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## Silenced by Instruction

Vida B. Johnson

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# SILENCED BY INSTRUCTION

Vida B. Johnson\*

## ABSTRACT

*Criminal law and procedure tell us a criminal defendant is presumed innocent. Jurors in criminal trials receive a specific instruction on the presumption of innocence prior to beginning deliberations in trial. But the instructions given to the jury in a number of jurisdictions when a defendant testifies is a significant legal obstacle standing in the way of the presumption of innocence. Jurors in a few states and federal courts all over the country receive instructions that a defendant's testimony should be viewed with caution because of his interest in the outcome of the case. In other states the general instructions about assessing credibility of all witnesses asks courts to consider the witnesses "interest in the outcome of the case." Since no one has a clearer or more apparent interest in the outcome of the case than the defendant, any type of instructions that highlights an interest in the outcome of the case undermines the presumption of the innocence is a significant infringement on his constitutional right. Despite the presumption of innocence, jurors are told when a person accused of a crime proclaims his innocence in the courtroom, that testimony should be viewed with skepticism. This Article shows how these types of instructions work to silence defendants. The Article proposes a new jury instruction that should be given whenever an accused person testifies.*

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## INTRODUCTION

Much of criminal law and procedure is ostensibly arranged around the ideal that a criminal defendant is presumed innocent. This animates the prohibition on shackles during trial and affords the accused the right not to wear prison garb in front of the jury. This presumption is the reason that the government may not introduce the defendant's prior convictions or present evidence of bad character except in certain prescribed circumstances. Jurors in criminal trials receive a specific instruction on the presumption of innocence prior to beginning deliberations in trial. However, in a number of jurisdictions, the instructions given to the jury when a defendant testifies are a significant legal obstacle standing in the way of this presumption of innocence. Jurors in a few states and federal courts all over the country receive instructions that a defendant's testimony should be viewed with caution because of his interest in the outcome of the case. In other states, the general instructions about assessing credibility of all witnesses ask courts to consider the witnesses' "interest in the outcome of the case." Since no one has a clearer or more apparent interest in the outcome of the case than the defendant, any type of instruction that highlights an interest in the outcome of the case undermines the presumption of the innocence and is a significant infringement on his<sup>1</sup> constitutional rights. Put another way, despite the presumption of innocence, jurors are told when a person accused of a crime proclaims his innocence in the courtroom that testimony should be viewed with skepticism.

As twenty-first century scholars reexamine our criminal legal system through the lens of mass incarceration, the criminal trial itself should be reexamined. There is a number of practices in the American criminal trial that unfairly disadvantage the accused. Of those individuals who choose to go to trial, only a small number decide to testify. A number of legal principles results in a silencing of defendants—the ability to impeach a defendant with his prior convictions, instructions that direct jurors to not hold it against a defendant when he remains silent, and a judge's ability to sentence more harshly a defendant who testifies but is disbelieved.<sup>2</sup> This Article adds to this discussion about the silencing of defendants by arguing that criminal jury instructions also contribute to the silencing of defendants and joins the chorus of those who are calling for more favorable practices and procedures to encourage defendants to testify.

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<sup>1</sup> While there is an increasing number of women who become involved in the criminal legal system, men are far more overrepresented. *Criminal Justice Facts*, SENTENCING PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Nov. 19, 2020). At times, I will use masculine pronouns to refer to the criminally accused.

<sup>2</sup> See *infra* notes 22, 56, 57, 108 and accompanying text.

These troubling jury instructions are yet another serious obstacle to fairness and contribute to the inequities of the criminal legal system on those ensnared in it.

I have previously written about how the phenomenon of poorly understood jury instructions concerning the presumption of innocence and burden of proof should require voir dire on the topic to help identify jurors who cannot or will not follow those important legal principles.<sup>3</sup> I have also argued previously that the police credibility instruction telling jurors to treat the testimony of a police officer like any other witness is unfair to the defense because it tells jurors to ignore the real biases inherent in law enforcement witnesses' testimony.<sup>4</sup>

Now, I propose a reconstruction of the jury instruction about the defendant's testimony in all states to help strengthen the application of the presumption of innocence in criminal jury trials. All defendants in criminal cases enjoy the right to testify (as well as the right not to testify). Trial courts must stop highlighting through their jury instructions that defendants have a unique interest in the outcome of the case when they testify. Doing so undermines the inadequately understood instructions on the presumption of innocence and the burden of proof. Particularly, in cases where the accused would like to testify and the government's main proof comes from law enforcement witnesses, the defendant is at a certain disadvantage that is inconsistent with his constitutional rights and does not square with the realities of our criminal legal system.

An instruction more consistent with the burden and presumption of innocence is needed even in jurisdictions where a defendant's testimony is not singled out during jury instructions. Trial judges should be instructing jurors to evaluate a defendant's testimony just as they would any other witness. Jurors should also be told to keep in mind the presumption of innocence in evaluating the accused's testimony and remember that the defendant's testimony does not relieve the government of its burden to prove guilt beyond a reasonable doubt. Jurors should be instructed to ask themselves whether the testimony of the defendant or any other defense witness gives them a reason to doubt the government's case. Such an instruction could encourage more criminally accused persons to testify at trial and result in fairer outcomes.

This Article will proceed in several parts. The first situates the importance of revisiting criminal jury instructions in the broader criminal legal reform

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<sup>3</sup> See Vida B. Johnson, *Presumed Fair? Voir Dire on the Fundamentals of Our Criminal Justice System*, 45 SETON HALL L. REV. 545 (2015).

<sup>4</sup> See Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245 (2017).

movement. Part II explains the role the presumption of innocence purports to play in our criminal legal system. Part III explains jury instructions generally and specifically addresses the instructions given to jurors when the defendant testifies and general credibility instructions, and contrasts those with police officer testimony instructions. Part IV explores how the law works to discourage testimony by defendants and how jury instructions play a role in this silencing of defendants. The Article concludes with solutions, including a proposed new instruction that courts should give when an accused person testifies.

## I. SITUATING THE ISSUE IN THE CRIMINAL LEGAL REFORM MOVEMENT

As the nation struggles to dismantle mass incarceration, the system is being reimagined by many scholars and activists. Some have called for complete decarceration.<sup>5</sup> Criminal justice reformers have tackled some of the more obvious injustices in the American system. Specialty courts have diverted some defendants from jail by recognizing the role of addiction and mental health in some jurisdictions.<sup>6</sup> Decriminalization and legalization of marijuana has helped individuals traditionally targeted by police and prosecutors avoid convictions and the repercussions that come from drug convictions.<sup>7</sup> The First Step Act, passed in 2019, focused its reforms on inhumanity in federal prisons.<sup>8</sup> These steps, while worthwhile, will not end mass incarceration.

More steps to overhaul the criminal legal system must be taken. One legal scholar recently opined that if reform continues at its current pace, it would take seventy-five years just to cut our prison population in half.<sup>9</sup> Everything from shrinking police forces, and what and who is prosecuted must be scrutinized.

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<sup>5</sup> See, e.g., Alexandra Natapoff, *Atwater and the Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147, 149, 155–57 (2020); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. UNIV. L. REV. 1597, 1599, 1604–05 (2017); Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html>; Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1172 (2015); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1615 (2015); Dean Spade, *The Only Way to End Racialized Gender Violence in Prisons Is to End Prisons: A Response to Russell Robinson's "Masculinity as Prison"*, 3 CALIF. L. REV. CIR. 182, 193 (2012).

<sup>6</sup> See generally U.S. DEP'T HEALTH & HUM. SERVS., MUNICIPAL COURTS: AN EFFECTIVE TOOL FOR DIVERTING PEOPLE WITH MENTAL AND SUBSTANCE USE DISORDERS FROM THE CRIMINAL JUSTICE SYSTEM (2015), <https://store.samhsa.gov/sites/default/files/d7/priv/sma15-4929.pdf>.

<sup>7</sup> See *Drug Decriminalization*, DRUG POL'Y ALL., <https://www.drugpolicy.org/issues/drug-decriminalization> (last visited Nov. 19, 2020).

<sup>8</sup> Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J. F. 791, 812–14 (2019).

<sup>9</sup> Campbell Robertson, *Crime Is Down, Yet U.S. Incarceration Rates Are Still Among the Highest in the World*, N.Y. TIMES (Apr. 25, 2019), <https://www.nytimes.com/2019/04/25/us/us-mass-incarceration-rate.html> (quoting Rachel Barkow: “If we keep working on the kinds of criminal justice reforms that we’re doing right

It has been pointed out by many, including our Supreme Court, that we no longer have a system of trials but a system of pleas.<sup>10</sup> There are myriad consequences of conviction that are faced by those ensnared in the system.<sup>11</sup> The most obvious of course is jail or prison time. But courts and reformers have focused not only on that serious consequence but also on the additional collateral consequences of conviction.<sup>12</sup> Everything from deportation, job loss, homelessness, to loss of a government pension can be the result of conviction.<sup>13</sup> This, of course, makes it very difficult for a person to reintegrate into their community after a conviction.<sup>14</sup>

Once a case has been brought to court, apart from diversion programs and dismissals, the only path that avoids consequences of conviction is an acquittal at trial. But to win at trial means that cases need to be set for trial and not pleaded out. Despite facing jail time and the other serious consequences of conviction, many still take pleas offered to them by the government rather than go to trial.<sup>15</sup>

now, it's going to take us 75 years to reduce the [prison] population by half.”)

<sup>10</sup> See *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (“In today’s criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.”); *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (highlighting “the reality that criminal justice today is for the most part a system of pleas, not a system of trials”); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (“[W]e have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.”).

<sup>11</sup> See *Padilla*, 559 U.S. at 360 (noting that “the ‘drastic measure’ of deportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes”) (citation omitted); MARGARET COLGATE LOVE, JENNY ROBERTS & CECELIA M. KLINGELE, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY AND PRACTICE* § 1.2 (2013).

<sup>12</sup> See, e.g., ZACHARY HOSKINS, *BEYOND PUNISHMENT?: A NORMATIVE ACCOUNT OF THE COLLATERAL LEGAL CONSEQUENCES OF CONVICTION* (2019); ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* 28, 30, 32, 34–35 (2018); Paul T. Crane, *Incorporating Collateral Consequences into Criminal Procedure*, 54 *WAKE FOREST L. REV.* 1, 10, 62 (2019); Brian M. Murray, *Are Collateral Consequences Deserved?*, 95 *NOTRE DAME L. REV.* 1031, 1033, 1037, 1039–40 (2020); see also *About CCRC*, *COLLATERAL CONSEQUENCES RES. CTR.*, <http://ccresourcecenter.org/about-the-collateral-consequences-resource-center/> (last visited Nov. 19, 2020).

<sup>13</sup> See Murray, *supra* note 12, at 1032, 1045; A.B.A., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: JUDICIAL BENCH BOOK 5* (2018); JOHN G. MALCOLM & JOHN-MICHAEL SEIBLER, *COLLATERAL CONSEQUENCES: PROTECTING PUBLIC SAFETY OR ENCOURAGING RECIDIVISM?* 3 (2017), <https://www.heritage.org/crime-and-justice/report/collateral-consequences-protecting-public-safety-or-encouraging-recidivism#:~:text=While%20some%20are%20certainly%20justifiable,the%20likelihood%20that%20an%20ex%2D>

<sup>14</sup> See MALCOLM & SEIBLER, *supra* note 13, at 12 (“[C]ollateral consequences that are applied indiscriminately, with a tenuous relationship between the restriction imposed and the offense committed, can make it more difficult for someone with a criminal record to reintegrate into society[.]”).

<sup>15</sup> See Emily Yoffe, *Innocence Is Irrelevant*, *ATL. MONTHLY* (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/> (reporting that approximately 94% of state felony convictions and 97% of federal felony convictions are the result of plea bargains); John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 *CORNELL L. REV.* 157, 163 (2014) (reporting that over 96% of all criminal cases were resolved by plea bargain between 2008 and 2012).

Some estimate that around 10% of the innocent take guilty pleas.<sup>16</sup> If individuals think that the risks of trial are too great, then that must also mean that individuals do not perceive their chances at trial to be high, even when they are innocent.<sup>17</sup> That participants do not think they are treated fairly calls into question the integrity and harshness of the system if even the innocent are too afraid of the system to participate fully.

Between innocent people pleading guilty, the slow rate of reform, and the dearth of programs that would allow people to avoid conviction, the criminal trial itself demands scrutiny. Defendants convicted at trial contribute to our carceral system. But, with a small percentage of convictions that are a result of a trial as opposed to a plea, convictions at trial represent only a small fraction of people who end up in state and federal prison. Of course, some people take plea offers rather than go to trial because they feel they will not get a fair shake at trial whether they are guilty or innocent.<sup>18</sup> These are legitimate fears, especially for poor people of color.<sup>19</sup> There are many reasons to be concerned about outcomes at trial for criminal defendants.

There are a number of ways in which criminal trials are unfair to defendants. Discovery rules,<sup>20</sup> the impeachment of criminal defendants with prior

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<sup>16</sup> See NAT'L ASSOC. OF CRIM. DEF. LAWS., *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* 17 (2018) (estimating "that anywhere from 1.6% to 27% of defendants who plead guilty may be factually innocent"); *Why Do Innocent People Plead Guilty to Crimes They Didn't Commit?*, INNOCENCE PROJECT, <https://www.guiltypleaproblem.org/> (last visited Nov. 19, 2020) ("18% of known exonerees pleaded guilty to crimes they didn't commit[.]"); see also Yoffe, *supra* note 15.

<sup>17</sup> See Blume & Helm, *supra* note 15, at 172–80 (explaining three primary reasons for innocent defendants to plead guilty).

<sup>18</sup> See Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> (theorizing that an innocent defendant with limited resources may plead guilty because he realizes that "his chances of mounting an effective defense at trial may be modest at best").

<sup>19</sup> See Jeanette Hussemann & Jonah Siegel, *Pleading Guilty: Indigent Defendant Perceptions of the Plea Process*, 13 TENN. J.L. & POL'Y 459, 473–75 (2019); Stephen B. Bright, *Rigged: When Race and Poverty Determine Outcomes in the Criminal Courts*, 14 OHIO ST. J. CRIM. L. 263, 265–66, 270, 273–76 (2016).

<sup>20</sup> See, e.g., Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. 771, 779–81 (2017) (discussing defendants' limited rights under the traditional criminal discovery framework and analyzing the potential impact of open-file discovery reform); Thea Johnson, *What You Should Have Known Can Hurt You: Knowledge, Access, and Brady in the Balance*, 28 GEO. J. LEGAL ETHICS 1, 3, 11, 12 (2015) (critiquing the rule that prosecutors have "no obligation to turn over exculpatory evidence when the defendant 'knew or should have known' about the 'essential facts' of the exculpatory material"); Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 166 (2012) (same); Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965, 982 (2008) ("[A]lthough criminal discovery is the primary mechanism through which the government reveals its evidence, the rules provide at best a narrow window through which defendants—and potentially the public—may glimpse the workings of the official information-gathering machine."); Mary

convictions,<sup>21</sup> inequities in the resources of court-appointed lawyers,<sup>22</sup> overzealous prosecutors who fail to turn over exculpatory material before and during trial,<sup>23</sup> purposeful and unconscious racism<sup>24</sup> by all players in the system,

Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 543, 545, 549 (2006) (examining how defendants' limited access to discovery substantially affects the reliability of criminal trial outcomes); Eugene Cerruti, *Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211, 239–41 (2005) (discussing how *United States v. Ruiz* erodes prosecutors' duty to disclose under *Brady*); Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 644 (2002); Hon. H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1106 (1991).

<sup>21</sup> See Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 2002–04, 2009–14 (2016).

<sup>22</sup> See, e.g., Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html>; John Pfaff, *Why Public Defenders Matter More Than Ever in a Time of Reform*, APPEAL (Apr. 18, 2018), <https://theappeal.org/why-public-defenders-matter-more-than-ever-in-a-time-of-reform-9b018e2184fe/> (“[T]here is no doubt that . . . public defenders . . . are underfunded—both in absolute terms, and compared to far better-funded prosecutor offices.”); Eve Brensike Primus, *Defense Counsel and Public Defense*, in REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 121–25 (E. Luna ed., 2017); Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 392 (2016); Vida B. Johnson, *A Plea for Funds: Suing Padilla, Lafler, and Frye to Increase Public Defender Resources*, 51 AM. CRIM. L. REV. 403, 404, 423 (2014); A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 3 (2004), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf).

<sup>23</sup> See, e.g., Kate E. Bloch, *Harnessing Virtual Reality to Prevent Prosecutorial Misconduct*, 32 GEO. J. LEGAL ETHICS 1, 14–15, 17–18, 23–24 (2019); Vida B. Johnson, *Federal Criminal Defendants out of the Frying Pan and into the Fire? Brady and the United States Attorney's Office*, 67 CATH. U. L. REV. 321, 337, 341–44 (2018); Hadar Aviram, *Legally Blind: Hyperadversarialism, Brady Violations, and the Prosecutorial Organizational Culture*, 87 ST. JOHN'S L. REV. 1, 25–29, 36 (2013); Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1543–44 (2010); Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 541–42 (2007); Cerruti, *supra* note 20, at 239–42 (discussing how *United States v. Ruiz* erodes prosecutors' duty to disclose under *Brady*); Janet C. Hoefel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN. ST. L. REV. 1133, 1135 (2005) (arguing that even good prosecutors err on the side of non-disclosure of exculpatory evidence); Sundby, *supra* note 20, at 653–54 (2002).

<sup>24</sup> See, e.g., POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT (Angela J. Davis ed., 2017); NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT* (2016); Christian B. Sundquist, *Uncovering Juror Racial Bias*, 96 DENV. L. REV. 309, 323–24 (2019); Anna Roberts, *Implicit Jury Bias: Are Informational Interventions Effective?*, in CRIMINAL JURIES IN THE 21ST CENTURY: CONTEMPORARY ISSUES, PSYCHOLOGICAL SCIENCE, AND THE LAW 85 (Cynthia J. Najdowski & Margaret C. Stevenson eds., 2019); David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions*, 133 Q.J. ECON. 1885, 1886, 1889–90 (2018); Christi Metcalfe & Ted Chiricos, *Race, Plea, and Charge Reduction: An Assessment of Racial Disparities in the Plea Process*, 35 JUST. Q. 223, 228 (2018); Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 83–85, 96, 104, 111 (2017); L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 867, 870, 876 (2017); Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J. F. 391, 395, 400, 402–03 (2017); Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 YALE L.J. F. 406, 409, 411 (2017); Jessica Blakemore, *Implicit Racial Bias and Public Defenders*, 29 GEO. J. LEGAL ETHICS 833, 836–38 (2016); William Y. Chin,

and unchecked racial discrimination in jury selection<sup>25</sup> are just some of the practices that unfairly injure the criminally accused and contribute to defendants avoiding trial and accepting plea bargains.

We know that jurors ignore or fail to understand critical criminal jury instructions, even about the legal standards of the presumption of innocence and the burden of proof.<sup>26</sup> The jurisdictions that have jury instructions that are hard to understand<sup>27</sup>—and the jurisdictions that do not allow voir dire on the topic<sup>28</sup>—disadvantage all criminal defendants because jurors are not adequately applying the legal standards essential to a fair trial.

Another unfairness in the American criminal legal system is about credibility instructions given to jurors. There is an unfairness in giving misleading criminal jury instructions about police officers' lack of bias even when they have an interest in the outcome of the case—like in an undercover sting case.<sup>29</sup> Criminal trial judges across the country tell jurors to treat the testimony of police officers just like the testimony of any other witness.<sup>30</sup> But when it comes to the testimony of the accused—who the jury will also be told is presumed innocent—those same jurors are often told that he has an interest in the outcome of the case and his testimony should be received with caution.<sup>31</sup>

*Racial Cumulative Disadvantage: The Cumulative Effects of Racial Bias at Multiple Decision Points in the Criminal Justice System*, 6 WAKE FOREST J.L. & POL'Y 441, 443, 457 (2016); Hon. Stephen J. Fortunato, Jr., *Judges, Racism, and the Problem of Actual Innocence*, 57 ME. L. REV. 481, 484, 487–88 (2005).

<sup>25</sup> See, e.g., Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1624–25 (2018); Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 YALE L. & POL'Y REV. 387, 400, 402–03, 414 (2016); Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. CRIMINOLOGY 1, 31, 34 (2014); Abbe Smith, *A Call to Abolish Peremptory Challenges By Prosecutors*, 27 GEO. J. LEGAL ETHICS 1163, 1172–73 (2014); Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1477–80 (2012); Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1552, 1554 (2012); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 150 (2010); Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 218, 228–29, 235 (2005).

<sup>26</sup> Johnson, *supra* note 3, at 556–57.

<sup>27</sup> See Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 455, 457–58, 464, 467, 473 (2006) (examining lack of jury instruction reform despite evidence that jury instructions are ineffective); Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1085–88 (2001).

<sup>28</sup> Michael L. Neff, *In Defense of Voir Dire: Legal History and Social Science Demand Appropriate Voir Dire*, 17 GA. BAR J. 14, 15 (2011) (citing *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (“Every party is entitled to ‘present his case with assurance that the arbiter is not predisposed to find against him.’”)).

<sup>29</sup> Johnson, *supra* note 4, at 250.

<sup>30</sup> *Id.* at 256.

<sup>31</sup> See, e.g., *Reagan v. United States*, 157 U.S. 301, 304–05 (1895) (“The deep personal interest which [the defendant] may have in the result of the suit should be considered by the jury in weighing his evidence and

This stark dichotomy of courts ignoring the bias of police officers while highlighting the bias of the defendant only amplifies and compounds an already unfair power imbalance in our criminal legal system. The police have tremendous power in comparison to defendants who have virtually none. The defense has only seemingly meaningless ideals of the system that are unexecuted through this disparity. Prosecutors and judges have a role in addressing injustices in our system. Indeed, judges are supposed to enforce the constitutional rights of the accused and prosecutors are supposed to “seek justice.”<sup>32</sup> When those parties fail to act, criminal defense attorneys can take action by litigating this issue in their cases both at the trial level by requesting alternate instructions and at the appellate level when they are unsuccessful.

Jurors are not informed of all of these inequities in the criminal legal system against criminal defendants or people of color who are prosecuted. No jury instruction or introduction from the judge gives jurors the background that could rectify the many imbalances against the criminally accused. And jurors who are familiar with those injustices may be stuck from a jury.<sup>33</sup> With no guidance from the trial judges, these inequities only become more entrenched and unfair at trial.

## II. PRESUMPTION OF INNOCENCE

The presumption of innocence is “a basic component of a fair trial under our system of criminal justice,”<sup>34</sup> and the history of the presumption of innocence has been “traced . . . from Deuteronomy through Roman law, English common law, and the common law of the United States.”<sup>35</sup> The Supreme Court has also noted that the presumption of innocence “cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced.”<sup>36</sup> Our system hinges on this ideal.

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in determining how far, or to what extent, if at all, it is worthy of credit.”).

<sup>32</sup> See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, STANDARD 3-1.2 (A.B.A. 4th ed. 2017) (“The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”); *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”); EVAN BERNICK, ENFORCING THE CONSTITUTION: HOW THE COURTS PERFORMED IN 2015–2016 (2016).

<sup>33</sup> See Abbie Vansickle, *You Can Get Kicked Out of a Jury Pool for Supporting Black Lives Matter*, MARSHALL PROJECT (July 7, 2020), <https://www.themarshallproject.org/2020/07/07/you-can-get-kicked-out-of-a-jury-pool-for-supporting-black-lives-matter>.

<sup>34</sup> *Estelle v. Williams*, 425 U.S. 501, 503 (1976); see *Taylor v. Kentucky*, 436 U.S. 478, 479 (1978).

<sup>35</sup> *Taylor*, 436 U.S. at 483.

<sup>36</sup> *Id.* at 485 (quoting 9 J. WIGMORE, EVIDENCE § 2511 (3d ed. 1940)).

The presumption of innocence is first and foremost a trial right.<sup>37</sup> Because of the importance of this right, a number of safeguards has been created to enforce it. Jurors do not hear about an accused person's prior conviction because of the presumption of innocence.<sup>38</sup> The right of detained defendants not to be handcuffed or shackled before a jury<sup>39</sup> or to wear civilian clothes in front of a jury<sup>40</sup> are some examples of additional efforts to safeguard the rights of the criminally accused. Evidently, the Supreme Court has made it clear that trial courts have an obligation to take steps to ensure that criminal defendants receive the benefit of the presumption of innocence and that the government is held to its burden.<sup>41</sup> Trial courts across the country make sure to instruct sitting jurors in criminal trials that the accused is presumed innocent, and many jurisdictions ask about prospective jurors' understanding and ability to abide by that core legal principle.<sup>42</sup>

The presumption of innocence is so important that recent reformist arguments against pre-trial cash bail are often framed as an assault on the presumption of innocence<sup>43</sup> because it imposes detention on those whom the law is supposed to consider innocent.<sup>44</sup> And, unsurprisingly, jurors are less likely to convict defendants whom they can see at liberty than those who are detained.<sup>45</sup>

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<sup>37</sup> See *Bell v. Wolfish*, 441 U.S. 520, 531–32 (1979).

<sup>38</sup> *Spencer v. Texas*, 385 U.S. 554, 575 (1967) (Warren, C.J., concurring) (“Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged.”).

<sup>39</sup> *Deck v. Missouri*, 544 U.S. 622, 627 (2005) (reasoning that it was error to shackle and handcuff defendant for the penalty phase of his capital trial).

<sup>40</sup> See *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

<sup>41</sup> See *Spencer*, 385 U.S. at 575; *Deck*, 544 U.S. at 627; *Estelle*, 425 U.S. at 503.

<sup>42</sup> See, e.g., 1 BARBARA E. BERGMAN, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, § 1.102 (MB rev. ed. 2020):

“Every defendant in a criminal case is presumed to be innocent. This presumption of innocence remains with the defendant throughout the trial unless and until s/he is proven guilty beyond a reasonable doubt. The burden is on the government to prove the defendant guilty beyond a reasonable doubt, and that burden of proof never shifts throughout the trial. The law does not require a defendant to prove his/her innocence or to produce any evidence. If you find that the government has proven beyond a reasonable doubt every element of [the] [a particular] offense with which the defendant is charged, it is your duty to find him/her guilty [of that offense]. On the other hand, if you find that the government has failed to prove any element of [the] [a particular] offense beyond a reasonable doubt, you must find the defendant not guilty [of that offense].”

<sup>43</sup> See *ODonnell v. Harris Cnty.*, 251 F. Supp. 3d 1052, 1143 (S.D. Tex. 2017) (finding that Harris County's money bail policy implicates “fundamental constitutional guarantees,” including the presumption of innocence).

<sup>44</sup> See, e.g., Scott Shackford, *Innocent Until Proven Guilty, But Only if You Can Pay*, REASON (2018), <https://reason.com/2018/07/14/innocent-until-proven-guilty-b/>; James A. Allen, *Making Bail: Limiting the Use of Bail Schedules and Defining the Elusive Meaning of Excessive Bail*, 25 J.L. & POL'Y 637, 640, 656, 680 (2017); R.A. Duff, *Pre-Trial Detention and the Presumption of Innocence*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 128 (Andrew Ashworth, Lucia Zedner & Patrick Tomlin eds., 2013); Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 754 (2011).

<sup>45</sup> See RAM SUBRAMANIAN, RUTH DELANEY, STEPHEN ROBERTS, NANCY FISHMAN & PEGGY MCGARRY,

Defense counsel may argue during closing about the presumption of innocence, but a defense attorney's statements about the law are no substitute from hearing about this legal standard from the judge himself. Jurors may see defense counsel as an advocate hired by the accused or appointed by the state. That role is far less esteemed than that of the judge—the neutral arbiter of the law. Instructions about the presumption of innocence from a judge are essential.

There is no denying the importance of the presumption of innocence on the criminally accused. It should permeate the criminal trial. However, there are few instances in which a jury sees or hears about the presumption. Apart from the fact that detained defendants can wear court attire or when defendants at liberty are seen outside the courtroom, the jury instructions are the only instances in which the jury hears or sees anything about the presumption. Often, the jury instructions come only at the end of a trial after the jurors have received and synthesized the testimony and evidence.<sup>46</sup> And the instructions about the defendant's testimony undermine the jury's consideration of his testimony and the presumption of innocence. Ridding trial courts of jury instructions that undermine the presumption of innocence should be something for which all stakeholders in the criminal legal system should advocate.

If the presumption of innocence is not adequately understood by jurors during a trial, then the accused person is denied something that was promised to him by the very system in which he is ensnared.

### III. JURY INSTRUCTIONS

Jury instructions are the legal principles that jurors are instructed by the judge to follow. So, while the jurors are supposed to find facts, the trial judge tells them what law to apply to those facts through the jury instructions.<sup>47</sup>

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INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 14 (2015), [https://www.vera.org/downloads/publications/incarcerations-front-door-report\\_02.pdf](https://www.vera.org/downloads/publications/incarcerations-front-door-report_02.pdf) (noting research indicating that “jurors tend to view defendants brought to court in jail uniforms and shackles as guilty regardless of the merits of the case”); Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1972 (2005) (“Numerous empirical studies have suggested that the longer a person spends time in pretrial detention, the more likely she will be convicted and the more likely that the sentence will be severe.”).

<sup>46</sup> Some courts address the presumption of innocence in preliminary instructions while others do not. See Elizabeth Ingriselli, Note, *Mitigating Jurors' Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 YALE L.J. 1690, 1715 (2015) (explaining that “juries in criminal trials generally receive the bulk of jury instructions after they hear evidence”); Neil P. Cohen, Symposium, *The Timing of Jury Instructions*, 67 TENN. L. REV. 681, 688, 694 (2000).

<sup>47</sup> Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The “Kettleful of Law” in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1541 (noting that the U.S. Supreme Court decision in *Sparf & Hansen v. United States* “solidified the importance of jury instructions, for

Virtually every jurisdiction gives at least some instructions as to the law in criminal and civil jury trials.<sup>48</sup>

While the role of jury instructions is important to understand, it should also be noted before delving further that these legal instructions are notoriously misunderstood by jurors.<sup>49</sup> This phenomenon exists for a number of different reasons including the manner in which jury instructions are delivered,<sup>50</sup> the timing of their delivery,<sup>51</sup> and the education and comprehension level of jurors as compared to the level at which the legal instructions are written.<sup>52</sup> As will be discussed later, the fact that instructions are poorly understood may disadvantage the criminal defendant.

In some jurisdictions, preliminary jury instructions are given before opening statements.<sup>53</sup> All jurisdictions offer instructions at the close of evidence and

if jurors did not have the right to decide legal issues, the trial judge had to give the jury instructions so that the jurors could apply the appropriate law to the facts they found”); *How Courts Work: Steps in a Trial*, A.B.A. (Sept. 9, 2019), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/juryinstruct/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryinstruct/) (“The judge instructs the jury about the relevant laws that should guide its deliberations. . . . [J]urors determine the facts and reach a verdict, within the guidelines of the law as determined by the judge.”).

<sup>48</sup> Jan Bissett & Margi Heinen, *State Jury Instructions on the Web*, 81 MICH. BAR J. 46, 46–48 (2002).

<sup>49</sup> Courtney E. Lollar, *Punitive Compensation*, 51 TULSA L. REV. 99, 134 (2015); Robert Rich, *The Most Grotesque Structure of All: Reforming Jury Instructions, One Misshapen Stone at a Time*, 24 GEO. J. LEGAL ETHICS 819, 823–26 (2011); Molly Armour, Comment, *Dazed and Confused: The Need for a Legislative Solution to the Constitutional Problem of Juror Incomprehension*, 17 TEMP. POL. & CIV. RTS. L. REV. 641, 652–55 (2008); Peter M. Tiersma, *Toward More Understandable Jury Instructions: The California Experience*, 21 CRIM. JUST. 5, 6 (2006); John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1196–97, 1199, 1201–02, 1207–08 (2002).

<sup>50</sup> See, e.g., Blake M. McKimmie, Emma Antrobus & Chantelle Baguley, *Objective and Subjective Comprehension of Jury Instructions in Criminal Trials*, 17 NEW CRIM. L. REV. 163, 167, 172–73 (2014) (finding that jury instructions are written to focus on jurors’ objective, rather than subjective, understanding, and subjective understanding is vital to comprehension of the instruction); Rich, *supra* note 49, at 824–25 (2011); Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701, 702 (2000) (noting that when jurors indicate confusion about an instruction, judges may simply re-read the instruction and are not obligated to fix the miscomprehension issue).

<sup>51</sup> See Ingriselli, *supra* note 46, at 1729–30 (finding that giving instructions before evidence leads to reduced biases); Marder, *supra* note 27, at 498–99; Judith L. Ritter, *Your Lips Are Moving . . . But the Words Aren’t Clear: Dissecting the Presumption That Jurors Understand Instructions*, 69 MO. L. REV. 163, 198 (2004); William Erickson, *Criminal Jury Instructions*, 1993 U. ILL. L. REV. 285, 291–92 (1993).

<sup>52</sup> See Lollar, *supra* note 49, at 134 (2015); Bettina E. Brownstein, *It’s Time to Make Jury Instructions Understandable*, 37 ARK. LAW. 24, 25 (2002); Cronan, *supra* note 49, at 1207–10.

<sup>53</sup> See Ingriselli, *supra* note 46, at 1715 n.103 (citing ARIZ. R. CRIM. P. 18.6(c)) (“Immediately after the jury is sworn, the court shall instruct the jury concerning its duties, its conduct . . . and the elementary legal principles that will govern the proceeding.”); Cohen, *supra* note 46, at 688–92; see also HON. GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, *THE STATES-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 36–37* (2007), [http://www.ncsc-jurystudies.org/\\_data/assets/pdf\\_file/0016/5623/soscompendiumfinal.pdf](http://www.ncsc-jurystudies.org/_data/assets/pdf_file/0016/5623/soscompendiumfinal.pdf) (finding that eight states “require judges to pre-instruct jurors on the substantive law before the evidentiary portion of the trial”). For example, the District of Columbia’s criminal jury

before deliberations begin—before or after closing statements.<sup>54</sup> And of course because few things can be defined prior to hearing evidence, even where instructions are given both at the beginning and the end of evidence, the final instructions are the longest.<sup>55</sup> Instructions can take a significant period of time. Some judges give written copies of those instructions to take back to the jury room to have with them during deliberations.<sup>56</sup> Other judges allow note-taking by jurors during instruction, and some allow neither.<sup>57</sup> Jurors are presumed to be able to understand instructions despite little evidence that this is true.<sup>58</sup>

In a criminal trial, jurors receive instruction on everything from the charges the defendant is facing; legal defenses like alibi; identification; self-defense; various theories of liability like accomplice, aider, and abettor; accessory, conspiracy, and other legal principles like constructive possession; and, of course, the legal standards to apply.<sup>59</sup> These instructions serve to help jurors understand the legal principles they are presumed to follow.

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instructions read:

Every defendant in a criminal case is presumed to be innocent. This presumption of innocence remains with the defendant throughout the trial unless and until s/he is proven guilty beyond a reasonable doubt. The burden is on the government to prove the defendant guilty beyond a reasonable doubt, and that burden of proof never shifts throughout the trial. The law does not require a defendant to prove his/her innocence or to produce any evidence. If you find that the government has proven beyond a reasonable doubt every element of [the] [a particular] offense with which the defendant is charged, it is your duty to find him/her guilty [of that offense]. On the other hand, if you find that the government has failed to prove any element of [the] [a particular] offense beyond a reasonable doubt, you must find the defendant not guilty [of that offense].

1 BERGMAN, *supra* note 42.

<sup>54</sup> See Cohen, *supra* note 46, at 694; see also FED. R. CRIM. P. 30(c) (providing that the court “may instruct the jury before or after the arguments are completed, or at both times”).

<sup>55</sup> See, e.g., Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 77 (1988) (“At the end of the trial the judge provides the jury with lengthy instructions explaining the law applicable to the case and directing the jurors to find the facts in accordance with certain legal definitions and instructions.”); J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 83 (1990).

<sup>56</sup> See Nancy S. Marder, *Jury Reform: The Impossible Dream*, 5 TENN. J.L. & POL’Y 149, 159–62 (2009); Peter Tiersma, *Asking Jurors to Do the Impossible*, 5 TENN. J.L. & POL’Y 105, 123 (2009) (explaining that while experts recommend jurors receive copies of the instructions, some judges are prohibited from providing them).

<sup>57</sup> Marder, *supra* note 56, at 162.

<sup>58</sup> Diamond et al., *supra* note 47, at 1557 (finding that “[m]iscomprehension was the primary source of the instruction errors (83.2%),” and that language—“a word or phrase [that] . . . was an unfamiliar legal term” or a juror’s failure to apply plain language like and/or—was one of three key barriers in the rate of jury instruction comprehension).

<sup>59</sup> See generally *Different Types of Jury Instructions*, LEGAL TRANSCRIPTION CO. (Nov. 13, 2015), <https://www.legaltranscriptionservice.com/blog/2015/11/different-types-jury-instructions.html>.

While jurors are supposed to find the facts, judges nevertheless instruct jurors on how to evaluate the evidence. Courts also comment on evidence in a number of ways—there are instructions about evidence of flight by the defendant and what weight to give circumstantial evidence.<sup>60</sup> Most pattern instructions have a generic instruction about how to evaluate witness testimony that discusses a number of factors like memory, demeanor on the stand, and whether the witness has any bias.<sup>61</sup>

Judges address the defendant's right not to testify when an accused person makes the decision not to testify. These instructions tell jurors not to hold it against a defendant when he elects to remain silent at trial. The instructions essentially interpret the Fifth Amendment right to silence for the fact finders.<sup>62</sup> An instruction to this end is required if requested by the defense.<sup>63</sup> Previously, jurors were allowed to take an adverse instruction when a defendant testified until the Court declared the practice (and prosecutors argued the same) unconstitutional in 1965.<sup>64</sup>

Generally, jury instructions are legal, not factual. They should not invade the province of the jury.<sup>65</sup> However, there are times when the judge comments on specific types of witnesses—expert witnesses, cooperating witnesses, witnesses with a plea agreement, child witnesses, the police officer witness and in many jurisdictions, the testimony of the defendant—and tells the jurors how to weigh that specific witness' testimony.<sup>66</sup>

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<sup>60</sup> See 1 JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL INSTRUCTIONS NOS. 223, 372 (2017).

<sup>61</sup> See, e.g., 1 BERGMAN, *supra* note 42, § 2.200:

You may consider anything that in your judgment affects the credibility of any witness. For example, you may consider the demeanor and the behavior of the witness on the witness stand; the witness's manner of testifying; whether the witness impresses you as a truthful person; whether the witness impresses you as having an accurate memory; whether the witness has any reason for not telling the truth; whether the witness had a meaningful opportunity to observe the matters about which he or she has testified; whether the witness has any interest in the outcome of this case, stands to gain anything by testifying, or has friendship or hostility toward other people concerned with this case.

<sup>62</sup> See *Griffin v. California*, 380 U.S. 609, 615 (1965).

<sup>63</sup> See *James v. Kentucky*, 466 U.S. 341, 342, 350 (1984); *Carter v. Kentucky*, 450 U.S. 288, 305 (1981).

<sup>64</sup> See *Griffin*, 380 U.S. at 615.

<sup>65</sup> See Ric Simmons, *Conquering the Province of the Jury: Expert Testimony and the Professionalization of Fact-Finding*, 74 U. CIN. L. REV. 1013, 1020 (2006).

<sup>66</sup> See, e.g., *State v. Higgins*, 518 A.2d 631, 637–38 (Conn. 1986) (upholding jury instruction on the defendant's interest in the outcome of the case, where the trial court “also gave special instructions upon the credibility of accomplices, police officers and experts, who had testified for the state”).

### A. *The Defendant's Testimony Instruction*

The jury instructions about the presumption of innocence can be significantly undermined when a defendant testifies if a judge gives a jury instruction that calls attention to the defendant's interest in the case. It is undoubtedly true that a criminal defendant enjoys a presumption of innocence under our laws. But it is also true that any criminal defendant has an interest in whether he is acquitted or convicted. Because of this well-recognized bias, defendants historically did not have the right to testify.<sup>67</sup> And, in some instances, even once they had the right to testify, defendants were not asked to swear an oath like other witnesses because it was assumed that falsehoods would follow.<sup>68</sup>

States as diverse as Alabama, Arizona, Rhode Island, Pennsylvania, and New Mexico all allow these troubling instructions that tell jurors that the defendant has an interest in the outcome of the case when the defendant testifies.<sup>69</sup> For example, the criminal jury instruction in the District of Columbia reads in part, "you may consider the fact that the defendant has [a vital] [an] interest in the outcome of his trial."<sup>70</sup> The Ninth Circuit has approved a jury instruction that directs the jury to consider the defendant's "personal interest in the outcome of the case."<sup>71</sup> The Fifth Circuit has also approved an instruction that reads, in part, "you are entitled to take into consideration the fact that he is the defendant and the very keen personal interest that he has in the result of your verdict."<sup>72</sup> These are instructions highlighting bias that are only read when a defendant testifies. There are other states, discussed below, that highlight this bias, but place it in a general credibility of witness instruction rather than one specifically for the defendant.<sup>73</sup>

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<sup>67</sup> See Alexander G.P. Goldenberg, *Interested, but Presumed Innocent: Rethinking Instructions on the Credibility of Testifying Defendants*, 62 N.Y.U. ANN. SURV. AM. L. 745, 749 (2007).

<sup>68</sup> Robert Popper, *History and Development of the Accused's Right to Testify*, 1962 WASH. U. L.Q. 454, 464–65 (1962).

<sup>69</sup> See, e.g., *Hosch v. State*, 155 So. 3d 1048, 1106 (Ala. Crim. App. 2013); *People v. Brown*, 141 P.2d 1, 3–4 (Cal. 1943); *State v. Kittell*, 847 A.2d 845, 850–51 (R.I. 2004); *Commonwealth v. Hunsinger*, 549 A.2d 973, 977 (Pa. Super. Ct. 1988); *People v. Piedra*, 87 A.D.3d 706, 707 (N.Y. App. Div. 2011).

<sup>70</sup> 1 BERGMAN, *supra* note 42, § 2.209. However, this instruction cannot be given over objection of the defense. *Id.*

<sup>71</sup> *United States v. Eskridge*, 456 F.2d 1202, 1205 (9th Cir. 1972).

<sup>72</sup> *Nelson v. United States*, 415 F.2d 483, 487 (5th Cir. 1969).

<sup>73</sup> For example, Georgia recommends the following jury instructions:

"The jury must determine the credibility of the witnesses. In deciding this, you may consider all of the facts and circumstances of the case, including the witnesses' manner of testifying, [their intelligence], their means and opportunity of knowing the facts about which they testify, the nature of the facts about which they testify, the probability or improbability of their testimony, their interest or lack of interest in the outcome of the case, and their personal credibility as you observe it."

2 GEORGIA SUGGESTED PATTERN JURY INSTRUCTIONS - CRIMINAL § 1.31 (2020)

It was well over a hundred years ago that the United States Supreme Court in *Reagan v. United States* sanctioned an instruction that singled out the testimony of the accused, highlighting the defendant's "deep personal interest."<sup>74</sup> In a District of Columbia federal district court case, the trial judge gave an instruction telling the jurors that the defendants had a "vital interest" in the outcome of the case.<sup>75</sup> Relying on *Reagan*, the D.C. Circuit found no problem with the instruction, though the court did not appear to wrestle with the constitutional question, never once mentioning the presumption of innocence in the opinion.<sup>76</sup>

These jury instructions about witness credibility that single out the testimony of the defendant no doubt cause confusion on the part of jurors. Jurors are instructed that the defendant is presumed innocent and then instructed that his testimony deserves careful scrutiny because he is the defendant. Jurors are essentially told that they should presume the defendant innocent but doubt him when he says so.

In recognition of the presumption, not every court allows special instructions that comment on the interests of the defendant. The Third Circuit instructs jurors to treat the testimony just like that of any other witness.<sup>77</sup> The Tenth Circuit also has a similar model instruction.<sup>78</sup>

In 2013, the Supreme Court of Connecticut decided that trials courts will "refrain from instructing jurors, when a defendant testifies, that they may specifically consider his interest in the outcome of the case and the importance to him of the outcome of the trial."<sup>79</sup> The court did not find that the instruction undermined the presumption of innocence. While the instruction at issue in that case did single out the defendant, it also instructed the jury to "apply the same principles by which the testimony of other witnesses is tested."<sup>80</sup> The court went on to distinguish the instruction in its cases against one the Second Circuit had previously ruled was unconstitutional, where the trial court discussed the defendant's "deep personal interest in the result of his prosecution."<sup>81</sup>

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<sup>74</sup> 157 U.S. 301, 304 (1895).

<sup>75</sup> *United States v. Jones*, 459 F.2d 1225, 1226 (D.C. Cir. 1972).

<sup>76</sup> *Id.* at 1227.

<sup>77</sup> COMM. ON MODEL CRIM. JURY INSTRUCTIONS THIRD CIR., MODEL CRIMINAL JURY INSTRUCTION § 4.28 (2018), <http://www.ca3.uscourts.gov/sites/ca3/files/2014%20Chapter%204%20final.pdf>.

<sup>78</sup> CRIM. PATTERN JURY INSTRUCTION COMM. OF THE U.S. CT. OF APPEALS FOR THE TENTH CIR., CRIMINAL PATTERN JURY INSTRUCTIONS § 1.08 (2011), <https://www.ca3.uscourts.gov/sites/ca3/files/2018%20Chapter%204%20revisions%20final.pdf>.

<sup>79</sup> *State v. Medrano*, 65 A.3d 503, 508 (Conn. 2013).

<sup>80</sup> *Id.* at 517.

<sup>81</sup> *Id.* at 518–19.

In 2006, the Second Circuit took up a case in which a federal trial judge instructed the jury that the defendant's bias gave him a motive to testify falsely.<sup>82</sup> Relying on the presumption of innocence the Second Circuit reversed the conviction and ruled that in future cases, jurors should not be instructed that the defendant has a "deep personal interest in the case," but instead should be told to evaluate their testimony just like any other witness.<sup>83</sup> The court wrote,

This principle leads us to denounce any instruction, including the one at issue here, that tells a jury that a testifying defendant's interest in the outcome of the case creates a motive to testify falsely. We do so not because the instruction is necessarily inaccurate[.] . . . But an instruction that the defendant has a motive to testify falsely undermines the presumption of innocence.<sup>84</sup>

The Second Circuit got it right here.

Despite the fact that many federal circuits and the State of Connecticut no longer allow these instructions, such instructions do still exist in some state trial courts as well as the District of Columbia.<sup>85</sup> A number of states and federal circuits still allow these types of instructions.<sup>86</sup>

The instruction highlighting the defendant's testimony as different than other witnesses is justified by prosecutors and judges by the reality that the defendant does have an interest in the outcome of the case. Proponents of these instructions would argue that this truth should be imparted to jurors. However, there are many other truths about the criminal justice system that routinely get sanitized to comport with the presumption of innocence or other legal principles. We do not tell jurors about evidence suppressed pursuant to the Fourth Amendment.<sup>87</sup> With respect to the presumption of innocence we do not inform jurors about prior convictions (unless a defendant testifies) or other evidence of

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<sup>82</sup> U.S. v. Gaines, 457 F.3d 238, 242 (2d Cir. 2006).

<sup>83</sup> *Id.* at 245–49.

<sup>84</sup> *Id.* at 246.

<sup>85</sup> *See, e.g.,* Castro v. United States, No. 04 CR. 664-2 TPG, 2013 WL 6508816, at \*2 (S.D.N.Y. Dec. 11, 2013) ("The defendant did not need to testify. But he did, and, now that he has testified, you will judge his credibility in the way that you judged the credibility of any witness."); *Medrano*, 65 A.3d at 518 ("[T]he jury was to evaluate the defendant's testimony in the same fashion as the testimony of the other witnesses."); *State v. Kittell*, 847 A.2d 845, 850 (R.I. 2004); *Givens v. State*, 751 S.E.2d 778, 781 (Ga. 2013); *State v. King*, 897 A.2d 543, 549 (Vt. 2006) ("The jury has the right to believe all, part, or none of the testimony of any witness, and this rule applies to the defendant as well as any other witness." (citing *State v. Camley*, 438 A.2d 1131, 1134 (Vt. 1981))); *United States v. Patel*, No. CRIM.A 06-60006, 2009 WL 1579526, at \*16 (W.D. La. June 3, 2009) (recognizing "general instructions given to the jury which state, 'The testimony of the defendant *should be weighed and his credibility evaluated in the same way as that of any other witness*'").

<sup>86</sup> *See infra* Appendix.

<sup>87</sup> *Mapp v. Ohio*, 367 U.S. 643, 655–57 (1961).

crimes except in some prescribed circumstances.<sup>88</sup> We do not inform jurors that the defendant was transported to the courthouse in restraints.<sup>89</sup> We also sanitize bad behavior by police with instruction as well.<sup>90</sup> For example, we do not tell jurors that police are allowed to stop citizens on pretexts or lie to elicit a confession.<sup>91</sup> An instruction suggesting a defendant may lie simply because he is the defendant undermines fundamental fairness, as well as the presumption of innocence in criminal trials, and underscores a fact that simply should not be highlighted.

For the most part, civil jury instructions do not highlight the bias of the parties. In a civil trial where money is at stake, for example, the plaintiff has an interest in winning the monetary damages, while the defendant has an interest in not losing the money.<sup>92</sup> Trial judges do not instruct jurors on these interests.<sup>93</sup>

The jury instructions about the defendant is closest to those given when convicted perjurers or cooperating witnesses testify in criminal trials.<sup>94</sup> Because those witnesses' credibility is in question because of obvious biases, a special instruction is given in the instances where they testify.<sup>95</sup> For example, where a witness with a cooperation agreement testifies, the trial court will tell the jury that while the witness has the same obligation to tell the truth as other witnesses, the jury can consider whether the witness "has an interest different from other types of witnesses" and that her testimony should "be considered with

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<sup>88</sup> See, e.g., FED. R. EVID. 404.

<sup>89</sup> *State v. Gonzalez*, 120 P.3d 645, 647, 650 (Wash. Ct. App. 2005) (holding the trial court's comment to the jury that the defendant was being held in jail because he could not post bail violated the defendant's right to the presumption of innocence).

<sup>90</sup> See Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493, 500 (2011) ("[W]e will discover that existing policies on the admissibility of prior crimes evidence are deeply flawed, because either they are built upon a set off erroneous a priori assumptions about juror inferences or they ignore critical aspects of police and prosecutorial behavior.").

<sup>91</sup> See, e.g., Shailla Dewan & Brenda Goodman, *Prosecutors Say Corruption in Atlanta Police Dept. Is Widespread*, N.Y. TIMES (Apr. 27, 2007), <http://www.nytimes.com/2007/04/27/us/27atlanta.html>.

<sup>92</sup> See *infra* Appendix.

<sup>93</sup> See *infra* Appendix.

<sup>94</sup> Compare *United States v. Dunson*, 142 F.3d 1213, 1214 (10th Cir. 1998) ("While instructing the jury, the district court told them an informant's or immunized witness' testimony should be considered with caution."), with *Walker v. United States*, 982 A.2d 723, 740 (D.C. 2009) (rejecting the defendant's argument that "when the court instructed the jury that they could weigh [the defendant's] testimony in light of his 'interest in the outcome' of the case, the court erred by singling him out").

<sup>95</sup> See, e.g., *United States v. Austin*, 215 F.3d 750, 752 (7th Cir. 2000) ("Although the judge thought an addict-informant instruction inadvisable, he did give an informant instruction, drawn from Instruction 3.13 of the *Pattern Criminal Federal Jury Instructions for the Seventh Circuit* (1998), telling the jury that the testimony of any cooperating witness should be 'considered with caution and great care.'").

caution.”<sup>96</sup> Those special instructions for interested parties are informed by a 1952 Supreme Court case, *On Lee v. United States*.<sup>97</sup> In *On Lee*, the Court wrote,

The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are ‘dirty business’ may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions.<sup>98</sup>

It is from that language that many lower courts have drawn the right to issue special charges to the jury in informer cases.<sup>99</sup> The fact these instructions highlight bias in a similar way to instructions about the accused’s testimony is troubling. Those other interested witnesses do not enjoy the right to be presumed innocent. In a case of a witness with a particular bias, current instructions in some jurisdictions would cause a juror to have a difficult time distinguishing how to evaluate the testimony of these types of witnesses, and run the risk that

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<sup>96</sup> KEVIN F. O’MALLEY, JAY E. GREINIG & WILLIAM C. LEE, *FEDERAL PRACTICE AND INSTRUCTIONS CRIMINAL COMPANION HANDBOOK* § 22.1 (2020); see *United States v. Dunson*, 142 F.3d 1213, 1214 (10th Cir. 1998) (“While instructing the jury, the district court told them an informant’s or immunized witness’ testimony should be considered with caution.”); *Austin*, 215 F.3d at 752 (“Although the judge thought an addict-informant instruction inadvisable, he did give an informant instruction, drawn from Instruction 3.13 of the *Pattern Criminal Federal Jury Instructions for the Seventh Circuit* (1998), telling the jury that the testimony of any cooperating witness should be ‘considered with caution and great care.’”); see also *People v. Valdez*, 53 A.D.3d 172, 179 (N.Y. App. Div. 2008) (“[T]he court gave the jury the standard instruction that the lieutenant’s testimony was to be given no more credence than that of any other witness simply because he was a police officer.”); *State v. Marcisz*, 913 A.2d 436, 442 (Conn. App. Ct. 2007) (Flynn, J., dissenting) (“Connecticut courts routinely instruct juries that they should evaluate the credibility of a police officer in the same way that they evaluate the testimony of any other witness, and that the jury should ‘neither believe nor disbelieve the testimony of a police official just because he is a police official.’”) (internal citations omitted); *United States v. Lawes*, 292 F.3d 123, 131 (2d Cir. 2002) (“[T]he jurors were instructed at the end of the trial that they were not to view the credibility of law-enforcement witnesses more favorably than other witnesses because of the officials’ occupation.”); *State v. Morales*, 10 P.3d 630, 634 (Ariz. Ct. App. 2000) (“[T]he trial court instructed the jurors . . . that they were the sole triers of witness credibility and that a police officer’s testimony ‘is not entitled to any greater or lesser weight or believability merely because of the fact that he is a police officer.’”); *United States v. Cornett*, 232 F.3d 570, 576 (7th Cir. 2000) (“The court instructed the jury that they were the ‘sole judges of the credibility of the witnesses’ and that a police officer’s testimony ‘is neither more nor less entitled to belief than any other witness.’”); *State v. Clark*, 655 N.E.2d 795, 817 (Ohio Ct. App. 1995) (“It has been held that a jury should be given such instruction, when warranted, to the effect that a police officer is not, by virtue of that status, deemed to be more credible than any other witness, but, instead, his credibility and the weight to be given his testimony are to be judged upon the same standard as other witnesses.”) (internal citations omitted).

<sup>97</sup> 343 U.S. 747 (1952).

<sup>98</sup> *On Lee*, 343 U.S. at 757.

<sup>99</sup> See, e.g., *State v. Patterson*, 886 A.2d 777, 789 (Conn. 2005); *People v. Petschow*, 119 P.3d 495, 504–05 (Colo. App. 2004); *State v. Grimes*, 982 P.2d 1037, 1041 (Mont. 1999); *State v. Moore*, 981 A.2d 1030, 1059–60 (Conn. 2009); *State v. Dennis*, 817 So. 2d 741, 751 (Fla. 2002); *State v. Adams*, 943 A.2d 851, 864 (N.J. 2008); *Banks v. Dretke*, 540 U.S. 668, 701–02 (2004) (advising that the issue of an informant’s credibility be submitted “to the jury ‘with careful instructions’”).

they might lump defendants in with witnesses who do not enjoy the presumption and have significant credibility issues.

The timing of instructions is also relevant to the issue of their fairness. When a defendant testifies, jurors often hear from the defendant last because the government's burden requires that the prosecution must put on its case first.<sup>100</sup> So, the instructions about the testimony of all witnesses will be heard close in time to the accused's testimony as opposed to the witness for the government who testify earlier. At least nine states have jury instructions about the defendant's testimony that do not highlight any interest in the outcome of the case.<sup>101</sup> Arizona's instructions, for example, simply tell jurors to assess the credibility of the defendant's testimony just like any other witness.<sup>102</sup> These

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<sup>100</sup> *Steps in a Trial: Opening Statements*, A.B.A. (Sept. 9, 2019), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/openingstatements/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/openingstatements/).

<sup>101</sup> See DEFENDANT AS WITNESS - IN GENERAL, ALASKA PATTERN JURY INSTRUCTIONS - CRIMINAL § 1.30 (2012) ("The defendant has testified in this case. Judge [his][her] testimony in the same manner as you judge the testimony of any other witness."); DEFENDANT'S TESTIMONY, ARIZONA JURY INSTRUCTIONS – CRIMINAL, NO. 36 (1996) ("You must evaluate the defendant's testimony the same as any witness' testimony."); WEIGHING THE EVIDENCE, 1 FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.9 (2019) ("The defendant in this case has become a witness. You should apply the same rules to consideration of [his] [her] testimony that you apply to the testimony of the other witnesses."); DEFENDANT AS A WITNESS, HAWAII PATTERN JURY INSTRUCTIONS - CRIMINAL § 3.15 (2020) ("The defendant in this case has testified. When a defendant testifies, his/her credibility is to be tested in the same manner as any other witness."); CREDIBILITY OF DEFENDANT AS WITNESS, IDAHO CRIMINAL JURY INSTRUCTIONS § 302 (2010) ("If the defendant testifies, the Court should not give any instruction that specifically addresses the evaluation of the defendant's credibility or testimony."); JURY IS SOLE JUDGE OF THE BELIEVABILITY OF WITNESSES, ILLINOIS PATTERN JURY INSTRUCTIONS–CRIMINAL § 1.02 ("You should judge the testimony of [ (a) (the) ] defendant[s] in the same manner as you judge the testimony of any other witness."); DEFENDANT TESTIFIES, INDIANA PATTERN CRIMINAL JURY INSTRUCTIONS, NO. 13.2500 (2019) ("You should judge the testimony of the Defendant as you would the testimony of any other witness."); DEFENDANT AS A WITNESS, PATTERN INSTRUCTIONS KANSAS - CRIMINAL § 51.160 (4th ed., 2020) ("The Committee recommends that there be no separate instruction given as to the defendant as a witness."); DUTY OF JURY TO FIND FACTS: EVIDENCE, WEIGHT AND CREDIBILITY, 17 LOUISIANA CIVIL LAW TREATISE, CRIMINAL JURY INSTRUCTIONS § 3:4 (2019) ("You should judge the testimony of the defendant in the same manner as you judge the testimony of any other witness."); CREDIBILITY OF WITNESS: IN GENERAL AND WHEN DEFENDANT TESTIFYING, 7 TENNESSEE PRACTICE PATTERN JURY INSTRUCTIONS–CRIMINAL § 42.04 (2019) ("The defendant having testified in [his] [her] own behalf, [his] [her] credibility is determined by the same rules by which the credibility of other witnesses is determined, and you will give [his] [her] testimony such weight as you may think it is entitled."); DEFENDANT TESTIFYING, MODEL UTAH JURY INSTRUCTIONS – CRIMINAL, CR211A (2d ed.) ("The defendant testified at trial. Another instruction mentions some things for you to think about in weighing testimony. Consider those same things in weighing the defendant's testimony. Don't reject the defendant's testimony merely because he or she is accused of a crime."); DEFENDANT AS WITNESS, VERMONT CRIMINAL JURY INSTRUCTIONS § 1-5-311 (2019) ("(Def) has taken the stand and testified in this case. [He] [She] has a right to testify if [he] [she] decides to do so. You are to weigh [his] [her] testimony the same way you weigh the testimony of any other witness."); CREDIBILITY OF WITNESSES, WISCONSIN JI-CRIMINAL (2000) ("The defendant has testified in this case, and you should not discredit the testimony just because the defendant is charged with a crime. Use the same factors to determine the credibility and weight of the defendant's testimony that you use to evaluate the testimony of any other witness.")

<sup>102</sup> DEFENDANT'S TESTIMONY, ARIZONA STANDARD CRIMINAL INSTRUCTIONS § 18(b) (2018) ("You must

instructions on their own do not offend the presumption of innocence. While on their own these instructions do not seem problematic, these instructions, when paired with certain other instructions about credibility, can still significantly undermine the presumption of innocence.

We must critically ask why these instructions are given. Do they serve a legitimate purpose in a system with too few trials, few defendants testifying, and far too many people in prison?

### *B. General Credibility Instructions*

In contrast, some states do not single out the defendant by name during instructions, but instead have instructions to aid the fact finder in evaluating the credibility of witnesses.<sup>103</sup> Factors that might be useful in assessing credibility are emphasized during these sorts of instructions.<sup>104</sup> These instructions ask jurors to keep in mind things like whether the witness seemed to have a good memory, the witness's demeanor, and whether the witness has a good opportunity to observe.<sup>105</sup> With respect to bias, some states just ask jurors to generically consider the interests or bias of the witnesses who testify.

But other states go much further with their credibility instruction. Some states do not have instructions that are specific to the defendant's testimony, but instead have instructions that allude to testimony of the defendant in the general instructions about credibility of witnesses. Colorado's jury instructions, for example, talk about witnesses who will be affected by the verdict.<sup>106</sup> Meanwhile, Florida asks jurors to consider whether the witness has "some interest in how the case should be decided."<sup>107</sup> Utah wants jurors to be thinking about whether the witness has "something to gain or lose from this case."<sup>108</sup> A number of states

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evaluate the defendant's testimony the same as any witness' testimony.").

<sup>103</sup> See, e.g., WITNESSES, JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS § 105 (2020).

<sup>104</sup> *Id.* (identifying fourteen factors for jurors to consider when evaluating the testimony of each witness without specifically addressing the defendant).

<sup>105</sup> *Id.*

<sup>106</sup> CREDIBILITY OF WITNESSES, COLORADO JURY INSTRUCTIONS, CRIMINAL E:05 (2019) ("You are the sole judges of the credibility of each witness and the weight to be given to the witness's testimony. You should carefully consider all of the testimony given and the circumstances under which each witness has testified. . . . Consider any relationship the witness may have to either side of the case, and how each witness might be affected by the verdict.").

<sup>107</sup> WEIGHING THE EVIDENCE, 1 FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.9 (2019) ("You should consider how the witnesses acted, as well as what they said. Some things you should consider are . . . [d]id the witness have some interest in how the case should be decided?").

<sup>108</sup> See, e.g., WITNESS CREDIBILITY, 2 MODEL UTAH JURY INSTRUCTIONS, CR 207 (2020) ("In deciding this case you will need to decide how believable each witness was. Use your judgment and common sense. Let me suggest a few things to think about as you weigh each witness's testimony . . . [d]oes the witness have

use similar language directing jurors to think about a witness's "interest or lack of interest in the case."<sup>109</sup>

While instructions like these are certainly preferable to ones that single out the defendant in particular, these instructions still undermine the presumption of innocence. The presumption of innocence is undermined when a defendant testifies since these instructions emphasize the fact of an interest in the outcome of the case. There is no one more impacted by the outcome of the case than the defendant because the potential sentence and the collateral consequences of conviction can only apply to him.<sup>110</sup> Naturally, in many instances, jurors must suppose that the judge is referring to the defendant's testimony even if the instruction is not labeled in that way.

Some states speak more generally about bias. Indiana's instruction asks jurors to consider, "any interest bias or prejudice the witness may have."<sup>111</sup> An instruction along these lines is more evenhanded as it could apply to different players in the trial. While one juror may believe the instruction refers to the defendant, another may believe it applies to an informant or other witness.

### C. *Police Officer Witness*

One type of witness has enjoyed the right to have his interests and biases ignored in every single jurisdiction in the country—the police officer witness. Fact finders are told that they should not give police officers' testimony any greater or lesser weight than that of other witnesses they will hear from at trial.<sup>112</sup>

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something to gain or lose from this case?").

<sup>109</sup> See, e.g., EVALUATION OF TESTIMONY—CREDIBILITY OF WITNESSES, 2 NEBRASKA JURY INSTRUCTIONS—CRIMINAL § 5.2 (2016) ("You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining this, you may consider the following . . . [t]he interest or lack of interest of the witness in the result of this case[.]"); PRELIMINARY INSTRUCTION, MONTANA JUDICIAL BRANCH, CRIMINAL JURY INSTRUCTIONS COMMISSION, No. 1-103 (2009) ("You are the sole judges of the credibility, that is, the believability, of all the witnesses testifying in this case, and of the weight, that is, the importance, to be given their testimony. . . . You may consider . . . [w]hether the witnesses have an interest in the outcome of the case or any motive, bias or prejudice."); EVALUATION OF TESTIMONY—BELIEVABILITY OF WITNESSES, 10 MINNESOTA PRACTICE, JURY INSTRUCTION GUIDES—CRIMINAL CRIMJIG 3.12 (6th ed.) (2019) ("In determining believability and weight of testimony, you may take into consideration the witness's . . . [i]nterest or lack of interest in the outcome of the case[.]").

<sup>110</sup> See generally *The Difference Between a Civil and Criminal Case*, MISS. BAR, <https://www.msbar.org/for-the-public/consumer-information/the-difference-between-a-civil-and-criminal-case/> (last visited Nov. 19, 2020) (describing the impacts and repercussions for a defendant in a criminal case).

<sup>111</sup> CREDIBILITY OF WITNESSES—WEIGHING EVIDENCE, INDIANA PATTERN CRIM. JURY INSTRUCTIONS, No. 1.1700 (2019).

<sup>112</sup> Johnson, *supra* note 4, at 248.

In many criminal cases, however, police officers are not at all disinterested parties. In undercover buy-bust stings, search warrant cases, and assault on police officers cases, police officers are not only the only government witnesses to the alleged offense, but also the only testifying witness at trial, and they certainly are invested in the outcome of the case.<sup>113</sup> These cases would not exist *but for* the police officer's involvement. Some cases are created as a result of a police department's interest. For example, police go out and act in an undercover capacity and claim to buy drugs or purchase sex because of the agendas that the police themselves or their offices have set.<sup>114</sup> Later, they may have to justify decisions they made about the selective use of limited departmental resources with arrests and convictions. Convictions are later used to justify the choices made by the department.<sup>115</sup>

In many instances, sting operations are often tied to police department budgets.<sup>116</sup> Individual police departments often need to keep their arrest numbers up to justify their budgets.<sup>117</sup> Some departments have arrest quotas they expect officers to make.<sup>118</sup> So, officers go out to make arrests to comply with this goal. Millions of dollars recovered in certain types of cases can be seized by the police department and used for the department that recovered the funds.<sup>119</sup> Individual officers' jobs may depend on the existence of a department or operation. In addition to budgetary interests and crime creation, there are professional rewards, like promotions and raises for officers who are successful at their

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<sup>113</sup> *Id.* at 246, 250–51.

<sup>114</sup> *Id.* at 250–51.

<sup>115</sup> *Id.*

<sup>116</sup> Jim Borden, *Prostitution Stings to Fund Police Budget*, KALAMAZOO GAZETTE, [http://blog.mlive.com/kzgazette/2007/10/prostitution\\_stings\\_to\\_fund\\_po.html](http://blog.mlive.com/kzgazette/2007/10/prostitution_stings_to_fund_po.html) (last updated Apr. 5, 2019); Matt Gutman, Erin Brady, Seni Tienabeso & Candace Smith, *How Undercover Cops in a Florida City Make Millions Selling Cocaine*, ABC NEWS (Oct. 9, 2013, 6:12 PM), <http://abcnews.go.com/US/undercover-cops-florida-city-make-millions-selling-cocaine/story?id=20523714>; Lisa Getter & Mary Ann Esquivel, *Some Cuts in Police Budget Restored*, MIAMI HERALD, Sept. 23, 1987, at 1B; Hector Castro, *Glitches Hurt Effort To Fight Prostitution: Clerking Error Misdirected Money*, SEATTLE POST-INTELLIGENCER REP., July 7, 2005, 2004 WLNR 3173805.

<sup>117</sup> U.S. DEP'T OF JUST. CIV. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9–15 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/fergusonpolice\\_departmentreport.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/fergusonpolice_departmentreport.pdf).

<sup>118</sup> Nathaniel Bronstein, *Police Management and Quotas: Governance in the CompStat Era*, 48 COLUM. J.L. & SOC. PROBS. 543, 544–46 n.14 (2015) (citing *Floyd v. City of New York*, 959 F. Supp. 2d 540, 602 (S.D.N.Y. 2013)) (“Officers may be subject to warnings and more severe adverse consequences if they fail to achieve what their superiors perceive as appropriate enforcement activity numbers. . . . [A]n officer’s failure to engage in enough proactive enforcement activities could result in . . . adverse employment action.”).

<sup>119</sup> Michael Sallah, Robert O’Harrow Jr., Steven Rich & Gabe Silverman, *Stop and Seize*, WASH. POST (Sept. 6, 2014), [https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/?utm\\_term=.7686cab7ea23](https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/?utm_term=.7686cab7ea23); GOVERNING: THE FUTURE OF STATES & LOCALITIES, GOVERNING STATES & LOCALITIES, DIVERSITY ON THE FORCE: WHERE THE POLICE DON’T MIRROR COMMUNITIES 2 (2015), <http://images.centerdigitaled.com/documents/policediversityreport.pdf>.

jobs.<sup>120</sup> As an officer, success often means making arrests, especially where the arrests result in convictions.<sup>121</sup> These are just some of the pressures that drive the operations of a police department.

The potential for civil rights lawsuits and investigations into police officer testimony by internal affairs, and the issue of discipline, especially related to issues of physical force against civilians, give police officers additional motives.<sup>122</sup> This is particularly true in assault-on-police-officer cases or any other case in which a defendant threatens physical force or where physical touching did in fact take place, whether or not an accused person makes the claim.<sup>123</sup>

So, while police have any number of interests in a case, judges are instructing jurors to assume that the officer is just like an unbiased witness.<sup>124</sup> So, even if the juror thinks that the mention of bias in a general credibility jury instruction applies to the officer, the judge explicitly tells him otherwise when he instructs him not to give the police officer's testimony any greater or lesser weight simply because he is a police officer.

While the officer's interests might be brought out by a skilled defense attorney at trial during cross examination or in closing arguments, the jury will not hear about it from the judge. In fact, jurors will be told just the opposite from the court. The court will instruct the jury that the testimony of the officer should be received and evaluated just like that of any other witness—except the accused.<sup>125</sup> In the same pre-deliberation instructions, the jury will be told that the defendant is biased and has a vital interest in the case and that the police officers have none.<sup>126</sup> This is a particularly troubling dichotomy in a case where

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<sup>120</sup> See Jennifer Kastner, *SDPD Officer Blows Whistle on 'Rewards for Arrests' Program*, ABC 10 NEWS SAN DIEGO, <https://www.10news.com/news/team-10/san-diego-police-officer-blows-whistle-on-rewards-for-arrests-program> (last updated Mar. 15, 2018).

<sup>121</sup> See Saki Knafo, *How Aggressive Policing Affects Police Officers Themselves*, ATL. (July 13, 2015), <http://www.theatlantic.com/business/archive/2015/07/aggressive-policing-quotas/398165/>.

<sup>122</sup> See Steve Reilly & Mark Nichols, *Hundreds of Police Officers Have Been Labeled Liars, Some Still Help Send People to Prison*, USA TODAY, <https://www.usatoday.com/in-depth/news/investigations/2019/10/14/brady-lists-police-officers-dishonest-corrupt-still-testify-investigation-database/2233386001/> (last updated Oct. 17, 2019, 3:26 PM).

<sup>123</sup> See Sa'id Wekili & Hyacinth E. Leus, *Police Brutality: Problems of Excessive Force Litigation*, 25 PAC. L.J. 171, 189 (1994).

<sup>124</sup> See, e.g., *United States v. Martinez*, 981 F.2d 867, 870–71 (6th Cir. 1992) (“People who are involved in law enforcement . . . [are] evaluated and judged by the same standard as anyone else.”).

<sup>125</sup> See, e.g., *United States v. Martinez*, 981 F.2d 867, 870–71 (6th Cir. 1992).

<sup>126</sup> See, e.g., WEIGHING THE EVIDENCE, 1 FLORIDA STANDARD JURY INSTRUCTIONS CRIMINAL § 3.9 (2019) (“You should consider how the witnesses acted, as well as what they said. Some things you should consider are . . . [d]id the witness have some interest in how the case should be decided?”).

it is the officer's word against the defendant's, and in many cases those parties are the only ones who truly know what happened.<sup>127</sup> While their stakes in the case are certainly different, it is only the defendant who is to be presumed innocent of the accusation and entitled to constitutional protections.<sup>128</sup> So, while the accused is entitled to the benefit the doubt, it is the police officer who actually receives it, despite the constitutional rights at stake.

Of course, a prosecutor will also bring out the defendant's bias during cross and closing arguments.<sup>129</sup> But only the prosecutor will have the judge reading a jury instruction reinforcing his cross-examination and closing arguments about the defendant's bias. The prosecuting attorney could even point to the instruction or mention that the judge will instruct them along the lines of his arguments.<sup>130</sup> Final instructions come after closing arguments, so the jurors will hear the court's instructions about the defendant's credibility just after receiving the prosecutor's arguments.<sup>131</sup> Jurisdictions that highlight a defendant's bias with a special instruction run a significant risk that the jurors will assume that the judge sanctioned the prosecutors' arguments about the defendant's testimony and thus that the defendant's testimony should not be believed.

Similar arguments by defense counsel about police officer bias and credibility will not be accompanied by any judicial backup. Rather than receiving an instruction acknowledging the police officer's bias, jurors are told to ignore it.<sup>132</sup>

Placing criminal defendants at a disadvantage *vis-à-vis* government witnesses in the age of mass incarceration should not be acceptable. This inequity between how the testimonies of police officers and defendants is treated is no doubt exacerbated by racial bias—both conscious and implicit. Police officers tend to be whiter than the public at large,<sup>133</sup> while criminal defendants

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<sup>127</sup> Wekili & Leus, *supra* note 123 (explaining that, in most cases, the police officer and the defendant are the only individuals who know what happened).

<sup>128</sup> See Goldenberg, *supra* note 67, at 776–77 (noting the inconsistency between the presumption of innocence and instructions related to defendants' self-interests).

<sup>129</sup> *Steps in a Trial: Cross Examination*, A.B.A. (Sept. 9, 2019), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/crossexam/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/crossexam/).

<sup>130</sup> *Steps in a Trial: Closing Arguments*, A.B.A. (Sept. 9, 2019), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/closingarguments/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/closingarguments/).

<sup>131</sup> See Fed. R. Crim. P. 30(c) (providing that the court “may instruct the jury before or after the arguments are completed, or at both times”).

<sup>132</sup> See, e.g., *United States v. Martinez*, 981 F.2d 867, 870–71 (6th Cir. 1992) (“People who are involved in law enforcement . . . [are] evaluated and judged by the same standard as anyone else[.]”).

<sup>133</sup> GOVERNING: THE FUTURE OF STATES & LOCALITIES, *supra* note 119.

are overwhelmingly more likely to be people of color than is representative of the public at large.<sup>134</sup>

Not only is the phenomenon of disparate credibility instructions for the defendant and police likely caused by bias, it reinforces it. White people are overrepresented on police forces and Black people are underrepresented.<sup>135</sup> Moreover, jurors are also more likely to be white.<sup>136</sup> Individuals who are incarcerated or who have felony convictions are often barred from serving as jurors either permanently or for some period of time.<sup>137</sup> Over 25% of adult African Americans have felony convictions, while only 6.5% of the total adult population has been convicted of a crime.<sup>138</sup> Between the higher rates of felony conviction and incarceration, there is a disproportionately high number of African Americans who have been rendered unqualified for jury service in many states. And we know the representation by Black jurors is very important.<sup>139</sup> Studies have shown that all-white juries are more likely to convict Black defendants.<sup>140</sup>

Research indicates that implicit bias permeates multiple aspects of the criminal legal system, including the selection of jurors,<sup>141</sup> jurors' interpretation

<sup>134</sup> See, e.g., SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>; Radley Balko, *21 More Studies Showing Racial Disparities in the Criminal Justice System*, WASH. POST (Apr. 9, 2019, 7:00 AM), [https://www.washingtonpost.com/opinions/2019/04/09/more-studies-showing-racial-disparities-criminal-justice-system/?utm\\_term=.8b4750c40d1a](https://www.washingtonpost.com/opinions/2019/04/09/more-studies-showing-racial-disparities-criminal-justice-system/?utm_term=.8b4750c40d1a).

<sup>135</sup> Jeremy Ashkenas & Haeyoun Park, *The Race Gap in America's Police Departments*, N.Y. TIMES, <https://www.nytimes.com/interactive/2014/09/03/us/the-race-gap-in-americas-police-departments.html?searchResultPosition=8> (last updated April 8, 2015).

<sup>136</sup> Ashish S. Joshi & Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, A.B.A. (Sept. 1, 2015), <https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences/>.

<sup>137</sup> See James M. Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service*, 36 LAW & POL'Y 1, 4–5 (2014) (finding that Maine is the only state that does not place any restrictions “on a felon’s opportunity to serve as a juror”).

<sup>138</sup> SARAH SHANNON, CHRISTOPHER UGGEN, MELISSA THOMPSON, JASON SCHNITTKER & MICHAEL MASSOGLIA, GROWTH IN THE U.S. EX-FELON AND EX-PRISONER POPULATION, 1948 TO 2010, at 7 (2011), <http://paa2011.princeton.edu/papers/111687>.

<sup>139</sup> Joshi & Kline, *supra* note 136 (“[M]inority presence on a jury allows the group to understand and appreciate the different life experiences that different racial identities have with the criminal justice system. . . . Studies have shown that ‘diverse juries had longer deliberations, discussed more case facts, made fewer inaccurate statements, and were more likely to correct inaccurate statements.’”) (citations omitted).

<sup>140</sup> See Steve Hartsoe, *Study: All-White Jury Pools Convict Black Defendants 16 Percent More Often Than Whites*, DUKE TODAY (Apr. 17, 2012), <https://today.duke.edu/2012/04/jurystudy>.

<sup>141</sup> Grosso & O’Brien, *supra* note 25, at 1554.

of instructions on character evidence,<sup>142</sup> and disproportionate conviction of Black defendants.<sup>143</sup> Even instructions like character evidence, which are seemingly neutral, are at worst not immune to the implicit racial bias of jurors. The color-blind rationale of jury instructions on flight, character evidence, and defendants' interest in the outcome of a case allows the personal stereotypes and prejudices against racial minorities that jurors may hold to enter the courtroom completely unchecked.<sup>144</sup> In other words, color-blind instructions given to jurors, though intended to prevent racially-based unfair and unjust outcomes, actually enable jurors to make judgments based on unconscious or conscious racial stereotypes and biases about defendants, most often at the expense of Black defendants and defendants of color.<sup>145</sup>

There is so much structural racism built into our criminal legal system that jurors hardly need an excuse to disbelieve people of color accused of crimes compared to police officers, but trial judges are explicitly giving jurors one reason to do exactly that in their jury instructions.

#### IV. SILENCING DEFENDANTS

Several prominent scholars have sounded the alarm about how the criminal legal system silences defendants.<sup>146</sup> Few defendants testify on their own behalf at trial.<sup>147</sup> And as a result, in trial, the fact finder rarely hears from the defendant about the incident itself.<sup>148</sup> Jury instructions that promote the credibility of police officer witnesses over that of the accused may contribute to the silencing of defendants in criminal cases. Our system should instead encourage the accused to testify at trial.

There are good reasons for defendants to testify. As Barbara Babcock put it in 1993, “[i]t is almost impossible to see the defendant as a deserving person

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<sup>142</sup> Chris Chambers Goodman, *The Color of Our Character: Confronting the Racial Character of Rule 404(b) Evidence*, 25 LAW & INEQ. 1, 5, 6, 11 (2007).

<sup>143</sup> See SHANNON ET AL., *supra* note 138, at 7.

<sup>144</sup> Goodman, *supra* note 142, at 5, 6 (illustrating how implicit racial bias and stereotypes about African American women with children may negatively sway a jury to convict such a woman of welfare fraud, regardless of actual evidence presented).

<sup>145</sup> *Id.* at 13 (encouraging courts to “give those jurors the tools to fight the unconscious bias or unconscious racism that otherwise seeps into criminal trials where the defendant or witnesses are persons of color”).

<sup>146</sup> See, e.g., Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 408–10, 421, 423, 426, 433–34 (2018); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1453–54, 1459–62, 1463–69 (2005).

<sup>147</sup> Bellin, *supra* note 146, at 397 (“In modern times, only about half of criminal defendants take the witness stand.”).

<sup>148</sup> *Id.*

unless he testifies, partly because the natural order of the trial dehumanizes him.”<sup>149</sup> Jurors may believe that an “innocent person proclaims it from the rooftops.”<sup>150</sup> But, despite the fact that defendants are more likely to win should they testify,<sup>151</sup> there are significant ways in which the law discourages their testimony. In all but three states, prior convictions will be introduced against defendants for impeachment purposes.<sup>152</sup> This means that during cross examination the prosecutor will ask the defendant about prior criminal convictions.<sup>153</sup> This is allowed with the understanding that this area of cross examination is appropriate to show that the defendant’s testimony is not credible, not to demonstrate a disposition toward criminality.<sup>154</sup> Defense attorneys worry that jurors consider this information against the defendants precisely as evidence of a general propensity to break the law.<sup>155</sup>

In addition, should a defendant’s testimony be disbelieved and he be convicted, judges can and do consider the fact that the accused lied under oath at sentencing.<sup>156</sup> Even when the defendant is not convicted of it, the judge can sentence him for the perjury the judge believes occurred during the defendant’s testimony at trial.<sup>157</sup> The federal sentencing guidelines explicitly tell judges that they may consider that the defendant went to trial.<sup>158</sup> This can result in additional

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<sup>149</sup> Barbara Allen Babcock, *Introduction: Taking the Stand*, 35 WM. & MARY L. REV. 1, 5–6 (1993).

<sup>150</sup> *Id.* at 13.

<sup>151</sup> See Bellin, *supra* note 146, at 426 (analyzing anecdotal and empirical evidence suggesting that “juries punish defendants for remaining silent at trial with a ‘silence penalty’”); Michael E. Antonio & Nicole E. Arone, *Damned If They Do, Damned If They Don’t: Jurors’ Reaction to Defendant Testimony or Silence During a Capital Trial*, 89 JUDICATURE 60, 60–61 (2005) (discussing reasons why jurors are likely to draw adverse inferences from a defendant’s decision not to testify).

<sup>152</sup> See Roberts, *supra* note 21, at 2018–30 (noting only Hawaii, Montana, and Kansas prohibit the impeachment of a defendant with his prior conviction).

<sup>153</sup> See Bellin, *supra* note 146, at 401.

<sup>154</sup> *Id.* at 401–02.

<sup>155</sup> *Id.* at 407.

<sup>156</sup> Babcock, *supra* note 149, at 3.

<sup>157</sup> Nicole Oelrich Tupman & Jason Tupman, *No Lie About It, The Perjury Sentencing Guidelines Must Change*, 59 S.D. L. REV. 50, 50–51 (2014) (“Under the Perjury Guidelines, a judge can increase a defendant’s sentence by applying a cross reference to the Accessory After the Fact Guideline. This cross reference directs a judge to increase a defendant’s sentence where the underlying perjury was ‘in respect to’ an ‘underlying crime,’ typically resulting in a significant increase in prison time. The ‘underlying crime’ includes crimes of which a jury acquitted a defendant or crimes with which a defendant was never charged. . . . The Perjury Guidelines also violate a defendant’s Sixth Amendment rights by destroying the criminal jury’s important historical role because a judge may use uncharged or acquitted conduct to increase the sentence for a perjury violation.”).

<sup>158</sup> Hon. Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 122–23 (2018) (explaining that a defendant may experience a “five-level swing” under the guidelines after losing at trial).

years in prison.<sup>159</sup> Any good defense attorney advises her clients of these consequences of their testimony.<sup>160</sup>

In addition to the legal frameworks that dissuade defendants from testifying, jury instructions also discourage defendants from testifying. Jurors are told that a defendant's silence at trial cannot be considered by them in any adverse way.<sup>161</sup> Defense attorneys advise their clients that the judge will tell the jurors this fact.<sup>162</sup> This could certainly allow a defendant to elect not to take the stand. The jury instructions offered when a defendant does choose to testify may also discourage testimony.<sup>163</sup>

This effect of silencing the criminal defendant is troubling for a number of reasons. To the extent that the criminal trial is meant to be a quest to uncover the truth about whether a crime has been committed—keeping the one person who knows whether he committed a criminal offense off of the witness stand hinders that pursuit for justice.<sup>164</sup> One scholar wrote, “[c]riminal defendants themselves are often a critical source of information about what happened.”<sup>165</sup> When defendants testify, more crucial information gets to the fact finder. The ability of the witness to handle questions by the prosecutor on cross examination can also be illuminating.<sup>166</sup> But when defendants choose not to testify, that opportunity is lost.

While one may assume only guilty defendants choose not to testify—that is not the case. One survey found that 47% of defendants who were later exonerated by DNA evidence did not testify at trial.<sup>167</sup> So, there can be little doubt that innocent defendants elect not to testify. In addition to the risks mentioned above, fear of public speaking, lack of sophistication or education,

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<sup>159</sup> Jeffrey T. Ulmer, James Eisenstein & Brian D. Johnson, *Trial Penalties in Federal Sentencing: Extra-Guidelines Factors and District Variation*, 27 JUST. Q. 560, 584 (2010) (finding a 15% sentence-length difference between those who plead guilty versus those convicted after trial).

<sup>160</sup> See 18 U.S.C. § 1623 (defining the acts and consequences of making false declarations before a grand jury or court).

<sup>161</sup> See Ted Sampsell-Jones, *Making Defendants Speak*, 93 MINN. L. REV. 1327, 1339 (2009).

<sup>162</sup> See *id.* at 1336.

<sup>163</sup> See Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules That Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 876–77 (2008).

<sup>164</sup> For more on this topic, see Sampsell-Jones, *supra* note 161, at 1331–35 and Bellin, *supra* note 161, at 854–57.

<sup>165</sup> Sampsell-Jones, *supra* note 161, at 1332.

<sup>166</sup> *Martin v. State*, 346 A.2d 158, 160 (Del. 1975) (“Speaking generally, there is a wide discretion given to counsel during cross-examination as he tests, among other things, the credibility of a witness as well as his ability to observe, remember and relate.”).

<sup>167</sup> BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 160 (2011).

and fear of a prosecutor twisting his words might dissuade a defendant from testifying.<sup>168</sup> Jury instructions as they currently stand certainly do not encourage the innocent (or the guilty) to testify.

This is worrisome for the integrity and reputation of the system. The fact that so many innocent people have been exonerated has eroded the public's trust in the police, prosecutors, and judges.<sup>169</sup> Popular media is brimming with true stories of flawed prosecutions that have led to disastrous results—*When They See Us*,<sup>170</sup> *Serial*,<sup>171</sup> *Murder on a Sunday Morning*,<sup>172</sup> and *Making a Murderer*.<sup>173</sup> The fact that innocent people do not trust the system only undermines the system more. Prosecutors and judges should want to play a role in a more equitable system and restore public confidence in that system. More defendants participating more fully in the system by testifying will also restore public trust.<sup>174</sup>

The second reason that we should worry about silencing the criminal defendant is that criminal defendants tend to be disproportionately people of color, so their silencing has racial implications.<sup>175</sup> Both implicit and explicit biases are at play when any witness testifies, but especially with respect to African American defendants.<sup>176</sup> It is possible that the system discourages people of color from testifying because their stories are perceived as less important. When a judge presiding over a trial gives an instruction that puts emphasis on the defendant's interest in the outcome of the case, it can reinforce stereotypes about guilt<sup>177</sup> and give license to jurors to discriminate consciously or unconsciously.

Further, police officers and police officer witnesses at trial are disproportionately white compared with the rest of the population.<sup>178</sup> This

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<sup>168</sup> *See id.* at 160, 167–68.

<sup>169</sup> *Innocence Project*, NACOLE (2016), [https://www.nacole.org/innocence\\_project](https://www.nacole.org/innocence_project).

<sup>170</sup> *When They See Us* (Netflix 2019).

<sup>171</sup> *Season One*, SERIAL (2014), available at <https://serialpodcast.org/season-one>.

<sup>172</sup> MURDER ON A SUNDAY MORNING (Docurama 2001).

<sup>173</sup> *Making a Murderer* (Netflix 2015).

<sup>174</sup> Sampsell-Jones, *supra* note 161, at 1329 (“[D]efendants’ own participation in the criminal process . . . would improve perceptions of legitimacy.”).

<sup>175</sup> *See* Bellin, *supra* note 146, at 433.

<sup>176</sup> *See* Goodman, *supra* note 142, at 4, 57.

<sup>177</sup> *See* Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 190, 201 (2010) (showing that participants held implicit racial biases about how good or bad African Americans were perceived to be, and based judgments of guilt on these implicit determinations).

<sup>178</sup> GOVERNING: THE FUTURE OF STATES & LOCALITIES, *supra* note 119.

discrepancy only further heightens the likelihood of the police officer being believed while the defendant is disbelieved.<sup>179</sup> Jury instructions that undermine the defendant and instructions that prop up a police officer's testimony should not further impair a defendant's chances at trial.

Judges decide which instructions to give in their courtrooms.<sup>180</sup> And judges, like the rest of the legal community, are disproportionately white.<sup>181</sup> Instructions can put the thumb on the scale, especially in a close case. We know that all-white juries are more likely to convict Black defendants in criminal cases,<sup>182</sup> so it is not far-fetched to imagine that trial judges are more likely to assume the guilt of Black defendants due to their implicit or explicit bias<sup>183</sup> and to dole out instructions that hurt a defendant's chances when the law allows the judge to do so.

Finally, we should be concerned about silencing defendants because it contributes to mass incarceration. While it is impossible to prove that instructions like those at issue in this Article would dissuade a defendant from testifying, there is evidence that criminal defendants who testify are more likely to win at trial, especially if they do not have a prior conviction for a similar offense.<sup>184</sup> With more favorable jury instructions, that number could rise. Americans who are worried about mass incarceration should want a fairer judicial system for defendants who elect to go to trial. And to the extent that our system of pleas is to blame for mass incarceration, trials in which a greater percentage of defendants prevail will encourage more defendants to go to trial and restore faith in criminal legal processes.<sup>185</sup> Criminal jury instructions that highlight the defendant's bias give defendants another reason not to testify at trial.

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<sup>179</sup> Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1378–80 (2018) (“For decades, our legal system has treated police officers as favored players, deferring to their judgments and reluctant to acknowledge their misconduct.”).

<sup>180</sup> See Steele & Thornburg, *supra* note 55, at 77 (1988).

<sup>181</sup> Moran, *supra* note 179, at 1378–79.

<sup>182</sup> Johnson, *supra* note 25, at 415.

<sup>183</sup> Levinson et al., *supra* note 177, at 197 (“The results of the study showed that, as in studies of the IAT in other populations, the judge participants displayed an implicit preference for White over Black. That is, participants were faster to group together photos of White faces with Good words compared to Black faces with Good words.”).

<sup>184</sup> See Bellin, *supra* note 146, at 403–15 (citing mock jury studies and a mock experiment showing similar results).

<sup>185</sup> See Sampsell-Jones, *supra* note 161, at 1335.

## V. COMPOUNDING THE PROBLEM

This problem with the jury instructions on credibility of defendants is further compounded by the fact that many jurors do not understand the instructions regarding the presumption of innocence. Jury instructions on the presumption of innocence do not ensure that the principles are enforced.<sup>186</sup>

Many, if not all, jurisdictions presume that jurors—who swear an oath to apply the law as it is stated to them—follow the jury instructions.<sup>187</sup> While the assumption that jurors can understand the instructions given to them is common, it is an inaccurate one. Jurors, of course, are lay people with varying levels of education and comprehension who tend not to have legal training.<sup>188</sup> Jurors have a difficult time understanding the legal instructions given to them. Since 1970, studies consistently show that “most instructions cannot be understood by most jurors.”<sup>189</sup> Despite 40 years of evidence, jury instructions and the manner in which they are delivered have changed very little.

The most likely reason for the juror comprehension problem is that legal instructions are written above the comprehension level of most jurors. The

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<sup>186</sup> While apparently every jurisdiction has standardized instructions on the principles of the presumption of innocence, the burden of proof, and the standard of proof beyond a reasonable doubt, the language within the instructions varies between jurisdictions. *Compare* 1 DAVID E. AARONSEN, MARYLAND CRIMINAL JURY INSTRUCTIONS AND COMMENTARY § 1.05 (3d ed. 2019) (explaining that “a reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs.”), with 1 BERGMAN, *supra* note 42, § 2.108 (“Reasonable doubt is the kind of doubt that would cause a reasonable person, after careful and thoughtful reflection, to hesitate to act in the graver or more important matters in life. However, it is not an imaginary doubt, nor a doubt based on speculation or guesswork; it is a doubt based on reason. The government is not required to prove guilt beyond all doubt, or to a mathematical or scientific certainty. Its burden is to prove guilt beyond a reasonable doubt.”), and MASSACHUSETTS SUPERIOR COURT CRIMINAL PRACTICE JURY INSTRUCTIONS § 1.2 (2020) (“What is proof beyond a reasonable doubt? The term is often used and probably pretty well understood, though it is not easily defined. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt, for everything in the lives of human beings is open to some possible or imaginary doubt. A charge is proved beyond a reasonable doubt if, after you have compared and considered all of the evidence, you have in your minds an abiding conviction, to a moral certainty, that the charge is true.”).

<sup>187</sup> *See, e.g.*, *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (finding that a death sentence should be upheld despite questions by the jury about legal instructions and where the judge responded to the questions using the same instruction); *Harris v. United States*, 602 A.2d 154, 165 (D.C. 1992) (en banc) (“The jury is presumed to have followed these instructions . . . and this court will not ‘upset a verdict by assuming the jury declined to do so.’”); *Hall v. United States*, 171 F.2d 347, 349–50 (D.C. Cir. 1948) (“[J]urors should be presumed to have understood and followed the court’s instructions.”); *Landay v. United States*, 108 F.2d 698, 706 (6th Cir. 1939); *Parmagini v. United States*, 42 F.2d 721, 724 (9th Cir. 1930).

<sup>188</sup> *See* Steele & Thornburg, *supra* note 55, at 100.

<sup>189</sup> *Id.* at 77.

average legal instruction is written at or above a twelfth-grade level,<sup>190</sup> which significantly surpasses the average reading comprehension level of most adult Americans.<sup>191</sup> Some even believe this figure to be declining.<sup>192</sup> Further, considering that most legal instructions are delivered orally, the fact that listening comprehension may be even lower than reading comprehension should be yet another cause for concern.<sup>193</sup> One legal observer has suggested that the jurors are like students studying for an exam when they are given legal instructions because they are learning topics previously foreign to them.<sup>194</sup> However, unlike students, jurors are never tested on their knowledge of any topic, limited in their ability to ask questions, and asked to absorb a large amount of information about complex topics in a relatively short period of time.<sup>195</sup>

Jurors' struggles with comprehending the law extend even to the core legal principles necessary to a fair criminal trial: the presumption of innocence and the standard of proof beyond a reasonable doubt. One study showed that 50% of prospective jurors believed that it was the defendant who had to prove his innocence.<sup>196</sup> That same study showed that 49.9% of people *who had previous jury experience* agreed that defendants had to prove their innocence.<sup>197</sup> A *Washington Post* poll showed that 31% of people believed that if a person had been charged with a crime, he was probably guilty of at least some crime.<sup>198</sup> In another poll, about 30% of people eligible for jury service in Miami and Atlanta thought that a person is probably guilty if the person is charged by the government and brought to trial.<sup>199</sup> Even worse, more than 40% of people eligible for jury service in those two cities expected a defendant to prove his innocence *despite a judge's instructions on the matter*.<sup>200</sup>

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<sup>190</sup> Rachel Small, Judith Platania & Brian Cutler, *Assessing the Readability of Capital Pattern Jury Instructions*, 25 JURY EXPERT 1, 1 (2013).

<sup>191</sup> *Id.*

<sup>192</sup> U.S. DEP'T. OF EDUC. NAT'L CTR. FOR EDUC. STAT., ADULT LITERACY IN THE UNITED STATES, (2019), <https://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2019179>.

<sup>193</sup> See Small et al., *supra* note 190, at 5 ("[I]t's likely that jurors would experience greater difficulty with listening comprehension compared to reading comprehension.").

<sup>194</sup> Dumas, *supra* note 50, at 714.

<sup>195</sup> See *id.* at 712, 714, 731.

<sup>196</sup> HEARST CORP., THE AMERICAN PUBLIC, THE MEDIA & THE JUDICIAL SYSTEM: A NATIONAL SURVEY ON PUBLIC AWARENESS AND PERSONAL EXPERIENCE 15 tbl.5D (1986).

<sup>197</sup> *Id.*

<sup>198</sup> Elissa Kraus, *Improving Voir Dire Procedures*, in JURYWORK SYSTEMATIC TECHNIQUES (2014) (citing Turner, Tabulation of Attitude Data on Criminal Justice Issues from a National Survey (June 1979) (unpublished manuscript)).

<sup>199</sup> *Id.* § 2.7 fig.2.1.

<sup>200</sup> *Id.* § 2.7 fig.2.2 (citing a National Jury Project poll from 2005).

There is also some evidence that jurors are unable to follow the instruction not to hold a defendant's silence against him. In a small study of jurors who served in capital murder trials, the jurors generally "believed that the defendant's silence inside the courtroom was a strong indication or an admission of guilt" after receiving instructions that a defendant's silence could not be considered adversely.<sup>201</sup> Defendants face jurors who are unable to understand a number of important legal principles. Courts should not undermine those principles further with instructions that unfairly highlight the factual issue of bias.

## VI. SOLUTIONS: NEW INSTRUCTIONS

Few criminal defendants testify. Studies show that approximately half of the criminally accused decline to testify at trial or motions to suppress.<sup>202</sup> There are many potential reasons for this—guilty defendants have little reason to testify truthfully at trial; their criminal convictions can be introduced as impeachment information in forty-seven states and the District of Columbia,<sup>203</sup> and defendants are not supposed to receive any negative consequences if they do not testify.<sup>204</sup> Testifying at trial and being subjected to cross-examination by a skilled prosecutor whose aim is to discredit is not a welcome prospect to many people. A trial could easily be a person's first instance of public speaking.<sup>205</sup>

Prosecutors may not comment on a defendant's silence and jurors are told not to hold it against him.<sup>206</sup> Unfavorable jury instructions may be another reason that defendants choose not to testify. While it is ultimately the decision of the individual accused of the crime whether or not to testify, the defendant does so with the benefit of advice from counsel who will likely inform him of the many reasons not to testify so that the defendant can make an intelligent decision.

Some scholars have argued for changing the legal rules to encourage more defendants to testify.<sup>207</sup> Fact finders and the community would benefit from being able to hear from defendants, especially those from marginalized communities. The accused's testimony could help the trier of fact understand the

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<sup>201</sup> Antonio & Arone, *supra* note 151, at 63.

<sup>202</sup> Bellin, *supra* note 164, at 852.

<sup>203</sup> See Roberts, *supra* note 21, at 1987.

<sup>204</sup> See *Griffin v. California*, 380 U.S. 609, 615 (1965) (Harlan, J., concurring).

<sup>205</sup> See Babcock, *supra* note 149, at 12.

<sup>206</sup> See *Carter v. Kentucky*, 450 U.S. 288, 300 (1981) (holding that judges must instruct jurors not to hold any adverse inferences against a defendant who does not testify).

<sup>207</sup> See, e.g., Bellin, *supra* note 164, at 897.

incident being considered.<sup>208</sup> Affording the defendant better circumstances under which he could testify might also restore some perception of fairness in the criminal legal system by offering an opportunity for a different factual narrative.<sup>209</sup> Hearing about an encounter between an officer and a citizen from the perspective of the citizen might appear to allow a different voice to be part of the criminal trial. Jurors might better understand what happened on the day in question as well as gain a new perspective on policing, or another community issues.

To encourage people on trial to testify and to strengthen the jurors' understanding of the presumption of innocence, I propose a new, standard "Defendant as Witness" instruction that could resolve these injustices:

*Mr. Defendant<sup>210</sup> never had any duty to testify. This is because, as I've told you, the burden of proof beyond a reasonable doubt remains on the government at all times and Mr. Defendant is presumed innocent. Mr. Defendant also has a right to testify on his own behalf. Mr. Defendant made the choice to testify in this case even though he did not have to. You should evaluate his testimony like that of any other witness except that in evaluating the testimony of Mr. Defendant, you should keep in mind that he is presumed innocent. You should not simply weigh his testimony against the government's witnesses. The standard of proof beyond a reasonable doubt is much higher than that. You should consider Mr. Defendant's testimony (and other defense witnesses) as reason to doubt the government's case.*

An instruction like the one suggested above would guard against diminishing jurors' understanding of the presumption of innocence and the government's burden of proof. Further, it could help reinforce the critical legal principles upon which our system is built. A jury instruction like this could also help encourage testimony from more accused people and result in fairer trials in which we could all have more confidence.

## CONCLUSION

While a new jury instruction will not completely solve the issue of silencing criminal defendants in their trials, it has the potential to make the criminal trials that do take place fairer. This improved instruction spotlights the presumption of innocence, the purported anchor of our criminal legal system. When an

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<sup>208</sup> *Id.* at 856.

<sup>209</sup> *See id.* at 857, 858.

<sup>210</sup> The word "Defendant" is a placeholder for the accused person's last name.

accused person is actually seen as presumed innocent by the judge presiding over the trial, the jurors in that trial are more likely to see it that way.

Allowing defendants to testify through an innocence frame requires changes to jury instructions. With a criminal legal system that incarcerates more people than any other place on earth, the goal should be more trials and more acquittals, not fewer. Abolition may be a worthy goal, but until we reach it, improving trials is worth doing now. If confidence is restored in trials, then more will take place. There is much to be undertaken in reforming our legal system and trials themselves should not be forgotten.

Americans have excelled at incarceration. Our system is perceived as unjust and overly harsh by many. If we want to create a truly fair system and animate the principles in which we say that we believe, we will examine the criminal trial itself. Jury instructions are meant to help jurors understand legal principles, not factual ones. If we want criminal trials to be fair, we must give new instructions when the accused person testifies. This could encourage more defendants to testify—perhaps even more trials if the system is viewed as fairer—and it will ensure that jurors enjoy a deeper understanding of the presumption of innocence and burden of proof.