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COMMENT

Should the Criminal Defendant Be Assigned a Seat in Court?



Photo courtesy of *The Houston Chronicle*

This somber courtroom in Houston's Bob Casey Federal Building has been the site of legal arguments for nearly fifty years.¹ This January, however, the room itself became the subject of legal argument when attorney Michael Ramsey requested seats for himself and his client at the table on the left, closest to the jury box and directly across from the witness stand.² Defendants should sit at that table, Ramsey argued, in order to have "an unimpeded, unobstructed

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1. Ed Asher, "Ugly" Design Let Building Escape Flood, CHRON.COM (Houston), June 15, 2001, <http://www.chron.com/disp/story.mpl/storm2001/944664.html>.
 2. Letter from Michael Ramsey to Judge Simeon Lake, U.S. Dist. Court, S. Dist. of Tex. (Jan. 17, 2006), available at http://www.npr.org/documents/2006/jan/enron_table_letter.pdf.

and uncluttered ‘face-to-face’ confrontation with the witnesses against them.”³ Perhaps because Ramsey’s client was Kenneth Lay, the former head of the defunct Enron Corporation and the prime target of a four-year federal task force,⁴ the U.S. Attorney promptly responded to Ramsey’s request with a brief arguing that Lay must remain where defendants “traditionally” sit, at the table farthest from the jury box.⁵

Judge Simeon Lake settled the dispute two days before voir dire began. In Houston, as in other federal districts, the prosecution is by custom permitted to sit at the table near the jury, though no local rule requires this arrangement.⁶ “Since there is no law to guide me in this weighty decision,” Judge Lake said, “fairness and common sense” led him to allow the prosecutors to sit at the closer table when presenting their case, and to grant the defendants the same privilege during their presentation.⁷ As it happened, Lay and his codefendant chose to remain at the far table.⁸

In this Comment I question the U.S. Attorney’s claim that every criminal defendant should be required to sit at the table farthest from the jury. Courtroom seating is properly within a trial judge’s discretion,⁹ and there are good reasons for seating some criminal defendants far from the jury.¹⁰ Yet

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3. *Id.* at 1. In Judge Lake’s courtroom, the table closest to the jury has the best view of the witness box. Ramsey argued that by giving Lay the near seat, Judge Lake would “give life and vitality to the core Constitutional value of ‘face-to-face’ confrontation.” *Id.* (citing *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988)).
 4. Press Release, U.S. Dep’t of Justice, Former Enron Chief Accounting Officer Richard Causey Pleads Guilty to Securities Fraud (Dec. 28, 2005), available at http://www.usdoj.gov/opa/pr/2005/December/05_crm_695.html.
 5. Government’s Opposition to Defendants’ Motion Concerning Courtroom Seating, *United States v. Skilling*, H-04-CR-025SS (S.D. Tex. Jan. 23, 2006) [hereinafter Government’s Opposition].
 6. See S.D. TEX. LOCAL R., APP. C., available at <http://www.txsd.uscourts.gov/dclclrl/dclr2005.pdf> (describing proper courtroom etiquette but not referring to seating).
 7. Mary Flood, *Lawyers To Share Table Near Jury*, CHRON.COM (Houston), Jan. 26, 2006, <http://www.chron.com disp/story.mpl/special/enron/3616078.html>.
 8. Posting of Mary Flood to Enron: TrialWatch, <http://blogs.chron.com/enrontrialwatch> (Apr. 3, 2006, 19:42 CST).
 9. See, e.g., *Mahon v. Prunty*, No. 96-55411, 1997 U.S. App. LEXIS 2122, at *6 (9th Cir. Feb. 6, 1997) (“[T]he court did not abuse its discretion by seating defendants closer to the jury.”); *United States v. Barta*, 888 F.2d 1220, 1226 n.4 (8th Cir. 1989) (“Where . . . [defense] counsel makes an objection to the seating arrangements, a trial judge may deem it appropriate to make the choice by some more neutral way than tradition or a race to the ‘best’ seat.”).
 10. The jurors’ safety is a paramount concern, and some courtrooms are built in such a way that dangerous defendants are more easily controlled at the farther table. See, e.g., AM. BAR ASS’N

there are also persuasive arguments, grounded in history and precedent, for why a trial judge should allow a well-behaved criminal defendant to choose for himself where he will sit. In Part I, I suggest that the criminal defendant's autonomy to choose his seat is an important aspect of the American courtroom tradition. In Part II, I argue that the defendant's well-established freedom to control some aspects of his appearance before the jury—by wearing civilian clothes rather than prison garb, for example—implies a freedom to choose the place of his appearance as well. Part III addresses the government's response to Ramsey's letter.

I. THE CRIMINAL DEFENDANT'S JOURNEY FROM DOCK TO COUNSEL TABLE

Over the last two centuries American courts have granted the criminal defendant more and more autonomy to choose where he will sit during trial. Our courts have allowed the defendant first to leave the "prisoner's dock"—the railed pen in which he once stood during trial—and then to join his lawyer on the other side of the "bar," even as England and Canada have continued to confine the defendant in the dock.¹¹ The scope and consistency of this trend suggests that assigning the criminal defendant to a particular seat is out of keeping with American tradition.

Abolishing the prisoner's dock was a decisive break with historical practice, because the dock was nearly as old as the English courtroom itself. Fifteenth-century illustrations of an English criminal trial show the accused standing front-and-center before the judges, with a marshal at his side.¹² He has

& AM. INST. OF ARCHITECTS JOINT COMM. ON THE DESIGN OF COURTROOMS & FACILITIES, *THE AMERICAN COURTHOUSE: PLANNING AND DESIGN FOR THE JUDICIAL PROCESS* 223 (1973) [hereinafter *THE AMERICAN COURTHOUSE*] (describing the state courthouse in Marin County, California). Another concern is that scary or unattractive defendants may well prefer to sit farther away from the jury's scrutiny.

11. See Lynal E. Doerksen, *Out of the Dock and into the Bar: An Examination of the History and Use of the Prisoner's Dock*, 32 CRIM. L.Q. 478 (1990) (recounting the history of the dock in Canadian courts and recommending its abolition); see also THE CRIMINAL JUSTICE SYS. OF ENG. & WALES, GOING TO COURT—INFORMATION FOR YOU 13-14 (2004), available at http://www.cjsonline.gov.uk/defendant/your_case/going_to_court/index.html (follow "English" hyperlink) (illustrating modern English courts); Lionel Rosen, *The Dock—Should It Be Abolished?*, 29 MOD. L. REV. 289 (1966) (advocating abolition of the dock in England).
12. CLARE GRAHAM, *ORDERING LAW: THE ARCHITECTURAL AND SOCIAL HISTORY OF THE ENGLISH LAW COURT TO 1914*, at 20 fig.3 (2003) (reproducing a mid-fifteenth-century illumination of the King's Bench).

remained there ever since, even as the elaborate architecture of the English courthouse has grown up around him.¹³

Though the dock survived the Atlantic crossing,¹⁴ and lingered in the courthouses of the eastern seaboard well into the twentieth century,¹⁵ by the end of the nineteenth century most American courts had ceased to confine the criminal defendant during trial.¹⁶ Today, the American criminal defendant sits with his lawyer at a counsel table positioned to reflect equal status with the prosecution's table.¹⁷

Once freed from the dock, the American criminal defendant then crossed the bar that separated spectators from participants, and took a seat beside his lawyer. One such migration is recorded in a decision of the Tennessee Superior Court in 1806. That court believed that the "proper place" for a prisoner who was "in custody" was behind the bar, because "[s]trictly speaking, no person has a right to go into the bar but attorneys."¹⁸ Nevertheless, the court conceded that the old custom was changing, and permitted a prisoner on bail to cross the bar and sit beside his lawyer.¹⁹

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13. Surviving plans of seventeenth-century courthouses show a prisoner's dock, located far away from the lawyers in the "well." *Id.* at 82-84, 87-88 (reproducing plans of English assizes). Graham has argued that it is likely that a similar enclosure was used as early as the sixteenth century; the term "dock" was first recorded in 1586. *Id.* at 55.
 14. A 1763 floor plan of the Salem, Massachusetts courthouse shows a dock, positioned well away from the lawyers' tables. MARTHA J. MCNAMARA, FROM TAVERN TO COURTHOUSE: ARCHITECTURE & RITUAL IN AMERICAN LAW, at fig.1.7 (2004); see also *United States v. Gilbert*, 25 F. Cas. 1287, 1313 (C.C.D. Mass. 1834) (No. 15,204) (Story, J.) (noting that in Salem "the usual place for prisoners, in all capital cases, is in the dock, or prisoner's bar"). A dock also appears in the circular courtroom of the Old Berkshire County Courthouse, built in 1815 in Lenox, Massachusetts. THE AMERICAN COURTHOUSE, *supra* note 10, at 234 (reproducing the floor plan). The Old New Castle County Courthouse in New Castle, Delaware, built in 1730, also contained a dock that, though not elevated, was cordoned off from the lawyers' tables by railings. *Id.* at 232 (reproducing a sketch of the courthouse).
 15. See, e.g., *State v. Kupis*, 179 A. 641 (Del. 1935) (refusing, on an interlocutory appeal, the defendant's request to leave the dock as "contrary to the well settled practice in this state"). *But see* *Young v. Callahan*, 700 F.2d 32, 36 n.5 (1st Cir. 1983) ("We understand that . . . the dock . . . is no longer used in Delaware during the course of a trial.").
 16. Joel Prentiss Bishop, in the 1895 edition of his treatise on criminal procedure, opined that "probably" the "strict English rules" on where a prisoner must stand were no longer enforced in U.S. courts, "[a]nd so, the author submits, it should be." JOEL PRENTISS BISHOP, NEW CRIMINAL PROCEDURE § 954, at 572 (4th ed. 1895).
 17. DON HARDENBERGH, THE COURTHOUSE: A PLANNING AND DESIGN GUIDE FOR COURT FACILITIES 75 (1998) (recommending designs for state courthouses).
 18. *State v. Underwood*, 2 Tenn. (2 Overt.) 92 (1806).
 19. *Id.*

The dock disappeared in part because the earliest American trials were held in taverns, meetinghouses, town halls, and private homes, which lacked the elaborate English furniture,²⁰ and in part, perhaps, because an emerging egalitarian spirit rebelled at the idea of denying the defendant the autonomy to choose his own seat. Breaking with the English custom, American courts permitted the criminal defendant first to leave the dock, and then to pass over the bar and sit at the lawyers' tables. It would be in keeping with that tradition to allow him one step more, over to the table near the jury.

II. THE DEFENDANT'S RIGHT TO "PRESENT HIMSELF IN HIS BEST POSTURE"

Most states got rid of their docks one courthouse at a time, and without appellate litigation.²¹ When a defendant did try to argue his way out of the dock, his most successful claim appears to have been that the distance between his pen and the counsel table impeded his right to consult with his lawyer,²² an argument that may also have been the most convenient constitutional shorthand through which appellate courts could express their distaste for assigned seats.²³

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20. MCNAMARA, *supra* note 14, at 11-22 (relying on sources from Massachusetts). Virginia's colonial courts did not use a dock, but instead brought the defendant to stand before the clerk's table in shackles. CARL R. LOUNSBURY, *THE COURTHOUSES OF EARLY VIRGINIA* 155 (2005). Only later, in the early eighteenth century, did some Virginia courthouses place him in a prisoner's box. *Id.* at 164.
 21. For example, Delaware's New Castle County had used a dock since at least 1730. *THE AMERICAN COURTHOUSE*, *supra* note 10, at 232. In 1881, the county built a new courthouse in Wilmington – but without a dock. The change was made easily and without fuss. Telephone Interview with Cindy Snyder, Site Manager, Old New Castle County Courthouse (Feb. 17, 2006).
 22. *E.g.*, *Commonwealth v. Boyd*, 92 A. 705, 706 (Pa. 1914) (rejecting the defendant's argument that the dock prejudiced the jury against him, and instead holding that the dock violated his "common-law right" to consult with his lawyer); *see also* *People v. Zammora*, 152 P.2d 180, 211-15 (Cal. 1944) (holding that an unusual arrangement of tables – deemed a "dock" by defense counsel at trial – violated the defendants' right under the state constitution to defend themselves "with counsel"); Rosen, *supra* note 11, at 294-95 (reporting that by the 1960s, most attorneys general believed that a dock would violate defendants' right to counsel).
 23. By using the right-to-counsel argument, the Supreme Court of Pennsylvania could remove the dock without requiring a new trial. Because Boyd presented no defense and attempted no cross-examinations, the court held that the dock's infringement of Boyd's right to counsel was harmless error. *Boyd*, 92 A. at 705-06. If the court had instead adopted Boyd's fair trial argument, then it may have been more difficult to avoid a new trial by calling the error harmless.

Finally, in 1983, the First Circuit called the dock what it was: prejudicial. Relying on *Estelle v. Williams*,²⁴ the case in which the U.S. Supreme Court held that the Due Process Clause prohibits a state from forcing a defendant to wear prison garb to court, the First Circuit held that the dock was, like prison garb, “a ‘brand of incarceration’ which is inconsistent with the presumption of innocence.”²⁵ It is now well settled that the Due Process Clause forbids the state from forcing a well-behaved defendant to appear before the jury in a way that suggests his guilt.²⁶

A corollary of that proposition is that the defendant has an affirmative right to control his appearance. Thus, a district court has held that members of a religious cult may wear their uniforms to trial—even when those uniforms might intimidate the jury.²⁷ Florida’s courts have held that a criminal defendant has a First Amendment right to wear sweatshirts with religious symbols.²⁸ Virginia’s courts have held it an abuse of discretion to refuse an active duty naval officer permission to wear his dress uniform, because “it is inappropriate for a trial court to deny a courtroom participant the right to present himself in his best posture.”²⁹ These cases tacitly acknowledge the obvious point: A defendant’s appearance matters to the jury and can affect the outcome of a trial. If the state is forbidden from forcing a defendant to look guilty, then the state ought not to prevent him from looking innocent.

And if a defendant is permitted to choose the clothes that he will be seen wearing, then he should also be allowed to choose where, and at what distance, he will be seen, because his proximity to the jury will have enormous influence on how the jurors perceive him. In Judge Lake’s courtroom, a defendant sitting at the near table is within what anthropologist Edward T. Hall termed “social distance” of the jurors, while a defendant seated at the far table is relegated to what Hall called “public distance.”³⁰ Hall argued that proximity matters: Social

24. 425 U.S. 501, 512 (1976).

25. *Young v. Callahan*, 700 F.2d 32, 36 (1st Cir. 1983) (vacating the state court conviction). *But see Moore v. Ponte*, 186 F.3d 26, 36-37 (1st Cir. 1999) (holding that the defendant’s confinement in the dock during his 1976 murder trial did not violate the Due Process Clause because the trial judge based his decision to use the dock on “security concerns” and gave a curative instruction).

26. *See also Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986) (noting that shackling should be permitted “only where justified by an essential state interest specific to each trial”).

27. *United States v. Yahweh*, 779 F. Supp. 1342 (S.D. Fla. 1992).

28. *Joseph v. State*, 642 So. 2d 613 (Fla. Dist. Ct. App. 1994).

29. *Johnson v. Commonwealth*, 449 S.E.2d 819, 821 (Va. Ct. App. 1994).

30. EDWARD T. HALL, *THE HIDDEN DIMENSION* (1966). Hall identified four zones of space around the person: “intimate distance” (from six to eighteen inches); “personal distance”

distance is used by “people who work together,”³¹ while persons at a public distance are outside the “circle of involvement” and are more likely to be perceived in a “formal style.”³² Professor Jeffrey S. Wolfe conducted his own test of juror perceptions and found that jurors consider lawyers to be more effective when they stand within social distance.³³ Manuals on trial advocacy agree with Wolfe’s findings, and recommend that lawyers take the table nearest the jury³⁴ and deliver their arguments within social distance of the jury box.³⁵ This evidence suggests that, especially in small courtrooms, where one sits matters as much as what one wears. For the same reasons that we permit the defendant to wear his Sunday best, so too should we allow him to choose a seat near the jurors who will judge him.

III. THE ARGUMENTS FOR ASSIGNED SEATS ARE NOT PERSUASIVE

In its response to Ramsey’s letter, the government warned Judge Lake that if Lay were to sit near the jury, he might “interact more freely with the jury through non-evidentiary means.”³⁶ Certainly if Lay were to chat up the jurors, that would indeed be a problem – but assuming, as seems fair, that Lay would

(from eighteen inches to four feet); “social distance” (from four to twelve feet); and “public distance” (over twelve feet away). *Id.* at 108-22.

31. *Id.* at 115.
32. *Id.* at 116; see also Stuart Albert & James M. Dabbs, Jr., *Physical Distance and Persuasion*, 15 J. PERSONALITY & SOC. PSYCHOL. 265, 269 (1970) (discussing the effect of proximity on “persuasion”).
33. Jeffrey S. Wolfe, *The Effect of Location in Courtroom on Jury Perception of Lawyer Performance*, 21 PEPP. L. REV. 731, 769-71 (1994).
34. See, e.g., Stephen W. Comiskey, *A Good Lawyer: Secrets Good Lawyers (and Their Best Clients) Already Know*, 66 TEX. B.J. 338, 340 (2003) (“Arrive early enough . . . to claim the counsel table closest to the jury.”); see also *United States v. Barta*, 888 F.2d 1220, 1226 n.4 (8th Cir. 1989) (“[L]egal folklore often expounds that advantages can be reaped from . . . occupying the counsel table nearer the jury.”).
35. RONALD J. MATLON, COMMUNICATION IN THE LEGAL PROCESS 191-92 (1988); see also THOMAS A. MAUET, TRIAL TECHNIQUES § 4.3(7), at 72 (6th ed. 2000) (recommending that a lawyer deliver opening arguments from a position a few feet away from the jury); L. TIMOTHY PERRIN ET AL., THE ART & SCIENCE OF TRIAL ADVOCACY 155-56 (2003) (same).
36. Government’s Opposition, *supra* note 5, at 2. The government also argued that the prosecutor is entitled to the closer table because he bears the burden of proof. See *id.* at 3; see also *United States v. Nava-Salazar*, 735 F. Supp. 274, 278 (N.D. Ill. 1990) (“[T]he government has traditionally been given the option of sitting closest to the jury because it bears the burden of proof.”). It is hard to see how the burden of proof is relevant to seating arrangements, however.

behave himself and sit quietly, why should his presence there be considered “non-evidentiary”?

There is good reason to think that a defendant’s appearance, posture, and facial expressions are evidence, and ought to be considered by the jury. The Supreme Court has long acknowledged that a jury will weigh and consider the defendant’s physical appearance, even if the defendant never leaves his seat at the counsel table.³⁷ In this trial, because Lay does plan to leave his seat and to testify in his defense,³⁸ his credibility will be a central issue. His nonverbal reactions to hostile witnesses are “relevant” to his credibility under Federal Rule of Evidence 401.³⁹ Judge Lake’s decision to offer Lay a seat at the near table during his own case is laudable, but less than ideal: Lay’s presence at the near table would have been most relevant during his confrontation with the witnesses against him, which occurred during the prosecution’s case.

CONCLUSION

The seating arrangements of a courtroom are within the trial judge’s discretion. When exercising that discretion, a judge should weigh a number of concerns, some of which—safety of jurors, for example, or avoidance of prejudice—may well lead her to seat a criminal defendant far from the jury. When a well-behaved defendant asks to sit near the jury, however, a judge should not deny his request on the basis of custom alone. By granting the defendant the autonomy to choose his own seat, a judge honors America’s historic break with the English practice of confining the defendant in the dock, respects the defendant’s right to appear before the jury in his best posture, and provides the jury with relevant, nonverbal evidence from the defendant’s confrontation with hostile witnesses.

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37. In a multidefendant trial, when one defendant confesses before trial and implicates his codefendant, that confession cannot be introduced at their joint trial, even with a clear limiting instruction. *Bruton v. United States*, 391 U.S. 123, 126 (1968). The *Bruton* rule also applies to confessions that physically describe, but do not name, the codefendant. *Harrington v. California*, 395 U.S. 250, 252–53 (1969). *Harrington* tacitly acknowledges the obvious: The jury will look at the codefendant seated at the counsel table.
 38. Transcript of Proceedings at 17, *United States v. Skilling*, H-04-CR-025SS (S.D. Tex. Jan. 31, 2006), available at http://www.kenlayinfo.com/upload/ramseyopeningstatementwebsite060131_59786.pdf (statement of Michael Ramsey).
 39. Even if those reactions are deemed “character” evidence, they are still admissible because they are “offered by [the] accused.” FED. R. EVID. 404(a)(1).