often prosecuted anyway, this approach closes the gap between the legal definition of the criminal conduct and actual patterns of enforcement, thus enhancing deterrence.

209. *See id.* at 373-74.

210. *See supra* Part III.B.1.

211. *See supra* Part III.B.2.

2. Express decriminalization of perjury in civil discovery

It is not surprising that the vast majority of those charged with perjury in connection with civil suits were actually parties to those underlying suits.²¹² Civil parties commit perjury because it can be profitable. Judges, however, can make perjury very unprofitable. Trial courts have a number of resources to keep parties in line during the course of a civil proceeding, particularly during the discovery phase. The federal district courts have the “inherent power to regulate litigation and to sanction litigants for abusive practices,” a power that is “deeply rooted in the common law tradition.”²¹³ Given this inherent power, and given the irregular and unpredictable enforcement of perjury in the civil discovery context by prosecutors, the offense of perjury should not apply to civil discovery.

Federal Rule of Civil Procedure 37(b)(2) codifies the district courts’ inherent power to sanction abusive practices committed during discovery.²¹⁴ Rule 37(b)(2) prescribes a range of sanctions that trial courts may impose on parties and witnesses for their failure to obey the court’s discovery orders. For example, the trial court may order that the facts the adverse party sought to establish through discovery are to be taken as true; it may refuse to allow the offending party to assert particular claims or defenses; it may strike pleadings or impose a default judgment on the offending party; finally, it may treat the failure to obey a discovery order as a contempt of court.²¹⁵ In addition, the injured party will ordinarily be awarded reasonable attorneys’ fees.²¹⁶ Such sanctions should be more than adequate to deter conduct primarily pursued because of its profitability.

Rule 37(b)(2) sanctions have been imposed where a party has lied in depositions or interrogatories submitted pursuant to court or-

212. In an informal review of 35 cases from federal appellate and district courts over the past ten years involving perjury based on civil actions, all but two of the perjury defendants had been parties to the underlying civil action. *See, e.g.*, *United States v. Wilkinson*, 137 F.3d 214 (4th Cir. 1998); *United States v. Holland*, 22 F.3d 1040 (11th Cir. 1994); *United States v. McAfee*, 8 F.3d 1010 (5th Cir. 1993); *United States v. Markiewicz*, 978 F.2d 786 (2d Cir. 1992); *United States v. Clark*, 918 F.2d 843 (9th Cir. 1990).

213. *Vargas v. Peltz*, 901 F. Supp. 1572, 1579 (S.D. Fla. 1995).

214. *See* FED. R. CIV. P. 37(b)(2).

215. *See id.* at 37(b)(2)(A), (B), (C), (D).

216. *See id.* at 37(b)(2)(E).

der.²¹⁷ Trial courts have struck pleadings, estopped parties from contesting certain allegations, and dismissed suits and entered default judgments as punishment for perjury committed in discovery proceedings.²¹⁸ In addition, trial courts have sanctioned parties under Federal Rule of Civil Procedure 11 for submitting falsified documents during discovery.²¹⁹

Rule 37(b)(2)(D) states that a court may treat the failure to obey a discovery order as a contempt of court.²²⁰ Civil contempt is employed to coerce a party or witness to comply with a court order or to compensate an opposing party for harm caused by the contemnor's defiance of the order.²²¹ 28 U.S.C. § 1826 authorizes courts to confine the contemnor for up to eighteen months in order to coerce compliance.²²² Criminal contempt is employed to punish a party or witness for past disobedience of a court order.²²³ Federal Rule of Criminal Procedure 42(a) authorizes courts to impose summary punishment for criminal contempt where the contempt was committed in the presence of the court and the judge certifies to having seen or heard it.²²⁴ However, where the punishment imposed on the contemnor is serious—for example, imprisonment for more than six months—the contemnor has the right to a jury trial.²²⁵

217. See, e.g., *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 989 F. Supp. 8, 16-17 (D.C. 1997); *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 837 F. Supp. 454, 458 (D.C. 1993).

218. See, e.g., *Vargas*, 901 F. Supp. at 1572, 1582-83; *Boron v. West Tex. Exports, Inc.*, 680 F. Supp. 1532, 1537-38 (S.D. Fla. 1988); *Amway Corp. v. Shapiro Express Co.*, 102 F.R.D. 564, 569-70 (S.D.N.Y. 1984); *Nittolo v. Brand*, 96 F.R.D. 672, 676-77 (S.D.N.Y. 1983).

219. See, e.g., *Pope v. Federal Express Corp.*, 974 F.2d 982, 985-86 (8th Cir. 1992) (remanding trial court's award of attorneys' fees under Rule 11 solely to determine parties' ability to pay).

220. See FED. R. CIV. P. 37(b)(2)(D).

221. See, e.g., *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303-04 (1947); *New York Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1351 (2d Cir. 1989); *Hess v. New Jersey Transit Rail Operations, Inc.*, 846 F.2d 114, 115 (2d Cir. 1988).

222. See 28 U.S.C. § 1826 (West 1988).

223. See, e.g., *Terry*, 886 F.2d at 1351.

224. See FED. R. CRIM. P. 42(a).

225. See 18 U.S.C. § 3691 (1994); *Codispoti v. Pennsylvania*, 418 U.S. 506, 515-17 (1974).

Perjury, standing alone, does not constitute contempt.²²⁶ In addition to the usual elements of perjury, the would-be contemnor must have obstructed the court in the performance of its duty.²²⁷ For example, in *Jones v. Lincoln Electric Co.*,²²⁸ a district court held that a witness could not be held in contempt merely for testifying falsely—although noting that it was a “close question.”²²⁹ While the witness may have violated his oath, he did not violate a court order to testify truthfully, and thus he did not impede the court’s authority to conduct an orderly trial.²³⁰ In some cases, however, perjury may be punished as civil or criminal contempt.²³¹ Where a party has violated a court discovery order by providing perjured deposition testimony, the additional element of obstruction of justice may be present.

Finally, the adversarial system itself possesses informal means to “punish” and deter perjury. Parties risk a great deal when they or their witnesses decide to lie under oath. If the jury detects the false testimony, that party’s credibility with the jury will be lost. One trial manual exhorts litigators to constantly remind their witnesses to tell the truth, for “[i]f the witnesses are not credible, you have no chance of establishing your own credibility. Jurors see right through witnesses who are trying to help the case with cute, incomplete, or otherwise tricky answers. Very few people are good at lying or attempting to deceive through incomplete answers.”²³² And the jury is then

226. See *In re Michael*, 326 U.S. 224, 228 (1945); *Ex parte Hudgings*, 249 U.S. 378, 382-84 (1919).

227. See *Michael*, 326 U.S. at 228.

228. 990 F. Supp. 1093 (N.D. Ind. 1997).

229. *Id.* at 1095

230. See *id.*

231. See, e.g., *In re Bongiorno*, 694 F.2d 917 (2d Cir. 1982) (grand jury witness held in civil contempt because of false assertion of inability to remember). In fact, Judge Susan Webber Wright, the trial judge in the *Jones v. Clinton* suit, recently held President Clinton in contempt of court for his deposition testimony concerning Monica Lewinsky. See John M. Broder, *Clinton is found to be in contempt on Jones lawsuit*, N.Y. TIMES, April 13, 1999, at A1.

232. STEPHEN D. EASTON, HOW TO WIN JURY TRIALS: BUILDING CREDIBILITY WITH JUDGES AND JURORS 8 (1998). Behavioral psychologists doubt whether humans are particularly effective “lie detectors” and further doubt whether “experts” such as law enforcement officials are really any better at detecting lies than the public at large. See ANDREAS KAPARDIS, PSYCHOLOGY AND LAW: A CRITICAL INTRODUCTION 211-25 (1997). Nevertheless, the courts have insisted that witnesses’ courtroom demeanor provides

likely to punish the untruthful party when it renders its verdict.

Of course, the opposing lawyers will do all they can to bring the false testimony to the jury's attention. False testimony given at the discovery stage provides special ammunition for opposing lawyers, who are eager to impeach witnesses by contradiction, pointing out to the jury the inconsistencies between the witness's current testimony and previous sworn statements. Moreover, there is a certain expectation that opposing witnesses will often be cagey and evasive—and sometimes will cross the line separating evasion from perjury. Far from relying on the truthfulness of opposing witnesses, parties pay skilled litigators handsomely to uncover the deceit.

Given the formal and informal means to check civil perjury inherent in the judicial system, there is little reason to expend valuable prosecutorial resources on it. Indeed, both judges and juries already have wide discretion to punish perjurers. Nothing seems to be gained by allowing prosecutors to exercise equally wide discretion to punish an offense in a necessarily irregular—perhaps even selective—manner.

IV. MATERIALITY AND THE CLINTON-LEWINSKY SAGA

As the Supreme Court stated in *Kungys*, determining the materiality of a given statement involves an inquiry into “what would have ensued from . . . knowledge of the misrepresented fact.”²³³ This requires, as we have seen, a “delicate assessment of the inferences a reasonable decision-maker would draw from a given set of facts and the significance of those inferences to him.”²³⁴ We turn now to assess the significance of the inferences that a reasonable decision-maker in the Paula Jones sexual harassment suit would draw from the sexual relationship between William Jefferson Clinton and Monica Lewinsky. Did Clinton's denial of a sexual relationship with Monica Lewinsky at his January 17, 1997, deposition constitute a “material false declaration”?

important clues regarding credibility, particularly for “experts” such as judges and lawyers. *See, e.g.*, *Rosales-Lopez v. United States*, 451 U.S. 182, 188-89 (1981).

233. *Kungys v. United States*, 485 U.S. 759, 775 (1988).

234. *United States v. Gaudin*, 515 U.S. 506, 512 (1995) (internal quotations and alteration omitted).

As the Court states in *Gaudin*, one of the “subsidiary questions of purely historical fact” that must be addressed before reaching the ultimate question of materiality is “what decision was the [decision-maker] trying to make?”²³⁵ We begin, then, with a brief overview of the Paula Jones suit, focusing particularly on the battle over discovery and Jones’s asserted grounds for making the discovery request at issue.

A. Jones v. Clinton and its Progeny

1. The Jones suit

On May 6, 1994, Paula Corbin Jones, a former Arkansas state employee, filed a civil suit against President Clinton in the Eastern District of Arkansas.²³⁶ Jones alleged that Clinton sexually harassed her while he was Governor of Arkansas and she was a state employee.²³⁷ Jones claimed that she was summoned to Clinton’s hotel room at the Excelsior Hotel in Little Rock, where Clinton exposed himself to her and asked her to perform oral sex on him.²³⁸ Jones claimed that she was the victim of quid pro quo and hostile work environment sexual harassment and that such harassment eventually

forced her to quit her job with the Arkansas Industrial Development Commission.²³⁹

The case was assigned to Judge Susan Webber Wright. Judge Wright held that a sitting president is entitled to temporary immunity from private lawsuits arising out of his unofficial acts and accordingly stayed Jones’s suit.²⁴⁰ The Eighth Circuit reversed Judge Wright’s ruling²⁴¹ and the Supreme Court affirmed.²⁴² However, in remanding the case to Judge Wright, the Supreme Court stated that

235. *Id.*

236. See Complaint, Jones v. Clinton, No. LR-C-94-290 (E.D. Ark. filed May 6, 1994).

237. See *id.* at ¶ 60.

238. See *id.* at ¶¶ 7, 20-21.

239. See *id.* at ¶¶ 39-40, 61-62.

240. See Jones v. Clinton, 869 F. Supp. 690, 699 (E.D. Ark. 1994).

241. See Jones v. Clinton, 72 F.3d 1354, 1363 (8th Cir. 1996).

242. See Clinton v. Jones, 520 U.S. 681, 710 (1997).

“[t]he high respect that is owed to the office of the Chief Executive, though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.”²⁴³ The Court noted that Judge Wright possessed “broad discretion” to manage the discovery process in a way that would not interfere with the President’s official duties.²⁴⁴

2. The battle over discovery

In fact, the next battle waged by the parties concerned the scope of discovery. The Jones team sought a broad scope of discovery covering all of Clinton’s extramarital sexual history since he was the Attorney General of Arkansas. For example, on October 1, 1997, Jones sent Clinton a set of interrogatories that asked him to provide “the name . . . of each and every individual . . .” with whom he had “had sexual relations,” “proposed having sexual relations,” or whom he “kissed during a private meeting” when he was the Attorney General of Arkansas, Governor of Arkansas, and President of the United States.²⁴⁵

Clinton’s attorneys attempted to restrict discovery to “purported incidents, if any, of non-consensual conduct occurring in plaintiff’s work place while she was employed there.”²⁴⁶ Jones’s far-reaching discovery requests, Clinton contended, were “irrelevant to the claims made by plaintiff, and [were] sought for the purpose of harassing and embarrassing the President.”²⁴⁷ Jones countered by emphasizing the liberal construction given to Rule 26(b).²⁴⁸ The issue, Jones argued,

243. *Id.* at 707.

244. *Id.* at 706.

245. Second Set of Interrogatories from Plaintiff to Defendant Clinton Nos. 10, 11, 16, Jones v. Clinton, No. LR-C-94-290 (E.D. Ark. filed Oct. 1, 1997).

246. Memorandum in Support of President Clinton’s Motion for a Protective Order at 2, Jones v. Clinton, No. LR-C-94-290 (E.D. Ark. filed Nov. 5, 1997) [hereinafter Defendant’s Protective Order Memorandum]. As Jones pointed out, however, Clinton himself did not adhere to such a limitation in his own discovery requests. See Plaintiff’s Memorandum Concerning Defendant Clinton’s Request for Status Conference at 4, Jones v. Clinton, No. LR-C-94-290 (E.D. Ark. filed July 29, 1997).

247. Defendant’s Protective Order Memorandum, *supra* note 246, at 1.

248. See Plaintiff’s Memorandum in Opposition to the Motion of Defendant Clinton to Limit Discovery at 2-3, Jones v. Clinton, No. LR-C-94-290 (E.D.

was “whether there is *any* possibility that the discovery *might*, directly or indirectly, lead to admissible evidence.”²⁴⁹

Jones offered a number of grounds to support her claim that virtually every facet of Clinton’s extramarital sex life was discoverable.²⁵⁰ In general, Jones contended that Clinton’s sexual conduct both before and after he was Governor might be relevant and admissible to determine his intent and state of mind in making his alleged sexual advances on her, under Federal Rule of Evidence 404(b).²⁵¹ Similar acts by Clinton, if discovered, would tend to show that Clinton intended to harass Jones “based on her gender and *motivated by his libido*.”²⁵² In fact, if Jones had discovered any acts of sexual assault by Clinton, they would be admissible under Federal Rule of Evidence 415 to show that Clinton had a propensity to engage in the sort of behavior Jones alleged in her complaint.²⁵³

Further, Jones argued that even Clinton’s consensual relationships were discoverable insofar as they might support Jones’s quid pro quo sexual harassment claim.²⁵⁴ Jones alleged that she was the victim of disparate treatment: Clinton used his governmental authority to cause employment favors or benefits to be bestowed on women who consented to his sexual overtures, while Jones and other women who refused Clinton’s advances were denied employment benefits.²⁵⁵ Jones further contended that Clinton’s consensual relationships might be relevant and admissible under Federal Rule of Evidence 406 as “habit,”²⁵⁶ to show that Clinton was a “sex addict.”²⁵⁷ Fi-

Ark. filed Nov. 3, 1997) [hereinafter Plaintiff’s Discovery Memorandum].

249. *Id.* at 2.

250. *See id.* at 4-25.

251. *See id.* at 6-13.

252. *Id.* at 8.

253. *See id.* at 15-19.

254. *See id.* at 8, 20-22.

255. *See id.* at 8. However, it would appear that plaintiffs may prove their quid pro quo claims through circumstantial evidence that other employees who submitted to the employer’s sexual demands received employment benefits, but only where the employer actually coerced the other employees’ submission. *See Toscano v. Nimmo*, 570 F. Supp. 1197, 1199-1201 (D. Del. 1983) (describing pattern of coercive conduct by employer toward other female employees). The *DeCintio* court noted that “submission, in [the quid pro quo] context, clearly involves a lack of consent and implies a necessary element of coercion or harassment.” *DeCintio*, 807 F.2d at 308.

256. “Evidence of the habit of a person or of the routine practice of an or-

nally, Jones pointed out that consent in a given case could only be established following a full investigation.²⁵⁸

In a series of discovery rulings, Judge Wright allowed Jones to explore Clinton's sexual relationships with subordinate employees both in Arkansas and Washington.²⁵⁹ Judge Wright noted that discovery "by its very nature takes unforeseen twists and turns and goes down numerous paths, and whether those paths lead to the discovery of admissible evidence often simply cannot be predetermined."²⁶⁰ Judge Wright did, however, require Jones to establish a "factual predicate" prior to any questioning relating to the so-called "Jane Does."²⁶¹ Jones first had to establish that the Jane Doe in question knew Clinton and had "some contact" with him; second, that she was a state or federal employee before, during, or after such contact.²⁶² Jones could then proceed to inquire into Clinton's sexual contact with the Jane Doe, provided Jones had a good-faith basis for the inquiry.²⁶³ While conceding that this limitation on discovery was only "minimal protection," Judge Wright did note that "[i]n the typical case, the Court would not bother to restrict deposition testimony" at all.²⁶⁴ Among these Jane Does was one Monica Lewinsky.²⁶⁵

ganization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." FED. R. EVID. 406.

257. Plaintiff's Discovery Memorandum, *supra* note 248, at 14.

258. *See id.*

259. *See* Order at 7-8, Jones v. Clinton, No. LR-C-94-290 (E.D. Ark. filed Dec. 18, 1997) [hereinafter Dec. 18 Order]; Clerk's Minutes of In Camera Hearing at 1, Jones v. Clinton, No. LR-C-94-290 (E.D. Ark. filed Nov. 24, 1997); Order at 3-4, Jones v. Clinton, No. LR-C-94-290 (E.D. Ark. Jan. 8, 1998).

260. Dec. 18 Order, *supra* note 259, at 7-8.

261. *Id.* at 1-3.

262. *See id.* at 4.

263. *See id.*

264. *Id.* at 7.

265. Jones' attorneys learned of Lewinsky through Linda Tripp. Apparently, the Jones camp contacted Tripp through Lucianne Goldberg, a conservative, fiercely anti-Clinton gossip columnist. Tripp provided Jones' attorneys details of Lewinsky's affair with Clinton shortly before Clinton's deposition—after Tripp began cooperating with the OIC. It appears that the OIC never instructed Tripp to keep quiet about the matter—leading some to believe that the OIC was setting a perjury trap for Clinton. *See* Alan C. Miller and Judy

Clinton was deposed on January 17, 1998. Jones's attorneys asked Clinton numerous questions concerning Monica Lewinsky, including whether he had ever engaged in "sexual relations" with her.²⁶⁶ Clinton denied having "sexual relations" or a "sexual affair" with Lewinsky.²⁶⁷ Ten days earlier, Lewinsky had signed an affidavit in which she also denied having a "sexual relationship" with Clinton.²⁶⁸

On January 16, 1998, the Office of the Independent Counsel ("OIC") received permission to expand its jurisdiction to investigate whether Lewinsky and Clinton had obstructed justice in the *Jones* suit.²⁶⁹ Twelve days later, the OIC filed a motion with Judge Wright requesting a stay of discovery in light of the OIC's newly-expanded criminal investigation.²⁷⁰ Judge Wright granted the OIC's motion as it related to the Lewinsky matter and further ruled that all evidence concerning Lewinsky would be excluded from the case.²⁷¹

Judge Wright excluded the Lewinsky evidence under the balancing test of Federal Rule of Evidence 403, concluding that its "probative value" was "substantially outweighed by its prejudicial effect" in the form of undue delay pending the OIC's investigation.²⁷² While Judge Wright acknowledged that the Lewinsky evidence "*might* be relevant" to the plaintiff's case, she nevertheless ruled that such evidence was not essential to the "core issues" of the case.²⁷³ Judge Wright "assumed for the sake of argument" that the Lewinsky evidence, as developed through further discovery, would be relevant to Jones's case,²⁷⁴ but she "concluded that such hypothetical evidence was still nothing more than Rule 404(b) evidence" and therefore

Pasternak, *Starr's Office Let Tripp Give Details to Jones' Lawyers*, L.A. TIMES, October 11, 1998, at A1.

266. See Referral to the United States House of Representatives pursuant to Title 28, United States Code, § 595(c) Submitted by the Office of the Independent Counsel, September 9, 1998 [hereinafter *Starr Report*], at Introduction, text accompanying nn.1028-31; I.A.1, text accompanying nn.6-8.

267. *Id.*

268. *Id.* at Introduction (text accompanying nn.952-60).

269. See *id.* at Introduction (text accompanying n.10).

270. See *Jones v. Clinton*, 993 F. Supp. 1217, 1218 (E.D. Ark. 1998).

271. See *id.* at 1218-19.

272. *Id.* at 1219, 1221 (quoting FED. R. EVID. 403).

273. *Id.* at 1219, 1222 (emphasis added).

274. *Id.* at 1222.

could not be used to show that Jones herself was the victim of sexual harassment.²⁷⁵ Moreover, Wright noted that “some of this evidence might even be inadmissible under Rule 608(b).”²⁷⁶

Thus, Judge Wright neither confirmed nor denied the relevance or admissibility of the subject of Clinton’s contested deposition testimony. Rather, she held that the minimal probative value of the Lewinsky evidence was not such as to justify a delay in the proceedings.

B. Application of the Legal Standards of Materiality to the Lewinsky-Related Evidence

1. The OIC’s determination that Clinton’s deposition testimony was material

In its Legal Reference accompanying its Referral to Congress, the OIC purported to address the materiality of Clinton’s deposition testimony concerning Monica Lewinsky.²⁷⁷ The OIC contended that a number of judicial rulings had already established the materiality of Clinton’s testimony: Judge Wright’s rulings on discovery;²⁷⁸ Judge Wright’s order excluding the Lewinsky matter from the *Jones* suit;²⁷⁹ and a ruling by the D.C. Circuit addressing the materiality of Lewinsky’s false affidavit filed in connection with a motion to quash her subpoena in the *Jones* suit.²⁸⁰ These claims will be examined in light of the standards of materiality in the civil discovery context reviewed

275. *Id.* at 1220. Evidence of other wrongful acts cannot be used to prove the character of a person in order to show action in conformity therewith, but may, instead, be used to prove intent, absence of mistake, motive, and the like. *See* FED. R. EVID. 404(b). Because Clinton denied that the alleged incident at the Excelsior Hotel ever occurred, it is difficult to see how such limited evidence would be relevant to Jones’ suit.

276. *Id.* at 1219. However, Wright was careful to point out that she was excluding the Lewinsky evidence under Federal Rule of Evidence 403 and was not ruling on its admissibility. *See id.* at 1221, 1222 n.8. Under Rule 608(b), an attorney may, on cross-examination, inquire into specific instances of a witness’ conduct relating to the witness’ character for untruthfulness.

277. *See* Office of Independent Counsel, Legal Reference [hereinafter Legal Reference] at § I.C.5.d.

278. *See id.* at § I.C.5.d.i.

279. *See id.*

280. *See id.* at § I.C.5.d.ii.

in Part III.

a. the District of Columbia Circuit ruling

First, the D.C. Circuit did *not* rule that Lewinsky-related evidence was material to the *Jones* suit. Rather, the court ruled that Lewinsky's false affidavit was material to her motion to quash.²⁸¹ In February 1998, the OIC subpoenaed Lewinsky's former attorney, Francis Carter, to testify before the Whitewater grand jury.²⁸² Lewinsky resisted the subpoena based on attorney-client privilege.²⁸³ The OIC then countered that the privilege was inapplicable under the crime-fraud exception because Lewinsky consulted Carter for the purpose of committing perjury in the *Jones* case.²⁸⁴ Lewinsky's response was that the crime-fraud exception did not apply because her affidavit in the *Jones* case was immaterial, and hence could not have constituted perjury.²⁸⁵ The D.C. Circuit court rejected this claim.²⁸⁶ Lewinsky had submitted her affidavit as part of her motion to quash the earlier subpoena issued by Jones's attorneys.²⁸⁷ Her affidavit was clearly material to this motion, for it was capable of influencing the decision-maker in deciding whether Lewinsky should be deposed.²⁸⁸ However, the court did *not* purport to address the question of whether Lewinsky's affidavit was material to the underlying *Jones* suit.

b. Judge Wright's discovery rulings

The OIC asserted that Judge Wright had determined the materiality of Clinton's deposition testimony concerning Monica Lewinsky, for purposes of a perjury prosecution, simply by ruling that Clinton's relationship with Lewinsky was discoverable.²⁸⁹ In coming to this conclusion, the OIC relied on the broad materiality stan-

281. *See In re Sealed Case*, 162 F.3d 670, 674 (D.C. Cir. 1998).

282. *See id.* at 672.

283. *See id.* at 672-73.

284. *See id.* at 673.

285. *See id.*

286. *See id.* at 674.

287. *See id.*

288. *See id.*

289. *See* Legal Reference, *supra* note 279, § I.C.5.c.

dard adopted in *Kross* and *Holley*.²⁹⁰ This approach to materiality turns *exclusively* on the question the alleged perjurer had been asked; it totally disregards the significance—or lack of significance—of a truthful answer. The OIC itself concedes as much: “if the question falsely answered was itself permissible under the rules of discovery, then the false answer is deemed material.”²⁹¹

As we have seen, there are strong arguments against equating the standard for materiality in perjury prosecutions with the standard established by Rule 26(b) for defining the scope of discovery. To summarize: This approach violates the plain language of 18 U.S.C. § 1623, which requires a false material *declaration*. Moreover, this approach does not warrant a “delicate assessment of inferences”—the touchstone of every determination of materiality, as the Supreme Court held in *Gaudin*—but merely requires one to pass on the propriety of a judge’s exercise of discretion under Rule 26(b). Thus, it ignores those aspects of the materiality question that led the Supreme Court to hold that materiality is an issue for the jury. Finally, this approach is flawed from a policy standpoint, for it ignores the difference between a trivial lie and a lie that poses a real and serious danger to the particular proceedings in which it was told.

c. Judge Wright’s January 29, 1998 order

The OIC also asserted that in her order of January 29, 1998, Judge Wright “concluded that Lewinsky-related evidence might be capable of influencing the ultimate decision in the lawsuit” but nevertheless excluded the evidence under Federal Rule of Evidence 403.²⁹² Oddly, the OIC transforms Judge Wright’s Rule 403 order into a “conclusion” that the Lewinsky evidence, and hence Clinton’s deposition testimony about Lewinsky, was material to the *Jones* suit. But such a transformation distorts the significance of Judge Wright’s ruling, which she further explained in a March 9, 1998 decision.

Judge Wright’s “conclusion” regarding the significance of Lewinsky-related evidence was a purely hypothetical exercise pursuant to Rule 403’s balancing test. Jones had contended that Judge

290. *See id.*

291. *See id.*

292. *See id.* § II.C.5.d.i.

Wright misapplied Rule 403 because she excluded Lewinsky-related evidence “*without knowing the substance of the evidence*”—necessarily, as she disallowed plaintiff from pursuing further discovery into the Lewinsky matter.²⁹³ Judge Wright responded that she 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.²⁹⁴

Nevertheless, Judge Wright ruled that the probative value of the evidence, thus imagined, was still substantially outweighed by the undue delay it would cause.²⁹⁵ Even assuming a best case scenario for the plaintiff, Judge Wright believed that the Lewinsky evidence could amount to “nothing more than Rule 404(b) evidence, *i.e.*, evidence of other alleged wrongful acts”²⁹⁶

Of course, Judge Wright was forced to consider the relevance of Lewinsky-related evidence to the *Jones* suit from a hypothetical perspective, since she did not have access to the facts surrounding Clinton’s relationship with Lewinsky. But why would the OIC cite Judge Wright’s January 29th Order to establish the materiality of Lewinsky-related evidence to the *Jones* suit? After spending months establishing the facts of Clinton’s relationship with Lewinsky through volumes of grand jury testimony, the most the OIC could do to support its contention that Lewinsky-related evidence was material to the *Jones* suit was to refer back to Judge Wright’s assumption that it might turn out to be relevant, an assumption Judge Wright made before she knew anything about it.

In fact, as the OIC’s investigation established, Clinton’s relationship with Lewinsky was fundamentally different from his alleged conduct toward Jones. It was purely consensual and did not constitute a quid pro quo for job benefits. Its very relevance to the *Jones* suit may be disputed. What follows is a fact-bound assessment of in-

293. *Jones v. Clinton*, 993 F. Supp. 1217, 1220 (E.D. Ark. 1998).

294. *Id.*

295. *See id.* at 1219-1220.

296. *Id.* at 1220.

ferences a reasonable juror would draw from Clinton's relationship with Lewinsky and a discussion of the significance of those inferences for the *Jones* suit.

2. Application of a narrow standard of materiality to Clinton's deposition testimony

The Lewinsky-related evidence proved to be far less significant than Judge Wright imagined in her hypothetical.²⁹⁷ In fact, Clinton's testimony relating to Lewinsky would likely be immaterial under the narrow standard of materiality developed in Part III.D.1. Under that standard, deposition testimony is only material if it is relevant and otherwise admissible in the underlying suit.

a. relevance

The stark differences between Clinton's relationship with Lewinsky and his alleged conduct towards Jones arguably render the Lewinsky-related evidence irrelevant under Federal Rule of Evidence 401. In other words, Clinton's relationship with Lewinsky may not have "any tendency to make . . . more probable" Clinton's alleged conduct towards Jones.²⁹⁸

First, Clinton's sexual contact with Lewinsky was far from unwelcome.²⁹⁹ Indeed, Lewinsky herself initiated it.³⁰⁰ On November 15, the day on which their sexual relationship began, Lewinsky "raised her jacket in the back and showed [Clinton] the straps of her thong underwear," while she and Clinton were conversing alone in the Chief of Staff's office.³⁰¹ Later that night, Clinton, who was alone in George Stephanopoulos's office, saw Lewinsky pass through the hallway.³⁰² He motioned for her to come in. Lewinsky then entered and told Clinton that she had a "crush" on him.³⁰³ Clinton invited her into his private study and she accepted. After a brief

297. *See id.*

298. FED. R. EVID. 401 (West 1998).

299. *See* Starr Report, *supra* note 266, at Introduction (text accompanying n.151).

300. *See id.*

301. *Id.*

302. *See id.* at Introduction (text accompanying n.153).

303. *Id.*

conversation in which they acknowledged the “chemistry” between them, Clinton asked Lewinsky if he could kiss her; she said yes.³⁰⁴ A few hours later, Clinton asked Lewinsky if she would like to meet him in Stephanopoulos’ office, and she agreed. With the lights out, Lewinsky unbuttoned her jacket; Clinton touched her breasts; and Lewinsky performed oral sex on him.³⁰⁵

Further, there were no allegations that Clinton conditioned any employment benefits on sex. Lewinsky accepted a paid White House position on November 13, 1995—two days *before* her first sexual contact with Clinton. Furthermore, the Deputy Chief of Staff may have dismissed Lewinsky from her position at the White House and transferred her to the Pentagon *on account of her relationship with Clinton*—perhaps even over Clinton’s objection. On April 6, 1996, Lewinsky was dismissed from her White House position and transferred to the Pentagon.³⁰⁶ She was very upset about this transfer, and believed that she was dismissed from the White House because of her relationship with Clinton.³⁰⁷ Clinton later asked Deputy Chief of Staff Evelyn Lieberman about Lewinsky’s dismissal, and Lieberman acknowledged that she was responsible for it.³⁰⁸ According to Lewinsky, Clinton told her that Lieberman fired her because she was spending too much time with him.³⁰⁹

It is therefore difficult to see how Clinton’s relationship with Lewinsky has “any tendency to make . . . more probable” Clinton’s alleged conduct towards Jones. There is no indication that Lewinsky “submitted” to Clinton’s sexual overtures in order to receive favorable employment benefits. As the Second Circuit has noted, “submission,” in the quid pro quo context, “clearly involves lack of consent and implies a necessary element of coercion or harassment.”³¹⁰ However, Rule 401 establishes a very liberal rule of relevancy; perhaps Clinton’s relationship with Lewinsky is still legally relevant to

304. *Id.* at Introduction (text accompanying n.154).

305. *See id.* at Introduction (text accompanying n.161).

306. *See id.* at Introduction (text accompanying nn.299-303).

307. *See id.* at Introduction (text accompanying nn.306-08).

308. *See id.* at Introduction (text accompanying n.345).

309. *See id.* at Introduction (text accompanying nn.308 & 343).

310. *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 307-08 (2d Cir. 1986).

the *Jones* suit, despite its consensual nature, by making it somewhat more probable that Clinton would be willing to engage in sexual activities with a subordinate female employee.

b. admissibility

The Lewinsky-related evidence would almost certainly not be admissible for the purpose just stated. In essence, it is relevant on this basis only to establish that Clinton had a propensity to engage in sexual activities with subordinate female employees. In other words, it constitutes evidence of other acts “to prove the character of a person in order to show action in conformity therewith,” a use forbidden by Federal Rule of Evidence 404.³¹¹ Jones, in fact, had argued that Clinton’s sexual propensity would be admissible under Federal Rule of Evidence 415.³¹² But Rule 415 only applies to other instances of *sexual assault*, which are admissible to establish a propensity to commit other sexual assaults.³¹³ Of course, Clinton’s relationship with Lewinsky was not a sexual assault, so Rule 415 does not apply.³¹⁴

Jones had also contended that “other acts” evidence would be admissible under Rule 406, “Habit; Routine Practice,” to show that Clinton was a “sex addict.”³¹⁵ However, Jones did not cite a single case to support her contention that Rule 406 could be used in this way, and, indeed, any such attempt would almost certainly fail.³¹⁶

311. “Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion” FED. R. EVID. 404(a). “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” FED. R. EVID. 404(b).

312. See Plaintiff’s Discovery Memorandum, *supra* note 248, at 15-19.

313. In a civil case based on a party’s alleged commission of sexual assault or child molestation, Rule 415 permits the admission of “evidence of that party’s commission of another offense or offenses of sexual assault or child molestation” for any relevant purpose. FED. R. EVID. 415(a).

314. See *Jones v. Clinton*, 990 F. Supp. 657, 667-68 (E.D. Ark. 1998) (noting that Clinton’s alleged conduct towards Jones did not constitute a sexual assault either).

315. Plaintiff’s Discovery Memorandum, *supra* note 248, at 13-15.

316. See *id.* The advisory committee note to Rule 406 approvingly quotes McCormick, who defines habit as a “person’s regular practice of meeting a particular kind of situation with a specific type of conduct. . . . The doing of

In her March 9, 1998, ruling, Judge Wright suggested that the Lewinsky-related evidence might have been admissible under Federal Rule of Evidence 404(b).³¹⁷ Rule 404(b) admits other acts evidence to prove such things as “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident”³¹⁸ Jones had argued that Clinton’s sexual harassment of other female employees would demonstrate Clinton’s intent to discriminate on the basis of gender, a required element of her § 1983 equal protection claim.³¹⁹ But no such intent to harass Jones could be inferred from Clinton’s relationship with Lewinsky, given its consensual nature.

Jones’s strongest argument for admitting the Lewinsky-related evidence under 404(b) would have been that it demonstrated a common scheme or plan on Clinton’s part to engage in sexual liaisons with subordinate female employees.³²⁰ Such a common scheme would tend to show that Clinton engaged in the lewd conduct at the Excelsior Hotel as Jones alleged. However, the Eighth Circuit has held that, in order to admit “other acts” evidence to demonstrate the existence of a common scheme or plan, the evidence must be “similar in kind and close in time to the crime charged.”³²¹ In particular,

the habitual acts may become semi-automatic.” FED. R. EVID. 406 advisory committee’s note (quoting MCCORMICK ON EVIDENCE § 162, at 340). Clinton’s alleged “habit” of propositioning subordinate female employees, as illustrated by his affair with Lewinsky, lacks the specificity required to be admissible under Rule 406. For example, such behavior could hardly be said to constitute a “semi-automatic” response to a particular type of situation.

317. See *Jones v. Clinton*, 993 F. Supp. 1217, 1220 (E.D. Ark. 1998).

318. FED. R. EVID. 404(b).

319. See Plaintiff’s Discovery Memorandum, *supra* note 248, at 6-13.

320. See generally EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE §§ 3:22-3:24 (1998) (discussing three types of plans supporting admissibility under 404(b): sequential plans, chain plans and, more controversially, unlinked plans); Manuel A. Méndez & Edward J. Imwinkelried, *The California Supreme Court’s About-Face on the Plan Theory for Admitting Evidence of an Accused’s Uncharged Misconduct*, 28 LOY. L.A. L. REV. 473 (1995) (criticizing unlinked plan theory of admissibility as violating prohibition on use of character evidence).

321. *United States v. Sanchez*, 963 F.2d 152, 155 (8th Cir. 1992) (quoting *United States v. O’Connell*, 841 F.2d 1408, 1422 (8th Cir. 1988)); see *United States v. Baker*, 82 F.3d 273, 276 (8th Cir. 1996) (“remarkably similar” extortion of other motorists properly admitted to show plan).

where the defendant's sexual conduct is at issue, the Eighth Circuit has stated that it is "hesitant to affirm the admission of evidence of prior sexual acts or crimes committed against persons other than the victim of the charged offense."³²²

United States v. LeCompte is instructive. In that case, the Eighth Circuit reversed the defendant's conviction for abusive sexual contact with his eleven-year-old niece.³²³ The trial court erroneously admitted evidence that the defendant had sexually abused another niece, of similar age, some ten years prior to the charged offense.³²⁴ Although the charged and uncharged conduct were similar in several respects—in each case, the abuse followed game playing and exposure; the victims were of the same age and of the same relationship to the defendant—the court nevertheless held that the two episodes did not evidence a common plan.³²⁵ The court noted that "[t]he victims were different, and the events were far apart in time. Absent more specific linkage, such evidence is relevant to 'plan' or 'preparation' only insofar as it tends to prove a propensity to commit crimes, which Rule 404(b) prohibits."³²⁶

The Lewinsky evidence would surely fail the Eighth Circuit's test for common scheme or plan evidence. First, as discussed above, there is very little similarity between the alleged Excelsior Hotel incident and Clinton's affair with Lewinsky.³²⁷ Second, there is no "specific linkage" connecting the two episodes. The OIC's investigation did not uncover any overarching plan by Clinton to condition

322. *United States v. LeCompte*, 99 F.3d 274, 277 (8th Cir. 1996) (quoting *United States v. Yellow*, 18 F.3d 1438, 1440 & n.2 (8th Cir. 1994)); *see also* *United States v. Has No Horse*, 11 F.3d 104, 105-06 (8th Cir. 1993) (evidence that defendant propositioned other teen-aged girls not admissible under "plan" theory to prove that defendant committed statutory rape of eleven-year-old girl); *United States v. Fawbush*, 900 F.2d 150, 151 (8th Cir. 1990) (testimony that defendant sexually abused his own daughters not admissible to prove that defendant sexually abused daycare children).

323. *See LeCompte*, 99 F.3d at 279. It should be noted that the government was not able to admit the uncharged sexual misconduct evidence under Federal Rules of Evidence 413 or 414 because it did not provide the defendant with sufficient notice, as required by those Rules. *See id.* at 276.

324. *See id.* at 277-78.

325. *See id.* at 278.

326. *Id.*

327. *See supra* Part IV.B.2.a.

government employment benefits on sexual submission. If anything, Lewinsky's experience demonstrated that having a sexual relationship with Clinton was an employment liability and that Clinton had little, if any, control over the hiring and firing of White House staff.

In short, the Lewinsky-related evidence was of dubious relevance and admissibility in the underlying *Jones* suit. Therefore, it is not the sort of evidence which "would be of importance to a reasonable person in making a decision about" Paula Jones's sexual harassment suit.³²⁸ Further, *no* court has held that deposition testimony of similarly tenuous relevance and admissibility, given in a civil suit between private parties, satisfies the materiality requirement for perjury. Therefore, under the materiality standard proposed in this Comment, the Clinton-Lewinsky testimony cannot serve as a basis for civil perjury.

V. CONCLUSION

Materiality is an essential element of the federal offense of perjury. Its inclusion in the offense indicates that perjury is something more than merely a crime against the administration of justice at the most abstract level. Only those lies that in some way threaten the rights of others constitute perjury.

The materiality requirement should be taken seriously where perjury is predicated on lies made during civil discovery. A broad standard of materiality in this context—one that equates materiality with discoverability—is flawed from a number of perspectives, and should be rejected. At a minimum, statements made during the course of discovery should only be considered material if they are relevant to, and would likely be admissible in, the underlying suit. More fundamentally, criminal sanctions may not be the most effective measure for keeping civil perjury in check. Judges and juries—not prosecutors—should sanction lies told in civil discovery.

328. *United States v. Winstead*, 74 F.3d 1313, 1320 (D.C. Cir. 1996) (discussing jury instructions on materiality).

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