DID CLINTON LIE?: DEFINING "SEXUAL RELATIONS"

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With the impeachment proceedings against President Clinton now a distant memory, we can step back and consider the matter somewhat more dispassionately than was possible in the midst of such an intense and highly politicized debate. The focus of the impeachment hearings was on whether Clinton perjured himself and engaged in obstruction of justice when answering questions relating to the nature of his relationship with a former White House intern, Monica Lewinsky. I will limit my observations in this Article to the question of whether Clinton committed perjury, and in particular, I will focus on whether he lied when he denied having had a "sexual relationship" with Lewinsky.

Yet the real subject of this Article is not the Clinton impeachment, nor is it primarily about perjury law, although I will have things to say about each. It is really about the difference between speech and writing, and in particular about what happens when we write something down in authoritative form, a process to which I refer as *textualization*. Much of the ordinary practice of law consists of creating authoritative texts, such as statutes, contracts, and wills. In the Clinton impeachment, the lawyers who questioned the president about his relationship with Monica Lewinsky textualized the definition of the term "sexual relations" by presenting him with an authoritative written definition of the phrase. I will argue that doing so allowed Clinton to pick apart the definition in a very unnatural way, and helps explain why so many members of the public felt that he had lied about his relationship with Lewinsky, even though technically he may have indeed succeeded in avoiding making a false statement.

In addition, I will explore some of the issues of meaning that the Clinton testimony raises. In particular, I will examine the nature of definitions in a legal context. When Clinton was first asked during a deposition in the Paula Jones lawsuit whether he had ever had a

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"sexual affair" or "sexual relationship" with Lewinsky, he explicitly denied it. During a second legal proceeding—his testimony before Independent Counsel Kenneth Starr's grand jury—he was again placed under oath and was asked about his deposition testimony. Clinton insisted that his denials during the deposition were true based on the ordinary meaning or definition of these terms. In other words, he appealed to usage of terms like "sexual relations" in the speech community.

Not all of Clinton's testimony at his deposition in the Jones lawsuit relied on the ordinary meaning of these words, however. The lawyers for Paula Jones at one point provided him with a formal written definition of the phrase "sexual relations." Jones's lawyers then interrogated Clinton about whether, under that rather convoluted written definition, he had engaged in "sexual relations" with Lewinsky. Clinton denied having done so.

During the subsequent grand jury proceedings, lawyers for Starr once again interrogated Clinton about his denials of having engaged in "sexual relations" with Lewinsky, as that term was defined in writing during the Jones deposition. His defense consisted of an extremely literalistic dissection of the words of the definition, much as a tax lawyer might pick apart the language of the Internal Revenue Code.

These events, which formed part of the basis for the Clinton impeachment proceedings, not only have intrinsic historical interest, but are a fascinating illustration of how these different types of definition operate, as well as the consequences of using one or the other in legal proceedings. There are some important differences between definitions that depend upon usage in the speech community and definitions that are textualized, *i.e.*, memorialized in authoritative written form. A result of textualizing a definition is that it invites a very literal interpretation. President Clinton was only too happy to accept this invitation.

I. SPEECH, WRITING, AND AUTONOMOUS TEXT

Law is surely one of the most literate of all professions. Lawyers and judges generate a tremendous output of written documents. There is such a massive volume of statutes, cases, and other legal texts, as well as hundreds of law reviews full of commentary on these statutes and cases, that I sometimes feel completely overwhelmed by this torrent of written material. And I'm sure that I'm not alone. It's

well nigh impossible to read everything that's published, even in your own specialty. Now that previously unpublished materials are available online, what was once a torrent has become a flood of Biblical proportions.

Yet despite the huge volume of documents produced by the legal profession, as well as the inclination of lawyers engaging in private transactions to "get it in writing," the spoken word continues to play a critical role in legal proceedings. Unlike trials in civil law countries, which rely heavily on written submissions, police reports, and so forth, American trials are still mostly oral. Jurors do little reading; mainly, they listen and watch. Some judges will not even give them copies of their jury instructions in writing. And even though the Statute of Frauds has for hundreds of years required certain sorts of transactions to be written down, oral legal transactions remain commonplace. While statutes, deeds, and wills must almost inevitably be in writing, most types of contracts need not be.[1] Other important legal transactions, like getting married or taking the oath of citizenship, and even taking the oath of the presidency, remain almost entirely oral acts.

My basic thesis in this Article is that it makes a difference whether we conduct legal affairs in speech or in writing. The nature of the writing—whether it is merely a record of an oral event, or a definitive statement that essentially replaces the oral event—also makes a difference. The historical development of the law of wills in England may help illuminate these distinctions, although parallel developments can be found in most areas of the law and in almost all legal systems.

The making of an early English, or Anglo-Saxon, will was originally an entirely oral affair. It was essentially a declaration made before a number of witnesses. The presence of the witnesses had various functions, but it seems logical that their primary purpose was to remember what had transpired.[2]

The transition from speech to writing began when members of the clergy started making written records of these wills. Because religious institutions were often beneficiaries of the testators, the clergy naturally had an interest in recording those gifts. Still, writing at this

1. Peter M. Tiersma, *Textualizing the Law*, 8 FORENSIC LINGUISTICS 73 (2001).

2. *See* Peter M. Tiersma, *From Speech to Writing: Textualization and Its Consequences*, *in* LANGUAGE AND THE LAW: PROCEEDINGS OF A CONFERENCE 349, 351–54 (Marlyn Robinson ed., 2003).

stage was clearly secondary. What mattered was what was said by the testator, not what was written by a scribe. The written documents were merely evidence of what had happened, rather than constituting operative or dispositive legal documents in the modern sense.[3]

Over the centuries, however, the writing and signing of the document itself became the legally operative or dispositive act. As a result of the Statute of Wills of 1540 and the Statute of Frauds in 1677, transfers of either real or personal property upon death had to be in writing. A person's will was no longer a mental state that was expressed in an oral act, but rather the words that were written on a piece of paper or parchment. And those words were no longer just a record created by a scribe, which might or might not be a faithful rendition of what really happened, but were deemed to be the words of the testator himself. As a result, anything that the testator might have *said* at the time of executing his will is not part of his will. This is a complete reversal from the earlier situation, where what the testator said was the only thing that mattered, and the writing was an optional record.[4]

To summarize the historical development, there are generally three major stages in the transition from oral legal act to authoritative written text:

1. The legal act is completely oral, perhaps accompanied by some ritual acts.

2. The legal act is still oral, but someone creates a written record of what happened.

3. The legal act is contained in an authoritative written text; oral evidence is largely irrelevant.

This historical development is characteristic not just of wills, but also of statutes and other categories of legal documents.

Other legal transactions have not fully progressed through these stages. The most interesting example may be contracts. An agreement can be completely oral, just like a will in Anglo-Saxon England. It is also possible to have an oral contract that is memorialized by a written record that contains some or all of the terms. In contract law this is generally called a *memorandum*. Like an oral Anglo-Saxon will

3. *See* Harold Dexter Hazeltine, *Comments on the Writings Known as Anglo-Saxon Wills*, *in* ANGLO-SAXON WILLS vii (Dorothy Whitelock ed. & trans., 1930) (reprint 1986); *see also* MICHAEL M. SHEEHAN, THE WILL IN MEDIEVAL ENGLAND 19 (1963) (describing the Anglo-Saxon will as "an oral transaction in which gifts were made which were usually completed only after the death of the donor.").

4. *See* Tiersma, *supra* note 2, at 354.

whose terms are written down by a monk, such a contract is essentially an oral agreement—the memorandum is simply a record or evidence of the oral event. Under the Statute of Frauds certain types of contracts (for example, those dealing with the sale of an interest in land) are only enforceable if there is a memorandum of this kind.[5] On other occasions, the writing may be simply an optional aid to memory.

Finally, the parties to a contract might decide that they want to create an authoritative text of their agreement. This, of course, is what lawyers call an *integrated* agreement. An agreement may be either partially or fully integrated, depending on the intent of the parties. They might decide to write down certain terms of the deal and intend those terms to be final, in which case the agreement would be partially integrated. Other terms might not be written down, or might be contained in documents that are not part of the integrated agreement. The result of integration is that the text is viewed as the authoritative statement of the parties' intentions. Because the agreement is partially integrated, the text is final, but only as far as it goes.[6]

The parties might instead decide to reduce their entire agreement to writing. If this is their intent, they have created a fully integrated agreement. This means that any terms that are not included in the writing, whether spoken or written, become legally irrelevant. In deciding what terms are included in the contract between the parties, you can only look at the text itself. The writing becomes the "exclusive repository of their agreement."[7] Thus, a fully integrated contract is an authoritative text very much like a will or statute.

There are several consequences that flow from whether a legal transaction is made orally, with or without a record, or by means of an authoritative written text. Some of these differences are closely tied to the speech/writing distinction. For example, we seldom remember the exact words that someone said. Instead, we tend to focus on the meaning, or gist, of an utterance.[8] This makes it very hard at a later stage to concentrate on the exact words of an oral statement. Once ideas are committed to writing, however, fixating on the words

5. E. ALLAN FARNSWORTH, CONTRACTS 391–444 (2d ed. 1990).

6. *Id*. at 470.

7. JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 381 (3d ed. 1990).

8. *See* LAWRENCE M. SOLAN & PETER M. TIERSMA, SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE (forthcoming).

becomes possible. In addition, writing is much more permanent than speech. Even if we could remember the exact words that someone said a few days or weeks after they were spoken, it is highly unlikely that we could continue to do so several years of decades after the event. In addition, the relative permanence of writing makes it possible to read something again and again. Thus, with a writing we usually have the very words of the author before us, sometimes many years after the event, and we can take the time to study them.

There are also drawbacks to writing things down or, conversely, advantages to speech. One is that with writing it is generally the case that we have less information at our disposal to interpret what the words mean. Speakers who are in face-to-face contact with one another can use cues that are provided by a speaker's tone of voice, facial expressions, gestures, and other paralinguistic information to help determine what the speaker intended to communicate. Such information is usually not available in writing. Also, people involved in face-to-face interaction are more likely to share background information that can help give meaning to their utterances. And if something is not clear, a person in face-to-face contact can ask what the speaker meant.

The result is that someone who is trying to interpret a written text typically has more, and more reliable, access to the exact words of the author, but less information about the circumstances and background of the communication. It seems to me that this has profound implications for how both speech and writing tend to be interpreted, and why the reader of a written text is much more likely to focus on the meaning of the exact words, while the hearer of speech will concentrate more on the speaker's intended meaning. When we focus on the words of a writing, the writer—and the writer's intended meaning—fade into the background. With speech, on the other hand, we tend to focus on the speaker, who is usually directly in front of us, and on the meaning that the speaker intended to convey. The spoken words tend to fade away.

The tendency of a reader to concentrate on the exact words of a text is even more pronounced when the text is held to be *authoritative*. By this I mean that the words of the text are deemed to be the definitive expression of its author. Of course, most written documents are not authoritative in this sense. And the notion of "authorship" in the legal context is often a fiction; a testator who is deemed to "speak" through the words of her will most likely did not write those

words, any more than a legislature that "speaks" through the statutes that it enacts usually does not itself draft the statutory language. Nonetheless, our legal system deems the words in texts like statutes, wills, and integrated agreements to be the authoritative statement of the person or body that executed or enacted them.

In addition, often an authoritative text is also deemed to be the *exclusive* statement of its author's intentions. If so, what the testator said during its execution is not part of a will, nor are statements by legislators during debate part of the statute that is enacted. This is related to the fact that authoritative texts tend to be written in a highly *autonomous* style.[9] In an autonomous document, the writer attempts to include in the text everything that the reader needs to understand it. The writer does so because she may be separated from the reader in time or space, and often in both. Information that might be obvious in a face-to-face conversation may not be available when a speaker or writer is separated from the hearer or reader in space or time. Especially with a written text, the writer may have no idea who the reader will be and therefore cannot assume that she shares background information or knowledge of the circumstances that prompted the writing. Hence, whatever the writer wishes to communicate must be in the text itself.

A simple illustration is that if I meet an acquaintance on the street, I do not have to identify myself. I can just say "Hi." But if I call the same person on the telephone, where we are separated by distance, I will generally have to speak more autonomously by saying, "Hi, this is Peter Tiersma." Or consider an oral will in Anglo-Saxon times, where a testator could simply refer to the land he owned at Coventry. Everyone present would know what land he meant. In a written will the land must be described with much greater particularity. Information that is available just by looking at the speaker in a face-to-face conversation needs to be expressed by words in a more autonomous communication.

Although it is not an absolute correlation, writing tends to be more autonomous than speech, simply because a written document is more likely to be conveyed across space and time to a reader who knows little about the writer and the circumstances of the writing. In such a situation, the writer will strive to put as much information as possible into the text itself and rely less on nonverbal information like

9. Paul Kay, *Language Evolution and Speech Style*, *in* SOCIOCULTURAL DIMENSIONS OF LANGUAGE CHANGE 21 (Ben G. Blount & Mary Sanches eds., 1977).

shared knowledge. It should be obvious that operative or dispositive legal documents are usually highly autonomous. The drafter of such a text tries to place as much information into the document as is necessary for another lawyer or a judge, who is removed in space and time, to understand what it means.

I have elsewhere discussed some ramifications of textualization in the area of statutory interpretation.[10] In this Article I will explore the consequences of textualizing a definition. This, of course, brings us back to the question of the meaning of "sexual relations" in the Affair Clinton. But before we proceed to that topic, we need to know a few things about definitions.

II. DICTIONARIES AND DEFINITIONS

Anyone can define a word or phrase, and often enough we do so. I might be conversing with someone and complain about problems I've been having with my "router." My interlocutor might then ask me, "What's a router?" I might then say something like: "Well, it's this small box that sits on my desk and connects my computer to two other computers in the house and lets all of them talk to each other and share my DSL connection." I've provided a definition of the word, albeit not a very elegant one, and it probably would not satisfy someone who is more technically inclined. Of course, for me to define a word in this way, I have to know what the word means. It's possible that I know the meaning of the word because someone has previously defined it for me. But it is far more likely that I was able to infer the meaning from hearing other people use the word. As any linguist can tell you, meaning ultimately derives from usage.

Of course, we live in a relatively literate society, and one of the consequences of literacy is the development of dictionaries. Nowadays, many people who are confronted with an unknown word will turn to a dictionary for a definition. This then raises the question: where do dictionaries find the meaning of words? Logically enough, a modern dictionary also focuses on usage. Linguists and lexicographers refer to definitions based on usage as *descriptive*. Such

10. For consequences of the notion of autonomy for statutory interpretation, see Peter M. Tiersma, *A Message in a Bottle: Text, Autonomy, and Statutory Interpretation*, 76 TUL. L. REV. 431 (2001) [hereinafter Tiersma, *A Message in a Bottle*].

definitions try to describe the way that a word is actually used in a particular speech community.[11]

This emphasis on usage has not always been so fashionable. Many of the earlier dictionaries and grammars of English paid more attention to how people *ought* to use the language. Such definitions are called *prescriptive,* in that they try to prescribe or dictate how a word ought to be used, rather than describe how it is actually used. A commonly-cited example of a prescriptive dictionary is that of Samuel Johnson. Dr. Johnson proposed that "[b]arbarous or impure words and expressions . . . be branded with some note of infamy [and be] eradicated whereever they are found."[12] In actuality, Johnson was rather inconsistent in his approach; he has also been credited as being one of the first lexicographers to take notes on the actual usage of writers.[13] Later dictionaries, most notably the Oxford English Dictionary ("OED"), relied extensively on usage. The editors of the OED managed to collect over five million citation slips that contained actual examples of the use of specific words in context, along with some details about the author and the work from which it was taken.[14] The definitions in the OED, which has a strong historical slant, are almost all supported by examples from actual usage.

Of course, whether a dictionary can ever be purely descriptive is open to serious question. Despite the massive amount of usage upon which the OED was based, it has been pointed out that it relied inordinately on the works of Shakespeare.[15] Modern dictionaries may not depend so heavily on one author, but they do tend to focus on "better" writers or, at least, on published writing in sources like books and newspapers. Thus, it is debatable whether any dictionary is entirely descriptive, or whether it even can be. On the other side of the coin, it is impossible for a dictionary's definitions to be truly prescriptive. Usage is continually evolving, and a dictionary that completely ignores the actual practices of the speech community is doomed to obsolescence.

Even though the issue is largely settled among linguists and lexicographers, many members of the public continue to think that a

11. *See* SIDNEY I. LANDAU, DICTIONARIES: THE ART AND CRAFT OF LEXICOGRAPHY 32 (1989).

12. RONALD A. WELLS, DICTIONARIES AND THE AUTHORITARIAN TRADITION 88 (1973).

13. SIMON WINCHESTER, THE MEANING OF EVERYTHING: THE STORY OF THE OXFORD ENGLISH DICTIONARY 31 (2003).

14. JOHN WILLINSKY, EMPIRE OF WORDS: THE REIGN OF THE OED 4 (1994).

15. *Id*. at 57–91.

dictionary should act as a guardian against what they perceive as deterioration of the language. The publication of Webster's Third New International Dictionary[16] in 1961 set off a firestorm of criticism for its alleged grammatical permissiveness.[17] No less of a figure than Justice Scalia of the Supreme Court has endorsed common arguments that it portrayed "common error as accepted usage."[18] Scalia's point is strikingly at odds with his reliance on dictionaries as keys to the meaning of words. Surely a judge who wants to know what a word means should be consulting a dictionary based on scientific lexicographic principles, not one that pretends to have the power to dictate what is "proper" English and what is not!

In any event, most modern dictionaries are primarily descriptive, although they nonetheless almost always contain some evaluative information on certain words. A good dictionary will tell you that the word *ain't* is generally avoided in written language, but that it often occurs in speech, where it is considered somewhat informal or substandard usage. This usage information should be considered descriptive, in that it merely describes how a word is ordinarily used. But because people consult dictionaries not just to figure out what a word actually means, but sometimes also for guidance on how a word ought to be used, any such descriptive information can be put to prescriptive use. Thus, there is probably no such thing as a purely descriptive or prescriptive dictionary.

Despite these limitations on the dichotomy between descriptive versus prescriptive dictionaries, the terminology is useful in exploring what definitions aim to accomplish. In fact, the distinction is particularly useful in law, because the law uses both types of definitions. The vast majority of words in legal language are understood in their ordinary, or descriptive, sense. Of course, lawyers use a great deal of technical vocabulary, but for the most part such terms are also defined by usage. In the case of ordinary legal dictionaries, the usage that underlies the definitions derives from how the word or phrase is used by members of a specific speech community: members of the legal profession. Good legal dictionaries, like the more recent editions of *Black's Law Dictionary* under the editorship of Bryan

16. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Philip B. Gove ed., 1961).
17. WELLS, *supra* note 12, at 75–86.
18. MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 228 n.3 (1994).

Garner, contain primarily descriptive definitions and are explicitly based on actual usage of legal terminology by the profession.[19]

But the law also makes widespread use of prescriptive definitions, which some legal scholars call *stipulative* definitions.[20] I have elsewhere called them *declaratory* definitions, because the person engaging in a legal act or transaction *declares* what the meaning of a particular word or phrase will be for the purposes of that act or transaction.[21] With such a definition, actual usage is no longer relevant.

For example, a federal statute defines an *employer* as a "person . . . who has fifteen or more employees." Another statute defines the term *state*, for purposes of that statute, to include Puerto Rico, even though Puerto Rico is clearly not a state. Declaratory definitions not only do not need to correspond to actual usage, but—as in the examples above—may fly in the face of the ordinary meaning.

The reason that it is possible for a declaratory definition to deviate from reality is that it is a fundamentally different type of speech act from the average dictionary definition. Ordinarily, a (descriptive) definition represents reality. In the words of John Searle, it must have a "word-to-world" fit. It can be a correct or incorrect definition, depending on how well it fits the world (*i.e.*, is consistent with actual usage).[22] We can say that a definition is a good one because it fits the world well.

On the other hand, a declaratory definition, like other declarative speech acts, has a "world-to-word" fit. The world, in a sense, must conform itself to the word. The truth, or correctness, of such a definition is not relevant.[23] As long as the speaker has the authority to make it, the definition will govern over actual usage.

Of course, no person or group has the right to dictate how other people should use a word (although some, like the Academie Française, may claim such authority). What we *do* have is the authority to define for others how we ourselves are going to use a word. So a mathematician can declare, "let X equal 2.974" For the rest of that conversation or lecture, X will indeed be 2.974. Likewise, a legislature can declare that an "employer" is anyone who employs fifteen or

19. BLACK'S LAW DICTIONARY (Bryan A. Garner ed., 7th ed. 1999).

20. For discussion, see FREDERICK BOWERS, LINGUISTIC ASPECTS OF LEGISLATIVE EXPRESSION 161 (1989).

21. *See* PETER M. TIERSMA, LEGAL LANGUAGE 118–19 (1999).

22. JOHN R. SEARLE, INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND 7 (1983).

23. *Id*.

more employees. The legislature cannot change the ordinary meaning of "employer." But it can establish the meaning of that word for purposes of that specific legislation. The same was true when Paula Jones's lawyers gave Clinton a written definition of the term "sexual relations." They could not change the meaning of the term for ordinary purposes. But for purpose of their subsequent questions during this deposition, their definition—not the ordinary meaning—would govern.

We will see that the distinction between these types of definitions may be an important point in evaluating whether Clinton was telling the truth during his deposition and in his testimony before Kenneth Starr's grand jury. The reason is that on some occasions Clinton was using the phrases "sexual relations" or "sexual relationship" in its ordinary meaning, where it is defined by usage in the speech community. On other occasions, however, he used the term "sexual relations" as that phrase was defined in writing. The written definition textualized the meaning of the term and made the ordinary meaning irrelevant.

Before returning to the Clinton impeachment, we need to deal with one last preliminary matter. To understand whether Clinton committed a potentially impeachable offense in his testimony regarding sexual activity with Lewinsky, we must make a short digression into certain aspects of the law of perjury. The reason is that, in the final analysis, the legal issue is not whether Clinton lied, but whether he committed the crime of perjury.

III. THE LAW OF PERJURY

In and of itself, lying is not a crime. To commit perjury, a person must have taken an oath to testify truthfully. Federal law also requires that the person "willfully and contrary to such oath state[] or subscribe[] any material matter which he does not believe to be true."[24] This is often called the *false statement* requirement.[25] Not only must the accused have made a false statement, but it must have been material, and the accused must have known that the statement was not true.

24. 18 U.S.C. § 1621(1) (2000).

25. Peter Meijes Tiersma, *The Language of Perjury: "Literal Truth," Ambiguity, and the False Statement Requirement,* 63 S. CAL. L. REV. 373 (1990).

Because of the oath requirement, it is primarily statements that Clinton made during his deposition in the Paula Jones case, as well as testimony that he later gave before the grand jury, that could constitute perjury. In addition, he responded to a number of interrogatories under oath.

There was some discussion during the impeachment proceedings regarding whether Clinton's statements about his relationship with Monica Lewinsky were *material* to Paula Jones's lawsuit against him for sexual harassment. After all, there is no doubt that his relationship with Lewinsky was completely consensual; there were never any allegations that it constituted harassment. So its relevance to the Jones lawsuit is debatable.

We are going to leave that issue aside, however, in order to concentrate on whether Clinton made a false statement under oath.

One final but important preliminary matter is that the United States Supreme Court has set a relatively high standard for determining whether a statement is false for purposes of perjury law. The seminal case is *Bronston v. United States*. The issue in *Bronston* was "whether a witness may be convicted of perjury for an answer, under oath, that is literally true but not responsive to the question asked and arguably misleading by negative implication."[26]

The case arose because Mr. Bronston was involved in bankruptcy proceedings. Attorneys for his creditors were examining him, under oath, regarding assets that he personally owned in various countries, as well as assets owned by companies under his control. During this examination, the following exchange occurred:

> Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?
>
> A. No, sir.
>
> Q. Have you ever?
>
> A. The company had an account there for about six months, in Zurich.[27]

The "truth" was that Bronston had had a large personal bank account in Switzerland for five years. Bronston was convicted of perjury, and his conviction was affirmed on appeal. But the Supreme Court reversed. The Court acknowledged that in ordinary conversation, Bronston's response would probably be understood to imply that he had never had a personal bank account in Switzerland. But this was a

26. 409 U.S. 352, 352–53 (1973).

27. *Id*. at 354.

legal proceeding where the parties were represented by lawyers trained in adversarial proceedings. Chief Justice Burger emphasized that the perjury statute refers to what the witness "states," not to what he "implies."[28] If a witness equivocates or gives a vague response, it is the examining lawyer's responsibility to probe more deeply and to clarify the answer.

The *Bronston* case is therefore understood as having established a *literal truth* defense to the charge of perjury. Clinton was educated in the law and was also a law professor for a while. There is every reason to believe that he would have been aware of *Bronston's* literal truth defense, if not before the Paula Jones deposition, then certainly before he appeared to give his grand jury testimony.[29]

Thus, when Paula Jones's lawyers asked him during his deposition whether he had ever been alone in the Oval Office with Monica Lewinsky, Clinton was careful not to make an outright denial. Rather, he responded that he remembered one or two times during a government shutdown when Lewinsky came to drop off some papers for him in the Oval Office. This statement was apparently true, as far as it went: Lewinsky did come by the Oval Office during the government shutdown, and seems to have brought along some papers, perhaps merely for the sake of appearances. But what Clinton does not mention is that she apparently did some more interesting things than just dropping off some boring government documents. Moreover, they seem to have been alone in the Oval Office more like ten to fifteen times.

Thus, what Clinton does *not* say is much more significant than what he says. But, according to *Bronston,* the only thing that seems to matter is what he actually states. As long as what a witness states is true, he cannot be convicted of perjury. What he does not state, as well as any implications that might be drawn from his silence, are legally irrelevant. This line of questioning is quite interesting, and I discuss the issue in some detail in a forthcoming book co-authored

28. *Id*. at 357–58.

29. During his grand jury testimony, Clinton mentioned several times that it was not his duty to "volunteer" information and that his statements about Lewinsky were true, even though they might have been "misleading." In addition, his lawyers referred extensively to the *Bronston* case and the literal truth defense in a Memorandum they filed with the Office of Independent Counsel. *Preliminary Memorandum Concerning Referral of Office of Independent Counsel, in* THE STARR REPORT: THE FINDINGS OF INDEPENDENT COUNSEL KENNETH W. STARR ON PRESIDENT CLINTON AND THE LEWINSKY AFFAIR 355, 403–06 (Wash. Post ed. 1998) [hereinafter THE STARR REPORT].

with Lawrence Solan.[30] For now, I would like to move on to the definition of "sexual relations."

IV. "SEXUAL RELATIONS": THE ORDINARY MEANING OF THE TERM

On a number of occasions, Clinton was asked about whether he had had sexual relations, or words to that effect, with women other than his wife, and without the critical phrase being explicitly defined. For instance, Clinton was sent a set of interrogatories by the Jones lawyers, one of which asked him to list the names of each and every federal employee with whom he had had sexual relations while president. He answered, "none."[31]

Some other examples dealing specifically with Monica Lewinsky occurred during his deposition in the Paula Jones case. Here, lawyers for Jones began by using a somewhat different term, "sexual affair":

> Q. Did you have an extramarital sexual affair with Monica Lewinsky?
>
> A. No.
>
> Q. If she told someone that she had a sexual affair with you beginning in November of 1995, would that be a lie?
>
> A. It's certainly not the truth. It would not be the truth.[32]

Toward the end of the deposition the subject arose again when Clinton's lawyer, Robert Bennett, asked the president—his own client—several questions. Some of these questions related to an affidavit that had been submitted by Lewinsky:

> Q: In paragraph eight of her affidavit, she says this: "I have never had a sexual relationship with the President, nor did he propose that we have a sexual relationship, he did not offer me employment or other benefits in exchange for a sexual relationship, he did not deny me employment or other benefits for rejecting a sexual relationship."
>
> Is that a true and accurate statement as far as you know?
>
> A: That is absolutely true.[33]

30. SOLAN & TIERSMA, *supra* note 8.

31. Jones v. Clinton, 36 F. Supp. 2d 1118, 1122 (E.D. Ark. 1999). The court noted that there was no definition of "sexual relations" in the interrogatories. *Id*. at n.6.

32. *Id*. at 1129. referring to the Clinton deposition in the Paul Jones sexual harassment case, at 78 [hereinafter Clinton Deposition]. The text of Clinton's deposition is available at http://www.washingtonpost.com/wp-srv/politics/special/pjones/docs/clintondep031398.htm.

33. *Id*. at 1122 (citing Clinton deposition at 204).

Clinton would later admit under oath, during his grand jury testimony, that he and Lewinsky were physically intimate. At the beginning of his grand jury testimony he read a prepared statement in which he admitted that he was alone with Lewinsky on several occasions during 1996 and early 1997. He regretted that he had "engaged in conduct that was wrong" and "inappropriate intimate contact," but he insisted that the encounters "did not consist of sexual intercourse."[34]

When Kenneth Starr's lawyers pressed him on the details, Clinton usually fell back on this prepared statement. Essentially, however, Clinton admitted during his grand jury testimony that Lewinsky had engaged in acts of oral sex on him. So, did he commit perjury when he previously stated—under oath—that he had not had a "sexual affair" with Lewinsky and that the statement in her affidavit denying a "sexual relationship" was "absolutely true"?

Not surprisingly, Kenneth Starr's lawyers, convinced that Clinton's denials were false, homed in on this point during Clinton's grand jury testimony.[35] They specifically asked him about his testimony that Lewinsky's affidavit was "absolutely true." Although they made statements in interrogatory form, they were essentially accusing him of lying. Clinton responded to their implicit accusations as follows:

> I believe at the time that she filled out this affidavit, if she believed that the definition of sexual relationship was two people having intercourse, then this is accurate. And I believe that is the definition that most ordinary Americans would give it.
>
> If you said Jane and Harry have a sexual relationship, and you're not talking about people being drawn into a lawsuit and being given definitions, and then a great effort to trick them in some way, but you are just talking about people in ordinary conversations, I'll bet the grand jurors, if they were talking about two people they know, and said they have a sexual relationship, they meant they were sleeping together; they meant they were having intercourse together.
>
> So, I'm not at all sure that this affidavit is not true and was not true in Ms. Lewinsky's mind at the time she swore it out.[36]

Clinton is explicitly invoking the ordinary definition of the term "sexual relationship." To be more exact, his answer to the question

34. THE STARR REPORT: THE EVIDENCE 354 (Phil Kuntz ed., 1998).

35. Starr's lawyers never specifically asked Clinton about his denial, during his deposition, that he had a "sexual affair" with her, but it is clear that Clinton's answer would pertain to this exchange as well.

36. THE STARR REPORT: THE EVIDENCE, *supra* note 34, at 359.

about the Lewinsky affidavit assumes that Lewinsky was using the term in its ordinary definition. Clinton also makes it clear that the ordinary definition depends upon usage in the speech community. His claim, of course, refers to a descriptive rather than prescriptive definition. And because it involves a descriptive claim, it should be possible—at least, in theory—to determine whether it corresponds to actual usage. While I am not aware of a definitive study that has been done on the matter, there is some preliminary evidence that English speakers are quite split on this issue.

Some evidence of the uncertainties inherent in this phrase comes from a study by two researchers, Stephanie Sanders and June Reinisch, who surveyed around 600 undergraduate college students to determine their usage of the phrase to "have sex" with someone.[37] The researchers asked their subjects whether it would be accurate to say they "had sex" with someone under a number of different conditions.[38] One of the conditions was that the person had engaged in "deep kissing (French or tongue kissing)" with someone else.[39] Only 2% of the respondents would say that they "had sex" under those circumstances.[40] If the condition was that the other person "had oral (mouth) contact with your genitals," slightly over forty percent of the subjects would say that they "had sex" with that person.[41] Nor surprisingly, in the case of penile/vaginal intercourse, virtually all the respondents (99.5%) would say they "had sex" with their partner.[42]

The study, conducted before the impeachment proceedings in the Senate, did not specifically ask about the term "sexual relationship." And it is unclear to what extent the results of research on undergraduates can be generalized to the population as a whole. In fact, the study, which appeared in the Journal of the American Medical Association, was heavily criticized for these and other reasons,[43]

37. Stephanie A. Sanders & June Machover Reinisch, *Would You Say You "Had Sex" If . . .?*, 281 JAMA 275 (1999). Printing the study during the Clinton impeachment proceedings was criticized as politicizing the American Medical Association, which published the journal.

38. *Id*. at 276.

39. *Id*.

40. *Id*.

41. *Id*.

42. *Id*.

43. *See Letters: Attitudes Toward and Definitions of Having Sex*, 282 JAMA 1916–19 (1999). One of the letters reports a different study that reached very similar results to those found by Sanders and Reinisch. *Id*. at 1917.

and the editor of the journal was later forced to resign.[44] Nonetheless, the study's overall conclusion seems correct: there is widespread disagreement about whether terms like "have sex" or "sexual relationship" include sexual activities other than intercourse.

No less of an authority than Webster's Dictionary defines "sexual relations" by referring to "coitus." It then defines "coitus" as "physical union of male and female genitalia accompanied by rhythmic movements leading to ejaculation of semen from the penis into the female reproductive tract."[45]

My point is not that Clinton was right in arguing that the ordinary meaning of phrases like "sexual relations" refers mainly or only to intercourse. One can debate the reliability of research results and whether dictionary definitions truly reflect usage, in the sense that they may or may not accurately describe actual speech and writing. Instead, my point is simply that speakers of English are sharply divided on what type of sexual acts are included within these phrases. Clinton was surely a wily witness who intended to mislead his interrogators. But it is harder to conclude that he made a false statement in response to questions that contained such a vague term.

One explanation for the fiercely divergent public opinions about whether Clinton lied in his deposition may therefore simply be that speakers differ in how they define this critical phrase. But an additional factor is that the term "sexual relationship" is a particularly slippery one. To be more exact, it is a term that shows prototype effects, a concept whose implications for the law is something that Larry Solan and Steven Winter have explored.[46] Basically, this

44. Terence Monmaney, *AMA Fires Editor Over Publishing Sex Survey Media: Officials Say That Printing A Study On College Students' Attitudes Toward Oral Sex During Impeachment Trial Wrongly Places Medical Association In Political Debate*, L.A. TIMES, Jan. 16, 1999, at A16.

45. WEBSTER'S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (Philip Babcock Gove ed., 1986).

Not surprisingly, the President's lawyers perused an array of dictionaries and found several other examples of "sexual relations" being defined as intercourse. Trial Memorandum of President William Jefferson Clinton, January 13, 1999, at ¶ 88 (noting that Random House Webster's College Dictionary (1st ed. 1996) at 1229, defines "sexual relations" as "sexual intercourse; coitus;" Merriam-Webster's Collegiate Dictionary (10th ed. 1997) at 1074, defines "sexual relations" as "coitus;" Black's Law Dictionary (Abridged 6th ed. 1991) at 560, defines "intercourse" as "sexual relations;" and Random House Compact Unabridged Dictionary (2d ed. 1996) at 1755, defines "sexual relations" as "sexual intercourse; coitus").

46. *See, e.g.,* Lawrence Solan, *Law, Language, and Lenity,* 40 WM. & MARY L. REV. 57 (1998); Lawrence M. Solan, *Judicial Decisions and Linguistic Analysis: Is There a Linguist in the Court?*, 73 WASH. U. L.Q. 1069 (1995); Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235; Steven L. Winter, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND (2001).

phenomenon involves the fact that for many categories there are certain members of that category that are considered "prototypical" examples. People tend to view robins as better examples of the category "bird" than they do penguins, for example.[47] Thus, a robin is a prototypical bird, while a penguin is less of one. Likewise, the prototypical "car" or "automobile" is probably for most people a sedan. A station wagon would be less prototypical, although most speakers would probably call it a car as well. On the other hand, a sport utility vehicle is a more peripheral member of the category for many speakers, and a pickup even more so. There are, in fact, plenty of speakers who would not regard either one as a "car."

In the Clinton case, speakers of English would almost universally agree that intercourse is a member of the category of "sexual relationships." In fact, intercourse is no doubt the prototypical example of a sexual relationship. That is to say, when someone says that two people had engaged in "sexual relationship," most of us would call to mind an image of a couple engaging in intercourse. That is the central or core meaning of the phrase.

Of course, English speakers would also include other types of sexual acts within the meaning of the phrase. Yet as the survey of college students suggests, speakers seem to differ substantially on whether and to what degree other types of acts that involve the sexual organs or sexual gratification should fall within the ordinary definition of the term. It appears that most sexual acts falling short of intercourse are more marginal members of the category. Some people include such acts within the meaning of the phrase, while others would not, and still others might not be sure either way.

In the face of this uncertainty, it seems to me that persuading twelve jurors to agree that Clinton made a false statement when he denied having a "sexual affair" with Lewinsky, or when he stated that Lewinsky's affidavit was true, would have been difficult. On neither of those occasions was the crucial phrase, either "sexual affair" or "sexual relationship," defined, nor was there any effort to ascertain how Clinton understood the phrases. If prosecutors wish to convict someone of perjury, they should only be able to do so when the testimony contains terminology that is more specific and less susceptible to these prototype effects. At the least, they should prosecute someone for perjury only when that person's statement is false under the

47. *See* Eleanor Rosch, *Cognitive Reference Points,* 7 COGNITIVE PSYCHOL. 532 (1975).

core meaning of the relevant term. After all, the prosecution had to prove beyond a reasonable doubt that Clinton made a false statement, and that he knew it was false. Because Clinton used the ordinary meaning of the rather vague term "sexual relations," it seems to me that the Starr team failed to make its case that he perjured himself in these exchanges.

The *Bronston* case places a great deal of confidence in the ability of examining lawyers to identify vague, incomplete, or misleading answers to their questions and to probe more deeply when confronted by such answers. In this case, the Jones lawyers should have been aware that a term like "sexual relationship" can be highly malleable and should therefore have explored how Clinton defined it, or how Clinton believed that Lewinsky defined it. Oddly enough, they never did so. Instead of trying to find out how Clinton understood the phrase, or how he thought that Lewinsky or the ordinary speaker of English would understand it, they proceeded instead by providing Clinton with an authoritative written definition of the term. In doing so, they unwittingly waded into a very different definitional quagmire.

V. TEXTUALIZING THE DEFINITION

The lawyers working for Paula Jones were not naive. They must have known that Clinton was a clever man who would try to slip through their fingers. But in trying to pin Clinton down, they made what—at least, in retrospect—would turn out to be a serious tactical error. As mentioned, they should have asked Clinton what sorts of activities *he* understood the phrases like "sexual relations" or "oral sex" to include, and then they should have followed up by asking him whether he and Lewinsky had engaged in activity that fit within his definition. Instead, they did what legislators often do when they draft statutes: they defined the term "sexual relations" in writing and then asked him if his conduct with Lewinsky fit within *their* definition. Perhaps if they had formulated a better definition, the strategy would have worked. But the definition that they drafted was highly convoluted, turned some relatively innocuous acts into "sexual relations," and at the same time left at least one enormous loophole.

The original definition had three subparts. Judge Wright, who was presiding at the deposition, ruled that only the first subpart applied, leaving the definition as follows:

> For the purposes of this definition, a person engages in "sexual relations" when the person knowingly engages in or causes . . .

> [1] contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to arouse or gratify the sexual desire of any person. . . .
>
> "Contact" means intentional touching, either directly or through clothing.[48]

This is obviously a prescriptive definition, or what I have called a declaratory definition. It is not intended to describe actual usage. Rather, it declares what the meaning of the phrase is to be for a particular purpose, in this case, for purposes of the deposition.

One of the interesting things about a declaratory or prescriptive definition like this one is that it supersedes the ordinary meaning of the term. Like a mathematician who defines the meaning of X in a proof, Jones's lawyers have defined what this phrase will mean in any subsequent questions. This definition is now the authoritative statement of the meaning of "sexual relations" for any question using that phrase during the rest of the deposition. Not only is it authoritative, but its authors clearly intended it to be the exclusive definition of the phrase. The definition, in other words has been textualized.

Recall that a testator is deemed to have placed all his testamentary intentions into the written will, just as legislators endeavor to place all their intentions into the text of a statute. What the testator says during the execution is not part of the will, just as comments and debates by legislators are not part of a statute. At most, what testators and legislators say can be used to interpret the writing. Their oral statements cannot add to it. Thus, the effect of textualizing a definition is that it becomes the authoritative and exclusive statement of the meaning of the defined term. The actual usage of the speech community no longer matters.

The definition is also quite autonomous, in the sense that it was written to be able to stand on its own, which is once again like a statute. It is highly abstract and impersonal. To understand what the definition means, you therefore focus mainly on the words themselves.

Because it is an authoritative statement that *prescribes* meaning rather than *describing* it, a declaratory definition can be either broader or narrower than ordinary usage. I suspect that most speakers of English would not think that the mere act of touching someone's inner thigh or even a woman's breast through her clothing, with an intent to arouse either that person or the actor, would be engaging

48. Jones v. Clinton, 36 F. Supp. 2d 1118, 1121 n.5 (E.D. Ark. 1999).

in sexual relations. According to the Sanders and Reinisch survey, only 3 percent of respondents would consider such actions to fit within the meaning of "having sex." But, odd as it seems, the Jones definition specifies that those acts constitute "sexual relations." This substantially broadens the reach of this term beyond its ordinary meaning.

A declaratory definition can also narrow the ordinary meaning. An illustration of narrowing is the statute referred to earlier in which "employer" is defined as anyone who employs more than fifteen people. As we will see, it turns out that the definition of "sexual relations" narrowed the ordinary meaning of the word in ways that the Jones lawyers seem not to have anticipated.

Definitions are intended to make the law more determinate by circumscribing the exact parameters of a word's meaning. Often they succeed, at least to some extent. But the success does not come cheaply: by trying to fix the boundaries of a word or phrase as exactly as possible, and thus trying to restrict the options of those subject to a rule or regulation, you create an incentive for them to interpret it in a hyperliteral way in a search for loopholes. The more tightly you weave the net in an effort to prevent a recalcitrant object of regulation from escaping, the more desperately that person will look for a way out. The best example of this is probably the Internal Revenue Code, which in an attempt to specify the tax rules as exactly as possible has spawned a huge volume of statutes, regulations, and rulings, all of which motivate creative taxpayers and their lawyers to find loopholes, which lead to further regulations to plug the loopholes, and renewed efforts to find new loopholes.

Like a lawyer scrutinizing the tax code, Clinton read the definition in a very literalistic way and found the loophole he was searching for. This allowed him to state during his deposition, when being questioned by a lawyer for Jones, that he had never engaged in "sexual relations" with Lewinsky under the definition:

> Q. . . . And so the record is completely clear, have you ever had sexual relations with Monica Lewinsky, as that term is defined in Deposition Exhibit 1, as modified by the Court? . . .
>
> A. I have never had sexual relations with Monica Lewinsky. . . .[49]

Later, during the grand jury proceedings, Clinton was interrogated by Starr's lawyers, who clearly thought that his denial should be

49. *Id*. at 1192 (citing Clinton Deposition at 78).

considered perjury. He explained that the definition referred to the person in question engaging in contact with one of the enumerated body parts of the other:

> I thought the definition included any activity by the person being deposed, where the person was the actor and came in contact with those parts of the bodies with the purpose or intent or [sic] gratification, and excluded any other activity.[50]

Because *Lewinsky* engaged in oral sex on *him*, rather than vice versa, Clinton argued that *she* had engaged in contact with one of *his* relevant body parts, which would mean that under the definition *she* had had sexual relations with *him*. But he argued that *he* had never engaged in contact with one of *her* listed body parts for the purpose of sexually gratifying either him or her, so that under the definition he had not engaged in "sexual relations" with her.

Unlike the lawyers in the Jones case, who never explored in any detail what Clinton thought was the ordinary meaning of the phrase "sexual relationship," lawyers working for the Office of Independent Council now probed how Clinton understood the textualized definition:

> Q. Well, I have a question regarding your definition then. And my question is, is oral sex performed on you within that definition as you understood it, the definition in the Jones—
>
> A. As I understood it, it was not, no . . . .
>
> Q. If the person being deposed kissed the breast of another person, would that be in the definition of sexual relations as you understood it when you were under oath in the Jones case?
>
> A. Yes, that would constitute contact. I think that would. If it were direct contact, I believe it would. I—maybe I should read it again, just to make sure.
>
> Because this basically says if there was any direct contact with an intent to arouse or gratify, if that was the intent of the contact, then that would fall within the definition. That's correct.
>
> Q. So, touching, in your view then and now—the person being deposed touching or kissing the breast of another person would fall within the definition?
>
> A. That's correct, sir.[51]

It would therefore seem that as Clinton understood the definition, for a man to kiss a woman's breast for the purpose of sexual gratification would constitute "sexual relations," while allowing a woman to orally

50. THE STARR REPORT: THE EVIDENCE, *supra* note 34, at 356.

51. *Id*. at 387.

stimulate his private parts would not. To be more exact, in that situation the woman would be engaging in sexual relations, while the man would not be.

Many people found Clinton's distinction absurd. Judge Richard Posner, for example, wrote that "[f]or the passive participant in a sexual act not to be engaged in sexual relations would imply that when Lewinsky was fellating the President she was engaged in sexual relations but he was not."[52] Based in part on the counterintuitive logic of this proposition, Posner concluded Clinton must have lied.[53] Likewise, the Starr report criticized Clinton for his unreasonable "linguistic parsing."[54]

The grand jury was similarly unimpressed, as indicated by a question they conveyed through the lawyer who was conducting the examination:

> Q. Well, the grand jury would like to know, Mr. President, why it is that you think that oral sex performed on you does not fall within the definition of sexual relations as used in your deposition.

In answering, Clinton makes it evident that he had studied the words of definition and interpreted it as authoritative text. Significantly, he no longer refers to the ordinary meaning of the phrase:

> A. Because that is—if the deponent is the person who has oral sex performed on him, then the contact is with—not with anything on that list, but with the lips of another person. It seems to be self-evident that that's what it is. And I thought it was curious.
>
> Let me remind you, sir, I read this carefully. And I thought about it. I thought about what "contact" meant. I thought about what "intent to arouse or gratify" meant.
>
> And I had to admit under this definition that I'd actually had sexual relations with Gennifer Flowers. Now, I would rather have taken a whipping than done that, after all the trouble I'd been through with Gennifer Flowers . . .[55]

Of course, it *is* very odd to suggest that one person can have sexual relations with another, while the converse is not true. As the saying goes, "it takes two to tango." Yet to a large extent, Clinton's hyperliteral analysis is a natural result of textualizing the definition. In contrast to speech, which is usually spontaneous, an autonomous written text tends to be carefully planned out in advance. As a conse-

52. RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 47 (1999).

53. *Id*.

54. THE STARR REPORT, *supra* note 29, at 169.

55. THE STARR REPORT: THE EVIDENCE, *supra* note 34, at 409.

quence, lawyers who interpret such texts usually assume that every word has meaning and that the choice of one word over another must be significant. Moreover, because the definition is in writing, the reader can study it carefully and read it over and over again.

Clinton testified that he read the definition carefully and thought about what the words meant. He obviously focused closely on the exact words of the definition, which refers to a person "engaging in" contact with the specified body parts of the other person. As Clinton observed during the grand jury testimony, "I thought the definition included any activity by the person being deposed, where the person was the actor and came in contact with those parts of the bodies with the purpose or intent or gratification [sic], and excluded any other activity." This is not a crazy interpretation of that phrase. If I hit you, *I* have obviously engaged in contact with *you*. But it is less clear that we would say that *you* "engaged" in contact with *me*. Perhaps you were "involved" in contact with me, but to "engage" in contact strongly suggests that the subject of the verb is an intentional actor who causes the contact to occur, nor just a passive recipient. And in a written authoritative text, the choice of one word over another possible word is generally held to be significant.

Notice also that "contact" is specifically defined as "intentional touching." This reinforces the notion that the definition envisions an actor who is initiating and engaging in the contacting, and a passive recipient of the touching or contact. Clinton is correct in asserting that the definition, literally construed, applies only to the actor. Of course, whether it is factually true that Clinton was merely a passive recipient of Lewinsky's favors is another matter entirely. It is conceivable, especially when sexual activity is forced upon someone, that the person is nothing more than a recipient of sexual contact. But in a consensual situation like that between Clinton and Lewinsky, it seems unlikely.

In his response to the grand jury's question, Clinton also made what might be called a "backup" argument. Assuming arguendo that the more passive partner in an oral sexual encounter is held to have "engaged in" intentional contact with the more active partner, he suggests that it would still be true that the passive partner might only have engaged in contact with the other person's *lips*, not necessarily with one of the body parts on the list.

We begin to see that Clinton is parsing this textualized definition in much the same way that a judge would construe a statute. A list

like the one in this definition need not be exhaustive. It might simply be an enumeration of some examples. One of the better known canons of construction, known as *expressio unius est exclusio alterius*, addresses exactly this issue. The expression of one or more members of a category is deemed to exclude other members of that same category.[56] It essentially means that a list is deemed to be complete, rather than illustrative or exemplary. For this reason, it is most appropriately applied to highly textualized and autonomous documents, which are generally held to be the complete and exclusive statements of their makers.[57]

Some textualists, like Justice Scalia, have argued that *expressio unius* and the other canons of construction should be applied more broadly, and that there should be less emphasis on the intent of the drafter.[58] For now, at least, Clinton is clearly in the camp of the textualists, even though his political positions have little in common with those of Scalia. What mattered is the plain meaning of the words, even if that meaning is at odds with what the drafters (presumably Paula Jones's lawyers) would have intended, and even if it seems at odds with common sense.

Whether Clinton "engaged" in contact with the listed body parts was not the only issue. The definition also contained a second verb, which states that sexual relations occur when a person "causes" contact with the body parts in question. Causation, of course, is a notoriously slippery concept. Dean William Prosser wrote that "[t]here is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion."[59]

Clinton took the position that he understood "cause" in the definition to require the use of physical force, or at least some kind of coercion. Clinton is certainly right that if he forced Lewinsky to touch his body parts, whether by physical force, threats, or duress, we could properly say that he "caused" her to engage in contact with him. On the other hand, if he passively allowed such contact, we would be less

56. *See* TIERSMA, LEGAL LANGUAGE, *supra* note 21, at 83–84.

57. Tiersma, *A Message in a Bottle*, *supra* note 10, at 431.

58. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 25–27 (Amy Gutmann ed., 1997).

59. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 263 (5th ed. 1984).

likely to reach this conclusion. Between these two extremes the question becomes more difficult.

What seems like the most likely scenario is that he *encouraged* her to engage in contact with his body, or that he *invited* her to do so, or that he *signaled* in some way that he welcomed it.[60] But does encouraging or inviting someone to do something "cause" the person to do the act? This depends on how significant a factor the encouragement or invitation was in bringing about the result. It is conceivable that Lewinsky's enthusiasm about engaging in sexual activity was what caused her to engage in contact with Clinton's body, even if technically his encouragement or invitation was also a but-for cause.

Clinton did not rely on the vagueness that inheres in causation, however. He explained during the grand jury testimony that the origin of the definition was also a factor:

> Q. What did you understand the word "causes," in the first phrase? That is, "For the purposes of this deposition, a person engaged in 'sexual relations,' when the person knowingly" causes contact?
>
> A. I don't know what that means. It doesn't make any sense to me in this context, because—I think what I thought there was since this was some sort of—as I, remember, they said in the previous discussion—and I'm only remembering now, so if I make a mistake you can correct me. As I remember from the previous discussion, this was some kind of definition that had something to do with sexual harassment. So, that implies it's forcing to me, and I—and there was never any issue of forcing in the case involving, well, any of these questions they were asking me.
>
> They made it clear in this discussion I just reviewed that what they were referring to was intentional sexual conduct, not some sort of forcible abusive behavior.[61]

Remarkably, Clinton, who up to this point had taken a strong textualist position, suddenly becomes an intentionalist. He specifically invokes the drafting history of the definition. He is referring to a discussion during his deposition in the Jones case, when Jones's lawyers first offered their written definition. Jones's lawyers told Judge Wright that they had largely taken the definition from a federal rule of evidence relating to sexual harassment.[62] While construing "cause" as "force" or "compel" would seem out of place in a deposition inquiring into consensual sexual activity, it would be entirely in keeping

60. For examples, see THE STARR REPORT *supra* note 29, at 161–62.
61. THE STARR REPORT: THE EVIDENCE, *supra* note 34, at 356–57.
62. Clinton Deposition, *supra* note 32, at 19. The reference is to FED. R. EVID. 413.

with the origins and purpose of the rule from which the language was borrowed. Clinton therefore essentially claimed that the "legislative history" of the definition confirmed his interpretation of its language.

This approach to interpretation is very common among contemporary judges. It begins with the text, but—unlike textualism—does not stop there. Rather, judges employing this approach will confirm their initial understanding of the text by considering available information on a statute's legislative history, even if the statute is not necessarily ambiguous. At the same time, many such judges are reluctant to base an interpretation on legislative history if it would override the most obvious meaning of the text.

Clinton's conversion to intentionalism does not stop here. He becomes even more of an intentionalist when he invokes what is essentially the "rejected proposal" rule, which is sometimes used by courts to infer the intent of the legislature. As described by William Eskridge, this rule posits that "proposals rejected by Congress are an indication that the statute cannot be interpreted to resemble the rejected proposals."[63]

In his testimony before the grand jury, Clinton invoked the "rejected proposal" principle when he was asked about another type of sexual activity. One of Starr's lawyers, Sol Wisenberg, asked Clinton whether inserting a cigar into a woman's private parts would come within the definition, as he claimed to understand it. There is little doubt that inserting a cigar into a woman's sexual organs for the purpose of gratification comes literally within the scope of the first paragraph: the person in question would have engaged in intentional contact with one of the enumerated body parts for the purposes of sexual gratification of either one of the parties involved. Perhaps Clinton might have argued that touching someone with a cigar is not within the definition of "contact," which requires "intentional contact, directly or through clothing." But it is hard to avoid the conclusion that someone who touches someone else's body with a cigar has, at the very least, *caused* contact with the other person's body. The person manipulating the cigar cannot plausibly argue that he was but a passive recipient of someone else's amorous advances.

So, how could Clinton talk his way out of this problem? If the Starr Report is to be believed, the President had engaged in precisely

63. William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 69 (1988). For examples, see *id.* at 67 n.3.

this action with Lewinsky during the late afternoon of Sunday, March 31, 1996, in a hallway outside the Oval Office study.[64] This is precisely what Starr's lawyers were eager to find out:

> Q. As you understood the definition then, and as you understood it now, would [the definition] include sticking an object into the genitalia of another person in order to arouse or gratify the sexual desire of any person? Would it constitute, in other words, contact with the genitalia?
>
> A. I don't know the answer to that. I suppose you could argue that since section 2, paragraph (2) was eliminated, and paragraph (2) actually dealt with the object issue, that perhaps whoever wrote this didn't intend for paragraph (1) to cover an object, and basically meant direct contact.
>
> So, if I were asked—I've not been asked this question before. But I guess that's the way I would read it.
>
> Q. If it—that it would not be covered? That activity would not be covered?
>
> A. That's right. If the activity you just mentioned would be covered in number (2), and number (2) were stricken, I think you can infer logically that paragraph (l) was not intended to cover it. But, as I said, I've not been asked this before. I'm just doing the best I can.

Recall that when Clinton was being deposed in the Jones lawsuit, one of the first things that the Jones lawyers did was to hand him the definition of "sexual relations," which initially had three subparts. After some legal wrangling by the lawyers, Judge Wright narrowed the definition to only the first of the three numbered paragraphs. Clinton testified that he circled part one to remind him that it was the only one that applied.[65] Significantly, the second paragraph, which was not part of the definition used at the deposition, stated that a person engages in sexual relations when a person engages in or causes "contact between any part of the person's body or an object and the genitals or anus of another person."[66]

Clinton is certainly correct that this paragraph seems to have been drafted explicitly to cover scenarios like that involving a cigar. Whether Judge Wright's rejection of this part of the definition is as significant as he claims is less certain. Eskridge has pointed out that the Supreme Court has not always used rejected proposal arguments when they were available, suggesting that while they are sometimes

64. THE STARR REPORT, *supra* note 29, at 162.
65. THE STARR REPORT: THE EVIDENCE, *supra* note 34, at 356.
66. *Id*. at 420.

helpful indicators of legislative intent, they should be used with caution.[67] This is true also in the Clinton case. It seems doubtful that Judge Wright, in excluding paragraph 2, meant to eliminate sexual contact that occurred by means of an object from the ambit of "sexual relations." She might just as well have thought that the second paragraph was duplicative of the first. So I am not entirely persuaded by his argument, although I have to admit that I *am* impressed by it.

The lesson is that creating a textualized prescriptive definition can be useful in pinning down the exact meaning of a word, or "fencing in" the meaning, especially when a word has a fairly broad semantic range in ordinary usage. But this exactness comes at a cost. Those who interpret such language will try to find holes in the fence. And very often, like Clinton, they succeed.

I certainly do not want to suggest that it is moral or ethical to dissect a definition in the way that Clinton did, especially when you have a legal obligation to provide information and to speak the truth. But it is certainly the case that declaratory definitions, especially those that are highly textualized, tend to allow and perhaps even promote a hyperliteral interpretation and a search for loopholes. Clinton was a willing participant in this game. But it was Jones's lawyers who made it possible.

CONCLUSION

So, did Clinton lie? To be more exact, did he commit perjury? And could the case have been proven beyond a reasonable doubt?

My personal view is that he probably did not commit perjury based on the evidence we have so far examined. He certainly intended to mislead his questioners in the Jones deposition. But the *Bronston* case emphasized that intent to mislead is not the legal standard in deciding whether someone made a false statement under federal perjury law. It is up to the examining lawyer to establish a clear record of the witness's testimony. This is something that the Jones lawyers failed to do. Instead of probing how Clinton understood phrases like "sexual relationship," they handed him their own definition. This textualized prescriptive definition provided Clinton with an opportunity to search for loopholes, and at least in my mind, he found them. And when he was asked questions that did not invoke the written definition, the terms that were used, like "sexual relationship" or

67. Eskridge, *supra* note 63, at 69.

"sexual affair," were simply too uncertain at the margins to support a perjury conviction.

But that is not the end of the matter. This discussion has so far presupposed that Clinton's version of what happened is true. According to the Starr Report, Monica Lewinsky told a different story. She agreed that they had never had sexual intercourse. But in her account to Starr, Lewinsky claimed that Clinton did, in fact, engage in intentional contact with some of her body parts which were listed in the definition.[68] So, at least with respect to whether Clinton engaged in sexual relations, and whether the President perjured himself in denying it, the question ultimately boils down to a classic "he said/she said" swearing contest.

It's possible that Starr's lawyers, who had the benefit of greater resources and access to much more information than the lawyers who represented Paula Jones, could have pinned Clinton down during the grand jury proceedings. Yet here Clinton pulled out his own piece of authoritative text: his written statement that he and Lewinsky had engaged in "conduct that was wrong" and "inappropriate intimate conduct," but that this conduct did not include sexual intercourse. Throughout the questioning before the grand jury, he held this statement out as the definitive and complete statement of what had happened. Every time Starr's lawyers asked him to be more specific, he referred back to the statement. Clinton, in other words, treated this statement as being fully textualized, just like a completely integrated contract. Oral evidence that could expand upon or modify the statement was, according to Clinton, inadmissible.

Many people might fault Clinton for relying on a text that he had written and then refusing to answer questions about it. Ordinary folks would surely be entitled to wonder about why Clinton could get away with this. One answer is that he was the president. Moreover, his relationship with Lewinsky was never all that relevant to the allegations by Paula Jones regarding sexual harassment. In addition, it is worth pointing out that the legal system itself routinely relies on written texts and then refuses to answer questions about what the text means. Consider the Supreme Court case of *Weeks v. Angelone*.[69] During the penalty phase of a capital proceeding, a Virginia judge read to the jury a convoluted instruction that spelled out how they were to decide

68. THE STARR REPORT, *supra* note 29, at 159–63.

69. 528 U.S. 225 (2000).

whether convicted cop-killer Lonnie Weeks should live or die.[70] During deliberations, the jury sent the judge a question that indicated they were confused on how to weigh the mitigating evidence, a point on which the instruction was remarkably obscure.[71] Like Clinton, the judge refused to answer the question, referring them back to the obscure instruction he had originally given them.[72] The Supreme Court held that the judge's response was perfectly proper.[73]

Language is powerful. Written text, especially authoritative text, can in some ways be even more powerful. It can pin people down. But it also offers people opportunities to slip away. A textualist approach encourages people to try to slip through loopholes in the text. An intentionalist approach encourages people to evade the text and focus more on evidence of the intended meaning of the speaker. Clinton, of course, used both approaches.

As a result, we may never know exactly what happened between Clinton and Lewinsky. In my opinion, it doesn't really matter. But it does provide an instructive opportunity to explore the nature of definitions, and of legal text more broadly.

70. *Id*. at 228.

71. *Id.* at 229; *see also* Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1096–99 (2001).

72. *Weeks*, 528 U.S. at 229. For other examples, see Peter M. Tiersma, *Jury Questions: An Update to Kalven and Zeisel*, 39 CRIM. L. BULL. 10 (2003).

73. *Weeks*, 528 U.S. at 234.