

INTERESTED, BUT PRESUMED INNOCENT: RETHINKING INSTRUCTIONS ON THE CREDIBILITY OF TESTIFYING DEFENDANTS

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INTRODUCTION

On January 28, 2004, Prince Gaines was arrested in the Bronx, New York, after police pulled over the livery cab in which he was a passenger and found a gun near his seat.¹ At Mr. Gaines' subsequent jury trial in federal court for being a felon in possession of a firearm, there were three principal witnesses. An arresting officer and the livery cab driver testified for the prosecution,² and Mr. Gaines testified in his own defense.³ The officer testified about stopping the livery cab and discovering a gun in the backseat.⁴ The driver testified that he had asked the passenger preceding Mr. Gaines to check the backseat of the cab before exiting, and that he observed her doing so and finding nothing there.⁵ Mr. Gaines asserted that the gun was not his and that he had no knowledge of it being in the vehicle.⁶ It was clear by the time both sides rested that the outcome of the case depended on the jury's assessment of witness credibility.

In her instructions to the jury at the end of trial, the judge offered a caution about the testimony of the defendant, warning of his "deep personal interest in the result of his prosecution," which "creates a motive for false testimony."⁷ She instructed jurors that because of this interest, "the defendant's testimony should be scru-

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1. *United States v. Gaines*, 457 F.3d 238, 240 (2d Cir. 2006).

2. *Id.* at 241-42.

3. *Id.* at 242.

4. *Id.* at 241-42.

5. *Id.* at 242.

6. *Id.*

7. *Id.*

tinized and weighed with care.”⁸ In a case in which the accused’s account was central to his defense, the judge placed a significant weight on the scale against him by diminishing the value of his testimony.

A scenario similar to this one could play out in most courtrooms in America, as a majority of jurisdictions permit judges to highlight the interest of testifying defendants when instructing juries on weighing credibility.⁹ This practice is rooted in the common law rule prohibiting criminal defendants from testifying on their own behalf because of the fear that their interest in the result of trial would lead them to testify falsely.¹⁰ Though the Supreme Court first upheld an instruction highlighting a defendant’s interest in 1895, the practice has continued to provoke opposition because of the singular importance of the judge’s charge.¹¹ In this Note, I will trace the history of instructions highlighting the interest of testifying defendants and analyze arguments supporting and opposing their continued use.

In Part I of this Note, I will present background information on the defendant’s presumption of innocence and right to testify. I will then trace the history of instructions highlighting the interest of testifying defendants from the earliest cases in which they are discussed through the present, with a focus on Supreme Court and federal circuit court decisions.¹² In Parts II, III, and IV, I will ad-

8. *Id.*

9. See *infra* Part I.D (discussing split among federal circuits on instructions singling out testifying defendants). For a compilation of state court cases on the question, see C.S. Wheatley, Jr., Annotation, *Right to and Propriety of Instruction as to Credibility of Defendant in Criminal Case as a Witness*, 85 A.L.R. 523 (2004).

10. See *infra* notes 26, 54 and accompanying text.

11. See *infra* notes 193-94 and accompanying text.

12. I have chosen to focus on federal cases, despite the fact that they represent a small fraction of criminal litigation in the United States. The split among federal courts on this issue provides a helpful framework for analysis with a diverse, though manageable, set of decisions. Like federal courts, states have also split on the propriety of singling out a defendant’s testimony. Compare *People v. Farnsley*, 293 N.E.2d 600, 607 (Ill. 1973) (“It is settled that an instruction that directs the jury to consider the interest of the defendant in determination of his credibility as a witness is permissible.”), and *People v. Ochs*, 143 N.E.2d 388, 389 (N.Y. 1957) (“The jury may of course be told that they may consider, on the issue of credibility, defendant’s obvious interest in the outcome of the case . . .”), and *Commonwealth v. Dolny*, 342 A.2d 399, 404 (Pa. Super. Ct. 1975) (citing *Commonwealth v. Tauza*, 150 A. 649 (Pa. 1930) (holding that it is permissible for the judge to advise the jury to consider the defendant’s interest in the outcome of his case), with *State v. Bester*, 167 N.W.2d 705, 710 (Iowa 1969) (holding that a jury instruction “which singles out and comments upon the testimony of a defendant” constitutes reversible error), and *Sumrall v. State*, 343 So. 2d 481, 482 (Miss. 1977)

dress the substantive arguments raised by criminal defendants and proponents of these instructions. In Part II, I will evaluate past rationales for permitting instructions singling out defendants and explain why they are insufficient to justify use of the charge. I will particularly focus on the error of equating testifying defendants with other trial witnesses. Next, in Part III, I will address the contention that instructions singling out defendants for special scrutiny conflict with the presumption of innocence. Finally, in Part IV, I will consider the assertion that such instructions burden a defendant's constitutional right to testify at trial.¹³ I will also argue that to properly balance the concerns of the government and the accused, judges should offer general guidance on assessing witness credibility and then instruct jurors to consider the defendant's testimony on the same terms as that of other witnesses.

I. BACKGROUND

A. *The Constitutional Significance of the Presumption of Innocence*

A fundamental premise of our criminal justice system is that all defendants are presumed innocent.¹⁴ The Supreme Court has traced the roots of this presumption to the book of Deuteronomy, while noting its importance in ancient Rome and at common law in Britain and the United States.¹⁵ In more recent cases, the Court has identified the presumption of innocence as the principle underpinning key procedural rights at trial, such as the requirement that the prosecution prove each element of an offense beyond a

(noting Mississippi's long-standing disapproval of instructions singling out a testifying defendant's interest, and stating that, "The right accorded an accused to testify in his own defense would be of little value if the trial court itself might blight his testimony by instructing the jury that in deciding upon the credibility of the witness, it should consider the interest the witness has in the outcome of the case . . ."), and *State v. Boise*, 498 A.2d 495, 497 (Vt. 1985) (holding that instructions stating that a defendant's testimony should be considered in light of his interest in his trial "encroach" on the presumption of innocence and burden the right to testify). See generally Wheatley, *supra* note 9 (compiling cases on point). The constitutional arguments that I make for reforming practice in federal court also apply to states.

13. See *Portuondo v. Agard*, 529 U.S. 61, 80-81 (2000) (Ginsburg, J., dissenting).

14. See *Coffin v. United States*, 156 U.S. 432, 453 (1895). For longer discussions about the presumption of innocence, see Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 260-63 (2002); Ralph H. Kohlmann, *The Presumption of Innocence: Patching the Tattered Cloak After Maryland v. Craig*, 27 ST. MARY'S L.J. 389, 405-08 (1996).

15. See *Coffin*, 156 U.S. at 454-55.

reasonable doubt.¹⁶ While the Constitution does not explicitly mention the presumption, the Court has said that it is essential to protecting a defendant's due process rights.¹⁷

The Supreme Court has described the presumption of innocence "as an 'assumption' that is indulged in the absence of contrary evidence,"¹⁸ and as a "shorthand description" for the right to "remain inactive and secure" until the prosecution has proven its case.¹⁹ As scholars have noted, the presumption of innocence is not rooted in an empirical belief that all or even a majority of criminal defendants are innocent.²⁰ Rather, it is premised on "grounds of public policy relating to political morality and human dignity."²¹

16. See *In re Winship*, 397 U.S. 358, 363 (1970) (noting that the reasonable-doubt standard "provides concrete substance" for the presumption of innocence).

17. See *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986) ("To guarantee a defendant's due process rights under ordinary circumstances, our legal system has . . . placed primary reliance on the adversary system and the presumption of innocence."); *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (citing *Drope v. Missouri*, 420 U.S. 162, 172 (1975)) (Burger, C.J.) ("The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.").

18. *Taylor v. Kentucky*, 436 U.S. 478, 483-84 n.12 (1978) (citing *Carr v. State*, 192 Miss. 152, 156 (1941)) (describing the evolution of the Court's understanding of the presumption of innocence). This definition is distinct from the usual use of the term "presumption" in evidence law in reference to a mandatory inference drawn from facts introduced into evidence. See *id.*; 2 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 342 (5th ed. Supp. 2003) [hereinafter MCCORMICK] (explaining operation of presumptions, and noting that most scholars use the term to describe situations where establishment of one fact satisfies the introducing party's burden of production or persuasion with respect to another fact).

19. *Taylor*, 436 U.S. at 484 n.12 (citing 9 J. WIGMORE, EVIDENCE § 2511 (3d ed. 1940)).

20. See Kitai, *supra* note 14, at 267 ("The presumption of innocence is not compatible with the fact that many suspects, and the vast majority of defendants, are convicted at the end of criminal proceedings."). For statistics on conviction rates, see BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003, at 59, <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0304.pdf> (finding that for criminal cases processed in federal court between October 1, 2002 and September 30, 2003, 78% of defendants who exercised their right to a trial were convicted either by a jury or a bench trial). "Crime control" theorists note the many indications of guilt evident before trial and the counterfactual nature of the presumption of innocence in promoting a more efficient, less protective model of criminal justice. See *id.* at 267-68; William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 351-52 (1995) (discussing crime control models endorsed by Professor Herbert Packer and others).

21. Kitai, *supra* note 14, at 272; cf. Laufer, *supra* note 20, at 332-33 (discussing history of the presumption of innocence and its valuation of liberty over society's interest in securing convictions).

Blackstone expressed this sentiment when he proclaimed that “the law holds that it is better that ten guilty persons escape than that one innocent suffer.”²² The presumption of innocence is also a substantive right, prohibiting conduct at trial that raises an improper inference that a defendant is guilty²³ and entitling the defendant to a jury instruction stating that he is presumed innocent.²⁴ The presumption of innocence is “axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”²⁵

B. The Development of the Right of Criminal Defendants to Testify at Trial

At common law, a criminal defendant was barred from testifying at trial because of the belief that a party with an interest in the outcome of a dispute was not competent to testify under oath.²⁶ This view controlled in the United States until the mid-nineteenth century when states began enacting legislation granting defendants the right to testify.²⁷ By the end of the nineteenth century, every state but Georgia had passed such a statute.²⁸ In 1878, Congress approved legislation, now codified at 18 U.S.C. § 3481, providing that, “In trial of all persons charged with the commission of of-

22. *Coffin v. United States*, 156 U.S. 456 (1895) (internal citations omitted).

23. *See Estelle v. Williams*, 425 U.S. 501, 512 (1976) (holding that the accused may not be compelled to appear before the jury wearing prison garb); *see also Derden v. McNeel*, 938 F.2d 605, 611 (5th Cir. 1991) (finding that judge’s repeated admonishments and comments to defense counsel and accused “encouraged a predisposition of guilt by the jury” and denied the defendant a fair trial); *Norris v. Riskey*, 918 F.2d 828, 831-34 (9th Cir. 1990) (granting habeas corpus relief after spectators wore “Women Against Rape” buttons at trial for non-consensual sexual intercourse, thereby undermining the defendant’s presumption of innocence and violating his Confrontation Clause rights); *United States v. Thomas*, 757 F.2d 1359, 1363-65 (2d Cir. 1985) (permitting practice of empanelling anonymous juries, but limiting their use to exceptional situations and demanding that “reasonable precaution be taken” to mitigate their negative impact on the defendant’s presumption of innocence); *Laufer*, *supra* note 20, at 404 (“The presumption of innocence guards against extra-legal suspicion and unwarranted inference.”).

24. *See Taylor*, 436 U.S. at 490 (reversing conviction because of judge’s refusal to give a presumption of innocence instruction).

25. *Coffin*, 156 U.S. at 453. This proposition has been reiterated more recently in *Taylor*, 436 U.S. at 483, and *In re Winship*, 397 U.S. 358, 363 (1970).

26. *See Rock v. Arkansas*, 483 U.S. 44, 49 (1987); *Ferguson v. Georgia*, 365 U.S. 570, 573-74 (1961); 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.5(d) (1999).

27. *See Ferguson*, 365 U.S. at 577; LAFAVE ET AL., *supra* note 26, § 24.5(d).

28. *Ferguson*, 365 U.S. at 577 n.6 (listing date each state adopted its statute).

fenses against the United States . . . the person charged shall, at his own request, be a competent witness.”²⁹ The statute also states: “His failure to make such request shall not create any presumption against him.”³⁰

In an early case brought under the statute, the Supreme Court addressed why Congress eliminated the rule prohibiting defendants from testifying: “[The common law] rule, while affording great protection to the accused against unfounded accusation, in many cases deprived him from explaining circumstances tending to create conclusions of his guilt which he could readily have removed if permitted to testify. To relieve him from this embarrassment the law was passed.”³¹ The Court also acknowledged the great challenge involved in standing before a jury when accused of a crime, noting the difficulty of explaining “transactions of a suspicious character.”³²

In the decades after states and the federal government passed statutes permitting defendants to testify, the Supreme Court implied in several opinions that the privilege might also be a constitutional right.³³ Then, in 1987, the Court directly held in *Rock v. Arkansas* that criminal defendants have a constitutional right to testify.³⁴ The *Rock* Court found the entitlement grounded in several constitutional provisions. First, it held that due process guaranteed by the Fourteenth Amendment includes the right to offer testi-

29. Act of March 16, 1878, ch. 37, 20 Stat. 30.

30. 18 U.S.C. § 3481 (2000).

31. *Wilson v. United States*, 149 U.S. 60, 65-66 (1893).

32. *Id.* at 66.

33. *See, e.g., Faretta v. California*, 422 U.S. 806, 819 n.15 (1975) (“This Court has often recognized the constitutional stature of rights that, though not literally expressed in the document, are essential to due process of law in a fair adversary process. It is now accepted, for example, that an accused has a right . . . to testify on his own behalf.”); *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972) (“Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right.”); *Harris v. New York*, 401 U.S. 222, 225 (1971) (“Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.”); *In re Oliver*, 333 U.S. 257, 273 (1948) (“A person’s right to . . . an opportunity to be heard in his defense . . . [is] basic in our system of jurisprudence; and . . . include[s], as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.”). For detailed accounts of the evolution of the right to testify, see Louis M. Holscher, *The Legacy of Rock v. Arkansas: Protecting Criminal Defendants’ Rights to Testify in Their Own Behalf*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 223, 226-30 (1993); Timothy P. O’Neill, *Vindicating the Defendant’s Constitutional Right to Testify at Criminal Trial: The Need for an On-the-Record Waiver*, 51 U. PITT. L. REV. 809, 811-21 (1990).

34. *Rock v. Arkansas*, 483 U.S. 44, 49 (1987).

mony.³⁵ Second, it found that the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the opportunity to call “witnesses in his favor,” necessarily includes the right to testify himself.³⁶ Third, the Court concluded that the right to testify is “a necessary corollary to the Fifth Amendment’s guarantee against compelled testimony,” because a right to decline to testify implies that the opportunity existed in the first place.³⁷ While four Justices dissented in *Rock*, none questioned the existence of a constitutional right to testify.³⁸

C. *Early Cases Addressing the Propriety of Jury Instructions Singling Out the Interest of Testifying Defendants*

Shortly after Congress enacted a federal statute permitting criminal defendants to testify, the Supreme Court considered an appeal brought by a defendant who had exercised the right.³⁹ In *Hicks v. United States*, the defendant was convicted of aiding and abetting murder based only on the testimony of a witness who claimed to have heard his words from more than 100 yards away.⁴⁰ After discussing the judge’s erroneous charge on accessorial liability, which it found sufficient to warrant reversal,⁴¹ the Court addressed the trial judge’s guidance to the jury on assessing the credibility of the defendant’s testimony.⁴² The judge had instructed in part:

He is in an attitude, of course, where any of us, if so situated, would have a large interest in the result of the case, the largest, perhaps, we could have under any circumstances in life, and such an interest, consequently, as might cause us to make statements to influence a jury in passing upon our case that would not be governed by the truth; we might be led away from the truth because of our desire. Therefore it is but right, and it is your duty to view the statements of such a witness in the light of his attitude and in the light of other evidence.⁴³

35. *Id.* at 51.

36. *Id.* at 52.

37. *Id.*

38. The dissent directed its attack at the Court’s conclusion that the right to testify also includes the privilege to testify after hypnosis, the specific question presented in the case. *Id.* at 62-65 (Rehnquist, C.J., dissenting).

39. *Hicks v. United States*, 150 U.S. 442, 446 (1893).

40. *Id.* at 452.

41. *Id.* at 447-50, 453.

42. *Id.* at 450-52.

43. *Id.* at 451.

While conceding that this statement on credibility alone might not have necessitated reversal, the Court expressed concern with the instruction:

[I]t must be remembered that men may testify truthfully, although their lives hang in the balance, and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word the jury, properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability.⁴⁴

The Court concluded by admonishing lower courts that “[t]he policy of this enactment should not be defeated by hostile comments of the trial judge, whose duty it is to give reasonable effect and force to the law.”⁴⁵

Writing in dissent, Justice Brewer argued that the instruction about the defendant’s testimony was proper.⁴⁶ He noted that while the statute permits defendants to testify, it does not provide that they should be entitled to greater deference than other witnesses.⁴⁷ Given that defendants may request instructions highlighting the interest of accomplices and informants, he argued that justice requires subjecting their testimony to similar warnings.⁴⁸

Two years after writing the dissent in *Hicks*, Justice Brewer wrote for the Court’s majority in *Reagan v. United States*, holding that it is permissible for a judge to highlight a testifying defendant’s interest in the outcome of his case.⁴⁹ In *Reagan*, the defendant was charged with smuggling cattle from Mexico, then a misdemeanor offense.⁵⁰ A primary issue on appeal was the potentially skewing effect of the judge’s instruction to the jury that it must determine “how far, or to what extent, if at all, [the defendant’s testimony] is

44. *Id.* at 452.

45. *Id.*

46. *Id.* at 459 (Brewer, J., dissenting).

47. *Id.* (Brewer, J., dissenting).

48. *Id.* at 460 (Brewer, J., dissenting).

49. 157 U.S. 301, 311 (1895). On the same day that the Court decided *Reagan*, Justice Brewer approved a second instruction on the weight to be given a defendant’s testimony in *Johnson v. United States*, 157 U.S. 320, 325-26 (1895). In *Johnson*, the judge did not single out the interest of the defendant in his charge. *Id.* Rather, after offering the jury broad guidance on factors to weigh for all witnesses, including personal interest, the judge instructed them to consider if the defendant’s testimony was “corroborated substantially and reliably by the proven facts.” *Id.*

50. 157 U.S. at 302-04.

worthy of credit,” in light of “[t]he deep personal interest which he may have in the result of the suit,” which makes “the temptation . . . strong to color, pervert, or withhold the facts.”⁵¹

Justice Brewer began his analysis by asserting that when a defendant testifies, “his credibility may be impeached, his testimony may be assailed, and . . . weighed as that of any other witness.”⁵² He then explained:

It is within the province of the court to call the attention of the jury to any matters which legitimately affect [the defendant’s] testimony and his credibility. This does not imply that the court may arbitrarily single out his testimony and denounce it as false. The fact that he is a defendant does not condemn him as unworthy of belief, but at the same time it creates an interest greater than that of any other witness, and to that extent affects the question of credibility. It is therefore a matter properly to be suggested by the court to the jury.⁵³

Justice Brewer noted that instructions highlighting a defendant’s interest reflect the common law prohibition on defendants testifying,⁵⁴ and then cited several state court decisions approving such language.⁵⁵ He also cited the Court’s recent holding in *Hicks*, observing that while that decision precludes a judge from charging “the jury directly or indirectly that the defendant is to be disbelieved because he is a defendant,” it permits commenting on his interest.⁵⁶ He concluded by reiterating the point he raised in his dissent in *Hicks*,⁵⁷ that justice demands equal treatment of testifying defendants and government witnesses, with similar jury instructions on the interests of each.⁵⁸

Justice Brewer’s opinion in *Reagan* essentially mirrors his dissent in *Hicks*, as he gives narrow effect to the *Hicks* Court’s discomfort with instructions singling out defendants’ credibility. While this reading of *Hicks* is somewhat surprising given that the language in the two instructions was not substantially different,⁵⁹ *Reagan* was

51. *Id.* at 304.

52. *Id.* at 305. Justice Brewer also stated, “[a]ssuming the position of a witness, [the defendant] is entitled to all its rights and protections, and is subject to all its criticisms and burdens.” *Id.*

53. *Id.*

54. *Id.* at 306.

55. *Id.* at 306-09.

56. *Id.* at 309-10.

57. 150 U.S. 442, 460 (1893) (Brewer, J., dissenting).

58. *Reagan*, 157 U.S. at 310-11.

59. See *id.* at 304 (language of instruction in *Reagan*); *Hicks v. United States*, 150 U.S. 442, 450-52 (1893) (language of instruction in *Hicks*).

nonetheless a unanimous opinion that remains the Court's most thorough analysis of the propriety of commenting on a testifying defendant's interest.

Despite its decision in *Reagan*, the Court reversed a conviction later the same year because of a prejudicial jury instruction in *Allison v. United States*.⁶⁰ Rather than cite its recent holding in *Reagan*, the *Allison* Court reiterated its message in *Hicks* that defendants may testify truthfully and judges should avoid instructions infringing on the statutory right to testify.⁶¹ Writing for the Court, Chief Justice Fuller first found that a portion of the trial judge's instruction improperly charged the jury that it was not entitled to find for the defendant on the basis of his testimony, a misstatement of the law.⁶² Chief Justice Fuller then expressed concern with a portion of the charge "commanding [the jury] to look at a man's statements in the light of the interest that he has in the case."⁶³ The Chief Justice explained: "As a witness, a defendant is no more to be visited with condemnation than he is to be clothed with sanctity, simply because he is under accusation, and there is no presumption of law in favor of or against his truthfulness."⁶⁴ The Chief Justice's reliance on *Hicks* reflected the Court's ongoing concern with instructions impugning defendants' testimony, even after *Reagan*.⁶⁵

60. 160 U.S. 203 (1895).

61. *Id.* at 207 (citing *Hicks*, 150 U.S. at 452). Chief Justice Fuller stressed, "it was for the jury to test the credibility of the defendant as a witness, giving his testimony such weight under all the circumstances as they thought it entitled to, as in the instance of other witnesses, uninfluenced by instructions which might operate to strip him of the competency accorded by the law." *Id.*

62. *Id.* at 209-10.

63. *Id.* at 210.

64. *Id.*

65. One year after *Reagan* and *Allison*, the Court again reversed a conviction because of an improper charge on the defendant's credibility, which crossed a line into an area where "reason is disturbed, passions excited, and prejudices are necessarily called into play." *Hickory v. United States*, 160 U.S. 408, 425 (1896). The trial judge in *Hickory* insinuated to the jury that the defendant's testimony could be "seduced by bribery into perjury" and instructed that:

[T]his defendant . . . stands before you as an interested party; the party who has in this case the largest interest a man can have in any case upon earth. While you are not to disbelieve his evidence because of that alone, if you are to do justice, if you are . . . not to be cruel to the country, and to the people of the country who are entitled to legal protection, you are to weigh these facts, and see whether they harmonize with [the murder victim's] statement when viewed by the light of your intelligence . . .

Id. at 424.

D. Treatment of Instructions Singling Out Defendants' Testimony in the Circuit Courts

1. Circuits That Have Granted Judges Broad Latitude to Comment on a Defendant's Interest

In the time since the initial Supreme Court decisions on instructions highlighting the interest of testifying defendants, federal courts have considered numerous appeals on the issue.⁶⁶ Several circuits have approved instructions singling out testifying defendants with little or no discussion.⁶⁷ When those circuits did justify

66. While most circuits have provided clear guidance about the propriety of singling out a defendant's testimony, some have not. The Third Circuit, for example, has not commented explicitly on highlighting a defendant's interest in his case. Recently, however, the Circuit published a pattern criminal jury instruction in which it recommended a charge that does not single out the defendant's interest. COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS THIRD CIRCUIT, MODEL CRIMINAL JURY INSTRUCTIONS, ¶ 4.28 (2006), <http://www.ca3.uscourts.gov/modeljuryinstructions.htm> [hereinafter THIRD CIRCUIT COMMITTEE] ("In a criminal case, the defendant has a constitutional right not to testify. However, if (he)(she) chooses to testify . . . [y]ou should examine and evaluate (his)(her) testimony just as you would the testimony of any witness."). The Comment to the instruction notes that the Third Circuit has not addressed the instruction in its caselaw. *Id.* District courts in the Third Circuit have approved instructions singling out the testifying defendant's interest. *See, e.g.,* *United States v. Morris*, 308 F. Supp. 1348, 1351 (E.D. Pa. 1970). In one case, an Eastern District of Pennsylvania judge offered a relatively benign instruction highlighting the defendant's interest, which the Third Circuit approved without comment. *See United States v. Jasinski*, Crim. No. 89-224-1, 1989 WL 156623, at *5 (E.D. Pa. 1989), *aff'd*, 908 F.2d 962 (3d Cir. 1990) (unpublished table decision).

The Tenth Circuit also has no clear rule on the propriety of highlighting a testifying defendant's interest. However, like the Third Circuit, it has published a model charge instructing jurors to treat the defendant's testimony like that of any other witness. CRIMINAL PATTERN JURY INSTRUCTION COMMITTEE OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, CRIMINAL PATTERN JURY INSTRUCTIONS ¶ 1.08 (2005), <http://www.ck10.uscourts.gov/downloads/pji10-cir.pdf> [hereinafter TENTH CIRCUIT COMMITTEE] ("The testimony of the defendant should be weighed and his credibility evaluated in the same way as that of any other witness.").

67. *See United States v. Shoetan*, No. 95-5660, 1997 WL 107456, at *3 (4th Cir. 1997) (per curiam) (citing *United States v. Figurski*, 545 F.2d 389, 392 (4th Cir. 1976)) (dispensing with the appellant's challenge to an instruction highlighting his interest in one brief paragraph); *Figurski*, 545 F.2d at 392 ("It was not improper for the district court, in instructing the jury about defendant's credibility as a witness, to point out defendant's vital interest in the outcome of the case . . .").

The Fifth Circuit established its rule in *Nelson v. United States*, where the judge had instructed the jury that, "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." 415 F.2d 483, 487 (5th Cir. 1969). The Circuit simply noted, "this instruction has been approved numerous times," citing *Reagan* and

their decisions, they perfunctorily cited *Reagan* as controlling authority without meaningful independent consideration of the defendants' concerns.⁶⁸

Among circuits granting judges significant latitude to comment on the interest of testifying defendants, the D.C. Circuit has been most thorough in its analysis. That circuit, which has held that it is within the discretion of the trial judge to highlight a testifying defendant's interest,⁶⁹ has acknowledged other courts' dissatisfaction with the practice and declined to endorse it

decisions from other circuits. *Id.* (internal citations omitted). *See also* United States v. Walker, 710 F.2d 1062, 1070 (5th Cir. 1983) (approving instruction identical to that in *Nelson*); United States v. Jones, 587 F.2d 802, 806 (5th Cir. 1979) (per curiam) (citing United States v. Wiggins, 566 F.2d 944, 945 (5th Cir. 1978), and noting that "appellant has not made any novel arguments that would allow us to deviate from this precedent"); United States v. Palmere, 578 F.2d 105, 108 (5th Cir. 1978) (per curiam) (citing *Nelson* in declining to follow other circuits that prohibit interested witness instructions); *Wiggins*, 566 F.2d at 945 (per curiam) (approving instruction highlighting the defendant's interest despite contrary recommendations in the Seventh and Eighth Circuits). Because the Eleventh Circuit has not addressed the propriety of singling out a testifying defendant's interest, it is bound by the Fifth Circuit's decisions. *See* Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (holding that all Fifth Circuit opinions handed down prior to September 30, 1981 are binding precedent in the Eleventh Circuit).

The Ninth Circuit has repeatedly approved an instruction highlighting "the interest which [the] defendant may have in the case, his hopes and fears, and what he has to gain or lose as a result of [its] verdict." *See* United States v. Eskridge, 456 F.2d 1202, 1205 (9th Cir. 1972) (citing *Louie v. United States*, 426 F.2d 1398, 1402 (9th Cir. 1970)); *see also* Papadakis v. United States, 208 F.2d 945, 954 (9th Cir. 1953) (citing *Fredrick v. United States*, 163 F.2d 536, 550 (9th Cir. 1947); *Marino v. United States*, 91 F.2d 691, 699 (9th Cir. 1937); *Schulze v. United States*, 259 F. 189, 191-92 (9th Cir. 1919)). Despite its general rule, the Ninth Circuit has not always enthusiastically permitted the instruction. In 1995, the Circuit considered two parts of an instruction, the first of which noted, "[a] defendant who wishes to testify is a competent witness and the defendant's testimony is to be judged in the same way as that of any other witness." *United States v. Nunez-Carreon*, 47 F.3d 995, 997-98 (9th Cir. 1995). The district court then charged the jury that it may consider the defendant's "hopes and fears." *Id.* at 998. The Circuit noted that "[b]oth paragraphs of the instruction might perhaps better have been omitted" before concluding that the lower court had not abused its discretion in including the second part of the instruction, because the defendant had requested the first part and the objectionable language was approved in *Louie*. *Id.* (citing *Louie*, 426 F.2d at 1402).

68. *See, e.g., Nelson*, 415 F.2d at 487; *Marino*, 91 F.2d at 699; *Schulze*, 259 F. at 191-92.

69. *See* United States v. Hill, 470 F.2d 361, 363 (D.C. Cir. 1972); United States v. Jones, 459 F.2d 1225, 1226 (D.C. Cir. 1972) (per curiam). For more recent cases, see *United States v. Lawrence*, No. 92-3008, 1993 WL 150657, at *1 (D.C. Cir. 1993) (per curiam), and *United States v. Smith*, No. 92-3055, 1996 WL 397489, at *1 (D.C. Cir. 1996) (per curiam), both citing *Jones*, 459 F.2d at 1226-27, and *Hill*, 470

wholeheartedly.⁷⁰ In a pair of opinions handed down in 1972, the Circuit addressed defendants' concerns with the instruction.⁷¹

In the first case, the D.C. Circuit considered an instruction noting the defendant's "vital interest" in the outcome of his case.⁷² On appeal, the defendant alleged that this instruction intruded on the jury's role as factfinder.⁷³ The Circuit rejected this criticism, finding that the instruction "clearly left the credibility of the witnesses and the determination of the essential facts to the untrammelled judgment of the jury."⁷⁴ The panel worried that accepting the defendant's argument would require prohibiting judges from commenting on evidence or witness credibility in contravention of existing Circuit precedent.⁷⁵ The court concluded that such a step

F.2d at 363-65, while approving instructions highlighting the defendant's "vital interest" in the outcome of his trial.

70. See *Hill*, 470 F.2d at 363 (citing *Taylor v. United States*, 390 F.2d 278, 285 (8th Cir. 1968); *United States v. Gaither*, 440 F.2d 262, 264 (D.C. Cir. 1971)) (other citations omitted).

71. See *id.* at 363-65; *Jones*, 459 F.2d at 1226-27.

72. *Jones*, 459 F.2d at 1226.

73. See *Jones*, 459 F.2d at 1226-27 (citing *State v. Bester*, 167 N.W.2d 705 (Iowa 1969)).

74. *Id.* at 1226.

75. *Id.* at 1227. The defendant in *Jones* cited Iowa's prohibition on judges commenting on evidence presented at trial. *Id.* at 1226-27 (citing *State v. Bester*, 167 N.W.2d 705 (Iowa 1969)). Other states have similar statutes and case law precluding judges from summing up or commenting on evidence. See, e.g., *State v. Nomura*, 903 P.2d 718, 721-22 (Haw. Ct. App. 1995) (citing *State v. Young*, 795 P.2d 285, 292 (Haw. Ct. App. 1990)) (noting that Hawaii Rule of Evidence 1102 "precludes the court from commenting upon the evidence"); *Sumrall v. State*, 343 So. 2d 481, 482 (Miss. 1977) (citing Miss. CODE ANN. § 99-17-35) (discussing Mississippi law preventing judge from summing up or commenting on testimony or evidence at trial). These rules differ significantly from the practice in federal court, where judges have broader license to comment on evidence. See *Quercia v. United States*, 289 U.S. 466, 469 (1933) ("In a trial by jury in a federal court . . . [i]t is within [the trial judge's] province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence"); *Guam v. McGravey*, 14 F.3d 1344, 1348 (9th Cir. 1994) (citing *United States v. Sanchez-Lopez*, 879 F.2d 541, 553 (9th Cir.1989)) ("[T]he federal rule [is] that the trial court has discretion to comment on evidence as long as it makes clear that the jury must ultimately decide all questions of fact for itself."). For a broad compilation of state and federal cases on this issue, see R.P.D., Annotation, *Scope and Application of Rule Which Permits Judge in Criminal Case to Comment on Weight or Significance of Evidence*, 113 A.L.R. 1308 (2004).

In this Note, I do not advance the argument that an instruction highlighting a defendant's interest violates the Sixth Amendment right to a jury trial. While the Court has observed that "[a] fundamental premise of our criminal justice system is that 'the jury is the lie detector,'" *United States v. Scheffer*, 523 U.S. 303, 312-13 (1998) (emphasis in original) (citations omitted), and interested-witness instruc-

was unnecessary, given the Circuit's and Supreme Court's prior approval of similar instructions.⁷⁶

In the other D.C. Circuit opinion, the panel first noted that courts had approved "pointed" comments highlighting the interest of testifying defendants in the past.⁷⁷ The court then addressed three criticisms of such instructions: first, that the charge is unnecessary; second, that it violates the defendant's statutory right to be a witness on his own behalf; and third, "that it trespasses on the presumption of innocence."⁷⁸ While the court acknowledged that the instruction "merely states an obvious fact," it held that highlighting the defendant's interest was within the trial judge's power to guide the jury by calling attention to particular witnesses.⁷⁹ The court explained that because Congress expressed no intent to limit that judicial prerogative when it granted defendants the right to testify, the instruction did not infringe on the statutory privilege.⁸⁰ Finally, the court found that the instruction did not conflict with the defendant's presumption of innocence, because "it merely treats his evidence the same as that of any other witness with a very special interest."⁸¹

2. Circuits Prohibiting Judges from Singling Out a Defendant's Interest

In contrast to circuits that have given judges broad discretion to highlight the interest of testifying defendants, the First, Second, and Eighth Circuits have exercised their supervisory power and limited the practice.⁸² In 1968, in *United States v. Taylor*, the Eighth

tions intrude on this function, they are not comparable to a directed verdict for the government, *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) (citations omitted), nor do they cast doubt on the jury's decision like a flawed reasonable doubt instruction, *id.* at 278, or a failure to have the jury find an element of an offense, *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (citations omitted). Furthermore, the Court already requires judges commenting on evidence to make clear to jurors that it is ultimately for them to make factual determinations. See *Quercia*, 289 U.S. at 470. Rather than contend that the instruction decides the case for the jury, I will argue that it impermissibly prejudices the defendant when the jury makes its decision.

76. *Jones*, 459 F.2d at 1227 (footnote omitted).

77. See *United States v. Hill*, 470 F.2d at 363-64 (citing *Reagan v. United States*, 157 U.S. 301 (1895), and cases from the Second, Fifth, and Ninth Circuits).

78. *Id.* at 364-65.

79. *Id.* at 365 (noting that a defendant's interest is even greater than that of informants and accomplices, and that properly evaluating his credibility is critical).

80. *Id.*

81. *Id.*

82. See *United States v. Gaines*, 457 F.3d 238, 240 (2d Cir. 2006); *United States v. Dwyer*, 843 F.2d 60, 62-63 (1st Cir. 1988); *United States v. Bear Killer*, 534 F.2d 1253, 1260 (8th Cir. 1976).

Circuit first expressed concern with an instruction singling out the defendant's testimony.⁸³ In *Taylor*, the district court advised the jury to treat the defendant's testimony like that of any other witness, before adding "[t]hen, again, it is for you to remember, you have a perfect right to do so, the very grave interest a defendant has in the case."⁸⁴ On appeal, then-Judge Blackmun found that the instruction as a whole fairly presented the case to the jury and did not violate the defendant's constitutional rights.⁸⁵ He warned, however, that "the trial court must protect the right a defendant has to take the stand and to keep the exercise of that right meaningful."⁸⁶ After acknowledging that the Circuit and Supreme Court had approved instructions singling out defendants in the past, he stated: "We would prefer that the defendant not be singled out. His interest is obvious to the jury."⁸⁷

In two cases after *Taylor*, the Eighth Circuit continued urging district courts to avoid singling out the testifying defendant's interest, though it found the instructions in each case to be harmless error.⁸⁸ Concerned that district courts had read its failure to reverse as a sign of approval, the Circuit issued a warning in 1976 that it would "declare, as a *per se* rule, that the error in giving the instruction can never be considered harmless" if judges continued to "'single out' the accused's testimony."⁸⁹ The Circuit has since incorporated its prohibition on singling out the interest of testifying defendants into its model jury instruction.⁹⁰

83. See *United States v. Taylor*, 390 F.2d 278, 284 (8th Cir. 1968) (Blackmun, J.).

84. *Id.* at 284 n.5.

85. *Id.* at 284.

86. *Id.*

87. *Id.* at 285.

88. *United States v. Brown*, 453 F.2d 101, 107 (8th Cir. 1971); *United States v. Long*, 449 F.2d 288, 298-99 (8th Cir. 1971).

89. *United States v. Bear Killer*, 534 F.2d 1253, 1260 (8th Cir. 1976). The trial judge had instructed in part, "In determining the degree of credibility that should be accorded by you to the defendant's testimony, you're entitled to take into the consideration the fact that he is the defendant and the personal interest he has in the result of your verdict." *Id.*

90. See JUDICIAL COMMITTEE ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT ¶ 3.04 (2006), http://www.juryinstructions.ca8.uscourts.gov/crim_manual_2006.pdf [hereinafter EIGHTH CIRCUIT COMMITTEE] ("Some instructions specifically address the credibility of a defendant in terms of his interest in the case . . . This circuit has repeatedly criticized the use of such an instruction because it has the effect of singling out the defendant in the jury charge.").

Following the lead of the Eighth Circuit, the First Circuit in 1969 expressed misgivings with an instruction stating that a defendant's "interest is usually greater than that of any other witness."⁹¹ In 1986, the First Circuit again considered a case where the judge had emphasized the defendant's interest, though the defendant had not properly objected at trial.⁹² While ultimately affirming the defendant's conviction, the court reiterated its concern that instructions singling out defendants cause substantial prejudice.⁹³ The court worried that highlighting the defendant's interest "might serve to suggest that the court has a message—don't trust this defendant."⁹⁴

In 1988, the First Circuit again examined an instruction singling out the defendant's interest.⁹⁵ The court began its discussion by acknowledging that the instruction was technically accurate, and that the Second Circuit had approved similar language.⁹⁶ It then noted, however, that the trial court had merely stated "what, to even the most unsophisticated, must be obvious, that the defendant has an interest in the outcome of the case."⁹⁷ It observed: "Beginning with 'Obviously' . . . it was, in terms, emphasizing the obvious. A jury might well think that the court had a purpose in stating the obvious . . . namely, a purpose unfavorable to the defendant."⁹⁸ The court found that the charge served no "useful purpose or need" and that the Government never should have requested it given Circuit precedent.⁹⁹ The court deemed the instruction particularly harmful because the defendant was the only witness for his side.¹⁰⁰ After subjecting the charge and other elements of the instruction to harmless error review, the court held that the cumulative impact of the errors warranted reversal.¹⁰¹

91. See *Carrigan v. United States*, 405 F.2d 1197, 1198 (1st Cir. 1969) (citing *Taylor v. United States*, 390 F.2d 278, 285 (8th Cir. 1968)).

92. *United States v. Rollins*, 784 F.2d 35, 36-37 (1st Cir. 1986).

93. *Id.* at 37.

94. *Id.* at 38.

95. *United States v. Dwyer*, 843 F.2d 60, 62 (1st Cir. 1988). The judge had instructed in part: "Obviously a defendant has a great personal interest in the result of his prosecution. The interest gives the defendant a strong motive to lie, to protect himself. In appraising his credibility, you may take that fact into consideration" *Id.*

96. *Id.* at 63 (citing *United States v. Gleason*, 616 F.2d 2, 15 (2d Cir. 1979)).

97. *Id.* at 63.

98. *Id.*

99. *Id.* (citations omitted).

100. *Id.* at 64.

101. *Id.* at 64-65. Very recently, the First Circuit approved an instruction stating, "[i]n this case, the defendant decided to testify. You should examine and eval-

The Second Circuit recently endorsed the First and Eighth Circuits' approach.¹⁰² In *United States v. Gaines*, the case discussed in the introduction to this Note, the Second Circuit reversed the defendant's conviction after concluding that the interested witness instruction highlighting his testimony constituted reversible error.¹⁰³ The court's primary concern was with the portion of the trial judge's instruction warning that the defendant's "interest in the outcome of the case creates a motive for false testimony."¹⁰⁴ The panel held that a judge undermines the presumption of innocence by instructing jurors that a defendant has a motive to lie, because an innocent defendant has a motive to testify truthfully.¹⁰⁵ The Second Circuit also expressed misgivings with the portion of the judge's charge asserting that the defendant had a "deep personal interest" in the outcome of the trial.¹⁰⁶ The court cited the First Circuit's concern that by stressing the obvious, a judge conveys a negative message about the defendant.¹⁰⁷ The panel suggested that district courts use the model instruction recommended by the Seventh Circuit, which includes an admonition to jurors to "judge the defendant's testimony in the same way that you judge the testimony of any other witness."¹⁰⁸

The Second Circuit's opinion in *Gaines* is noteworthy because in prior cases, the Circuit had approved some particularly strong language.¹⁰⁹ In *Gaines*, the Second Circuit did not explicitly over-

uate his testimony just as you would the testimony of any witness with an interest in the outcome of the case." *United States v. Gonsalves*, 435 F.3d 64, 72 (1st Cir. 2006). While explicitly reaffirming the rule established in *Dwyer* and *Rollins* restricting judges' freedom to comment on defendants' testimony, the First Circuit declined to extend those cases after finding the instruction less prejudicial than those it had condemned in the past and within the permissible bounds set by the Supreme Court. *Id.* (citing *Portuondo v. Agard*, 529 U.S. 61, 71 (2000); *Reagan v. United States*, 157 U.S. 301, 305-06 (1895)).

102. *United States v. Gaines*, 457 F.3d 238, 240 (2d Cir. 2006).

103. *Id.*

104. *Id.* at 246.

105. *Id.*

106. *Id.* at 247.

107. *Id.* at 247-48 (citing *Carrigan v. United States*, 405 F.2d 1197, 1198 (1st Cir. 1969)).

108. *Id.* at 248 & n.6, 249 & nn. 8-9.

109. See, e.g., *United States v. Gleason*, 616 F.2d 2, 15 (2d Cir. 1979) (approving instruction stating that a defendant "has a deep personal interest in the result of this prosecution" and "the greatest kind of stake in its outcome" which "creates, at least potentially, a motive for false testimony" and "is of a character possessed by no other witness"); *United States v. Tolkow*, 532 F.2d 853, 859 n.3 (2d Cir. 1976) ("Interest creates a motive for false testimony; the greater the interest the stronger the motive, and a defendant's interest in the result of his trial is of a character

rule those earlier cases, but instead carefully distinguished them in a footnote.¹¹⁰ Nevertheless, the opinion clearly prohibits district court judges from using unnecessarily prejudicial language when commenting on the defendant's testimony.

While the First, Second, and Eighth Circuits have taken the strongest positions against instructions singling out a defendant's interest, they are not alone in their criticism. The Sixth and Seventh Circuits have also suggested that the better practice is to avoid singling out testifying defendants, though they have declined to prohibit judges in their jurisdictions from giving such instructions.¹¹¹

E. Portuondo v. Agard: Reagan Resurfaces a Century Later

More than a century after deciding *Reagan*, the Supreme Court revisited that decision in *Portuondo v. Agard*.¹¹² *Portuondo* addressed

possessed by no other witness. In appraising his credibility, you may take that fact into consideration. . . ."). The Circuit had demanded, however, that judges include "balancing language" noting that interested witnesses may still testify truthfully. *See, e.g., Gleason*, 616 F.2d at 15 ("In short, the court should not emphasize the suspect nature of the testimony of certain witnesses without pointing out that they may be believed."); *United States v. Martin*, 525 F.2d 703, 706 (2d Cir. 1975) (noting with approval that trial court tempered its instruction on credibility by explaining that a defendant's interest is not incompatible with him telling the truth). The *Gaines* court found even this balancing language unacceptable, noting that "the practical effect of the 'balancing' language our cases have endorsed is a message more akin to 'even guilty people can occasionally admit it' than to 'even defendants may truthfully deny the accusations.'" 457 F.3d 238, 247 (2d Cir. 2006).

110. The Circuit distinguished its earlier decisions by identifying four factors in *Gaines* that were not all present in any of its other cases. 457 F.3d at 250 n.10. Those factors are: "(1) a preserved challenge to a charge that (2) the defendant has a deep personal interest giving rise to (3) a motive to lie and a resulting need to (4) carefully scrutinize the defendant's testimony." *Id.*

111. *See United States v. Johnson*, 756 F.2d 453, 455 (6th Cir. 1985) ("We agree with counsel for the defendant that the better practice is for a district court not to single out the testimony of a defendant in a criminal trial by advising the jury of the fairly obvious fact that the defendant has an overwhelming interest in the outcome of the trial. However, we do not believe this single comment constituted reversible error"); *see also United States v. Crovedi*, 467 F.2d 1032, 1036 (7th Cir. 1972) ("Arguably it may be better practice, as has been suggested, not to treat separately the interest of a defendant who testifies We are not persuaded, however, that the instruction given was prejudicial.") (footnote omitted); *United States v. Saletko*, 452 F.2d 193, 197-98 (7th Cir. 1972) (agreeing with the Eighth Circuit that the suggestion "that the defendant not be singled out . . . is a sounder procedure" though finding that the "self-interest instruction . . . was not so harmful to the defendant in this case as to warrant reversal").

112. 529 U.S. 61 (2000).

the constitutionality of a prosecutor arguing in her closing statement that the defendant abused his presence at trial by tailoring his testimony to make it consistent with the accounts of earlier witnesses.¹¹³ A divided Second Circuit panel found the comment reversible error.¹¹⁴

In contrast to *Reagan*, which involved interpretation of the federal statute granting defendants the right to testify,¹¹⁵ *Portuondo* involved constitutional claims.¹¹⁶ Also unlike *Reagan*, *Portuondo* involved comments by the prosecutor, rather than the judge.¹¹⁷ Despite these differences, Justice Scalia relied on the Court's decision in *Reagan* in his majority opinion in the *Portuondo* case, subjecting *Reagan* to the most extensive discussion it has enjoyed since it was decided.¹¹⁸

Justice Scalia's opinion reversed the Second Circuit¹¹⁹ and attacked the lower court's decision to extend the logic of *Griffin v. California*, in which the Court prohibited judges and prosecutors from commenting unfavorably on a defendant's refusal to testify,¹²⁰ to the prosecutor's statement in *Portuondo*.¹²¹ Justice Scalia relied

113. *Id.* at 63. The prosecutor stated: "[U]nlike all the other witnesses in this case the defendant . . . gets to sit here and listen to the testimony of all the other witnesses before he testifies That gives you a big advantage, doesn't it He's a smart man He used everything to his advantage." *Id.* at 64.

114. *Agard v. Portuondo*, 117 F.3d 696, 709, 712, 714-15 (2d Cir. 1997) (finding that the prosecutor's comment violated the defendant's Sixth Amendment Confrontation Clause rights, constitutional right to testify, and Fourteenth Amendment due process rights).

115. 157 U.S. 301, 304-05 (1895) (initiating Court's analysis by citing the federal statute in question).

116. 529 U.S. at 63 ("In this case we consider whether it was constitutional for a prosecutor, in her summation, to call the jury's attention to the fact that the defendant had the opportunity to hear all other witnesses testify"). The Second Circuit found the defendant's Sixth Amendment Confrontation Clause rights, constitutional right to testify, and Fourteenth Amendment due process rights implicated by the prosecutor's comments. *See supra* note 114.

117. *Id.*

118. 529 U.S. at 70-73. Writers commenting on *Portuondo* have reached different conclusions about the propriety of Justice Scalia relying on *Reagan* in his analysis. Compare J. Fielding Douthat, Jr., Casenote: *A Right to Confrontation or Insinuation? The Supreme Court's Holding in Portuondo v. Agard*, 34 U. RICH. L. REV. 591, 614-15 (2000) (pointing out flaws in the Court's reliance on *Reagan*), with John Owens, Comment, *Portuondo v. Agard: Distinguishing Impeachment of Credibility from the Act of Burdening a Defendant's Constitutional Rights*, 78 DENV. U. L. REV. 173, 187 (2000) (arguing *Reagan* was still good law and an appropriate case to cite for support).

119. *Portuondo*, 529 U.S. at 69, 75.

120. 380 U.S. 609, 612-13 (1965).

121. *Portuondo*, 529 U.S. at 65-73.

on *Reagan* for several key points, initially citing it for the proposition that a defendant who testifies may have his credibility impeached and his testimony assailed like any other witness.¹²² He then used *Reagan* to refute two arguments that Justice Ginsburg made in her dissenting opinion. First, he responded to her concern that generic warnings failing to cite specific instances of tailored testimony do not help identify guilty defendants, noting that *Reagan* also involved a general comment.¹²³ Second, he dismissed her contention that comments made in a prosecutor's closing argument run the risk of being more prejudicial because the defendant has no chance to respond, explaining that the instruction in *Reagan* was also offered after defense counsel's closing argument.¹²⁴ Justice Scalia concluded his discussion of *Reagan* by noting the "unquestionable propriety of the standard interested-witness instruction,"¹²⁵ which follows "in a long tradition that continues to the present day."¹²⁶

In a lengthy dissent, Justice Ginsburg assailed the majority's opinion, primarily for transforming a defendant's Sixth Amendment Confrontation Clause right "into an automatic burden on . . . credibility."¹²⁷ Justice Ginsburg also objected to Justice Scalia's reliance on *Reagan*, arguing that the case could not inform the controversy before the Court because it predated the constitutional right

122. *Id.* at 69.

123. *Id.* at 70-71 (noting that "generic" comments, like those in *Portuondo* and *Reagan*, have been approved despite failing to "rely on any specific evidence of actual fabrication for [their] application")

124. *Id.* at 71-72 (observing that in *Reagan*, the judge charged the jury after either party had an opportunity to reply). In the New York State Supreme Court, where Agard's trial took place, the prosecutor presents his closing argument after the defendant. The issue of timing would not arise in federal court or most state jurisdictions, unless the government reserved the attack for its concluding rebuttal.

125. *Id.* at 73 n.4.

126. *Id.* at 72-73 (citing *United States v. Jones*, 587 F.2d 802 (5th Cir. 1979); *United States v. Hill*, 470 F.2d 361 (D.C. Cir. 1972); 2 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 501 & n.1 (1982)). Scalia also noted that an interested witness charge was used at Agard's trial. *Id.* at 73 (quoting Tr. 834) ("A defendant is of course an interested witness since he is interested in the outcome of the trial. You may as jurors wish to keep such interest in mind in determining the credibility and weight to be given to the defendant's testimony.").

127. *Id.* at 76 (Ginsburg, J., dissenting). Justice Stevens concurred in the Court's judgment, noting that while the prosecutor's comment did not rise to the level of constitutional error, it demeaned "the truth-seeking function of the adversary process," and that "such comment[s] should be discouraged rather than validated." *Id.* at 76 (Stevens, J., concurring in the judgment).

to testify,¹²⁸ and therefore only controlled the Court's interpretation of the statute at issue in that case.¹²⁹ In a footnote, Justice Ginsburg added that while she did not question the constitutionality of a general instruction on witness credibility permitting jurors to take the interest of all witnesses into account,¹³⁰ "[i]t is a far different matter for an instruction or an argument to impose unique burdens on defendants."¹³¹

II. ASSESSING THE FLAWED REASONING OF PAST CASES UPHOLDING THE CONSTITUTIONALITY OF INSTRUCTIONS HIGHLIGHTING THE INTEREST OF TESTIFYING DEFENDANTS

On its face, *Reagan* seems to control the issue addressed in this Note, as it holds that jury instructions may highlight the interest of testifying defendants.¹³² More recently, Justice Scalia's reliance on *Reagan* in *Portuondo* appeared to reaffirm *Reagan*'s holding.¹³³ However, I will begin my analysis by explaining why, in light of subsequent changes in the law and flaws in *Reagan*'s reasoning, that case should not be considered controlling authority and why Justice Scalia's discussion of the case in *Portuondo* does not establish its continued validity.

A. *Reagan Did Not Address a Constitutional Question*

The most fundamental reason why *Reagan* is no longer controlling authority is that the decision was based on the Court's interpretation of a federal statute and did not address a constitutional question.¹³⁴ Courts must now reexamine instructions impugning defendants' testimony¹³⁵ in light of the Court's 1987 decision in *Rock v. Arkansas* finding a right to testify embodied in the Fifth, Sixth, and Fourteenth Amendments.¹³⁶

128. *Id.* at 80 (Ginsburg, J., dissenting). In *Rock v. Arkansas*, decided in 1987, the Court first explicitly held that a defendant has a constitutional right to testify. 483 U.S. 44, 49, 51-53 (1987).

129. *Portuondo*, 529 U.S. at 80-81 (Ginsburg, J., dissenting).

130. *Id.* at 82 n.3 (Ginsburg, J., dissenting).

131. *Id.* (Ginsburg, J., dissenting).

132. 157 U.S. 301, 310-11 (1895).

133. 529 U.S. at 70-73.

134. This is not to say that a statutory interpretation ruling cannot be highly persuasive in a subsequent case addressing a similar constitutional question. I address this point *infra*, in Part II.B.

135. *Portuondo*, 529 U.S. at 80-81 (Ginsburg, J., dissenting).

136. 483 U.S. 44, 51-53 (1987).

In a footnote to his opinion in *Portuondo*, Justice Scalia disputed Justice Ginsburg's argument in dissent that *Reagan*'s holding only controlled the interpretation of the federal statute addressed in that case, which granted defendants the right to testify.¹³⁷ He emphasized that the *Griffin* Court relied on a prior interpretation of the same statute to reach its constitutional decision and that the *Reagan* Court's opinion should be entitled to similar deference.¹³⁸ In response, Justice Ginsburg explained that the *Griffin* Court did not rely solely on a previous statutory interpretation ruling, but also conducted its own constitutional analysis.¹³⁹ She also noted that *Griffin* relied on a different portion of the statute in question than *Reagan* did.¹⁴⁰ Justice Ginsburg could also have argued that even if *Griffin* had relied entirely on a prior statutory interpretation decision, it cited that decision for a rule protective of defendants' rights.¹⁴¹ Thus, it does not follow that the Court's unfavorable treatment of defendants under other parts of the statute would also pass constitutional muster.

Justice Scalia also explained that the *Reagan* Court would not have sanctioned construction of a statute that rendered it unconstitutional, and that any conclusions the *Reagan* Court reached would therefore withstand constitutional scrutiny.¹⁴² Justice Scalia's reasoning, however, fails to account for the evolution of the defendant's right to testify and its changing role in the Court's jurisprudence.¹⁴³ It is unsurprising that the *Reagan* Court did not detect a constitutional problem, because the case was decided nearly a century before the Court held that the right to testify is a constitutional privilege. Furthermore, the Court's understanding of the right to testify has progressed significantly since *Reagan*, and

137. 529 U.S. at 72 n.3.

138. *Id.* The *Griffin* Court relied in part on the Supreme Court's 1893 decision in *Wilson v. United States*, in which the Court reversed a defendant's conviction after finding that the prosecutor violated the portion of the federal statute invoked in *Reagan* protecting defendants who decline to testify from negative comments. *Griffin v. California*, 380 U.S. 609, 612 (1965) (citing *Wilson v. United States*, 149 U.S. 60 (1893)). The *Griffin* Court held that the same logic applied to federal courts in *Wilson* should also apply to states through application of the Fifth Amendment. *Id.* at 613-15.

139. *Id.* at 81-82 (Ginsburg, J., dissenting).

140. *Id.* (Ginsburg, J., dissenting).

141. *Griffin*, 380 U.S. at 612-13 (citing *Wilson v. United States*, 149 U.S. 60 (1893)) (approving of *Wilson*'s holding precluding prosecutors from disparaging a defendant's decision not to testify).

142. *Portuondo*, 529 U.S. at 72 n.3.

143. See *supra* Part I.B (discussing evolution of the Court's jurisprudence and its finding that defendants have a constitutional right to testify).

modern courts should not rely on *Reagan's* statutory interpretation holding when deciding if instructions highlighting the interest of testifying defendants are constitutional.

B. Courts Have Improperly Relied on the Premise That Defendants Do Not Enjoy Unique Protection as Witnesses

While *Reagan* involved a question of statutory interpretation,¹⁴⁴ the decision was grounded in principles that could also apply in a constitutional context.¹⁴⁵ Two rationales for allowing a judge to highlight a testifying defendant's interest merit special attention, as they have been cited by subsequent courts: first, that a testifying defendant may be treated like any other witness;¹⁴⁶ and second, that justice requires highlighting the interest of a testifying defendant, because courts note the interest of accomplices and informants testifying for the prosecution.¹⁴⁷

1. Treating Testifying Defendants Like Other Witnesses

Justice Brewer began his analysis in *Reagan* by stating that as a witness, a defendant is just like any other witness and is therefore subject to all forms of impeachment.¹⁴⁸ In *Portuondo*, Justice Scalia stressed this point: "In sum, we see no reason to depart from the practice of treating testifying defendants the same as other witnesses."¹⁴⁹ Neither of these assertions accounts for the Court's opinions demanding more careful treatment of testifying defendants¹⁵⁰ and providing them specific rights that other witnesses do not enjoy.¹⁵¹

144. 157 U.S. 301, 304-05 (1895) (initiating the Court's analysis by citing the federal statute in question).

145. *Id.* at 304-05, 310 (discussing issues surrounding the rights of testifying defendants and the freedom of judges to highlight their testimony).

146. *Id.* at 305 ("Assuming the position of a witness, [the defendant] is entitled to all its rights and protections, and is subject to all its criticisms and burdens.").

147. *See id.* at 310-11 (urging equal treatment of testifying defendants and accomplices called by the government).

148. *Id.* at 305 (explaining that specific "privileges and limitations . . . inhere in the witness as a witness").

149. 529 U.S. 61, 73 (2000).

150. *See infra* note 163 and accompanying text.

151. *See infra* notes 152-56 and accompanying text. State courts have also observed that testifying defendants enjoy unique protections. *See, e.g.*, *State v. Daniels*, 861 A.2d 808, 819 (N.J. 2004) (citations omitted) (holding that a comment similar to that in *Portuondo* constituted prosecutorial misconduct and reversible error, while noting that a "criminal defendant is not simply another witness.

On at least three occasions, the Court has elevated the rights of testifying defendants above legitimate state concerns about the reliability of their testimony.¹⁵² First, in *Brooks v. Tennessee*, the Court struck down a rule requiring defendants testifying on their own behalf to do so prior to all other witnesses.¹⁵³ The Court held that the rule violated the Fifth Amendment privilege against self-incrimination, which can only be exercised effectively once a defendant has had the opportunity to hear other witnesses.¹⁵⁴ Later, in *Geders v. United States*, the Court held that sequestering a testifying defendant and preventing him from consulting with his attorney during a trial recess violated his Sixth Amendment right to counsel.¹⁵⁵ Most recently, in *Rock v. Arkansas*, the Court held that a defendant's right to testify includes the right to do so after hypnosis, a privilege that other witnesses may be denied.¹⁵⁶

In approving the prosecutor's comment accusing the defendant of tailoring his testimony in *Portuondo*, Justice Scalia acknowledged the Court's decisions in *Brooks* and *Geders*, but distinguished them by explaining that neither they nor *Griffin* concerned a defendant's "credibility as a witness," an area where the Court has allowed expansive impeachment.¹⁵⁷ Not surprisingly, other than *Reagan*, all of the cases that Justice Scalia relied on to support his point involved cross-examination.¹⁵⁸ The Court has repeatedly and em-

Those who face criminal prosecution possess fundamental rights that are 'essential to a fair trial.'").

152. For a discussion of two of the cases that follow and an argument against the proposition that a testifying defendant may be treated like any witness, see Brief For Nat'l Ass'n of Criminal Defense Lawyers as Amicus Curiae in Support of Respondent at 12-15, *Portuondo v. Agard*, 529 U.S. 61 (2000) (No. 98-1170).

153. 406 U.S. 605, 611 (1972).

154. *Id.* at 610-12.

155. 425 U.S. 80, 91 (1976).

156. 483 U.S. 44, 61-62 (1987).

157. 529 U.S. at 69-70 (emphasis in original).

158. *Id.* In his discussion, Justice Scalia cited *Brown v. United States*, 356 U.S. 148, 155 (1958) (holding that witness at civil trial may not invoke privilege against self-incrimination and refuse to respond to questions related to her direct testimony), *Perry v. Leake*, 488 U.S. 272, 282 (1989) (holding that a criminal defendant is not entitled to consult with counsel during brief trial recess between his direct and cross-examinations), *Jenkins v. Anderson*, 447 U.S. 231, 238-39 (1980) (holding that defendant may be cross-examined about pre-arrest and pre-Miranda warning silence), and *Grunewald v. United States*, 353 U.S. 391, 420 (1957) (holding that trial court erred in permitting cross-examination on defendant's failure to answer questions before grand jury, while acknowledging Court's prior statement "that when a criminal defendant takes the stand, he waives his [Fifth Amendment] privilege completely and becomes subject to cross-examination impeaching his credibility just like any other witness").

phatically stressed that a defendant's right to testify is not an invitation to commit perjury.¹⁵⁹ Reflecting this concern, it has held that a testifying defendant waives his Fifth Amendment right against self-incrimination and cannot claim immunity on cross-examination with respect to matters he himself put in dispute.¹⁶⁰ While this principle has prompted the Court to admit evidence broadly on cross-examination,¹⁶¹ the Court has still protected testifying defendants against some general attacks on their credibility.¹⁶² Furthermore, the Court's decisions establish that even to protect statutory rights, judges must be particularly cautious in charging jurors, because their comments carry extraordinary weight.¹⁶³ Thus, while testifying defendants may be tested by many

159. See *Jenkins*, 447 U.S. at 237-38 (citing *Harris v. New York*, 401 U.S. 222, 225 (1971)) ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury."); *Brown*, 356 U.S. at 156 (quoting *Walder v. United States*, 347 U.S. 62, 65 (1954) ("There is hardly justification for letting the defendant affirmatively resort to perjurious testimony . . .")).

160. See *Jenkins*, 447 U.S. at 238 ("[I]mpeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial."); *Brown*, 356 U.S. at 156 (observing that allowing a defendant to refuse to answer questions on cross-examination would be "a positive invitation to mutilate the truth").

161. See, e.g., *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (holding that pre-Miranda warning silence may be used for impeachment purposes); *Harris v. New York*, 401 U.S. 222, 226 (1971) (allowing impeachment of defendant's testimony through use of evidence obtained as a result of a Miranda violation); *Walder v. United States*, 347 U.S. 62, 65-66 (1954) (permitting impeachment of defendant's direct testimony through use of evidence obtained in violation of the Fourth Amendment). See also Alan D. Hornstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 53-54 (1997) (noting that the Court has granted prosecutors greatest freedom when impeaching specific inaccuracies in the content of a defendant's testimony, because of the state's interest in deterring perjury).

162. See *Doyle v. Ohio*, 426 U.S. 610, 619-20 (1976) (prohibiting prosecutor from using defendant's post-Miranda warning silence to impeach his testimony).

163. *Hicks v. United States*, 150 U.S. 442, 452 (1893) (noting that the privilege to testify "would be a vain one if the judge, to whose lightest word the jury, properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability"). Later, even as it approved the instruction offered at trial, the *Reagan* Court warned that a judge "is not at liberty to charge the jury directly or indirectly that the defendant is to be disbelieved because he is a defendant . . ." 157 U.S. 301, 310 (1895). After *Reagan*, the Court continued to demand that judges use caution when commenting on a defendant's testimony. See *Allison v. United States*, 160 U.S. 203, 209-10 (1895) (warning that judge's instruction on the defendant's credibility improperly implied that the defendant was unworthy of belief because of his position); *Hickory v. United States*, 160 U.S. 408, 425 (1896) (striking down instruction

of the “truth-seeking” tools employed at trial,¹⁶⁴ they still enjoy unique protections.

2. Equating Instructions Highlighting the Interest of Defendants and Informants

A central rationale of Justice Brewer’s dissenting opinion in *Hicks* and majority opinion in *Reagan* was that judges must “hold the scales even between the government and the defendant” by highlighting the potential for interested witnesses on both sides to commit perjury.¹⁶⁵ The D.C. Circuit has also reasoned that because judges may bring the interest of cooperating witnesses to the jury’s attention, the same rule should apply for defendants, who have an even greater interest.¹⁶⁶ Despite the superficial appeal of this argument, the use of instructions singling out the testimony of accomplices and informants is an insufficient rationale to justify singling out defendants.

As a threshold matter, only the defendant enjoys a constitutional¹⁶⁷ and statutory¹⁶⁸ right to testify and the benefit of a presumption of innocence.¹⁶⁹ An informant or accomplice testifying as part of a deal with the government does not have the same stake in how she is received by the jury, and therefore enjoys less protection. While prosecutors and judges might assess a cooperating witness’s performance on the stand or the verdict in a case when deciding how to reward her testimony,¹⁷⁰ the defendant has a unique liberty interest in the outcome of the proceeding.

on defendant’s credibility as excessively prejudicial); *Quercia v. United States*, 289 U.S. 466, 471-72 (reversing conviction because judge went too far in commenting on the evidence by stating that the defendant appeared to be lying because “he wiped his hand during his testimony”).

164. *Portuondo v. Agard*, 529 U.S. 61, 69 (2000) (quoting *Perry v. Leeke*, 488 U.S. 272, 282 (1989)).

165. *Hicks*, 150 U.S. at 460 (Brewer, J., dissenting); *Reagan v. United States*, 157 U.S. 301, 310-11 (1895).

166. *United States v. Hill*, 470 F.2d 361, 365 & n.10 (1972).

167. *See Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987).

168. *See* 18 U.S.C. § 3481 (2000).

169. *See supra* note 17 and accompanying text.

170. *See, e.g.*, UNITED STATES ATTORNEYS’ MANUAL § 9-27.630 to -27.740 (September 2006), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcr.htm#9-27.630 (last visited June 12, 2007) (noting that prosecutors should be very clear when negotiating with defendants that a non-prosecution agreement is premised on “complete and truthful” testimony, and that prosecutors should consider “the results of the cooperation” when deciding whether to suggest a reduced sentence after a guilty plea); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1(a) (2005) (instructing federal judges to consider “the truthfulness, completeness, and reliability of any information or testimony provided by the defen-

This difference in defendants' and cooperating witnesses' constitutional interests is reflected in the way that interested witness instructions are used in practice. While most federal jurisdictions allow judges to single out testifying defendants, the charge is never required, and many judges refuse to give it "on the basis of their own notions of fairness."¹⁷¹ In contrast, it is reversible error in a majority of circuits for a judge to refuse to warn the jury about accomplice testimony,¹⁷² and some circuits require an instruction even absent a request from the defendant.¹⁷³ Furthermore, while federal courts permit conviction based solely on uncorroborated accomplice testimony,¹⁷⁴ many states do not,¹⁷⁵ reflecting their con-

dant" along with the "significance and usefulness" of the defendant's assistance when deciding when to depart downward in sentencing because of "substantial assistance to authorities").

171. 1 HON. LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS, ¶ 7-4 (Matthew Bender 2005) (1984).

172. *See id.* ¶ 7-5 (citing cases from the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits holding that it is reversible error to refuse an instruction admonishing jurors to scrutinize accomplice testimony and weigh it with care, especially where the testimony is uncorroborated). *See generally* Sheldon R. Shapiro, Annotation, *Necessity of, and Prejudicial Effect of Omitting, Cautionary Instruction to Jury as to Accomplice's Testimony Against Defendant in Federal Criminal Trial*, 17 A.L.R. FED. 249, 268 (Supp. 2005).

173. *See* SAND ET AL., *supra* note 171, ¶ 7-5 (Matthew Bender 2005) (1984) (citing cases from the First, Fifth, Seventh, and Tenth Circuits holding that in close cases, judge should instruct jurors to view accomplice testimony with caution, even absent a request by the defendant).

174. *See id.* & n.19 (citing *United States v. Tucker*, 169 F.3d 1115, 1119 (8th Cir. 1999); *United States v. Chatman*, 994 F.2d 1510, 1514-15 (10th Cir. 1993); *United States v. Benstein*, 533 F.2d 775, 790-91 (2d Cir. 1976); *United States v. Marsh*, 451 F.2d 219, 221 (9th Cir.1971)).

175. *See, e.g.*, *Millsap v. State*, 621 S.E.2d 837, 839 (Ga. Ct. App. 2005) (citing GA. CODE ANN. § 24-4-8 (2006)); *People v. Brown*, 73 P.3d 1137, 1167 (Cal. 2003) (citing CAL. PENAL CODE § 1111) (noting that "an accomplice's testimony must be corroborated before a jury may consider it"); *Edmond v. State*, 476 S.E.2d 731, 733 (Ga. 1996) ("To sustain a felony conviction based upon the testimony of an accomplice, there must be independent corroborating evidence which connects the accused to the crime."); *People v. Steinberg*, 595 N.E.2d 845, 849 (N.Y. 1992) (citing N.Y. MCKINNEY'S CRIMINAL PROCEDURE LAW § 60.22) (addressing New York State statute requiring that accomplice testimony be corroborated by evidence "tending to connect the defendant with the commission" of the crime). Because of the burden of proof at trial, accomplices called by the defendant must be entitled to greater deference. *Cool v. United States*, 409 U.S. 100, 104 (1972) (*per curiam*) (contrasting accomplices called by the prosecution and defense, and holding that it is reversible error to require that defense witnesses be credible beyond a reasonable doubt, because such a rule would conflict with the defendant's presumption of innocence).

cern with the impact of suspect testimony on the rights of defendants.

In addition to constitutional concerns, the probative value of highlighting the interest of cooperating witnesses is qualitatively different than singling out the interest of a testifying defendant. Jurors are well aware of the defendant's interest and stake in their verdict,¹⁷⁶ because of the defendant's place in the courtroom at the center of the trial proceedings. Even without an instruction from the judge, jurors are likely to consider the defendant's status when weighing the defendant's testimony.¹⁷⁷ In contrast, the government deals with informants behind closed doors, outside the view of the jury. While this relationship might come to light during direct or cross-examination, clarification and guidance from the judge impartially confirms that a cooperating witness is deriving specific benefits in exchange for her testimony. The need to inform jurors of this arrangement explains the prevalence of detailed pattern jury instructions conveying how to weigh such testimony properly.¹⁷⁸ Thus, offering a specific interested witness instruction

176. Courts reaching opposite conclusions about the propriety of singling out a defendant's interest have agreed that the statement merely states something already obvious to jurors. See *United States v. Hill*, 470 F.2d 361, 365 (D.C. Cir. 1972) (upholding conviction while noting, "[t]he reference in the instruction to the interest of the defendant in the outcome of the case merely states an obvious fact"); *United States v. Dwyer*, 843 F.2d 60, 63-65 (1st Cir. 1988) (reversing conviction, while observing that the trial court had stated "what, to even the most unsophisticated, must be obvious, that the defendant has an interest in the outcome of the case . . .").

177. A recent nationwide survey of 1198 jurors from 353 capital trials found that many jurors have extremely strong, overwhelmingly negative reactions to defendants' testimony at the guilt stage of capital trials. Michael D. 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, 61-64 (2005). It is clear from the results of the survey and jurors' comments to researchers that they were cognizant of the defendants' incentive to commit perjury. *Id.* at 63-64. While jurors' reactions were likely particularly strong because death penalty cases involve the most serious offenses, their comments and reactions would also apply in other trials, especially those involving violent crimes.

178. See, e.g., FIFTH CIRCUIT DISTRICT JUDGES ASSOCIATION, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) ¶¶ 1.14-15 (2001), available at <http://www.lb5.uscourts.gov/juryinstructions//crim2001.htm> (addressing accomplices or informers with immunity and accomplices or co-defendants with plea agreements); EIGHTH CIRCUIT COMMITTEE, *supra* note 90, §§ 4.04-06 (addressing testimony given under grant of immunity or plea bargain, or by an accomplice or cooperating witness); IA KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE & INSTRUCTIONS §§ 15.02-04 (5th ed. 2005) (addressing informants, immunized witnesses, and accomplices); SAND ET AL., *supra* note 171, ¶¶ 7-5, -11, -14 (addressing accomplices called by the government, codefendants pleading guilty, and government informants).

for a testifying accomplice, while declining to give one for the defendant, does not compromise the “interests of justice.”¹⁷⁹

C. Courts Relying on Reagan’s Holding Have Not Properly Considered Its Constitutional Implications

In *Portuondo*, Justice Scalia spoke approvingly of instructions highlighting the interest of testifying defendants, noting their use in “a long tradition that continues to the present day.”¹⁸⁰ Justice Scalia supported his assertion by citing *Reagan*, two circuits permitting such instructions with few reservations, and a treatise on federal practice that makes no reference to the minority rule adopted in the First, Second, and Eighth Circuits.¹⁸¹ This statement ignores circuits with contrary rules,¹⁸² the Court’s early expression of concern with instructions singling out defendants,¹⁸³ and the United States Department of Justice’s amicus brief in support of the warden conceding a trend toward prohibiting such instructions.¹⁸⁴ Circuit courts have also relied heavily on historical practice and *Reagan* in approving instructions highlighting the interest of testifying defendants, without offering independent reasoning for their decisions.¹⁸⁵

It is anachronistic for modern courts to diminish the value of the right to testify based on concerns rooted in a common law prohibition abandoned in the nineteenth century.¹⁸⁶ Instructions sin-

179. *Reagan v. United States*, 157 U.S. 301, 311 (1895).

180. 529 U.S. 61, 72-73 (2001) (citations omitted).

181. *Id.* (citing *United States v. Jones*, 587 F.2d 802 (5th Cir. 1979); *United States v. Hill*, 470 F.2d 361 (D.C. Cir. 1972); 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 501, and n.1 (1982)).

182. *See United States v. Dwyer*, 843 F.2d 60, 62-63 (1st Cir. 1988); *United States v. Bear Killer*, 534 F.2d 1253, 1260 (8th Cir. 1976) (prohibiting judges from singling out defendants’ interest).

183. *See Allison v. United States*, 160 U.S. 203, 210 (1895); *Hicks v. United States*, 150 U.S. 442, 452 (1893).

184. Brief for the United States as Amicus Curiae Supporting Petitioner at 15 n.5, *Portuondo v. Agard*, 529 U.S. 61 (2000) (No. 98-1170).

185. Some circuits have relied on *Reagan* in decisions broadly approving instructions highlighting the interest of testifying defendants. *See, e.g., Nelson v. United States*, 415 F.2d 483, 487 (5th Cir. 1969); *Marino v. United States*, 91 F.2d 691, 699 (9th Cir. 1937). The Seventh Circuit expressed significant displeasure with the practice of singling out defendants, yet still relied on *Reagan* in declining to prohibit such instructions. *See United States v. Crovedi*, 467 F.2d 1032, 1036 (7th Cir. 1972); *United States v. Saletko*, 452 F.2d 193, 197-98 (7th Cir. 1972).

186. *See Reagan v. United States*, 157 U.S. 301, 306 (1895) (noting the old practice of prohibiting defendants from testifying, which it adapted to permit testimony with an appropriate cautionary instruction). In *Ferguson v. Georgia*, the Court stressed how thoroughly the common law prohibition on defendants testify-

gling out the interest of testifying defendants must be reexamined in light of the Court finding a constitutional right to testify as well as the prejudicial impact of the charge.

III.

SINGLING OUT A DEFENDANT'S TESTIMONY DEMEANS THE PRESUMPTION OF INNOCENCE

A. Singling Out a Defendant's Testimony and Subjecting It to Adverse Commentary Conflicts with the Presumption of Innocence

A defendant's interest is obvious to jurors from the moment they enter the courtroom. The defendant is the focus of the entire trial proceeding, from opening statements and examination of witnesses through closing arguments and the judge's instructions. Though jurors may not know the precise punishment that a defendant faces,¹⁸⁷ their task is to find guilt or innocence, a decision they understand is profoundly important. Jurors also understand, based on common experience, that people lie to evade responsibility for misconduct, whether in the context of a student telling her teacher that the dog ate her homework or a President announcing to the nation that he "did not have sexual relations with that woman."¹⁸⁸ This basic familiarity with human nature will inform jurors, long before the judge has offered guidance, that a guilty defendant has a

ing had been repudiated over time, stating that, "In sum, decades ago the considered consensus of the English-speaking world came to be that there was no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution's case." 365 U.S. 570, 582 (1961). In a concurring opinion in *Ferguson*, Justice Clark described a provision of the Georgia statute rendering criminal defendants incompetent as witnesses "as an unsatisfactory remnant of an age gone by." 365 U.S. at 602.

187. See *Shannon v. United States*, 512 U.S. 573, 579 (1994) (citing *Rogers v. United States*, 422 U.S. 35, 40 (1975); *Pope v. United States*, 298 F.2d 507, 508 (5th Cir. 1962)) (noting the "well established [rule] that when a jury has no sentencing function, it should be admonished to 'reach its verdict without regard to what sentence might be imposed'" and urging judges not to provide jurors with sentencing information that "invites them to ponder matters that are not within their province . . .") (footnotes omitted).

188. On January 26, 1998, President William J. Clinton attempted to defuse a growing scandal involving himself and a former White House intern, commenting to reporters: "I did NOT HAVE SEXUAL RELATIONS with that woman, Miss Lewinsky." See James Bennet, *The President Under Fire: The Overview; Clinton Emphatically Denies an Affair With Ex-Intern*, N.Y. TIMES, Jan. 27, 1998, at A1. Several months later, the President addressed the nation after testifying before a grand jury, and admitted having had "inappropriate intimate physical contact" with the intern. James Bennet, *Testing of a President: The Overview; Clinton Admits Lewinsky Liaison to Jury*, N.Y. TIMES, Aug. 18, 1998, at A1.

motive to lie.¹⁸⁹ In contrast, an innocent defendant has a strong motive to tell the truth to avoid appearing disingenuous or subjecting himself to prosecution for perjury.¹⁹⁰ When a judge states or implies in an instruction that a defendant has a motive to lie, the judge insinuates that the defendant is guilty. Because jurors will not know this is a standard instruction, they will assume the judge knows something invidious about the particular defendant on trial. The statement is prejudicial and potentially misleading, as an innocent defendant has a motive to be forthcoming.

Statements about a testifying defendant's motivation are particularly powerful when coming from the judge.¹⁹¹ The truth-seeking function of a criminal trial is advanced through an adversarial process, which assumes that the prosecutor will vigorously pursue conviction, while defense counsel seeks acquittal. It is vitally important that the judge remain an impartial arbiter, showing no favoritism to either side.¹⁹²

Because of the judge's substantial influence on jurors, the Supreme Court has recognized the unique power of jury instructions,¹⁹³ and intermediate courts have closely scrutinized

189. See *supra* note 176 and accompanying text.

190. Jeremy Bentham, an early and ardent advocate for granting defendants the right to testify, argued that an innocent suspect would be eager to share his honest account, in order to "dissipate the cloud which surrounds his conduct, and give every explanation which may set it in its true light." JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 241 (M. Dumont ed., J.W. Paget, 1825) (1825). More recently, Professors Daniel Seidmann and Alex Stein have published a thorough game-theory analysis on the role of the right to remain silent in the criminal justice process, concluding that it encourages innocent suspects to share their stories and guilty suspects to remain silent. Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 433-34, 489-94 (2000).

191. See, e.g., *Carter v. Kentucky*, 450 U.S. 288, 302 n.20 (1981) (citing *Starr v. United States*, 153 U.S. 614, 626 (1894)) ("It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling."). The *Carter* Court went on to cite a string of psychological studies offering support for the "longstanding assumption" that the judge has a powerful impact on jury decisionmaking. *Id.* See also Andrew Horwitz, *Mixed Signals and Subtle Cues: Jury Independence and Judicial Appointment of the Jury Foreperson*, 54 CATH. U. L. REV. 829, 845-54 (2005) (surveying caselaw addressing the influence of the judge on jury proceedings).

192. See, e.g., *United States v. Vega*, 589 F.2d 1147, 1153 (2d Cir. 1978) ("Of course the judge must be conscious of the special attention and respect he commands from the jury and therefore caution in maintaining an appearance of impartiality must be exercised.") (internal citations omitted).

193. *Carter*, 450 U.S. at 303 ("A trial judge has a powerful tool at his disposal to protect the constitutional privilege—the jury instruction—and he has an affirm-

instructions on appeal.¹⁹⁴ Instructions impugning the defendant's credibility are unusual in that judges more commonly will comment to juries to safeguard defendants' rights. For example, not only must judges remind jurors that the defendant is presumed innocent and that the government must prove guilt beyond a reasonable doubt,¹⁹⁵ but judges must also use their influence to dispel a wide variety of improper inferences that may arise during trial.¹⁹⁶ Most relevant to this discussion is the constitutional requirement that judges instruct jurors not to draw an adverse inference from the defendant's failure to testify.¹⁹⁷ The protective function that jury instructions normally serve reflects the gravity of the judge's role and the importance of the court dispelling, rather than raising, improper inferences.

The subtext of an instruction singling out a defendant's interest is more obvious in some cases than others. When a judge says: "Obviously, a defendant has a great personal interest in the result of his prosecution. The interest gives the defendant a strong motive to lie, to protect himself,"¹⁹⁸ there is an unmistakable insinuation that the defendant has done something wrong, which may be interpreted as guilt for the crime charged. Less pointed instructions, however, are also inconsistent with the presumption of inno-

ative constitutional obligation to use that tool when a defendant seeks its employment.").

194. One practice guide asserts that more federal cases are overturned because of infirmities in jury instructions than any other aspect of trial. 2 F. LEE BAILEY & KENNETH J. FISHMAN, *CRIMINAL TRIAL TECHNIQUES* § 49:1 (2002). See also SAND ET AL., *supra* note 171, ¶ 1.01 (advising judges that instructions must be written in part for appellate courts, "which will microscopically examine the charge to see if it is capable of misconstruction").

195. BAILEY & FISHMAN, *supra* note 194, §§ 49:9 to :10 (noting that judges must instruct jurors that the burden of proof at trial always rests with the government and that the defendant enjoys a presumption of innocence until found guilty beyond a reasonable doubt); *cf.* 1 CHARGES TO THE JURY AND REQUESTS TO CHARGE IN A CRIMINAL CASE NEW YORK § 2.03 (1988) (explaining that the instructing judge must "state the fundamental principles applicable to criminal cases" including the defendant's presumption of innocence and the requirement that the state prove guilt beyond a reasonable doubt).

196. See, e.g., SAND ET AL., *supra* note 171, ¶¶ 2-14, -19 (instructing jurors to insulate themselves from publicity about the defendant's trial and ignore the disposition of codefendants' cases). See also *id.* ¶ 7-13; O'MALLEY ET AL., *supra* note 178, § 15.08 (instructing jurors that they are prohibited from using evidence of prior convictions offered to impeach the defendant for any purpose but assessing his credibility).

197. See *Carter*, 450 U.S. at 305.

198. *United States v. Dwyer*, 843 F.2d 60, 62 (1st Cir. 1988).

cence.¹⁹⁹ In one Eighth Circuit case, for example, the judge instructed the jury: “In determining the degree of credibility that should be accorded by you to the defendant’s testimony, you’re entitled to take into consideration the fact that he is the defendant and the personal interest he has in the result of your verdict.”²⁰⁰ On its face, this comment is neither inflammatory nor inconsistent with what the jury may actually consider. Yet, it makes the defendant’s testimony less credible than the testimony of other witnesses by insinuating that his interest might lead him to testify falsely, an assumption with no sound basis for an innocent defendant.

Even subtle comments from the judge about the defendant’s interest may compound suspicions that arise by virtue of the defendant being on trial with the weight of the state aligned against him.²⁰¹ The fear that juries are predisposed to find the accused guilty is a key concern underlying the presumption of innocence.²⁰²

199. The Australian and Canadian high courts have prohibited judges from singling out the interest of testifying defendants because of the conflict between the charge and the presumption of innocence. For a discussion of those cases, and their relevance to the Supreme Court’s holding in *Reagan*, see Michael C. Plaxton, Portuondo v. Agard: *Can a Criminal Defendant Be a Credible Witness?*, 27 AM. J. CRIM. L. 279 (2000).

200. *United States v. Bear Killer*, 534 F.2d 1253, 1260 (8th Cir. 1976).

201. See Richard D. Friedman, *A Presumption of Innocence, Not of Even Odds*, 52 STAN. L. REV. 873, 879 (2000) (noting that a person walking into a courtroom and seeing the defendant in the center of the trial proceedings would rationally conclude that he is more likely than not guilty by virtue of his status and the statistical likelihood of conviction); Laufer, *supra* note 20, at 367, 373-74 (discussing empirical research on jury behavior, and observing that even with the professed role of the presumption of innocence in the criminal justice system, jurors are predisposed toward guilt). For a scathing critique of the imbalance of power between the state and defendant in criminal trials and the role of the media and mass entertainment in orienting jurors to favor conviction, see Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743, 744-46 (1995).

202. See *Taylor v. Kentucky*, 436 U.S. 478, 483-86 (1978) (citing 9 J. WIGMORE, EVIDENCE § 2511 (3d ed. 1940)) (“[I]n a criminal case the term [presumption of innocence] does convey a special and perhaps useful hint over and above the other form of the rule about the burden of proof, in that it 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.”); *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (citing *In re Winship*, 397 U.S. 358, 364 (1970) (“To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.”). See also Friedman, *supra* note 201, at 880-82 (applying a Bayesian analysis to craft a presumption of innocence jury instruction intended to dispel

This concern has led courts to prohibit procedures or conduct in the courtroom that intrudes on the defendant's presumption of innocence.²⁰³ Despite the existence of the presumption, however, jurors struggle to grasp the concept when judges explain it to them at trial.²⁰⁴ By referring explicitly to the defendant's interest in his case, the judge reinforces the jury's predisposition to view the defendant's status as evidence of guilt.

Just as instructions varying in the severity of their language may all be prejudicial, the defendant suffers whether or not he is the only person testifying subject to an interested witness instruction. When the judge only offers such an instruction for the defendant, the defendant will be deemed less credible than other witnesses, which is especially harmful in a trial where the sole issue is the defendant's credibility.²⁰⁵ However, subjecting a defendant and cooperating witness to similar instructions also creates prejudice by equating their interests in jurors' eyes. Cooperating witnesses working with prosecutors have admitted guilt; implying that a defendant has the same motive to lie raises an inference that the defendant has also broken the law.

jurors' predisposition to find guilt and help them properly assess the defendant's status at the beginning of trial); Laufer, *supra* note 20, at 393-94 (suggesting that the purpose of the presumption of innocence "is to ensure, to the greatest extent possible, that juror predispositions and subsequent dispositions are consistent with the accused's right to a fair trial").

203. See *supra* note 23 and accompanying text.

204. See Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L. 589, 600 (1997) (reviewing studies and concluding that jurors do not adequately understand presumption of innocence instructions). While jurors performed well in studies providing multiple choice questions, in some studies, as few as 17% of jurors were able to paraphrase the instruction correctly. *Id.* Jurors also struggle to understand reasonable doubt instructions. See Irwin A. Horowitz & Laird C. Kirkpatrick, A CONCEPT IN SEARCH OF A DEFINITION: THE EFFECTS OF REASONABLE DOUBT INSTRUCTIONS ON CERTAINTY OF GUILT STANDARDS AND JURY VERDICTS, 20 LAW & HUM. BEHAV. 655, 661, 669 (1996) (conducting a study with mock jurors testing different approved reasonable-doubt instructions and concluding that either current instructions are highly ineffective or juries are intentionally lowering the proper threshold of proof by convicting in trials that should result in acquittal).

205. The High Court of Australia has suggested that when only the defendant's testimony is subject to a cautionary instruction, the charge impermissibly shifts the burden of persuasion to the defense, by imposing a higher bar on the defendant to establish the truth of his account. *Robinson v. R.* [1991] 102 A.L.R. 493 (Austl.).

B. The Repercussions of Instructions Highlighting a Defendant's Interest Extend Beyond Their Implications for the Defendant's Credibility as a Witness

A key assumption about instructions singling out the interest of testifying defendants is that they only implicate the defendant as a witness.²⁰⁶ If jurors could conduct strictly confined analyses of the defendant, first assessing the defendant's credibility as a witness and only later weighing the defendant's guilt or innocence, an instruction influencing the first part of the juror's task might not conflict with the presumption of innocence. In reality, however, empirical evidence suggests that it is difficult for jurors to separate information relating to truthfulness from broader arguments about guilt or innocence, because the testifying defendant is the same person judged at the end of trial.²⁰⁷

While researchers have not specifically tested instructions singling out a defendant's interest, they have repeatedly documented jurors' difficulty in limiting their application of information received into evidence to one specific purpose.²⁰⁸ Jurors also struggle to understand and properly apply the judge's instructions, which are often rife with technical legal jargon.²⁰⁹ When confused about what standards to apply, jurors sometimes resort to "commonsense

206. See *supra* Part II.B.1 (discussing argument that a testifying defendant may be treated like any other witness).

207. See *infra* notes 208, 211 and accompanying text.

208. See Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 *PSYCHOL. PUB. POL'Y & L.* 622, 666 (2001) (surveying a range of psychological studies on jury behavior, and concluding: "The theme that emerges from these findings is that jurors are unwilling (or unable) to set aside information that appears relevant to determining what happened—regardless of what the law (and thus the judge) has to say about it."); Robert D. Dodson, *What Went Wrong With Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 *DRAKE L. REV.* 1, 31-44 (1999) (discussing decades of studies addressing the inability of jurors to disregard or limit their use of information presented at trial, even when instructed to do so by the judge).

209. See Lieberman & Sales, *supra* note 204, at 589 ("[J]urors' unfamiliarity with legal standards, combined with the complexity of the law, make their task exceptionally difficult."). A recent article offers four theories to explain why courts have largely ignored thirty years of empirical research demonstrating jurors' difficulty in comprehending instructions: an "institutional process theory" highlighting the constraints and pressures trial judges face; an "acculturation process theory" noting the role of instructions in impressing upon jurors the seriousness of their task; a "skeptical view" questioning whether a problem exists in the first place; and, a "traditional view" stressing the need for continuity and urging caution in reforming established practice. Nancy S. Marder, *Bringing Jury Instructions Into the Twenty-First Century*, 81 *NOTRE DAME L. REV.* 449, 454-58, 464, 467, 473 (2006).

justice” based on their general understanding of the law.²¹⁰ In this context, a “commonsense” understanding of the charge might be that the judge harbors suspicion about the defendant. This insinuation could lead jurors to conclude that the defendant is not to be believed. Because this distrust is most closely associated with somebody who has something to hide, jurors may assume the judge is raising concerns about the defendant extending beyond his credibility.

Rule 609(a) of the Federal Rules of Evidence reflects the concern that information intended to undermine credibility might be understood as substantive evidence of guilt.²¹¹ Rule 609(a) creates a stricter standard for admissibility of information about prior convictions for impeachment purposes for testifying defendants than it does for other witnesses.²¹² The authors of the Rule understood that concerns arise when impeaching the defendant, noting: “in virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice.”²¹³ The Senate Judiciary Committee worried that the prejudicial impact of prior-crimes evidence would be greater for the defendant than other witnesses, because it might go to the ultimate question of guilt or innocence.²¹⁴ That same concern arises with instructions highlighting the defendant’s interest. While a reference to interest might be less explosive than evidence of prior crimes, the judge is the party impeaching the defendant’s testimony, creating a greater danger that the jury will give great weight to the comment. In contrast, evidence of prior crimes is offered by the prosecution, and the judge issues a cautionary instruction reminding jurors that they should only consider it for impeachment

210. See Lieberman & Sales, *supra* note 204, at 589-90 (citing NORMAN J. FINKELE, *COMMONSENSE JUSTICE: JURORS’ NOTIONS OF THE LAW* 2 (1995)) (suggesting that when uncertain of the precise meaning of the judge’s charge, jurors may instead apply “commonsense justice” based on their general understanding of the law).

211. Empirical studies have shown that jurors misuse information about defendants’ prior convictions. See, e.g., Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 L. & HUM. BEHAV. 67, 76 (1995) (finding that jurors with information about prior convictions are more likely to convict and discussing other studies reaching the same conclusion).

212. FED. R. EVID. 609(a) advisory committee note to 1990 amendments. See also McCORMICK, *supra* note 18, § 42, at 168-69 (discussing the concern that evidence of prior crimes used for impeachment will have a broader influence on the jury).

213. See FED. R. EVID. 609(a) advisory committee’s note to amended rule.

214. S. Rep. No. 93-1277, at 14 (1974).

purposes.²¹⁵ The general concern expressed in the passage of Rule 609(a)—that information meant to assist jurors in assessing credibility may be interpreted as substantive evidence of guilt—also counsels against the judge singling out the defendant’s interest.

IV.
THE CONFLICT BETWEEN INSTRUCTIONS
SINGLING OUT DEFENDANTS AND THE
CONSTITUTIONAL RIGHT
TO TESTIFY

The Supreme Court has not developed a uniform test for evaluating the impact of challenged conduct on a criminal defendant’s rights. However, three questions emerge from the Court’s cases that provide a useful framework for analysis. First, the Court has considered whether a particular practice imposes a penalty on the exercise of a constitutional right.²¹⁶ Second, it has analyzed whether the penalty appreciably impairs the policies underlying the right being burdened.²¹⁷ Third, it has balanced the government’s interest against the defendant’s to determine whether there is a compelling reason for permitting the challenged practice.²¹⁸

In this section, I will address these questions in relation to instructions singling out testifying defendants. I will begin by analyzing how the instruction burdens a defendant’s right to testify and the severity of this encumbrance on the policies underlying the right. I will then weigh the government’s interest in judges giving the instruction against the need to protect the defendant’s presumption of innocence and right to testify. I will apply this balancing to three forms of the instruction that courts have approved, before concluding with the recommendation that judges offer a general charge on witness credibility with an admonition to treat the defendant like any other witness.

*A. The Supreme Court Has Held That Defendants May
Not Be Penalized for Exercising Constitutional Rights*

In *Griffin v. California*, the Supreme Court held that in criminal trials, judges must prohibit procedures that serve as “a penalty imposed [on defendants] by courts for exercising a constitutional

215. See *supra* note 196 (citing examples of this charge in model jury instructions).

216. See *infra* Part IV.A.

217. See *infra* Part IV.B.

218. See *infra* Part IV.C.

privilege.”²¹⁹ In *Griffin*, the Court held that the trial judge violated the defendant’s Fifth Amendment right against self-incrimination by instructing jurors that they may draw an adverse inference from the defendant’s failure to testify.²²⁰

Since *Griffin*, the Court has applied similar logic in rejecting other rules that infringe on defendants exercising their constitutional rights. In *United States v. Jackson*, the Court struck down portions of the Federal Kidnapping Act that threatened defendants with imposition of the death penalty only when they chose to pursue their cases at trial.²²¹ While acknowledging the Act’s laudable goal of limiting death sentences to defendants found guilty by juries, the Court found that the structure of the Act discouraged exercise of the Fifth Amendment right to plead innocent and the Sixth Amendment right to a jury trial.²²² The Court noted, “Whatever might be said of Congress’ objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights.”²²³

In *Brooks v. Tennessee*, the Court struck down a rule intended to prevent defendants from tailoring their testimony by requiring them to testify first.²²⁴ Quoting *Griffin*, the Court held that the Tennessee statute imposed too harsh a penalty on the right to remain silent at trial, which a defendant can only exercise effectively once he knows the strength of the prosecution’s evidence.²²⁵

By definition, instructions addressing testifying defendants are limited to defendants who actually testify. Because a defendant who declines to testify is entitled to an instruction that jurors may

219. 380 U.S. 609, 614 (1965). The Court has applied similar reasoning to safeguard rights in the civil context. *See, e.g.*, *Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973) (striking down New York State law forcing public contractors to testify without immunity by threatening to strip them of future state contracts); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (striking down waiting period on the receipt of welfare benefits for penalizing the constitutional right to travel), *overruled in part on other grounds by Edelman v. Jordan*, 425 U.S. 651 (1974); *Harman v. Forssenius*, 380 U.S. 528, 528, 540 (1965) (striking down a Virginia law penalizing citizens who refuse to pay a poll, while noting that, “It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution”) (internal citations omitted).

220. 380 U.S. at 615.

221. 390 U.S. 570, 582-83 (1968).

222. *Id.* at 581-82.

223. *Id.* at 582 (internal citations omitted).

224. 406 U.S. 605, 611 (1972).

225. *Id.* (quoting *Griffin*, 380 U.S. at 614) (finding that the rule “cuts down on the privilege [to remain silent] by making its assertion costly”).

not draw an adverse inference from that decision,²²⁶ defendants in most jurisdictions face a stark set of options: forego the opportunity to testify, and enjoy the benefit of an ameliorative instruction; or, elect to testify, and face negative commentary from the judge. In one situation, judges must go out of their way to protect defendants' presumption of innocence; in the other, they may impute a pernicious motive to testifying defendants. Defendants who take the stand face this penalty no matter how frank, truthful, or believable their testimony might be—only by abandoning the right to testify may they avoid judges impugning their credibility. By requiring testifying defendants to accept judges degrading their presumption of innocence, instructions singling out the interest of defendants make exercise of the privilege to testify “costly,”²²⁷ thereby violating the rule in *Griffin*.²²⁸

*B. The Court Has Held That Some Burdens
on Defendants' Rights Are Permissible*

While *Griffin*'s penalty analysis remains good law,²²⁹ the Supreme Court has since held that some rules burdening the exercise of constitutional rights are permissible,²³⁰ as criminal defendants must often make difficult choices about proper trial strategy.²³¹ In *Crampton v. Ohio*, decided with *McGautha v. California*, the Court explained that the threshold question in determining whether a constraint on a defendant's options at trial violates the Constitution is whether “compelling the election impairs to an appreciable extent any of the policies behind the rights involved.”²³²

In *Crampton*, the defendant challenged the constitutionality of Ohio's single-trial procedure that required adjudicating the ques-

226. See *Carter v. Kentucky*, 450 U.S. 288, 305 (1981) (holding that the trial judge, upon a defendant's request, has a constitutional obligation to instruct the jury that it may not give any weight to the defendant's failure to testify).

227. *Griffin*, 380 U.S. at 614.

228. See *Portuondo v. Agard*, 529 U.S. 61, 80-81 (2000) (Ginsburg, J., dissenting) (arguing that the instruction approved in *Reagan* would not pass constitutional muster because it burdened the defendant's right to testify).

229. *Griffin* itself was recently reaffirmed in *Mitchell v. United States*, 526 U.S. 314 (1999) where the Supreme Court extended the rule that no negative inference may be drawn from a defendant's refusal to testify to the sentencing context.

230. See *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973) (“*Jackson* did not hold, as subsequent decisions have made clear, that the Constitution forbids every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.”).

231. See *McGautha v. California*, 402 U.S. 183, 213 (1971) (citing *McMann v. Richardson*, 397 U.S. 759, 769 (1970)).

232. *Id.*

tions of guilt and punishment simultaneously in death penalty cases.²³³ The defendant argued that the policy created an impermissible tension between his Fifth Amendment right to avoid self-incrimination on the issue of guilt and his Fourteenth Amendment due process right to speak for himself on the issue of punishment.²³⁴ While the Supreme Court acknowledged that Ohio's law left Crampton with a difficult choice, it found that his dilemma did not implicate most of the rationales underlying the privilege against self-incrimination.²³⁵ To the extent the policy did encumber Crampton's rights, the Court noted that it was no more burdensome than other factors defendants must consider when deciding whether to remain silent.²³⁶ The Court similarly held that the right to present evidence in one's own voice for sentencing purposes was not appreciably impaired by the fact that the evidence would also be probative on the issue of guilt.²³⁷ As this reasoning demonstrates, the Court considers other factors already influencing a defendant's decision when deciding if a procedure is unduly burdensome and therefore unconstitutional.

Jury instructions highlighting a testifying defendant's interest impose a substantial burden on the defendant beyond other factors he must already consider. Underlying the right to testify is concern with the injustice of convicting a defendant who has been denied the opportunity to present his own story. The Supreme Court has noted that the defendant "above all others may be in a position to meet the prosecution's case,"²³⁸ and it has described the right of the accused to testify as "essential to due process of law in a fair adversary process."²³⁹ While an essential right in modern criminal trials, this privilege is only effective if jurors are willing to give the defendant a fair hearing. Highlighting a testifying party's interest is a well-established form of impeachment, intended to broadly impair the witness's credibility and diminish the impact of her testi-

233. *Id.* at 208-17.

234. *Id.* at 210-11.

235. *Id.* at 213-17. *Contra* *Simmons v. United States*, 390 U.S. 377, 391-94 (1968) (holding that a defendant's testimony at a pretrial hearing on a motion to suppress evidence may not be introduced as affirmative evidence in the prosecution's case-in-chief at trial, because a defendant should not be forced to choose between a Fourth Amendment claim and the Fifth Amendment right against self-incrimination).

236. *McGautha*, 402 U.S. at 213-17.

237. *Id.* at 217-20.

238. *Ferguson v. Georgia*, 365 U.S. 570, 582 (1961).

239. *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)).

mony.²⁴⁰ Even weighing the many factors a defendant must consider before testifying,²⁴¹ adverse jury instructions are especially burdensome because they come directly from the judge.²⁴² A judge singling out a testifying defendant's interest impairs the accused's exercise of the right to testify by predisposing the jury to place less value on his account.

*C. Where a Right Is Burdened, the Court
Will Examine Counterbalancing Interests*

Even once a procedure is found to burden the exercise of a constitutional right, the Court will look to the importance of the government interest at stake when deciding whether to uphold the policy.²⁴³ In *Jenkins v. Anderson*, for example, the Court upheld a prosecutor's right to impeach the testifying defendant by reference to his pre-trial silence, after concluding that the questioning furthered the state's interest in properly testing the witness's credibility.²⁴⁴ Similarly, in *Portuondo*, the Court permitted the prosecutor to comment on the defendant's presence at trial and insinuate that he had tailored his testimony, after finding that the state needed a truth-testing tool because testifying defendants may not be sequestered.²⁴⁵

While a policy infringing on a defendant's constitutional rights will sometimes be upheld because of a strong counterbalancing governmental need, even a significant interest can be insuffi-

240. See, e.g., 2 MICHAEL H. GRAHAM, HANDBOOK OF FED. EVID. § 607.7 (6th ed. 2006) (noting that factors like interest, which may color a party's testimony, are a proper line of inquiry during cross-examination); McCORMICK, *supra* note 18, § 39 (addressing impeachment of witnesses on the basis of partiality). Cf. *United States v. Abel*, 469 U.S. 45, 51-52 (1984) (holding that the Federal Rules of Evidence do not limit impeachment by inquiry into bias, which includes a party's self-interest).

241. For an example of the Court analyzing the burdens a testifying defendant already faces, including cross-examination and impeachment by prior conviction, see *McGautha*, 402 U.S. at 213-217.

242. See *supra* note 193 and accompanying text.

243. See *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) (citing *Chaffin v. Stynchcombe*, 412 U.S. 17, 32 & n.20 (1973)).

244. *Id.* at 238-39. Some states have declined to follow the Court's holding in *Jenkins*. See, e.g., *People v. Conyers*, 420 N.E.2d 933, 935-36 (N.Y. 1981) (declining to follow *Jenkins* on account of New York evidentiary rules).

245. 529 U.S. 61, 73 (2000). A defendant may not be sequestered because of the Confrontation Clause of the Sixth Amendment. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

cient.²⁴⁶ Furthermore, as part of its balancing, the Court has considered whether other alternatives might achieve the desired goal without infringing on the exercise of a right.²⁴⁷

The broad justification for imposing limits on a defendant's right to testify is the need to advance "the truth-seeking function of the trial."²⁴⁸ Speaking specifically of the interested witness instruction that the Court approved in *Reagan*, Justice Scalia explained that it "set forth a consideration the jury was to have in mind when assessing the defendant's credibility, which, *in turn*, assisted it in determining the guilt of the defendant."²⁴⁹ In other words, the benefit of highlighting a defendant's interest is in reminding jurors that interest is an appropriate factor to consider when weighing the defendant's testimony, and thereby providing guidance to help jurors assess the defendant's guilt or innocence.

While guiding jurors is important, it is also necessary to note several basic truth-testing functions that instructions highlighting defendants' testimony do not serve. This analysis is relevant because the Court has looked at other means available to achieve the government's desired goal when weighing the costs and benefits of a practice.²⁵⁰

First and foremost, an instruction singling out a defendant's interest does almost nothing to deter perjury, a crucial goal of the

246. See *Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973) (striking down a New York State law forcing public contractors to testify without immunity by threatening to strip them of future state contracts, while acknowledging the important state interest in regulating public contractors); *Brooks v. Tennessee*, 406 U.S. 605, 611-12 (1972) (striking down a rule requiring that defendants who wish to testify on their own behalf do so before all other witnesses, while noting rule's worthy intent of preventing defendants from tailoring their testimony); *United States v. Jackson*, 390 U.S. 570, 582 (1968) (striking down portions of the Federal Kidnaping Act that threatened defendants with imposition of the death penalty only when they chose to pursue their case at trial, despite intent of Congress to protect death-eligible defendants).

247. See, e.g., *Geders v. United States*, 425 U.S. 80, 91 (1976) (reversing trial court's decision prohibiting a testifying defendant from consulting with his attorney during an overnight recess, while noting that there are many other tools for combating improper influence on a defendant's testimony).

248. See *Portuondo*, 529 U.S. at 69 (citing *Perry v. Leeke*, 488 U.S. 272, 282 (1989)); Hornstein, *supra* note 161, at 46.

249. *Portuondo*, 529 U.S. at 71 (italics in original). See also *United States v. Reagan*, 157 U.S. 301, 305 (1895) (observing that it is "within the province of the court to call the attention of the jury to any matters which legitimately affect his testimony and credibility").

250. See *supra* note 247 and accompanying text.

truth-seeking process,²⁵¹ as it does not bring any specific facts or inaccuracies to light.²⁵² The instruction is particularly ineffective when compared with other tools utilized for combating perjury, including cross-examination,²⁵³ the threat of an additional prosecution,²⁵⁴ and harsher punishment under the United States Sentencing Guidelines.²⁵⁵ Second, the instruction fails to accomplish a general goal of impeachment, which is to display a witness's reactions and demeanor on the stand to help jurors assess credibility.²⁵⁶ Third, because the accused's interest is obvious to jurors, the instruction fails to tell them anything about the defendant they do not already know.²⁵⁷ This contrasts with a cooperating witness whose interest might not be apparent at trial.²⁵⁸

251. See cases cited *supra* note 159 (expressing Court's concern that the right to testify may be used for the purpose of committing perjury).

252. See *Portuondo v. Agard*, 529 U.S. 61, 79 (2000) (Ginsburg, J., dissenting) (arguing that generic arguments made after the defendant has testified do not advance the trial's search for truth); Hornstein, *supra* note 161, at 49 (observing that the Supreme Court has been most permissive in allowing impeachment of the specific content of a defendant's testimony, because of its great probative value).

253. See *United States v. Salerno*, 505 U.S. 317, 328 (1992) (Stevens, J., dissenting) ("Even if one does not completely agree with Wigmore's assertion that cross-examination is 'beyond any doubt the greatest legal engine ever invented for the discovery of truth,' one must admit that in the Anglo-American legal system cross-examination is the principal means of undermining the credibility of a witness whose testimony is false or inaccurate.") (footnote omitted); *Watkins v. Sowders*, 449 U.S. 341, 349 (1981) (describing "the time-honored process of cross-examination as the device best suited to determine the trustworthiness of testimonial evidence").

254. See 18 U.S.C. § 1621 (2006) (outlawing perjury generally); 18 U.S.C. § 1623 (2006) (prohibiting "false declarations before grand jury or court").

255. See U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2005) (permitting a two level upward adjustment for obstruction of justice, which includes false testimony at trial).

256. See *Portuondo*, 529 U.S. at 80-81 (2000) (Ginsburg, J., dissenting). The importance of having a witness on the stand, where jurors can observe his demeanor and assess his credibility, is a key rationale behind the general prohibition on the use of hearsay evidence at trial. See *McCORMICK*, *supra* note 18, § 245.

257. See *supra* note 176 and accompanying text.

258. See generally *United States v. Abel*, 469 U.S. 45, 49 (1984) (addressing probative value of evidence highlighting the interest and bias of trial witness); see also *supra* notes 176-79 and accompanying text (discussing differences in the educational value of instructions highlighting the interest of accomplices and defendants).

*D. Applying the Constitutional Balancing
of the Government and Defendants' Interests*

1. Instructions That Should Be Held Unconstitutional

Appellate courts have approved a range of instructions for guiding jurors in weighing the credibility of testifying defendants. At one end of the spectrum are instructions featuring highly prejudicial language. For example, the *Reagan* Court based its decision in part on instructions approved by state courts, including a charge from a Michigan judge stating: "I can't charge . . . that you are bound to give the same weight to [the defendant's testimony] that you are to that of a disinterested person. This . . . defendant, himself deeply interested . . . has a motive for committing perjury or perverting facts which the other witnesses have not."²⁵⁹ The Second Circuit has also approved several problematic instructions, including a pronouncement by the judge that "it is perfectly obvious to all of you the man in this case with the deepest, greatest interest is the defendant himself."²⁶⁰ These instructions, because of their overt insinuation that the accused is lying, are highly detrimental to the defendant's presumption of innocence and right to testify.

An instruction that the Ninth Circuit has repeatedly approved also falls into this category, by referring to "the interest which [the] defendant may have in the case, his hopes and fears, and what he has to gain or lose as a result of [the jury's] verdict."²⁶¹ The instruction's allusion to the defendant's "hopes and fears," like reminders that a defendant's interest is of "a character possessed by no other witness,"²⁶² unnecessarily arouses jurors' passions and increases their suspicion of the defendant.

While inimical to defendants' constitutional interests, these instructions serve no benefit over guidance featuring less prejudicial language. Because the defendant's stake in the outcome of trial is obvious to jurors, it is unnecessary for judges to use inflammatory words when advising jurors on assessing the defendant's testi-

259. 157 U.S. 301, 308 (1895) (citing *People v. Calvin*, 26 N.W. 851, 854 (1886)).

260. *United States v. Mahler*, 363 F.2d 673, 678 (2d Cir. 1966). For more examples of prejudicial instructions approved by the Second Circuit, see *supra* note 109. Given its recent decision in *United States v. Gaines*, 457 F.3d 238, 240 (2d Cir. 2006), the Circuit would not likely approve these same instructions today.

261. See *United States v. Eskridge*, 456 F.2d 1202, 1205 (9th Cir. 1972) (citing *Louie v. United States*, 426 F.2d 1398, 1402 (9th Cir. 1970)).

262. *United States v. Gleason*, 616 F.2d 2, 15 (2d Cir. 1979).

mony.²⁶³ On balance, these instructions harm defendants more than they advance the truth-seeking function of trial and should be deemed unconstitutional.

2. Instructions on the Borderline of Constitutionality

The intermediate category of instructions consists of those singling out the defendant's interest without using inculpatory or inflammatory language. One model jury instruction recommends the following charge:

In a criminal case, the defendant cannot be required to testify, but, if he chooses to testify, he is, of course, permitted to take the witness stand on his own behalf. In this case, the defendant decided to testify. You should examine and evaluate his testimony just as you would the testimony of any witness with an interest in the outcome of this case. You should not disregard or disbelieve his testimony simply because he is charged as a defendant in this case.²⁶⁴

The First Circuit, which generally prohibits instructions singling out the interest of defendants, nevertheless recently upheld a conviction involving an instruction almost identical to this one.²⁶⁵ Similarly, New York State appellate courts have approved similar instructions, while striking down more pointed language.²⁶⁶

263. In the comment accompanying his model instruction, Judge Sand, who generally recommends that judges offer a specific charge for testifying defendants, critiques instructions "highlight[ing] the degree of the defendant's interest" for providing no benefit over less pointed instructions. SAND ET AL., *supra* note 171, ¶ 7-4.

264. *Id.* The Federal Judicial Center recommends a similar instruction: The defendant, _____, testified in his own behalf. You may be wondering if the personal stake that he has in the outcome of this trial should cause you to consider his testimony any differently from that of other witnesses. It is proper for you to consider his personal stake in the outcome of the trial when you decide whether or not you believe his testimony. But remember that the defendant is presumed innocent unless the government proves, beyond a reasonable doubt, that he is guilty. The fact that he has been charged with the crime of _____ is no reason by itself for you not to believe what he said. FED. JUDICIAL CTR., PATTERN CRIMINAL JURY INSTRUCTION ¶ 40 (1987), reprinted in 2 MODERN FEDERAL JURY INSTRUCTIONS: CRIMINAL, ¶ [F]C.40] (Matthew Bender 2005) (1984).

265. *United States v. Gonsalves*, 435 F.3d 64, 72 (1st Cir. 2006).

266. *Compare* *People v. Smith*, 653 N.Y.S.2d 931, 932 (App. Div. 1997) (upholding instruction stating that the defendant is an interested witness), *with* *People v. Isidron*, 619 N.Y.S.2d 329, 329-30 (App. Div. 1994) (finding prejudicial error in instruction noting in part "that the defendant had a 'deep personal interest' in his prosecution that is greater and 'of a character . . . possessed by no other witness'").

While instructions in this category do a better job of balancing the government and defendant's interests, they still demand that judges comment on defendants separately from other witnesses. This alerts jurors to the judge's suspicion about the defendant, demeaning the presumption of innocence. Allowing the judge to impeach the defendant's testimony also diminishes the value of the defendant's account, even if less substantially than instructions in the first category.

Instructions like these do, however, provide some benefit, in that they specifically convey to jurors what they may consider when weighing the defendant's testimony, helping them perform their task as fact-finders.²⁶⁷ If offered verbatim, the instruction does not appear to be unconstitutional, as it avoids causing undue prejudice, while providing jurors helpful information. For courts committed to permitting judges to comment specifically on defendants' testimony, the instruction is a reasonable option. However, a danger in recommending any jury instruction singling out a defendant's interest is that model instructions are only tools to guide judges in crafting case-specific charges.²⁶⁸ Appellate courts generally refuse to dictate the precise language a judge must use,²⁶⁹ a dynamic evident in the wide range of suggestive adjectives that judges have used to describe a defendant's interest, including "grave,"²⁷⁰ "vi-

267. Judge Sand argues that because a defendant's testimony is a significant event that draws jurors' attention, instructions to consider the defendant's testimony like that of any other witness do not comport with reality and they fail to provide jurors the information they need. SAND ET AL., *supra* note 171, ¶ 7-4.

268. See 2A CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 485, at 378-79 (3d ed. 2000) ("Though . . . pattern instructions can be extremely helpful to a judge in preparing his charge, they are, as those who have prepared the patterns would be the first to insist, no substitute for careful thinking and preparation of the charge by the judge himself.") (footnote omitted).

269. See, e.g., United States v. Blazek, 431 F.3d 1104, 1109 (8th Cir. 2005) (citing United States v. Sdoulam, 398 F.3d 981, 993 (8th Cir. 2005)) ("In reviewing challenges to jury instructions, this Court recognizes that the district court has wide discretion in formulating the instructions . . ."); United States v. Tingle, 183 F.3d 719, 729 (7th Cir. 1999) (citing United States v. Abdelkoui, 19 F.3d 1178, 1182 (7th Cir.1994)) ("The district court is given substantial discretion with respect to the exact wording of instructions."); United States v. Garcia, 405 F.3d 1260, 1273 (11th Cir. 2005) (citing United States v. Schlei, 122 F.3d 944, 968 (11th Cir. 1997)) ("The district court has broad discretion in formulating jury instructions as long as those instructions are a correct statement of the law.").

270. United States v. Taylor, 390 F.2d 278, 284 n.5 (8th Cir. 1968) ("Then, again, it is for you to remember, you have a perfect right to do so, the very grave interest a defendant has in the case.").

tal,”²⁷¹ “deep,”²⁷² and “very keen.”²⁷³ Because even the unadulterated form of this model instruction raises constitutional concerns, appellate courts must be diligent in ensuring that judges use this or similarly moderate language. Determining if a particular instruction passes muster is not an easy task, because when appellate courts allow trial judges to single out defendants there is no bright-line distinction between permissible and forbidden instructions.²⁷⁴ Entirely prohibiting judges from highlighting a defendant’s interest eliminates the danger that courts may approve language that excessively burdens a defendant’s right to testify and presumption of innocence.

3. Instruction Properly Balancing the Interests of the Government and Defendants

The best way to balance the government’s need to guide jurors with the competing interest of protecting defendants’ rights is to include a brief reference to the defendant in a general instruction explaining factors to consider when weighing witness credibility. One leading manual of federal jury instructions recommends this approach, suggesting a general charge for all witnesses’ testimony²⁷⁵ and then a defendant-specific instruction stating: “You

271. *United States v. Figurski*, 545 F.2d 389, 392 (4th Cir. 1976) (“It was not improper for the district court, in instructing the jury about defendant’s credibility as a witness, to point out defendant’s vital interest”); *United States v. Jones*, 459 F.2d 1225, 1226 (D.C. Cir. 1972) (per curiam) (“[I]n weighing [the defendant’s] testimony, you have a right to consider the fact that he does have a vital interest in the outcome of the case.”).

272. *United States v. Gleason*, 616 F.2d 2, 15 (2d Cir. 1979) (approving instruction stating that a defendant “has a deep personal interest in the result of this prosecution”).

273. *Nelson v. United States*, 415 F.2d 483, 487 (5th Cir. 1969) (“[Y]ou 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.”).

274. This ambiguity is reflected in the Supreme Court’s early cases addressing the statutory right to testify, which reached different conclusions without clearly distinguishing the differences in the instructions. *Compare Allison v. United States*, 160 U.S. 203, 207, 209-10 (1895), and *Hicks v. United States*, 150 U.S. 442, 451-52 (1893), with *United States v. Reagan*, 157 U.S. 301, 304 (1895). In *United States v. Gaines*, 457 F.3d 238, 246-47 (2d Cir. 2006), the Second Circuit noted the difficulty it had experienced administering a rule requiring judges to balance instructions highlighting a defendant’s interest with a reminder that defendants may testify truthfully.

275. The instruction states in part:

You, as jurors, are the sole and exclusive judges of the credibility of [that] witness[] called to testify in this case In making your assessment of that witness you should carefully scrutinize all of the testimony given by that witness, the circumstances under which each witness has testified, and all of the

should judge the testimony of the Defendant _____ in the same manner as you judge the testimony of any other witness in this case.”²⁷⁶ This approach has been endorsed by almost all federal circuits that have published their own model instructions,²⁷⁷ including jurisdictions that still leave judges discretion to highlight a testi-

other evidence which tends to show whether a witness, in your opinion, is worthy of belief. Consider each witness’s intelligence, motive to falsify, state of mind, and appearance and manner while on the witness stand. Consider the witness’s ability to observe the matters as to which he or she has testified and consider whether he or she impresses you as having an accurate memory or recollection of these matters. Consider also any relation a witness may bear to either side of the case, the manner in which each witness might be affected by your verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case . . . After making your own judgment or assessment concerning the believability of a witness, you can then attach such importance or weight to that testimony, if any, that you feel it deserves. You will then be in a position to decide whether the government has proven the charge[s] beyond a reasonable doubt.

O’MALLEY ET AL., *supra* note 178, § 15.01.

276. *Id.* § 15.12.

277. See THIRD CIRCUIT COMMITTEE, *supra* note 66, ¶ 4.28 (“In a criminal case, the defendant has a constitutional right not to testify. However, if *(he)(she)* chooses to testify . . . [y]ou should examine and evaluate *(his)(her)* testimony just as you would the testimony of any witness.”); FIFTH CIRCUIT DISTRICT JUDGES ASSOCIATION, *supra* note 178, ¶ 1.08 (“The testimony of the defendant should be weighed and his credibility evaluated in the same way as that of any other witness.”); SIXTH CIRCUIT DISTRICT JUDGES ASSOCIATION COMMITTEE ON PATTERN CRIMINAL JURY INSTRUCTIONS, PATTERN CRIMINAL JURY INSTRUCTIONS ¶ 7.02 (2005), http://www.ca6.uscourts.gov/internet/crim_jury_insts/pdf/crmpattjur_full.pdf (“(1) You have heard the defendant testify. Earlier, I talked to you about the ‘credibility’ or the ‘believability’ of the witnesses. And I suggested some things for you to consider in evaluating each witness’s testimony. (2) You should consider those same things in evaluating the defendant’s testimony.”); COMMITTEE ON FEDERAL CRIMINAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT, PATTERN CRIMINAL FEDERAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT ¶ 1.03 (1998), <http://www.ca7.uscourts.gov/Rules/pjury.pdf> (“You should judge the defendant’s testimony in the same way that you judge the testimony of any other witness.”); EIGHTH CIRCUIT COMMITTEE, *supra* note 90, § 3.04 (“You should judge the testimony of the defendant in the same manner as you judge the testimony of any other witness.”); TENTH CIRCUIT COMMITTEE, *supra* note 66, ¶ 1.08 (“The testimony of the defendant should be weighed and his credibility evaluated in the same way as that of any other witness.”); COMMITTEE ON PATTERN JURY INSTRUCTIONS OF THE JUDICIAL COUNCIL OF THE ELEVENTH, ELEVENTH CIRCUIT ¶ 6.3 (2003), <http://www.ca11.uscourts.gov/documents/jury/crimjury.pdf> (“A Defendant has a right not to testify. If a Defendant does testify, however, you should decide in the same way as that of any other witness whether you believe the Defendant’s testimony.”). The Second Circuit has explicitly endorsed the Seventh Circuit’s model instruction. *United States v. Gaines*, 457 F.3d 238, 249 (2d Cir. 2006).

fy defendant's interest.²⁷⁸ While less precise than instructions singling out defendants, this charge comprehensively informs jurors of factors to consider when weighing credibility, and jurors will realize that the judge's general charge to consider a witness's interest applies to the defendant. Without the judge calling specific attention to the accused, however, jurors will have less reason to suspect that the judge has superior knowledge about the defendant that may raise doubts about his innocence. Thus, while this charge might diminish the value of the defendant's testimony by instructing jurors to consider the interest of witnesses,²⁷⁹ it does not insinuate that the defendant is guilty by stating that he has a motive to lie. In sum, this instruction properly balances the government's interest in ascertaining the truth and the defendant's constitutional rights.

CONCLUSION

For more than a century, the Supreme Court has permitted trial judges to offer jury instructions highlighting a testifying defendant's interest in the outcome of his case. In this Note, I have traced federal court decisions on the propriety of the instruction and addressed the rationales behind these courts' rulings. I have explained why the practice should be reconsidered in light of modern rulings that defendants have a constitutional right to testify at trial and the inherent conflict between the instruction and the presumption of innocence. I have argued that to properly balance defendants' rights with the need to educate jurors on weighing witness testimony, judges should offer a general charge on credibility and then instruct jurors to consider the defendant's testimony

278. Compare *Nelson v. United States*, 415 F.2d 483, 487 (5th Cir. 1969), and *United States v. Walker*, 710 F.2d 1062, 1070 (5th Cir. 1983) (both approving instruction stating that, "[Y]ou 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"), with *FIFTH CIRCUIT DISTRICT JUDGES ASSOCIATION*, *supra* note 178, ¶ 1.08 (encouraging courts to instruct that, "The testimony of the defendant should be weighed and his credibility evaluated in the same way as that of any other witness").

279. Because jurors would be free to consider the defendant's interest on their own, even without an instruction from the judge, a general instruction causes the defendant little additional harm. See *Portuondo v. Agard*, 529 U.S. 61, 68 (2000); see also *Hornstein*, *supra* note 161, at 60 ("[A] defendant who elects to testify is always subject to impeachment by his or her interest in the outcome, whether or not the Government undertakes cross-examination in this vein. The jury is obviously aware of the defendant's interest and will surely take that into account in assessing the credibility of the defendant qua witness.").

like that of other witnesses. While this charge treats defendants more favorably than accomplices and informants, it is largely consistent with the Court's goal "of treating testifying defendants the same as other witnesses."²⁸⁰ Any preferential treatment of defendants in the instruction is a necessary concession given their due process rights. In jurisdictions still intent on permitting judges to single out defendants' testimony, appellate courts should insist that judges succinctly note a defendant's interest and avoid unnecessarily inculpatory language.

The interested witness instructions approved in many jurisdictions strike at the heart of the defendant's presumption of innocence and right to appear as a witness on his own behalf. It is untenable for the Supreme Court to insist that a defendant's right to testify is an essential tool for protecting the innocent and detecting the guilty,²⁸¹ while at the same time permitting judges to discourage and devalue the exercise of that privilege. Similarly, judges should not denigrate the defendant's presumption of innocence, a due process right that "lies at the foundation of the administration of our criminal law."²⁸² Judges singling out testifying defendants should reevaluate their use of the instruction and utilize less prejudicial alternatives.

280. *Portuondo*, 529 U.S. at 73.

281. *See Ferguson v. Georgia*, 365 U.S. 570, 580-81 (1961).

282. *See supra* note 25.