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1-1-2001

## Just Being a Lawyer: Reflections on the Legal Ethics of a President Under Impeachment

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### Recommended Citation

John A. Humbach, Just Being a Lawyer: Reflections on the Legal Ethics of a President Under Impeachment, 4 *Legal Ethics* 155 (2001) (book review), <http://digitalcommons.pace.edu/lawfaculty/449/>.

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**Just Being a Lawyer: Reflections on the Legal Ethics of a President under Impeachment,** A review of “An Affair of State: The Investigation, Impeachment and Trial of President Clinton,” by Richard A. Posner (1999)

ABSTRACT

*The core vice that Posner finds in Clinton’s efforts to contain the truth of the Lewinsky affair is very similar to a fault the public perceives in the behavior of lawyers generally. Namely, lawyers often try to obscure or distract from factual truth order to prevent the law from applying as intended. Most of this avoidance behavior is technically lawful because, for pragmatic reasons, allowances for such avoidance have been deliberately built into the criminal laws against perjury, obstruction of justice and the like. These allowances are a compromise that the law makes with morals so its criminal prohibitions will not unduly chill the advocacy zeal on which the adversary system depends. Because of these allowances, however, it may be problematic to make a legal case against Clinton for his efforts to conceal the Lewinsky affair. Nonetheless, Clinton’s manner of defense discloses unmistakably the serious discrepancy that exists between the standards of honesty that lawyers apply to themselves and those that the public expects of honest people in general and of a legitimate system of law in particular.*

This is a book about obstruction of justice. It is a story of efforts to avoid consequences that the law prescribes. Specifically, Judge Richard Posner<sup>1</sup> accuses President Clinton of trying to head off negative legal consequences from his “sexual affair with a young White House worker named Monica Lewinsky”<sup>2</sup> and from his later attempts to keep that affair confidential.<sup>3</sup> These efforts of the President were not necessarily “obstructions of justice” in the legal sense, but Posner clearly believes that many of them were.<sup>4</sup> He refers to Clinton as “a lying scofflaw of a President”<sup>5</sup> who richly deserved to be rebuked and sanctioned, if not impeached.<sup>6</sup> He says that Clinton deliberately attempted to deceive the American people and to obstruct justice by “subornation of perjury and witness tampering, and . . . lying.”<sup>7</sup>

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<sup>1</sup> U.S. Court of Appeals for the Seventh Circuit (in Chicago), Senior Lecturer in Law at the University of Chicago Law School, and major intellectual force in the law-and-economics movement.

<sup>2</sup> Richard A. Posner, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON 1 (1999) (hereinafter “AS”).

<sup>3</sup> AS at 38-52.

<sup>4</sup> See, e.g., AS at 2 n. 6, 9, 10, 34-56. *But cf.* the important qualification, *id.* at 7, n. 13: “all the legal assessments” are based on the “public record.” Apparently, however, Posner believes that the public record is generally accurate.

<sup>5</sup> AS at 210. *Cf. id.* at 242 (“flouting the nation’s criminal laws”).

<sup>6</sup> On the central question of impeachment, Posner ultimately punts, describing the process as only “quasi-legal,” with the proper outcome turning on choices one makes as a matter of “political philosophy.” AS at 183.

<sup>7</sup> AS at 1, 54, 93, 239 (“Clinton was guilty of serious crimes”). Posner lists numerous alleged lies. *Id.* at 45-48.

Like many who find they must defend themselves at law, President Clinton does indeed seem to have been animated by a purpose to conceal certain facts. For reasons both legal and political, he undoubtedly wanted to keep a wrapper on the sexual details of the Lewinsky affair. Doing so, however, meant getting in the way of various legal processes. For example, evidence of the affair would likely have been legally relevant in the sexual harassment lawsuit then being waged against the President by Paula Jones.<sup>8</sup> Later, in the proceedings of the special prosecutor, the relationship's sexual details may have been relevant as evidence that Clinton lied during his *Jones* deposition, or that he otherwise obstructed justice.<sup>9</sup> By trying to preserve the confidentiality of the Lewinsky affair, President Clinton almost surely impeded, in some degree, the processes of justice in both of those proceedings, as well as in his own impeachment. Whether these actions of the President were crimes, however, is another matter altogether. Maybe Clinton was just being a lawyer.

Lest there be misunderstanding, let me stress at once that I do not mean to defend President Clinton's conduct by suggesting he was "just being a lawyer."<sup>10</sup> On the contrary, I mean the statement as a serious criticism of certain key mores of the legal profession. Clinton's conduct in his own defense, and Posner's critique of that conduct, bring into sharp focus important questions about those mores. Why do lawyers (including, apparently, Clinton) think it is all right to seek to avoid the law's substantive intent by concealing and distracting from the truth? Why do lawyers think it is all right to pretend to disagree with legally relevant facts just because such pretended controversies might have a reasonable chance of "winning," thereby gaining an advantage that is not, in truth, warranted? Why do lawyers think it is all right to deliberately mislead others as long as they can do so without resort to outright lies or other illegality?<sup>11</sup>

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<sup>8</sup> See AS at 20, 50-51.

<sup>9</sup> AS at 46, 51-52.

<sup>10</sup> Cf. Posner's disdain, well-founded in my view, of one lawyer's effort to defend the President on the ground that his "basic character flaw" was the he was "a lawyer." AS at 243. For a reasoned argument that lawyer-politicians should be held to even higher standards of probity, see Nancy B. Rapoport, *Presidential Ethics: Should A Law Degree Make A Difference?* 14 GEO. J. L. E. 725 (2001).

<sup>11</sup> The United States is, compared with the United Kingdom, considerably more liberal in permitting lawyers to mislead tribunals and others. In England, the line seems to fall between "actively" misleading (impermissible) and merely standing by "passively" as another person errs. See *Vernon v. Bosely*, [1997] 1 All E.R. 614, 630-31 (C.A.), citing *Saif Ali v. Sydney Mitchell & Co.*, [1978] 3 All E.R. 1033, 1042-43 (H.L.) ("A barrister must not . . . actively mislead the court as to the facts; although, consistently with the rule that the prosecution must prove its case, he may passively stand by and watch the court being misled by reason of its failure to ascertain facts that are within the barrister's knowledge"); *Ernst and Young v. Butte Mining plc*, [1996] 1 W.L.R. 1605, 1621-22 (out-of-court negotiations to settle a civil action). See also THE BAR COUNCIL, CODE OF CONDUCT OF THE BAR IN ENGLAND AND WALES 302 (7TH ED. 2000) ("must not deceive or knowingly or recklessly mislead the Court"); THE LAW SOCIETY, THE GUIDE TO THE PROFESSIONAL CONDUCT OF SOLICITORS Principles 21.01, 21.15 (8th ed. 1999); RICHARD O'DAIR, LEGAL ETHICS: TEXT AND MATERIALS 193-95 (2001). In the United States, by contrast, mere misleading is generally condoned even if is "active" in the U.K. sense. See *infra* text accompanying notes 105-19; CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 642-43, 650-51 (1986); but cf. *Virzi v. Grand Trunk Warehouse and Cold Storage Co.*, 571 F. Supp. 507 (E.D. Mich 1983). In 1981, the American Bar Association rejected a proposal that would have required a lawyer to correct a "manifest misapprehension" of fact resulting from the lawyer's own representations to the tribunal. See STEPHEN GILLERS, REGULATION OF LAWYERS 378-79 (1998). As Posner himself suggests, to mislead without lying may be "perhaps not wrongful at all." AS at 140. Cf. *id.* at 34. See *infra* note 85.

The public record shows that Clinton deliberately did all of these things: concealed truth, created distractions, pretended to disagree with factual allegations, and tried to mislead the whole world about the Lewinsky affair.<sup>12</sup> It is not so clear, however, that Clinton's intention to do these things was ipso facto criminally culpable. It is not so clear, that is, that a mere intention to hide truth and avoid justice supplies the mens rea element for criminal charges such as obstruction or perjury.<sup>13</sup> After all, Clinton's actions must be viewed in light of the very salient fact that other lawyers very commonly do the very same kinds of things, viz. keep material facts secret, put things in the "best" light, and make disclosures selectively to the client's best advantage. Doing them is regarded simply as good advocacy, protecting the clients' interests. This suggests that, at least in practice, the mens rea for crimes like perjury and obstruction of justice almost certainly requires more than merely a generalized purpose to conceal, mislead or avoid legal consequences. Otherwise, lawyers would be guilty of obstruction of justice every time they said something material "that, as intelligent people, they could not have believed."<sup>14</sup>

Let's face it, generic "obstruction" of justice occurs every time a lawyer helps a client to avoid unpleasant legal consequences. In the current "Dominant View"<sup>15</sup> of lawyering ethics, that is one of the things lawyers are expected to do.<sup>16</sup> For example, in protecting their clients, lawyers are supposed to conceal information, i.e., maintain "confidentiality,"<sup>17</sup> even though the information may be relevant to the processes of justice. In the course of competent advocacy, lawyers are supposed to portray past events as favorably as possible to their own client's position, i.e., to distract from or downplay the evidentiary bits that tend to damage their clients' interests while stressing the helpful

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<sup>12</sup> See, e.g., AS at 23, 93 ("evasions," "pettifogging legalisms and diversionary tactics"). In the Agreed Order of Discipline terminating Clinton's state disbarment proceedings, Clinton admitted to "knowingly" giving "evasive and misleading" answers in deposition. "What Clinton would not do ... was use language that tracked any perjury statute." Nancy B. Rapoport, *Presidential Ethics: Should A Law Degree Make A Difference?* *supra* note 10, at 737 n. 34 (2001) (citing Thomas Oliphant, Clinton's Closure, BOSTON GLOBE, Jan. 23, 2001, at A11).

<sup>13</sup> See *infra* text accompanying notes 30-31; 105-19.

<sup>14</sup> AS at 245. For example, in *United States v. Cueto*, 151 F.3d 620 (7th Cir. 1998), a lawyer was convicted of obstruction for "traditional litigation-related conduct," but the lawyer's intent was to protect his client's *on-going* criminal enterprise, not just defend a prosecution for a past crime.

<sup>15</sup> See generally WILLIAM SIMON, *THE PRACTICE OF JUSTICE* 7-11 and *passim* (1998), in which he decries the "Dominant View" of legal ethics, with its contra-ethical tendencies to suppress disclosure and truth. He advocates instead a "contextual view" in which the determination of cases would be more in accordance with their underlying merits. See also Jane B. Baron, and Rishard K. Greenstein, *Constructing the Field of Professional Responsibility*, 15 NOTRE DAME J. L. ETHICS & PUB. POL. 37, 47, 98 (2001)(decrying "a construction of professional responsibility that encourages a flight from responsibility").

<sup>16</sup> See e.g., Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 670 (1994); Stephen Gillers, *Can a Good Lawyer Be a Bad Person?* 2. J. INST. STUD. LEG. ETH. 131, 134 (1999). Obviously, Clinton was his own "client" in his self-defense, but this should make no difference. It would be extraordinary if lawyers were permitted to protect clients from the law's prescriptions by resorting to forms of deception that are forbidden to the clients themselves. See MODEL RULES OF PROFESSIONAL CONDUCT 1.2(d) (1983), as set forth in AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (4th ed. 1999) (hereinafter "MODEL RULES"). It cannot be the rule that people are permitted to trick the law if, but only if, they can get a lawyer to do the talking for them. *But cf. infra* note 33.

<sup>17</sup> MODEL RULES 1.6(a).

bits, even if the overall effect is to mislead.<sup>18</sup> Indeed, this is the advocacy stance with which American lawyers are inculcated to the point of second nature: Always put your own side in the best light you can, short of outright lies. Lawyers routinely strive to weave stories that are false out of statements that are true.

Lawyers are, moreover, supposed to advance their clients' causes by using whatever procedural or substantive rules have a reasonable chance to help. Even if a lawyer has no sound reason to doubt that the client committed the tort, breached the contract, or whatever, it is still considered permissible--perhaps obligatory--to test the other side's ability to prove it.<sup>19</sup>

In doing all these various "obstructive" things (concealing truth, stressing the positive, holding out, putting to proof, etc.), lawyers are certainly not generally considered to be acting with anything like criminal intent. Indeed, most lawyers probably do not consider such behavior to be anything wrong at all. It is just being a lawyer.

Actually, a lot of people may be of more than one mind about these sorts of lawyer tactics. On one hand, most probably believe that, for better or worse, the substance of the law ought to apply to the things people actually do. It should not be open for wrongdoers to try to derail the law's intended consequences by deliberately obfuscating the facts. At the same time, however, the very reason many people go to lawyers is because they do not want the truth to come out or have "justice" rendered to their detriment. People who have committed crimes do not want to go to jail. Business people who fail to perform their contracts do not want to pay damages for breach. Most motorists would rather not face financial ruin just because, in a momentary lapse of attention, they might seriously injure another. Within the Dominant View of ethics in our adversary system, it is considered to be perfectly legitimate to seek the services of lawyers to find "legal" ways avoid these and other legal inconveniences, to assert a legal "right to injustice."<sup>20</sup>

There are, of course, limits on asserting this supposed "right to injustice," even within the Dominant View. These limits do not, however, outlaw every kind of effort to impede the law's intent. Obstruction of justice is not a legal wrong unless it is done in a legally prohibited way. Posner himself acknowledges this distinction when he describes obstruction of justice as "corrupting or interfering *improperly* with the course of legal justice."<sup>21</sup> The word insertion of the word "improperly" implies, of course, that there can also be such a thing as "proper" interference with justice. Presumably, such "proper" interference is exactly what happens when people seek the help of lawyers to get themselves out of a legal jam or otherwise to escape law-prescribed comeuppances for

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<sup>18</sup> See, e.g., MODEL RULES 1.3 (diligence) and 1.6 (confidentiality of information).

<sup>19</sup> See MODEL RULES 3.1 cmt [1]. Frivolous or dilatory tactics are prohibited, of course, but these prohibitions are defined in terms of potential for "winnability" rather than in terms of objective truth or substantive justice. See my discussion at John A. Humbach, *Abuse of Confidentiality and Fabricated Controversy: Two Proposals*, in THE PROFESSIONAL LAWYER, vol. 11, no. 4 (Summer, 2000).

<sup>20</sup> See SIMON, *supra* note 15, at 26-52.

<sup>21</sup> AS at 37 (emphasis added).

things they have done. Lawyers work to get people off, and not just the falsely accused, but that is normally not seen (by lawyers at least) as “obstruction of justice.”

Under current conventions, then, what criminal “obstruction of justice” seems to come down to is not the deep moral wrong of trying to prevent the substance of the law from applying to the events that actually occur. It is instead the much more prosaic infraction of trying to interfere with law without playing by all the rules.<sup>22</sup> It is not, for example, all right to lie or help others to lie,<sup>23</sup> nor is it permissible to bribe witnesses, threaten jurors and or make false applications for bail.<sup>24</sup> As long as the lawyer does not violate any of the specific rules, however, the lawyer apparently remains legally free to protect a client’s “interest”--even when that interest is best served by preventing the law from applying to the facts that actually occurred. That is just being a lawyer.

Something, of course, feels very wrong about all this. Surely there is no actual “right to injustice”--no actual right to make the law to misapply, even if a lawyer can make it happen by entirely lawful means. The law prescribes various substantive rules, and people are expected to obey those rules in everyday life. The consequences for violations are meant to be enforced according to the things that actually occur. On this account, the supposed “right to injustice” is merely an illusion, a chimera that results because the law’s procedural rules can sometimes be made to misfire. Most procedural rules (including those of evidence) exist to support and buttress the search for truth.<sup>25</sup> Nevertheless, a skillful lawyer can invoke these rules in ways that actually detract from that search. When a technical rule can be applied in a way that works *against* its intended purpose, it may seem almost equivalent to a “right to injustice.” Nevertheless, sound arguments can be made that it is not. And when lawyers employ procedural protections to secure contra-justice outcomes, it is an abuse rather than legitimate use of the protections. A client’s private interest in not being brought to justice is not, on this analysis, a legitimate client “interest” for a lawyer to pursue. Alas, such is not the Dominant View.

Posner himself displays a hearty disdain for the use by lawyers of “evasions,” “pettifogging defenses” and “diversionary tactics.”<sup>26</sup> Because the Dominant View allows lawyers a wide range of such tactics, however, Posner’s legal case against Clinton may be fatally undercut. The problem concerns the element of intention. Clinton was trained as a lawyer and, quite evidently, has acquired the lawyer’s forensic instincts; a genuine possibility therefore exists that all he was really *trying* to do was just to be a lawyer,

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<sup>22</sup> The term “obstruction of justice” sometimes refers specifically to violating the rules set out in the sixteen or so offenses (such as witness tampering) in the “Obstruction of Justice” chapter of the United States Code (18 U.S.C. tit. 18, ch. 73). AS at 37. However, Posner “generally employs” obstruction of justice as “a generic term” for “a variety of specific statutory crimes” that are “scattered throughout the federal criminal code.” AS at 37, 38. Their common feature is that they all involve efforts at “corrupting or interfering improperly with the course of legal justice.” *Id.*

<sup>23</sup> See, e.g., MODEL RULES 1.2(d) (forbidding lawyers to counsel or assist in “criminal or fraudulent” conduct); MODEL RULES 3.3 (Candor Toward the Tribunal).

<sup>24</sup> AS at 37.

<sup>25</sup> See my discussion of the narrow class of exceptions in John A. Humbach, *National Association of Honest Lawyers: An Essay on Honesty, “Lawyer Honesty” and Public Trust in the Legal System*, 20 PACE L. REV. 93, 116-18 (1999).

<sup>26</sup> AS at 14, 93.

within the Dominant View--attempting to conceal facts, distract and mislead, perhaps, but never actually meaning to lie outright or to induce others to lie. Nothing Posner cites in the public record firmly rules out this possibility. Obviously, Clinton had reasons to want to impede various legal processes, namely, the Paula Jones lawsuit, the special prosecutor's grand jury inquest and impeachment. It does not, however, follow that Clinton ever intended to do so by legally impermissible means. It does not follow that he ever intended to "corruptly" influence witnesses, utter an answer he believed false on any reasonable interpretation, or commit any other "specific statutory crimes"<sup>27</sup> of obstruction.

Far more plausibly, attorney Clinton simply decided to respond to an adversarial attack in a normal, lawyer-like adversarial way, namely, by cooperating as little as possible with his opponents' efforts against him while, at the same time, endeavoring to see that the evidence appear "in the best light possible." Taken by themselves, these adversary tactics could, of course, hinder the search for truth and constitute an impediment to justice. However, the adversary system takes these tactics in large measure for granted and, in theory, the zeal of the opponent compensates for them. In current "Dominant View,"<sup>28</sup> at any rate, they are just being a lawyer

Whether Clinton ultimately succeeded in just being a lawyer, never actually overstepping the legal bounds, is of course a different question. Posner clearly believes he did not succeed,<sup>29</sup> and he argues that Clinton did a number of things which, if culpably intended, would have gone over the line. The question of legal guilt depends crucially, however, on whether Clinton's actual intentions were in fact culpable. An accidental misstatement is not perjury.<sup>30</sup> It is here that the proof gets slippery.

We cannot, as Posner apparently wants to do, simply look at Clinton's efforts to avoid legal consequences, infer that the avoidance was intentional, and from this conclude that Clinton's intentions were culpable.<sup>31</sup> The only intention we can infer, without a lot of conjecture, is an intention to mislead, distract and obfuscate in order to

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<sup>27</sup> See *supra* note 22.

<sup>28</sup> SIMON, *supra* note 15, at 7-9.

<sup>29</sup> For example, with respect to the charges of lying under oath, Posner asserts that "[t]he evidence of his guilt was overwhelming, and barely contested by his lawyers." AS at 241. Presumably, Posner means that the evidence of "false statement" is overwhelming because, at best, the evidence of intention is only inferential and, as explained in the text that immediately follows, the inferences are ambiguous.

<sup>30</sup> See *United States v. Dunnigan*, 507 U.S. 87, 96 (1993)(perjury means "false testimony ... with the willful intent to provide false testimony, rather than as a result of confusion, mistakes, or faulty memory"); *United States v. Catano-Alzate*, 62 F.3d 41, 43 (2d Cir. 1995) (simile "even if his belief was irrational or mistaken"); *United States v. Mount*, 896 F.2d 612,624 (1st Cir. 1990)(a misstatement is not perjury unless the witness "did not believe what he said to be true"). See also *infra* text accompanying notes 105-19.

<sup>31</sup> See, e.g.: "Even if ... none of President Clinton's lies under oath amounted to perjury..., they were false and misleading statements designed to derail legal proceedings, and so they were additional acts of obstruction of justice." AS at 54. Elsewhere, Posner has shown a markedly behaviorist bent, and he may not really believe in such subjective mental entities as intent as such, but rather sees such concepts as being proxies for various objective characteristics of human behavior. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 169-79 (1990) [hereinafter "JURISPRUDENCE"].

keep the Lewinsky details confidential. Such an intention may seem bad enough but it is, nonetheless, every bit as consistent with the non-culpable intention of an adversarial advocate as it is with criminal guilt. While criminal intention is sometimes *res ipsa loquitur* (a person aims a gun at another and then fires), here it is not. Without some independent proof of *mens rea*, there is no warrant for resolving the ambiguity of intention against Clinton.

It is, at any rate, a question of rather transitory importance whether Clinton in fact overstepped the legal boundaries that limit smokescreen advocacy. The far more important question for our profession has to do with the legitimacy of smokescreen advocacy itself. Even if Clinton did not break the law, would not Posner still be correct that Clinton's "evasions," "pettifogging defenses" and "diversionary tactics" were objectionable as impediments to justice?

Just as the near-impeachment of Watergate prompted re-consideration of some of our profession's ethical norms, so likewise might the impeachment of President Clinton. Posner points out that Clinton's private life made him, for many people, a symbol of an attitude toward "personal responsibility."<sup>32</sup> The same may be said of his methods of legal defense. In an adversary system, what is the individual participant's *personal responsibility* to the truth? Is the adversary's responsibility properly limited to the petty truths of individual statements, or does it extend also to the grand truths, the ultimate facts on which the application of laws depends?<sup>33</sup>

Unfortunately, in choosing to couch his case against Clinton in mostly legal terms, Posner was required to lay most of his stress on a set of standards that condemn only *some* false advocacy but not all deliberate efforts to mislead,<sup>34</sup> standards which denounce some "obstructions" of justice but do not treat efforts to avoid legal consequences as a wrong *per se*. The criminal law's narrower definition of "obstruction" has, to be sure, a firm pragmatic basis. It is a compromise that the law must make with morals to avoid impinging unduly on advocacy zeal, which is thought essential to our adversarial system. By concentrating on the legal standards, however, Posner passes up the chance to analyze the episode along readily intelligible lines of moral distinction, such as deceptiveness versus candor, or reverence for truth versus instrumentalist indifference. Instead, he finds himself making his case against Clinton mostly by way of a technical hashing and distinguishing of behavior that was *all* essentially similar in both

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<sup>32</sup> AS at 12.

<sup>33</sup> I am aware of arguments that lawyers in an adversary system have a particular role that morally permits them to engage in conduct that would be wrong for other people. *See, e.g.,* Charles Fried, *The Lawyer as Friend*, 85 YALE L.J. 1060 (1976); Stephen Pepper, *the Lawyer's Amoral Ethical Role*, 1986 A.B.F. RES. J. 613; Gillers, *supra* note 16; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975) (criticizing the argument); W. Bradley Wendel, *Professional Roles and Moral Agency*, 89 GEO. L.J. 667 (2001) (good synopsis of the debate). I am also aware of arguments that people in various public positions are, somehow, exempt from the moral constraints that ordinary personal responsibility entails. *See, e.g.,* THOMAS NAGEL, *Ruthlessness in Public Life*, in MORTAL QUESTIONS 75 (1979). *Cf.* AS at 133-34, 151. I have not, however, been able to make these arguments parse as justifications for deliberate efforts to defeat the substance of the law.

<sup>34</sup> *See* AS at 44 (to be perjury a statement "must be false rather than merely misleading").

motive and effect, *viz.* to conceal material facts and hinder various processes of justice. Due to Posner's focus on legalities, the main message of his argument is not that Clinton's efforts to conceal and mislead were wrong *per se*, but that Clinton went over the line by employing illicit means.

It is understandable why Judge Posner chose to stress the legal case against Clinton. By doing so, however, he has underplayed some serious ethical implications of what was, in the view of many, the main event. The morally infuriating thing about what Clinton did was not that he might have run afoul of some "scattered" sections of the United States Code.<sup>35</sup> What infuriates is that the President deliberately tried to mislead us and to avoid the prescribed consequences of the law that binds us all. What goes against our ethical grain is not that he tried to distort the truth and obstruct justice in some illegal way, but that he tried to do it at all.

Ultimately, the Clinton episode can serve as a strong object lesson for the legal profession and for justice system as a whole because it implicates our foundational standpoint toward very the meaning of legal justice and the "rule of law." Is it a legitimate for a person to seek an advantage that is not, in *truth*, legally deserved under the substance of the law, or to avoid a legal consequence that the substantive law intends should apply? More crucially to our profession, is it ethical for lawyers to knowingly help clients obtain such outcomes or avoidances, even if they can manage to do so without themselves violating any specific prohibitions of ethics or law?

### **Obstructing the "Rule of Law"**

Posner says that Clinton's behavior "flouted" and even tended to "subvert" American rule-of-law ideology and values,<sup>36</sup> but what does rule of law really *mean*? Almost everybody agrees that, at its core, rule of law represents a sort of antithesis to arbitrary coercion, to capricious uses of power, and to favoritism. It entails, as the mantra goes, that "no man is above the law."<sup>37</sup> Beyond this core of meaning, however, there are at least two fundamentally different conceptions that lawyers seem to have in mind when talking about "rule of law."<sup>38</sup> Out of these two emerge two different conceptions of obstruction of justice. The conception of "obstruction" favored by Posner seems relatively less concerned with the law's substantive import and more with its *processes*.<sup>39</sup> This focus on process reflects a particularly formal (as opposed to substantive) conception of "rule of law" itself.

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<sup>35</sup> See *supra* note 22. See L.H. LaRue, *The Story of Clinton's Impeachment*, 63 J. L. & CONTEMP. PROB. 193, 194 (2000), arguing that "the House Republicans were foolish to have cast their charges as a story about the rule of law" rather than about trust.

<sup>36</sup> AS at 10, 155.

<sup>37</sup> AS at 230.

<sup>38</sup> Cf. William H. Simon, *Conceptions of Legality*, 51 Hastings L.J. 669, 669 (2000), who sees in Watergate two competing conceptions of respect for law, which he differentiates on the basis of whether the law's explicit promulgations are viewed as exhaustive or merely evocative of its substantive (values) content.

<sup>39</sup> See *infra* notes 42-47 and accompanying text.

In its more substantive conception, the rule of law is closely associated with “objective” right and wrong, roughly what Posner refers to as moral “rigorism.”<sup>40</sup> In this conception, the rule of law means that the regulation of people’s activities (their liberty) will be guided in accordance with a system of substantive rectitude, with the implication that substantive rectitude should be, to the greatest extent humanly possible, embodied in the law’s substantive rules and principles. A corollary of this view is that, in order to implement substantive rectitude, the legal system must judge and treat people according to what they actually do. Justice results if and only if just rules and standards are applied to actual facts (“truth”). Because this view essentially treats the law as something “real,” as ontologically real as the physical events to which it applies, it might aptly be called the “real rule of law.”<sup>41</sup>

Many observers, including apparently Posner,<sup>42</sup> doubt that the law does or even can embody any sort of “objective” substantive rectitude or, for that matter, any other comprehensive set of *ex ante* prescriptions or “rights.” For them, there is no preordained system of substantive rectitude out there that the law can embody and that judges can apply “off the shelf,” as it were, as cases arise. Instead, the legal system must produce justice as it goes along, case by case, and this it does by providing a set of fair processes for the resolution of disputes.<sup>43</sup> When policy choices are required, they are made not by reference to substantive rectitude as such but instead based on other considerations such as, to take Posner’s favored criterion, a comparison of the *consequences* of various alternatives.<sup>44</sup> Posner refers to this as “pragmatism,” in contrast to moral rigorism.<sup>45</sup> In any case, under this view the rule of law is not chained to any supposedly “objective” right and wrong but, rather, means mainly that the government will not intervene in people’s lives unless the various procedural formalities, designed to assure fairness, are faithfully complied with. Because this view places its ultimate trust in the law’s formal processes, rather than in any pre-ordained system of substantive norms, I will call it “formal rule of law.”<sup>46</sup>

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<sup>40</sup> AS at 183-87.

<sup>41</sup> Notice that the term “real” is used here in the sense of philosophical “realism,” not in the colloquial sense of “genuine.” The “real” rule of law presupposes as a basis for action (though not necessarily as a metaphysical truth, *see* Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 PHIL. & PUB. AFF. (1996)), that we best proceed as though there is an objective body of law “out there” that can be discovered and applied to the things people do. *See generally* Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424, 2427-46 (1992). This notion of a “real” body of law ready and waiting to be discovered and applied to events (facts) is, among other things, denied by adherents to the other meaning of rule of law, described in the text immediately *infra*.

<sup>42</sup> RICHARD A. POSNER, *THE PROBLEMATICS OF LEGAL AND MORAL THEORY* 243 (1998) [hereinafter “PROBLEMATICS”]; JURISPRUDENCE, *supra* note 31, at 26, 30-31, 192-244, 313-419.

<sup>43</sup> JURISPRUDENCE, *supra* note 31, at 225 (describing law as an “activity”).

<sup>44</sup> *See* AS at 100, 183. *See also* PROBLEMATICS, *supra* note 42, at 242, 253; JURISPRUDENCE, *supra* note 31, at 122, 467.

<sup>45</sup> AS at 183.

<sup>46</sup> Somewhat confusingly (and in manifest deviation from the usual philosophical usage) the adherents to this latter vision of “rule of law” are sometimes called “legal realists,” despite the fact that the objective “reality” of law is one of the main things that they specifically deny. A better name for them might be “coercion realists,” for they acknowledge the reality of exercises of governmental coercion but not of law as a binding body of norms.

The way ones understands “obstruction of justice” should logically depend a good deal on the view one takes of the “rule of law.” Adherents to the “real rule of law” view, with their stress on substantive rectitude, would likely view as an obstruction any attempt to cause a legal outcome to deviate from the substantive intendment of the law. For adherents to the formal view, however, obstruction would mean acts to interfere with the *processes* of law (there being no pre-ordained “right and wrong” to deviate from). Indeed, this latter view of obstruction is precisely the view that Posner takes. His primary rule-of-law focus seems to be on the *processes* of the law: No one is above the legal process.<sup>47</sup>

This distinction is nicely illuminated in Posner’s discussion of proper role of prosecutorial discretion, with particular reference to cases of presidential malfeasance.<sup>48</sup> Prosecutors have discretion to decide “whom to prosecute, and for what crimes,”<sup>49</sup> and the exercise of that discretion is an integral part of the legal process. According to Posner, the discretion exists not merely to conserve limited resources<sup>50</sup> but is also a kind of escape valve to make our nation’s “vague and broad criminal statutes tolerable.”<sup>51</sup> In this role it “protects the population against the felt injustice of the law when it is enforced to the hilt.”<sup>52</sup> (Notice Posner’s robust skepticism on the question of whether the substance of the law embodies substantive rectitude.)

“A President,” Posner suggests, “should be entitled to a uniquely generous exercise of prosecutorial discretion in his favor--so generous, indeed, as to excuse him from being prosecuted for criminal behavior [except ‘monstrous’ behavior] engaged in before or during his term of his term of office.”<sup>53</sup> Indeed, he says, a criminal prosecution of Clinton would strike him as “a grotesque prospect,”<sup>54</sup> even if the prosecution were deferred until after Clinton left office.<sup>55</sup> Although it is “fundamental to the ideology of the rule of law” that “even the highest officials in the land are subject to the ordinary processes of law,”<sup>56</sup> he explains, it does not follow that those processes should invariably carry out the law’s prescribed sanctions. In Posner’s view, exempting a wrongdoer from the law’s substantive consequences (on pragmatic grounds<sup>57</sup> or otherwise) still counts as

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There is in addition what might be called a “mixed” view. Adherents to the mixed view believe, at some level, that there is truly such a thing as substantive rectitude, or “objective” right and wrong, but they doubt that there is any ultimate way to know it except by examining the outcomes produced by fair sets of procedures. This mixed view is in practice just another version of the “formal rule of law.”

<sup>47</sup> See, e.g., AS at 38, 54, 187, 194 (“processes”).

<sup>48</sup> AS at 94.

<sup>49</sup> AS at 60.

<sup>50</sup> AS at 60.

<sup>51</sup> AS at 84.

<sup>52</sup> AS at 59.

<sup>53</sup> AS at 194.

<sup>54</sup> *Id.*

<sup>55</sup> This apparently despite the fact that Posner thinks acts like Clinton’s would ordinarily justify prosecution. AS at 83-87.

<sup>56</sup> AS at 194.

<sup>57</sup> See AS at 194-95.

the rule of law as long as the wrongdoer was duly subject to its *processes*.<sup>58</sup> A criminal who is gets a free pass due to prosecutorial discretion has been just as much subject to the ordinary processes of law, as everyone else, since prosecutorial discretion is part of the process.

The objection to Posner's process-oriented view of obstruction of justice is that it seems to make a much weaker moral claim than the concept of obstruction entailed by the "real" rule of law. Indeed, considering the certitudes implicit in the rigorist mantra "no felony shall go unpunished,"<sup>59</sup> one suspects that Posner's "pragmatist" suggestion that Clinton be released from prosecution would probably not sound much like the rule of law at all to a moral "rigorist, and Posner concedes as much.<sup>60</sup>

What Clinton's adversaries largely had in mind was the "real" rule of law: What they wanted was for rules embodying substantive rectitude to be applied to the things that Clinton actually did, *i.e.*, to the "truth."<sup>61</sup> There is right and there is wrong, and Clinton did wrong. By contrast, Clinton's legal defenders and, perhaps the President himself, were endeavoring to exonerate him in accordance with the formal rule of law. What they insisted was that a fair set of formal procedures be applied, and whatever "facts" and legal standards were found and applied through those procedures should be deemed to be definitive, the "rule of law."

As for Posner himself, he certainly cannot be counted among the President's defenders. Nevertheless, as a legal "pragmatist,"<sup>62</sup> he would seem more closely aligned with the "formal rule of law" camp. At the same time, however, he seems to feel the tugs and attractions of substantive rectitude. He insists for example that "[d]eliberately obstructing justice ... is not morally neutral."<sup>63</sup> This sounds more like the declaration of one deeply concerned about the law's substantive prescriptions than of one who is mostly concerned about mere processes. After all, unless it is pre-supposed that the law's processes are aimed at yielding substantive rectitude, it is hard to see what moral vice there is in trying to derail them. Why should there be a big moral fuss about "derailing" something that is on no particular track in the first place?<sup>64</sup>

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<sup>58</sup> See AS at 186-87.

<sup>59</sup> AS at 230. Perhaps this should rather be described as a "conservative" mantra, embracing both "moralistic" and "libertarian" brands of conservatism. See *id.* at 203.

<sup>60</sup> AS at 183-87.

<sup>61</sup> See AS at 155-56, 183-87, 230, *quoted supra* at text accompanying note 59.

<sup>62</sup> See AS at 5, 100; JURISPRUDENCE, *supra* note 31, at 31, 465-66.

<sup>63</sup> AS at 144.

<sup>64</sup> Posner may well, of course, want to say that pragmatic/consequentialist choices and decisions *are* substantive rectitude, meaning in effect that people have legal rights insofar (but only insofar) as the government finds it pragmatic to confer them. See JURISPRUDENCE, *supra* note 31, at 316-17, 321-28 (where Posner suggests that private legal remedies are allowed as a "judgment of expediency rather than an entitlement of justice"). Unhappily, however, this view would not regard substantive rectitude as a matter of *personal* right and wrong but rather as, ultimately, a matter of collective pragmatic convenience. Correspondingly, a litigant's claim to have a court make a correct decision in his case would not be a personal claim but, instead, a kind of generic *qui tam*, a right that the individual asserts on behalf of the polity as a whole. While individuals would, in this view, still receive and enjoy private benefits from various public choices made on pragmatic/consequentialist grounds, any legal entitlements to those benefits

The reason most people find obstruction of justice to be offensive is, I think, because we believe that, to some great degree, the law does embody substantive rectitude and, so, to undercut the law's processes is to undercut rectitude itself. For most, the integrity of the law's adjudicative processes is not important in itself but only because conduct counts and, for better or worse, the substance of the law should apply to the things that people actually do. Unless it is pre-supposed that legal norms generally provide "objectively" just resolutions based on "real" versions of events, the law is no more than an arbitrary system of symbols, an elaborate formulary to accompany governmental inflictions. Truth and rectitude are inseparable from the law's integrity.<sup>65</sup>

All of this said, however, Posner is surely correct to doubt the wisdom of the moral "rigorists." The administration of laws must be sprinkled liberally with what Aristotle called *epieikes*, a disposition to deviate from the letter of the law in special cases, because in prescribing legal rules it is, in Aristotle's words, "plainly impossible to pronounce with complete accuracy upon such a subject-matter as human action."<sup>66</sup> To recognize a need for frequent "rectification of legal justice"<sup>67</sup> is, however, not to deny but rather to reconfirm that law should embody substantive rectitude.

Another reason to doubt the rigorists is that the current law is, in some respects, arguably a very bad embodiment of substantive rectitude. One might mention such particulars as the racially disparate impact of its draconian anti-drug policies<sup>68</sup> or such generalities as its overwhelming reliance on the infliction of human suffering ("punishment") as a solution to social problems. Such substantive imperfections do not, however, mean that it is all right for legal professionals to throw monkey wrenches into the works in order to obstruct the substantive norms that the law does embody, even if they do so playing by the rules.<sup>69</sup> Unfortunately, however, when obstruction of justice focuses on process, not substance, it ironically encourages exactly that. It encourages, that is, people to manipulate the rules and make plays on the process as a means of avoiding the intentment of the law.<sup>70</sup> Unfortunately this works as well for unjust as it does for the just. Even worse, "within-the-rules" efforts to muddle the facts in order to get desirable legal outcomes can

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would be essentially a matter of luck, not of individual "rights." See *id.* In his predilection for pragmatism as a basis for judicial decisions Posner may have identified an important function of government, but it may not be function of doing "personal" justice. See *id.* at 330-32.

<sup>65</sup> Cf. RONALD DWORKIN, *LAW'S EMPIRE* 176-275 (1986). While the primary concern of Dworkin's inquiry is the integrity of the substance of the law, he does recognize in passing the importance of "procedures . . . that promise the right level of accuracy" when it comes to "judging whether some citizen has violated laws laid down by the political procedures." *Id.* at 165. Cf. also *id.* at 143. But cf. RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 322 (2001) ("the law does not and should not strive for perfect accuracy in the determination of facts").

<sup>66</sup> ARISTOTLE, *NICOMACHEAN ETHICS*, Bk. V, ch. XIV (J.E.C. Welldon trans., 1987).

<sup>67</sup> *Id.*

<sup>68</sup> See *A Survey of Illegal Drugs*, *THE ECONOMIST*, July 28, 2001, at 13.

<sup>69</sup> See excellent critique of such practices, in the criminal defense context, in SIMON, *supra* note 15, at 170-94. For Posner's recent suggestion that such monkey wrenches might conceivably be morally justified when the law is unjust, see See POSNER, *supra* note 65, at 335.

<sup>70</sup> See Barbara Babcock, *Defending the Guilty*, 32 *Cleve. St. L. Rev.* 175 (1983); SIMON, *supra* note 15, at 189 ("exploiting procedural obstacles to conviction").

take off the pressure to revise and reform the law, to wring out its ineptitudes and deviations from substantive right.

### **Posner's Case for Obstruction of Justice**

Posner divides Clinton's alleged obstructions of justice into two main classes: witness tampering ("influencing other witnesses") and perjury. On the whole, Posner believes the stronger case against Clinton is for perjury<sup>71</sup>--in the *Jones* deposition, before the independent counsel's grand jury, and to Congress.<sup>72</sup> However, with respect to both classes of charges the evidence Posner cites is, in at least many instances, irresolvably ambiguous. From what the public record shows, it seems at least as apt to say that, in most or all respects, Clinton's "obstructions" were only meant as normal advocacy within the distended limits of our exaggerated adversary system.

**Witness tampering**--The witness tampering charges against Clinton were founded largely on allegations that he lied to potential witnesses (his secretary, Betty Currie, and various aides),<sup>73</sup> and that he advised Lewinsky to lie in an affidavit and tried to get her a job outside of Washington.<sup>74</sup> Witness tampering is defined to include attempts to "corruptly" persuade or to mislead people who are potential witnesses in official proceedings, *provided* it is done with the statutorily stipulated intent (to influence testimony, cause concealment of a document, etc.).<sup>75</sup> Here, as throughout the case against Clinton, ambiguities of intent are the rub.

While Clinton may have tried to influence the thinking of aides and associates, it is not so clear that his motivation was to influence them *qua* witnesses.<sup>76</sup> As an active politician, Clinton had many fish to fry. For example, the alleged efforts to get Lewinsky a job outside Washington may not have been so much to buy her off as to remove her from the scene because she was, in Posner's words, "dangerous and a pest."<sup>77</sup> Plausible "dual intentions"<sup>78</sup> also can be surmised with respect to the other witnesses. Even if Clinton's actions had the unintended consequence of influencing testimony, that would be at most a sort of "negligent" witness tampering, which would not violate the criminal law.<sup>79</sup> Posner rightly doubts the one case he cites, which implies the contrary.<sup>80</sup>

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<sup>71</sup> AS at 37.

<sup>72</sup> AS at 38. Stuart Green provides another (and very useful) analysis of alleged illegality of Clinton's deceptions in connection with the Lewinsky affair. Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 *Hastings L.J.* (forthcoming, 2001).

<sup>73</sup> AS at 25, 40 and 42.

<sup>74</sup> AS at 38-40, 42-43.

<sup>75</sup> 18 U.S.C. §1511(b).

<sup>76</sup> See AS at 38-44.

<sup>77</sup> AS at 40.

<sup>78</sup> AS at 41.

<sup>79</sup> See 18 U.S.C. §1511(b), which specifies intention.

<sup>80</sup> AS at 41-42. The case is *United States v. Neiswender*, 590 F.2d 1269 (4th Cir. 1979). The court there essentially equated the "reasonable foreseeability" of a result with an intention to produce it, even absent proof that the defendant in fact foresaw the result or knew it might occur. Posner denominates this extraordinary conflation of "negligence" and "intentional" mens-rea states as "open to debate." AS at 42.

Posner does try, though not very convincingly, to make out a case of witness tampering based on Clinton's suggestion to Lewinsky that she swear out an affidavit in the Paula Jones case.<sup>81</sup> The idea behind the suggestion was that Lewinsky could possibly avoid a live deposition if she supplied a suitably worded affidavit instead. "It was implicit," Posner contends, "that the affidavit would be false"<sup>82</sup> and "would deny a sexual relationship,"<sup>83</sup> because "a truthful affidavit would not have staved off a deposition."<sup>84</sup> In this, Judge Posner seems to overlook a third possibility, one that is, for a lawyer, far more plausible than advising an affiant to lie. Lewinsky could try to craft her affidavit to make it look like she was not worth deposing, taking advantage of the supposed "sharp distinction between lies and statements that are misleading but not, in the formal sense, untrue."<sup>85</sup> Of course, no such "sharp distinction" actually exists, except in legal technicality. Deception is deception. Nevertheless, given the legal technicalities it would not necessarily be subornation of perjury for Clinton to suggest that Lewinsky could try to throw the Jones lawyers off the track with an affidavit that was literally true.<sup>86</sup> In helping her escape a live deposition by putting things in the "best light" possible, he would have been just being a lawyer.

Posner also tries to make something of Clinton's advice to Lewinsky concerning twenty or so items that he had given her and which the Paula Jones lawyers were trying to subpoena. Clinton informed Lewinsky that the subpoena only required her to turn over items "in her possession,"<sup>87</sup> arguably a hint that she should get rid of all compromising evidence, pronto. Posner calls it "incurably ambiguous"<sup>88</sup> whether this bit of presidential legal advice was a mere "legal truism" or a witness-tampering hint.<sup>89</sup> In fact, it seems beyond debate that the advice informed Lewinsky how she might manage to skirt her legal obligations without actually violating them. Even as such, however, it would be merely the kind of information that lawyers authorize themselves to provide under their Model Rules of Professional Conduct.<sup>90</sup> When lawyers tell witnesses and others about the technical boundaries of legal obligation, they do not see it as an invitation to overstep those boundaries. *Au contraire*. The advice may tend to frustrate certain purposes of the law, but doing that (within legal bounds) is just being a lawyer.

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<sup>81</sup> AS at 43.

<sup>82</sup> *Id.*

<sup>83</sup> AS at 20.

<sup>84</sup> *Id.*

<sup>85</sup> AS at 231, quoting Michael J. Sandel, who was citing Kant. *See also* Green, *supra* note 72 (defending the distinction). It is unclear to me whether, in fact, Posner accepts such a distinction. At one point he suggested that misleading others, as distinguished from lying, is "perhaps not wrongful at all." AS at 140. *Cf. id.* at 34. From the book's overall tenor, however, it seems that Posner suggested this possibility purely *arguendo*. At any rate, Clinton himself apparently regards mere misleading as "wrong," albeit not technical perjury. *See id.* at 135 n. 8.

<sup>86</sup> *See infra* text accompanying notes 105-10.

<sup>87</sup> AS at 43.

<sup>88</sup> *Id.*

<sup>89</sup> 18 U.S.C. §1512(b)(2): "Whoever...corruptly persuades another person...with intent to...cause or induce any person to...conceal an object with intent to impair the object's...availability for use in an official proceeding" is subject to fine or prison.

<sup>90</sup> MODEL RULE 1.2(d): A lawyer may "discuss the legal consequences of any proposed course of conduct." *Cf.* 18 U.S.C. § 1515(c).

Finally, Posner finds possible witness tampering in Clinton's séance with Betty Curry where he plied her with various "recollections" of key events,<sup>91</sup> and in his ruminations to Lewinsky on what had prompted her transfer out of the White House.<sup>92</sup> There is, however, a serious difficulty in evaluating these alleged attempts to "influence testimony," if that is what they were. The difficulty is that the whole area of witness tampering is clouded by the notion that witness "preparation" is (in America) considered to be perfectly legitimate.<sup>93</sup> Most lawyers think it perfectly all right to go over prospective testimony with witnesses, solidifying hazy recollections, trying out different formulations or emphases, pondering aloud whether to stress this or that, and discussing how best to characterize touchy areas of fact.<sup>94</sup> Many lawyers would maintain that advocates ought to feel free to talk about such things with witnesses without fear that, later on, somebody's impressionistic hearsay account of the conversation will form the basis of a witness-tampering prosecution. As a practical matter the distinction between witness preparation (lawful) and unlawful "coaching" may be fanciful at best. As long as we pretend the distinction exists, however, Clinton's alleged statements to Curry and Lewinsky should not be parsed via hearsay and surmise. Presumptively, he was just being a lawyer.

**Perjury**--Making deliberately false statements under oath is *not*, of course just being a lawyer. It is being a perjurer.<sup>95</sup> However, the problematic ground in Posner's accusations is, once again, mainly concerned with intention. In particular, what is the relationship between intentions to do acts constituting perjury and intentions to engage in such lawyer-like conduct as deflecting attention from awkward truths, fostering factual misconceptions and generally trying to make clients look better than they actually are.

Posner enumerates many statements of Clinton's which he says were false.<sup>96</sup> Mere falsity alone, however, is not enough for perjury.<sup>97</sup> "[T]he statement must be deliberately false."<sup>98</sup> Moreover, "it must be false rather than merely misleading."<sup>99</sup>

The problem with Posner's perjury case against Clinton centers on the issue of intention. Just about all the evidence of intent is inferential. There is nothing unusual about that, but the problem here is that one cannot simply presume that Clinton's false statements resulted from deliberate lying. They might just as well have resulted from the misfiring, under pressure, of a typical adversary game plan, namely, to stress whatever

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<sup>91</sup> AS at 25.

<sup>92</sup> AS at 43-44.

<sup>93</sup> See *United States v. Poppers*, 635 F. Supp. 1034, 1036-37 (N.D. Ill. 1986).

<sup>94</sup> Posner himself sees merit in allowing lawyer to "assist witnesses to make [their] stories credible."

POSNER, *supra* note 65, at 349.

<sup>95</sup> See, e.g., 18 U.S.C.A. §§ 1621, 1623.

<sup>96</sup> See, e.g., AS at 29-30, 45-48.

<sup>97</sup> See *infra* text accompanying notes 105-10.

<sup>98</sup> AS at 44. See citations *supra* note 30.

<sup>99</sup> AS at 44, citing *Bronston v. United States*, 409 U.S. 532 (1973). I pass over the element of materiality, and concentrate on the three elements that raise the most obvious ethical concern: false statement, willfully made, and in the belief at the time that it was false.

helps one's position while holding back on damaging points by hedging, hemming, and quasi-responsive answers--anything but outright lies.<sup>100</sup> He may have tried, that is, to avoid revealing awkward truths by "walking a tight-rope and . . . did not succeed in staying on it."<sup>101</sup> That he fell off, however, does not mean he intended to jump off. The typical adversary game plan carries with it, to be sure, an intention to avoid the truth and its consequences, but solely by *lawful* means. If seeking by lawful means to protect private interests from dire legal consequences is the very essence of good advocacy, can it also be regarded as the mens rea of perjury?

In making his case against Clinton, Posner seems to take the position that an intention to mislead *can* supply the mens rea for perjury even if none of the witness's statements are deliberately false—and even, indeed, if none are false at all. To support this somewhat startling contention he relies heavily on a recent case, *United States v. DeZarn*,<sup>102</sup> which held that a person can be convicted of perjury even if his statements are true.

The defendant in *DeZarn* had been asked under oath whether political fundraising occurred at a certain party given by X in 1991. The defendant's answer was "no." This answer was literally true. The fundraising in question had occurred at a party given by X, but that party was in 1990, not 1991. There was strong evidence from the context that the defendant knew full well that his questioner had meant the 1990 party and had merely misspoken.<sup>103</sup> Apparently impressed that DeZarn intended to mislead, the court held he could be found guilty of perjury even though his answer was true. (Notice that if DeZarn had given the opposite answer, it would have been a flat-out falsehood and, prima facie, would have been perjury as well.)

The important thing about *DeZarn* is the pivotal role that it gives to the defendant's intention to mislead.<sup>104</sup> In holding that intention to mislead can support a conviction for perjury, the *DeZarn* case seems well motivated. However, as Posner's key authority it suffers by being at odds with the leading United States Supreme Court case on the subject of "wily" witnesses who "succeed in derailing" their questioners, *Bronston v. United States*.<sup>105</sup>

The *Bronston* case arose out of a search for assets in a bankruptcy proceeding. The defendant was asked:

Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?

A. No, sir.

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<sup>100</sup> For example, as Posner himself concedes, most of Clinton's answers to Congress were "evasions or non-responsive rather than outright falsehoods." AS at 30.

<sup>101</sup> *Vernon v. Bosely*, [1997] 1 All E.R. 614, 631 (C.A.).

<sup>102</sup> 157 F.3d 1042 (6<sup>th</sup> Cir. 1998).

<sup>103</sup> *Id.* at 1048-50.

<sup>104</sup> *Id.* at 1049-50.

<sup>105</sup> 409 U.S. 352, 360 (1973) (stating that "the perjury statute is not to be . . . invoked simply because a wily witness succeeds in derailing the questioner").

Q. Have you ever?

A. The company had an account there for about six months, in Zurich.<sup>106</sup>

This last response hid from view the information being sought, namely, that Bronston had once maintained a *personal* account in a Swiss bank. By means of his non-responsive evasion he misled with literal truth.

The Supreme Court held that Bronston could not be convicted of perjury. “It is the responsibility of the lawyer to probe ... to recognize evasion and ... to flush out the whole truth with tools of the adversary examination.”<sup>107</sup> As to the relevance of the witness’s intention, the Court made two points: First, a jury should not be permitted to “conjecture” about what a witness had in mind in choosing to answer as he did.<sup>108</sup> In other words, absent concrete evidence to show a guilty intention, the jury should not make up the deficit by means of speculation. Second, in an adversary system, parties cannot expect their opponents to deliver up the case against themselves on a silver platter. “If a witness evades, it is the lawyer’s responsibility to recognize the evasion and to bring the witness back to the mark.”<sup>109</sup> The Court acknowledged that the defendant’s answers in *Bronston* were very likely “not guileless but were shrewdly calculated to evade,”<sup>110</sup> but it did not say that such behavior was wrong. Rather, it said that adversaries must be ready to deal with it. While *Bronston* does not endorse attempts to be evasive, disguise truth or foster misconceptions, the Court makes clear enough these are forensic tactics the law allows--even if grudgingly.

Whether the Supreme Court would now embrace the *DeZarn* approach in preference to that of *Bronston*, no one can tell. Among Court of Appeals decisions, *DeZarn* seems to be a bit of an outlier,<sup>111</sup> though Posner himself sees no reason to doubt it.<sup>112</sup> Nevertheless, it can be harmonized with *Bronston* only by jettisoning most of what the Supreme Court had to say about the nature of the adversary game. *Bronston* advances strong pragmatic arguments as to why the law of perjury must, as a matter of policy, be protective of witnesses who might otherwise be “unsure of the extent of their responsibility for the misunderstandings and inadequacies of examiners.”<sup>113</sup> Likewise, unless the law leaves parties with wide latitudes to deflect and evade an adversary attack (short of deliberate lies), the prospect of perjury prosecutions might place a pall on advocacy zeal, deterring litigants from trying to assert hard-to-prove facts and making them feel obliged to shore up the poor adversarial performances of their opponents.

The crucial question for present purposes is whether such latitudes should be available when a party, trying to distract from legally embarrassing truths, slips up “under

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<sup>106</sup> *Id.* at 354.

<sup>107</sup> *Id.* at 358-59.

<sup>108</sup> *Id.* at 359.

<sup>109</sup> *Id.* at 358-59.

<sup>110</sup> *Id.* at 362.

<sup>111</sup> *See, e.g.,* United States v. Shotts, 145 F.3d 1289 (11<sup>th</sup> Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999), and cases therein cited at 1298-99.

<sup>112</sup> AS at 49.

<sup>113</sup> 409 U.S. at 359-60.

pressures and tensions of interrogation”<sup>114</sup> and utters an unintended falsehood. If policy considerations dictate that an intent “merely” to mislead should not be mens rea for perjury, the same policies probably ought to apply whenever a person resolves to make the strongest case possible, without lies, and then inadvertently falters in the execution of that intention. For one thing, it is not easy to see how a false utterance is “willful” if it occurs as an unplanned and unintentional *deviation* from a deliberate “no-lying” strategy, something that can easily occur due to misunderstanding a question, mistakenly seeing “loopholes” in intricate definitions (e.g., famously, “sexual relations”<sup>115</sup>), or just plain being “caught off guard,” as Clinton was.<sup>116</sup> Furthermore, the answers to many questions turn on perceptions (e.g., were you and Lewinsky ever “alone” in the White House?<sup>117</sup>), and “an allegation of perjury as to a ‘matter of perception’ fails ‘absen[t] *conclusive* proof’ that the witness testified falsely as to her belief, rather than that she was merely mistaken in her subjective assessment of the facts.”<sup>118</sup> The pragmatic reasons for strict limitations on the perjury offense apply as well to this as to any other “inadvertent” misstatement: If a person could be held guilty of perjury for inadvertently going over the boundary of literal truth that he had carefully set for himself, then pursuing a strategy of not throwing in the towel in tough cases, of forcing the opponents to make their proof, might often become unduly risky, and a fundament of the adversary system might jeopardized.<sup>119</sup>

It does not at all follow, however, that these same pragmatic concerns justify the pursuit by lawyers of “interests” their clients might think they have in avoiding or defeating the substance of the law. Sometimes adversary lawyers talk as though all they are doing is making the other side prove its own case. The larger objective is, however, often more insidious than that. When parties and partisan witnesses take a non-cooperative stance, the object is often to induce jurors and others to reach inaccurate conclusions, wholly or in part, about who did what, and when. This is, of course, pretty much what Posner accuses Clinton of trying to do. The fact that so many lawyers think such tactics are properly consistent with just being a lawyer (along with abuse of confidentiality, fabricated controversy, inducing false inferences and the like<sup>120</sup>) may be a major ethical problem of our profession.

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<sup>114</sup> *Id.* at 358. See *Hoke v. Netherland*, 92 F.3d 1350, 1361 (4<sup>th</sup> Cir. 1996).

<sup>115</sup> AS at 25 (a definition bristling with appositives and containing upwards of 50 words).

<sup>116</sup> AS at 24. See *Bronston*, 409 U.S. at 358, listing ways even “the most earnest witnesses” can be knocked off stride.

<sup>117</sup> See AS at 46-47.

<sup>118</sup> *United States v. Derrick*, 163 F.3d 799, 828 (4<sup>th</sup> Cir. 1998) (emphasis added). Posner treats Clinton’s negative answer to the “alone” question as an example of perjury by “private meaning.” Posner asserts “[t]here is no possibility that he misunderstood the question.” Maybe. Clinton almost surely knew what the questioner was driving at. Then again, the word “alone” is almost always used as a relative term (can a person live “alone” in Manhattan?). I think the point of cases like *Derrick* and *Bronston* is that people should not be convicted of perjury for mis-weighting the quantum of semantic doubt (on the fly) or discouraged from giving themselves, rather than their adversaries, the benefit of doubts they (perhaps erroneously) perceive.

<sup>119</sup> See *Bronston*, 409 U.S. at 359-61, for a lengthy explanation.

<sup>120</sup> See my discussion in Humbach, *supra* note 19.

Most people, when they really need a lawyer, are of course very happy to find someone who can do exactly these sorts of things, a smart lawyer who can deal creatively with the facts and legally avoid "undesired" legal results. However, the notion that it is ethical or right for lawyers to offer such a service only further feeds "the lay intuition that what lawyers mainly do is drive a wedge between law and justice."<sup>121</sup> As such, it is corrosive to the system and, ultimately, to the very credibility and authoritativeness of the rule of law.

For pragmatic reasons we may have to leave room for such maneuvers in the law of perjury and obstruction, but we do not have to condone them. We do not have to leave them unremarked when, after the fact, it becomes apparent they have been deployed. In not leaving them unremarked, Judge Posner has done a great service. Although President Clinton's efforts at protecting his confidentiality may not have violated any laws, because he was just being a lawyer, the manifest dubiousness of his "just being a lawyer" should give our profession pause.

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<sup>121</sup> AS at 242.