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THE AMERICAN CRIMINAL JUSTICE SYSTEM APPROACHING THE YEAR 2000

INTRODUCTION: TAKING THE STAND

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The style of a criminal case baldly describes an unequal contest, pitting the State, or the United States, or more pungently yet, the People, against John Doe.¹ But with our deep cultural distaste for mismatches, we seek to balance the odds at trial by shoring up the accused, giving him independence and autonomy, rights and options. Most important is the accused's choice between remaining

* Ernest W. McFarland Professor of Law, Stanford Law School. The author thanks William Simon and Robert Weisberg for helpful comments on an earlier draft, Michael Fitzpatrick (J.D., Stanford, 1993) for sharpening my interest in *Dunnigan* with an excellent paper, and Thomas Grey, first among colleagues, for softening the pitch.

1. The situation of the criminally accused overmatched in an adversary contest by a state with far greater resources and procedural advantages is the theme of the now classic article by Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960). For a modern update showing that little has changed in this regard, see Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992). In what will undoubtedly be a widely used exchange, William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993), argues that the imbalance of resources has been exaggerated, and at any rate does not justify in most cases, aggressive defense tactics to ease its impact. In response, David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993), points to dozens of studies and cases showing that the imbalance exists, and argues that trying to equalize the adversaries is a legitimate defense goal.

silent and testifying in his own behalf. Uniquely in our system, the accused may sit mute while the government strives to meet its handicapped burden of proof beyond a reasonable doubt. Or the defendant may choose to tell his side or explain himself, by testifying in his own behalf. Thus we try to equalize the adversaries: sentient individual against sovereign state.²

The Fifth Amendment to the Constitution guarantees the right to silence, but the right to speak was not explicit until 1987 when the Burger-Rehnquist Court inferred it from the purposes of due process, from the right to summon witnesses and from the implications of the Fifth Amendment itself.³ This latecomer from the due process pantheon trails no clouds of glory, though; it was not born of a grand purpose to balance the adversary contest by bolstering the accused. That distinctive goal of American criminal procedure is fading as a background fact for deciding whether a defendant received fair treatment.

In this introductory Essay, I want to illustrate what has happened through a little case from the Court's last term, *United States v. Dunnigan*.⁴ I use the term "little" because neither the accusation nor the accused were in any sense notorious, and because the Court itself treated the case summarily in a short unanimous opinion. Justice Brennan and Justice Marshall were not there to dissent, and no one else was able, or perhaps inclined, to acknowledge a defense perspective. My larger purpose, as always

2. "The state and [the individual] meet in adversary trial, as equals—strength against strength, resource against resource, argument against argument." Abe Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEV. B. ASS'N J. 91, 98-99 (1954). See Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1136-42 (1982) (arguing that the Fifth Amendment is critical to our view of the adversary system in criminal cases); see also David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986) (setting out arguments about the Fifth Amendment privilege, and finding the rationales inadequate). A major modern proponent of the "equalizing" functions of the Fifth Amendment is R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15 (1981).

3. See *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987). In holding that the defendant could not be prevented from testifying by a state statute barring hypnotically-refreshed testimony, the Court traced the evolution of the defendant's right to testify in his own behalf. *Id.*, see also *Ferguson v. Georgia*, 365 U.S. 570, 582 (1961) (holding that presentation of the defendant's unsworn statement would not substitute for his right to testify).

4. 113 S. Ct. 1111 (1993).

when I write about, or teach, criminal procedure, is to explain the criminal defense world view, and—perhaps this is quixotic—even to arouse a sympathetic understanding in some readers to whom it is an unnatural way to look at things.⁵

Sharon Dunnigan took the stand and denied her guilt of a one count indictment for conspiracy to sell cocaine.⁶ A jury disbelieved her and, at the urging of the prosecutor, the trial judge increased her sentence under the United States Sentencing Guidelines (“Guidelines”) because he found that she had committed perjury.⁷ Reversing, the Fourth Circuit held that the probability of sentence enhancement interfered with the accused’s constitutional choice between silence and speech.⁸ The Supreme Court reinstated the sentence, observing that “a defendant’s right to testify does not include a right to commit perjury.”⁹

The government presented five witnesses who swore that Dunnigan went from Charleston, West Virginia to Cleveland, Ohio, to

5. For previous efforts along these lines, see Barbara A. Babcock, *Gary Gilmore’s Lawyers*, 32 STAN. L. REV. 865 (1988); Barbara A. Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1983-84); Babcock, *Fair Play*, *supra* note 2.

6. *Dunnigan*, 113 S. Ct. at 1114.

7. *Id.* at 1114-15. The Federal Sentencing Guidelines were developed by an expert bipartisan commission pursuant to the Sentencing Reform Act of 1984, 28 U.S.C. § 991(b)(1) (1988). The Guidelines under the Act, whose constitutionality was upheld against a challenge that it violated separation of powers, *see* *Mistretta v. United States*, 488 U.S. 361 (1989), essentially make the Commission’s determination of sentences binding on the courts.

Dunnigan’s sentence was enhanced pursuant to U.S.S.G. § 3C1.1, which states in full:

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

U.S.S.G. § 3C1.1 (1989). The commentary to this Guideline makes clear, and the Court in *Dunnigan* approved it, that trial perjury is an instance of obstruction of justice. U.S.S.G. § 3C1.1 cmt. 1(c) (Nov. 1989); *Dunnigan*, 113 S. Ct. at 1115-16.

8. *United States v. Dunnigan*, 944 F.2d 178, 185 (4th Cir. 1991) (“The rigidity of the guidelines makes the § 3C1.1 enhancement an intolerable burden upon the defendant’s right to testify in his own behalf.”).

Other circuit courts that had considered the perjury-enhancement issue had upheld the Guideline. *See, e.g.*, *United States v. Batista-Polanco*, 927 F.2d 14, 22 (1st Cir. 1991); *United States v. Beaulieu*, 900 F.2d 1531, 1535 (10th Cir. 1990); *United States v. Acosta-Cazares*, 878 F.2d 945, 953 (6th Cir. 1989). But some circuits had required additional specific findings of perjury before the judge would enhance a sentence, though finding that the judge need be satisfied of them only by a preponderance of the evidence. *See, e.g.*, *United States v. Contreras*, 937 F.2d 1191, 1194 (7th Cir. 1991); *United States v. Wallace*, 904 F.2d 603, 604 (11th Cir. 1990); *United States v. Keys*, 899 F.2d 983, 989 (10th Cir. 1990).

9. *Dunnigan*, 113 S. Ct. at 1117.

purchase cocaine, and several added that she sold cocaine from her apartment.¹⁰ Against these numbers, Dunnigan's protested innocence, coupled with a story about being in Cleveland to visit relatives,¹¹ made the trial court smell mendacity. Yet, all of the government witnesses were themselves part of the demi-monde of cocaine dealing and addiction.¹² Originally, all five had been charged in the same conspiracy with Dunnigan, and were presumably testifying in hope of favorable treatment for themselves.¹³ Assuming skillful cross-examination by the defense, the odds may not have looked so formidable at the moment she decided to take the stand.¹⁴

More to the point from a defense world view, Sharon Dunnigan's words may have been less a disavowal of the charges than a plea for mercy: her formal denial, a speech-act to establish her character, her personhood, her place in the world (which was at worst, a

10. *Id.* at 1114.

11. *Id.*

12. Aside from the ringleader's testimony, the only person who testified directly to trips to Cleveland with Dunnigan to purchase drugs was a paranoid schizophrenic and a heroin addict. *United States v. Dunnigan*, 944 F.2d 178, 180 (4th Cir. 1991). The Fourth Circuit found error in the failure to reveal this to the defense in advance, but that the error was harmless. *Id.* at 182.

13. "Common sense would suggest that [an accomplice, co-conspirator or another facing criminal charges] often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing." *Washington v. Texas*, 388 U.S. 14, 22 (1967); see also *United States v. Garcia*, 528 F.2d 580, 587-88 (5th Cir. 1976) (holding that the defendant was entitled to a cautionary instruction on credibility when the government's case was based solely on the testimony of an informer or accomplice).

14. "The facile logic of hindsight deems such disbelieved testimony a lie. Hindsight, however, does not help the accused when he must decide whether to take the stand. He already knows that he faces the possibility of conviction, and that he is much less likely to be acquitted if he remains silent." *Dunnigan*, 944 F.2d at 183.

After Dunnigan testified, the government presented a sixth witness on rebuttal who swore to a single, surveilled purchase from Dunnigan, after she had denied it on cross-examination. *Id.* at 181. This witness was vulnerable to impeachment for bias like the others, having turned informer as a result of an earlier arrest. *Id.* Apparently, the prosecutor had not found his testimony strong enough to base a charge on it, even though the alleged conspiracy was in the same time period as the sale. Because the trial judge made no specific findings as to what constituted perjury in his opinion, *Dunnigan*, 113 S. Ct. at 1114-15, the record does not reflect whether he relied on the rebuttal testimony.

The assumption of adequate cross-examination of the government witnesses may be unrealistic, since this was a "crack case from the projects," i.e., a routine criminal matter, and Dunnigan had court-appointed counsel. Telephone Interview with Brent Beveridge, Court-Appointed Appellate Counsel for Dunnigan (Aug. 31, 1993).

very low minion in the drug hierarchy of Charleston). In this view, her testimony was not about going to Cleveland but about going to prison. Disclosing herself to the jury, Dunnigan sought redemption and forgiveness.

In years past, Dunnigan might have pled guilty and thrown herself on the court's mercy.¹⁵ But today, this scenario is less likely because the federal judge is constrained by mandatory sentencing guidelines. While a criminal defendant may still seek lenience through plea bargaining, the prosecutorial fact finder exacts a (usually heavy) price. Only the jury may forgive freely. They seldom do so, however, and usually they need to hear from the accused to determine whether she *deserves* mercy.¹⁶

It is almost impossible to see the defendant as a deserving person unless he testifies, partly because the natural order of the trial

15. For many years before the Sentencing Reform Act of 1984, district court judges enjoyed broad discretion to decide the length of a sentence within statutorily specified ranges for particular crimes. U.S. SENTENCING COMM'N, REPORT ON THE SENTENCING GUIDELINES 9 (1991). The philosophy was one of fitting the punishment to the individual and the possibilities of her rehabilitation. See *Williams v. New York*, 337 U.S. 241, 247 (1949) (upholding the constitutionality of indeterminate sentencing). In *United States v. Grayson*, 438 U.S. 41 (1978), the Court upheld a sentence increase for trial perjury under the pre-Guidelines indeterminate sentencing scheme. Many of the circuits that upheld the Guideline increase, see *supra* note 8, did so because they determined that *Grayson* was still controlling law despite the Guidelines. Dunnigan's counsel spent most of his Supreme Court brief distinguishing *Grayson*, mostly on the ground that the Guidelines were a "wooden and reflex" increase for perjury forbidden expressly by *Grayson*. Brief for Appellee at 21-26, *United States v. Dunnigan*, 113 S. Ct. 1111 (1993) (No. 91-1300). *Grayson* also justified consideration of trial perjury by its adverse reflection on the likelihood of rehabilitation, *Grayson*, 438 U.S. at 53, a prime goal of the indeterminate sentencing regime, one that has been considerably downgraded under the Guidelines.

Justice Stewart, writing in dissent and joined by Justices Marshall and Brennan, was particularly devastating in pointing out that any consideration of trial perjury was really punishment for a separate unproved crime without due process. *Id.* at 56 n.3.

16. See, e.g., *Grayson*, 438 U.S. at 58 n.5 (Stewart, J., dissenting) ("A defendant who does not take the stand will probably fatally prejudice his chances of acquittal.") (quoting Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 212 n.36 (1956)); *Lakeside v. Oregon*, 435 U.S. 333, 340 n.10 (1978) (recognizing that the negative inference a jury may draw from the accused's decision not to take the stand "may be inevitable"); see also Douglas Ayer, *The Fifth Amendment and the Inference of Guilt from Silence: Griffin v. California After Fifteen Years*, 78 MICH. L. REV. 841, 858 (1980) (arguing that a defendant's fear that a jury will infer guilt from a failure to take the stand is justified). The Fourth Circuit in *Dunnigan* stated of the decision to take the stand: "[The defendant] already knows that he faces the possibility of conviction and that he is much less likely to be acquitted if he remains silent." *Dunnigan*, 944 F.2d at 183.

dehumanizes him. For hours, days, even months, the jury has heard the government's witnesses—the victims and the professionals: experts and police.¹⁷ Again and again, they have seen the moving finger point to the sullen, or perhaps sad, but always silent, accused. Then, finally, he takes the stand and is suddenly revealed: with a family or not, educated thus, worked in these ways, and ultimately, “in his own words,” he tells what happened on the “day in question.”¹⁸ As a practical matter, the only real chance the defendant has to speak to the jury is by taking the stand—and this he may not do without denying his guilt.¹⁹

17. David Luban points out the psychological and process factors that strongly incline the jurors to believe the government's witnesses, especially the police: “the jury enters the box with an overwhelming predisposition” against the accused. They believe that “where there's smoke, there's fire,” have “sympathetic responses to the police for offering physical protection,” and are subject to common impulses toward “obedience to authority” and the desire to believe in a just world, which does not encompass government chicanery. Luban, *supra* note 1, at 1741. Moreover, the prosecution witnesses are legitimated through process—jurors believe the case has been carefully screened, and even that it may be stronger than it appears because of suppression on legal technicalities. *Id.* at 1742. Finally, Luban points to the paradox that the very political legitimacy that we desire and applaud in government creates an “enormous initial credibility” for its own witnesses. *Id.* at 1743.

18. On direct examination of their own witnesses, both sides are allowed to ask preliminary questions that place a witness in his setting. While the trial judge has discretion about the extent of this inquiry, its relevance to establish credibility is clear. *See United States v. Fowler*, 465 F.2d 664, 667 (D.C. Cir. 1972) (discussing permissible purposes of cross-examination, including identifying the witness “with his community” so that “the jury may interpret his testimony in the light reflected upon it by knowledge of his environment”) (quoting *Alford v. United States*, 282 U.S. 687, 691-92 (1931)); *see also* DAVID COHEN, *HOW TO WIN CRIMINAL CASES BY ESTABLISHING A REASONABLE DOUBT* 710 (1980) (recommending that counsel question the defendant about “his family, his children, his work, his army background, his education and his general background”); 2 PUBLIC DEFENDER SERV. FOR THE DISTRICT OF COLUMBIA, *CRIMINAL PRAC. INST., TRIAL MANUAL* 31.22-31.23 (1990) (emphasizing the importance of “positive information about [the accused's] background” to bolster the accused's credibility in the eyes of the jury); HOWARD H. SPELLMAN, *DIRECT EXAMINATION OF WITNESSES* 85 (1968) (recommending that counsel “introduce” a witness to the fact finder at the beginning of direct examination by asking several background questions).

19. The only other chance the defendant might have to speak to a jury is to seek to represent herself. Although *Faretta v. California*, 422 U.S. 806 (1975), established the constitutional right to self-representation, inferred from the Sixth Amendment, it is a perilous course for anyone, but especially for Sharon Dunnigan with little education and less experience in the courtroom. Dunnigan had no prior felony record and is poor and black. Telephone Interview with Brent Beveridge, Court-Appointed Appellate Counsel for Dunnigan (Aug. 31, 1993).

Because of the potential disorder arising from self-representation, as well as a distaste for making so obvious the imbalance between the prosecution and the defense, judges do not accord the right freely. They almost never allow “hybrid” representation in which there is

To recapitulate—the Supreme Court has held that the defendant has a right to this moment of humanization, just as he has a right to defend himself generally, to summon witnesses, to have the assistance of counsel. But he is limited in the form of his testimony to a denial of the charges, and if the judge disbelieves his denial, he will serve more time in prison. Why should there be such a price for taking the stand unsuccessfully? Because, the Court says, there is no “right to commit perjury”²⁰ Instead of making the choice free between silence and speech, the Court has trammelled the newly proclaimed right, largely by means of this potent one-liner. The rhetorical power of this slogan is matched only by its eerie irrelevance to the real world of criminal defense. Yet, it has been decisive in cases where the accused argued that he was prevented from witnessing for himself.

The “no right to perjury” line appeared first in *Harris v. New York*,²¹ when the Burger Court was still new. In a brief opinion which the Chief Justice said would be “of interest mostly to members of the bar,”²² the Court held that if the defendant took the stand, the State could impeach him with statements taken in violation of the *Miranda* rule. To the argument that this would chill or burden fundamental privileges, the Court uttered for the first time its magisterial non sequitur, leading two well-known commentators to observe:

Of course a defendant has no “right to commit perjury.”
Neither does a defendant have the right to commit murder, and
yet the Government may not prove that crime by means of an

mutual respect, planning and accord between the defendant and his lawyer, with tasks apportioned appropriately. For example, the defendant might give the opening statement, and do some direct examination. The lawyer might make the legal motions and objections, and cross-examine the witnesses. Even when allowing the right to self-representation, courts usually appoint a “stand-by” counsel to advise the accused, and allow this attorney considerable latitude to intervene in the trial. See *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (holding that stand-by counsel did not unduly interfere with the defendant’s right to self-representation though there were many heated exchanges between them).

20. *United States v. Dunnigan*, 113 S. Ct. 1111, 1117 (1993).

21. 401 U.S. 222, 225 (1971).

22. John P. MacKenzie, *Court Eases Restraints on Confessions*, WASH. POST, Feb. 25, 1971, at A1 (quoting Chief Justice Burger), cited in Alan M. Dershowitz & John H. Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1198 (1971).

illegally obtained statement. Nor, indeed, could it introduce such a statement as part of its case in chief in a perjury prosecution.²³

Not only logic, but candor was a victim in the *Harris* case, which suffered from a badly-doctored quote and distortion of the record as well.²⁴

Perhaps some institutional embarrassment led the Court, in a later case, to draw back from *Harris* when the prosecutor, not to be thwarted by the defendant's silence at trial, used his illegally obtained statements to impugn the only witness instead. In *James v. Illinois*,²⁵ the Court held that the accused must not be prevented from putting on any defense at all by the "no right to perjury" line. As the latest decision turning on the locution, *Dunnigan* ignores its lineage altogether: *Harris* is not even cited.

The *Dunnigan* opinion concentrated on refuting the contention that additional years for perjury would be automatic whenever the defendant testified.²⁶ Concluding that it was enough that the trial judge made a specific finding of perjury,²⁷ the Court added that the

23. Dershowitz & Ely, *supra* note 22, at 1222. The passage in the text continues by observing that the question is whether an illegally obtained statement may be used "to prove perjury in the context of a trial for a different crime [which] is not answered by denying that there is a right that no one asserted." *Id.*

24. The most egregious example of misquotation was the omission in a quote from *Walder v. United States*, 347 U.S. 62 (1954), central to the opinion, that changed its meaning. *See Harris*, 401 U.S. at 224. The words omitted are relevant here:

Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief.

Walder, 347 U.S. at 65.

The worst misrepresentation of the record was the assertion that there was no "claim that the statements made to the police were coerced or involuntary," when, in fact, *Harris* had made exactly that claim in all courts, including the briefs and oral argument in the Supreme Court itself. Dershowitz & Ely, *supra* note 22, at 1201 (quoting *Harris*, 401 U.S. at 224).

25. 493 U.S. 307 (1990).

26. The Court passed quickly over the argument about burdening the right to testify partly because *Dunnigan* did not urge it strongly. *See United States v. Dunnigan*, 113 S. Ct. 1111, 1117 (1993). As a tactical matter, the defense apparently decided in light of *United States v. Grayson*, 438 U.S. 41 (1978), to focus on the lack of due process in the automatic increase for perjury without a hearing or any standard of proof.

27. Although the Court in *Dunnigan* required a specific finding of perjury, which it defined as "false testimony concerning a material matter with the willful intent to provide

risk of an erroneous enhancement was, at any rate, "inherent in a system which insists on the value of testimony under oath."²⁸ In the same vein, the Court observed: "The requirement of sworn testimony, backed by punishment for perjury, is as much a protection for the accused as it is a threat."²⁹ A fearful symmetry this, in a situation where symmetry has never before been the point.

It is, moreover, almost perverse to say that a potent threat actually protects the defendant against prosecution lies. Police perjury, especially, is virtually never prosecuted, though anecdotal and empirical evidence show that it is common, especially when the subject is observance of the defendant's constitutional rights.³⁰ In thirty years of observing the criminal justice system, I do not recall a case in which police witnesses were prosecuted for trial perjury. To the extent they exist at all, such prosecutions would be in high-profile cases, not following upon either convictions or acquittals in the everyday rounds of the criminal courts. Formal prosecution of trial perjury on either side is so rare that the usual excuse of limited prosecutorial resources cannot completely account for the scarcity³¹

false testimony, rather than as a result of confusion, mistake or faulty memory," *Dunnigan*, 113 S. Ct. at 1116, and though it added that it is "preferable" for the court "to address each element of the alleged perjury in a separate and clear finding," *id.* at 1117, it nevertheless upheld the summary conclusion in the case. Observers of the system believe that added years for perjury will be all but automatic after *Dunnigan*. See, e.g., Richard Reuben, *Sentencing Enhancement Allowed for Perjury*, S.F. DAILY J., Feb. 24, 1993, at 1, 7 (quoting well-known defense lawyers); Aaron Epstein, *Lengthened Sentences for Liars: Defendants Giving False Testimony Should Be Punished, The Supreme Court Ruled Unanimously*, PHIL. INQUIRER, Feb. 24, 1993, at A2 (quoting Nancy Hollander, President of the National Association of Criminal Defense Lawyers: "there'll be fewer defendants taking the stand from now on").

28. *Dunnigan*, 113 S. Ct. at 1118.

29. *Id.*

30. Police perjury has been extensively documented in the circumstance of avoiding the effects of the exclusionary rule. For an impressive recent study, collecting the major sources, see Myron W Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 98 & *passim* (1992); see also HOWARD JAMES, *CRISIS IN THE COURTS* 189 (1971) (discussing pat stories in search and seizure cases); John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1038 (1974) (describing police perjury as routine).

31. In other contexts, the Court has recognized that the purpose of a trial is to sort truth from untruth, and that, in a sense, "simple perjury was not so much an obstruction of justice as an expected part of its administration." *Dunnigan*, 113 S. Ct. at 1116 (distinguishing *In re Michael*, 326 U.S. 224 (1945), and *Ex parte Hudgings*, 249 U.S. 378 (1919), which held

Rather, a mix of sporting attitude and philosophical rationalization underlies the failure to prosecute for trial perjury. The police witnesses are valuable members of the prosecutor's team, and will be needed for future events. Discipline for mistakes, often a result of overzealousness rather than malice, must be private to avoid hurting team morale. At any rate, it's a rough game, even a war in some metaphoric schemes, and both sides should have considerable leeway in making their plays.

As to the defense, hitting a man when he is down—piling on in football—is poor sportsmanship. In sport and in criminal trials, the convicted defendant is certainly down. He will likely be drawing a long prison sentence, so there is no need to strike again with a second prosecution. It is especially unsportsmanlike when the defendant has testified to his innocence because, in a sense, the original conviction is for perjury as well as for the underlying crime.³² If the jury had believed him, or found him worthy of mercy, they would have acquitted.

To even a mildly relativist philosopher, each trial, especially in view of the esoteric rules of criminal procedure and evidence, has its own "truth"—encapsulated, summarized, and concluded by the jury verdict. Prosecution for perjury is virtually impossible in this view because it would require re-creating the first case in order to know its peculiar "verities." The idea of the trial as a one-time event, defying accurate reconstruction, is not unfamiliar to a Court

in the contempt context that perjury was not an obstruction of justice); *see also* *Bronston v. United States*, 409 U.S. 352, 359 (1973) (reversing a perjury conviction that was based on deliberately misleading, but not literally untrue, testimony, and noting that perjury laws must be administered with great care so as not to "discourage witnesses from appearing or testifying").

32. In the same sense that the conviction embraces a finding of perjury if the defendant testified, the pre-Guidelines sentence also might have included false testimony as a negative factor in the picture of the whole defendant to which the judge was responding. Although *United States v. Grayson*, 438 U.S. 41 (1978), upheld a sentence that took perjury into account explicitly (though not assigning a set number of years for the increase), it was far from a universal practice among trial judges. As Justice Stewart pointed out in dissent: "Indeed, without doubting the sincerity of trial judges one may doubt whether the single incident of a defendant's trial testimony could ever alter the assessment of rehabilitative prospects so drastically as to justify a perceptibly greater sentence." *Id.* at 56 n.3 (Stewart, J., dissenting). Because of its automatic and mandatory nature once there is a finding of perjury by the trial judge, Guidelines sentencing is far more threatening to due process and to the right to take the stand than the previous highly discretionary sentencing practices.

which has reshaped federal habeas corpus in that image.³³ Most dramatically, in the same term as *Dunnigan*, the Court found that evidence of factual innocence came too long after the main event to call for a hearing before a convicted defendant went to his death.³⁴ In a system in which a trial cannot be tested by its referential power, but refers only to its own closed form, prosecutions for perjury will always be uncommon. Thus they cannot serve either to deter perjury or to protect the accused against government lying.

The discussion to this point might sound like an argument for the right to commit perjury. The reasoning would go like this: in reality, the trial is an occasion for each side to tell its best story, constrained solely by indisputable physical facts and by cross-examination; the truth emerges at the end of the trial in the form of the jury verdict. Some sworn falsehoods may be an unfortunate by-product of each side's right to make its case, just as, for example, the destruction and loss of evidence can occur from strictly observing the Fourth Amendment.³⁵

When I first started teaching criminal procedure, more than a decade ago, I would coax students to entertain such ideas, urging that the right to defend might trump all others. "Think about the stakes for the accused facing a government bent on depriving him of all liberty, and maybe even his life," I would say. "Doesn't he have the right to make his best defense?" Implacably they would

33. See, e.g., *McCleskey v. Zant*, 111 S. Ct. 1454 (1991); *Teague v. Lane*, 489 U.S. 288 (1989); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986). See generally Robert Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9 (1990) (suggesting that the Supreme Court has substantially eviscerated federal habeas corpus jurisdiction as an instrument of constitutional law).

34. *Herrera v. Collins*, 113 S. Ct. 853, 870 (1993). Indeed, in its cynicism about the possibility of reopening a trial to ensure justice, the new judicial attack on habeas corpus ironically echoes the advent of deconstructionist and post-structuralist scholarship in legal academics. Thus, all discourse is a "constructed" and fragile text; no text can rely on a point or origin outside its own discourse. See, e.g., Jacques Derrida, *Structure, Sign and Play in the Discourse of the Human Sciences*, in *THE STRUCTURALIST CONTROVERSY* (R. Macksey & E. Donato eds., 1972); see generally TERRY EAGLETON, *LITERARY THEORY* (1983).

35. The paragraph in the text summarizes a subset of the larger ongoing discourse about the contingent nature of truth in the adversary process, which usually is cast in terms of the lawyer's professional responsibilities, i.e., whether these include assisting what the attorney believes to be false testimony. Among much good writing, for the classic formulations on the subject, see MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 43-58 (1975); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 197-201 (1988).

respond: "He doesn't have a right to lie. There is no constitutional right to commit perjury." From these exchanges, I learned that the slogan's expressive power depends on a common image held by those who rely on it. A cool and calculating defendant, caught red-handed, blandly denies the charges under oath. Counting on his slick story and maybe his slick lawyer, he swaggeringly defies the society he has already violated by committing some unspeakable crime.

I have quite a different mental picture of the accused on the stand. It is an amalgam of many of the people I represented, typically young African American men, uniformly frightened and profoundly aware that their first public speaking was to occur before a largely hostile audience. The performance aspects of witnessing—unlike natural story-telling, so intimate beneath its formal structure—are difficult for all the non-professional actors, but they are most demanding for the testifying accused. When the defendant takes the stand, even in a routine case, the courtroom grows unnaturally still and all thought converges for a moment. The only other time this happens to the same degree is when the jury returns its verdict. The two instants of extreme drama are connected because few defendants who fail to testify win their cases.³⁶

It is hard for a jury to acquit and they seldom do so. Felony conviction rates after trial are around eighty percent, and in the high ninety percent range for all charged felonies.³⁷ It is especially difficult to acquit in routine cases of street crime—the criminal cases that most concern us. Subtle, and not so subtle pressures, bear the jury toward conviction. The crime is serious, and if they are wrong in acquitting, there will be more victims. The price of a

36. See *supra* note 16 and accompanying text. Of course, in certain cases it is less imperative that the defendant take the stand. See *infra* note 51 (discussing cases involving defenses like entrapment and insanity, where the accused may rely solely on other witnesses to present the defense effectively to the jury).

37. In *Are Criminal Defenders Different?*, *supra* note 1, David Luban prints as an epigraph: "Rate of felony acquittal in state courts: 1%. Rate of acquittal in U.S. District Courts: 2.8%." *Id.* at 1729 (footnote omitted). One study cited by Luban shows that seven out of nine cases (78%) tried in state felony courts result in conviction. *Id.* at 1741 n.55 (citing BARBARA BOLAND ET AL., U.S. DEP'T OF JUSTICE, THE PROSECUTION OF FELONY ARRESTS 1988, at 1 fig.2 (1992)). A second Department of Justice study showed a conviction rate of five out of six cases (83%). *Id.* (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1988, at 12 tbl.13 (1990)).

wrong conviction does not appear comparably high to the jury because from all they can see and surmise, the defendant probably did something like what he is accused of doing here, or will do something like it. Juries know, too, that evidence may be hidden from them because of legal technicalities, and that this trial is a costly procedure.³⁸

It is even harder to acquit if the accused himself does not speak. Then he becomes a mere referent—choose your own metaphor—a piece of meat the dogs fight over, the trophy awarded the winning gladiator. To many jurors, whether of color or white, rich or poor, male or female, straight or gay, wise or ignorant, the passive defendant deserves what he gets. Jurors believe that an innocent person proclaims it from the rooftops.³⁹

The assumption that juries would hold the accused's silence against him was one reason for the common law rule that prohibited the criminal defendant from testifying. If, as John Henry Wigmore put it, "he failed to testify, that would damage his cause more seriously than if he were able to claim that his silence were enforced by law."⁴⁰ Along with statutes and rules that now allow the defendant to speak,⁴¹ constitutional doctrines and practices evolved to protect the right to silence. Prosecutors may not argue, for instance, that the defendant did not testify because he has nothing to say, or indeed, comment at all upon the great gap in the

38. David Luban, in arguing that the overwhelming balance of advantage toward the State in criminal cases justifies aggressive defense tactics, writes:

One of the first points that any criminal defense lawyer will make about her practice is that the legal burden of proof has nothing whatever to do with the actual burden of proof: the jury enters the box with an overwhelming predisposition to believe that the accused is guilty as charged.

Luban, *supra* note 1, at 1741.

39. Apparently, the Court believes it too because it has held that a defendant's pre-arrest silence about his self-defense claim can be used to impeach his testimony at trial. *See Jenkins v. Anderson*, 447 U.S. 231 (1980).

40. 2 JOHN H. WIGMORE, *EVIDENCE* § 579, at 828 (James H. Chadbourn rev., 1979); *see also Ferguson v. Georgia*, 365 U.S. 570 (1961) (discussing the history of the disability of the accused as a witness); *United States v. Grunewald*, 233 F.2d 556, 578 (2d Cir. 1956) (Frank, J., dissenting) (arguing that the 19th century reform allowing the accused to testify "often has the effect of coercing a defendant into abandoning his privilege").

41. *See, e.g.*, 18 U.S.C. § 3481 (1988) (establishing the right of the accused to testify in state courts); *see also Ferguson*, 365 U.S. at 596 (listing the dates on which states enacted statutes allowing the defendant to testify).

defense's case.⁴² And judges, on the defendant's request, or even against his wishes, must instruct the jury that they should draw no adverse inferences from the failure to speak.⁴³

Jurors often penetrate the safeguards we have erected around the right to silence with this certain knowledge: if they themselves were wrongly accused, they would say so. Several recent notorious instances illustrate the importance of the defendant's testimony. In the so-called Rodney King cases where police officers were tried for using excessive force, the victim was actually the defendant in the sense that the issue was whether he "deserved" what he unquestionably got. At the state trial, King did not take the stand to say he was the submissive victim of brutality; in the federal trial he did and convictions followed. For another contemporary illustration, William Kennedy Smith could never have been acquitted of rape without his beautifully groomed account of the circumstances under which he had intercourse with "the alleged victim."⁴⁴

Why would a defendant, then, ever pass up his main chance; that is, why would he elect not to take the stand? One reason is that he has no defense, though a sensible system would make a guilty plea desirable for such a person. Another reason is that he cannot articulate his defense himself from the stand. Perhaps he has a criminal record, or confessed when arrested and these facts would emerge on cross-examination, or maybe he is unattractive, even scary, or slow and obtuse so that he could hurt, rather than

42. *Griffin v. California*, 380 U.S. 609, 613 (1965). In holding that prosecutorial comment would unduly burden the Fifth Amendment right by making its exercise costly, the Court went on to point out that, in fact, the inference of guilt from silence is not necessarily accurate. *Id.* at 615. An innocent defendant might not testify for many reasons: fear of impeachment by prior crimes; confusion and embarrassment; and timidity and nervousness that might make the innocent person appear guilty. *Carter v. Kentucky*, 450 U.S. 288, 300 n.15 (1981).

43. *Carter*, 380 U.S. at 300 (holding that upon the defendant's request, the trial court must instruct the jury to draw no adverse inferences from the accused's failure to testify); *Lakeside v. Oregon*, 435 U.S. 333, 340-41 (1978) (holding that the trial court may give a cautionary instruction even over the defendant's objection).

44. "When Smith took the stand the defense had prepared him so that every possible inconsistency in his statement had been carefully thought through and an answer prepared for every possible question." Barbara A. Babcock, *Quick Verdict Shows Prosecutor Failed to Woo Jurors*, L.A. TIMES, Dec. 12, 1991, at A24. See also Barbara A. Babcock, *Smith Case Prosecutor Failed Key Test*, L.A. TIMES, Dec. 11, 1991, at A19 (discussing the impact of carefully timed defense testimony).

help himself as a witness. Calling the decision whether to testify, “a delicate balancing,” the Solicitor General in his *Dunnigan* brief said it was a combination of “factors, such as the credibility of his testimony, his prior criminal record and susceptibility to impeachment, his capacity to withstand cross-examination effectively, the strength of the government’s case, and the availability of other defense evidence.”⁴⁵

To make this critical and complex decision, the defendant needs help. And if he has a competent lawyer, his possible testimony has been a subject of discussion from very early in the representation. Those who are well-defended rehearse their testimony; the better defended they are the more they rehearse. One of my first jobs as a young lawyer in the office of Edward Bennett Williams was to prepare a defendant to take the stand. We spent all day, every day, for weeks going over his testimony. By the time he took the stand, he had heard every possible question at least once. But even in (most) cases where preparation is necessarily less thorough, defense lawyers in their final arguments can urge the unequal confrontation:

You saw my client, with her sixth grade education, who has never before spoken to an audience in public, on trial in a federal court; and you saw the government prosecutor with her decades of learning, and years of experience, closely cross-examine her. Yet in this unequal contest, you never once heard my client deviate from her basic testimony in this case: she is not guilty.

Fleshed out, this argument alone can make it worth the defendant’s taking the stand, even if his testimony is weak in substance and halting in style.

Let me summarize the discussion so far of taking the stand from the defense view. The decision is fraught—but always in the background is the fact that his failure to testify will increase the already great probability that he will go to prison. Now to this delicate calculus, add the fact that if the accused has confessed to his

45. Brief for Petitioner at 16, *United States v. Dunnigan*, 113 S. Ct. 1111 (1993) (No. 91-1300). The Solicitor General went on to argue, with seemingly unconscious cynicism, that the Guidelines actually may aid the defendant’s decision about whether to take the stand because he can calculate the exact cost of perjury, rather than guessing at what the judge might impose. *Id.*

lawyer (perhaps in response to the lawyer's mention of confidentiality), then, according to official doctrine, he may not take the stand in the normal course. All professional canons and codes agree that an attorney may not knowingly aid or induce perjured testimony.⁴⁶ In fact, a lawyer who threatens to reveal the defendant's lie to the court if he takes the stand, is not ineffective, according to the Supreme Court.⁴⁷ Where does this situation leave the defense lawyer after *Dunnigan*, one might well ask?

Remember that *Dunnigan* holds that the trial court must increase significantly the sentence upon finding that the defendant committed perjury. But what does such a finding say about the defense lawyer, who, if she was doing her job, at least elicited the testimony, also presumably shaped and rehearsed it, and who argued its credibility to the jury in closing?⁴⁸ Should the trial judge also refer the defense lawyer for disciplinary action?

Such a preposterous result could follow from *Dunnigan*, because it is written without regard either to the pressure on an accused to testify, or to the responsibilities of defense counsel to advise him.⁴⁹ I would hate to be in the position of explaining to a client that he has a right to take the stand, but that if he is convicted, his sen-

46. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) ("A lawyer shall not knowingly offer evidence that the lawyer knows to be false."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (A)(4) ("[A] lawyer shall not [k]nowingly use perjured testimony or false evidence."); *id.* at DR 7-102 (A)(6) ("[A] lawyer shall not participate in the creation of evidence when he knows or it is obvious that the evidence is false."). See also *supra* note 35.

47. *Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (holding that the defense attorney's threat to withdraw from the case if the defendant committed what the lawyer considered perjury was not ineffective assistance because it did not "breach any recognized professional duty").

48. The Supreme Court rejected a Georgia practice of allowing the defendant's testimony only through an unsworn statement. See *Ferguson v. Georgia*, 365 U.S. 570 (1961). In holding that due process required the help of counsel in shaping the testimony of the accused, the Court observed:

The tensions of a trial for an accused with life or liberty at stake might alone render him utterly unfit to give his explanation properly and completely. Left without the "guiding hand of counsel," he may fail properly to introduce, or to introduce at all, what may be a perfect defense.

Id. at 594-95 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

49. The right to testify and the right to counsel are closely associated in the Court's jurisprudence. Establishing formally the right to testify, *Rock v. Arkansas*, 483 U.S. 44 (1987), relied on *Ferguson*, 365 U.S. at 582 (holding that a Georgia rule that did not allow counsel to elicit answers through formal questioning violated due process). See *supra* note 48.

tence very probably, practically automatically, will be increased two levels for perjury. And that this could be done even without anyone proving that he lied; it is simply a matter of the judge's opinion from hearing him on the stand. This situation would baffle most lay people, of whom defendants are only a specially interested and alert subset.⁵⁰ Here is how it would sound:

You have a constitutional right to take the stand.

But if you lie on any important fact or, if you get confused or are mistaken and appear to be lying, the judge will very probably increase your sentence.

You do not have a right to take the stand on the perjury charge.

If the judge decides to add time to your sentence, you will not have a right to explain that you were confused or mistaken.

In some, perhaps most, circumstances, the lawyer must also tell the client:

Since your testimony is that you are innocent, were not even present at the time, rather than that you were insane, or acted in self defense or under duress, you are at even greater risk that the judge will decide that you were lying.⁵¹

50. To the perjury explanation, the lawyer probably should add that if the defendant should continue to deny her guilt after conviction, then she will not receive the two-level "acceptance of responsibility" reduction in sentence. This scenario happened to Sharon Dunnigan. See *United States v. Dunnigan*, 944 F.2d 178, 181 (4th Cir. 1992). Of course, if the accused accepts responsibility and admits her guilt, she will then confirm that her trial testimony was false, and justify a sentence increase.

51. The Court in *Dunnigan* argued that enhancement will not occur in every case in which the defendant testifies. *Id.* at 184-85. The court may find that he was confused, or mistaken rather than lying. In addition, certain types of defenses, the Court mentions "lack of capacity, insanity, duress or self-defense," *United States v. Dunnigan*, 113 S. Ct. 1111, 1117 (1993), may be truthful but not sufficient to justify the criminal act, in the jury's determination. Paradoxically, the defendant actually might win these sorts of cases and some forms of entrapment without taking the stand because the claim is not one of total non-involvement. See, e.g., John Riley, *Acquittal: The DeLorean Defense Lawyers Discover Silence Can Be Golden*, NAT'L L.J., Sept. 3, 1984, at 3, 14 (examining the trial defense strategy of John DeLorean after his acquittal on cocaine conspiracy charges, and quoting a surprised criminal defense lawyer, who noted that "[i]n a case with videotapes [of the alleged criminal activity], to win an entrapment defense without putting the defendant on the stand is incredible"). The enumerated defenses peculiarly may involve other witnesses through whom

And for good measure, she should add the following:

The judge *must* decide whether you were lying on important facts if the prosecutor asks him to. It would be hard for the judge to find that you were truthful when you claimed innocence in the face of a jury verdict, especially because the sentencing judge himself presided over the trial.

The Court's unanimous decision in *Dunnigan* will require real people to hold such absurd dialogue. The opinion, and the case line from which it springs, undercut the defendant's choice at a critical moment, destabilizing the equality that we have tried to approximate between the adversaries at the trial itself.

The opinion's unanimity emphasizes the fact that the Court as an institution no longer understands the defense perspective. Its decisions these days are so resolutely pro-prosecution that interpretations and practices once designed to prevent government overreaching no longer serve that purpose. Some examples in the following pages are the ban on using race to strike potential jurors,⁵² certainty in sentencing,⁵³ the *Miranda* rule,⁵⁴ the suppression of evidence gathered in violation of the Fourth Amendment,⁵⁵ and habeas corpus review of constitutional error.⁵⁶ When the balance shifts too far, as the commentators gathered here believe it has, not only defendants' rights in a formal sense, but the fundamental fairness of the system itself is at stake.

the defendant's story can be presented. For instance, insanity defenses almost always involve the testimony of experts and lay witnesses to the state of mind. *See, e.g.,* Laura A. Kiernan & Eric Pianin, *Hinckley Found Not Guilty, Insane*, WASH. POST, June 22, 1982, at A1, A12 (noting that although John Hinckley never took the stand in his trial for shooting President Reagan, Hinckley's lawyers successfully presented his insanity defense to the jury using the testimony of three expert witnesses). Thus, the Court's only examples of cases in which perjury might not be held against the defendant are also ones in which it is least likely that the defendant must take the stand.

52. Sheri L. Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21 (1993).

53. Sara S. Beale, *Procedural Issues Raised by Guidelines Sentencing: The Constitutional Significance of the "Elements of Sentence,"* 35 WM. & MARY L. REV. 147 (1993).

54. Paul Marcus, *A Return to the "Bright Line Rule" of Miranda*, 35 WM. & MARY L. REV. 93 (1993).

55. Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197 (1993).

56. John H. Blume & Stephen P. Garvey, *Harmless Error in Federal Habeas Corpus After Brecht v. Abrahamson*, 35 WM. & MARY L. REV. 163 (1993).

To end this introduction on an optimistic rather than apocryphal note—in most instances the Court has not overruled the precedents it has undercut; nor has it prevented or prohibited lower courts from assuming a more pro-defense stance. In *Dunnigan*, for example, nothing in the opinion prevents a sentencing judge from holding a due process hearing before he enhances a sentence for trial perjury, or even from requiring that perjury be proved beyond a reasonable doubt. There is still interpretive room, in other words, for restoring equilibrium to the criminal process by shoring up the accused.