Article

Making Defendants Speak

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INTRODUCTION

Criminal defendants have a right to testify in their own defense.[1] They also have a right to remain silent at trial.[2] Under the Constitution, the choice is theirs.[3]

But while the abstract constitutional ideal of free choice is appealing, the complicated and messy reality of modern criminal trials makes it impossible to grant a defendant a truly free choice. A defendant's decision is not made in a legal vacuum. Myriad legal rules—rules of evidence, rules of procedure, and rules of substantive criminal law—affect his choice. Some legal rules burden testimony and encourage silence. Other legal rules burden silence and encourage testimony.

State neutrality between testimony and silence is neither possible nor desirable.[4] Any legal rule that affects testifying and non-testifying defendants differently will burden one right

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1. *See* Rock v. Arkansas, 483 U.S. 44, 49–53 (1987). The right to testify has no explicit textual source but rather "has sources in several provisions of the Constitution," including the Due Process Clause and the Compulsory Process Clause. *Id*. at 51.

2. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

3. *See* Harris v. New York, 401 U.S. 222, 225 (1971) ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so."); *see also Rock*, 483 U.S. at 51 (stating that the Constitution ensures the "right of a criminal defendant to choose between silence and testifying in his own behalf" (quoting Ferguson v. Georgia, 365 U.S. 570, 602 (1961) (Clark, J., concurring))).

4. *See* Chaffin v. Stynchcombe, 412 U.S. 17, 30 (1973) (stating that the Constitution does not forbid "every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights").

or the other. Such rules pervade the criminal process, and removing them all would be impossible, or at least unwise.

When a defendant takes the stand, for example, the prosecutor may cross-examine him. The prosecutor's ability to cross-examine a defendant chills the latter's right to testify—it makes the exercise of that right costly. In the interest of eliminating the cost, we could reform evidence law to prohibit prosecutorial cross-examination of criminal defendants. But such a reform would be senseless. Even if it would promote "neutrality" by unburdening the right to testify, it would be anomalous in evidence law, and it would impede the truth-seeking function of trial.[5]

In any event, a debit on one side of the ledger is a credit on the other. Under the current regime, one *benefit* of remaining silent is the ability to avoid cross-examination. Removing the cost imposed on testimony would also remove the benefit associated with silence. That dynamic applies generally for a simple reason: exercising the constitutional right to testify necessarily involves waiving the constitutional right to remain silent, and vice versa. To the extent that a legal rule creates incentives to exercise one right, it inevitably creates disincentives to exercise the other. It is a zero-sum game.

Thus, the question is not whether the current set of rules burdens the exercise of either right—of course it does, as would any reasonable set of rules. The question is not whether the current set of rules is neutral between the two options—it is not neutral, and no reasonable set of rules could be neutral. Instead, the question is simply whether the current set of rules creates the proper mix of incentives and disincentives. In my view, it does not. The legal system punishes defendants too much for taking the stand, and rewards defendants too much for remaining silent. Courts should adjust the mix by rewarding defendants more for testifying and punishing them more for declining to testify.

There are two main reasons why we should encourage more defendants to testify. First and foremost, it would give the jury access to important additional information, and thereby

5. *See* United States v. Grayson, 438 U.S. 41, 57 (1978) (Stewart, J., dissenting) ("A defendant's decision to testify may be inhibited by . . . the possibility that damaging evidence not otherwise admissible will be admitted to impeach his credibility. These constraints arise solely from the fact that the defendant is quite properly treated like any other witness who testifies at trial.").

help the jury reach accurate results. Second, it would increase defendants' own participation in the criminal process, which would improve perceptions of legitimacy, thereby aiding rehabilitation and reintegration. Increasing lay participation would also reduce dependence on lawyers, which could reduce systematic disparities between rich and poor defendants.

Toward those ends, I propose three reforms. First, as a matter of constitutional criminal procedure, the Supreme Court should overrule *Griffin v. California*,[6] and should thus allow prosecutors to argue adverse inferences from a defendant's silence. Second, as a matter of evidence law, courts should alter or abandon the *Gordon v. United States*[7] test for Rule 609,[8] and admit fewer prior convictions for impeachment. Third, as a matter of sentencing law, courts should not impose perjury enhancements based on a defendant's trial testimony.[9]

Of the countless possible reforms that could make more defendants speak, these three are proposed in large part because each has independent legal merit. Each is justifiable at the doctrinal level—as a matter of evidence law, as a matter of criminal procedure, and as a matter of substantive criminal law. In addition to furthering the goals sketched above, each stands independently on a solid doctrinal footing.

Taken individually, the first proposal would benefit the prosecution, while the second and third proposals would benefit defendants. Taken together, however, the goal of the proposed reforms is not to tip the scales in either direction. The goal, rather, is to encourage more defendants to speak at trial, and thus to increase the accuracy, legitimacy, and fairness of criminal adjudication.

I. RATIONALE

Our current legal system encourages criminal defendants to remain silent. We should change the system in a way that

6. Griffin v. California, 380 U.S. 609, 615 (1965) (holding that the Self-Incrimination Clause prevents instructions and arguments suggesting an adverse inference from a defendant's silence).

7. Gordon v. United States, 383 F.2d 936, 939–41 (D.C. Cir. 1967) (setting forth factors that courts should consider when weighing the admission of prior felonies).

8. FED. R. EVID. 609(a)(1) (allowing the admission of prior felonies for impeachment subject to a probative-prejudice balancing test).

9. *See* U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 cmt. n.4(b) (2008) (allowing for a two-level sentencing enhancement for obstruction of justice, including trial perjury).

encourages more defendants to testify. Doing so would have several benefits. It would improve accuracy, participation, legitimacy, and equity.

A. ACCURACY

Criminal proceedings have some intrinsic value, but for the most part, their value is instrumental.[10] The primary goal of a criminal proceeding is to determine whether a defendant committed a crime and, if so, what crime.[11] Criminal proceedings have instrumental value insofar as they lead to accurate determinations of those issues.[12]

Criminal adjudication is a sorting process—the judicial system attempts to determine which defendants are guilty and which are not.[13] It is a human system, and errors are inevitable.[14] There are two types of errors: *false positives*, where an innocent person is found guilty; and *false negatives*, where a guilty person is set free.[15] Criminal law reform proposals often falter because they decrease one type of error only at the cost of increasing the other. Proposals aimed at providing greater protections to defendants may reduce false positives, but they almost invariably increase false negatives.

10. Donald A. Dripps, *Delegation and Due Process*, 1988 DUKE L.J. 657, 674–75 (describing the theory that constitutional "liberty" demands fair judicial proceedings); Frank Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 109–15 (discussing the Court's instrumental justification for specifying process once a statute has specified substance).

11. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) ("[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . . .").

12. *See* Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 1030 (2006) ("[T]he main, though certainly not the only, goal for evidence law is to promote accuracy in fact finding.").

13. *See generally* DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE (2003) (tracing the history of criminal procedure and the Fourteenth Amendment's role in the criminal procedure doctrine); *see also* Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument From Institutional Design*, 104 COLUM. L. REV. 801, 817 (2004) (stating that the adversary criminal process has "a primary goal of truth-finding").

14. *See* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 155–57 (Lawbook Exch., Ltd. 2d ed. 2005) (1947) (discussing how medieval inquisitors insisted on confessions because of the possibility of error); LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW 1–3 (2006) (describing the role errors play in criminal trials).

15. Simon A. Cole, *More than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. CRIM. L. & CRIMINOLOGY 985, 994–95 (2005).

Historically, Anglo-American jurisprudence took the normative position that false positives are worse than false negatives.[16] As Blackstone famously said, "it is better that ten guilty persons escape, than that one innocent suffer."[17] Courts[18] and academics[19] tirelessly repeat the maxim. But Blackstone's ten-to-one ratio is not self-evidently true.[20] Perhaps two-to-one is the correct ratio, or perhaps one hundred-to-one is best.[21] Underlying normative disagreement about the proper ratio, though it rarely rises to the surface of explicit argument, may well drive debates about specific reform proposals.[22]

Regardless of the proper ratio, both errors are costly.[23] To the extent that the judicial system can reduce both types of error, it should do so. If there are legal reforms that will increase the accuracy of the sorting mechanism—helping to convict more of the guilty and free more of the innocent—courts and legislatures should embrace them. Encouraging more defendants to speak would increase the accuracy of the fact-finding

16. 4 WILLIAM BLACKSTONE, COMMENTARIES *352.

17. *Id.*

18. *See, e.g.*, United States v. Clotida, 892 F.2d 1098, 1105 (1st Cir. 1989); United States v. Schwimmer, 882 F.2d 22, 27–28 (2d Cir. 1989); People v. Scott, 151 P.2d 517, 527 (Cal. 1944); State v. Porter, 698 A.2d 739, 790 (Conn. 1997) (Berdon, J., concurring and dissenting); McGinnis v. State, 31 Ga. 236, 252 (1860); State v. Reyes, 116 P.3d 305, 309 (Utah 2005).

19. *See, e.g.*, Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1523 (1996); Joshua Dressler, *Kent Greenawalt, Criminal Responsibility, and the Supreme Court: How A Moderate Scholar Can Appear Immoderate Thirty Years Later*, 74 NOTRE DAME L. REV. 1507, 1524 n.74 (1999); Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CAL. L. REV. 721, 775 (2007); Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1168 (2003); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 572 (2004).

20. *See* Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 174–77 (1997) (asking why ten is the number indoctrinated in legal scholarship).

21. *See* Richard D. Friedman, *A Presumption of Innocence, Not of Even Odds*, 52 STAN. L. REV. 873, 879 n.19 (2000).

22. *See* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 416–17 (1999) (arguing that empirical debates about deterrence mask cultural and moral conflict).

23. *See* Paul Rosenzweig, *Civil Liberty and the Response to Terrorism*, 42 DUQ. L. REV. 663, 680 (2004) (noting that "we see a great cost in any Type I error" [false positive] and that Type II errors [false negatives] impose "additional costs on society"); *cf.* Adam Raviv, *Torture and Justification: Defending the Indefensible*, 13 GEO. MASON L. REV. 135, 156–57 (2004) (discussing the tradeoff between false positives and false negatives in the war on terrorism).

process. It would help to reduce both false negatives and false positives.

Criminal defendants themselves are often a critical source of information about what happened.[24] In some cases, such as homicide cases with no witnesses other than the defendant and the victim, the defendant is often one of the only good sources of information.[25] Depriving the jury of defendant testimony deprives the jury of key information.[26]

Paradoxically, the value of defendants as an informational resource was recognized at common law more than it is today. Defendants were not allowed to take an oath or formally testify, but they were expected to present their own defense, answering and explaining away the prosecution's evidence.[27] In fact, as Hawkins explained in the early eighteenth century, the common law denied the assistance of counsel in order to make defendants speak.

> [E]very one of Common Understanding may as properly speak to a Matter of Fact, as if he were the best Lawyer; and that it requires no manner of Skill to make a plain and honest Defence, which in Cases of this Kind is always the best, the Simplicity and Innocence, artless and ingenuous Behaviour of one whose Conscience acquits him, having something in it more moving and convincing than the highest Eloquence of Persons speaking in a Cause not their own. . . . [T]he Innocent, for whose Safety alone the Law is concerned, have rather an Advantage than Prejudice in having the Court their only Counsel. Whereas on the other Side, the very Speech, Gesture and Countenance, and Manner of Defence of those who are guilty, when they speak for themselves, may often help to disclose the Truth, which

24. JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 1–9 (2003) (discussing the importance of the accused as an informational resource).

25. *See* 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 229–41 (1827) (describing the reasons behind the rule against self-incrimination and the value of self-provided testimony); Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1376–77 (1991) (describing the privilege against self-incrimination as a truth-impairing right); John H. Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71, 86 (1891) ("[I]f an accused person is innocent, he should be [able] to explain the facts of his conduct and vindicate himself . . . .").

26. *See* David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1076–77 (1986) (describing the effect on a jury of a defendant not testifying); Erwin N. Griswold, *The Right to Be Let Alone*, 55 NW. U. L. REV. 216, 223 (1960).

27. *See* LANGBEIN, *supra* note 24, at 14, 35–36 (describing the lawyer-free "accused speaks" criminal trial that prevailed in England from the sixteenth century into the eighteenth century).

> probably would not so well be discovered from the artificial Defence of others speaking for them.[28]

Hawkins was overly sanguine about the value of defendants' testimony. Some guilty defendants are slick liars, and their testimony may produce false negatives. Some innocent defendants are bad witnesses, ineloquent, contradictory or nervous, and their testimony may produce false positives.[29] On the whole, however, encouraging more defendants to testify would enhance the accuracy of the sorting process.

Admittedly, there is no way to prove empirically that more defendant testimony would lead to more accurate results. There is no good way to study the effect of a defendant's testimony in a real trial without conducting the trial twice, once with the defendant's testimony and once without.[30] Mock trial studies, though they allow for a control group, have inherent limitations due in part to their inability to replicate real trials.[31]

Nonetheless, the common sense argument that more defendant testimony would increase trial accuracy has some empirical support. There is a body of research suggesting that while jurors do not have much ability to assess truthfulness based on a witness's *demeanor*, they do have some ability to assess truthfulness based on the *content* of a witness's statement.[32] Moreover, the most recent empirical research provides more reason for optimism about jurors' ability to detect lies, especially when jurors are provided with sufficient information to

28. 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 400, *reprinted in* AMERICAN LAW: THE FORMATIVE YEARS (photo. reprint 1972) (2d ed. corrected 1724).

29. *See* Wilson v. United States, 149 U.S. 60, 66 (1893) (explaining that innocent defendants may fear testifying because nervousness may increase rather than remove prejudice against them).

30. Even if such an experiment were possible, it would be worthless without knowing in advance the truth of the defendant's guilt or innocence. Conducting a trial twice could demonstrate whether the presence of a defendant's testimony affects the outcome. Without knowing actual guilt or innocence, however, there would be no way to know whether the presence of a defendant's testimony led to the *right* outcome.

31. *See* Shari Seidman Diamond, *Illuminations and Shadows from Jury Simulations*, 21 LAW & HUM. BEHAV. 561 (1997); *see also* Brian H. Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?*, 23 LAW & HUM. BEHAV. 75, 88 (1999).

32. *See* Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1100–01 (1991) (reviewing the empirical research and concluding that while jurors are not effective at detecting lies by viewing witness demeanor, they are at least somewhat effective at detecting lies by assessing the content of witness testimony).

provide context to any witness's testimony.[33] The research suggests, in other words, that jurors with more information are more likely to reach correct results.[34] Juries are not perfect lie detectors,[35] to be sure, but they are decent.

A defendant's value as a resource of information does not mean, as Hawkins argued, that she should be denied counsel. Nor does it necessarily mean, as modern commentators since Bentham have argued, that the right against self-incrimination should be scrapped altogether.[36] The more moderate point is simply that a defendant's silence is truth-impairing, and that we should not enact or maintain legal rules that create a preference for silence over testimony without a very good reason to do so.

B. PARTICIPATION, LEGITIMACY, AND EQUITY

Aside from the instrumental values of accuracy in sorting, criminal proceedings have intrinsic value as well[37] because

33. *See* Bella DePaulo et al., *The Accuracy-Confidence Correlation in the Detection of Deception*, 1 PERS. & SOC. PSYCHOL. REV. 346, 347 (1997); Maria Hartwig et al., *Strategic Use of Evidence During Police Interviews: When Training to Detect Deception Works*, 30 LAW & HUM. BEHAV. 603, 604 (2006); Hee Sun Park et al., *How People Really Detect Lies*, 69 COMM. MONOGRAPHS 144, 145 (2002).

34. Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 CARDOZO L. REV. 2557, 2568 (2008) (reviewing recent research and concluding that "[o]bservers not only use context, they also use it effectively").

35. *See* George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 578 (1997).

36. 5 BENTHAM, *supra* note 25, at 226–27. For examples of modern scholars criticizing the self-incrimination right, see Dolinko, *supra* note 26, at 1064; Donald A. Dripps, *Supreme Court Review: Foreword: Against Police Interrogation—and the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 701 (1988); and Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 672 (1968). *See also* Stephen A. Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. CHI. L. REV. 6, 8–11 (1986) (discussing various critiques of the privilege).

37. For general discussions of the intrinsic value of legal procedures, see Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 893–94 (1999); Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1489 (1991); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1212–13 (2001); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 482–91 (1986); Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation and Fees*, 71 N.Y.U. L. REV. 296, 357–59 (1996); and Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 226–32 (2004).

they create an opportunity for participation—a day in court.[38] For a criminal defendant, "a participatory opportunity may also be psychologically important" simply "to have played a part in" the process that decides his fate.[39] Regardless of the result, criminal defendants view the process as more legitimate if they have the opportunity to tell their side of the story.[40]

For defendants, the lack of any opportunity to participate in the process can be frustrating and alienating.[41] The inability to participate causes negative perceptions of legitimacy and fairness.[42] Those perceptions, in turn, can inhibit reintegration and foster recidivism.[43] In short, "procedural justice shapes legitimacy," and "legitimacy shapes recidivism."[44]

38. *See* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (stating that the "[T]wo central concerns of procedural due process [are] the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process."); Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1275–77 (1975); William M. O'Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 LAW & SOC'Y REV. 661, 662 (1985); Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 160–63 (1978).

39. Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, *in* DUE PROCESS: NOMOS XVIII 126, 127 (J. Roland Pennock & John W. Chapman eds., 1977).

40. *See* Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483 (1988) (demonstrating the importance of procedural justice to convicted criminals' perceptions of fairness and legitimacy); *see also* Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 463–67 (2007) (examining the reasons given by criminal defendants who decline appointed counsel).

41. *See* Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1494–96 (2005) (discussing how defendants' silence decreases their understanding of and engagement with the criminal process, thus inhibiting remorse and rehabilitation); Michael M. O'Hear, *Faith, Justice, and the Teaching of Criminal Procedure*, 90 MARQ. L. REV. 87, 90–91 (discussing a noninstrumental approach to criminal procedure).

42. Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 167–68; *see also* United States v. Adams, 252 F.3d 276, 288 (3d Cir. 2001) (arguing that allocution "helps assure the fairness, and hence legitimacy, of the sentencing process"); United States v. De Alba Pagan, 33 F.3d 125, 129 (1st Cir. 1994) ("[A]llocution 'has value in terms of maximizing the perceived equity of the process.'" (quoting United States v. Barnes, 948 F.2d 325, 328 (7th Cir. 1991))); Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 FORDHAM L. REV. 2641, 2672–74 (2007) (discussing the benefits to defendants of allocution rights).

43. *See* Gordon Bazemore & Mark Umbreit, *Balanced and Restorative Justice: Prospects for Juvenile Justice in the 21st Century*, *in* JUVENILE JUS-

Many criminal defendants who would prefer to testify are dissuaded from doing so.[45] Their attorneys advise them—quite correctly—that given the current set of legal rules, the relative costs of taking the stand are high, and that remaining silent is a far safer option.[46] That dynamic has systematic costs, not just in the deprivation of information to the jury, but also in the deprivation of the defendant's opportunity to participate in a profoundly important event in his life.[47]

A beneficial side effect of increasing lay participation in the criminal process would be reducing dependence on lawyers.[48] When a criminal defendant does not testify, he must defend himself by proxy. He must rely on other defense witnesses, and, most importantly, on his attorney.[49] Thus, when fewer defendants testify, attorneys necessarily take a more important role in the criminal process.[50]

TICE SOURCEBOOK 467, 468 (Albert R. Roberts ed., 2004); Robin Bradley Kar, *Hart's Response to Exclusive Legal Positivism*, 95 GEO. L.J. 393, 459–60 (2007); Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1342–43 (2006); Ted Sampsell-Jones, *Culture and Contempt: The Limitations of Expressive Criminal Law*, 27 SEATTLE U. L. REV. 133, 178–81 (2003).

44. Tom R. Tyler et al., *Reintegrative Shaming, Procedural Justice, and Recidivism: The Engagement of Offenders' Psychological Mechanisms in the Canberra RISE Drinking-and-Driving Experiment*, 41 LAW & SOC'Y REV. 553, 575–76 (2007).

45. *See* Natapoff, *supra* note 41, at 1471.

46. *See id.* at 1470.

47. *See* Kimberly Helene Zelnick, *In* Gideon*'s Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion*, 30 AM. J. CRIM. L. 363, 393 (2003).

48. For general discussions of the economic and efficiency drawbacks of lawyer-dominated legal process, see DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000); Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 533–36 (1994); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 19–20 (1988); Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 1–3 (1993); Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807, 814–17 (1994); Michelle J. White, *Legal Complexity and Lawyers' Benefit from Litigation*, 12 INT'L REV. L. & ECON. 381, 393–95 (1992); Nicholas S. Zeppos, *The Legal Profession and the Development of Administrative Law*, 72 CHI.-KENT. L. REV. 1119, 1123–24 (1997).

49. *See* LANGBEIN, *supra* note 24, at 310 ("Adversary trial put in place a new conception of the trial, oriented on the lawyers. Criminal trial became an opportunity for defense counsel to test the prosecution case.").

50. *See* Natapoff, *supra* note 41, at 1469 ("The most immediate engine of a defendant's silence is his lawyer.").

In a lawyer-dominated criminal process, the results can be skewed by the quality of legal representation. Defendants with lower quality representation are more likely to receive adverse results.[51] On the whole, poor defendants are more likely to receive lower quality representation.[52] A very wealthy criminal defendant can afford to hire a private attorney who, if paid hourly, has a substantial incentive to spend the time necessary to mount a vigorous defense.[53] Wealthy defendants can also afford to hire investigators, experts, and other witnesses.[54] In short, for a wealthy defendant, defending herself by proxy is relatively easy and often beneficial.

A poor defendant, by contrast, must rely on whatever system of indigent defense the state provides—typically a public defender. While many public defenders are excellent attorneys, financial constraints on the system of public defense—especially at the state level—often preclude the sort of aggressive, thorough defense that defendants desire.[55] Public defenders often have large caseloads that make it impossible to devote significant time to any individual case.[56] Because they are mostly salaried, they lack financial incentives to spend extra

51. *See* LANGBEIN, *supra* note 24, at 318.

52. *See id.* at 315 (discussing the "wealth effect" of the lawyer-dominated adversary criminal trial).

53. *See* Herbert M. Kritzer et al., *The Impact of Fee Arrangement on Lawyer Effort*, 19 LAW & SOC'Y REV. 251, 252–53 (1985) (discussing the incentives created by hourly pay); *see also* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 17 (1991) ("The standard hourly fee eliminates an incentive the lawyer might have under other fee arrangements to work insufficient hours on the case.").

54. KENNETH MANN, DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 5 (1985); Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?*, 22 RUTGERS L.J. 361, 409–11 (1991); William J. Genego, *The New Adversary*, 54 BROOK. L. REV. 781, 787 (1988); Rodney Uphoff, *Convicting the Innocent: Abberation or Systematic Problem?*, 2006 WIS. L. REV. 739, 747.

55. *See* Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 48–49 (1995); Carol J. DeFrances, BUREAU OF JUSTICE STATISTICS, *State-Funded Indigent Defense Services*, 1999 (2001 N.C.J. 188464), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/sfids99.pdf.

56. *See* David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1765 (1993); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1240–41 (1993); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 10–11 (1997); Kim Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153, 165 (2004).

time on any given case.[57] They also lack resources needed to conduct full investigations, to hire experts, and to locate and prepare other witnesses.[58] In short, poor defendants frequently receive less assistance from their attorneys than wealthy defendants do. To the extent that legal rules increase the importance of attorneys in the criminal process, they increase disparities between rich and poor defendants.

The current legal system encourages defendants to remain silent and thus encourages defense by proxy. The defense-by-proxy system hurts poor defendants more than wealthy defendants. Adjusting the incentives that shape the decision to testify would increase lay participation in the criminal process and reduce dependence on lawyers.

II. PROPOSALS

For reasons of accuracy, legitimacy, and equity, it is worth considering measures that would encourage more criminal defendants to testify. Of course, the value of testimony is not infinite, and there are important countervailing considerations. Thus, it would not make sense to torture non-testifying defendants, nor would it make sense to free testifying defendants from all manner of impeachment and cross-examination. But courts should pursue reasonable reforms to encourage more testimony. To the extent that courts depart from generally applicable rules of evidence and procedure, they should depart in a way that will result in more testimony, not less.

Unfortunately, the criminal justice system currently departs from generally applicable rules of law in ways that encourage silence. In several areas of law, courts have created doctrines that are internally unsound and create perverse incentives that dissuade defendants from testifying. These doctrines, in other words, are both dubious in their own rights and unwise as policy matters because they punish defendants too much for testifying and reward them too much for remaining

57. *See* Albert W. Alschuler, *Guilty Plea: Plea Bargaining*, *in* 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 832–33 (Sanford H. Kadish ed., 1983) (discussing the perverse incentives of salaried public defenders); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1989–90 (1992).

58. Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169 (2003); *see also* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1098 (2006); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 235 (2004).

silent. Courts should reconsider these unsound and unwise judicial practices.

Three such doctrines are targeted here.[59] The first is the "no adverse inference" rule of *Griffin v. California*, which forbids prosecutorial comment on a defendant's silence.[60] The *Griffin* rule makes little sense as a matter of constitutional law, forbids a reasonable evidentiary inference, and is unduly solicitous of silence. The second is the *Gordon v. United States* test for Federal Rule of Evidence 609, which governs the admission of prior convictions for the purpose of impeachment.[61] The *Gordon* test fails to respect the text of Rule 609 or normal principles of evidence law, and by admitting too many convictions, it severely punishes defendants who testify. The third is the judicial practice of enhancing sentences based on a defendant's perjured trial testimony.[62] Such sentence enhancements do little to deter perjury, and they add another unnecessary disincentive to testifying.

These three doctrines should be reformed. Legislatures could, of course, add additional and even stronger pro-testimony reforms, but no such legislative reforms are considered here. The best first move is one that should be made by courts: they should clear their case law of the ill-advised, judge-made doctrines that promote silence.

A. PROPOSAL ONE: MOVING BEYOND *GRIFFIN*

Griffin v. California is part of the Warren Court's criminal procedure canon. In *Griffin*, the Court held that prosecutors and trial judges may not suggest that any adverse inference be drawn from a defendant's decision to remain silent at trial. The Court later extended *Griffin* to cover even indirect comments on silence,[63] and to require a jury instruction prohibiting adverse inferences.[64]

59. For a recent article arguing for a similar set of proposed reforms, see Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851 (2008).

60. 380 U.S. 609, 615 (1965).

61. *See* FED. R. EVID. 609(a)(1); Gordon v. United States, 383 F.2d 936, 939–40 (D.C. Cir. 1967).

62. *See* U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2008). For a discussion of state analogues, see *infra* note 210.

63. Baxter v. Palmigiano, 425 U.S. 308, 319 (1976) (prohibiting the use of silence as "substantive evidence of guilt" in criminal cases). *But see* United States v. Robinson, 485 U.S. 25, 25 (1988) (holding that when defense counsel suggests that the prosecution prevented the defendant from telling his side of

The Court has since lauded the *Griffin* rule as "an essential feature of our legal tradition."[65] But such breathless praise does little to hide the fact that the *Griffin* rule is dubious both as a matter of evidence law and as a matter of constitutional law.

1. Evidence and Inference in *Griffin*

The facts of *Griffin* are worth recounting briefly, in part because they appear nowhere in the Supreme Court's opinion. Early on the morning of December 3, 1961, a man named Alfredo Villasenor was walking down an alley when he saw Eddie Griffin emerge from a large trash box.[66] Griffin zipped up his pants.[67] Villasenor asked Griffin what he was doing and Griffin responded "Nothing" and walked away.[68] Villasenor then discovered Essie Mae Hodson in the trash box, badly beaten, bleeding and barely conscious.[69] She died the next afternoon from head injuries.[70]

Griffin stayed overnight with Essie Mae and her partner after drinking with them at a local bar.[71] According to the prosecution, Griffin fought Essie Mae's partner in their apartment, then dragged her to the alley and brutally raped her.[72] When he was arrested in Mexico, Griffin told police that Essie Mae's injuries were sustained during the earlier fight in the apartment, and that following that fight, Essie Mae had consented to sex in the trash box.[73]

Griffin did not testify at trial[74] (no doubt in part because the story he had told police was so wholly implausible). The trial judge instructed the jury that "among the inferences that may be reasonably drawn" from the defendant's silence, "those

the story, the prosecution may point out the defendant's failure to testify).

64. *See* Carter v. Kentucky, 450 U.S. 288, 288 (1981) (holding that jury instructions are constitutionally required when properly requested by the defendant).

65. Mitchell v. United States, 526 U.S. 314, 330 (1999).

66. People v. Griffin, 383 P.2d 432, 434 (Cal. 1963), *rev'd*, Griffin v. California, 380 U.S. 609 (1965).

67. *Id.*

68. *Id.*

69. *Id.* at 434–35.

70. *Id*.

71. *Id.* at 434.

72. *Id*. at 434–35.

73. *Id*. at 435.

74. Griffin v. California, 380 U.S. 609, 609 (1965).

unfavorable to the defendant are the more probable."[75] The prosecutor made the following argument to the jury:

> What kind of a man is it that would want to have sex with a woman that beat up if she was beat up at the time he left? He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman. These things he has not seen fit to take the stand and deny or explain. And in the whole world, if anybody would know, this defendant would know. Essie Mae is dead, she can't tell you her side of the story. The defendant won't.[76]

2. *Griffin*'s Shaky Underpinnings

The Supreme Court ruled that the adverse inference instruction and the prosecutor's argument violated the Self-Incrimination Clause.[77] The Court's opinion was, to put it gently, sparse. Its legal analysis essentially consisted of two sentences: "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."[78]

The problem with the adverse inference, in the Court's view, was that it imposed a condition on the exercise of the right.[79] *Griffin* was, in other words, an application of the "unconstitutional conditions" doctrine.[80] The Court's reasoning,

75. *Id.* at 610.

76. *Id.* at 610–11.

77. *Id.* at 612–15.

78. *Id.* The Court also noted that many state statutes prohibited adverse inferences from silence. *Id.* at 611 n.3. And the Court noted that "comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice.'" *Id.* at 614.

79. *Id.* at 614 (describing that if a defendant chooses to not testify, the prosecution is not allowed to use his silence as evidence against him).

80. For discussions of the doctrine of unconstitutional conditions, see, for example, Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6–11 (1988); Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321, 321–22 (1935); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1298–301 (1984); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1143 (1987); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415–29 (1989).

however, like much of its unconstitutional conditions doctrine in other areas, lacked cogency and analytical rigor.

At a minimum, the *Griffin* Court's analysis moved much too quickly. The Supreme Court has occasionally made statements to the effect that the state may not in any way punish the exercise of constitutional rights.[81] But as the Court has recognized elsewhere, state actors routinely impose costs on constitutional rights in various ways.[82]

In fact, in the very context of a defendant's decision to testify, the Court has recognized that a defendant's decision may be limited and conditioned in various ways. Rule 609[83] impeachment may penalize a defendant's decision to testify—it makes the assertion of the right to testify costly. The rule has nonetheless been upheld against constitutional challenges.[84] Sentencing enhancements for perjury also make the assertion of a right costly, but they too have been upheld.[85] Likewise, rules of evidence and procedure will occasionally preclude a defendant from presenting a certain defense if he fails to testify.[86]

81. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 363 (1977) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . .").

82. *See, e.g.*, Chaffin v. Stynchcombe, 412 U.S. 17, 30 (1973) (stating that the Constitution does not forbid "every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights").

83. FED. R. EVID. 609.

84. *See* Ohler v. United States, 529 U.S. 753, 759–60 (2000); *see also* Spencer v. Texas, 385 U.S. 554, 562 (1967) ("To say the United States Constitution is infringed simply because this type of evidence may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects, would make inroads into this entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence."); United States v. Belt, 514 F.2d 837, 846–48 (D.C. Cir. 1975) (rejecting constitutional challenge to a statute that admitted prior convictions without regard to any balancing test).

85. United States v. Dunnigan, 507 U.S. 87, 96–98 (1993); United States v. Grayson, 438 U.S. 41, 54 (1978).

86. Attorneys may only present arguments based on evidence in the record. *See* United States v. Roach, 502 F.3d 425, 434 (6th Cir. 2007); United States v. Earle, 375 F.3d 1159, 1163 (D.C. Cir. 2004). Trial courts may impose limitations on defense attorney's arguments when an argument strays beyond evidence in the record. *See* United States v. Ortiz, 857 F.2d 900, 905 (2d Cir. 1988); United States v. Brown, 688 F.2d 1112, 1119 (7th Cir. 1982). Thus, for example, when a defendant fails to present any evidence supporting a theory of self-defense, the trial court may refuse to present a self-defense instruction and may forbid argument on the issue. *See* United States v. Perry, 223 F.3d 431, 433 (7th Cir. 2000); United States v. Scout, 112 F.3d 955, 960–62 (8th Cir. 1997).

Such rules make the assertion of the right to remain silent more costly, but they are nonetheless constitutional.

Griffin notwithstanding, the Supreme Court has repeatedly held that such conditions are constitutional because "it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify."[87] There is, in other words, no "categorical ban on every governmental action affecting the strategic decisions of an accused, including decisions whether or not to exercise constitutional rights."[88] To strike down every law that imposes some cost on the right to testify or the right to remain silent would "would make inroads into this entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence."[89]

Griffin's stated rationale is grotesquely naïve. If there is a constitutional basis for the *Griffin* no adverse inference rule, it must be found elsewhere. What is needed is some theory to explain which conditions are constitutionally acceptable and which are not.

a. Defining "Penalties"—The Baseline Problem

As an initial matter, a sensible evaluation of the *Griffin* rule must incorporate the lessons learned from other applications of the unconstitutional conditions doctrine. One of the first critical lessons is that without defining some baseline, there is no neutral, determinate way to classify what counts as a "penalty."[90] As constitutional law scholars have recognized in other contexts, what counts as a "penalty" or "benefit," a "tax" or "subsidy," depends on positing some legal or moral baseline from which departures can be measured.[91]

87. McGautha v. California, 402 U.S. 183, 215 (1971).

88. *Dunnigan*, 507 U.S. at 96.

89. *Spencer*, 385 U.S. at 562.

90. *See* Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech and Abortion)*, 70 B.U. L. REV. 593, 602 (1990) ("[T]he distinction between 'subsidy' and 'penalty' . . . rel[ies] on a baseline defining the ordinary or desirable state of affairs. The courts must rely on some status quo to decide what people would 'otherwise' receive.").

91. *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 298–301 (1993); Sullivan, *supra* note 80, at 1436; Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 875 (1987). For discussions of baseline problems in other contexts, see, for example, Jack M. Beermann & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 956–72 (1989); Michael C. Dorf, *Create Your Own Constitutional*

Imagine two sentencing regimes. The first punishes criminal convictions with a sentence of ten years, but gives a credit of one year if the defendant testifies. The second punishes criminal convictions with a sentence of nine years, but adds an additional year if the defendant remains silent. The two regimes are equivalent. To distinguish the two on the ground that the first merely "rewards" testimony while the latter impermissibly "punishes" silence is a meaningless semantic game.

The Supreme Court has at times played similar semantic games. In the American system of plea bargaining, for example, defendants receive lesser sentences if they accept a plea rather than going to trial.[92] Some have argued that plea discounts are unconstitutional because they penalize a defendant for exercising his trial rights.[93] The Supreme Court rejected that argument by recharacterizing the imposition of a penalty as an optional benefit: "we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State" by waiving his trial rights.[94] That characterization might make sense, but only if there is some baseline from which to measure departures.

Recharacterization could have worked equally well in the *Griffin* context. Rather than characterizing an adverse inference as a penalty on the right to remain silent, the Court could have said that an adverse inference rule extends a benefit to defendants in exchange for their waiver of the right to remain

Theory, 87 CAL. L. REV. 593, 604 (1999); Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 408–09 (1999); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 645 (1996).

92. David Brereton & Jonathan D. Casper, *Does It Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW & SOC'Y REV. 45, 45–47 (1982); Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1611 (2005); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2561 (2004).

93. *See, e.g.*, Albert A. Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 63–65 (1975); Malvina Halberstam, *Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process*, 73 J. CRIM. L. & CRIMINOLOGY 1, 5–10 (1982); Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1387–90 (1970); Tina Wan, Note, *The Unnecessary Evil of Plea Bargaining: An Unconstitutional Conditions Problem and a Not-So-Least Restrictive Alternative*, 17 S. CAL. REV. L. & SOC. JUST. 33, 38 (2007); *see also* Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 802–03 (2003) (comparing the unconstitutional conditions doctrine with doctrines of waiver in criminal procedure).

94. Brady v. United States, 397 U.S. 742, 753 (1970).

silent. Once again, the only way to settle which characterization is correct is by reference to some established baseline.

The *Griffin* Court only hinted about its baseline. It noted in a footnote that forty-four states banned adverse inferences by statute—that California's rule stood in opposition to the "overwhelming consensus of the States."[95] Certainly, against the backdrop of an overwhelming legislative consensus to bar adverse inferences, an outlier jurisdiction's decision to depart might look like a penalty. More bluntly, the legal status quo frequently supplies a hidden but intuitive baseline condition. But as a matter of constitutional law, there is no reason that the legislative consensus in 1963 provides a permanent baseline, and that any departure from there is unconstitutional. The Fifth Amendment does not mandate that all states must do forever what most states did in 1963. *Griffin*'s apparent baseline, defined solely by the then-status quo, is untenable.

b. Neutrality

Griffin failed to define or justify any baseline to support its result. It also failed to recognize an important related dynamic: that in this context, there are not one but two rights necessarily implicated. A defendant must either testify or remain silent; he cannot do both. A legal rule that raises the relative price of one right necessarily lowers the relative price of the other. If it is a zero-sum game, and there is no net loss, then the constitutional difficulty dissolves.

Recognizing that there are two rights at issue, however, suggests a different approach to the *Griffin* problem: an approach based on state neutrality.[96] Some language in other Supreme Court cases, including *Miranda*, supports such a view.[97] An approach using neutrality as the touchstone might provide a sturdier foundation for the *Griffin* rule than the oversimplified unconstitutional conditions rationale offered in the opinion itself.

95. Griffin v. California, 380 U.S. 609, 611 n.3 (1965).

96. *See* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2625 (1996) ("Although officials need not encourage a suspect to remain silent, they must remain at least neutral toward her decision not to speak.").

97. *See* Miranda v. Arizona, 384 U.S. 436, 460 (1966) (requiring state governments to respect their citizens' rights to remain silent until they choose to speak); *see also* Garner v. United States, 424 U.S. 648, 657 (1976) (stating that a defendant must have "free choice to admit, to deny, or to refuse to answer").

The difficulty with this approach lies in fashioning a workable definition of neutrality. It cannot be the case that any law that affects testifying and non-testifying defendants differently violates the principle of neutrality. It cannot be the case, in other words, that any rule that has the incidental effect of raising the relative cost of one right or the other is void as non-neutral.

Neutrality is not a novel concept in constitutional law, and a definition of neutrality for the *Griffin* context could be borrowed from elsewhere. In the First Amendment context, for example, the Supreme Court has held that where a "generally applicable" law has the "incidental effect" of burdening the exercise of a constitutional right, the Constitution is not offended.[98] Such laws are "valid and neutral" because their object is not to burden the right; rather, they apply generally and only burden the right incidentally.[99]

Such an approach could help to explain the Supreme Court's treatment of various laws affecting the decision to testify. Rules allowing impeachment of a defendant's testimony, by prior convictions or other means, are valid because they are generally applicable rules that only incidentally burden the right to testify. Sentencing enhancements for perjury are valid because they punish lying on the stand, not the decision to testify itself. Because these rules (and myriad others) only incidentally burden constitutional rights, they are neutral, and therefore valid.

It could be argued that an adverse inference from silence, by contrast, violates the neutrality principle. It could be ar-

98. Employment Div. v. Smith, 494 U.S. 872, 878 (1990); *see* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006) ("[T]he Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws."); Rice v. Paladin Enters., Inc., 128 F.3d 233, 243 (4th Cir. 1997) ("[S]peech which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statutes."); *see also* Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 768 (2001) ("[A] person who breaks a law not directed at speech can claim no constitutional immunity just because he was acting for expressive reasons."); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharged Zones*, 90 CORNELL L. REV. 1277, 1294–97 (2005).

99. *Smith*, 494 U.S. at 879–80; *see also* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1626 (2008) (Scalia, J., concurring) (arguing that a "generally applicable" photo-identification law for voters was constitutional even though it burdened the rights of certain voters).

gued, in other words, that an adverse inference from silence is invalid because it punishes the exercise of the right itself. This argument—an argument from neutrality—is probably the best possible justification for *Griffin*.

The difficulty with the argument from neutrality, however, is that adverse inferences are themselves justified by generally applicable rules of evidence. As I will explain more fully below, generally applicable laws of evidence allow one party to argue an adverse inference from her opponent's failure to produce relevant evidence, and generally applicable laws of evidence allow consciousness of guilt to be inferred from silence.[100] These generally applicable rules, when applied to a non-testifying defendant, burden the right to remain silent, but they do so only incidentally.

Thus, just as it can be said that a perjury enhancement punishes a defendant's decision to lie rather than his decision to testify, it can be said that an adverse inference punishes a defendant's decision to withhold evidence rather than his decision to remain silent. Both laws are, in that sense, neutral. Even if the Constitution mandates state neutrality between testimony and silence, an adverse inference from silence is at least arguably consistent with neutrality. Efforts to re-ground the *Griffin* rule on a principle of neutrality might have no better prospects than the usual efforts to ground the rule in the unconstitutional conditions doctrine.

c. Compulsion: Text, History, and Policy

In the end, however, there should be no need to engage in difficult debates about the nature of neutrality, for the Constitution simply does not mandate neutrality. The Constitution does not say "Congress shall make no law respecting a criminal defendant's decision to testify." Rather, it simply says that no person "shall be *compelled* in any criminal case to be a witness against himself."[101] The relevant touchstone is compulsion. The text leaves open the possibility of some state regulation of a defendant's decision so long as the regulation does not rise to the level of compulsion. The threat of an adverse inference, which is after all a relatively trivial penalty compared to torture or contempt, does not constitute compulsion.[102]

100. *See infra* Part II.A.3.b.

101. U.S. CONST. amend. V (emphasis added).

102. *See* Akhil Reed Amar, THE CONSTITUTION AND CRIMINAL PROCEDURE 51–61 (1997) (comparing different definitions of compulsion from torture to the

Of course, as in contract law, there is no easy way to draw the line between valid consent and invalid coercion, between permissible offers and impermissible threats.[103] Threats involve departures from "the normal or natural or expected course of events."[104] In other words, just as we can only differentiate between penalties and rewards by positing some baseline condition, we can only differentiate from offers and threats by positing some baseline condition.[105]

If we appeal to history to supply the baseline, then *Griffin* fails, for adverse inferences from silence were long approved at common law, and "compulsion" was equated with sanctions akin to torture and contempt.[106] Similarly, if we appeal to gen-

Court's "trivial" application of the "no worse off" standard including no adverse inferences); *see also* Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 439 (1987) (noting that *Griffin* endorses a view that even "pressure that is wholly informal and psychological" can constitute "compulsion").

103. *See* Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 615–26 (1943); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 478–83 (1980); Peter Westen, *"Freedom" and "Coercion"—Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 571–73 (1985); *see also* Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465, 468 (2005) ("Basic questions concerning voluntariness and free will—e.g., whether they exist, and if so, when they exist—have puzzled philosophers for centuries and represent one of history's Gordian knots."). In criminal law, the debate arises in contexts such as blackmail and rape. *See, e.g.*, Donald A. Dripps, *More on Distinguishing Sex, Sexual Expropriation, and Sexual Assault: A Reply to Professor West*, 93 COLUM. L. REV. 1460, 1463–68 (1993); Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553, 554 (1983); Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 172–77 (1998); James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 671 (1984).

104. Robert Nozick, *Coercion*, *in* PHILOSOPHY, SCIENCE, AND METHOD 440, 447 (Sidney Morgenbesser et al. eds., 1969) (contrasting threats from offers based on whether the action's consequences are worse or better than the original course of events).

105. *See* Kreimer, *supra* note 80, at 1352; Sullivan, *supra* note 80, at 1436, 1448 & n.142.

106. *See* Mitchell v. United States, 526 U.S. 314, 335 (1999) (Scalia, J., dissenting) ("Our hardy forebears, who thought of compulsion in terms of the rack and oaths forced by the power of law, would not have viewed the drawing of a commonsense inference as equivalent pressure."); J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND: 1660-1800, at 348–49 (1986) (describing the "old" form of trial whereby defendants that remained silent were assumed to be unable to deny the validity of the evidence); 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 440 (London, MacMillan 1883); John H. Langbein, *The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries*, *in* THE PRIVILEGE AGAINST SELF-INCRIMINATION 82, 108 (R.H. Helmholz et al. eds., 1997).

erally applicable rules of evidence to supply the baseline, then *Griffin* also probably fails, for adverse inferences from a party's refusal to submit evidence in his possession are typically allowed.[107] For these reasons and others, the European Court of Human Rights has rejected claims that adverse inferences from silence necessarily constitute "improper compulsion."[108]

The only way to maintain *Griffin* is to supply some other baseline—that is, some policy argument about why adverse inferences from silence are so abnormal or unnatural that we should treat them as a type of compulsion.[109] The implicit baseline policy argument of *Griffin* and related cases is that silence is preferable to testimony. In *Griffin*, the Court struck down a relatively minor penalty imposed on the right to silence, but in other cases, the Court has upheld major penalties imposed on the right to testify. For the reasons stated in Part II above, the Supreme Court's implicit policy preference for silence over testimony is wrong-headed.

Griffin cannot be justified as an application of the unconstitutional conditions doctrine. It cannot be justified by reference to a principle of neutrality. And most centrally, it cannot be justified in terms of the text or history of the Self-Incrimination Clause. Given its unfounded preference for silence over testimony, it cannot be justified as a matter of policy. It ought to be abandoned.

3. Imagining a Post-*Griffin* World

Overruling *Griffin* would throw the matter back to individual jurisdictions. Some would allow adverse inferences and some would not.[110] Some amount of national variation and experimentation would be both inevitable and beneficial.[111] For

107. *See infra* notes 113–22 and accompanying text.

108. Murray v. United Kingdom, 22 Eur. Ct. H.R. 29, 60–64 (1996); *see* Mark Berger, *Europeanizing Self-Incrimination: The Right to Remain Silent in the European Court of Human Rights*, 12 COLUM. J. EUR. L. 339, 373–80 (2006) (discussing Great Britain's permissive adverse inference statute and the European Court's rulings on adverse inferences).

109. *But see* Godsey, *supra* note 103, at 492–95 (discussing the test for "compulsion" in formal settings as "objective" and prohibiting "objective penalties" for choosing to remain silent such as adverse inferences, termination, and refusal of future state contracts).

110. Prior to *Griffin*, most American jurisdictions had passed statutes proscribing adverse inference instructions and argument. *See* Griffin v. California, 380 U.S. 609, 611 n.3 (1965).

111. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that

the first time in decades, state courts and legislators would have the opportunity to reconsider their rules regarding adverse inferences from a defendant's silence. In deciding what course to choose, they should be guided by general principles of evidence law.

a. Adverse Inferences and Privileges

Two well-established principles of evidence law provide support for the idea that a prosecutor should be able to argue adverse inferences from a defendant's silence. The first principle is that when a party fails to produce evidence in its control, it is reasonable for the opposing party to argue an adverse inference.[112] This principle dates at least to the early eighteenth century and the chimney sweep's jewel case.[113] As the Supreme Court put it in *Graves v. United States*:

> The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.[114]

The *Graves* "missing witness" rule retains vitality today.[115] The related law of spoliation allows an adverse inference to be drawn from a party's destruction of physical evidence.[116] Courts

a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). For academic discussions about the virtues of federalism in fostering innovation and experimentation, see, for example, Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1445–48 (1992); Charles Fried, *Federalism—Why Should We Care?*, 6 HARV. J.L. & PUB. POL'Y 1, 2–3 (1982); Richard W. Garnett, *The New Federalism, The Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 18 (2003).

112. 2 MCCORMICK ON EVIDENCE § 264, at 220–26 (Kenneth S. Broun ed., 6th ed. 2006).

113. Armory v. Delamirie, (1722) 93 Eng. Rep. 664, 664 (K.B.); *see also* 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 285, at 368–70 (Boston, Little et al. 1904) (discussing court decisions following *Armory*). For early American statements of the rule, see, for example, Gordon v. People, 33 N.Y. 501, 509 (1865).

114. 150 U.S. 118, 121 (1893).

115. *See* United States v. Luvene, 245 F.3d 651, 655 (8th Cir. 2001); Revson v. Cinque & Cinque, P.C., 221 F.3d 71, 81–82 (2d Cir. 2000); Shank v. Kelly-Springfield Tire Co., 128 F.3d 474, 479 (7th Cir. 1997); United States v. Glenn, 64 F.3d 706, 709 (D.C. Cir. 1995); United States v. Spinosa, 982 F.2d 620, 632 (1st Cir. 1992); United States v. Charles, 738 F.2d 686, 698 (5th Cir. 1984); State v. Malave, 737 A.2d 442, 452 (Conn. 1999); State v. Padilla, 552 P.2d 357, 364 (Haw. 1976); People v. Savinon, 791 N.E.2d 401, 403–04 (N.Y. 2003).

116. *See* Foraker v. Chaffinch, 501 F.3d 231, 234 (3d Cir. 2007); Morris v.

have thus recognized that a party's destruction of evidence or refusal to produce evidence has evidentiary significance.

The second principle is that a party's silence, like other forms of conduct, may constitute an admission. "When a statement is made in the presence of a party containing assertions of facts which, if untrue, the party would under all the circumstances naturally be expected to deny, failure to speak has traditionally been received as an admission."[117]

Indeed, "[s]ilence is often evidence of the most persuasive character."[118] Thus, for the purposes of the hearsay rule, silence can constitute an admission in some circumstances.[119] Silence can also count as a prior inconsistent statement, both for hearsay and impeachment purposes, when a party refuses to answer questions prior to trial but then testifies at trial.[120] Consistent with these general principles, it is reasonable in at least some circumstances to treat a defendant's silence at trial as a type of admission from which an adverse inference can be drawn.

The application of those two principles is admittedly more complicated, however, when it comes to privileged materials. There is substantial evidence-law authority for the proposition that an adverse inference may be drawn from a party's failure

Union Pac. R.R., 373 F.3d 896, 901 (8th Cir. 2004); Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997); Nation-Wide Check Corp. v. Forest Hills Distribs., Inc., 692 F.2d 214, 218 (1st Cir. 1982) (Breyer, J.); Brown v. Hamid, 856 S.W.2d 51, 56–57 (Mo. 1993) (en banc); *see also* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 7.16, at 449–50 & n.30 (4th ed. 2005).

117. 2 MCCORMICK ON EVIDENCE, *supra* note 112, § 262, at 212.

118. United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 153–54 (1923) (Brandeis, J.).

119. *See* FED. R. EVID. 801(d)(2)(B) (excluding adoptive admissions from the definition of hearsay); Anderson v. Charles, 447 U.S. 404, 408 (1980); United States v. Duval, 496 F.3d 64, 76 (1st Cir. 2007); United States v. Tocco, 135 F.3d 116, 128–29 (2d Cir. 1998); United States v. Schaff, 948 F.2d 501, 505 (9th Cir. 1991); White Indus., Inc. v. Cessna Aircraft Co., 611 F. Supp. 1049, 1063 (W.D. Mo. 1985); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.29, at 778 (3d ed. 2003); Henry S. Hilles, Jr., Note, *Tacit Criminal Admissions*, 112 U. PA. L. REV. 210, 229 (1963); *see also* United States v. Hale, 422 U.S. 171, 176, (1975) ("Failure to contest an assertion . . . is considered evidence of acquiescence . . . if it would have been natural under the circumstances to object to the assertion in question.").

120. FED. R. EVID. 613 & 801(d)(1)(A); Jenkins v. Anderson, 447 U.S. 231, 235–38 (1980); United States v. Vaughn, 370 F.3d 1049, 1053 n.2 (10th Cir. 2004); United States v. Matlock, 109 F.3d 1313, 1319 (8th Cir. 1997); United States v. Strother, 49 F.3d 869, 874 (2d Cir. 1995); United States v. Carr, 584 F.2d 612, 618 (2d Cir. 1978); MUELLER & KIRKPATRICK, *supra* note 119, § 6.40, at 522–23.

to produce privileged material, so long as the exercise of the privilege is within the party's control.[121] There is also some authority, however, for the contrary principle that an adverse inference may never be drawn from a party's failure to produce evidence protected by a privilege.[122] Jurisdictions that maintain the latter rule might keep the *Griffin* rule as a matter of evidence law even if it were abandoned as a matter of constitutional law.

But there is good reason for treating the privilege against self-incrimination differently from statutory privileges such as the attorney-client privilege. Statutory privileges, for the most part, operate to protect communication in important personal or professional relationships such as the attorney-client relationship, the physician-patient relationship, or the marital relationship. Courts establishing a "no adverse inference" rule for statutory privileges have done so on the basis that adverse inferences could chill communication and thus undermine those important confidential relationships.[123]

The same rationale does not apply to the privilege against self-incrimination, which does not protect confidential communications. Its purpose (though disputed and never clearly understood) is to prevent coercion and unreliable confessions, and perhaps to promote some measure of individual autonomy and dignity.[124] Allowing adverse inferences to be drawn from a defendant's failure to testify would not significantly undermine those goals. Adverse inferences would create an additional disincentive for exercising the right to silence, but that would simply mean that more defendants would exercise the right to testify, which is also autonomy-enhancing.

121. *See* Baxter v. Palmigiano, 425 U.S. 308, 319 (1977); Phillips v. Chase, 87 N.E. 755, 758 (Mass. 1909); *see also* MODEL CODE OF EVID. R. 233 (1942).

122. *See* John Deere Co. v. Epstein, 769 P.2d 766, 768–70 (Or. 1989) (discussing proposed Federal Rule of Evidence 513); 1 MCCORMICK ON EVIDENCE, § 74.1, at 347 (Kenneth S. Broun ed., 6th ed. 2006).

123. *See* Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp., 383 F.3d 1337, 1344–45 (Fed. Cir. 2004) (en banc); United States v. Sanchez, 176 F.3d 1214, 1223 (9th Cir. 1999).

124. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 56 n.5 (1964) (discussing the various values served by the self-incrimination clause); Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 922–25 (1995) (arguing that the primary purpose of the clause is ensuring reliable trial evidence); *see also* Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 313 (1998) (arguing that the Supreme Court has employed three theories to justify excluding confessions: ensuring reliability of confessions, preventing abuse by police, and protecting defendants' autonomy).

In short, even those jurisdictions that do not allow adverse inferences based on the exercise of a statutory privilege should consider allowing adverse inferences based on the exercise of the self-incrimination privilege. As a few states have already recognized, the policy arguments for the former do not apply to the latter.[125] The importance of defendants' testimony at trial justifies incentives for testifying and disincentives for remaining silent. Adverse inferences from silence make sense as a matter of policy and as a matter of evidence law.

b. Argument and Instruction

There is a common-sense inference from silence to guilt. As Justice Scalia argued in *Mitchell*, "If I ask my son whether he saw a movie I had forbidden him to watch, and he remains silent, the import of his silence is clear."[126] But it is important to remember that silence does not *always* raise an inference of guilt. Silence is ambiguous, and in some situations, defendants have entirely innocent reasons for remaining silent.[127] In fact, in some situations silence might raise a positively exculpatory inference, as where a defendant declines to take the stand simply because the prosecution's case is so weak that there is no need to respond.

For that reason, the significance of silence is a matter that both parties should be allowed argue to the jury (subject to important caveats outlined below).[128] The prosecution should be allowed to argue that the defendant's silence constitutes a tacit admission, while the defense should be allowed to argue a contrary inference. The strength of the opposing arguments will vary depending on the circumstances of the case, and the jury can decide which is more persuasive.

A more difficult question is whether, in addition to allowing argument by the parties, trial courts should give an in-

125. *See, e.g.*, WIS. R. EVID. 905.13 (forbidding adverse inferences based on statutory privileges, but allowing adverse inferences based on the exercise of the self-incrimination privilege in civil cases).

126. Mitchell v. United States, 526 U.S. 314, 332 (1999) (Scalia, J., dissenting); *see also* Charles R. Nesson & Michael J. Leotta, *The Fifth Amendment Privilege Against Cross-Examination*, 85 GEO. L.J. 1627, 1674–78 (1997) (discussing the logic of adverse inferences from silence).

127. *See* United States v. Hale, 422 U.S. 171, 176–77 (1975); United States v. Johnson, 302 F.3d 139, 145–46 (3d Cir. 2002); United States v. Zaccaria, 240 F.3d 75, 79 (1st Cir. 2001); Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1, 8–11 (1995).

128. *See infra* Part II.A.3.c.

struction informing the jury that an adverse inference is allowed.[129] An adverse inference instruction would stamp the court's imprimatur on the prosecution's argument.[130] That would have the beneficial effect of encouraging more defendants to testify.[131] But any instruction that captured the truth—that silence sometimes suggests guilt but sometimes does not—might be so watered down that it would have little effect.[132] It would also add more bulk to jury instructions that are already too long.[133]

Moreover, as a general matter, permissive-inference instructions are unnecessary where the significance of evidence can be appropriately assessed by the jury without any extra assistance.[134] The law of evidence regarding flight provides a good analogy. Like silence, flight is a type of conduct that in some

129. *See* Julie E. McDonald, *Drawing an Inference from the Failure to Produce a Knowledgeable Witness: Evidentiary and Constitutional Considerations*, 61 CAL. L. REV. 1422, 1430 (1973) ("[T]here is a difference between what the jury might infer on its own, which can never be completely controlled, and what the jury might think when the absence of certain evidence is highlighted by . . . the judge's instructions.").

130. United States v. Moran, 503 F.3d 1135, 1146 (10th Cir. 2007) (noting how particular jury instructions can have the unwanted result of putting the court's imprimatur on one party's theory of the case); Hous. 21, L.L.C. v. Atl. Home Builders Co., 289 F.3d 1050, 1055 (8th Cir. 2002) (same); Bird v. Ferry, 497 F.2d 112, 119 (5th Cir. 1974) (same); *see* Carter v. Kentucky, 450 U.S. 288, 302 n.20 (1981) ("[T]he influence of the trial judge on the jury is necessarily and properly of great weight. . . ." (quoting Starr v. United States, 153 U.S. 614, 626 (1894))).

131. Arguably, if a jurisdiction decides to give an adverse inference instruction when defendants refuse to testify, it also should give a positive inference instruction when defendants do take the stand. *But see* United States v. McQuarry, 726 F.2d 401, 402 (8th Cir. 1984) (refusing to give a consciousness of innocence instruction based on lack of flight); United States v. Telfaire, 469 F.2d 552, 558 (D.C. Cir. 1972) (same); United States v. Scott, 446 F.2d 509, 510 (9th Cir. 1971) (same).

132. Permissive-inference instructions regarding flight or missing witnesses typically take pains to point out that an adverse inference is not the only inference that may be drawn. *See* KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 14.08, at 300, § 14.15, at 337 (5th ed. 2000).

133. *See* Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 77–78 (1988) (arguing that jury instructions are "lengthy" and confusing).

134. *See* State v. Litzau, 650 N.W.2d 177, 186 n.7 (Minn. 2002) ("Permissive-inference instructions are also unnecessary in that '[i]f the rational connection between facts presented and facts inferred is derived from common sense and experience, the matter can normally be left to the jury's judgment upon general instructions.'" (alteration in original) (citation omitted)).

circumstances suggests consciousness of guilt.[135] Of course, flight does not always suggest guilt—in some cases a defendant flees for innocent reasons.[136] In part for that reason, a number of appellate courts have sensibly held that permissive-inference instructions on flight are disfavored, and that the matter should be left to the arguments of counsel.[137]

Courts should apply the same approach to evidence of a defendant's silence. With such evidence, as with evidence of a defendant's flight, "[t]he interest of justice is perhaps best served if this matter is reserved for counsel's argument, with little if any comment by the bench."[138]

c. Fair Response and Unfair Prejudice

As discussed above, a defendant will sometimes decline to testify for entirely innocent reasons, and the defense should have an opportunity to argue against any adverse inference that may be drawn from this silence. The matter should be argued by both sides, and the jury should decide which argument is more persuasive. This approach, however, can only work where both sides have a fair opportunity to present an argument on the subject.[139] In some cases, a defendant will not be

135. United States v. Salameh, 152 F.3d 88, 157 (2d Cir. 1998); United States v. Blakey, 960 F.2d 996, 1000–01 (11th Cir. 1992); United States v. Silverman, 861 F.2d 571, 581 (9th Cir. 1988); People v. Howard, 175 P.3d 13, 27 (Cal. 2008); s*ee* 2 MCCORMICK ON EVIDENCE, *supra* note 112, § 263, at 217.

136. "[I]t is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses." Alberty v. United States, 162 U.S. 499, 511 (1896); *accord* United States v. Salamanca, 990 F.2d 629, 639 (D.C. Cir. 1993); United States v. Hernandez-Bermudez, 857 F.2d 50, 54 (1st Cir. 1988); People v. Champion, 549 N.W.2d 849, 869 (Mich. 1996); State v. Patton, 930 P.2d 635, 644 (Mont. 1996).

137. State v. Wrenn, 584 P.2d 1231, 1233 (Idaho 1978); Dill v. State, 741 N.E.2d 1230, 1233 (Ind. 2001); State v. Bone, 429 N.W.2d 123, 125–27 (Iowa 1988); State v. Valtierra, 718 N.W.2d 425, 432 (Minn. 2006); State v. Hall, 991 P.2d 929, 930 (Mont. 1999); State v. Stilling 590 P.2d 1223, 1230 (Or. 1979); State v. Grant, 272 S.E.2d 169, 171 (S.C. 1980); *see also* MUELLER & KIRKPATRICK, *supra* note 119, § 4.4, at 164 (stating that the "better practice" is to "forgo any jury instruction on the point").

138. United States v. Robinson, 475 F.2d 376, 384 (D.C. Cir. 1973); *cf.* United States v. Hankins, 931 F.2d 1256, 1263 (8th Cir. 1991) (asserting that flight evidence is only "marginally probative" and that district courts may choose not to mention it in jury instructions).

139. One way that a party's evidence can be unfairly prejudicial is if the opposing party has no opportunity to respond. *See* United States v. Lee, 274 F.3d 485, 495–96 (8th Cir. 2001); United States v. Barnette, 211 F.3d 803, 823–24 (4th Cir. 2000); Trower v. Jones, 520 N.E.2d 297, 301 (Ill. 1988); Gen.

able to explain his decision to remain silent without revealing unfairly prejudicial information to the jury. In such cases, the entire matter should be removed from consideration, and no argument should be allowed on either side.[140]

Once again, cases involving flight evidence provide a good source of guidance. Ordinarily, both sides may argue that the jury should draw contrary inferences from flight.[141] But in some cases, a defendant's explanation for his flight will reveal unfairly prejudicial information—for example, if the defendant fled based on fear of apprehension for a separate offense.[142] In such cases, the court may not instruct the jury to consider the defendant's flight as evidence of his guilt, and the prosecution is not allowed to argue as much.[143]

The same general rules should apply to evidence of a defendant's silence at trial. Thus, for example, if a defendant declines to take the stand in order to avoid the prosecution's use of other crimes for impeachment,[144] the prosecution should not be able to argue that the defendant's silence constitutes an admission. In that situation, the defendant would not have an opportunity to explain his silence without revealing unfairly prejudicial information.[145] Prosecutors should therefore be forced

Motors Corp. v. Seay, 879 A.2d 1049, 1062 & n.19 (Md. 2005); *see also* MUELLER & KIRKPATRICK, *supra* note 119, § 4.9, at 173 ("[S]urprise may sometimes be a factor in a finding that evidence will result in unfair prejudice . . . .").

140. *See* Edward J. Imwinkelried, *Impoverishing the Trier of Fact: Excluding the Proponent's Expert Testimony Due to the Opponent's Inability to Afford Rebuttal Evidence*, 40 CONN. L. REV. 317, 320–21 (2007) (asserting that the risk of a jury overvaluing certain evidence is "obviously magnified when the opponent cannot afford a rebuttal"); *cf.* United States v. Sblendorio, 830 F.2d 1382, 1394 (7th Cir. 1987) ("Unless the jury knows exactly why a party did not call a witness, it cannot fully evaluate the meaning of the witness's absence.").

141. *Cf.* United States v. Obi, 239 F.3d 662, 666 (4th Cir. 2001) (noting that evidence was presented as to what inferences the jury could draw).

142. *See* United States v. Foutz, 540 F.2d 733, 740 (4th Cir. 1976); 2 MCCORMICK ON EVIDENCE, *supra* note 112, § 263, at 218 ("Particularly troublesome are the cases where defendant flees when sought to be arrested for another crime, is wanted for another crime, or is not shown to know that he or she is suspected of the particular crime."(footnotes omitted)).

143. *See* United States v. Myers, 550 F.2d 1036, 1050 (5th Cir. 1977); *Foutz*, 540 F.2d at 739–40; Escobar v. State, 699 So. 2d 988, 997 (Fla. 1997); Mack v. State, 650 So. 2d 1289, 1308–10 (Miss. 1994); Guy v. State, 839 P.2d 578, 583 (Nev. 1992); 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5181, at 261–62 & n.50 (1978 & Supp. 2008).

144. *See* FED. R. EVID. 609 (allowing the admission of evidence of other crimes for impeachment purposes); *infra* Part II.B.

145. *Cf.* Richard Friedman, *Character Impeachment Evidence: Psycho-*

to decide between introducing evidence of other crimes for impeachment purposes and arguing an adverse inference from a defendant's failure to testify; they should not be allowed to do both, and a judge should address the matter efficiently, before or during trial.[146] Consistent with general principles of evidence law,[147] a prosecutor should only be allowed to argue an adverse inference if the defendant has a fair opportunity to respond.

d. A Return to the Baseline

Griffin's "no adverse inference rule"[148] marks a departure from generally applicable rules of evidence. Measured from that baseline, *Griffin* offers criminal defendants an extra subsidy for remaining silent.[149] *Griffin* is dubious as a matter of constitutional interpretation, and as a policy matter it is unwise to subsidize silence. *Griffin* should be abandoned.

In the absence of a constitutional command, states could experiment with different approaches to silence. General principles of evidence law, such as those adopted in cases of a defendant's flight,[150] provide a good rough guide. The best result would be the following simple rule: "Unless the defense would not have a fair opportunity to respond, the prosecution may ar-

Bayesian [!?] Analysis and a Proposed Overhaul, 38 UCLA L. REV. 637, 678–80 (1991) (discussing the relationship between Rule 609 evidence and the *Griffin* rule, and arguing that character evidence of the accused should not be allowed and that *Griffin* may require a reexamination).

146. Courts endorse a similar approach when a party seeks to draw an adverse inference from the opponent's failure to call a witness:

> The better practice . . . is for the party seeking to obtain a charge encompassing such an inference to advise the trial judge and counsel out of the presence of the jury, at the close of his opponent's case, of his intent to so request and demonstrating the names or classes of available persons not called and the reasons for the conclusion that they have superior knowledge of the facts. This would accord the party accused of nonproduction the opportunity of either calling the designated witness or demonstrating to the court by argument or proof the reason for the failure to call. Depending upon the particular circumstances thus disclosed, the trial court may determine that the failure to call the witness raised no inference, or an unfavorable one, and hence whether any reference in the summation or a charge is warranted.

People v. Ford, 754 P.2d 168, 178 n.8 (Cal. 1988) (quoting State v. Clawans, 183 A.2d 77, 82 (N.J. 1962)).

147. *See supra* note 139 and accompanying text.

148. *See* Griffin v. California, 380 U.S. 609, 613–14 (1965).

149. *Cf. id.* at 613–14 (prohibiting prosecution from commenting on silence, thereby encouraging a defendant's avoidance of the witness stand).

150. *See supra* notes 135–37 and accompanying text.

gue that the defendant's silence raises an inference of guilt, but the court should not endorse the inference." That rule would conform to the larger landscape of evidence law, and it would encourage more defendants to testify.

B. PROPOSAL TWO: ABANDONING THE *GORDON* TEST FOR RULE 609

Like *Griffin*'s "no adverse inference" rule,[151] many other rules raise the relative cost of testimony. Of these, one of the most powerful is Federal Rule of Evidence 609. American law generally excludes evidence of a defendant's bad character, including evidence of his prior criminal convictions.[152] Rule 609 is an exception to the character evidence rule—it allows the admission of some convictions as impeachment evidence if the defendant takes the stand.[153] The accepted theory of the Rule 609 exception is that when a defendant takes the stand, his prior convictions can be used to demonstrate his character for untruthfulness as a witness but not his character for criminality as a defendant.[154]

Thus, under the accepted theory of the rule, if a defendant testifies, the prosecutor may use his prior rape conviction to show that he is a liar, but not that he is a rapist. That any human fact finder could so limit the evidence is dubious,[155] and a substantial body of empirical literature questions the Rule's premise.[156] Several commentators, characterizing the theory of

151. *See Griffin*, 380 U.S. at 613–14.

152. *See* FED. R. EVID. 404; Old Chief v. United States, 519 U.S. 172, 180–82 (1997); 1 MCCORMICK ON EVIDENCE, *supra* note 112, § 188.

153. *See* FED. R. EVID. 404(a)(3); FED. R. EVID. 609(a); 1 MCCORMICK ON EVIDENCE, *supra* note 112, § 194.

154. *See* United States v. Harding, 525 F.2d 84, 89 (7th Cir. 1975) (Stevens, J.).

155 *See* MUELLER & KIRKPATRICK, *supra* note 119, § 6.29, at 492–93 (discussing the difficulties with Rule 609 impeachment); Alan D. Hornstein, *Between* Rock *and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 14 (1997) (same); H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 792–93 (1993) (same).

156. *See generally* Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes* (Cornell Legal Studies Research Paper No. 07-012, 2007), *available at* http://ssrn.com/abstract=998529 (summarizing social science research demonstrating that jurors routinely misuse Rule 609 evidence as evidence of the defendant's general propensity for guilt rather than just evidence of truthfulness).

Rule 609 as a rank fiction, even call for its repeal.[157] Whatever the merits of that argument, for my purposes it is enough to say that courts expand this arguably unwise exception to the character rule beyond all sense of proportion.

Much of the fault for this situation lies at the feet of *Gordon v. United States*.[158] In *Gordon*, then-Judge Warren Burger set forth a five-factor test governing the admission of prior convictions for impeachment.[159] The five factors are: (1) the nature of the prior offense; (2) the staleness of the prior offense; (3) the similarity of the prior offense to the charged offense; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue.[160] The *Gordon* test is very influential;[161] most federal circuits and many state courts have adopted the test, in whole or in part, to interpret Rule 609 or the corresponding state version of that Rule.[162]

157. *See* Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 4 (1999); Richard D. Friedman, *Character Impeachment Evidence: The Asymmetrical Interaction Between Personality and Situation*, 43 DUKE L.J. 816, 831 (1994); *cf.* Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b), and 609(a)*, 38 EMORY L.J. 135, 135–36, 138 (1989) (arguing for amendment of Rule 609, but not outright appeal). *But see* Roger C. Park, *Impeachment with Evidence of Prior Convictions*, 36 SW. U. L. REV. 793, 813–17 (2008) (offering a defense of allowing evidence of prior convictions as impeachment evidence).

158. 383 F.2d 936 (D.C. Cir. 1967).

159. *See id.* at 939–41. In *Gordon*, Judge Burger did not explicitly number the factors, but the test is referred to as a five-factor test. *See, e.g.*, Roderick Surratt, *Prior-Conviction Impeachment Under the Federal Rules of Evidence: A Suggested Approach to Applying the "Balancing" Provision of Rule 609(a)*, 31 SYRACUSE L. REV. 907, 942 (1980).

160. *Gordon*, 383 F.2d at 939–41.

161. *See* United States v. Estrada, 430 F.3d 606, 617–18 (2d Cir. 2005); MUELLER & KIRKPATRICK, *supra* note 119, § 6.31, at 496–99; 2 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 1033 (7th ed. 1998). For an extensive discussion of jurisdictional variations on the test governing the admissibility of prior convictions for impeachment purposes, see generally Dannye R. Holley, *Judicial Anarchy: The Admission of Convictions to Impeach: State Supreme Courts' Interpretative Standards, 1998-2004*, 2007 MICH. ST. L. REV. 307.

162. *See, e.g.*, United States v. Gant, 396 F.3d 906, 909 (7th Cir. 2005); United States v. Martinez-Martinez, 369 F.3d 1076, 1088 (9th Cir. 2004); United States v. Pritchard, 973 F.2d 905, 908–09 (11th Cir. 1992); United States v. Meyers, 952 F.2d 914, 916–17 (6th Cir. 1992); United States v. Acosta, 763 F.2d 671, 695 n.30 (5th Cir. 1985); United States v. Grandmont, 680 F.2d 867, 872 n.4 (1st Cir. 1982); Virgin Islands v. Bedford, 671 F.2d 758, 761 n.4 (3d Cir. 1982); United States v. Jackson, 627 F.2d 1198, 1209 (D.C. Cir. 1980); United States v. Hawley, 554 F.2d 50, 53 n.5 (2d Cir. 1977); Jackson v. State, 668 A.2d 8, 14 (Md. 1995); Commonwealth v. Diaz, 417 N.E.2d 950, 955

The widespread adoption of *Gordon*, however, does a disservice to Rule 609 and to evidence law. The five-factor *Gordon* test is both overinclusive and underinclusive. In structure, it has obscured the balancing test prescribed by the Rule. On the whole, it has prevented courts from recognizing simple propositions that should guide—and limit—application of Rule 609.

1. Overinclusiveness

The *Gordon* test is overinclusive. It sets forth five factors that courts applying Rule 609 should consider, but four of those five factors should bear little or no weight in a proper Rule 609 analysis.

The first *Gordon* factor is the nature of the prior conviction.[163] The principle suggested in *Gordon* is that certain crimes reflect strongly on credibility while other crimes reflect on credibility only weakly.[164] But the application of this factor has often befuddled courts. It is often difficult to classify crimes as one or the other.

For example, which crime reflects more on credibility, theft or rape? On one hand, theft might be more sneaky, more suggestive of mendacity, and thus more probative of credibility. On the other hand, rape is a more serious crime and a more serious transgression of social norms. Compared to a defendant who has only committed a relatively minor felony theft, a defendant who has committed a crime as serious as rape might be more likely to commit perjury. Courts scatter on these issues in part because the question itself is muddled by substantial incoherence.[165]

(Mass. 1981); State v. Jones, 271 N.W.2d 534, 537–38 (Minn. 1978); Peterson v. State, 518 So. 2d 632, 636 (Miss. 1987); State v. Eugene, 340 N.W.2d 18, 34 (N.D. 1983); State v. McClure, 692 P.2d 579, 585 (Or. 1984); Theus v. State, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992); State v. Banner, 717 P.2d 1325, 1334 (Utah 1986).

For variations on the *Gordon* test, see, for example, People v. Castro, 696 P.2d 111, 114 (Cal. 1985); Label Sys. Corp. v. Aghamohammadi, 852 A.2d 703, 720–21 (Conn. 2004); People v. Cox, 748 N.E.2d 166, 169 (Ill. 2001); State v. Axiotis, 569 N.W.2d 813, 816 (Iowa 1997); State v. Smith, 553 N.W.2d 824, 827 (Wis. Ct. App. 1996).

163. *Gordon*, 383 F.2d at 940.

164. *Id.*; *see also Estrada*, 430 F.3d at 617–19; Boyde v. Brown, 404 F.3d 1159, 1174–75 (9th Cir. 2005) (quoting People v. Beagle, 492 P.2d 1, 7–8 (Cal. 1972)); United States v. Lipscomb, 702 F.2d 1049, 1057 (D.C. Cir. 1983); People v. Allen, 420 N.W.2d 499, 516 (Mich. 1988); 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 609.05[3][b] (Joseph M. McLaughlin, ed., 2d ed. 2008).

165. Some courts, for example, hold that rape convictions are "not highly

Admittedly, there are good arguments that some crimes do, in fact, have more probative value than others. For example, because perjury involves intentional wrongdoing, prior crimes involving intentional wrongdoing may reflect more on character for truthfulness than prior crimes involving mere recklessness or negligence. It could be thus be argued under the first *Gordon* factor that intentional murder is more probative of truthfulness than vehicular manslaughter. But even if there is some real difference in the probative value of various non-*crimen falsi* felonies, it is questionable whether there is very much. When it comes to the first *Gordon* factor, the game probably is not worth the candle. The first *Gordon* factor receives more attention than it deserves.

The second *Gordon* factor is the remoteness of the prior conviction.[166] *Gordon* suggests the principle that a nine-year-old offense is less probative than a one-year-old offense, and thus that the latter should be admitted more readily than the former.[167] But prejudicial impact can decline along with probative value.[168] A nine-year-old offense is less probative than a one-year-old offense, but it also creates less potential for unfair prejudice.[169] The second *Gordon* factor also receives more attention than it deserves; arguably, it should be excluded altogether.[170]

probative of credibility." Christmas v. Sanders, 759 F.2d 1284, 1292 (7th Cir. 1985). Other courts disagree. *See, e.g.*, State v. Ihnot, 575 N.W.2d 581, 587 (Minn. 1998). Some courts hold that drug convictions have only slight probative value. *See, e.g.*, Wilson v. Union Pac. R.R. Co., 56 F.3d 1226, 1231 (10th Cir. 1995); United States v. Martinez, 555 F.2d 1273, 1273, 1276 (5th Cir. 1977). Other courts disagree. *See, e.g.*, United States v. Chauncey, 420 F.3d 864, 873–74 (8th Cir. 2005); *see also* United States v. Hayes, 553 F.2d 824, 828 (2d Cir. 1977) (arguing that while "mere narcotics possession" has relatively little probative worth, drug smuggling "ranks relatively high on the scale of veracity-related crimes").

166. *Gordon*, 383 F.2d at 940.

167. *See* United States v. Brito, 427 F.3d 53, 64 (1st Cir. 2005); *Lipscomb*, 702 F.2d at 1062; United States v. Field, 625 F.2d 862, 872 (9th Cir. 1980); *Gordon*, 383 F.2d at 940; State v. Gardner, 433 A.2d 249, 252 (Vt. 1981); MUELLER & KIRKPATRICK, *supra* note 119, § 6.31, at 498; 4 WEINSTEIN'S FEDERAL EVIDENCE, *supra* note 164, § 609.05[3][c].

168. *See* MUELLER & KIRKPATRICK, *supra* note 119, § 4.16, at 202 ("Ironically, the risk of unfair prejudice sometimes increases even as probative worth increases.").

169. United States v. Rodriguez, 215 F.3d 110, 120 n.11 (1st Cir. 2000) ("The older the evidence that a defendant was a bad character, the weaker the force of inference about his present character or propensity.").

170. Of course, Rule 609(b) creates a general rule of exclusion for crimes older than ten years. Some courts have read that provision as expressing a

The fourth and fifth *Gordon* factors are the most puzzling of all. The fourth factor is the importance of the defendant's testimony.[171] *Gordon* suggests that if a defendant's testimony is important, then impeachment might deter him from taking the stand and should not be allowed.[172] The fifth factor—the centrality of the defendant's credibility[173]—suggests that if a defendant's credibility is important, then impeachment is also important and should be allowed.[174]

The fourth and fifth factors do not really address probative value or potential for unfair prejudice, at least as those terms are usually conceived in evidence law. Rather, they simply reflect the competing policy arguments of the Rule's internal compromise.[175] It is sometimes useful to consider an evidence rule's rationale when applying the rule, but in this case, the competing policy considerations simply cancel one another out. As a defendant's testimony becomes more important, his credibility also becomes more important.[176] So as the fifth factor pulls more strongly for exclusion of prior convictions, the fourth factor pulls more strongly for admission.[177] At best, the fourth and fifth factors are mostly meaningless. At worst, they confuse courts and distract from the real issues that should be considered.

In sum, these four *Gordon* factors have little or no value in assessing the probative value or prejudicial effect of a prior conviction admitted for impeachment. The *Gordon* test is thus

conclusion that probative value fades more quickly than prejudicial effect. *See, e.g.*, *Lipscomb*, 702 F.2d at 1062 (discussing Federal Rule of Evidence 609(b) and reviewing its legislative history). By that logic, however, courts should also consider the punishment authorized for the prior offense, as well as the age of the offender at the time of the prior offense. *See* FED. R. EVID. 609(a)(1), 609(d).

171. Gordon v. United States, 383 F.2d 936, 940–41 (D.C. Cir. 1967).

172. *Id.*; *see also* United States v. Oakes, 565 F.2d 170, 173 (1st Cir. 1977); State v. Gentry, 747 P.2d 1032, 1037 (Utah 1987); MUELLER & KIRKPATRICK, *supra* note 119, § 6.31, at 499; 4 WEINSTEIN'S FEDERAL EVIDENCE, *supra* note 164, § 609.05[3][e].

173. *Gordon*, 383 F.2d at 941 n.11.

174. *Id.*

175. Surratt, *supra* note 159, at 943.

176. United States v. Brewer, 451 F. Supp. 50, 54 (E.D. Tenn. 1978); Jackson v. State, 668 A.2d 8, 16 (Md. 1995); State v. McClure, 692 P.2d 579, 591 (Or. 1984).

177. Surratt, *supra* note 159, at 945; Bruce P. Garren, Note, *Impeachment By Prior Conviction: Adjusting to Federal Rule of Evidence 609*, 64 CORNELL L. REV. 416, 435 n.114 (1979).

overinclusive—it focuses courts' attention on factors that have little or no evidentiary salience.

2. Underinclusiveness

The *Gordon* test is also underinclusive. The five-factor test ignores two critical factors that should be considered by courts weighing the admission of prior convictions.[178]

First, the *Gordon* test ignores the availability of other means of impeachment. A central principle of evidence law is that the probative value of a given piece of evidence depends on the availability of other evidence to prove the same point.[179] As the Supreme Court put it, no piece of evidence is an island—when we measure probative value, we must measure "discounted probative value."[180]

That principle should be recognized in the Rule 609 weighing process just as it is in the Rule 403 weighing process.[181] If the prosecution has other means to impeach a defendant, then the discounted probative value of proffered 609 convictions decreases.[182] If the prosecution can, for example, call a witness

178. To be fair to *Gordon*, it must be noted that Judge Burger explicitly cautioned that "there are many other factors that may be relevant in deciding whether or not to exclude prior convictions in a particular case." *Gordon*, 383 F.2d at 940. Courts since then, however, have largely ignored that note of caution, settling instead for the relative security of the five-factor test derived from *Gordon*. *But see* State v. Trejo, 825 P.2d 1252, 1255–56 (N.M. Ct. App. 1991) (noting that these factors "are not to be considered mechanically or in isolation"); MUELLER & KIRKPATRICK, *supra* note 119, § 6.31, at 500 ("No thoughtful person is likely to be satisfied with any list of factors.").

179. *See* FED. R. EVID. 403 advisory committee's note (stating that the "availability of other means of proof may also be an appropriate factor" to consider in a 403 balancing test); 22 WRIGHT & GRAHAM, *supra* note 143, § 5250, at 546–47 ("The probative worth of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point.").

For examples of this principle in court opinions, see United States v. Stout, 509 F.3d 796, 800 (6th Cir. 2007); United States v. Ali, 493 F.3d 387, 391 n.2 (3d Cir. 2007); United States v. Curtin, 489 F.3d 935, 945 (9th Cir. 2007); United States v. Scott, 270 F.3d 30, 51 (1st Cir. 2001); People v. Walker, 812 N.E.2d 339, 347–48 (Ill. 2004); State v. Humphrey, 412 So. 2d 507, 521 n.2 (La. 1982); People v. Hine, 650 N.W.2d 659, 662–63 (Mich. 2002).

180. Old Chief v. United States, 519 U.S. 172, 191 (1997).

181. *See* 2 SALTZBURG ET AL., *supra* note 161, at 1033 (discussing a proposed amendment to Rule 609 that would have required consideration of other evidence offered to impeach).

182. This principle has been suggested by a few judges. *See* United States v. Johnson, 388 F.3d 96, 104 (3d Cir. 2004) (McKee, J., concurring); United States v. Bagley, 772 F.2d 482, 488 (9th Cir. 1985); People v. Rist, 545 P.2d 833, 839 (Cal. 1976); State v. Martin, 704 N.W.2d 674, 676 (Iowa 2005); State v. Gardner, 433 A.2d 249, 252 (Vt. 1981).

who will offer opinion testimony that the defendant has character for untruthfulness,[183] then the prosecution need not admit the defendant's prior rape for impeachment. Likewise, if the prosecution has admitted one conviction for impeachment, then it need not admit a second and third.

Second, the *Gordon* test ignores the relative severity of the prior conviction. It correctly recognizes under the third factor that if a prior conviction is similar to the charged offense, there is a greater potential for unfair prejudice.[184] But the *Gordon* test fails to recognize that if a prior conviction is particularly lurid or inflammatory, there is also a greater potential for unfair prejudice. When analyzing the evidence of other acts covered by Rule 404(b), courts have consistently held that the inflammatory or lurid nature of the evidence weighs against admission.[185] Moreover, as California state courts have recognized with unusual clarity, *relative* severity is particularly important.[186]

A defendant charged with murder will not be much prejudiced by the admission of a prior burglary conviction. Few jurors would convict a man of murder simply because they knew him to be a burglar. The potential for prejudice is much higher when the crimes are reversed—a defendant charged with burglary will be greatly prejudiced by the admission of a prior murder conviction.[187] In that scenario, the potential for preven-

183. *See* FED. R. EVID. 608(a) ("The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation . . . .").

184. Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967).

185. *See, e.g.*, United States v. Stout, 509 F.3d 796, 801 (6th Cir. 2007); United States v. Blue Bird, 372 F.3d 989, 994–95 (8th Cir. 2004); United States v. Givan, 320 F.3d 452, 470 n.5 (3d Cir. 2003) (quoting Virgin Islands v. Pinney, 967 F.2d 912, 917 (3d Cir. 1992)); United States v. Aramony, 88 F.3d 1369, 1378 (4th Cir. 1996); United States v. Harvey, 991 F.2d 981, 996–97 (2d Cir. 1993); 1 MCCORMICK ON EVIDENCE, *supra* note 112, § 190, at 768 (discussing, in the 404(b) context, how the heinousness of the previous crime is an important factor to consider); MUELLER & KIRKPATRICK, *supra* note 119, § 4.16, at 201–02 (same).

186. *See* People v. Ewoldt, 867 P.2d 757, 772 (Cal. 1994) ("The testimony describing defendant's uncharged acts, however, was no stronger and no more inflammatory than the testimony concerning the charged offenses."); People v. Branch, 109 Cal. Rptr. 2d 870, 876 (Cal. Ct. App. 2001) ("The first factor we must consider is whether the uncharged offenses were more inflammatory than the charged offenses."); *see also* State v. Beck, 745 S.W.2d 205, 209 (Mo. Ct. App. 1987); Marc v. State, 166 S.W.3d 767, 776 (Tex. App. 2005).

187. *Compare* People v. Ortiz, 134 Cal. Rptr. 2d 467, 470, 479 (Cal. Ct. App. 2003) (affirming murder conviction where the state admitted evidence of prior crimes of drunk driving and speeding), *with* People v. Harris, 70 Cal. Rptr. 2d 689, 692–93, 697 (Cal. Ct. App. 1998) (reversing sexual assault conviction

tative conviction (a type of pro-prosecution nullification) is much higher.

These principles comport with common sense and with the larger landscape of evidence law. Courts applying *Gordon*, however, have largely ignored them. Having enthusiastically adopted the five-factor test, they stopped looking for considerations beyond those five mentioned in one case decided forty years ago by Judge Burger.

3. Lost Balance

Aside from any individual factor, the *Gordon* test also distorts the underlying mechanics of Rule 609. Rule 609 is, by its terms, a balancing test: courts are instructed to admit prior crimes if and only if they determine "that the probative value of admitting this evidence outweighs its prejudicial effect to the accused."[188] Those words sound familiar, and for good reason—they are borrowed from Rule 403, the all-encompassing fallback rule that allows for discretionary exclusion of relevant evidence.[189] In their eagerness to run through the five-box checklist of the *Gordon* test, courts forget that their ultimate task is to balance probative value against the potential for prejudice. They forget that their task is simply to perform a version of the 403 balancing test.[190]

Courts have also forgotten that the 609 balancing test is a *modified* version of the 403 balancing test—and modified in a

where the state admitted evidence of a prior crime involving sexual torture and mutilation).

188. FED. R. EVID. 609(a)(1).

189. FED. R. EVID. 403; *see also* Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 497 (1983) (discussing the importance of Rule 403); Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 905–06 (1988) (describing Rule 403 as "a cornerstone of the Federal Rules [of Evidence]"); Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097, 1120 (1985) (describing Rule 403 as the "most important" exclusionary rule in the Rules of Evidence); Kathryn Cameron Walton, Note, *An Exercise in Sound Discretion:* Old Chief v. United States, 76 N.C. L. REV. 1053, 1053 (1998) ("Rule 403 primarily serves as a guide for situations in which no other specific rules control.").

190. *See, e.g.*, State v. Gary M.B., 676 N.W.2d 475, 483 n.9 (Wis. 2004) (discussing state law analogues to Rules 403 and 609 and explaining that *Gordon*-like factors "are merely elements to be considered" when balancing probative value against potential prejudice (citing WIS. STAT. ANN. §§ 904.03, 906.09(2) (West 2000))).

way that is tilted more in favor of exclusion.[191] While Rule 403 only allows exclusion if the potential for prejudice *substantially* outweighs the probative value,[192] Rule 609 only allows admission if the probative value outweighs the potential for prejudice.[193] That difference cannot be reduced to any bright-line rules of application, but it should not be forgotten.

The proper metaphoric framework for applying Rule 609 is not any checklist of factors, whether numbered five or otherwise. The proper metaphoric framework is a scale with two sides.[194] On one side is the probative value, which will vary somewhat depending on the overall evidentiary posture of the case. On the other side is the potential for unfair prejudice, which will vary substantially depending on the overall evidentiary posture of the case.[195] Courts should simply do what the text of the Rule demands: compare one side of the scale to the other.

In practice, especially as its application has calcified over the decades, the *Gordon* test has resulted in the admission of too many prior convictions for impeachment.[196]

191. *See* United States v. Tse, 375 F.3d 148, 160 (1st Cir. 2004); State v. Martin, 704 N.W.2d 674, 676 n.1 (Iowa 2005) (addressing state analogues to the federal rules); RONALD J. ALLEN ET AL., EVIDENCE 413 (3d ed. 2002); Uviller, *supra* note 155, at 799–800.

192. *See* FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (emphasis added)); United States v. Jimenez, 507 F.3d 13, 18 (1st Cir. 2007) ("[T]he Rule 403 analysis is confined to 'unfair' prejudice, and the scales do not tip in favor of exclusion unless the probative value is 'substantially outweighed.'" (quoting FED. R. EVID. 403)).

193. *See* FED. R. EVID. 609 ("[E]vidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused . . . .").

194. Courts and commentators frequently invoke the scale metaphor when discussing the Rule 403 balancing test. *See, e.g.*, *Jimenez*, 507 F.3d at 18; Muth v. Ford Motor Co., 461 F.3d 557, 566 n.18 (5th Cir. 2006); United States v. Davis, 181 F.3d 147, 150 (D.C. Cir. 1999).

195. The case-specific, context-specific nature of the inquiry is precisely why the Federal Rules of Evidence grant discretion to trial judges. *See* David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937, 959 (1990); Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 413–14 (1989); Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CAL. L. REV. 2437, 2443 (2000); Waltz, *supra* note 189, at 1100.

196. Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2296–97 (1994) ("Too

4. Replacing *Gordon*

The five-factor *Gordon* test should be abandoned in favor of a two-sided balancing test consistent with the text and purpose of Rule 609. That balancing test should be guided by general principles of evidence law and common sense, both of which have been lacking in courts' application of *Gordon*.

a. Assessing Probative Value

On the probative side of the scale, two key points should be remembered. First, in every criminal case, the defendant's testimony is important, and therefore any evidence impeaching his testimony will have significant probative value. Defendants take the stand to deny guilt. If that denial is believed, the jury will acquit. If some evidence can show that the defendant is not believable, either in this instance or in general, it will substantially affect the result. Evidence impeaching a defendant-witness has an inherently high probative value.

But that point must be recognized along with a second countervailing point: in every criminal case, a defendant's interest in the outcome is obvious, therefore lessening the need for other impeachment evidence.[197] Criminal defendants have a huge incentive to lie, and jurors are well aware of that huge incentive. Prosecutors may impeach defendants by pointing out their bias and self-interest.[198]

Because that means of impeachment is so readily available, the marginal value of additional impeachment evidence is diminished.[199] The "discounted probative value" of a defendant's prior conviction is inherently low.

Beyond those two points, there may not be much else to say about the probative value of Rule 609 evidence in any given case. It is doubtful whether much turns on the nature of the prior conviction. It is reasonable to argue that a rape conviction

often [courts] make the mistake of assuming that the uncertainties of the Rule's text provide license to exercise virtually unrestricted discretion.").

197. 1 MCCORMICK ON EVIDENCE, *supra* note 112, § 39, at 173 ("The witness's *self-interest* is evident when he is himself a party . . . .").

198. *See* 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6094 (2d ed. 2007) (discussing showings of bias as one of the prototypical forms of impeachment).

199. *See* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1527 (1999) ("There is no basis for supposing that recidivists are more likely than first-time offenders to lie; both are criminals, and the incentive of a criminal to lie is unrelated to whether he has committed one crime or more than one.").

shows more about a person's truthfulness than a theft conviction, and it is reasonable to argue the opposite. In either case, the fit between the fact of the prior conviction and the current assessment of credibility is somewhat loose. At bottom, the most sensible conclusion is that all (non-*crimen falsi*)[200] crimes reflect somewhat on truthfulness. Nevertheless, they do not reflect a great deal, and no one type of crime reflects a great deal more than another.

In short, all 609(a)(1) crimes have some probative value, but their probative value is inherently somewhat limited.

b. Assessing Prejudice

On the prejudice side of the scale, there are again two key points to bear in mind. First, if a prior conviction is similar to the charged offense, the potential for unfair prejudice is inherently high. *Gordon* correctly recognized that point,[201] but it has been too often forgotten by courts since.[202]

Second, if a prior conviction is much more serious than the charged offense, the potential for unfair prejudice is also high. Where a prior conviction is more inflammatory and frightening than the present offense, there is a greater danger that the jury will be distracted by the former and lose focus of the latter.[203] The risk of preventative conviction increases with the severity of the prior conviction.

In short, all 609(a)(1) crimes have some potential for prejudice, but some crimes are much more prejudicial than others.

c. Overall Balance and Results

Within the universe of 609(a)(1) crimes, both probative value and potential for prejudice may vary depending on the circumstances, but the potential for prejudice varies more. Put differently, the strength of the proper inference—regarding character for truthfulness—varies a little from case to case,

200. *See* FED. R. EVID. 609(a)(2) (making *crimen falsi* crimes admissible per se).

201. Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967) ("As a general guide, those convictions which are for the same crime should be admitted sparingly . . . .").

202. *See, e.g.*, State v. Inhot, 575 N.W.2d 581, 587 (Minn. 1998) (admitting a prior rape conviction as impeachment evidence against a defendant-witness charged with rape).

203. *See* Edward E. Gainor, Note, *Character Evidence by Any Other Name . . . : A Proposal To Limit Impeachment by Prior Conviction Under Rule 609*, 58 GEO. WASH. L. REV. 762, 781 (1990).

while the strength of the improper inference—regarding character for criminality—varies a great deal. With that in mind, courts can implement a post-*Gordon* version of Rule 609 that is more in keeping with general principles of evidence law and more in keeping with the text of the Rule itself.

To some extent, the test must remain case-specific, committed to a trial judge's discretion. But while bright-line analytic rules are probably impossible, we can settle on some general rules of application. In general, where a prior conviction is similar to the charged offense, it should not be admitted for impeachment. Similarly, where a prior conviction is much more serious than the charged offense, it should not be admitted for impeachment. Finally, where a prior conviction is dissimilar to the charged offense and less serious than the charged offense, it should be admitted.

Results along those lines would be consistent with the text and rationale of Rule 609. They would be consistent with principles of evidence law borrowed from Rule 403 jurisprudence and elsewhere. They would be consistent with both common sense and empirical evidence regarding jurors' use of Rule 609 impeachment evidence.

Results along those lines would, on the whole, lead to the admission of fewer prior convictions for impeachment. In so doing, they would substantially reduce the cost of testifying and would eliminate a barrier that prevents many defendants from taking the stand.

C. PROPOSAL THREE: FORGOING PERJURY ENHANCEMENTS FOR TRIAL TESTIMONY

In addition to replacing the *Gordon* test for Rule 609 and abandoning *Griffin*'s "no adverse inference" rule, American courts should stop imposing sentencing enhancements for defendants' trial testimony. While such enhancements are constitutionally valid, they are not sensible as a matter of sentencing policy. They also deter defendants from testifying, thus depriving the jury of important evidence and depriving the system of greater legitimacy.[204] Sentencing courts should thus decline to impose perjury enhancements.

204. For a discussion of the other harms associated with perjury enhancements, see Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CAL. L. REV. 425, 457–62 (2004).

1. Creation and Validation of Perjury Enhancements

Like any other witness, a defendant who testifies falsely under oath may be prosecuted for perjury. But perjury prosecutions are time-consuming and difficult; they are therefore rare.[205] In order to deter perjury, most American jurisdictions allow judges to enhance a defendant's sentence based on his trial testimony.[206] Thus, if a defendant testifies at trial and denies guilt, but the jury finds him guilty, the judge may impose a sentence based not only on the underlying crime but also on the perjured testimony.[207]

In the federal system, Section 3C1.1 of the United States Sentencing Guidelines creates the sentence enhancement for perjury. It states that if the defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice," the judge should increase the offense level by two levels.[208] The application notes make clear that Section 3C1.1 covers false testimony at trial.[209] Most states similarly allow some enhancement for a defendant's perjured trial testimony, either under state sentencing guidelines or as a part of a judge's more general sentencing discretion.[210]

205. *See* Kevin J. Kelley, Note, *To Enhance or Not to Enhance: A Guide to Uniformity in Applying Perjury Enhancements Under Section 3C1.1 of the United States Sentencing Guidelines:* United States v. Dunnigan, 27 CREIGHTON L. REV. 585, 585 (1994) (introducing the inconsistent application of perjury enhancements in American courts).

206. *See* Peter J. Henning, *Balancing the Need for Enhanced Sentences for Perjury at Trial Under Section 3C1.1 of the Sentencing Guidelines and a Defendant's Right to Testify*, 29 AM. CRIM. L. REV. 933, 934 (1992).

207. *Id.*

208. U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2008).

209. *See id*. § 3C1.1 cmt. n.4(b) (stating that the enhancement applies to conduct including "committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction").

210. *See, e.g.*, Strachan v. State, 615 P.2d 611, 613 (Alaska 1980); State v. Lask, 663 P.2d 604, 605 (Ariz. Ct. App. 1983); People v. Redmond, 633 P.2d 976, 982 (Cal. 1981); People v. Wilson, 599 P.2d 970, 972 (Colo. Ct. App. 1979); State v. Huey, 505 A.2d 1242, 1245 (Conn. 1986); Banks v. United States, 516 A.2d 524, 528 (D.C. 1986); State v. Kohoutek, 619 P.2d 1151, 1152 (Idaho 1980); People v. Meeks, 411 N.E.2d 9, 13 (Ill. 1980); State v. Bragg, 388 N.W.2d 187, 189 (Iowa Ct. App. 1986); State v. May, 607 P.2d 72, 76–77 (Kan. 1980); State v. Plante, 417 A.2d 991, 992 (Me. 1980); Atkins v. State, 391 A.2d 868, 870 (Md. Ct. Spec. App. 1978); State v. James, 784 P.2d 1021, 1024 (N.M. Ct. App. 1989); People v. Marchese, 608 N.Y.S.2d 776, 777 (N.Y. Sup. Ct. 1994); State v. Stewart, 435 N.E.2d 426, 427 (Ohio Ct. App. 1980); Commonwealth v. Alicea, 449 A.2d 1381, 1382–83 (Pa. 1982); State v. Bertoldi, 495 A.2d 247, 249 (R.I. 1985); State v. Degen, 396 N.W.2d 759, 760 (S.D. 1986);

At both the state and federal level, perjury enhancements have been attacked on the ground that they impermissibly burden a defendant's constitutional right to testify. The attacks, in other words, echo *Griffin*'s oversimplified suggestion that it is impermissible to "cut down" on the exercise of a constitutional right by "making its assertion costly."[211]

In *United States v. Dunnigan*, the Supreme Court faced such a constitutional challenges to section 3C1.1.[212] The Court responded by stated that "a defendant's right to testify does not include a right to commit perjury."[213] That response, widely parroted by state courts upholding their own perjury enhancements,[214] has a "beguiling simplicity"[215]—which is to say that it is both facile and a bit fatuous. In *Griffin*, the Court might just as well have said that "a defendant's right to remain silent does not include the right to conceal and withhold relevant evidence." Indeed, a court can almost always evade an unconstitutional conditions challenge by redefining the scope of the right.

In any event, the *Dunnigan* Court went on to argue (more sensibly) that not every rule that burdens a constitutional right is unconstitutional.

> Nor can respondent contend § 3C1.1 is unconstitutional on the simple basis that it distorts her decision whether to testify or remain silent. Our authorities do not impose a categorical ban on every governmental action affecting the strategic decisions of an accused, including decisions whether or not to exercise constitutional rights.[216]

That portion of *Dunnigan*'s rationale, while inconsistent with *Griffin*, is surely correct. Many legal rules burden either the right to testify or the right to remain silent, and perjury

State v. Bunch, 646 S.W.2d 158, 160–61 (Tenn. 1983); *In re* Welfare of Luft, 589 P.2d 314, 320–21 (Wash. Ct. App. 1979); State v. Finley, 355 S.E.2d 47, 49 (W. Va. 1987).

211. Griffin v. California, 380 U.S. 609, 614 (1965).

212. 507 U.S. 87, 89 (1993).

213. *Id*. at 96; *see also* United States v. Grayson, 438 U.S. 41, 54 (1978) ("The right guaranteed by law to a defendant is narrowly the right to testify truthfully in accordance with the oath . . . .").

214. *See, e.g.*, *In re* Perez, 148 Cal. Rptr. 302, 305 (Cal. Ct. App. 1978); People v. Nedelcoff, 409 N.E.2d 316, 317 (Ill. App. Ct. 1980); Atkins v. State, 391 A.2d 868, 871 (Md. Ct. Spec. App. 1978); People v. Adams, 425 N.W.2d 437, 442 (Mich. 1988); People v. Malcolm, 612 N.Y.S.2d 746, 747 (N.Y. Sup. Ct. 1994); State v. Stewart, 435 N.E.2d 426, 429 (Ohio Ct. App. 1980); Commonwealth v. Bowersox, 690 A.2d 279, 281 (Pa. Super. Ct. 1997); State v. Tiernan, 645 A.2d 482, 487 (R.I. 1994).

215. *See* Scott v. United States, 419 F.2d 264, 269 (D.C. Cir. 1969) (Bazelon, C.J.).

216. *Dunnigan*, 507 U.S. at 96.

enhancements are not unconstitutional on the simple ground that they chill testimony. The question remains, however, whether perjury enhancements are sensible as a matter of sentencing policy.

2. The Flawed Rationale of Perjury Enhancements

In approving perjury enhancements, courts have relied on traditional sentencing goals including deterrence, retribution, incapacitation, and rehabilitation. They argue that perjury is wrong and ought to be deterred,[217] that a defendant's perjury suggests the need for incapacitation and retribution,[218] and that a perjuring defendant demonstrates a lack of remorse and thus less hope of rehabilitation.[219]

Those arguments are faulty because they ask and answer the wrong question. The question is not whether a defendant who lies on the stand is culpable—surely he is. The question, rather, is whether a guilty defendant who takes the stand is *more culpable* than a guilty defendant who remains silent. The answer to that question is far from clear for two reasons.

First, while a testifying guilty defendant is culpable for lying to the jury, a non-testifying guilty defendant is culpable for concealing evidence. There are two kinds of deliberate deceit: *suggestio falsi* and *suppressio veri*.[220] The testifying guilty defendant commits the former sin while the non-testifying guilty defendant commits the latter. In many contexts, the law has recognized that deception "may consist in silence as well as in actual outspoken misrepresentation, and there are circumstances when the *suppressio veri* may be reprehensible as the *suggestio falsi*."[221] Under federal mail and wire fraud statutes,

217. *See, e.g.*, United States v. Rohde, 159 F.3d 1298, 1306 (10th Cir. 1998); State v. Grindle, 942 A.2d 673, 677 (Me. 2008); People v. Marchese, 608 N.Y.S.2d 776, 7853 (N.Y. Sup. Ct. 1994).

218. *See* People v. Ramos, 53 P.3d 1178, 1179 (Colo. App. 2002).

219. *See, e.g.*, United States v. Nunn, 525 F.2d 958, 961 (5th Cir. 1976); United States v. Hendrix, 505 F.2d 1233, 1235 (2d Cir. 1974); United States v. Moore, 484 F.2d 1284, 1288 (4th Cir. 1973); Fox v. State, 569 P.2d 1335, 1337 (Alaska 1977); *In re* Perez, 148 Cal. Rptr. 302, 304 (Cal. Ct. App. 1978); People v. Wilson, 599 P.2d 970, 974 (Colo. App. 1979); People v. Meeks, 411 N.E.2d 9, 15 (Ill. 1980).

220. *See* WILLIAM C. BURTON, LEGAL THESAURUS 169 (2d ed. 1992); *see also* Paula J. Dalley, *The Law of Deceit, 1790–1860: Continuity Amidst Change*, 39 AM. J. LEGAL HIST. 405, 407 (1995).

221. The Kalfarli, 277 F. 391, 400 (2d Cir. 1921). The law of conveyances in property, for example, has long treated the two concepts as equivalent. *See, e.g.*, N.Y. Life Ins. Co. v. Miller, 73 F.2d 350, 352 (8th Cir. 1934); Eppes v.

for example, affirmative misstatements of fact prove unnecessary for conviction—deceitful concealment suffices.[222]

Indeed, even Section 3C1.1 recognizes that concealing material evidence constitutes obstruction of justice.[223] A guilty defendant who refuses to testify may not affirmatively lie, but he does conceal evidence. Operating under *Griffin*'s shadow, courts have not considered imposing the Section 3C1.1 obstruction enhancement based on a defendant's failure to testify. Once again, the difference between punishments based on testimony and punishments based on silence creates an unexplained and unjustified constitutional asymmetry.

Second, a non-testifying guilty defendant often simply has someone else lie on his behalf. He presents a false defense by proxy, using other witnesses and his attorney. In general, an attorney acts as an agent of the client, and a principal can be held responsible for the acts of his agent.[224] In criminal cases as elsewhere, because an attorney acts as "speaking agent" for her client, the statements of the defense attorney can be held against the defendant.[225] "A defendant cannot stand idly by while he hears his attorney provide false information to the court . . . and then claim that he was exercising his Fifth Amendment right."[226] If a defendant can be held accountable

Thompson, 79 So. 611, 613 (Ala. 1918); Jacobs v. George, 20 P. 183, 187 (Ariz. 1889); Ambrose v. Barrett, 54 P. 264, 265 (Cal. 1898); Dunlap & Co. v. Cody, 31 Iowa 260, 262 (Iowa 1871); *see also* Smith v. Babcock, 22 F. Cas. 432, 441 (D. Mass. 1846) ("In such cases there is little if any difference between *suppressio veri* and *suggestio falsi*.").

222. *See, e.g.*, Neder v. United States, 527 U.S. 1, 22 (1997); United States v. Stephens, 421 F.3d 503, 507 (7th Cir. 2005); United States v. Hasson, 333 F.3d 1264, 1270–71 (11th Cir. 2003); United States v. Bohonus, 628 F.2d 1167, 1173 (9th Cir. 1990); *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 579 (1996) ("[A]ctionable fraud requires a *material* misrepresentation or omission." (citing RESTATEMENT (SECOND) OF TORTS § 538 (1977))).

223. U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 cmt. n.4(d) (2008).

224. Hayes v. Nat'l Serv. Indus., 196 F.3d 1252, 1254 (11th Cir. 1999); Davidson v. Keenan, 740 F.2d 129, 133 (2d Cir. 1984); LeBlanc v. INS, 715 F.2d 685, 694 (1st Cir. 1983); Ampex Credit Corp. v. Bateman, 554 F.2d 750, 753 (5th Cir. 1977).

225. *See* United States v. McKeon, 738 F.2d 26, 31–34 (2d Cir. 1984); *see also* FED. R. EVID. 801(d)(2)(C) (admitting statements authorized by the party's speaking agents, including attorneys); MUELLER & KIRKPATRICK, *supra* note 119, § 8.31 (discussing the role of attorneys as "speaking agents").

226. United States v. Owolabi, 69 F.3d 156, 164 (7th Cir. 1995).

for lies that he utters with his own mouth, he should also be held accountable for lies that others utter for him.[227]

Thus, while it is true that testifying guilty defendants are culpable for lying, it is also true that many non-testifying guilty defendants are culpable for concealing evidence and for having others lie on their behalf. It is hard to see why the former are more culpable than the latter. If both are equally culpable, perjury enhancements are unjustified. Surprisingly, many courts have endorsed perjury enhancements without even considering whether testifying guilty defendants are more culpable than non-testifying guilty defendants. In this area as in others, the law reflects an unstated and unjustified preference for silence over testimony.

3. Perjury Enhancements After *Booker*

In the federal system after *Dunnigan*, several circuits held that Section 3C1.1 enhancements were mandatory if a judge determined that the defendant lied on the stand.[228] Other circuits suggested that enhancements were discretionary.[229] Mandatory or not, perjury enhancements have since *Dunnigan* been imposed routinely, almost mechanically, across the federal criminal justice system.[230]

In the wake of *Booker*,[231] however, courts have both renewed reason and renewed ability to reconsider the imposition of perjury enhancements. The Guidelines are now advisory—district courts must consult them, but they are not bound to apply them.[232] In addition to considering the Guidelines, district courts must consider the broader array of factors listed in 18 U.S.C. § 3553(a), including "the need to avoid unwarranted

227. *See* Fuller v. State, 860 A.2d 324, 333 (Del. 2004) (imposing a sentencing enhancement where defendant remained silent but encouraged another witness to commit perjury).

228. *See, e.g.*, United States v. Austin, 948 F.2d 783, 788–89 (1st Cir. 1991); United States v. Alvarez, 927 F.2d 300, 303 (6th Cir. 1991).

229. *See, e.g.*, United States v. Dillard, 43 F.3d 299, 311 (7th Cir. 1994); United States v. Cabral-Castillo, 35 F.3d 182, 186 (5th Cir. 1994); United States v. Yost, 24 F.3d 99, 106 (10th Cir. 1994); *see also* United States v. Shonubi, 895 F. Supp. 460, 468–70 (E.D.N.Y. 1995) (Weinstein, J.) (discussing the split of authority); Barbara Allen Babcock, *Introduction: Taking the Stand*, 35 WM. & MARY L. REV. 1, 19 (1993) ("There is still interpretive room, in other words, for restoring equilibrium to the criminal process . . . .").

230. *See* Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363, 1378 (2000).

231. United States v. Booker, 543 U.S. 220 (2005).

232. *Id*. at 264.

sentence disparities" among similarly situated defendants.[233] In short, district courts have greater freedom "to reject (after due consideration) the advice of the Guidelines,"[234] particularly when a particular provision of the Guidelines makes no sense.

Post-*Booker*, district courts have greater freedom to decline Section 3C1.1 enhancements for trial testimony. District courts should ask themselves: "Is this defendant, who testified at trial and was found guilty, truly more culpable then another guilty defendant who remained silent and pressed a false defense by proxy?" If not, then no enhancement should be imposed. State court judges, many of whom have even greater sentencing freedom than federal judges, should ask themselves the same question.

Perjurious defendants are culpable, and perjury enhancements are constitutional, but such enhancements are still unwise.

CONCLUSION

The right to remain silent and the right to testify are inextricably intertwined. The extent to which defendants exercise one right depends on its cost relative to the other. Any penalty on the right to remain silent raises its relative cost, but also lowers the relative cost of the right to testify. Any subsidy has the converse offsetting effect.

Courts and commentators have too often analyzed the rights separately and have therefore missed the dynamic of offsetting effects. More generally, they have failed to see that labels like "penalty" and "subsidy" are relative terms that can only be measured by reference to some baseline condition. American courts have unjustifiably struck down rules that raise the relative cost of silence while upholding rules that raise the relative cost of testimony. Taken together, these rul-

233. 18 U.S.C. § 3553(a)(6) (2006); *see* Gall v. United States, 128 S. Ct. 586, 596–97 (2007) ("[T]he Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party.").

234. Kimbrough v. United States, 128 S. Ct. 558, 577 (2007) (Scalia, J., concurring); *see also* United States v. Rodriguez, 523 F.3d 319, 523 (5th Cir. 2008) ("*Rita* and *Kimbrough* allow a district court to impose a non-Guideline sentence based on disagreement with Guideline policy that results in a sentence greater [and presumably less] than necessary to achieve the sentencing goals of 18 U.S.C. § 3553(a).").

ings can only be explained by positing silence as the desired normative baseline from which all departures are measured.

American law, in other words, currently reflects an implicit policy preference for silence over testimony. That preference has never been explained, and it cannot be justified. More testimony by criminal defendants would improve the accuracy, legitimacy, and fairness of the criminal justice system. Legal rules that raise the relative cost of testimony undermine these critically important goals.

Our baseline condition ought to be defined by generally applicable rules of law. To the extent that we depart from such rules, we should depart in a way that encourages more testimony. At a minimum, we should not depart in a way that encourages silence. For the last half century, American law has departed in the wrong direction, and it is time to reverse course.